

COMMUNICATION FROM JAPAN

Other Regulations of Commerce

1. The intention of this paper is to contribute to the systemic debate in the Committee on Regional Trade Agreements regarding "other regulations of commerce" in Article XXIV:5 of the GATT and "other restrictive regulations of commerce" in Article XXIV:8 of the GATT.

I. INTRODUCTION

(a) Regional Trade Agreements and the Multilateral Trading System

2. The task of the WTO is to maintain and enhance the multilateral trading system, and one of the basic principles of the WTO Agreements is to ensure the MFN principles and non-discriminatory treatment. The formation of customs unions and free-trade areas is permitted under Article XXIV because they could contribute to the expansion of world trade.

3. In the Singapore Ministerial Declaration, Ministers reaffirmed the primacy of the MTS and renewed commitments to ensure that regional trade agreements (RTAs) are complementary to the multilateral trading system (MTS) and consistent with its rules. RTAs derogate inherently from the MFN principle of the GATT and can bring discriminatory treatment to third countries. RTAs, therefore, may run the risk of weakening the open multilateral trading system. In this context, in accordance with Article XXIV of the GATT, it is necessary to avoid negative effects of RTAs upon third countries. This point was reaffirmed by the preamble of the Understanding on the Interpretation of Article XXIV of the GATT 1994 (the Understanding) – i.e. "Reaffirming that the purpose of such agreements should be to facilitate trade ... and not to raise barriers ... and that ... the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members").

(b) Article XXIV of the GATT and Other Provisions of WTO Agreements

4. RTAs are governed by Article XXIV of the GATT, but the parties to RTAs, as Members of WTO, should also abide by the MFN principle and other provisions of WTO Agreements. Article XXIV must be interpreted in a way consistent with other provisions, in the context of WTO Agreements as a whole, and with due consideration given to their overall spirit and basic principles.

II. "OTHER REGULATIONS OF COMMERCE" IN ARTICLE XXIV:5

5. According to Article XXIV:5 of the GATT, "other regulations of commerce" in a customs union or in a free-trade area shall not be higher or more restrictive than the general incidence prior to the formation of that RTA. The Understanding provides that "for the purpose of the overall assessment of the incidence of other regulations of commerce ..., the examination of individual measures, regulations, products covered and trade flows affected may be required."

6. There are cases, however, where third countries might be adversely affected and face disadvantages due to other regulations of commerce applied in regional arrangements in a manner

which is not consistent with Article XXIV:5. For example, there might be a case where an RTA sets regional rules of origin that require higher standards for local (regional) content than those effective before its formation, thereby making them substantially more restrictive to third countries. There might also be RTA enlargement cases where safeguard measures and anti-dumping measures that have already been taken by an RTA against imports to the existing RTA members from third parties are automatically taken against imports to new members to the RTA as well.

7. Those measures would not be permissible under Article XXIV:5, which requires that regulations of commerce in RTAs shall not be higher or more restrictive than those prior to the agreements' formation. Indeed they would raise trade barriers to third countries and would not have a basis for justification in the Agreement on Rules of Origin, the Agreement on Safeguards, and the Agreement on Implementation of Article VI of the GATT 1994. In addition, we should be cautious about the view that a customs union may be allowed to raise barriers to trade with third countries in specific areas through regulations of commerce other than customs duties as long as they are "on the whole" no more restrictive than the prior level.

III. ARTICLE XXIV:8(a)(i) AND (b): INTERPRETATION OF THE EXCEPTIONS

8. There is a divergence of views on whether the Articles listed in the parentheses in Article XXIV:8(a)(i) (Articles XI, XII, XIII, XIV, XV and XX of the GATT) are an exhaustive list of exceptions to the requirement that restrictive regulations of commerce be eliminated. It would be difficult to interpret that the exceptions are limited only to those permitted under those Articles listed in the parentheses. Such interpretation would require members of RTAs to eliminate, for example, regulations permitted under Article XXI of the GATT (the exception for national security) against other Members of the RTA, even if the regulations were essential for the national security of that Member. This interpretation would be very unrealistic. Therefore, we should examine whether there are exceptions other than those listed in the parentheses of Article XXIV:8 in light of the intents of other WTO provisions. In so doing, it is necessary to keep in mind the guiding principle that adverse effects on third countries must be avoided to the highest possible extent.

(a) Article XXIV:8: Safeguards and Anti-dumping

9. Safeguard measures are considered to provide a safety valve for domestic industries against a sudden increase in imports that cause serious injury and grave economic and social costs. This function of safeguard measures should not be changed even if the imports are from members of an RTA.

10. As safeguards are urgent and temporary measures, derogation from Article II and other provisions is allowed on an exceptional and temporary basis. If it is not necessary to apply safeguard measures against imports from members of an RTA, safeguard measures should not be applied against third countries, either. Otherwise it would create discrimination between RTA members (which do not face safeguard measures) and third countries (which face safeguards). Therefore, it should be understood that safeguard measures should be applied on an MFN basis without discrimination between RTA members and third countries, as provided for in Article 2:2 of the Agreement on Safeguards.

11. This understanding would also apply to anti-dumping measures. If anti-dumping measures are applied discretionarily, free and non-discriminatory trade will be distorted. It should be kept in mind that the development in the harmonization of competition policy in RTAs would not be uniform.

(b) Article XXIV:8(a)(ii): Substantially the Same Regulations of Commerce

12. Article XXIV:8(a)(ii) stipulates that "substantially the same duties and other regulations of commerce are applied" *vis-à-vis* third parties. In other words, exactly the "same" regulations of

commerce, for instance anti-dumping measures, are not always required for a member of a customs union in the trade with third countries. If there are regulations of commerce that should not be applied uniformly by the members of a customs union, we should consider what those regulations are.

13. In considering this matter, we should again examine the viewpoint of avoiding adverse effects on third countries, taking due consideration of the relevant WTO provisions and their intents.

14. Consideration of both Article XXIV:8 of the GATT, the Agreement on Safeguards and the Agreement on Implementation of Article VI of the GATT 1994 would lead us to the conclusion that it is not appropriate for new members of RTAs to automatically take safeguard or anti-dumping measures at the enlargement of an RTA. And, it would not be appropriate to understand that members of an RTA are granted, just by joining the RTA, the "right" to apply new restrictive measures against third countries (including quantitative import restrictions, licensing measures and restrictive rules of origin) which they would have not been able to apply if they had not joined the RTA.
