

Economic Partnership and Free Trade Agreements in East Asia

- Japan's Experiment in the Framework of the WTO -

The Evolving WTO Regime and Regional Economic Cooperation:
Implications for Northeast Asia

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I. Development of economic partnership agreements in East Asia

1. Recent movements toward proliferation of FTA arrangements

About 90% of the Members of the WTO are participants of FTA (customs union and free trade areas). In the year 2000, the four FTAs (the EU, the NAFTA, the MERCOSUR and the ASEAN) occupied 64.5.4% of the total export trade and 69.5% of the total import trade of the world.¹ This fact presents a challenge to the WTO and the multilateral trading system. Proliferation of bilateral and regional agreements may cause erosion of the disciplines of the WTO and thereby the effectiveness of the multilateral trading system may be weakened. But given the fact that there are more than 130 of such agreements and such agreements include important entities such as the European Union, the NAFTA, and the MERCOSUR, it is obvious that the WTO has to live and co-exist with them. The core issue is how to recognize the existence of FTA arrangements and yet to exert some discipline on them so that they would not undermine the WTO system.

Although there is a risk that an excessive spread of FTAs may undermine the basis for multilateral trading system, there are advantages of FTAs.

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¹ 2002 Report on the WTO Consistency of Trade Policies by Major Trading Partners (Industrial Structure Council, METI, Japan 2002), p. 488

Compared with multilateral trade negotiations, a bilateral and regional trade negotiation for the conclusion of FTAs is generally easier. If a FTA is successful, the trade in the areas covered by the FTA is liberalized and this liberalization promotes economic development of the region. Economic prosperity achieved by the FTA provides a greater opportunity for enterprises outside the region to trade with the region and invest in it. An important task for the WTO and FTAs is to maximize the benefit of FTAs while minimizing the negative effects of them.

2. Recent developments toward FTA in Japan and East Asia

Until quite recently, there was little movement toward FTA in East Asia as compared with the rest of the world. Of course, the APEC (the Asia Pacific Economic Cooperation) has been active in the past decade. However, the APEC is not a FTA in the strict sense of the term. Among the industrialized countries, Korea and Japan were perhaps the only countries which did not enter into FTA agreements. The position of Japan was to emphasize multilateralism as incorporated in the WTO and to avoid entering into bilateral or regional agreements with other trading nations.

However, there was a shift of this policy in Japan after the failure of the WTO Ministerial Conference in Seattle. There was disillusionment in Japan of the effectiveness of the WTO regime after Seattle. Also the trend of increasing FTAs in the world was accelerated including the idea of forming the FTAA (Free Trade Area of Americas) and an expansion of the EU into East Europe. In East Asia, the emergence of China as a trade power caused some uneasiness among trade and government circles. Japan began to explore possibilities of entering into FTA agreements with some countries. A pilot project was the EPA/FTA agreement between Singapore and Japan.

Japan entered into a FTA with Singapore in early 2002 and, with regard to a Korea/Japan FTA, the Korea/Japan FTA Forum was formed and this Forum was composed of business persons both from Korea and Japan. After about one year study of the subject, the Forum adopted a resolution on 25 January

2002.² It presented a recommendation to the government of Korea and the government of Japan to explore the possibility of entering into a FTA/EPA agreement. Also there are some interests among business and government circles in Japan with regard to FTA arrangements with some countries as Mexico, Chile and Canada. Some suggest that there should even be a FTA arrangement among ASEAN countries plus 3 (China, Korea and Japan).

As mentioned above, one of the driving forces behind the move toward FTAs between Japan and Korea is a concern that China will emerge as a big entity in East Asia and acquire hegemony in trade policy in the region and in the WTO. There are sentiments among business persons in Korea and Japan that they need to cooperate in trade policy matters, pull their economic resources and create an alliance to offset the omnipotence of China in East Asia. At this time, it is too early to predict the exact content of a FTA/EPA agreement between Korea and Japan. However, due to the changes in economic and political circumstances in East Asia and the world trading system, it is possible that there will be some form of agreement between the two countries. A likely scenario is a creation of EPA/FTA agreement between the two governments based on the EPA/FTA Agreement between Singapore and Japan.

3. EPA/FTA Agreement between Singapore and Japan

The recently concluded trade agreement between Singapore and Japan is characterized as an economic partnership agreement (EPA) and this EPA concept will be used in negotiating trade agreements between Japan and other countries in future. EPA is a wider concept than a FTA.³ Whereas a traditional FTA emphasizes reduction of tariffs and trade barriers, EPA emphasizes not only reduction of the tariff and quantitative restriction of trade but also promotion of investment, trade in services

² "Nikkan Business Forum Hokokusho" (Report of the Korea/Japan Business Forum, February 2002) This report is written both in Korean and Japanese languages and, to the knowledge of the writer, there is no English translation.

³ For an outline of this Agreement, see note (1), *supra*, p. 491 *et seq.* Also for detailed analysis of this Agreement, see Rajan, Sen & Siregar, Singapore and Free Trade Agreements: Economic Relations with Japan and the United States, Institute of Southeast Asian Studies, 2001.

and other forms of economic and non-economic activities.

The Trade Agreement between Japan and Singapore signed in January 2002 covers areas as above described and provides, *inter alia*, for tariff elimination, establishment of the rule of origin, simplification and effectuation of customs procedures, mutual recognition of standards and certificates, promotion of trade in services, establishment of rules regarding investment, recognition of the importance of free across-the-border movements of experts and skilled workers, cooperation in competition policy, provisions on antidumping, safeguard and intellectual properties, financial services, information technology and communication, cooperation in life science and technology relating to environment and establishment of a "sister street relationship" between the Ginza Street in Tokyo and the Orchard Street in Singapore.

This EPA agreement is a framework agreement within which FTA measures are subsumed. The relationship of FTA to EPA is like that of a smaller circle within a larger and concentric circle. The core of EPA is mandatory FTA and FDI measures such as elimination of tariffs and other trade barriers and the establishment of the MFN and national treatment in investment. Around this core, there are a variety of provisions covering wide areas as above described. Those provisions create circumstances in which the overall close economic relationship among the participants is promoted. FTA portion and EPA portion complement each other to achieve a greater market integration among the participants. FTA portions may be binding but non-FTA portions may be voluntary. If trade liberalization envisaged in FTA cannot be accomplished immediately (under the WTO rule, it should be completed within ten years), still other provisions may be put into effect immediately after signing an EPA agreement. An EPA also provides stages for negotiating and deepening FTA measures among the participants.

4. Proposals for Korea/Japan EPA/FTA agreement

Recently there have been proposals for concluding an EPA/FTA agreement between Korea and Japan. The relationship between Korea and Japan is economically quite close. In 2001, Japan's export to Korea amounted

to \$ 25.2 billion and Japan's import from Korea was equal to \$ 17.2 billion. Korea is the third largest trading partner of Japan next only to the United States and China.⁴ But it is a difficult relationship because of the past history and, as indicated above, a large trade imbalance between Korea and Japan in favor of Japan. For this reason, it is reported that some industries in Korea are uneasy about the possibility of increasing import from Japan of machineries and parts and components. Also interest groups in Japan in agriculture are quite nervous about imports from Korea of agricultural and marine products.⁵ The proportion of agricultural products in the Korea/Japan⁶ trade is about 4.6 % but, considering only the proportion of agricultural products from Korea to Japan in the total imports from Korea to Japan, its figure is about 10 %.⁷ It is reported that the agriculture issue may be an "Achilles heel" in the Korea/Japan negotiation.⁸ Nevertheless there have been proposals recently that an EPA/FTA agreement should be seriously considered by both governments.

There are a variety of reasons for this new thinking. As stated earlier, the emergence of China as a trading giant overshadows the entire East Asia and both Korean and Japanese governments are concerned that their economies may be overwhelmed. Also the relationship between Korea and Japan has been improved as shown by such event as the joint sponsoring of the World Cup of soccer game. The failure of the WTO Ministerial Conference in Seattle and disillusionment caused by this failure may have contributed to this new trend. If the economies of Korea and Japan were put into a closer cooperative relationship, there would be something akin to a common market with the population of about 1.8 hundred million and the total GDP of about \$ 5 trillion. It is expected that a closer cooperative relationship between the two economies will generate a larger scale of economy, a more effective use of resources, an increase of trade

⁴ International Trade Reporter, Vol. 19, No. 28, Thursday, 11 July 2002, p. 1225

⁵ It is reported that the Japanese Ministry of Agriculture wants to exclude Korean fishery products from tariff elimination to protect domestic fishermen if a FTA agreement is signed between the two countries. See note (4), *supra*..

⁶ Asahi Shinbun (Asahi Newspaper), 3 July 2002, p. 7, col. 1

⁷ Id..

⁸ Id.

and thereby a more competitiveness of both economies.

A bilateral agreement between Korea and Japan on direct investment was recently signed and will take effect soon. If an EPA/FTA agreement is entered into between Korea and Japan, this bilateral investment agreement will be an important part of the EPA/FTA arrangement. Therefore, an examination of this bilateral investment agreement between Korea and Japan follows.

The bilateral investment agreement between Korea and Japan contains the following items: (a) the most-favored nation treatment and the national treatment with regard to direct investment, the guarantee of repatriating capital and profit and due compensation for nationalization, (b) the freedom of foreign direct investment except for the enumerated areas (gas, electricity, telecommunication, aviation, defense industry, cabotage and a few other areas), (c) the prohibition of imposing the requirements of using national facility and services, linking the sale in the domestic market with export performance and acquisition of foreign currency and compulsory transfer of technology and knowledge, (d) the guarantee for the entry and stay of persons engaged in investment activities, (e) the creation of dispute settlement procedures relating to investment, (f) the declaration in Preamble that harmonious labor relationships will contribute to the promotion of investments, (g) the provision for a temporary safeguard whereby the government restricts transfer of money in order to deal with emergency in the financial markets, and (h) the exclusion from the application of this agreement of measures related to stabilization of domestic financial market.

What is remarkable with regard to this agreement is that it provides for not only disciplines imposed on the governments concerning FDIs but also some promotional measures such as the creation of the Korea/Japan Investment Development Bank. Another is the Human Exchange Program (HEP) whereby both governments undertake to promote a program for employing nationals of one party by enterprises of another party in some areas (such as the IT area). In a future Korea/Japan EPA/FTA agreement, this FDI agreement together with the reduction (or elimination) of tariffs

and other trade restrictions will constitute the core parts of the EPA/ETA agreement supplemented by other provisions for EPA cooperative measures.

In the year 2000, an agreement was reached between the President of Korean Republic, Kim Dae Jung, and the then Prime Minister of Japan, Yoshiro Mori, to establish a group called the Korea/Japan FTA Business Forum to study feasibility of concluding an EPA/FTA agreement between the two countries. The Forum was established in 2001 and business persons and academics participated in this program. In February 2002, the Forum submitted a report⁹ to both governments and recommended that both governments initiate study and negotiate an agreement between them.

On 25 January 2002, the Forum announced a joint statement requesting both the Korean and the Japanese governments to consider a negotiation on a Korea/Japan EPA/FTA agreement. The essence of the recommendation is as follows.

- Korea and Japan should cooperate each other as the partners in order to lead stable development of the economy and industries of the East Asia. For this purpose, it is necessary to construct a closer relationship between the industries and economies of both countries. A Korea/Japan FTA is an effective means of achieving this goal and should be materialized soon.
- A FTA agreement between the two countries should be a comprehensive economic partnership agreement which incorporates reduction of tariffs and harmonization of institutions relating to business activities. Through this agreement, the promotion of competitiveness of industries in both countries and structural adjustment of their economies will be achieved.
- There are sectors in both countries which will be seriously affected by the implementation of a FTA agreement between the two countries. It is necessary to consider the proper treatment of such sectors and to take appropriate measures to deal with them. However, if the scope of FTA agreement were limited to a confined area because of a short run viewpoint, there would be a risk that a vitalization of economies

as the goal of FTA is not accomplished. Therefore, there should be a balance between the macroeconomic advantages of FTA and particular interests of sectors on the basis of an overall perspective.

- Both Korea and Japan should play the role of important partners as the developed countries in East Asia which will lead the development of the economy of East Asia as the whole. While the immediate goal is to conclude a FTA between Korea and Japan, the consolidation of industrial activities in China and the ASEAN and the stabilization of the economic basis in this area should be considered and, in the long run, an economic integration with this area should be in view.
- The Forum expects that both governments will exert efforts to initiate negotiation to conclude a FTA between Korea and Japan soon.

Beside the above proposals, the Report of the Forum contains a list of items that members on the side of Japan considered to be important. In addition to reduction of tariffs and quantitative restrictions, the following items are mentioned. (Issues of investment are excluded because investment issues are covered by the Korea/Japan Investment Agreement).

- Competition policy: Anti-competitive practices of private enterprises are one of the important impediments of trade between the two countries. It is necessary to strengthen antimonopoly legislation to cope with this problem.
- Government procurement: Joint development of technology in regard to the promotion of electronic disposition of customs procedures.
- Movement of personnel: Improvement of visa requirements and simplification of immigration control
- Services: Widening of liberalization with respect to trade in services including transportation, tourism, distribution, financial services, telecommunication and electronic commerce.
- R & D: The promotion of joint R & D.
- Medical and social welfare services: Cooperation in technological development in medical sciences and in social

⁹ See note (2), *supra*.

welfare

- Standards: Harmonization and mutual recognition of standards
- Intellectual properties: Assistance in strengthening intellectual properties and harmonization of patent and trademark application
- Medium and small business: Interaction and cooperation among medium and small enterprises of both countries, promotion of investment in both countries and improvement of market access of each country
- Venture business: Cooperation in promoting venture business
- Education: Mutual recognition of credits between universities and colleges of both countries and harmonization of professional qualifications
- Broadcasting: Joint production of TV programs and joint use of satellites
- Environment: Mutual assistance and transfer of technology relating to environmental protection
- Dispute settlement: Establishment and promotion of dispute settlement process among enterprises and between the governments

Not all of the above items can be incorporated in a Korea/Japan EPA/FTA agreement. However, one can see that there are voices in the business circles both in Korea and Japan that an EPA/FTA agreement between the two countries should encompass not only purely trade matters such as tariffs and quantitative restrictions but also non-trade issues which have some bearings on the economic relationship between the two countries.

At the time of writing this article, it is reported that talks between Korea and Japan begun in July 2002 to explore a bilateral FTA between the two countries. This undertaking was decided by an agreement between President Kim Dae Jung of Korea and Premier Junichiro Koizumi of Japan.¹⁰ A joint study program of both Korean and Japanese experts is about to be initiated with the view to explore the possibility of concluding a FTA agreement between

Korea and Japan. It is expected that the study group will examine the matter for two years and will issue reports regarding whether or not a FTA agreement between Korea and Japan is possible and, if so, what is the appropriate form. If there is a FTA agreement, it is likely that it will take the form of EPA/FTA agreement in which not only provisions for tariff reduction and easing of quantitative restrictions and for investment but also some provisions for a wider cooperative relationship in trade and non-trade issues will be included.

II. Legal analysis of EPA and FTA in the framework of the WTO

5. Key provisions of Article XXIV of the GATT regarding FTA

Legal analysis of EPA and FTA in the framework of the WTO is essential for the success of EPA/FTA. Both Korea and Japan are Members of the WTO and an EPA/FTA agreement which is agreed upon such an agreement should be consistent with the requirements of the WTO, especially those in Article XXIV of the GATT 1994. Moreover, the Japanese government has repeatedly stated that FTAs that Japan may enter into are supplementary to the WTO.

As mentioned above, EPA is a wider concept than FTA. Some provisions of EPA do not raise any problem with the WTO since they are only non-binding arrangements and provide no discriminatory measures for the benefit of the participants in exclusion of others. Some provisions are related to trade in services and these must comply with GATS requirements. Others provide for investment measures. Still others provide for cooperation on technological developments. These are generally outside the scope of the WTO.

However, the essential element of FTA is the preferential treatment for the participants in terms of tariff reduction and elimination of other trade and investment restrictions. Inevitably some forms of exclusivity is a feature of FTAs. WTO disciplines are imposed on the

¹⁰ See note (4), *supra*.

formation of FTAs so that they would not be excessively restrictive.

The key substantive provisions of the GATT 1994 are Article XXIV:4, Article XXIV:5 (a) , (b) and (c), Article XXIV:6, and Article XXIV:(a) (i)(ii) and (b)

Article XXIV:4 lays out the general principles by providing that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

Article XXIV:5 sets out the conditions under which FTAs can be formed. Article XXIV:5 (a) provides that a customs union can be formed if the duties or other regulations imposed at the institution of such union with regard to commerce with outside parties shall not on the whole be higher or more restrictive than those applicable prior to the formation of such union. Article XXIV:5 (b) provides the same conditions with regard to a free trade agreement.

Article XXIV:6 states that, if a Member increases tariffs above the concession rate as a result of forming a customs union, it negotiate with other Members outside the union under Article XXVIII of the GATT 1994.

Article XXIV:8 defines customs unions and free trade areas. Article XXIV:8 (a)(i) states that a customs union is an entity in which duties and restrictions of commerce are eliminated with respect to substantially all the trade between the members of the union except those restrictions permitted under Articles XI, XII, XIII, XIV, XV and XX. Article XXIV:8 (ii) states that a customs union establishes common tariffs and other restrictions of commerce with respect to commerce with Members that are outside parties to the union. Article XXIV:8 (b) provides the same requirements with respect to a free trade area except for the fact that there is no requirement equivalent to (ii) which applies to a customs union.

In the past, there were many instances in which working parties were established to examine compatibility of FTA with GATT/WTO disciplines under Article XXIV of the GATT. However, in almost all of such working parties, there was a sharp difference of views regarding compatibility of a FTA with GATT/WTO rules and, in the reports of those working parties, usually there are two opposing views listed side by side. One advocates that a FTA is compatible with GATT/WTO rules and other criticizes the FTA as not compatible with GATT/WTO rules.¹¹ The issue of how to interpret Article XXIV in relation to FTAs was raised first when EEC Treaty was negotiated in 1957. Since that time until 1994, 69 working parties were established to examine compatibility of FTAs under GATT rules but, in only 6 out of 69 working parties, a consensus was reached.¹² The reason for this poor performance is conflicting interests among Members. Those which formed a FTA advocate their interests in maintaining it and those outside the FTA criticize it. In part, the difficulty is the vagueness of the text of Article XXIV such as "substantially all", "other trade restrictions" and "on the whole". Only 3 panels were established to examine the legality of FTAs in light of Article XXIV but, in all of them, the panel reports remain unadopted.¹³

6. Understanding on the Interpretation of Article XXIV of GATT 1994

Attempts were made to clarify meanings of Article XXIV of the GATT 1994 in the Uruguay Round. As the result, a limited number of issues were clarified.

(a) (i) The level of tariffs should be calculated by using weighted average rates.

(ii) The period for the completion of FTA is in principle 10 years.

(iii) When a member of a customs union raises tariff above the concession rate as

a result of joining the customs union, that member negotiates with outside WTO Members in accordance with XXVIII of the GATT

¹¹ See note (1), *supra.*, p. 495.

¹² *Id.*

¹³ *Id.*

1994.

(vi) An outside Member which enjoys the reduction of tariffs due to the joining of

a member in a customs union is under no obligation to offer compensation.

(v) omitted

(b) Article 4.3 of Antidumping Agreement

When the degree of integration of a customs union has reached the level as provided for in Article XXIV:8 (a), the totality of an industry in the region covered by the customs union is deemed to be a domestic industry.

(c) The principle of (b) applies to CVD.

(d) Article XXI:1, footnote

No provision in Article XXIV of the GATT 1994 prejudices interpretation of the relationship between Article XIX of GATT and Article XXIV:8 of the GATT 1994.

(e) Omitted

7. The relationship between Article XXIV:4 and Article XXIV:5-9

Article XXIV:4 announces general principles and Article XXIV:5-9 provide for specific requirements. A question is what is the relationship between Article XXIV:4 and Article XXIV:5-9. In particular, a question is whether the requirement of Article XXIV:4 is satisfied as long as the requirements provided for in Article XXIV:5-9 are fulfilled. If the answer is yes, then all that is required is to fulfill the requirements of Article XXIV:5-9 and Article XXIV:4 does not give an independent cause of action. If the answer is no, there is a cause of action under Article XXIV:4 even if all of the requirements in Article XXIV:5-9 are satisfied.

The EU has maintained that, as long as the requirements provided for in Article XXIV:5-9 are satisfied, automatically the requirement of Article XXIV:4 is satisfied and, therefore, Article XXIV:4 does not give any independent cause of action. In particular, the EU has maintained that, although a new restriction is created by the formation of a customs union in respect to each independent measure, there is no increase of trade barriers in relation to outside countries as prohibited in Article XXIV:4 as long as there is no increase of the level of protection as provided for in Article XXIV:5 (a).

Others, however, maintained that, if a particular new trade measure is applied as a result of the formation of a customs union, that new measure constitutes an increase of trade barriers prohibited by Article XXIV:4 and, therefore, this is an independent cause of action under Article XXIV:4 regardless of whether the requirements of Article XXIV:5-9 are satisfied. The gap between those two positions has not been narrowed and this remains to be one of the issues of interpretation of Article XXIV. It is to be noted, however, that the term "should" is used in Article XXIV:4 and this may be an indication of the fact that Article XXIV:4 provides for general principles of interpretation and is hortatory in nature.

8. The meaning of "substantially all" - the interpretation of Article XXIV:8 of GATT 1994

Article XXIV:8 states that "substantially all of trade" must be liberalized if a customs union or a free trade area is qualified to meet the requirements for exemption under Article XXIV. A question is what is "substantially all", i.e., whether it is a quantitative requirement or a quantitative and qualitative requirement. If it is merely a quantitative requirement, there is room to interpret this to mean that "substantially all" is satisfied even if, for example, agricultural sector of a customs union or a free trade area is not liberalized as long as the trade of the customs union or the free trade area is quantitatively liberalized on the whole. If it is a quantitative and qualitative requirement, the mere fact that the trade of a member country

is liberalized as the whole is not sufficient for the customs union or free trade area to be qualified to be exempted under Article XXIV if a particular sector (for example, agriculture) is not liberalized.

The Japanese government has taken the position that, at the minimum, tariff should be eliminated with regard to 90% of trade within the area and no specific sector should be exempted from the liberalization. In the agreement between Japan and Singapore, it is provided that tariff is eliminated with regard to 98% of trade between the two countries. There is no block exemption from this liberalization of any sector, not even agricultural and marine products. It is to be noted, however, that there is little exports of agricultural and marine products from Singapore to Japan and, in this sense, this is not a real issue between the two countries.

9. The trade remedies - the relationship between Article XXIV of the GATT 1994 and other WTO agreements

Whether or not trade remedies can be applied within a FTA is an important question. It is not only important as the matter of legal interpretation of Article XXIV of the GATT 1994 but also as the matter of internal politics when negotiating a FTA agreement. In many countries, there are sensitive sectors of the economy in which interest groups react strongly to any proposal to conclude a FTA as exemplified by agricultural groups in Japan. Whenever a proposal was made to negotiate a FTA agreement or any international agreement in which a plan for liberalization of trade in agriculture was involved, it was met with a strong opposition of interest groups in agriculture in Japan. This proves that whenever a negotiation for FTA is initiated, the negotiators should be able to present some proposals to domestic interest groups that there would be some remedies to injury that may be caused to the economic sector. As discussed already, Article XXIV of the GATT 1994 requires an extensive liberalization of trade inside the FTA.

The question here is whether trade remedy measures such as antidumping and countervailing duties and safeguard measures are a solution to the

above issue. The question here is whether or not interest groups in both countries which would be adversely affected by a FTA agreement are comforted by the possibility of using trade remedy measures when they are confronted with difficulties. This is primarily the issue of examining whether or not Article XXIV of the GATT 1994 allows an interpretation that trade remedies such as antidumping and countervailing duties and safeguard can be applied to imports coming from other partners of the FTA. However, reports of panels and the Appellate Body on this issue are not decisive.

Let us first look at Article XXIV and see how this provision can be interpreted. Article XXIV:8 of the GATT 1994 states that tariffs and trade restrictions must be liberalized but measures under Articles XI, XII, XIII, XIV, XV and XX are exempted from the obligation to liberalize and can be maintained. It is to be noted that Article XIX of the GATT 1994 and antidumping and countervailing duty measures are not mentioned here. Therefore, a *contrario* interpretation may be that the obligation to liberalize applies to the trade remedy measures and there is obligation under Article XXIV:8 of the GATT for a member of a customs union or a free trade area to refrain from applying a safeguard or antidumping and countervailing duty measures. In this interpretation, a member of a customs union or a free trade area which is also a Member of WTO can and should apply safeguard or antidumping and countervailing duty measure to imports coming from other WTO members which are not members of the customs union or a free trade area while not applying the same measures to members of the customs union or a free trade area.

On the other hand, there is a counter-argument that the trade remedy measures such as safeguard and antidumping and countervailing duty measures apply even within the FTA area. The rationale for this interpretation is that the premise of trade remedy measures is that trade is already liberalized. If trade is still not liberalized, there is no need for trade remedy measures. Trade remedy measures apply once trade is open. In this view, trade remedy measures apply within the FTA area since the essence of a FTA is to liberalize trade. In this interpretation, it is a mistake to overemphasize the wording of Article

XXIV:8 and deny the possibility of applying trade remedy measures within the FTA area.

However, if the economic integration within a customs union has progressed to the extent that industries of the participants have become a "community industry" (such as in the EU), there is no domestic industry in a participating country which needs to be protected from imports, dumping and subsidization of another participating country.

The question of what types of trade remedy measures should be instituted was debated when the negotiation took place between Singapore and Japan with a view to concluding an EPA/FTA agreement. With regard to antidumping and countervailing duty measures, four views were presented with regard to this issue. One is that there should be no trade remedy measure to be applied between the two countries. The second is that there should be no trade remedy measure provided that a sufficient degree of harmonization of competition laws is achieved. This view advocates that trade remedy rules be supplanted by the law of predatory pricing.

The third is that there should be stricter disciplines on trade remedy measures between the two countries with regard to antidumping and countervailing duties than the WTO disciplines require such as a higher *de minimus* rule. The fourth is that antidumping and countervailing duty measures can be applied between the two countries on the basis of WTO disciplines.

The negotiators decided to adopt the fourth approach and incorporated the rule that antidumping and countervailing duty measures apply in accordance with WTO rules. Other approaches would be effective only if there were a closer economic integration between the participating countries as exemplified by the European Union and the Closer Economic Relations Agreement between Australia and New Zealand. In respect of safeguard, the negotiators decided to include a provision for regular safeguard under the requirements of Article XIX of the GATT 1994 and the Safeguard Agreement.

A bilateral safeguard was incorporated in the EPA Agreement between Singapore and Japan. Under this provision, both governments are allowed to raise tariffs to the maximum of the WTO concession rates if a domestic industry is seriously injured due to an increase of imports caused by the elimination of tariffs. However, this measure is a temporary measure and will expire after ten years.

10. Automatic extension of trade remedies

Another problem is whether a customs union or a FTA is allowed automatically to extend the coverage of an outstanding safeguard or antidumping/countervailing measure with regard to a new entrant enters into the customs union or the FTA. For example, suppose the EU has applied an antidumping measure to products from Japan and when a new member joins the EU, the question arises as to whether the EU can extend the protection of this antidumping measure to this new member and impose antidumping duty on product imported to the territory of this Member from Japan. If this were allowed, would this not mean that an antidumping duty is imposed on product from Japan imported into the territory of this new member without investigation?

When three new members joined the EU and became a 15 member entity, the EU automatically applied the antidumping measure to products from Japan imported into the territories of those three new members. Japan objected and a negotiation was held between EU and Japan in which a compromise was reached that EU would conduct a review of the totality of that antidumping measure at request. The position of Japan is that this automatic expansion of the antidumping measure is contrary to the requirement of Antidumping Agreement which requires a Member applying antidumping measures to conduct investigation before imposing a measure.¹⁴

In the Turkish Textiles and Clothing Case¹⁵, the issue was whether Turkey was justified in imposing a quantitative restriction on the import

¹⁴ See note (1), *supra.*, pp. 95-96

¹⁵ Turkey-Restrictions on imports of Textiles and Clothing Products, WT/DS34/AB/R, 22 October 1999

of textile products coming from the third countries when Turkey entered into a customs union agreement between the EU and Turkey to effectuate the quantitative restriction on textile products which the EU had been applying before the conclusion of this agreement. The Panel and the Appellate Body held that this imposition was contrary to Articles XI and XIII of GATT 1994 and Article 2 of ATC.

11. Parallelism in safeguard measures

In the past few years, several important decisions were rendered by the Appellate Body in which the issue was whether a WTO Member who is also a member of a FTA can exclude from the application of a safeguard measure imports of the product in question coming from countries that are members of the FTA. Important cases include the Argentina Footwear Case¹⁶, the United States-Wheat Gluten Case¹⁷ and the United States Lamb Case¹⁸. In the Argentina Footwear Case, Argentina took into account the import of footwear from MERCOSUR when determining injury to a domestic industry but excluded the application of a safeguard measure to the import from the members of MERCOSUR. The EU challenged this practice at the WTO and both the Panel and the Appellate Body ruled that the selective application of safeguard measure by Argentina was contrary to Article 1 and cannot be exempted under Article XXIV:8 (a)(i) of the GATT 1994.

In all of those cases, the Appellate Body announced that there should be a parallelism between the scope of investigation for a safeguard measure conducted by a Member and the scope of safeguard which is applied as the result of it. Suppose Country A investigates whether imports of Product X coming from Countries B, C, D, E and F cause a serious injury to a domestic industry in Country A and further that Countries A, B and C are the members of a FTA. The question here is: Can Country A exclude from the application of a safeguard measure imports of Product X coming

¹⁶ Argentina-Safeguard Measures on Imports of Footwear, WT/DS121, 14 December 1999.

¹⁷ United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R/22 December 2000

¹⁸ United States-Safeguard Measures on imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R; WT/DS178/AB/R, 1 May 2001

from Countries B and C for the reason that they are members of the FTA while applying the safeguard measure on imports of Product X coming from Countries D,E and F which are outside the FTA?

The ruling of the Appellate Body in the above cases is that a WTO Member cannot exclude from the imposition of a safeguard measure on imports coming from WTO Members that are members of a FTA while applying the safeguard measure on imports of the same or like product coming from other WTO Members that are not members of the FTA as long as the safeguard investigation was conducted with regard to imports of the product coming from all of the countries unless there is a persuasive evidence that the imports coming from the Members that are also members of the FTA did not cause an injury to the domestic industry.

12. Article XXIV as a defense to the alleged discriminatory nature of a safeguard

However, the parallelism as enunciated by the Appellate Body does not resolve the question of whether or not Article XXIV can be raised as a defense by a Member when challenged for discriminatory treatment in favor of Members that are insider of a FTA with regard to safeguard. This issue was raised in the United States-Line Pipe from Korea Case¹⁹ in which Korea challenged the imposition of a safeguard measure on imports of line pipe from Korea. The Panel held that Article XXIV could be invoked as a defense to claims of violation of provisions in the GATT 1994 and Korea appealed this finding. The Appellate Body dismissed the Korean appeal on the ground that the question of whether Article XXIV serves as an exception to the requirement of non-discrimination under the GATT arises only in two situations, i.e. (a) that the administering authority did not consider imports coming from countries that are members of a FTA in determining injury issues and (b) that the administering authority determines that

¹⁹ United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, 15 February 2002

imports coming from Members outside the FTA alone are sufficient to cause a serious injury to a domestic industry. The Appellate Body reasoned that, since neither of such situations existed in this case and, therefore, this issue was legally moot.

Article 17:12 of the DSU requires that the Appellate Body address every legal issue raised in an appeal and, in light of this provision, the appropriateness of dismissing on the part of the Appellate Body this appeal by Korea is questionable. This issue, however, is likely to come up again in connection with safeguard cases.

13. "Substantially all" and trade remedies

A legal aspect of Article XXIV in relation to trade remedies is a question of whether trade remedies are allowed if, after applying trade remedies, substantially all of the internal trade of a FTA is liberalized. Since the language of Article XXIV requires the liberalization with respect to "substantially all" of the internal trade but not "all" of the internal trade of the FTA, there is a room for restrictions to exist even within a FTA. Does it mean that trade remedy measures applied within a FTA are allowed as long as they remain within this limit. The liberal reading of the text seems to allow this interpretation and this approach has been suggested by the Appellate Body in the Argentina Footwear Case.²⁰ If this interpretation is established, this may undermine the legitimacy of an argument that Members of the WTO which are also members of a FTA can claim exemption from the MFN obligations since Members of the WTO can apply trade remedy measures as long as substantially all of the internal trade of a FTA is liberalized.

It is to be noted, at the same time, that a trade remedy measure that a WTO Member which is a member of a FTA may apply has such a great impact that substantially all of the internal trade of a FTA is not liberalized any more. If this happens, there is no justification of trade remedy measures applied internally within a FTA for this reason. A determination as to whether a particular trade remedy measure would restrict the trade

within a FTA to the extent that substantially all of the internal trade within the FTA is not liberalized any more should necessarily be made on a case-by-case basis.

Conclusion

Proliferation of EPA/FTAs is a fact of life and there are reasons for the tendency of increasing FTAs in the world economy. One of such reasons is the fact that the multilateral agreements at the WTO is becoming increasingly difficult due to an increase of the number of the Members, especially developing country Members. However, in spite of risks involved in the proliferation of FTAs, there is a way in which the multilateral trading system as represented in the WTO and FTAs can co-exist and complement each other. For this purpose, it is important that negotiators in the Doha Round take up issues of the relationship between WTO disciplines and FTAs and come up with clearer rules as regards this relationship.

²⁰ See note (16), *supra*.