
THE UNIVERSITY *of* EDINBURGH

# Trade Remedy Measures in the WTO and Regional Trade Agreements

*YANGYANG HUANG*


Thesis submitted for the degree of Doctor of Philosophy

Law School

**The University of Edinburgh**

2012

# T H E  U N I V E R S I T Y  O F  E D I N B U R G H

## ACCESS TO A THESIS AND PUBLICATION OF ABSTRACT

Full Names of Candidate (surname first):

Candidate for degree of: College:

Title of Thesis:

N.B. I note that copies of my thesis which are deposited in Edinburgh University Library will be catalogued and details made available on the Internet through the online catalogue. The thesis also may be consulted by registered users in Edinburgh University Library or in the libraries of other educational establishments but may not be issued for loan to individuals outside any library except to members of the academic staff of the University of Edinburgh. All applicants for consultation, loan or photocopy of the thesis have to sign the following declaration:

> 'I undertake fully to observe the author's copyright in this thesis, not to publish the whole or any part of it without the author's written permission, and not to allow any other person to use the copy made for me'.

1. I hereby authorise The University of Edinburgh to publish the abstract of this thesis, and to authorise others to do so, for scholarly purposes and with proper acknowledgement of authorship.

2. I hereby authorise Edinburgh University Library to copy my thesis for the purpose of supplying copies, on request, to libraries and individuals, subject to them signing the appropriate copyright declaration which will be preserved in Edinburgh University Library.

The University of Edinburgh may keep a copy of your dissertation for use in teaching or research. The Freedom of Information (Scotland) Act 2002 requires the University to make available to any enquirer any information held by the University, unless one of the legislation's narrowly defined exemption applies (see overleaf).

**IN EXCEPTIONAL CIRCUMSTANCES authors may ask the University to restrict access to their theses for a limited period. If you require this, please read the form overleaf and obtain your Head of School's signed agreement. If this agreement is obtained this restriction overrides for the period of the restriction your consent as given in paragraph 2 above**.

**Request to Restrict Access to a Thesis**

I request that no access of any kind be permitted to this thesis for one year, commencing from the date of graduation. I understand

(i) that 'no access' means that no one, not even I, or my supervisor, or my Head of School, or Library staff will have access to the thesis;
(ii) that at the end of the year the thesis will be made available to library users unless I make a request for the restriction to be extended for a further year. This restriction may, however, be lifted, for a named person for a specified period at the joint request of my Head of School and myself;
(iii) Edinburgh University Library is under no obligation to contact me about extending the period of restriction. Restriction can be extended for a period of up to 5 years. The restriction then lapses and cannot be renewed.

Certificate by The University of Edinburgh Head of School:
I have read the full text of the above paragraph and I support the request for restriction of access for the following reason(s):-

| | |
|---|---|
| | The thesis contains information provided in confidence |
| | Releasing the thesis would cause substantial prejudice to commercial interests |
| | The thesis contains information about research in progress where there is an intention to publish at a later date |
| | Other |

Please give further details:

| |
|---|
| |

In the event that anyone asks to see the thesis, we will use this information to determine whether or not it qualifies for a freedom of information exemption and can be withheld.

*Signature of Head of School* **……** *Date* **……..**

Signature of Candidate **……**
Date**……..**

# Acknowledgements

This thesis would not have been possible without the guidance of my tutors, help from friends, and support from my family.

First of all, I would like to express my deepest gratitude to my supervisor, Dr James Harrison, for his excellent guidance, caring and patience on my research.

I would also like to thank Professor John Usher, Dr Stephen Neff, Dr Robert Lane, Professor Niamh Nic Shuibhne and Professor Alan Boyle for guiding my research and academic life in the past several years. Special thanks go to Professor Joseph McMahon and Dr Gracia Marin-Duran, who participated in my oral examinations and provided valuable comments at the last stage.

I would like to convey thanks to my best friends, Ms Emily Morris, Dr Peng He and Dr James Huang, who were always encouraging and taking care of me during my study. In addition, many thanks to Mr Ray Holloway, who patiently corrected my writing. My research would not have been possible without their helps.

Finally, I wish to express my gratitude to my family and my partner, Mr Zhixi Ding, for their endless love, understanding and support through my good times and bad.

# Table of Contents

# Abstract

Trade remedy measures (TRMs) in international economic law refer to anti-dumping measures, countervailing duties and safeguard measures. They are designed to respond to unfair trade practices or to compensate the negative impact on domestic industries resulting from tariff concessions made under the trade liberalization arrangements. Due to the importance of these instruments, the rules on TRMs are strengthened in the WTO legal framework and established on non-discriminatory basis towards all WTO Members. However, with the proliferation of regional trade agreements (RTA) in recent decades, it was noticed that, most RTAs adopted innovative approaches on TRMs among their regional partners. Such incoherence has brought a series of trade disputes and arguments concerning the conflicts between the WTO and RTA. Current central issues in this area are whether those innovative TRMs are consistent with WTO law and what is the appropriate approach to examine the legality of those measures.

Against the canvas of WTO trade remedy rules, this research first investigates the diversified trade remedy approaches in RTAs and their impact on international trade. It then clarifies the ambiguous legal criteria against which TRMs in RTAs should be judged in order to be WTO-consistent. Thereafter, a methodology through which a RTA-specific TRM could be tested against the WTO's criteria is also developed. It is argued that facilitating TRMs in RTAs must always adhere to the criteria laid down by the WTO, e.g. GATT Article XXIV. In particular, a "necessity test" should be applied when examining the legality of a special TRM in RTAs, in the case where a dispute arises between the RTA members and third countries on the issue.

In order to bring the RTA-specific TRMs into compliance with WTO law, this research also looks at the WTO surveillance mechanism on RTAs. Considering a number of difficulties that have arisen in the GATT/WTO's surveillance of RTAs in the past, the thesis addresses what positive measures can be taken in the future and whether TRMs in RTAs should be scrutinized by WTO political organs or through the dispute settlement mechanism.

# List of Abbreviations

| | |
|---|---|
| AD: | Anti-dumping |
| ADA: | WTO Anti-dumping Agreement |
| ANZCERTA: | Australian-New Zealand Closer Economic Relationship Trade Agreement |
| CACM: | Central American Common Market |
| CAFTA-DR FTA: | Dominican Republic-Central America and the United States Free-trade Agreement |
| CARICOM: | Caribbean Community and Common Market |
| CEP: | Closer Economic Partnership |
| CBERA: | US – Caribbean Basin Economic Recovery Act |
| CCFTA: | Canada-Chile Free-Trade Agreement |
| COTED: | Council for Trade and Economic Development |
| CRTA: | Committee of Regional Trade Agreement |
| CTG: | Council for Trade in Goods |
| CUFTA: | Canada-United States Free-trade Agreement |
| CU: | Customs Union |
| CVD: | Countervailing Duty |
| DDA: | Doha Development Agenda |
| DSU | Dispute Settlement Understanding |
| EC: | European Community |
| EEA: | European Economic Area |
| EEC: | European Economic Community |
| EFTA: | European Free-trade Agreement |
| EU: | European Union |
| FTA: | Free-trade Agreement |
| GATS: | General Agreement on Trade in Service |
| GATT: | General Agreement on Tariffs and Trade |
| GCC: | Gulf Cooperation Council |
| ICJ: | International Court of Justice |
| ITC: | US International Trade Commission |
| JSEPA: | Japan-Singapore Economic Partnership Agreement |
| MERCOSUR: | *Mercado Común del Sur* (Common Market of the South) |
| MFN: | Most-Favoured-Nation |

| | |
|---|---|
| MOU: | Memorandum of understanding |
| MTS: | Multilateral Trading System |
| NAFTA: | North American Free-trade Agreement |
| NGR: | Negotiation Group on Rules (WTO) |
| OECD: | Organisation for Economic Co-operation and Development |
| ORC: | "other regulations of commerce" |
| ORRC: | "other restrictive regulations of commerce" |
| RTA: | Regional Trade Agreement |
| SA: | WTO Agreement on Safeguards |
| SAT: | "substantially all the trade" |
| SG: | Safeguard |
| TRMs: | Trade Remedy Measures |
| UN: | United Nation |
| VERs: | Voluntary Export Restrictions/Restrains |
| VCLT: | Vienna Convention on the Law of Treaties of 1969 |
| WTO: | World Trade Organization |
| 1994 Understanding: | "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994" |

# Introduction

In recent decades, the number of regional trade agreements (RTAs) as well as the share of world trade covered by them has been steadily increasing and this trend will be further strengthened by many RTAs being proposed and those currently under negotiation. The stalemate in the Doha Round drives more and more WTO Members to pursue preferential trade liberalization rather than the MFN path. The proliferation of RTAs presents WTO Members with both challenges and opportunities: the promotion of free trade through preferential agreements can foster trade liberalization and benefit economic development by deepening the market integration across the borders; however the development of complex networks of non-MFN trade relations will increase discrimination and may well undermine transparency and predictability in international trade relations. Therefore, it is of systemic importance for the multilateral trading system that the WTO addresses this dichotomy and ensures that RTAs are designed and implemented so to complement and not undermine the multilateral process.[1] Against this background, this research discusses the trade remedy measures adopted in existing regional trade agreements, which deviate from WTO general rules and incur increasing disputes between WTO Members.

Under the GATT, particularly in the decade before the completion of the Uruguay Round, trade remedy measures, including anti-dumping, countervailing duty measures and safeguards, became a powerful weapon of choice against competitive imports, largely as a result of successful tariff reduction. TRMs have thus been highly active ever since being legislated in GATT/WTO. According to statistics, twenty-four percent of the panels in the GATT years were involved in TRMs[2]; from 1995 to the mid of 2011, 3922 anti-dumping actions were initiated by the WTO Members and 2543 anti-dumping measures were imposed.[3]

---

[1] R V Fiorentino, L Verdeja and C Toqueboeuf, "The Changing Landscape of RTAs: 2006 Update", Discussion Paper No 12, Regional Trade Agreements Section, Trade Policies Review Division (WTO 2007), abstract.
[2] See "Adopted panel reports within the framework of GATT1947", http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm
[3] See "Anti-dumping Initiations: By Exporting Country From: 01/01/1995 To: 30/06/2011", http://www.wto.org/english/tratop_e/adp_e/ad_init_exp_country_e.pdf; "Anti-dumping Measures: By Exporting Country From: 01/01/1995 To: 30/06/2011", http://www.wto.org/english/tratop_e/adp_e/ad_meas_exp_country_e.pdf

The trade restrictive effect of TRMs has invited strict rules under WTO legal framework for Member States to follow. Importantly, TRMs must be imposed non-discriminatively in accord with the Most-Favoured-Nation principle of the WTO. However, in the development of RTAs, it has been noticed that the adoption of the TRMs in RTAs has significantly deviated from WTO basic rules. Making use of opportunities of regional integration, abolishing or tightening the imposition requirements of TRMs has been made available in increasing numbers of RTAs. According to recent WTO reports, in 74 RTAs under investigation, 56 either abolished or lesser use anti-dumping; 65 RTAs contains specific rules on safeguards, 18 RTAs have provisions on global safeguards with 14 taking exceptions to the WTO Safeguards Agreement.[4] In all disputes brought forward to WTO panels regarding regional trade rules, it has been noticed that a large percentage of the cases are involved with the trade remedy measures due to the preferential treatment between RTA partners. The centre of the arguments is whether those preferential treatments are consistent with WTO law and whether they are fair to non-RTA member countries. Due to the fact that the WTO provisions regulating RTAs (e.g. the GATT Article XXIV) never clearly address the trade remedy issues, no firm conclusion has been drawn on this question.

Consequently, academic concerns are raised. Typically as Bhagwati, who saw the potential trade diversion effect of the preferential trade remedy rules in RTAs, stated:

> "… even the modification of Article XXIV, to ensure that the external (implicit and explicit) tariff barriers come down as a price for CUs to be allowed under GATT rules, will leave open a gaping hole that would be tantamount to an open invitation to trade diversion by these preferential arrangements. In fact, trade creation can degenerate rapidly into trade diversion, when AD actions and VERs[5] are freely used.

[4] R Teh, T J Prusa, and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03 (WTO 2007).

[5] "Voluntary" export restraint or "voluntary" export restriction is a type of imports restriction coerced upon the exporters by importing country, when the import-competing industries seek protection from a surge of imports from particular exporting countries. VERs are often offered by the exporter to appease the importing country and to deter the other party from imposing even more explicit (and less flexible) trade barriers compared with TRMs. The word voluntary in quotes is to indicate it's rarely completely voluntary. They represent a "Beggar-thy-Neighbor" policy that seeks to shift economic activities (or preserve it) for the importing country, and has the effect of increasing costs for consumers there. More importantly, the VERs are out of the discipline of the GATT

Imagine that the United States begins to eliminate (by outcompeting) an inefficient Mexican industry once the FTA goes into effect. Even though the most efficient producer is Taiwan, if the next efficient United States outcompetes the least efficient Mexico, that would be desirable trade creation (through the best course would be free trade so that Taiwan would take more of the Mexican market instead).

But what would the Mexicans be likely to do? They would probably start AD actions against Taiwan, which would lead to reduced imports from Taiwan as the imports from the United States increased, leaving the Mexican production relatively unaffected: trade diversion from Taiwan to the United States would have occurred. Similarly, the effect of Mexican competition against the United States could well be that the United States would start AD actions and even VERs against Taiwan.

My belief that FTAs will lead to considerable trade diversion (because of modern methods of protection, which are inherently selective and can be captured readily for protectionist purposes) is one that may have been borne out in the European Community. It is well known that the European Community has used AD actions and VERs profusely to erect "Fortress Europe" against the Far East. Cannot much of this be a trade-diverting policy on response to the intensification of internal competition among the member states of the European Community?"[6]

Others assert that the elastic and selective nature of trade remedies may lead to more discrimination, with reduced trade remedy actions against RTA partners, but a greater frequency of trade remedy actions against non-members. To them, the adoption of RTA specific trade remedy rules increases this risk of discrimination, with trade remedies against RTA members being abolished outright or being subject to greater discipline. Therefore, the need to be vigilant about increased discrimination arising from trade remedy rules in RTAs is imminently suggested.[7]

---

and have severe trade-distortive effect to the free trade. Due to above factors, as a result of the Uruguay round of the GATT, VERs were formally prohibited by all WTO members.

[6] J N Bhagwatti, "Regionalism and Multilateralism: an Overview", in J De Melo and A Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge: Cambridge University Press 1993), pp 36-37.

[7] R Teh, T J Prusa, and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03 (WTO 2007), p 2.

The question of whether the preferential TRMs in RTAs are WTO-consistent and welfare-enhancing has been complicated due to the controversial arguments on the rationale and the frequent use of TRMs in the last two decades. The rationales of the existing trade remedy measures in international trade are believed as the political demands, and such demands grew with the evolution of open trade in recent decades. One explanation for the near universal presence of trade remedy provisions in trade agreements is the political economy of protectionism.[8] The long-term process of tariff liberalization in the post-world war II era has successfully reduced tariff rates to very low levels worldwide. However, import competing sectors continue to have an incentive to secure protection through whatever means they can find. Although TRMs are typically administered by bureaucracies which appear to be insulated from political pressure, influence can be brought to bear on them indirectly "through the shaping of the laws and regulations" which govern their work. One of the advantages offered by administered protection to import competing sectors is that it is inherently biased in their favour since it is a channel for complaints about an excess of import competition and not of its lack. By design, the trade remedy bureaucracy can only impose protection and not remove it (other than that which it imposes itself).[9]

The second explanation sees trade remedy measures as a "pragmatic tool" to deal with the political demands for protection that trade liberalization provokes.[10] Trade liberalization may lead to costs of adjustment. If nothing is done to manage those costs, political pressure may build up to a point where protectionist forces would be able to engineer a permanent reversal of trade liberalization. The introduction of TRMs in a trade agreement may be thought of as anticipating the possibility of such difficult adjustment and the political pressure for protectionism that they give rise to and providing a means to deflate this pressure with a temporary reversal of liberalization. This implies that the depth of liberalization that can be achieved by a trade agreement *ex-ante* may depend on whether there are built-in mechanisms that allow governments to depart temporarily from their liberalization commitments under well-defined and circumscribed conditions. TRMs address this

[8] P K M Tharakan, "Political Economy and Contigent Protection" (1995) 105 *The Economic Journal* 1550.
[9] J M Finger, H K Hall and D R Nelson, "The Political Economy of Administered Protection" (1982) 72 (3) *American Economic Review* 452, at 454.
[10] J H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed.) (the MIT Press 1997), pp 176-177.

need. While the use of TRMs may result in *ex-post* welfare losses during periods when the level of protection is temporarily increased, the deeper liberalization that is allowed *ex-ante* means that this could be outweighed by the long-term welfare gains.

Therefore, on one hand, TRMs are essential leverage instruments that balance the structural reform of all trading countries in the international trade liberalization process. Anti-dumping and countervailing duties measures counteract the unfair trade behavior in the international trade market, while safeguards could release the economic and social pressure that result from the imports surges during the pace of trade liberalization – all of them play a vital role in achieving further liberalization of trade. However, due to the frequent use of TRMs in recent years, to some people, TRMs tend to be resorts of protectionism. They actually defeat the comparative advantages of the exporting countries and hamper the efforts toward trade liberalization. According to this view, preferential TRMs could reduce trade remedy actions and hence create a more competition-friendly environment of cross-border trade. Especially in the setting of RTAs, phasing out TRMs is an important step to achieve the market integration; in the meantime, it posed a good sign to reduce the restrictions from trade remedies amongst all WTO Members.

So far, WTO negotiators have not worked out a good solution to all the above arguments. Nevertheless, new RTA negotiations and litigations keep following the existing fashion adopting TRMs deviating from WTO basic rules, which may not be consistent with WTO rules and cause further disruption in international trade relations.

Target on this problem, this thesis looks at a broad range of RTAs coming right up to date, including those newly established RTAs, e.g. the EU-Korea FTA, EU-Columbia-Peru FTA. It summarizes the different types of the diversity of the TRMs in those RTAs and examines their impact on international trade. Thereafter, it tries to clarify the ambiguous and controversial legal criteria against which TRMs in RTAs should be judged in order to be WTO-consistent. In order to bring the RTA-specific TRMs into compliance with WTO law, this thesis also looks at the WTO surveillance mechanism on RTAs. Considering a number of difficulties that have arisen in the GATT/WTO's surveillance of RTAs in the past, the thesis attempts to address what positive measures can be taken in the future and whether TRMs in

RTAs should be scrutinized by WTO political organs or through the dispute settlement mechanism.

The structure of this thesis is established on the main research questions as follows:

*1) What is the relationship between RTAs and the WTO? Should RTA trade policies be compliant with the WTO rules?*

In Chapter one, this author tries to articulate a fundamental assumption underlying the thesis that RTAs, taken as a regional trade liberalization process, should facilitate the efforts of global trade integration, represented by WTO practice. Innovative approaches in RTAs, even if deviating from current WTO regulations, should aim to enhance the WTO system, not undermine it. Current deviations of RTA approaches from WTO practice have created great legal uncertainty to non-RTA members that seem to undermine the transparency and predictability of the international trade environment. In recent years, increasing number of trade disputes have been witnessed between RTA members and non-member countries regarding the preferential trade remedy measures adopted in RTAs. To reduce or prevent further confusion and conflicts in trade practice, clear disciplines under the multilateral trade framework regarding RTA-specific trade remedy rules, as well as further improvement on these rules, are indispensable.

*2) What are the differences between TRMs in RTAs and WTO?*

By reviewing and summarizing the regulations of TRMs in GATT/WTO and RTAs, Chapters 2 and 3 present a round picture on the deviations of TRMs in RTAs from WTO regulations.

In chapter 2, this author examines GATT/WTO regulations on trade remedy measures, and also reviews the controversial academic ideas over the rationale and function of anti-dumping, countervailing duty measures and safeguards in international trade, which is believed to be necessary due to the fact that different views on TRMs lead to different approaches on how to adopt TRMs in RTAs. This context is the background for further analyses of TRMs in RTAs. It also gives references to the comparative study of TRMs in WTO and RTAs in Chapter 3.

In chapter 3, TRMs in RTAs, summarized in a number of strategic approaches, are introduced through a comparative method against WTO regulations. It mainly

discusses the deviation of TRMs in RTAs from WTO regulations, which reveals the innovation that has been occurring in this sector, with a focus on the influence of those innovative measures on the regional trade and the imports from third-countries.

*3) Whether TRMs in RTAs can deviate from WTO general rules and what are the legal conditions they must adhere to?*

Based on the observation in Chapter 3 that, at present, many RTAs provide differential TRMs to their regional partners compared to the WTO rules, Chapter 4 attempts to address the WTO legal criteria on TRMs in RTAs with the aim of clarifying 1) whether RTA-specific TRMs are allowed to deviate from the WTO general rules; and 2) if the answer is "yes", in what conditions they are allowed to deviate. It then turns to work out a methodology, through which a RTA-specific TRM could be tested against the WTO's criteria.

The analysis will be based primarily on: (i) a "parallelism" requirement developed by WTO dispute settlement panels in case law; (ii) the legal relationship between Article XXIV and the GATT/WTO provisions that refer to TRMs (i.e., GATT Article VI, Article XIX and WTO agreements on anti-dumping, countervailing duties measures and safeguards); and (iii) relevant benchmarks in the provisions of GATT Article XXIV and the 1994 Understanding. Relevant findings and approaches provided by WTO dispute settlement panels in RTA-related disputes will also be addressed.

*4) How to enforce the WTO-consistency test on RTA-specific TRMs and bring them back onto the right track?*

To find out a feasible platform to enforce the WTO-consistency test on TRMs in RTAs proposed in this thesis, Chapter 5 is designed to look at the WTO surveillance mechanism on RTAs. Considering the GATT/WTO's unsuccessful experience with RTA surveillance, this chapter examines the difficulties which have arisen from the RTA reviewing procedures in the past. Through this analysis, some ideas will be presented on the key questions surrounding the WTO's surveillance on RTAs, for instance, whether the role of overseeing compatibility of TRMs in RTAs is best performed by the political organs of the WTO or through dispute settlement, how the judicial organ should manage its jurisdiction with the purpose to examine TRMs in RTAs, and how to reconcile the recommendations and decisions of these two organs.

By answering all above questions in this thesis, the author wishes to give her own comments and suggestions on how to improve TRM policies in both RTAs and the WTO. It is intended this work be taken as part of academic effort aiming to guide future rulemaking practice on international trade liberalisation and integration.

# Chapter 1 WTO and the Regional Trade Agreements

## 1.1 Introduction

To give a start to the discussion of TRMs in the WTO and RTAs, this chapter introduces the background of the multilateral trading system and the regional trade agreements. Section 1.2 aims to construct a good understanding on the interrelationship between multilateralism and regionalism. It takes historical and theoretical perspective to assess the roles and functions of the multilateral trading system and RTAs. After comparing the advantages and disadvantages of each arrangement, it will be proposed that for a healthy and sustainable international trade environment, regionalism should complement multilateralism, not provide an alternative. Section 1.3 presents the recent proliferation of RTAs and their trend to develop complex networks of non-MFN trade relation, which not only challenges the dominance of the WTO but also creates more and more confusion on the WTO-RTA relationship. Section 1.4 and 1.5 gives a brief introduction to the WTO rules on RTAs and their surveillance in history to expose that, to date, the WTO's supervision of RTAs is inadequate. Based on above discussions, Section 1.6 will emphasize that to reduce or prevent further confusion and conflicts in trade practice, clear disciplines under the multilateral trade framework regarding the RTAs are indispensable.

## 1.2 Multilateralism and Regionalism

The fundamental theory of international trade holds that each country has a "comparative advantage" over the others in some products. Trade translates the individual advantage of many countries into maximum productivity for all[11] and the result is greater wealth for the world economy as well as the participants. Trade arrangements between sovereignties on the treatment of each other's' merchants and shipping can be traced back centuries. With the growth of commercial ability and

[11] GATT, *Trade Policies for a Better Future: Proposals for Action* (GATT 1985) (also called "The Leutwiler Report").

consumer demands, trade liberalization has become an irreversible trend of the world economy. In the meantime, how to manage trade liberalization turned out to be a prominent subject in international studies.

Regionalism and multilateralism are two major paths towards the trade liberalization among the participating countries. Although it has no single definition, "multilateralism" in this context refers to trade liberalization concluded without discrimination throughout the world trade system, such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). [12] Multilateralism trade liberalization basically includes the majority countries in the world and adopts the "single undertaking" principle in tariff reduction and market access across all participating countries. Regionalism, defined broadly as preferential trade agreements among a sub-set of nations, provides trade priorities to other members at the exclusion and discrimination of non-members who should be protected from such discrimination under the multilateral rules.[13]

In contemporary international economic study, the concept of regionalism is no longer limited as an ideal to liberalize trade in self-contained blocs only, simply because the world economy has become irreversibly interdependent. For many scholars and policy-makers, regionalism shares the same purpose with multilateral trade liberalization. It is rather a strategy instrument to liberalize the trade in group of countries that may extend worldwide.[14] However, the substantial differences between these two philosophies have incurred long-standing debate that basically asks "which arrangement is more conductive to trade liberalization?" Discussions mainly pertain to the following two broad issues: (i) relative welfare effects of non-preferential across-the-board (MFN) liberalization versus preferential liberalization; and (ii) the political economy implications of RTAs for the multilateral trading system, as well as those of the multilateral trading system for RTAs. While the first question asks which approach to trade liberalization is superior in terms of trade and welfare gains for the

[12] WTO, *Trading into the Future* (2nd edition), (WTO 2001), p 4.
[13] WTO, *Annual Report 2002*, http://www.wto.org/english/res_e/booksp_e/anrep02_e.pdf, p 40.
[14] For example, since the European Economic Community (the predecessor of the European Union) was established in 1958, it has been expanded several times and actively seeking bilateral trade agreements with other countries. As a consequence, more and more countries were included into its trade integration network. In 2006, the European Commission set out a new Global Europe strategy to reorient European bilateral trade agreements through a new generation of Free Trade Agreements with Asian markets, which would further expand EU's trade integration network (see, European Commission, *Global Europe – Competing in the World*, http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf).

members of RTAs, third countries and the world as a whole, the second question seeks to ascertain the systemic implications of RTAs for the multilateral trading system in general and multilateral trade negotiations in particular, i.e. whether regional integration constitutes a building block or stumbling block to the multilateral trade liberalization and a more open and liberal multilateral trading system.[15] As a matter of fact, not many people simply endorse one or the other strategy, since the answer depends on the circumstances. For instance, regional trade liberalization among a small number of countries normally goes quicker than that under multilateral negotiations. However, regional agreements can lead to a cascade of other regional agreements and to a general opening of trade, or to retaliation against discrimination and to the fragmentation of trade. Similarly, multilateralism can reduce negotiation costs through economies of scale, or they can divert attention away from potentially beneficial regional deals. Both multilateralism and regionalism are two-folded.

Multilateralism and regionalism have actually always co-existed in the history of the international trade, one perhaps prevailing over the other in different eras. The drive for an open trade regime in the late 19 century came from the bilateral Anglo-French commercial treaty of 1860. Britain adopted the unconditional MFN clause so that its tariff reductions to France became automatically available to all its trading partners. France adopted the conditional MFN whereby its tariff reductions were available to any country willing to sign a treaty similar to the Anglo-French treaty with it while the higher tariffs applied to all other nations. Other European states quickly followed suit. To seek lower tariffs of their goods, they concluded agreements with France, Britain, and each other. Thus, a bilateral agreement led to dozens of other agreements culminating in the creation of a free multilateral trading system. By 1908, France had MFN agreements with 20 countries, Britain with 46, and Germany with 30.[16]

The regime brought into existence by bilateral treaties ended abruptly in August 1914 with the outbreak of World War I. In the interwar period, by contrast,

[15] M Mashayekhi and T Ito (eds), *Multilateralism and Regionalism: The New Interface* (United Nations 2005), p 5.
[16] A I Douglas, "Multilateral and Bilateral Trade Policies in the World Trading System: an Historical Perspective", in J De Melo and A Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge University Press 1993), pp 90-119.

discriminatory trade blocs and protectionist bilateral arrangements contributed to the severe contraction of world trade that accompanied the Great Depression. The disaster of the interwar period strengthened the resolve of policymakers during World War II to construct a sound multilateral trading system that would prevent any return to discriminatory bilateralism in trade policy.

The architects of the postwar world trading system, who lived through both periods, concluded that 19th century history exemplified the virtues of non-discriminatory multilateralism, while the interwar experience demonstrated the vices of preferential bilateralism.[17] As a consequence, the international trading system after World War II, represented by GATT/WTO, is virtually based on the multilateral approach. At the heart of the GATT/WTO system is the rule that WTO members may not discriminate against each other's members (i.e. GATT Article I "the most-favoured-nation clause"). In other words, if a WTO member lowers a duty for one member, it must do the same for all other members.

Compared with a fragmented bilateral or plurilateral trading network, a non-discriminatory multilateral system is deemed as having undeniable advantages. In this context, one of the leading authors on international economic law, Prof. John H Jackson, has stated that:

> "The MFN clause has the salutary effect of minimizing distortions of the 'market' principles that motivate many arguments in favour of liberal trade. When governments apply trade restrictions uniformly without regard for the origin of goods, the market system of goods allocation and production will have maximum effect. ... MFN often causes a generalization of liberalizing trade policies, so that overall more trade liberalization occurs (the multiplier effect of the MFN clause). ... MFN concepts stress general rules applicable to all participating nations, which can minimize the costs of rule formation (such as the difficulty of negotiating a multitude of bilateral agreements). ... MFN helps minimize transaction costs, since customs officials at the border may not need to ascertain the 'origin of goods' to carry out their tasks with respect to goods controlled by MFN.
>
> [Of political concern]... without MFN, governments may be tempted to form

[17] Ibid.

particular discriminatory international groupings. These special groupings can cause rancor, misunderstanding and disputes, because those countries which are 'left out' resent their exclusion. Thus MFN can serve the functions of lessening tensions among nations and inhibiting temptations for short-term ad hoc government policies which could be tension-creating in a world already too tense."[18]

Briefly speaking, it is the MFN clause that created global order out of an essentially mercantilist system. Most importantly, perhaps, from the standpoint of lesser nations with little bargaining power, through the application of the MFN clause, purely bilateral bargains negotiated under the auspices of the GATT/WTO become available to all. It provides for a "level-playing field" for all members to trade goods and services with one another. This principle of non-discrimination is one of the main reasons that countries join the GATT/WTO.

The conclusion of the Uruguay Round of multilateral trade negotiations in 1994, and the establishment of the WTO in 1995 to provide institutional support to the multilateral trade agreements, constituted a significant milestone in the evolution of the multilateral trading system. The principle of "single undertaking" bound all WTO members to all the results of the Uruguay Round negotiations (with the exception of some particular plurilateral agreements protected by the so-called "grandfathering clause" of the GATT that their rights and obligations remain intact[19]), thereby reinforcing the fundamental principle of MFN treatment. Over half century, enormous progress towards global free trade has been made under this non-discriminatory approach to tariff reductions.

---

[18] J H Jackson, *The World Trading System* (The MIT Press 1989), pp 134-35.

[19] A "grandfathering clause" is an exception which allows something pre-existing to remain as it is, despite a change to the contrary in the rules applied to newer situations. Often, such a provision is used as a compromise, to effect new rules without upsetting a well-established physical or political situation. During the course of work on tariff-cuts and trade rules from 1946-1947 in the framework of the drafting of the charter of the International Trade Organization (ITO), it was recognized that a number of the founding GATT contracting parties operated preferential trading schemes. These schemes were in clear violation of the MFN principle of the non-discrimination (GATT Article I) that was being promulgated. It thus became apparent that some provision was required to cater for this anomaly, establishing the basis for the GATT Article I:2.
GATT Article I:2 explicitly exempts in perpetuity (grandfathers) from the MFN requirement certain preferential arrangements existing at the time the GATT came into force. These include the British Imperial Preferences, preferences granted by the Benelux customs union and the United States, preferences granted by the Lebanon-Syrian Customs Union to Palestine and Transjordan. The grandfathering preferences were limited by a requirement that they could not be raised above existing levels (those in force in 1947). Moreover, their significance has been steadily eroded over the past few decades by successive rounds of GATT tariff negotiations and reductions, and some of them have since ceased to exist. See M Mashayekhi and T Ito (eds), *Multilateralism and Regionalism: The New Interface* (United Nations 2005), p 34.

Nevertheless, preferential and regional trade arrangements have never been abandoned by GATT/WTO Members during the multilateral processes. When the GATT was established in 1947, the framers recognized the "free-rider" or "foot-dragger" disadvantages that may arise from the MFN principle. Therefore, the GATT includes provisions allowing particular departures from MFN to facilitate trade liberalization, if such liberalization goes far enough to provide substantial advantages to the world.

In the field of goods, the main exceptions to MFN are set forth in the GATT Article XXIV. In the field of services, a largely parallel provision is contained in the GATS Article V and Article V *bis* GATS for Labour Market Integration Agreements. Special provisions were also provided in respect of preferential trade arrangements in trade in goods concluded between developing country Members, i.e. the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the so-called "Enabling Clause")[20]. The criteria set up in above provisions are fundamentally three: transparency, commitment to deep intra-region trade liberalization, and neutrality *vis-à-vis* non-parties trade. In practice, a limited degree of transparency is the only requirement attached to RTAs concluded under the Enabling Clause.[21]

Therefore, although GATT Article XXIV is based partly on the historical precedent of special regimes of frontier traffic between adjacent countries, from the inception of the GATT, the prevailing perception was that genuine regional initiatives promoting extensive trade liberalization among sub-sets of the Members could be congruent with multilaterally-agreed trade liberalization, and could contribute to the development of global trade and of the multilateral trading system. Total world welfare can be enhanced by collective elimination of restrictions on trade among those countries who further the market access they have bound in the GATT by concluding RTAs, albeit subject to a certain number of criteria. The coexistence of regional and multilateral (i.e. GATT MFN) tracks to trade liberalization thus was viewed as ultimately positive in international trade relations.

With the exception of GATT Article XXIV, three waves of regional deals

[20] *Differential and more favourable treatment reciprocity and fuller participation of developing countries – Decision of 28 November 1979*, L/4903.
[21] R V Fiorentino, L Verdeja and C Toqueboeuf, "The Changing Landscape of RTAs: 2006 Update", Discussion Paper No 12, Regional Trade Agreements Section, Trade Policies Review Division (WTO 2007), p 27.

emerged soon after. The first came during the early 1960s, the second started in middle 1980s and the latest started in the mid-1990s.[22]

As a persistent dedicator of regionalism, the European Community was established in 1958 and marked a partial watershed of many countries attitude towards regionalism after establishment of the GATT. Under the impetus of the European Common Market, while motivated by the altogether different economic rationale formulated by Cooper and Massell [23], Johnson [24] and Bhagwati [25], regionalism spread throughout Africa, Latin America and other parts of the developing world. The United States was then a hegemonic power and a staunch supporter of multilateralism. The so-called "First Regionalism" then came to a halt during much of the 1970s.

However, in the 1980s, the chief proponent of multilateralism and non-discrimination, United States, became disappointed by a lack of progress at the GATT negotiations and decided to switch course and went on to conclude first the Canada-US Free-Trade Agreement (CUFTA) in 1989 (i.e. now the North American Free-Trade Agreement (NAFTA)). The United States also announced its intention to negotiate free-trade agreements with groups of other Latin American countries. Alongside this, the European Community has continued to widen and deepen its integration. These developments have, in turn, led other countries to reconsider the regional option. East Asia, in particular, is beginning to fear that a regional bloc may be the only way to meet the challenge posed by developments in the Americas and Europe. Even developing countries are beginning to fear that their access to world markets may be curtailed considerably if trading blocs become a reality and they are left out. As a consequence, the concluding of regional trade agreements soon spread over.[26]

A key reason for the United States' conversion to regionalism was the slow

[22] J N Bhagwati, "Regionalism and multilateralism: an overview", in J De Melo and A Panagariya (eds) *New Dimensions in Regional Integration* (Cambridge: Cambridge University Press 1993), pp 22-51.
[23] C A Cooper and B F Massell, "A New Look at Customs Union Theory" (1965) 75 *The Economic Journal* 742; C A Cooper and B F Massell, "Towards a General Theory of Customs Unions for Developing Countries" (1965) 73 (No. 5) *Journal of Political Economy* 461.
[24] H G Johnson, "An Economic Theory of Protectionism, Tariff Bargaining, and the Formation of Customs Unions" (1965) 73 *Journal of Political Economy* 256.
[25] J N Bhagwati, "Trade Liberalization Among LDCs, Trade Theory and GATT Rules", in J N Wolfe (ed), *Value, Capital, and Growth: Papers in Honour of Sir John Hicks* (Oxford University Press 1968).
[26] J De Melo and A Panagariya (eds) *New Dimensions in Regional Integration* (Cambridge University Press 1993), introduction.

progress at the GATT. In particular, the GATT negotiations had less success in later years. The difficulties encountered by the United States in multilateral trade negotiation were noticed by some scholars. For instance, Paul Krugman offered four reasons for this stalemate: first, the number of players participating in the process had grown larger which makes negotiations difficult and free-rider problem harder to handle. Second, the decline in US dominance has made it more difficult to run the system. Third, institutional differences among major countries make negotiations complicated in further liberalization at multilateral level. Finally, the character of protection has changed. The presence of voluntary export restrains (VERs), anti-dumping (AD) mechanisms, and other forms of administered protection make the negotiating space vastly more complicated than it was in the past.[27]

For other countries, there are even more reasons for the attractiveness of regional agreements as compared to multilateral negotiations. Interesting explanations have been offered in much of the related literature. The Director-General of the WTO, Pascal Lamy succinctly explained the motivations on constitution of the RTAs:

> "First, they seem quicker to conclude. Fewer parties means that preferential trade agreements can be wrapped-up within a shorter period of time. This is usually very attractive to both politicians and business communities who are looking for quicker results.
>
> Secondly, they can enter into new territories. Because of similarities in interests and often more common values, bilateral trade agreements can go into new areas such as investment, competition, technical standards, labour standards or environment provisions, where there is no consensus among WTO Members.
>
> Thirdly, many of the recent FTAs contain political or geopolitical considerations. For developing countries negotiating with more powerful developed countries, there is usually the expectation of exclusive preferential benefits, as well as expectations of development assistance and other non-trade rewards. They are also viewed as an instrument to get "brownie points" and gain an advantage over other WTO Members. Bilateral trade agreements are also useful for negotiators to learn how to negotiate thus contributing to reinforcing a country's trade

[27] P Krugman, "Regionalism versus Multilateralism: Analytical Notes" in J De Melo and A Panagariya (eds) *New Dimension in Regional Integration* (Cambridge University Press 1993), pp 58-75.

institutions. Many regional trade agreements have been the bedrock for peace and greater political stability.

Finally, they are often used as instruments for domestic reform in areas where the multilateral system offers a weaker leverage."[28]

Under such circumstance, it is not a surprise that many WTO Members are pursuing regional agreements. However, this does not mean that regionalism is better than multilateralism either now or in the future. Prominently, the welfare effects stemming from the formation of a RTA are ambiguous. To borrow the early theoretical and empirical work on RTAs started in the 1950s with Viner's seminal work, in a simple partial equilibrium model under perfect competition, a RTA may increase the level of trade between members at the expense of less efficient domestic producers (*trade creation*) but also to the detriment of more efficient third countries (*trade diversion*). The net effect of a RTA on trade and economic welfare thus depends on the relative size of these two effects. On the other hand, the dynamic effect of regionalism is still unknown.[29]

Again, according to Lamy, multilateralism should remain as the virtues of international trade relation and the regional agreements cannot replace the multilateral trade rules. To support this opinion, he emphasized four crucial limitations of regional agreements from an empirical perspective:

"First, the conclusion of preferential trade agreements can create an incentive for even further discrimination, which eventually will hurt all trading partners. Countries outside an agreement will try to conclude agreements with one of those that are inside to avoid exclusion. This has been called the "domino" or "bandwagon effect" and is the reason for much of the regional trade agreement activity seen in Asia recently. In other words, the consequence is that the preferences obtained through forming a preferential agreement against competitors tend to be short-lived. The more agreements you have, the less meaningful the preferences would be.

Secondly, bilateral agreements cannot solve systemic issues such as rules of

[28] P Lamy, "Multilateral or Bilateral Trade Agreements: Which Way to Go?", Pascal Lamy's speech in Confederation of Indian Industries Partnership Summit 2007 (See http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm).
[29] J Viner, *The Custom Union Issue* (Carnegie Endowment for international Peace, 1950).

origin, anti-dumping, agricultural and fisheries subsidies. These issues simply cannot be handled at the bilateral level. Take for instance, negotiations to eliminate or reduce trade distorting agriculture subsidies, or fisheries subsidies. There is no such thing as a "bilateral" farmer or fisherman, or a "bilateral" chicken and a "multilateral" farmer or chicken or fish. Subsidies are given to farmers for all their poultry production. The same is true for rules of anti-dumping.

Thirdly, the proliferation of regional trade agreements can greatly complicate the trading environment, creating a web of incoherent rules. Take rules of origin: an increasing number of WTO Members are party to ten or more regional trade agreements, most of which for a given Member contain agreement-specific rules of origin which are necessary to ensure that the preferences go to your partner and not to others. This complicates the production processes of business who may be obliged to tailor their products for different preferential markets in order to satisfy rules of origin. It also complicates life for customs officials who are obliged to assess the transparency of the trading regime. Borrowing the expression used by Professor Bhagwati – this is where we begin to have a real "spaghetti bowl" of twisted rules of origin.

Finally, to many small and weak developing countries, entering into a bilateral agreement with a powerful big country means less leverage and a weaker negotiating position as compared that in the multilateral talks. It might not be the case for India, China, Brazil, the US and the EC, it will be true for Mauritius, Sri Lanka, Cambodia or Ghana."[30]

In line with above views, RTAs may result in inward-looking, discriminatory and protectionist trading entities competing for spheres of influence and becoming self-contained fortresses. In particular, large RTAs – those whose membership covers a large share of global trade – can potentially have harmful effects for non-members leading to net trade diversion rather than net trade creation. By enabling faster and deeper integration, new-generation RTAs may reduce incentives for countries to

[30] P Lamy, "Multilateral or Bilateral Trade Agreements: Which Way to Go?", Pascal Lamy's speech in Confederation of Indian Industries Partnership Summit 2007 (available at: http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm).

favour a multilateral approach to trade liberalization. The proliferation of RTAs, with more and more countries being members of several RTAs at the same time, can act as negotiating forums virtually substituting for the WTO, thereby leading to "forum shopping", and posing a systemic risk to the viability of the multilateral trading system. Such overlapping membership would also pose tremendous administrative burdens for small countries with limited negotiating and institutional capacities. Furthermore, the developments on standard-setting in new issues (i.e. investment or competition policy) in RTAs representing the potential risk of increased fragmentation of trade rules at regional levels, making it difficult to agree multilaterally on new issues.[31] On the other hand, regional arrangements, by their nature cannot solve the systemic issues that involve world-wide trade relations.

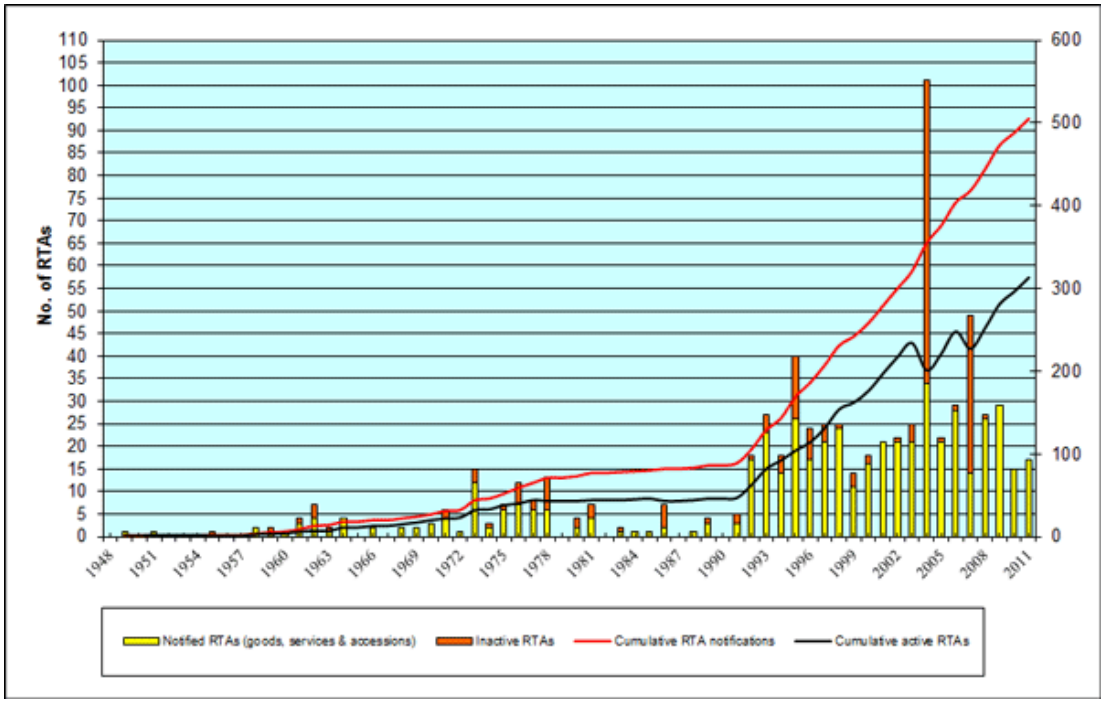
## 1.3 Proliferation of RTAs and its Challenges to the Multilateral Trading System

Since the mid-1990s, the number of regional trade agreements (RTAs) unprecedentedly has increased, with today virtually all countries being part of one or more RTAs (the exception being Mongolia). Regionalism, characterised as both an increase in the number of RTAs and in intra-regional trade flows, has progressed rapidly in many regions, having started in Europe and the Western Hemisphere, it now extends to more and more Asian-Pacific and Africa countries. In the period 1948-1994, the GATT received 124 notifications of RTAs (relating to trade in goods), and since the creation of the WTO in 1995, almost 300 additional arrangements covering trade in goods or services have been notified (see Table 1).

[31] M Mashayekhi and T Ito (eds), *Multilateralism and Regionalism: The New Interface* (United Nations 2005), p 7.

**Table 1**

Evolution of Regional Trade Agreements in the world, 1948-2011




*Source: WTO Secretariat*

(The above chart shows all RTAs notified to the GATT/WTO during 1948-2011, including inactive RTAs, by year of entry into force)

Taking account of the RTAs that are operational although not yet notified, almost 300 RTAs were in force in 2010.[32] The expansion, widening and deepening of RTAs has resulted in a situation whereby intra-RTA trade has been steadily increasing (see Table 2). The share of intra-RTA trade in world merchandise exports accounted for 17.8 per cent (excluding the EC/EU) in 1990 and doubled in 2008 (see Table 3). Thus, international trade flows are increasingly concentrated within regional groupings formed by large trading nations.

[32] WTO, *World Trade Report 2011 – The WTO and preferential trade agreements: From co-existence to coherence*, p6.

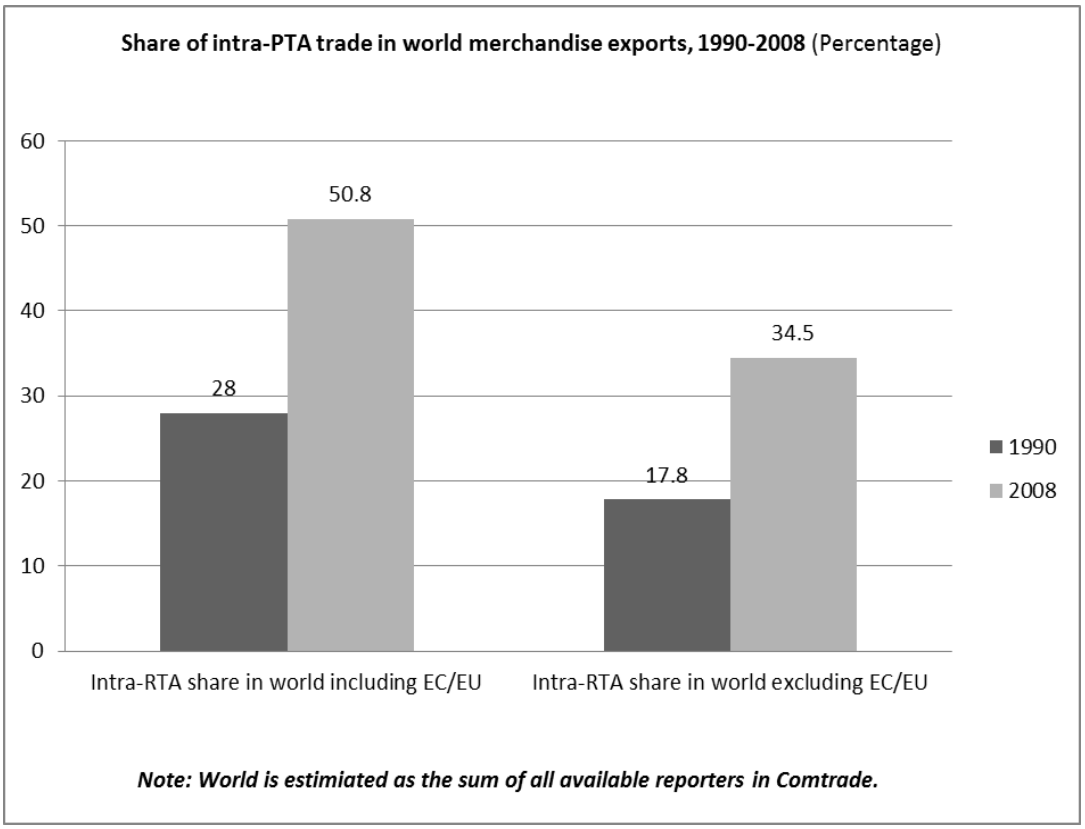
**Table 2**

Evolution of intraregional merchandise exports against world statistic, selected RTAs (2001-2010, in Billions of dollars)

| | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|---|---|---|---|---|---|---|---|---|---|---|
| **World Total** | 6169.3 | 6492.4 | 7585.6 | 9218.0 | 10488.7 | 12112.7 | 14002.6 | 16120.5 | 12516.4 | 15236.8 |
| **EFTA** | 143.4 | 153.6 | 175.5 | 208.2 | 237.8 | 273.5 | 313.2 | 377.9 | 291.5 | 331.4 |
| **NAFTA** | 1147.5 | 1106.2 | 1162.9 | 1319.6 | 1475.8 | 1664.1 | 1840.7 | 2035.2 | 1602.3 | 1964.6 |
| **MERCOSUR** | 87.8 | 88.8 | 106.1 | 135.8 | 164.0 | 190.1 | 223.8 | 278.4 | 217.2 | 281.3 |
| **CACM** | 14.4 | 16.7 | 18.0 | 19.9 | 21.7 | 24.3 | 27.3 | 29.6 | 26.1 | 29.9 |
| **CARICOM** | 7.8 | 7.3 | 9.0 | 11.0 | 14.9 | 20.2 | 20.1 | 26.3 | 14.9 | 17.3 |
| **GCC** | 160.2 | 167.9 | 212.7 | 285.2 | 397.6 | 480.7 | 555.0 | 751.8 | 509.8 | 649.0 |

*Source:* WTO, *International Trade Statistics 2011* (Appendix: Historical Trends)

**Table 3**




*Source*: WTO, *World Trade Report 2011*: Figure B.6 (original from UN: Comtrade, database)

Along with the dramatic increase in the number of RTAs, the new regionalism is also characterized by more ambitious levels of integration. To facilitate this, rules and policies adopted in RTAs are noted going beyond multilateral disciplines and liberalization commitments with two exceptional trends: 1) based on the current multilateral disciplines bounded under the GATT/WTO, many RTAs altered the trading rules by offering their regional partners priorities; 2) the qualitative dimension of RTAs in respect of coverage of policy areas evolved. Recent "new-generation" RTAs increasingly cover not only the traditional trading issues, but also other "behind the border" regulatory areas, including investment, intellectual property rights, competition policy, labour, environment and development cooperation.

A typical example is the trade remedy measures in RTAs that will be discussed in detail in this thesis. Against the WTO provisions in the areas of anti-dumping, countervailing duties and safeguard measures, the approaches taken by RTAs are

quite diverse. Some have gone beyond the WTO framework by strengthening WTO rules to minimise the opportunity to use such measures in a protectionist manner, while other RTAs have completely eliminated the possibility of using them among participating countries. Yet in the area of safeguards, some RTAs add new opportunities to use such measures. Some RTAs are also facilitated with regional bodies to investigate and/or review the final determination of TRMs applied by national authorities. An OECD report concluded that, "in RTAs, provisions in these areas reflect two tendencies: on the one hand, border trade barriers between members have been reduced below MFN levels, which could give rise to fears of an increased resort to contingency measures; yet at the same time the objective of deeper integration may obviate the need or lead the members to forgo (or limit the scope of) contingency measures [i.e. the trade remedy measures], and in the case of customs unions to implement common external policies in these areas."

The constitution of RTAs is under the auspices of the GATT/WTO and is based on the perception that regionalism can be a useful vehicle to promote global trade integration and maximize the welfare of all participating countries. However, the proliferation of RTAs and the rules diversification of the RTAs not only complicate the international trading environment, but also bring significant challenges to the existing multilateral trading system. The central concern of the evolving RTAs is the conflict with one of the cornerstones of the WTO – the non-discrimination principle. The parties to an RTA liberalize trade solely among themselves, which exactly contradicts with the non-discrimination concept. This key difference in approach makes the relationship between the WTO and RTAs both complicated and controversial. Concern was voiced by several WTO Members that the MFN principle could be increasingly bypassed by the conclusion of agreements among RTAs and the development of regional trade policy disciplines differing from those under the WTO Agreements could lead to Members forgoing some of their WTO rights when becoming parties to a RTA.[33]

[33] WTO CRTA, *Checklist of Systemic Issues Identified in the Context of the Examination of Regional trade Agreements*, WT/REG/W/12, 10 February 1997, paras 9 and 11 (See also CRTA, *Annotated Checklist of Systemic Issues – Note by the Secretariat*, WT/REG/W/16, 26 May 1997, WT/REG/W/16, paras 57-60).

## 1.4 WTO Rules on RTAs

In order to regulate the development of RTAs, as previously mentioned, GATT/WTO allows its Member States to enter into regional trade arrangements under specific conditions, which are spelled out in three sets of rules:

i) GATT Article XXIV, which provides for the formation and operation of customs unions and free-trade areas covering trade in goods;

ii) Article V of GATS, which governs the conclusion of RTAs in the area of trade in services, for both developed and developing countries; and

iii) the so-called Enabling Clause (i.e., the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries), which refers to preferential trade arrangements in trade in goods between developing country Members.

All the above provisions allow WTO Members to depart from the cornerstone principle of the MFN under certain criteria, and establish the requirements to be fulfilled by members of RTAs in order to be compatible with the WTO.[34] This research is limited on discussing the TRMs in those RTAs notified under GATT Article XXIV.

Comprised of 12 paragraphs altogether, GATT Article XXIV covers four aspects regarding the constitution of a RTA: the general objective of the RTA, the coverage and level of the trade liberalization within the RTA, the transitional period of the RTA and the procedural requirements which refers to notification and transparency issues. In the WTO era, it was further elaborated by the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* (the "1994 Understanding") concluded in the Uruguay Round and a *Draft Decision on a*

[34] GATS Article V contains similar requirements as Article XXIV applied to the RTAs in respect of the trade in services. However, these requirements are not applicable under the Enabling Clause. The Enabling Clause provides that the MFN clause of GATT Article I.1 is exempted for a limited number of preferential arrangements, including "regional or global arrangements entered into amongst less-developed counties for the mutual reduction of tariff reduction or elimination of tariffs" (paragraph 2c). Thus, it can be argued that the Enabling Clause sets out less stringent requirements than those contained in GATT Article XXIV. Indeed, a number of South-South RTAs have been notified under the Enabling Clause. Other non-generalized preferential schemes, for example non-reciprocal preferential agreements involving developing and developed countries, require Members to seek a waiver from WTO rules. Such waivers require the approval of three quarters of WTO Members. Examples of such agreements which are currently in force include the US - Caribbean Basin Economic Recovery Act (CBERA), the CARIBCAN agreement whereby Canada offers duty-free non-reciprocal access to most Caribbean countries, Turkey-Preferential treatment for Bosnia-Herzegovina and the EC-ACP Partnership Agreement. See "Regional Trade Agreements: Rules" at http://www.wto.org/english/tratop_e/region_e/regrul_e.htm.

*Transparency Mechanism for Regional Trade Agreements* (the "Transparency Mechanism") reached in the Doha Round in 2006 on provisional basis.

The objective of GATT Article XXIV is to assume the role of overriding, constitutional disciplines which structure the shape and contents of preferential agreements – all with a view to support regional integration, as building blocks to trade regulation and liberalization, while at the same time avoiding unnecessary trade distortions. GATT Article XXIV:4 clearly provides that "the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." The preamble of the 1994 Understanding reaffirmed this objective and further stated that, in RTA formation or enlargement, the parties to them "should to the greatest possible extent avoid creating adverse effects on the trade of other Members".

The heart of GATT Article XXIV is three basic obligations to be followed by WTO Members who wishing to enter into an RTA covering trade in goods – the first one is of procedural nature, and the latter two are of substantive nature:

*a) an obligation to notify the RTA*

Since regional integration essentially amount to an exception from the basic obligation to treat international trade in a non-discriminatory manner, the resulting legal consequence is that WTO Members wishing to enter into a RTA, and consequently deviate from the obligation to treat trade from all other WTO Members in a non-discriminatory manner, will have the burden of proof to state that they have complied with the relevant multilateral rules.[35] Thus, the first step towards meeting this obligation comes with the notification of the scheme.

The procedural obligation on the constitution of RTAs emphasizes the duty of prompt notification and transparency. Pursuant to GATT Article XXIV:7 and paragraph 11 of the 1994 Understanding, "any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such area, shall promptly notify the WTO Members and shall make

[35] With regard to the "exception" status of GATT Article XXIV, see WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products ("Turkey – Textiles")*, WT/DS34/AB/R, dated 22 October 1999, para 45 and footnote 13.

available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate". In addition, the Members of RTAs are required report periodically to the Council for Trade in Goods (CTG) on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur. The recently concluded Transparency Mechanism further clarified the procedure for the early announcement of RTAs, the timeframe for notification, the spectrum of information to be submitted by the parties, consideration on the notified RTAs and streamlined procedures for RTAs' subsequent notification and reporting.

*b) an obligation to liberalize among constituents of the RTA substantially all trade*

The MFN departures are in theory allowed only for CUs and FTAs that are defined to require liberalization on "substantially all" the trade involved (the so-called "internal trade requirement"). GATT Article XXIV:8(a) provides that, either in a customs union (CU) or in a free trade area (FTA), "duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories".

*c) an obligation not to raise the overall level of protection and make access of products of third parties not participating in the RTA more onerous*

GATT Article XXIV:5(a) provides that "with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not *on the whole* be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement". Similar requirements are imposed on the constitution of free trade area in paragraph (b). But the assessment on the constituent of a FTA is to ensure that

each and every *individual* trade instrument will not become more restrictive, post-establishment of the FTA.

According to Article XXIV:8(a)(ii), on the constitution of a customs union, WTO Members are required to adjust their external protection (e.g. tariffs) so that all of them provide substantially the same level of protection. Therefore, some members of a customs union may need to increase or reduce their tariff rates and customs duties towards non-members. In order not to impede the fulfilment of Article XXIV:5(a), according to Article XXIV:6 of GATT (compensatory adjustment), CU members wishing to raise tariffs beyond the rate bound under Article II of GATT had to renegotiate them under the procedure for the modification of tariff concessions in Article XXVIII of GATT. However, in providing for compensatory adjustment, due account should be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union. The 1994 Understanding, paragraph 5, further provides that these negotiations should be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In the event that no agreement can be reached within a reasonable period of time, the customs union will, nevertheless, be free to modify or withdraw the concessions; affected Members will also be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

In some occasions the constitution of either a CU or FTA may not be completed at once, where a transition period is needed towards full integration. Therefore, WTO Members can also enter into "interim agreements" to form a CU or an FTA. GATT Article XXIV:5(c) stipulates that, any interim agreement for the transition period shall include a plan and schedule for the formation of the RTA within a reasonable length of time. Since there is no clear indication regarding this time span, paragraph 3 of the1994 Understanding adds that the "reasonable length of time" should not exceed 10 years apart from some exceptional cases. In cases where WTO Members to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods as to the need for a longer period.

## 1.5 GATT/WTO's Surveillance on RTAs in History

In order to look over the constitutions of RTAs, during the GATT years, a working party was typically formed to review the consistency of a notified RTA with the GATT rules. Now, the task is entrusted to the Committee on Regional Trade Agreement (CRTA). However, both the WTO and its predecessor, the GATT, have not been successful in clarifying this test. This situation is largely owing to the ambiguous languages of GATT Article XXIV, which led the participators of the CRTA constantly failure to establish clear understanding on the provisions. In the meantime, the surveillance mechanism for reviewing the RTAs is also deemed problematic.

GATT Article XXIV provisions confronted their first real test with the notification of the Treaty of Rome which established the EEC in 1957. The working party, however, concluded that "no agreement was reached on the compatibility of the Treaty of Rome with Article XXIV, and the contracting parties agreed that because 'there were a number of important matters on which there was not at this time sufficient information … to complete the examination of the Rome Treaty' … this examination and the discussion of the legal questions involved in to could not be usefully pursued at the present time".[36] The examination of the EEC was never taken up again in the GATT. The examination of CUs and FTAs subsequently notified to the GATT also did not lead to any clear assessments of full consistency with the rules. Frictions arising between GATT Members in these areas were dealt with pragmatically. Legal concepts contained in GATT Article XXIV were noticed to be difficult to apply and have caused much controversy in the GATT. For example, the GATT exception allows an "interim agreement" – one that leads to a CU or FTA within a reasonable time – to depart from MFN. This has opened a loophole of considerable size, since almost any type of preferential agreement can be claimed to fall within the exception for "interim agreement", and "reasonable time" is exceedingly imprecise.

Accordingly, the Uruguay Round concluded the 1994 Understanding, which was designed by the negotiators to address some of these problems. While not changing

[36] GATT Working Party, *The Rome Treaties – Statement of Conclusions for Approval by the CONTRACTING PARTIES*, GATT doc. W/13/49, 18 November 1958.

the actual language of GATT Article XXIV, the 1994 Understanding sets forth certain guidelines for handling some of the ambiguities in Article XXIV. However, the supplement is of a rather procedural nature; very little substantive clarification or interpretation was provided of the essential requirements contained in the Article.

At the time of the launch of the Doha Round in November 2001, the CRTA again had made no further progress on its mandate of consistency assessment due to the endemic questions of interpretation of the provisions contained in Article XXIV of the GATT 1994. Members had not been able to reach consensus on the format nor the substance of the reports on any of the examinations entrusted to the CRTA.

Concerns over the developmental aspects of RTAs and a malfunctioning multilateral surveillance mechanism prompted Ministers meeting at the Fourth Ministerial Conference in Doha in November 2001 to include RTA rules under the Doha Development Agenda (DDA). In the Doha Ministerial Declaration, WTO Members recognize that RTA can play an important role in promoting trade liberalization and in fostering economic development, and stress the need for a harmonious relationship between the multilateral and regional processes. On this basis, Ministers agreed to launch negotiations aimed at clarifying and improving the relevant disciplines and procedures under existing WTO provisions with a view to resolving the impasse in the CRTA, exercising better control of RTAs dynamics, and minimizing the risks related to the proliferation of RTAs.

Again, achievement was only made on procedural issues, with Members reaching a formal agreement on the Transparency Mechanism in July 2006; negotiations on the substantive issues have made little progress as the scope of issues under consideration is wide, complex and relates to several other regulatory areas.

In the end, the substantive components of the legal test contained in GATT Article XXIV and the 1994 Understanding for a qualifying RTA are still considered inadequate, especially for today's developing international economic practice. A number of issues have been raised in CRTA meetings and the academia. For instance, neither the GATT generally, nor the language of Article XXIV, deals with the important question of "rule of origin" in RTAs, by which preferential parties determines whether goods are entitled to receive the preference of their arrangement. Similarly, certain other non-tariff trade policy laws are not clearly addressed in the

GATT language with regard to the RTAs. A typical example is the trade remedy measures discussed in this thesis. Furthermore, there are a number of issues regarding the institutional structure of preferential arrangements, particularly those relating to dispute settlement. The dispute settlement provisions contained in "new generation" RTAs could build jurisprudence conflicting with that of the WTO. In the meantime, there is no guideline for those newly generated issues that are not covered in the multilateral trading system, such as environmental, investment and competition issues in RTAs.

To date, the CRTA has not been able to adopt final reports on its examination. Some believe that this is in large part due to the very limited progress made by WTO Members in resolving "systemic issues" concerning WTO rules on RTAs.[37] Systemic issues pertain to the interpretation of some of the terms and benchmarks in the provisions. For instance, there has been no agreement among WTO Members as to the exact meaning and measurement of key terms such as "substantially all the trade", "not on the whole higher or more restrictive", and "other regulations of commerce (ORC)"; and with respect to the treatment of preferential rules of origin, "other restrictive regulations of commerce (ORRC)" and obligations during transitional periods.[38] The reviewing procedure convened by the GATT working parties and the CRTA adds more difficulties to achieve a result because both organs operate by consensus – all decisions need consensus of the participants (usually the representatives of all GATT/WTO Members).[39] As the participants usually held divergent views on the substantive criteria on RTAs, consensus was hardly ever reached on specific issues.

Review of the consistency of RTAs can also take place through submission of RTA-related disputes to WTO adjudicating bodies, which is known as "Track II" review, in contrast with the reviews under GATT working parties or CRTA. In practice, RTA-related disputes have rarely been submitted to adjudicating bodies for

[37] See P De Lombaerde (ed), *Multilateralism, Regionalism and Bilateralism in Trade and Investment: 2006 World Report on Regional Integration* (Springer 2007), p 10.
[38] Ibid. The relationship between RTAs notified under the Enabling Clause and GATT Article XXIV has also been raised. Systemic issues with regard to GATS include the interpretation of "substantial sectoral coverage" and "absence or elimination of substantially all discrimination".
[39] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford University Press 2003), p 344.

review. As a result, RTAs have been left largely unchallenged.[40] Although this does not mean that all RTAs are problematic, unchallenged RTAs essentially implies that the WTO has not been instrumental in regulating regionalism.[41]

## 1.6 Conclusion

Regional trade agreement, since its inception, has been a major route to liberalize trade between the participating countries parallel to the multilateral trade agreement presented by the GATT and WTO. Nonetheless, the welfare effect of regionalism to the world economy is not confirmed in economic theory. The historical experience of the open trade regime shows that, the healthy development of an international trading environment needs supportive and complementary RTAs to the greatest extent possible with the multilateral trading system in a way which strengthens its credibility.

When the GATT was established in 1947, the coexistence of preferential and multilateral arrangements to trade liberalization was viewed as ultimately positive in international relations. The then prevailing perception was that genuine regional initiatives promoting extensive trade liberalization among sub-set of the Members could be congruent with multilaterally-agreed trade liberalization and could contribute to the development of global trade and of the multilateral trading system. Thus, from the inception of the GATT, Members have been allowed to further the market access they have bound in the GATT by concluding RTAs, albeit subject to a certain number of criteria. For agreements in trade in goods, the criteria are contained in GATT Article XXIV, including fundamentally three elements: (a) transparency, (b) commitment to deep intra-regional trade liberalization, and (c) neutrality *vis-à-vis* non-parties trade.

Although the criteria were further elaborated in the WTO era by the 1994 Understanding and the Transparency Mechanism on RTAs, such exceptions and limits so far have not effectively resolved the inconsistencies and conflicts between RTA and WTO rules. The fact is, legally, WTO Members have different

[40] For detail discussion, see section 5.3.2 of this thesis.
[41] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford University Press 2003), p 344.

understandings on the WTO disciplines when shaping RTAs policies; politically, WTO Members consistently fail to examine regional agreements; in dispute settlement, very limited interpretation has been put forward on the WTO's disciplines on RTAs. Moreover, Members often refrain from notifying agreements to the WTO, thus defeating WTO-consistency examination and discussion. [42] Thus, the improvement and clarification of WTO disciplines affecting RTAs are critical in disciplining RTAs in a manner supportive of a multilateral trading system – one which minimizes the harmful effects of RTAs on third countries and the multilateral trading system.

Unlike the RTAs campaigns in 1960's and1980's, the recent wave of regionalism shows many signs of strength to enduring and expanding. Today, virtually all members of WTO are party to, or are in the process of, negotiating a regional trade agreement. For most countries, RTAs have become the centrepiece of their commercial policy implying in many cases a shift of resources from multilateral trade objectives to the pursuance of preferential agreements. Moreover, RTAs show an increasing level of sophistication; and their outreach in terms of partners is becoming both innovative and geographically unbound. As Crawford and Fiorentino in their work claimed that, "the significance of the phenomenon should not be overlooked since it will ultimately influence the nature of international trade relations and the policy choices and behavior of the operating actors."[43]

In respect to the supremacy of the WTO over RTAs, the constituent treaties of many new-generation RTAs clearly state that these need to be consistent with WTO rules. To many advocators of the multilateral trading system, this indicates that future RTAs could be built on the WTO, seeking to maintain compatibility with its disciplines. For them, this points to a positive, dynamic interface between regional trade liberalization and disciplines on the one hand, and multilateral liberalization and disciplines on the other. But of course, in order for these intentions to become reality, all RTA provisions need to be WTO-compatible.[44] Nevertheless, the facts is that the RTA coverage and evolution of trade disciplines has already posed some incompatibility with multilateral rules and generated increasing disputes between

[42] See the listing of agreements relating to the Eastern Europe in M Godel and J Gage (eds) *Multilateralism and Bilateralism after Cancun: Challenges and Opportunities of Regionalism* (Seco Publikation Welthandel 2004).
[43] Ibid.
[44] Ibid.

WTO Members. This highlights the urgent need for coherence between the multilateral and regional processes if the potential benefits are to be maximized. The challenge may not simply be the issue of whether the RTA constituent countries would like to follow the multilateral rules but will be to ensure the effectiveness of WTO's discipline on RTA and its RTA surveillance mechanism as an interface between preferential and MFN trade relations.

# Chapter 2 Trade Remedy Rules in the GATT/WTO

The purpose of this chapter is to conduct a review over the trade remedy rules of GATT/WTO to form a background for further analyses of TRMs in RTAs and also provides a reference point for the comparative study of TRMs in WTO and RTAs in Chapter 3.

Therefore, the task of this chapter is to discuss: 1) the general background of anti-dumping, subsidy and countervailing duty measures and safeguards, which includes an overview of the definition, scope, economic and political justification; 2) the historical development of TRMs at the multilateral level that explains why states have chosen to strengthen the rules on TRMs; 3) the current legal framework of anti-dumping, subsidy and countervailing duty measures and safeguards under the WTO; and 4) the latest academic arguments on trade remedy measures.

## 2.1 Anti-Dumping Measures in the GATT/WTO

### 2.1.1 Introduction to Anti-Dumping Measures

The concept of "dumping" that first appears in economics was described as a form of "price-discrimination between national markets."[45] In international settings, enterprises may sell the same commodity at different prices for reasons not associated with differences in costs or at the same price where costs are different. The classic definition of "dumping" refers to a situation where prices are lower in the importing market than in the domestic market of the exporter.[46]

The initiative that an enterprise wants to maintain, for a certain period of time, two different prices in two different markets may vary.[47] However, dumped imports are normally undesirable to importing nations because the low priced products rob the market share from domestic competitor industries and they could interfere with or distort the market of the importing country. For almost 100 years, international

[45] J Viner, *Dumping: A Problem in International Trade* (University of Chicago Press 1923).
[46] See G Marceau, *Anti-Dumping and Anti-Trust Issues in Free Trade Areas* (Clarendon Press 1994), p 11, cf. Clements, E., "Price Discrimination and the Multi-Product Firm" (1951) 19 *Review of Economic Studies* 1.
[47] See Ibid, p 12 and J H Jackson, *The World Trading System* (2nd ed) (MIT Press 1997), pp 218-223 for different possibilities of an enterprise may dump.

trade policy rules have generally recognized dumping as an "unfair" practice to be condemned, against which the importing country is legitimately to take certain countermeasures, i.e. anti-dumping measures, when the dumped goods cause injury to competing industries in the importing country.

Anti-dumping was integrated early into economic theory as an international counterpart of domestic competition policy.[48] In historical context, anti-dumping first made its appearance at the beginning of the 20th century – an era that was a high season of globalization, with labour and capital able to move internationally as never before or since, but also an era marked by an awakening of economic nationalism in newly industrializing countries, and by growing concern over the power of large corporations that were emerging to exploit the economies of scale allowed by mass production, which itself was facilitated by the growth of international trade.[49] It then received some official ratification in international treaties.

National anti-dumping laws were enacted first in Canada (1904), then New Zealand (1905), Australia (1906), Japan (1910), South Africa (1914), the USA (1916-21), and Britain (1921).[50] The Canadian Anti-dumping Act of 1904 provided for an automatic imposition of anti-dumping duty equal to the difference between the Canadian price and the price of similar goods in the exporting country. There was no investigation into the exporter's intent or the injury caused to the importing country. Until 1969 Canada's anti-dumping provisions contained no injury test.[51]

The first specific US anti-dumping law, the Revenue Act of 1916, was of criminal nature, was enforced in ordinary courts, and required proof of the predatory intent of the exporter-importer. It was a form of legislative extraterritorial application of the Sherman Act's principles at the time when the Sherman Act was considered not to apply outside the US territory.

The difficulties of establishing intent required by the 1916 Act led to the adoption

[48] Besides the fact of essentially being a trade tool, the origins of anti-dumping laws in the early twentieth century show that the first provisions related to the subject mainly followed concern expressed in antitrust laws. This view has been gradually changed, and nowadays, the concept of dumping as defined in article VI of the GATT shows slight correlations with antitrust provisions. See P Florêncio, "What kind of interaction between anti-dumping and competition policies is desirable within Mercosur", Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers (University of California 2007), p 17, cf. G Niels, "What is Anti-dumping Policy Really About" (2000) 14 (4) *Journal of Economic Surveys* 467, pp 468-469.
[49] A V Deardorff and R M Stern, "A Centennial of Anti-dumping Legislation and Implementation: Introduction and Overview" (2005) 28(5) *The World Economy* 633, at 634.
[50] J Viner, *Dumping: A Problem in International Trade* (University of Chicago Press 1923).
[51] P A Magnus, "The Canadian Antidumping System" in J H Jackson and E A Vermulst, *Antidumping Law and Practice, A Comparative Study* (University of Michigan Press 1989), p 174.

of the 1921 US Anti-dumping Act, which provided an administrative procedure for the imposition of anti-dumping duties equal to the margin of dumping. Unlike the then Canadian statute, it incorporated a condition that dumped imports should be shown to actually or potentially injure the domestic injury. Consequently, the US used their Anti-dumping Act of 1921 as a model when drafting the section on dumping in the Havana Charter and the GATT.

Concerning the long history of national and international concerns with dumping, although the GATT is in favour of free trade and non-discrimination/National Treatment, anti-dumping eventually became a legitimate measure available for GATT contracting parties to temporarily restrain the affected products into the importing markets in appropriate circumstances. As a result, individual nations and trade blocs followed the GATT rules and developed extensive national anti-dumping laws and regulations for their own application.

As time passed, some Members of GATT began to feel that other countries, in applying their anti-dumping laws, were doing so in such a way as to raise a new protectionism barrier to trade. Some believed that anti-dumping procedures, such as delay, dumping margin calculations and the injury test, were causing restrictions and distortions on international trade flows, therefore creating risks and uncertainties to traders. Consequently, during the Kennedy Round of GATT trade negotiations (1962-1967), the contracting parties of GATT negotiated the first international Anti-Dumping Code[52], which set forth a series of procedural and substantive rules regarding the application of anti-dumping duties. The Code was intended to limit problematic anti-dumping practices damaging to international trade.[53] In 1979, the Tokyo Round developed a new AD Code replacing the 1967 GATT AD Code. The Uruguay Round, building on the prior AD Codes, further modified the anti-dumping rules,[54] and created the *Agreement on Implementation of Article VI of the GATT 1994* (the WTO Anti-Dumping Agreement). The Uruguay Round text became a mandatory agreement in the WTO. The Anti-Dumping Agreement provides further elaboration on the basic principles set forth in Article VI itself, to govern the investigation,

[52] GATT, *Agreement on the Implementation of Article VI* (the "1967 Code").
[53] The 1967 Code entered into force in 1967 as a result of the Kennedy Round. However, the United States never signed the Kennedy Round Code, and as a result the Code had little practical significance. See *Technical Information on Anti-Dumping*, http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm
[54] WTO Agreement on Anti-Dumping.

determination, and application of anti-dumping duties.

In accordance with the provisions in GATT Article VI and the Anti-Dumping Agreement, anti-dumping measures are unilateral remedies which may be applied by a WTO Member after an investigation and determination by that Member that an imported product is "dumped" and that the dumped imports are causing material injury to a domestic industry producing the like product.

To be noted here, unlike the Agreement on Subsidies and Countervailing Measures, the Anti-Dumping Agreement does not establish any disciplines on dumping itself, primarily because dumping is a pricing practice engaged in by business enterprises, and thus not within the direct reach of multilateral disciplines. On the contrary, considering the anti-dumping measure having impact on the trade flow, the Anti-Dumping Agreement is regarded as an attempt to restrain national anti-dumping actions. In line with this perspective, the Anti-Dumping Agreement sets forth certain substantive requirements that must be fulfilled in order to impose an anti-dumping measure, as well as detailed procedural requirements regarding the conduct of anti-dumping investigations and the imposition and maintenance in place of anti-dumping measures. A failure to respect either the substantive or procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure.

### 2.1.2 Basic Rules of WTO Anti-Dumping Law

As established in Article VI of the GATT 1994 and the WTO Anti-Dumping Agreement [hereafter: ADA], before an anti-dumping duty can be applied, three elements need to be satisfied: 1) there is dumping; 2) there is "material injury" (or threat) to the domestic industry of the importing country (or retarding the establishment of such an injury) and the causation between the dumping and the material injury must be shown; and 3) the importing country has carried out its investigation in accordance with WTO rules.

## 1. Dumping Determination

Dumping occurs when the imported goods are sold below the comparable price at

which they are sold in the home market. Therefore, the identification and comparison of the prices in the two different markets as well as the calculation method of the dumping margin are vital in dumping determination. The criteria for examining the existence of a dumping action are prescribed in Article 2 of the ADA, and consists of the definition of normal value, export price, method of comparison and calculation of the dumping margin.

## A. "Like products" and "Domestic Industry"

Two notions should be mentioned prior to anti-dumping investigation, "like products" and "domestic industry". An examination has to be confined to the imports which are the like products of the concerned domestic industry.

A "like product" is defined in Article 2.6 ADA as "a product, which is identical, i.e. alike in all respects, to the product under consideration, or in the absence of such product, another product, which has characteristics closely resembling those of the product under consideration". In the context of the ADA, the term is relevant for both the dumping and injury determination. Noteworthy, this definition is clearly narrower than the term "like or directly competitive products" in the Safeguards Agreement.[55]

Article 4 ADA defines the definition of the "domestic industry" as "the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products" except those producers which related to the exporters or importers or are themselves importers of the alleged dumping product. Such producers may benefit from the dumping and therefore may distort the injury analysis.

In exceptional circumstances, the producers within each subdivided competitive market of the importing country can be regarded as a separate industry.[56] There is also a special concern where two or more countries constitute regional trade agreement that have reached a level of integration with the characteristics of a single, unified market. The industry in that entire area of integration is regarded as the "domestic industry".[57]

[55] See Safeguards Agreement, Article 4.1(c) and Section 2.3.3(2)(B) of this thesis.
[56] Agreement on Anti-Dumping, Article 4.1(ii).
[57] Ibid, Article 4.3.

A regional industry comprising of only producers in a certain market of a Member's territory may be found to exist under Article 4.1(ii) if these producers sell all or almost all of their production in that market and the demand within that market is not to any substantial degree supplied by producers of the product located elsewhere in the territory. Injury may then be found even where a major portion of the total domestic industry is not injured, provided that there is a concentration of dumped imports into the isolated market and the dumped imports are causing injury to the producers of all or almost all of the production in that market. If the regional industry exception is used, anti-dumping duties shall be levied only on imports consigned for final consumption to that area. Where this is not allowed under the constitutional law of the importing Member, exporters should be given the opportunity to cease exporting to the area concerned or to give undertakings.

Last, it is noted that definition of the domestic industry is closely linked to the standing determination which importing Member authorities must make prior to initiation.[58]

## B. Normal Value

The normal value is a product's price in the home market, which is charged "in ordinary courses of trade" in market economy condition.[59] Different calculating measures of normal value have been laid down for different circumstances.

*a. Standard Calculation Method*

Basically, the normal value shall be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. However, on some occasions, the home market price may not be available or may be unrepresentative. For example, there are no or insufficient domestic sales (less than 5 per cent of the export sales) of the like product in the ordinary course of trade, or prices which appeared to be affected by any arrangement may not be used to establish normal value.[60] Hence, two alternative measures are provided for

[58] See Section 2.1.2(3) of this thesis.
[59] Ibid, Article 2.1.
[60] Ibid, Article 2.2.

establishing the normal value: 1) the price of sales to third country. In the same condition as before, the normal value may also be based on the representative export price, in ordinary course of trade, to an appropriate third country. 2) Constructed value. The normal value of the like product shall be established on the basis of the cost of the production in the country of origin plus a reasonable amount for selling, general and administrative cost and profits.

Where domestic sales of the like product and comparable models are representative, it often happens that some domestic sales are sold below cost of production. Article 2.2.1 ADA provides that such sales below cost may be treated as not being "in the ordinary course of trade" and may be disregarded, i.e. excluded from the normal value calculation, unless the investigating authorities determine that such sales are made within an extended period of time in substantial quantities at prices which do not provide for the recovery of all costs within a reasonable period of time. In practice, sales below cost are often excluded where the weighted average selling prices is below the weighted average per unit costs or where they represent more than 20 per cent of the quantity of total domestic sales of the models concerned.[61] Exclusion of sales below cost will increase the normal value and thereby makes the finding of dumping more likely.

It may also happen that domestic producers and distributors are related. Some WTO Members will then ignore the prices charged by the producer to the distributor on the ground that they are not arms' length transactions. Instead, they base normal value on the sales made by the distributor to the first independent customer. This price will be higher and is therefore more likely to lead to the finding of dumping.

In the typical situation, a product is exported from country A to country B. However, it is possible that more than two countries are involved in the product flow. Article 2.5 ADA deals with this situation. The basic rule is that where products are not imported directly from the country of origin but are exported from an intermediate country, the export price shall normally be compared with the comparable price in the country of transshipment. However Article 2.5, by way of exception, nevertheless allows a comparison with the price in the country of origin, if, for example, the products are merely transshipped through the country of export,

[61] Ibid, footnote 5.

such products are not produced in the country of export, or there is no comparable price for them in the country of export.

*b. Normal value for non-market economy country*

In calculation of the normal value of the imported products from those non-market economy countries, WTO law offered special measures, so-called "analogue country or surrogate country" method.[62] GATT/WTO Members have the right not to accept prices or costs in non-market economies as an appropriate basis for the calculation of normal value on the grounds that such prices and costs are controlled by the government and therefore not subject to market forces. The investigating authorities will then use prices or costs in a third market economy country as the basis for normal value. This means that export prices from the non-market economy to the importing Member will be compared with prices or costs in the surrogate/analogue country.

The selection of an analogue country can be of crucial importance in establishing whether or not there is dumping and the margin of dumping. It may be noted that for several reasons the surrogate country concept tends to lead to findings of high dumping. For example, the producers in the surrogate country are or will be competing in the market place with the investigated exports and therefore it is not in their interest to minimize a possible finding of dumping for their competitors or competitors-to-be.

WTO law, however, does not lay down specific guidance as to the choice of analogue country, except that the national authorities must act in an appropriate and not unreasonable manner. Establishing the normal value on the basis of the analogue country's price is, currently, the only method which could be applied to the imports from non-market economy countries in WTO law. Nevertheless, it almost excludes the comparative economic advantages of the concerned products from the non-market economy countries, if such comparative economic advantages do exist. Therefore, it has been a point of argument and is opposed by exporters from non-

[62] See *Second Supplementary Provision to Paragraph 1.2 of GATT Article VI* : "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability of the purpose of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."

market economy countries.

## C. Export Price

According to Article 2.1 ADA, the export price is the price at which the product is exported from one country to another. In other words, it is the transaction price at which the product is sold by a producer/exporter in the exporting country to an importer in the importing country. This price is normally indicated in export documentation, such as the commercial invoice, the bill of lading and the letter of credit. The export price is potentially the dumped price. The extent to which the export price is lower than the normal value constitutes the dumping margin.

According to Article 2.3 ADA, where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. If the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, the investigating authorities may construct the export price on any reasonable basis. In such cases, allowances for costs, duties and taxes, incurred between importation and resale, and for profits accruing, should be made in accordance with Article 2.4 ADA.

## D. Calculation of the Dumping Margin

Dumping margin is the amount by which the normal value exceeds the export price. Article 2.4 ADA, in the first place, requires the investigating authorities to take a “fair comparison” between the export price and the normal value. The price comparison should be made at the same level of trade, normally the ex-factory level, and in respect of sales made at as nearly as possible the same time. To ensure the compatibility between the prices, due allowance may be made in each case.

Since dumping margin establishes a ceiling for the total amount of anti-dumping

duties that can be levied on the entries of the subject product,[63] Article 2.4.2 ADA establishes three important methodologies that investigating authorities may use to calculate the margin of dumping during the investigation phase:

> "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of [i] a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or [ii] by a comparison of normal value and export prices on a transaction-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchases, regions or time periods, and if an explanation is provided as to why"

The first sentence sets out two comparison methodologies, weighted average-to-weighted average ("W-W") and transaction-to-transaction ("T-T"), involving symmetrical comparisons of normal value and export prices. These two methodologies "shall normally" be used by investigating authorities to establish margins of dumping. The second sentence of Article 2.4.2 sets out a third methodology, weighted average-to-transaction ("W-T"), which involves an asymmetrical comparison and may be used only in exceptional circumstances, providing that: (i) "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and (ii) "an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison".

In practice, anti-dumping investigation normally involves a few different types of products. Thus, when using the "W-W" method, the investigating authorities typically break down the product at issue into a number of different sub-categories or models. For each model, the authorities subtract the weighted average export price from the weighted average normal value, and then aggregate the results to establish

[63] Agreement on Anti-Dumping, Article 9.3. See also the Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") ("US – Zeroing (EC"))*, WT/DS294/AB/R, dated 18 April 2006, at para 130.

the overall dumping margin, expressed as a percentage of the total value of all export transactions. Dividing a product into models and engaging in this kind of "multiple comparison" is now generally accepted as permitted under the ADA.[64]

However, it was noticed that, at the stage of aggregation of the results of the sub-groups in order to establish an overall margin of dumping for the product, some authorities disregarded the results of the models of which the export price is *higher* than the normal value. In other words, the *negative* dumping margin under those models was "zeroed"; only the models with *positive* dumping margin was taken into consideration when establishing the overall dumping margin.[65] Such practice is the so-called "model zeroing".

A similar approach could also happen under the "T-T" method (the "simple zeroing"). In *US – Softwood Lumber V (Article 21.5 - Canada)*, the US Department of Commerce started the dumping margin calculation with a comparison of normal value and export prices on transaction-specific basis, but only aggregated the results of those transaction-specific comparisons in which export price was less than normal value "when calculating the margin of dumping for each respondent foreign producer or exporter".[66]

Although it is difficult to evaluate the economic merits of zeroing, because there is no consensus on the economic rationale of anti-dumping in the first place,[67] zeroing method not only increases the likelihood of a dumping determination but also the magnitude of the dumping margin. Over the years, the practice of "zeroing" has become a contentious issue in anti-dumping disputes and it has been turned down by WTO adjudicating bodies several times, who claim that it is inconsistent with the text of the ADA and GATT Article VI.

---

[64] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, dated 11 August 2004, paras 81 and 97; cf Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* ("*US – Stainless Steel*"), WT/DS179/R, dated 1 February 2001, paras 6.114 and 6.125 (multiple averaging not prohibited per se but prohibited in this instance, where the period of investigation was split into two sub-periods without justification).

[65] This was illustrated by the European Communities' approach in *EC – Bed Linen* case. See Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/AB/R, adopted 1 March 2001, para 47.

[66] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* ("*US – Softwood Lumber V (Article 21.5 - Canada)*"), WT/DS264/RW, dated 3 April 2006, para 5.16.

[67] M Janow and R Staiger, "EC-Bed Linen: European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India" in H Horn and P Mavroidis (eds), *The WTO Case Law of 2001: The American Law Institute Reporters' Studies* (Cambridge University Press 2003) 115, 135.

In *EC – Bed Linen*, the Appellate Body read the words "all comparable export transactions" in Article 2.4.2 as precluding model zeroing, because the expression prohibits investigating authorities to ignore some export transactions. Meanwhile, the Appellate Body indicated that model zeroing is inconsistent with the "fair comparison" requirement in Article 2.4 as it inflates the overall dumping margin.[68] It also emphasized that authorities must establish the dumping margin for the "product" under investigation. Such requirements of Article 2.4 and 2.4.2 could not be said to apply only at the stage of comparing normal value and export price for each "model" and not at the second stage of aggregating the results of those comparisons.[69]

In *US – Lumber V*, the Appellate Body further clarified its position that, under the ADA and GATT Article VI, "'margins of dumping' can be found only for the product under investigation *as a whole*, and cannot be found to exist for a product type, model, or category of that product".[70] In other words, an overall dumping margin cannot be determined on *part of* the results obtained at the intermediate stage when investigating authorities choose to undertake multiple comparisons. This view soon became a primary reasoning to decline the zeroing pursuant to the "T-T" method in subsequent cases, for example, *US – Softwood Lumber V (Article 21.5 – Canada)*[71], *US – Zeroing (Japan)*[72] and *US – Continued Zeroing*[73], where the "all comparable export transactions" requirement is not applicable according to the text of Article 2.4.2.

As will be discussed later, the ADA offers three types of review of anti-dumping measures – the newcomers requested review, interim review and expiry review (also called the "sunset review") – to determine the continuation, termination or change of the duty amount, where the original measures are no longer appropriate or necessary.[74] These reviews are regulated respectively in Article 9.5, Article 11.2 and Article 11.3 of the ADA, which may involve zeroing in addition to the dumping

[68] Appellate Body Report, *EC – Bed Linen*, para.55.
[69] Appellate Body Report, *EC – Bed Linen*, paras 51, 53.
[70] Appellate Body Report, *US – Softwood Lumber V*, para 96 (emphasis added).
[71] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 - Canada)*), WT/DS264/AB/RW, dated 15 August 2006, para 89.
[72] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, dated 9 January 2007, para 115.
[73] Panel Report, *United States – Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing*"), WT/DS350/R, dated 1 October 2008, para 7.183; Appellate Body Report, *US – Continued Zeroing*, WT/DS350/AB/R, dated 4 February 2009, para 395(d).
[74] See section 2.1.2(5) of this thesis.

margin calculation in the original investigation.

In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated, in the context of sunset reviews under Article 11.3 of the ADA, that, "should investigating authorities choose to rely upon dumping margins in making their ... determination, the calculation of these margins must conform to the disciplines of Article 2.4"[75], because, according to the Appellate Body, there are "no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins".[76] The Appellate Body in *US – Zeroing (Japan)* further considered, without explanation, that Article 2.4 applies to both interim and newcomer requested reviews.[77] As a consequence, the practice of zeroing was prohibited in the interim and newcomer requested reviews as well.

## 2. Injury Determination

According to the ADA, anti-dumping duties may be imposed *only if* the dumped imports cause or threaten material injury to an established domestic industry of the importing country or materially retard the establishment of such industry. Therefore, the investigating authorities also need to examine the existence and degree of the injury caused by the dumped imports. It is worth noting, the standard for "material injury" test is generally thought to be less stringent than the "serious injury" test applicable to safeguard action under GATT Article XIX and the SA.[78]

The determination of material injury must be based on positive evidence and involve an objective examination of the volume of the dumped imports, their effect on the domestic prices in the importing country's market and their consequent impact on the domestic industry. In *Thailand – H-Beams*, the Appellate Body held that this determination may be based on the confidential case file and overruled a panel finding that it follows from the words "positive" and "objective" that the injury determination should be based on reasoning or facts disclosed to, or discernible by,

[75] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, dated 15 December 2003, para 127.
[76] Ibid.
[77] Appellate Body Report, *US – Zeroing (Japan)*, para 168.
[78] J H Jackson, *The World Trading System* (2nd edn) (MIT Press 1997), pp 266-267. See also, Section 2.3.3(2)(A) of this thesis.

the interested parties.[79]

As provided in ADA, the injury examination focuses on:

(1) the performance of the dumped imports, which reflects on the *volume* of the dumped imports and the effect of the dumped imports on *prices* in the domestic market for like products. (Article 3.2)
(2) the consequent impact of these imports on domestic producers of such products. (Article 3.4)
(3) the causal link between dumped imports and injury. (Article 3.5)

Considering the ADA does not establish any specific period of investigation, nor does it establish guidelines for determining an appropriate period of investigation, for the examination of either dumping or injury, a non-obligatory recommendation of the WTO Committee on Anti-Dumping Practices provides that injury should preferably be analyzed over a period of at least 3 years.[80]

With regard to the first point, the investigating authorities must examine whether there is a significant increase in dumped imports – either absolute or relative to production or consumption in the importing Member, and whether there has been a significant price undercutting by the dumped imports, or whether the effect of the imports has been to significantly depress prices or prevent price increases, which otherwise would have occurred, to a significant degree.

In the event that imports from several countries are simultaneously subject to anti-dumping investigations, their effects may be assessed cumulatively for injury purposes, as long as they do not qualify the *de minimis* or *negligibility* thresholds[81] and a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the like domestic products. This is the so-called "principle of cumulation". In practice, WTO Members apply cumulation

[79] WTO Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted on 12 March 2001, paras 107 and 111.
[80] WTO Committee on Anti-Dumping Practices, *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, adopted by the Committee on 5 May 2000, WTO Doc. G/ADP/6.
[81] According to Article 5.8 ADA, the margin of dumping shall be considered to be *de minimis* if the margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing market, unless the imports of those particular countries collectively account for more than 7 per cent of the like product in the importing market.

almost as a matter of course so long as the thresholds are not reached.

It should be noted that in *EC – Bed Linen (Article 21.5 - India)* the Appellate Body emphasized that, according to the text of Article 3.2, the imports from those exporters who were not found to be dumping should be excluded in such "volume and effect" examination.[82]

The second point to be estimated in the injury analysis is the consequent impact of the dumped imports to the domestic industries. When examining the dumping related injury, the investigating authorities shall evaluate *all* relevant economic factors and indices which influence the state of the industry, rather than focusing on the impact of concerned dumped imports. Article 3.4 ADA mentions 15 specific factors to be examined by the investigating authorities, however, this list is not exhaustive and none of these factors can necessarily give decisive guidance. The scope of this obligation has already been examined in panel proceedings several times. Those Panels, strongly supported by the Appellate Body in *Thailand – H-Beams*, held that the evaluation of the 15 factors is *mandatory* in each case and must be clear from the published documents.[83] To be stressed, the determination of injury cannot be established unless the impact of the dumped imports was classified as "material".

In some instances, a domestic industry may allege that it is not yet suffering material injury, but is *threatened* with material injury, which will develop into material injury unless anti-dumping measures are taken. However, because such statements are easy to make and any investigation based on threat of material injury will necessarily be speculative because it involves analysis of events that have not yet happened, the ADA requires special care for a threat case. According to Article 3.7 ADA, a determination of threat must be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation, in which the dumping would cause injury, must be *clearly foreseen and imminent*.

In making a threat determination, the importing Member authorities should

---

[82] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC – Bed Linen (Article 21.5 - India)*"), WT/DS141/AB/RW, dated 8 April 2003, para 111.

[83] Appellate Body Report, *Thailand – H-Beams*, para 125 (footnote omitted); Panel Report, *EC – Bed Linen*, WT/DS141/R, dated 30 October 2000, para 6.167.

consider, *inter alia*, four special factors:

i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
ii) sufficiently freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
iv) inventories of the product being investigated.

No single factor will necessarily be decisive, but the *totality* of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur. The *Mexico – Corn Syrup* Panel concluded that a threat analysis must also include evaluation of the Article 3.4 factors.[84]

Furthermore, the demonstration of the causal link must be based on an examination of all relevant evidence before the authorities, which must also examine *any known* factors other than the dumped imports which are also injuring the domestic industry, and the injury as a result of such other known factors must *not* be attributed to the dumped imports. Article 3.5 then provides a non-exhaustive list of other factors which may be relevant depending on the facts of the case.

The evaluation of import volumes and prices, and their impact on the domestic industry is relevant not only for determining whether the domestic industry has in fact suffered material injury, but often will also be indicative of whether the injury has been caused by the dumped imports or by other factors. Thus Article 3.5 ADA, first sentence, refers back to Article 3.2 and 3.4 ADA. Nonetheless, the Panel in *Thailand – H-Beams* held that, contrary to the Article 3.4 factors, the Article 3.5 factors need not be examined as a matter of course in each administrative determination. Rather, such examination will depend on the arguments made by

[84] Panel Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R, dated 28 January 2000, para 7.128.

interested parties in the course of the administrative investigation.[85]

## 3. Requirements on the National Procedures

Despite the substantive elements that the importing Member authorities must scrutinize, WTO law also lays out various procedural obligations on how to handle the anti-dumping investigation. Those requirements include the *notification* of the investigation, sufficiency of the *evidence*, *legal standing* of the interested parties, *time-span* of the investigation and imposition of an anti-dumping measure, etc. These thresholds in procedures are also closely related to the result of an anti-dumping case.

An anti-dumping case normally starts with the official submission of a written complaint by the domestic industry to the importing Member authorities that injurious dumping is taking place. The requirements for the contents of this application are contained in Article 5.2 ADA – it must include evidence of dumping, injury and causal link between the two; simple assertion is not sufficient. Hence, the importing Member authorities are obligated to examine, before initiation, the accuracy and the adequacy of the evidence in the application.

It should be stressed that the importing Member authorities must determine, again before initiation, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by, or on behalf of, the domestic industry. According to Article 5.4 ADA, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

In terms of legal standing of the interested parties, the parties most directly affected by an anti-dumping investigation are the domestic producers, foreign producers and exporters and their importers. However, the government of the exporting country and representative trade association also qualify. Article 6.11 ADA provides that other domestic or foreign parties may also be included as interested parties by the importing country Member. Obviously, selection of interested parties included in an investigation may well make a difference to the course and outcomes

[85] Panel Report, *Thailand – H-Beams*, para 7.273 (footnote omitted); Panel Report, *Mexico – Corn Syrup*, paras 7.126-7.127.

of an investigation.

Article 5.5 ADA expresses a preference for confidential treatment of applications prior to initiation of an investigation. On the other hand, before initiation, the importing Member authorities must notify the government of the exporting Member, although the ADA does not contain rules on the form of such notification. Article 12 obligates importing Member authorities to publish public notices of initiation, and of preliminary and final determinations, with increasing degrees of specificity, as the investigation progresses. In addition, they must publish detailed explanations of their determinations.

Finally, Article 5.10 ADA provides that, an investigation shall normally be concluded within one year and in no case more than 18 months, after initiation. The 18 months' deadline is absolute.

## 4. Outcome of the Anti-Dumping Investigation

### A. Termination without protective action

Anti-dumping proceedings may terminate without any protective action on the basis of many specific reasons or a combination of the reasons in number of cases, such as, no dumping; no injury; no sufficient domestic producers supporting the complaint; withdrawal of the complaint; etc.

Article 5.8 ADA also provides two situations in which the proceeding should be terminated immediately, i.e. the dumping margin is *de minimis* or the volume of dumped imports is *negligible*.

The margin of dumping is considered to be *de minimis*, where the authorities find that the margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible where the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like products in the importing Member; unless countries which individually account for less than 3 per cent of the import of the like product in the importing Member collectively account for more than 7 per cent of the imports of the like products in the importing Member.

## B. Acceptance of undertaking

Pursuant to Article 8.1 ADA, anti-dumping investigations may also be suspended or terminated without anti-dumping duties where exporters offer undertakings to revise prices or cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Use of the word "may" indicates that authorities have complete discretion in this regard. Nevertheless, undertakings shall not be sought or accepted from foreign exporters unless a provisional affirmative determination of dumping and resulting injury has been made.[86]

If an undertaking is accepted, the investigation of dumping and injury should be completed if the exporter so desires or the authorities so decide. In each case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of the ADA. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of the ADA.

Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.[87]

## C. Imposition of anti-dumping measures

If no undertakings are accepted, or they have been accepted but are then withdrawn or breached by non-compliance with the substantive or procedural requirement, a provisional measure or definitive anti-dumping duty may be applied

[86] Agreement on Ant-Dumping, Article 8.2.
[87] Ibid, Article 8.5.

as a penalty.

Once a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry, provisional measures may be applied if necessary.[88] Provisional measures should preferably take the form of a security (cash deposit or bond) being no greater than the dumping margin.[89] It may not be applied earlier than 60 days from initiation of the proceedings, and may not last longer than four months, except on decision of the importing Member authorities, upon request by exporters representing a significant percentage of the trade involved, to a maximum of six months.[90] Where authorities determine a lesser duty would be sufficient to remove injury, the period may be extended to nine months.[91] In practice, provisional duties are normally paid by the importers, which will be secured by way of guarantee, as a condition for free circulation of the products in the importing country.

Pursuant to Article 10.2 ADA, at the time that the importing Member decides to impose definitive duties, it may also retroactively levy provisional anti-dumping duties, recognizing that injury may have occurred during the period of investigation, or that exporters may have taken actions to avoid the imposition of an anti-dumping duty.

It is worth noting that, the GATT/WTO does not obligate contracting parties to apply anti-dumping measures, even if all the requirements for imposition have been met.[92] In addition, it encourages, but does not require, a duty less than the dumping margin if such lesser duty would be adequate to remove the injury to the domestic industry.[93]

## 5. Review of Anti-Dumping Measures

The ADA offers three types of reviews of anti-dumping measures – the newcomers requested review, interim review and expiry review – to determine the continuation, termination or change of the duty amount where the original measures

[88] Ibid, Article 7.1.
[89] Ibid, Article 7.2.
[90] Ibid, Article 7.3.
[91] Ibid, Article 7.4.
[92] Ibid, Article 9.1.
[93] Ibid.

are no longer appropriate or necessary.

First, Article 9.5 ADA requires importing Member authorities to promptly – and in accelerated manner – carry out reviews requested by newcomers, i.e. producers which did not export during the original investigation period and which will normally be subject to the residual duty ("all others" rate) that was imposed in the original investigation. During the course of the review, no anti-dumping duties shall be levied on the newcomers. However, the importing Member authorities may withhold appraisement and/or request guarantees to ensure that, should the newcomer review investigation result in a determination of dumping, anti-dumping duties can be levied retroactively to the date of initiation of the review.

Second, Article 11 ADA provides for what could be called an interim and expiry reviews ("sunset review"). To start with the latter, definitive anti-dumping duties shall normally expire after 5 years from their imposition, unless the domestic industry asks for a review within a reasonable period of time preceding the expiry, arguing that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

During the five year period (hence the term interim review), interested parties may request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. In both cases, the measures may stay in force pending the outcome of the review.

Interim and expiry review investigations require prospective and counter-factual analysis. In this context, the fact that during the review investigation period, dumping and/or injury did not take place is not necessarily decisive because it might indicate that the measures in place are having effect.

Article 13 ADA provides that Members, which do adopt anti-dumping legislation, must also maintain independent judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative final and review determinations.

## 6. MFN Principle in Respect of Anti-Dumping

Since anti-dumping actions usually involve products from particular countries,

imposition of anti-dumping duties is optional and the importing country enjoys certain flexibilities on anti-dumping duty collection, it is easy to infer that anti-dumping can be handled discriminatorily. As a matter of fact, Article 9.2 ADA explicitly provides that:

> "When an anti-dumping duty is imposed in respect of any product, such anti-dumping measures shall be collected in the appropriate amounts in each case, on a *non-discriminatory* basis on imports of such product from *all* sources found to be dumped and causing injury." (emphases added)

In other words, the importing country cannot discriminate against one WTO Member from another when imposing anti-dumping measures, in case the exports from all concerned countries are found to be dumped and causing injury.

Nevertheless, the ADA neither expresses whether the non-discriminatory treatment also applies in other stages of an anti-dumping proceeding (e.g. in anti-dumping legislation, initiation, notification, investigation and reviews, etc.), nor does it indicate whether Article I:1 of the GATT 1994 plays a role in an anti-dumping action. In practice, anti-dumping investigations can be arbitrarily established on a discriminatory basis and therefore particular exports could be picked out. Given its significant impact on exporters in reality, it is crucial to clarify such ambiguities.

To date, no anti-dumping measure has been challenged in WTO dispute settlement proceeding for the reason of discriminatory treatment under Article 9.2 ADA or GATT Article I:1. However, the GATT case *US – Non-Rubber Footwear II*[94] sheds some light and therefore it is worth discussion.

In order to bring its legal regime in the countervailing duty area into conformity with Article VI:6(a), in 1979, the United States introduced the injury requirement into its national rules and started to conduct injury review on a number of pre-existing countervailing duty [hereafter: CVD] orders levied upon the imports from certain GATT contracting parties. Pre-existing CVD orders could be revoked if the products in question were no longer causing injuries to US domestic industry.

In backdating the effect of its negative injury determination, the United States automatically backdated the effect of revocation of pre-existing CVD orders, without

[94] Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, BISD 39S/128, adopted on 19 June 1992.

the necessity of the country subject to the order making a request for an injury review under the United States GSP programme. Nevertheless, the United States only backdated the revocation of the pre-existing countervailing duty order on non-rubber footwear from Brazil to the date of Brazil's request for an injury determination (29 October 1981), rather than to the date when the obligation for the United States to provide an injury determination under Article VI of the GATT 1947 entered into force (1 January 1980). Hence, Brazil claimed that the United States acted inconsistently with its obligation under Article I:1 of the GATT 1947; and, in the application of its Article VI obligation, the United States treated imports from Brazil less favourably than imports from other contracting parties.

When examining whether Article I:1 of the GATT 1947 is applicable to revocation of countervailing duties, The Panel noted that Article I:1 of the GATT 1947 provides in relevant part that:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation …, and with respect to all rules and formalities in connection with importation …, … any advantage … granted by any contracting party to any product originating in … any other country shall be accorded immediately and unconditionally to the like product originating in … the territories of all other contracting parties".

The Panel held that "the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1".[95] Therefore, the Panel considered the United States' backdating rules and their application in concrete cases have to be consistent with Article I:1 of the GATT 1947.[96]

In line with this view, Article I:1 of the GATT 1994 is also applicable to the national anti-dumping rules applied to the WTO Members within the WTO framework.

---

[95] Ibid, para 6.8.

[96] Ibid, paras 6.9-6.13. On the other hand, the Panel noticed that, the grant of non-tariff advantage to products originating in a country beneficiary of the GSP programme is inconsistent with paragraph 2(a) of the Enabling Clause. Therefore, the United States' preferential treatment on revocation of countervailing duties cannot be justified. In the end, the Panel held that the United States violated Article I:1 of the GATT 1947. See the same report, paras 6.15 and 7.2.

Although above ruling was made under the GATT 1947, this report was adopted by the GATT contracting parties and therefore its legal significance is considerable.

Basically, anti-dumping is an exception to the MFN. It allows countries to act in a way that would normally break the GATT principles of binding a tariff and not discriminating between trading partners – typically anti-dumping action means charging extra import duty on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country.

Nevertheless, such an "exception" only hinges to the condition that the product at stake is dumped and causing injury. Given the significant role of the MFN principle in the WTO,[97] such an "exception" should be interpreted in a narrow way. Put differently, such a discriminatory "exception" should not arise unless the imports from certain countries are found problematic within the meaning of Article VI of the GATT 1994 and the ADA. MFN principle must be respected not only on imposition of anti-dumping measures, but also in other stages of an anti-dumping action, e.g. in the national legislation on anti-dumping, initiation, notification and investigation. In addition, the non-discriminatory requirement expressed in Article 9.2 ADA indicates that an equal treatment should be applied to the products from all sources that qualify for anti-dumping measures. Hence, it is reasonable to infer that the MFN principle applies to anti-dumping reviews as well.

## 2.2 Subsidies and Countervailing Measures in the GATT/WTO

### 2.2.1 Introduction to the Subsidies and Countervailing Measures

In addition to dumping, unfair trade practices taking the form of subsidies are also subject to the WTO law.

Subsidies have a broad definition. They usually cover a spectrum from governmental budgetary outlays granted to specific economic operators to virtually

[97] As the Appellate Body stated in *EC – Tariff Preferences*, it is well settled that the MFN treatment obligation set out in Article I;1 is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system". See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* ("*EC – Tariff Preferences*"), WT/DS246/AB/R, dated on 7 April 2004, para 101. See also Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998* ("*US – Section 211 Appropriations Act*"), WT/DS176/AB/R, dated 2 January 2002, para 297; Appellate Body Report, *Canada – Autos*, para 69.

any government policy resulting in a change in conditions in the marketplace.[98] They are trade policy instruments that are widely used by governments to pursue and promote important and legitimate economic and social objectives. According to a 2006 WTO study, governments have many reasons for subsidization, which include the pursuit of industrial development, supporting the creation of new knowledge through research and development, attaining distributional objectives among members of society, protecting the environment, protection of national security or cultural diversity.[99] On some occasions, where subsidies are applied for less defensible reasons, they may only reflect the response of elected officials to the demands of various interest groups, whose political support may be crucial for political success, or a purpose to give an artificial competitive advantage to exporters or import-competing industries, which is more likely to disturb economic relations among countries.[100] Some reasons for subsidization have political and economic rationale (being either positively or negatively efficient to the domestic or international trade), but others may have a very remote link with economic considerations. Therefore, it has been notoriously famous that the economics is not so much useful here in judging the objective and identifying whether subsidies are the most efficient means of attaining it.[101] One thing is for sure though: subsidies may have adverse effects on the interests of trading partners, whose industry may suffer, in its domestic or export market, from the unfair competition from subsidized products. Hence, subsidization became one of the subject matters regulated under the multilateral trading rules.

Considering the social and political needs of subsidization and its surrounding economic controversies, multilateral subsidy rules were noticed, from the beginning, "focusing on the potential distortive effects of subsidies on trade flows, with any given subsidy disciplined or tolerated in direct relation to its trade-distortive potential".[102] In the GATT years, the multilateral subsidy discipline was contained in

[98] WTO Secretariat, *World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO* (WTO, 2006), (available at www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf) xxiii.
[99] Ibid, xxiv to xxvi.
[100] Ibid.
[101] Ibid, iv. See also J H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed.), (The MIT Press 1997), pp. 281-84 and M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), pp. 332-34.
[102] WTO Secretariat, *World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO* (WTO 2006), p 189.

Article XVI of the GATT 1947, which was taken from the Havana Charter. However, with merely 5 paragraphs, Article XVI neither provided clear definition for "subsidy", nor did it include comprehensive rules on subsidies. All Paragraph 1 required was that signatories should notify "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory…". The notification was required to specify the extent and nature of the subsidization, its estimated effects on exports and imports, and the circumstances making the subsidization necessary. If the subsidization was deemed to cause serious prejudice to the interests of any other party, the subsidizing contracting party was only required to discuss the possibility of limiting the subsidization. Likewise, Article VI of the GATT 1947, which provides the countervailing duty measure to counteract any subsidy granted to an imported product, did not provide for clear and comprehensive rules. The brevity of those disciplines invited further negotiation in the following years and as a result undergone significant transformation, with changes generally in the direction of making the rules stricter and more precise.[103] Eventually an *Agreement on Subsidies and Countervailing Measures* [hereafter: SCM Agreement] was reached in Uruguay Round as a part of the Annex 1 A to the *WTO Agreement*. The multilateral rules on subsidies are now set out in Articles VI and XVI of the GATT 1994 and, most importantly, in the SCM Agreement.

The entire SCM Agreement is divided into five parts plus seven annexes. It takes an unambiguous stance against subsidies.[104] Part I "General Provisions" (Articles 1 and 2) that provides the concepts of "subsidy" and "specificity" are the key to the entire Agreement. They define which measures are subject to the multilateral subsidy disciplines. Article 1 of the SCM Agreement states that subsidy is deemed to exist if a financial contribution or income or price support is provided by a government, and a benefit is thereby conferred, and that such subsidy is subject to the Agreement if it is "specific". Article 2 defines the concept of specificity, which further limits the multilateral disciplines to the subsidies which, explicitly or in fact,

[103] See detail discussion in A L Stoler, "The Evolution of Subsidies Disciplines in GATT and the WTO", Symposium on WTO Litigation: Issues and Reforms, Law School, University of Sydney, Sydney Australia, 14 August 2009 (available at: http://www.iit.adelaide.edu.au/conf/subsidies_usyd_0809.pdf) pp 2-10.
[104] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), p 334

address certain enterprises.

Parts II, III and IV of SCM Agreement distinguish the "subsidies" in the terms of Article 1 and 2 into three categories: the prohibited subsidies, the actionable subsidies (permitted, but potentially subject to action) and non-actionable subsidies (permitted, and shielded from action). Prohibited subsidies, i.e. subsidies that apply to export performance and import substitutions, are presumed irrebuttably to be trade distortive. Therefore, they are pronounced illegal in the SCM Agreement. Non-actionable subsidies were deemed to be non-specific within the meaning of Article 2 or meet certain other specified requirements relating to their form and purpose. The latter encompassed certain research-related subsidies, regional subsidies and environment-related subsidies.[105] This provision was of a transitional character[106] and has not been renewed by the WTO Members so far. As a result, a scheme which qualifies as a subsidy can nowadays be counteracted is either prohibited subsidy or an actionable subsidy. Subsidies within the actionable category are not deemed illegal *unless* they cause defined kinds of adverse trade effects – namely serious prejudice, injury to the industry of an importing Member, or nullification or impairment of benefits.[107] Correspondingly, actionable subsidies are subject to remedial actions only if the complaining party successfully demonstrates the existence of the injury and the causal link between the challenged subsidies and the injury.

Both prohibited and actionable subsidies may be challenged either through multilateral dispute settlement or through the imposition of countervailing measures unilaterally. For multilateral challenges through dispute settlement, the complaining party must demonstrate either that the measure is a prohibited subsidy, in which case it must be withdrawn, or that the measure is an actionable subsidy that has caused adverse trade effect, in which case the measure must be withdrawn or its adverse effects removed. The substantive and procedural rules of the remedies to these different kinds of subsidies are regulated respectively in Article 4 and Article 7 of the SCM Agreement. For countervailing measures, the importing Member must conduct an investigation which demonstrates that the subsidized imports are causing injury to

[105] SCM Agreement, Article 8.
[106] Ibid, Article 31. The initial category of non-actionable subsidy expired on 1 January 2000.
[107] Ibid, Articles 5 and 6.

its domestic industry. Importantly, they must follow the comprehensive rules which are set forth in Part V of the SCM Agreement.

Subsidies on agricultural products are subject to certain rules set out in the Agreement on Agriculture, which are *lex specialis* to the SCM Agreement. These types of subsidies are not discussed by this thesis.

### 2.2.2. Basic Rules of WTO Subsidies and Countervailing Measures

## 1. Determination of Subsidization

According to Article 1 of the SCM Agreement, a subsidy subject to the multilateral disciplines exists where there is a "financial contribution" "by a government or any public body" (or any form of income or price support in the sense of Article XVI of GATT 1994), and a "benefit is thereby conferred" to "specific" enterprises; and, a subsidy only exists when the quoted elements apply *cumulatively*. Hence, the major issues involved in a subsidization determination include:

1) what constitutes the "financial contribution by government or public body";
2) how to justify a "benefit conferred"; and
3) which subsidy falls into the scope of the "specificity" within the meaning of Article 2 of the SCM Agreement, other than those widely available to all economic operators?

## A. "financial contribution"

To demonstrate the "financial contribution", Article 1.1 provides for an exhaustive list of types of practices which includes:

i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
iii) a government provides goods or services other than general

infrastructure, or purchases goods;

iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in i) to iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

Pursuant to above list, financial contribution is deemed exist when financial support (i.e. funds, goods, service or forgiveness of any revenue due) other than general infrastructure were provided by government. Accordingly, identifying such requirement mainly depends on questioning:

a) whether the support at issue is *financial* support;
b) whether such financial support is a *general* scheme; and
c) whether it was *actually effectuated* (regardless of how it occurred).

## B. "by government or public body"

For a financial contribution to be a subsidy within the meaning of Article 1.1 of the SCM Agreement, it must be made by a government or a public body. Compared with the "government", a term which is self-interpretive, the SCM Agreement does not explain what constitutes a "public body". Hence, this issue has been discussed in dispute settlement several times.

The early ruling on "public body" was set out by the Appellate Body in *Canada – Dairy*, a case which involves subsidies and countervailing measures under the Agreement on Agriculture. *In Canada – Dairy*, "government or their agencies", a term which is parallel with the "public body" in the SCM Agreement, was defined as "an entity which exercises powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character".[108]

The Panel in *Korea – Commercial Vessels*, however, held that "an entity will constitute a 'public body' if it is *controlled* by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then

[108] Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("*Canada – Dairy*"), WT/DS103/AB/R, WT/DS113/AB/R, dated 13 October 1999, para. 97.

any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the SCM Agreement."[109]

In the recent case of *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body adopted the position in *Canada – Dairy* and overruled the "government control" argument, providing that:

> "A public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority."[110]

The latest interpretation clearly narrowed the ambit of meaning of the "public body", especially when the challenged financial contribution was provided by State-owned enterprises or State-owned commercial banks. The findings that an entity is "controlled by government" (e.g. owned by government or controlled by government in personnel) is no longer enough to identify the financial contribution at issue is subject to the SCM Agreement, unless there is positive evidence to demonstrate that the "governmental authority" was involved in the operation of the entity.

Article 1.1(a)(1)(iv) also envisages a situation that a financial contribution made by a private body, which might be entrusted or directed by a government to carry out one or more of the type of functions illustrated in Article 1.1(a)(1)(i) to (iii). The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* indicated that, this provision "is intended to ensure that governments do not evade their obligations under the SCM Agreement by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself. In other words, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision."[111]

In *US – Export Restraints*, Canada challenged the United States' position that an export restraint may be imposed by a government to limit certain producers' ability to export and lead those producers to provide the restrained good to domestic

---

[109] Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels* ("*Korea – Commercial Vessels*"), WT/DS273/R, dated 7 March 2005, para 7.50 (emphasis added).
[110] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ("*US – Anti-Dumping and Countervailing Duties (China)*"), WT/DS379/AB/R, dated 11 March 2011, para 317.
[111] Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* ("*US – Countervailing Duty Investigation on DRAMS*"), WT/DS296/AB/R, dated 27 June 2005, para.113.

purchasers for less than adequate remuneration. Therefore, an export restraint constitutes subsidy in the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.[112]

In this dispute, the Panel first defined that the "private body" is a counterpoint to the terms "government" or "any public body" as used in Article 1.1.[113] Therefore, "any entity that is neither a government nor a public body would be a private body".[114] With regard to the "entrustment" or "direction", the Panel stated that this requirement refers "to the situation in which the government executes a particular policy by operating through a private body."[115] Following dictionary definitions of these terms, the Panel stated that the action of the government must contain a notion of "explicit and affirmative action of delegation or command", which comprises these elements: "*something* is necessarily delegated, and it is necessarily delegated *to someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something*…. either entrustment or direction could be said to have occurred until all of these three elements are present."[116]

To determine whether export restraint would constitute a financial contribution "entrusted or directed" by government, the Panel found that, the connection between the export restraints and the domestic producers to sell their product (in greater quantities or exclusively) to the domestic purchasers/users of that product cannot fulfil the "entrusts or directs" standard of Article 1.1(a)(1)(iv) of the SCM Agreement.[117] In the Panel's view, the "existence of a financial contribution in the case of an export restraint depends entirely on the reaction thereto of the producers of the restrained good, and specifically on the extent to which they increase their domestic sales of the restrained product because of the restraint"[118]. On this issue, a distinguishment must be made between "government entrustment or direction" and "the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market."[119]

---

[112] Panel Report, *US – Measures Treating Exports Restrains as Subsidies* ("*US – Export Restraints*"), WT/DS194/R, dated 29 June 2001, para 2.9.
[113] Ibid, para.8.49.
[114] Ibid, para.8.28.
[115] Ibid, para 8.28.
[116] Ibid, para.8.29.
[117] Ibid, para.8.44.
[118] Ibid, para.8.33.
[119] Ibid, para.8.31.

In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body considered that the "delegate" or "command" is too narrow for interpreting the term "entrust or direct", given the fact that some of government action "may be more subtle than a 'command' or may not involve the same degree of compulsion".[120] Therefore, the Appellate Body provided that:

> "'entrustment' occurs where a government gives responsibility to a private body, and 'direction' refers to situations where the government exercises its authority over a private body. In both instance, the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraph (i) through (iii)."[121]

## C. "benefit conferred"

Pursuant to Article 1.1(b), a financial contribution by a government or a public body is a subsidy within the meaning the SCM Agreement only if the financial contribution *confers a benefit*. Although no further explanations are provided in the SCM Agreement, three issues raised in case law are worthy of remark when examining the "benefit conferred" by a government or public body:

1) making a financial contribution does not amount to conferring a benefit to a recipient;
2) a "benefit" arises only if the recipient has received a financial contribution on terms more favourable than those available to any recipient in the market.[122]
3) the "benefit conferred" by subsidies in the meaning of Article 1.1(b) may also happen when benefit is "passed through" when goods are sold by a subsidized upstream producer to a downstream producer.

In *Canada – Aircraft*, Canada argued that "cost to government" is one way of conceiving of "benefit". This view was rejected by the Appellate Body with the

[120] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras 110 and 111.
[121] Ibid, para.116.
[122] P Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2nd edn) (Cambridge University Press 2008), p 566.

explanation that:

> "A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term 'benefit', therefore, implies that there must be a recipient. …. "[123]

The *Canada – Aircraft* Appellate Body further held with regard to the term "benefit" that:

> "the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' then it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[124]

This position was consistent with Article 14 of the SCM Agreement which lays down certain guidelines to investigating authorities on subsidy calculation in terms of benefit that the recipient has received as a benchmark for remedial action.

It should be noted that the "benefit conferred" by subsidies in the meaning of Article 1.1(b) may also happen when benefit is "passed through" when goods are sold by a subsidized upstream producer to a downstream producer, or in the transaction of privatization of a State-owned producers. The case-law shows that, in the former situation, when the producers are not related and the goods are sold at an arm's-length price, i.e. the fair market value, the benefit that the upstream producer has received is not assumed to be passed through to the downstream producers.[125] In the like manner, "if 'fair market value' is paid in a privatization transaction, the subsidies previously provided to the State-owned producer may extinguish the

[123] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), WT/DS70/AB/R, dated 2 August 1999, at para 154.
[124] Ibid, at para 157.
[125] Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* ("*US – Softwood Lumber III*"), WT/DS236/R, dated 27 September 2002, para 7.71

benefit to the privatized producer."[126]

## D. Specificity

Another element in determination of subsidization is the "specificity". The WTO rules on subsidies do not apply to "financial contributions by government that confer a benefit" unless the access to the subsidies in question were limited to *specific enterprises*.

Article 2.1 to 2.3 of the SCM Agreement envisages four types of subsidies that fall into the category of the specificity and hence subject to the WTO rules:

(a) *Enterprise specificity*, i.e. a situation in which a government targets a particular company or companies for subsidization;
(b) *Industry specificity*, i.e. a situation in which a government targets a particular sector or sectors for subsidization;
(c) *Regional specificity*, i.e. a situation in which a government targets producers in specified parts of its territory for subsidization; and
(d) *Prohibited subsidies*, i.e. a situation in which a government targets export goods or goods using domestic inputs for subsidization.[127]

The "specificity" requirement in the SCM Agreement is based on the rationale that "a subsidy is widely available within an economy is presumed not to distort the allocation of resources within that economy and therefore, does not require or justify any action."[128] Therefore, the main task here is to distinguish whether a subsidy scheme is available to all economic operators or to targeted enterprises as described above.

Pursuant to Article 2.1(b) of the SCM Agreement, if the criteria and conditions governing eligibility for, and the amount of, a subsidy are objective, the subsidy is not specific (provided that eligibility is automatic and the criteria and conditions are strictly applied). To enhance this requirement, footnote 2 to the *SCM Agreement*

[126] Appellate Body Report, Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities* ("*US – Countervailing Measures on Certain EC Products*"), WT/DS212/AB/R, dated 9 December 2002, paras 103-105.
[127] P Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2nd edn) (Cambridge University Press 2008), p 568.
[128] Ibid, at p 568.

explains that the "objective criteria and conditions" mean:

> "criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise."

Accordingly, authorities who granted subsidies must clearly spell out such criteria or conditions "in law, regulation, or other official document, so as to be capable of verification".[129]

With regard to the *de facto* subsidies which may not be specific, on its face, but, in fact, operates in a specific manner, pursuant to Article 2.1(c) of the SCM Agreement, other factors will be considered in the "specificity" determination, including:

(a) the use of the subsidy programme by a *limited number* of certain enterprises;

(b) *predominant use* by certain enterprises;

(c) the granting of *disproportionately large amounts* of subsidy to certain enterprises; and

(d) the manner in which *discretion* has been exercised by the granting authority in the decision to grant a subsidy.

When investigating authorities evaluate the above factors, the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time during which the subsidy programme has been in operation must also be taken into account to determine if the subsidy in question is not specific *de jure*, but is specific *de facto*.[130]

## 2. Classification of Subsidies

### A. Prohibited Subsidies

Two types of subsidies are prohibited by the SCM Agreement: 1) export subsidies, and 2) import substitution subsidies (also known as local content subsidies).

[129] SCM Agreement, Article 2.1(b).
[130] Ibid, Article 2.1(c).

Pursuant to Article 3 of the SCM Agreement, export subsidies are those that are contingent, in law or in fact, whether solely or as one of several conditions, on export performance. The Annex I to the SCM Agreement provided an illustrative list of the export subsidies that are prohibited. In *Brazil – Aircraft (Article 21.5 - Canada)*, the challenged subsidy scheme was under the purview of the *Illustrative List*. Consequently, the Appellate Body did not question satisfaction of the threshold embedded in Article 3.1 of the SCM Agreement.[131] Therefore, it was considered that a subsidy "coming under the purview of the *Illustrative List* was *ipso facto* prohibited".[132]

On the occasion that a subsidy is not included in the *Illustrative List*, the complaint will have to demonstrate that the subsidy at issue, "either in law or in fact", is an export subsidy. In other words, the SCM Agreement captures not only *de jure* export subsidies but also *de facto* export subsidies, where WTO Members attempt to link benefit to exports without explicitly stating in the law that this has indeed been the case. *De facto* export contingency, as well as *de facto* specificity rules discussed above, are designed for the purpose of anti-circumvention.[133]

Pursuant to footnote 4 to the SCM Agreement, a subsidy is contingent *de facto* upon export performance:

> "when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is *in fact tied to actually or anticipated exportation or export earnings*. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision." (emphasis added)

In *Canada – Aircraft*, the Appellate Body stressed that the legal standard expressed by the word "contingent" is the same for both *de jure* and *de facto* contingencies. The difference is in what evidence may be employed to prove that a subsidy is export contingent.[134] Since *de facto* export contingency is usually much more difficult to demonstrate than *de jure* export contingency, d*e facto* export

[131] WTO Appellate Body Report, *Brazil – Export Financing Programme for Aircraft Recourse by Canada to Article 21.5 of the DSU* ("*Brazil – Aircraft (Article 21.5 - Canada)*"), WT/DS46/AB/RW, adopted 21 July 2000.
[132] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press, 2006), at p 360.
[133] Ibid.
[134] Appellate Body Report, *Canada – Aircraft*, para 167.

contingency requires there to be a "close connection" between the granting of, or maintenance of, a subsidy and export performance.[135] In addition, the decision must be established on the total configuration of the facts constituting and surrounding the granting of the subsidy and none of these facts on its own is likely to be decisive.[136]

The other form of the prohibited subsidies, import substitution subsidies, are defined as subsidies contingent upon the use of domestic over imported goods. The Appellate Body in *Canada – Autos* ruled that the prohibition of import substitution subsidies of Article 3.1(b) also covers both *de jure* and *de facto* contingency upon the use of domestic over imported goods,[137] although this requirement is not clearly stated in the legal text.

## B. Actionable Subsidies

Unlike prohibited subsidies, an actionable subsidy is countervailable only if it "causes injury to its domestic industry, or nullification or impairment of benefits accruing to it, or serious prejudice to its interests".[138] Therefore, an injury determination is involved in actionable subsidies investigation.

*a. Subsidies causing injury*

Pursuant to Article 15 of the SCM Agreement, the requirements on injury determination involved in a subsidy case largely mirror the correspondent contents in antidumping.

The subsidy injury examination also focuses on the "volume of the subsidized imports", the "effect of the subsidized imports on prices in the domestic market for like products", and the "consequent impact of these imports on the domestic producers of such products".[139] When examining the quoted elements and the causal link between the subsidized imports and injury, investigating authorities must take all relevant factors into consideration.[140] In the causation examination, a non-attribution

[135] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* ("*Australia – Automotive Leather II*"), WT/DS126/R, adopted 25 May 1999, para 9.55.
[136] Ibid, paras 170-173
[137] Appellate Body Report, *Canada – Autos*, para 142.
[138] SCM Agreement, Article 5.
[139] Ibid, Article 15.1.
[140] Ibid, Article 15.2.

test is also required.[141]

As with the anti-dumping rules, a determination of threat of material injury must be based on facts and not merely on allegation, conjecture or remote possibility; and the claimed threat of injury must be clearly foreseen and imminent.[142] In the event that imports of a product from more than one country are simultaneously subject to the subsidy investigations, cumulative assessment is allowed when the imports from each country reached *de minimis* and negligible threshold.[143]

*b. Subsidies causing nullification or impairment*

As mentioned in previous section, the "material injury" or threat thereof is the sole threshold in injury determination in anti-dumping investigation. Subsidies, however, are also subject to remedial actions when causing nullification or impairment of benefits that other Members could otherwise accrue under the GATT; or when the subsidies in question cause "serious prejudice" to other Members.

Footnote 12 of the SCM Agreement, the term "nullification or impairment" used in the SCM Agreement is "in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions."

*c. Subsidies causing serious prejudice*

According to Article 6.3 of the SCM Agreement, "serious prejudice" may arise where a subsidy has one or more of the following effects:

(1) the subsidy displaces or impedes imports of a like product of another Member into the market of the subsidizing Member;

(2) the subsidy displaces or impedes the export of a like product of another Member from a third country market;

(3) the subsidy results in a significant price undercutting by the subsidizing product in comparison to the like product of another Member in the same market, or significant price suppression, price depression, or lost sales in the same market; or

[141] Ibid, Article 15.5.
[142] Ibid, Article 15.7.
[143] Ibid, Article 15.3. To be noticed, the *de minimis* and negligible threshold set forth for subsidies are different with those in anti-dumping rules (see section 2.1.2(4)(A) of this thesis).

(4) the subsidy leads to an increase in the world market share of the subsidizing Member in a particular primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

The "serious prejudice" threshold in the subsidy cases enables WTO Members whose producers were adversely affected by subsidized imports to claim their rights not only in domestic market, but also in the subsidizing country and the third countries' market. This is significantly different from the anti-dumping measures.

## 3. Permissible Actions against subsidization under the WTO

### A. Multilateral response

Whenever a WTO Member has reason to believe that a prohibited subsidy is granted or maintained by another Member, or its producers are adversely affected by an existing actionable subsidy, the Member can respond to the subsidies in question through a multilateral approach. The multilateral response for prohibited subsidies and actionable subsidies are respectively regulated in Articles 4 and 7 of the SCM Agreement.

If the case involves prohibited subsidies, consultations may be requested with any Member believed to be granting or maintaining a prohibited subsidy. If no mutual solution has been reached within 30 days, the dispute may be referred to the WTO Dispute Settlement Body [hereafter: DSB] for adjudication. A panel established for a "prohibited subsidy" dispute may ask a Permanent Group of Experts (PGE) whether the measure at issue is a prohibited subsidy.[144] If a panel finds a measure to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay with a specified time-period within which the measure must be withdrawn in its recommendation.[145]

In the event the recommendation of the DSB is not followed within the time-period specified by the panel, the DSB must grant authorization to the complaining Member to take appropriate countermeasures, upon the request of the original

[144] Ibid, Article 4.5.
[145] Ibid, Article 4.7.

complaining Member and by reverse consensus.[146]

The rules and procedure of multilateral response in the actionable subsidy case are quite similar. However, the actionable subsidy case does not involve the PGE and some timeframes under Article 7 are longer than those under Article 4, due to the fact that actionable subsidy cases always involve injury examinations.

## B. Unilateral response - Countervailing Measures

In addition to the multilateral response, the affected WTO Member may impose countervailing duties on the subsidized imports unilaterally to offset the subsidization. Article VI of the GATT 1994 and Articles 10 to 23 of the SCM Agreement govern the rules under which WTO Members may respond to subsidized trade which causes injury to the domestic industry.

*a. Countervailing Investigations*

Similar to the anti-dumping measures discussed above, countervailing duties may only be imposed when it is properly established that:

(1) there are subsidized imports;

(2) there is injury to a domestic industry producing the like product; and

(3) there is a causal link between the subsidized imports and the injury.

As with the conduct of anti-dumping investigations, the conduct of countervailing investigations is also subject to strict procedural requirements. In fact, the procedural requirements for countervailing investigation set out in the SCM Agreement largely mirror the procedural requirements for anti-dumping investigation set out in the Anti-dumping Agreement. For instance, a countervailing investigation also starts with a written request by (or on behalf of) the domestic industry alleged injured by the subsidized imports[147] or, in special circumstances, can be initiated *ex officio*[148]; before the initiation of the investigation, the investigating authority must make sure the application contains sufficient evidence of the existence of the subsidy, the injury to the domestic industry and the causal link between the subsidized

[146] Ibid, Article 4.10.
[147] Ibid, Article 11.1.
[148] Ibid, Article 11.6.

imports and the alleged injury.[149] At the same time, the investigating authorities must review the accuracy and adequacy of the evidence provided in the application.[150]

Once the application is accepted, a consultation is required before the initiation of any investigation. Members, the products of which may be subject to such investigation, must be invited for consultations with the aim of clarifying the situation as to the matters and arriving at a mutually agreed solution.[151] As soon as an investigation has been initiated, interested parties must be given notice of the information and ample opportunity to present evidence they consider relevant to the investigation.[152]

*b. Application of countervailing measures*

The SCM Agreement provides for three types of countervailing measures: provisional countervailing measures, undertakings and definitive countervailing duties.

The provisional countervailing measure usually applies when the investigating authorities have made a preliminary affirmative determination that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports, and a provisional measure is considered necessary to prevent continuous injury during the investigation.[153] Provisional measures can neither be applied sooner than 60 days from the date of initiation of the investigation nor longer than four months.[154]

The definitive countervailing measures cannot be applied until the investigating authorities have made a final determination that the subsidies exist and the subsidies cause, or threaten to cause injury to domestic producers; and no mutual solution can be reached through consultation.

Pursuant to Art 19.2 SCM, WTO Members can impose countervailing duties either:

(a) at the level of the subsidy paid; or

(b) adequate to remove the injury, provided that duties are at an amount lower

[149] Ibid, Article 11.2.
[150] Ibid, Article 11.3.
[151] Ibid, Article 13.1. To be noticed, consultation is not requested in anti-dumping.
[152] Ibid, Article 12.1.
[153] Ibid, Article 17.1.
[154] Ibid, Articles 17.3 and 17.4.

than that under (a).

As with anti-dumping measures, the lesser duty is encouraged, but not obliged.

However, the investigation proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings where the subsidizing government agrees to eliminate or limit the subsidy; or the exporters agree to revise its prices so that the injurious effect is eliminated.[155] It is noteworthy that an undertaking must not be sought or accepted before a preliminary affirmative determination that the subsidy is causing injury is established.[156] Moreover, the price increases under such undertaking cannot be higher than necessary to eliminate the amount of the subsidy.[157] Again, a lesser duty is encouraged in an undertaking.

*c. Review of the countervailing measures*

As with anti-dumping measures, a countervailing duty may remain in force only as long as and to the extent necessary to counteract the injurious subsidization.[158] Therefore, a countervailing measure is also subject to midterm review and sunset review after being imposed.

Pursuant to Article 21.2 SCM Agreement, a midterm review can be initiated upon request by interested parties, at any time following the original imposition, or *ex officio*, provided that a reasonable time since the imposition of the measures has lapsed. In contrast to the original investigation, the midterm investigation mainly examines:

(a) whether the continuation of the countervailing measure is necessary to offset the injury/subsidization; and
(b) whether the damage will recur if the measure in place were to be removed.[159]

According to Art 21.3 SCM Agreement, all countervailing measures must be withdrawn five years after their imposition, unless the WTO Member concerned has conducted a review, i.e. sunset review. The sunset review is primarily concerned with

[155] Ibid, Article 18.1.
[156] Ibid, Article 18.2.
[157] Ibid, Article 18.1(b).
[158] Ibid, Article 21.1.
[159] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), p 387.

whether the damage will reoccur if the measure is removed.

Remarkably, the five-year period is not necessarily counted from the date of the original imposition. Art 21.3 SCM Agreement makes it clear that the five-year period can be counted on the date that a midterm review has taken place, provided that this review covered both subsidization and damage. This method significantly increases the possibility of continuous imposition of countervailing measures.

### 4. MFN Principle in respect of Countervailing Duty Measures

As with the anti-dumping measures,[160] countervailing duties must also be imposed on MFN base. Article 19.3 of the SCM Agreement clearly provides that:

> "When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a *non-discriminatory* basis on imports of such product from *all* sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which under takings under the terms of this Agreement have been accepted." (emphases added)

Like the ADA, the SCM Agreement neither expresses whether the non-discriminatory treatment also applies at other stages of a countervailing proceeding (e.g. in countervailing duty measures legislation, initiation, notification, investigation and reviews, etc.), nor does it indicate whether Article 1:1 of the GATT 1994 plays a role in a countervailing action. However, the MFN analysis on anti-dumping also applies to the countervailing duty measures.[161] It is expected that future negotiation on the CVD rules will clarify this issue.

## 2.3 Safeguard Measures in the GATT/WTO

### 2.3.1 Introduction to the Policies of Safeguard Measures

The term "safeguards" is generally used to denote government actions responding to imports that are deemed to "harm" the importing country's economy or

[160] See section 2.1.2(6) of this thesis.
[161] Ibid.

domestic competing industries. It usually takes the form of "import restriction" such as quantitative import restrictions or of duty increases to higher than bound rates or "voluntary" restrains coerced upon the exporting countries to protect the domestic market of the importing country.[162]

Unlike the anti-dumping and countervailing duty measures that countervail the unfair advantages to exporters who sell below the normal price or receive certain trade-related subsidies from their governments and therefore enjoy unfair competitive advantages, safeguards can be invoked in absence of any unfair practice on the part of the exporter. Thus the question arises, why should there be this type of trade restriction measure?

The justification of safeguards originates from the reduction of border barriers and market access developed under the free trade. In general, according to Prof. John Jackson, two arguments have been presented for this purpose – one seems to focus on an "economic adjustment" goal while the other bases itself on a more general "pragmatic" recognition of practical policies.[163]

The core of the "economic adjustment" argument is to ease the pain of the adjustment process that the competing domestic firms are forced to take under the pressure/harm of imports, particularly recent increasing imports, even though they may in the long term and in the broader aggregate increase the welfare of their society. Globalization often results in increases in imports. Rapid increases in imports may well cause a significant strain on the competing domestic industry of the importing country, causing acute economic problems such as unemployment. The subsequent deterioration of a domestic industry may also invoke a series of adverse chain effects on other industries relating to the particular industry, magnifying the problem.[164] Consequently, it is argued that a temporary period of time of some relief from imports will allow the domestic competing industry the opportunity to take the necessary adjustment measures. This "adjustment" process taken, either by improving domestic competitors' competitiveness (productivity, price, quality, etc.) or by moving resources out of production of the competing products into production of other products, has often been viewed as "temporary" but costly.

[162] Jackson, J. H., *The World Trading System* (MIT Press, 2nd ed, 1997), p 175.
[163] Ibid, at pp. 176-79.
[164] Lee, Y.S., *Safeguard Measures in World Trade: The legal Analysis* (Kluwer Law International, 2003).

Due to the fact that domestic interest groups are normally in a much stronger position than foreign producers/sellers to influence their governments, it is recognized the political forces for border protection against imports are often formidable and even those who favoring liberal trade (i.e. disfavoring import barriers) feel that to insist too rigidly on the fullest application of their principles could lead to general dismantling of the policies of the last several decades which have reduced import barriers. Consequently, some argue that "it is better pragmatically to give in to the idea of temporary and limited import barriers for specific (and hopefully not too significant) cases as a way not only to alleviate some of the burdens of adjustment, but also to diminish the pressure for a more drastic departure from the general approach to imports." [165] Therefore, prior to the GATT 1947, bilateral trade agreements normally provided a safeguard mechanism as a "safety valve" that is distinguished from anti-dumping and countervailing which attempt to set off the "unfair advantages" gained by exporters from price undercuts and subsidies.

Nowadays, the safeguard mechanism still remains one of the limited exceptions which can be invoked to setup certain restrictions of an emergency nature on imports, irrespective of the importing Member's obligation under its concessions. [166] That means, WTO Members are allowed to temporarily suspend the bounded concessions or obligations to the negotiated agreements regarding certain imports on which safeguard measures are effective.

### 2.3.2 "Escape Clause", GATT Article XIX and Agreement on Safeguards

The modern safeguard regime originated from the "escape clause" of United States Reciprocal Trade Agreement of 1942 with Mexico [167] which was also

[165] J H Jackson, *The World Trading System* (2nd edn) (MIT Press, 1997), p 177.
[166] In general, various GATT Articles and the WTO Agreement allow Members depart from their negotiated concessions and restrict imports irrespective of the existence of unfair trade practices. They include GATT Articles XIX, XII, XVIII, the Agreement on Safeguards, the Understanding on Balance of Payments of the GATT 1994, the Agreement on Agriculture (AA), the Agreement on Textile and Clothing (ATC), Article XII of General Agreement on Trade in Services (GATS) and Section 16 of the Protocol of Accession of the People's Republic of China (TPSSM). Those provisions are invoked under different circumstances. This thesis, however, focuses on the general safeguard measures that are provided under GATT Article XIX and the WTO Agreement on Safeguards.
[167] The relevant clause provides, "If, as a result of unforeseen development and of the concession granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in

accommodated in the subsequent international trade agreements including GATT. This clause established a basic framework introducing the notion of safeguard measures being an emergency action to prevent or remedy serious injury to domestic industry and three essential conditions for the application of safeguard measure, which include an increase in imports; serious injury or threat thereof to domestic competitive industries; and a causal link between the imports and injury. Both GATT Article XIX and the Agreement on Safeguards have adopted those important elements as general requirements for the application of a safeguard measure.

Under the GATT 1947, safeguards were regulated only by Article XIX. Due to the brevity and lacks of detailed substantive and procedural requirements for application of a safeguard measure, GATT Article XIX is considered insufficient for the important and practical issues in the implementation of safeguard measures. The perceived problems included in Article XIX were pointed out by GATT Secretariat in 1987 that: (i) there was no procedural requirement as to the investigation, causing lack of transparency in the process; (ii) there was no clear definition of serious injury, allowing governments to make arbitrary decisions; (iii) the notification and consultation process was inadequate; (iv) and there was no guideline for the duration of safeguard measures.[168] The brevity of Article XIX makes it difficult for exporting countries to challenge safeguard measures which were considered being applied rather arbitrarily. Meanwhile, the deficiency of the discipline on safeguards also caused a growing dependency on "grey area measures" which arguably violated the prohibited quantity restrictions in GATT and nullification or impairment of the benefit accruing to a contracting party under the GATT.[169] Therefore, with attempts to enact supplementary safeguard rules and bring the "outside practices" into conformity with the GATT rules, a series of multilateral negotiations on safeguards were launched and eventually achieved the Agreement on Safeguards in 1994.

---

such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury." See *Agreement on Reciprocal Trade*, December 23, 1942, US-Mexico, Article XI, 57 Stat. 833, 845-866.

[168] See GATT Secretariat, *Work Already Undertaken in the GATT on Safeguards*, (GATT Doc. No. MTN.GNG/ NG9/W/1, dated 8 April, 1987). Merely consists of five paragraphs, Article XIX only provide the general conditions for the application of safeguard measure. Many essential elements for application of the safeguard measures including assessment of serious injury to domestic industry, specific duration of the measure and investigation process have not been addressed in this provision.

[169] "Grey area measures" refers to the "voluntary" restrictions on trade agreed between the exporting and importing countries. See Y S Lee, *Safeguard Measures in World Trade: The Legal Analysis* (Kluwer Law International 2003), p 30.

Comprised of 14 Articles, the new Agreement on Safeguards [hereafter: SA] provides WTO Members with the right to take global safeguard actions against unforeseen surges of imports from all sources pursuant to Article XIX of GATT 1994. It clarifies and makes certain changes to the substantive and procedural requirements for the application of a safeguard measure regulated in Article XIX of GATT. Moreover, it declares the principle of non-discriminatory application of a safeguard measure and prohibits all grey-area measures. The guiding principles of the SA are that safeguard measures must be temporary; that they may be imposed only when imports are found to cause or threaten serious injury to a competing domestic industry; that they (generally) be applied on a non-selective (MFN) basis; that they be progressively liberalized while in effect; and that the Member imposing them (generally) must pay compensation to the Members whose trade is affected. The Preamble of the SA explicitly expresses that the aims of the agreement are to: (i) clarify and reinforce GATT disciplines, particularly those of Article XIX; (ii) re-establish multilateral control over safeguards and eliminate measures that escape such control; and (iii) encourage structural adjustment on the part of the industries adversely affected by increased imports, thereby enhancing competition in international markets. This more complete agreement has effectively reinforced the old provisions of Article XIX. It has been acclaimed as a substantial achievement of the Uruguay Round negotiations.[170]

### 2.3.3 Basic Rules on Safeguard Measures

According to the general condition set out in Paragraph 1(a) of Article XIX, GATT and Article 2.1 of SA, a GATT/WTO Member may apply a safeguard measure only if:

1) imports of a product are increasing either absolutely or relatively, and such increase must be a result of unforeseen development and of the effect of the GATT/WTO obligations (e.g. tariff concessions) ;
2) it must also be shown that domestic producers of competitive products are seriously injured, or are threatened with serious injury, and that this injury is

[170] Y S Lee, *Safeguard Measures in World Trade: The legal Analysis* (Kluwer Law International 2003), p 3.

caused by the increased imports; and

3) the importing nation keeps its procedures consistent with GATT/WTO rules.

Consequently, the importing nation is entitled to suspend "such" GATT/WTO obligations in respect of such products, but not exceed the time span as necessary to prevent or remedy the injury.

## 1. Determination of the Increased Imports

The basic prerequisite on application of a safeguard measure is "increased imports". For a determination of "increased imports" under the WTO safeguard regime, not any import increase is sufficient. The provisions set out two main conditions, which must be met for the increase imports to justify the imposition of safeguard measures. Firstly, such increase must have occurred "as a result of unforeseen developments and of the effect of the obligations incurred by" a WTO Member.[171] Secondly, imports should enter into the importing country "in such increased quantities and under such condition" as to cause or threaten to cause serious injury to the domestic industry. There are four questions that merit attention which include:[172] 1) what are "unforeseen developments"; 2) what is the time span for "increased imports"; 3) how is "product" to be defined – broadly or narrowly; 4) must the increase be "absolute," or will a "relative" increase suffice? All of these questions shall be discussed in this section below.

### A. Unforeseen Development

*a. Existence of the "unforeseen development" requirement*

The first conditions is set out in Article XIX:1(a) of GATT 1994, providing that the increase in imports must result from "unforeseen developments". This clause is not further defined or illustrated by examples in Article XIX of the GATT 1994 and importantly, it was not included in the SA. In *Korea – Dairy* and *Argentina – Footwear (EC)*, one of the issues was the omission of this criteria. Many doubted if this criteria continues to have some legal effect after the SA coming into force. The

[171] GATT 1994, Article XIX:1(a).
[172] J H Jackson, *The World Trading System* (2nd edn) (MIT Press 1997), p 186.

question aroused provided some chances for WTO panels in interpreting the requirement of "unforeseen development" in those cases.

In *Korea – Dairy*, the Panel concluded that the "unforeseen development" requirement *does not address the conditions* for Article XIX measures to be applied but *rather explains why a provision such as Article XIX may be needed*…[173] Also, the Panel on *Argentina – Footwear* found that, although Article XIX and the SA "legally co-exist" as part of the WTO Agreement, the "unforeseen development" was "*expressly omitted*" by the Uruguay Round negotiators and this "omitted" phrase has no meaning[174]. Both of the conclusions were reversed by the Appellate Body which ruled that the requirements of the WTO Safeguards Agreement and of GATT Article XIX apply on a *cumulative* basis.[175] The precise nature of the relationship between Article XIX of the GATT 1994 and the SA within the WTO Agreement is described in Article 1 and 11.1(a) of the SA as follows:

*Article 1 General Provision*

> This Agreement established rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

*Article 11 Prohibition and Elimination of Certain Measures*

> 1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provision of that Article applied in accordance with this Agreement.

The text of Article 1 suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language "unless such

[173] Panel Report, *Argentina - Safeguard Measures on Imports of Footwear* ("*Argentina-Footwear (EC)*"), WT/DS121/R, adopted 25 June 1999, para 7.45.
[174] Panel Report, *Argentina-Footwear*, para 8.55.
[175] Appellate Body Report, *Argentina-Footwear*, WT/DS121/AB/R, adopted 12 January 2000, para 89.

action conforms with the provisions of that Article applied in accordance with this Agreement" clearly is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards.[176] Therefore, the Appellate Body concluded that the requirement of "unforeseen development" does have meaning; also, it must be satisfied in order for a safeguard measure to be imposed.[177]

*b. The meaning of the "unforeseen development"*

The clause of the "unforeseen development" demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, "emergency actions." And, such "emergency actions" are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation. The term was first defined in the *US – Hatter's Fur case*, in which the GATT Working Party observed that:

*... the term 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated ...*[178]

In the case of *Korea – Dairy*, the Appellate Body stated: "… the ordinary meaning of the phrase 'as a result of unforeseen developments' requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'".[179] In addition, in *US – Lamb* case, the Appellate Body clarified that the "demonstration" must be provided by the

[176] Ibid, at para 89.
[177] Ibid, at para. 90.
[178] "Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX" (the "*Hatter' Fur*" case), GATT/CP/106, adopted 22 October 1951. para 9. This interpretation was proposed by the representative of Czechoslovakia, and was accepted by the majority of the Working Party with the exception of the United States.
[179] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 14 December 1999, para 84.

competent domestic authorities before taking the measure.[180] This means that the measure itself must contain an express finding to this effect; otherwise its legal basis is flawed. The *US – Lamb* Panel also found that the investigation report must specifically examine the "unforeseen developments." The Panel stated, "it must be clear from the published report that the investigating authorities examined the existence of unforeseen developments and came to a reasoned conclusion in this regard."[181] The Appellate Body affirmed the Panel's position that the demonstration of the existence of this circumstance must feature in the published report of the investigating authorities.[182] If the published report does not discuss or offer any explanation as to why certain factors mentioned in it can be regarded as "unforeseen developments," that report does not demonstrate that the safeguard measure has been applied as a result of "unforeseen developments."[183]

With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions…", it was stated by Appellate Body in *Argentina – Footwear (EC)* that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions.[184]

## B. The Assessment of the Increase in Imports

The relevant provisions of the assessment of an increase in imports are provided in both Article XIX of GATT and the SA. Article 2.1 of the SA reproduced and confirmed the language of Article XIX:1 of GATT 1994, meanwhile, Article 4.2 sets out the operational requirements for determining whether the conditions identified in Article 2.1 exist.

Members contemplating a safeguard measure should first establish the requisite increase in imports under the provision of Article 2.1 of the SA that states "A member may apply a safeguard measure to a product only if that Member has

[180] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R and WT/DS178/AB/R, adopted on 1 May 2001, para 72.
[181] Panel Report, *US – Lamb*, WT/DS177/R and WT/DS178/R, adopted 21 December 2000, para 7.29.
[182] Appellate Body Report, *US – Lamb*, para 72.
[183] Ibid, para 73.
[184] Appellate Body Report, *Argentina – Footwear (EC)*, para 91.

determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that products like or directly competitive products…".

Article 4.2(a) further requires in relevant part, "[i]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of its Agreement, the competent authorities shall evaluate (…) in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports …".

Two requirements must be fulfilled under Article 2.1. The first one is a quantitative requirement, while the second is more generally related to the "conditions" under which foreign products come into the territory of the Member seeking to take a safeguard measure.[185] Each of the requirements is discussed in following paragraph.

*a. The absolute or relative nature of the increase*

To determine whether imports have increased in sufficient quantities for purposes of applying a safeguard measure, Articles 2.1 and 4.2 require an analysis of the rate and amount of the increase in imports. Further, they also identify that such increase could be in absolute terms or in its magnitude relative to domestic production, which Article XIX:1 of GATT 1994 does not lay down.

Under Article 2.1 of the SA, absolute imports and relative imports are alternative conditions. Accordingly, in order to meet the "increased imports" requirement it is sufficient that one form of increase has occurred. Members are allowed to apply a safeguard measure where the amounts of imports actually decrease but the ratio between imports and domestic production results in a higher figure because domestic production shrinks. In *US – Line Pipe*, the panel considered that even if it had found that imports of line pipe into the United States has not increased in absolute terms, its conclusion that there had been "increased imports" consistent with the SA would

[185] UN, *"Safeguard Measures", in Unite Nations Conference on Trade and Development, Dispute Settlement, World Trade Organization* (United Nations 2003), p 12.

have been supported by the fact that imports had increased *relative* to domestic production. Concerns were that the application of a safeguard measure based on the relative increase in imports would accelerate a decline in trade in the time of general recession.[186] It was also considered to be difficult to prove causation between the relative increase in imports and injury, which is another important requirement under the safeguard regime.[187]

It should be noted that while the presence of an absolute increase or a relative increase are equally relevant to meet Article 2.1, a difference in the application of Article 8.3 of the SA may result depending on the type of increase.

In addition, in *Argentina – Footwear (EC)*, the Panel considered that, since the wording of Article 2.1 of the SA refers to quantities, the analysis of domestic authorities and panel review must focus on quantities rather than value.

*b. Quantity and time span of the increase*

There are two main questions in connection with the requirement that imports have increased. The first is how much increase is necessary. The second question to be answered is over which time span or rather the duration of the increase. No method to assess the increase in imports is set out, neither under Article XIX, nor in the SA. The WTO panels so far have clarified that both the rate and the amount of the increase in imports (in absolute and relative terms) must be evaluated.

A first general response to both questions was provided by the Appellate Body in *Argentina – Footwear (EC)*. It ruled that the increase in imports "must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury."[188] Accordingly, the increase volume must be "sharp" and "significant" enough in confirming the magnitude of an "increased imports" determination. In addition, the term "recent" and "sudden" suggests that the relevant increase must take place over a relatively short time span. This entails that the competent authorities are required to consider the trends in imports over the period of investigation, rather than just

[186] J H Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill 1969), p 555.
[187] Y S Lee, *Safeguard Measures in World Trade: The legal Analysis* (Kluwer Law International 2003), p 123.
[188] Appellate Body Report, *Argentina – Footwear (EC)*, para 131. The decision was also followed in WTO Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/R, adopted 31 July 2000, para 8.31.

comparing the situation of imports at the beginning and at the end of the reference period (the so-called "end points" of the period).[189]

As a practical example, the panel in *US – Wheat Gluten* found that the "recent, sudden and sharp" increase requirement was met in a case where (1) imports had risen (in absolute terms) from 124 to 177 million pounds, with the highest increase occurring towards the end of the reference period, and (2) the ratio of imports to production has risen from 100.6 per cent at the end of the reference period.[190]

## 2. Determination of "serious injury"

The presence of serious injury or threat thereof to the domestic industry as a result of the increased imports is a major substantive requirement for the imposition of a safeguard measure.

### A. Definition of "Serious Injury" or "Threat of Serious Injury"

Article 4.1 provides the definitions for the term relevant to the injury determination. "Serious injury" is defined as "a significant overall impairment in the position of a domestic industry" (Article 4.1(a)). "Threat of serious injury" is defined as "serious injury that is clearly imminent, in accordance with the provisions of paragraph 2" (Article 4.1(b)). As a general matter, the standard of "serious injury" built in the SA has been recognized by the Appellate Body to be "very high" ("exacting")[191], and in particular to be stricter than the "material injury" standard in the Anti-dumping Agreement.[192]

### B. Definition of the "Domestic Industry"

According to the general conditions of Article 2.1, an assessment of the serious injury or the threat thereof should be directed to the relevant domestic industry.

[189] Appellate Body Report, *Argentina – Footwear (EC)*, para 126.
[190] Panel Report, *US – Wheat Gluten*, para 8.32.
[191] WTO Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001 (hereafter: Appellate Body Report, *US – Wheat Gluten*), para 149.
[192] Appellate Body Report, *US – Lamb*, para 124.

Therefore, the identification of the "domestic industry" is a prerequisite to the injury assessment. Article 4.1(c) provides the definition "the producers as a whole of the like or directly competitive products, operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitute a major proportion of the total domestic production of those products". There are two criteria to identify the scope of "domestic industry". Firstly, the relevant domestic industry is defined as producers making products, which are "like or directly competitive" to the imports targeted by the investigation.

The methodology to determine the scope of "like or directly competitive products" is not provided in the SA. However, this term has been interpreted by Appellate Body. The notion of "likeness" is mainly focused on the physical and functional similarities between the relevant domestic products and imports.[193] In *US – Lamb*, the Appellate Body stated several exclusions to the "like" products. It ruled out certain domestic products which are simply in a "*continuous line of production*" to the like products of the targeted imports[194], those products manufactured by producers who have a "*substantial coincidence of economic interests*" with that of the domestic producers of the genuine "like" domestic products,[195] or that production structures may have an impact on deciding whether two products are "like" or "directly competitive".[196] The rational of the Appellate Body's findings is that the focus of the SA is on products, not on production processes.[197]

With regard to the "direct competitiveness", the Appellate Body stressed that it focuses on "marketplace", that is on the competitive conditions on the importing country, starting from elasticity of substitution between the imports and the allegedly directly competitive domestic products.[198] The national authorities are obligated to provide reasoned conclusions or findings as regards the likeness or direct competitiveness between domestic products and the imported products subject to the

[193] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R-11, adopted 1 November 1996, DSR 1996:1, 97 (p 20 *ff*.).
[194] Appellate Body Report, *US – Lamb*, para 90.
[195] Ibid, paras 89-90.
[196] Ibid, para 94.
[197] UN, *"Safeguard Measures", in United Nations Conference on Trade and Development, Dispute Settlement, World Trade Organization* (United Nations 2003), p 22.
[198] Appellate Body Report, *Japan – Alcoholic Beverages II*, para 25.

safeguard.[199]

The second criteria laid down in Article 4.1(c) to define the "domestic industry" requires the injury assessment must be based on either the whole of such domestic industry, or on the part thereof which constitutes a "major proportion" of the total amount. A serious injury finding can also be based on data collected for a part of the "major proportion", provided that it is *sufficiently representative*.[200]

## C. The Determination of Serious Injury or Threat of Serious Injury

Article 4.2(a) provides that the injury assessment must be based on "the evaluation of all the relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry…" Eight injury factors to be evaluated by domestic competent authorities are enlisted in this Article as objective criteria for an assessment of the injury: i) the rate and amount of the increase in imports of the product concerned in absolute and relative terms; ii) the share of the domestic market taken by increased imports; changes in the level of iii) sales; iv) production; v) productivity; vi) capacity utilization; vii) profits and losses; viii) employment.

The examination of the injury factors by the domestic authorities involves a *formal* aspect and a *substantive* aspect. The formal aspect requires the domestic authorities to evaluate "all relevant factors" [201] and possibly relevant "other factors"[202]. Failure to account, in full or in part, for the trend in one of the relevant factors automatically results in a violation of Article 4.2(a).[203] The substantive aspect entails a reasoned and adequate explanation for their determination by domestic authorities of how the facts support their determination of the "serious injury" to the domestic industry.[204] The domestic authorities are not required to show that each

[199] Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Agriculture*"), WT/DS207/R, adopted 3 May 2002, para 7.146.
[200] Appellate Body Report, *US – Lamb*, paras 91-92, 132.
[201] Appellate Body Report, *US – Lamb*, para 103. Also, in Appellate Body Report, *Argentina – Footwear*, para 136, the Appellate Body confirmed with the Panel's interpretation that Article 4.2(a) of the SA requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as other factors that are relevant to the situation of the industry concerned.
[202] Appellate Body Report, *Argentina – Footwear*, para 136; Appellate Body Report, *US – Wheat Gluten*, para 55; Appellate Body Report, *US – Lamb*, para 103.
[203] Panel Report, *Korea – Dairy*, WT/DS98/R, adopted 21 June 1999, paras 7.58, 7.63, 7.68, 7.69, 7.75, 7.76 and 7.78.
[204] Appellate Body Report, *US – Lamb*, para 103. The formal and substantive examinations of the injury factors are also entailed in the standard review of safeguard measures by the WTO Panel.

listed injury factor is declining but rather, they must reach a determination in light of the evidence as a whole.[205]

A determination of the existence of a threat of serious injury refers to Article 4.2, regulating determinations of actual "serious injury".[206] In making a "threat" determination, the domestic authorities must find that serious injury is "clearly imminent".[207] This requires a high degree of likelihood that the anticipated serious injury will materialize in the very near future.[208] It needs to be stressed that a "threat" determination shall be based on facts and not merely on allegation, conjecture or remote possibility.[209]

## D. Causation

Pursuant to Article 4.2(a), a determination of the injury not only includes the examination of the "serious injury or threat thereof" having a bearing on the domestic industry, but also needs an examination of whether the injury has been caused by the increased imports or by the "other factors", that is, the "causal link" between the increased imports and the injurious effects. Article 4.2(b) lays down the causation requirement, which is twofold. On the one hand, a demonstration of the casual link between increased imports and serious injury is required. On the other hand, it is also required that any injury caused by factors other than the increased imports must not be attributed to such imports.[210]

An examination of causation often requires the test of whether an upward trend in imports coincides with downward trends in the injury factors; whether the condition of competition in the domestic market between imported and domestic products demonstrates a causal link of the imports to the injury, and if not, whether a reasoned explanation is provided as to why the data nevertheless shows causation; whether other relevant factors have been analyzed and whether it is established that the injury

[205] Ibid, para 144.
[206] Agreement on Safeguards, Art 4.1(b).
[207] Appellate Body Report, *US – Lamb*, para 136.
[208] Ibid.
[209] Agreement on Safeguards, Art 4.1(b).
[210] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, dated 8 March 2002, para 208.

caused by factors other than the imports has not been attributed to the imports.[211] However, the Appellate Body has indicated that to establish causation pursuant to Article 4.2(b), it is not necessary to show that increased imports alone – on their own – must be capable of causing serious injury.[212] Article 4.2(b) provides that the causation examinations should be demonstrated on the basis of objective evidence.

With respect to the "non attribution" test, the Appellate Body required the domestic authorities to separate and distinguish the injurious effects of the other causal factors in the assessment of the injury ascribed to increased imports, in a situation where several factors are causing injury at the same time.[213] Therefore, the domestic authorities are required to identify "the nature and extend of the injurious effects of the known factors" as well as "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the increased imports".[214]

## 3. Application of Safeguard Measures

## A. Definitive Safeguard Measures

Safeguard measures shall be applied after an injury determination has been affirmed. Unlike in the case of anti-dumping or countervailing measures, safeguard measures are not limited to particular types or forms. Article XIX:1 of the GATT 1994 very generally refers to the possibility of suspending obligations, or withdrawing or modifying tariff concessions granted under its provisions to the extent and for such time as may be necessary to prevent or remedy the serious injury or threat thereof by the imports under investigation. In practice, safeguard measures take a form of increased tariffs, quotas, surcharges, quantitative restrictions, import authorizations or a combination.[215] However, "voluntary" restrictions on trade agreed between the exporting and importing countries, so-called "grey-area" measures are strictly prohibited in the SA in Article 11.1(b).

---

[211] Panel Report, *Argentina – Footwear*, para 8.229; Appellate Body Report, *Argentina – Footwear*, paras 140-146; Panel Report, *US – Wheat Gluten*, para 8.91.
[212] Appellate Body Report, *US – Wheat Gluten*, para 70; Appellate Body Report, *US – Line Pipe*, para 209.
[213] Appellate Body Report, *US – Lamb*, para 185.
[214] Appellate Body Reports, *US – Line Pipe*, para 213.
[215] WTO Secretariat, *Analytical Index, Guide to GATT Law and Practice, Vol. 1* (WTO 1995), p 539 *ff.*

Article 5.1 of the SA provides that a Member shall apply safeguard measures "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". However, the domestic authorities are not required to prove the adequacy of the measure unless the measure takes a form of quantitative restriction and the quantity of the imports was reduced below the level of a recent period.[216]

The quota allocation needs to be agreed among all Members having a substantial interest in supplying the product concerned. If agreement cannot be made, the quota may be allocated according to the import share of the Members for a representative period.

### B. Provisional Measures

Article XIX:2 of GATT and Article 5 of the SA provide that in critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. Such measures should only take the form of tariff increase which shall be promptly refunded if the subsequent investigation does not determine that increase imports have caused or threatened to cause serious injury to a domestic industry. The duration of the provisional safeguard measure is limited to a maximum 200 days and cannot be extended. The period of a provisional measure is counted as part of the initial period of a safeguard measure should a definitive measure be applied.[217]

## 4. Notification and Consultation

It is the transparency requirement that the provisions regard to notifications and consultations are laid out in both Article XIX of GATT and the SA in regulating the activities in connection with the application of the safeguard measure. Article XIX:2 of GATT 1994 concerns the procedural requirements for the application of safeguards. It provides, "before any contracting party shall take action pursuant to

[216] Appellate Body Report, *Korea – Dairy*, para 99; Appellate Body Report, *US – Line Pipe*, paras 133-134.
[217] Agreement on Safeguards, Article. 5.

the provisions of paragraph 1 of Article, it shall give notice in writing to the Contracting Parties as far in advance as may be practicable and shall afford the Contracting Parties and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action."

Article 12 of the SA provides for the notification and consultation process. The brief procedural requirements under Article XIX:2 have been refined and detailed in the new Agreement. Members are obligated to issue notifications at various states of the application of a safeguard measure to the Committee on Safeguards, which includes i) the initiation if the investigation (Article 12.1(a)); ii) the making of a finding of serious injury or threat thereof (Article 12.1(b)); iii) the decision to apply or extend a safeguard measure (including provisional measures) (Article 12.1(c)). Recent Panels repeatedly emphasized the importance of time notification that those three notifications should be made immediately after the relevant decisions.[218]

Article 12.2 stipulates the required contents of the notifications. Article 12.2 provides in the relevant part, "… the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguard with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the products involved and the proposed measure, proposed date of introduction, expected duration and time table for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall be also provided." The extent of "all pertinent information" has been subject to question. The Appellate Body ruled that, at a minimum, notification should address the injury factors listed in Article 4.2(a) as evidence of injury and include all the other items expressly listed in Article 12.2.[219]

[218] Appellate Body Report, *Korea – Dairy*, para 107; Panel Report, *US – Wheat Gluten*, para 8.194; Appellate Body Report, *US – Wheat Gluten*, paras 105-112.
[219] Appellate Body Report, *Korea – Dairy*, paras 108-109.

Article 12.3 provides for consultations prior to the application of a safeguard measure. It provides that "A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8".

Consultations would provide the involved parties with an important opportunity to exchange their views on the proposed safeguard measure. The importing country may be persuaded to modify the measure or even not to apply it at all, or may also agree on compensation during those consultations. Therefore, the exchange of views as well as any agreement during the consultation would be properly reflected in the final implementation of the measure.[220] Successful consultations would lead to mutually agreeable compromises and thereby enable the involved parties to avoid disputes and retaliations.[221]

## 5. Duration, Midterm Review and Extend

Both Article XIX of GATT and the SA provide that a safeguard measure should be applied "for such period of time" as may be necessary to prevent or remedy serious injury and facility an adjustment to the domestic injury. The duration requirement of an application of the safeguard measure denotes the "temporary" nature of the safeguard measures and also requires the proportionality between the measure applied and the injury. Article XIX did not specify the maximum duration of a safeguard measure, while the SA provides the detail requirements in Article 7.

The period of a safeguard measure shall not exceed 4 years. The measure can be extended only once up to four more years if the continuation of the measure is determined necessary to remedy or prevent serious injury and there is evidence that the injury is adjusting. The total period of a safeguard measure including the period of any preceding provisional measure cannot exceed 8 years[222]

[220] Appellate Body Report, *US – Wheat Gluten*, para 136.
[221] Y S Lee, *Safeguard Measures in World Trade: The legal Analysis* (Kluwer Law International 2003), p 56.
[222] Agreement of Safeguards, Article 7.3.

The extension of the measure would require investigation, following the procedures in Article 2-5. If the duration of a safeguard measure is over 1 year, the measure needs to be liberalized at regular intervals.[223] An extended measure cannot be more restrictive than it was at the end of the initial period, and should continue to be liberalized.[224] The time equal to the duration of the previous safeguard measure, provided the period of non-application is at least 2 years, must lapse before the re-application of a safeguard measure with respect to the same product.[225] If the duration of a safeguard measure exceed 3 years, the Member applying the measure must review the situation not later than the mid-term of the measure and, if appropriate, withdraw the measure altogether or increase the pace of liberalization.[226]

The specified duration and the required time interval before the re-introduction of a safeguard measure highlight the temporary nature of safeguards. The liberalization requirement should encourage the domestic industry to make necessary adjustment. The mid-term review provides an opportunity to place a safeguard measure under scrutiny before its expiry.

## 6. Compensation and retaliation

An application of a safeguard measure inevitably breaches the balance of concessions between the importing and exporting Members. The WTO requires the Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure.[227] To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade. The right to suspend the substantial equivalent concessions was already set out in Article XIX:3. Article 8 of the SA further provides that should the Members concerned fail to reach agreement on compensation within 30 days, the affected exporting Members shall be

[223] Ibid, Article 7.4.
[224] Ibid, Article 7.4.
[225] Ibid, Article 7.5.
[226] Ibid, Article 7.4.
[227] Ibid, Article 8.1.

free, not later than 90 days after the measure is applied, to suspend the substantially equivalent concessions or other obligations under GATT 1994.[228] Any form of compensation and proposed suspension under Article 8.2 must be notified immediately to the Council for Trade in Goods[229], and the proposed retaliation is applicable on the expiration of 30 days from the receipt of such notice by the Council as long as the Council does not "disapprove" the proposed measure.

## 7. MFN Principle in respect of Safeguard Measures

Since safeguard measures do not require a finding of an "unfair" practice, the authorization of a discriminatory measure applicable to the import only from a particular source could have been an invitation for a trade war between the importing country applying a safeguard measure and the exporting country. The text of Article XIX neither specifically approves nor prohibits the selective application of a safeguard measure according to the sources of the product concerned. A specific MFN provision was included in the Charter of the International Trade Organization (ITO) at the Havana meeting, and the Contracting Parties generally understood that the MFN principle applies to safeguard measures, although the Charter has never acquired the legal effect. The Contracting Parties of the GATT later confirmed the application of the MFN principle in subsequent panel cases.[230] As a result of long negotiations on the MFN issue, Article 2.2 of the SA specifically provided that safeguard measures shall be applied to a product being imported irrespective of its source.

Although a non-selective principle was adopted in SA as to the application of safeguards, there are two possibilities where an importing country may depart from it.

First of all, Article 5.2(b) of the SA allows a Member to depart from the MFN quota allocation if (i) imports from certain Members have increased in

[228] However, there is an important qualification contained in Article 8(3) that such right of suspension "shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports."
[229] Safeguards Agreement, Article 12.5.
[230] See, e.g. *Norway – Restrictions on Imports of Certain Textile Products*, BISD 27S/119, adopted 18 June 1980, para 14(b). The panel "was of the view that the type of action chosen by Norway, i.e. the quantitative restrictions limiting the importation of the nine textile categories in question, as the form of emergency action under Article XIX was subject to the provisions of Article XIX which provides for non-discriminatory administration of quantitative restrictions".

disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of such a non-MFN measure shall not be extended beyond the initial 4 years, and shall not be permitted in the case of threat of serious injury.

Secondly, GATT Article XXIV has been referred to as a possible justification to deviate from such a non-discrimination principle. In fact, footnote 1 of the SA Article 2.1 provides that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994", suggesting that selective safeguard application was deliberately left unsolved during the Uruguay Round.[231]

The panel in *US – Line Pipe* noted that availability of the Article XXIV defence against claims brought under the provisions of the SA is confirmed by this sentence.[232] However, the Appellate Body refused to rule on the question whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the SA based on the above quoted sentence. According to the other content of the footnote 1 to Article 2.1 of the SA, the Appellate Body only admitted that the GATT Article XXIV:5 defence to a violation of the Safeguard Agreement is only available when the "parallelism" principle was respected.[233] Therefore, to the Appellate Body, the extensions of GATT Article XXIV:5 exception in the SA in conditional.

To date, whether GATT Article XXIV can justify the deviation from the MFN principle in Article 2.2 of the SA remains controversial in both academia and practice.[234]

## 2.4 Conclusion

The economic rationale of TRMs has long been debated. While economic justifications for import restrictions are controversial, political needs for trade

[231] D Ahn, "Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules" (2008) 11(1) *Journal of the International Economic Law* 107, at p 127.
[232] Panel Report, *US – Line Pipe*, WT/DS202/R, adopted 8 March 2002, para.7.151
[233] Appellate Body report, *US – Line Pipe*, paras 198-199.
[234] For full discussion on this issue, see section 4.2 of this thesis.

remedy measures are quite strong and it is therefore likely that these measures will remain a lasting part of the world trading system. Disciplined trade remedy measures with well-paced liberalization plans can, at a minimum, provide Members with an opportunity for economic adjustment. GATT/WTO trade remedy rules were designed to reduce the negative impact on Members' domestic industry by liberalizing their domestic markets and so advance the national economic interest of the Members that apply them. The agreements on anti-dumping, subsidies and countervailing duty measures and safeguards were a success in that they did replace the popularity of grey-area measures in the GATT era. Then the task would be to minimize the adverse effects of import restrains with effective disciplines.

Since the Uruguay Round, these instruments, particularly anti-dumping, have been increasingly used, by developing economies even more than by developed countries. Proliferating global trade remedy actions reflects the severe problems in GATT/WTO rules. Certain ambiguities in the current WTO rules as discussed in this chapter have caused confusion and controversy in the application of trade remedy measures. For example: i) the "zeroing" in anti-dumping calculation has not been explicitly prohibited in the legal text of the ADA; ii) many key terms of the provisions are ambiguous in definition, which led WTO dispute settlement panels to constantly formulate different interpretations; iii) except for the imposition of the measures, it is unclear whether national legislations and proceedings of TRMs applicable to other WTO Members have to take non-discriminatory stance.

In addition, provisions of WTO TRMs leave sufficient room to the users to trigger those measures easily. For instance, in anti-dumping laws, the comparison is made on an ex-factory basis without consideration of the final price. Freight, advertising, insurance, and other direct and indirect costs are deducted from the sale price when assessing what the ex-factory prices are in both countries.[235] In practice, when prices are constructed, overhead costs of 10 and 8 per cent profits are added to those ex-factory costs of production in the home country, which inflated the margin of price discrimination.[236] Provisions stipulating that due allowance be made for the "differences in conditions and terms of sale, taxation and other differences affecting

[235] See section 2.1.2(D) of this thesis.
[236] Ibid. See also, G Marceau, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (Clarendon Press 1994), p 112.

price comparability" can further inflate foreign prices.[237] Under the "W-T" anti-dumping calculation method, dumping may be determined positive or the dumping margin may be exaggerated if the investigating authority makes its determination on arbitrarily selected transaction models.[238] All these give some Members a good chance to misuse trade remedy actions as a strong protectionism weapon.

Compare with CVD and safeguard measures, anti-dumping campaigns are far more devastating. There were almost 4000 anti-dumping initiations versus 262 CVD measures and 216 safeguard measures from 1995 to mid-2010.[239] Compared with CVD and safeguard measures, anti-dumping is much easier applicable to any case of troublesome imports because 1) anti-dumping investigations are usually established on discriminatory bases and therefore particular exports can be picked out; 2) the rhetoric of foreign unfairness provides a vehicle for building a decent excuse for protection; 3) the price undertaking under the anti-dumping law as one of remedies has similar effects to the voluntary export restrictions, which are prohibited by safeguards; 4) the anti-dumping investigation process itself tends to curb competitive imports. This is because exporters bear significant legal and administrative costs and importers face the uncertainty of having to pay backdated anti-dumping duties, once an investigation is completed; 5) there is no rule against double jeopardy – if one petition against an exporter fails, minor re-specification generates a new valid petition. By all accounts, anti-dumping is a more problematically designed trade remedy measure. Its economics is ordinary protection; it excludes the domestic interests what will bear the costs; its unfair trade rhetoric undercuts rather than supports a policy of openness. Expressions of concern to modify the anti-dumping rules so as to restrain their use have been brought forward equally as the intense defences. Although anti-dumping, as well as CVD and safeguard measures were put into place in the negotiating mandate of the Doha Round, no progress has been made so far in these negotiations.

All these facts have called the urgency to further strengthen the current trade

---

[237] Ibid.
[238] Ibid.
[239] See "AD Initiations: By Exporting Country 01/01/95 - 30/06/10", http://www.wto.org/english/tratop_e/adp_e/ad_init_exp_country_e.pdf (visited in April 2011); "Countervailing Initiations: By Exporting Country 01/01/1995 – 30/06/2011", http://www.wto.org/english/tratop_e/scm_e/cvd_init_exp_country_e.pdf; "Safeguard Initiations by Reporting Member – Period: 29/03/1995 to 31/10/2010" http://www.wto.org/english/tratop_e/safeg_e/safeg_stattab1_e.pdf

remedy rules in the WTO regime. They are also the reasons that more and more RTAs consider the preferential TRMs in their regional trade policies. While it is controversial on the reform of current trade remedy rules, these instruments simply present different ways of reaching a same goal – improvement of domestic producers' competitive position against foreign exporters. Based on the discussion presented in this chapter, this research will make further comparison between trade remedy measures under the WTO regime with relevant approaches in RTAs, with the purpose to find out whether the preferential TRMs are more reasonable approaches that could reduce trade remedy actions and hence create a more competition-friendly environment for cross-border trade, or they are negative deviations that would harm domestic competitive industries and the non-RTA members.

# Chapter 3 Trade Remedy Measures in the Regional Trade Agreements

## 3.1 Introduction

Under the WTO legal framework, RTAs are basically governed by Article XXIV of GATT 1994 and its supplement, the "Understanding on the Interpretation of Article XXIV of GATT 1994" (1994 Understanding). The objective of an RTA, which was indicated in the Preamble to the 1994 Understanding, is to contribute to the expansion of world trade by promoting closer integration between the economies of the parties to such agreements. Although the coverage and depth of preferential treatment amongst the member countries varies from one RTA to another, it has been noticed that, in general, modern RTAs tend to go far beyond WTO practices. In order to achieve deeper regional trade integration, they provided increasingly complex regulations and innovative mechanisms governing intra-trade. Some sophisticated RTAs even go beyond traditional trade policy mechanisms, to include regional rules on investment, competition, environmental protection, labour rights, etc.

This tendency is also reflected in the area of trade remedy measures, i.e. anti-dumping, countervailing duty measures and safeguards. Some RTAs have gone beyond the WTO by strengthening WTO rules to minimise the opportunity to use these measures in a protectionist manner, while other RTAs have completely eliminated the possibility of their use among participating countries. In the area of safeguards, some RTAs add new opportunities to use these measures.[240] In brief, RTAs usually retain the possibility of using some of these measures based on the GATT/WTO regime, but in varying combinations. It is asserted that one of the reasons for diversity in the provisions is deemed to have been derived from the lack of a prescribed model with a consensus for the treatment of trade remedy measures in the RTAs.[241] The rationales behind those strategies entail further analysis. More importantly, the innovative approaches on TRMs put in place through RTAs have brought many cases into the WTO dispute settlement forum. Almost all of the

[240] OECD, "The Trade Relationship between Regional Trade Agreements and the Multilateral Trading System – Contingency Protection", report of the Organisation for Economic Co-operation and Development (OECD), 06 May, 2002 (TD/TC/WP(2002)20/FINAL), p 4.
[241] N Sagara, "Provisions for Trade Remedy Measures (Anti-dumping, Countervailing and Safeguard Measures) in Preferential Trade Agreements", RIETI Discussion Paper Series 02-E-13, September 2002, p 32.

arguments have concentrated on the legality of those innovative approaches under the WTO framework. As with other unsettled issues in RTAs, this ambiguity not only makes international trade more complex, but also undermines the WTO's transparency and predictability standards.

In order to examine the TRM issues in RTAs, Chapter 3 is designed to go through these RTA-specific TRMs with the purpose to reveal the discrepancies between regional TRMs and the WTO TRMs and evaluate their potential influence on the regional trade and the trade with third-countries. Therefore, a comprehensive picture of current trade remedy approaches in RTAs is presented in this chapter, along with a comparative study with the WTO rules. Special attention is given to the RTAs, which eliminated TRMs between their member states, because of their significant deviation from the multilateral disciplines. In the meantime, considering many RTAs are facilitated with regional bodies, which are given a role to conduct investigations and/or review the final anti-dumping and countervailing duty determinations of national authorities, section 3.5 will address those special institutional mechanisms that apply to TRM issues in RTAs.

The study in this chapter is mainly based on the legal text of selected regional trade agreements (see Annex 1). In a number of cases involving older RTAs or RTAs under planning, the study has also relied on decisions that were enacted subsequently after the RTA came into force or officially drafted agreements to establish the RTA. In addition, existing literature is considered to help understanding the context. Due to the great amount of RTAs under the WTO while the limited length of this thesis, the research will focus on those RTAs with representative approaches on trade remedy issues.

## 3.2 Anti-dumping Measures in RTAs

Anti-dumping actions started to gain popularity in the 1970s and soon after, anti-dumping law became a hot topic in the study of international trade. Compared with the situation at the multilateral level, it is noted that RTA partners handle anti-dumping measures much more carefully in bilateral trade. The consensus is using anti-dumping in an arbitrary or protectionist manner could severely retard the pace of

regional market integration.[242]

Generally there are three different approaches in RTAs on the application of anti-dumping measures (see Table 4), i.e. maintenance of right to apply AD measure (category A), lesser use of AD measures (category B), and abolition of AD measures (category C).

**Table 4 Variances of Anti-dumping Measures in RTAs**

| | AD Measures in RTA | Result | Example(s) |
|---|---|---|---|
| **A** | No provisions[243]/directly refer to WTO AD rules | Dumped imports from RTA partner are completely subject to WTO AD rules | US-Australia, US-Chile, US-Jordan, EC-Morocco, EFTA-Egypt, Korea-Chile, Japan-Singapore, Mexico-Israel, New Zealand-Thailand |
| **B** | Maintain WTO AD rules with modification on application thresholds | Dumped imports from RTA partner are subject to AD rules with higher threshold | New Zealand-Singapore, US-CAFTA-DR, Korea-Singapore, Canada-Costa Rica, Korea-EU |
| **C** | Abolish AD measures | No AD measure is applicable on dumped imports from RTA partner (however, RTA partners are bound by common competition policy) | EFTA, EEA, EFTA-Albania, EFTA-Singapore, EFTA-Chile, ANZCERTA, Canada-Chile, China-Hong Kong, China-Macao |

### 3.2.1 Maintenance of Right to Apply Anti-Dumping Measures

Of the RTAs observed in this research, more than half of them containing anti-dumping provisions that make specific references to the GATT/WTO definition of dumping, and there is a clear tendency towards this in the post-1990 agreements. A greater proportion of RTAs require that appropriate measures to counteract dumping

[242] For example, in the New Zealand-Singapore FTA (Article 9), the parties clearly expressed their desire to strength anti-dumping rules to bring greater discipline to AD investigations and minimise the opportunities to use anti-dumping in an arbitrary or protectionist manner.

[243] It is worth to note that, the provisions of anti-dumping in RTAs essentially amount to *lex specialis* to the corresponding provisions in the GATT/WTO. Thus, where a RTA has no anti-dumping provisions in their regional trade agreements, the WTO anti-dumping rules are assumed automatically apply if the members of those RTAs are also Members States of the WTO. Same rationale applies to similar situation refers to countervailing duties measures and safeguards.

be taken in accordance with the relevant GATT/WTO rules. Specific reference to the relevant GATT/WTO rules (e.g. on the definition of dumping and the protective measures to be taken) is much more prevalent in the FTAs than in CU.

It was noted that, for example, the most US-related RTAs (e.g. US-Australia, US-Bahrain, US-Chile, US-Jordan, US-Israel, US-Morocco, US-Singapore) have no specific provisions on anti-dumping. In the US-Singapore FTA, the provision on "Import and Export Restrictions" stipulates that:

> "1. Except as otherwise provided in this Agreement, a Party shall not adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its interpretative notes, and to this end Article XI of GATT 1994, including its interpretative notes, is incorporated into and made a part of this Agreement.
>
> 2. The Parties understand that the GATT 1994 rights and obligations incorporated by paragraph 1 prohibit, in any circumstances in which any other form of restriction is prohibited, export price requirements and, except as permitted in enforcement of countervailing and antidumping orders and undertakings, import price requirements."[244]

The bulk of these have been negotiated after NAFTA. One interpretation put forwarded on this is that the US wants to preserve its autonomy in applying its anti-dumping procedures against RTA partners from the NAFTA experience.[245]

Of course, same position is also taken in many other non-US-related RTAs, for example, the Canada-Israel FTA, EC-Chile FTA, EC-Morocco FTA, EFTA-Canada FTA, EFTA-Egypt FTA, Korea-Chile FTA, Japan-Singapore FTA, Mexico-Chile FTA, Mexico-Israel FTA, New Zealand-Thailand FTA, etc. In Japan-Singapore FTA, Article 14.5 explicitly provided that:

> "Nothing in this Article shall prevent a Party from imposing, at any time, on the importation of any goods of the other Party:

[244] US-Singapore FTA, Article 2.7.
[245] R Teh, T J Prusa and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03, p 21.

…

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI of GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures in Annex 1A to the WTO Agreement; …"

Over time, most of the RTAs notified to the GATT/WTO have not resulted in the elimination of the trade remedy protection (if this existed) and have not included a transition period during which this was to be achieved. Despite this, there has never been a case where a RTA was disapproved because of the continued existence of anti-dumping provisions.[246]

### 3.2.2 Special Mechanism for Lesser Use of Anti-Dumping Measure

Different with those RTAs which maintain anti-dumping measures follow strictly with the WTO general rules, many RTAs made special mechanisms on the anti-dumping rules apply to imports from their RTA partners. In most cases, they did not provide an individual comprehensive framework on anti-dumping for intra-regional trade; instead, they introduced strengthened requirements and mild treatment on application of the anti-dumping measures based on the WTO Anti-Dumping Agreement. Those changes covered both substantive and procedural elements with the purpose of achieving lesser use of anti-dumping measures.

*1) Preferential dumping determination*

First of all, it is important to mention the changes on substantive requirements in dumping determination. In the WTO Anti-dumping Agreement, it is prescribed that no anti-dumping measures should be applied where dumping margin is lower than 2% or the injury margin is lower than 3%.[247] These are the so-called "*de minimis* dumping margin" and "negligible injury result". The agreement of CEP (Closer Economic Partnership) of New Zealand and Singapore agreed to strengthen the rule

[246] This does not mean that anti-dumping, as well as other TRMs, are certainly allowed to exist in RTA. In fact, this issue was neither agreed among WTO negotiators nor clarified by the WTO adjudicating bodies so far. Therefore, it will be discussed in detail later in Chapter 4.
[247] Agreement on Anti-Dumping, Article 5.8.

to implement the WTO Anti-dumping Agreement in order to "bring greater disciplines to anti-dumping investigations and to minimize the opportunities to use anti-dumping in an arbitrary or protectionist manner".[248] Hence, the Agreement altered the substantial requirements of the anti-dumping rules in the WTO framework by increasing the *de minimis* dumping margin and the negligible injury threshold of the WTO Anti-dumping Agreement. The *de minims* dumping margin was raised from 2% to 5% and the volume of dumped imports which shall normally be regarded as negligible increased from 3% to 5%.[249] Apparently, anti-dumping actions will be reduced between Singapore and New Zealand by the uplifted thresholds.

In the case of the Korea-Singapore FTA, preferential treatment in anti-dumping is reflected in the prohibition of "zeroing". Pursuant to Article 6.2.3(a) of the Korea-Singapore FTA, "when anti-dumping margins are established on the weighted average basis, all individual margins, whether positive or negative, should be counted toward the average". Although the "zeroing" method in dumping calculation has been claimed inconsistent with the WTO Anti-dumping Agreement several times by WTO panels and the Appellate Body, it was constantly used by some WTO Members.[250] Codification of the prohibition of "zeroing" in RTAs also strengthened WTO anti-dumping rules and prevented further disputes on this issue.

Likewise, Article 2.8.1(h) of the Singapore-Jordan FTA provides that "in the conduct of investigations and reviews, the margin of dumping and the resulting dumping duty based on such margin shall be calculated by strict price comparison on the basis of transaction to transaction ["T-T"], and weighted average to weighted average ["W-W"], and not weighted-average price and individual price ["W-T"]".

This is in contrast to the WTO, where comparison between export price and the normal value on the basis of the W-T method is entirely permitted under the WTO Anti-dumping Agreement.[251] However, in that case, dumping may be determined positive or the dumping margin may be exaggerated if the investigating authority makes its determination on arbitrarily selected transaction models. Therefore, prohibition of this method will significantly improve the fairness of the anti-dumping

[248] New Zealand-Singapore CEP Agreement, Article 9.1.
[249] Ibid.
[250] See section 2.1.2 (1)(D) of this thesis.
[251] Agreement on Anti-Dumping, Article 2.4.2. See detail explanation in section 2.1.2(1)(D) of this thesis.

measure.[252] This mechanism, however, is presently only available in the Singapore-Jordan FTA.

*2) Preferential injury determination*

Lesser use of anti-dumping is reflected in the changes in injury determination as well. Pursuant to the WTO Anti-dumping Agreement, where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports.[253] Nevertheless, Section 771(7)(G)(ii)(IV) of the US Tariff Act of 1930 provides that, the US International Trade Commission (ITC) shall not cumulatively assess the volume and effect of imports under the WTO rules:

> "(III) from any country designated as a beneficiary country under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701 et seq.) for purposes of making a determination with respect to that country, except that the volume and effect of imports of the subject merchandise from such country may be cumulatively assessed with imports of the subject merchandise from any other country designated as such a beneficiary country to the extent permitted by clause (i);[254] or
>
> (IV) from any country that is a party to an agreement with the United States establishing a free trade area, which entered into force and effect before January 1, 1987, unless the Commission determines that a domestic industry is materially injured or threatened with material injury by reason of imports from that country."

Since the US-Israel FTA is the only FTA that entered into force and effect before January 1, 1987, "non-cumulation" was introduced into this agreement. Although the text of the US-Israel FTA did not explicitly stipulate this exception, the non-cumulation requirement in Section 771(7)(G)(ii)(IV) of the US Tariff Act of 1930 automatically applies. In the US-Central America-Dominican Republic FTA

[252] For detail explanation and analysis of the "W-T" method for dumping calculation, see section 2.2.2 (1)(D) of this thesis.
[253] Agreement on Anti-Dumping, Article 3.3.
[254] The US – Caribbean Basin Economic Recovery Act (CBERA) is a non-reciprocal preferential agreements operated under a waiver from WTO rules and it is irrelevant to the CAFTA-DR FTA. However, In CAFTA-DR FTA, both parties agreed to treat each other as "beneficiary country" and refer their intra-regional anti-dumping measure to this provision.

(CAFTA-DR FTA), Article 8.8 confirms that in determining material injury for an anti-dumping action, the US shall "continue to treat each other Party as a 'beneficiary country'", therefore not cumulatively assess the volume and effect of imports from Central America-Dominican Republic FTA.

It was asserted that this so-called "non-cumulation" provision would substantially reduce the likelihood of injury determination because exportation from "beneficiary countries" is assessed separately from that of other countries (especially those export intensive countries such as China and India) in an anti-dumping investigation.[255] Consequently, the imports of the "beneficiary countries" may not subject to anti-dumping measures though they are captured in an anti-dumping investigation at the initial stage.

*3) Preferential remedies*

Preferential treatment in anti-dumping remedies is also popular in RTAs. First of all, it reflects on the reduction of the duties. Since anti-dumping measures are aimed at eliminating certain unfair advantages the exporters gained from low priced imports, the amount of the price being undercut establishes a ceiling for the total amount of duties that can be levied on the entries of the subject products. WTO law encourages importing countries to apply lesser duty, if it would be adequate to remove the injury to the domestic industry, but it is not a legal obligation.[256] Put differently, the importing countries can still charge higher duties than the necessary level if they wish to do so. In the Korea-EU FTA[257], the Korea-Singapore FTA[258] and the Singapore-Jordan FTA[259], however, the "lesser duty rule" was officially codified. The RTA parties, when collecting the anti-dumping duties from the other side, must always stick to the least amount, as long as such amount is adequate to remove the injury to the domestic industry. Under this obligation, the complaining domestic industries can no longer pursue extra competitive advantages from anti-dumping measures, except for fair protection. At the same time, the exporters of the other RTA partner are assured to enjoy lowest barriers on the entry of the importing market even

[255] See, D Ahn, "Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules", *J Intl' Eco Law* 11, No. 1 (2008), p 133.
[256] Agreement on Anti-Dumping, Article 9.1
[257] Korea-EU FTA, Article 3.14.
[258] Korea-Singapore FTA, Article 6.2.3(b).
[259] Singapore-Jordan FTA Article 2.8.1(g).

they were captured in anti-dumping cases.

It is also typical that some RTAs reduced the time span on termination and/or review of anti-dumping duties, so that normal trading conditions can be restored in a shorter period. For example, the New Zealand-Singapore CEP Agreement and the MERCOSUR modified the period for termination and/or review of anti-dumping duties in WTO law by limiting the duration of anti-dumping duties to be undertaken for three, rather than the five years in WTO anti-dumping law.[260] Under this circumstance, of course, the anti-dumping measure will be removed on importing products from RTA partners in much shorter period, while the imports from third-parties may still face restrictions from the anti-dumping duties. Again, that would create discriminatory market access between the exporters of RTA members and the third-countries, and thus divert the importing source from third-countries.

Additionally, pursuant to Article 3.11 of the Korea-EU FTA, for anti-dumping investigation on a good from the other party on which anti-dumping measures have been terminated in the previous 12 months as a result of review, pre-initiation examination must be undertaken "with special care".[261] Although there is no further explanation on what kind of "special care" will be enforced in practice, it indicates that the Korea or EU will place effort *not* to re-introduce anti-dumping measures on those imports. This is actually a mechanism to ensure less recurrence of anti-dumping measures.

*4) "Public Interests" Clause*

It is well known that, although dumping and subsidization are unfair and harmful to the competitive industries in the importing country, the consumers and downstream industries may well benefited from those low priced imports. Therefore, taking the entire national welfare into account, not all dumping or subsidizations are worth a fight. Considering the two-edged effect of anti-dumping, RTAs such as the Canada-Costa Rica FTA[262], Korea-EU FTA[263], and the forthcoming EU-Columbia

[260] New Zealand-Singapore CEP Agreement, Art 9:1(e); MERCOSUR, "Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay", Art 4.
[261] Nevertheless, there was no further explanation on what "special care" exactly means. Therefore, such condition is not enforceable until further agreement is made between the Korea and EU.
[262] Canada-Costa Rica FTA, Article VII:1.2(a).
[263] Korea-EU FTA, Article 3.10.

and Peru FTA[264] give the possibility to conduct a public interest test when applying anti-dumping measures.

In the Canada-Costa Rica FTA, it was provided that:

> "In the interest of promoting improvements to, and clarifications of, the relevant provisions of the WTO Agreement the Parties *recognise the desirability of*:
> (a) establishing a domestic process whereby the investigating authorities can consider, in appropriate circumstances, broader issues of public interest, including the impact of antidumping duties on other sectors of the domestic economy and on competition; …" (emphasis added)

In the Korea-EU FTA, provision is laid down simply as:

> "The Parties shall *endeavor to consider* the public interests before imposing an anti-dumping or countervailing duty." (emphasis added)

The softness of the wording (as highlighted) in above texts indicates that those requirements do not have any binding nature. Nonetheless, they clearly suggest the investigating authorities should balance the various interests at stake and examine the possible impact of the duties on the economic operators before imposing any measures. The consideration gives weight to the needs of commercial users and consumers who benefit from the imported goods and is very likely to reduce the initiation of anti-dumping measures in the RTA.

### 3.2.3 Abolition of Anti-Dumping Measures in the RTAs

In all RTAs observed in this research, nine of them entirely prohibited the use of anti-dumping measure in intra-regional trade, i.e., the European Free Trade Association (EFTA), the European Economic Area (EEA), EFTA-Albania FTA, EFTA-Singapore FTA, EFTA-Chile FTA, Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), Canada-Chile Free Trade Agreement (CCFTA), Closer Economic Partnership Arrangement between China-Hong Kong (China-Hong Kong CEPA) and China-Macao (China-Macao CEPA). Although these RTAs have different backgrounds and initiatives to take such strategy, the elimination

[264] EU-Columbia-Peru FTA, Article 39.

of anti-dumping measure often comes with an enforcement of common/harmonized competition rules.

***EFTA & EEA***

The EFTA is one of major regional groups in Western Europe, which was originally established based on the agreement signed in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. It is said to have been founded as a reaction to the creation of the EEC. A regional body – the EFTA Council – was established to supervise the agreement.

At the initial stage of the EFTA, anti-dumping actions between member states remained possible. However, article 17 paragraph 2 of the EFTA Convention provided a boomerang clause for re-export of dumped goods free of charge. Under this clause,

> "Any products which have been exported from the territory of one Member State to the territory of another Member State and have not undergone any manufacturing process since exportation shall, when reimported into the territory of the first Member State, be admitted free of quantitative restrictions and measures with equivalent effect. They shall also be admitted free of customs duties and charges with equivalent effect …"[265]

In economic theory, trans-border price discrimination, i.e., dumping, is not possible unless there is a market segmentation based on such factors as tariffs and transport costs that prevent price equalizing arbitrage.[266] Accordingly, tariff elimination under the RTA will reduce (but not eliminate) the ability of firms to dump and the need for relief traditionally provided under the anti-dumping laws. In the EFTA where member countries are geographically close to each other (which is another element forecloses market segmentation), dumping is very likely diminished. Thus, the boomerang clause can be seen as a provision that reduces anti-dumping

[265] This approach may not be attainable if the regional partners do not have close geographical relationship.
[266] In Marceau's work, she holds the view that different prices between different markets presuppose that: (1) there are two separate markets. The separation can be social, geographical, cultural or legal; and (2) One market is less competitive than the other. The elasticity of demand and supply must differ between the two markets. In the event that there is no market segmentation between the exporting and importing countries, the dumped imports can flow back to the exporting country freely. As consequence, the high price charged in the exporting countries home market cannot maintain in a long run. The cross-subsidization dumping is thus impossible. See G Marceau, *Anti-dumping and Antitrust Issues in Free Trade Areas*, (Clarendon Press 1994), p 12.

measures in the EFTA.

In the meantime, anti-competitive practices were prohibited under the EFTA Convention (Article 15), but the states were still the only entities responsible for the implementation of Article 15. The EFTA Council did not have any power to conduct regional competition issues. The cross-border anti-competitive issues remained on a diplomatic level. In 1966, the EFTA countries agreed to notify and consult each other when introducing anti-dumping measures and when changing their own legislation on anti-dumping. Since then, anti-dumping issues as well as other unfair practices could be discussed in the EFTA Council.

The reason for the success of the EFTA Council in dealing with anti-dumping and competition issues is regarded as the equal economic power of the EFTA members. Similar process contained in the bilateral free-trade agreements between the EEC and EFTA counties turned out to be inefficient.[267]

With the purpose to solve wider economic integration in Western Europe, individual bilateral free-trade agreements were signed between the EEC and the six EFTA countries in 1972. After the United Kingdom and Denmark left the EFTA to join the EEC, an FTA agreement between EEC countries and the EFTA countries (Norway, Iceland and Liechtenstein, except for Switzerland[268]) was concluded in 1992. It is the so-called European Economic Area (EEA) agreement.

In EEA territory, not only trade in goods and services but also mobility of humans and capital, has been comprehensively liberalized. Between the EU and the EFTA, the preceding FTA to abolish the tariffs for industrial goods was already agreed upon in 1972. One of the targets of the EFTA for the formation of the EEA was abolition of anti-dumping and countervailing duty measures, in order to realize a more stable European market without the threat of those measures being imposed.

In order to adjust itself for the preceding events of the EEA agreement with the EU in 1992 and the bilateral FTA between Switzerland and the EU in 1999, the EFTA had a major amendment in 1999. At the time of this agreement, the EFTA explicitly abolished anti-dumping and countervailing measures for intra-trade (Article 36 and 16 of the EFTA Convention). By that time, on a few occasions when unfair trading practices arose across the EFTA countries, bilateral negotiation solved

[267] Ibid, p 197.
[268] Switzerland signed the EEA but did not ratify the agreement thereafter.

the disagreements.[269]

However, the elimination of trade remedy measures between the EU and EFTA was made conditional on the EFTA's full acceptance of the *acquis communautaire*, which is perceived as the total body of EU law accumulated this far, including all the treaties, regulations and directives passed by the European institutions, as well as judgments laid down by the European Court of Justice. This approach is noted as a remarkable feature of the EEA agreement as well as the EU Enlargement agreements, perhaps because the EU is economically much stronger than any of those counties, and also because some EFTA members and the EU Enlargement candidate countries had been seeking full membership of the EU.

Due to the formation of the EEA, the EFTA accepted the majority of *acquis communautaire* of the EU, and shares common rules of competition policies and state aid policies. Nevertheless, it did not accept the EU Common Agricultural Policies and the Common Fisheries Policies. As consequence, Article 26 of the Agreement on the European Economic Area stipulates the non-application of anti-dumping and countervailing measures. However, Protocol 13 on the Non-Application of Anti-dumping and Countervailing Measures states that the coverage of non-application is limited to where Community *acquis* is fully integrated. This means that the agricultural sector is not included, and that, when avoiding circumvention, anti-dumping and countervailing measures can still be applied.

***ANZCERTA (Australia-New Zealand Closer Economic Relations Trade Agreement)***

The ANZCERTA came into effect in 1983 with the initial prospect of progressively reducing and eliminating trans-Tasman trade barriers in respect of goods. The objectives of the Agreement, according to Article 1, are "to strengthen the broader relationship between Australia and New Zealand; to develop closer economic relations between Australia and New Zealand through mutually beneficial expansion of free trade between the two countries; to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with minimum of disruption and; to develop trade between New Zealand and Australia under conditions of fair competition." The preamble of

[269] G Marceau, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (Clarendon Press 1994), p 196.

the Agreement indicates the member states' "commitment to an outward looking approach to trade", and their belief that "a closer economic relationship will lead to a more effective use of resources and an increased capacity to contribute to the development of the region through closer economic and trading links with other countries, particularly those of South Pacific and South East Asia".

At the initial stage of ANZCERTA, anti-dumping and countervailing duty measures were included as principle operative provisions of the Agreement. Article 15 of the Agreement proceeds on the following understanding:

> "Dumping, by which goods are exported from the territory of a Member State into the territory of the other Member State at less than their normal value, that causes material injury or threatens to cause material injury to an established industry or material retards the establishment of an industry in the territory of the other Member State, is inconsistent with the objectives of this Agreement."[270]

Paragraph 2 of the Article provides that each member of the ANZERTA could levy anti-dumping duties in respect of goods imported from the territory of the other Member State if it had determined that there was dumping, material injury (including threatened material injury to an established domestic industry), and a causal link between the dumped goods and the injury, and if it had afforded the other Member State the opportunity for consultations. Provisional measures, including the taking of securities, could be implemented in appropriate circumstances for up to six month.[271] Notably, ANZCERTA codified an optional anti-dumping action in the WTO Anti-Dumping Agreement, i.e., anti-dumping on behalf of third-country[272], between Australia and New Zealand. Pursuant to paragraph 8 of Article 15, upon the request of one party, the other party must take action if it appears that goods are being dumped in the territory of the other party by a non-ANZCERTA country, and that dumping is causing material injury (or threatening thereof) to an industry located in the first party. Such obligation demonstrates the strong responsibility of both parties to look after their entire regional industries on anti-dumping issues.

Five years later, in 1988, both parties of ANZCERTA launched a general review

[270] ANZCERTA, Article 15:1.
[271] ANZCERTA, Article 15:6.
[272] Agreement on Anti-Dumping, Article 14.

of the Agreement and took significant steps toward the integration of the trans-Tasman trade. The centrepiece of this review was a Protocol on Acceleration of Free Trade in Goods ("1988 Protocol") signed by both parties, in which the decision was made to eliminate the anti-dumping measure for trans-Tasman trade and to rely instead on protection against predatory trading practices through harmonized competition provisions from mid-1990s.

Article 4 of the 1988 Protocol declared Article 15 anti-dumping provisions of the original ANZCERTA were now superseded, apart from the text relating to dumping by third countries in the territory of one Member State causing injury to an industry in the territory of the other Member State being intact. At the same time, it ordered that current investigations were to be terminated, and securities and undertaking were to be released from the same date.

The reason for such a decision is clearly presented by the preamble to the 1988 Protocol – the parties believe that the maintenance of anti-dumping provisions in respect of goods originating in the other Member States "cease to be appropriate as the Member States move towards the achievement of full free trade in goods between them and a more integrated market."

This general understanding was further explained by Graham and Richardson, indicating that,

> "In making this decision to abolish anti-dumping within the CER, the Australian and New Zealand governments recognized that... [At first,] different thresholds for establishing dumping and applying competition-law remedies between the two countries – significantly lower in the case of dumping – would have maintained protection for relatively inefficient sectors in the open trans-Tasman market and therefore hampered the efficient allocation of resources [and their efforts to promote competitiveness of the region in global market]... [Second, to maintain the anti-dumping measure] would have required a bigger bureaucracy, which itself would have spawned private-sector operations to service anti-dumping investigations, which would be costly to both countries... [Third,] both governments believed that the removal of trade barriers would make the resort to anti-dumping action increasingly redundant, as the scope for price discrimination between the domestic and export market decreased and the threat

> of cross-Tasman retaliation by competitors increased, with the possible occurrence of arbitrage... [Moreover,] maintaining anti-dumping remedies risked continuing prolonged disputes at an official level (as well as the commercial level), which neither government wanted."[273]

In brief, it was considered that, as of 1 July 1990, trans-Tasman trade was in the nature of domestic rather than international commerce. Therefore the operations of anti-dumping as a remedy to reduce distortion in the pattern of international trade were no longer suitable for trans-Tasman trade.[274] At the same time, safeguards measures, export subsidies or export incentives on goods traded were no longer available in the area, despite the old rules on countervailing duty measures being intact.

In the same Protocol, Paragraph 4 stipulates a crucial obligation that both countries extend the application of their respective competition law prohibitions on the misuse of market power to the trans-Tasman markets by stating that:

> "[e]ach Member State shall take such actions as are appropriate to achieve the application of its competition law by 1 July 1990 to [relevant anti-competitive conduct affecting trans-Tasman trade in goods] in a manner consistent with the principles and objectives of the Agreement."

It was regarded that, such obligation exactly arose from the abandoning of the anti-dumping remedy in ANZCERTA.[275]

To fulfil this requirement, Australia introduced Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990 as a part of section 46A of the Trade Practices Act 1974. The corresponding New Zealand provision is section 36A of the Commerce Act 1966. The doctrine of both provisions is that a corporation ("person", under New Zealand legislation) that has a substantial degree of a market power ("a dominant position", under the New Zealand legislation) in a trans-Tasman market shall not take advantage of ("use", under the New Zealand legislation) that power or position to distort the orderly competitive market.

---

[273] E M Graham and J D Richardson, *Global Competition Policies*, (Institute for International Economics, U.S., 1995), p 399.
[274] P Prove, "The Australia New Zealand Closer Economic Relations Trade Agreement" (1995) 1(1) *International Trade and Business Law* 113.
[275] K M Vautier, J A Farmer and R Baxt (eds), *CER and business competition: Australia and New Zealand in a global economy* (Commerce Clearing House New Zealand 1990).

Developing the elements of the agreement was made easier by the fact that there was already a significant level of compatibility between the competition laws of Australia and New Zealand. New Zealand had closely modelled the competition-law provisions of its Commerce Act of 1986 on those of part 4 of the Australian Trade Practices Act of 1974. Although slightly differences existed between the two countries' new laws covering trans-Tasman trade, a number of further changes were made to enable the new provisions to operate effectively.

The ANZCERTA is an exponent of eliminating anti-dumping measures and applying domestic competition laws to the territory traditionally covered by anti-dumping. However, similar initiatives are very rare in other regional trade agreements. It was emphasised by Peter Prove that the Australia-New Zealand initiatives were greatly facilitated by the close historical associations of the two countries and their mutual confidence in each other's judicial and administrative structures. These are features not necessarily to be found so easily in most existing RTAs.[276]

***Canada-Chile Free Trade Agreement (CCFTA)***

The CCFTA came into force on 5 July 1997 was intended to facilitate and to promote the accession of Chile to the NAFTA.[277] One important area in which the CCFTA surpasses the achievement of the NAFTA parties to date is in trade remedies. In introducing legislation to give effect to this, the Canadian government expressed the hope that this might eventually create a precedent for the elimination of anti-dumping in NAFTA. The elimination of anti-dumping provision is consistent with the Canadian trade position in Canada-United States Free trade Agreement (CUFTA) negotiations.

In the CCFTA, a mutual exemption from the application of anti-dumping laws

[276] P Prove, "The Australia New Zealand Closer Economic Relations Trade Agreement" (1995) 1(1) *International Trade and Business Law* 113.

[277] The NAFTA, which entered into force on January 1, 1994, contains an accession clause (Article 2004) that permits other countries to join, upon the agreement of the existing parties, provided that the acceding countries accept the disciplines of the NAFTA. The Summit of the Americas in Miami in December 1994 provided the occasion for the heads of government of the three NAFTA parties and Chile to announce their decision to begin the process for Chile's accession. Nevertheless, blockage emerged when no agreement could be reached between the US Congress and the Clinton Administration on the terms of fast-track negotiating authority. Against this background, and following consultations with Canada's NAFTA partners, Canada and Chile decided in December 1996 to negotiate an "interim" bilateral free trade agreement that would serve as a bridge to, and help to maintain the momentum toward, eventual NAFTA accession. *See* D Daley, "Canada-Chile: Free Trade Agreement – Introductory Note" (1996) 36 *International Legal Material* 1067.

was agreed upon between Canada and Chile as following:[278]

*Article M-01: Reciprocal Exemption from the Application of Anti-dumping Duty Laws*

1. Subject to Article M-03, as of the date of entry into force of this Agreement each Party agrees not to apply its domestic anti-dumping law to goods of the other Party. Specifically:

(a) neither Party shall initiate any anti-dumping investigations or review with respect to goods of the other Party;

(b) each Party shall terminate any ongoing anti-dumping investigations or inquiries in respect of such goods;

(c) neither Party shall impose new anti-dumping duties or other measures in respect of such goods; and

(d) each Party shall revoke all existing orders levying anti-dumping duties in respect of such goods.

Article M-03 is a phase-in provision requiring that, for each good, the exemption will take effect as of the final elimination of import duties in both parties for that good at the tariff subheading level, or on January 1, 2003, whichever comes first. Regarding "exceptional circumstances that may arise with respect to the operation of [the trade remedies] Chapter", the Agreement provides that, either party may request consultations, which is designed to facilitate the prompt restoration of normal trading conditions.[279]

To ensure that the benefits of the CCFTA were not undermined by private barriers to trade, the parties also agreed upon provisions on competition policy and cooperation in Article J-01.

Unlike the Australia-New Zealand CER, the CCFTA does not require either party to align their competition laws to each other. Instead, the agreement provides very general obligations relating to cooperation in the issues of competition law enforcement policy. The CCFTA obligates the parties to maintain measures prescribing anti-competitive business conduct, and to take appropriate enforcement

[278] See Canada-Chile Free Trade Agreement, Dec. 5, 1996, Canada-Chile, 36 I.L.M. 1067 (1997), Article M-01 and M-03.

[279] CCFTA Article M-04 (1). Paragraph (2) of the same Article states: "Exceptional circumstances may include significant changes in recent trading conditions."

action.[280] In addition, the Agreement requires the parties to consult from time to time about the effectiveness of their competition laws and to cooperate in the enforcement of competition laws in the free trade area.[281] The CCFTA did not require the establishment of a competition authority as both sides already had one. Nonetheless, each party is obliged to designate a contact point to facilitate communication between the parties in any matter covered by CCFTA, including competition policy.[282]

In 2001, the competition authorities of both countries signed a more detailed Memorandum of Understanding (MOU), thus formalising the obligations of Article J-01of the CCFTA while reducing the effect of potential differences in the application of their relevant laws.[283] The MOU provides for *inter alia* notification of the enforcement activities that may affect the other party's interest in the application of its competition law,[284] cooperation and coordination,[285] avoidance of conflicts procedure,[286] and the holding of meetings of competition officials.[287] Thus it was commented that the CCFTA is a typical example of an FTA that eliminates anti-dumping in the presence of effective but not harmonized antitrust regimes.[288]

***The Elimination of Anti-Dumping Measures in Additional RTAs***

In addition to above RTAs, the EFTA-Albania FTA[289], EFTA-Singapore FTA[290] and EFTA-Chile FTA[291] also eliminated anti-dumping measures. For example, Article 16 of the EFTA-Singapore FTA provides that:

> "1. A Party shall not apply anti-dumping measures as provided for under the WTO Agreement on Implementation of Article VI of the GATT 1994 in relation to products originating in another Party.
>
> 2. In order to prevent dumping, the Parties shall undertake the necessary

[280] CCFTA, Article J-01(1).
[281] Ibid, Article J-01(2).
[282] Ibid, Article L-01.
[283] Canada-Chile MOU, Article I(1).
[284] Ibid, Article II(1).
[285] Ibid, Article III.
[286] Ibid, Article IV.
[287] Ibid, Article V.
[288] B Hoekman, "Free Trade and Deep Integration: Anti-dumping and Antitrust in RTAs", World Bank Policy Research Working Paper No. 1950 (World Bank 1998).
[289] EFTA-Albania FTA, Article 17.
[290] EFTA-Singapore FTA, Article 16.
[291] EFTA-Chile FTA, Article 18.

measures as provided for under Chapter V."

Other than above mentioned RTAs that eliminated anti-dumping in intra-regional trade, some RTAs have also expressed their wishes to abolish the anti-dumping in intra-regional trade and placed this conception on agenda. Nevertheless, for a variety of reasons, they still maintain anti-dumping measures at present. For example, the Free Trade Agreement between Chile and Mexico (Chile-Mexico FTA) records that "the Parties undertake to begin negotiations as from the second year following the Agreement's entry into force with a view to the reciprocal elimination of anti-dumping duties",[292] although no conclusion has been made so far. In US-Australia FTA, the agreement does not abolish the anti-dumping duties for bilateral trade directly. However, unfair trading practices are also regulated by the competition policies provided in that agreement.[293] The anti-dumping measures will perhaps be phased-out with the completion of the integration/harmonization of competition policies in both countries. The Common Market of Southern Cone (Mercado Commun del Sur – MERCOSUR) also contains a proposal for their gradual elimination from intra-zone trade before then end of 2001.[294] Nevertheless, subsequent decisions have extended this deadline.

### 3.2.4 Potential Trade Diversion Effect of the Preferential Anti-dumping Measures in RTAs

As discussed in chapter 2, anti-dumping rules are highly technical, containing numerous minor points to affect final determination. Therefore, success or failure of anti-dumping cases may well turn on technical matters. It has been noticed that existing RTAs adopted diverse methods to reduce anti-dumping measures in intra-regional trade. It is quite clear that strengthened rules on anti-dumping in RTAs can largely reduce the import restrictions between RTA partners. However, the impact on third-countries is also worth observation.

In a recent research, Dukgeun Ahn established a particular example to illustrate his concern on potential trade diversion effect with regard to the obligatory "lesser

[292] Chile-Mexico FTA, Article 20-08(b).
[293] US-Australia FTA, Chapter Fourteen: Competition-Related Matters.
[294] See MERCOSUL/CMC/DEC. N°28/00.

duty" rule agreed upon in RTAs.[295]

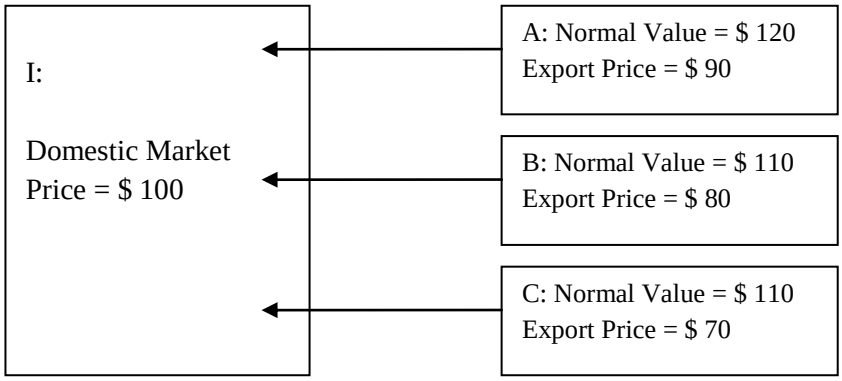



Figure 4. Trade diversion case by preferential anti-dumping action (*this figure is also taken from Dukgeun Ahn's work*)

"Suppose that Country I imports a gadget from three WTO Members, A, B, and C when the domestic market price is $ 100. Export prices and normal values for each Member are as shown in Figure 4, indicating that all exporters are currently engaged in dumping exportation. In a normal situation without applying a lesser duty rule, Country I would impose anti-dumping duties of $ 30, $ 30 and $ 40 for Country A, B, and C, respectively, to make up for the dumping margins that are the difference between normal values and export prices. The competitive conditions among exporters are restored with anti-dumping duties that make normal values actual competition prices in Country I.

But suppose that Countries I and A established an FTA arrangement in which both countries agree on a lesser duty rule. In that case, Country I can impose the anti-dumping duty of only $ 10 to address the injury margin, not the dumping margin of $ 30, against Country A. So, the market price – including anti-dumping duty – for gadgets from A in Country I would be $ 100, whereas the prices for B and C be $ 110. Therefore, the preferential anti-dumping system under the FTA can also seriously distort competitive conditions among competitors, causing potentially substantial adverse effects

[295] D Ahn, "Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules" (2008) 11(1) *Journal of the International Economic Law* 107, pp. 131-32.

on non-party countries."

It shows the fact that the preferential treatment in anti-dumping duty collection within the RTA has a direct impact on the imports price competition. If the demand for certain products in a domestic market is stable, applying lower duty to the imports from RTA partners would undoubtedly offer an opportunity to the firms of RTA partners to lower the exporting price of the products and therefore it would be easier for them to gain more market share, at the expense of the market share maintained by the imports from third-parties. This would result in increased barriers of market access for the imports from third-parties. Dukgeun Ahn stressed that, considering the fact that competitive conditions among exporters critically hinge on relative competitive advantages, distortion caused by preferential trade remedy systems may have considerable economic implication in a real economy.[296]

The non-cumulation method in injury determination of an anti-dumping case (as provided in the US-Israel FTA), on the other hand, may be regarded as a parallel provision of selective safeguard application in the anti-dumping system. When an import from an RTA party is separated from – *i.e.* not cumulated on – other countries' exportation for the purpose of injury determination, the RTA party is very likely to be exempted from the coverage of anti-dumping action since injury determination regarding imports from the RTA party tends to be negative, especially in the case of small exporters. Unlike the special treatment in terms of dumping margin calculation that normally works to reduce anti-dumping duties, a non-cumulation provision affecting injury determination is much more inclined to completely exclude RTA parties from anti-dumping actions. Then, exactly like selective safeguard application cases, trade diversion in favour of RTA parties may become more serious under a systemically created preferential system for anti-dumping measures. Nevertheless, whether these preferential treatments are consistent with the relevant WTO rules is so far unclear.

## 3.3 Countervailing Duty Measures in RTAs

Under multilateral rules, countervailing duties can be levied on imports which

[296] Ibid, p 131.

benefit from subsidies if they cause or threaten material injury to an established domestic industry, or are such as to retard materially the establishment of a domestic industry. Similar to anti-dumping in RTAs, three approaches are found in the case of countervailing duty measures, i.e. 1) retain the right to apply a countervailing duty measure; 2) establish some kind of mechanism to make lesser use of the measure while maintaining the right to apply; or 3) abolish the application of the measure.

In the RTAs observed by this research, the great majority either have no CVD provisions or clearly maintain the right to apply WTO CVD measures among the parties (see Table 5, category A and B). Only four RTAs abolished the CVD, namely China-Hong Kong, China-Macao, the EEA and the EFTA (in the EEA and EFTA, abolition of CVD measure does not extend to agricultural and fishery products) (see Table 5, category F). Only the Korea-EU FTA and the EU-Columbia-Peru FTA provide substantive preferential treatment on CVD with a "public interests" clause and codification of "lesser duty" rules on application of the measures (see Table 5, category D). The remaining RTAs may be classified as those containing certain special conditions different from the WTO rules primarily because they have regional bodies to conduct CVD investigations or have the power to review and remand final CVD determinations. Therefore, maintenance of the WTO CVD measure in intra-regional trade is the main trend in existing RTAs.

What makes the variance of RTA-specific CVD measures different from AD is that the CVD measure responds to subsidy – a governmental practice that is also subject to multilateral or bilateral disciplines. Accordingly, adoption of the CVD measure in a RTA usually hinges on the presence of a common policy/programme on subsidies or any additional disciplines that are imposed on the use of subsidies and state aid. Such relation was succinctly explained in 2007 WTO Working Paper that,

> "If the RTA members have a common policy on subsidies or state aid, they may be able to dispense with the use of countervailing duties. Alternatively, if the RTA members are able to agree on additional disciplines that apply to subsidies or state aid, then it may be possible to limit the application of countervailing duties in the RTA. But absent a common subsidy policy or additional disciplines on subsidies, it is unlikely for the provisions governing countervailing duties in

the RTA to depart from multilateral rules or practice."[297]

The difficulty in agreeing reduction or elimination of subsidies in RTA negotiations lies in the fact that part of the trade benefits from that will be captured by non-members. That the only meaningful negotiation on further reduction in agricultural subsidies is occurring at the multilateral level may explain WTO Members' reluctance to give away such a 'freebie' and thus they haven't put subsidy programmes on the table in their RTA negotiations. As consequence, CVD measures continue to be needed as a weapon to wield against such support.[298]

**Table 5 Variances of Countervailing Duty Measures in RTAs**

| | **Countervailing Duty Measures in RTA** | ***Common/Additional Subsidy Rules*** | **Result** | **Example(s)** |
|---|---|---|---|---|
| **A** | No provisions/directly refer to WTO CVD rules | *NA* | RTA partners are completely bound by WTO CVD rules | RTAs are not listed in the sections below |
| **B** | No provisions/directly refer to WTO CVD rules | *Available* | RTA partners are bound by WTO CVD rules (but less CVD measures will be activated if they adhere to regional subsidy rules) | EFTA-Israel |
| **C** | Maintain WTO CVD with modification on application thresholds | *NA* | RTA partners are bound by WTO CVD rules with higher threshold | NA |
| **D** | Maintain WTO CVD with modification on application thresholds | *Available* | RTA partners are bound by WTO CVD rules with higher threshold (and less measures will be activated if they adhere to regional subsidy rules) | EU-Korea FTA, EU-Columbia-Peru FTA |
| **E** | Abolish CVD measures | *NA* | RTA partners are neither bound by WTO CVD rules | NA |

[297] R Teh, T J Prusa and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03, p16.
[298] Ibid, p 22.

| | | | | |
|---|---|---|---|---|
| | | | nor common subsidy rules | |
| **F** | Abolish CVD measures | *Available* | No WTO CVD measure is applicable on regional subsidised imports;<br>RTA partners are completely bound by regional subsidy rules | China-Hong Kong, China-Macao, EEA, EFTA |

### 3.3.1 Maintenance of Right to Apply CVD measures

Regarding maintenance of the right to apply CVD measures in a RTA, a typical example may be demonstrated by the relevant provision in the EU-Mexico FTA, a FTA that maintains both WTO anti-dumping and CVD measures. The Community and Mexico confirm their rights and obligations arising from the WTO Agreement on Implementation of Article VI of the General Agreement on Implementation of Article VI of the GATT1994 and from the WTO Agreement on Subsidies and Countervailing Measures.[299]

In the New Zealand-Singapore FTA, the relevant text is laid down as:

"1. The Parties agree to prohibit export subsidies on all goods including agricultural products.

2. If either Party grants or maintains any subsidy which operates to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the other Party of the extent and nature of the subsidisation, of the estimated effect of the subsidisation on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidisation necessary. In any case in which it is determined that serious prejudice to the interests of the other Party is caused or threatened by any subsidisation, the Party granting the subsidy shall, upon request, discuss with the other Party the possibility of limiting the subsidisation. This paragraph shall be applied in conjunction with the relevant applicable provisions of the General Agreement on Tariffs and Trade 1994 (GATT 1994)

[299] Article14, Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000.

and the WTO Agreement on Subsidies and Countervailing Measures (WTO SCM Agreement).

3. The Parties reaffirm their commitment to abide by the provisions of the WTO SCM Agreement in respect of actionable subsidies.

4. Each Party shall seek to avoid causing adverse effects to the interests of the other Party in terms of Article 5 of the WTO SCM Agreement."[300]

Although this provision adds an additional obligation on prohibition of export subsidies on agriculture products, it virtually adheres to the WTO CVD rules.

As mentioned in section 3.2.3, the Canada-Chile FTA and the ANZCERTA are two RTAs that have eliminated anti-dumping measures in their regional trade. Nonetheless, such elimination does not extend to the WTO CVD measures.[301] A party will still have recourse to countervailing duties as permitted under the WTO if its domestic industry is injured, or threatened with injury, by subsidized imports from the other party.

### 3.3.2 Special Mechanism for Lesser Use of CVD Measure

Under WTO law, imposition of CVD measures is subject to a number of disciplines. The substantive requirements include determination of subsidy, determination of injury and determination of appropriate remedies; the procedural requirements include the requirement on initiation, consultation, investigation, evidence, retroactivity, duration, review and transparency.[302] In common with AD, those RTAs that having special mechanism of CVD measures generally accept the definition of subsidy under the WTO rules, pattern regional CVD regimes after the SCM Agreement and contain special conditions that aim to reduce the application of CVD measures. However, unlike AD, in those cases that existing RTAs altered the WTO rules in diverse aspects, most RTAs only contain a special institutional mechanism, e.g. the existence of regional bodies, with regard to the CVD measure.

Nonetheless, because of the close relationship between CVD measures and subsidy policies, the establishment of common policy or additional disciplines on

[300] New Zealand-Singapore FTA, Article 7.
[301] Canada-Chile FTA, Article M-01 to M-08; ANZCERTA, Article 16.
[302] See section 2.3 of this thesis.

subsidies or state aid in RTAs forms a unique mechanism that reduces or replaces the use of CVD measure. Therefore, it will be included in the discussion below.

*1) Special conditions in RTA-specific CVD rules*

In the RTAs observed in this research, only the Korea-EU FTA and the EU-Columbia-Peru FTA provide substantive preferential treatment on CVD: one condition put forward is a "public interests" consideration on application of a CVD measure, the other is a "lesser duty" clause in respect of the collection of countervailing duties.

In EU-Colombia-Peru FTA, Article 39 provides that, with regard to anti-dumping and CVD measures,

> "[i]n accordance with their domestic law, the EU and Colombia shall provide the opportunity for industrial users and importers of the product under investigation, as well as for representative consumer organisations, as appropriate, to provide information which is relevant to the investigation. Such information shall be taken into account by the investigating authority, to the extent that it is relevant, duly supported by evidence and filed within the time limits specified in the domestic law."

Pursuant to this "pubic interests" provision, the investigating authorities are responsible to not only take account of the losses of industries who are suffering from the subsidised imports, but also to take care of the needs of commercial users and consumers who benefit from the subsidised goods. Therefore, it is likely to reduce the initiation of CVD measures in the RTA.

Similar to anti-dumping measures, countervailing duty measures are aimed at eliminating certain unfair advantages the exporters gained from government subsidies, thus the amount of the subsidy paid establishes a ceiling for the total amount of duties that can be levied on entries of the subject products. WTO law also encourages importing countries to apply lesser duty, if it would be adequate to remove the injury to the domestic industry, but, as with the AD rule, it is not a legal obligation.[303] Therefore, the importing countries can still charge higher duties than the necessary level if they wish to do so. In the Korea-EU FTA and the EU-

[303] WTO SCM Agreement, Article 19.2.

Columbia-Peru FTA, however, the "lesser duty rule" was officially codified.[304] For example, Article 40 of the EU-Columbia-Peru FTA provides that,

> "Notwithstanding their rights under the Anti-dumping Agreement and the Subsidies Agreement as regards the application of anti-dumping and countervailing duties, the EU and Colombia consider it desirable that duty applied be less than the corresponding margin of dumping or subsidy, as appropriate, if the lesser duty would be adequate to remove the injury to the domestic industry."

Accordingly, the investigating authorities, when collecting the countervailing duties from the other side, are very likely to apply the least amount, as long as such an amount is adequate to remove the injury to the domestic industry. The "lesser duty" rule on CVD measures ensures the countervailing duties are not abused, unless it is "necessary" to remedy the adverse effect caused by the subsidies at issue.

*2) Common policy or additional disciplines on subsidy/state aid in RTAs*

In section 3.2.3, it was noted that the ANZCERTA is perhaps the FTA that has gone the farthest in regional integration; most border measures have already been eliminated in the Trans-Tasman trade. Such elimination however does not extend to the CVD measures. Instead, the ANZCERTA includes disciplines on subsidies that are stronger than those contained in the WTO rules.

In the ANZCERTA, all export subsidies were eliminated in internal trade by 1987. Regarding domestic support, following the first five-yearly General Review of the ANZCERTA in 1988, the two members signed an Agreed Minute on Industry Assistance agreeing not to pay (from July 1990) production bounties or similar measures on goods exported to the other member and undertook to attempt to avoid the adoption of industry-specific measures (bounties, subsidies and other financial support) that have adverse effects on competition within the FTA. Following the second five-yearly General Review in 1992, this was strengthened by an agreement that each member would also give due consideration to representations from the other member on the effect that industry-specific, non-financial assistance may have on competition within the FTA. These measures have gone a long way towards the

[304] Korea-EU FTA, Article 3.14; EU-Colombia-Peru FTA, Article 40.

elimination of subsidy-related trade distortions of all forms, a unique accomplishment among RTAs.[305] As consequence, CVD measures have never been used since the ANZCERTA came into effect.

The Korea-EU FTA and the EFTA-Israel FTA are two RTAs that provided additional disciplines on subsidy.

The Korea-EU-FTA builds on the notion of a subsidy according to the relevant WTO rules; however, it introduced two additional types of prohibited subsidies – unlimited guarantee on debts and subsidies for ailing companies without a credible restructuring plan.[306] Highlight on these two forms of subsidies derives from the EU state aid rules, in which they are identified as the most distortive subsidies to trade.

Accordingly, first, the parties cannot therefore guarantee the debts or liabilities of certain enterprises without any limitation. The added value lies in the fact that an unlimited guarantee of this type, which would amount to a highly distortive permanent operating aid, would breach the agreement. Second, the parties can only grant support to ailing companies if they present a reasonable restructuring plan that ensures long-term viability and contribute themselves to the costs of restructuring. This provision transposes the centerpiece of the EU's state aid rules[307] into this bilateral agreement, and ensures that ailing companies are not artificially kept alive through public subsidies alone. This will increase the chances of efficient companies on both sides expanding their market shares at the cost of firms with unviable business models.

From the legal perspective, this provision is distinguishable from the prohibited subsidy rules of the WTO SCM Agreement.

First, specific subsidies to enterprise, especially when in financial distress, are explicitly highlighted as prohibited subsidies. In other words, the subsidies are disciplines based on the nature of the recipients. This is contrast with the WTO law that prohibits the subsidies based on use of subsidies – contingency in export performance or import substitution.

Second, unlike the prohibited subsidy rules under the WTO SCM Agreement,

[305] OECD, *The Relationship between Regional Trade Agreements and the Multilateral Trading System* (OECD 2002), pp 11-12.
[306] Korea-EU FTA, Article 11.11.
[307] See EC Commission, "Community guidelines on State aid for rescuing and restructuring firms in difficulty", Official Journal C 244, 01.10.2004, pp 2-17.

the provision requires the injury condition, i.e., "adverse effect" to trade of the other party that is a legal element for actionable subsidies in the SCM Agreement. In this sense, this provision is not a serious modification of the WTO rules. In fact, it is tantamount to the clarification of the SCM Agreement, because FTA parties would be able to rely on the WTO rules to prohibit those subsidies essentially under the same legal conditions. Nevertheless, it demonstrates that Korea and the EU – both among the most frequent targets of the SCM Agreement – have tried to agree on more stringent subsidy disciplines. Of course, if both parties adhere to this additional subsidy discipline, no corresponding CVD measures will be triggered between Korea and the EU.

Contrary to the Korea-EU FTA, the common state aid policy provided by the EFTA-Israel FTA aims to exclude certain types of subsidies from the CVD measures. In other words, the FTA opts certain types of subsidies as "non-actionable subsidies", a category which currently has not been agreed upon at the multilateral level.[308]

In the EFTA-Israel, subsidy and CVD matters are governed by Article 18, providing that:

> "Any aid granted by a Party or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it may affect trade between an EFTA State and Israel, be incompatible with the proper functioning of this Agreement."

In addition, Annex VI of the FTA contains criteria for assessment of the state aid referred in Article 18, Annex VII provides the transparency requirement of state aid measures and Article 23 of the FTA lays down the procedures with regard to correspondent measures that a FTA party can counteract the state aid in the sense of Article 18.

Pursuant to Annex VI (a), the state aid is classified as those measures "which result in a net transfer of funds from State sources to the recipient through direct subsidies or which result in tax revenues foregone through tax concession"; "aid granted under schemes which are fully paid for by the beneficiaries are not State aid in the sense of Article 18". Consequently, four types of subsidies listed in Annex VI

[308] See section 2.3.1 of this thesis.

(b) are regarded as falling outside the scope of the state aid in the sense of Article 18 and thus are not subject to the CVD measure in the EFTA-Israel FTA:

(i) credits and loans from State sources or agencies, if the interest and capital repayments are in accordance with current international market conditions;
(ii) guarantees given by State or State agencies, if the premiums cover the long-term cost of the scheme;
(iii) equity injections by State or State agencies if the rate of return on such investment can reasonably be expected to be at least equal to the cost of State borrowing;
(iv) tax measures including social security charges that are part of the general national income norm for tax purposes, available to all enterprises, and uniformly applied in a country.

Moreover, ten types of subsidies listed in Annex VI (c) are regarded as fully consistent with Article 18, which include:

(i) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
(ii) aid to make good the damage caused by natural disasters or exceptional occurences;
(iii) aid to research, development and innovation;
(iv) aid given to sectors with problems of overcapacity to rationalize the structure of industry by ensuring an orderly downscaling of production and employment;
(v) general aid to export promotion such as national weeks, store promotion, industrial fairs, provided that such aid is not company-specific;
(vi) regional development aid to the extent that it does not interfere with conditions of fair competition;
(vii) the aid in form of general public services to trade and industry on terms and conditions not favouring certain sectors and enterprises;
(viii) general aid for the creation of new employment opportunities provided such jobs are not in sectors already suffering from overcapacity;

(ix) environmental aid;

(x) aid to small and medium-sized enterprises is intended to offset disadvantages directly linked to the size of the firm in question.

Under WTO law, some subsidies highlighted above are not subject to the CVD measures either (e.g. the state aids that are available to all enterprises), but others are entirely actionable or well disputable. The list of "non-actionable subsidies" in the EFTA-Israel FTA is a significant departure from WTO subsidy and CVD rules and will undoubtedly reduce the application of CVD measures between its members.

### 3.3.3 Abolition of CVD Measures in RTAs

In the RTAs observed in this research, only four RTAs have abolished CVD, which are the China-Hong Kong CEPA, China-Macao CEPA, EEA and EFTA (except for agricultural and fishery products). Therefore, abolition of CVD in RTAs is very rare at present and it heavily depends on the existence of a common political system.

In the China, Hong Kong and Macao CEPA, although the economic policies and political cultures of Hong Kong and Macao still differ markedly from Mainland China, Hong-Kong (since 1st July 1997) and Macao (since 20th December 1999) are governed by the political framework of China's "one country, two systems". Accordingly, all subsidy schemes in these three economic entities are meant to be supervised by one central government. A similar case may not happen in other RTAs.

For the EEA and the EFTA, as aforementioned, abolition of CVD measures is a natural result of establishment of a common policy on subsidy under the *acquis communautaire* of the EU.[309]

Although abolishing CVD measures with the establishment of common policy on subsidies or state aid is also possible in other EU-related RTAs, it has been proved that implementing such strategy is not an easy task. Taking the EC-Egypt FTA as an example, subsidies and CVD are governed under separate provisions – Article 23 and Article 34 of the agreement. Article 34 lays down a general rule that prohibits "any

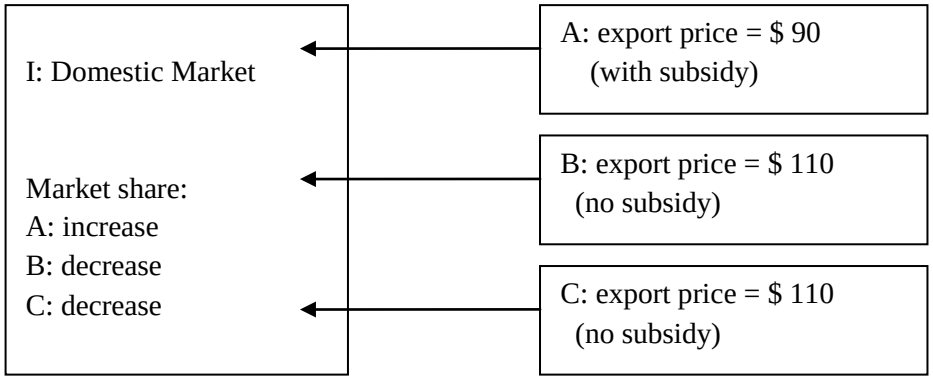
[309] See section 3.2.3 of this thesis.

public aid which distorts, or threatens to distort, competition by favouring certain undertakings or the production of certain goods". In the meantime, it requires the regional body – the Association Council – to build up necessary rules for implementation of the prohibition on public aid within five years of the entry into force of the agreement. Article 23 states that the WTO rules on subsidies and CVD measures shall apply between the parties, until the necessary rules on public aid referred to in Article 34 are adopted. In other words, although the WTO CVD measure is maintained by the EC-Egypt FTA, it is only on a temporary basis and will be abolished once the common policy on public aid is implemented. Similar arrangements are also found in the EC-Croatia, EC-Israel, EC-Jordan, EC-Lebanon, EC-Morocco and the EC-Tunisia FTAs.[310] However, no further development was noticed on this issue, though the prescribed time-schedule has already expired.

### 3.3.4 Potential Trade Diversion Effect of the Preferential CVD Measures in RTAs

Given the fact that very few RTAs have adopted special CVD rules or completely abolished CVD measures in internal trade at present, it does not appear that there is significant threat of trade diversion arising from the specific rules adopted on CVD in RTAs. In theory, unlike the ADA and the Safeguards Agreement, the WTO SCM Agreement provides WTO Members multilateral response to subsidies, which allows a WTO Member to secure its interests in a third-country's market, when the product of such a Member is displaced or impeded by a like product that is granted subsidy. In the case of trade diversion arising from the specific CVD rules in RTAs, a non-RTA country may end this adverse effect by taking countermeasure through such multilateral response.

[310] See EC-Croatia FTA, Article 70; EC-Israel FTA, Article 36; EC-Jordan FTA, Article 53, EC-Lebanon FTA, Article 20 and 27; EC-Morocco FTA, Article 36; EC-Tunisia FTA, Article 36.




Taking Dukgeun Ahn's illustration as example, suppose that Country I imports a gadget from three WTO Members, A, B, and C; export prices for each Member are as shown in above figures, indicating that A granted subsidy on the industry that produces gadgets, but B and C have no subsidy.

When Countries I and A established an FTA arrangement in which both countries agree on abolition of CVD measures, the market share of A is very likely to increase and the market share of B or C may decrease; in other words, trade diversion may happen. Pursuant to the WTO SCM Agreement, B and C will have a way to terminate such adverse effect. If the subsidy granted by A is export subsidy or import substitution subsidy, which is prohibited by the SCM Agreement, B or C may request A to withdraw this subsidy or further refer the case to the WTO dispute settlement mechanism;[311] If the subsidy granted by A is an actionable subsidy, a similar response is available, as long as B or C could demonstrate that the effect of the subsidy is to displace or impede their exports from the market of Country I.[312]

Therefore, with the backup of the multilateral response provided by the SCM Agreement, the special CVD rules or abolition of CVD in RTAs may not distort competitive conditions among competitors as seriously as the case of AD and SGs. The only risk lies in the possibility that some damages are irreversible, although the subsidy might eventually be removed.

## 3.4 Safeguard Measures in RTAs

In chapter 2, it was discussed that, in GATT/WTO, the rationale of safeguard

[311] WTO SCM Agreement, Articles 3 and 4.
[312] WTO SCM Agreement, Articles 5, 6 and 7.

measures is to prevent sharp impact on domestic industry from sudden increased imports resulting from market concessions under the GATT/WTO rules, so that domestic industry could have some breathing space to cope with strong competition.[313] Because of their emergency nature, safeguard measures differ from anti-dumping and countervailing duties which respond to unfair trade practices in various aspects:

1) The safeguard measure can only be applied when the injury to like or directly-competitive domestic industry of the importing country must be at "serious" level;
2) it does not question the fairness of the trading practice on the part of the exporter;
3) it has to be applied on a non-discriminatory basis, i.e. against all imports of the goods irrespective of sources; and
4) once the safeguard measure is applied, the importing country must allow equivalent compensation to the exporting country.

In the context of RTA, preferential reduction/elimination of tariffs and duties are usually lower than the MFN level so that they incur more risk to cause injury (or threat thereof) to domestic industry in RTA member countries before they adapt themselves to the new competition environment. Thus, safeguard measures become very important protective instrument in RTAs, especially in the transition period. According to a WTO report,[314] most RTAs provide for the use of safeguard measures to deal with emergency situations such as balance of payments, structural adjustment or agricultural problems. Emergency safeguard provisions (i.e. GATT Article XIX-type actions) are found in practically all the agreements, whether of a general or a specific nature. To cushion the adverse effect coming from preferential tariff reduction/elimination under the RTA, many RTAs even established a special safeguard mechanism only applicable to intra-regional trade to prevent a serious import surge from regional partners. This is known as a "bilateral safeguard

[313] See section 2.3.1 of this thesis.
[314] This information was extracted from a total of 69 agreements notified in the GATT/WTO and, in principle, currently in force as of 1998. See, WTO Committee on Regional Trade Agreements, *Inventory of Non-Tariff Provisions in Regional Trade Agreements – Background Note by the Secretariat*, WT/REG/W/26, 5 May 1998.

measure".[315] In substance, bilateral safeguard measure is a built-in mechanism that deals with the imports surge resulting from the RTA concessions only. Therefore, it is an *ad hoc* system unattached to the WTO safeguard regime.

As illustrated in the table below (Table 6), in the RTAs observed in this research, almost all of them contained safeguard provisions, but in various combinations: some RTAs adopt multilateral safeguard disciplines in intra-regional trade with no special provisions regarding regional imports (category A). Some RTAs include measures specifically applicable to the RTA bilateral trade while applying equal safeguard measures to any state in global-wide action (category E). Unlike the AD & CVD measures in RTAs, no particular RTA modified the detail application threshold of WTO safeguards that apply in regional trade (category B and F). However, whether having bilateral safeguards or not, many RTAs exclude regional imports from the global safeguards, as long as the imports from the other party are not a substantial cause of serious injury or threat thereof (category C and G). A small number of RTAs even completely abolish the safeguard measure in regional trade (category D and H).

**Table 6 Variances of Safeguard Measures in RTAs**

| | Bilateral SG | Global SG applicable in RTA | Result | Example(s) |
|---|---|---|---|---|
| **A** | NA | No provision/directly refer to WTO SG | Regional imports are subject to WTO SG in any circumstances | Korea-Chile |
| **B** | NA | Maintain WTO SG with modifications on application thresholds | Regional imports are subject to WTO SG but with different thresholds. | NA |
| **C** | NA | Exclude RTA partners under certain conditions | Regional imports are only subject to WTO SG, and may be excluded if it dose not substantially contribute to the serious injury. | US-Israel |
| **D** | NA | Exclude RTA partners in any circumstances | SG is entirely abolished in RTA | New Zealand-Singapore, Australia-Singapore |

[315] Bilateral safeguard measure is not a trade restriction as named only applies between one RTA party and the other. In practice, it is a safeguard measure applies on intra-regional base, which means it can be imposed on one or more parties in an RTA.

| | | | | |
|---|---|---|---|---|
| **E** | Available | No provision/directly refer to WTO SG | Regional imports resulting from RTA concessions are subject to bilateral SG;<br>Regional imports resulting from WTO concessions are subject to WTO SG. | JSEPA, Canada-Costa Rica, EU-Mexico, EFTA-Singapore, Korea-EU |
| **F** | Available | Maintain WTO SG with modifications on application thresholds | Regional imports under RTA concessions are subject to bilateral SG;<br>Regional imports under WTO concessions are subject to WTO SG but with different thresholds. | NA |
| **G** | Available | Exclude RTA partners under certain condition | Regional imports under RTA concessions are subject to bilateral SG;<br>Regional imports resulting from WTO concessions are subject to WTO SG, but may be excluded if it does not contribute significantly to the serious injury. | NAFTA, Chile-Mexico, US-Australia, Canada-Chile, Canada-Israel, New Zealand-Thailand Singapore-Jordan |
| **H** | Available | Exclude RTA partners in any circumstances | RTA parties are regulated by bilateral SG only, which will be abolished after transition period. | ANZCRTA, MERCOSUR, US-Jordan, China-Hong Kong/Macao |

### 3.4.1 Bilateral Safeguard Measures in RTAs

In contrast with the WTO safeguards, bilateral safeguard action is usually permitted only if it is determined that the injury was due to the reduction/elimination of tariffs and duties contemplated in the RTA agreement;[316] this measure is used in the transition period; and, any bilateral safeguard restrictions or increased duties should not exceed the MFN rate in force at the time. For example, NAFTA permits bilateral safeguard measures to be applied to bilateral trade, if the increasing imports of a good from a NAFTA party, as a result of reduction or elimination of duties provided in this agreement, alone constitutes a substantial cause of serious injury, or a threat thereof to a relevant domestic industry of the other party. Such bilateral

[316] This view is also supported by some WTO Members, *e.g.* Israel, in CRTA, *Note on the Meeting of 20 June 1997*, WT/REG31/M/1, 29 July 1997, para 30; Canada, WT/REG38/M/1, para. 44.

safeguard action was in use only during a 10 year transition period which ended on 31 December 2003.[317]

Similarly with anti-dumping and countervailing duty measures, most RTAs do not detail in their texts either the procedures to be followed by parties on the invocation of a bilateral safeguard action or rules for the imposition of the resulting trade-restrictive measures. They generally establish a link to WTO disciplines and stipulate specific conditions on what measures are allowed where necessary. In nearly all of these RTAs, increased imports of a product may trigger a bilateral safeguard mechanism. However, against the multilateral context, at least some of the bilateral safeguards criteria defined in RTAs are less stringent.

*1) Consultation*

Typically, RTAs provide for strict prior consultation and notification and state a preference for measures which least distort their functioning. Regional bodies often play an important role in initial communication and consultation procedures.

In JSEPA (Article 18.3), a party shall immediately deliver a written notice to the other party upon initiating an investigatory process relating to the injury investigation, making a finding of the injury and making a decision to apply such a measure. *Adequate* opportunity for prior consultations should be provided.

The EFTA-Singapore FTA only includes bilateral safeguard measures, and does not mention global safeguard measures at all. Article 17 of the Agreement between the EFTA States and Singapore states that, the party intending to take an emergency measure under this Article shall *promptly* make notification to other parties and the Joint Committee, containing *all* pertinent information which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved, the proposed measure, proposed date of introduction and expected duration of the investigation and the proposed measure.

MERCOSUR stipulates bilateral safeguard measures in the Annex IV Safeguard Clause to the Treaty. Each state party of MERCOSUR may apply safeguard clauses to imports of products benefiting from the trade liberalization programme established

[317] NAFTA, Article 801.

under the Treaty[318]. If imports of a given product damage or threaten serious damage to its market as a result of a significant increase in imports of that product from the other states parties over a short period of time, the importing country shall request the Common Market Group to hold a consultation with a view to *ending* such a situation. The importing country shall accompany its request with a detailed statement of the supporting facts, reasons and justifications. The Common Market Group shall begin consultations within a maximum of 10 calendar days from the submission of the request by the importing country and shall conclude them, having taken a decision thereon, within 20 calendar days from the start of consultations.[319] To minimise the distorting effect of the safeguards, the MERCOSUR parties agreed to use these rules only in *exceptional* cases. However, as a consequence of the expiration of the transitional period at the end of 1994, the bilateral safeguards have no longer been applicable.

*2) Injury requirements*

As previously mentioned, bilateral safeguard is essentially a built-in mechanism that deals with the imports surge resulting from the RTA concessions only. Therefore, apart from most EU-related FTA agreements,[320] almost all RTAs observed in this research linked the invocation of a bilateral safeguard measure to injuries resulting from preferential concessions granted in the agreement. Such requirement ensures that the regional imports will not be wrongly captured by bilateral safeguard action, if an increasing of imports that causes or threatens to cause serious injury to a RTA country's relevant industry is a result of the tariff concessions under the WTO. In that case, a global safeguard measure should apply irrespective of any resources of the imports. To enhance such assurance, other RTAs facilitated with a bilateral safeguard mechanism also provide that the bilateral safeguard can be applied only if such imports of goods from a RTA party *alone* constitutes a substantial cause of serious injury, or threat thereof to a relevant domestic industry of the other party. For example, In NAFTA, bilateral safeguard measures can be applied to bilateral trade in

[318] MERCOSUR, Annex IV Safeguard Clause, Article 1.
[319] Ibid, Article 2.
[320] It was noticed that most of the EU-related FTA agreements do not contain such requirement, however, the new generation EU-related RTAs, e.g. the Korea-EU FTA and the forthcoming EU-Columbia and Peru FTA clearly build up the link. See Korea-EU FTA, Article 3.1.1; EU-Columbia and Peru FTA, Article 48.1.

NAFTA only if:

1) the increasing imports of a good from a NAFTA party is a result of reduction or elimination of duties provided in this agreement,
2) such increasing imports of a good from a NAFTA party *alone* constitute a substantial cause of serious injury, or threat thereof to a relevant domestic industry of the other party.[321]

Similar provisions are found in JSEPA[322] and other US related RTAs, e.g. the US-Jordan FTA[323], US-Australia FTA[324] and US-Singapore FTA[325].

Under WTO safeguard rules, the standard injury requirements for invocation of emergency safeguards are serious injury (or threat thereof), or substantial cause of serious injury (or threat thereof). Compared with the WTO safeguard rules, the array of reasons provided for in RTAs for invoking emergency safeguards among parties is also wider-ranging.

Some RTAs attach importance on the general economic and social status of the region, including serious economic, social or environmental difficulties of a sectoral or regional nature, trade deflection, serious detriment (or threat thereof) to the external financial stability caused by imports from regional partners, etc. Such provisions are popular in European-country-related RTAs. For example, the EEA and EFTA state that, a member state may unilaterally take appropriate safeguard measures "if serious economic, social or environmental difficulties of a sectorial or regional nature liable to persist are arising..."[326] In the EU-Mexico FTA, bilateral SG is applied when (a) "serious injury to the domestic industry of like or directly competitive producers in the territory of the importing party"; or (b) "serious disturbances in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region of the importing party".[327] Similar conditions are provided in a number of EFTA-related RTAs, e.g. the EFTA-Croatia FTA and the EFTA-Israel FTA.[328]

[321] NAFTA, Article 801.
[322] JSEPA, Article 18.
[323] US-Jordan FTA, Article 10.
[324] US-Australia FTA, Article 9.1.
[325] US-Singapore FTA, Article 7.1.
[326] See EEA Agreement Articles 112, 113 and 114, and EFTA Convention Articles 40 and 41.
[327] Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000, Article 15.
[328] EFTA-Croatia FTA, Article 22; EFTA-Israel FTA, Article 20.

*3) Applicable measures*

The applicable measures of bilateral safeguards usually take the form of an increase in the rate of tariff and duty on the certain goods involved in the action. Again, because the bilateral SG aims to regulate the regional trade flows under RTA concessions, almost all RTAs indicate that the applicable measures that remedy or prevent the injury shall not be at a level higher than the MFN rate. At the same time, most RTAs reclaim the requirement contained in the WTO Safeguard Agreement, that the applicable measure shall be no more than the minimum extend necessary to prevent or remedy the injury.[329]

In addition, some RTAs provide that any member, who intends to invoke safeguard action, must propose a mutually acceptable schedule to progressively liberalise safeguard measures in a reasonable timescale. The EU-Mexico FTA Article 15 provides that "such measure shall contain clear elements progressively leading to their elimination at the end of the set period, at the latest."

Quite different to WTO safeguard rules, not all bilateral safeguards are to be imposed on a non-discriminatory basis amongst regional members. In NAFTA, bilateral safeguard measures can only involve tariff changes (not quotas) and any increased duty must not exceed the most favoured nation rate in force at the time, or at the time NAFTA came into force, whichever is the lesser. Noteworthy, Article 801 does not clarify whether the imposition of bilateral safeguard measure shall be based on the MFN principle in NAFTA, where an importing member encounters serious injury or the threat of serious injury on its domestic industry from another member. In practice, the importing member imposes safeguard measures only to the country whose imports individually constitute a substantial cause of serious injury or threat thereof.[330] But in the EFTA[331] and the EFTA-Israel FTA[332], it was clearly stated that the affected member states may suspend preferences provisionally and *without discrimination.*

[329] For example, the EU-Mexico FTA, EFTA, and the JSEPA.
[330] See NAFTA, Final Panel Reports, *U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico (Broom Corn Brooms)*, USA-MEX-1997-2008-01, adopted on 30 January 1998, http://registry.nafta-sec-alena.org/cmdocuments/4ec05db7-9497-48cf-87cf-930c206afd93.pdf
[331] EFTA Convention Article.40, 41.
[332] EFTA-Israel FTA Article 25.

*4) Time span*

Pursuant to WTO safeguard rules (global safeguard measure), the period of a safeguard measure shall not exceed four years. The measure can be extended only once up to four more years if the continuation of the measure is determined necessary to remedy or prevent serious injury and there is evidence that the injury is adjusting. The total period of a safeguard measure including the period of any preceding provisional measure cannot exceed 8 years.[333]

In contrast to WTO safeguard rules, RTAs often regulate more stringent time limits for safeguard measures to apply. Bilateral safeguard measures are basically only available during a transition period (except that a small number of RTAs permit the use of it with the consent of the other party after the transition period has expired, e.g. the Korea-EU FTA[334], NAFTA[335], Canada-Cost Rica FTA[336] and Chile-Mexico FTA[337]). In addition, the time span of bilateral safeguards is much shorter, along with stricter limits on extension and re-application of the measure.

For example, in JSEPA, bilateral safeguards can only be used once and up to one year during the transition period.[338] In both the EU-Mexico FTA and EFTA-Singapore FTA, measures can be taken only for a period not exceeding one year or with strict exceptions for three years; no measures shall be applied to the import of a product which has previously been subject to such a measure for a period of at least five years, since the expiry of the measure.[339] In the Canada-Costa Rica FTA, "no [bilateral safeguard] action may be maintained for a period exceeding 3 years. During the transition period, the party may apply safeguard measures to the same good no more than 2 times."[340] In the US-Australia FTA, bilateral safeguard measures shall be applied not exceeding two years except that the period may be extended by up to two years provided that the measure continues to be necessary.[341]

[333] WTO Agreement of Safeguards, Article 7.3 and See section 2.3.3(5) of this thesis.
[334] Korea-EU FTA, Article 3.2(5).
[335] NAFTA, Article 801.
[336] Canada-Costa Rica FTA, Article VI.2.
[337] Chile-Mexico FTA, Chapter 6-02.3.
[338] JSEPA, Article 18.
[339] EU-Mexico FTA, Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000, Article 15; EFTA-Singapore FTA, Article 17(3).
[340] Canada-Costa Rica FTA, Article VI.2.
[341] US-Australia FTA, Article 9.1.

### 3.4.2 Global Safeguard Measure Provisions in RTAs

Unlike anti-dumping and countervailing duty measures in RTAs, no particular RTA has been identified in this research that modifies the detailed threshold of WTO safeguards that apply to regional trade. Instead, application of global safeguard action for intra-trade varies depending on whether it is abolished in a RTA. Accordingly, three different approaches are found in existing RTAs:

a) abolish global safeguards in any circumstances;
b) abolish global safeguards in principle but with exceptions under certain conditions; or
c) apply global safeguard measures irrespective of intra-trade or trade with non-members

**a) RTAs which abolish global safeguard measures**

In all RTAs observed in this research, only the New Zealand-Singapore FTA and Australia-Singapore FTA abolished global safeguard measures unconditionally. Since both FTAs have no bilateral SG mechanism, no forms of safeguard measures are permitted in these two FTAs.

Article 8 of the New Zealand-Singapore FTA explicitly provides that:

> "Neither Party shall take safeguard measures against goods originating in the other Party from the date of entry into force of this Agreement".

In the Australia-Singapore FTA, Article 9 reads as:

> "A Party shall not initiate or take any safeguard measure within the meaning of the WTO Agreement on Safeguards against the goods of the other Party from the date of entry into force of this Agreement."

Both the ANZCERTA[342] and MERCOSUR[343] also abolished global safeguard measures. Nevertheless, such abolition did not take place until the end of the transitional period.

[342] Safeguard measures between Australia and New-Zealand was originally provided in Article 17 of the ANZCERA and it is in transitional nature. Since the transition period ended when free trade in goods based on the Protocol of 1988 was achieved, the safeguard measures were abolished in the ANZCERTA.
[343] MERCOSUR, *Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, Annex IV, Article I.

The best explanation as to the rarity of abolition of global safeguards in RTAs may be the emergency nature of safeguard measures. On-going reduction/elimination of tariffs and duties cross borders without any protective instruments – even the last resort, i.e., the emergency safeguard measures – may cause vital crisis to domestic competitive industries.

The reasons for eliminating global safeguards between Australia-New Zealand and Singapore were perhaps because: 1) there is mutual confidence in each other's judicial and administrative structures, and; 2) the manufacturing industries in Australia-New Zealand and Singapore are generally complementary to each other. Thus, the risk arising from each other's imports is relatively small. If a crisis happens, it can be solved at a diplomatic level.

**b) RTAs which abolish global safeguards in principle but with exceptions under certain conditions**

The RTAs that abolish global safeguards in principle but with exceptions under certain conditions are NAFTA[344], the Canada-Chile FTA[345], and the Canada-Israel FTA[346], which mainly concern Canada and the US. The safeguard action in principle is abolished for intra-trade, unless the import share of a member country accounts for a substantial share of total imports or is importantly contributing to the serious injury. For example, NAFTA Article 802 reserves to each member government the right to impose global safeguard measures authorized by GATT Article XIX and the WTO Agreement on Safeguards. However, it also provides that, NAFTA member exports "must be excluded" unless they account for a "substantial share" of total imports; and action can only be taken against these exports, when they considered individually or together with those of the other NAFTA member, contribute "importantly" to the serious injury. "Substantiality" is defined in terms of whether the NAFTA member was one of the top five suppliers to the market over the previous three years. An important contribution is deemed not to have arisen where the growth rate of imports from the NAFTA member concerned is "appreciably lower" than that of the other import sources. Preferential treatment to NAFTA exporters is also provided in

[344] NAFTA, Article 802.
[345] Canada-Chile FTA, Article F-02.
[346] Canada-Israel FTA, Article 4.6.

restricting the importing NAFTA member from reducing imports below the trend of imports, and also requiring allowance for reasonable growth.

**c) RTAs which apply global safeguard measure irrespective of intra-trade or trade with non-members**

The RTAs which apply global safeguard measure irrespective of intra-trade or trade with non-members are the EEA, the EFTA[347], the Korea-EU FTA[348], the EU-Columbia and Peru FTA,[349] the EFTA-Canada FTA[350], the EFTA-Chile FTA[351], the JSEPA[352] and the Japan-Brunei Darussalam FTA[353], which mainly concern the European countries and Japan.

Although RTAs under this category appear to fully respect the WTO safeguard rules, for those RTAs facilitated with bilateral safeguards, these two types of measures usually cannot be applied cumulatively. This may also give rise to discrimination in global safeguard actions. The Korea-EU FTA, Article 3.7(4) and the EU-Columbia and Peru FTA, Article 45 express that products under bilateral safeguard measures should not be subject to global safeguard measure.[354] Put differently, when one party applies global safeguards, the relevant imports from the other party must be excluded if such imports are subject to bilateral safeguards. In this circumstance, duties on the product from the FTA party will be no more than the MFN rate, while other countries' product will confront higher customs duties.

### 3.4.3 Trade Diversion Effect of the Preferential Safeguard Measures in RTAs

The major problem of selective application of global safeguard measures rests on the fact that such application of safeguard measures often results in substantial change of import sources instead of import volumes. As illustrated in the *US – Line*

[347] EFTA, Article 40(4).
[348] Korea-EU FTA, Article 3.7(1).
[349] EU-Columbia and Peru FTA, Article 43.
[350] EFTA-Canada FTA, Article 25(11).
[351] EFTA-Chile FTA, Article 20.
[352] JSEPA, Article 18(5).
[353] Japan -Brunei Darussalam FTA, Article 21(6).
[354] Similar provision is also noticed in EU-Columbia and Peru FTA, Article 45.

*Pipe* case, the exclusion of NAFTA parties from US safeguard measures resulted in import reduction mainly from Korea that was the historically largest exporter; however, at the same time, a significant increase of import from Mexico to leave overall import roughly unchanged. Mexico actually became the largest exporter after the imposition of – indeed, exemption from – the safeguard measure.[355] In an empirical work that analysed the impact of the discriminatory safeguard measures, it was also proved that formal exceptions for RTA partners do allow these countries to gain market share on average, sometimes at the expense of other suppliers.[356] However, whether such preference is legally allowed under the WTO framework is questionable.

## 3.5 Special Institutional Mechanism Applies to TRM Issues in RTAs and the Influence

In addition to the substantive changes on TRMs, many RTAs are facilitated with regional bodies, which also affect the trade remedy measures in regional trade. Some of them act as a forum for negotiation, some are able to review domestic investigations, and some are given a role to conduct investigations themselves. Although there are clear distinctions between the different powers that are available to those regional bodies, with the authority to monitor/conduct the investigating process, the regional institutions either work as good office where disputes arise, or handle the cases directly to prevent arbitrary use of TRMs led by national authorities. These regional institutions usually govern all trade remedy issues as well as the subsidies. This tends to be the most prevalent feature of the RTA-specific countervailing provisions that are different to the WTO regime.

In the case of the EU-related RTAs, almost all of them contain specific provisions on TRMs. These provisions have a number of common features. In particular, there is always a regional body (named as "joint committee", "trade committee", "cooperation council" etc.) that is established to oversee the whole

[355] D Ahn, "Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules" (2008) 11(1) *Journal of the International Economic Law* 107, at 129; see also WTO Panel Report, *US – Line Pipe*, WT/DS202/R, adopted 8 March 2002, para 4.26.

[356] C P Brown and R McCulloch, "The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact", in M G Plummer (ed.), *Empirical Methods in International Trade: Essays in Honor of Mordechai Kreinin* (Edward Elgar Publishing 2004) 145.

regional trade agreement. With the sole exception on the EEA, all the RTAs concluded by the EU subject the imposition of trade policy measures to a consultation procedure.

For example, the Korea-EU FTA is facilitated with a "Working Group on Trade Remedy Cooperation" with the function to:

(a) "enhance a Party's knowledge and understanding of the other Party's trade remedy laws, policies and practise;
(b) oversee the implementation of this Chapter;
(c) improve cooperation between the Parties' authorities having responsibility for matters on trade remedies;
(d) provide a forum for the Parties to exchange information on issues relating to anti-dumping, subsidies and countervailing measures and safeguards;
(e) provide a forum for the Parties to discuss other relevant topics of mutual interest including:
    (i) international issues relating to trade remedies, including issues relating to the WTO Doha Round Rules negotiations; and
    (ii) practices by the Parties' competent authorities in anti-dumping, and countervailing duty investigations such as the application of 'facts available' and verification procedures; and
(f) cooperate on any other matters that the Parties agree as necessary."

Accordingly, when (or even before) a trade remedy action is initiated, the parties involved must inform the regional body immediately and launch consultation with attempts to arrive at a mutually agreed solution. Trade remedy action proceeds, only if no mutually acceptable solution is reached.

The RTAs, into which the EFTA countries have entered with the same partners as the EU, also exhibit similar patterns. For example, the EFTA-related RTAs widely include a requirement that before one RTA party initiates an CVD investigation to determine the existence, degree and effect of any alleged subsidy in the other party, the former must make written notice to the later with a view to finding a mutually acceptable solution under the supervision of the Joint Committee.[357] . Apart from serving as a forum for consultations or notifications, they play no central role in the

[357] See EFTA-Columbia FTA, Article 2.15(2); EFTA-Mexico FTA, Article.11; EFTA-Albania FTA, Article. 16.

trade remedy investigation process. The requirement for consultation and/or the involvement of the overarching institutional body prior to the adoption of protective measures in fact acts as a sort of safety valve in anti-dumping cases in RTA.

Compared with the regional body that simply serves as a negotiation forum for TRM issues, NAFTA provides for an *ad hoc* bi-national panel, which has power to review final anti-dumping and CVD determinations as a replacement for domestic judicial review. On its own initiative, an involved NAFTA party may request review of a final determination by a panel based on the request of a person who would otherwise be entitled under the law of the importing party, to commence domestic procedures for judicial review of that final determination.[358]

Different from a domestic court, a bi-national panel consists of five panelists: each litigant chooses two of the five panelists, and the panelists themselves choose the fifth.[359] Decisions of the five person panels are by majority vote and must be based on the votes of all members of the panel.[360] In case, for any reason, a panellist is not be able to continue to participate in the process or in deliberations, proceedings of the panel shall be suspended pending a selection of a substitute panellist.[361]

Pursuant to Article 1904(3), bi-national panels apply both the law of the country whose agency made the determination under review and that country's standard of review, which otherwise a national court having jurisdiction would apply to the proceeding. The United States, Canada and Mexico all have different standards of review for their various agencies' determinations. These different standards of review have resulted in different results at the bi-national level.

Since the bi-national panels completely replace national judicial review of final anti-dumping and countervailing determinations, the panels either uphold or remand (in whole or in part) a final administrative agency determination in anti-dumping or countervailing investigations. In the event of a remand, the original administrative agency is supposed to reconsider its decision in light of the panel's determination. Panel decisions cannot be appealed to domestic courts.[362] Article 1904(9) states that "the decision of a panel under this Article shall be binding on the involved Parties

[358] NAFTA, Article 1904(5).
[359] NAFTA Annex 1901.2 sets forth the details of the qualifications and selection procedures for the member of a bi-national panel. Panelists are drawn from a roster of 75 individuals, mainly international trade lawyers.
[360] NAFTA, Annex 1901.2(5).
[361] NAFTA, Annex 1901.2(9)
[362] NAFTA, Article 1904(11).

with respect to the particular matter between the Parties that is before the panel".

The introduction of a bi-national panel review mechanism could reduce some of the cost of using domestic judicial review system and secure some fairness of judicial review as seen in the negotiation of the NAFTA.

As a replacement of the domestic courts, one exceptional feature of Chapter 19 dispute settlement is that the bi-national panel's decision is final. Within the panel process there is no appeal of a Chapter 19 bi-national panel decision except where there is an allegation of gross misconduct, bias, or serious conflict of interest, where the panel decision departs from a fundamental rules of procedure, or where the panel exceeds its power, authority, or jurisdiction and such actions materially affected the decision.[363] In such instance alone, an "extraordinary challenge procedure," an appeal of the panel decision, is permitted to a special three person review panel for decision.[364] However, this appeal may be taken only by a NAFTA government, not by the private "interested parties" that appeared before the national administrative agency and the bi-national panel.[365]

The regional agreements of the Central American Common Market (CACM)[366] and Caribbean Community (CARICOM)[367] are also facilitated with a regional body, which usually consists of representatives of all regional members or an expert group on trade issues. Those regional bodies are given the role of conducting investigations and/or reviewing the final determinations of national authorities. With the power to conduct/monitor the investigating process, the regional institutions either work as good office where disputes arise, or handle the cases directly to prevent arbitrary use of the trade remedy measures led by national authorities.

In CACM, the Secretariat for Central American Economic Integration (SIECA) is given the authority to conduct anti-dumping investigations.[368] In the CARICOM, one of the regional organs – the Council for Trade and Development (COTED) – has the authority to conduct anti-dumping investigations, to authorize member states to

[363] NAFTA, Article 1904(13).
[364] See NAFTA, Article 1904, para. 13.
[365] See, NAFTA, Article 1904, paras, 5 and 13.
[366] The CACM was constituted under the "General Treaty on Central American Economic Integration" between Guatemala, El Salvador, Honduras and Nicaragua, signed at Managua in December 1960 and came into force in 1961.
[367] The Caribbean Community, originally called Caribbean Community and Common Market, was established by the "Treaty of Chaguaramas" which came into effect in 1973. The first four signatories were Barbados, Jamaica, Guyana and Trinidad and Tobago; it now extends to 15 Caribbean countries.
[368] "General Treaty on Central American Economic Integration", Article XXI.

apply anti-dumping measures and to keep such measures under review.[369] It is regarded that the use of regional bodies in TRM cases in these RTAs may have been intended as a device to lower the public cost; it also alleviates the potential for domestic producers to lodge a complaint taking advantage of the national investigating authority to seek TRMs. Thus, an RTA that gives a role to regional institutions in conducting investigations and in final determinations may see less initiations and findings on TRMs.[370]

Although the trade diversion effect arising from the preferential TRMs analysed above is theoretically assumptive and may be collective in practice, existing literature has presented some realistic evidence through empirical analysis. For example, in NAFTA case, Goldstein conducted a test is to examine whether there is a significant difference in outcome of the appeals before bi-national panels as opposed to national tribunals.[371] She computed the ratio of the share of US unfair trade orders against Canada as a proportion of Canadian imports to the United States and found that, in 1987, before the FTA, the Canadian ratio of AD orders to its share of US imports was 0.83; by the close of 1990, that number had been reduced to 0.33. This reduction in unfair trade orders occurred only in Canadian trade as the same ratio computed for the European Community and Japan rose during the same period. She attributes this shift to the rulings of the NAFTA bi-national panels. Rugman and Anderson reviewed the initial five-year period (1989-1994) of the operation of CUFTA.[372] They noted that two thirds of Canadian appeals of US trade remedy actions before bi-national panels were remanded compared with one third for non-NAFTA countries before US tribunals, namely the Court of International Trade. Although they are critical of the bi-national panels and make a number of recommendations for improving them, given this evidence they acknowledged that Canada obtained a unique benefit from the bi-national panels under CUFTA.

[369] "Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy", Art 15.
[370] R Teh, T J Prusa and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03 (WTO 2007), p 20.
[371] J Goldstein, "International Law and Domestic Institutions: Reconciling North American 'Unfair' Trade Laws" (1996) 50(4) *International Organization* 541, pp 541-64.
[372] A M Rugman and ADM Anderson, "NAFTA and the Dispute Settlement Mechanisms: A Transaction Cost Approach." (1997) 20(7) *The World Economy* 935, pp 935-50.

## 3.6 Conclusion

From above context, it can be seen that using special TRMs that distinguish from the WTO regime has become a predominant feature of RTAs. Taking the WTO's trade remedy measure as standard, the variances of the RTA-specific TRMs can theoretically be classified into five categories:

1) There is no relevant provision contained in the regional agreement (thereby parties are assumed to be bound by the WTO law);
2) The regional measure completely refers to the WTO rules;
3) The regional measure refers to WTO rules but was modified with lower thresholds on imposition of such a measure;
4) The regional measure refers to WTO rules but was modified with higher thresholds on imposition of such a measure; and
5) The regional measure was expressly abolished in the RTA.

In the RTAs observed in this research, there is no regional TRM provision under category 3). Most RTA parties either maintain their rights and obligations prescribed under the WTO regime or adopted regional trade remedy rules stricter than the WTO law. In order to cope with the pressure resulting from RTA concessions, many RTAs contain *ad hoc* trade remedy mechanisms that only target the regional trade flow, i.e. the bilateral safeguard clauses. However, the trade restriction under bilateral safeguards is usually lower than the MFN level. Therefore, practically all special mechanisms adopted in regional TRMs tend to reduce or eliminate the trade remedy actions in RTAs (see Table 7).

**Table 7 Variances of the TRMs provisions in existing RTAs**

| Different Strategies | 1) No TRMs provision | 2) Refer to WTO rules completely | 3) Refer to WTO rules but specified with lower threshold | 4) Refer to WTO rules but specified with higher threshold | 5) Expressly abolish the TRMs | *Ad hoc* mechanism for RTA concessions |
|---|---|---|---|---|---|---|
| **AD measures** | ✓ | ✓ | NA | ✓ | ✓ | NA |
| **CVD measures** | ✓ | ✓ | NA | ✓ | ✓ | NA |
| **Safeguards** | ✓ | ✓ | NA | ✓ | ✓ | Bilateral safeguards |
| **Effect to the intra-regional trade** | Same as pre-RTA | | More WTO TRMs | Less WTO TRMs | No WTO TRMs | Less WTO TRMs |

By all appearances, the innovations and mechanisms on TRMs in RTAs reduce the number of trade remedy actions and the potential arbitrary use of these instruments between the RTA members. Thus, for most RTAs, they are ultimately positive for internal trade flow. However, whether they would create negative influence on the third-countries is unclear. The prevailing concern on this matter is whether inefficient RTA industries will be artificially maintained or protected at the expense of those efficient industries of third-countries.

The frequency of trade remedy actions in recent decades makes the lesser use of those measures in RTAs more sensitive to the third-counties. It is asserted by some scholars that, while preferential trade remedy rules in RTAs may reduce actions against RTA members, they will not necessarily reduce the total number of actions. Initiations of the TRMs or impositions of the measures against non-members may increase to such an extent that the total incidence of trade remedy actions at the

global level remains unchanged.[373] Through above theoretical and empirical analysis, it may be safe to concluded that, providing preferential TRMs between the RTA partners would, more or less, cause adverse effect to the third-parties.

The advocates of RTAs may argue that as RTA is an exception to the multilateral system, regional integration will unavoidably affect third-countries' interests. Being an exception to the WTO non-discriminatory principle, RTAs are truly allowed certain space to deviate from the WTO general rules. However, neither the WTO agreements on safeguards, anti-dumping and subsidy and countervailing measures, nor the language of Article XXIV of GATT and the 1994 Understanding, which govern the relation between the WTO and the RTAs, are clear enough on the issue of how to treat RTA-specific trade remedy measures. Therefore, it is necessary to examine whether TRMs in RTAs are allowed to deviate from the WTO general rules on TRMs, in what conditions, and to what extent they are allowed to deviate. These questions will be specifically addressed in next chapter.

[373] R Teh, T J Prusa and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03 (WTO 2007), p 13.

# Chapter 4 Legal Criteria for WTO-Consistent Trade Remedy Measures in Regional Trade Agreements

## 4.1 Introduction

Under the WTO agreements, which are based on the MFN principle, countries cannot normally discriminate between their trading partners. If a Member State of the WTO grants another Member a special favor (such as a lower customs duty rate for one of their products), then that country has to do the same for all other WTO Members.[374] Nevertheless, recognizing RTAs could be effective instruments to promote the trade liberalization and foster the economic development of the multilateral trading system, GATT/WTO confers onto the Members which are parties to RTAs a special right to deviate from WTO MFN principle as necessary for the constitution of a customs union or free trade area. As briefly introduced in Chapter 1, GATT Article XXIV, the central provision governing RTA issues in trade of goods under the GATT/WTO framework, allows Members to provide discriminatory trade policies to their regional partners, provided that they adhere to certain transparency requirements, commit to deep intra-regional trade liberalization, and be neutrality *vis-à-vis* non-parties trade.[375]

However, the problem here is, apart from providing some basic rules, GATT Article XXIV does not clearly indicate how TRMs should be managed in RTAs. Therefore, the options on how to adopt the TRMs in RTAs have been significantly left to the individual RTAs since the beginning.

With the proliferation of RTAs in recent decades, such uncertainty has brought more and more disputes and arguments on RTA-related TRMs. Taking the safeguards issue as an example, five out of six safeguard measures have been forwarded to dispute settlement proceedings under the WTO Safeguards Agreement regarding the safeguard actions to date,[376] in which national authorities excluded the products

[374] The Most-Favoured-Nation treatment is stipulated in GATT Article I.
[375] See section 1.4 of this thesis.
[376] These six cases are: (1) Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, "*Argentina – Footwear (EC)*"), WT/DS121/AB/R, adopted 12 January 2000; (2) Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea - Dairy*"), WT/DS98/AB/R, adopted 12 January 2000; (3) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001; (4) Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen*

imported from regional partners from the eventual safeguard measures. The plaintiffs claimed that such conduct seriously violated the non-discrimination requirement under the WTO Safeguards Agreement. It is also regarded by some people as new trade barriers to the non-RTA member countries, contrary to the basic tenet of RTA. However, the defendants responded that such action is a need for the constitution of RTA. It can be justified by GATT Article XXIV – even it violates the Safeguards Agreement. In the face of these disputes and arguments, the WTO negotiators neither reached any agreements nor provided any clear guidance. What has been noticed over time is a mixing and muddling of the internal and external requirements in the review process.

To address this issue, this chapter starts with a discussion of the WTO legal criteria on TRMs in RTAs with the aim of clarifying: 1) whether TRMs in RTAs are allowed to deviate from the WTO general rules on TRMs; and 2) if the answer is "yes", under what conditions they are allowed to deviate. It then turns to work out a methodology, through which a RTA-specific TRM could be tested against the WTO's criteria.

Without clear guidelines on how to adopt the TRMs in RTAs, the traces on WTO's requirements on this issue can be inferred primarily from three analyses: (i) a "parallelism" requirement developed by WTO dispute settlement panels in case law; (ii) the relationship between Article XXIV and the other WTO provisions (here, especially referring to the GATT Article VI, Article XIX and WTO agreements on anti-dumping, countervailing duties measures and safeguards), and; (iii) the specific requirements on RTAs contained in GATT Article XXIV and the 1994 Understanding.

The latter two analyses are the main focus of this section. Due to the complexity of the two sets of trade remedy rules existing in the WTO and RTAs, the discussion firstly introduces WTO principle provisions governing RTAs – GATT Article XXIV and the 1994 Understanding. At first, the discussion will investigate the relationship between GATT Article XXIV and other WTO agreements, to find out (i) whether RTA-specific trade remedy rules need to follow the WTO agreements on anti-

---

*Lamb Meat from New Zealand and Australia* ("*US - Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16, May 2001; (5) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002; (6) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, ("*US - Steel*"),WT/DS248/AB/R, adopted 10 December 2003. The only case not involves RTA is *Korea – Diary*.

dumping, countervailing duty measures and safeguards; (ii) in the event that a measure adopted by RTA is inconsistent with other WTO provisions, whether Article XXIV can be invoked as a defence to justify it. Subsequently, emphasis will be placed on the detail legal requirements related to the RTA-specific TRM issues, i.e. Article XXIV paragraphs 4, 5 and 8.

In addition to analysis of the WTO legal text on RTAs, WTO dispute settlement panels also provided valuable references on RTA-specific rules' WTO-consistency test in their findings. These references are an important supplement to the ambiguous WTO provisions and so they are also included in discussion of this paper.[377]

## 4.2 "Parallelism" Requirement in Application of RTA-Related Global Safeguard Measures

In terms of the discriminatory TRMs in RTAs, to date, there are five cases which refer to global safeguard measures that exclude imports from regional partners. Therefore, it is important to have a look first at how the WTO panels dealt with these issues.

In the dispute *Argentina – Footwear (EC)*, *US – Wheat Gluten* and *US – Line Pipe*, the Appellate Body avoided making any rulings on whether, as a general principle, a member of a RTA can exclude other members of that RTA from the application of a safeguard measure[378], or on whether GATT Article XXIV permits exempting imports originating in a partner of an RTA from a measure in departure from the MFN requirement of the Safeguard Agreement.[379] However, the panels and Appellate Body "invented" a "parallelism" requirement on application of a safeguard action, considering the products imported from regional partners. The concept of parallelism first appeared in *Argentina – Footwear (EC)* provided by the panel and

[377] Pursuant to the WTO Dispute Settlement Understanding Article 3.2, decisions of the Appellate Body do not creating binding precedent. Nevertheless, the Appellate Body has held that adopted Panel reports create legitimate expectations among the parties to the dispute. As a result, the Appellate Body and the Panel rely on the reasoning and conclusions of previous Appellate Body reports to support their own. See http://www.wto.int/english/tratop_e/dispu_e/repertory_e/s8_e.htm

[378] Appellate Body Report, *Argentina – Footwear (EC)*, para. 113; Appellate Body Report, *US – Wheat Gluten*, para 99.

[379] Appellate Body Report on *US – Line Pipe*, para 198.

later confirmed by the Appellate Body[380]:

> "[t]he imports included in the [injury] determinations made under Articles 2.1 and 4.2 *should correspond* to the imports included in the application of the measure, under Article 2.2."[381]

The parallelism requirement originated from EC's argument in *Argentina – Footwear (EC)*. The Panel consented to this view after analysing the footnote 1 of Article 2.1 of the WTO Safeguards Agreement, which authorizes a customs union to take a safeguard measure on behalf of its member states against non-member countries. According to the ordinary meaning of the text of the footnote to Article 2.1, in the case of measures imposed by a customs union, there are two options for imposing safeguard measures, i.e., (i) as a single unit or (ii) on behalf of a member state. In the former case, all the requirements for the injury determination shall be based on the conditions existing in the customs union as a whole. In the latter case, when a safeguard measure is imposed on behalf of a member state, all requirements for the injury determination shall be based on the conditions existing in that member state and the measure shall be limited to that member state. According to the context of the footnote, the Panel explained that,

> "This result supports the interpretation that the two options offered by the footnote to Article 2.1 read in conjunction with Article 2.2 imply a *parallelism* between the scope of a safeguard investigation and the scope of the application of safeguard measures. Thus, in the light of the context of the footnote to Article 2.1, a member-state-specific investigation in which serious injury or threat thereof is found based on imports from all sources could only lead to the imposition of safeguard measures on a MFN-basis against all sources of intra-regional as well as extra-regional supply of a customs union. By the same token, a customs-union-wide investigation could only lead to the application of safeguard measures to all sources of extra-regional supply and could not justify the application of safeguard measures against some or all sources of intra-regional supply, as these would be part of the domestic

[380] Panel Report and Appellate Body Report on *Argentina – Footwear (EC)*, respectively at para 8.91 and para 113.
[381] Appellate Body Report, *US – Wheat Gluten*, at para 96, emphasis added.

industry in that context."[382]

It should be noted that, the Panel's parallelism requirement is *only* applied in two circumstances: (i) in a member-state-specific investigation in which injury determination is based on imports from all sources; and (ii) in a customs-union-wide investigation in which injury determination could only be based on the imports from third countries. The Panel did not mention whether regional imports could be excluded from safeguard measures where an injury determination is based on third-parties' imports by a member state of CU. The Appellate Body in *Argentina – Footwear (EC)* only confirmed the Panel's finding that Argentina's investigation, in which it evaluated whether serious injury or the threat thereof was caused by imports from all sources, could only lead to the imposition of safeguard measures on imports from all sources.[383]

When the issue appeared again in *US – Wheat Gluten*, the Appellate Body explained the parallelism requirement from another angle. The Appellate Body read Article 2 of the Safeguards Agreement as providing that:

> "The same phrase – 'product... being imported' – appears in *both*... paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Article 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted." [384] (original emphasis)

The Appellate Body then stated in *US – Wheat Gluten* that "the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the

[382] Panel Report, *Argentina – Footwear (EC)*, para 8.87.
[383] Appellate Body Report, *Argentina – Footwear (EC)*, para 113.
[384] Appellate Body Report, *US – Wheat Gluten*, para 96.

imports included in the application of the measure, under Article 2.2." [385] This interpretation substantially developed the "parallelism" provided by the Panel in *Argentina – Footwear (EC)*, and exactly linked the scope of the injury determination and the scope of the application of the measure.

In *US – Wheat Gluten*, the United States conducted a separate causal analysis between the imports from Canada and the imports from all sources which caused serious injury to domestic industry. The United States subsequently determined that the imports from Canada did not reach the "substantial share" and did not "contribute importantly" to the injury. However, the Panel found that, once the injury determination is made based on the imports from all sources, a safeguard measure must be applied to the imports from all sources regardless of the result from such an analysis because imports from different sources may have collectively caused the injury and therefore the exclusion of the imports from a particular source from the application of a safeguard measure is not warranted.[386] This finding was upheld by the Appellate Body.[387]

Moreover, the Appellate Body in *US – Wheat Gluten* also added that a gap between imports covered under the investigation and imports falling within the scope of the measure can be justified only if the national authorities "establish explicitly" that imports from sources covered by the measure alone "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*." [388] In *US – Line Pipe*, the United States contended that it had considered the injurious effect of imports from non-NAFTA countries. However, the Appellate Body found that the note only included conclusions about such injurious effects, and that the United States had failed to provide a "reasoned and adequate explanation" that establishes "explicitly" that imports from non-NAFTA sources satisfied the conditions for the application of a safeguard measure.[389]

In *US – Line Pipe* the Appellate Body stated that, in light of the parallelism requirement, exempting regional imports from safeguard measures is permitted only

[385] Ibid.
[386] Panel Report, *US – Wheat Gluten.*, para 8.176.
[387] Appellate Body Report, *US – Wheat Gluten*, paras 98-100.
[388] Appellate Body Report, *US – Line Pipe*, para 181.
[389] Ibid, paras 197-199; Appellate Body Report on *US – Lamb*, para 103 (original emphasis).

in two different circumstances[390]:

(1) Where the imports from a regional partner *are not considered* in the determination of serious injury; and

(2) Where the imports from a regional partner *are considered* in the determination of serious injury, provided that the national authorities have also established explicitly, through a reasoned and adequate explanation, that imports from a source outside the RTA, alone, satisfied the conditions for the application of a safeguard measure as set out in Safeguards Agreement.

In this author's understanding, the parallelism requirement in essence obligates the parties who are implementing the safeguard measures, to conduct a *separate* investigation of the injury determination on the imports solely from third-parties, *regardless* of any conclusion made from the investigation of the injury determination based on the imports from all sources. Once it is determined that the imports from third parties alone caused serious injury or threat thereof, safeguard measures can be applied to those imports from third parties only. The parallelism requirement actually grants permission to exclude the regional imports from the global safeguard measure.

In summary, the parallelism requirement allows WTO Members to exclude the imports from RTA-partners from the application of the global safeguard measure, where the national authority demonstrates that the imports from the third-parties alone satisfy the conditions set up in the WTO general rules on safeguards. However, the parallelism requirement is not completely consistent with the requirements under GATT Article XIX and the Agreement on Safeguards on two issues, for the reasons:

(1) Parallelism requires the national authorities to exclude the regional imports in the consideration of the injury determination if the Member wants to exclude the regional imports from the application of the measure. This is not consistent with Article 4 of the Safeguards Agreement, which requires the national authorities to take account of all relevant factors having a bearing on the situation of the domestic industry, although the injury effects of the regional imports should not be attributed to the third-parties' imports.

(2) Parallelism is ambiguous on whether Article XXIV is a defence to exclude the regional imports from global safeguard measures. In *US – Line Pipe*, the

[390] Appellate Body Report, *US - Line Pipe*, at para 198.

Appellate Body avoided this question, providing that:

> "We need not, and so do not, rule on the question whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the *Agreement on Safeguards*. The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* became relevant in only two possible circumstances. One is when, in the investigation by the national authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the national authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2."[391]

In other words, according to the Appellate Body, GATT Article XXIV only comes into play if parallelism has been respected. From this statement, one can deduce that, for the Appellate Body, GATT Article XXIV can never justify a violation of parallelism. Yet, the Appellate Body has never explained why this is the case.[392] If this question is not substantially answered, it is hard to discern why excluding the regional imports from the safeguard measure is WTO-consistent, when they are allowed to be excluded from the investigation of the injury determination.

Moreover, the parallelism requirement is based on footnote 1 of Article 2.1 of the WTO Safeguards Agreement. Since there is no similar text in contained in GATT Article VI (neither in the Agreement on Anti-Dumping nor in the Agreement on Subsidies and Countervailing Measures), this approach cannot solve the discriminatory treatment in anti-dumping and countervailing duty measures that invoking GATT Article XXIV as a defence raises. Therefore, it is necessary to re-address the WTO-consistency test on the TRMs in RTAs.

---

[391] Appellate Body Report, *US - Line Pipe*, at *para.* 198.
[392] J Pauwelyn, "The Puzzle of WTO Safeguards and Regional Trade Agreements" (2004) 7(1) *Journal of International Economic Law* 109, at p 122.

## 4.3 Relationship between Article XXIV and WTO Rules on Safeguards, Anti-Dumping and Subsidies and Countervailing Measures

Since GATT/WTO provisions are based on the non-discriminatory principle while Article XXIV is an exception to the WTO non-discrimination principle, there is a natural tension between the GATT/WTO general provisions and the RTA-specific rules. In these circumstances, GATT Article XXIV plays a role as a conflict clause identifying whether a RTA-specific measure is permitted. However, the language of GATT Article XXIV does not explicitly address that to what extent it can be invoked as an exception. Put differently, it is unclear whether GATT Article XXIV is an exception solely to the GATT Article I (the MFN clause) or to other provisions under the GATT/WTO (e.g., GATT Article VI, XIX and the WTO agreements on anti-dumping, countervailing duty measure and safeguards) as well. Thus, to examine whether the RTA-specific TRMs should follow the rules in GATT/WTO general rules on those measures, the first important question to address is whether GATT Article XXIV can be invoked as defence to justify such deviation (i.e., the legal relationship between GATT Article XXIV and the GATT/WTO provisions governing the TRMs).

### 4.3.1 Relationship between Article XXIV and Other Provisions of the GATT

The relationship between Article XXIV and other GATT provisions is mainly defined in paragraph 5 of Article XXIV that grants WTO Members a right to derogate from the obligations under other GATT provisions upon the formation of a CU or FTA:

> "Accordingly, the provisions of this Agreement [the GATT Agreement] shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area…"

The first question to be answered regarding this issue is whether Article XXIV

should be considered as derogation from Article I of the GATT 1994 only, or from other the provisions of the GATT 1994 as well. Both views have historically co-existed in the Membership.[393] This question refers to whether Article XXIV provides additional rights to RTA parties and therefore may be used as a legal cover for otherwise GATT-inconsistent measures or trade policies which the parties to a RTA might take or maintain. Persuasive arguments were brought forward to support the latter view:

1) The opening sentence of Article XXIV: 5 refers to the "provisions of the Agreement", not to any one or any defined number of particular provisions of the Agreement, not just Article I.[394]

2) International law on multilateral treaties generally holds that parties to a multilateral agreement can form subsequent agreements between a subset of the membership of the wider agreement, varying their rights and obligations between themselves, provided they do not abridge the rights of the third countries to the wider, underlying agreement.[395]

According to this view, the CRTA added, the act of joining an RTA does not modify any of the rights and obligations of a Member towards other Members under WTO instruments, as illustrated by the fact that the assumption of Article XXIV: 5 is that parties to RTAs can resort to all of the regulations of commerce available to them under the various WTO instruments in the conduct of their commercial relations with third countries. That would mean, for example, that measures in the context of an RTA could differ from the relevant WTO provisions, provided that they do so in a manner that does not diminish the rights of third parties.[396]

This view was also supported by the discussions of the Council for Trade in Goods (CTG), at the time of adoption of the first terms of reference for the examination of a RTA in the WTO. The mandate for examination of RTAs normally reads as follows:

---

[393] For example, in *Turkey – Textiles* case, the panel concluded that Article XXIV permits derogations from Article I, but not from other GATT provisions. See Panel Report, *Turkey – Textiles*, paras 9.188 and 9.189.
[394] Turkey's argument, Panel Report, *Turkey-Textiles*, para 6.67; Appellate Body Report, *Turkey-Textiles*, para 12.
[395] Vienna Convention, Art 41.
[396] WTO Committee on Regional Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements - Note by the Secretariat*, WT/REG/W/37, 2 March 2000, p 12. EC, who also stated that this was balanced to some extent by the requirement that the incidence of duties and other regulations should not increase as a result of the formation of the RTA (WT/REG/M/14, para 13 and WT/REG/M/15, para 54).

"According to the Understanding on the Interpretation of Article XXIV of the GATT 1994 'all notifications under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of the GATT 1994 ..." [397]

Since this terminology refers only to the GATT 1994 and does not specify whether the examination may also be carried out against the background of all WTO Agreements relating to the trade in goods, it was agreed to expand the terms of reference through an understanding, whereby Members have

"... the mandate to examine the incidence and restrictiveness of all duties and regulations of commerce, in particular those governed by the provisions of the Agreements contained in Annex 1A of the WTO Agreement ... although the Working Party would conduct its examination in light of the relevant provisions of the Agreements contained in Annex 1A of the WTO Agreement, the conclusions of the Report of the Working Party would be confined to reporting on consistency with the provisions of Article XXIV". [398]

These terms of reference (including the understanding) became standard for all subsequent examinations of RTAs notified under GATT Article XXIV.

In accord with above interpretations, it is observed that Article XXIV has an extraordinary independent position in GATT. It is a derogation from all provisions of GATT 1994, and not merely from the MFN principle.

### 4.3.2 Relationship between Article XXIV and WTO Agreements (e.g. the WTO Agreements on Anti-Dumping, Countervailing Duty Measures and Safeguards)

Above analyses made it clear that Article XXIV can justify the violation of other GATT provision, including Article VI that addresses the anti-dumping and countervailing duty measures, Article XVI which deals with subsidies, and Article XIX which deals with the safeguards. In addition, the terms of reference laid down

[397] See WTO, *Working Party on the Enlargement of the European Communities - Accession of Austria, Finland and Sweden - Terms of Reference and Membership*, WT/REG3/1, 13 March 1995.
[398] Ibid. This same understanding applies *mutatis mutandis* to FTAs.

by the CTG above expressed that the Working Party would also conduct its examination in light of the relevant provisions of the Agreements contained in Annex 1A of the WTO Agreement (the *Marrakesh Agreement Establishing the World Trade Organization*).

However, one would ask whether GATT Article XXIV can justify a measure that violates the agreements included in Annex 1A of WTO Agreement despite the GATT provisions. It was noticed in the CRTA discussions that, at the same time as multilateral non-tariff trade policy disciplines were developing well beyond the original GATT rules, Article XXIV provisions with respect to these matters remain static and their relationship with the new disciplines is undefined.[399] On the face of it, the exception in GATT Article XXIV:5 applies solely to inconsistencies with the provisions of "this Agreement", that is GATT 1994 itself. The exception might not, therefore, justify RTA measures that are inconsistent with other WTO agreements.

In *Turkey – Textiles*, the issue of whether the EC-Turkey customs union was consistent with the requirements of Article XXIV was not questioned by the complainant, India. Instead, India's claim was that "WTO Members forming a customs union, irrespective of whether their union met the requirements set out in Article XXIV or not, had to abide by the disciplines of Article XI:1 of GATT and Article 2.4 of the ATC with respect to the trade of third Members".[400] The Appellate Body specifically addressed this issue in footnote by stating that the chapeau "refers only to the provisions of the GATT 1994".[401] Nonetheless, the Appellate Body considered that Article XXIV:5 could provide an exception for an inconsistency with Article 2.4 of the ATC because Article 2.4 itself permits restrictions introduced under "relevant GATT 1994 provisions". The Appellate Body considered that this explicit reference to GATT 1994 in Article 2.4 means that the exception in Article XXIV is "incorporated in the ATC".[402]

The Appellate Body's reasoning in *Turkey – Textiles* suggests that the exception does not extend automatically to all WTO provisions. In *Turkey – Textiles*, the extension was based on an *express reference*, in another covered agreement, to GATT

[399] WTO Negotiation Group on Rules, *Compendium of Issues Related on Regional Trade Agreements – Background Note by the Secretariat*, TN/RL/W/8/Rev.1, 1 August 2002, p 12.
[400] Panel Report, *Turkey – Textiles*, para 6.30.
[401] Appellate Body Report, *Turkey – Textiles*, footnote 13.
[402] Ibid.

1994.

By the same token, in a recent case *China – Raw Materials*, the panel and the Appellate Body excluded China's right to recourse to GATT Article XX as a defence to justify China's export restriction on certain raw materials. The conclusion is based on the fact that, Paragraph 11.3 of the *China's Accession Protocol* clearly states that all fees and charges shall be eliminated on those raw materials, and it does not include any *express reference* to GATT Article XX, or to provisions of the GATT more generally that may connect China's commission under Paragraph 11.3 with GATT Article XX exception.[403]

In line with above rulings, extensions of the exception in Article XXIV:5 to other Annex 1A agreements will also depend on the wording and context of the relevant provisions. In respect of the TRMs, no such express reference was discovered in the Agreement on Anti-dumping, the Agreement on Subsidies and Countervailing Measures or the Agreement on Safeguards[404]. Scholars who support the Appellate Body's "express reference" ruling asserted "[I]f the exception in Article XXIV:5 permits an RTA measure that is inconsistent with another goods agreement, a conflict exists between GATT 1994 and the other agreement. If a panel automatically applied the GATT 1994 exception to the other agreement, without examining the specific context, this would be contrary to Annex 1A of the WTO Agreement."[405]

So, does that mean, accordingly, GATT Article XXIV cannot justify the measures inconsistent with the agreements on anti-dumping, countervailing measures or safeguards?

---

[403] Panel Report, *China – Materials Related to the Exportation of Various Raw Materials* ("*China-Raw Materials*"),WT/DS394/R, WT/DS395/R, WT/DS398/R, dated 5 July 2011, para. 7.124; Appellate Body Report, *China-Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, dated 30 January 2012, para 291.

[404] In *US-Line Pipe*, another consideration in extending the exceptions in Article XXIV of GATT 1994 to the Agreement on Safeguards is the last sentence of the footnote 1 to the latter agreement, which states:

> "Nothing in [the *Agreement on Safeguards*] prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

The panel in *US – Line Pipe* noted that availability of the Article XXIV defence against claims brought under the provisions of the Safeguards Agreement is also confirmed by this sentence. (See, Panel Report, *US – Line Pipe*, para.7.151) However, the Appellate Body refused to rule on the question whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the Agreement on Safeguards based on above quoted sentence. According to the other content of the footnote 1 to Article 2.1 of the Safeguards Agreement, the Appellate Body only admitted that the GATT Article XXIV:5 defence to a violation of the Safeguard Agreement is only available when the "parallelism" principle was respected (See, Appellate Body report, *US – Line Pipe*, paras 198-199). Therefore, the extensions of GATT Article XXIV:5 exception in the Safeguards Agreement in conditional. See section 4.2 of this thesis above.

[405] N JS Lockhart and A D Mitchell, "Regional Trade Agreements under GATT 1994: An Exception and Its Limits", in A D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005) 217, at p 229.

In *US – Line Pipe*, Korea added another argument on this issue that "the *Agreement on Safeguards* constitutes a *lex specialis vis-à-vis* the general obligations arising from the GATT 1994. The obligations arising under the *Agreement on Safeguards* may go beyond the obligations arising from the GATT 1994. In the event of conflict, Korea argues, the provisions of the *Agreement on Safeguards* prevail pursuant to the General interpretative note to Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*")."[406]

As a matter of fact, although the GATT 1994, which incorporates the original Article XXIV in GATT 1947 and the 1994 Understanding, is part of the Annex 1 A of the WTO Agreement, the other Annex 1A agreements are given priority over the GATT 1994. The General Interpretative Note in Annex 1A to the WTO Agreement (the "General Interpretative Note")[407] explicitly provides that:

> "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement establishing the World Trade Organization (referred to in the agreements in Annex 1A as the 'WTO Agreement'), the provision of the other agreement shall prevail to the extent of the conflict."

The other Annex 1A agreements include, *inter alia*, the Agreement on Anti-dumping, the Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards. Thus, it is easy to conclude that the latter provisions prevail over the GATT 1994 in the event of conflict.

In response to Korea's proposition, the panel in *US – Line Pipe* ruled that the Article XXIV:5 of the GATT 1994 can provided a defence to Article 2.2 of the Agreement on Safeguards. The panel highlighted the "close interrelation between Article XIX and the Safeguard Agreement", and the fact that "safeguard measures subject to the provisions of the Safeguards Agreement are understood to be Article XIX measures".[408] It noted that Article XXIV:5 provides a defence to the MFN

[406] Panel Report, *US – Line Pipe*, para 7.159. Appellate Body Report, *US – Line Pipe*, para 40.
[407] The General Interpretative Note was set forth at the beginning of the Annex 1A "Multilateral Agreements on Trade in Goods" of the *Marrakesh Agreement Establishing the World Trade Organization*. It is a provision that specifies the relationship between the GATT 1994 (and the related understandings) and side agreements on trade in goods.
[408] Panel Report, *US – Line Pipe*, para 7.150.

obligations in Article I, XIII, and XIX of GATT 1994[409] and that it would be "incongruous" if it did not also provide a defence to the MFN obligation in Article 2.2 of the Agreement on Safeguards for the same measure.[410]

Thus, the panel's reasoning can be seen as a development on the Appellate Body's "express reference" ruling in *Turkey-Textiles*, which extended the exception in Article XXIV:5 to a provision of a side agreement in Annex 1A on the basis of the "close interrelation" between such side agreement and another GATT provision that allows the exception in Article XXIV:5.

Although the Appellate Body declared the panel's findings on Article XXIV moot and of no legal effect,[411] the panel's reasoning on this issue is compelling in accord with the "effectiveness" principle on interpretation of the WTO Agreement. In *Korea – Dairy*, the Appellate Body made an important statement that:

> "We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a 'Single Undertaking' and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously ... In light of the interpretative principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'. An important corollary of this principle is that a treaty should be interpreted as a whole, and in particular, its sections and parts should be read as a whole."[412]

Accordingly, the Agreement on Safeguards and Article XIX of GATT 1994 should be recognized as imposing a single, cumulative set of obligations on the same measures – that is, safeguard measures.[413] In addition, the preamble of the Agreement on Safeguards expressed that it was established "to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency

[409] Ibid, para 7.146.
[410] Ibid, para 7.150.
[411] Appellate Body Report, *US – Line Pipe*, paras. 198-199
[412] Appellate Body Report, *Korea – Dairy*, para.77. This proposition is supported in the context of the relationship between GATT Article III, the TRIMS Agreement, and the SCM Agreement (*Indonesia – Autos*), GATT Article XIII and the Agreement on Agriculture (*EC – Bananas III*), GATT Article XIII and the Safeguards Agreement (*US – Line Pipe*), and GATT Article XIX and the Safeguards Agreement (*Korea – Dairy*), as well as the *EC – Bananas III* and *Canada – Periodicals* decisions of the Appellate Body in connection with the relationship between GATT and GATS.
[413] See section 2.1.2 of this thesis.

Action on Imports of Particular Products)".[414] The link is particularly strong in the case of the MFN obligation because this same obligation is imposed in both Article 2.2 of the Agreement on Safeguards and in Articles XIX of GATT 1994.

Nonetheless, in *US – Line Pipe*, neither did the panel nor the Appellate Body make any clarification on the predominant argument put forward by Korea, i.e., whether the Agreement on Safeguards constitute a *lex specialis vis-à-vis* the general obligations arising from the GATT 1994, so that it overrides GATT Article XXIV; and whether the conflict rule addressed in the General Interpretative Note applies to this relationship. The answer is given in another case – *Indonesia – Autos*.

In *Indonesia – Autos*, the panel explicitly examined the concept of "conflict" in international treaty interpretation, providing that:

> "In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the *same parties*. Second, the treaties must cover the *same substantive subject matter*. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations."[415] (emphases added)

According to the above conditions, in the case of the GATT Article XXIV–Agreement on Safeguards relationship, no "conflict" could possibly exist because these two set of rules direct to substantially different subject matters – the GATT Article XXIV regulates the WTO Members' rights and obligations when constituting a regional trade agreement; while, the Agreement on Safeguards sets out the rules on imposition of safeguard measures. In the context of the WTO Agreement, the "conflict" in the General Interpretative Note rather governs the relationship between GATT Article XIX and the Agreement on Safeguards. In other words, the Agreement on Safeguards constitutes a *lex specialis vis-à-vis* the obligations in GATT Article XIX instead of GATT Article XXIV. Therefore, the hierarchical order laid down in the General Interpretative Note does not apply to the GATT Article XXIV–Agreement on Safeguards relationship.

Defining the GATT Article XXIV–Agreement on Safeguards relationship should

[414] Preamble, Agreement on Safeguards.
[415] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia-Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, dated 2 July 1998, footnote 649.

start with the examination of the possible conflict between GATT Article XIX and the Agreement on Safeguards. Since the Agreement on Safeguards and Article XIX of GATT 1994 are recognized as a single, cumulative set of obligations on the same measure, in the event that GATT Article XIX allows exceptions in GATT Article XXIV:5, the Agreement on Safeguards is deemed offer exception to GATT Article XXIV:5 as well, unless it specifically opts itself out of such exception. The same rationale should apply to the relationship between GATT Article XXIV and the Agreements on Anti-dumping and the Agreements on Subsidies and Countervailing Measures due to the fact that they complement GATT Article VI, which also allows exceptions in GATT Article XXIV:5.

To conclude, the exception in GATT Article XXIV:5 not only applies to all provisions of GATT 1994, but may also extend to the provisions of the other Annex 1A agreements in the WTO, provided that there is "express reference" in a such side agreement to GATT 1994, or there is a "close interrelationship" between such a side agreement and another GATT provision that allows the exception in Article XXIV:5.

For the purpose of this paper, it can be determined that GATT Article XXIV can provide a derogation from the general obligations in GATT/WTO on TRMs, no matter whether such obligations are contained in GATT 1994 or in the WTO agreements on anti-dumping, countervailing duty measures and safeguards. Of course, this derogation is limited and conditional upon the requirements of Article XXIV being met. We will now turn to look at the conditions set by Article XXIV.

## 4.4 GATT Article XXIV & the 1994 Understanding

As RTA is an important exception to the MFN principle that is the cornerstone of the WTO, Article XXIV of the GATT 1994 and the 1994 Understanding establish strict criteria for an acceptable RTA. The central requirements are contained in paragraphs 4, 5 and 8. Article XXIV provides that an acceptable RTA under the GATT is an agreement in which duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the parties (paragraph 8) and which does not raise duties and other restrictive regulations of commerce with respect to trade with third countries (paragraph 5). An RTA should

meet both internal ("substantially all the trade liberalization") and external ("not to raise trade barriers against non-parties") requirements. Article XXIV:4 puts an emphasis on this position, saying that the purpose of a RTA should be to facilitate trade between the parties and not to raise barriers to the trade of non-parties with the parties. Accordingly, the discussions in this section contain two parts: (i) external requirements on RTAs regulated in Article XXIV:5; and (ii) internal requirements on RTAs regulated in Article XXIX:8.

### 4.4.1 Article XXIV:5 – External Requirement on RTA

Paragraph 5 provides for the external requirements on the constitution of an RTA, more specifically, an assessment of the conditions of third countries' access to the markets of the parties to an RTA, before and after the formation of the RTA. The basis for such an assessment is found in subparagraph (a) for CU and in subparagraph (b) for the FTAs:

> "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
>
> a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the *duties and other regulations of commerce* imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not *on the whole* higher or more restrictive than the *general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
>
> b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the *duties and other regulations of commerce* maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to

such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and...

c) any interim agreement referred to in subparagraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time. (emphasis added)"

*1) Definition and Scope of "duties and other regulations of commerce"*

For the purpose of this paper, the first issue that needs to be clarified here is the definition (or coverage) of the expression "duties and other regulations of commerce (ORC)" in Article XXIV:5(a) and (b). This refers to whether the assessment of pre- and post-RTA trade barriers statutorily includes TRMs in RTAs, especially those applicable between the constituent countries of a RTA.

Since anti-dumping and countervailing measures are described as "duties" in Article VI of the GATT (as well as in the Agreement on Implementation of Article VI of the GATT 1994, the Agreement on Anti-dumping and the Agreement on Subsidies and Countervailing Measures), and safeguard measures can also take the form of "duties", it could be arguable that those TRMs are comprehended within the scope of "duties" mentioned in Article XXIV:5. However, according to Gobbi Estrella and Horlick's work, evidence was found in the French and Spanish versions of the GATT that the term equivalent to "duties" in the English version refers to "customs duties" only. Therefore, it was concluded that the duties resulting from anti-dumping, countervailing measures and safeguards cannot be easily encompassed by such a specific meaning.[416] As observed in Chapter 2 of this thesis, anti-dumping, countervailing and safeguard measures can take the form of customs duties as well as price undertaking, quantitative restrictions and extra charges that rectify the low price of imports that impair the competition in the importing market. In the former case, they fall into the category of "duties" and, in the latter case, they should be considered as "other regulations of commerce". However in all instances, TRMs are

[416] A T Gobbi Estrella and G N Horlick, "Mandatory Abolition of Antidumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling", in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 109, at p 118.

encompassed in ORC and hence they are regulated by Article XXIV:5.

Although the GATT/WTO did not define the term ORC in Article XXIV:5(a), (b) or Article XXIV:8(a)(ii), nor did they specifically distinguish it from the term ORRC in Article XXIV:8(a)(i) and (b), the term ORC did receive some interpretation from the WTO adjudicating body.

In *Turkey – Textiles*, the Panel explicitly defined the meaning of ORC by stating that:

> "While there is no agreed definition between Members as to the scope of this concept of 'other regulations of commerce'... More broadly, the ordinary meaning of the term 'other regulations of commerce' could be understood to include *any* regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g. sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any other trade related domestic regulation, e.g. ...)."[417] (emphasis added)

In line with this opinion, ORC is considered to include "any measures having an impact on trade" including both border measures which applied upon importation/exportation have impact on the cross-border movement of goods (i.e. importation/exportation measures, duties, tariffs and charges (other than simply "duties")), and marketplace regulations which applied to imported products that adversely affect them as compared with domestic products in the sense of Article III of the GATT.[418] To scholars supporting a broader meaning of ORC, it includes anything "trade related" even the subject matter does not fall within the WTO Agreements, e.g. domestic/regional regulations on environment, competition, labour standards, etc.[419] In respect of TRMs, no matter if the scope of ORC is defined narrowly or broadly, trade remedies, which affect the cross-border movement of goods, are clearly included in ORC, without noting the fact that anti-dumping was expressly indicated in the list of ORC provided by the *Turkey – Textiles* Panel.

---

[417] Panel Report, *Turkey – Textiles*, para 9.120.
[418] N JS Lockhart and A D Mitchell, "Regional Trade Agreements under GATT 1994: An Exception and Its Limits", in A D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005) 217, at pp 236-237; J H Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (T.M.C. Asser Press 2002).
[419] J H Mathis, "Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'?", in L. Bartels and F. Ortino (eds), *RTA and the WTO Legal System* (Oxford University Press 2006), at p 90.

It is clear that ORC has an "outward-looking" meaning and refers to those regulations governing the trade of the parties to an RTA with non-RTA parties.[420] Hence, the fundamental question here is: does Article XXIV:5 assessment extend to RTA internal trade policies (or the impact of the RTA internal trade policies on trade with third parties)?

This question is of special relevance to RTA internal TRM issues discussed in this paper. Take anti-dumping measures as an example: in the case where an RTA contains preferential anti-dumping provisions inside while retaining the WTO anti-dumping rules towards the third-parties, should we examine the resulting effect of internal anti-dumping provisions on non-RTA member countries against Article XXIV:5(a) or (b)? In this case, the anti-dumping measure applicable to the non-RTA countries is evidently not "higher or more restrictive" compared with that applicable before the formation of the RTA. However, the internal preferential anti-dumping provisions in such a RTA are very likely affect trade flow and reduce the market share of the products from non-RTA members before the constitution of such RTA. Thus, it is questionable whether such preference violates Article XXIV:5(a) or (b).

According to the ordinary meaning of the expression "duties and other regulations of commerce" "in respect of/to the trade with contracting parties not parties to such union or agreement", the legality assessment contained in Article XXIV:5(a) or (b) rather directs to the "duties and other regulations of commerce" that have a straight link with third-parties. Therefore, trade diversion effects caused by a RTA's internal trade policies will not make this RTA inconsistent with Article XXIV:5(a) or (b).

As there are no agreed definition and scope on ORC, some WTO Members urged a formal specification on the concept of ORC for the sake of future RTA review and dispute settlement.[421] One suggestion raised by Korea is to use the *Standard Format for Information on Regional Trade Agreements* [hereafter: the Standard Format][422] provided by the CRTA in 1996 to serve as a starting point to help clarifying the concepts of ORC and ORRC.[423]

---

[420] Canada, in CRTA, *Note on the Meetings of 17 November and 4-5 December 1997*, WT/REG/M/15, 13 January 1998, para 26.
[421] EU and Korea's submission.
[422] *Standard Format for Information on Regional Trade Agreements*, WT/REG/W/6, 15 August 1996.
[423] *Communication from the Republic of Korea, Submission on Regional Trade Agreements*, TN/RL/W116.

The 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. However, the information requested in this Standard Format "does not prejudge the scope and coverage of the consistency aspect of the examination process, nor does it replace the requirement for parties to regional trade agreements to provide Members with all relevant texts of the laws and detailed trade and tariff data".[424] Therefore, WTO Members "may adhere to the requirements of the Standard Format on a voluntary basis; in this respect, it should be viewed as Guidelines by the [CRTA] Chairman as to basic information that could be provided by parties notifying regional agreements to the WTO."[425]

As noted by Korea, many of the issues to be considered in interpreting the terms ORC and ORRC arise out of this document. 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 as listed below:

- 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.

Noteworthy, the information sought in the Standard Format "does not preclude Members from posing questions in writing and seeking additional information from

[424] Standard Format.
[425] Ibid.

parties".[426] In other words, this list is comprehensive but not exhaustive. Therefore, measures not listed are also worth consideration in respect of ORC and ORRC, including domestic marketplace regulations affecting imports/exports and domestic/regional regulations which direct to the subject matters that are presently not covered in WTO regime.

As noted by Korea, the Standard Format does not use the terms ORC or ORRC at all, even though those terms appear in GATT Article XXIV. Thus, it would be instructive for the CRTA to explain why the Standard Format does not use the same terms to describe measures that are specifically used in GATT Article XXIV.[427]

Although no link has been established between the Standard Format list and the term ORC/ORRC, the illustration of the Standard Format list serves a good formulation to specify the coverage of "ORC" referred to in paragraphs 5(a)(b) and 8(a)(ii) and "duties and ORRC" referred to in Article XXIV:8(a)(i) and (b). Following the *Turkey – Textiles* Panel's ruling, it will be undisputable that all trade provisions listed in the Standard Format should be included in the scope of ORC. On the other hand, the categories divided by the Standard Format may be borrowed to distinguish the "other regulations of commerce" (ORC) from "other restrictive regulations of commerce" (ORRC).

*2) Compare the trade barriers on third parties before and after the constitution of a RTA*

The consequent issue is how to compare pre- and post- RTA trade barriers to judge a RTA's compatibility or how a WTO member that is party to a RTA knows if it has satisfied this requirement. This issue was raised especially in respect of the CUs, since the parties to a CU after the formation of such CU are required to take common trade policy to the third-parties. In other words, members forming a CU must adjust their external protection (e.g. tariffs) so that all members provide the same level of protection.

In adjusting external protection levels when forming a CU, members of the CU must be mindful of their Article XXIV:5(a) obligation. Article XXIV:5(a) states:

[426] Ibid.
[427] Korea's submission.

"[W]ith respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with the contracting parties not parties to such union or agreement shall not on the whole higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be."

The use of the phrases "on the whole" and "general incidence" suggests that Article XXIV:5(a) does not require an item-by-item comparison of protection before and subsequent to the formation of the CU. Instead, a general comparison of overall external protection before and subsequent to the formation of the CU appears sufficient.

Although no consensus was reached in GATT years, the 1994 Understanding ended any lingering debate on this issue. The interpretation makes clear that the comparison is to a tariff-line basis and is worth quoting at length. Article XXIV:5 itself does not stipulate precise criteria on this issue. Whereas, the 1994 Understanding paragraph 2 provides the evaluation of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a CU:

"The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an *overall assessment of weighted average tariff rates and of customs duties collected*. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall

assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, *the examination of individual measures, regulations, products covered and trade flows affected may be required*." (emphases added)

However, opinions within the CRTA again fall into two distinct camps where customs unions are concerned (sub-paragraph 5(a)):[428]

(a) Some maintained that, in such a case, only the net effect of the barriers on third parties is to be considered: while an increase in the overall level of barriers is clearly not permitted, parties are not bound by an obligation not to raise any barrier.[429]

(b) Others see the phrase "not to raise barriers" not only as an attempt to maintain a standstill in overall barriers against third parties but as preventing any new barriers from being raised.[430]

In the *Turkey – Textiles* case, the Panel found that "What paragraph 5(a) provides, in short, is that the effect of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, *overall*, than were the constituent countries' previous trade policies" and that paragraph 5(a) provided for an "economic" test for compatibility; both these findings were shared by the Appellate Body.[431]

With respect to "other regulations of commerce" adopted by a CU, the Appellate Body in *Turkey – Textiles* further explained that "Article XXIV:5(a) requires that those applied by the constituent members *after* the formation of the customs union 'shall *not* on the whole be... *more restrictive than the general incidence*' of the regulations of commerce that were applied by each of the constituent members *before* the formation of the customs union. Paragraph 2 of the Understanding on Article XXIV explicitly recognizes that the quantification and aggregation of regulations of commerce other than duties may be difficult, and, therefore, states that

[428] WTO Committee on Regional Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements - Note by the Secretariat*, WT/REG/W/37, 2 March 2000, para 35.
[429] Argentina and EC, in CRTA, *Note on the Meetings of 17 November and 4-5 December 1997*, WT/REG/M/15, paras. 15 and 36, respectively; Turkey, in CRTA, *Note on the Meetings of 16-18 and 20 February 1998*, WT/REG/M/16, 18 March 1998, para 54.
[430] Australia, in CRTA, *Note on the Meetings of 3-5 November 1997*, WT/REG/M/14, 24 November 1997, para 18; HKC and Australia, CRTA, *Note on the Meetings of 17 November and 4-5 December 1997*, WT/REG/M/15, paras 14 and 31, respectively.
[431] Panel Report, *Turkey – Textiles*, para 9.121 and Appellate Body Report, *Turkey – Textiles*, para 55.

'for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.'"[432]

The Appellate Body then agreed with the Panel that the terms of Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the Understanding on Article XXIV, provide:

> "… that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies."[433]

As quoted in the above ruling, the Appellate Body stressed that Article XXIV:5 requires the evaluation of not merely the form but the *effects* of trade policy measures of the new RTAs. It can be concluded that, the Panel and the Appellate Body in *Turkey – Textile* clearly supported the view (a) that the evaluation of the trade measures and policies of a CU focuses on the *net effect* of the barriers or third parties. Any single barriers of trade being raised may not be an issue under Article XXIV:5(a) and the 1994 Understanding. In the event that new barriers are raised due to the formation of a CU, such new barriers should be permitted, providing that the overall level of the barriers of such RTA is still lower than the level before the constitution of the CU, because it is very likely that the effect of the new barriers will be evened out by other trade measures and policies.

In contrast with the assessment approach on CU, the language contained in Article XXIV:5(b) in respect of the FTA seemingly does not refer to duties and other regulations of commerce as a whole, but to *individual* instruments. Thus, the external requirement on the constitution of a FTA "assumed, is not, in principle, to come to *more or less* the pre-FTA situation by rebalancing various instruments; it is to ensure that each and every *individual* trade instrument will not become more restrictive, post-establishment of the FTA".[434]

---

[432] Appellate Body Report, *Turkey – Textiles*, para 54.
[433] Panel Report, *Turkey – Textiles*, para 9.121.
[434] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press, 2006), p 563.

### 4.4.2 Article XXIV:8 – Internal Requirement on RTA

Article XXIV:8 sets out internal criteria on the constitution of RTA:

"For the purposes of this Agreement:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(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."

In other words, it lays down a definition on what qualifies as a FTA or a CU, which essentially requires WTO Members wishing to enter into a CU or a FTA will have to eliminate *duties and other restrictive regulations of commerce* with respect to *substantially all trade* in products originating in the constituents of the regional integration scheme. The language shows that it seeks to protect RTA members themselves from another member's exclusion of trade from the agreement and to protect other WTO Members from claiming an exception from the MFN principle for agreements that are not really FTAs or CUs. The internal requirement of FTAs and CUs is virtually the same. The idea behind the Article XXIV:8 requirement was to ensure that countries go "all the way" in their regional liberalization. GATT framers wanted RTAs to be vehicles that would eventually lead to multilateral free trade agreements and not remain stuck as self-contained discriminating regional

initiatives.[435]

Although Article XXIV:8 lays down important requirements specifically on how to treat the duties and ORRC between the member states of RTA, whether trade remedy measures should be eliminated in RTAs has proven controversial.

Looking closer into Article XXIV:8, when the key paragraph 8(a)(i) and (b) rule that a CU or FTA is meant to eliminate the "duties and other restrictive regulations of commerce ... with respect to substantially all the trade between the constituent territories in products originating in such territories...", it exclusively permitted several GATT provisions (i.e. Article XI, XII, XIII, XIV, XV and XX) to be retained in the formation of a CU or FTA. Neither GATT 1994 Article VI (anti-dumping and countervailing measures) nor Article XIX (safeguard measures) is cited in this exception list. This expression can be easily understood on its face that those TRMs should certainly be eliminated in a RTA. Nevertheless, since early reviews of RTAs under the GATT, the absence of GATT Article VI and XIX in the exceptions list in Article XXIV:8 has become an issue of whether this provision obligates the RTA to eliminate the TRMs for intra-regional trade, or allows the RTA to retain the TRMs.[436] The WTO Secretariat has observed that "[t]he drafting history does not indicate why Articles XI-XV and XX were included in the list of exceptions while others, in particular Article XIX, were not included".[437] The disagreements on TRMs most likely derive from their contingency nature, which is similar to some regulations included in the exceptions list in Article XXIV:8, as well as the impact on trade flow once they are imposed discriminatively.[438] So far, no consensus has ever been reached on this subject, nor a definite clarification provided by the GATT/WTO dispute settlement mechanism.[439]

Given the fact that there are plenty of terms and expressions in Article XXIV:8

[435] 1994 Understanding, Preamble.
[436] See WTO Negotiation Group on Rules, *Compendium of Issues Related on Regional Trade Agreements – Background Note by the Secretariat*, TN/RL/W/8/Rev.1, 1 August 2002, paras 73-75. Safeguard measure is often the centre of discussion, but same status applies to anti-dumping and countervailing measures.
[437] See WTO Committee on Regional Trade Agreements, *Systemic Issues Related to "Other Regulations of Commerce" – Background Note by the Secretariat (Revision)*, WT/REG/W/17/Rev.1, 5 February 1998, para 6.
[438] See R. Hudec and J.D. Southwick, "Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly", in M. Rodr ́guez Mendoza, P. Low, and B. Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Brookings Institution Press 1999), at p 67-68.
[439] See A T Gobbi Estrella and G N Horlick, "Mandatory Abolition of Antidumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling", in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Cambridge University Press 2006) 109, at p 111 footnote 7 and 8.

that have not gained a common understanding among WTO Members, disagreement on trade remedy issues in RTAs extensively involves several questions listed below.

The first question is whether the "duties and ORRC" encompasses TRMs? Although the term "duties and other restrictive regulations of commerce" is presented as a central notion of Article XXIV:8, its definition and scope have never been clearly identified in any official GATT/WTO documents. Hence, it is not clear what exactly the "duties and ORRC" means. The exclusion of TRMs in the exceptions list could mean that TRMs are simply *not* ORRC, thus they are not subject to elimination according to Article XXIV:8. In this circumstance, Article XXIV:8 cannot justify elimination or discriminatory TRMs in RTAs at all.

But it is also possible that the TRMs are included in "duties and ORRC". Then other possibilities arise.

Apparently, Article XXIV:8 divided the duties and ORRC applicable between the WTO Members into two groups – the group of measures included in the parenthesis are not subject to elimination in RTAs, whereas the remaining duties and ORRC must be eliminated on substantially all the trade to meet the qualification of a RTA. Prevailing debate on intra-regional TRMs, which does not fall into the parenthesis, arose over the nature of this exceptions list provided in Article XXIV:8 – that is, whether it is *illustrative* or *exhaustive*.

If the list of exceptions under Article XXIV:8 of GATT is interpreted as exhaustive, TRMs, as well as other duties and ORRC which are not covered in the list, should be deemed "forbidden" among RTA partners. To the contrary, if the list of exceptions is only illustrative, the parenthesized measures that are exempted from elimination in a RTA may encompass TRMs. As a consequence, RTA members would be *either permitted or obligated* to maintain TRMs, same as other parenthesized measures, in intra-regional trade. In this regard, the mandatory or optional nature of the list of exceptions to the rule on elimination of duties and ORRC in Article XXIV:8 is of relevance.

In the parenthesized listed exceptions, Article XXIV:8 states that "except, *where necessary*, those permitted under ...". Disagreement thus turned on whether the list of exceptions to the rule on elimination of duties and ORRC in Article XXIV:8 may or must be retained in RTA, focusing on how the phrase "where necessary" shall be

read.

One interpretation (the "may" interpretation) reads the phrase as providing that a party to a CU or FTA is *allowed* to apply the restrictions listed in the parenthesis to imports from its RTA partners, *when that party deems it necessary*. In line with this interpretation, the RTA parties are *not obligated* to maintain those restrictive regulations of commerce addressed in the parenthesis. As a consequence, no matter whether the TRMs fall into the list of exceptions or not, RTA members are entitled to eliminate them in intra-regional trade.

The other interpretation (the "must" interpretation) reads the same phrase as permitting a party to a CU or FTA to apply the restrictions in the listing to the trade of its partners in the arrangement *whenever necessary pursuant to the terms and principles of the listed provisions themselves*. Since most listed provisions set forth criteria prescribing that the measures they regulate shall apply on a MFN basis, the "must" interpretation implies that the measures regulated by the provisions in the listing *must* remain applicable in intra-CU or intra-FTA trade and *must* be imposed on RTA parties whenever imposed on third parties.[440] The rule applies to TRMs as well if the listed exceptions are illustrative.

Moreover, some scholars assert that since Article XXIV:8 stipulates that a CU or FTA is understood as duties and ORRC (except, ...) are eliminated with respect to "substantially all the trade" between the constituent territories of such a CU or FTA, the rule on elimination of duties and ORRC with respect to "substantially all the trade" requires that trade restrictions not be applied (rather than be applicable) to a portion of the intra-RTA trade correspondent to the "substantially all the trade" threshold.[441] Even if the analyses on ORRC and the exceptions list allow the existence of TRMs in intra-regional trade, the "substantially all the trade" threshold renders the maintenance of TRMs in RTAs impossible or applicable to an insubstantial portion of trade only. Thus, the "substantially all the trade" requirement also merits consideration in respect of whether TRMs are subject to elimination in RTAs according to GATT Article XXIV:8.

*1) The scope and definition of "duties and other restrictive regulations of commerce"*

[440] Ibid, at p 122.
[441] Ibid, at p125.

As noted by Matsushita et al, the disagreement on the scope of the term arose in the 1970 Working Party report on *EEC-Association with Africa and Malagasy States* is that whether the fiscal charges on imports in the RTA should be eliminated as "duties and ORRC" according to Article XXIV:8. The members of the Working Party which were not members to such a FTA held that the free trade within the meaning of Article XXIV:8(b) did not exist in view of the continued imposition by certain parties to the FTA of fiscal charges on imports from other members. However, the members of the FTA declared that "the provision of Article XXIV, concerning the concept of a free-trade area concerned only protective measures. The taxes referred to were of a fiscal character, not protective…"[442] In the end, where the distinction should be made between "protective" and "fiscal" was not discussed (or explained) any further.[443]

The discussion on how to deal with trade remedies such as anti-dumping, countervailing and safeguard measures also starts with the definition and scope of the duties and ORRC in Article XXIV:8.

Compared with the expression "other regulations of commerce" (ORC) contained in Article XXIV:5(a)(b) and Article XXIV:8(a)(ii), the term ORRC is prefixed with the adjective word "restrictive". The reference to restrictiveness would seem to argue that ORC and ORRC were intended to have different meaning. However, the coincident wording of these two terms makes it reasonable to believe that the "measures referred to in Article XXIV:8(a)(i) and (b) are a subset of the ORC referred to in paragraphs 5(a)(b) and 8(a)(ii), distinguished by its restrictive nature, thus the meaning of ORC informs the meaning of ORRC."[444] Raising the *Turkey-Textiles* panel's ORC definition for possible application to ORRC, the ORRC should be understood as any regulations having "restrictive" effect on trade.

Borrowing the trade regulations listed in the Standard Format, it might be argued that the rules of origin and standards (e.g. the TBT and the SPS measures) are not encompassed in the scope of ORRC as they are not ordinary "restrictive", because

[442] GATT Working Party Report on *EEC-Association with Africa and Malagasy States*, L/3465, adopted on 2 December 1970, BISD 18S/133, at p 135-137.
[443] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), p 570.
[444] A T Gobbi Estrella and G N Horlick, "Mandatory Abolition of Antidumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling", in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Cambridge University Press 2006) 109, at p118.

they are not intended, as other measures are, to reduce market access for economic reasons. The only possibility to include them in ORRC is where they accord less favourable treatment to like imported products of the regional members. [445] In contrast, anti-dumping and countervailing measures are described as "duties" that are imposed on the importation of products in addition to ordinary customs duties in GATT Article VI and the Agreement on Anti-dumping/SCM; safeguard measure is defined as a modification or withdraw of market access concession for imported goods under GATT Article XIX and the Agreement of Safeguards, which normally takes the form of either duty or quantitative restriction. Although those TRMs are temporary in nature, their very purpose is to restrict imports in a legitimate time-span and they do have restrictive effect on imports within this period of time. Thus, there is little reason to infer that TRMs are not encompassed in the scope of ORRC. Therefore, this conclusion invites further examination of whether they should be eliminated in RTA under GATT Article XXIV:8.

*2) The exhaustive or illustrative nature of the exceptions list of Article XXIV:8*

As mentioned previously, to meet the qualification of a RTA, RTA members are required to eliminate duties and ORRC applicable between them on substantially all the trade. However, Article XXIV:8 specifically exempts a group of measures, i.e. Article XI, XII, XIII, XIV, XV and XX, from the obligation of elimination in RTA. To establish whether TRMs are subject to elimination in RTA, most discussions are linked to the exhaustive/illustrative nature of the permitted exceptions to the internal elimination of "other restrictive regulations of commerce" (ORRC) in an RTA, as provided in Article XXIV:8.

Three interpretations have been put forward in this regard.

*First*, the list of exceptions under Article XXIV:8 of GATT should be interpreted as exhaustive. The duties and ORRC that are not covered in the list, including trade remedies, should be deemed "forbidden" among RTA partners.

*Second*, the list of exceptions is only illustrative; the parenthesized measures that are exempted from elimination in RTA may encompass TRMs. As a consequence,

[445] See, J H Mathis, , "Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'?", in L. Bartels and F. Ortino (eds), *RTA and the WTO Legal System* (Oxford University Press 2006) 79, at p 91, footnote 33.

RTA members are either obliged or permitted to maintain TRMs in intra-regional trade.

The *third* "flexible" interpretation, supported by the EU in the context of global safeguards, is that the application of those measures to RTA partners is "permitted but not obliged", to the extent that their application does not prejudice the rights of third parties.[446]

People holding the "exhaustive" view have interpreted the reference to "other regulations restricting trade" to include TRMs and anti-dumping actions in particular. They argue that, since RTAs have the objective of dismantling all barriers to intra-regional trade, one natural expectation is that RTA members will abolish the use of trade remedies against intra-bloc trade.[447] On this view, the elimination of TRMs is a requirement under GATT Article XXIV. This view is strengthened by the fact that paragraph 8(b) of GATT Article XXIV allows, where necessary, RTA members to exclude certain GATT articles from the general requirement to "eliminate other regulations restricting trade". It would have been easy to add GATT Article VI (anti-dumping and countervailing duties) and XIX (safeguards) to the excluded GATT Articles, if that had been the intention of the framers of the GATT. That they are not would suggest to some that RTAs which retain the use of trade remedy instruments are inconsistent with GATT rules.[448] From the treaty interpretative view, some asserted that since the bracketed list provides an exception to the general rule of elimination of ORRC, it would normally be interpreted in a manner precluding the addition of other measures. Otherwise, the exceptions list in Article XXIV:8 would be meaningless.[449]

The advocates of the "illustrative" position hold the view that, while Article XX (General Exceptions) is included in the list, Article XXI (Security Exceptions) is not, so if the list is "exhaustive", import-export control concerning security cannot be

[446] WTO Committee on Regional Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements - Note by the Secretariat*, WT/REG/W/37, 2 March 2000. The EU is reported to hold the view that the intra-RTA safeguard measures are only allowed during the transitional period of an agreement, after which other legislation such as competition policy should supersede the trade remedy laws.
[447] G Marceau, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (Clarendon Press 1994).
[448] R Teh, T J Prusa and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03 (WTO 2007).
[449] N JS Lockhart and A D Mitchell, "Regional Trade Agreements under GATT 1994: An Exception and Its Limits", in A D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005) 217, at p 239.

utilized. This would be unacceptable to any WTO Member.[450] In a like manner, it was noticed that GATT Article XVIII-B (BOP restrictions by developing countries) is not included in the exceptions list.[451] Article XVIII-B permits less economically developed WTO members to impose BOP restrictions, subject to several conditions, including the conditions that the restrictions "avoid unnecessary damage to the commercial or economic interests of any other contracting party" and that the party imposing the restrictions relax the restrictions as its economic conditions improve. These qualifications make the operations of Article XVIII-B similar to the operation of GATT Article XII-XV mentioned in the Article XXIV:8 exceptions list. Inclusion of one regulation while excluding another which serves a very similar purpose also explains the illustrative nature of the list.

To address these arguments, people in the "exhaustive" camp allege that Article XXI exclusively states: "Nothing in this Agreement ... shall prevent any contracting party from taking any action which it considered necessary for the protection of its essential security interests." It seems a strong case that "nothing in this Agreement" includes the requirement of "elimination of the duties and ORRC" under GATT Article XXIV:8. Thus, notwithstanding that Article XXIV:8 does not specifically exempt Article XXI measures, a member of an RTA may apply national security exceptions to its RTA partners.[452] As for the GATT Article XVIII-B, it was pointed out that the BOP provisions of Article XVIII-B were added to the GATT in the 1955 Review Session amendments, seven years after the formal text of Article XXIV was adopted.[453] It is possible that the drafters of Article XVIII-B simply overlooked amending the Article XXIV:8 exceptions list to include Article XVIII. Unlike the Article XXI and Article XVIII-B, it may be difficult to make strong argument that

[450] This view is confirmed in working party reports where, speaking on the issue of Article XXI, the EEC stared that "it would be difficult … to dispute the right of contracting parties to avail themselves of [Article XXI]m which related, among other things, to traffic in arms, fissionable materials, etc., and it must therefore be concluded that the list was not exhaustive". See *European Economic Community*, 29 Nov 1957, GATT BISD (6th Supp) at 70, section D, para 26.

[451] R Hudec and J D Southwick, "Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly", in M Rodr ǵuez Mendoza, P Low, and B Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Brookings Institution Press 1999), at p 66.

[452] A T Gobbi Estrella and G N Horlick, "Mandatory Abolition of Antidumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling", in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Cambridge University Press 2006) 109, at pp 142-144.

[453] See, WTO Secretariat, *Analytical Index, Guide to GATT Law and Practice, Vol. 1* (Geneva, Switzerland: WTO, 1995), p 460.

why TRMs could be retained in a RTA.[454]

However, given the seriousness of the law making and the conclusion of the WTO Agreement in 1995, it is hard to believe that the negotiators and the drafters of the WTO Agreement would have overlooked these two provisions.

In dispute settlement in the WTO era, the *Argentina – Footwear (EC)* Panel opined that safeguards could be entertained between the regional members as, "[i]n our view, that paragraph does not necessarily prohibit the imposition of safeguard measures between the constituent territories."[455] Although the Appellate Body skilfully rejected the Panel's view without explaining why, it implicitly determined that a member of a RTA may impose safeguards against other members of the RTA, as well as in the case of *US – Wheat Gluten* and *US – Line Pipe*.[456] While not a definitive ruling on this issue, this line of jurisprudence suggests that the Appellate Body read the list of exceptions in Article XXIV:8 as not exhaustive.

*3) The optional or mandatory nature of the exceptions list*

Noteworthy, the illustrative view does not answer the question whether TRMs, on the other hand, can be eliminated in RTA. In other words, even if TRMs are comprehended in the exceptions list, the wording of Article XXIV:8 is ambiguous on whether they must or may be retained in RTAs (in the later case, they can also be eliminated as the RTA members wish). In the parenthesized listed exceptions, Article XXIV:8 states that "except, *where necessary*, those permitted under ...". Disagreement thus turned on whether the list of exceptions to the rule on elimination of duties and ORRC in Article XXIV:8 may or must be retained in RTA, focusing on how the phrase "where necessary" shall be read. In an early work on this issue, two possible interpretations were put forward in light of the context of Article XXIV:8:

First, it could mean that an RTA member country may apply those restrictions listed to other RTA members, notwithstanding the general requirement to eliminate substantially all barriers to intraregional trade, where the RTA member deems it necessary in order to address the policy concerns underlying each restriction. This

[454] R Hudec and J D Southwick, "Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly", in M Rodr ǵuez Mendoza, P Low, and B Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Brookings Institution Press 1999), at p 66-67.
[455] Panel Report, *Argentina – Footwear (EC)*, para 8.97.
[456] Appellate Body Report, *Argentina – Footwear(EC)*, paras 107-108; Appellate Body Report, *US – Wheat Gluten*, paras 98-100; Appellate Body Report, *US – Line Pipe*, paras 181-194.

reading makes intraregional application of the exceptions measures permissive rather than mandatory. [457]

The second possible reading is that an RTA member is permitted to apply the restrictions to other RTA members where necessary to act in conformance with the terms and principles of the exceptions measures themselves. Most of the other articles in the exceptions list also include criteria limiting the extent to which they can be applied in a manner prejudicial to the interests of particular WTO members. This second reading of the "where necessary" language suggests that they too must be applied to RTA members as well as non-members where necessary to meet those criteria. Policy considerations support this reading for each of the listed exceptions as well. In each case, excluding imports of another RTA member from application of the exceptions increases the burden on imports from non-RTA members or discriminates against them without sound policy justification.[458]

In *Turkey – Textiles* the Appellate Body resolved the long lasting debate on the optional or mandatory nature of the list of exceptions in Article XXIV:8. When stating its framework for assessing the availability of defence based on Article XXIV of the GATT, the Appellate Body ruled in *Turkey – Textiles* that:

> "Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the internal trade between constituent Members in order to satisfy the definition of a "customs union". It requires the constituent members of a customs union to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" between them."[459]

Furthermore, the Appellate Body noted, with regard to the exceptions list in the same provision, that:

> "The terms of subparagraph 8(a)(i) provide that members of a customs union *may* maintain, where necessary, in their internal trade, certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994." (emphasis added)

---

[457] R Hudec and J D Southwick, "Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly", in M Rodr ǵuez Mendoza, P Low, and B Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Brookings Institution Press 1999), at p 64.
[458] Ibid.
[459] Appellate Body Report, *Turkey – Textiles*, para 48.

The above quotations leave no doubt that the Appellate Body endorsed the "may" interpretation of the meaning of the exception listing.[460] According to this ruling, the RTA parties are not obligated to retain those restrictive regulations of commerce addressed in the parenthesis, as the case may be. On the assumption that the list of permitted exception is illustrative, i.e. the TRMs may be included in the exception list to ORRC, Article XXIV:8 still leaves room for the RTA members to eliminate the TRMs internally. In this sense, the "flexible" interpretation that views Article XXIV:8 "permits but not obliges" the existence of TRMs in RTAs is a development of the illustrative interpretation.

*4) "Substantially all the trade"*

As mentioned at the outset, since Article XXIV:8 requires the constituent members of a CU/FTA to eliminate duties and other restrictive regulations of commerce with respect to "substantially all the trade" between them, "substantially all the trade" (SAT) becomes another parameter related to the elimination/maintenance of TRMs in RTAs.

The SAT requirement in Article XXIV:8 is generally considered that the elimination of duties and ORRC in RTAs should cover a sufficient percentage of trade and at the majority sectors of the national economy. Because there is no exact definition referring to the term "substantially all the trade", neither the GATT contracting parties nor the WTO Members have ever reached an agreement on to what extent an elimination of the trade barriers in RTAs would meet such requirement.[461] Disagreements normally give rise to how much volume of the trade (in percentage) should be liberalized in RTAs, whether the SAT requirement allows any major sector to be excluded from the liberalization and what other factors should be taken into account when evaluating the SAT.[462]

---

[460] A T Gobbi Estrella and G N Horlick, "Mandatory Abolition of Antidumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling", in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Cambridge University Press 2006) 109, at p 135.

[461] Panel Report, *Turkey – Textiles*, para 9.148.

[462] See the Working Party report on *EEC*, GATT Doc BISD 6S/100 at § 34 and GATT Doc BISD 6S/70 at § 30; Working Party report on *EFTA*, GATT Doc. BISD 6S/70 at § 30; Working Party report on *EEC – Agreements with Finland*, GATT Doc. BISD 29S/79 at § 12. It was pointed out by Matsushita that no progression on the interpretation of "substantially all the trade" has ever been reached in more recent years:

The economist Jagdish Bhagwati considered that Article XXIV:8's SAT requirement was intended to close all potential legal loopholes that would allow the GATT/WTO system to degenerate into an array of less-than-100-percent RTAs. In practice, however, he argues, this rule's ambiguity and potential pressures from RTA advocators has made it nearly impossible for the GATT/WTO to sanction RTAs that doesn't cover all trade between its members.[463]

The panel in the *Turkey – Textiles* case examined this issue and concluded that the "ordinary meaning of the term 'substantially'...appears to provide for both qualitative and quantitative components."[464] In particular, the panel noted that "in the terms of sub-paragraph 8(a)(i), the possibility for parties to a customs union to maintain certain restrictions of commerce on their trade with each other, including quantitative restrictions ("…where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX"). This implies that even for "substantially all trade originating in the constituent countries" to be covered [...], certain WTO compatible restrictions can be maintained."[465] The Appellate Body agreed with the panel on this point, concluding that the SAT test in Article XXIV:8 requires both a percentage of trade to be liberalized and the non-exclusion of any major sector.[466] It also confirmed the panel's view that that this test offers the requisite *flexibility* because, although it does require "something considerably more than merely some of the trade", "substantial" is clearly not the same as "all".[467]

Advocates of the "exhaustive" view on ORRC assert that since Article XXIV:8 requires the duties and ORRC (except, ...) are eliminated with respect to "substantially all the trade" between the constituent territories of a RTA, the rule on elimination of duties and ORRC with respect to SAT requires that trade restrictions

---

> "[the] GATT Analytical Index (vol.2) on p 824 in footnote 162 provides and exhaustive list of Working Party reports dealing with this issue, where the outcome is still the same; the term under examination has not been clearly defined in relevant GATT practice. In series of papers that the WTO Secretariat prepared for the Committee, the conclusion was inescapable: 50 years of practice notwithstanding, WTO Members failed to come up with a workable definition on this term." (citation omitted)

See, M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), p 569.

[463] J N Bhagwati, "Regionalism and Multilateralism: An Overview", in Bhagwati, J., Krishna, P. and Panagariya, A. (eds), *Trading Blocs: Alternative Approaches to Analysing Preferential Trade Agreements* (The MIT Press 1999), p 7.

[464] Panel Report, *Turkey – Textiles*, paras 9.146-148.

[465] Ibid, para 9.150.

[466] Appellate Body Report, *Turkey – Textiles*, para 48.

[467] Ibid.

not be applied (rather than applicable) to a portion of the intra-RTA trade correspondent to the SAT threshold.[468] Even if the analyses on ORRC and the exceptions list allow the existence of TRMs in intra-regional trade, the SAT threshold renders the maintenance of TRMs in RTAs impossible or applicable to an insubstantial portion of trade only. Some advocates in "illustrative" camp hold the view that, "substantially all the trade" (not "all the trade") offers enough flexibility to permit regional TRMs.[469] This also suggests the TRMs are only applicable to the insubstantial portion of the RTA internal trade if they are included in the exceptions list to ORRC.

However, whether products subject to ORRC listed in the parenthesis in Article XXIV:8 are part of the "substantial" or "insubstantial" portion of trade is arguable. In Lockhart and Mitchell's work, the authors asserted that the measures included in the exceptions list to ORRC should not be constrained to the "insubstantial" portion of trade. To demonstrate their view, they specifically analysed the restrictions maintained pursuant to GATT Article XX:

> "Article XX provides a general exception to all GATT 1994 obligations. In certain circumstances, Article XX allows Members to promote governance priorities – such as public health and environmental protection – that conflict with WTO rules. [...] There is broad recognition in the WTO agreements, and among WTO Members, that Members should have discretion to pursue these other priorities, subject to the conditions governing the exceptions to WTO rules. However, if a product subject to health restrictions permitted by Article XX necessarily formed part of the insubstantial portion of trade on which ORRCs had not been eliminated, this would constrain WTO Member's right to pursue health objectives. In a customs union or an FTA, a WTO Member would be able to promote health only through internal restrictions on the "insubstantial" group of products. As well as being questionable in terms of State sovereignty, this

[468] A T Gobbi Estrella and G N Horlick, "Mandatory Abolition of Antidumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling", in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 109, p 125
[469] See, J Pauwelyn, "The Puzzle of WTO Safeguards and Regional Trade Agreements" (2004) 7(1) *Journal of International Economic Law* 109.

reading of Article XXIV:8 would be at odds with the text of Article XX."[470]

Thus, they read the structure of Articles XXIV:8(a)(i) and (b) as requires a RTA to "eliminate all ORRCs – except those bracketed – on substantially all trade."[471] Since the exceptions list is located immediately after the phrase "duties and other restrictive regulations of commerce" and, together with this phrase, the regulations in the bracket should also be excluded from the SAT threshold.

In line with this understanding, WTO Members would be entitled to maintain, where necessary, any of the ORRC listed in the brackets with respect to any product and any percentage of the trade. This interpretation of the SAT threshold would, therefore, avoid the problem of constraining Members from maintaining measures permitted under Article XX.

This argument is particular strong, taking account of the fact that Article XX(b) states "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ... necessary to protect human, animal or plant life or health". If GATT Article XXIV:8 meant that Article XX health measures could only be maintained on the insubstantial portion of trade, it would 'prevent' the adoption or enforcement of health measures on 'substantially all the trade', contrary to Article XX. Therefore, maintenance of the restrictions under the exceptions list in Article XXIV:8 should not be bounded in the "insubstantial" portion of trade.

According to this interpretation of the SAT requirement, if the exceptions list to ORRC is exhaustive, TRMs must be eliminated on a substantially portion of trade in RTAs, for example, 90 per cent of the trade. The imposition is possible but only limited to the remaining 10 per cent of trade. However, if the exceptions list is illustrative only, which means TRMs may be maintained in RTAs as same as other parenthesized measures, the SAT requirement does not affect the imposition of TRMs.

To sum up the above analysis, it is clear that TRMs *can* be eliminated in RTAs. More reasonably, the elimination is *optional*. Otherwise, questions would arise such as:

i) Whether TRMs should be treated as the ordinary restrictive regulations of

[470] N JS Lockhart and A D Mitchell, "Regional Trade Agreements under GATT 1994: An Exception and Its Limits", in A D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005) 217, pp 240-241.
[471] Ibid, p 241.

commerce that are subject to elimination in RTAs? The very nature of the safeguards is *emergency* protection which restrict import surge that cause serious injury to like domestic industry on *temporary* basis. It is questionable why the BOP measures are allowed to exist in RTA but safeguards are not. In the meantime, anti-dumping and countervailing measures are duties to counter unfairly low-priced or subsidised imports. It is hard to convince that such protection against the *unfair* trade practices must be eliminated in RTAs.

ii) Whether mandatory elimination of TRMs is practical for RTA integration? The constitution of an RTA normally leads to tariff reduction and border barriers below the MFN rate. Prompt elimination of the trade remedy measures would no doubt have an adverse impact on domestic industries in RTA member countries especially in transition period. In fact, most existing RTAs facilitate TRMs as necessary instruments when adjusting their market integration between the constituent countries. The origination of TRMs under the GATT/WTO demonstrates that a government is usually reluctant to open its domestic market without contingency protection. The same rationale should apply to regional integration as well.

It might be the reason why no agreement has been reached between the WTO Members on this issue and why the Appellate Body pragmatically permitted the existence of safeguards in RTAs, although Article XIX is not explicitly indicated in the exceptions list to ORRC. Therefore the "flexible" interpretation on ORRC is considered the most reasonable and practical approach in respect of TRMs – the application of those measures to RTA partners should be "permitted but not obliged", to the extent that their application does not prejudice the rights of third parties. Given this situation, to eliminate TRMs in intra-regional trade, other conditions are needed to facilitate the implementation of such deviation ensuring it meets the external requirements not to raise any barriers to third countries. One practical resolution might be to examine whether a RTA-specific TRM is "necessary" to the formation of the RTA.

## 4.5 "Necessity Test" in the Context of Article XXIV

### 4.5.1 "Necessity test" in the Context of Article XXIV:5

As a matter of fact, the Appellate Body in *Turkey – Textiles* tightened the criteria whereby a RTA could be justified under the WTO, by further confining a specific condition that need to be fulfilled in order to fully justify the use of the exception of Article XXIV provisions by Member States – the parties to the RTA must demonstrate that the formation of the RTA *would be prevented* if it were not allowed to introduce the measure in question.

In other words, the Appellate Body laid down a "necessity test" in examining any exceptions invoked under GATT Article XXIV. In particular, according to the Appellate Body, such "necessity test" is parallel with the internal and external requirements contained in Article XXIV:8 and 5. If the measure at issue were noticed not being "necessary" to the formation of the RTA, even if the RTA fulfilled the internal and external requirements, it may still be nullified by the Appellate Body.

The *Turkey – Textiles* case concerned certain quantitative restrictions imposed by Turkey on 19 categories of textile and clothing products imported from India. Turkey adopted these quantitative restrictions upon the formation of a customs union with the EU, with the purpose to adjust its external policy to the same level as the EU. India claimed that the imposition of these quantitative restrictions on textiles and clothing violated GATT Article XI and XIII, as well as Article 2.4 of the Agreement on Textile and Clothing. The Panel found these quantitative restrictions to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC.[472] The issue raised by Turkey in this appeal was whether these quantitative restrictions were nevertheless justified by GATT Article XXIV.[473]

When reviewing Turkey's appeal, the Appellate Body, in clarifying whether a Member is justified to adopt otherwise WTO inconsistent measures when setting up a CU, focused on the chapeau to Paragraph 5:

> "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union...; Provided

[472] Panel Report, *Turkey – Textiles*, para 9.86.
[473] Appellate Report, *Turkey – Textiles*, paras 6-20.

that..."

The Appellate Body stated that "the chapeau of paragraph 5 of Article XXIV is the key provision for resolving the issue before us in this appeal."[474]

The Appellate Body's analysis focused on the phrase "shall not prevent" found in the chapeau, and considered that the chapeau implies that "Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions *only if* the measure is introduced upon the formation of a customs union, and *only to the extent* that the formation of the customs union would be prevented if the introduction of the measure were not allowed".[475] Hence, this interpretation laid down a substantive obligation upon defendant states to be fulfilled before they could avail of the Article XXIV exception.

Accordingly, the Appellate Body summarised that:

> "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this 'defence' is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV."[476]

Therefore, the GATT-conformity of preferential (or non-)application of these non-tariff measures within RTAs appears to depend on whether or not those measures are "necessary" for the formation of RTAs in the sense of Article XXIV:5 and 8 of GATT 1994. To the extent of their necessity for the formation of an RTA, otherwise GATT-inconsistent measures can find justification under Article XXIV:5 of GATT. The Appellate Body asserted that, in order for an RTA to be eligible for the defence

[474] Appellate Report, *Turkey – Textiles*, para 43.
[475] Appellate Report, *Turkey – Textiles*, para 46 (emphases added).
[476] Appellate Body Report, *Turkey – Textiles*, para 58. That reversed the Panel finding that Article XXIV did not authorize a departure from GATT/WTO obligations other than Article I of GATT (Panel Report, *Turkey – Textiles*, paras 9.186-9.188).

under Article XXIV of GATT against the claim of MFN violation, it is incumbent on the parties to the RTA to demonstrate that the measures in question are "necessary" for the formation of the RTA, in the absence of which the formation of the RTA would have been made impossible, and that the measures at issue were introduced upon the formation of the RTA in the sense of Article XXIV:5 and 8 of GATT.[477]

### 4.5.2 "Necessity test" in the Context of Article XXIV:8

In *Turkey – Textiles*, the Appellate Body developed and applied a necessity test to the exception for RTAs in GATT Article XXIV:5. A similar test could also be applied to the TRMs in Article XXIV:8. In that context, TRMs can be eliminated or significantly deviate from the WTO TRM rules to the extent that the formation of an RTA would be prevented if not doing so.

However, it is not clear whether the necessity test applies solely to inconsistencies arising from the imposition of external trade restrictions or also to inconsistencies arising from the elimination of internal trade restrictions. In *US – Line Pipe* which concerned the safeguard measure imposed by the United States that excluded imports from other NAFTA members, one of the central questions was whether such discriminatory imposition of safeguard measure can be justified under Article XXIV.

To address this question, the panel distinguished *Turkey – Textiles* on the basis that the measure at issue in the *US – Line Pipe* case, which involved the facilitation of internal trade, is the very raison d'être of any RTA. It concluded "[i]f the alleged violation of GATT 1994 forms part of the elimination of 'duties and other restrictive regulations of commerce', there can be no question of whether it is necessary for the elimination of 'duties and other restrictive regulations of commerce'"[478]. This may be understood as a statement that any measure to comply with Article XXIV:8 is irrebuttably "necessary".[479]

The panel further stated in the footnote to above view that,

"Indeed, the application of a necessity test in such circumstances would give rise

[477] Appellate Body Report, *Turkey – Textiles*, para 46.
[478] Panel Report, *US – Line Pipe*, para 7.148.
[479] J P Trachtman, "Towards Open Recognition? Standardization and Regional Integration under Article XXIV of GATT" (2003) 6(2) *Journal of International Economic Law* 459, at p 475.

to absurd results. For example, assume that an FTA eliminates duties on peanuts, but not cars. In the context of a necessity test, third countries could claim that it was not necessary to eliminate duties on peanuts to meet the "substantially all the trade" threshold of Article XXIV:8(b), as that threshold could have been met by eliminating duties on cars. In such cases, it is difficult to imagine how a necessity requirement could ever be fulfilled."[480]

Based on the US's demonstration that NAFTA complies with Article XXIV:5(b)(c) and Article XXIV:8, and the panel's own finding that elimination of safeguard measure is required by Article XXIV:8(b)[481], the panel thus concluded that the exclusion of Canada and Mexico's imports from global safeguard is undoubtedly necessary.

The Appellate Body in *US – Line Pipe*, unfortunately, only reiterated the exclusion was only possible subject to a parallelism requirement when matching both source of investigation and application as to the same subject parties, and considered the panel's necessity test was irrelevant and hence it is moot and having no legal effect.[482] Therefore, whether elimination of safeguards for the purpose of Article XXIV:8 is irrebuttably "necessary" is undetermined.

It should be noted that the "necessity test" analysis provided by the panel is based on the definition of the term ORRC. In the appeal of the case, Japan questioned the panel's conclusion by arguing that the safeguard measure is in fact not required to be eliminated by Article XXIV:8.[483] Thus, the exclusion of Canada and Mexico's imports from US global safeguards should not be sanctioned as "necessary" in this regard. The EC claimed that "the imposition of a new safeguard measure in *US – Line Pipe* amounted precisely to the introduction of a trade restriction having adverse effect on the trade of other Members … The argument that the exclusion of its NAFTA imports from the measure was authorized as part of the elimination of the restrictions necessary to establish a free-trade area is contradicted by the facts"[484]. These arguments demonstrate that in the current circumstance where

[480] Panel Report, *US – Line Pipe*, footnote 137.
[481] Ibid, para 7.141. The panel stated that "[s]ince the line pipe measure introduces a tariff quota, we consider that the line pipe measure constitutes a "dut[y] [or] other restrictive regulation[] of commerce" within the meaning of Article XXIV:8(b)."
[482] Appellate Body Report, *US – Line Pipe*, para 199.
[483] Ibid, para 72.
[484] Ibid, para 66.

there is no consensus on whether TRMs are included in ORRC, the panel's reasoning should not apply to the elimination of the TRMs in RTAs.

In this regard, it should be noted that the panel's ruling in *US – Line Pipe* in fact is only applicable to the measures that are *mandatorily* to be eliminated in RTAs, not to those non-tariff measures included in the parenthesized exceptions list in Article XXIV:8. In Article XXIV:8(a)(i) and (b), it is clearly stated that:

> "duties and other restrictive regulations of commerce (*except, where necessary*, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to …"

Therefore, a necessity test is inherently built in Article XXIV:8 with regard to those non-tariff measures demonstrated in the exceptions list.

Scholars who consider that the necessity test should be confined to the external restrictions point to the fact that Article XXIV:5 aims to prevent increases in the level of external trade restrictions. Because the necessity test was derived from Article XXIV:5, it should apply solely to inconsistencies arising from the imposition of external trade restrictions.[485] However, as the chapeau of paragraph 5 is the sole provision in GATT Article XXIV that grants WTO Members a right to derogate from the obligations under other GATT provisions upon the formation of a CU or FTA,[486] it could logically be inferred that the necessity test contained in the chapeau of Article XXIV:5 applies to the RTA internal measures that is not mandatorily requested to be eliminated, e.g. the TRMs in RTAs.

This view can further be supported by an overriding requirement contained in Article XXIV:4 and the 1994 Understanding. Paragraph 4 of Article XXIV sets forth a general requirement for an acceptable RTA, including both internal and external concern. It states that "the purpose of a customs union or free-trade area should be to facilitate trade between the constituent territories and *not to raise barriers* to the trade of other contracting parties with such territories. (emphasis added)" This purpose is explicitly reaffirmed in the fifth paragraph of the Preamble of the 1994 Understanding, providing that in the formation or enlargement of a RTA, the constituent members should "to the greatest possible extent avoid creating adverse

[485] N JS Lockhart and A D Mitchell, "Regional Trade Agreements under GATT 1994: An Exception and Its Limits", in A D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005) 217, at p 227.
[486] See analyses in section 4.3 of this thesis.

effects on the trade of other Members." Therefore, it is easy to presume that, Article XXIV:4 together with the 1994 Understanding sets forth an overriding requirement for RTA to comply with, which embraces an economic concern that a RTA should not entail trade diversion effects.

From the pragmatic perspective, since there is no compensation mechanism available on the trade diversions resulting from discriminatory TRMs, the necessity test can provide a good instrument to balance trade benefit between the members of RTA and third countries.

Although the Appellate Body has not explicitly stated that the *Turkey – Textiles* necessity test is applicable in the context of Article XXIV:8, interestingly, in *Argentina – Footwear(EC)* – a case with regard to exclusion of regional imports in global safeguard measures, it reiterated that such test is an essential part of the conditions to justify WTO-inconsistent measures in the context of RTAs.[487] This implies a possibility to adopt the necessity test on RTA-related safeguard measures in the future.

Nevertheless, the present necessity test interpreted by the WTO tribunals in respect of GATT Article XXIV poses significant inadequacy and requires substantial improvement. In *Turkey – Textiles* case, with respect to the necessity criterion, Turkey asserted that if it had not imposed the quantitative restrictions at issue, the EC would have "exclude[ed] these products from free trade within the Turkey/EC customs union". The EC would have done so to prevent trade diversion: to prevent these products from flowing into the EC through Turkey, and thereby avoiding the application of the EC's quantitative restrictions. These goods accounted for 40 per cent of Turkey's trade with the EC, thus raising concerns that, if they were excluded, Turkey's regional arrangement with the EC would not satisfy the "substantially all trade" criterion.[488]

However, the Appellate Body agreed with the panel that there were less trade restrictive alternatives available, including the use of rules of origin to distinguish between Turkish and third country textiles. This would have addressed the problem of trade diversion, and obviated the need to exclude the textiles and clothing sector

[487] Appellate Body Report, *Argentina – Footwear (EC)*, paras 109-110.
[488] Appellate Body Report, *Turkey – Textiles*, para 61.

from the EC-Turkish CU.[489] In other words, the quantitative restrictions imposed by Turkey on Indian textiles and clothing products in that case were considered as not necessary for the formation of the EU-Turkey customs union.[490] Therefore Article XXIV was not available as a defence to justify the quantitative restrictions in that instance.

Pursuant to the above rulings, the "necessity test" interpreted in the *Turkey – Textiles* case presents two primary features:

1) The Member State using the Article XXIV as defence has a burden of proof to the effect that the measure at issue is "necessary" upon the formation of the RTA;

2) The sole standard to meet "necessary" addressed here is that there are no "least trade restrictive alternatives" available for the constitution of the RTA.

These features imply great legal uncertainty due to the member's inability to determine in advance which alternative method would be considered "least trade restrictive". In the meantime, the RTA members may be called upon to adjust the level of their enforcement measure for an alternative that might not be as effective to achieve the objective they pursue. As Trachtman asserted, in *Turkey – Textiles*, "the Appellate Body did not address the fact that such rules of origin would require administration, and would prevent the formation of the kind of CU that the EC and Turkey wished: one that would not require border controls on goods, consistent with the principle of 'free-circulation'".[491]

In addition, the approach of the Appellate Body in *Turkey – Textiles* seems to decline to balance the integration benefits against the detriments to the third-party, although the Appellate Body's language, based on Article XXIV:4 and Article XXIV:5(b) seems to call for this type of balancing. That would be counter to the ruling evolved from Article XXIV:5(a) that the evaluation of the trade measures and policies of a CU focuses on the *net effect* of the barriers on third parties; any single barriers of trade being raised may not be an issue under Article XXIV:5(a) and the

[489] Ibid, para 62.
[490] Ibid.
[491] J P Trachtman, "Towards Open Recognition? Standardization and Regional Integration under Article XXIV of GATT" (2003) 6(2) *Journal of International Economic Law* 459, at p 475. See also Panel Report, *Turkey – Textiles*, para. 4.3, quoting a response to written questions by the European Communities as follows: "The use of rules of origin benefiting only Turkish exports would have been an exception to the principle of free circulation within the customs union and would have required the maintenance of customs and border checks within the customs union designed to ensure that Turkey would not become a transit point of goods in circumvention of the Community's quota system arising from Turkey's adoption of the Community's rates of tariffs, etc."

1994 Understanding. In the event that new barriers are raised due to the formation of a CU, such new barriers should be permitted, providing that the overall level of the barriers of such a RTA is still lower than that before the constitution of the CU, because it is very likely that the effect of the new barrier will be evened out by other trade measures and policies.

Despite the *Turkey – Textiles* and *US – Line Pipe* cases, the WTO adjudicating bodies shed no light on the necessity test in the context of GATT Article XXIV. Therefore, the issue requires substantial improvement.

### 4.5.3 "Necessity test" in Other GATT/WTO Provisions

Necessity tests are not new in the GATT/WTO. Apart from the obligations to liberalize trade, in accord with the GATT/WTO, Member States have sufficient regulatory autonomy to derogate from their obligations for legitimate policy goals. For instance, WTO Members are allowed to establish domestic technical standards to protect the environment; to set up sanitary/phytosanitary measures to protect human, animal and plant life or health; or to take certain measures to secure compliance with laws or regulations which are not inconsistent with the GATT/WTO. Nevertheless, those regulations/enforced measures can pose trade barriers if applied in protectionism manner or constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Necessity tests thus establish the WTO-consistency of a measure based on whether the measure is "necessary" to achieve certain policy objectives. These tests reflect the balance in WTO agreements between two important goals: preserving the freedom of Members to set and achieve regulatory objectives through measures of their own choosing, and discouraging Members from adopting or maintaining measures that unduly restrict trade. Necessity tests typically achieve this balance by requiring that measures, which restrict trade in some way (including by violating obligations of an agreement) are permissible only if they are "necessary" to achieve the Member's legitimate policy objective.[492] In so doing, the necessity tests confirm the right of Members to regulate and pursue their policy objectives.

[492] *WTO Working Party on Domestic Regulation, "Necessity Tests" in the WTO – Note by the Secretariat*, S/WPDR/W/27, 2 December 2003.

Except for GATT Article XXIV discussed in this paper, WTO Agreements contain a number of provisions, which in whole or in part are commonly referred to as "necessity tests". Notably, these include Article XX and XI of the GATT; GATS Article XIV and VI:4, paragraph 2(d) of Article XII and paragraph 5(e) of the Annex on Telecommunications; Articles 2.2 and 2.5 of the TBT Agreement; Article 2.2 and 5.6 of the SPS Agreement; Article 3.2, 8.1 and 27.2 of the TRIPS Agreement; and Article 23.2 of the Agreement on Government Procurement.

In order to seek appropriate interpretation of the necessity test in the context of GATT Article XXIV, the following paragraphs attempt to investigate the analysis of the necessity test in some other areas of GATT/WTO, especially GATT Article XX(b) and (d) which have been frequently reviewed by WTO panels. Although the tests in other provisions of GATT/WTO law would not certainly be applicable to Article XXIV, there are some interesting similarities and they are worthy of consideration.

The term "necessary" was first interpreted in GATT years by the panel in *US – Section 337*, when it applied GATT Article XX(d). Article XX(d) allows measures to be GATT inconsistent if they are necessary to secure compliance with a Member's laws and regulations which conform with GATT disciplines. According to the panel, "necessary" means that no alternative measure exists, which the country "could reasonably be expected to employ" and "which is not inconsistent with other GATT provisions" or "which entails least degree of inconsistency with other GATT provisions". [493] This interpretation was followed by the panels *Thailand – Cigarettes*[494] and *US – Gasoline*[495] where the tribunals construed "necessary" as it is embodied in paragraph b) of GATT Article XX, a provision which allows Members to use otherwise GATT inconsistent measures to pursue their health policies. The Appellate Body in *EC – Tariff Preference* established that the kinds of measures listed in Article XX are "exceptions" to the general GATT rules, and that the burden of proof is therefore on the party invoking a specific Article XX sub-paragraph to

[493] Panel Report, *United States – Section 337 of the Tariff Act of 1930* ("*US – Section 337*"), BISD 36S/345, adopted 7 November 1989, para 5.26; see also Panel Report, *United States – Measures affecting alcoholic and malt beverages* ("*US – Malt Beverages*"), BISD 39S/206, adopted 19 June 1992, para 5.52.
[494] Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thailand – Cigarettes"*), BISD 37S/200, para 75, adopted 20 February 1990.
[495] Panel Report, *US – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/R, dated 29 January 1996, paras 6.25-6.28.

show that the measure is justified under that provision.[496]

Such "least inconsistent measure principle" incurred numerous criticisms on the legal uncertainty and onerous burden of proof on the responding party it may induce.[497] Since there was no explicit standard on the term "reasonably available", the challenged measure was very easily to be rendered into failure. That was the case in *US – Section 337* and *Thailand – Cigarettes*, in both of which the panel considered that reasonable alternatives were available to the responding party.

Especially, it was criticised of lacking of sensitivity to domestic legislators' aims. Put differently, the tests "impinge too heavily upon Member's regulatory autonomy to pursue legitimate non-economic values".[498] In *US – Gasoline*, the Appellate Body considered individual instead of the collective emission standards for foreign refiners to be "reasonably available", although compliance controls for such standards would render these measures more difficult for the US administration.[499] In *Thailand – Cigarettes*, in employment of the hypothetical regulatory measure, the panel and the Appellate Body failed to examine whether the achievement of the government's object was feasible or efficient. Various alternative measures were judged to be "reasonably available" to Thailand without considering the difficulty that could be encountered in applying them.[500] The controversy over this dispute was fuelled by the fact that Thailand, as a developing country, could not easily implement some of the suggested measures for lack of the requisite institutions and resources.[501]

With the advent of the WTO, the necessity analysis was significantly evolved. "The focus shifted from the goals of the measure relative to WTO-consistency/trade restrictiveness, to the relationship between the measure and the end sought. The recent necessity cases, *Korea – Beef* and *EC – Asbestos* represent a significant and

---

[496] Appellate Body Report, *EC – Tariff Preferences*, para 95.

[497] D A Osiro, "GATT/WTO Necessity Analysis: Evolutionary Interpretation" (2002) 29(2) *Legal Issues of Economic Integration* 123, at p 127. On the issue of the legal uncertainty, the author stated that "[t]here was no direction on how to determine the various degrees of infringement. It was not clear whether one would balance the relative GATT inconsistency (e.g. possibility of a violation of Article XI being considered more severe thus more restrictive than Article III), or whether the trade impact was quantified".

[498] J Neumann and E Türk, "Necessity Revisited: Proportionality in World Trade Organization Law after *Korea-Beef*, *EC-Asbestos* and *EC-Sardines*", *Journal of World Trade* 37(1) 2003, p 208.

[499] Appellate Body Reports, *US – Gasoline*, WT/DS2/AB/R, dated 29 April 1996, p 25-26.

[500] Panel Report, *Thailand – Cigarettes*.

[501] D A Osiro, "GATT/WTO Necessity Analysis: Evolutionary Interpretation" (2002) 29(2) *Legal Issues of Economic Integration* 123, at p128, cf. Stephen Charnovitz, "Exploring Enviromental Exceptions in GATT Article XX" (1991) 37 *Journal of World Trade* 117; M J Trebilcock and & R Howse, *The Regulation of International Trade* (Routledge 2000); S Bal, "International Trade Agreement and Human Rights: Reinterpreting Article XX of GATT" (2000) 10(1) *Minnesota Journal of Global Trade* 62; and C Corea, "Implementing National Public Health Policies in the Framework of WTO Agreements" (2000) 34(5) *Journal of World Trade* 89.

radical shift involving the balancing of domestic regulations against trade obligations, sometimes finding in favour of the former. This current interpretative approach not only established substantive guidelines, but also results in the proportionality test being allowed to the necessity analysis."[502]

First of all, the Appellate Body provided important clarification on the meaning of "necessary". In *Korea – Beef*, it recognized that "necessary" can have a range of meanings various from "indispensable" to "making contribution to", and it considered that, in the context of Article XX(d), the meaning is closer to "indispensable". Measures that are actually indispensable, it said, are clearly "necessary". In addition, though, measures that are not "indispensable" may nevertheless be "necessary".[503]

Secondly, the Appellate Body set out a number of factors that influence whether a measure at issue is "necessary", besides the difficulty of implementation. In *Korea – Beef*, it held that, the necessity analysis involves in every case a process of weighing and balancing a series of factors, which prominently include "the *contribution* made by the compliance measure to the enforcement of the law or regulation at issue, the *importance of the common interests or values* protected by that law or regulation, and the *accompanying impact* of the law or regulation on imports or exports".[504]

Thus, to determine the "necessity" of a challenged measure, the panels or Appellate Body will examine:

i) how important the policy objectives the challenged measure intends to protect. According to the Appellate Body's analyses in *EC – Asbestos*, the *Korea – Beef* interpretation laid down an important rule that, "the more vital or more important the common interests or values pursued, the easier it would be accept as "necessary" measure designed to achieve those ends"[505]. In *US – Gambling*, the Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "*begins with* an assessment of the 'relative importance' of the interests or values

[502] Ibid, at p 129.
[503] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, dated 11 December 2000, paras 159-164.
[504] Ibid, para 164.
[505] Appellate Body Report, *EC – Asbestos*, para 172

furthered by the challenged measure".[506] And, in any circumstance, participants do not dispute that it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve[507], as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.[508]

ii) the extent to which the measure contributes to the realization of the end pursued. The greater the contribution, the more easily a measure might be considered to be "necessary".[509]

iii) the extent to which the compliance measure produces restrictive effects on international commerce, that is, the restrictive effects on imported goods. A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.[510]

When determining whether an alternative measure is considered "reasonably available", the factors listed above are also relevant. The Appellate Body indicated in *EC – Asbestos* that, one aspect of the weighing and balancing process comprehended in the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure "contributes to the realization of the end pursued".[511] In other words, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".[512]

In *EC – Asbestos*, this "contributive" assessment applies also with an evaluation of the importance of the common interests or values at stake. The objective pursued by the measure in *EC – Asbestos* is the preservation of human life and health though the elimination, or the reduction, of the well-known, and life-threatening, health risks posed by the asbestos fibres. The value pursued is "both vital and important in the highest degree."[513] The Appellate Body then asked whether there is an alternative

[506] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Service* ("*US – Gambling*"), WT/DS285/AB/R, dated 7 April 2005, para 306 (footnote omitted).
[507] Appellate Body Report, *US – Gasoline*, p 30, DSR 1996:I, 3, at 28.
[508] Appellate Body Report, *EC – Asbestos*, para. 168.
[509] Appellate Body Report, *Korea – Beef*, para 163.
[510] Ibid, para 163.
[511] Appellate Body Report, *EC – Asbestos*, para 172.
[512] Appellate Body Report, *US – Gambling*,, para. 308.
[513] Appellate Body Report, *EC – Asbestos*, para 172

measure that would achieve *the same end* and that is less restrictive of trade than prohibition. In the view of the Appellate Body, France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the challenged measure sought to "halt". Such alternative measure would, in effect, prevent France from achieving its chosen level of health protection. According to the Appellate Body's analysis in *EC – Asbestos*, the more vital or more important the common interests or values pursued, the more effective the alternative measures must be.[514] However, an alternative measure did not *cease* to be "reasonably" available simply because the alternative measure involved *administrative difficulties* for a Member. [515]

In *Brazil – Tyres*, the Appellate Body further established a requirement that such a contribution could be quantified, which was not mentioned in previous cases[516]. It stated that: "a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue."[517] In other words, the challenged measure must bring about a *material* contribution to the achievement of its objective. In addition, a measure of which the contribution is not immediately observable, may also be justified under Article XX(b). Some policy goals can be tackled only with a comprehensive policy comprising a multiplicity of interacting measures, and the results obtained from certain actions can only be evaluated with the benefit of time.[518] Thus, the demonstration of contribution could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.

In conclusion, in order to determine whether a measure is "necessary" within the meaning of Article XX of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at

[514] Ibid, para 172 (quote Appellate Body Report, Korea-Beef, para.162).
[515] See Panel Report, *United States – Gasoline*, paras 6.26 and 6.28.
[516] Appellate Body Report, *Korea – Beef*, paras 163 and 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para 306; WTO Appellate Body Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes* ("*Dominican Republic – Import and Sale of Cigarettes*") WT/DS302/AB/R, dated 25 April 2005, para 70.
[517] WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* ("*Brazil – Tyres*"), WT/DS332/AB/R, dated 3 December 2007, para 145.
[518] Ibid, para 151. In this respect, the Appellate Body noted that, in *US – Gasoline*, the Appellate Body stated, in the context of Article XX(g) of the GATT 1994, that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable." (Appellate Body Report, *US – Gasoline*, p 21, DSR 1996:I, 3, at 20)

stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

The recent necessity test also significantly relaxed the burden of proof on the responding party. In *US – Gambling*, the Appellate Body further clarified that "it is not the responding party's burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives", that is "a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective".[519] Rather, "it is for a responding party to make a prima facie case that its measure is 'necessary' by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be 'weighed and balanced' in a given case".[520] In doing so, the Appellate Body noted, the responding party "may ... point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is 'necessary'".[521] However, if the complaining party "raise a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available'".[522] Finally, if a responding party "demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary' within the terms of Article XIV(a) of the GATS"[523]

In brief, the responding party only needs to establish a prima facie case that the challenged measure is "necessary" to achieve the desired legitimate policy objective. That is to say, the responding party is not obliged to demonstrate that they have sought for alternative measures and explain why those alternative measures would

[519] Appellate Body Report, *US – Gambling*, para 309.
[520] Ibid, para. 310.
[521] Ibid, para 310.
[522] Ibid, para. 311.
[523] Ibid.

not achieve the same objectives as the challenged measure. Once the prima facie case is established by the responding party, the onus actually will shift to the complaint to illustrate certain alternative measures, which are less trade restrictive and reasonably available to achieve the same end.

### 4.5.4 Further Improve the "Necessity Test" in the Context of GATT Article XXIV

In contrast with the "necessity test" currently developed in the context of Article XXIV, the correspondent examination under other GATT provisions is evidently more fully-fledged. Especially, it provides quite a number of additional factors that are critical in determining how much favour should be given to a measure adopted in RTAs that is otherwise WTO-inconsistent. In the author's opinion, the GATT Article XXIV "necessity test" should inevitably include a weighing and balancing process taking account of the factors listed below:

i) the meaning of "necessary" in the context of Article XXIV;
ii) the level of the importance of the interests and values pursued by RTA members under Article XXIV against their obligation to conform with other WTO provisions;
iii) the trade restrictive effects of the challenged measure on imported goods from third-countries;
iv) the burden of proof that should be adopted in the "necessity test" under Article XXIV; and
v) the contribution that would be possibly made by the challenged measure and the alternative measures held by the complaining Member.

*First of all*, the WTO adjudicating bodies need to clarify the exact meaning of "necessary" in the context of GATT Article XXIV.

As noted previously, the Appellate Body in *Korea – Beef* recognized that "necessary" can have a range of meanings varying from "indispensable" to "making contribution to". Measures that are actually indispensable, it said, are clearly "necessary". In addition, though, measures that are not "indispensable" (e.g. "making

contribution to") may nevertheless be "necessary".[524] According to an ordinary understanding of this interpretation, the more "indispensible" a measure is, the stronger proof should be made by the defendant that, without such measure, realization of the legitimate objective pursued would be prevented. Therefore, in the range of meanings varying from "indispensable" to "making contribution to", it is essential to determine to which end "necessary" in context of Article XXIV is close to.

As discussed in section 4.3.2.1 The Appellate Body in *Turkey – Textiles* stated that the "necessity test" originates from the chapeau of paragraph 5 of Article XXIV:[525]

> "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union...; Provided that..."

The Appellate Body hence focused on the phrase "shall not prevent" found in the chapeau, and considered the chapeau implies that "Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions *only if* the measure is introduced upon the formation of a customs union, and *only to the extent* that the formation of the customs union would be prevented if the introduction of the measure were not allowed".[526]

The italicized terms in the above interpretation clearly eliminate the possibility that a measure which is simply "making contribution to" the formation of a RTA would be recognized as "necessary" in the context of Article XXIV. The "necessary" in Article XXIV is rather closer to the "indispensable" end of the range. Therefore, a WTO Member who is seeking to adopt a measure which is inconsistent with certain other WTO provisions under the cover of GATT Article XXIV might need to make a strong case that such measure is introduced because it is "indispensible" to the formation of the relevant RTA.

*Secondly*, to examine the "necessity" of a WTO-inconsistent measure under GATT Article XXIV, WTO adjudicating bodies need to evaluate the importance of the interest and values pursued by WTO Members under GATT Article XXIV against

[524] Appellate Body Report, *Korea – Beef*, paras 159-164.
[525] Appellate Body Report, *Turkey – Textiles*, paras 43.
[526] Ibid, para 46 (emphases added).

their obligation to conform with other WTO provisions, especially in the circumstance that a regional measure/policy derogates from other WTO provisions and distorts (or has potential to distort) the trade with third-countries.

As aforementioned, in the context of GATT Article XX, the importance of the policy objective the challenged measure intends to protect is one of the prominent factors to be considered in the "necessity test". Since "necessity test" is an instrument to balance the WTO Members' right to achieve their legitimate policy objective against their obligation to comply with WTO general rules, the importance of the policy objective the challenged measure intends to protect should be universally considered in "necessity test" indicated in any GATT provisions, including Article XXIV. Compared with the protection of environment, human or animal's life and health addressed under GATT Article XX, however, the importance of the interests and values pursued by WTO Members to constitute a RTA (i.e. eliminate trade barriers and other regulations of commerce on substantially all intra-regional trade) is surely not at the highest degree. In this sense, perhaps no much favour would be given to a regional measure which is inconsistent with certain other GATT provisions.

*Thirdly*, the Article XXIV "necessity test" should evaluate the trade restrictive effects of the challenged measure on imported goods from third-countries. As the Appellate Body stated in *Korea – Beef*, a measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.[527] Although this ruling was made under GATT Article XX(d), there is no reason to reject such consideration in the context of Article XXIV.

It should be noted that in the case involving the constitution of a CU, an evaluation of the trade restrictive effects of the challenged measure on imported goods from third-countries should be assessed along with the net effect of the impact on the trade with third-countries. Such an evaluation is actually an inherent requirement contained in Article XXIV:5 (a), which provides that:

> "with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the

[527] Appellate Body Report, *Korea – Beef*, para 163.

institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not *on the whole* higher or more restrictive than *the general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;" (emphases added)

In doing so, such evaluation must be processed in line with the 1994 Understanding paragraph 2, which provides detailed guidelines to evaluate the general incidence of the duties and other regulations of commerce applicable before and after the formation of a CU.[528] If the overall level of the barriers of such CU is lower than or equal to that before the constitution of the CU, a trade distortive measure raised due to the formation of CU should be permitted.

*Fourth*, the burden of proof should be further clarified in the Article XXIV "necessity test".

Pursuant to the rules on burden of proof established in the WTO,

(a) it is for the complaining party to establish the violation it alleges;

(b) it is for the party invoking an exception or an affirmative defence to prove that the conditions contained therein are met; and

(c) it is for the party asserting a fact to prove it.[529]

In the Article XXIV "necessity test", the burden of proof is obviously on the RTA members to show that the challenged measure is "necessary" for the purpose of constitution of a RTA. Nevertheless, it will induce too onerous responsibility on the responding parties to ask them to demonstrate that they have sought for alternative measures and explain why those alternative measures would not achieve the same objectives as the challenged measure.[530] Therefore, it is more reasonable to require the defending party to establish a prima facie case that the challenged measure is "necessary" to achieve the desired legitimate policy objective. Once the prima facie case is established by the defending party, the complaint should bear the onus to

[528] See section 4.3.3.1 2) of this thesis.
[529] Panel Report, *Turkey – Textiles*, para 9.57 (quote Panel Report on *Argentina – Footwear (EC)*, paras. 6.34 - 6.40).
[530] In *Turkey-Textiles*, Turkey and EU was questioned by the Panel that whether they had spent any effort to look at alternative means of securing the same effect other than adopting the contested measure. See Panel Report, *Turkey – Textiles*, para 4.1. The burden of proof was not further mentioned and clarified by the Appellate Body.

illustrate the existence of certain alternative measures, which are less trade restrictive and reasonably available to achieve the same end.

*Finally*, the Article XXIV "necessity test" should evaluate and compare the contribution that would possibly be made by the challenged measure and the alternative measures held by the complaining Member. Such evaluation has two significant functions:

i) to ensure those regulations/enforced measures will not be applied in protectionism manner or constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail;
ii) to secure the realization of the legitimate objectives the respondent is pursuing, in case alternatives held by the complaint are not effective.

With regard to the evaluation of the contribution of the challenged measure, the Appellate Body in *Brazil – Tyres* laid down a very solid ruling that, the challenged measure must bring about a *material* contribution to the achievement of its objective; especially in the circumstances that the measure is not "indispensable" and has significant trade-restrictive effects, a measure which brings a marginal or insignificant contribution can nevertheless be considered necessary.[531] Therefore, the greater a challenged measure may contribute to the realization of the end pursued, the more easily the measure should be sanctioned to be "necessary".

In the same vein, the availability of an alternative measure held by the complaint should also rely on how much contribution it would make to achieve the end pursued by the respondent. Nevertheless, in the Article XXIV "necessity test", it might not be sensible to require the alternative measure to achieve *the same end* as the challenged measure. According to the Appellate Body's analysis in *Korea – Beef* and *EC – Asbestos*, the more important vital or more important the common interests or values pursued, the more effective the alternative measures must be.[532] Thus, in the case of pursuing regional trade integration, an alternative measure that *materially* contributes to the objectives should be considered as "reasonably available". In the meantime, an alternative measure should not be rejected simply because the alternative measure involves administrative burdens for the respondent.

[531] Appellate Body Report, *Brazil – Tyres*, para 150.
[532] Appellate Body Report, *Korea – Beef*, para 162 (reiterated in Appellate Body Report, *EC – Asbestos*, para 172.)

In sum, to judge the legality of a RTA-specific TRM under WTO, the WTO tribunal needs to first investigate whether such innovative TRM is consistent with the WTO basic rules. In the event that a RTA-specific TRM is not consistent with WTO basic rules, the next step is to examine whether Article XXIV can justify the adoption of such measure. The examination should be based on two key criteria set out in GATT Article XXIV:

1) whether the RTA at issue is a FTA or CU defined in Article XXIV:8(a) and (b);
2) Whether the challenged measure is introduced upon the formation of the RTA and whether it is necessary for the formation of the RTA.

Take *US – Line Pipe* as an example, one of the main issues challenged by Korea is that the United States violated the MFN principle set forth in GATT Article XIX and Article 2.2 of SA by excluding Mexico and Canada from the line pipe measure. Korea asserted that the exemption of Mexico was particularly egregious in this case since this selective safeguard measure resulted in significant import increase from Mexico and Canada at the expense of the import reduction mainly from Korea that was the historically largest exporter.[533] In response to this claim, the US quoted GATT Article XXIV as a defence to justify its selective safeguard measure. Hence, the legality of such a measure relies on whether it is permitted under GATT Article XXIV.

In terms of the legal status of NAFTA, the US provided that duties on 97 per cent of the NAFTA-parties' tariff lines would be eliminated within 10 years, whereas with respect to "other regulations of commerce" a reference to "the principles of national treatment, transparency, and a variety of other market access rules" was made.[534] In absence of effective refutation by Korea, NAFTA should be considered as in conformity with Article XXIV:8(b) and therefore the US is entitled to seek Article XXIV as a defence to justify a measure that is otherwise WTO-inconsistent.

With regard to condition 2), since the US introduced a measure that derogated from WTO SA and was complained by Korea that this measure has seriously detriment its trade profits, WTO tribunal is expected to examine the necessity of such

[533] Panel Report, paras.7.127-7.130. Korea demonstrated that, Mexico was the second largest exporter to the US market during the ITC's period of investigation; however, it became the largest exporter after the imposition of – indeed, exemption from – the safeguard measure, and Canada has increased its imports three-fold to become the number three supplier to the US market.
[534] Panel Report, *US – Line Pipe*, para 7.142.

a measure.

According to the necessity test summarised previously, in this particular case, WTO tribunal should question and evaluate a number of issues listed below:

i) What is the specific objective the US pursued by introducing a selective safeguard measure that is inconsistent with SA?
ii) How much trade diversion has the selective measure caused on imported goods from Korea?
iii) Is there any least trade distortive alternative measure could be adopted to achieve the interests that the US pursued? And
iv) What contributions that would be possibly made by the challenged measure and the alternative measures held by the complaining Member?

In the end, the conclusion will depend on the contribution the measure has made to the objective that the US pursued versus the trade diversion it has incurred, and whether the measure at stake is indispensable to the formation of NAFTA or is replaceable by another least trade distortive measure.

## 4.6 Conclusion

Putting above analysis together, it is observed that:

1. Recognizing RTAs could be effective instruments to promote the trade liberalization and foster the economic development of the multilateral trading system, GATT/WTO confers onto the Members which are parties to RTAs a special right to deviate from WTO MFN principle as necessary for the constitution of a customs union or free trade area. Nevertheless, WTO provisions regulating RTAs, i.e. GATT Article XXIV and the 1994 Understanding only spells out general principles on the scope and the effect of measures introduced on the constitution of RTAs. The vagueness of these provisions has become a source of disputes between RTA members and third countries, especially in TRM field.

2. With regard to certain discriminatory treatment in safeguard measures, WTO panels have developed a “parallelism” principle in case law. However, such principle is found not to be fully consistent with GATT/WTO statutory requirements and, generally, it does not answer the question whether GATT Article XXIV can justify an

otherwise WTO-inconsistent TRM in RTAs. Therefore, the legal criteria of WTO-consistent TRMs in RTAs must to be re-addressed.

3. After analysing the relationship between GATT Article XXIV and other provisions in GATT/WTO, it was concluded that Article XXIV is a derogation not merely from the MFN principle, but also from all the provisions of the GATT 1994 as well as the WTO's agreements on TRMs. Thus, Article XXIV may be invoked as a defence where an RTA-specific measure is not consistent with WTO TRMs rules.

4. Pursuant to the internal requirement laid down by Article XXIV:8, RTA members enjoy certain discretion on how to adopt TRMs internally. Nevertheless, since TRMs are not mandatorily requested to be eliminated in RTAs, adoption of these measures is subject to certain requirement laid down in the chapeau of Article XXIV:5, i.e., to establish RTAs, WTO Members can adopt a measure which is inconsistent with certain other GATT provisions *only if* the measure is introduced upon the formation of a customs union, and *only to the extent* that the formation of the customs union would be prevented if the introduction of the measure were not allowed.

Hence, it submitted that, in a case where a RTA adopts a TRM which violates general GATT/WTO obligations, the defending Member has to demonstrate: i) the measure that violates general GATT/WTO obligations and is in force under an Article XXIV arrangement, was in place upon the formation of the RTA; ii) the RTA under which the measure is introduced is within the meaning of GATT Article XXIV; and iii) the measure in question is "necessary" to the formation of the RTA.

5. Given the fact that the present necessity test interpreted by WTO tribunals in respect of GATT Article XXIV poses significant inadequacy, substantial improvement is expected in future practice, borrowing the ideas developed in the "necessity test" under other GATT provisions.

# Chapter 5 WTO's Surveillance Mechanism on RTAs

## 5.1 Introduction

In previous chapter, the consistency test was introduced as a vehicle to examine whether trade remedy measures in a particular RTA conform to WTO regulations and agreements. In order to see how this test might be applied in practice, this chapter will look at the WTO surveillance mechanism through which TRMs in RTAs can be reviewed and brought onto the right track.

There are two routes available to the Contracting Parties for reviewing the consistency of a RTA-specific TRM with the multilateral rules: First, the *multilateral* track: according to GATT Article XXIV:7, WTO Members have to notify RTAs they enter into to the WTO Committee on Regional Trade Arrangements (CRTA) (*ad hoc* Working Party in GATT era) and confront an assessment at political level (Track I); Second, the *bilateral* track: WTO Members may challenge the consistency of a TRM in a RTA with the multilateral rules through WTO dispute settlement proceedings (Track II).

However, the legal examination of RTAs has a notoriously unsuccessful history. As briefly introduced in Chapter 1, the CRTA and its predecessor the GATT working parties have never been able to adopt final reports on their examinations. In terms of Track II review, RTA-related disputes have rarely been submitted to adjudicating bodies for review. As a result, RTAs have been left largely unchallenged. In the few cases that have been examined through the dispute settlement proceedings, WTO judicial bodies' jurisdiction on reviewing RTA-related issues remains controversial, considering the political aspects of RTAs. Moreover, given the fact that both the political organ and the judicial organ are available to review RTAs, the interplay between these two tracks is unclear. It is evident that this status will hinder the examination of RTAs in the future.

To find out a feasible platform to enforce the consistency test on TRMs in RTAs proposed in this thesis, this chapter examines the difficulties that have arisen from RTA reviewing procedures in the past. Through this analysis, some ideas are presented on the key questions surrounding the WTO's surveillance of RTAs, for instance, whether the role of overseeing compatibility of TRMs in RTAs is best

performed by the political organs of the WTO or through dispute settlement, how the judicial organ should manage its jurisdiction with the purpose to examine TRMs in RTAs, and how to reconcile the recommendations and decisions of these two organs.

## 5.2 Multilateral Review of RTAs

Considering the discriminatory nature of regionalism and its potential distortive effect on the multilateral trading system, GATT Article XXIV *inter alia* provides a multilateral consistency assessment of certain notified RTAs. Paragraph 7(a) of GATT Article XXIV explicitly provides that:

> "Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate."

With regard to the interim agreements leading to the establishment of a CU or FTA, GATT Article XXIV:7(b) provides as follows:

> "If … the CONTRACTING PARTIES finds that such agreement is not likely to result in the formation of a customs union or of a free-trade area … the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations."

Accordingly, the WTO's surveillance of RTAs involves two intertwined tasks – gathering information about a given RTA and judging whether this RTA complies with the relevant legal criteria. Any WTO Member who attempts to constitute a RTA has an obligation to promptly notify the other Members. In the meantime, the GATT/WTO are mandated to consider and review the formation and modification of RTAs to ensure their compatibility with the GATT/WTO rules, on the basis of notifications by members of RTAs and additional information requested by WTO Members. Hence, RTAs notified under GATT XXIV are also submitted to an

"examination" of their legal consistency, where the substantive obligations will be tested.

With regard to the result of the examination, this wording suggests that the Member States can make any recommendation it deems appropriate. Thus, it may even conclude that a notified RTA is inconsistent with the GATT. For interim agreements, the GATT/WTO can effectively turn down a proposed CU or FTA, although the GATT Contracting Parties have never exercised their authority in such a drastic way.[535]

### 5.2.1 GATT Practice

In the GATT years, examination of RTAs was conducted in individual working parties. Based on GATT Article XXIV:7, a Working Party would be established upon notification of constitution of a RTA. Participation was open to all interested GATT contracting parties.[536] Often, several working parties co-existed, each assessing different RTAs.

The inefficiency of the Working Parties' assessments was soon revealed. One, this fragmented approach has long been criticised for its lack of coherence and orderly discussions of systemic issues commonly found in RTAs[537] Two, it was conducted by consensus mode – compatibility or incompatibility of a reviewed RTA or individual trade policy measure would not be concluded unless all Member States reach a unanimous opinion. Due to the disagreements on the interpretation of certain substantive provisions of the rules relating to RTAs, under the GATT working parties' procedure, the examination of specific RTAs was frustrated. For example, in the 46 years of the GATT up to the end of 1994, a total of 98 agreements had been notified under Article XXIV, most of which were examined in individual working parties; however, consensus on the conformity of these agreements with GATT provisions was reached in only one case: the Czech-Slovak customs union.[538] In the

[535] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), p 560.
[536] Ibid, p 559.
[537] Y Devuyst and A Serdarevic, "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap" (2007) 18 *Duke Journal of Comparative & International Law* 1, at p 45.
[538] J-A Crawford and S Laird, "Regional Trade Agreements and the WTO", Credit research paper, Centre for Research in Economic Development and International Trade, University of Nottingham, May 2000, p 8.

end, their adopted report reflected divergent views on the consistency of the reviewed RTAs and became an inventory of future disputes. The legal status of all these agreements has therefore remained undetermined.[539] By the same token, no conclusion was noted in respect of the legal consistency of the discriminatory TRMs in RTAs.

### 5.2.2 WTO Practice

To remedy this problem, in February 1996, the WTO General Council established the Committee on Regional Trade Agreements (CRTA) as a replacement of the GATT working parties.[540] All WTO Members can participate in the CRTA.

The mandate of the CRTA is described in the mentioned decision of February 7, 1996:

> "(a) to carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action;
>
> (b) to consider how the required reporting on the operation of such agreements should be carried out and make appropriate recommendations to the relevant body;
>
> (c) to develop, as appropriate, procedures to facilitate and improve the examination process;
>
> (d) to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system …"[541]

Accordingly, when examining a RTA notified under GATT Article XXIV:7, the CRTA has the mandate to examine the incidence and restrictiveness of *all* duties and regulations of commerce, in particular those governed by the provisions of the

[539] Roessler, F, "The Relationship between Regional Integration Agreements and the Multilateral Trade Order", in K Anderson and R Blackhurst (eds), *Regional Integration and the Global Trading System* (Harvester Wheatsheaf 1993) 311, at p 321.
[540] See *Decision Establishing the CRTA*, WT/L/127.
[541] Ibid. See also *Guidelines on Procedures to Improve and Facilitate the Examination Process*, WT/REG/W/15, dated 6 May 1997.

Agreements contained in Annex 1A of the WTO Agreement.[542] The CRTA can conduct its examination in light of the relevant provisions of the Agreements contained in Annex 1A of the WTO Agreement; however, the conclusions of the report would be confined to reporting on consistency with the provisions of Article XXIV.[543]

The examination process of a RTA typically proceeded as follows: the notification of a RTA under GATT Article XXIV (to the Council for Trade in Goods) triggered the adoption of terms of reference for its examination in the CRTA. In order to facilitate the examination process, RTA parties were charged with preparing a summary of the RTA based on an advisory template agreed among WTO Members.[544] During the CRTA meeting the parties would introduce the agreement and provide responses to Members' oral questions. Outstanding questions were dealt with through an exchange of written questions and replies and an additional round of examination at a subsequent meeting of the CRTA would be scheduled until Members agreed that the factual examination was complete. In general, this process resulted in a minimum of two rounds of examination, with some agreements requiring multiple rounds. Once an examination was complete, the WTO Secretariat was charged with drafting an examination report.[545]

Compared with the GATT working parties, the establishment of the CRTA as the single body responsible for the examination of agreements helped streamline the examination process and provided a forum for the discussion of cross-cutting system issues which are common to most, if not all, agreements. Therefore, it has contributed to greater expertise and a more coherent interpretation in the field of regional integration.

---

[542] See, *Meeting of the Council for Trade in Goods 20 February 1995*, G/C/M/1, 27 March 1995, paras 7.1-7.12. The first terms of reference under the WTO for the examination of RTA – Enlargement of the European Communities (accession of Austria, Finland and Sweden) – was adopted by the Council for Trade in Goods on 20 February 1995, along with an understanding read out by the Chairman at that meeting. Since then, these terms of reference and Chairman's understanding have been standard for the examination of all RTAs notified under GATT Article XXIV. See, *WTO Analytical Index: Guide to WTO Law and Practice*, Vol. 1, (Cambridge University Press 2007), 2nd ed., p301.

[543] Ibid.

[544] *Standard Format for Information on Regional Trade Agreement*, WT/REG/W/6, dated 15 August 1996.

[545] J-A Crawford, "A New Transparency Mechanism for Regional Trade Agreements" (2007) 11 *Singapore Yearbook of International Law* 133, at p135.

Nevertheless, the voting mode and the incentive structure of the CRTA examination remained intact – the CRTA decides by consensus.[546] As a result, no conclusion has been made on the consistency of any of the notified RTAs because the CRTA was unable to reach consensus.[547]

Legality of the discriminatory TRMs in RTAs was also undetermined. In the considerable debate on the interpretation of GATT Article XXIV, Members' disagreement on TRMs issues is remarkable. Questions were frequently raised on whether RTA parties can take safeguard or anti-dumping action against each other under GATT Article XXIV:8's reference to the elimination of "other restrictive regulations of commerce".[548] Some countries traditionally favoured the exemption of RTA parties from anti-dumping action, while others did not.[549] The question concerning safeguards between RTA parties is even more pronounced. If safeguards are forbidden between RTA parties, then a member may exempt its RTA partner from its application. Some members took a more permissive view, while others disagreed.[550]

Since CRTA reports are adopted independently whether CRTA Members have unanimously concluded that a given RTA is consistent or inconsistent with the multilateral rules, reports that are adopted by consensus do not necessarily conclude on the consistency or the inconsistency of a RTA with the multilateral rules, which means "final reports can be inconclusive and yet adopted."[551] Eventually, the examination process in the CRTA ends with the "factual examination".

It is universally accepted in academic literature that: first of all, the dismal performance of the political review on RTAs is in large part due to the very limited

[546] Where a decision cannot be arrived at by consensus, the matter at issue is to be referred to the appropriate higher body. *See* Rule 33 of the *Rules of Procedure for Meetings of the Committee on Regional Trade Agreements*, WT/REG/1, adopted on 14 August 1996.
[547] Between its establishment in 1996 and the launch of the Doha Development Agenda in November 2001, the CRTA held thirty sessions of meetings and completed the examination of total of 69 RTAs, but none of them was determined consistent or inconsistent with the WTO rules (see J-A Crawford, "A New Transparency Mechanism for Regional Trade Agreements", (2007) 11 *Singapore Yearbook of International Law* 133, p 135). By 2006, a total of 158 RTAs has been examined by the CRTA; however, no progress was made on the completion of the corresponding examination reports (see, *Report (2006) of the Committee in Regional Trade Agreements to the General Council*, WT/REG/17, 24 November 2006). Since the new Transparency Mechanism came into effect in 2006, the legal examination of the RTAs was upheld (see details in Section 5.2.3 of this thesis).
[548] WT/REG/W/12, para. 5(b); WT/REG/W/16, para. 50(c).
[549] WT/REG/W/12, para. 20; WT/REG/M/15, para. 26; WT/REG/W/28.
[550] WT/REG/M/15, para. 40; WT/REG/M/14, para. 7; WT/REG/W/29, paras 8-11; WT/REG/M/15, para. 22.
[551] P C Mavroidis, "Do not Ask Too Many Questions: The Institutional Arrangements for Accommodating Regional Integration within the WTO", in E K Choi and J C Hartigan (eds), *Handbook of International Trade Volume II: Economic and Legal Analysis of Trade Policy Institutions* (Blackwell Publishing 2005) 239, at p 245.

progress made by the WTO Members in resolving "systemic issues" (pertaining to the interpretation of some of the terms and benchmarks in the provisions) concerning WTO rules on RTAs.[552] For instance, there has been no agreement among WTO Members as to the exact meaning and measurement of key terms as "substantially all the trade", "other regulations of commerce", and, with respect to the treatment of preferential rules of origin, "other restrictive regulations of commerce" and obligations during transitional periods.[553] The quoted terms are of vital importance in judging the legality of the discriminatory TRMs in RTAs.

Secondly, the reviewing procedure convened by the CRTA leaves much to be desired because of the mode of voting, namely, by consensus. Frieder Roessler, the former Director of the GATT's Legal Service and a prominent participant in such reviews, has pointed out that, countries entrusted with enforcing the legal test have no incentive to do so and sometimes have an incentive not to do so, [554] especially because the RTA parties are also the voters.

Information gathering is another problem. Members in RTAs became increasingly reluctant to supply detailed information on their agreements, which could be used as ammunition by other compliance with WTO rules.[555] A number of RTAs are not even notified, and WTO Member often have little, or incomplete, information on notified RTAs. This situation added more difficulties to reviewing the RTAs at the political level.

Therefore, it is safe to anticipate that, unless the interpretations on the substantive legal criteria on RTAs are clarified or the consensus voting mode is changed (for example, by majority-voting mode), the CRTA examinations are unlikely to spell out a definitive conclusion on the legal status of the overwhelming majority of RTAs, or to make a clear judgment on those controversial trade policy measures like TRMs in RTAs.

---

[552] See P De Lombaerde (ed), *Multilateralism, Regionalism and Bilateralism in Trade and Investment: 2006 World Report on Regional Integration*, (Springer 2007), p 10.
[553] Ibid. Systemic issues with regard to GATS include the interpretation of "substantial sectoral coverage" and "absence or elimination of substantially all discrimination".
[554] F Roessler, "The Relationship between Regional Integration Agreements and the Multilateral Trade Order", in K Anderson and R Blackhurst (eds), *Regional Integration and the Global Trading System* (Harvester Wheatsheaf 1993) 311.
[555] See WTO Negotiation Group on Rules, *Compendium of Issues Related on Regional Trade Agreements – Background Note by the Secretariat, TN/RL/W/8/Rev.1*, 1 August 2002, p.8.

### 5.2.3 Renegotiation on the Multilateral Review of RTAs

The formidable increase in RTA activity in the last 15-20 years exacerbated the need for the multilateral trading system to strengthen RTA surveillance given that these RTAs undermine the MFN principle. In 2001, when WTO members gathered at the Doha Ministerial Conference to launch negotiations in the area of WTO rules, they agreed to start negotiations on new disciplines applying to RTAs, taking developmental aspects into account.[556]

The negotiating mandate on RTAs was assigned to the Negotiating Group on Rules (NGR). Potential issues for negotiation were rapidly identified: on 1 August 2002, the WTO Secretariat produced a checklist defining the universe of problematic issues, which served as a basis for the negotiations.[557] Parallel negotiations took place between 2001 and 2003, covering two aspects of RTAs: "systemic" or "legal" issues of more substantive nature, and issues of "procedural" nature.

As the scope of the "systemic" or "legal" issues under consideration is wide and complex, little progress has been made in the negotiation. Hence, the substantive components of legal test contained in GATT Article XXIV and the 1994 Understanding for qualifying a RTA were neither changed nor clarified.

From 2003 to 2006, there was shift in the attention of members from the difficult discussions on systemic issues to procedural issues.[558] In July 2006, Members reached a formal agreement on a *Draft Decision on a Transparency Mechanism for Regional Trade Agreements* ("Transparency Mechanism"). The Decision was applied on a provisional basis in December 2006 while awaiting the conclusion of the Doha Round.[559]

Comprising nine sections and one annex, the new Transparency Mechanism mainly provides:

---

[556] WTO Ministerial Declaration of 14 November 2001, para.29 "We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."

[557] See WTO Negotiation Group on Rules, *Compendium of Issues Related on Regional Trade Agreements – Background Note by the Secretariat*, TN/RL/W/8/Rev.1, 1 August 2002.

[558] J-A Crawford, "A New Transparency Mechanism for Regional Trade Agreements" (2007) 11 *Singapore Yearbook of International Law* 133, at p136.

[559] See, WTO Negotiating Group on Rules, *Transparency Mechanism for Regional Trade Agreements – Draft Decision*, Annex to *Negotiating Group on Rules – Report by the Chairman to the Trade Negotiations Committee*, TN/RL/18, 13 July 2006; General Council, *Meeting of 14-15 December 2006*, WT/GC/M/106 (March 1, 2007), at p3.

- a procedure for the early announcement of RTAs (paragraphs 1 and 2);
- a timeframe for notification (paragraphs 3 and 4);
- the spectrum of information to be submitted by the parties (Annex);
- the WTO Secretariat's factual presentation on the main features of the notified RTAs (paragraph 10);
- consideration on the notified RTAs (paragraph 6);
- streamlined procedures for RTAs' subsequent notification and reporting (paragraphs 14 to 17).

The context of the Transparency Mechanism shows that the key objective of it is to optimise the flow of accurate and complete information on the making and implementation of all RTAs and to make that information available to all Members.

On the other hand, it also implies that the WTO Members attempt to delink the information provision of RTAs from the legal examination. Unlike the procedure of the CRTA in earlier years, under the Transparency Mechanism, the notification and information provision of a RTA will not trigger consistency examination immediately. It only gives arise to a "consideration" by the CRTA,[560] which consists of an exchange of questions and replies between interested members and the parties. When the WTO Secretariat prepares the factual presentation, paragraph 9 of the TM provides that the WTO Secretariat "shall refrain from any value judgment". Paragraph 10 further made it clear that the "factual presentation" shall not be used as a basis for dispute settlement procedure.

It was commented by Crawford and Lim that, "[i]t does so by removing the need for a consistency assessment, thereby avoiding deadlock over questions concerning substantive disciplines",[561] and there is a "tacit understanding [among the WTO Members] that any questions of legal compliance with WTO rules will be dealt with elsewhere".[562]

Therefore, the Transparency Mechanism does not provide a radical remedy to the potential difficulties in the consistency examination of RTAs by the CRTA; on the contrary, it lays up the consistency examination. Although GATT Article

[560] Same approach is applied by the Committee on Trade and Development (CTD) for those RTAs notified under the Enabling Clause.
[561] J-A Crawford and C L Lim, "Cast Light and Evil Will Go Away: The Transparency Mechanism for Regulating Regional Trade Agreements Three Years After" (2011) 45 (2) *Journal of World Trade* 375, at p 383.
[562] Ibid, at p 386.

XXIV:7 is still there, requiring that agreements notified under GATT Article XXIV be subjected to a multilateral "examination" and consistency assessment, the assessment may not be re-commenced until the substantive criteria against which compliance has to be measured are finally crystallized.

In these circumstances, a legal challenge to a RTA, including TRMs issues, against somewhat imprecise GATT Article XXIV, is more likely to be settled in the context of the judicial process. The question will then be whether the panels and the Appellate Body are capable of taking on such a difficult task.

## 5.3 Dispute Settlement and the Review of RTAs

### 5.3.1 GATT Practice

In the GATT years, the dispute settlement generally operates in following way:[563] first, the disputing parties are given opportunities for consultation. When this does not result in agreement, the complaining party can ask the GATT Council (the GATT Contracting Parties) to establish a "panel" for undertaking an examination of the dispute.[564] Advocacy proceeds both orally and in writing, and sometimes Contracting Parties that are not disputants will be given an opportunity to give their views about the subject. The Panel deliberate in secret, and finally produces a report which is transmitted to the GATT Councils for adoption or approval.

Therefore, the decision on the establishment of a panel, the decision on the adoption of the panel report and the decision to authorize the suspension of concessions were to be taken by the GATT Councils. And, all this operates by

[563] The content is derived from J H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press: 2000), pp 122-123. The GATT dispute settlement procedures is largely set out in *Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance* (GATT Doc. L/4907, LT/TR/U/1, Nov. 28, 1979), further modified and elaborated by actions through the 1980s and particularly at the Uruguay Round mid-term review in Montreal in December of 1988 (*Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures*, BISD 36S/61).

[564] A panel will usually consist of three (sometimes five) individuals acting in their own capacity, and in recent years those individuals have included non-government specialists, such as academicians, retired diplomats, or retired GATT secretariat officials. . The parties must agree on the composition of the panel, although if an impasse is reached, there are provisions for the intervention of the Director-General. *See Ibid.*

consensus.[565] The responding party could thus delay or block any of these decisions and thus paralyse or frustrate the operation of the dispute settlement system.

As a consequence, during the GATT years (1947-1994), three panels were established to examine claims relating to the consistency of a RTA with the multilateral rules.[566] Two reports were issued and they both remain unadopted.[567]

### 5.3.2 WTO Practice

With the advent of the WTO, drastic changes were noticed in the new dispute settlement mechanism, which allows the WTO judicial body to draw conclusions on RTA-related disputes.

First of all, an independent, judicial-type institution was established: the General Council of the WTO convenes as DSB to administer the rules and procedures of the WTO Dispute Settlement Understanding [hereafter: DSU].[568] The adjudication of disputes is entrusted to panels at the first instant level and the Appellate Body at the appellate level. Secondly, it operates in a negative consensus mode. Panels will be established if a potential complaint so wishes.[569] Adoption of the report and authorization of countermeasures come into effect automatically, unless the DSB decides by consensus to *reject* them.[570] Hence, the new mechanism eliminated the possibility that the establishment of the panel or of its report being adopted or of an eventual request for countermeasures be blocked by the other party (who, indeed, has an incentive to behave in a non-cooperative manner). Disputes submitted to the WTO

---

[565] In J H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press 2000), pp 122-123, it was explained that:

> "Although the GATT provides for a majority vote in decisions of the Contracting Parties, with "one nation, one vote", the GATT Contracting Parties for some years have endeavoured to avoid strict voting and to adopt decisions by 'consensus,' which generally means extensive negotiation for a text to which all parties can agree. It is the idea of consensus that has been carried over into the dispute settlement procedure, such that it is deemed necessary to have a consensus decision of the Council to adopt a panel report."

[566] The first, after a request by Canada in 1974 in connection with the accession to the European Community of Denmark, Ireland, and the United Kingdom (GATT Doc. C/W/250) was not activated because the parties to the dispute reached an agreement (GATT Doc. C/W/259). The second led to an unadopted panel report in *EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* (hereinafter the *EC – Citrus*), GATT Doc. L5776. The third report is on *EEC – Import Regime of Bananas* (hereinafter the *EEC – Bananas*), DS38/R, dated 11 February 1994, which also remains unadopted.

[567] Ibid.

[568] Article IV:2 of the WTO Agreement and Article 2.1 of the DSU.

[569] DSU, Article 6.1.

[570] DSU, Article 16 and 22.

dispute settlement system will end up with an outcome; favourable, or unfavourable, an outcome anyway.[571]

In the meantime, the extent of the judicial review of WTO panels was clarified. In the 1994 Understanding, paragraph 12 explicitly provides that:

> "The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be involved with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area."

Therefore, WTO judicial bodies are officially granted a large review power which extends to any matter arising from the application of Article XXIV GATT. Although GATT practice as noticed *supra* suggests that panels are competent to adjudicate RTA-related claims, this is the first time in GATT/WTO history that such an acknowledgement is made explicitly and it takes place in an era where there is no consensus-hurdle to establish panels.[572]

Since the establishment of the WTO dispute settlement mechanism, although only two cases cited to GATT Article XXIV have been reviewed through the panel's proceedings, both went on conclusion and were accepted by the disputants[573]. Such a result was neither achieved by the GATT working parties nor the CRTA. Thus, dispute settlement proceeding is the only feasible way to handle the RTA-related issues in the current regime.

---

[571] P C Mavroidis, "Do not Ask Too Many Questions: The Institutional Arrangements for Accommodating Regional Integration within the WTO", in E K Choi and J C Hartigan (eds), *Handbook of International Trade Volume II: Economic and Legal Analysis of Trade Policy Institutions* (Blackwell Publishing 2005) 239, at p 266.
[572] Ibid, at p 267.
[573] *Turkey – Restrictions on Imports of Textile and Clothing Products* (*Turkey – Textiles*) (DS34) and *Canada – Certain Measures Affecting the Automotive Industry* (*Canada - Autos*) (DS139) (see http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A9#selected_agreement). In Section 4.4 of this thesis, it was mentioned that, to date, there are also five cases were reviewed by the WTO panels regarding safeguard measures involves RTAs notified under GATT Article XXIV. However, the panels and the Appellate body shied away from making examinations on those RTAs. Meanwhile, the interpretation of the legal requirements under GATT Article XXIV in those cases is very limited.

### 5.3.3 Academic Debates Concerning WTO Panels' Jurisdiction over RTAs

Despite the initial success of the bilateral review, a few questions have been raised regarding WTO panels' jurisdiction on RTA-related disputes.

First of all, protests have been raised as to whether Track II should be available at all – in other word, whether TRMs in RTAs are justiciable, taking account of the highly political context surrounding regional integration.

In *India – Quantitative Restrictions*, India argued that the question of whether a restriction can be justified on balance of payments grounds is inherently political and this is why such issues have been entrusted to Committees on Balance of Payment and not to panels.[574] Similar argument could be raised that the consistency of a RTA with the WTO is one of a political nature, and hence not justiciable.

In this regard, Matsushita et al., provided a strong argument which counters the above view: the only genuinely political question in respect of a RTA is the *rationale* for choosing the regional route; however, it is not put into question at all by GATT Article XXIV. What is questioned by the WTO contract is the conditions under which a RTA can legitimately be formed.[575]

On the other hand, the wording of the 1994 Understanding "[a]ny matter relating to the application of Article XXIV GATT" reflects the willingness of negotiators to affirm their intention to see WTO panels deal with RTA-related issues. Therefore, it is quite clear that RTA-related issues are justiciable before the WTO judicial organ.

Indeed, since the adoption of the 1994 Understanding, it is universally accepted that WTO judicial bodies are competent to examine individual trade measures of RTAs. Thus, there is little doubt that WTO panels can review TRMs in RTAs.

Controversies, however, exist on the question of whether an *overall* assessment on the compatibility of RTAs is appropriate to be conducted by the WTO judicial body. A typical view supporting the negative answer is that the term "[a]ny matter relating to the application of Article XXIV GATT" in paragraph 12 of the 1994 Understanding only refers to individual trade measures adopted upon the formation

[574] Appellate Body Report, *India – Quantitative Restrictions on Imports of Agriculture, Textiles and Industrial Products* ("*India – Quantitative Restrictions*"), WT/DS90/AB/R, dated 23 August 1999.
[575] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), p 556.

of RTAs, not the overall compatibility of the RTAs themselves. According to Roessler, "[t]he 'ordinary meaning' of the term 'application' is 'a specific use or purpose for which something is put' and 'applicability in a particular case.'"[576] Thus, he "suggests that panels can only make findings on specific measures imposed."[577] This issue is well worth discussion because it is particularly relevant to the review of TRMs in RTAs.

As identified in Chapter 4, since GATT Article XXIV is an exception to other WTO provisions, WTO Members are logically requested to first show consistency of their RTA with WTO rules before they can invoke GATT Article XXIV as a defence to justify discriminatory TRMs applied in RTA. That is to say, assessment of the overall consistency of a RTA is a pre-requisite to the examination of an individual TRM imposed by such a RTA.

Due to the fact that the WTO political organ has been unable to make conclusions on the legal status of the notified RTAs, WTO panels had to (and, very likely, will continue to) make their own judgment on the overall consistency of a RTA before entering into examination of the individual measures adopted by such RTA. However, whether WTO panels are competent to carry out this task remains contentious. Hence, in order to see whether the consistency test proposed in Chapter 4 can be effectively conducted by WTO panels, it is necessary to clarify whether WTO panels have jurisdiction on the overall consistency of RTAs.

In the GATT years, this issue was addressed in two cases, where the GATT panels held different positions.

The first case is *EC – Citrus*, in which the EEC invoked GATT Article XXIV as a defence to justify its tariff preferences granted to citrus products imported from certain Mediterranean countries. The panel held that it could examine individual measures but not the overall consistency of a RTA with the multilateral rules. The relevant passage of the report reads:

> "The Panel noted that at the time of the examination of the agreements entered into by the European Community with certain Mediterranean countries, there

[576] F Roessler, "The Institutional Balance between the Judicial and the Political Organs of the WTO", in M Bronckers and R Quick (eds), *New Directions in International Economic Law, Essays in Honour of John H. Jackson* (Kluwer Law International 2000) 325, at p 330.
[577] Ibid.

was no consensus among contracting parties as to the conformity of the agreement with Article XXIV:5 … The agreements had not been disapproved, nor had they been approved. The Panel found therefore that the question of conformity of the agreements with the requirements of Article XXIV and their legal status remained open."[578]

In 1993, the *EEC – Bananas* panel adopted a different logic. In *EEC – Bananas*, the European Community granted tariff preferences for bananas to certain African, Caribbean and Pacific (ACP) countries which violated GATT Article I:1. To justify this measure, The EEC claimed that such tariff preferences, which were granted under the Lomé Convention, were justified by Article XXIV and that this Convention could only be examined by the political organ.

The panel responded to this claim as follows:

"The Panel could not accept that tariff preferences inconsistent with Article I:1 would, by notification of the preferential agreement and invocation of Article XXIV against the objections of other contracting parties, escape any examination by a panel established under Article XXIII. If this view were endorsed a mere communication of a contracting party invoking Article XXIV could deprive all other contracting parties of their procedural rights under Article XXIII:2 and therefore also of the effective protection of their substantive rights, in particular those under Article I. The Panel concluded therefore that a panel, faced with the invocation of Article XXIV, first had to examine whether or not this provision [GATT Article XXIV:7] applied to the agreement in question."[579]

The panel successively found that the one-way preferential arrangements concluded under the Lomé Convention are *per se* inconsistent with GATT Article XXIV[580]. Hence, it went on to conclude that the Lomé Convention did not correspond to the type of agreements which GATT Article XXIV covers; obligations to liberalize must be assumed by all participants.[581]

[578] Panel Report, *EC – Citrus*, L/5776, dated 11 February 1985 (unadopted), at para.4.6 and at para.4.10.
[579] Panel Report, *EEC – Bananas*, paras 158-59.
[580] Ibid., para 159.
[581] Ibid., para 164.

Although the panel's reasoning in *EEC – Bananas* is pretty sound, since the reports of both cases remain unadopted, the legal value of these reports is minimal.

When the same issue arose in the WTO era, the panels and Appellate Body's position was once again split.

In *Turkey – Textiles*, the panel declined to examine the overall consistency of the EU-Turkey customs union, of which a certain measure was challenged as violating other WTO provisions on quantitative restrictions. The panel provided its reason in relevant part of the report that:

> "[W]e understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV, that panels have jurisdiction to examine 'any matters "arising from" the application of these provisions of Article XXIV,' For us, this confirms that a panel can examine the WTO compatibility of one or several measures 'arising from' Article XXIV types of agreement …. Thus, we consider that a panel can assess the WTO compatibility of any specific measure adopted by WTO Members … on the occasion of the formation of a customs union …. As to whether panels also have the jurisdiction to assess the overall WTO compatibility of a customs union, we recall that the Appellate Body stated that the 'measures' … all of which could potentially be examined by panels, before, during or after … CRTA examination, if the requirements laid down in the DSU are met. However, it is arguable that a customs union (or a free-trade area) as a whole would logically not be a 'measure' as such, subject to challenge under the DSU."[582]

The panel therefore, simply assumed the EU-Turkey CU is consistent with GATT Article XXIV and focused on examining whether the individual measures adopted by the EU-Turkey CU could be justified under GATT Article XXIV.

The case was appealed, and the Appellate Body adopted a different stance. According to the Appellate Body, the Article XXIV GATT defence holds only if two conditions are met:

> "First, the party claiming the benefit of this defence must *demonstrate that the measure at issue is introduced upon the formation of a customs union that fully*

[582] Panel Report, *Turkey – Textiles*, paras 9.50, 9.51 and 9.53.

*meets the requirements of sub-paragraph 8(a) and 5(a) of Article XXIV*. And second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue …. We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled."[583]

This *obiter dictum* clearly indicates that: one, examination on the legality of a trade measure in a RTA is based on a strict pre-examination on whether the accused RTA is compatible with GATT Article XXIV; two, WTO panels are entirely competent to examine the overall consistency of a RTA.

Most recently, in *US – Line Pipe* the United States argued that, since it is a member of NAFTA, it was entitled to treat imports from NAFTA different than imports from non-NAFTA sources when imposing a safeguard measure. The panel first addressed the issue of burden of proof:

"As the party seeking to rely on an Article XXIV defence... the onus is on the United States to demonstrate compliance with these conditions."[584]

The same report addressed the issue of the quantum of proof that the party carrying the burden of proof has to provide in order to establish a *prima facie* case of consistency of a RTA with the multilateral rules. Paragraph 7.144 of the report reads in this respect:

"In our view, the information provided by the United States in these proceedings, the information submitted by the NAFTA parties to the Committee on Regional Trade Agreements ("CRTA") (which the United States has incorporated into its submissions to the Panel by reference), and the absence of effective refutation by Korea, establishes a prima facie case that NAFTA is in conformity with Article XXIV:5(b) and (c), and with Article XXIV:8(b)."

The information provided by the United States in the proceedings is reflected in paragraph 7.142 of the report and essentially is exhausted in a statement that duties on 97 per cent of the NAFTA-parties' tariff lines will be eliminated within 10 years, whereas with respect to "other regulations of commerce" a reference to "the

[583] Appellate Body report, *Turkey – Textiles*, paras.58-59 (emphasis added).
[584] Panel Report, *US – Line Pipe*, para 7.142.

principles of national treatment, transparency, and a variety of other market access rules" is made.

Apparently, the above cases presented three different approaches on how to handle the assessment of the overall consistency of the RTA at issue when examining an individual measure adopted by such a RTA.

The approach adopted by the *Turkey – Textiles* panel requires a panel to refrain from making judgment on the overall consistency of the RTA at stake. Based on an assumption that the RTA is consistent with GATT Article XXIV, the panel focuses on examining the individual measures adopted by such a RTA. This approach is obviously inappropriate. Examination of the overall compatibility of the accused RTA is an indispensable pre-requisite to the examination of the concrete trade policy measures adopted by the RTA even it is not questioned by the disputants, because it essentially prevents other forms of trade union to abuse the rights under GATT Article XXIV – the *EEC-Bananas* case has already demonstrated that this could happen.

The approach adopted by the *Turkey – Textiles* Appellate Body requires a panel to make strict examination of whether the accused RTA is compatible with GATT Article XXIV before examining the legality of an individual measure in such a RTA. Although it is quite ideal to determine the overall consistency of the RTA at stake before questioning the legality of the individual measures imposed by such a RTA, this is the approach that received most opposition in the academic literature. Many scholars advise the WTO judicial organ to restrain from making comprehensive assessment on the overall consistency of RTAs.

*First of all*, Devuyst and Serdarevic, in a recent research paper, asserted that the WTO in fact is only a "partial" constitutional supervisor of RTAs. RTAs often have broader goals going well beyond trade policy; the WTO, however, is largely confined to trade law and policy that is far from the comprehensive legal structure that reflects the variety of issues covered by RTAs.[585] Thus, in their view, "[W]hile the WTO is the appropriate forum for the assessment of *the trade policy measures* of

[585] Y Devuyst and A Serdarevic, "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap" (2007) 18 *Duke Journal of Comparative & International Law* 1, at p 56.

RTAs, it should not be burdened with the role of *overall* constitutional arbiter of the legality of RTAs."[586]

*Second*, the vague nature of WTO provisions on RTAs is the most significant factor that restrains WTO panels from formulating a convincing judgment on overall assessment of RTAs. As Devuyst and Serdarevic explain, "in the literature on compliance with international legal norms, the substantive characteristics of treaties are among the most important predicting factors affecting effective implementation. Duties of a general and imprecise nature that leave a large margin of interpretation are much less likely to be correctly implemented than precise obligations that are tested on their simplicity in implementation."[587] Since the WTO's current rules on RTAs are characterized by a general lack of precision, it is inappropriate to make the legal status of RTAs dependent on such shaky provisions and controversial calculations.[588]

*Third*, there is a need to preserve the WTO's institutional balance between political and judicial bodies. Roessler has proposed that, for reasons having to do with the institutional balance of the WTO, a limited judicial review by WTO adjudicating bodies is the most appropriate one.[589] According to Roessler, the framers of the WTO negotiated a complex institutional structure "under which separate judicial and political bodies" were created.[590] He made a distinction between:

- The WTO's legislative branch: the membership of the WTO acting collectively under the amendment and other rule-making provisions;
- The WTO's executive branch: the political organs of the WTO taking decisions within the framework of the existing law, including the Committee on Regional Trade Agreements and the Committee on Balance-of-Payments Restrictions; and
- The WTO's judicial branch: the Panels, arbitrators and the Appellate Body.[591]

[586] Ibid, at p 60.
[587] Ibid, at p 65 (footnote omitted).
[588] F Roessler, F, "The Relationship between Regional Integration Agreements and the Multilateral Trade Order", in K Anderson and R Blackhurst (eds), *Regional Integration and the Global Trading System* (Harvester Wheatsheaf 1993) 311.
[589] F Roessler, "The Institutional Balance between the Judicial and the Political Organs of the WTO", in M Bronckers and R Quick (eds), *New Directions in International Economic Law, Essays in Honour of John H. Jackson* (Kluwer Law International 2000) 325.
[590] Ibid, at p 325.
[591] Ibid, at p 326.

He therefore asserted that "[j]ust as modern states, the WTO must ensure that its judicial organs exercise their powers with due regard to the jurisdiction assigned to the other parts of its institutional structure".[592] As a judicial branch, WTO panels evidently cannot replace the legislative branch.

*Fourth*, considering the onerous administrative burden and the time constrain that WTO panels have to adhere to, the CRTA is the more appropriate forum to review overall consistency of notified RTAs. On this score, Devuyst and Serdarevic advanced that "it is doubtful whether Panels are technically equipped to make an overall assessment of the compatibility of RTAs with the WTO disciplines."[593] In their opinion,"[I]n view of the paralysis of the CRTA, it is unlikely that Panels – when examining the overall compatibility of the RTA – will be able to base their rulings on clear decisions adopted by the members. Panels would thus need to rule on the overall compatibility of RTAs in line with their own assessment. It is entirely unclear how Panels would approach such a daunting task as their rulings would go well beyond the interpretation of a WTO rule in a precise case."[594]

*Moreover*, there is a problem of the political acceptability of dispute settlement rulings on the legality of RTAs, especially in view of the vague substantive criteria. It is entirely unclear what consequences would be of a WTO dispute settlement ruling that effectively declares an RTA incompatible with the WTO laws.[595]

It should be admitted that above reasons make sufficient sense that a *comprehensive* overall assessment on the compatibility of RTAs should be exclusively assigned to the WTO political organ. Although WTO panels so far have not yet made any comprehensive review of the overall legality of a RTA, they are suggested to avoid doing so.

In contrast, the approach adopted by the *US – Line Pipe* panel is rather practical. It requires a panel to conduct a *prima facie* examination on the overall consistency of the RTA with GATT Article XXIV; if a positive conclusion is made, the panel can further examine the legality of an individual measure in a RTA. The *prima facie* overall compatibility requirement laid down by the *US – Line Pipe* panel is

[592] Ibid.
[593] Y Devuyst and A Serdarevic, "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap" (2007) 18 *Duke Journal of Comparative & International Law* 1, p 68.
[594] Ibid, pp.68-69.
[595] Ibid, p 69.

fundamentally different from a comprehensive assessment on the overall compatibility of RTAs. In common understanding, establishment of a *prima facie* case on the overall compatibility of an accused RTA is not conclusive or irrefutable, therefore, it does not prejudice the CRTA to make its own judgment on a later occasion.

It is worth noting that, even in an extreme case where a WTO Member wishes a panel to make a comprehensive review on the overall compatibility of a RTA, there is little reason for panels to reject such a claim in accord with the current legal regime.

Pursuant to Article 1 of the *Dispute Settlement Understanding* [hereafter: the "DSU"], the WTO dispute settlement mechanism applies to all the multilateral agreements, subject to special or additional provisions contained therein. Because there are no such special or additional rules and procedures applicable to the assessment of the overall compatibility of RTAs in the DSU or in Article XXIV, such assessment logically falls into the purview of WTO judicial bodies. Prohibiting Members recourse to the dispute settlement procedure will deprive the complaining party's rights under the DSU, given the fact that the political organ (GATT working parties and the CRTA) has never made any definitive conclusion in past decades.[596]

On the other hand, as Bartels observed,

> "… unlike most 'ordinary' courts and tribunals, panels and the Appellate Body are extremely limited in their ability to manage cases that are inappropriate for resolution in dispute settlement proceedings. They have no power to declare cases 'inadmissible', they are unable to suspend proceedings while a relevant decision is taken in another forum, and they are unable to declare that the law which they are bound to apply is incapable of determination."[597]

Therefore, WTO panels have inherent difficulties to decline to give decisions on issues, no matter if it is political sensitive, or, of which the substantive law is unclear.

Bring together, in the current regime, WTO panels have authority to review the overall compatibility of RTAs, not only to *prima facie* extent but also to a

[596] W J Davey, "Has the WTO Dispute Settlement System Exceeded its Authority?" (2001) 4 *Journal of International Economic Law* 79, at p 87.
[597] L Bartels, "The Separation of Powers in the WTO: How to Avoid Judicial Activism" (2004) 53 *International and Comparative Law Quarterly* 861, at p 862.

comprehensive extent. However, given the reasons submitted by their opponents cited previously, it is suggested WTO negotiators either exclusively assign the comprehensive overall assessment on RTAs' compatibility to the political organ, or enlarge the power of WTO panels so that they would have the authority to decline to take the issue into consideration.[598]

## 5.4 Interplay between Tracks I and II

Since the WTO panels and the CRTA both have authority to review trade policy measures in RTAs, problems may arise in the interplay between the two organs. For example, should one organ take into account the decision made by the other when determining relevant subject matters; what happens if a RTA is simultaneously assessed before the panel and the CRTA; what happens if a RTA (or trade measure applied upon the RTA) was sanctioned as consistent/inconsistent with Article XXIV but later received a reverse judgment in the CRTA, etc.

### 5.4.1 CRTA Decision Followed by Dispute Settlement Proceedings

As to the legal significance of the CRTA reports, Matsushita et al. asserted that, if the CRTA by consensus concludes on the consistency/inconsistency of the notified RTA (or a trade measure imposed upon the RTA) with the multilateral rules, there is good reason to believe that a panel subsequently dealing with the issue will follow their opinion.[599]

To support this view, they quoted the panel report on *India – Quantitative Restrictions* which dealt with a similar issue (i.e., to what extent a panel dealing with an issue where the Balance of Payments Committee has already decided) in paragraph 5.94:

[598] For detail analysis on the proposal of how to enlarge the panels' power, see generally in L Bartels's work, ibid.
[599] Matsushita, M, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), pp 557-558.

> "… we see no reason to assume that the panel would not appropriately take those conclusions into account. If the nature of the conclusions were binding … a panel should respect them."[600]

They then suggested that the same reasoning should apply to panels dealing with RTA-related issues.

It deserves pointing out here that, with regard to the interplay between the political organ and the judicial organ review on BOP matters, paragraph 13 of the BOP Understanding clearly provides that "[w]henever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations". Thus, if a recommendation was given out by the BOP Committee and adopted by the General Council, WTO panels would have to take those recommendations into account in successive cases. To the contrary, similar provision is not available with regard to RTAs. That is to say, there is no legal compulsion for a panel to follow a CRTA decision.

However, since the CRTA report is an expression of all relevant WTO Members' willingness, there is little reason not to take the CRTA's decisions or recommendations into account, especially on those issues where discretion is exercised (e.g., the overall WTO compatibility of a RTA, or whether a discriminatory TRM imposed by a WTO Member is "necessary" to the formation of its RTA).

But if the CRTA has not issued its report at the time the dispute was submitted to the panel, should the panel stop short of making findings based on its own discretion? The answer should be negative. In common understanding, absence of a determination by the CRTA on the legal status of a RTA (or a trade measure introduced upon a RTA) simply means that the CRTA neither determined such RTA (or the trade measure) is compatible with the WTO, nor determined it is incompatible with the WTO. Since WTO judicial bodies are also competent to review RTA-related disputes, they should not be bound from making their own findings without receiving any guidance from the CRTA. If the panels refrain from doing so, they would risk depriving WTO Members' rights under the DSU, given the fact that the political organ has never made any definitive conclusion in past decades.

[600] Panel Report, *India – Quantitative Restrictions*, WT/DS90/R, dated 6 April 1999.

Therefore, in *US – Line Pipe*, the Panel explicitly stated that:

> "Concerning Article XXVIII:8(b), we do not consider the fact that the CRTA has not yet issued a final decision that NAFTA is in compliance with Article XXIV:8 is sufficient to rebut the *prima facie* case established by the United States. Korea's argument is based on the premise that a regional trade arrangement is presumed inconsistent with Article XXIV until the CRTA makes a determination to the contrary. We see no basis for such a premise in the relevant provisions of the Agreements Establishing the WTO."[601]

### 5.4.2 Dispute Settlement Proceedings Followed by CRTA Decision

Indeed, due to the time constraint that the panels have to adhere to and the absence of such constraint in the CRTA review, WTO panels had made (and, very likely, will continue to make) their findings without receiving any guidance from the political organ. So, do the panel's findings prejudge future action by the CRTA? What happens if a RTA (or trade measures applied upon the RTA) was sanctioned as consistent/inconsistent with Article XXIV but later received a reverse judgment in the CRTA?

As to the first question, the answer seems to be no. The Appellate Body has on several occasions stated that the reports of the panels and Appellate Body, even adopted, are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise, because the definitive interpretations of the provisions of the WTO agreements shall only be made by the Ministerial Conference and the General Council.

The legal status of a panel report was initially addressed by the Appellate Body in *Japan – Taxes on Alcoholic Beverages II*:

> "We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that

[601] Panel Report, *US – Line Pipe*, para 7.144.

this is contemplated under GATT 1994…. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding…"[602]

In *US – Shrimp* the Appellate Body quoted above statement and added that "this reasoning applies to adopted Appellate Body reports as well".[603]

In *US — Stainless Steel (Mexico)*[604], the Appellate Body further clarified that "[i]t is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties";[605] "[w]hile Appellate Body reports adopted by the DSB shall be accepted unconditionally by the parties to the dispute, it is the exclusive authority of the Ministerial Conference and the General Council to adopt, pursuant to Article IX:2 of the WTO Agreement, interpretations that are binding upon the WTO membership."[606]

As a consequence, WTO Members can at any time (e.g., through a WTO Committee) adopt an interpretation of the term which may be different or contradict to the panels' finding in previous proceedings. However, since such interpretation cannot be applied retroactively, what panels dealing previously with the issue ended up with is not a concern for the WTO Members.[607]

### 5.4.3 Simultaneous Consideration

In exceptional circumstances, it is also possible that a RTA is reviewed simultaneously before the CRTA and the panels. The question would then arise as to

[602] Appellate Body Report, *Japan-Taxes on Alcoholic Beverages II* , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 4 October 1996, p12-13. This is a clear reference to Article IX:2 of the WTO Agreement, which states that "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreement [by three-fourths majority voting of the Members]."
[603] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia* (*US — Shrimp (Article 21.5 — Malaysia)*"), WT/DS58/AB/RW, dated 21 November 2001, paras 107-109.
[604] Appellate Body report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico* ("*US — Stainless Steel (Mexico)*"), WT/DS344/AB/R, dated 30 April 2008, paras 158-159.
[605] Ibid, para 158.
[606] Ibid, footnote 308.
[607] P C Mavroidis, "Do not Ask Too Many Questions: The Institutional Arrangements for Accommodating Regional Integration within the WTO", in E K Choi and J C Hartigan (eds), *Handbook of International Trade Volume II: Economic and Legal Analysis of Trade Policy Institutions* (Blackwell Publishing 2005) 239, at p 271.

whether the reviewing proceedings of one organ should be or could be suspended whilst an issue is being discussed before another organ. To answer this question, this section analyses whether the CRTA or the WTO panels have obligation or power to suspend their proceedings.

On the CRTA side, no legal text indicates that it bears obligation to suspend its proceeding whilst the same issue is being examined by WTO judicial bodies. However, since it is a political organ that operates by consensus-mode among all WTO Members, if all participants unanimously agreed to wait for the conclusion to be made by the panels and the Appellate Body, nothing should prevent them from doing so.

Then, how about the WTO judicial bodies? Do WTO panels and the Appellate Body have either obligation or power to suspend a dispute settlement proceeding? This issue is barely examined in existing literature, except for a paper presented by L. Bartels that discusses it at length.[608]

In the first place, he mentions the "judicial comity" followed by the arbitral tribunal in *MOX Plant Arbitration (UK/Ireland)*. It was noticed that, in these proceedings, the arbitrators ordered the suspension of proceedings for five months, so that various issues material to the questions of jurisdiction could be decided in a more appropriate forum (the European Court of Justice). The original text of the Order provided:

> "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties."[609]

[608] L Bartels, "The Separation of Powers in the WTO: How to Avoid Judicial Activism" (2004) 53 *International and Comparative Law Quarterly* 861, at pp 890-891.
[609] The *Mox Plant Case* (*Ireland v. United Kingdom*), Permanent Court of Arbitration (Order No 3, 24 June 2003), para 28.

The Tribunal made its Order based on a provision in its Rules of Procedure which stated as follows:

> "Subject to these Rules, the Arbitral Tribunal may conduct the proceedings in such manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity to be heard and to present its case."[610]

Thus, it is important to know whether the rules of procedure (i.e. the DSU), authorize WTO panels to suspend their proceedings. In all provisions of the DSU, only Article 12.12 grants panels the express power to suspend proceedings at the request of the complaining party. It states, relevantly, as follows:

> "The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months … If the work of the panel has been suspended for more than 12 months, the authority for the establishment of the panel shall lapse."

Obviously, Article 12.12 DSU allows the complaining party to request suspension of panel proceedings. However, this is a right bestowed upon the complaint, and not an obligation to behave in this way assuming certain contingencies (e.g., discussions of the issue before a WTO Committee) have been met.[611] Put differently, according to Article 12.12 DSU, a panel has no power to suspend proceedings on its own motion or at the request of the defendant.

In Bartels work, he also examined the possibility for WTO panels to suspend their proceedings under their Working Procedure. Pursuant to DSU Article 12 and Article 17, the panels and the Appellate body should adopt certain working procedures at the initial stage of the dispute settlement proceedings, which cover arrangements on information provision, communication between the disputants and the panels, and the proposed timetable for the panel and Appellate Body's work. The pattern of the Working Procedures for the panel is provided in Appendix 3 of the

[610] United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, Article 15(1).
[611] M Matsushita, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006), p 557, in footnote 23.

DSU; the Appellate Body's working procedure is provided in a separate document.[612]

Although the working procedures are modelled in these documents, the panel and the Appellate Body enjoy certain flexibility to adopt different procedures in particular cases. Notably, Article 16(1) of the Appellate Body's Working Procedures provides that:

> "In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules…"[613]

In this regard, Bartels pointed out that the Appellate Body has adopted a generous interpretation of its own powers and the powers of a panel to adopt Working Procedures in a number of cases.[614] However, he noted, on all occasions, the Appellate Body also held that, the procedural rules adopted either by itself or by the panels must comply with the substantive provisions of the DSU. Therefore, he concluded that "[e]ven if panels and the Appellate Body have the power to suspend proceedings under their Working Procedures, any suspension that would take proceedings beyond the deadlines in these provisions would appear to be prohibited".[615]

In brief, pursuant to relevant provisions of the WTO panels' procedure, a WTO panel has an obligation and authorization to suspend dispute settlement proceedings at the request of the complaining party for maximum 12 months. However, generally, neither a panel nor the Appellate Body has authority to suspend the proceeding on its own motion or at the request of the defendant. In particular cases, the panel and the

---

[612] The original Appellate Body's working procedure is provided in WT/AB/WP/1 which came into effect on15 February 1996. The most recent amendments were announced on 26 July 2010 in "*Working Procedures for Appellate Review*", WT/AB/WP/W/11.

[613] Available in "*Working Procedures for Appellate Review*", WT/AB/WP/4, dated 1 May 2003.

[614] Appellate Body Report, *European Communities – EC Measures Concerning Meat and Meat Products (Hormones)*(" *EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, dated 16 January 1998, para 152 n 138; Appellate Body Report, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India-Patents (US)*"), WT/DS50/AB/R, dated 19 December 1997, at para 92. Appellate Body Report *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US-Lead and Bismuth II*"), WT/DS138/ABR, dated 10 May 2000, at para 39.

[615] L Bartels, "The Separation of Powers in the WTO: How to Avoid Judicial Activism" (2004) 53 *International and Comparative Law Quarterly* 861, pp 893-894.

Appellate Body may be able to temporarily suspend proceedings under the working procedures they adopted in particular case; this suspension will not take long and exceed the time limits set up by the DSU.

In the author's view, given the fact that the CRTA has never made a conclusion on RTA examinations in history, suspension of dispute settlement proceedings is very unlikely to obtain any definitive response from the CRTA and therefore, the suspension will impair the complaining party's rights under the DSU.

## 5.5 Conclusion

The above observations and analysis show that, throughout the GATT years and the WTO, the Member States sought to determine the compliance of RTAs with the relevant rules (i.e., consistency assessment) but with very little success.

In the political review procedures, long-standing differences of interpretation of some of the key elements of the legal texts pertaining to RTAs, coupled with the consensus decision mode impeded the GATT working parties and the WTO CRTA from developing definitive results on RTAs examination. Although a lot of effort has been devoted to improve the substantive and procedural criteria on RTA in recent decades, the result remains unsatisfactory. The latest concluded Transparency Mechanism further implies that, formal consistency examinations on RTAs tend to be laid up at political level in the near future. Therefore, legal challenge to a RTA, including TRM issues, against the somewhat imprecise GATT Article XXIV is more likely to be settled in the context of a judicial process.

Since the establishment of the WTO dispute settlement regime, a negative consensus decision mode has replaced the consensus mode in the GATT era. Therefore, WTO panels were able to make conclusions on RTA-related disputes brought in front of them. Nevertheless, the panels and the Appellate Body consistently took different positions on their jurisdiction in the review of RTA-related cases, taking account of the institutional balance between the WTO's political organ and judicial organ. The issue also became very contentious in academia. The major questions refer to whether WTO panels have jurisdiction to review specific

trade measures adopted in RTAs and whether they have jurisdiction to review the overall compatibility of a RTA with the WTO rules.

After analysing the relevant provisions on RTAs, the reasoning provided by WTO panels in relevant cases and the prevailing literature addressed this issue, it is concluded that, examination of the legality of an individual measure in a RTA should be based on an examination on the overall consistency of the RTA with GATT Article XXIV. In the current regime, WTO panels have authority to review both specific trade measures in RTAs and the overall compatibility of RTAs. However, for the sake of institutional balance, they are suggested to refrain from making judgment on the latter issues. Alternatively, a *prima facie* examination on the overall consistency of the RTA with GATT Article XXIV can be conducted by the WTO panels.

In terms of the interplay between Track I and Track II, the finding is:

Firstly, since the report of the panels and the Appellate Body only binds the specific disputants on specific subject matters and the definitive interpretations of the provisions of the WTO agreements shall only be made by the Ministerial Conference and the General Council, the WTO panel's finding will not prejudge future action by the CRTA. WTO Members can at any time through the CRTA adopt an interpretation of the term which may be different or contradict to the panels' finding in previous proceedings.

Secondly, there is no legal compulsion for the WTO panel to follow a CRTA decision. But since the CRTA report is an expression of all WTO Members' willingness, WTO panels are expected to take the CRTA's decisions or recommendations into account, especially on those issues where discretion is needed.

In the exceptional circumstance that a RTA is reviewed simultaneously before the CRTA and the panels, the CRTA may suspend its proceeding, waiting for the result from the dispute settlement if the participants agree unanimously, although it has no obligation to do so. However, WTO panels are only entitled to make suspensions at the request of the complaint and limited to a 12 months' time-span. In particular cases, the Appellate Body can suspend its proceedings under Working Procedure; however, this cannot exceed the time frame (90 days) listed by the DSU (Article 17.5).

# Concluding Remarks

This thesis has discussed TRMs adopted in existing RTAs, based on a comparative study with their counterparts in the WTO legal system. It observed that, given the WTO's inadequate and ambiguous disciplines on RTAs, adoption of TRMs in RTAs has significantly deviated from WTO basic rules, and this trend is likely to be further enhanced in the future. The main concern of such incoherence is that rule diversification on TRMs lies in the creation of another method to wield a discriminatory authority which is structured to favour inefficient RTA parties at the expense of more efficient third countries. In addition, it also undermines the transparency and predictability standards of the international trading system presented by the WTO.

To address this problem, this thesis discussed four key issues as follows and provided academic opinions and suggestions respectively:

1) What is the relationship between RTAs and the WTO? Should RTA trade policies be compliant with WTO rules?
2) What are the TRMs and what are the differences between TRMs in RTAs and the WTO?
3) Whether TRMs in RTAs can deviate from WTO general rules, given the exceptional status of a RTA in WTO; what are the legal conditions they must adhere to? and
4) How to enforce the WTO-consistency test on RTA-specific TRMs and bring them back onto the right track?

In this thesis, RTAs and the WTO are recognized as two different arrangements to liberalized trade. Hence, to discuss the corresponding trade a policy in RTAs and the WTO, the first issue was dealt with is: what is the relationship between RTAs and the WTO?

For this purpose, Chapter 1 introduced the background of the multilateral trading system and the regional trade agreements. It took historical and theoretical perspectives to assess the roles and functions of the multilateral trading system and RTAs. After comparing the advantages and disadvantages of each arrangement, it

proposed that for a healthy and sustainable international trade environment, RTAs should complement to the WTO, not an alternative. Consequently, it considered the recent proliferation of RTAs and their trend to develop complex networks of non-MFN trade relations. It argued that this situation not only challenges the dominance of the WTO but also creates more and more confusion on the WTO-RTA relationship. To ensure a positive interplay between the WTO and RTAs, clear disciplines under the multilateral trade framework regarding the RTAs are indispensable.

Chapter 2 examined GATT/WTO regulations on TRMs, and also reviewed the controversial academic views over the rationale and function of anti-dumping, countervailing duty measures and safeguards in international trade. It observed that, preferential TRMs in RTAs, in the first place, root on the extraordinary features of TRMs as well as the ambiguities existing in WTO TRM rules. The controversial economic rationale of TRMs, frequent usage of those measures in recent years in a protectionism manner and the vague criteria on application of TRMs are potential reasons that RTAs altered the corresponding rules for intra-regional trade. Therefore, current trade remedy rules in the WTO regime need to be further strengthened.

In chapter 3, TRMs in RTAs, summarized in a bunch of strategic approaches, were introduced through comparative method against WTO regulations. It mainly revealed the deviations of TRMs in RTAs from the WTO rules and presented the influence of those innovative measures on regional trade and imports from third-countries.

It observed that, use of special TRMs as distinguished from the WTO regime has become a predominant feature of existing RTAs. By all appearances, those measures aim to reduce the potential arbitrary use of these instruments between RTA members and thus become ultimately positive in promoting intra-regional trade flow; however, they actually more or less divert trade opportunities from third-countries. Although actual trade diversion has not substantially materialized on the basis of emerging preferential application of trade remedy rules, a future risk seems much more real when major exporting countries with keen interests for trade remedy systems are engaging actively in RTA negotiations. It can be claimed that, such phenomenon should not be overlooked and a positive solution must be located in the WTO legal framework.

Since WTO provisions regulating RTAs, i.e. GATT Article XXIV and the 1994 Understanding, have never clearly addressed the trade remedy issues, Chapter 4 clarified the ambiguous legal criteria of WTO-consistent TRMs in regional trade agreements and provided a methodology through which a RTA-specific TRM could be tested against WTO's criteria.

In the first place, section 4.2 criticised the "parallelism" principle, a methodology which was adopted by the WTO adjudicating body to assess discriminatory global safeguard measures in previous dispute settlements. It proposed that such a principle is not found fully consistent with the GATT/WTO statutory requirement and, generally, it does not answer the question whether GATT Article XXIV can justify an otherwise WTO-inconsistent TRM in RTAs.

Accordingly, section 4.3 and 4.4 re-addressed the legal criteria of WTO-consistent TRMs in RTAs in two tiers: 1) whether TRMs in RTAs are allowed to deviate from the WTO general rules on TRMs, given the exceptional status of RTA in the GATT/WTO; and 2) in what conditions and to what extent they are allowed to deviate.

With regard to the first question, section 4.3 analysed the relationship between GATT Article XXIV and other provisions in GATT/WTO. It concluded that, Article XXIV is a derogation not merely from the MFN principle, but also from all the provisions of the GATT 1994 as well as the WTO's agreements on TRMs. Thus, Article XXIV may be invoked as a defence where an RTA-specific measure is not consistent with WTO TRMs rules.

In terms of the second question, section 4.4 looked into the substantive requirements for an acceptable RTA prescribed in GATT Article XXIV. It argued that pursuant to the internal requirement laid down by Article XXIV:8, RTA members enjoy certain discretion on how to adopt TRMs internally. Nevertheless, since TRMs are not mandatorily requested to be eliminated in RTAs, adoption of these measures is subject to certain requirement laid down in the chapeau of Article XXIV:5, i.e., to establish RTAs, WTO Members can adopt a measure which is inconsistent with certain other GATT provisions *only if* the measure is introduced upon the formation of a customs union, and *only to the extent* that the formation of the customs union would be prevented if the introduction of the measure were not allowed.

Thus, it submitted that, in a case where a RTA adopts a TRM which violates general GATT/WTO obligations, the defending Member has to demonstrate:

i) the measure that violates general GATT/WTO obligations and is in force under an Article XXIV arrangement, was in place upon the formation of the RTA;
ii) the RTA under which the measure is introduced is within the meaning of GATT Article XXIV; and
iii) the measure in question is "necessary" to the formation of the RTA.

Due to the brevity of the present necessity test interpreted by WTO tribunals in respect of GATT Article XXIV, section 4.5 further explored potential improvement that could be employed in future practice.

Based on analysis of the necessity test under other GATT provisions, it proposed that, GATT Article XXIV "necessity test" should inevitably include a weighing and balancing process taking account of the factors listed below:

i) the meaning of "necessary" in the context of Article XXIV;
ii) the level of the importance of the interests and values pursued by RTA members under Article XXIV against their obligation to conform with other WTO provisions;
iii) the trade restrictive effects of the challenged measure on imported goods from third-countries;
iv) the burden of proof that should be adopted in the "necessity test" under Article XXIV; and
v) the contribution that would possibly be made by the challenged measure and the alternative measures held by the complaining Member.

Finally, Chapter 5 of this thesis examined the WTO surveillance mechanism on RTAs, with the purpose to locate a feasible platform to enforce the proposed consistency test on TRMs in RTAs proposed in this thesis. The discussion focused on the roles and jurisdictions of WTO CRTA and the dispute settlement panels on RTA examination, and the interplay between these two organs.

First, it examined whether the role of overseeing compatibility of TRMs in RTAs is best performed by the political organs of the WTO (i.e. the CRTA) or through dispute settlement. It argued that, because of long-standing differences of

interpretation of some of the key elements of the legal texts pertaining to RTAs, legal examination of RTAs is not appropriate to be conducted by the CRTA, which operates by consensus mode. Legal challenge to a RTA, including TRM issues, is more likely to be settled in the context of a judicial process.

Secondly, it discussed how the judicial organ should manage its jurisdiction when examining TRMs in RTAs, taking account of the institutional balance between the political organ and the judicial organ. It argued that, examination of the legality of an individual measure in a RTA should be based on an examination on the overall consistency of the RTA with GATT Article XXIV. In the current regime, WTO panels have authority to review both specific trade measures in RTAs and the overall compatibility of RTAs. However, for the sake of institutional balance, they are suggested to refrain from making judgment on the latter issues. Alternatively, a *prima facie* examination on the overall consistency of the RTA with GATT Article XXIV can be conducted by WTO panels.

Thirdly, it clarified the interplay between the recommendations and decisions issued by these two organs. It submitted that: 1) if decisions or recommendations on RTA issues have been made by the CRTA at an earlier point in time, there is no legal compulsion for the panels to follow. However, the WTO panels and the Appellate Body are expected to take such decisions or recommendations into account; 2) if the WTO panels or the Appellate Body make findings on particular RTAs, the CRTA may also take it into consideration. However, such findings will not prejudge future action by the CRTA; and 3) if a RTA is reviewed simultaneously before the CRTA and the panels, the CRTA may suspend its proceedings waiting for the result from the dispute settlement if the participants agree unanimously. In dispute settlement proceedings, the WTO panels and the Appellate Body are only entitled to make suspensions at the request of the complaint, and within the specific time-span prescribed in the DSU.

To be noted, due to the limited length of the thesis, this research did not include all RTAs that are established or under negotiation pursuant to the WTO law, especially the RTAs notified under the Enabling Clause (i.e., the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, which refers to preferential trade arrangements in trade in

goods between developing country Members) and the non-generalized preferential schemes (for example, non-reciprocal preferential agreements involving developing and developed countries, which require Members to seek a waiver from WTO rules).[616]

As the requirements on those RTAs are quite different from the criteria set forth in GATT Article XXIV, TRMs in those RTAs is a potential subject for future study.

[616] See above note 34.

# Bibliography

## Case reports:

| Short Title | Full case title and citation |
|---|---|
| *Australia – Automotive Leather II* | WTO Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, dated 25 May 1999 |
| *Argentina – Footwear (EC)* | WTO Panel Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/R, dated 25 June 1999; WTO Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, dated 12 January 2000 |
| *Brazil – Aircraft (Article 21.5 - Canada)* | WTO Appellate Body Report, *Brazil – Export Financing Programme for Aircraft Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, dated 21 July 2000 |
| *Brazil – Tyres* | WTO Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, dated 12 June 2007; WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, dated 3 December 2007 |
| *Broom – Corn Brooms* | NAFTA Final Panel Reports, *U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico*, USA-MEX-1997-2008-01, dated on 30 January 1998 |
| *Canada – Aircraft* | WTO Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, dated 14 April 1999; WTO Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, dated 2 August 1999 |
| *Canada – Autos* | WTO Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, dated 11 February, 2000; WTO Appellate Body Report, |

| | |
|---|---|
| | *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, dated 31 May 2000 |
| *Canada – Dairy* | WTO Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, dated 17 May 1999; WTO Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, dated 13 October 1999 |
| *Canada – Periodicals* | WTO Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, dated 14 March 1997; WTO Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, dated 30 June 1997 |
| *China-Raw Materials* | WTO Panel Report, *China-Materials Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, dated 5 July 2011; Appellate Body Report, *China-Materials Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, dated 30 January 2012 |
| *Chile – Agriculture* | WTO Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, dated 3 May 2002; |
| *EC – Asbestos* | WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, dated 18 September 2000; WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, dated 12 March 2001 |
| *EC – Bananas III* | WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, dated 9 September 1997 |

| | |
|---|---|
| *EEC – Bananas* | GATT Panel Report, *EEC – Import Regime of Bananas*, DS38/R, dated 11 February 1994 (unadopted) |
| *EC – Bed Linen* | WTO Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, dated 30 October 2000; |
| *EC – Bed Linen (Article 21.5 - India)* | WTO Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 8 April 2003 |
| *EC – Citrus* | GATT Panel Report, *EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* L5776, dated 7 February 1985 (unadopted) |
| *EC – Hormones* | WTO Appellate Body Report, *European Communities – EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, dated 16 January 1998 |
| *EC – Tariff Preferences* | WTO Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, dated on 7 April 2004 |
| *Dominican Republic – Import and Sale of Cigarettes* | WTO Appellate Body Report, *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, dated 25 April 2005 |
| *Hatter' Fur* | GATT, *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX*, GATT/CP/106, adopted 22 October 1951 |
| *India – Patents (US)* | WTO Appellate Body Report, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, dated 19 December 1997 |

| | |
|---|---|
| *India – Quantitative Restrictions* | WTO Panel Report, *India – Quantitative Restrictions on Imports of Agriculture, Textiles and Industrial Products*, WT/DS90/R, dated 6 April 1999; WTO Appellate Body Report, *India – Quantitative Restrictions on Imports of Agriculture, Textiles and Industrial Products*, WT/DS90/AB/R, dated 23 August 1999. |
| *Indonesia – Autos* | WTO Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, dated 2 July 1998 |
| *Japan – Alcoholic Beverages II* | WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, dated 4 October 1996; |
| *Korea – Commercial Vessels* | WTO Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, dated 7 March 2005 |
| *Korea –Beef* | WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, dated 11 December 2000 |
| *Korea – Dairy* | WTO Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, dated 21 June 1999; WTO Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, dated 12 January 2000 |
| *Mexico – Corn Syrup* | WTO Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, dated on 28 January 2000; |
| *Mox Plant Case* (*Ireland v. United Kingdom*) | Permanent Court of Arbitration, *Mox Plant Case (Ireland v. United Kingdom)*, Order No 3, dated 24 June 2003 |
| *Norway – Restrictions on Imports of Certain Textile Products* | GATT Panel Report, *Norway – Restrictions on Imports of Certain Textile Products*, BISD 27S/119, adopted 18 June |

| | |
|---|---|
| | 1980 |
| *Thailand – Cigarettes* | GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200, adopted on 7 November 1990 |
| *Thailand – H-Beams* | WTO Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, dated 28 September 2000; WTO Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, dated on 12 March 2001 |
| *Turkey – Textiles* | WTO Panel Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/R, dated 31 May 1999; WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R, dated 22 October 1999 |
| *US – Anti-Dumping and Countervailing Duties (China)* | WTO Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, dated 11 March 2011 |
| *US – Countervailing Duty Investigation on DRAMS* | WTO Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, dated 27 June 2005 |
| *US – Continued Zeroing* | Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, dated 1 October 2008; Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, dated 4 February 2009 |
| *US – Corrosion-Resistant Steel Sunset Review* | WTO Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, dated 15 December 2003 |

| | |
|---|---|
| *US – Countervailing Measures on Certain EC Products* | WTO Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, dated 9 December 2002 |
| *US – Export Restraints* | WTO Panel Report, *US – Measures Treating Exports Restrains as Subsidies*, WT/DS194/R, dated 29 June 2001 |
| *US – Lamb* | WTO Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R and WT/DS178/R, dated 21 December 2000; WTO Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, dated 16, May 2001 |
| *US – Lead and Bismuth II* | WTO Appellate Body Report *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* , WT/DS138/ABR, dated 10 May 2000 |
| *US – Line Pipe* | WTO Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, dated 29 October 2001; WTO Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, dated 8 March 2002 |
| *US – Gambling* | WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Service*, WT/DS285/AB/R, dated 7 April 2005 |
| *US – Gasoline* | WTO Panel Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, dated 29 January 1996; WTO Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, dated 29 April 1996 |

| | |
|---|---|
| *US – Malt beverages* | GATT Panel Report, *United States – Measures affecting alcoholic and malt beverages*, BISD 39S/206, adopted 19 June 1992 |
| *US – Non-Rubber Footwear II* | GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, BISD 39S/128, dated on 19 June 1992 |
| *US – Section 211 Appropriations Act* | WTO Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, dated 2 January 2002 |
| *US – Section 337* | GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989 |
| *US – Shrimp (Article 21.5 – Malaysia)* | Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, dated 21 November 2001 |
| *US – Stainless Steel* | WTO Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, dated 1 February 2001 |
| *US – Stainless Steel (Mexico)* | WTO Appellate Body report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, dated 30 April 2008 |
| *US – Softwood Lumber III* | WTO Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, dated 27 September 2002 |
| *US – Softwood Lumber V* | WTO Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, dated 11 August 2004 |
| *US – Softwood Lumber V (Article 21.5 - Canada)* | WTO Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, |

| | |
|---|---|
| | WT/DS264/RW, dated 3 April 2006; Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, dated 15 August 2006 |
| *US – Steel* | WTO Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R, dated 11 July 2003 ; WTO Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, dated 10 December 2003 |
| *US – Wheat Gluten* | WTO Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, dated 31 July 2000; WTO Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, dated 19 January 2001 |
| *US – Zeroing (EC)* | Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, dated 18 April 2006 |
| *US – Zeroing (Japan)* | Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, dated 9 January 2007 |

## GATT/WTO Working Reports:


GATT, *Trade Policies for a Better Future: Proposals for Action* (GATT 1985) (The Leutwiler Report)

GATT Secretariat, *Work Already Undertaken in the GATT on Safeguards*, MTN/GNG/ NG9/W/1, 8 April 1987

GATT Working Party Report on *EEC-Association with Africa and Malagasy States*, L/3465, adopted on 2 December 1970, BISD 18S/133

GATT Working Party, *The Rome Treaties – Statement of Conclusions for Approval by the CONTRACTING PARTIES*, W/13/49, dated 18 November 1958.

GATT Working Party report on *EEC*, BISD 6S/100 and BISD 6S/70

GATT Working Party report on *EFTA*, BISD 6S/70

GATT Working Party report on *EEC – Agreements with Finland*, BISD 29S/79

GATT Council, *Canada - Article XXIV:6 Renegotiations with the European Communities - Statement by the Representative of Canada at the Council Meeting of 8 November 1974*, GATT Doc. C/W/250, 8 November 1974

GATT Council, *24 March 1975 - Canada - Article XXIV:6 - Negotiations with the European Communities - Text of Joint Declaration*, GATT Doc. C/W/259, 31 March 1975

GATT, *Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance* L/4907, LT/TR/U/1, adopted 28 November 1979

*Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures*, BISD 36S/61

WTO, *Working Party on the Enlargement of the European Communities - Accession of Austria, Finland and Sweden - Terms of Reference and Membership*, WT/REG3/1, 13 March 1995

WTO, Chairman of the Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/1, 15 February 1996

WTO, Chairman of the Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/4, 1 May 2003.

WTO, Chairman of the Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/W/11, 26 July 2010

WTO Committee on Anti-Dumping Practices, *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, 5 May 2000

WTO Committee on Regional Trade Agreements, *Decision of 6 February 1996*, WT/L/127, 7 February 1996

WTO Committee on Regional Trade Agreements, *Rules of Procedure for Meetings of the Committee on Regional Trade Agreements*, WT/REG/1, 14 August 1996

WTO Committee on Regional Trade Agreements, *Standard Format for Information on Regional Trade Agreement*, WT/REG/W/6, 15 August 1996

WTO Committee on Regional Trade Agreements, *Report (2006) of the Committee in Regional Trade Agreements to the General Council*, WT/REG/17, 24 November 2006

WTO Committee on Regional Trade Agreements, *Checklist of Systemic Issues Identified in the Context of the Examination of Regional trade Agreements*, WT/REG/W/12, 10 February 1997

WTO Committee on Regional Trade Agreements, *Guidelines on Procedures to Improve and Facilitate the Examination Process*, WT/REG/W/15, 6 May 1997

WTO Committee on Regional Trade Agreements, *Annotated Checklist of Systemic Issues – Note by the Secretariat*, WT/REG/W/16, 26 May 1997

WTO Committee on Regional Trade Agreements, *Note on the Meeting of 20 June 1997*, WT/REG31/M/1, 29 July 1997

WTO Committee on Regional Trade Agreements, *Note on the Meetings of 3-5 November 1997*, WT/REG/M/14, 24 November 1997

WTO Committee on Regional Trade Agreements, *Note on the Meetings of 17 November and 4-5 December 1997*, WT/REG/M/15, 13 January 1998

WTO Committee on Regional Trade Agreements, *Note on the Meetings of 16-18 and 20 February 1998*, WT/REG/M/16, 18 March 1998

WTO Committee on Regional Trade Agreements, *Communication from Australia*, WT/REG/W/25, 1 April 1998

WTO Committee on Regional Trade Agreements, *Note on the Meeting of 7 May 1998*, WT/REG38/M/1, 11 June 1998

WTO Committee on Regional Trade Agreement, *Communication from Japan*, WT/REG/W/28, 28 July 1998

WTO Committee on Regional Trade Agreement, *Communication from Japan*, WT/REG/W/29, 29 July 1998

WTO Committee on Regional Trade Agreements, *Inventory of Non-Tariff Provisions in Regional Trade Agreements – Background Note by the Secretariat*, WT/REG/W/26, 5 May 1998

WTO Committee on Regional Trade Agreements, *Synopsis of "Systemic" Issues Related to Regional Trade Agreements - Note by the Secretariat*, WT/REG/W/37, 2 March 2000

WTO General Council, *Meeting of the Council for Trade in Goods 20 February 1995*, G/C/M/1, 27 March 1995

WTO General Council, *Decision Establishing the CRTA*, WT/L/127, 7 February 1996

WTO General Council, *Transparency Mechanism for Regional Trade Agreements*, Decision of 14 December 2000, WT/L/671, 18 December 2006

WTO General Council, *Meeting of 14-15 December 2006*, WT/GC/M/106, 1 March 1 2007

WTO Negotiating Group on Rules, *Transparency Mechanism for Regional Trade Agreements – Draft Decision*, Annex to *Negotiating Group on Rules – Report by the Chairman to the Trade Negotiations Committee*, TN/RL/18, 13 July 2006

WTO Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements – Background Note by the Secretariat – Revision*, TN/RL/W/8/Rev.1, 1 August 2002

WTO Negotiation Group on Rules, *Communication from the Republic of Korea, Submission on Regional Trade Agreements*, TN/RL/W116, 11 June 2003

WTO Working Party on Domestic Regulation, *"Necessity Tests" in the WTO – Note by the Secretariat*, S/WPDR/W/27, 2 December 2003.

## Secondary Sources:

Ahn, D, "Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules" (2008) 11(1) *Journal of the International Economic Law* 107

Bal, S, "International Trade Agreement and Human Rights: Reinterpreting Article XX of GATT" (2000) 10(1) *Minnesota Journal of Global Trade* 62

Bartels, L. "The Separation of Powers in the WTO: How to Avoid Judicial Activism" (2004) 53 *International and Comparative Law Quarterly* 861

Bartels, L and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006)

Bhagwatti, J N, "Regionalism and Multilateralism: an Overview", in J De Melo and A Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge University Press 1993)

Bhagwatti, J N, "Regionalism and Multilateralism: An Overview", in JN Bhagwatti, P Krishna and A Panagariya (eds), *Trading Blocs: Alternative Approaches to Analysing Preferential Trade Agreements* (The MIT Press 1999)

Bhagwatti, J N, "Trade Liberalization Among LDCs, Trade Theory and GATT Rules", in J N Wolfe (ed), *Value, Capital, and Growth: Papers in Honour of Sir John Hicks* (Oxford University Press 1968)

Brown, C P and R McCulloch, "The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact", in M G Plummer (ed.), *Empirical Methods in International Trade: Essays in Honor of Mordechai Kreinin* (Edward Elgar Publishing 2004) 145

Charnovitz, S, "Exploring Enviromental Exceptions in GATT Article XX" (1991) 37 *Journal of World Trade* 117

Clements, E, "Price Discrimination and the Multi-Product Firm" (1951) 19 *Review of Economic Studies* 1

Cooper, C A and B F Massell, "A New Look at Customs Union Theory" (1965) 75 *The Economic Journal* 742

Cooper, C A and B F Massell, "Towards a General Theory of Customs Unions for Developing Countries" (1965) 73 (5) *Journal of Political Economy* 461

Corea, C, "Implementing National Public Health Policies in the Framework of WTO Agreements" (2000) 34(5) *Journal of World Trade* 89

Crawford, J-A, "A New Transparency Mechanism for Regional Trade Agreements" (2007) 11 *Singapore Yearbook of International Law* 133

Crawford, J-A and S Laird, "Regional Trade Agreements and the WTO", Credit research paper, Centre for Research in Economic Development and International Trade, University of Nottingham, May 2000

Crawford, J-A and C L Lim, "Cast Light and Evil Will Go Away: The Transparency Mechanism for Regulating Regional Trade Agreements Three Years After" (2011) 45 (2) *Journal of World Trade* 375

Daley, D, "Canada-Chile: Free Trade Agreement – Introductory Note" (1996) 36 *International Legal Material* 1067

Davey, W J, "Has the WTO Dispute Settlement System Exceeded its Authority?" (2001) 4 *Journal of International Economic Law* 79

Deardorff, A V and R M Stern, "A Centennial of Anti-dumping Legislation and Implementation: Introduction and Overview" (2005) 28(5) *The World Economy* 633

De Lombaerde, P (ed), *Multilateralism, Regionalism and Bilateralism in Trade and Investment: 2006 World Report on Regional Integration* (Springer 2007)

De Melo, J and A Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge University Press 1993)

Devuyst, Y and A Serdarevic, "The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap" (2007) 18 *Duke Journal of Comparative & International Law* 1

Douglas, A I, "Multilateral and Bilateral Trade Policies in the World Trading System: an Historical Perspective", in J De Melo and A Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge University Press 1993)

Finger, J M, "GATT's Influence on Regional Arrangements", in J De Melo and A Panagariya (eds), *New Dimension in Regional Integration* (Cambridge University Press 1993)

Finger, J M, H K Hall, and DR Nelson, "The Political Economy of Administered Protection" (1982) 72 (3) *American Economic Review* 452

Florêncio, P, "What kind of interaction between anti-dumping and competition policies is desirable within Mercosur", Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers (University of California 2007)

Fiorentino, R V, L Verdeja and C Toqueboeuf, "The Changing Landscape of RTAs: 2006 Update", Discussion Paper No 12, Regional Trade Agreements Section, Trade Policies Review Division (WTO 2007)

Geloso-Grosso, M, *The Trade Relationship between Regional Trade Agreements and the Multilateral Trading System – Contingency Protection* (OECD 2002)

Gobbi Estrella, A T and G N Horlick, "Mandatory Abolition of Antidumping, Countervailing Duties and Safeguards in Customs Unions and Free Trade Areas Constituted between WTO Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's *Turkey – Textiles* Ruling", in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 109

Godel, M and J Gage (eds) *Multilateralism and Bilateralism after Cancun: Challenges and Opportunities of Regionalism* (Seco Publikation Welthandel, No 2, 2004)

Goldstein, J, "International Law and Domestic Institutions: Reconciling North American 'Unfair' Trade Laws" (1996) 50(4) *International Organization* 541

Graham, E M, and J D Richardson, *Global Competition Policies*, (Institute for International Economics, U.S., 1995)

Hoekman, B, "Free Trade and Deep Integration: Anti-dumping and Antitrust in RTAs" World Bank Policy Research Working Paper No. 1950 (World Bank 1998)

Hudec, R and J D Southwick, "Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly", in M Rodríguez Mendoza, P Low, and B Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Brookings Institution Press 1999).

Jackson, J H, *World Trade and the Law of GATT* (Bobbs-Merrill 1969)

Jackson, J H, *The World Trading System* (The MIT Press 1989)

Jackson, J H, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn) (The MIT Press, 1997)

Jackson, J H, "Perspectives on Regionalism in Trade Relations" (1996) 27 *Law and Policy in International Business* 873

Jackson, J H, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press 2000)

Janow, M and R Staiger, "EC-Bed Linen: European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India" in H Horn and P Mavroidis (eds), *The WTO Case Law of 2001: The American Law Institute Reporters' Studies* (Cambridge University Press 2003)

Johnson, H G, "An Economic Theory of Protectionism, Tariff Bargaining, and the Formation of Customs Unions" (1965) 73 *Journal of Political Economy* 256

Krugman, P, "Regionalism versus Multilateralism: Analytical Notes" in J De Melo, and A Panagariya (eds), *New Dimensions in Regional Integration* (Cambridge University Press, 1993)

Lamy, P, "Multilateral or Bilateral Trade Agreements: Which Way to Go?", Pascal Lamy's speech in Confederation of Indian Industries Partnership Summit 2007, http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm

Lee, Y S, *Safeguard Measures in World Trade: The legal Analysis* (Kluwer Law International 2003)

Lockhart, N JS and A D Mitchell, "Regional Trade Agreements under GATT 1994: An Exception and Its Limits", in A D Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May 2005) 217

Magnus, P A, "The Canadian Antidumping System" in J H Jackson and E A Vermulst (eds), *Antidumping Law and Practice, A Comparative Study* (University of Michigan Press 1989)

Marceau, G, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas* (Clarendon Press 1994)

Mashayekhi, M and T Ito (eds), *Multilateralism and Regionalism: The New Interface* (United Nation 2005)

Matsushita, M, T J Schoenbaum and P C Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (Oxford University Press 2003)

Matsushita, M, T J Schoenbaum and P C Mavroidis, *World Trade Organization: law, practice, and policy* (Oxford University Press 2006)

Mavroidis, P C, "Do not Ask Too Many Questions: The Institutional Arrangements for Accommodating Regional Integration within the WTO", in E K Choi and J C Hartigan (eds), *Handbook of International Trade Volume II: Economic and Legal Analysis of Trade Policy Institutions* (Blackwell Publishing 2005) 239

Mathis, J H, "Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'?", in L. Bartels and F. Ortino (eds), *RTA and the WTO Legal System* (Oxford University Press 2006) 79

Mathis, J H, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (T.M.C. Asser Press 2002)

Neumann, J and E Türk, "Necessity Revisited: Proportionality in World Trade Organization Law After *Korea-Beef*, *EC-Asbestos* and *EC-Sardines*" (2003) 37(1) *Journal of World Trade* 199

Niels, G, "What is Anti-dumping Policy Really About" (2000) 14 (4) *Journal of Economic Surveys* 467

OECD, *Trade and Competition: Their Interaction* (OECD 1984)

OECD, *The Relationship between Regional Trade Agreements and the Multilateral Trading System* (OECD 2002)

Osiro, D A, "GATT/WTO Necessity Analysis: Evolutionary Interpretation" (2002) 29(2) *Legal Issues of Economic Integration* 123

Pauwelyn, J, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003)

Pauwelyn, J, "The Puzzle of WTO Safeguards and Regional Trade Agreements" (2004) 7(1) *Journal of International Economic Law* 109

Prove, P, "The Australia New Zealand Closer Economic Relations Trade Agreement"

(1995) 1(1) *International Trade and Business Law* 113

F Roessler, "Are the Judicial Organs Overburdened?" Paper presented in the *Conference in the honour of Raymond Vernon*, Harvard, Kennedy School, 2-3 June 2000

Roessler, F, "The Institutional Balance between the Judicial and the Political Organs of the WTO", in M Bronckers and R Quick (eds), *New Directions in International Economic Law, Essays in Honour of John H. Jackson* (Kluwer Law International 2000) 325

Roessler, F, "The Relationship between Regional Integration Agreements and the Multilateral Trade Order", in K Anderson and R Blackhurst (eds), *Regional Integration and the Global Trading System* (Harvester Wheatsheaf 1993) 311

Rugman, A M, and ADM Anderson, "NAFTA and the Dispute Settlement Mechanisms: A Transaction Cost Approach" (1997) 20(7) *The World Economy* 935

Sagara, N, "Provisions for Trade Remedy Measures (Anti-dumping, Countervailing and Safeguard Measures) in Preferential Trade Agreements", RIETI Discussion Paper Series 02-E-13, September 2002

Stoler, A L, "The Evolution of Subsidies Disciplines in GATT and the WTO", *Symposium on WTO Litigation: Issues and Reforms*, Law School, University of Sydney, 14 August 2009, available at: http://www.iit.adelaide.edu.au/conf/subsidies_usyd_0809.pdf note 86

Teh, R, T J Prusa, and M Budetta, "Trade Remedy Provisions in Regional Trade Agreements", Staff Working Paper ERSD-2007-03 (Geneva, Switzerland: WTO, 2007)

Tharakan, P K M, "Political Economy and Contingent Protection" (1995) 105 *The Economic Journal* 1550

Trachtman, J P, "Towards Open Recognition? Standardization and Regional Integration under Article XXIV of GATT" (2003) 6(2) *Journal of International Economic Law* 459

Trebilcock, M J and & R Howse, *The Regulation of International Trade* (Routledge 2000)

United Nation, "Safeguard Measures", in *Unite Nations Conference on Trade and Development, Dispute Settlement, World Trade Organization* (United Nation 2003)

Vautier, K M, J A Farmer, and R Baxt (eds), *CER and business competition: Australia and New Zealand in a global economy* (Commerce Clearing House New Zealand 1990)

Viner, J, *The Custom Union Issue* (Carnegie Endowment for international Peace 1950)

Viner, J, *Dumping: A Problem in International Trade* (University of Chicago Press 1923)

WTO, *Annual Report 2002*, available at:

http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep02_e.pdf

WTO, *Trading into the Future* (2nd edn) (WTO 2001)

WTO, *World Trade Report 2011 – The WTO and preferential trade agreements: From co-existence to coherence*, available at: http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf

WTO, *International Trade Statistics 2011* (WTO 2012)

WTO Secretariat, *Analytical Index, Guide to GATT Law and Practice, Vol. 1* (WTO 1995)

WTO Secretariat, *World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO* (WTO 2006), available at www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf

WTO Secretariat, *WTO Analytical Index: Guide to WTO Law and Practice*, 2nd edn Vol. 1, (Cambridge University Press 2007)

Yi, L, "Trade Remedy Measures in Regional Trade Agreements" (2004) 1(2) *Journal of Law and Economics in International Trade* 89

## Bulletins and Newsletters:

*Dated panel reports within the framework of GATT1947*, http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm

*"Anti-dumping Initiations: By Exporting Country From: 01/01/1995 To: 30/06/2011"*, http://www.wto.org/english/tratop_e/adp_e/ad_init_exp_country_e.pdf;

*"Anti-dumping Measures: By Exporting Country From: 01/01/1995 To: 30/06/2011"*, http://www.wto.org/english/tratop_e/adp_e/ad_meas_exp_country_e.pdf

European Commission, *Global Europe – Competing in the World*, http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf

*Regional Trade Agreements: Rules*, http://www.wto.org/english/tratop_e/region_e/regrul_e.htm

*Status of Panels and Appellate Body Reports* http://www.wto.int/english/tratop_e/dispu_e/repertory_e/s8_e.htm

*Technical Information on Anti-dumping*, http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

# Annex I

## RTAs observed in This Research*

| RTA Name | Members | Type | Date of notification | Date of entry into force | Status |
|---|---|---|---|---|---|
| Australia - Chile | | FTA | 03-Mar-09 | 06-Mar-09 | In Force |
| Australia - New Zealand (ANZCERTA) | | FTA | 14-Apr-83 | 01-Jan-83 | In Force |
| Canada - Chile | | FTA | 30-Jul-97 | 05-Jul-97 | In Force |
| Canada - Colombia | | FTA | 07-Oct-11 | 15-Aug-11 | In Force |
| Canada - Costa Rica | | FTA | 13-Jan-03 | 01-Nov-02 | In Force |
| Canada - Israel | | FTA | 15-Jan-97 | 01-Jan-97 | In Force |
| Canada - Peru | | FTA | 31-Jul-09 | 01-Aug-09 | In Force |
| Caribbean Community and Common Market (CARICOM) | Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Suriname; Trinidad and Tobago | CU | 14-Oct-74 | 01-Aug-73 | In Force |
| Central American Common Market (CACM) | Costa Rica; El Salvador; Guatemala; Honduras; Nicaragua | CU | 24-Feb-61 | 04-Jun-61 | In Force |
| Chile - China | | FTA | 20-Jun-07 | 01-Oct-06 | In Force |
| Chile - Colombia | | FTA | 14-Aug-09 | 08-May-09 | In Force |
| Chile - Japan | | FTA | 24-Aug-07 | 03-Sep-07 | In Force |
| Chile - Mexico | | FTA | 27-Feb-01 | 01-Aug-99 | In Force |
| China - Costa Rica | | FTA | 27-Feb-12 | 01-Aug-11 | In Force |
| China - Hong Kong, China | | FTA | 27-Dec-03 | 29-Jun-03 | In Force |

* RTAs selected in this research in this form include FTAs and CUs notified under GATT Article XXIV by June 2012. The factual information and legal text of these agreements are available in WTO RTA database at http://rtais.wto.org/UI/PublicAllRTAList.aspx

| | | | | | |
|---|---|---|---|---|---|
| China - Macao, China | | FTA | 27-Dec-03 | 17-Oct-03 | In Force |
| China - New Zealand | | FTA | 21-Apr-09 | 01-Oct-08 | In Force |
| China - Singapore | | FTA | 02-Mar-09 | 01-Jan-09 | In Force |
| Colombia - Mexico | | FTA | 13-Sep-10 | 01-Jan-95 | In Force |
| Costa Rica - Mexico | | FTA | 17-Jul-06 | 01-Jan-95 | In Force |
| Dominican Republic - Central America | Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Nicaragua | FTA | 06-Jan-12 | 04-Oct-01 | In Force |
| Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR) | Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Nicaragua; United States | FTA | 17-Mar-06 | 01-Mar-06 | In Force |
| EFTA - Albania | | FTA | 07-Feb-11 | 01-Nov-10 | In Force |
| EFTA - Canada | | FTA | 04-Aug-09 | 01-Jul-09 | In Force |
| EFTA - Chile | | FTA | 03-Dec-04 | 01-Dec-04 | In Force |
| EFTA - Colombia | | FTA | 14-Sep-11 | 01-Jul-11 | In Force |
| EFTA - Croatia | | FTA | 14-Jan-02 | 01-Jan-02 | In Force |
| EFTA - Egypt | | FTA | 17-Jul-07 | 01-Aug-07 | In Force |
| EFTA - Israel | | FTA | 30-Nov-92 | 01-Jan-93 | In Force |
| EFTA - Jordan | | FTA | 17-Jan-02 | 01-Jan-02 | In Force |
| EFTA - Korea, Republic of | | FTA | 23-Aug-06 | 01-Sep-06 | In Force |
| EFTA - Lebanon | | FTA | 22-Dec-06 | 01-Jan-07 | In Force |
| EFTA - Mexico | | FTA | 25-Jul-01 | 01-Jul-01 | In Force |
| EFTA - Morocco | | FTA | 20-Jan-00 | 01-Dec-99 | In Force |
| EFTA - Peru | | FTA | 30-Jun-11 | 01-Jul-11 | In Force |
| EFTA - Singapore | | FTA | 14-Jan-03 | 01-Jan-03 | In Force |
| EFTA - Tunisia | | FTA | 03-Jun-05 | 01-Jun-05 | In Force |
| EFTA - Turkey | | FTA | 06-Mar-92 | 01-Apr-92 | In Force |
| Egypt - Turkey | | FTA | 05-Oct-07 | 01-Mar-07 | In Force |
| EU - Albania | | FTA | 07-Mar-07 | 01-Dec-06 | In Force |

| | | | | | |
|---|---|---|---|---|---|
| EU - Algeria | | FTA | 24-Jul-06 | 01-Sep-05 | In Force |
| EU - Andorra | | CU | 23-Feb-98 | 01-Jul-91 | In Force |
| EU - Cameroon | | FTA | 24-Sep-09 | 01-Oct-09 | In Force |
| EU - Chile | | FTA | 03-Feb-04 | 01-Feb-03 | In Force |
| EU - Croatia | | FTA | 17-Dec-02 | 01-Mar-02 | In Force |
| EU - Egypt | | FTA | 03-Sep-04 | 01-Jun-04 | In Force |
| EU - Iceland | | FTA | 24-Nov-72 | 01-Apr-73 | In Force |
| EU - Israel | | FTA | 20-Sep-00 | 01-Jun-00 | In Force |
| EU - Jordan | | FTA | 17-Dec-02 | 01-May-02 | In Force |
| EU - Korea, Republic of | | FTA | 07-Jul-11 | 01-Jul-11 | In Force |
| EU - Lebanon | | FTA | 26-May-03 | 01-Mar-03 | In Force |
| EU - Mexico | | FTA | 25-Jul-00 | 01-Jul-00 | In Force |
| EU - Montenegro | | FTA | 16-Jan-08 | 01-Jan-08 | In Force |
| EU - Morocco | | FTA | 13-Oct-00 | 01-Mar-00 | In Force |
| EU - Norway | | FTA | 13-Jul-73 | 01-Jul-73 | In Force |
| EU-Columbia-Peru | | FTA | NA | NA | Pending |
| EU - South Africa | | FTA | 02-Nov-00 | 01-Jan-00 | In Force |
| EU - Syria | | FTA | 15-Jul-77 | 01-Jul-77 | In Force |
| EU - Tunisia | | FTA | 15-Jan-99 | 01-Mar-98 | In Force |
| EU - Turkey | | CU | 22-Dec-95 | 01-Jan-96 | In Force |
| European Economic Area (EEA) | | FTA | 13-Sep-96 | 01-Jan-94 | In Force |
| European Free Trade Association (EFTA) | Iceland; Lichtenstein; Norway; Switzerland | FTA | 14-Nov-59 | 03-May-60 | In Force |
| Gulf Cooperation Council (GCC) | Bahrain; Kuwait; Oman; Qatar; Saudi Arabia; United Arab Emirates | CU | NA | 01-Jan-03 | In Force |
| Hong Kong, China - New Zealand | | FTA | 03-Jan-11 | 01-Jan-11 | In Force |
| India - Japan | | FTA | 14-Sep-11 | 01-Aug-11 | In Force |
| India - Singapore | | FTA | 03-May-07 | 01-Aug-05 | In Force |
| Israel - Mexico | | FTA | 22-Feb-01 | 01-Jul-00 | In Force |

| | | | | | |
|---|---|---|---|---|---|
| Japan - Brunei Darussalam | | FTA | 31-Jul-08 | 31-Jul-08 | In Force |
| Japan - Malaysia | | FTA | 12-Jul-06 | 13-Jul-06 | In Force |
| Japan - Mexico | | FTA | 31-Mar-05 | 01-Apr-05 | In Force |
| Japan - Peru | | FTA | 24-Feb-12 | 01-Mar-12 | In Force |
| Japan - Philippines | | FTA | 11-Dec-08 | 11-Dec-08 | In Force |
| Japan - Singapore | | FTA | 08-Nov-02 | 30-Nov-02 | In Force |
| Japan - Switzerland | | FTA | 01-Sep-09 | 01-Sep-09 | In Force |
| Japan - Thailand | | FTA | 25-Oct-07 | 01-Nov-07 | In Force |
| Jordan - Singapore | | FTA | 07-Jul-06 | 22-Aug-05 | In Force |
| Korea, Republic of - Chile | | FTA | 08-Apr-04 | 01-Apr-04 | In Force |
| Korea, Republic of - India | | FTA | | 01-Jan-10 | In Force |
| Korea, Republic of - Singapore | | FTA | 21-Feb-06 | 02-Mar-06 | In Force |
| Korea, Republic of - US | | FTA | 15-Mar-12 | 15-Mar-12 | In Force |
| New Zealand - Malaysia | | FTA | 07-Feb-12 | 01-Aug-10 | In Force |
| New Zealand - Singapore | | FTA | 04-Sep-01 | 01-Jan-01 | In Force |
| North American Free Trade Agreement (NAFTA) | Canada; Mexico; United States | FTA | 29-Jan-93 | 01-Jan-94 | In Force |
| Peru - Chile | | FTA | 29-Nov-11 | 01-Mar-09 | In Force |
| Peru - China | | FTA | 03-Mar-10 | 01-Mar-10 | In Force |
| Peru - Korea, Republic of | | FTA | 09-Aug-11 | 01-Aug-11 | In Force |
| Peru - Mexico | | FTA | 22-Feb-12 | 01-Feb-12 | In Force |
| Peru - Singapore | | FTA | 30-Jul-09 | 01-Aug-09 | In Force |
| Singapore - Australia | | FTA | 25-Sep-03 | 28-Jul-03 | In Force |
| Southern Common Market (MERCOSUR) | Argentina; Brazil; Paraguay; Uruguay | CU | 17-Feb-91 | 29-Nov-91 | In Force |
| Thailand - Australia | | FTA | 27-Dec-04 | 01-Jan-05 | In Force |
| Thailand - New Zealand | | FTA | 01-Dec-05 | 01-Jul-05 | In Force |
| Turkey - Albania | | FTA | 09-May-08 | 01-May-08 | In Force |
| Turkey - Chile | | FTA | 25-Feb-11 | 01-Mar-11 | In Force |

| | | | | | |
|---|---|---|---|---|---|
| Turkey - Croatia | | FTA | 02-Sep-03 | 01-Jul-03 | In Force |
| Turkey - Georgia | | FTA | 18-Feb-09 | 01-Nov-08 | In Force |
| Turkey - Israel | | FTA | 16-Apr-98 | 01-May-97 | In Force |
| Turkey - Jordan | | FTA | 07-Mar-11 | 01-Mar-11 | In Force |
| Turkey - Montenegro | | FTA | 12-Mar-10 | 01-Mar-10 | In Force |
| Turkey - Morocco | | FTA | 10-Feb-06 | 01-Jan-06 | In Force |
| Turkey - Syria | | FTA | 15-Feb-07 | 01-Jan-07 | In Force |
| Turkey - Tunisia | | FTA | 01-Sep-05 | 01-Jul-05 | In Force |
| US - Australia | | FTA | 22-Dec-04 | 01-Jan-05 | In Force |
| US - Chile | | FTA | 16-Dec-03 | 01-Jan-04 | In Force |
| US - Colombia | | FTA | 08-May-12 | 15-May-12 | In Force |
| US - Israel | | FTA | 13-Sep-85 | 19-Aug-85 | In Force |
| US - Jordan | | FTA | 15-Jan-02 | 17-Dec-01 | In Force |
| US - Morocco | | FTA | 30-Dec-05 | 01-Jan-06 | In Force |
| US - Peru | | FTA | 03-Feb-09 | 01-Feb-09 | In Force |
| US - Singapore | | FTA | 17-Dec-03 | 01-Jan-04 | In Force |