

## **On the Discretion and Limitations of Adopting Trade Remedies Provisions in RTAs**

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### **Abstract**

Most RTAs allow different kinds of trade remedies. Only a few of them prohibit the adoption of trade remedies against their constituent members. However, there has not been a consensus about the legal status of trade remedy regimes in RTAs under the WTO.

The paper analyzes Article XXIV and relevant provisions in the GATT 1994 and other WTO agreements to find bases to support the argument for the limited allowance of trade remedies in RTAs. The paper argues that RTA parties have limited discretion to decide the adoption of trade remedy rules. The limits basically come from Article XXIV:8 of the GATT 1994. The paper clarifies the limits of adopting and applying trade remedies in RTAs.

### **I. Introduction**

There are different trade remedy rules in different regional trade agreements (RTAs).<sup>1</sup> Most RTAs allow different kinds of trade remedies (including Antidumping, countervailing and safeguard measures) with or without specific provisions. Only a limited number of RTAs prohibit the adoption of trade remedy measures against their constituent members.

Trade remedies in RTAs are relevant to the proliferation of the regional integrations. They allow parties to provide temporally protection for their industries from competition from their RTA counterparts. They thus have the potential of reducing the anxiety of the industries being negatively affected by the RTAs negotiated by their governments. However, the legal basis of trade remedies in RTAs is not so firm. There has not been a consensus about the legal status of trade remedy regimes in RTAs under the World Trade Organization (WTO), especially under Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994.

Some commentators consider the inclusion of trade remedies in RTAs being against the standards implied by Article XXIV:8 which requires that restrictive regulations of commerce are eliminated with respect to substantially all the trade between members of the RTAs. Also in the parentheses of Article XXIV:8 (a) and (b), only Article XI, XII, XIII, XIV, XV and XX are excepted. This seems to amplify the basis that trade remedies should not be included in

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<sup>1</sup> Since there are no comprehensive trade remedy rules concerning trade in services, the discussions about trade remedies are only on trade in goods.

RTAs. Conversely, there are also concerns about trade remedy rules being omitted or differently enacted from WTO trade remedies leading to less trade remedies against RTA members and thus creating more discrimination against non-RTA members.

From the perspective of the author, it might not be correct to ascertain that trade remedies are at all times allowed or disallowed under the WTO rules. The paper is to analyze Article XXIV, relevant provisions in the GATT 1994 and other WTO agreements to find bases to support the argument for the limited allowance of trade remedies in RTAs. The Appellate Body reports, such as Argentina Footwear Case and Turkish Textiles and Clothing Case are also relevant to the interpretation of whether Article XXIV allows trade remedies.

The paper will argue that RTA parties have limited discretion to decide the adoption of trade remedy rules based on the analyses. But the limits on the adoption and application of trade remedies for RTAs are also of importance. The limits basically come from Article XXIV:8 of the GATT 1994. The paper will clarify the limits of adopting and applying trade remedies in RTAs.

## **II. Diversified Trade Remedies in RTAs**

Although RTAs are meant to be the basis of dismantling trade barriers between the constituent members, in practice, there are still trade barriers in the forms of trade remedies in many RTAs. According to a study conducted by the WTO,<sup>2</sup> there is only a limited number of RTAs abolishing the adopting of either anti-dumping, countervailing or safeguard measures. Most of the RTAs still have different kinds of trade remedy provisions.

For instance, although there are a few RTAs not allowing the adoption of anti-dumping and countervailing measures for industrial products, they still allow the measure being applied for agricultural and fishery products. Some RTAs have special procedural provisions for anti-dumping and countervailing measures, such as to have special committee to review the anti-dumping and countervailing decisions against the RTA members. Some others have special substantive provisions, such as the increase of *de minimis* volume or the shortening of the period of anti-dumping and countervailing measures.

Concerning safeguard measures, only a limited number of RTAs abolish the adoption of such trade remedies. Many RTAs still reserve the right of taking bilateral safeguard measures against other RTA members either within a period of transition period or with special provisions articulating special requirements for the adoption of safeguard measures. In terms of global safeguard measures, some RTAs do not have different requirements for the safeguard measures taken against RTA members and non-RTA members. Some RTAs have their requirements different from GATT Article XIX and the Agreement on Safeguards, such

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<sup>2</sup> Robert Teh and Thomas J. Prusa, "Trade Remedy Provisions in Regional Trade Agreements", at 18-22; Staff Working Paper ERSD-2007-03 September 2007; [http://www.wto.org/english/res\\_e/reser\\_e/ersd200703\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd200703_e.pdf). (visited 29 June 2009).

as requiring RTA members to be excluded from global safeguard measures, unless the imports account for a substantial share of total imports and they contribute importantly to the serious injury.<sup>3</sup>

The fact that the majority of RTAs do allow the adoption of different kinds of trade remedies indicates that WTO Members consider that either it is legal under the WTO to have whatever trade remedies in RTAs or, although it might not have been confirmed as legal, it is practically acceptable to include different trade remedies in their RTAs. A valid question to be asked then would be whether the wide practice of including different trade remedies in RTAs would make the discussion of legal status of RTA trade remedies unnecessary or pointless.

From the perspective of the author, there are the following reasons that still warrant the discussions. First, if the inclusion of trade remedies in RTAs is not legally permitted or should be restricted under the WTO agreements, it would not become legitimate or unrestricted merely because there are many WTO Members having adopted such measures in their RTAs. Second, a clarification of the legal status of RTA trade remedies would help countries to be aware of their respective rights and obligations under the WTO and to decide their policy toward RTA trade remedies accordingly in the future. Third, the discussion could potentially help WTO Members to consider whether and how to negotiate possible modification of the current rules relevant to the issue.

### **III. Legal Status of RTA Trade Remedies under GATT Article XXIV:8**

#### **A. Whether Trade Remedies Constitutes “Duties” of GATT Article XXIV:8**

There are various legal issues of trade remedies in RTAs under Article XXIV, paragraph 8 and Article I of the GATT 1994 and under other agreement. In this part, discussions will be on the issues surrounding paragraph 8 of GATT Article XXIV.

As indicated above, RTA is meant to be the basis for constituent members to have their internal trade being under no or minimum trade restrictions. Thus paragraph 8 of Article XXIV of the GATT 1994 has the following relevant requirements for the customs union and the free trade agreement respectively:

“duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories.”

and

“the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories [of a free trade agreement]

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<sup>3</sup> Ibid. at 22-26.

in products originating in such territories.”

The first question to be asked under GATT Article XXIV, paragraph 8 is whether trade remedies constitute “duties” under this paragraph. If they are “duties” under the provision, they must be eliminated with respect to substantially all the trade between the constituent parties of the RTAs.

There is no definition of “duty” in the GATT 1994. In regard to rules governing the imposition of duties, paragraph 1 of Article II should be most relevant in the GATT 1994 and thus looking into the words used there could help clarifying the meaning and scope of the word “duty” used in Article XXIV, paragraph 8.

Article II, paragraph 1 uses the terms “ordinary customs duties”, “all other duties” and “charges of any kind” to indicate the concessions included in the schedules of the Members. Countries adopting anti-dumping or countervailing measures are actually to impose “anti-dumping duty” and “countervailing duty” on imported products.<sup>4</sup> Literarily speaking, “anti-dumping duty” and “countervailing duty” are never the “ordinary customs duties”. But they definitely should fall within the scope of “other duties” used in GATT Article II, paragraph 1. Otherwise it would not be necessary to have paragraph 2 of this article exempting an anti-dumping or countervailing duty from the binding obligation required in paragraph 1.<sup>5</sup>

If anti-dumping and countervailing duties are “other duties” under Article II, paragraph 1, it would not be easy to imagine why they do not fall within the scope of “duties” under paragraph 8 of Article XXIV for the reason that they both use the term “duties”. Thus the ordinary meaning of duties in Article XXIV, paragraph 8 should include anti-dumping and countervailing duties.

However, it must be noted that although anti-dumping and countervailing duties actually imposed against imports are “duties” provided in Article XXIV, paragraph 8 of the GATT 1994, the mere existence of anti-dumping and countervailing provisions is definitely not “duties”. Anti-dumping and countervailing provisions are only the bases for countries to initiate the investigations and eventually impose such duties. Thus when we talk about whether the adoption of anti-dumping and countervailing measures is in breach of Article XXIV of the GATT 1994, we should be referring to the situation when there have been anti-dumping and countervailing duties imposed against imported products to see whether it would make duties with respect to substantially all the trade being not eliminated as required by paragraph 8 of Article XXIV.

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<sup>4</sup> See GATT Article VI, paragraphs 2 and 3, which provide that “a contracting party may levy on any dumped product an *anti-dumping duty*...” and that “No *countervailing duty* shall be levied ... in excess of an amount equal to the estimated bounty or subsidy determined to have been granted...” (emphases added)

<sup>5</sup> Paragraph 2 of Article II provides in part that: “Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: ... (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI.”

In terms of safeguard measures, GATT Article XIX authorizes the suspension of the obligation in whole or in part or the withdrawal or the modification of the concession. Thus safeguard measures can be made in the forms of quantitative restrictions or increase of duties to suspend the GATT obligation or to withdraw or modify the tariff concession. If there is an increase of duties as the safeguard measure, then there is a question of whether such increased duties against imported products would make duties with respect to substantially all the trade being not eliminated as required by paragraph 8 of Article XXIV.

Same parenthesis should be made that although duties actually imposed against imports as a result of safeguard investigation are “duties” provided in Article XXIV, paragraph 8 of the GATT 1994, the mere existence of safeguard provisions is definitely not “duties”. Safeguard provisions are only the bases for countries to initiate the investigations and eventually impose such duties.

#### **B. Whether Trade Remedies Constitute “Other Restrictive Regulations of Commerce” of GATT Article XXIV:8**

Again, there is no definition on “other restrictive regulations of commerce”. From its plain language, if a rule that would have an effect of restricting commerce between constituent members of an RTA, it should suffice the requirement. Based on this understanding, there are two questions to be asked, namely, whether the existence of anti-dumping, countervailing and safeguard provisions themselves falls within the scope of “other restrictive regulations of commerce” and whether the quantitative restriction actually imposed as a result of safeguard investigation falls within the scope of “other restrictive regulation of commerce.”

As to the first question, anti-dumping, countervailing and safeguard rules are designed to counteract dumping practice of foreign manufacturers or exporters, subsidies of foreign governments and increased imports of foreign products. The trade flow of exporting and importing countries could be restricted by the initiation of investigation and the imposition of provisional and final duties and measures. They are the bases for the authorities of the importing countries to initiate investigations against the practice of foreign manufacturers and exporters to see whether there is dumping involved causing material injury to domestic industries, against the practice of foreign governments to see whether there are subsidies involved causing material injury to domestic industries, and against foreign increased imports seriously injuring domestic industries. If the findings are positive, then the authorities of the importing countries could impose anti-dumping, countervailing, or safeguard measures.

It could be argued that there is no restrictiveness of commerce unless and until there are anti-dumping, countervailing or safeguard measures actually applied. The rules are established only for domestic industries to apply for an investigation, for foreign manufacturers and exporters to defend and for domestic authorities to initiate investigations and to impose the duties or other measures. However, the wording of Article XXIV, paragraph 8 is clear in that the regulations of commerce are to be eliminated as long as they are

restrictive in nature. Trade remedy rules in RTAs are certainly regulations of commerce between RTA members and they are restrictive in the following aspects: First, their ultimate goal is to impose antidumping, countervailing or safeguard measures. No matter how sound and justifiable for the importing countries to impose such measures, these measures are aimed to limit the imports through additional duties or through quantitative restrictions. Second, the investigation of dumped, subsidized or increased import itself could already have chilling effect on the importation. Commerce between RTA members could be affected even before the measures being actually applied. Third, there are other restrictive aspects of trade remedies, such as the provisional measures and the price undertakings. Thus it can be concluded that trade remedy rules fall within the scope of “other restrictive regulation of commerce” provided in GATT Article XXIV, paragraph 8.<sup>6</sup>

Concerning the second question, i.e., whether quantitative restriction imposed as a result of safeguard investigation falls within the scope of “other restrictive regulations of commerce”, there could be different arguments. On the one hand, it could be argued that if WTO Members have concern about the existence of restrictive regulations, they would even have greater concern if the restrictive regulations have actually been applied and commerce is actually restricted. On the other hand, it could be argued that since quantitative restriction is the measure resulting from the restrictive regulations and since they themselves are not regulations, it would be difficult to conclude that the measures are restrictive regulations.

The paper is of the view that quantitative restrictions imposed under the RTA safeguard provisions should fall within the scope of the items to be removed by RTA members for their internal trade. The purpose of GATT Article XXIV, paragraph 8 is to promote free flow of goods between RTA members. Measures having restrictive effect should be removed to the extent required by this article. If the elimination obligation does not include the removal of safeguard measures in the form of quantitative restriction, it is theoretically possible that even if an RTA does not have safeguard provisions, an RTA member can still decide to impose safeguard mechanism without relying on the safeguard provisions. If the measure is not regulated in Article XXIV, paragraph 8, then this member would not have an obligation to remove such measures. This result is definitely not in line with the goal of Article XXIV.

## **C. Whether the Existence of Trade Remedies would make the RTA not Meeting the Requirement of “Substantially All Trade”**

### **1. Meaning of “Substantially All Trade”**

The phrase “substantially all trade” (hereinafter “SAT”) is critical in the formation and

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<sup>6</sup> Gabrielle Marceau interprets the phrase “other regulations restricting trade” to include trade remedies, and to antidumping actions in particular. See Gabrielle Marceau ed., *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas*. (Oxford: Clarendon Press 1994).

operation of regional agreements under multilateral trading system. Unfortunately, there is lack of consensus on the meaning of SAT among Members of the WTO, leading to the impasse in the examination of regional trade agreements and WTO negotiations on rules.<sup>7</sup>

There are historically two basic approaches trying to define the phrase. Quantitative approach tries to adopt a specific percentage of trade to decide whether the coverage of a regional agreement has achieved the level of substantially all trade. A WTO Secretariat report<sup>8</sup> explains the quantitative, qualitative and other approaches to the interpretation of SAT. In regard to quantitative approach, it is stated that this approach favours “the definition of a statistical benchmark, such as a certain percentage of the trade between the parties, to indicate that the coverage of a given RTA fulfils the SAT requirement. Arguments against this approach include the view that a single numerical definition or threshold cannot suit the different contexts in which the word ‘substantially’ is used within paragraph 8, and that, whatever the quantitative figure set for coverage, it could essentially be giving a licence to exclude a set amount of trade.”<sup>9</sup>

Qualitative approach, on the other hand, sees the contents of coverage and considers not having substantially all coverage if there is any sector not being covered by a regional agreement. The above-mentioned WTO Secretariat Report states that “A *qualitative approach*, according to which the SAT requirement means that no sector (or at least no major sector) was to be kept out of intra-RTA trade liberalization. Under this approach, SAT is viewed as preventing the exclusion of any sector where the amount of trade was small before the formation of the RTA due to the restrictive policies in place, as would be the case if a quantitative approach was used. One argument made against this view is that an RTA which lists all sectors as being subject to liberalization may not necessarily satisfy Article XXIV:8, because this does not automatically result in free trade.”<sup>10</sup>

There was a good opportunity to solve the SAT issue during GATT Uruguay Round Negotiations. However, countries failed to reach any result in this regard. Thus, although the “Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994” concluded in Uruguay Round Negotiations clearly indicates in the preamble to recognize that the contribution of RTAs is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to “all trade”, and diminished if any “major sector of trade” is excluded, it does not require the elimination of duties and restrictive regulations to be extended to all trade with no major sector being excluded. Neither does the Understanding touch upon the definition of SAT.

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<sup>7</sup> WT/REG/W/12, para. 17.

<sup>8</sup> WTO Secretariat, *Synopsis of “Systemic “ Issues, Related to Regional Trade Agreements, Note by the Secretariat*, at 21, WT/REG/W/37, 2 March 2000.

<sup>9</sup> *Ibid.*

<sup>10</sup> Above note 2.

## **2. Whether Trade Remedy Measures would Lead to SAT not Being Met**

There are a number of points to make in this context. First, duties imposed under trade remedy rules fall within the scope of “duties” of GATT Article XXIV, paragraph 8, as explained above and thus it is subject to the requirements under this article. RTA members are to be eliminated with respect to substantially all the trade between them. Thus when an RTA member is to impose duties under RTA trade remedy rules, it should follow the SAT requirements, in addition to observing the trade remedy provisions. In other words, the trade remedy duties are not to be imposed on products of the whole sector at the same time, from qualitative perspective.

Second, although in the above discussions, trade remedy duties and quantitative restrictions are analyzed at different paragraphs for the reason that they have their respective legal issues to be resolved, they are both subject to SAT requirements. So when SAT is at issue, there is no need to discuss such issue in different paragraphs. They should be calculated cumulatively so as to decide the range and scope of trade being affected and whether the remaining not affected parts still meet the requirement of SAT.

Although there has not been any agreed quantitative figure set for the minimum coverage of RTAs, there must still be such minimum percentage of trade being covered by an RTA for the purpose of meeting SAT requirement. If the total percentage of import trade being at the same time subject to actual trade remedy measures (including anti-dumping duties, countervailing duties and safeguard measures) plus the imports subject to ordinary duties would make the remaining parts not meeting the requirement of SAT, than it should not be allowed.

## **3. Whether the Existence of Trade Remedy Rules Would Lead to SAT not Being Met**

A difficult question is about how to calculate the range of effect arising from the mere existence of trade remedy rules in RTAs. According to the argument above, trade remedy rules are “other restrictive regulations of commerce” so that they need to be eliminated “with respect to” or “on” substantially all the trade between RTA members. If trade remedy rules are applied “with respect to” or “on” all import from the RTA partners, it would be logically difficult to argue that restrictive regulations of commerce are eliminated for substantially all the trade. Also, if trade remedy rules are applied “with respect to” or “on” whole agricultural or fishery sector, qualitatively, it still does not meet the requirements of SAT.

If such interpretation is correct, than it would only be possible for an RTA member to have its trade remedy rules being applied only to limited number of products. This is greatest limitation on the discretion of RTA members to include their trade remedies rules in their RTA.

## **D. Whether Specially Drafted Trade Remedy Rules Would Change the Results**

For those RTAs allowing the application of trade remedies against imports from other

RTA members, there are some trade remedy rules having substantive or procedural requirements different from their trade remedy rules for non RTA members.

For instance, the trade remedy rules can be made stricter for RTA members to apply, such as to increase the *de minimis* volume to limit the application. Such change can make the trade remedies less trade restrictive. However, if it does not change the natures of trade remedies, it would not change the analysis of the legal status of RTA trade remedies under GATT Article XXIV, paragraph 8. Nevertheless, it is possible that RTA trade remedies are designed only for a transition period after the formation of an RTA or an interim arrangement leading to an RTA. If the transition period is reasonable, it could be justified, not because of the different interpretation of Article XXIV, paragraph 8, but because of Article XXIV, paragraph (c) which allows RTA members to have transition period to achieve real and complete RTAs.

#### **E. Whether the parenthesis of Article XXIV:8 would exclude the possibility of trade remedies in RTAs**

GATT Article XXIV, paragraph 8 has parenthesis including following wording: “except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX”. Rules permitted by the exception in the parenthesis would not have to be eliminated at all, or would not have to be eliminated on substantially all the trade between RTA members.

Trade remedy provisions are not listed in the parenthesis. A potentially controversial issue is whether the articles listed in the parenthesis are exhaustive or only illustrative. It is argued that

“Despite unclear evidence from the negotiating history of Article XXIV, an overly narrow scope of listed provisions in the exception parenthesis of Article XXIV:8 seems to indicate that they are not an exhaustive list. For example, it would be inconceivable that all trade restrictions imposed on the basis of national security exceptions under Article XXI must be eliminated between FTA parties.”<sup>11</sup>

Although the argument has its valid basis, there could be different views on this. First, logically, even if national security exception can serve as a basis to exempt a member from the obligations under RTAs, it does not lead to the same conclusion that trade remedy rules should also be exempt from the RTA obligations. Second, it is unimaginable to list less important articles in the parenthesis and leave national security provisions of Article XXI of the GATT 1994 not included. National security interests protected under GATT Article XXI is certainly more important than or at least equally important with the balance-of-payments interests protected under GATT Article XII. The only reasonable explanation is that Article XXI is an unintentional omission. If Article XXI is an unintentional omission, then it must be dealt with by treaty interpretation or through negotiation to decide whether security exception

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<sup>11</sup> Dukgeun Ahn, Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules, 11 *J. Int'l Econ. L.* 107, at 121 (2008).

can be included. However, it might not be correct to make the same argument from any perspective that the omission of trade remedy provisions in the parenthesis is also unimaginable.

As to the question whether trade remedy provisions should be included in the parenthesis, the wording seems to make the listed articles exhaustive. It specifies “except...those permitted under Articles XI, XII, XIII, XIV, XV and XX.” Literarily, only “those” permitted under Articles XI, XII, XIII, XIV, XV and XX” are excepted from the obligations. Although there is the term “where necessary”, this term does not help expanding the list to cover trade remedy rules. Because the term “where necessary” is connected with the listed articles. In other words, it is to qualify the application of the listed articles. There is no clue from the wording that it can be used to connect other non-listed articles. There are two possible ways to interpret the term “where necessary”. It can be interpreted to allow the RTA parties to decide whether it is necessary to include such exceptions. It can also be interpreted to make the inclusion of the exceptions subject to “necessity” test to determine whether the inclusion of the exceptions is justifiable. Neither one of these interpretations helps the inclusion of trade remedy rules in the parenthesis of Article XXIV, paragraph 8.

#### **IV. Legal Status of RTA Trade Remedies under GATT Article I**

Article I of the GATT 1994 requires WTO Members to immediately and unconditionally accord any advantage, favour, privilege or immunity granted by such Members to any product originating in or destined for any other country to the like product originating in or destined for the territories of all other Members with respect to “customs duties and charges of any kind” and with respect to “all rules and formalities in connection with importation and exportation.”

Since anti-dumping and countervailing duties and the additional duties under safeguard rules are duties in nature, they should fall within the scope of “customs duties and charges of any kind”. Also trade remedy rules should be within the meaning of “all rules in connection with importation.” It is further apparent that non-application of trade remedies granted by an RTA member to the products from its RTA partners is immunity to them. Thus it would not be difficult to conclude that the application requirements of Article I is met if trade remedies are abolished for RTA members. The question to be asked then is whether the abolishment of trade remedies constituting a discrimination against non-RTA members can be justified under paragraph 5 of Article XXIV of the GATT 1994, which provides in part that

“the provisions of this Agreement shall not prevent ... the formation of a customs union or of a free-trade area...; *Provided* that: (a) with respect to a customs union ... the duties and other regulations of commerce imposed at the institution of any such union ... in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general

incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union...; (b) with respect to a free-trade area... the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area ... to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area...”

Thus, if an RTA meets the requirement that the duties and other regulations of commerce imposed against non-RTA members are not on the whole higher or more restrictive prior to the formation of the RTA, Article I does not prevent the formation of such RTA having abolished trade remedies. Since RTA is meant to eliminate duties and other restrictive regulations of commerce with respect to substantially all the trade and since the abolishment of trade remedies is to fulfill the goal of elimination of duties and restrictive regulations of commerce, it is not to increase the restriction with respect to the trade with non-RTA members. In other words, the logical conclusion should be that the abolishment of trade remedies does not prevent an RTA from meeting the requirements in Article XXIV, paragraph 5. And thus Article I should not prevent RTA members from abolishing trade remedies in their RTA.

## **V. Legal Status of RTA Trade Remedies from the Perspective of WTO Trade Remedy Rules**

Trade remedies under RTAs can also be discussed under the trade remedy agreements. There are two groups of issues. Anti-dumping Agreement and SCM Agreement are similar in that the investigation and imposition of duties are country specific and company specific. In other words, only those companies from the countries identified as the target of investigation and only if such companies having adopted dumping practice or receiving subsidies would be subject to trade remedies. There is no such requirement of non-discrimination in these agreements. Anti-dumping and countervailing duties themselves are discriminatory in that they only apply to those having involved dumping or receiving subsidies and being investigated and not apply to others.

A potentially problematic situation is the following: There are two countries providing similar subsidies to their respective industries producing like products causing similar injury to the industry of the importing country or there are two exporters in different countries engaging in similar dumping practice concerning like products causing similar injury to the industry of the importing country. The importing country only initiates investigation against one of the exporting countries and then imposes countervailing or anti-dumping duties against products from this country. The question to be asked is whether there is a discrimination against the target country and whether there is a favor granted to the exempt country.

Theoretically it is possible that Article I of the GATT 1994 could be relevant. However, in practice, it would not be easy to make such claim due to the fact that without proper investigation, it might not be found the existence of dumping practices or subsidies that are not equally dealt with.

In terms of safeguards, GATT Article XIX expects countries to impose safeguard measures on a non-discriminatory manner. Also Article 2.2 of the Agreement on Safeguards requires safeguard measures to be applied to a product being imported irrespective of its source. There are two aspects in this regard: Whether the abolishment of safeguard measures against RTA members would constitute a violation of non-discrimination under the Agreement on Safeguards and whether the non-abolishment of safeguard measures against RTA members would be the only way to meet the non-discrimination requirement under the Agreement.

The answer is not legally clear due to the last sentence of footnote 1 in the Agreement on Safeguards, which states: “Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.” However, if we look at the nature of RTAs being to remove restrictive regulations of commerce and the fact that safeguard rules are restrictive regulations, it should be clear that the abolishment of safeguard provisions in RTAs and the non-application of safeguard measures within RTAs should be expected. And thus the non-discrimination requirement under GATT Article XIX should not prevent RTA members from forming their RTA which meet the requirement of Article XXIV but not including safeguard rules.

## **VI. Legal Status of RTA Trade Remedies from the Perspective of WTO AB Reports**

The paper is not to discuss the legal issues of “parallelism” created by the Appellate Body but to infer from the “parallelism” to show that the Appellate Body does admit the adoption of safeguard measures with respect to RTA members. Briefly, the Appellate Body in Argentina–Footwear, United States–Wheat Gluten, United States–Line Pipe and United States–Steel reports ascertains that there should be parallelism requirement prohibiting asymmetry in the application of safeguards measures. Under parallelism,

“[If] WTO Member has conducted a safeguard investigation considering imports from all sources, it cannot, subsequently, without any further analysis, exclude imports from RTA partners from the application of the resulting safeguard measure. In order to be able to exclude imports from RTA partners, the investigating authority must establish explicitly that imports from non-RTA sources alone caused serious injury or threat of serious injury to the domestic industry. The investigating authority, in its causality analysis, should ensure that the effects of the excluded (RTA) imports are not

attributed to the imports included in the safeguard measure.<sup>12</sup>

It could be concluded from the Appellate Body position that an RTA member can decide not to impose safeguard measures against other RTA members, as long as the imports from such other RTA members are not included in the calculation of increased imports and that an RTA member can also decide to impose safeguard measures against other RTA members along with non-RTA members. Since in its view if imports from all sources are considered, RTA members must be subject to the safeguard measures, it apparently implies that the imposition of safeguard measures is allowed against RTA members. But it makes such implication without elaborating the requirements or prerequisites of such imposition.

## **VI. Some Concluding Remarks**

As mentioned, although there is such wide practice of including different trade remedies in the RTAs, it is theoretically and practically important to analyze the legal status of RTA trade remedies.

Although the Appellate Body has implied that RTA members can decide whether to take safeguard measures against other RTA members, as long as parallelism is followed. However, from the above analysis, the following conclusions can be drawn:

1. Trade remedy measures and trade remedy rules constitutes “duties” and “other restrictive regulations of commerce” of GATT Article XXIV, paragraph 8.
2. The existence of trade remedies could make the RTA not meeting the requirement of SAT.
3. The parenthesis of Article XXIV:8 does not include trade remedies.
4. The abolishment of trade remedies does not prevent an RTA from meeting the requirements in Article XXIV, paragraph 5. And thus Article I should not prevent RTA members from abolishing trade remedies in their RTA.
5. Non-discrimination requirement under GATT Article XIX should not prevent RTA members to form their RTA which meet the requirement of Article XXIV but not including safeguard rules.

Based on such conclusions, it should be correct to state that as long as trade remedies in RTAs are made for reasonable transitional period, it would be less controversial. However, if it is not designed to deal with transitional period, it must be ensured that they are applied only for limited items so as to meet the SAT requirements.

It would not be correct to state that trade remedies are at all times allowed or disallowed under the WTO rules. But the discretion for RTA members to adopt trade remedies is limited.

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<sup>12</sup> Above note 2, at 25.