



CHAPTER 10

Trade Remedies Chapter

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The aim of this chapter is to analyse the trade remedies chapter in the Regional Comprehensive Economic Partnership (RCEP) agreement. Based on the comprehensive analysis method, we break down each trade remedy instrument and compare it with the World Trade Organization (WTO) Agreement and other relevant regional trade agreements to review any distinct feature in the RCEP Trade Remedies Chapter. These features are important to assess, together with this chapter's consistency with WTO Agreement, to avoid the abuse of trade remedy instruments and to provide more legal certainty.

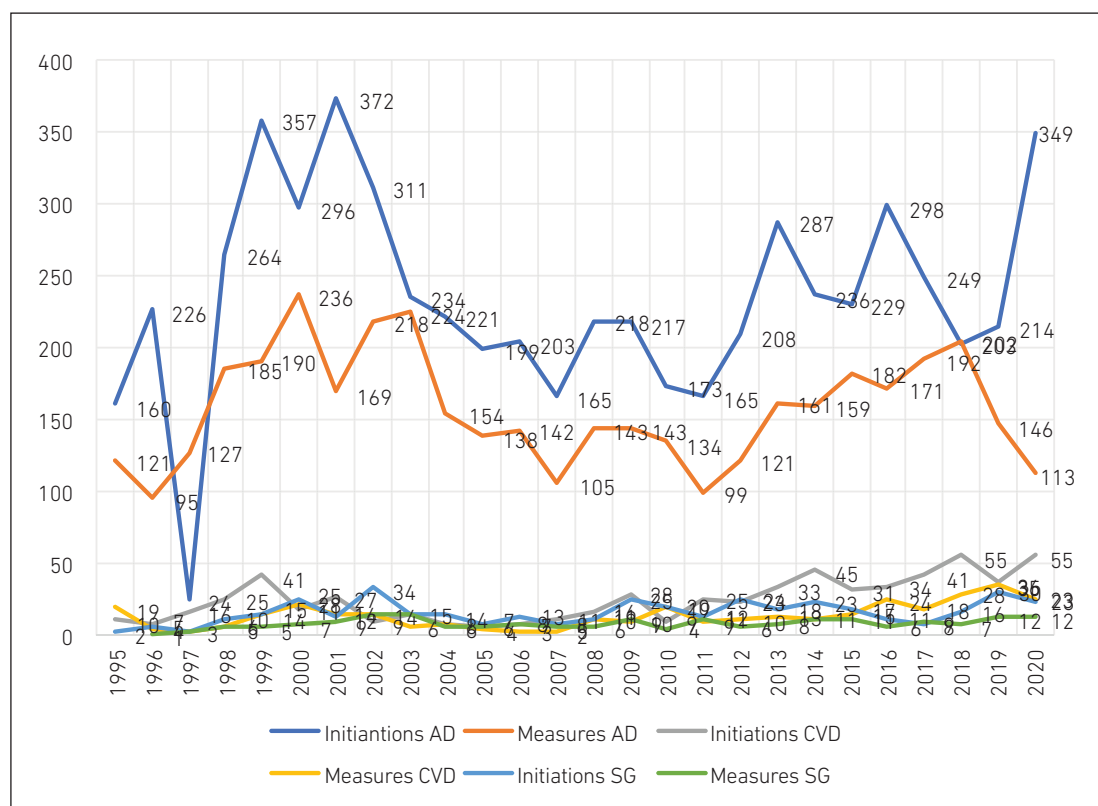
Importance of Trade Remedies for RCEP members

The conclusion of the Uruguay Round in 1995 resulted in a reduction of import tariffs amongst World Trade Organization (WTO) members. The average tariffs applied by WTO members for trade in goods, especially for non-agricultural products, has been reduced significantly (Fulton and Buterbaugh, 2007). In addition, there has been significant proliferation of regional and bilateral free trade agreements that further reduce tariff barriers (WTO, 2022). This liberalisation has increased international trade from \$5 trillion in 1995 to \$17 trillion in 2020 (Statista, 2021). Global value chains have made the production of goods more efficient and have resulted in many positive multiplier effects such as job creation, raised standard of living, poverty reduction, increased real income, etc. However, many countries are producing competing products that are identical or similar to those produced in other countries. The competition of imported products versus local products has been present even before the establishment of the WTO. Previously, governments imposed tariffs as one of the tools to protect local industries against import competition. Now, due to multilateral, regional, or bilateral commitments, governments have very limited policy space to protect domestic industry by increasing ordinary import duty. Although many countries impose more Non-Tariffs Measures (NTMs) to implement certain objectives, the importance of tariffs as protection tools, especially for unfairly traded goods, is still indispensable. These types of additional tariff instruments are commonly called 'trade defence' or 'trade remedies'.

Trade remedies can be in the form of antidumping measures, countervailing measures or safeguard measures. Each instrument has its own features to remedy a specific situation. When this kind of unfair trade practice causes material or threat of material injury to the domestic producers of the like products, the importing country can impose an antidumping duty to offset the unfair trade practice. Similarly, a countervailing measure defends against subsidies. A safeguard measure, on the other hand, is also an emergency trade defence instrument that can be implemented when there is a surge of imports causing or threaten to cause serious injury to the domestic industry. For a safeguard, there is no need to demonstrate the existence of unfair trade. Thus, each of the trade remedies has conditions that must be fulfilled in order to achieve their purpose.

There has been a proliferation of trade remedies amongst WTO members, including Regional Comprehensive Economic Partnership (RCEP) members. From 1995 until 2020, there have been 6,300 antidumping investigations, 632 countervailing duty (CVD) investigations, and 400 safeguard investigations initiated by WTO members. There has been a significant increase of initiation of antidumping from 1995 to 2020, as seen in Figure 10.1 (WTO, 2020a, 2020b, 2020c). On average, around 49% to 66% out of those investigations end up with the application of the measures.¹

Figure 10.1 Trade Remedies Initiations and Imposition 1995–2020



AD = antidumping, CVD = countervailing duty, SG = safeguarding.

Source: Authors.

¹ For antidumping, there were 6,077 initiations from 1995–2020 and 4,071 measures in place (66%). For CVD, there were 632 initiations from 1995–2020 and 344 measures in place (54%). For safeguarding, there were 400 initiations from 1995–2020 and 196 measures in place (49%).

RCEP members, especially Australia, China, Indonesia, Republic of Korea (henceforth, 'Korea'), Malaysia, Thailand, New Zealand, and Viet Nam, are frequent users of trade remedies. Australia is the biggest user of antidumping instruments by initiating 375 investigations, followed by China with 292 antidumping investigations, and Korea with 159 antidumping investigations (WTO, 2020a). For CVD, again Australia is the most frequent user, initiating 39 investigations, followed by China's 17 CVD investigations and New Zealand's nine CVD investigations (WTO, 2020b). For safeguards, Indonesia is the most frequent user amongst RCEP members, with 38 investigations, followed by the Philippines, with 20 safeguard investigations, and Thailand, Viet Nam, and Malaysia, with six investigations (WTO, 2020c). The combined total of all RCEP members' antidumping investigations from 1995–2020 accounts for 20.492% of the total initiated by all WTO members during the same period (WTO, 2020a), while for CVD and safeguards investigations from 1995–2020, initiations by RCEP members accounted for 10.443% and 21.75% of the total by all WTO members during the same period respectively (WTO, 2020c). If India is taken into account in these statistics, the numbers increase drastically since it is also one of the biggest users of trade remedy investigations (Table 10. 1).²

Table 10.1 Trade Remedy Investigation Initiations by RCEP Members

COUNTRIES	ANTIDUMPING	CVD	SAFEGUARD
AUSTRALIA	375	39	4
BRUNEI DARUSSALAM	0	0	0
CAMBODIA	0	0	0
CHINA	292	17	2
INDONESIA	144	0	38
JAPAN	17	1	1
LAO PDR	0	0	0
MALAYSIA	109	0	6
MYANMAR	0	0	0
NEW ZEALAND	68	9	0
PHILIPPINES	21	0	20
REPUBLIC OF KOREA	159	0	4
SINGAPORE	0	0	0
THAILAND	99	0	6
VIET NAM	32	1	6

CVD = countervailing duty, Lao PDR = Lao People's Democratic Republic, RCEP = Regional Comprehensive Economic Partnership.

Source: WTO (1995 – 30 June 2021).

² India initiated 1,071 AD investigations, 28 CVD investigations, and 46 safeguard investigations.

On the other hand, RCEP members are also one of the main targets of trade remedy investigations. China has been the most frequent target of antidumping instruments, being investigated 1,507 times, followed by Korea with 480 investigations and Thailand in 256 antidumping investigations (WTO, 2020a). For CVD, again China has been the most frequent target, with 193 CVD investigations followed by Korea with 32 CVD investigations and Indonesia with 30 CVD investigations (WTO, 2020b).

Table 10.2 RCEP Member Being Target of Trade Remedy Investigations

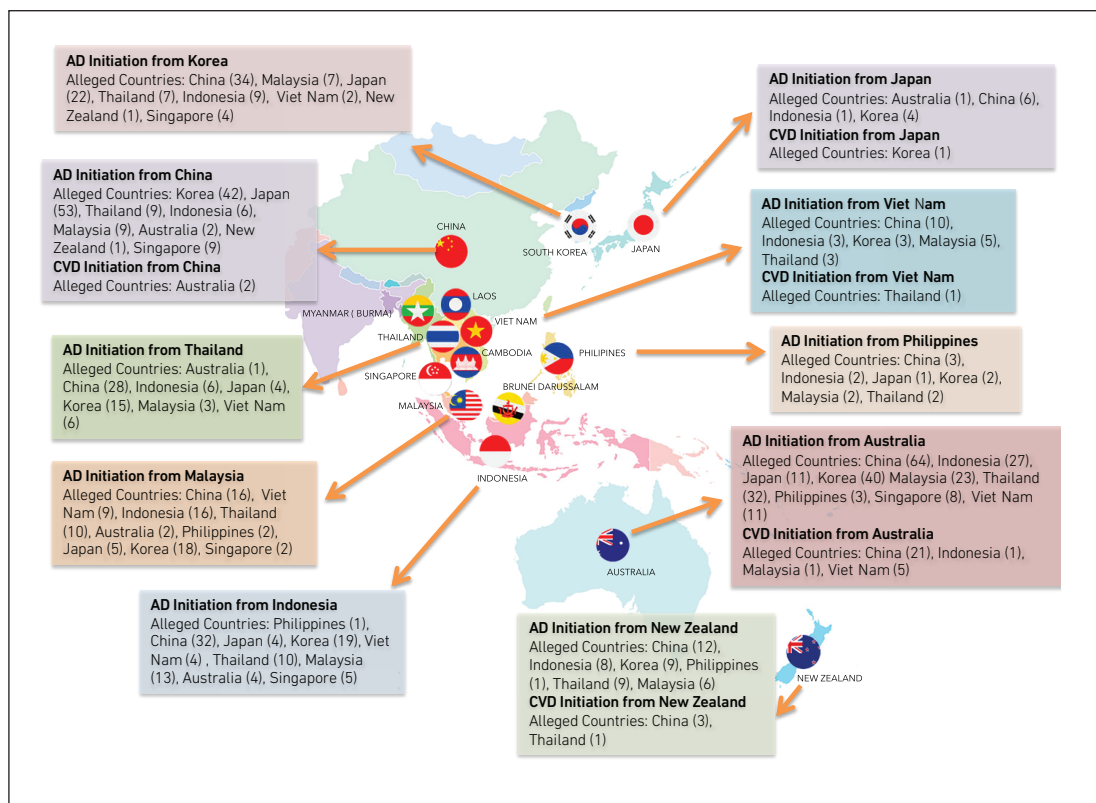
COUNTRIES	ANTIDUMPING	CVD
World	6,422	644
AUSTRALIA	38	4
BRUNEI DARUSSALAM	0	0
CAMBODIA	1	0
CHINA	1,507	193
INDONESIA	241	30
JAPAN	237	0
LAO PDR	0	0
MALAYSIA	188	19
MYANMAR	0	0
NEW ZEALAND	11	0
PHILIPPINES	19	2
REPUBLIC OF KOREA	480	32
SINGAPORE	69	1
THAILAND	256	22
VIET NAM	114	23

CVD = countervailing duty, Lao PDR = Lao People's Democratic Republic, RCEP = Regional Comprehensive Economic Partnership.

Source: WTO (1995 – 30 June 2021)

Many RCEP members are also targeting one another in trade remedy investigations. As seen in Figure 10.2, for example, Indonesia has initiated 32 antidumping investigations against China, 19 against Korea and 13 against Malaysia, while Australia has initiated 21 CVD investigations against China, five against Viet Nam and one against Malaysia.

Figure 10.2 Trade Remedies Investigations Amongst RCEP Members



AD = anti-dumping, CVD = countervailing measure.

Source: World Trade Organization statistic

All of these figures show how important investigations are for the RCEP members and could be one of the reasons why trade remedies still need to be further regulated as a separate chapter in the RCEP Agreement, although trade remedies have been regulated in the WTO Agreement and all of the RCEP members are also WTO members. Trade remedies have also been regulated in RCEP members' respective national legislations. In addition, many FTAs or regional trade agreements (RTAs) concluded by RCEP members have a trade remedies chapter. There are currently 37 FTAs/RTAs concluded by RCEP members; however, not all FTAs/RTAs have a separate trade remedies chapter,³ and some FTAs do not have a trade remedies provision at all.⁴

³ For example, see the bilateral agreement between Japan and the other RCEP members; the bilateral safeguard measure has been regulated under Trade in Goods chapter.

⁴ See Trade Agreement Between the Kingdom of Thailand and Lao PDR.

FTAs/RTAs that have trade remedies may typified one of three ways. The first is only reaffirmation of the parties' rights under the WTO Agreement without any significant additional obligation or procedure.⁵ The second is that the trade remedies only focus on the bilateral/regional safeguard measure, providing only reaffirmation for anti-dumping and countervailing measures.⁶ Third, there are additional details for the procedure and obligation concerning trade remedies.⁷

Historically, there have been at least 11 disputes at WTO level arising from the imposition of trade remedy instruments amongst RCEP members, namely Korea – Stainless Steel Bars (DS 553);⁸ Korea – Pneumatic Valves (DS 504),⁸ initiated by Japan; Japan – DRAMs (DS 336),¹⁰ launched by Korea; Korea – Certain Paper (DS 312),¹¹ where Indonesia was acting as complainant, as well as Indonesia – Safeguard on Certain Iron or Steel Products (DS 496)¹² where Indonesia was the respondent on the claim brought by Viet Nam; Australia – AD/CVD on Certain Products (DS 603)¹³ where China was a complainant; China – AD/CVD on Wine (DS 602)¹⁴ where Australia was complainant; China – AD on Stainless Steel (DS 601)¹⁵ launched by Japan; China – AD/CVD on Barley (DS 598)¹⁶ launched by Australia; Australia – Anti-Dumping Measures on A4 Copy Paper (DS 529)¹⁷ where Indonesia was a

⁵ See ASEAN Trade in Goods Agreement (ATIGA), Trans-Pacific Strategic Economic Partnership (TPSEP), Indonesia – Australia Comprehensive Partnership (IA-CEPA), ASEAN, Hong Kong, China Free Trade Agreement (AHKFTA), Asia-Pacific Trade Agreement (APTA) and Preferential Trade Agreement Among D-8 Member States (PTA-D8).

⁶ See ASEAN-China Free Trade Agreement (ACFTA), ASEAN-Korea Free Trade Area (AKFTA), Korea – Singapore Free Trade Agreement (KSFTA), ASEAN – Japan Comprehensive Economic Partnership (AJCEP), ASEAN – Australia – New Zealand Free Trade Area (AANZFTA), Thailand – Australia Free Trade Agreement (TAFTA), Japan – Thailand Economic Partnership Agreement (JTEPA), China – Singapore Free Trade Agreement (CSFTA), NZ – Thailand Closer Economic Partnership, Japan – Singapore Economic Partnership (JSEPA), Japan – Viet Nam Economic Partnership Agreement, Japan – Australia Economic Partnership Agreement (JAEPA), China – Australia Free Trade Agreement (ChAFTA), Japan – Brunei Darussalam Economic Partnership Agreement, New Zealand – China Free Trade Agreement (NZCFTA), Indonesia – Japan Economic Partnership (IJEPA), Japan – Malaysia Economic Partnership Agreement, and Japan – Philippines Economic Partnership Agreement. The Malaysia – Australia FTA also focuses on bilateral safeguard measures; however there are additional obligations for the anti-dumping measure such as 'lesser duty rule' and prohibition for zeroing.

⁷ Korea – Australia Free Trade Agreement (KAFTA), China – Korea FTA, Viet Nam-Korea Free Trade Agreement, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Australia – New Zealand Closer Economic Relations Trade, Indonesia – Korea Comprehensive Economic Partnership Agreement (IK-CEPA), New Zealand – Malaysia Free Trade Agreement (MNZFTA), and New Zealand – Korea FTA.

⁸ DS 533: Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds553_e.htm (accessed 13 December 2021)

⁹ DS 504: Korea – Anti Dumping Duties on Pneumatic Valves from Japan, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds504_e.htm (accessed 13 December 2021)

¹⁰ Japan – Countervailing Duties on Dynamic Random Access Memories from Korea, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds336_e.htm (accessed 13 December 2021)

¹¹ DS 312: Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds312_e.htm (accessed 13 December 2021)

¹² DS 496: Indonesia – Safeguard on Certain Iron or Steel Product, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds496_e.htm (accessed 13 December 2021)

¹³ At the time of writing this paper, this case was in the consultation stage. DS 603: Australia – Anti-Dumping and Countervailing Duty Measures on Certain Product from China, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds603_e.htm (accessed 13 December 2021)

¹⁴ At the time of writing this paper, the panel has composed. DS 602: China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds602_e.htm (accessed 13 December 2021)

¹⁵ At the time of writing this paper, the panel has established but not yet composed. DS 601: China – Anti-Dumping Measures on Stainless Steel Products from Japan, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds601_e.htm (accessed 13 December 2021)

¹⁶ At the time of writing this paper, the panel has composed. DS 598: China – Anti-dumping and Countervailing Duty Measures on Barley from Australia, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds598_e.htm (accessed 13 December 2021)

¹⁷ DS 529: Australia – Anti-Dumping Measures on A4 Copy Paper, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds529_e.htm#:~:text=The%20Panel%20concluded%20that%20Australia,did%20%20E2%80%9Cnot%20permit%20a%20proper (accessed 13 December 2021)

complainant; and China – HP-SSST (DS 454)¹⁸ launched by Japan. Interestingly, the RCEP Trade Remedies Chapter explicitly excludes the anti-dumping and CVD section, including Annex 7A from the RCEP Dispute Settlement Chapter, although it mentioned that this is subject to further review by RCEP members, which is addressed below.

RCEP Trade Remedies Chapter

RCEP is an FTA amongst 15 countries in East Asia and between ASEAN countries and major trading partners: Australia, New Zealand, Japan, Korea, and China (excluding India, which decided not to join RCEP).¹⁹ A free-trade area is a group of two or more custom territories in which the duties and other restrictive regulations of commerce are eliminated on nearly all the trade between the constituent territories in products originating in such territories.²⁰ RCEP is a mega-RTA which includes trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement, e-commerce, small and medium enterprises, and other issues (ASEAN, 2012). RCEP has the potential to deliver significant opportunities for businesses in the East Asia region, given the fact that the 15 RCEP participating countries account for almost half of the world's population, and contribute about 30% of global gross domestic product (GDP) and over a quarter of world exports. RCEP will become the world's largest Preferential Trade Agreement by GDP, encompassing around 28.7% of the world's economic activity based on 2019 figures,²¹ as shown in Table 10. 3. Moreover, RCEP is the first mega-regional/plurilateral FTA in which China is a party. Therefore, RCEP has the potential to deliver strong economic advantages.

Table 10.3 Comparison of RTAs

Agreement	Parties	Global GDP%	Global Trade%	Global Population %
Regional Comprehensive Economic Partnership (RCEP)	15	28.7	27.8	29.65
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	11	15.03	15.43	6.64
United States-Mexico-Canada Agreement (USMCA)	3	25.82	16.11	6.45

¹⁸ DS 454: China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SST") from Japan, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds454_e.htm (accessed 13 December 2021)

¹⁹ India withdrew their participation in November 2019.

²⁰ Paragraph 8(b) of GATT Article XXIV.

²¹ All underlying data calculated from World Bank's World Development Indicators. Global GDP percentage is the sum of GDP in US dollars in 2019 (indicator NY.GDP.MKTP.KD) for each agreement signatory divided by the world total.

Agreement	Parties	Global GDP%	Global Trade%	Global Population %
Mercosur	4	3.44	1.49	3.49
African Continental Free Trade Agreement (AfCFTA)	54	3.07	2.79	17.04
Gulf Cooperation Council (GCC)	8	1.84	3.44	0.75

RTA = regional trade agreement, GDP = gross domestic product.

Source: Meyer (2021).

RCEP will provide a framework aimed at lowering trade barriers and securing improved market access for goods and services for businesses in the region. In order to achieve such a goal, RCEP: (i) reduces or eliminates custom duties imposed by each member state on originating goods approximately 92% over a period of 20 years; (ii) prohibits non-tariff measures on the importation or exportation between the RCEP members, except in accordance with the right and obligations under the WTO Agreement; (iii) stipulates trade facilitation and transparency measures; and (iv) sets out a detailed set of rules of origin (RoO) that would apply to businesses seeking to qualify their goods as originating for RCEP purposes (ASEAN, 2016).

Thus, one of the main purposes of the any RTA is to eliminate all barriers to intra-regional trade (Teh, Prusa, and Budetta, 2007). The elimination of intra-regional tariffs may cause or threaten to cause injury to domestic industries producing like products. It is very common that trade remedy instruments are used to combat unexpected circumstances. Nevertheless, not all RTAs/FTAs have a specific trade remedies chapter. Since most countries engaging in RTAs/FTAs are also members of the WTO, they feel that it is unnecessary to further regulate trade remedy instruments in their RTAs/FTAs. However, since RCEP members are very active users and targets of trade remedy instruments, the existence of a trade remedies chapter in the agreement is considered very important to secure the balance between trade liberalisation and protectionism and to further elaborate substantive and procedural issues that have not yet been regulated by the WTO. Trade remedies in the RCEP Agreement are regulated in Chapter 7 entitled 'Trade Remedies'. The chapter is divided into two broad categories namely (1) RCEP Safeguard/Global Safeguard Measures and (2) antidumping and countervailing duties. Most of the provisions contain procedural, transparency and due process issues,²² but there are some

²² Procedural issues include, for example, the investigation procedure regarding the transitional RCEP safeguard measure; transparency issues include, for example, the obligation of notification and disclosure of the essential fact; due process issues include, for example, the requirement of consultation.

substantive provisions as well that institutionalised WTO jurisprudences.²³ In addition, there is also Annex 7A entitled 'Practices Relating to Antidumping and Countervailing Duty Proceeding'. It is interesting to note, however, both Chapter 7 Section B for Anti-Dumping and Countervailing Duties and Annex 7A are explicitly excluded from the RCEP Dispute Settlement Chapter.²⁴ The applicability of the dispute settlement chapter in RCEP will be subject to general review 5 years after the date of entry into force of this Agreement.²⁵

RCEP Transitional Safeguard

Section A of the RCEP trade remedies chapter concerns safeguard measures. These measures can be seen as transitional, allowing the import-competing industries a bulwark against the unexpected consequences of entering the RCEP Agreement. Article 7.2 of the RCEP trade remedies chapter stipulates that, because of the reduction or elimination of customs duties, members can apply this transitional safeguard measure only when a good from another Party (or RCEP Parties collectively) is being imported in such increased quantities so as to cause, or threaten to cause, serious injury to a domestic industry which produces a like or directly competitive good (New Zealand Foreign Affairs & Trade, n.d.). Below are the important features of the RCEP transitional safeguard measures with the objective to address the effect of unanticipated consequences of the regional liberalisation.

The substantive requirements of the RCEP transitional safeguard measure are quite similar to Article 2.1 and the first paragraph of Article 5 of the WTO Agreement on Safeguards. The conditions to apply the RCEP transitional safeguard measure are provided in Article 7.2 of RCEP trade remedies chapter. However, there is a difference regarding the unforeseen development requirement. At the WTO, there is a requirement to substantiate the existence of the unforeseen development and the effect of obligations incurred by WTO members resulting in the increase of imports. By contrast, the RCEP requirement is only to substantiate that the increase in imports is a result of the reduction or elimination of a customs duty under RCEP.

²³ Substantive issues, include, for example, the prohibition of using zeroing methods in calculating dumping margins that, although not explicitly regulated, have been clarified by the WTO Appellate Body to be inconsistent with the WTO Antidumping Agreement. The first case concerning zeroing methodology is in the EC – Bed Linen case brought by India against the European Communities. However, the US is the most frequent user of the zeroing methodology even after it was found that it is inconsistent with the WTO Anti-Dumping Agreement. WTO cases involving US zeroing practices can be found in US – Zeroing (EC), US – Zeroing (Japan), US – Continued Zeroing, and US – Zeroing (Korea) for the initial investigation, and US – Anti-Dumping Measures on PET Bags for the review investigation. See below for further explanation for the most recent case of zeroing, namely US – Washing Machine.

²⁴ Article 7.16 of RCEP Chapter 7 stipulates that 'the applicability of dispute settlement to this section will be subject to review in accordance with Article 20.8 (General Review)'.

²⁵ Article 20.8 of RCEP.

There is also a limitation of the applicable form of the RCEP transitional safeguard measure, which prohibits imposing such measures in the form of tariff rate quotas or quantitative restriction on goods.²⁶ By contrast, the WTO allows the Party to use a quantitative restriction as a form of safeguard measure as regulated under Article 5 of the Agreement on Safeguards. The WTO Agreement on Safeguards emphasises that members should choose measures most suitable to prevent or remediate the serious injury.

Another limitation for the RCEP transitional safeguard measure is that it can only be applied either (1) to suspend the further reduction of any rate of customs duty or (2) to increase the rate of customs duty to a level not exceeding the lesser of the Most Favoured Nation-applied rate in effect on the day when the measure is applied or on the day immediately preceding the date of entry into force of RCEP for the imposing member.²⁷ The WTO safeguard measures have no such limitation and can be imposed at any level, even beyond the binding tariffs of a member set forth in its Schedule of Commitments as long as necessary to prevent or remedy serious injury and to facilitate adjustment.²⁸

Furthermore, the duration of the RCEP transitional safeguard measure is limited. Article 7.5.1(c) of the trade remedies chapter prohibits the imposition of the measure beyond the expiration of the transitional safeguard period,²⁹ which is 8 years after the elimination or reduction of the custom duty is completed for that particular good.³⁰ It also prohibits the imposition of the RCEP transitional safeguard measure in the first year after RCEP enters into force. On the other hand, the WTO Safeguard Agreement allows for the imposition of safeguard measures at any time.

It is also important to note that the imposition period of the RCEP transitional safeguard measure is shorter than the Global Safeguard. The total duration including extension must not exceed 4 years,³¹ while the WTO Safeguard Agreement provides that measures can be in place for 8 to 10 years depending on the status of a member. There is also a limit to the duration a safeguard measure can be reapplied for the same goods in RCEP as compared with the WTO Safeguard Agreement since in RCEP there is no differentiation between developed and developing country members.³² No RCEP transitional safeguard measures shall be reapplied for the same goods for a period of time equal to the duration of the previous measure or 1 year since the expiry of such measure, whichever is longer.³³ There is also a time limit for an investigation to be completed within 1 year since its initiation, while the WTO Safeguard Agreement has no such time limit.

²⁶ Article 7.2 of RCEP.

²⁷ Article 7.2.1 of RCEP Chapter 7.

²⁸ Article 5.1 of WTO Agreement on Safeguards.

²⁹ Article 7.1 of RCEP for the transitional safeguard period definition.

³⁰ In accordance with the Member's Schedule of tariff commitment in Annex 1 of RCEP.

³¹ Article 7.5.1 of RCEP Chapter 7.

³² Article 7.5.2 of RCEP.

³³ Article 7.5.5 of RCEP Chapter 7.

There is also a particular provision concerning a special treatment for the least-developed ASEAN member country. First, a provisional or transitional RCEP safeguard measure shall not be applied to a least-developed ASEAN member country.³⁴ Second, a least-developed ASEAN member country may extend its transitional RCEP safeguard measure for an additional period of 1 year.³⁵ Third, a least-developed ASEAN member country that applies or extends a transitional RCEP safeguard measure shall not be requested for any compensation by the affected members.³⁶ According to the Committee for Development Policy in United Nations, the RCEP members that are on the list of least developed countries are Cambodia, Myanmar, and Lao PDR (United Nations, 2021). This specific provision concerning the least developed countries is one of the unique features in the RCEP Agreement, considering there is no such provision in the WTO Agreements.

In addition, the compensation provision in RCEP provides that a member that intended to apply or extend a transitional safeguard measure must be in consultation with the exporting member that would be affected in order to provide mutually agreed adequate trade compensation that must be in the form of concessions. However, if such consultations do not result in agreement on trade compensation within 30 days, any contesting member may suspend the application of substantially equivalent concessions which affect the goods of the Party that is maintaining the safeguard measure. It is important to note that the right of suspension shall not be exercised for the first 3 years during which the transitional RCEP safeguard measure is in effect, as long as the measure conforms to the RCEP Agreement.³⁷ This compensation provision is rather similar to what has been provided in Article 8 of the WTO Safeguard Agreement.

The calculation of de minimis (negligible) imports for a provisional or transitional RCEP safeguard measure is a bit different than what has been provided in Article 9.1 of the WTO Agreement on Safeguards. Aside from the special treatment for the Least Developed Country member, the calculation of de minimis for imports of less than 3% (provided that they collectively account for not more than 9%) is based only on the total imports of RCEP members instead of the total imports from all countries.³⁸

³⁴ Article 7.6.2 of RCEP Chapter 7.

³⁵ Article 7.5.1(b) of RCEP Chapter 7.

³⁶ Article 7.7.6 of RCEP Chapter 7.

³⁷ Article 7.7 of RCEP Chapter 7.

³⁸ Article 7.6.1 of RCEP Chapter 7.

Based on the description above, the RCEP Trade Remedies Chapter has particular features as compared to the WTO Safeguard Agreement, inter alia, the timing of the measure,³⁹ the duration of the measure,⁴⁰ the limitation on form of measure,⁴¹ exclusion of the measure,⁴² and the treatment for least developed countries.⁴³

Nevertheless, the RCEP Safeguard Measure section does not provide any special safeguard provision, unlike other RTAs.⁴⁴ However, during the negotiation rounds, India suggested the transitional safeguard measures 'auto-trigger and snapback' to counter a sudden surge in imports for a period of 6 months when imports from an RCEP partner exceed a particular threshold. India's suggestion is similar to the special safeguard mechanism, and the snapback provision would allow India to revert to the original higher tariffs to counter a sudden surge in imports (Kirtika, 2019). This suggestion did not go through and in the end India decided to exit the RCEP negotiation by stating that 'the present form of the RCEP Agreement does not fully reflect the basic spirit and the agreed guiding principles of RCEP'. Thus, in India's point of view, RCEP does not satisfactorily address its outstanding issues and concerns, in particular its concern that its domestic industries would have been swamped by imports considering its trade deficit with RCEP members is \$105 billion, with China alone accounting for \$53.5 billion (Panda, 2019). It is unclear why this proposed mechanism could not gain support from all RCEP members.

Global Safeguard

Global safeguard provisions are common in trade agreements in addition to regional and bilateral safeguards. In general, these provisions allow members of bilateral or regional agreements to retain their rights to impose global safeguard measures under the General Agreement on Tariffs and Trade (GATT) Article XIX and the WTO Agreement on Safeguards, although some FTAs have specific distinct rules (Kruger, Denner and Cronje, 2009).

³⁹ Article 7.5.2 of RCEP Agreement.

⁴⁰ Article 7.5.1(b) of RCEP Agreement.

⁴¹ Article 7.2.2 of RCEP Agreement.

⁴² Exclusion from the safeguard measure can be applied if the RCEP member's share import does not exceed 3% of total import from all members, provided that those members with less than 3% share collectively account for not more than 9%. This special treatment condition is much the same as Article 9 of the WTO Agreement on Safeguard; however, it should be noted that this kind of treatment only applies to developing country members and the calculation is compared to total imports, not just particular members. Meanwhile, according to Article 7.6 of RCEP, this condition can be applied to all RCEP members, including developed country members such as Australia, New Zealand, Japan, and Republic of Korea.

⁴³ Article 7.6.2 of the RCEP Agreement provides that 'a provisional or transitional RCEP safeguard measure shall not be applied to an originating good of any least developed country party'. See also Article 7.7.6, which provides that a least developed country party that applies a provisional RCEP safeguard measure or extends a transitional one shall not be requested for any compensation by the affected parties.

⁴⁴ Examples include the bilateral agreement between Japan and Australia, which invokes the special safeguard, and the bilateral agreement between Korea and Australia, which does likewise.

The provision of the global safeguard in the RCEP Agreement is provided in Article 7.9 of RCEP Trade Remedies Chapter stating that all RCEP members rights and obligations under Article XIX of GATT 1994 and the WTO Safeguard Agreement shall not be affected. Nevertheless, the global safeguard provision requires RCEP members to provide other members with a written notification or an electronic copy of all pertinent information as required under Articles 12.1, 12.2, and 12.4 of the WTO Safeguards Agreement when such a member initiates a safeguard investigation under Article XIX of GATT 1994 and the WTO Safeguard Agreement, including preliminary determinations and final findings. A member will be deemed to be in compliance with this obligation if it has notified the WTO Committee on Safeguards in accordance with Article 12 of the WTO Safeguards Agreement.

Lastly, the RCEP Agreement prohibits members from applying the transitional RCEP safeguard measure and the global safeguard measure (pursuant to Article XIX of GATT 1994 and WTO Safeguard Agreement) to the same product at the same time.

Antidumping/CVD

The second part of the RCEP Trade Remedies chapter regulates the antidumping and CVD provisions. This part starts by emphasising the RCEP member's rights and obligations under Article VI of GATT 1994, the WTO Anti-Dumping Agreement, and the WTO Subsidies and Countervailing Measures Agreement. This implies that provisions in the section are not inconsistent with the WTO Agreement but rather their purpose is to enhance the transparency and due process in antidumping and countervailing investigations under the RCEP Agreement without any fundamental change.

This section clarifies several procedures concerning the antidumping investigation such as:

- (i) The verification process, including specific timing of its notice and information;⁴⁵
- (ii) the requirement to maintain a non-confidential file for each investigation and review it in either physical or electronic form;⁴⁶
- (iii) the notification and consultation requirement,⁴⁷ including the timing to provide the written notification before initiating an investigation;⁴⁸
- (iv) the requirement to provide full and meaningful disclosure of the essential facts in an antidumping or CVD investigation, including its timeline;⁴⁹ and
- (v) the treatment of confidential information.⁵⁰

⁴⁵ Article 7.11.2 of RCEP Agreement.

⁴⁶ Articles 7.11.3 and 7.11.4 of RCEP Agreement.

⁴⁷ Consultation requirement is provided for the countervailing investigation. See also Article 7.12.2 of RCEP Agreement.

⁴⁸ Article 7.12.1 of RCEP Agreement.

⁴⁹ Article 7.14 of RCEP Agreement.

⁵⁰ Article 7.15 of RCEP Agreement.

All of these provisions are fundamentally still in line with the WTO Anti-Dumping Agreement.

However, there are some provisions that are not regulated under the WTO Anti-Dumping Agreement and have become additional obligations for the RCEP members, namely, inter alia, 'the prohibition on zeroing'. According to Article 7.13 of the RCEP Trade Remedies Chapter, all members shall count all individual dumping margins, whether positive or negative, for weighted average-to-weighted average or transaction-to-transaction comparisons when established, assessed or reviewed under Article 2, paragraphs 3 and 5 of Article 9, and Article 11 of the Agreement.

It should be noted that the discussion of zeroing has been disputed in many WTO litigations and has been found to be inconsistent with the legal standard of the second sentence of Article 2.4.2 of the WTO Anti-Dumping Agreement.⁵¹ In a nutshell, zeroing refers to a method of calculating dumping margins, assigning zero value when the exporter's price is above their normal value. This kind of methodology, in practice, tends to increase the exporter's dumping margins and results in the imposition of higher anti-dumping duties. The US has used this calculation method in its antidumping investigation in the past.⁵² Moreover, according to the historical report in the WTO dispute, zeroing is amongst the most litigated issues of the most contentious subject under the WTO's purview (Vermulst and Ikenson, 2007). The practice of zeroing, in general, is an issue under Article 2.4.2 of the WTO Antidumping Agreement (ADA) considering Article 2.4 provides guidance as to what constitutes a fair method for normal value and export price on a weighted average-to-weighted average or transaction-to-transaction comparison. However, a normal value established on the weighted average basis may be compared to prices of individual export transactions if the authorities find an export price pattern that differs significantly

⁵¹ Although there are many WTO disputes involving zeroing as a measure at issue, each case has a different application of zeroing vis-à-vis a 'fair comparison method'. For example: (i) in *EC – Bed Linen*, where India was complainant, the main issue was the practice of model zeroing under the weighted average-to-weighted average comparison method using the negative dumping margins (the EC did not fully take into account the entirety of the prices of some export transactions, and instead treated this export price as if they were less than what they were); (ii) in *U.S. – Softwood Lumber V* (Art.21.5), the main issue was the zeroing practice using the transaction-to-transaction method. In this case, the Appellate Body in compliance proceedings found that Article 2.4.2 does not admit an interpretation that would allow the use of zeroing under the transaction-to-transaction comparison methodology (the Appellate Board ruled against zeroing 'as applied'); and (iii) in *US – Zeroing (Japan)*, this case concerned dumping findings in several cases and contained allegations of 'as such' and 'as applied' violations of the Anti-dumping Agreement (ADA). The Appellate Body found that the US: a) acted inconsistently with Articles 2.4 and 2.4.2 of the WTO ADA by maintaining zeroing procedures when calculating dumping margins under the T-T method in original investigation, b) acted inconsistently with Articles 2.4 and 9.3 of WTO ADA and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews, c) acted inconsistently with Articles 2.4 and 9.5 of the ADA and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in new shipper reviews, and d) acted inconsistently with Article 11.3 of WTO ADA when it relied on dumping margin calculated in previous proceeding using the zeroing method for purposes of conducting sunset review investigation (for findings, points a to c are 'as such' findings).

⁵² The WTO Disputes that involve the US practice of zeroing are *U.S. – Sheet/Plate from Korea*, *U.S. – Corrosion-Resistant Steel Sunset Review*, *U.S. – Softwood Lumber V*, *U.S. – Zeroing (EC)*, *U.S. – Zeroing (Japan)*, *U.S. – Shrimp AD Measure (Ecuador)*, *U.S. – Stainless Steel (Mexico)*, *U.S. – Shrimp (Thailand)*, *U.S. – Continued Zeroing*, *U.S. – Carrier Bags*, *U.S. – Zeroing (Korea)*, *U.S. – Orange Juice (Brazil)*, *U.S. – Shrimp (Viet Nam)*, *U.S. – Shrimp/Sawblades*, *U.S. – Shrimp II (Viet Nam)*, *U.S. – Washing Machines*, *U.S. – Anti-Dumping Methodologies (China)*, and *U.S. – Differential Pricing Methodology*.

amongst different purchasers, regions, or time periods and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison (Vermulst and Ikenson, 2007: 239).

In summary, an investigating authority is 'normally' required to use either of the two symmetrical comparison methodologies provided and the second sentence of Article 2.4.2 of the ADA provides an asymmetrical comparison methodology to address a pattern of 'targeted dumping'. All these methodologies in relation to zeroing have been addressed in the WTO Disputes for the past few years. For example, the Appellate Body in U.S. – Washing Machines stated that the W-T comparison methodology in the second sentence of Article 2.4.2 requires a comparison between a weighted-average normal value and 'the entire universe of export transactions that fall within the pattern as properly identified under that provision, irrespective of whether the export price of individual "pattern transactions" is above or below normal value.'⁵³ Thus, the Appellate Body in this case clearly found that Article 2.4.2 does not permit zeroing practice under the W-T methodology.

Moreover, there is also an additional Annex 7A that identifies a range of practices that promote the goals of transparency and due process in antidumping and CVD proceedings (New Zealand Foreign Affairs & Trade, n.d.). It is important to note that the practice in Annex 7A has been followed by some of the RCEP members in their laws and regulations. This practice includes for providing the opportunities to remedy or explain deficiencies in requests for information, procedures for offering and concluding undertakings, and public notices procedures. However, this practice is a non-binding guidance for the RCEP members pursuant to footnote 2 of Annex 7A.

All these provisions, in principle, are in accordance with the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing to ensure full transparency at the regional level when initiating antidumping investigations against products originating in a RCEP member, even though there are some additional obligations that are not provided in WTO-covered Agreements, which makes this Agreement a WTO-Plus RTAs type. The antidumping and CVD measure in the RCEP Agreement does not substantially modify market access for imported goods, whether originating from RCEP members or from a third party. In RCEP, there is no specific provision to exclude other members from antidumping investigations or impositions, unlike certain types of bilateral/regional trade agreements that 'reduce' the right of their Parties to apply antidumping measures or even prohibit the application of such measures toward intra-RTA partners.⁵⁴

⁵³ Appellate Body Report, US – Washing Machines, para. 6.9.

⁵⁴ See Section C below for further description.

Trade Remedies Chapters under other RTAs/FTAs

As mentioned above, not all the regional or bilateral trade agreements have their own trade remedies chapter. Some of them are just a part of the trade in goods chapter such as: the bilateral agreement between Indonesia and Japan,⁵⁵ the bilateral agreement between Japan and Thailand, the bilateral agreement between Japan and Australia, the bilateral agreement between Japan and Malaysia, the bilateral agreement between Japan and Viet Nam, and the bilateral agreement between Japan and Brunei Darussalam. In fact, most of the bilateral agreements focus more on the safeguard provision with a sufficient procedural detail to allow the Parties concerned to apply this measure. For example, most of the bilateral agreements between Japan and the other RCEP members⁵⁶ provide only the detail of the application of the bilateral safeguard measure, along with the investigation procedures, compensation, imposition duration, triggered condition, consultation, provisional measure, notice, and review. Meanwhile, for the antidumping and CVD measure, they only provide that 'the term of custom duty in the respective agreements does not include any anti-dumping or countervailing duty applied consistently with the provision of Article VI of the GATT 1994, the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures'.⁵⁷

In addition, there are also some bilateral agreements that only reaffirm the rights and obligations of the Parties under the WTO Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measure through a simple reference. For example, the bilateral agreement between Japan and Indonesia provides that 'a Party shall not prevent to imposing any time any anti-dumping duties or countervailing duties that applied consistently with the Article VI of the GATT 1994 and the WTO Anti-Dumping Agreement,' in relation with the elimination of custom duties in trade in goods chapter.⁵⁸ Other examples can also be seen in the bilateral agreement between Australia and Japan,⁵⁹ the bilateral agreement between Australia and Thailand,⁶⁰ the bilateral agreement between Australia and Malaysia,⁶¹ the bilateral agreement between New Zealand and Thailand,⁶² the bilateral

⁵⁵ Most of the bilateral agreements between Japan and other RCEP members do not have a separate chapter concerning trade remedies, but they have bilateral safeguard provisions as part of the trade in goods chapter.

⁵⁶ Japan has the bilateral agreement with Thailand, Indonesia, Malaysia, Viet Nam, Australia, Brunei Darussalam, the Philippines, and Singapore.

⁵⁷ See Article 15 of the Agreement between Japan and the Kingdom of Thailand for an Economic Partnership; See Article 13 of the Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership; See Article 16 of the Agreement between the Government of Malaysia and the Government of Japan for an Economic Partnership; and See Article 13 of the Agreement between Japan and Brunei Darussalam for an Economic Partnership.

⁵⁸ See Article 20.4 of the Agreement between Japan and the Republic of Indonesia for an Economic Partnership.

⁵⁹ See Article 2.12 of the Agreement between Australia and Japan for an Economic Partnership.

⁶⁰ See Article 206 of the Thailand-Australia Free Trade Agreement.

⁶¹ See Article 7.12 and Article 7.13 of the Malaysia-Australia Free Trade Agreement.

⁶² See Article 5.1 and Article 5.2 of the Thailand-New Zealand Economic Partnership Agreement.

agreement between China and Australia,⁶³ the bilateral agreement between Indonesia and Australia,⁶⁴ ASEAN Trade in Good Agreement,⁶⁵ the ASEAN-Hong Kong, China Free Trade Agreement,⁶⁶ and the Trans-Pacific Strategic Economic Partnership (TPSEP or P4).⁶⁷ The trade remedies measure will be applied in a non-discriminatory manner and substantially in line with the WTO Agreements. Therefore, these bilateral agreements do not contain any specific procedures related to the application of antidumping measures and do not establish any mechanism to address cases of dumping/antidumping other than referring to the WTO Anti-Dumping Agreement and Agreement on Subsidies and Countervailing in a very concise provision.

There are also different types of regional/bilateral agreements that provide a separate chapter for the trade remedies. In general, most of the regional/bilateral agreements that provide trade remedies chapters are usually divided into two main sections concerning the trade remedies measure, namely: the safeguard measure section and the antidumping and CVDs section. These types can be seen on the bilateral agreement between Korea and Viet Nam;⁶⁸ the bilateral agreement between Indonesia and Korea;⁶⁹ the bilateral agreement between New Zealand and Korea;⁷⁰ and the RTA, namely the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁷¹ In these bilateral/regional agreements, there are specific procedural and additional obligations for the Parties in relation to the bilateral/regional safeguard measure and also the antidumping and CVD measure, including a regional body to oversee the implementation of the trade remedies chapter.⁷²

For regional/bilateral trade agreements that provide the bilateral/regional safeguard measures, these are sometimes described as 'tariff snapbacks' (Voon, 2021). This is because they involve reversion to most-favoured nation (MFN) tariff rates if the conditions have been met. In general, this is in the form of a transitional measure because its application is only allowed in the transitional period explicitly stated in the agreement.

⁶³ See Article 7.9 and Article 7.10 of the China-Australia Free Trade Agreement.

⁶⁴ See Article 2.14 of the Indonesia-Australia Comprehensive Economic Partnership Agreement.

⁶⁵ See Chapter 9 of the ASEAN Trade in Good Agreement.

⁶⁶ See Chapter 7 of the ASEAN-Hong Kong, China Free Trade Agreement.

⁶⁷ The Regional Trade Agreement between Brunei Darussalam, Republic of Chile, New Zealand and Republic of Singapore. See Chapter 6 of the TPSEP.

⁶⁸ See Chapter 7 of the Viet Nam-Korea Free Trade Agreement.

⁶⁹ See Chapter 5 of the Indonesia-Korea Comprehensive Economic Partnership Agreement.

⁷⁰ See Chapter 7 of the New Zealand-Korea Free Trade Agreement.

⁷¹ The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is an FTA between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Viet Nam. See Chapter 6 of the CPTPP for Trade Remedies Chapter.

⁷² For example, the Committee on Trade Remedies in the Viet Nam-Korea Free Trade Agreement, see Article 7.11 concerning the Committee on Trade Remedies. See also Article 15 of the China-Korea Free Trade Agreement.

It is also interesting to note that the prohibition of zeroing in terms of the antidumping application has been regulated as a practice in other regional/bilateral trade agreements, even if it is only written implicitly and not explicitly as in Article 7.13 of RCEP Trade Remedies Chapter. For example, paragraph 2 in Article 6.8 of the Korea-Australia FTA stipulated that 'the Parties confirm their current practice of counting toward the average all individual margins, whether positive or negative, when anti-dumping margins are established on the weighted-to-weighted basis or transaction- to-transaction basis, or weighted-to-transaction basis'. This article confirms that the Parties are not to use the zeroing practice, even though it is not explicitly prohibited in such article. A similar provision also can be found in other bilateral/regional trade agreements such as the Indonesia-Korea Comprehensive Economic Partnership,⁷³ the Viet Nam-Korea Free Trade Agreement,⁷⁴ and the New Zealand-Korea Free Trade Agreement.⁷⁵

In terms of safeguard measures, beside bilateral and global measures, there is also a special measure. Special safeguard mechanisms create a different threshold for imposing additional protective measures on sensitive sectors that are usually for the agricultural products, textiles, and apparel products (Teh, Prusa, and Budetta, 2007). For example, the bilateral agreement between Japan and Australia provides a special safeguard,⁷⁶ and the bilateral agreement between Korea and Australia also has a similar provision.⁷⁷ Generally, a special safeguard measure in these agreements allows the Parties to impose safeguard measures on sensitive products such as the agricultural products listed in the Party's schedule. In some cases, the condition to trigger the application is when the volume of imports of that good exceeds a trigger level that has been set under such agreement.⁷⁸ Once the volume of imports of goods crosses the threshold, then the Party is allowed to apply this special safeguard measure. The application of a special safeguard allows the Parties to impose additional duties, although the tariffs should not exceed the MFN rate⁷⁹ and this measure can be imposed even without showing a serious injury or threat of serious injury suffered by domestic industry. This special safeguard is similar to the mechanism provided under the WTO Agreement on Agriculture.

Furthermore, even though most of the bilateral/regional trade agreements only maintain or retain the rights and obligations of the Parties under the WTO Agreement in terms of the antidumping and CVD measure without any substantial change, there are some bilateral agreements that modify the WTO's threshold set up in the WTO Anti-Dumping Agreement in order to minimise using antidumping and/or CVD instruments in an arbitrary or protectionist manner. In this case, the bilateral agreement between New

⁷³ See Article 5.7.3 of the Indonesia-Korea Comprehensive Economic Partnership Agreement.

⁷⁴ See Article 7.6.3 of the Viet Nam-Korea Free Trade Agreement.

⁷⁵ See Article 7.7.2 of the New Zealand-Korea Free Trade Agreement.

⁷⁶ See Article 2.18 of the Japan-Australia free Trade Agreement.

⁷⁷ See Article 6.7 of the Korea-Australia Free Trade Agreement (KAFTA).

⁷⁸ *Ibid.*, see also Article 2.18 of the Japan-Australia Free Trade Agreement (JAEPA) and Annex 1 of JAEPA for the specific number.

⁷⁹ See Article 2.18.4 of JAEPA Article 6.7.2 of KAFTA.

Zealand and Singapore is one example. Article 2.17 of the New Zealand-Singapore Closer Economic Partnership provides that the Parties will minimise the opportunities to use the antidumping measure through the increase of the threshold of the requirement of de minimis dumping margin and the negligible import volume. The de minimis dumping margin threshold becomes 5% as compared to the 2% threshold provided in Article 5.8 of the WTO Anti-Dumping Agreement and the negligible import volume increases from 3% to 5%. The New Zealand-Singapore Closer Economic Partnership also reduces the period of review or termination of the antidumping duties from 5 years, as provided in Article 11.3 of the WTO Anti-Dumping Agreement, to 3 years.

Finally, there are also bilateral agreements that eliminate the possibility of using antidumping measures on goods covered by the agreement. An example is the FTA between Australia and New Zealand. In the beginning, the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), which entered into force in 1983, did not change the Parties' right under the WTO as stipulated in Article 15 of the agreement. However, this agreement was modified in 1988, with the entry into force of the ANZCERTA Protocol of Acceleration of Free Trade in Goods. The Protocol also eliminated the possibility of using antidumping measures on goods covered by the agreement as stipulated in Article 4.⁸⁰ The Parties confirmed that Article 4 of the Protocol superseded Article 15, paragraphs 1–7, of the initial ANZCERTA with respect to goods originating in the territory of the other Party (Rey, 2012). However, the imposing of antidumping measures on goods from the third parties is still possible. Only intra-ANZCERTA antidumping measures are prohibited. It is important to note that both Australia and New Zealand are RCEP members and the RCEP Agreement maintains their right to impose trade remedies measures on other members.

To summarise, there are two types of RTAs that have been concluded by the RCEP members based on the trade remedies chapter. The first category is the WTO-Equivalent RTAs and the second category is the WTO-Plus RTAs.⁸¹ The WTO-Equivalent RTA is the general provision on trade remedies with no or only minor modifications. On the other hand, the WTO-Plus RTAs provide more substantial modifications to WTO rules, i.e. by reducing the application of antidumping, CVD, or safeguard measures between RTA partners or limiting their degree.⁸² Out of 37 RTAs between the RCEP members, most fall under first category, i.e. the WTO-Equivalent RTAs, such as ASEAN Trade in Goods Agreements, Asia – Pacific Trade Agreement, ASEAN – China Free Trade Area, etc. (there are 20 RTAs in this category). Meanwhile, there are only 16 RTAs that fall under second category namely, inter

⁸⁰ Article 4 of the Protocol states that 'the [ANZCERTA] Member States agree that antidumping measures in respect of goods originating in the territory of the other Member States are not appropriate from the time of achievement of both free trade in goods between the [ANZCERTA] Member States on 1 July 1990 and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods'.

⁸¹ These categories are based on Voon (2010).

⁸² See also WTO Analysis of RTA trade remedy provisions, see WTO Committee on Regional Trade Agreements, *Inventory of Non-Tariff Provisions in Regional Trade Agreements*: Background Note by the Secretariat, WT/REG/W/26 (5 May 1998) 15 – 22.

alia, Korea – Australia Free Trade Agreement, Australia – New Zealand Closer Economic Relations Trade Agreement, and New Zealand – Thailand Closer Economic Partnership Agreement.⁸³ For the WTO-Plus RTAs, most have excluded the application of antidumping and/or global safeguard measures between the RTA members, as well as modified the WTO rules regarding trade remedies such as by imposing lesser duty rule in antidumping proceeding,⁸⁴ raising *de minimis* dumping margins,⁸⁵ the prohibition to use surrogate value in calculating normal value and/or export price,⁸⁶ and/or the prohibition of zeroing (even if it is only written implicitly).⁸⁷

WTO, RCEP, and National Legislations: Dispute Settlement?

Trade remedy instruments have been regulated in multilateral, regional, bilateral, and national levels. WTO provides disciplines on antidumping measures, subsidy and CVD measures and safeguard measures. RCEP and other bilateral/regional trade agreements amongst ASEAN members with other RCEP members like China, Korea, Australia and New Zealand also have trade remedies chapters.⁸⁸ Every RCEP member also has their own national laws and regulations as a legal basis to initiate and impose trade remedy instruments. It is desirable that all regulations at different levels complement each other (not having inconsistency with one another) and to provide more legal certainty in terms of substantive and procedural issues so that due process can be secured and disputes can be avoided.

As explained above, although there are some distinct features of the trade remedies regulations in RCEP Trade Remedies Chapter as compared to WTO laws, they are, in principle, still in line with the WTO Agreements. This view is asserted by the provision that explicitly reaffirmed the rights and obligations of RCEP members under the WTO rules and principles as stipulated in Article 7.9 paragraph 1 and Article 7.11 paragraph 1 of RCEP Trade Remedies Chapter. All national laws and regulations would also be, in principle, in line with the WTO Agreements, including trade remedies. Article XVI.4 of the Marrakesh Agreement establishing the WTO provides 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as

⁸³ There are 16 RTAs in this category.

⁸⁴ See for example Korea – Australia Free Trade Agreement (KAFTA), Viet Nam – Korea Free Trade Agreement (VKFTA), and Malaysia – Australia Free Trade Agreement (MAFTA).

⁸⁵ See Article 2.17 of the New Zealand – Singapore Closer Economic Partnership.

⁸⁶ See FTA between the Government of the People's Republic of China and the Government of the Republic of Korea.

⁸⁷ See for example Article 6.8 of the Korea-Australia Free Trade Agreement. The similar provision can be found in other RTAs such as Indonesia-Korea Comprehensive Economic Partnership, the Viet Nam-Korea Free Trade Agreement, and the New Zealand-Korea Free Trade Agreement.

⁸⁸ See footnotes 18–20 above.

provided in the annexed Agreements.' Thus, there should not be any conflict between what has been regulated in the multilateral, regional, and national levels.

Nevertheless, *assuming arguendo*, there is a conflict, at the WTO there is a principle of exclusive jurisdiction, whereby disputes regarding WTO Agreements, including those relating to trade remedies, i.e. Agreement on Safeguards, Antidumping Agreements or Agreements on Subsidy and Countervailing Measures, can only be brought to the WTO dispute settlement system⁸⁹ and not any other system.⁹⁰ Disputes regarding non-compliance with RTAs or national laws and regulations cannot be brought to the WTO dispute settlement system. RTAs/FTAs (or customs unions) can only be invoked in WTO dispute settlement proceedings as an affirmative defence pursuant to GATT 1994 Article XXIV.⁹¹

In the RCEP Agreement, the dispute settlement mechanism is provided in Chapter 19. This chapter applies to the settlement of disputes between Parties regarding the interpretation and application of RCEP and to situations where a Party considers that a measure of another Party is not in conformity with the obligations under this Agreement, or otherwise failed to carry out its obligations.⁹² According to this chapter, RCEP members can seek consultations or other alternative forms of dispute resolution, in lieu of or before triggering the establishment of a dispute settlement panel.⁹³ However, it is important to note that this chapter does not apply to other chapters that specifically rule out Chapter 19. Nevertheless, for the Trade Remedies Chapter, the exclusion wording ruling out Chapter 19 is different from other chapters. The other chapters exempted from the applicability of Chapter 19 are Sanitary and Phytosanitary measure (Chapter 5), Competition (Chapter 13), Electronic Commerce (Chapter 12), Small and Medium Enterprises (Chapter 14), Economic and Technical Cooperation (Chapter 15), and Government Procurement (Chapter 16). In those chapters, the wording for the 'Non-Application of Dispute Settlement' provision is 'No Party shall have recourse to dispute settlement under Chapter 19 for any matter arising under this Chapter', while in Article 7.16, also entitled 'Non-Application of Dispute Settlement', a provision contains specific language that no RCEP member shall have recourse to the RCEP dispute settlement system under Chapter 19 for any matter arising under this *Section* or *Annex 7A* concerning Practices Relating to Anti-Dumping and Countervailing Duty Proceedings. Thus, there is a difference in language between Article 7.16 and the other chapters with regard to the non-application of dispute settlement

⁸⁹ Article 23.1 of the WTO Dispute Settlement Understanding states: 'When members seek to redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this understanding.'

⁹⁰ Panel Report, US-Section 301 Trade Act (2000), para.7.43.

⁹¹ The Appellate Body in *Turkey – Textile* stated that 'Article XXIV can only be invoked as a defense to a measure that is inconsistent with certain GATT provisions to the extent that the measure is introduced upon the formation of a customs union which meets the requirement in sub-paragraph 5(a) of Article XXIV relating to the duties and other regulations of commerce applied by the constituent members of the custom union to trade with third countries'. See Appellate Body Report, *Turkey – Textile*, para. 52.

⁹² See Article 19.3(1) of RCEP.

⁹³ See Article 19.6 and 19.7 of RCEP.

provisions. The difference is between the use of the words 'chapter' and 'section'. The non-applicability in Chapter 7 only refers to specific 'sections' and not the whole 'chapter'. It refers only to Section B for antidumping and CVD measures and Annex 7A. Similarly, a specific exemption language also can be found in Chapter 17 concerning General Provisions and Exceptions. Article 17.9 (Measure against Corruption) states 'No Party shall have recourse to dispute settlement under Chapter 19 for any matter arising under this *Article*'. This clearly rules out Chapter 19 only for that particular article and not the entire chapter.

Although the applicability of this provision will be subject to review in the future, at the moment, the enforcement mechanism of the RCEP Trade Remedies Chapter for Anti-dumping and Countervailing Section is questionable. Should there be any RCEP member breaches of any provision of the RCEP Trade Remedies Chapter for antidumping and CVD, there is no forum available to settle the dispute. At the moment, RCEP Trade Remedies Chapter for section 7B and Annex 7A can only be seen as a soft law that relies on the good faith of RCEP members for compliance. The WTO Dispute Settlement also cannot become an option to settle any dispute arising from non-compliance with the RCEP Trade Remedies Chapter for Anti-dumping and Countervailing Section due to the exclusive jurisdiction as explained earlier, unless there are similar provisions that overlap between RCEP and the WTO. Therefore, this issue must be discussed carefully in the future; based on the historical record, there have been quite a few disputes on trade remedies amongst RCEP Parties under the WTO dispute settlement, especially concerning the antidumping and CVD measures such as: *Korea – Stainless Steel Bar (Japan)*,⁹⁴ *Korea – Pneumatic Valves (Japan)*,⁹⁵ *Korea – Certain Paper (Indonesia)*,⁹⁶ *Australia – AD/CVD on Certain Products (China)*,⁹⁷ *China – AD/CVD on Wine (Australia)*,⁹⁸ *China – AD on Stainless Steel (Japan)*,⁹⁹ *China – AD/CVD on Barley (Australia)*,¹⁰⁰ *Australia – Anti-Dumping Measures on A4 Copy Paper (Indonesia)*,¹⁰¹ *China – HP-SSST (Japan)*,¹⁰² and *Japan – DRAMs*

⁹⁴ DS 533: *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds553_e.htm (accessed 1 December 2021).

⁹⁵ DS 504: *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds504_e.htm (accessed 1 December 2021).

⁹⁶ DS 312: *Korea – Anti-Dumping Duties on imports of Certain Paper from Indonesia*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds312_e.htm (accessed 1 December 2021).

⁹⁷ At the time of writing this paper, this case was in the consultation stage. See DS 603: *Australia – Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds603_e.htm (accessed 1 December 2021).

⁹⁸ At the time of writing this paper, the panel has composed. See DS 602: *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds602_e.htm (accessed 1 December 2021).

⁹⁹ At the time of writing this paper, the panel has established but not yet composed. See DS 601: *China – Anti-Dumping Measures on Stainless Steel Products from Japan*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds601_e.htm (accessed 1 December 2021).

¹⁰⁰ At the time of writing this paper, the panel has composed. See DS 598: *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds598_e.htm (accessed 1 December 2021).

¹⁰¹ DS 529: *Australia – Anti-Dumping Measures on A4 Copy Paper*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds529_e.htm#:~:text=The%20Panel%20concluded%20that%20Australia,did%20%E2%80%9Cnot%20permit%20a%20proper (accessed 1 December 2021).

¹⁰² DS 454: *China – Measures Imposing Anti-Dumping Duties on High Performances Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds454_e.htm (accessed 1 December 2021).

(Korea).¹⁰³ Based on this record, it is not an understatement that there is a high possibility of disputes arising between RCEP members regarding trade remedies. Therefore, the necessity of the dispute settlement procedure is crucial for the enforcement of the RCEP Trade Remedies Chapter.

However, there is also a need to anticipate the problem of forum shopping. Forum shopping has been defined as a litigant's attempt to 'have his action tried in a particular court or jurisdiction where he feels he will receive the most favourable judgment or verdict'. As explained earlier, many substantive and procedural issues of trade remedies have been regulated in multilateral, regional and national levels. Thus, there have been some instances whereby multiple forums have had recourse on the same issues to obtain favourable decisions for a particular party. Forum shopping between the WTO, on the one hand, and RTAs, on the other, has become quite common (Jain, 2007). Sometimes, the same case can also be brought to the national court or tribunal; when the verdicts conflict, that can create legal uncertainty.

One of the famous cases related to forum shopping issue is that of the North American Free Trade Agreement (NAFTA) Parties, for example Mexico – Corn Syrup. According to Gantz (1999) concerning the forum shopping issue, the cases brought before NAFTA and/or the WTO can be divided into three categories: (1) no effective choice of forum; (2) apparent choice, with legal or political considerations in some instances dictating one forum over the other; and (3) availability of parallel fora.

For the first category, a forum of choice does not effectively exist because of the exclusivity of jurisdiction of each forum. For the second category, one of the examples is the Broom¹⁰⁴ case, in which Mexico chose to settle a dispute under Chapter 20 of NAFTA due its political reason. Mexico favoured NAFTA rather than WTO because it considered that it would operate more quickly and compliance by the US was more likely (Gantz, 1999). For the last category, where antidumping and CVD duties are the main issue, one can expect actions in multiple forums, as demonstrated in the Mexican antidumping action in the high fructose corn syrup case. In this case, the American sugar industry has brought an action under NAFTA Chapter 19 challenging the Mexican administrative decision imposing antidumping duties¹⁰⁵ and a WTO panel was being formed to review the same Mexican antidumping duty determination.¹⁰⁶ Thus, in this case, there were two proceedings ongoing at the same time on the same issue. However, it is important to note that the Chapter 19 panel is limited to reviewing administrative decisions about its

¹⁰³ DS 336: *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds336_e.htm (accessed 1 December 2021).

¹⁰⁴ See Panel Report of Arbitral Panel Established Under Chapter Twenty of NAFTA in the matter of the U.S safeguard action taken on corn brooms from Mexico, 30 January 1998.

¹⁰⁵ See Article 1904 Binational Panel Review Under NAFTA in the matter of Review of the Final Determination of the Anti-Dumping Investigation on Imports of High Fructose Corn syrup, Originating from the United States of America, 3 August 2001.

¹⁰⁶ See Panel Report, Mexico – Anti-Dumping Investigation of High-Fructose from the United States, 28 January 2000.

consistency with the national antidumping law that may or may not be consistent with the WTO Agreement. In contrast, the WTO proceeding would permit a challenge to existing national law, or the national investigating authority's application thereof, on the grounds it is inconsistent with GATT Article VI or XVI or the WTO Agreements on Anti-dumping or Subsidies (Gantz, 1999).

Hence, recognising the issue of parallel adjudication mechanisms between the WTO and RTAs, the forum selection clauses are usually provided under the dispute settlement chapter. In general, this clause provides that once a party has opted to submit a dispute to given forum, that choice is irreversible and the party is precluded from taking the dispute to another forum (Zang, 2020). This clause has been provided in several RTAs such as MERCOSUR¹⁰⁷ and NAFTA.¹⁰⁸ This clause has also been regulated in the RCEP Agreement, particularly in Article 19.5 concerning 'choice of forum'. In this Article, it clearly states that 'where a dispute concerns substantially equivalent rights and obligations under this Agreement and another international trade or investment agreement to which the Parties to the dispute are party, the Complaining Party may select the forum in which to settle the dispute and that forum shall be used to the exclusion of other fora'. However, there is an exclusion in this Article if the Parties agree in writing that Article 19.5 shall not apply to a particular dispute; if the Parties agree to this exclusion, there is a high probability of the existence of parallel adjudication, although this scenario is unlikely to happen.¹⁰⁹

Conclusion

Trade remedy instruments are very important for RCEP members before the conclusion of the RCEP Agreement and became more indispensable when the Agreement entered into force since members are their most frequent users. Further regulations on trade remedy instruments in a dedicated chapter along with its Annex are designed to avoid their abuse and to provide more legal certainty. There have been some distinct features for each trade remedy instrument, which have not been regulated at the multilateral or even in national level. Although many of such provisions are, in principle, not in contradiction with what has been regulated at the WTO, the enforcement of the trade remedies chapter might become problematic since, at the moment, there is no forum available to settle any dispute. This will impact the implementation and enforcement of the RCEP trade remedies chapter. The options for making the RCEP trade remedies chapter into only soft law or non-binding law, the implementation of which will only rely on the good faith of the members or making it legally binding and enforceable, will depend on the existence of a RCEP trade remedies chapter dispute settlement procedure in the future.

¹⁰⁷ See MERCOSUR, Article 1 of the Protocol of Olivos.

¹⁰⁸ See Article 2005 of NAFTA.

¹⁰⁹ See Article 19.5 of RCEP.

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