

Trade remedy provisions in regional trade agreements

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Multiple factors, including the stagnation of the Doha Round of WTO trade negotiations, have led to a proliferation of bilateral and multilateral free trade agreements around the world. The GATT permits these regional trade agreements ('RTAs') as an exception to the bedrock principle of 'most favoured nations' treatment, but only if they eliminate 'duties and other restrictive regulations of commerce' – a phrase which, if read literally, appears to encompass all trade remedies such as antidumping duties, countervailing duties, and safeguard provisions.

The reality, though, is quite different, and most RTAs leave the signatories' trade remedy rights unaffected. However, in the RTAs that do address these issues, parties have developed an array of modifications to both the substantive and the procedural aspects of the rules that govern trade among WTO members. The purpose of this paper is to review and summarise the more significant of these modifications in order to provide a reference tool for practitioners involved in negotiations of RTAs over this important and often contentious issue, and also to suggest ways in which these modifications could help to advance the current negotiations over trade remedies in the Doha Round.

Legal framework

Trade remedies under the GATT and the WTO agreements

The term 'trade remedies' refers to the legal mechanisms in the GATT and the various WTO agreements that allow parties to take action against unfairly traded or injurious imports. The three principal trade remedies described in the WTO agreements are antidumping duties, countervailing duties, and safeguards:

- Antidumping duties are permitted under Article VI of the GATT, and the rules governing their application are spelled out in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('AD Agreement'). Generally speaking, 'dumping' occurs when a foreign producer sells its merchandise in a foreign market at less than its 'normal value'. If these imports also cause or threaten to cause material injury to the domestic industry in the importing country, the importing country is permitted to apply antidumping duties to offset this unfair pricing.
- Countervailing duties are permitted under Articles

VI and XVI of the GATT, and their application is governed by the Agreement on Subsidies and Countervailing Measures ('SCM Agreement'). An importing country is permitted to apply countervailing duties to specified imports if it can demonstrate that a foreign producer has benefited from an unfair government subsidy, and that imports from that foreign producer have caused, or threaten to cause, material injury to the domestic industry in the importing country.

- Safeguard measures are permitted under Article XIX of the GATT, and rules regarding their application are contained in the Agreement on Safeguards. Unlike the antidumping and countervailing duty remedy, a party is not required to demonstrate that imports were unfairly priced in order to apply a safeguards remedy. Rather, a party need only determine that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten serious injury to the domestic industry that produces like or directly competitive products.

Parties are not required to impose trade remedies to the fullest extent permitted under the GATT; indeed, parties are not required to impose trade remedies at all. However, if parties do employ such measures, they must do in a manner consistent with the GATT and these agreements.

Regional trade agreements

As noted above, RTAs directly conflict with the 'most favoured nations' principle that is fundamental to the GATT, in that RTAs are specifically designed to provide more favourable treatment to their signatories than to other trading partners. However, the GATT does provide an exception for RTAs, but sets a high standard for this exception in order to ensure that the benefits of any particular RTA outweigh its potential negative consequences to the multilateral trading system as a whole. Specifically, Article XXIV(8)(b) of the GATT states that:

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (*except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX*) are eliminated on substantially all the trade between

the constituent territories in products originating in such territories.

The omission of Articles VI, XVI and XIX – the Articles that provide for antidumping duties, countervailing duties and safeguards measures – from the highlighted portion of Article XXIV(8) (b) quoted above suggests that the drafters of the GATT considered trade remedies to be among the ‘duties and other restrictive regulations of commerce’ that a free trade area was intended to eliminate.

Treatment of trade remedies in regional trade agreements

To determine exactly how trade remedies have been addressed in the RTA context, over 100 RTAs notified to the WTO were reviewed for the terms ‘antidumping’, ‘countervailing’ and ‘safeguards’.² While the language of Article XXIV suggests that trade remedies would be eliminated in RTAs, in fact, only a small number of RTAs satisfy this requirement. Many of the RTAs reviewed do not mention trade remedies at all, and a large percentage of those that do simply reiterate the RTA signatories’ rights under the various WTO agreements.

Modifications to antidumping and countervailing duty provisions

Only a small number of RTAs meet the standard implied by Article XXIV(b) (8) of eliminating the antidumping remedy altogether,³ and in only one RTA reviewed did the parties also agree to eliminate the CVD remedy.⁴ In addition, two RTAs contemplate the possible elimination of the AD remedy,⁵ and two more RTAs suggest that parties can rely on the CVD remedy only until certain laws relating to competition and public aid are revoked.⁶

Of the procedural changes to trade remedies, the most common among the RTAs reviewed is the referral of any AD/CVD dispute to a ‘joint committee’.⁷ If the joint committee is unable to resolve the matter within a specified period of time (usually in the range of 30–45 days), the party may continue with its action. Since most of these ‘joint committees’ consist of representatives from the parties in equal numbers, the efficacy of this referral step is questionable. Nevertheless, the referral to a joint committee might allow certain cases to be addressed and disposed of before duties are applied, particularly where the complaint involves a government action – like the provision of a subsidy – that could be efficiently investigated and resolved before a full CVD investigation is undertaken. Other RTAs contain a similar requirement for pre-initiation consultations between the governments before initiating an AD proceeding.⁸ Some RTAs also suggest that these pre-initiation consultations should lead the complaining

party to give reasonable consideration to price undertakings.⁹

In terms of substantive changes, while none of the RTAs reviewed modify the standards for applying the CVD remedy, several RTAs do modify AD rules. The following are some of the more common or interesting occurrences:

- Increasing the threshold for determining ‘negligible’ imports from two per cent to five per cent;¹⁰
- Increasing the standards for *de minimis* dumping margins in investigations from two per cent to five per cent;¹¹
- Eliminating the practice of ‘zeroing’ in calculating dumping margins;¹²
- Use of the ‘lesser duty’ rule (ie, a duty which is less than the dumping margin where such lesser duty is sufficient to eliminate material injury);¹³
- An agreement to eliminate the application of any third country dumping provisions as otherwise permitted by Article 14 of the AD Agreement;¹⁴ and
- Recognition of the ‘public interest’ in making AD determinations.¹⁵

Dispute settlement for antidumping and countervailing duty decisions

Separate from changes to the procedural and substantive provisions of AD/CVD proceedings themselves, some RTAs contain provisions that affect the way in which AD/CVD disputes between the signatories are addressed.

The most well-known of these is Chapter 19 of the North American Free Trade Agreement (‘NAFTA’), which was based on a comparable provision of the US–Canada Free Trade Agreement, under which the NAFTA parties (ie, Canada, Mexico and the United States) established an alternative mechanism, independent of each country’s normal judicial process, for reviewing AD/CVD decisions made by each party’s national administering authority. The Chapter 19 review process is unique because decisions of a NAFTA panel are as enforceable on the administering authority as a decision from a national court of competent jurisdiction. While the panel review process does result in a decision that is free from the appearance of bias, its disadvantage is that it required the parties to create an entirely new appellate review process from whole cloth as well as the integration of decisions from this review into national law. In the *Softwood Lumber from Canada* dispute, all of the difficulties inherent in integrating this novel provision into national law were laid bare, particularly as the United States sought to avoid implementation of several adverse decisions.

A different, perhaps simpler approach is suggested by the Canada–Chile Free Trade Agreement, which uses a streamlined version of the existing WTO dispute settlement process for the review of AD/CVD disputes between the signatories in lieu of creating an entirely

new dispute settlement mechanism. Specifically, Canada and Chile have agreed that where Canada and Chile are the only countries involved in an AD/CVD dispute, they will: (i) enter into consultations within ten days of the receipt of a request for consultations (instead of the 30 days provided for under Article 4.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ('Dispute Settlement Understanding' or 'DSU'));¹⁶ (ii) conclude such consultations within 30 days of receipt (instead of the 60 days provided for under Article 4.7 of the DSU);¹⁷ (iii) waive their right under Article 6.1 of the DSU to object to the establishment of a panel at the first meeting of the Dispute Settlement Body at which the request is examined;¹⁸ and (iv) direct their competent administering authority to take action not inconsistent with the panel report if the panel concludes that the party's AD/CVD measure is inconsistent with WTO provisions, and to refund duties paid.¹⁹ The potential advantage of this approach as opposed to the NAFTA Panel approach is that all WTO parties have already agreed to the basic dispute settlement procedure and have already developed mechanisms to implement DSU Panel decisions. For these reasons, the adoption of a 'stripped-down' WTO DSU proceeding to address AD/CVD disputes might be easier to negotiate and implement than a dispute settlement provision like Chapter 19 of the NAFTA that is unique to that particular agreement.

Safeguard proceedings

The RTAs reviewed contain very few modifications to the global safeguards provisions of Article XIX of the GATT. Only in two RTAs reviewed did the parties state that they would not apply global safeguard to goods originating from the other RTA signatories.²⁰ As with AD/CVD disputes, many RTAs require global safeguards proceedings to be referred to a 'joint committee' for potential resolution before either party is permitted to take action, and one provides for enhanced consultation provision when one of the RTA countries has a 'substantial interest' as an exporter of the product, which is defined to exist when the countries is one of the five largest exporters over a three year period.²¹

The only substantive deviation from GATT norms in the context of global safeguards is that a small number of RTAs raise the threshold for including imports from an RTA signatory in any global safeguards proceeding. For example, several RTAs signed by the United States provide that if imports from a party are not a 'substantial cause' of 'serious injury or threat thereof', they may be excluded from consideration in a global safeguards proceeding.²² Some RTAs – though none with the United States as a party – go even further, and provide that imports from a party shall be excluded unless they constitute a 'substantial share' of total

imports, and 'contribute importantly' to the serious injury.²³ Perhaps because the number of safeguard proceedings is quite low,²⁴ parties may not view modification of the safeguard remedy as a high priority in RTA negotiations.

Conclusions

Particularly in light of the expansive language of Article XXIV, the fact that more RTAs do not eliminate trade remedies, or at least substantially reduce their effect, is disappointing. The most significant departures from GATT norms occur in RTAs between countries that are not either significant users or targets of trade remedy proceedings. For example, two RTA negotiated by the European Free Trade Association ('EFTA') eliminate the AD remedy altogether, but the four EFTA countries, Switzerland, Norway, Iceland and Liechtenstein, have filed a grand total of zero AD cases from 1995 to mid 2007.²⁵ By contrast, the largest users of trade remedies since 1995 – the United States, the EU, and India – have made the fewest compromises in their RTAs. All this suggests that the treatment of trade remedies under RTAs is even worse than it first appears, as the only real advances toward trade liberalisation are being made between countries where such liberalisation is largely meaningless. None of this is particularly surprising. Many domestic industries would urge their government to reject ratification of an RTA that not only lowered tariffs and non-tariff barriers but also reduced or eliminated the effectiveness of the only tools that those industries have to prevent injury from increased or unfairly traded imports.

All of this suggests that trade negotiators must be realistic in their expectations of what may be achievable on the trade remedy issue in RTA negotiations. The recently negotiated Korea–United States Free Trade Agreement illustrates what might be achieved between two parties whose trade is subject to frequent trade remedy actions. In this yet-to-be-approved agreement, the parties created a Committee on Trade Remedies to address trade remedy issues that may arise between the parties,²⁶ and also to provide 'due consideration, and adequate opportunity for consultations', to the possibility for a price undertaking to suspend the AD/CVD investigation.²⁷ While these steps do not substantially change the legal landscape, they represent a meaningful step forward in the trade remedy field, and provide possible approaches for negotiators looking to make progress with major trade remedy users in future negotiations.

Notwithstanding this somewhat disappointing record, the treatment of trade remedies in RTAs may provide some important insights for the Doha Round of WTO negotiations. In November 2007, the Chairman of the Rules Committee, Ambassador Guillermo Valles Galmés, issued a draft text that suggested numerous changes to the AD and SCM agreements. While the

Galmés, issued a draft text that suggested numerous changes to the AD and SCM agreements. While the text was designed to spur further discussion on these difficult issues, it has been poorly received by most WTO parties. Assuming that the Rules negotiations continue to progress, perhaps the negotiators could look to the changes that have been made to trade remedies in the RTA context to find ideas that have gained acceptance among at least some WTO members. For example, concepts like adopting a more streamlined dispute settlement process for AD/CVD cases (as reflected in the Canada–Chile Free Trade Agreement) or imposing a requirement for pre-initiation consultations between governments have already gained currency with at least some WTO members. Particularly given the reaction that the Valles text has received, WTO parties might consider looking to the RTA experience around the world as a basis for finding more widely accepted ideas for future Rules negotiations in the Doha Round.

Notes

- 1 I am grateful to Vincenza Battaglia (Georgetown University Law Center '08) for her research assistance on this paper.
- 2 All RTAs notified to the WTO are listed on the WTO's website www.wto.org/english/tratop_e/region_e/region_e.htm. RTAs that were not available in English or that were not available through an internet source were not included in this review.
- 3 Canada–Chile (Art M-01); China–Hong Kong (Art 7); EFTA–Chile (Art 18.1); EFTA–Singapore (Art 16).

- 4 China–Hong Kong (Art 8).
- 5 EFTA–Korea (Art 2.10.2) (five years after entry into force, parties will review whether antidumping measures remain necessary); Chile–Mexico (Art 20-08(b)) (parties agree to begin negotiations to eliminate antidumping measures within one year after entry into force).
- 6 Egypt–EU (Art 23); EU–Lebanon (Art 24).
- 7 See, eg, Croatia–EFTA (Art 20); Croatia–EU (Art 24); EFTA–Morocco (Art 21).
- 8 See, eg, India–Singapore (Art 2.7.1); Croatia–Macedonia (Art 25.3); EFTA–Korea (Art 2.10.1.a); EFTA–Mexico (Art 13.2).
- 9 Australia–Thailand (Art 206(2)).
- 10 Jordan–Singapore (Art 2.8.1.b); New Zealand–Singapore (Art 9.1.c).
- 11 Jordan–Singapore (Art 2.8.1.a); New Zealand–Singapore (Art 9.1.a).
- 12 Korea–Singapore (Art 6.2.a).
- 13 Jordan–Singapore (Art 2.8.1.g); Korea–Singapore (Art 6.2.b); EFTA–Korea (Art 2.10.1.b); El Salvador–Panama (Art 7.05).
- 14 India–Singapore (Art 2.8.1.d).
- 15 Canada–Costa Rica (Art VII.1).
- 16 Canada–Chile (Art M-07.4(a)).
- 17 Id.
- 18 Canada–Chile (Art M-07.4(b)).
- 19 Canada–Chile (Art M-07.5).
- 20 Australia–Singapore (Title 2, Art 9); New Zealand–Singapore (Art 8).
- 21 Chile–EU (Art 92).
- 22 See, eg, Australia–United States (Art 9.5).
- 23 Israel–Mexico (Art 5-03); Chile–Mexico (Art 6-03); Australia–Singapore (Art F-02.1).
- 24 As of September 2007, only 82 safeguards measures had been imposed since 1995. See www.wto.org/english/news_e/news07_e/safeg_nov07_e.htm.
- 25 See www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.pdf.
- 26 Korea–United States (Art 10.8).
- 27 Korea–United States (Art 10.7.4).

Buying safely from China: China's legal and regulatory development regarding product safety control

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Made-in-China products perhaps have never encountered more challenges than those they faced in 2007. Concerns arose over the safety of pet foods, toys, toothpaste and farmed fish –all from China. Massive recalls of Chinese exports had devastating economic effects, and even compelled some businesses to certify their products as 'China-free'. In response to worldwide criticism, China has taken a series of actions demonstrating its strong commitment to strengthening its product safety control system. Domestically, China has enacted a number of rules and regulations clarifying the standards applied to exports and has implemented a strict reporting and recall system;

internationally, China has cooperated with importing countries, such as the United States, to enhance the transparency of its export industries. This article provides an overview of China's existing product quality control system and the recent augmentation of its product standards, and discusses the US–China agreements that purport to further promote the safety of Chinese exports. In addition, this article notes contract-drafting techniques that are essential to minimise the risks associated with importing Chinese products.