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FOE OR FRIEND OF GATT ARTICLE XXIV: DIVERSITY IN TRADE REMEDY RULES

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ABSTRACT

While the WTO Member countries continue to increase their FTA arrangements with divergent frameworks, they have begun to adopt modified WTO trade remedy systems in FTAs. Although the content and degree of these modified systems may not be significant yet, they still set very important precedents, or 'seeds', for 'rule diversification' in the world trading system. Such modification typically aims to further liberalize mutual trade between FTA parties and thereby contribute to a freer world trading system. However, such rule diversification appears to be inconsistent with the mandate of Article XXIV of GATT by worsening economically inferior trade diversion. The reinterpretation of the legal obligations in Article XXIV commensurate with economically more reasonable structures implies that trade remedy rules in FTAs should be applied on a non-discriminatory basis. Moreover, an FTA safeguard measure must precede a WTO safeguard measure to ensure optimal competitive conditions among trading partners. In sum, the right channel for improving the current WTO trade remedy systems is not the FTA forums but the WTO negotiation.

I. INTRODUCTION

Whereas positive aspects of free trade agreements (hereinafter 'FTAs')[1] to promote more trade and investment have been well taken by policy makers as well as academics, negative aspects of FTAs particularly incurred by too much diversification in rules of origin systems, in addition to trade diversion effects, have also been raised concerning proliferation of what are basically

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[1] In recent years, the WTO Members use many different expressions basically to mean FTAs, such as strategic economic cooperation agreement (SECA), economic partnership agreement (EPA), strategic economic partnership agreement (SEPA), economic complementarity agreement (ECA), and so on. In this article, they are generally referred to as 'FTAs'.

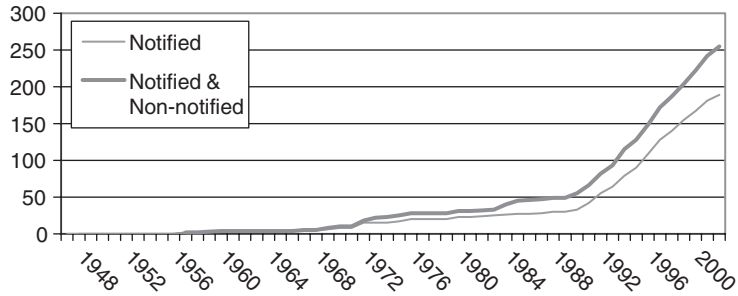

Figure 1. Trend of FTAs: 1948–2003.

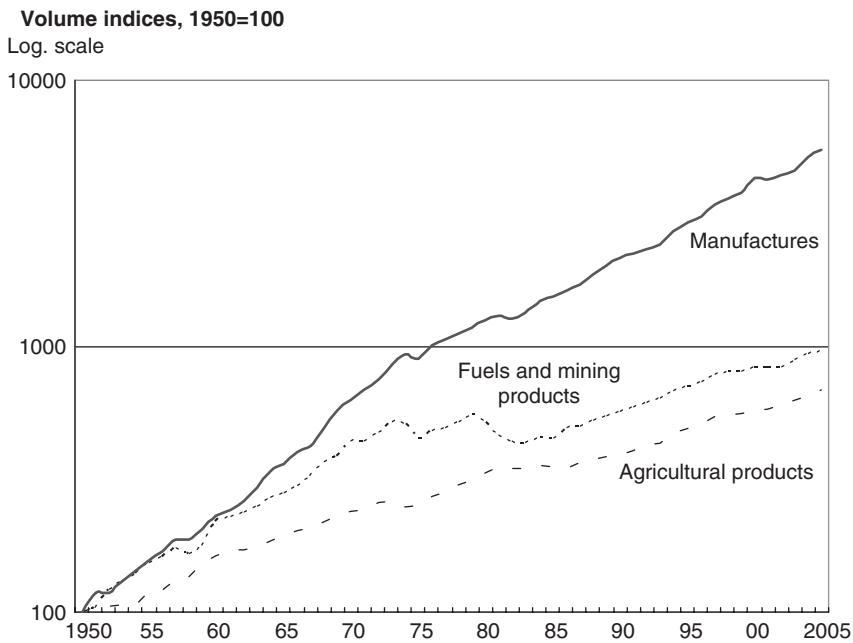

Figure 2. Trend of sectoral trade: 1950–2005.

preferential trading arrangements.[2] These concerns have been assuaged by the paradoxical reality that an exponential increase of FTAs[3] since the 1990s—illustrated in Figure 1—has barely affected the total world trade, as shown in Figure 2.

A more recent FTA wave has, however, provoked more worrisome development. Aggressive FTA policies employed by Asian countries,

[2] See, for example, Peter Sutherland et al., *The Future of the WTO* (WTO, 2004) 19–28.
[3] WTO Secretariat, 'The Changing Landscape of RTAs' (WTO Discussion Paper, No.8, 2003).

culminating in the Korea–US FTA, provoked even the European Union (EU) that practically abandoned FTAs since the late 1990s to reinitiate FTA negotiations, especially with Asian countries such as ASEAN, India and Korea.[4] A successful implementation of the EU's new FTA policy change would then instigate a chain reaction by other major countries such as Japan, China and the United States, and might lead to FTAs even among huge economies. In other words, unlike the situation so far, major trading countries may now begin a FTA race that can cause economically significant impacts to the world trading system.

On the other hand, many WTO Members often adopt interesting and experimental ideas in various elements of their recent FTAs. One of the most intriguing legal developments is the 'rule diversification' that emerges through the adoption of modified WTO trade remedy systems.[5] Although there have been some discussions among practitioners and academics as well as government delegations in Geneva about whether trade remedy measures may be permitted in FTAs,[6] this phenomenon of rule diversification is indeed unprecedented in the history of the GATT/WTO system.[7,8]

For example, the WTO Members have rarely tried to adopt different anti-dumping rules in FTA negotiations before the Doha Round negotiation in which rules negotiations to amend the current trade remedy systems

[4] 'Global Europe: Competing in the World – A Contribution to the EU's Growth and Jobs Strategy', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. http://trade.ec.europa.eu/doclib/html/130376.htm. (visited 10 May 2007). For critical assessment of the new EU trade policy, see Simon Evenett, 'Global Europe: An Initial Assessment of the European Commission's New Trade Policy', Aussenwirtschaft (December 2006), at 377–402 or Patrick Messerlin, 'Assessing the EC Trade Policy in Goods', Jan Tumlir Policy Essays 01/2007 (April 2007).

[5] This problem was already noted by Professor Jackson more than a decade ago. He opined that:

> Likewise, certain other trade policy laws and rules are not clearly addressed in the language of the GATT. For example, how does a safeguard or escape clause measure operate? Can a preferential arrangement give preferences to its preference parties in the application of an escape clause? Arguably, the answer should be yes, since the preferential group should be treated like a single trading entity. A similar argument, or problem, arises with regard to unfair trade rules (anti-dumping and countervailing duty rules), but a practice has developed of tolerating preferential agreements as long as they do not eliminate such unfair trade rules between the preference parties.

John H. Jackson, 'Perspectives on Regionalism in Trade Relations', 27 Law and Policy in International Business 873 (1996), at 876.

[6] For example, Estrella and Horlick argued that trade remedy measures must be abolished in FTAs. Their analysis is very enlightening, but not completely agreed by the view in this paper. See generally Angela T. Gobbi Estrella and Gary N. Horlick, 'Mandatory Abolition of Anti-dumping, Countervailing Duties and Safeguards in Customs Union 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: Oxford University Press, 2006) 109–148.

[7] See generally Robert Teh et al., 'Trade Remedy Provisions in Regional Trade Agreements', (WTO Staff Working Paper, September 2007).

[8] WTO, *International Trade Statistics* (2006) at 26.

took one of the centre places.[9] But more FTAs, particularly involving Asian countries, have begun to adopt modified trade remedy rules that depart from the WTO systems.

FTA parties typically adopt modified WTO trade remedy systems in their FTAs in an effort to further facilitate trade between them and thereby contribute to a freer world trading system.[10] Despite such seemingly innocuous intents, however, such arrangements may cause serious economic problems by systemically inducing economically inferior trade diversion. This problem has already been manifested by many FTAs that exempt their parties from global—i.e. WTO—safeguard measures. For example, a selective application of WTO safeguard measures under the NAFTA invariably caused substantial trade diversion from other WTO Members to NAFTA parties so as to distort competitive conditions. This situation led to many WTO disputes,[11] although legal solution in the dispute settlement system was not fully satisfactory.[12]

The scholarly assessment of trade remedy rules—mostly of anti-dumping rules—has long proposed consistent legal systems to address problems in ensuring adequate competitive conditions between domestic and imported products.[13] The frequently suggested optimal solution has been to repeal anti-dumping rules and substitute them with competition rules that do not differentiate imported goods from domestic goods. In some sense, anti-dumping rules are discriminatory legal systems that do not respect the national treatment principle in terms of establishing competitive market conditions. However, we cannot conclude that even such a forceful solution to take competition policy approach always contributes to enhancing the world economic welfare if it is adopted only by subsets of WTO Members, not as a uniform standard. Or even the question whether such an approach

[9] For a more comprehensive analysis of restructuring the current WTO trade remedy systems, *see generally* M. Matsushita, D. Ahn and T. Chen, *The WTO Trade Remedy System: East Asian Perspectives* (London: Cameron May Publisher, 2005).

[10] For legal issues concerning coherent jurisprudence between the WTO and the RTAs, see Locknie Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links', in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 525–52.

[11] Among the NAFTA parties, the United States and Canada imposed six and one WTO safeguard measures, respectively. Four of the US measures were brought to the WTO dispute settlement system.

[12] For example, typically three year safeguard measures cannot be properly disciplined under the WTO dispute settlement system due to the period required for litigation that often takes almost three years including an implementation period. See Dukgeun Ahn, 'Restructuring the WTO Safeguard System', in M. Matsushita, D. Ahn and T. Chen (eds), *The WTO Trade Remedy System: East Asian Perspectives* (London: Cameron May Publisher, 2006) 11–31. See also William J. Davey, 'Implementation of the Results of WTO Trade', in M. Matsushita, D. Ahn and T. Chen (eds), *The WTO Trade Remedy System: East Asian Perspectives* (London: Cameron May Publisher, 2006) 32–61.

[13] For an aptly summarized overview, *see generally* Alan O. Sykes, 'Antidumping and Antitrust: What Problems Does Each Address?', in Robert Z. Lawrence (ed), *Brookings Trade Forum: 1998* (Washington: Brookings Institution Press, 1998) 1–43.

adopted in FTAs is consistent with the WTO disciplines remains unanswered. The drafting history of GATT Article XXIV does not provide any conclusive guideline on the question.[14]

This article argues that rule diversification in FTAs in terms of trade remedy systems is indeed legally inconsistent with Article XXIV requirements and economically inferior for global welfare. This conclusion is primarily based on the requirements under Article XXIV:5, instead of Article XXIV:8 which has been the focal point of discussion on the WTO consistency of FTAs. Part I summarizes the state-of-the-play of FTAs that adopt modified WTO trade remedy systems. Part II analyses the legal issues of rule diversification on the basis of Article XXIV. Part III explains economic problems incurred by modified trade remedy systems in FTAs. Part IV concludes.

II. EMERGING DIVERSITY IN TRADE REMEDY RULES

A. Anti-dumping systems for FTAs

Although most FTAs simply retain all the rights and obligations, without any change, under the WTO Anti-dumping Agreement, a few FTAs have incorporated special legal elements that are distinct from the WTO system.

Somewhat extreme cases categorically prohibit any anti-dumping measures. As the first example of this kind, Article M-01 of the Canada–Chile FTA enunciates reciprocal exemption of the application of anti-dumping laws, including the revocation of all the existing duties and the prohibition of new investigations. In recent years, EFTA advanced this approach strongly at least in terms of principles.[15] Article 16 of the EFTA-Singapore FTA stipulates that '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'. Instead of anti-dumping actions, it proposed the use of necessary measures in the realm of competition policies. This approach was subsequently followed in the EFTA-Chile FTA. The competition policy approach adopted in these two FTAs—competition policy measures in lieu of anti-dumping measures to address alleged dumping problems—is noteworthy in that it is actually the first example in international trade agreements to employ competition policy solutions for dumping problems. The complete prohibition of anti-dumping measures between FTA signatories was also adopted by China for its 'Closer Economic Partnership Arrangement (CEPA)' with Hong Kong and Macao. However, CEPA merely banned anti-dumping measures as in the

[14] See, for example, Kerry Chase, 'Multilateralism Compromised: the Mysterious Origins of GATT Article XXIV', 5 (1) World Trade Review 1 (2006) 1–30.

[15] The European Free Trade Association (EFTA) includes Iceland, Liechtenstein, Norway and Switzerland.

Table 1. FTAs with Special Anti-dumping (AD) Rules

FTA (date of entry into force)	Special AD Rules	
	Prohibition of AD Action	Modification of AD Rules
EFTA-Singapore FTA (1 January 2003)	No AD measure allowed (Competition policy measures)	
EFTA-Chile FTA (1 December 2004)	No AD measure allowed (Competition policy measures)	
China-Hong Kong FTA (1 January 2004)	No AD measure allowed	
China-Macao FTA (1 January 2004)	No AD measure allowed	
Canada-Chile FTA (5 July 1997)	No AD measure allowed	
US-Israel FTA (19 August 1985)		Non-Cumulation
CAFTA-DR-US FTA		Non-Cumulation
Singapore-New Zealand FTA (1 January 2001)		- 5% of export price as *de minimis* margin for refund and review cases as well as new cases - 5% of import volume - 3-year sunset review
Singapore-Australia FTA (28 July 2003)		Lesser duty rule
Jordan-Singapore FTA (22 August 2005)		- 5% of export price as *de minimis* margin for new case - 5% of import volume - No third country dumping - 12-month period for injury determination - 3-year sunset review - Lesser duty rule - Prohibition of zeroing - No AD if SG imposed
Singapore-Korea FTA (1 March 2006)		- Lesser duty rule - Prohibition of zeroing
EFTA-Korea FTA (1 September 2006)		Lesser duty rule

Canada–Chile FTA, without providing an alternative solution such as competition policy measures (Table 1).

The United States and the European Union rarely touched anti-dumping provisions in their FTAs. A notable exception is the Central America–Dominican Republic–US FTA. Article 8.8 of the Central America–Dominican Republic–US FTA requires the United States to 'continue to treat each other Party as a "beneficiary country" for purposes of 19 U.S.C. §§ 1677(7)(G)(ii)(III) and 1677(7)(H) and any successor

provisions', which means that in determining material injury for an anti-dumping action, the US International Trade Commission (ITC) shall not cumulatively assess the volume and effect of imports from any country designated as a beneficiary country under the Caribbean Basin Economic Recovery Act. 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 such as China and India in anti-dumping investigation.[16]

In contrast, Singapore appears to experiment with various legal elements in FTA anti-dumping systems. Article 9 of the Singapore–New Zealand FTA stipulates additional requirements to the WTO Anti-dumping Agreement 'in order to bring greater discipline to anti-dumping investigations and to minimize the opportunities to use anti-dumping in an arbitrary or protectionist manner'. Under the Singapore–New Zealand FTA, the *de minimis* dumping margin as a percentage of the export price was increased from 2% of the WTO Anti-dumping Agreement to 5% for both new investigations and review procedures. The maximum negligible volume of dumped imports was also raised from 3% of the WTO Anti-dumping Agreement to 5%. Furthermore, the sunset period was shortened to 3 years. In addition to such technical modification, Article 8.2 of the Singapore–Australia FTA mandates a 'lesser duty rule' which requires the party to impose a lower rate than a dumping margin if such a lesser duty would be adequate to remedy the injury to the domestic industry. The Jordan–Singapore FTA includes the most comprehensively modified anti-dumping system so far by including, *inter alia*, prohibition of zeroing and no third country dumping provided in Article 14 of the WTO Anti-dumping Agreement, in addition to all the elements described earlier. In fact, Article 2.8.1(h) of the Jordan–Singapore FTA stipulates a categorical prohibition of zeroing practices by providing 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, and weighted average to weighted average, and not weighted-average price and individual price'. Moreover, it provides that 'where weighted-average prices are used, such prices shall be calculated based on the entire period of investigation, and not any particular period therein'. It is particularly noteworthy that Article 2.8.3 of the Jordan–Singapore FTA forbids an anti-dumping investigation against a good that is subject to a safeguard measure.[17] Subsequently, Article 6.2 of the Singapore–Korea FTA adopted

[16] 'Non-cumulation' was first introduced by the US–Israel FTA. Although the text of the US–Israel FTA did not explicitly stipulate this exception, the non-cumulation requirement was included in Section 771(7)(G)(ii)(IV) of the US Tariff Act of 1930. See 19 U.S.C. 1676a.

[17] The parallel provision to ban a safeguard investigation for a good that is subject to an anti-dumping measure is also stipulated in Article 2.7.7 of the Jordan–Singapore FTA.

the lesser duty rule and the prohibition of zeroing.[18] The provision to prohibit zeroing practices was further simplified by enunciating that 'when anti-dumping margins are established on the weighted average basis, all individual margins, whether positive or negative, should be counted toward the average'.

The EFTA-Korea FTA also adopted the lesser duty rule. In addition, the EFTA-Korea FTA stipulates that parties 'shall endeavor to refrain from initiating anti-dumping procedures against each other' and consult 'with the other with a view to finding a mutually acceptable solution', but it does not mandate any specific additional legal requirements. In fact, the parties under the EFTA-Korea FTA shall review whether a need exists to maintain anti-dumping measures after 5 years of application. The usual approach of EFTA to replace anti-dumping measures with competition policy measures appears to be considered for adoption, *albeit* not immediately.

B. Countervailing systems for FTAs

Special countervailing systems adopted in relation to FTAs are much rarer. Even EFTA, which has recently adopted FTA rules to completely eliminate anti-dumping measures completely, has not adopted any new element to modify the WTO countervailing mechanism in their FTAs. As of July 2007, under Article 8 of the CEPA, only Hong Kong, Macao and China undertook not to apply countervailing measures to goods mutually imported and originated.[19] This arrangement under the CEPA is perfectly rational because all three entities are of the same country, eliminating the need to counteract their own subsidy programs. Other than the CEPA, there has been no FTA notified to the WTO that eliminates countervailing measures for FTA parties.

Countervailing actions that are designed to address distortion of competition by government subsidies are in fact completely different measures from anti-dumping actions that are intended to deal with private pricing behaviours. Consequently, even a competition policy solution to substitute anti-dumping actions that are economically preferred does not work for

[18] The 'zeroing' method has become practically prohibited through repeated rulings by the WTO panels and the Appellate Body. See WTO Panel and Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R and WT/DS322/AB/R, adopted 23 January 2007; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')*, WT/DS294/R, WT/DS294/AB/R, adopted 9 May 2006; *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, WT/DS264/AB/R, adopted 31 August 2004, WT/DS264/RW, WT/DS264/AB/RW, adopted 1 September 2006.

[19] The textual languages of the 'Closer Economic Partnership Arrangement' between China and Hong Kong and Macao are identical.

countervailing cases in which government subsidies arbitrarily distort competitive conditions. In other words, the seemingly contradictory approach by EFTA to maintain the WTO countervailing system in its FTAs is not actually unreasonable.

Nevertheless, it is difficult to understand why even FTAs which modify technical elements of anti-dumping investigations do not adopt fundamentally identical elements in practically identical parts of countervailing investigations. For example, the lesser duty rule, if adopted by a WTO Member, is in fact applied equally for anti-dumping and countervailing investigations in its domestic trade remedy system. However, the lesser duty rule has been explicitly codified only in the anti-dumping part, not in the countervailing part of FTAs. The lack of consistent procedures parallel to those of anti-dumping systems might be understood only as the result of arbitrary judgment of negotiators rather than by any rational explanation.

On the other hand, Article 2.9 of the EFTA-Korea FTA requires at least a 30-day period for mutual consultation before parties can initiate countervailing investigations. It is an additional requirement, *albeit* weak, to the WTO disciplines that merely require the notification of a decision to initiate an investigation. Similarly, Article 10.7 of the Korea–US FTA also requires a consultation opportunity preceding the initiation of an investigation.[20]

C. FTA safeguard mechanism

Unlike anti-dumping and countervailing systems, most FTAs adopt FTA-specific bilateral safeguard mechanisms to suspend a concession temporarily in case serious injury or threat thereof is caused to domestic industry. Although the exact natures of bilateral safeguard measures vary considerably depending upon FTAs, they share the common feature that the concession only under an FTA can be temporarily suspended against an FTA party. It should therefore be noted that the MFN tariff rates bound in the WTO become the maximum ceiling for bilateral FTA safeguard measures. In addition, many FTAs introduce sector-specific safeguard systems, typically for agricultural and textile industries.

On the other hand, following the NAFTA approach, increasingly more countries in recent years have sought to exempt the other FTA parties from

[20] The consultation requirement may be particularly weak in its binding nature with the United States where the procedural due process of trade remedy actions is rigorously enforced. For a more detailed discussion on the implication of the Korea–US FTA trade remedy systems, see generally Dukgeun Ahn, Analysis of Trade Remedy Systems in the Korea–US FTA (in Korean, 2007).

the application of global—i.e. WTO—safeguard actions. Article 802 of the NAFTA stipulates that:

> . . . any Party taking an emergency action under Article XIX or any such agreement *shall* exclude imports of a good from each other Party from the action unless:
>
> (a) imports from a Party, considered individually, account for a substantial share of total imports; and
> (b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

The exclusion of FTA parties from the WTO safeguard coverage had been previously adopted in MERCOSUR, for which Article 98 of the Common Regulation stipulates that imports from member states of the customs union must be excluded from safeguard measures.[21] Fundamentally identical provisions were adopted in the Canada–Chile FTA.[22] These FTAs stipulate a 'duty' to exclude FTA parties from WTO safeguard actions if the pertinent legal requirements are satisfied.

A similar—but legally distinctive—approach to exclude FTA parties was adopted in other FTAs. For example, the Singapore–US FTA 'permits' a party taking a global safeguard measure to exclude imports of an originating good from the other party 'if such imports are not a substantial cause of serious injury or threat thereof'.[23] The textual language for exemption became weaker by providing that 'a Party taking a global safeguard measure *may* exclude imports of an originating good from the other Party'. By replacing 'shall' with 'may' in the relevant provision, these FTAs transform a 'duty' to exclude parties into a 'right' for parties to exempt the application. This system was subsequently adopted in many FTAs involving the United States, including the Australia–US FTA, the Central America–Dominican Republic–US FTA, the Korea–US FTA and so on. Table 2 shows that the US government appears to have adopted this provision almost as a template for its recent FTAs. In fact, Canada, Mexico and Israel were all excluded under such provisions when the US government imposed the global safeguard action on lamb meat, which led to a WTO dispute.[24] Israel and

[21] The Treaty of Asunción and the Common Regulation, adopted by Decision 17/96 of the Common Market Council.

[22] Article F-02, Canada–Chile Free Trade Agreement, http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/chap-f26-en.asp. (visited 10 June 2007).

[23] Article 7.5, Singapore–US FTA, http://www.fta.gov.sg/fta/pdf/FTA_USSFTA_Agreement_Final. pdf. (visited 10 May 2007).

[24] WTO Panel Report, *US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177, 178/R, adopted 16 May 2001, para. 2.8.

Table 2. FTAs with Special Safeguard (SG) Rules

FTA (date of entry into force)	Special SG Rules	
	Prohibition/Exclusion	Sectoral SG
MERCOSUR (29 November 1991)	Must exclude	
NAFTA (1 January 1994)	Shall exclude	Agriculture
Canada-Chile FTA (5 July 1997)	Shall exclude	
Jordan-Singapore FTA (22 August 2005)	May exclude (no SG if AD imposed)	
Thailand-Australia FTA (1 January 2005)	May exclude	- Agriculture
Thailand-New Zealand FTA (1 July 2005)	May exclude	- Agriculture
US-Israel FTA (1 September 1985)	May exclude	
US-Jordan FTA (17 December 2001)	May exclude	
US-Singapore FTA (1 January 2004)	May exclude	- Textiles
US-Australia FTA (1 January 2005)	May exclude	- Agriculture
CAFTA-DR-US FTA (not yet)	May exclude	- Agriculture - Textiles
Korea-US FTA (not yet)	May exclude	- Agriculture - Textiles
Singapore-New Zealand FTA (1 January 2001)	Prohibition of SG	
Singapore-Australia FTA (28 July 2003)	Prohibition of SG	

Jordan were similarly excluded from the global safeguard action related to the steel industry, which was also later contested in a WTO dispute.[25]

Singapore went further in its FTAs in terms of modifying the WTO safeguard system. Article 8 of the Singapore–New Zealand FTA categorically prohibits any safeguard measure within the meaning of the WTO Agreement on Safeguards. Article 9 of the Singapore–Australia FTA also similarly prohibits such WTO safeguard measures. In other words, unlike other FTAs that shall or may exclude a FTA party only under certain circumstances, these FTAs involving Singapore always exclude the FTA parties from WTO safeguard actions, irrespective of underlying economic situations.

There are various peculiar elements in different FTA safeguard systems. For example, Article 3.12 of the Korea–Chile FTA sets forth a special safeguard system for agricultural goods in case an import increase causes or threatens to cause serious injury or 'market disturbance'.[26] Although 'serious injury' and 'threat of serious injury' are defined in line with the WTO Safeguard Agreement, the concept of 'market disturbance' in the context of the safeguard system is not enunciated specifically in the FTA text and is completely unprecedented in the jurisdiction of both countries. The absence of a clear definition of the 'market disturbance' element for safeguard actions has raised concern about serious controversy in the actual application of

[25] WTO Panel Report, *US – Definitive Safeguard Measures on Import of Certain Steel Products*, WT/DS248, 249, 251, 252, 253, 254, 258, 259/R, adopted 10 December 2003, para. 1.19.

[26] This provision was reflected in the amendment of the 'Laws on Investigation of Unfair Trade and Safeguard' as Article 22.3 in Korea. Public Law 7093 (promulgated 20 January 2004).

the provision. However, this element was not yet elaborated by more concrete guidelines or criteria in either country.[27]

In the case of the Japan–Singapore FTA, Article 18.7 mandates a domestic judicial review procedure for safeguard actions, which is currently lacking in the WTO Safeguard Agreement. Article 2.7.5(b) of the Jordan–Singapore FTA also provides judicial review procedures for injury determination. Moreover, Article 2.7.7 of the Jordan–Singapore FTA stipulates that no bilateral safeguard investigation shall be initiated against a good that is the subject matter of an anti-dumping measure. This provision, however, does not explain how to coordinate exclusive application of anti-dumping measures with safeguard actions.[28]

The typical FTA bilateral safeguard system has shown two important departures—good and bad—from the WTO Safeguard Agreement.[29] First, a bilateral safeguard action can be taken normally based on a 'substantial' causation requirement.[30] This substantial causation requirement for safeguard actions appeared most notably in the NAFTA, and since then it has become a norm in most subsequent FTAs concluded not only by the United States but also by many other countries, where their domestic safeguard regulations require mere 'causation' pursuant to the WTO Safeguard Agreement instead of 'substantial causation'. This is indeed an important and desirable legal development because it is an indication that, WTO Members which are not subject to such a higher legal requirement, as in the United States and Canada whose domestic safeguard regulations mandate 'substantial' or 'principal' causation, have begun to adopt an economically more suitable legal element through FTAs. Secondly, bilateral safeguard systems do not generally include the 'facilitation of structural adjustment' requirement that must be a quintessential element necessary to maintain safeguard actions. It is contrasted with the WTO Safeguard Agreement, which explicitly mandates the application of a safeguard measure 'only to the extent necessary . . . to facilitate adjustment', although this legal requirement

[27] For example, in Korea, Article 22.3 of the Law on Investigation of Unfair Trade and Safeguard was elaborated by Article 22.3 of the Implementing Regulation (Presidential Order 18565, promulgated and entered into force 21 October 2004). However, the Implementing Regulation did not clarify the concept of 'market disturbance' either.

[28] It remains unclear whether a safeguard investigation will be reinitiated once an anti-dumping measure is expired or repealed while the safeguard measure is still enforced.

[29] Dukgeun Ahn, above n 12, at 17–19. See also Dukgeun Ahn, 'Trade Remedy System in East Asian Free Trade Agreements', in Y. Taniguchi, A. Yanovich and J. Bohanes (eds), *The WTO in the Twenty First Century: Dispute Settlement, Negotiations and Regionalism in Asia* (Cambridge: Cambridge University Press, 2007) 423–33.

[30] Yet, there are some FTAs that still incorporate a mere causation requirement instead of substantial causation. For example, Thailand has not adopted a substantial causation requirement. In any case, 'causation' issues have raised many controversial problems in the WTO jurisprudence. See Alan O. Sykes, *The WTO Agreement on Safeguards: A Commentary*' (Oxford: Oxford University Press, 2006) 156–74; Alan O. Sykes, 'The Safeguards Mess: A Critique of Appellate Body Jurisprudence', 2 World Trade Review 261 (2003); Dukgeun Ahn, above n 12.

has been almost completely ignored in the WTO safeguard jurisprudence and practice.[31] Codification of legally inconsistent practices by formally deleting the 'facilitation of structural adjustment' requirement in FTA safeguard systems should be rectified to prevent further deterioration of the WTO safeguard mechanism.

III. LEGAL ISSUES UNDER GATT ARTICLE XXIV

The question of whether trade remedy systems are allowed by Article XXIV along with the listed provisions such as Articles XI, XII, XIII, XIV, XV and XX has been neither clearly answered nor decided by the GATT/WTO.[32] Nonetheless, the WTO Members have routinely adopted and sometimes modified the WTO trade remedy rules in their FTAs, leaving the permissibility question practically pointless. The legal boundary of Article XXIV has been scrutinized by many scholarly studies, but most analyses of Article XXIV have specifically addressed the implications for duties or import tariffs, which are not directly applicable to trade remedy rules.[33] In fact, the interpretation that the term 'duties' might encompass trade remedy measures cannot be supported by a more comprehensive consideration of GATT texts, especially the French and Spanish versions using the terms of 'droits de douane' and 'derechos de aduana', which are directly translated into 'customs duties'.[34]

On the other hand, the wording of 'other restrictive regulations of commerce' should be understood to embrace trade remedy measures that are typically imposed to restrict imports as a border measure.[35] In fact, the panel in *Turkey–Textiles* interpreted 'other regulations of commerce' very broadly to include any regulation having an impact on trade such as SPS, TBT and anti-dumping as well as environmental standards or export credit schemes.[36] A legal analysis of the provisions related to 'other restrictive regulations of commerce' seems to suggest the WTO inconsistency of diversification in terms of trade remedy rules as explained below.

[31] See Dukgeun Ahn, above n 12, at 21–2.

[32] WTO, TN/RL/W/8/Rev.1, paras. 73–7 (dated 1 August 2002). See also WTO, WT/REG/W/37, 18 (dated 2 March 2000).

[33] For example, WTO, *Analytical Index: Guide to GATT Law and Practice*, Vol. 2 (WTO, 1995), 800–07. See also Raj Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (London: Thomson Sweet and Maxwell, 2005), 566–614; John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969), 575–623.

[34] A. Estrella and G. Horlick, above n 6, at 117–8.

[35] Ibid, at 118–21. See generally James H. Mathis, 'Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'?, in L. Bartels and F. Ortino (eds), above n 6.

[36] WTO Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, para. 9.120.

A. Article XXIV:8

Article XXIV:8 stipulates the requirement for customs union and free-trade area as follows:

> 8. 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.

Article XXIV:8 explicitly lists 'Articles XI, XII, XIII, XIV, XV and XX' as potential areas of exception for customs unions or FTAs. In contrast, other provisions—particularly Article VI and XIX, which provide trade remedy rules under GATT—are not included in the listed exception scope for duties and other restrictive regulations of commerce. Consequently, the question of whether a trade remedy measure might be maintained between parties of a customs union or FTA critically hinges on the exhaustiveness of the listed exception provisions in Article XXIV:8.

Despite unclear evidence from the negotiating history of Article XXIV, an overly narrow scope of listed provisions in the exception parenthesis of Article XXIV:8 seems to indicate that they are not an exhaustive list. For example, it would be inconceivable that all trade restrictions imposed on the basis of national security exceptions under Article XXI must be eliminated between FTA parties.[37] Moreover, because 'other restrictive regulations of commerce' including anti-dumping, countervailing and safeguard measures are to be eliminated with respect to 'substantially all',[38]

[37] Joost Pauwelyn, 'The Puzzle of WTO Safeguards and Regional Trade Agreements', 7 Journal of International Economic Law 109 (2004) at 126–7.

[38] There are two conflicting approaches to interprete 'substantially all the trade': quantitative and qualitative approach. See WTO, WT/REG/W/37, 21 (dated 2 March 2000). Despite the 'Understanding on the Interpretation of Article XXIV of GATT' which mentions the

not 'all' or 'completely all' the trade between parties,[39] the current practices to restrict imports under the trade remedy systems should be permitted by understanding that predominant parts of trade not subject to trade remedy actions between parties can still constitute 'substantially all the trade'.[40] In other words, although those listed provisions are wholly exempted from the liberalization requirement for 'substantially all the trade', the possibility of trade remedy actions between parties of customs union or free-trade areas that can be, by nature, used only under certain circumstances and also for a limited period of time would be regarded as the permitted realm of trade restriction even under customs unions or free-trade areas. The historical evidence related to the US–Canada FTA, which became the basis of Article XXIV text, also seems to suggest that the requirement to liberalize 'substantially all the trade', instead of total trade, was deliberately drafted to preserve anti-dumping and countervailing measures against Canadian goods.[41] In conclusion, the absence of Articles VI and XIX in the exception parenthesis might still be interpreted not to categorically prohibit trade remedy rules from customs unions or FTAs.

B. Article XXIV:5

Whereas Article XXIV:8 provides the definitions of a customs union and an FTA that imply the kind of measures permitted within the ambit of a regional trade agreement (hereinafter 'RTA'), Article XXIV:5 stipulates external requirements for an RTA which demand the consideration of an economic effect. Article XXIV:5 provides the following:

> (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 be higher or more

exclusion of any major sector of trade as the diminution to the expansion of world trade, this issue has remained contentious. Ibid, at 21. On the other hand, the panel and the Appellate Body in the *Turkey–Textile* case agreed that the term 'substantially all' encompassed both quantitative and qualitative components. WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textile)*, WT/DS34/AB/R, adopted 19 November 1999, para. 49.

[39] The Appellate Body in the *Turkey–Textile* case also explained that 'substantially all the trade' is not the same as all the trade and therefore Article XXIV:8(a)(i) offers 'some flexibility' to constituent members of a customs union when liberalizing their internal trade. Ibid, at para. 48.

[40] This view is also shared by other scholars. See, for example, Pauwelyn, above n 37, at 109. See also Won-Mog Choi, 'Regional Economic Integration in East Asia: Prospect and Jurisprudence', 6 Journal of International Economic Law 49 (2004), at 67–9.

[41] Kerry Chase, 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV', 5 (1) World Trade Review 1 (2006), at 17.

> 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

This external requirement for RTAs, especially that other regulations of commerce shall not be more restrictive than those of pre-RTAs, embraces an economic concern that an RTA should not entail trade diversion effects. It is noteworthy that, although Article XXIV:4 also addresses the same aspect of the economic concern by stipulating that the purpose of RTAs 'should be to facilitate trade' between parties and 'not to raise barriers to the trade of other contracting parties', Article XXIV:5 stipulates a more direct and independent legal obligation.[42]

On the other hand, it is important to discern that mere trade diversion effects on balance may not make pertinent RTAs inconsistent with Article XXIV:5.[43] By the very nature of a preferential market access created by RTAs would trade diversion be unavoidable—in some cases, even to a considerable extent. In this regard, it is noted that Article XXIV:5 prescribes the different legal conditions for duties and other regulations of commerce: 'not higher' for the former and 'not more restrictive' for the latter. The requirement not to adopt higher post-FTA duties for non-party countries is easier to understand and implement because the application can be evidently verified through the numerical comparison. In other words, the market access condition in terms of tariffs set out in Article XXIV:5 can be satisfied when FTA parties do not increase their tariff levels as opposed to non-party members.

However, the requirement not to apply more restrictive regulations of commerce does demand *de facto* as well as *de jure* analysis. To put it

[42] In the first legal analysis to apply such an economic rationale, Professor Dam recommended a 'creative reinterpretation' of Article XXIV:4. Kenneth W. Dam, 'Regional Economic Arrangements and the GATT: the Legacy of a Misconception', 30 University of Chicago Law Review 615 (1963), at 633.

[43] James H. Mathis, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* (The Hague: Springer, 2002), 112.

differently, the legality of other regulations of commerce in respect of Article XXIV:5 might be determined not only by *ex ante* evaluation of structures of regulations but also by *ex post* assessment of trade effects. Nevertheless, whether this part of the legal obligations in Article XXIV:5 sanctions preferential trade remedy rules is not yet obvious.

In relation to the above inquiry, paragraph 2 of the *Understanding on the Interpretation of Article XXIV of the GATT 1994* (hereinafter *'Understanding on Article XXIV'*) adopted by the Uruguay Round negotiation elaborates on Article XXIV:5 as follows:

> 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.

As emphasized in the above, the *Understanding on Article XXIV* countenances case-by-case assessment for 'other regulations of commerce', although it stipulates relatively articulated rules related to duties.[44] It does not, however, clarify specific criteria to examine each factor listed in the last sentence of the paragraph.

In a rare case that directly reflects the application of Article XXIV, the Appellate Body held that consistency with Article XXIV:5 requires an economic test to assess the effects of the resulting trade measures and policies of the new regional agreement:

> 54. With respect to "other regulations of commerce", 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

[44] For a more detailed analysis of the Understanding on Article XXIV, R. Bhala, above n 33, at 596–600.

> duties may be difficult, and, therefore, states 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."
>
> 55. We agree 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.
>
> and we also agree that this is:
>
> > an "economic" test for assessing whether a specific customs union is compatible with Article XXIV.[45]

As quoted in the above ruling, the Appellate Body explained that Article XXIV:5 requires the evaluation of not merely the form but the effects of trade policy measures of the new RTAs. In particular, the Appellate Body emphasized the recommendation enunciated in the preamble of the *Understanding on Article XXIV*:

> 57. According to paragraph 4, the purpose of a customs union is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries. We note that the *Understanding on Article XXIV* explicitly reaffirms this purpose of a customs union, and states that in the formation or enlargement of a customs union, the constituent members should "to the greatest possible extent avoid creating adverse affects on the trade of other Members". Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV.[46]

Although the preambular language of the *Understanding on Article XXIV* does not stipulate binding legal duty, the recommendation to avoid creating adverse effects, to the greatest possible extent, on the trade of other Members sets out an important principle in interpreting and applying Article XXIV:5.

[45] WTO, above n 38, paras. 54–5.
[46] Ibid, at para. 57.

Therefore, based on the interpretation of the Appellate Body regarding Article XXIV:5, other regulations of commerce, including trade remedy rules, in FTAs should avoid adverse economic effects on other Member countries. This requirement provides an important implication for FTA negotiations. Despite innocuous intent by FTA parties to further liberalize or facilitate trade between them, preferential arrangement of trade remedy systems in FTAs would inevitably entail substantial trade diversion towards FTA parties.[47] Although non-discriminatory application of trade remedy rules would generally restore competitive conditions for exporters after the relevant measures are actually imposed, preferential application of trade remedy rules for FTA parties would substantially distort competitive conditions in favour of parties. In other words, preferential application of trade remedy rules would constitute a systemic distortion by creating a more trade-restrictive mechanism against non-party Members, which is inconsistent with the legal duty under Article XXIV:5. This interpretation of Article XXIV:5 would forbid FTA parties from creating any preferential arrangement in terms of trade remedy rules, including not just partial modification of the rules but also complete elimination of trade remedy actions between FTA parties which appears to have been a preferred solution.

As a case in contrast, suppose that an FTA includes trade remedy systems to the disadvantage of FTA parties as opposed to non-party Members. For example, suppose that a country currently applying a lesser duty rule concludes an FTA that forbids such a rule. Consequently, this country applies a lesser duty rule to all other WTO Members except for an FTA party. This arrangement is at least not inconsistent with Article XXIV:5 requirement because it is not 'more trade restrictive' to non-party Members. However, such an arrangement would in any case not be politically feasible during the FTA negotiation.

The critical difference between duties and other regulations of commerce in terms of legal obligations is that the former is typically the subject matter for negotiation to balance market access conditions whereas the latter tends to involve domestic regulatory reforms having an implication for competitive conditions. Therefore, a relatively more stringent obligation for other regulations of commerce might be understood as the system to ensure an equal competitive environment of a market in which market access arrangement is implemented.

In conclusion, under the mechanism of Article XXIV:5, the only legally viable solution for an FTA trade remedy system is either to adopt the WTO

[47] The discussion in the Committee on RTA also raised this point as early as 1998. Japan argued that an RTA adopting competition policy measures rather than anti-dumping measures would cause trade distorting effects. See WTO, WT/REG/W/28 (dated 28 July 1998).

trade remedy system *en bloc* or to apply trade remedy rules adopted by FTAs to all WTO Members so that FTA parties can still ensure non-discriminatory application of trade remedy rules. Only then would competitive conditions for other WTO Members remain to be no more trade restrictive after the conclusion of FTAs. The obligation of Article XXIV:5 to avoid trade distorting effects thus requires basically non-discriminatory application of trade remedy measures.

C. Non-discrimination requirement in AD/SCM agreement

Both the WTO Anti-dumping and Subsidy Agreement specify the non-discrimination principle. Article 9.2 of the AD Agreement requires that 'when an anti-dumping duty is *imposed* in respect of any product, such anti-dumping duty 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'. This provision appears to prohibit discriminatory application of anti-dumping measures. Indeed, on the basis of this non-discrimination principle, some authorities refrained from imposing anti-dumping duties when they had convincing evidence that the domestic industry filed a selective application against certain countries while excluding other countries despite a *prima facie* case of injurious dumping.[48]

However, it should be noted that the non-discrimination principle in Article 9.2 of the Anti-dumping Agreement only applies to the collection, not the imposition, of anti-dumping duties. In fact, this article was inherited from Article 8.2 of the Tokyo Round Anti-dumping Code while the corresponding text of the Kennedy Round Code provided that 'such anti-dumping duty shall be *levied* in the appropriate amounts in each case on a non-discriminatory basis'. In a general procedure for an anti-dumping action, a dumping margin is first assessed and then an anti-dumping duty is imposed or levied. Only after the imposition of an anti-dumping duty would the duty be actually collected. Based on this procedure, a Member would be able to comply with Article 9.2 by non-discriminatorily collecting the anti-dumping duties even if the duties themselves are levied discriminatorily based on the preferential trade remedy rules.[49]

[48] Edwin Vermulst, *The WTO Anti-dumping Agreement: A Commentary* (Oxford: Oxford University Press, 2005), 173.

[49] The European Communities imposed anti-dumping duties on imports of hot-rolled coils originating in India, Taiwan and Serbia and Montenegro, but not on imports from Egypt, Slovakia and Turkey, although the investigation led to positive proposals. India brought a complaint against the European Communities based on discriminatory application of anti-dumping measures. The European Communities settled the case by terminating the anti-dumping measures for all pertinent countries. WTO, *European Communities – Anti-dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India*, WT/DS313/2 (dated 27 October 2004). This is the only case so far in which an actual discriminatory anti-dumping measure was challenged in the dispute settlement system.

In this regard, it is noteworthy that Article 19.3 of the SCM Agreement stipulates that 'when a countervailing duty is *imposed* in respect of any product, such a 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'. This provision was identically adopted from the Tokyo Round SCM Code.

This discrepancy between the Anti-dumping and Subsidy Agreement has never been a serious issue in the GATT/WTO system.[50] The intent of negotiators during the Tokyo Round to change the provision was not known, either. A practical implication from this change is that the US government could render preferential treatment in terms of an anti-dumping investigation for Israel by applying the non-cumulation provision and still comply with disciplines under the Anti-dumping Code. As already explained, no WTO Member has adopted preferential countervailing rules in FTAs. For that reason, it is necessary to loosen the legal requirement in the SCM Agreement. It might explain why Article 19.3 of the SCM Agreement still maintains a more stringent legal provision. It appears that this seemingly minor change in the WTO Anti-dumping Agreement might provide—intentionally or inadvertently—a legal cover to accommodate a potentially preferential and discriminatory application of anti-dumping measures.

D. Non-discrimination in safeguard agreement

Whether a WTO Member may exclude an FTA party from its WTO safeguard measures has been a focal point of controversy regarding the WTO safeguard system.[51] Despite the clear provision in Article 2.2 that safeguard measures shall be applied to a product being imported irrespective of its source, Article XXIV of GATT has been referred to as a possible justification to deviate from such a non-discrimination principle. In fact, footnote 1 of the WTO Safeguard Agreement 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 unresolved during the Uruguay negotiation.

On the other hand, the following ruling of the Appellate Body in the Turkey–Textile case seems to indicate that selective or discriminatory

[50] There seems to be no formal record from the relevant committees of the GATT or the WTO of a discussion of this difference. This issue has not been raised in the Doha Rules negotiation, either.

[51] See, for example, J. Pauwelyn, above n 37, at 109–42; A. Sykes, above n 30, at 232–36.

safeguard application might not satisfy the requirements under Article XXIV[52]:

> 58. Accordingly, on the basis of this analysis of the text and the context of the chapeau of paragraph 5 of Article XXIV, we are of the view 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.

Therefore, any measure allegedly introduced for the formation of an RTA should satisfy both timing and necessity requirements. Even if the provision to exclude a FTA party from safeguard actions might arguably meet the timing requirement, it seems very unlikely for such a selective safeguard application to satisfy the necessity requirement elaborated by the Appellate Body.[53]

Moreover, as explained earlier, the interpretation of Article XXIV:5 particularly commensurate with an economic test emphasized by the Appellate Body also indicates that Article XXIV cannot be the basis of selective application of WTO safeguard measures. An adverse trade diversion effect induced by the preferential application of a measure is particularly severe in the case of safeguard measures. Consequently, exclusion of FTA parties from the scope of WTO safeguard actions would constitute a 'more trade restrictive' measure that violates Article XXIV:5.[54]

IV. ECONOMIC IMPLICATION OF DISCRIMINATORY TRADE REMEDY RULES

While preferential arrangement of trade remedy rules in FTAs typically aims to further facilitate trade between the constituent parties, it may aggravate already serious trade diversion problems.[55]

[52] WTO, above n 38, at para. 58.

[53] A. Sykes, above n 30, at 236.

[54] This conclusion disagrees with Pauwelyn's argument that exclusion of FTA parties should be possible in the current WTO system. However, he also indicated that the trade diversion effect occurring to non-party countries might tilt his conclusion on justifiability of selective safeguard application on the basis of Article XXIV:4 instead of Article XXIV:5. J. Pauwelyn, above n 37, at footnote 60.

[55] The balance between trade creation and trade diversion effects of RTAs has long been the subject of economic debates on efficiency and desirability of RTAs. See generally J. Bhagwati et al., *Trading Blocs: Alternative Approaches to Analyzing Preferential Trade Agreements* (Cambridge: MIT Press, 1999). Such economic consideration was also discussed in the

This problem has been widely recognized regarding safeguard measures, which has provoked serious controversy since the Tokyo Round negotiation.[56] The major problem of selective application of 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 Pipe* case, the exclusion of NAFTA parties from US safeguard measures resulted in import reduction mainly from Korea that was the historically largest exporter but, at the same time, significant increase of import from Mexico to leave overall import roughly unchanged.[57]

The current practice for selective safeguard measures by FTAs is especially devised and structured to create inefficient trade diversion. For example, NAFTA stipulates that imports of a good from each other Party are excluded from the action unless imports from a party, considered individually, account for a substantial share of total imports. Suppose that the United States has three different trading partners for a steel product in addition to Canada and Mexico. In the case that the US International Trade Commission finds that six trading partners are to be subjected to safeguard measures, whereas imports from Canada and Mexico are to be excluded since they do not account for a substantial share of total imports, the underlying economic reason may well be that producers in Canada and Mexico are relatively less efficient and competitive and thereby occupy only small shares of the total imports. In this situation, the selective application of safeguard measures to exclude Canada and Mexico from the import restriction merely shifts import sources from more efficient non-NAFTA countries to less-efficient NAFTA producers.[58]

To the contrary, when NAFTA parties are not excluded since they are indeed major import sources, the safeguard measures tend to address industry injury more reasonably by covering all imports—especially major

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legal interpretation of Article XXIV in early GATT years. See, for example, Kenneth W. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970) 274–95; J. Jackson, above n 33, 575–623.

[56] Gilbert R. Winham, *International Trade and the Tokyo Round Negotiation* (Princeton: Princeton University Press,1986) 197–200 and 240–7.

[57] Mexico actually became the largest exporter after the imposition of - indeed, exemption from – the safeguard measure. WTO Panel Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, para. 4.26. For a more general empirical evidence of trade diversion effects to non-FTA parties caused by selective safeguard actions, see Chad P. Bown and Rachel McCulloch, 'The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact', in Michael G. Plummer (ed.), *Empirical Methods in International Trade: Essays in Honor of Mordechai Kreinin* (Cheltenham: Edward Elgar Publishing, 2004), 145–68.

[58] Until September 2007, the US government imposed six safeguard measures. Among them, except for only one case in which broom corn brooms from Mexico was not excluded, all five cases excluded imports from Canada and Mexico based on the NAFTA provisions. For the broom case, see WTO, G/SG/N/10/USA/1 (dated 6 December 1996).

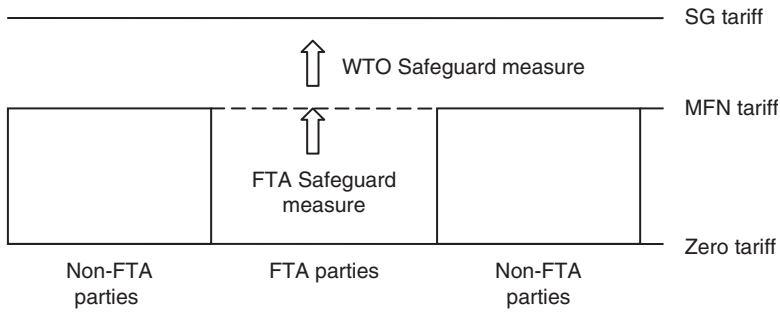

Figure 3. Sequential safeguard structure.

causes of injury. Another problem in this case is that an industry injury mainly incurred by FTA parties should be addressed by a FTA safeguard measure, not by a WTO safeguard measure whose MFN application requirement may restrict too much importation including economically innocuous imports from non-party Members. However, in the current NAFTA model, an FTA party basically has an option to choose between FTA and WTO safeguard measures. Considering the common structure of FTA safeguard measures that permit only the restoration to MFN tariff levels, an FTA party has little incentive to confine its safeguard protection by invoking an FTA safeguard mechanism in such a situation. It probably explains why there has been no case reported so far for the invocation of an FTA safeguard measure despite quite a few WTO safeguard measures.

Given such trade diversion or distortion effects by interplay of FTA and WTO safeguard systems, a more economically reasonable mechanism to maintain an FTA safeguard system by the WTO Members is to mandate an FTA safeguard action before a WTO safeguard action is permitted. When a domestic industry is seriously injured or threatened thereof by import increases, an FTA safeguard measure, if available, must be invoked first to restore an MFN competitive environment for importation. A WTO safeguard measure should be permitted only after an FTA safeguard action turns out to be ineffective to fully remedy industry injury problems. As illustrated in Figure 3, this sequential application of safeguard actions would be able to address industry injury caused by import increases more directly and reasonably through gradual constraints for importation. Furthermore, a sequential safeguard application that begins with an FTA safeguard action and follows with a WTO safeguard action would minimize potential trade diversion to respect legal obligations under Article XXIV:5.

A similar trade diversion problem also occurs in relation to anti-dumping systems as explained in Figure 4. 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

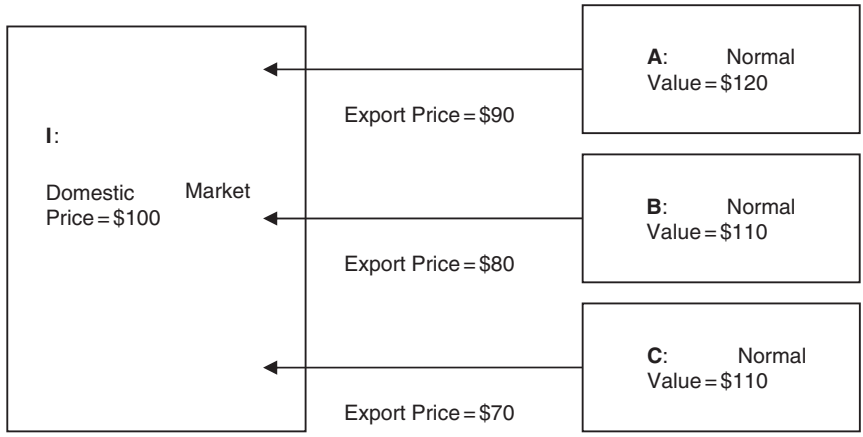

Figure 4. Trade diversion case by preferential anti-dumping action.

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 competing prices in Country I.

But, suppose that Countries I and A establish 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 on non-party countries. In other words, distortion, rather than restoration, of competitive conditions can induce substantial trade diversion. 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. The difference from the safeguard situation is that at least distortion caused in terms of dumping calculation tends to be random exclusively depending on the FTA arrangement rather than systemically aggravating economic inefficiency as in a FTA safeguard situation.

On the other hand, the non-cumulation provision currently adopted under the CAFTA-DR-US FTA may be regarded as a parallel provision of selective safeguard application in the anti-dumping system. When an import from an FTA party is separated from—i.e. not cumulated on—other countries' exportation for the purpose of injury determination, the FTA party is very

likely to be exempted from the coverage of anti-dumping action since injury determination regarding imports from the FTA 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 FTA parties from anti-dumping actions. Then, exactly like selective safeguard application cases, trade diversion in favour of FTA parties may become more serious under a systemically created preferential system for anti-dumping measures.

V. CONCLUSION

Although most of the RTAs have primarily adopted all the rights and obligations under the WTO trade remedy system, modified models have begun to emerge in recent FTA negotiations. It is indeed noteworthy that such a 'rule diversification' in terms of trade remedy systems permeates into FTAs of some of the key players in the world trading system. Codification of such diversified rules at an international level might constitute important precedents for future trade negotiations and ultimately affect the development of the WTO trade remedy system.

A particularly disturbing aspect of the recent 'rule diversification' phenomenon is that FTA parties have a strong incentive to agree on preferential trade remedy rules because trade between parties will be further advantaged as opposed to non-party WTO Members. Furthermore, the less efficient or competitive is an FTA party compared to non-party WTO Members, the greater does the consequent adverse trade diversion effect tend to be. There are concerns that this problem may be utilized in future FTA negotiations as one of the major instruments to motivate negotiating partners. Therefore, rule diversification problems recently observed may have much more serious potential to spread over future FTA regimes. It appears that rule diversification in terms of trade remedy systems might be another channel to deepen a prisoner's dilemma situation for WTO Members facing FTA negotiations, which will result in a complex distorting mechanism only to worsen world economic welfare.[59]

The core problem of rule diversification lies in the creation of another method to wield a discriminatory authority which is structured to favour inefficient FTA parties at the expense of more efficient non-party WTO Members. Fortunately, actual trade diversion has not been substantially materialized on the basis of emerging preferential application of trade

[59] The risk of undermining trade rules founded on the MFN principle was forcefully raised even in some of very early analyses on the GATT system. For example, Professor Jackson wrote that '[p]erhaps no case is more revealing of the danger of preferential arrangements contrary to Most-Favored-Nation creeping into GATT through the ambiguity of Article XXIV'. J. Jackson, above n 33, 609.

remedy rules. A future risk, however, seems much more real when major exporting countries with keen interests for trade remedy systems including China, Japan and Korea are engaging actively in FTA negotiations even between themselves.

The implication of the analysis above makes us turn back to the WTO for addressing FTA trade remedy problems. The usual argument in favour of FTAs as opposed to the WTO in terms of market access appears to be forcefully applied to the trade remedy negotiation: FTA forums are preferred to experiment or adopt various reform proposals for WTO rules negotiations that seem too slow to generate tangible achievement in the near future.[60] Despite their innocuous intent to facilitate more intra-FTA trade, it is the WTO that should still be the place to undertake restructuring of the trade remedy rules for the world trading system unless any modified rules adopted through FTAs apply to all WTO Members on a non-discriminatory basis.

[60] It should be noted that even market access is not the area where RTA negotiations make significant improvement because market access for services as well as agricultural sectors has not been substantially enhanced beyond the WTO commitment levels under the most RTA arrangements.