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Provisions for Trade Remedy Measures (Anti-dumping, Countervailing and Safeguard Measures) in Preferential Trade Agreements

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Abstract

Preferential trade agreements that complement the multilateral trade regime under the WTO have recently been actively utilized. Making use of the opportunities of forming preferential trade agreements, abolishing, or tightening the imposition requirements of trade remedy measures, such as anti-dumping, countervailing and safeguard measures has been increasingly made available within these agreements. These new approaches also often entail harmonization of competition policies and strengthening the disciplines of subsidies as substitutes for trade remedy measures.

In this paper, the details of provisions for anti-dumping, countervailing and safeguard measures, as well as competition policy and subsidy policy in the existing preferential trade agreements are examined. The discussions at the Committee of Regional Trade Agreements of the WTO and the critical issues raised in the related dispute settlement cases are analyzed. In conclusion, a proposal for desirable forms of trade remedy measures in preferential trade agreements is explained.

Keywords: WTO, Regional Trade Agreement, Free Trade Agreement, Customs Union, Anti-dumping, Safeguard, Countervailing Duties, Subsidy, Competition Policy

JEL Classification: F02, F13, F15, K33

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1. Introduction

Preferential trade agreements[1] (PTAs), that complement the multilateral trade regime under the World Trade Organization (WTO), have recently been actively utilized. By the beginning of 2002, more than 150 PTAs had been observed by the WTO.

The main purpose of the PTAs is, without doubt, the elimination of tariff barriers. It is a recent trend, however, that many of the PTAs furnish provisions concerning trade remedy measures (i.e. anti-dumping, countervailing and safeguard measures), such as abolishing or strengthening the imposition criteria for trade among their constituent countries.

Although imposition of trade remedy measures are legally allowed under the relevant WTO Agreements if certain criteria are met, it also has been widely acknowledged that, on one hand, they can protect the domestic industries damaged by foreign imports, and, on the other hand, they harm domestic consumers, domestic downstream industries, and foreign exporting industries, by increasing the commodity price and by creating an unstable trade environment and trade distorting effects. Therefore, making use of the opportunities of forming PTAs, abolition or tightening the imposition requirements of trade remedy measures within their territories has been increasing. These new approaches also often entail the harmonization of competition policies and strengthening the disciplines of subsidies as substitutes for trade remedy measures.

In this paper, details of the provisions for anti-dumping, countervailing and safeguard measures, as well as competition and subsidy policies in the existing PTAs are examined. Then, the discussions at the Committee of Regional Trade Agreements (CRTA) of the WTO and the critical issues raised in the related dispute settlement cases are analyzed. In conclusion, a proposal for desirable types of trade remedy measures in PTAs is explained.

Following chapter 2, according to the research done by the WTO Secretariat for CRTA, the quantitative tendency of provisions for anti-dumping measures, subsidies and countervailing measures, and safeguard measures in the PTAs that had been reported to the WTO by 1998, is described.

In chapter 3, looking at the existing PTAs in Europe, North and South America, and Asia and Oceania, details of provisions for trade remedy measures are examined.

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[1] Preferential trade agreements, which include free trade agreements and customs unions, are also often called “regional trade agreements.” However, many of the preferential trade agreements recently are not all contained within a geographical “region.” Therefore, the term “preferential trade agreement” is used throughout this paper. (See Bhagwati and Panagariya (1996) for further arguments on PTAs.)

At the same time, details of provisions for competition and subsidy policies that are substitutes for anti-dumping and subsidy measures are examined.

In chapter 4, using the facts examined in chapters 2 and 3, the tendencies of provisions for trade remedy measures in the PTAs are viewed, taking into account differences in the approaches, the date when the PTAs were agreed upon, and other factors.

In chapter 5, consistencies in the WTO despite the diverse provisions of trade remedy measures in the different PTAs are analyzed. For that purpose, key issues in the discussions at CRTA, and the Panel and the Appellate Body reports for the related dispute settlement cases, are studied.

Finally, based on what was found in the previous chapters, a proposal for desirable forms of provisions for trade remedy measures in PTAs are discussed in conclusion.[2]

[2] In this paper, PTAs have two categories: “customs unions (CUs)” and “free trade areas (FTAs),” according to the distinction stipulated in the related provisions of Article XXIV of GATT.

2. Quantitative grasp of provisions for trade remedy measures in PTAs

Since the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) implemented reciprocal abolition of anti-dumping measures in 1990, discussions began concerning the abolition of trade remedy measures within PTA territory. In particular, a special committee, the CRTA, was organized following the establishment of the WTO in 1995 to examine the PTAs, including the provisions for trade remedy measures.

In 1998, the WTO Secretariat for CRTA issued a report titled "Inventory of Non-Tariff Provisions in Regional Trade Agreements[3]." It compiled the data for sixty-nine PTAs reported to the WTO by that time. According to the data in the report, overall trends of provisions for trade remedy measures in the PTAs were drawn as follows.

2.1 Anti-dumping measures

Among sixty-nine PTAs, sixty-two of them allow member countries to impose anti-dumping measures on each other. A breakdown of the sixty-two PTAs shows six CUs[4] out of ten and fifty-six FTAs out of fifty-nine. This index does not take into account the impact of individual PTAs, such as GDP size, amount of trade, and geographical coverage. However, in terms of mere numbers, intra-territory abolition of anti-dumping measures at the PTAs was seen as a phenomenon of approximately 10 % as of 1998.

Looking closely at the PTAs, the report described that explicit provisions for anti-dumping and references[5] to GATT/WTO had become more prevalent since 1990. This fact reflects an increasing interest in anti-dumping measures among countries. It is notable that the methods of preventing abusive use of the measure, such as notification of the surveillance organization and consultations between the related parties before imposition of a measure, were installed in approximately 80% (fifty-three out of sixty-nine) of the PTAs.

2.2 Countervailing measures against subsidies

Among sixty-nine PTAs, sixty-four allow member countries to impose

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[3] "Inventory of Non-Tariff Provisions in Regional Trade Agreements" (WTO:WT/REG/W26)

[4] Two CUs in addition to six limit the application of anti-dumping measures only during the transition period.

[5] In many cases, GATT/WTO rules are referred for definition and imposition procedures of anti-dumping.

countervailing measures against subsidies. However, forty-six PTAs out of sixty-four, that is 72%, include a notification and consultation obligation prior to imposition. Also, it is notable that almost all post-1990 PTAs[6] include a general provision that state aid, which distorts or threatens to distort competition, is not compatible with the obligations under their agreements.[7]

2.3 Safeguard measures

As to the safeguard measures, sixty-eight PTAs out of sixty-nine, that is almost all, allow member countries to apply the emergency import restriction measures of Article XIX of GATT.[8] Among them, six PTAs limit the application only during the transition period. There are some other provisions for accepting safeguard measures in the cases of balance-of-payment difficulties, structural adjustment for domestic industries and protection for infant industries, and those specific to the agricultural sector. In many cases, prior consultation and notification are required, and a preference for measures that least distort the functioning of the PTAs is stated.

About 10% of the PTAs abolish safeguard measures for intra-trade after a transition period.

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[6] Four CUs out of five and forty-four FTAs out of forty-five include this provision.
[7] Agricultural subsidies are often stipulated separately from subsidies for industrial goods in the PTAs, as in the WTO scheme.
[8] Article XIX: 1(a) of GATT: If as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

3. Details of provisions for trade remedy measures in individual PTAs

The report by the WTO Secretariat referred to in the previous chapter covers the PTAs until 1998, and does not provide the details of provisions for trade remedy measures in individual PTAs. Therefore, in this chapter, the details of the provisions of trade remedy measures, as well as those of policy harmonization in competition and subsidies policies, are examined. All the countries and economic units that are active players in making use of PTAs, such as the EU, the EFTA, the U.S., Canada, MERCOSUR, Australia, New Zealand, Singapore and others, are closely examined.

3.1 The approaches in Europe

(1) EU (European Union)[9][10]

In the EU tariffs and quotas were abolished for intra-trade under the Treaty of Rome, which came into effect in 1958, and anti-dumping measures were simultaneously abolished. Since customs duties on imports and exports, and charges having an equivalent effect are prohibited between member states, countervailing duties against subsidies and safeguard measures, as well as anti-dumping measures, are no longer employed.

One of the characteristics of the EU is that trade in goods and services, and mobility of humans and capital, have been extensively liberalized. The EU is governed by the so-called *acquis communautaire* that is perceived as the entire body of European laws including all the treaties, regulations and directives passed by the European institutions, as well as judgments laid down by the European Court of Justice. The member states of the EU, as a customs union, take common duties and other regulations of commerce to apply to third parties. In terms of competition policies, Articles 81[11] and 82 of the Treaty of Rome, as well as related regulations, stipulate the common rules. In terms of state aid, Article 87 of the Treaty of Rome describes that any aid that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is incompatible with the common market. Article 88 also stipulates the constant review mechanism of state aid and provides the European Commission with the authority to decide on the

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[9] In this paper, the notation “EU” is uniformly used unless a distinction between the EC and EU is necessary.

[10] The members at present are the following fifteen countries: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, and England.

[11] Due to Article 12 of the Treaty of Amsterdam that came into effect in 1999, the article numbers were amended. The former Articles 85, 86, 92 and 93 were modified to the new Articles 81, 82, 87 and 88 respectively.

abolition or alteration of any aid incompatible with the common market[12].

In the EU case, trade remedy measures were abolished as a natural consequence of the formation of a customs union. The abolition entailed the common rules on competition and state aid for deeper integration. Therefore, the purposes of anti-dumping and anti-subsidy measures themselves to be a countermeasure against the trade distorting behavior of foreign countries were replaced by the introduction of extensive common rules on competition.

Although the EU has abolished the trade remedy measures for intra-trade, it is still one of the major users of trade remedy measures. The difference in treatment between member countries of the EU and non-members seems to often bring blame, and, thus, to affect the agenda of trade negotiations between the EU and non-member countries in proximity.

(2) EEA (European Economic Area)

The EEA is an FTA agreed upon in 1992 between the EU countries and the EFTA countries (Norway, Iceland and Liechtenstein) except for Switzerland.[13] 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 in 1992 was abolition of anti-dumping and countervailing measures, in order to realize a more stable European market without the threat of those measures being imposed. Article 26 of the Agreement on the European Economic Area[14] stipulates the non-application of anti-dumping and countervailing measures. However, Protocol 13 on the Non-Application of Anti-dumping and Countervailing Measures[15] stipulates that the coverage of non-application is limited to

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[12] For example, the EU did not allow state aid by the Belgian government for its flag carrier Sabena Airlines when it filed for bankruptcy after suffering from the downturn in the aviation industry after the terrorist attacks in the U.S. on September 11 last year.

[13] In May 1992, Switzerland requested accession to the EU. On the other hand, at the national referendum in December 1992, its entry into the EEA was voted down. Influenced by this event, their accession request to the EU was also frozen. In 1999 Switzerland and the EU agreed on a bilateral FTA. As a consequence, member countries of the EU and the EFTA, including Switzerland, finally succeeded in joining the common market in Europe.

[14] Article 26 of the Agreement on the European Economic Area: Anti-dumping measures, countervailing duties and measures against illicit commercial practices attributable to third countries shall not be applied in relations between the Contracting Parties, unless otherwise specified in this agreement.

[15] Protocol 13 on the Non-Application of Anti-dumping and Countervailing Measures:

where Community *aquis* 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.

Due to the formation of the EEA, the EFTA accepted the majority of *acquis communautaire* of the EU, and shares the common rules of competition policies and state aid policies. The EFTA, however, did not accept the Common Agricultural Policies (CAP) and the Common Fisheries Policies (CFP), and the agricultural and fishery sectors are not covered by non-application.

The EEA leaves the right to impose safeguard measures in the hands of both parties in situations of serious economic, social or environmental difficulties of a sectorial or regional nature that are liable to persist. At the same time, requirements for imposition are strengthened to demand prior notifications and consultations, and periodic reviews of the effective measures every three months. (Articles 112, 113 and 114)

(3) EFTA (European Free Trade Association)[16]

The EFTA was originally established based on the agreement signed in 1960. 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 amendment, the EFTA explicitly abolished anti-dumping and countervailing measures for intra-trade. (Articles 36 and 16 of the EFTA Convention)[17] As to safeguard measures, the EFTA leaves the right of

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The application of Article 26 of the Agreement is limited to the areas covered by the provisions of the Agreement and in which the Community *acquis* is fully integrated into the Agreement.

Moreover, unless other solutions are agreed upon by the Contracting Parties, its application is without prejudice to any measures which may be introduced by the Contracting Parties to avoid circumvention of the following measures aimed at third countries:

- anti-dumping measures;
- countervailing duties;
- measures against illicit commercial practices attributable to third countries.

[16] Member countries at present are Ireland, Liechtenstein, Norway and Switzerland. The original members in 1960 were the following seven countries: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and England. Afterwards, Iceland, Finland and Liechtenstein joined in 1970, in 1986 and in 1991 respectively. On the other hand, England and Denmark withdrew from the EFTA in 1972 in order to join the EU, followed by Portugal in 1985 and Austria, Finland and Sweden in 1995.

[17] Article 36 of the EFTA Convention: Anti-dumping measures, countervailing duties and measures against illicit commercial practices attributable to third countries shall not be applied in relations between the Member States.
Article 16.2 of the EFTA Convention: Member States shall not apply countervailing

imposition to its member countries with stricter requirements similar to the EEA. (Articles 40 and 41 of the EFTA Convention)

The EEA between the EFTA and the EU is not a CU but an FTA, and, thus, the EFTA does not need to share common trade policies, such as common tariff duties, with the EU. The EFTA and the EU, however, share the common motivation to realize a single market and political, social and economic stability in Europe, and have a similar strategy in their relationships with Central and Eastern Europe and with Mediterranean countries. The EFTA has FTAs with those countries in proximity and in parallel to the FTAs between them and the EU. The EFTA has also been seeking FTAs in parallel to the EU with the Central and South American countries such as Mexico.

(4) EFTA-Singapore Free Trade Agreement

In June 2002, the EFTA and Singapore agreed on an FTA. The parties to the EFTA-Singapore FTA agreed on the abolition of anti-dumping measures. In order to prevent dumping, they decided to make use of the necessary measures provided in Chapter V on "Competition." (Article 16[18]) In Chapter V both parties recognized that certain business practices, such as anti-competitive agreements or concerted practices and abuse of a dominant position, might restrict trade between the parties. They agreed to establish a consultation scheme with a view to eliminating such practices.

As for state aid and countervailing measures, the parties let their rights and obligations in respect to subsidies to be governed by Articles VI and XVI of GATT 1994, the WTO Agreement on Subsidies and Countervailing Measures and the WTO Agreement on Agriculture.

The EFTA-Singapore FTA only includes bilateral safeguard measures for intra-trade, and does not mention global safeguard measures at all. As to bilateral safeguards, measures can be taken only for a period not exceeding one year with strict exceptions for three years, within the Most-Favoured-Nation (MFN) applied rate of duty, and after the investigation in full accordance with the procedures laid down in the WTO Agreement on Safeguards. Also, any party that might be affected by the measure is to be simultaneously offered compensation in the form of substantially

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measures as provided for under Part V of the WTO Agreement on Subsidies and Countervailing Measures in relation to any other member State in accordance with Article 36.

[18] Article 16: Anti-dumping

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

equivalent trade liberalization. If such compensation is not mutually agreed upon within 30 days from the date of notification, the party against whose product the measure is taken may take compensatory action, which consists of suspension of concessions.

The parties are to review the bilateral safeguard mechanism in two years with a view to determining whether there is a need to maintain it. If the parties decide to maintain the bilateral safeguard mechanism, they will thereafter conduct a biennial review.

(5) EU Accession of Central and Eastern Europe

The EU promotes the accession of the Central and Eastern European countries based on the adoption, implementation and enforcement of *acquis communautaire.*[19] The EU encourages the accessions of the ten Central and Eastern European countries[20] through the Europe Agreements, and those of Cyprus, Malta and Turkey through the Association Agreements.

In the Europe Agreements and the Association Agreements, the contracting parties who seek accession agreed to adopt the same competition and state aid policies as the EU. However, trade remedy measures such as anti-dumping were not abolished at once though the EU did abolish them for its intra-trade. Taking the Interim Agreement between Slovenia and the European Communities agreed upon in 1996 for forming an FTA for future accession to the EU as an example, both parties decided to keep the right to impose anti-dumping measures, while the following stricter conditions were added, such as prompt notification before initiating an investigation, prior consultations to provisional or definitive measures, and preference of price undertakings and price monitoring to anti-dumping duties. Countervailing measures were abolished as state aid conformed to the EU regulations. As to safeguard measures, the right of imposition was maintained.

Currently, the twelve countries of the Europe Agreements and the Association Agreements[21], except Turkey, are under accession negotiations. The anti-dumping measures, countervailing measures and safeguard measures between those countries

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[19] The EU also provides an aid program for accession called PHARE in order to assist the Central and Eastern European countries in facilitating economic reform and strengthening democracy. Fiscal aid is contained in this program to bring into existence the extensive *acquis communautaire* including competition policies and state aid policies.

[20] These ten countries are Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia

[21] The EU started accession negotiations with the six countries of Cyprus, Poland, the Czech Republic, Hungary, Estonia and Slovenia in 1998 and with the other six countries of Latvia, Lithuania, Slovakia, Romania, Bulgaria and Malta in 2000.

and the EU will possibly be abolished at the time of accession.

(6) EU-Turkey Customs Union

Turkey requested accession to the EU in 1987 – the earliest of all the countries that are currently seeking accession. However, Turkey has not yet proceeded to negotiation, and has been given the status of a "candidate country." As mentioned above, Turkey is one of the countries that have an Association Agreement with the EU[22]. In 1996, the EU and Turkey entered into the CU. Although the trade remedy measures for intra-trade were not all abolished at once, it seems they will be eventually.

Article 44 of the Agreement on the customs unions of both parties[23] stipulates that the Association Council will review the principle of application of trade defense instruments other than safeguards upon the request of the EU or Turkey, and that the Association Council may decide to suspend the application of these instruments if Turkey has implemented competition, state aid controls and other relevant parts of the *acquis communautaire* that are related to the internal market and ensured by their effective enforcement, thus providing a guarantee against unfair competition comparable to that existing inside the internal market[24]. The modalities of implementation of anti-dumping measures are set out in Article 47 of the Additional Protocol. During a period of twenty-two years and upon application of either party, the Association Council will address recommendations to the person or persons who practiced anti-dumping in order to terminate it. The injured party can take suitable protective measures including anti-dumping duties of up to three months, if the Association Council has not made any decision on recommendations or if the dumping practices continue despite the issuing of recommendations.

As to the safeguard measures, Article 63 of the Agreement refers to Article 60 of the Additional Protocol that permits the application of protective measures, including

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[22] Cyprus and Malta are the other countries that have an Association Agreement with the EU. Cyprus started accession negotiations with the EU in 1998, and Malta in 2000.

[23] The agreement on a customs union between the EU and Turkey is called the "Decision No.1/95 of the EC-Turkey Association Council implementing the final phase of the Customs Union."

[24] Article 44:1 The Association Council shall review upon the request of either Party the principle of application of trade defence instruments other than safeguard by one Party in its relations with the other. During any such review, the Association Council may decide to suspend the application of these instruments provided that Turkey has implemented competition, state aid control and other relevant parts of the *acquis communautaire* which are related to the internal market and ensured their effective enforcement, so providing a guarantee against unfair competition comparable to that existing inside the internal market.

safeguard measures, between the parties in the case of balance of payment difficulties and regional or development matters.[25]

It is noteworthy that the formation of the CU and the entailed elimination of all tariff duties were not enough for the EU to abolish anti-dumping and countervailing measures in the case of Turkey. The EU explicitly urged Turkey to adopt and effectively enforce *acquis communautaire* for a guarantee against unfair competition.

(7) EU-Mexico Free Trade Agreement

Mexico is a member country of NAFTA, and is one of the most important countries in Central America. The FTA between the EU and Mexico[26] came into effect in 2000. Both parties to the FTA merely confirmed their rights and obligations under the WTO Agreements on Anti-dumping, and on Subsidies and Countervailing Measures.[27] (Article 14) Concerning competition policies, a cooperation mechanism between the authorities of the parties having responsibility for the implementation of competition rules was established. The competition authorities of both parties are also required to present an annual report on the implementation of the mechanism to the Joint Committee. (Article 39) There is no reference to state aid. In the case where an increase in imports of a product of one party leads to serious injury in the domestic industry of the other party, safeguard measures with adequate compensation can be employed (Article 15), as well as in the case of balance of payment difficulties, without compensation (Article 21).

(8) Interregional Framework Cooperation Agreement between EU and MERCOSUR

One year after the establishment of MERCOSUR in 1991, the EU and MERCOSUR signed the Interinstitutional Cooperation Agreement, and in 1995, based on the results of preceding cooperation, the EU and MERCOSUR entered into the Interregional Framework Cooperation Agreement. The Interregional Framework Cooperation Agreement covers commercial and economic cooperation, preparing for

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[25] Although the language of Article 60 of the Additional Protocol is not all clear in terms of the situations where safeguard measures are allowed to be used, their imposition is deemed to be limited in the case of balance of payment difficulties and regional or development matters, according to the EU's explanation to the relevant committee in the WTO. (WTO:WT/REG22/5)

[26] This FTA is given as the "Decision No.2/2000 of the EC-Mexico Joint Council of 23 March 2000."

[27] Article 14 of the Decision: The Community and Mexico confirm their rights and obligations arising from the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and from the WTO Agreement on Subsidies and Countervailing Measures.

gradual and reciprocal liberalization of trade between the two regions as a prelude to the negotiation of an Interregional Association Agreement between them.

According to Article 5 of the Agreement, the EU and MERCOSUR conduct periodic dialogues on trade and economic matters at the ministerial level. The main focus of the dialogues includes trade discipline, such as restrictive trade practices and safeguards. Also, the Joint Subcommittee on Trade was established in accordance with the procedures laid down in Article 5, in order to ensure that trade-related objectives are fulfilled, and to conduct preparatory work and make proposals for the subsequent liberalization of trade. (Article 29) Although there are no direct provisions for competition policies and state aid control, both parties confirmed that they would encourage integration in general, taking past experience into account and upon the specific request of MERCOSUR.[28]

In 2000, the EU and MERCOSUR started negotiations for an FTA.[29][30]

Europe, as has been seen, is very active in extending preferential trade agreements, not only with the countries in proximity but also with key countries in different regions, such as Central and South America. Its approach toward the treatment of trade remedy measures has differed according to the depth of market integration evaluated by the adoption and enforcement level of *acquis communautaire*.

3.2 The approaches in America

(1) NAFTA (North American Free Trade Agreement)

Following the US-Canada Free Trade Agreement formed in 1989, Mexico joined to the FTA and the North American Free Trade Agreement (NAFTA) came into effect in 1994. In NAFTA, each party reserves the right to apply its anti-dumping law and

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[28] In terms of the financial resources for cooperation, Article 24 of the Agreement referred to the further utilization of the European Investment Bank. Since the Interinstitutional Cooperation Agreement in 1992, financial assistance to MERCOSUR by the EU has been increasing, particularly on such projects as the transfer of empirical knowledge of the EU, technical assistance, and the facilitation of the economic integration of MERCOSUR.

[29] In addition, the EU has the Euro-Mediterranean Partnership Agreements with the Mediterranean countries, and the Cotonou Agreement on preferential duties with the African, Caribbean and Pacific countries, which are the so-called ACP countries. With the Asian countries, under the plan of the Asia Europe Meeting (ASEM) both parties conduct political dialogues. With the U.S., the EU has the Trans-Atlantic Economic Partnership.

[30] In May 2002, the EU concluded an FTA with Chile called the EU-Chile Association Agreement.

countervailing duty law to goods imported from the territory of any other party. A distinctive point about the treatment of anti-dumping and countervailing measures in NAFTA is that Article 1904 provides each party with the right to replace judicial review of final anti-dumping or countervailing duty determinations by a binational panel review. However, the jurisdiction of the binational panel review is limited to looking into whether the final determinations of an investigating authority were in accordance with the importing party's anti-dumping or countervailing duties laws, using the same standard of review that a reviewing court would apply. The final determinations, providing there are no flaws in the lawful process of investigation, cannot be reversed by the binational panel review.[31]

As to the safeguard measure, NAFTA recognizes two types of safeguards: bilateral and global. In the case of a global safeguard action, the member countries of NAFTA are, in principle, excluded from application. To be precise, Article 802 establishes that when a country that is party to NAFTA takes a safeguard action, its NAFTA partners shall be excluded from the action, except where their exports of the good in question to the NAFTA country concerned (a) account for "a substantial share" of total imports of the good by the country applying the measure (the Agreement stipulates that for exports from a NAFTA country to constitute a "substantial share" of the imports it must be among the top five suppliers of the good in question); and (b) contribute importantly to a serious injury or threat thereof (for exports from a NAFTA country to be considered not to contribute importantly to the injury or threat thereof, the growth rate of imports of the good originating in such a party must be appreciably lower than the growth rate of total imports of the good). If any party's safeguard action is applied to its NAFTA partners, mutually agreed trade liberalizing compensation should be provided.

In the case of a bilateral safeguard, if a good is being imported to another party, as a result of the reduction or elimination of a duty in such increased quantities, in absolute terms, and under such conditions that the imports of the good from that party alone constitute a substantial cause of serious injury or threat thereof to a domestic industry producing a like or directly competitive good, the importing party may take a safeguard action by suspending the further reduction of any rate of duty or increasing the rate of duty on the good to a level not to exceed the MFN rate, against the exporting party, to the minimum extent necessary to remedy or prevent the injury, no more than once, up to three years, and only during the ten-year transition period. Similar to a global action, the party taking a bilateral action should provide the exporting party with a mutually agreed upon trade liberalizing compensation. (Article 801)

There seems to be no vigorous intention to harmonize the competition policies

[31] WTO: WT/REG4/1 p.69.

and state aid control in NAFTA. The chapter of NAFTA concerning competition policy, monopolies and state enterprises states the importance of cooperation and coordination among the competent authorities to further effective competition law enforcement, such as mutual legal assistance, notification, consultation and exchange of information. (Articles 1501, 1502 and 1503) It is notable that Article 1504 stipulates the establishment of a working group on trade and competition, to report and to make recommendations on further work within five years on relevant issues concerning the relationship between competition laws and policies, and trade in the free trade area. Yet the treatment of anti-dumping measures for intra-trade has not been explicitly studied.[32] There is no provision in NAFTA concerning state aid.

(2) The Canada-Chile Free Trade Agreement

The Canada-Chile Free Trade Agreement, which came into effect in 1997, has a distinctive chapter on anti-dumping and countervailing duties.[33] The abolition of anti-dumping for intra-trade takes effect when the tariffs on each product have reached zero in both countries, or by 1 January 2003, whichever comes first. (Articles M-01 and M-03) If exceptional circumstances arise with respect to the operation of Chapter M, both parties will have consultations. (Article M-04) Such circumstances may include changes in normal trading patterns due, for example, to a trade action in a third country.[34]

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. Article M-05 also provides for consultations through the Committee on Anti-dumping and Countervailing Measures, with a view to defining subsidy disciplines further and eliminating the need for domestic countervailing duty measures on trade between the parties. The same article, moreover, stipulates that the aforementioned Committee was established to work together in multilateral fora, including the WTO, and in the context of negotiating Chile's full accession to NAFTA and the establishment of the Free Trade Area of the Americas, with a view to improving trade remedy regimes to minimize their potential to impede trade; and to consult on opportunities for working together with other like-minded countries with a view to expanding agreement on the elimination of the application of anti-dumping measures within free trade areas.

The Agreement also requires both parties to re-evaluate the above mention provisions, including the exemption provision for anti-dumping measures, after five

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[32] Interim Report of NAFTA 1504 Working Group on Trade and Competition to the NAFTA Commission, February 1997.
[33] Chapter M: Anti-dumping and Countervailing Duty Matters
[34] WTO: WT/REG38/2 p.6.

years, that is in 2002. (Article M-06)

The provision for safeguard measures in the Canada-Chile FTA is similar to that of NAFTA. There are separate provisions for bilateral and global safeguard measures. Article F-01 provides bilateral emergency action (bilateral safeguard measures), during the six-year transition period, in circumstances where duty reductions made pursuant to the Agreement result in increased imports from the other party under such conditions that these imports alone are causing serious injury, or threat thereof, to the domestic industry of the importing party. These measures may include the suspension of the further reduction of rate of duty provided under the Agreement, and an increase in the rate of duty to a level not higher than the MFN rate. Such action may be taken against a particular good only once. No action may be maintained for a period exceeding three years or beyond the expiration of the transition period without the consent of the other party.

As to global safeguard measures, Article F-02 establishes that when a party takes a safeguard action, the other party shall be excluded from the action, except where its exports of the good in question to the party concerned (a) account for "a substantial share" of total imports of the good by the country applying the measure (the Agreement stipulates that for exports of a party to constitute a "substantial share" of the imports it must be among the top five suppliers of the good in question): and (b) contribute importantly to the serious injury or threat thereof (for exports from the other party to be considered not to contribute importantly to the injury or threat thereof, the growth rate of imports of the good originating in such a party must be appreciably lower than the growth rate of total imports of the good).

In case of either bilateral or global safeguards, compensation must be provided to the other party by the party taking the action.

The language of the provisions implies that Canada and Chile were keen on the abolition of the anti-dumping measures for intra-trade, and on the extension of the idea to NAFTA at Chile's entry and to the FTAA. Although Canada had been eager to abolish anti-dumping measures for intra-trade in the US-Canada FTA and succeeding NAFTA establishment processes, they were maintained and the replacement option of a judicial review for final anti-dumping or countervailing duty determinations with a binational panel review was achieved.[35]

(3) Canada-Israel Free Trade Agreement

The Canada-Israel Free Trade Agreement came into effect about half a year earlier than the Canada-Chile FTA. The Canada-Israel FTA has similar provisions to

[35] In August 1999, the Free Trade Agreement between Chile and Mexico came into effect.

the Canada-Chile FTA for bilateral and global emergency actions, with the transition period lasting until July 1999. However, as to anti-dumping and countervailing measures, they merely adopted the condition to be in accordance with the WTO Agreement.[36]

(4) MERCOSUR (El Mercado Comun del Sur)

MERCOSUR is a CU established in 1991 based on the Treaty of Asuncion. As its transition period expired at the end of 1994, free trade in the area was gradually realized.[37] The parties to the Agreement are Argentina, Brazil, Paraguay and Uruguay.

Annex IV to the Treaty of Asuncion stipulates intra-regional safeguard measures; a measure may be taken, during the transition period and in the case of emergency, only once against a good up to one year, and not to exceed two years. Before imposing the measure, the party concerned should notify and consult the Common Market Group (CMG), which is the executive body of MERCOSUR. The CMG has to hold a meeting within ten days after a request and make a decision within another twenty days, taking into account the increase in imports and injury. Safeguard measures may be taken only through a type of import quota, no lower than records of the past three years. However, as a consequence of the expiration of the transition period at the end of 1994, since 1995 intra-regional safeguard measures have no longer been applicable.

As to the safeguard measures to the third countries, common legislation was drawn up in 1996 and put into practice.[38][39]

MERCOSUR devised a policy to abolish anti-dumping and countervailing measures for intra-trade in the future, allowing imposition during the transition period. The abolition schedule seems to have been delayed. The initial plan was that, until common legislation of anti-dumping and countervailing measures against the non-member countries is drawn up during the transition period, relevant domestic legislation of individual member countries may be taken against both member and non-member countries. In the case of member countries, additional regulations, such

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[36] The related provisions are as follows: Article 2.3 Definitions (Anti-dumping and Countervailing measures), Article 4.5 Bilateral Emergency Actions, Article 4.6 Global Emergency Actions, and Article 9.2 Subsidies and Countervailing Measures.

[37] In 1994, Protocol of Ouro Preto, which describes the organization of MERCOSUR, was signed. Also, the MERCOSUR Action Programme 2000 provides concrete procedures for integration.

[38] Decision 17/96 “Regulations concerning the Application of Safeguard Measures for Imports Originating from non-member countries of MERCOSUR”

[39] The competent authority was established as the Committee on Trade Defense and Safeguards.

as procedures for exchange of information on anti-dumping investigation, may apply.[40] In 1996 after the expiration of the transition period, MERCOSUR decided to extend the application of domestic legislation until 2000 and to consider application of common rules on competition beyond 2000.

In 1997, common legislation of anti-dumping measures against non-member countries was established. As to countervailing measures, common legislation was established in 1993 and amended afterwards in order to incorporate the negotiation results of the Uruguay Round of the WTO concluded in 1994.

Although the Treaty of Asuncion did not contain provisions stipulating the competition policies among the member countries, the CMG made a decision to establish common rules on competition policies and submitted a proposal to the Technical Committee under the Trade Commission. In 1996, the Protocol for the Defense of Competition was adopted and harmonization of the competition policies was accelerated.[41]

(5) FTAA (Free Trade Area of the Americas)

The formation of the FTAA to unite the economies of North, Central and South America into a single free trade agreement was proposed at the Summit of the Americas, which was held in 1994 in Miami. A commitment to complete negotiations for the agreement by 2005 was made at the same time. The first ministerial meeting took place in 1995 in Denver, and seven working groups were established, one of which was on anti-dumping and countervailing duties. At the second ministerial meeting held in Cartagena in 1996, another four working groups were established, including one on competition policy.

At the second Summit of the Americas in Santiago, Chile, the FTAA negotiations were launched formally in April 1998, on the basis of the San Jose Declaration that was concluded at the third ministerial meeting a month earlier. At the second Summit of the Americas, the Heads of State and Government agreed on the initiation of negotiations, reconfirmed the completion by 2005, and set out the structure, general principles, and objectives to guide the negotiations. Accordingly, the Trade

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[40] Decision 3/92 provides the anti-dumping system for intra-trade during the transition period, Decision 33/92 extends the time-limit, and Decision 63/93 states the procedures for exchange of information on anti-dumping investigation for imports from the member countries.

[41] Other than the above-mentioned preferential trade agreements in Central and South America, there are CUs such as CARICOM (Caribbean Community) and CACM (Central American Common Market), and the regional agreements aimed at the reduction and removal of tariffs, such as the Andean Community and the LAIA (Latin American Integration Association). The LAIA is an extensive regional agreement, geographically covering MERCOSUR and the Andean Community.

Negotiation Committee (TNC), comprised of the vice ministers responsible for trade, and the nine FTAA Negotiation Groups, which have specific mandates from ministers and the TNC to negotiate text in their subject areas, were established. "Anti-dumping and countervailing duties" and "competition policy" were two of the nine subjects for the Negotiation Groups.

At the fifth ministerial meeting in Toronto in 1999, ministers instructed the Negotiation Groups to prepare a draft text of their respective chapters, to be presented at the sixth ministerial meeting in Buenos Aires in April 2001. The presented draft text includes chapters on "subsidies, anti-dumping and countervailing duties," on "competition policy," and on "market access" that covers provisions concerning safeguard measures.

The Ministerial Declaration of the sixth meeting, which was held in Buenos Aires in 2001, laid out the detailed requests to each Negotiation Group for extending the draft. The Negotiation Group on Subsidies, Anti-dumping and Countervailing Duties was instructed to intensify its work of identifying options for deepening existing disciplines on subsidies in the WTO Agreement on Subsidies and Countervailing Measures; to intensify its efforts to reach a common understanding with a view to improving the rules and procedures for the operation and enforcement of trade remedy laws, so as not to create unjustified obstacles to free trade within the concerned hemisphere; and to identify, based on the study on the interaction between trade and competition policies, any areas that might merit further consideration by the Trade Negotiations Committee.

The Negotiation Group on Market Access was instructed to intensify the negotiation of a safeguards regime applicable to the goods of the hemisphere. The Negotiation Group on Competition Policy was instructed to identify, based on the study on anti-dumping and regional trade agreements, any areas that might merit further consideration by the Trade Negotiations Committee. All the Negotiation Groups were told to submit their results or recommendations to the Trade Negotiations Committee by the deadline of April 2002.

According to the draft text of the agreement as of July 2001, chapter nineteen on subsidies, anti-dumping and countervailing duties contains an option for the abolition of anti-dumping measures for intra-trade. No specific treatment of countervailing duties was explicitly described. In the related part of the chapter on market access, bilateral and global safeguard schemes coexist. In the chapter on competition policy, it is mentioned that each party shall adopt or maintain measures to proscribe anticompetitive business conduct and shall consider cooperating in investigating it with a cross-border impact.

The language of the draft agreement is still under negotiation and beyond prediction. It is, however, notable that abolition of trade remedy measures for intra-trade was included as an option.

3.3 The approaches in Asia and Oceania

(1) AFTA (ASEAN Free Trade Area)

The ASEAN (Association of South, East Asian Nations) was established in 1967. Its present members are the following ten countries: Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Myanmar and Cambodia.[42] The ASEAN countries signed the Agreement to form AFTA in 1992 in order to further cooperation in the economic growth of the region by accelerating the liberalization of intra-ASEAN trade and investment.[43] The Common Effective Preferential Tariff (CEPT) scheme is the key framework for the reduction and removal of tariffs among the members with the objective of creating AFTA.

The AFTA Agreement has certain provisions on safeguard measures. Article 6 stipulates that if, as a result of the implementation of the Agreement, the importation of a particular product eligible under the CEPT scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing member states, the importing member states may suspend preferences provisionally and without discrimination. Such a suspension of preferences is required to be consistent with GATT. Also, in the case of a serious decline of monetary reserves, a member state shall endeavor to create or intensify quantitative restrictions or other measures limiting imports, with the concessions agreed upon. When emergency measures are employed, immediate notice of such an action should be given to the ministerial-level council and such action may be the subject of consultation. There are no provisions on anti-dumping measures or on subsidies and countervailing measures.

The Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products signed in 1999 contains provisions concerning the application of safeguard measures; for sensitive products, it reiterates the application of emergency measures given by Article 6 of the AFTA Agreement; and for highly sensitive products, it accords additional flexibility on the imposition of safeguard measures.[44]

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[42] Among them, the three countries of Vietnam, Laos and Cambodia have not yet been admitted to the WTO.

[43] Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.

[44] The relevant provisions of the Protocol are Article VII: Safeguards and ANNEX 4: Additional Flexibility on Safeguards. An ASEAN member country may raise the ASEAN applicable tariffs to the MFN levels when imports of highly sensitive commodities from the ASEAN sources subject to the CEPT special concession reach a trigger level. In effect, the ASEAN concession shall be suspended when an import

In addition, the Protocol on Notification Procedures was signed in 1998 so as to strengthen the surveillance mechanism on actions or measures that may nullify or impair any benefit to other member states, directly or indirectly, under any ASEAN economic agreement, or that impede the attainment of any objective of the ASEAN economic agreements.[45] ASEAN does not intend to limit imposition of the trade remedy measures applicable under the WTO rules, but to facilitate transparency by enhancing notification. Given the fact that the ASEAN countries are not heavy users of trade remedy measures, AFTA is not urged to abolish the trade remedy measures for intra-trade.

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

The ANZCERTA came into effect in 1983. It had a major review of the Agreement in 1988 and signed a new Protocol ("Protocol to ANZCERTA on Acceleration of Free Trade in Goods"). Article 4 of the Protocol stipulates the abolition of anti-dumping measures after July 1990, when free trade is achieved.[46][47] The Protocol, in parallel, extended the application of both countries' respective competition law prohibitions on the misuse of market power to trans-Tasman markets.

As to subsidies and countervailing duties, Article 16 of the Agreement of 1983 stipulates that neither member state shall levy countervailing duties on goods imported from the territory of the other member state, except when no mutually acceptable alternative course of action has been determined and in accordance with its international obligations under the WTO Agreement on Subsidies and Countervailing Measures. In the Agreed Minute on Industry Assistance of 1988, it is confirmed that from July 1990 neither Australia nor New Zealand would pay export incentives, production bounties and like measures on goods, which are exported to the other country. From January 1989 Australia and New Zealand each try to avoid the adoption of industry-specific measures (bounties, subsidies and other financial

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surge threatens domestic producers of the product.

[45] The provisions of the Protocol exclude actions taken under emergency or safeguard measures of the ASEAN economic agreements.

[46] Article 4 of the Protocol: 1. The Member States agree that anti-dumping measures in respect of goods originating in the territory of the other Member State are not appropriate from the time of achievement of both free trade in goods between the Member States on 1 July 1990 and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods.
2. From 1 July 1990, neither Member State shall take anti-dumping action against goods originating in the territory of the other Member State. (continues)

[47] The provision of the ANZCERTA agreement of 1983 concerning anti-dumping is Article 15. Article 4 on anti-dumping of the Protocol of 1988 amended Article 15 of the Agreement.

support) which have adverse effects on competition between industries in the ANZCERTA. This agreement was taken into consideration as a part of the formal review in 1992.

Article 17 of the Agreement provides for safeguard measures during the transition period. Safeguard measures may be introduced in respect to goods traded in the area which originate in the territory of a member state as a last resort when no other solution can be found and only during the transition period, if increased imports were occurring as a result of trade liberalization by the FTA, and causing or posing an imminent and demonstrable threat to cause severe material injury to a domestic industry producing like goods. The transition period was referred to as the period in which exist tariffs, quantitative import restrictions or tariff quotas, performance-based export incentives, or measures for stabilization or support, hinder the development of trading opportunities between the member states on an equitable basis. The transition period ended when free trade in goods based on the Protocol of 1988 was achieved. Accordingly, the safeguard measures were abolished for intra-trade.[48]

(3) Agreement between New Zealand and Singapore on a Closer Economic Partnership

The Agreement between New Zealand and Singapore on a Closer Economic Partnership was signed in 2000. Although both parties kept their rights to impose anti-dumping measures for intra-trade, they agreed to strengthen the rule to implement 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." (Article 9.1) The changes are given as follows:

(a) the de minimis dumping margin of 2% expressed as a percentage of the export price below which no anti-dumping duties can be imposed provided for in Article 5.8 of the WTO Anti-dumping Agreement is raised to 5%;
(b) the new de minimis margin of 5% established in (a) is applied not only in new cases but also in refund and review cases;
(c) the maximum volume of dumped imports from the exporting party, which shall normally be regarded as negligible under Article 5.8 of the WTO Anti-dumping Agreement, is increased from 3% to 5% of imports of the like product by the importing party. Existing cumulation provisions under Article 5.8 continue to apply;
(d) the time frame to be used for determining the volume of dumped imports under

[48] In addition, the ANZCERTA holds periodic meetings on trade liberalization with AFTA and MERCOSUR respectively. With the South Pacific countries, it agreed on the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA).

the preceding sub-paragraphs shall be representative of the imports of both dumped and non-dumped goods for a reasonable period. Such a reasonable period shall normally be at least twelve months;[49]

(e) the period for review and/or termination of anti-dumping duties provided for in Article 11.3 of the WTO Anti-dumping Agreement is reduced from five to three years.

The notification procedures are also strengthened (Article 9.2 of the Agreement); each party is required to inform the other party immediately following the acceptance of a properly documented application from its domestic industry for the initiation of an anti-dumping investigation, while Articles 5.5 and 12.1 of the WTO Anti-dumping Agreement require the party to inform the other party only when the decision to initiate an investigation is made and before proceeding to initiate an investigation. In addition, particular attention is drawn to Article 17.2 of the WTO Anti-dumping Agreement concerning consultations.[50]

Article 3 of the Agreement on Competition emphasizes "protect[ing] the competitive process rather than competitors." (Article 3.1) Both parties must make efforts to reduce or remove impediments to trade and investment through application of fair competition principles to economic activities; application of competition and regulatory principles in a manner that does not discriminate between or among economic entities in like circumstances; reduction of transaction and compliance costs for business; and promotion of effective regulatory coordination across borders. (Article 3.2) Both parties, moreover, must make efforts to effectively protect the competitive process across their economies through consultation and cooperation in the development of any new competition measures; adequate filling of the resource in the regulatory authorities responsible for competition to carry out their functions, including non-discriminatory enforcement; and enhancing the information exchange and exploration of the scope for further cooperation between them, with particular emphasis on transactions or conduct in one that has competition effects in the other's

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[49] This condition responds to note 4 under Article 2.2.1 of the WTO Anti-dumping Agreement, which describes that the extended period of time that is used in the investigation for determining the fact of dumping, should normally be one year but shall in no case be less than six months. By adopting a longer period of investigation, the possibility of imposing anti-dumping measures can be reduced for the commercial behavior of price-cutting as cyclical dumping. In addition, by explicitly requiring inclusion of dumped and non-dumped goods for the calculation of a dumping margin, overestimation problems such as zeroing can be prevented.

[50] The language of Article 17.2 of the WTO Anti-dumping Agreement is as follows: Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation, regarding representations made by another Member with respect to any matter affecting the operation of this Agreement.

market, or in both parties' markets. (Article 3.3)[51]

As to countervailing duties, the parties agreed to keep their rights to impose the measure provided that they reaffirm their commitment to abide by the provisions of the WTO Subsidies and Countervailing Measures Agreement. At the same time, however, they agreed to prohibit export subsides on all goods including agricultural products, and to strengthen notification and consultation procedures; 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 subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory, and of the circumstances making the subsidization 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 subsidization, the party granting the subsidy shall, upon request, discuss with the other party the possibility of limiting the subsidization. Both parties, moreover, are agreed to seek to avoid causing adverse effects to the interests of the other party. (Article 7) It is notable that the provisions concerning subsidies in this Agreement are extensive and concrete.

Both parties agreed to abolish safeguard measures, which fall within the boundary of the WTO Safeguard Agreement, against goods originating in the other party from the date of entry into the force of the agreement.[52] (Article 8)

(4) JSEPA (Agreement between the Republic of Singapore and Japan for a New-Age Economic Partnership)

The JSEPA drew attention as the first FTA that Japan ever entered. Preceding the negotiations, the Joint Study Group Report was issued in September 2000. The Joint Study Group was comprised of government officials, academics and business leaders.

The Joint Study Group proposed in the report that, in order to underscore Japan's and Singapore's shared philosophy against protectionist and arbitrary use of such unilateral remedies in the international trading system and to contribute towards the WTO's objective of promoting freer trade, it would be desirable to establish model

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[51] At the time of the negotiations on the Agreement, the competition legislations in Singapore had not yet been fully laid down, and the Agreement was based on anticipation of future establishment.

[52] There is another provision on measures to safeguard the balance of payments, namely Article 73. Both parties agreed that in the case of trade in goods, where a party is in serious balance of payments and external financial difficulties or under threat thereof, it may, in accordance with GATT 1994 and the Understanding on the Balance-of-Payments Provisions of GATT 1994, adopt restrictive import measures. (Article 73.5)

anti-dumping/countervailing duty/safeguard rules in JSEPA. The Joint Study Group noted that the two countries could explore the possibility of going beyond the WTO framework in these areas. Four options are suggested in the report as follows; (a) abolition of anti-dumping measures for intra-trade except where it pertains to predatory pricing, and work towards the future abolition of countervailing duty actions and safeguard measures[53]; (b) abolition of anti-dumping and continuation of countervailing duty actions and safeguard actions, on condition that both countries take appropriate measures against anti-competitive business practices such as predatory pricing and establish a cooperation mechanism in the field of competition policy; (c) strengthening of the provisions on anti-dumping, countervailing duty and safeguard measures to bring greater discipline when using such measures and minimize the opportunities to use them in an arbitrary or protectionist manner, with such rules as higher thresholds (e.g., higher de-minimis margins and /or import volumes), shorter duration for imposition of duties, and/or use of a competition test on actions brought by one country on imports of the other; and (d) simple affirmation of their rights and obligations in the WTO Agreements on Anti-dumping, on Subsidies and Countervailing Measures, and on Safeguards.

The Joint Study Group, however, mentioned that this would be a subject for further negotiations in JSEPA, because while non-application of anti-dumping, countervailing duty and safeguard measures would have a significant positive demonstration effect, there were differing interpretations regarding its consistency with the WTO MFN obligation, and business might be concerned if the ability of either country to impose such measures were removed completely.[54] In addition, the Joint Study Group agreed on the need to, under JSEPA, establish a framework on competition policy to deal with anti-competitive practices that might have an adverse impact on trade between the two countries. There was no reference to disciplines on subsidies in the report.[55]

Following the results of the study, the negotiations started and were substantially accorded in October 2001. In January 2002, Prime Ministers of both countries signed the agreement. In consequence, the provision of bilateral safeguard measures during the transition period, and that of global safeguard measures in which the non-discriminatory principle of the action was affirmed, were contained in the Agreement. There was no reference to anti-dumping and countervailing duty measures in the Agreement. However, the statement of the Joint Action in the WTO for the Strengthening of Disciplines of Anti-dumping Measures was complementarily

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[53] As the factual premise, the Joint Study Group mentioned that both Japan and Singapore had rarely taken anti-dumping actions and had never initiated any countervailing actions.

[54] The corresponding part of the report is para.42 through 45 in Section 2.

[55] The corresponding part of the report is para.65 through 68 in Section 2.

issued in the Joint Announcement of the Japan and Singapore Prime Ministers at the Signing of the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership.[56]

As to safeguard measures, Article 18 of the Agreement stipulates emergency measures with the following contents:

(a) Only once and up to one year during the transition period and to the minimum extent necessary to prevent or remedy the injury and to facilitate adjustment, each party may suspend the further reduction of any rate of customs duty on the good provided, or increase the rate of customs duty on the good to a level not to exceed the MFN rate, if an originating good of the other party is being imported into the territory of the former party in such increased quantities, in absolute terms, and under such conditions that the imports of that originating good alone constitute a substantial cause of serious injury, or threat thereof, to a domestic industry of the former party, as a result of the reduction or elimination of a customs duty.

(b) A party may take a measure set out in (a) only after an investigation has been carried out by the competent authorities of that party in accordance with the same procedures as those provided for in Article 3 and paragraph 2 of Article 4 of the WTO Safeguard Agreement.

(c) A party shall immediately deliver a written notice to the other party upon initiating an investigatory process relating to serious injury or threat, making a finding of serious injury, and making a decision to apply such a measure. Adequate opportunity for prior consultations should be provided.

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[56] The Joint Action in the WTO for the Strengthening of Disciplines of Anti-dumping Measures states as follows:

(1) The two Prime Ministers recognize a growing inclination in the world to easy recourse to anti-dumping measures, and share the profound apprehension that such measures are frequently abused for protectionist purposes to domestic industries. The two Prime Ministers note with grave concern that such measures produce trade restrictive effects which hamper global efforts towards trade liberalization, currently being pursued strenuously, in particular by the WTO, which now stands at the gate of a new round of multilateral trade negotiations.

(2) The two Prime Ministers hence affirm the pressing need to establish robust and clear rules to ensure not only fairness and consistency in the application of anti-dumping measures but also transparency in anti-dumping proceedings. At the same time, in recognition of the potential for abuse of anti-dumping measures, the two Prime Ministers are determined that, in the context of the JSEPA, the two Governments should not use such measures for protectionist purposes, and should only use them to the extent really necessary, and when no other means are available to remedy the injurious effects of dumping.

(3) The two Prime Ministers are determined to continue and strengthen the co-operation between the two countries, particularly in the framework of the WTO, to clarify, improve and strengthen rules governing anti-dumping measures.

(d) A party proposing to apply a measure shall provide to the other party mutually agreed upon adequate means of trade compensation in the form of concessions of customs duties whose levels are substantially equivalent to the value of the additional duties expected to result from the measure. If the Parties are unable to agree on the compensation within 30 days of the commencement of the consultations, the party against whose originating good the measure is taken shall be free to suspend the application of concessions of customs duties, which are substantially equivalent to the measure applied.

(e) As to a global action, each party shall not be prevented from applying safeguard measures to a good being imported to that party irrespective of its source including such a good being imported from the other party, unless such measures are inconsistent with Article XIX of GATT 1994 and the WTO Safeguard Agreement.

Its stricter requirement of providing compensation at the time of imposition of bilateral safeguards is similar to NAFTA. It is significant that inclusion of intra-trade in a global safeguard action is explicitly mentioned, based on the consideration of the MFN principle for safeguard application.

As to competition policy, both parties agreed on cooperation in the area, such as information exchange for the sectors of telecommunication, electricity and gas, where Singapore already had competition legislation.[57] Cooperation on technical assistance has also been agreed upon. Both parties decided to review their cooperation and consider extending it, including co-ordination of enforcement activities, positive comity, and comity within three years. There is no reference to further strengthening the disciplines of subsidies.[58][59]

(5) APEC (Asia Pacific Economic Cooperation)

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[57] The responding provisions on competition policy are Chapter 12 on Competition (Article 103 through 105) of the JSEPA agreement, and Chapter 15 on Competition (Article 15 through 25) of the Implementing Agreement between the Government of Japan and the Government of the Republic of Singapore pursuant to Article 7 of the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership.

[58] As already mentioned, Singapore is involved in the four FTAs with New Zealand, Japan, the EFTA and the other ASEAN countries in the AFTA, respectively. In addition, Singapore is under negotiations for FTAs with the U.S., Mexico, Canada and Australia. Singapore and the EU are considering initiating negotiation for an FTA. Singapore is the most active country in Asia in terms of forming FTAs. However, the provisions for trade remedy measures vary in the individual agreements.

[59] Japan is studying the possibilities of forming FTAs respectively with ASEAN, ASEAN+3, Korea, Mexico, Chile, Australia and Canada. Some of them are the studies between governments and others are between business sectors.

APEC was established in 1989. It is currently comprised of 21 countries and economies: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei, Thailand, the United States and Vietnam. At the second Economic Leaders' Meeting in Bogor, Indonesia in 1994, the vision of an open trading system became the ambitious goal of "free and open trade and investment in the Asia-Pacific region by 2010 for developed member economies and 2020 for developing ones," and was set out in the APEC Economic Leaders' Declaration of Common Resolve.[60] However, trade liberalization in APEC is not based on any legally binding FTA or CU. The liberalization process of APEC has been developed based on the Individual Action Plan, under which individual member economies take unilateral action to liberalize their trade and investment schemes, and on the Collective Action Plan, on which member economies collaborate.

Looking at these Plans, trade remedy measures are merely mentioned as operating consistently with the relevant WTO Agreements. Competition policy is on the table as one of the important issues to consider, and a database about the competition policies and legislation of member economies is being developed. Strengthening the disciplines of subsidies does not seem to have attracted much attention so far.

In the past, namely in the first[61], second[62] and third[63] reports issued in 1993 through 1995, the Eminent Persons Group of APEC pointed out that APEC should commit itself to address the problems associated with the abuse of anti-dumping policies, taking into full account the interests of consumers and industrial users of imports, as well as import competing firms and workers, in implementing anti-dumping policies. It was also argued that member economies should authorize their competition policy officials to challenge anti-dumping actions that run counter to the goals of competition policy. As for safeguard measures, stricter application was proposed. However, further consideration of disciplining trade remedy measures subsided after that.[64]

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[60] It is called the "Bogor Declaration."

[61] "*A Vision for APEC: Towards an Asia Pacific Economic Community*," APEC Secretariat, Nov. 1993.

[62] "*Achieving the APEC Vision: Free and Open Trade in the Asia Pacific*," APEC Secretariat, Aug. 1994.

[63] "*Implementing the APEC Vision*," APEC Secretariat, 1995.

[64] Other than the above-mentioned events concerning the PTAs in the Asia-Pacific region, China launched an FTA plan with ASEAN in 2001. Intending to conclude the FTA within ten years, China and ASEAN initiated negotiations in 2002. Asian countries became more interested in making PTAs than ever before.

The provisions for trade remedy measures and for competition and subsidy policies in the different PTAs analyzed in this chapter are tabulated in Table 3.1.

4. Tendencies of the provisions for trade remedy measures in the PTAs

According to the surveys in the preceding chapters 2 and 3, what tendencies can be recognized about the provisions for trade remedy measures in the PTAs?

4.1 Diversity of the provisions

One of the most significant tendencies is diversity for the treatment of each of the trade remedy measures in their provisions. For example, the diversity of treatments includes abolition of measures, strengthening the disciplines for imposition, mere reference to the WTO Agreements, additional conditions for imposition, use of the transitional measures, and so on.

Each of the trade remedy measures, namely the anti-dumping, countervailing or safeguard measures, has a choice of the above-mentioned examples for treatment, taking into account the member countries' domestic political arguments. Combinations of the treatments of the three different trade remedy measures also intensify diversity.

In addition, even countries that engage in more than one PTA do not necessarily adopt the same treatments for trade remedy measures all the time. In fact, they have chosen different types of treatments on a case-by-case basis, depending on trade relations with the other party.

The languages of Article XXIV of GATT and the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, which govern the principles for the relations between the WTO as the multinational trade regime and the PTAs, are not clear enough on the issue of how to treat trade remedy measures. Therefore, 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 PTAs. Accordingly, each country has cautiously adopted different types of provisions for each of the three trade remedy measures, reflecting the variety of pro and con views of the individual countries on the economic effects of each trade remedy measure and the domestic political pressures from interest groups.

4.2 Historical changes in the contents of the provisions

In terms of the relation between the contents of the provisions and the date when each PTA came into being, the treatment of trade remedy measures became explicitly stipulated in the PTAs when they were newly agreed upon or amended after the 1990s. In other words, since the 1990s more and more parties to the PTAs found that the mutual elimination of the tariff barriers only was not fully satisfactory, and the

abolition of trade remedy measures for intra-trade evolved, greatly strengthening the disciplines of imposition, harmonization and cooperation in competition and subsidy policies in PTA negotiations.[65] This is because discussions in academia became active concerning the trade distorting effects of trade remedy measures, and the possibility of substituting trade remedy measures with a competition policy. Public recognition was also widely enhanced by the discussions.

In addition, since the middle of the 1990s the WTO dispute settlement cases concerning the treatment of safeguard measures in FTAs have increased.[66] Taking into account the outcome of those dispute settlement cases, the abolition of safeguard measures for intra-trade in FTAs was cautiously excluded from the choices in the recently agreed upon FTAs, such as JSEPA and the EFTA-Singapore FTA.

4.3 Provisions for trade remedy measures in the CUs

It is noteworthy that in the CUs such as the EU, MERCOSUR and the EU-Turkey CU, the same objective of abolishing all three of the trade remedy measures was pursued, with exceptions limited to the transition period.

Compared to the FTAs, the member countries of the CUs in general seem to face more pressures to economically integrate themselves, because members of the CU are required to apply the same duties and other regulations of commerce to trade with non-members under the conditions of Article XXIV of GATT. The trend of abolishing all trade remedy measures for intra-trade in the CUs is interesting in terms of correlation with the depth of economic integration of the PTAs.

4.4 Tri-polarized trends in the application of a global safeguard action for intra-trade

Regarding the application of a global safeguard action for intra-trade, there are tri-polar trends that are: a) abolition, b) application irrespective of intra-trade or trade with non-members, and c) abolition in principle with exceptions under certain conditions.

The FTAs which take position a) are ANZCERTA and the NZ-Singapore FTA, which mainly concern the Oceania countries. The CUs, such as the EU, the EU-Turkey CU and MERCOSUR, also take position a).[67]

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[65] The EU is alone in terms of the date of its establishment, because in the late 1950s it already realized the abolition of trade remedy measures for intra-trade and initiated the harmonization of competition and subsidy policies of the individual member countries, as the natural course of CU formation.

[66] The details are described in chapter 5 in this paper.

[67] In the case of CU, there are two methods of application for a global safeguard action: one is that the CU as a whole takes a global safeguard action toward non-member

The FTAs which take position b) are the EEA, the EFTA, the Europe Agreements and the Association Agreements between the EU and the Central and Eastern European countries, the EU-Mexico FTA, the AFTA, the JSEPA and the EFTA-Singapore FTA, which mainly concern the European countries and Japan.

The FTAs that take position c) are NAFTA, the Canada-Chile FTA, and the Canada-Israel FTA, which mainly concern Canada and the U.S. The safeguard action in principle is abolished for intra-trade, however, if the import share of a member country is as large as that among the top five sources, and the rapid increase of such imports cause serious injury to domestic industry, a safeguard action may be applied to member countries. Nevertheless, imposition of a safeguard measure entails further trade-liberalizing concessions as a package, so that a safeguard action for intra-trade is difficult to employ in reality.

4.5 Bilateral (intra-regional) safeguard actions during the transition period

Bilateral or intra-regional safeguard actions, which should be distinguished from global safeguard actions, are often set out as extra provisions in preparation for the vast increase of imports as a result of trade liberalization by the agreed upon PTAs. A bilateral safeguard action may be applied under certain conditions only during the transition period. Recently, inclusion of provisions for bilateral safeguard actions became more common in the PTAs.

The PTAs, which have such a provision for bilateral safeguard actions, are MERCOSUR, the Canada-Chile FTA, the Canada-Israel FTA, NAFTA, JSEPA and the EFTA-Singapore FTA.[68]

Bilateral safeguard actions are an emergency measure functioning as insurance to drastic trade liberalization, so that, in general, it is terminated as the transition period expires.

Incidentally, inclusion of a bilateral safeguard action in PTAs is independent from the tri-polarized positions on global safeguard actions described in section 4.4. Namely, the PTAs that have a provision for bilateral safeguard actions are diverse in their positions on whether to apply a global safeguard action for intra-trade. Although some argue that the inclusion of a bilateral safeguard action in the PTAs justifies the exclusion of member countries from a global safeguard action, there is no

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countries; and the other is that one of the member countries of the CU takes a global safeguard action for itself. In the latter case, if the country taking the global safeguard action excludes the other member countries of the CU from the action, it will have to resolve the same issue of the MFN principle for safeguard actions that the FTA faces.

[68] In the EFTA-Singapore FTA, a transition period is not set out. However, bilateral safeguard actions are scheduled to be reviewed two years after the agreement begins, to decide whether such a mechanism should be retained.

logically legitimate linkage.

4.6 Policy harmonization, anti-dumping and countervailing measures

When anti-dumping and countervailing measures are abolished for intra-trade, common rules on competition and subsidy policies are developed in parallel, as seen in *acquis communautaire* of the EU, or at least cooperation on those policies, such as information exchange among member countries, are established.

Comparing competition policies with subsidy policies, harmonization in competition policies is going ahead, so that the abolition of anti-dumping measures is deemed to be easier than eliminating countervailing measures.

The PTAs that abolished anti-dumping measures for intra-trade are the EU, the EEA, the EFTA and ANZCERTA. The EU-Turkey CU, MERCOSUR and the Canada-Chile FTA will abolish anti-dumping measures when their transition periods expire.

The PTAs that abolished countervailing measures for intra-trade are the EU, the EEA, the EFTA, and the FTAs between the EU and the Central and Eastern European countries. The EU-Turkey CU and MERCOSUR will abolish countervailing measures when the transition periods expire.

4.7 Reference to trade distorting effects by trade remedy measures

It is widely known that while trade remedy measures can protect certain domestic industries seriously injured by imports, they are a double-edged sword that harm domestic consumers, domestic user-industries, and industries in exporting countries through price appreciation or trade diversion. Therefore, in some cases using trade remedy measures in PTAs has a negative effect on trade and problems of abuse are explicitly addressed.

In the Canada-Chile FTA, which abolishes anti-dumping and safeguard measures for intra-trade in principle, it is mentioned that Canada and Chile work together to minimize the potential of trade remedy measures that impede trade, and extend the elimination of anti-dumping measures while cooperating with other like-minded countries in the WTO, NAFTA and the FTAA.[69]

In the Joint Announcement of the Japan and Singapore Prime Ministers at the Signing of JSEPA, it is stated that the two Prime Ministers recognize a growing inclination in the world to have easy recourse to anti-dumping measures, share the profound apprehension that such measures are frequently abused for protectionist

[69] The responding provision is Article M-05 in Chapter M. The details were described in section 3.2 (2) of the Canada-Chile FTA in this paper.

purposes to domestic industries, and note with grave concern that such measures produce trade restrictions that hamper global efforts toward trade liberalization.[70]

In ANZCERTA, which abolished anti-dumping and safeguard measures for intra-trade in 1990, it is mentioned that anti-dumping measures are not appropriate after both free trade in goods and application of competition laws were achieved.[71]

In the NZ-Singapore Closer Economic Partnership Agreement, the rules on implementation of anti-dumping measures were strengthened 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."[72]

4.8 The treatment of trade remedy measures in the surge of PTAs

In the U.S., eight years after 1994, the Trade Promotion Authority bill providing the President with comprehensive authority on trade negotiations, was passed by Congress and signed by the President. Accordingly, the U.S. will become more active in negotiations for FTAA and the bilateral FTAs with Singapore and Chile. On the other hand, the EU is making great efforts to complete the accessions of the ten Central and Eastern European countries in 2002. The EU is also trying to enhance negotiation for an FTA with MERCOSUR.

In Asia, not only is Singapore continually active in negotiating bilateral FTAs, but Japan is also fully engaged in studies and negotiations for FTAs with Korea, Mexico and ASEAN. China is also trying to expedite FTA negotiations with ASEAN. Moreover, other Asian countries and Oceania countries, such as Australia and New Zealand, are actively exploring another possibility for FTAs.

In the near future, a surging wave of new PTAs will have a big impact on international trade in terms of numbers of countries and trade volume. It will be necessary to closely observe how provisions for trade remedy measures are treated in these influential PTAs.

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[70] During the negotiation of JSEPA, Japan was careful to abolish trade remedy measures including an anti-dumping measure for intra-trade by a legally binding system, although hardly any trade remedy measures were imposed by either country.
[71] The details were described in the section 3.3 (2): ANZCERTA and in the footnote 46.
[72] The details were described in section 3.3 (3): Agreement between New Zealand and Singapore on a Close Economic Partnership in this paper.

5. Systemic issues concerning trade remedy measures in PTAs and the related dispute settlement cases

In the previous chapters, the details of the provisions for trade remedy measures in various PTAs were analyzed. In this chapter, the consistency of these provisions with the WTO rules will be examined.

What issues were raised concerning the different types of provisions for trade remedy measures, in the light of Article XXIV of GATT which governs the PTAs, as well as the Anti-dumping Agreement, the Subsidies and Countervailing Measures Agreement and the Safeguard Agreement of the WTO?

Based on the discussions at CRTA and in the Panel and the Appellate Body reports of the related dispute settlement cases, the systemic issues concerning PTAs will be extracted and the consistency will now be studied.

5.1 Key systemic issues concerning trade remedy measures in PTAs

In terms of WTO consistency, the following issues concerning trade remedy measures in PTAs have been raised for discussions, mainly at CRTA.

(1) Issue 1: Coverage of "other restrictive regulations of commerce"

Should trade remedy measures be included in the "other restrictive regulations of commerce (ORRC)," which should be repealed in the PTAs by the WTO rules?

Article XXIV:8(a)(i) and Article XXIV:8(b) of GATT respectively require CUs and FTAs to eliminate "duties and ORRC" with respect to substantially all trade between the constituent territories.

There is an exceptions list[73] of eliminations for ORRC. The measures on the exceptions list can be employed on a necessary basis. However, the GATT Articles on trade remedy measures, namely Article VI (Anti-dumping and Countervailing Duties) and Article XIX (Emergency Action on Imports of Particular Products (Safeguard Measures)), are not explicitly included in the list.

Therefore, there are two different arguments on this matter.

a) One argument is that the list is "illustrative," so that Article VI and Article XIX do not need to be eliminated, if necessary, in CUs and FTAs.
b) The other argument is that the list is "exhaustive," so that trade remedy measures

[73] The GATT Articles that are included in the exceptions list are: Article XI (General Elimination of Quantitative Restrictions), Article XII (Restrictions to Safeguard the Balance of Payments), Article XIII (Non-discriminatory Administration of Quantitative Restrictions), Article XIV (Exceptions to the Rule of Non-discrimination); Article XV (Exchange Arrangements) and Article XX (General Exceptions).

which are not on the exceptions list should be eliminated at the formation of a CU or FTA.

There is a view that while Article XX is included in the list, Article XXI (Security Exceptions) is not, so if the list is "exhaustive," import-export control concerning security cannot be utilized. Thus, this view backs the above-mentioned argument a).

However, consensus has not been reached over which of the confronting arguments is right. Nor has any conclusion of dispute settlement panels been answered regarding this question.[74]

(2) Issue 2: Abolition of safeguard measures for intra-trade

There are three confronting arguments on whether global safeguard measures should be applied to intra-trade. Each country tends to argue in favor of the real provisions of the FTAs with which it is concerned.

a) The position that safeguard application for intra-trade should be abolished:

There is an argument that the exceptions list for ORRC is exhaustive, so safeguard measures should be abolished for intra-trade.[75] Another argument to support this position is that if safeguard measures were used beyond the transition period, the efficiencies achieved by PTAs and the member countries' commitments for economic integration would be compromised, and thus they are required to exempt PTA partners from any global safeguard action once the PTA is fully implemented.[76]

b) The position that safeguard application should be consistent with the MFN obligation:

This argument emphasizes the importance of the MFN principle, which is one of the most eminent disciplines of the WTO, and concerns its erosion by the exceptions allowed in PTAs. In other words, it is obligatory, the supporters of this view argue, that global safeguards should apply on a MFN basis, i.e. both to the PTA partners and to other WTO members. The exceptions list is considered here to be purely illustrative.[77] In support of this view, it is argued

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[74] The Panel report on U.S. Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe stated that the safeguard measure constitutes an ORRC. (WTO:WT/DS202/R para. 7.141) However, the Appellate Body report found that the Panel report's findings and conclusions concerning Article XXIV of GATT were not necessary to resolve the case, and declared the issues moot and as having no legal effect.

[75] See Australia's argument in WTO: WT/REG/M/15 and WT/REG/W/37.

[76] See Australia's and Canada's arguments in WTO: WT/REG/W/18, WT/REG/M/15, and WT/REG/W/37.

[77] Other reasons why the exceptions list should be illustrative are provided as follows; the list does not include Article XXI of GATT (Security Exceptions), which no member

that selectivity in the application of global safeguards would lead to discrimination toward third parties and compromise the MFN principle contained in Article 2.2 of the Safeguard Agreement of the WTO ("safeguard measures shall be applied to a product being imported irrespective of its source").

From an economic perspective, safeguard measures are only to be used in special circumstances when a member is experiencing serious injury to a domestic industry; if imports continue to flow from a PTA partner, it is questionable whether the injury is indeed serious enough to justify the safeguard action against third parties.[78]

c) The position that safeguard application for intra-trade can be flexible:

The supporters of this argument contend that the PTA parties are entitled to vary their rights and obligations between themselves as supported by the international law on multilateral treaties, provided they do so in a manner that does not abridge the rights of third parties, and therefore safeguard application can have flexibility for intra-trade.

For example, some argue that depending on whether the imports from the PTA partner account for a "substantial share" of total imports and contribute to "serious injury," in other words with de minimis conditions, the PTA parties are entitled to exempt their partners from global safeguard actions.[79]

However, among the supporters of this argument, there are a variety of different views concerning the characteristics of the exceptions list and conditions when safeguard actions for intra-trade are permitted to apply.

As will be described in section 5.2 of this paper, non-applications of global safeguard action to intra-trade have been brought to the WTO Dispute Settlement Body (DSB) several times. Although in all cases non-applications were concluded as inconsistent with the WTO rules in terms of procedure, the issue of whether members of the WTO can abolish safeguard measures for intra-trade of PTAs itself has not yet been directly answered.

(3) Issue 3: Abolition of anti-dumping and countervailing measures for intra-trade

Concerning abolition of anti-dumping and countervailing measures for

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would willingly forfeit, and the effect of safeguard measures is similar to that of measures under Articles XI and XII, both of which are specified in the exceptions list.

[78] See Japan's and Hong Kong's arguments in WTO: WT/REG/M/14, WT/REG/M/15 and WT/REG/W/37.

[79] See Israel's and Canada's arguments in WTO: WT/REG31/M/1, WT/REG38/M/1 and WT/REG/W/37.

intra-trade, there are a variety of different arguments in terms of the ORRC exceptions list and relations with MFN treatment, just as in the safeguard discussions.

The difference between the anti-dumping and countervailing measures and the safeguard measure is that while Article 2.2 of the WTO Safeguard Agreement explicitly stipulates the non-discriminatory principle as "(s)afeguard measures shall be applied to a product being imported irrespective of its source," anti-dumping and countervailing measures are applied to the alleged exporters or countries specifically, by nature, in a discriminatory manner, deviating from the MFN principle of the WTO.

Based on this difference, some argue that the issue of the MFN application does not arise in the sphere of anti-dumping and countervailing measures.[80]

(4) Issue 4: Parallelism in determination of serious injury and the scope of application

One of the indispensable requirements before the imposition of safeguard, anti-dumping and countervailing measures is the determination of serious injury, or threat thereof, to the domestic industry. There is a strong argument that the coverage of the investigation for the determination of serious injury should be the same as that used for the application of the measure.[81] That is, while imports from the PTA partners were included in the investigation for the determination of the serious injury of the domestic industry, it is inconsistent that such imports are exempt from the application of the trade remedy measures.

This issue of "parallelism" in determination of serious injury and coverage of application has been contested several times at the WTO DSB in the Argentina-Footwear case, the U.S.-Wheat Gluten case, the U.S.-Lamb case and the U.S. Line Pipe case, concerning safeguard measures.[82] In all cases, it was concluded to be inconsistent with the WTO rules stating that the member countries to NAFTA or to MERCOSUR respectively were exempt from the application of the safeguard measure while they were included in the investigation to determine serious injury.

Article 3.3 of the WTO Anti-dumping Agreement and Article 15.3 of the WTO Subsidies and Countervailing Measures Agreement allow "accumulation" where imports of a product from more than one country are simultaneously subject to anti-dumping or anti-subsidy investigation, and the investigating authorities may cumulatively assess the effects of such imports. If the PTA member countries are included in the investigation and exempt from the application, the issue of

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[80] See Canada's argument in WTO: WT/REG/M/15 and WT/REG/W/37.

[81] Exclusion of developing countries as an exception is permitted in a manner consistent with the WTO Agreements.

[82] Concerning the special safeguard on textiles, the issue of parallelism was also contested in the U.S.-Combed Cotton Yarn case at the WTO DSB. The exclusion of NAFTA members was found to be inconsistent with the WTO rules.

"parallelism" also arises in anti-dumping and countervailing measures, as well as safeguard measures.

(5) Issue 5: Automatic extension of trade remedy measures by a CU to third parties

At the time of CU formation, is it adequate that one of the parties to the CU will automatically employ the same trade remedy measures as the other party is applying? Article XXIV:8(a)(ii) of GATT provides a prerequisite for being considered a CU as follows: "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." Whether such a prerequisite justifies the automatic extension of trade remedy measures has become the point at issue.

On the other hand, Articles XXIV:4 and XXIV:5 of GATT stipulate respectively that the purpose of a CU or an FTA should not be to raise barriers to the trade of other contracting parties with such territories, and that the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect to trade with contracting parties who are not parties to such a union or agreement, shall not on the whole be higher or more restrictive than the general incidence of duties and regulations of commerce applicable in the constituent territories prior to the formation of such a union or the adoption of such an interim agreement. Therefore, the opponents argue that the trade remedy measures imposed on third counties should not be automatically employed by the other parties to the CU at its formation.

Although it does not directly concern trade remedy measures, the Turkey-Restrictions on Imports of Textiles and Clothing Products case dealt with Turkey's automatic extension of quantitative restrictions on imports that were imposed by the EU at the time of the formation of the EU-Turkey CU. In this case, both the Panel report and the Appellate Body report concluded that an import restriction measure that was not consistent with the WTO rules could not be justified by Article XXIV of GATT.[83]

In addition to the above mentioned conclusion, the Appellate Body set out the two conditions to be fulfilled in order to have the benefit of defence under Article XXIV as follows: "(f)irst, 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."[84]

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[83] WTO: WT/DS34/R para. 9.189.

[84] The fulfillment of these conditions is called the "necessity test." Refer to section

(6) Issue 6: Differences between CUs and FTAs

The required conditions for a CU in the GATT Articles and the related WTO Agreements are different from those for an FTA. Do those differences affect the treatment of trade remedy measures in CUs and FTAs?

As mentioned above, one of the prerequisites for being considered a CU given in Article XXIV:8(a)(ii) of GATT is that substantially the same duties and other regulations of commerce (ORC[85]) are applied by each of the members of the union to the trade of territories not included in the union. The FTA does not have this prerequisite of application of substantially the same duties and ORC.

Based on this fact, there is an argument that intra-trade for a CU can be exempt not only from anti-dumping and countervailing measures but also from global safeguard measures.[86] The counterargument to this view is that the word "substantially" indicates that total harmonization of the external regime is not required, in particular if that implies a further derogation from the MFN principle or an increase in barriers vis-à-vis third countries, and that global safeguard measures should be applied irrespective of the import source.[87]

Footnote 1 of the WTO Safeguard Agreement stipulates that "a customs union may apply a safeguard measure as a single unit or on behalf of a member state." It is also stipulated that when a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under the Safeguard Agreement shall be based on the conditions existing in the customs union as a whole; and in the case on behalf of a member state, they shall be based on the conditions existing in that member state and the measure shall be limited to that member state. Therefore, the exclusion of member countries to a CU from a global safeguard action should be examined if the measure was taken, not for a single unit, but on behalf of a member state, and whether the parallelism of the scopes of

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5.2(1) Turkey- Restrictions on Imports of Textiles and Clothing Products case in this paper.

[85] ORC (other restrictions of commerce) is distinguished from ORRC (other restrictive regulations of commerce). Similar to ORRC, the scope of ORC is not clear enough. In the Turkey- Restrictions on Imports of Textiles and Clothing Products case, however, the Panel report states that "the ordinary meaning of the terms "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, and technical barriers to trade; as well as any other trade-related domestic regulation, e.g. environmental standards, export credit schemes)." (WTP:WT/DS34/R, para. 9.120)

[86] See EC's argument in WTO: WT/REG/M/14, para. 9.

[87] See Hong Kong's and Korea's arguments in WTO: WT/REG/W/19, para. 11 and in WT/REG/M/14, para.10.

investigation and application was fulfilled.

In addition, there is an argument that the maintenance of a dual system of anti-dumping duties for third parties and a competition policy for PTA parties is likely to have trade distortive effects.[88] It is not clear whether a dual system in CUs is justified beyond this concern because of its substantially equal trade policies toward third parties.

5.2 Related dispute settlement cases

In this section, the related dispute settlement cases will be focused on, and the discussions and conclusions concerning the treatment of trade remedy measures and similar import restricting behaviors in the PTAs will be analyzed.

(1) Turkey - Restrictions on Imports of Textile and Clothing Products[89]

This case doesn't deal directly with any of the three trade remedy measures. However, the import restrictions introduced at the formation of the CU and examined in this case have often been referred to in the following cases on trade remedy measures in the PTAs.

In 1995, Turkey and the European Communities (EC) agreed on the implementation of their CU by the Turkey –EC Association Council Decision 1/95. Accordingly, in order to apply what it considers to be "substantially the same commercial policy" as the EC uses on its trade in textiles and clothing, Turkey introduced quantitative restrictions on imports from India in the nineteen categories of textiles and clothing products, as of 1 January 1996. In February 1998, India requested an establishment of a panel. The Panel report was issued in May 1999, and Turkey appealed. In November 1999, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

The Panel found that Turkey's measures were inconsistent with Articles XI and XIII of GATT 1994, and consequently inconsistent with Article 2.4 of the Agreement on Textiles and Clothing (ATC) of the WTO. The Panel also rejected Turkey's assertion that its measures were justified by Article XXIV of GATT 1994. The Appellate Body upheld the Panel's conclusion.

In addition, the Appellate Body pointed out that in the case involving the formation of CU, the "defence under Article XXIV" to justify a measure which is inconsistent with certain other GATT provisions, is available only when two conditions

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[88] See Japan's argument in WTO: WT/REG/W/28.

[89] WTO: WT/DS34- Turkey- Restrictions on Imports of Textile and Clothing Products.

are fulfilled. Both of the conditions must be met to have the benefit of defence under Article XXIV.[90] Although the two conditions were described in the preceding section, they are again stated as follows:

a) first, the party claiming the benefit of this defence must demonstrate that the measure at issue was introduced upon the formation of a CU that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV.

b) second, the party must demonstrate that the formation of the CU would be prevented if it were not allowed to introduce the measure at issue.

The Appellate Body observed that there were other alternatives than the quantitative restrictions on imports, such as rules of origin, available to Turkey and the EC to prevent any possible diversion of trade in this case. Thus, under the second condition, the Appellate Body concluded that Turkey was not, in fact, required to apply the quantitative restrictions at issue in order to form a customs union with the EC.

Furthermore, the Appellate Body concluded that the Panel erred in its legal reasoning in interpreting Article XXIV of GATT 1994. The Appellate Body pointed out that it made no finding on the issue of whether quantitative restrictions found to be inconsistent with Articles XI and XIII of GATT 1994 would *ever* be justified by Article XXIV. Likewise, the Appellate Body stated that it made no finding either on many other issues that might arise under Article XXIV.[91]

(2) Argentina- Safeguard Measures on Imports of Footwear[92]

In this case, non-application of safeguard measures for intra-trade of the CU was disputed. In February 1997, a safeguard investigation on footwear was initiated by Argentina and, at the same time, a provisional measure was imposed. In September 1997, Argentina determined to impose a definitive safeguard measure in the form of

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[90] As mentioned under the previous section, these criteria are called the "necessity test." They have often been referred to in Panel reports and Appellate Body reports.

[91] Also, in this case, in the context of support to obtain defence under Article XXIV, Turkey brought up the chapeau to Article XXIV:5, which stipulates "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."

However, the Appellate Body pointed out that the chapeau of paragraph 5 must be interpreted in the light of the purpose of customs unions set forth in paragraph 4, referring to the purposive language of Article XXIV:4, namely 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; and also referring to Understanding on Article XXIV which states that in the formation or enlargement of a customs union, the constituent members should "to the greatest possible extent avoid creating adverse effects on the trade of other Members."

[92] WTO: WT/DS121 – Argentina – Safeguard Measures on Imports of Footwear.

minimum specific duties on certain imports of footwear. Although this safeguard measure was processed based on Argentina's legislation, notification of the definitive safeguard measure was done by Uruguay, as Pro Tempore President (the present Chair) of MERCOSUR and on behalf of Argentina. In June 1998, the EC requested an establishment of a panel, alleging that Argentina's measure was violating Articles 2, 4, 5, 6 and 12 of the Agreement of Safeguards, and Article XIX:1(a) of GATT 1994. The Panel report was circulated in June 1999, and Argentina appealed. The Appellate Body report was circulated in December 1999, and the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report in January 2000.

The Panel found that Argentina's measure was inconsistent with Articles 2 and 4 of the Agreement on Safeguards. The Appellate Body upheld the panel's finding that Argentina's measure was inconsistent with Articles 2 and 4 of the Agreement on Safeguards, but reversed certain findings and conclusions of the Panel in respect to the relationship between the Agreement on Safeguards and Article XIX of GATT 1994, and the justification of imposing safeguard measures only on non-MERCOSUR third-country sources of supply. In other words, the Appellate Body found that the Panel erred in assuming it was dealing with the safeguard measure imposed by MERCOSUR, in fact by Argentina, and in assuming footnote 1 of the Safeguard Agreement applied in a way in which the constituent countries of the CU were exempt. The Appellate Body finally pointed out that lacking "parallelism" between the scopes of investigation and application of the measure, Argentina's investigation couldn't serve as a basis for excluding imports from other MERCOSUR member countries from application of the safeguard measure.

The Appellate Body also underscored that it made no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure.

(3) United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities[93]

In this case, non-application of safeguard measures for intra-trade of the FTA was disputed. The U.S. International Trade Commission (USITC) initiated a safeguard investigation in October 1997, and imposed a definitive measure as a form of quantitative restriction on imports in June 1998. The imports from Canada, which is a member country of NAFTA, was exempt from the application of the measure. The EC brought the case to the DSB. The Panel report was circulated in July 2000, and

[93] WTO: WT/DS166 – United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities.

the Appellate Body report was adopted, with the Panel report as modified, by the DSB in January 2001.

The Panel found that the definitive safeguard measure imposed by the U.S. on certain imports of wheat gluten based on the U.S. investigation and determination was inconsistent with Articles 2.1 and 4.2 of the Safeguard Agreement in which imports from Canada (a NAFTA partner) were excluded from the application of the measure after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports. The U.S. refuted that the Panel failed to take sufficient account of the fact that, in this case, following its determination that imports from all sources were causing serious injury, the USITC conducted a "separate and subsequent examination," as part of the same investigation, concerning Canadian imports alone. However, the Appellate Body upheld the Panel's conclusion, stating that, although the USITC examined the importance of imports from Canada separately, it did not establish explicitly that imports from these same sources, excluding Canada, satisfied 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, and, thus, the separate examination of imports from Canada carried out by the USITC in this case was not a sufficient basis for the safeguard measure ultimately applied by the U.S.

The U.S. also asserted that the Panel erred by failing to assess the legal relevance of footnote 1 to the Agreement on Safeguards and Article XXIV of GATT 1994 to this issue; while the Panel determined that this dispute did not raise the issue of whether, as a general principle, a member of a free-trade area could exclude imports from other members of that free-trade area from the application of a safeguard measure, and that it could rule on the claim of the EC without having recourse to Article XXIV or footnote 1 to the Agreement on Safeguards. The Appellate Body found no error in the Panel's approach, and made no findings on these arguments.[94]

(4) United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb

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[94] The EC also made claims for the Panel on the USITC's failures in considering "unforeseen developments" provided for in Article XIX:1(a), the MFN principle in Article I of GATT 1994, and Article 5.1 of the Safeguard Agreement, which provides the condition that the safeguard measures apply only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The Panel did not examine these points in the principle of judicial economy.

In its appeal, the EC asked the Appellate Body to reverse the Panel's exercise of judicial economy in declining to rule on these claims, in order to avoid simple repetition in the determination of serious injury and application of measures in the same way. The Appellate Body considered that since the safeguard measure at issue was inconsistent with Articles 2 and 4 of the Agreement on Safeguards, there was no need to go further and examine whether, in addition, the measure was also inconsistent with these claims.

from New Zealand and Australia[95]

The U.S. initiated a safeguard investigation on imports of fresh, chilled or frozen lamb in October 1998, one year after its initiation of a safeguard investigation on wheat gluten. In July 1999, the U.S. imposed a definitive safeguard measure as a form of tariff quota. New Zealand and Australia brought the case to the DSB. The Panel report was circulated in December 2000, and the Appellate Body report with the Panel report as modified was adopted in May 2001.

In this case, although the scope of the safeguard investigation conducted by the U.S. included Canada and Mexico (the NAFTA partners) and the Caribbean countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, the scope of the application of the measure did not include these countries.

The Panel and the Appellate Body found that the U.S. acted inconsistently with Article XIX:1(a) of GATT 1994 by failing to demonstrate as a matter of fact the existence of "unforeseen developments, with Article 4.1(a)[96] of the Agreement on Safeguards by making a determination regarding the "domestic industry" on the basis of data that was not sufficiently representative of that industry, and with Article 4.2(b) of the Agreement on Safeguards in respect to causation by not demonstrating the required causal link between increased imports and threat of serious injury. Due to judicial economy, both the Panel and the Appellate Body declined to rule on Article I of GATT 1994 and Article 2.2 of the Safeguard Agreement concerning the general principle in the relation between a free-trade area and the application of safeguard measures.

(5) United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan[97]

Although this case is not related to safeguard measures under the Safeguard Agreement but to those under the Agreement on Textiles and Clothing, it contains the issue of non-application of the measure to intra-trade of the FTA.

In March 1999, the U.S. imposed a transitional safeguard measure on combed cotton yarn from Pakistan. Pakistan requested the establishment of a Panel. The Panel report was issued in May 2001, and the Appellate Body report was circulated in

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[95] WTO: WT/DS177, WT/DS178 – United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia.

[96] In terms of defining the domestic industry, the Panel found that the U.S. acted inconsistently with Article 4.2(c) of the Agreement on Safeguards, while the Appellate Body modified it with Article 4.2(a).

[97] WTO: WT/DS192 – United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan.

October 2001 and adopted by the DSB in November 2001.

The U.S. safeguard measure was concluded as inconsistent with Article 6.4 of the Agreement on Textiles and Clothing, since the U.S. failed to examine the effect of imports of cotton yarn from other major suppliers individually, namely from Mexico (a NAFTA partner), when attributing serious damage to imports from Pakistan.

(6) United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe[98]

The safeguard measures applied by the U.S. from 1998 to 2000 resulted in successive dispute settlement cases. In July 1999, the U.S. initiated a safeguard investigation on imports of circular welded carbon quality line pipe, and imposed the definitive safeguard measure in March 2000. Canada and Mexico, the NAFTA partners, were exempt from the application of the measure. Korea brought the case to the DSB. The Panel report was circulated in October 2001, and the Appellate Body report was circulated in February 2002 and adopted in March 2002.

In the Panel report, as in the U.S. Lamb case, the measure taken by the U.S. was concluded to be inconsistent with certain provisions of GATT 1994 and the Safeguard Agreement, in particular, with its obligations under Article XIX, by failing to demonstrate the existence of "unforeseen developments" prior to the application of the line pipe measure, and with Article 4.2(b) by failing to establish a "causal link" between the increased imports and serious injury, or threat thereof. However, the Panel concluded that the U.S. was entitled to rely on Article XXIV as a defence, regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure.

That is, in the Panel's view, the U.S. demonstrated that NAFTA was in conformity with Article XXIV, and the line pipe measure constituted an "other restrictive regulation of commerce" within the meaning of Article XXIV:8(b). Therefore, in the Panel's view, as the exclusion of imports from Canada and Mexico forms part of the elimination of "duties and other restrictive regulations of commerce" between the NAFTA members, it is in principle authorized by Article XXIV:5, provided the relevant conditions on establishing an FTA were fulfilled. As to the "necessity test" considered in the Appellate Body report on the Turkey –Textiles case, the Panel stated that it concerned the imposition of restrictive measures by a member of a CU against imports from a third country upon the formation of the CU, and it was not applicable in cases where the alleged violation of GATT 1994 arose from the elimination of "duties and other restrictive regulations of commerce" between parties

[98] WTO: WT/DS202 – United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe.

to an FTA. In addition, the Panel concluded that Article XXIV could provide a defence against claims of discrimination brought under Article 2.2. As a consequence, the Panel found that the U.S. was entitled to rely on Article XXIV as a defence to Korea's claims under Articles I, XIII and XIX of GATT 1994, and Article 2.2 of the Safeguard Agreement, regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure.

Moreover, regarding the "parallelism" between the scope of investigation and that of application (Articles 2.1 and 2.2 of the Safeguard Agreement), the Panel rejected Korea's claim. Since note 168 of the USITC report contains a finding by the ITC that imports from non-NAFTA sources increased significantly over the period of investigation, and also were the basis for a finding that non-NAFTA imports caused serious injury to the relevant domestic industry, the Panel concluded that Korea failed to establish a *prima facie* case that the U.S. violated parallelism by including Mexico and Canada in the analysis of injurious imports, but excluded Mexico and Canada from the application of the safeguard measure.

Korea's claims before the Appellate Body included the Panel's negative conclusion on Korea's establishment of a *prima facie* case regarding parallelism. The Appellate Body pointed out that, in its investigation, the USITC considered imports from all sources, including those from Canada and Mexico, and exempted those imports from the imposition of the measure. The Appellate Body, contrary to the Panel's findings, determined that Korea did establish a *prima facie* case of violation of parallelism on the line pipe measure.

Having found that, the Appellate Body examined whether the USITC provided a *reasoned and adequate explanation* that establishes explicitly that imports from non-NAFTA sources "satisfied 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." The Appellate Body, consistent with its ruling in the US - Wheat Gluten case, found that footnote 168 did not amount to a "*reasoned and adequate explanation* of how the facts support the determination, and that the U.S. violated the above-mentioned provisions.

In addition, the Appellate Body stated that it was not required to make a determination on the question of whether an Article XXIV defence was available to the U.S. and on the question of the relationship between article 2.2 in the Agreement on Safeguards and Article XXIV of GATT 1994, and modified the findings and conclusions of the Panel relating to these two questions contained in the relevant paragraphs of the Panel report by declaring them moot and as having no legal effect. Moreover, the Appellate Body mentioned that the question of whether Article XXIV of GATT 1994 served 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 competent authorities of a WTO Member, the imports that are exempted from the safeguard

measure *are not considered* in the determination of serious injury; and the other is when, in the investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent 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 of the Safeguard Agreement.

5.3 Observations on the raised issues

In the previous sections in this chapter, the systemic issues concerning trade remedy measures raised in CRTA and the related dispute settlement cases have been examined. Some of the issues raised in CRTA have been disputed at the DSB. Above all, the following aspects deserve a wider attention.

(1) Trade remedy measures and their likeliness to become dispute settlement cases

According to the dispute settlement cases described in section 5.2, non-application of safeguard measures for intra-trade is the most common case brought to the DSB. On the contrary, the non-application of anti-dumping and countervailing measures for intra-trade has not yet been brought to the DSB.

One of the reasons for the difference between safeguard measures, and anti-dumping and countervailing measures is, as described in section 5.1 (3), that the non-discrimination provision as stipulated in Article 2.2 of the Agreement on Safeguards is often contested directly against non-application of safeguard measures for intra-trade of PTAs, while the Anti-dumping Agreement and the Agreement on the Subsidies and Countervailing Measures do not have this provision.

Another reason is that the U.S. has frequently used the safeguard measures recently, while the U.S. is a member of NAFTA where safeguard measures are, in principle, abolished. Thus, as a result, dispute settlement cases with the same root came to the surface consecutively.

(2) The issue of non-application of safeguard measures for intra-trade

Although it has often been disputed, the Panel and the Appellate Body so far seem to have circumspectly avoided making any determination that directly affects the legality of the treatment of non-application of safeguard measure for the intra-trade of PTAs. According to the past dispute settlement cases, the safeguard measures at issue were repeatedly concluded as inconsistent with the WTO rules in terms of a

procedural validity such as fulfillment of "parallelism."

If a new safeguard measure, however, is to be applied without changing the legal framework of the PTAs setting out the non-application for intra-trade, the fundamental legality of non-application of safeguard measure for intra-trade of PTAs won't be able to avoid being examined in a manner beyond "parallelism," as pointed out by the Appellate Body in the U.S. Line Pipe case.

Most recently, eight countries have requested the establishment of a panel on the U.S. safeguard measure taken in March 2002 on imports of steel, which again exempt Canada and Mexico (the NAFTA partners) from application. The conclusion and findings of the Panel will be widely noticed.

(3) Observations on anti-dumping and countervailing measures

Anti-dumping and countervailing measures also need to be watched with regard to possible automatic applications of measures at the time of formation or enlargement of the CUs.

In addition, as described in section 5.1 (4) of this paper, the issue of non-application of anti-dumping or countervailing measures for intra-trade in PTAs can potentially violate the "parallelism" between investigation and application, which was recurrently concluded to be inconsistent in safeguard cases.

(4) Implementation of recommendations and necessity for feedback to CRTA

Needless to say, it is very important to steadily implement the recommendations by the Panel and the Appellate Body concerning the treatment of trade remedy measures in PTAs. Furthermore, it is also necessary that the implications of those recommendations should be reflected in the discussions and the examinations of PTAs at CRTA, and in the negotiations in the new round.

6. Conclusion – what are desirable forms of trade remedy measures in PTAs? –

In chapters 2 through 5, the details of provisions for trade remedy measures in the different PTAs, the systemic issues concerning trade remedy measures in the PTAs whether consistent with the WTO rules or not, and the past related dispute settlement cases, were comprehensively examined. Based on the facts studied, what prescription can be written for desirable forms of trade remedy measures in PTAs?

Considerations necessary to bear in mind when drafting or examining provisions for trade remedy measures in a PTA in the future are as follows:

Bilateral (intra-regional) safeguard measures

If a rapid increase of imports from the other party/parties to a PTA is anticipated as a consequence of trade liberalization due to a PTA coming into effect, the framework of provisional safeguard measures applicable to bilateral/intra-regional trade during a transition period with certain conditions can be a means of soothing the liberalization process.

Global safeguard measures

In the light of the past dispute settlement cases, legally binding framework on non-application of global safeguard measures for intra-trade in FTAs can cause further disputes once a measure is imposed, although the existing framework of non-application in the FTAs themselves has not yet been determined inconsistent with the WTO rules.

In the case of a CU, if member countries to the CU are to be exempt from a global safeguard measure, it is necessary to assure that the measure will be taken by the relevant unit, namely the CU as a whole, and that "parallelism" between the scope of investigation and that of application is fulfilled.

Other restrictive regulations of commerce (ORRC)

If one supports the view that the legally binding framework of non-application of global safeguard measures for intra-trade may give rise to an inconsistency problem, he/she also needs to take the position that the exceptions list for ORRC is of an illustrative nature, and that safeguard measures based on Article XIX of GATT can be retained in PTAs on a basis of necessity.

In addition, if safeguard measures are deemed to be included in ORRC, it is natural to consider that anti-dumping and countervailing measures are also covered in ORRC. The necessities of exemption from elimination of anti-dumping and

countervailing measures may differ among countries or PTAs.

Anti-dumping and countervailing measures for intra-trade

On the assumption that anti-dumping and countervailing measures are included in ORRC, if they do not need to be maintained in the PTAs because of such substitutes as harmonization of competition policies and strengthening of subsidy disciplines, it is appropriate to try to abolish these measures for intra-trade, in conformity with the principle provided in Article XXIV:8 of GATT.

Applications of existing trade remedy measures to third parties

When a CU adopts common external trade policies when it is newly formed or enlarged, the introduced measures should be deliberately considered and fully comply with the "necessity test" shown in the Turkey – Textiles case, and these measures are not to be for raising trade barriers to the third parties as provided for in Articles XXIV:4 and XXIV:5 of GATT.

The present situation and the related discussions on the treatment of the provisions for anti-dumping, countervailing and safeguard measures in PTAs have been analyzed, and the desirable types of trade remedy measures have been discussed.

Moreover, the new approaches to trade remedy measures applied in the various PTAs, i.e. as a means to enhance trade liberalization beyond mutual tariff elimination, are deemed to be useful for extending the discussions in the multilateral trade regime in which the WTO is playing a central part. For instance, the establishment of the Working Group on Trade and Competition at the WTO can be seen as the first step. Based on what has been learned from the treatments of trade remedy measures in PTAs, it is expected to reconsider the functions of trade remedy measures under the WTO, and to explore new ways to further facilitate global free trade.

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Table 3.1 Provisions for Trade Remedy Measures in Preferential Trade Agreements

(1) Customs Union

	EU	EU-Turkey	MERCOSUR
AD	Abolition	Abolition(T)	Abolition(T)
CVD	Abolition	Abolition(T)	Abolition(T)
SG	Abolition	Abolition	Abolition
Intra-Regional SG	None	None	Transitional (until '94)
Competition Policies	Common	Common	Common
Subsidy Policies	Common	Common	N.A.

(2) FTAs

	EEA	EFTA	EFTA-Singapore	EU-MidEastEurope
AD	Abolition	Abolition	Abolition	Continuation(*)
CVD	Abolition	Abolition	Continuation	Abolition
SG	Continuation(*)	Continuation(*)	Continuation	Continuation
Intra-Regional SG	None	None	Transitional ('04 review)	None
Competition Policies	Common	Common	Cooperation	Common
Subsidy Policies	Common	Common	No Mention	Common

	EU-Mexico	NAFTA	Canada-Chile	Canada-Israel
AD	Continuation	Continuation(*)	Abolition(T)	Continuation
CVD	Continuation	Continuation(*)	Continuation(*)	Continuation
SG	Continuation	Abolition(*)	Abolition(*)	Abolition(*)
Intra-Regional SG	None	Transitional (until '04)	Transitional (until '03)	Transitional (until '99)
Competition Policies	Cooperation	Cooperation	Cooperation	Cooperation
Subsidy Policies	No Mention	No Mention	Cooperation	Cooperation

	AFTA	ANZCERTA	NZ-Singapore	JSEPA
AD	Continuation(*)	Abolition	Continuation(*)	Continuation(*)
CVD	Continuation(*)	Continuation(*)	Continuation(*)	Continuation
SG	Continuation(*)	Abolition	Abolition	Continuation(*)
Intra-Regional SG	Transitional	Transitional (until '90)	None	Transitional (until '12)
Competition Policies	No Mention	Cooperation	Cooperation	Cooperation
Subsidy Policies	No Mention	Cooperation	Cooperation	No Mention

(3) Others

	FTAA (under negotiation)	APEC	EU-MERCOSUR (under negotiation)
AD	Continuation(*) ?	Continuation	Continuation ?
CVD	Continuation(*) ?	Continuation	Continuation ?
SG	Abolition(*)?	Continuation	Continuation ?
Intra-Regional SG	Transitional?	None	None?
Competition Policies	Cooperation ?	Cooperation	Cooperation ?
Subsidy Policies	Cooperation ?	No Mention	Cooperation ?

Note 1: Continuation(*) entails additional conditions for application.
2: Abolition(T) only permits application during current transition period.
3: Abolition(*) means abolition in principle, allowing an exceptional application when enormous effects by imports from the member countries of the PTA are recognized.
4: SG described here corresponds to GATT Article XIX type in case of rapid import increase.