

Analysis of China's FTAs

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I. Introduction

Over last two decades the world economy has continued to experience a variety of changes. One of the most noticeable developments in the world economy is proliferation or explosion of regional trade agreements¹. China is not an exception to the global trend. China has negotiated for free trade agreements (FTAs) with a number of trading partners. China's FTAs include FTA with Australia, ASEAN, Chile, Korea and Switzerland.² All of them except China-ASEAN FTA Upgrade Protocol³ and China-Georgia FTA⁴ have already entered into force.⁵

There are studies on China's FTAs from various perspectives. While some studies examine its FTA policies and outcome from a broad perspective (Wang (2011), Zhao and Webster (2011)), other studies analyze provisions of some China's FTAs or the FTAs themselves (Sohn (2015a, 2015b) and Wang (2016 a, 2016b)). However, little attention has been paid to the issue of whether China's FTAs are consistent with the WTO agreements. In addition, there are limited analyses on whether China's FTAs result in the so-called "WTO-plus" outcome which could expand its trade policy space beyond the WTO rules.⁶ Recognizing that China's prominent position in the global economy can influence increasingly the regional as well as the multilateral trading system, we would like to assess China's FTAs from institutional perspective with a view to exploring useful policies for the upcoming FTA negotiations.

Though China has played a leading role in global economy, its FTAs did not receive sufficient attention matching its economic importance. One of possible reasons for

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¹ Regional trade agreements (RTAs) are sometimes called as preferential trade agreements (PTAs).

² Other FTAs which are in force are China-Iceland FTA, China-Costa Rica FTA, China-Peru FTA, China-Singapore FTA, China-New Zealand FTA, China-Pakistan FTA, Mainland and Hong Kong Closer Economic and Partnership Agreement, and Mainland and Macau Closer Economic and Partnership Agreement.

³ China and ASEAN member countries embarked China-ASEAN FTA Upgrade negotiation in August 2014 and signed document of the negotiation results on November 22, 2015.

⁴ China and Georgia began FTA negotiations in December 2015, and signed the outcome document on October 5, 2016.

⁵ Most recently China-Australia FTA and China-Korea FTA came into effect on December 20, 2015.

⁶ Sohn (2015a) analyzes the trade remedies provisions of China-Korea FTA and Sohn (2015b) examines the SPS and TBT provisions of China-Korea FTA.

insufficient analyses is the arguable perception that Chinese government has sought FTAs primarily from international political perspective, while it gave relatively low priority to the economic interest. However since the political interest and economic interest are closely linked each other, it is important to analyze China's FTAs with a view to exploring useful strategies for China's future FTAs.

We examine selected provisions of more than ten China's FTAs, which are deemed to be of interest to China. In particular, we analyze trade remedies, SPS and TBT provisions of China's FTAs.⁷ Then we compare those rules with the provisions of related WTO Agreements, which are Anti-Dumping Agreement, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards, Agreement on Sanitary and Phytosanitary Measures and Agreement on Technical Barriers to Trade. We also try to draw lessons from some WTO disputes, if applicable.

This paper is organized as follows. In section II, we examine trade remedies, SPS and TBT provisions of China's FTAs. In particular, we review safeguard, anti-dumping duties and countervailing duties provisions, respectively. Then, in section III, we assess those provisions with an emphasis on the question of whether they are consistent with WTO Agreements. In section IV, we suggest policies for the effective implementation of China's FTAs and those for future FTAs. Finally, in section V, we conclude with some future issues.

II. Key features of China's FTAs

1. Trade remedies⁸

Trade remedy chapter stipulates rules on three measures, anti-dumping duty, countervailing duty and safeguard. While China's FTAs put stress on the safeguard provisions, most of them, except China-Korea FTA, touch upon anti-dumping and countervailing duties to the limited extent.

⁷ We explain briefly the reasons for selecting trade remedies, SPS and TBT provisions. First, since China is the top target country of anti-dumping measures, trade remedies provisions shall be of significant importance to China. Also China has been the most frequent target of countervailing duties. During the period from January 1, 1995 to June 30, 2016, WTO Members have imposed total of 3,316 anti-dumping measures. 840 anti-dumping measures have been imposed on China which is followed by Korea. Since China exports and imports enormous volume of agricultural products, SPS measures are of interest to China. Also since disputes concerning technical regulations and standards have continued to increase, it is important to examine the TBT provisions.

⁸ The term of "trade remedies" refers to anti-dumping duties, countervailing duties and safeguard measures collectively. The three measures are sometimes called as "contingent protection".

a. Safeguard measures

Safeguard provisions consist of two parts, rules on bilateral safeguard (BSG) and global safeguard (GSG). While bilateral safeguard measures shall be applied only to the imports from Parties, global safeguard measures shall be applied to a product being imported irrespective of its origin. China's FTAs address primarily the bilateral safeguard provisions, while they contain some rules on the global safeguard measures.

(i) Bilateral safeguard measures

BSG provisions stipulate a number of rules such as conditions for imposition of BSG measures, types of applicable measures, duration and extension, progressive liberalization, compensation and other provisions. While many BSG rules are analogous to the WTO Safeguards Agreement (SG Agreement), there are some FTA-specific rules such as grace period and the maximum number of BSG application.

We begin with the conditions for imposing the bilateral safeguard measures. BSG measures can be applied only when three conditions in general are met. The conditions are an increase in imports from the other Party, serious injury or threat thereof to the domestic industry producing like or directly competitive goods, and causation. Regarding the first condition, the increase shall be a result of the reduction or elimination of a customs duty under the FTA in question. Unlike most China's FTAs, China-Peru FTA includes additional requirement for determination of whether there is an increase in imports from the other Party. The BSG rule of China-Peru FTA stipulates that the import increase shall be a result of unforeseen developments in conjunction with the existence of a preferential tariff under the FTA.⁹ It is, however, important to note that the rule does not require the Parties to satisfy the unforeseen requirement, but as long as the Parties prove that the import increase is as a result of the reduction or elimination of a customs duty under the FTA, *or* as a result of unforeseen development, the first condition of the import surge is satisfied.¹⁰

Common provisions on BSG measures include rules on provisional measures, duration and extension, progressive liberalization and compensation. Most of them except duration and extension are similar to rules of WTO Safeguard Agreement. The duration and extension rules also vary among FTAs. Though the bilateral safeguard measures may be applied only during the transition period¹¹, Parties may apply a provisional bilateral safeguard measure in

⁹ Article 70.1 of China-Peru FTA.

¹⁰ WTO case laws such as *Argentina-Footwear* require that pursuant to Article XIX.1(a) of GATT 1994, the WTO members applying a (global) safeguard measure shall prove that the import increase is a result of unforeseen developments.

¹¹ There is a variation in transition periods with some exceptions. For China-Australia FTA, its general transition period is the three-year period from the date of entry into force of the FTA. The transition periods for

critical circumstances before making a final determination. The critical circumstance means the situation where delay of the BSG measure application would cause damage which would be difficult to repair. Thus, when a Party makes a preliminary determination that there is a clear evidence that the increased imports have caused or are threatening to cause serious injury to a domestic industry which produces like or directly competitive good of the imported good under investigation. The duration of a provisional bilateral safeguard measure shall not exceed 200 days.¹²

Various FTAs introduce a grace period for application of the bilateral safeguard measures.¹³ Under the grace period rule, a Party is not permitted to apply a bilateral safeguard measure on the same good from the other Party until certain period elapses from termination of the previous application. In addition, the FTAs set a minimum period of non-application.¹⁴ On other hand, it is notable that some FTAs limit the maximum number of BSG application on the same good during the transition period.¹⁵

There is an exception to the application of BSG measure. Even when three conditions for imposing a BSG measure are met, when it is found that the import from the other Party accounts for less than certain market share of the total import in the importing country, the importing Party shall not apply the BSG measure on the good from the other Party. In other words, when the imports of a subject good under investigation from the other Party fails to reach a threshold market share, the importing Party is not allowed to apply a BSG measure. China-ASEAN FTA and China-Singapore FTA set the threshold for negligible volume at 3 percent.¹⁶

Parties are required to hold consultations. Under China-New Zealand FTA and China-Swiss FTA, the importing Party shall provide the other Party with the adequate opportunity for consultation prior to the application of a BSG measure. The consultation opportunity also shall be given the exporting Party before the extension of application.¹⁷ Moreover, China-New Zealand FTA requires the importing Party to initiate the consultations, upon the request of the other Party, immediately after a provisional BSG measure is applied.¹⁸

China-Chile FTA, China-Korea FTA and China-Peru FTA are three-year period, ten-year period and eight-year period from their effective dates, respectively.

¹² China's FTAs stipulating the provisional BSG include Article 7.5 of China-Australia FTA, Article 7.3 of China-Korea FTA and Article 73 of China-Peru FTA,

¹³ All China's FTAs except China-Peru FTA contain the grace period rule.

¹⁴ While most China's FTAs allow the application of BSG measure on the same good only after the same period of previous application elapses, China-Cost Rica FTA's grace period is half of the previous application period.

¹⁵ Both China-Australia FTA and China-Switzerland FTA allow the application of BSG measure on the same good up to twice. (Article 7.3.3 of China-Australia FTA and Article 5.5.3 of China-Australia FTA)

¹⁶ Article 9.7 of China-ASEAN FTA and Article 43 of China-Singapore FTA.

¹⁷ Article 71.3 of China-New Zealand FTA and Article 5.8.3 of China-Swiss FTA.

¹⁸ Article 71.4 of China-New Zealand FTA.

(ii) Global safeguard measures

Unlike the bilateral safeguard measure which is applied only to the import from the other Party, the global safeguard measure is applied a product originating from any country. The WTO Safeguards Agreement provides the rules for application of global safeguard measures. Thus, without introducing any substantive rules, China's FTAs reaffirm the Parties' rights and obligations under Article XIX of GATT 1994 and the Article XIX of GATT and WTO Agreement on Safeguards.¹⁹

Certain FTAs place notification obligation on the invoking Party. When the other Party requests, the Party intending to take a global safeguard measure may notify immediately in writing all pertinent information on the initiation of a safeguard investigation, the preliminary determination and the final determination of the investigation.²⁰

b. Anti-dumping duties

Most China's FTAs do not include substantive provisions on anti-dumping duties. They just reaffirm the rights and obligations under the WTO Anti-Dumping Agreement (ADA). Moreover, they do not have FTA-specific or preferential rules on the conditions for imposing anti-dumping duties, determination of dumping, injury and causation.

There are provisions concerning determination of dumping which are considered to be of importance to China. ASEAN members agreed to grant China a market economy status for the purpose of anti-dumping investigation. Regardless of the number of anti-dumping investigations against Chinese products, the market economy status is expected to relieve Chinese exporters from the extra burden for demonstrating normal price level as non-market economy status.²¹ China and Korea agree not to use the zeroing methodology²² in the comparison of normal value with export prices.²³

On the other hand, some FTAs include clarified and improved provisions on the anti-dumping investigation procedures. One of them is the requirement to notify the other Party

¹⁹ NAFTA, MERCOSUR and Korea-US FTA contain a provision which allows exemption of the imports from other Party from the application of global safeguard measures under certain conditions. The preferential treatment rules in NAFTA and MERCOSUR had been issues in WTO disputes.

²⁰ Article 7.5.2 of China-Korea FTA.

²¹ Article 14 of China-ASEAN FTA. It is noted that ASEAN members agreed to recognize China as a market economy from the date of signature of the FTA, not from the date of entry of force.

²² The "zeroing" refers to the methodology to treat a negative margin of dumping as zero. The methodology would increase the amount of dumping margin and, consequently increase the likelihood of determining the existence of dumping.

²³ Article 7.7.2 of China-Korea FTA.

of the receipt of anti-dumping application claiming against imports from the Party. Pursuant to the rules, the Parties shall notify in writing the fact of receiving the anti-dumping application immediately²⁴ or as soon as possible²⁵. More importantly, China-Korea FTA specifies the time frame for the notification. Under the FTA, China and Korea shall provide the written notification to the other Party no later than seven days prior to the initiation of an investigation.²⁶

China-Korea FTA has meaningful provisions. One of them is the explicit application of *de minimus* standard²⁷ to the new exporter review.²⁸ Another provision is a rule which encourages Parties to refrain from initiating an anti-dumping investigation on particular goods from the other Party. When investigating authorities of a Party make an initiation decision on a good from the other Party whose anti-dumping measure has been terminated in the previous twelve months as a result of a review, they shall examine carefully any application for initiation of anti-dumping investigation on a good from the other Party and on which anti-dumping measures have been terminated in the previous twelve months as a result of a review.²⁹

c. Countervailing duties/Subsidies

Most FTAs reaffirm Parties' rights and obligations under the WTO Agreement on Subsidies and Countervailing Measures (ASCM). Thus they do not include substantive FTA-specific rules on countervailing duties except some rules on countervailing duty investigation procedures. After a Party receives a countervailing duty application against imports from the other Party, the Party shall provide the other Party with written notification of its receipt of the application as soon as possible.³⁰ In addition, as soon as after receiving a properly documented application for a countervailing duty investigation against imports from the other Party, a Party shall provide the other Party with consultation opportunity before initiation.³¹

Some FTAs prohibit any form of export subsidy on any goods destined for the other Party. In particular, neither Party shall introduce or maintain export subsidies for goods to be

²⁴ Article 86.2(a) of China-Cost Rica FTA and Article 77.2(a) of China-Peru FTA.

²⁵ Article 40.2 of China-Singapore FTA.

²⁶ Article 7.8.1 of China-Korea FTA.

²⁷ Pursuant to Article 5.8 of the WTO Anti-Dumping Agreement, when the margin of dumping is found to be less than 2 per cent of export price, the investigating authorities shall terminate the investigation immediately.

²⁸ Article 7.14 of China-Korea FTA.

²⁹ Article 7.12 of China-Korea FTA.

³⁰ Article 7.10.3 of China-Australia FTA.

³¹ Article 7.10.4 of China-Australia FTA and Article 7.8.2 of China-Korea FTA..

exported to the other Party.³² Since a number of questions could be raised, we will discuss them in Section III.

2. Sanitary and phytosanitary (SPS) measures

After reaffirming the rights and obligations under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), China's FTAs address important issues such as international standards, equivalence, regional conditions and mechanisms for cooperation.

SPS Agreement requires the WTO Members to base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist.³³ To an aim of harmonization of SPS measures, Parties shall take into account standards, guidelines and recommendations developed by the relevant international organizations.³⁴ In the absence of the relevant international standards, guidelines and recommendations, the Parties shall base their SPS measures on science and guarantee that the appropriate level of sanitary or phytosanitary protection is achieved.³⁵ Certain FTA stipulates the procedures to be taken in the situations where an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary measure is not substantially the same as the content of an international standard, guideline or recommendation, and if the measure may have a significant effect on trade of the other Party. In one of those situations, the Party should normally allow at least 60 days for the other Party to make comments in writing, shall discuss the comments upon request, and shall take the comments and the results of the discussion into account.³⁶ However, in the case of urgent problems of health protection, the Party is not required to provide the other Party with the opportunity to make comments prior to the entry into force of the measure.³⁷

Equivalence is one of the most important issues concerning sanitary and phytosanitary measures. Thus, Parties have made efforts to seek practical approaches to facilitate recognition of equivalence of the other Party's SPS measures. China's FTAs do not introduce any mechanism to provide substantive preferential treatment for the other Party's SPS measures. Under some FTAs, Parties agree to give favourable consideration to accepting the equivalence of each other's SPS measures which are consistent with the FTA and the SPS Agreement.³⁸ Other FTAs require Parties to accept the SPS measures of the other Party as equivalent if the other Party objectively demonstrates that its measures achieve the Party's appropriate level of sanitary and phytosanitary protection.³⁹

³² Article 63 of China-New Zealand FTA and Article 41 of China-Singapore FTA.

³³ Article 3.1 of SPS Agreement.

³⁴ Article 84.1 of China-Peru FTA.

³⁵ Article 84.2 of China-Peru FTA.

³⁶ Article 5.5.4 of China-Australia FTA.

³⁷ Article 5.5.5 of China-Australia FTA.

³⁸ Article 53.1 of China-Singapore FTA and Article 62 of China-Costa Rica FTA.

³⁹ Article 5.8.3 of China-Australia FTA and Article 85.1 of China-Peru FTA.

China is known to attach importance to the regional sanitary or phytosanitary conditions. FTAs attempted to introduce more detailed and practical provisions on regional conditions in line with the WTO SPS Agreement. WTO Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.⁴⁰

The FTAs place variant degree of obligation concerning the regional conditions provision. China-Peru FTA requires the importing Party to recognize in an expeditious way, upon request by the other Party and after the receipt of the necessary information provided by the exporting Party and an assessment by the importing Party, the pest- or disease-free areas and areas of low pest or disease prevalence recognized by the relevant international organizations.⁴¹ On the other hand, China-Switzerland FTA provides that in case of an event affecting the sanitary or phytosanitary status of a pest-free or disease-free area or an area of low pest or disease prevalence, the Parties shall do their utmost for re-establishing such status based on risk assessment taking into account relevant international standards, guidelines and recommendations.⁴²

Parties agree to cooperate in sanitary or phytosanitary matters of mutual interest in various forms. The cooperation mechanisms include exchange of information, and joint works in development, formulation and implementation of relevant standards and programmes. China and New Zealand agreed to carry out proactive steps on equivalence. They will jointly develop principles, criteria and processes regarding determination of equivalence, and apply them to their determination.⁴³

3. Technical barriers to trade (TBT)

TBT Chapters touch mainly upon rules on technical regulations, standards and conformity assessment procedures. It is not surprising that the FTAs reaffirm the rights and s under the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Among issues are equivalence of the other Party's technical regulations, accreditation and recognition of conformity assessment bodies in the other Party and recognition of conformity assessment results conducted in the other Party.

WTO Members are required to use the relevant international standards, or the relevant parts of them, as a basis for their technical regulations if technical regulations are required

⁴⁰ Article 6.1 of SPS Agreement.

⁴¹ Article 87.1 of China-Peru FTA.

⁴² Article 7.5.3 of China-Switzerland FTA.

⁴³ Article 81.4 of China-New Zealand FTA.

and relevant international standards exist or their completion is imminent. However, if the international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems, Members may not use the international standards.⁴⁴ Following the TBT Agreement, some FTAs stipulate that Parties' technical regulations shall be based on the international standards. International guides or recommendations also shall be used as a basis for conformity assessment procedures of central government bodies.⁴⁵

Some China's FTAs require Parties to use international standards, or the relevant parts of international standards, as a basis for their technical regulations and related conformity assessment procedures where relevant international standards exist or their completion is imminent. But this requirement to use the international standards does not apply to the situation where the international standards or their relevant parts are ineffective or inappropriate to fulfil legitimate objectives.⁴⁶

The WTO TBT Agreement has a rule on the equivalence of technical regulations. It, however, does not put any substantive obligation on WTO Members. Rather, WTO Members are required to give positive consideration to accepting as equivalent technical regulations of other Members, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.⁴⁷ Some China's FTAs follow the above equivalence provision of the WTO TBT Agreement.⁴⁸

Australia and China shall accredit or recognize the conformity assessment bodies in the other Party on national treatment principle.⁴⁹ Pursuant to the Chinese law, China must reach a cooperation agreement between Parties or their competent authorities before it can accredit, approve, license or otherwise recognize a body in the territory of Australia for assessing conformity with a particular technical regulation or standard.⁵⁰ More importantly, China and Peru agreed to seek for cooperation to facilitate the acceptance of the results of conformity

⁴⁴ Article 2.4 of WTO TBT Agreement.

⁴⁵ Article 5.4 of WTO TBT Agreement. There is an exception where the guides or recommendations or relevant parts are inappropriate for the Members concerned for reasons such as national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment.

⁴⁶ Article 51.1 of China-Singapore FTA, Article 39.2 of China-Pakistan FTA, Article 6.5 of China-Australia FTA and Article 96.1 of China-Peru FTA.

⁴⁷ Article 2.7 of WTO TBT Agreement.

⁴⁸ Article 6.6.1 of China-Australia FTA, Article 20.8 of China-Iceland FTA, Article 65 of China-Chile FTA, Article 53 of China-Singapore FTA and Article 95 of China-New Zealand FTA

⁴⁹ Article 6.7.5 of China-Australia FTA.

⁵⁰ Article 6.7.6 of China-Australia FTA.

assessment conducted in the other Party.⁵¹ China and Australia also agreed on similar provision which encourage their conformity assessment bodies to work more closely to facilitate the acceptance of conformity assessment in the other Party.⁵²

III. Assessment of China's FTAs

We analyze whether or not the trade remedies, SPS and TBT provisions in China's FTAs are consistent with those of the related WTO Agreements. While we examine the WTO-consistency of FTA provisions in comparison with WTO Agreements, we exclude the provisions on bilateral safeguard measures from our WTO-consistency discussions.

1. Trade remedies

a. Safeguard measures

Safeguard provisions consist of two parts, those on the bilateral safeguard measures and the global safeguard measures. Since the WTO Agreement on Safeguards does not contain rules on the bilateral safeguard measures, we cannot examine whether the BSG provisions are consistent with the WTO SG Agreement. Rather, we will discuss briefly some BSG rules in comparison with the WTO SG Agreement. The first one is the grace period rule which prohibits the Parties to apply a safeguard measure on the same good again unless a certain period elapses after the termination of the measure. Most of China's FTAs include the grace period rule with a slight variation in the grace periods. The grace period provisions on the application of bilateral safeguard measures reflect Article 7.5 of the WTO SG Agreement. Some FTAs including China-Australia FTA set the maximum number in which Parties may apply the bilateral safeguard measures on the same product origination in the other Party. China-Australia FTA and China-Switzerland FTA permit the Parties to apply the BSG measure on the same product up to twice. The WTO SG Agreement does not have the maximum frequency rule.

There is a difference between the conditions for imposing the bilateral safeguard measures and those for a global safeguard measures under the WTO SG Agreement. To apply a global safeguard measure, the importing WTO Members shall demonstrate that, pursuant to Article

⁵¹ Article 98.1 of China-Peru FTA.

⁵² Article 6.7.4 of China-Australia FTA.

XIX.1(a) of GATT 1994, the imports have increased as a result of unforeseen developments. But the BSG provisions require in general to demonstrate that the increased imports, as a result of reduction or elimination of customs duties under the FTA, caused serious injury or are threatening to cause serious injury to the domestic industry which produces like or directly competitive product of the imports from the other Party. An exception to the conditions for application of bilateral safeguard measures is found in China-Peru FTA. Under China-Peru FTA, the Parties shall prove that the imports increased as a result of reduction or elimination of customs duties pursuant to the FTA, or as a result of unforeseen developments in conjunction with the existence of a preferential tariff under the FTA.

Some FTAs establish the negligible volume rule. When it is found that the imports from the other Party do not exceed a certain share of the total imports, the importing Party shall not apply the bilateral safeguard measures on the imports originating in the other Party. China-ASEAN FTA and China-Singapore FTA set the threshold at three percent. The WTO SG Agreement also stipulates the negligible volume rule with three per cent for individual exporters and nine per cent for all exporters whose individual shares in total imports do not exceed three per cent. The difference between the negligible volume rule in China's FTAs and the rule in the WTO SG Agreement is that under the WTO SG Agreement, the negligible volume rule is applied only to the imports from developing countries.⁵³

b. Anti-dumping duties

There are a number of FTA provisions which are different from the WTO Anti-Dumping Agreement. China-Korea FTA specifies the time line for the notification of the receipt of an anti-dumping application against the imports from the other Party. In particular, after receiving an anti-dumping application with respect to imports from the other Party, Parties shall notify in writing the other Party of its receipt of the application. Since the WTO Anti-Dumping Agreement does not have the provision specifying the notification time line, this provision can be considered to be WTO-plus.

Another issue is prohibition of zeroing methodology. China and Korea confirm their current practice of counting toward the average all individual dumping margins, regardless of whether they are positive or negative, in the comparison of normal value with export prices on the basis of one of three methodologies. In other words, both China and Korea currently do not use zeroing methodology and hope to keep using this practice. It is important to understand that China-Korea FTA did not prohibit the zeroing methodology explicitly. Thus, we cannot exclude the possibility for at least one of the Parties to change the current no-zeroing practice in the future, but it could be a remote possibility because all WTO Members except the United States do not use currently the zeroing approach in comparison of normal

⁵³ Article 9.1 of the WTO SG Agreement.

value with export prices.⁵⁴ The very fact that neither China nor Korea uses currently the zeroing methodology may help to consider the provision as WTO-plus. Since it is an interpretation matter, the provision could not be deemed as WTO-plus, but this provision is expected to influence the future FTAs. We note that in both NAFTA Side Agreement on Environment and Side Agreement on Labor, instead of adopting the strengthened environment policies and labor policies, the United States and Mexico agreed to include a provision stating that they will apply their national environment policies and labor policies, respectively.

ASEAN Members agreed to treat China the market economy status for the purpose of anti-dumping investigation. The term of “the particular market situation” in Article 2.2 of the WTO Anti-Dumping Agreement refers in general to the non-market economy which could increase the likelihood that dumping is found to exist. Thus, market economy status is expected to help to increase Chinese exports to ASEAN member countries. Also it could be considered as WTO-plus.

There are additional provisions which could be WTO-plus. One of them is the provision which requires application of *de minimus* standard of Article 5.8 of the WTO Anti-Dumping Agreement to the new shipper review.⁵⁵ Another WTO-plus provision is the provision concerning examination of the anti-dumping duty application on a good originating in the other Party and on which anti-dumping measures have been terminated in the previous 12 months as a result of a review. Pursuant to the provision, the importing Party shall give special regard to the examination of the anti-dumping duty application against a particular good from the other Party.⁵⁶

When a Party’s investigating authorities receive an anti-dumping application, they shall examine the accuracy and adequacy of evidence provided in the application with a view to determine whether there is sufficient evidence to justify the initiation of an investigation.⁵⁷ The WTO Anti-Dumping Agreement does not put further obligations on the initiation decision by the investigating authorities. However, under the China-Korea FTA, the authorities shall satisfy additional guidance in making the initiation decision. In particular, the authorities are required to “examine carefully” any application for the initiation of an anti-dumping investigation on a good originating in the other Party and on which anti-dumping measures have been terminated in the previous 12 months as a result of a review. Thus, this provision on how to examine the anti-dumping application could be considered to be WTO-

⁵⁴ There are several WTO disputes in which zeroing methodology had been questioned. All cases except *EC-Bed Linen* case were brought against the U.S. The cases concerning zeroing methodology include *US-Zeroing (EC)*, *US-Zeroing (Japan)*, *US-Continued Zeroing*, *US-Anti-Dumping Measures on PET Bags*, *US-Zeroing (Korea)*, *US-Shrimp (Viet Nam)*, *US-Shrimp and Sawblades (China)*.

⁵⁵ Article 7.14 of China-Korea FT

⁵⁶ Article 7.12 of China-Korea FTA.

⁵⁷ Article 5.3 of the WTO AD Agreement.

plus, regardless of its effects on the investigation.

c. Countervailing duties and subsidies

A number of China's FTAs provide a rule concerning the countervailing duty investigation. They require the importing Parties to hold consultation prior to making an initiation decision. The WTO Agreement on Subsidies and Countervailing Measures (ASCM) stipulates explicitly that before the investigating authorities decide whether to initiate an investigation or not, the exporting Member shall be invited for consultations with the aim of clarifying the issues raised by the domestic industry and reaching at a mutually agreed solution.⁵⁸ Thus, the prior consultation rule is not an additional rule.

China-New Zealand FTA and China-Singapore FTA provide that neither Party shall introduce or maintain any form of export subsidy on any goods destined for the territory of the other Party. There are some issues to be clarified. First, there is a need to clarify the definition of an export subsidy. To the aim, it is desirable to state that the export subsidy is one within the meaning of Article 3.1(a) of ASCM. Pursuant to the Article, when a WTO Member grants subsidies contingent upon export performance, those subsidies are considered to be export subsidies and are prohibited. Second, another question may be raised whether the provision covers only the directly granted export subsidies or both directly and indirectly granted ones.

2. SPS

a. Equivalence

Obligations concerning equivalence under a certain China's FTAs are less strict than those provided in the WTO SPS Agreement. Pursuant to Article 62.1 of China-Costa Rica FTA, the importing Party is required to *give positive consideration to accepting* the sanitary or phytosanitary measures of the exporting Party as equivalent, if the exporting Party objectively demonstrates to the importing Party that its measures achieve the importing Party's appropriate level of sanitary or phytosanitary protection (emphasis added). On the other hand, the WTO SPS Agreement requires Members to *accept* the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the

⁵⁸ Article 13.1 of ASCM. It is possible that when the exporting Member does not want or is not able to participate in the consultation for some reasons despite the invitation by the importing Member, a consultation would not be held.

importing Member's appropriate level of sanitary or phytosanitary protection (emphasis added).⁵⁹

Despite the reaffirmation of rights and obligations under the WTO SPS Agreement⁶⁰ and its recognition of equivalence principle set out in Article 4 of the SPS Agreement⁶¹, China-Costa Rica FTA places an obligation which is less strict than one under the WTO SPS Agreement. Thus, this provision on equivalence could be inconsistent with the WTO SPS Agreement. As a result, China and Costa Rica need to exchange views on improving this provision in a manner consistent with the WTO SPS Agreement.

b. Regional conditions

Since China is a very big country, it is understood that China attaches particular importance to the adaptation to the regional conditions. Thus, a number of China's FTAs⁶² provide rules on regional conditions which are more detailed and more specific than those of the WTO SPS Agreement. For example, China-Switzerland FTA refers to the Guidelines to further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (G/SPS/48) adopted by the WTO Committee on Sanitary and Phytosanitary Measures and of relevant developed by OIE and IPPC.⁶³ China-New Zealand FTA provides that in order to facilitate trade between the Parties, where a Party objectively demonstrates an area or part of its territory to be free of a pest or disease or an area to be of low pest prevalence, following an assessment by the other Party, the Parties may agree to recognize this status.⁶⁴ In addition, China-Peru FTA requires the importing Party shall recognize in an expeditious way, upon request by the other Party after the receipt of the necessary information provided by the exporting Party and an assessment by the importing Party, the pest- or disease-free areas and areas of low pest or disease prevalence recognized by the relevant international organizations.⁶⁵

The WTO SPS agreement has a number of rules on regional conditions. First, the WTO Members are required to ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. Also when Members assess the sanitary or phytosanitary

⁵⁹ Article 4.1 of the WTO SPS Agreement.

⁶⁰ Article 60.1 of China-Costa Rica FTA.

⁶¹ Article 62.1 of China-Costa Rica FTA.

⁶² China-Korea FTA does not have a provision on the regional conditions.

⁶³ Article 7.5 of China-Switzerland FTA.

⁶⁴ Article 80.1 of China-New Zealand FTA.

⁶⁵ Article 87.1 of China-Peru FTA.

characteristics of a region, they are required to take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.⁶⁶ Second, the claiming exporting Members are required to provide the necessary evidence to objectively demonstrate to the importing Member that the areas at issue are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively.⁶⁷

We compare the equivalence provisions of China's FTAs with those of the WTO SPS Agreement. Since the former contains more details than the latter, the equivalence provisions of China's FTAs could be considered as WTO-plus, though to a limited extent.

3. TBT

When the importing Party accepts the results of conformity assessment procedures in the other Party, the acceptance would facilitate the international trade and reduce the costs to the exporters. Thus, Parties tend to attach importance to exploration of the appropriate rules on the mutual acceptance.

The WTO TBT Agreement contains provisions on the issue. Pursuant to the Agreement, WTO Members are required to ensure, whenever possible, that results of conformity procedures in other Members are accepted, even when those procedures differ from their own, provided that they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures (emphasis added).⁶⁸

On the other hand, some China's FTAs do not contain provisions which help to implement the relevant rules of the WTO SPS Agreement in practice, but they stipulate the provisions that do not match the obligations set out in the WTO SPS Agreement. For example, China and Peru simply recognize the existence of a broad range of mechanisms facilitating the acceptance in a Party's territory of the results of conformity procedures conducted in the other Party's territory.⁶⁹ In the event of not accepting the results of a conformity assessment procedure performed in the other Party's territory, China and Peru are, upon request by the other Party, required to explain the reasons for the rejection.⁷⁰ China-Australia FTA just provides that the Parties agree to encourage their conformity assessment bodies to work more closely with a view to facilitating the acceptance of conformity assessment results between

⁶⁶ Article 6.1 of the WTO SPS Agreement.

⁶⁷ Article 6.3 of the WTO SPS Agreement.

⁶⁸ Article 6.1 of the WTO TBT Agreement.

⁶⁹ Article 98.1 of China-Peru FTA.

⁷⁰ Article 98.3 of China-Peru FTA.

both Parties.⁷¹

In comparison with the relevant provisions of the WTO TBT Agreement, we may conclude that provisions of China's FTAs are not consistent with the WTO TBT Agreement.

IV. Policy recommendations

1. Policies for the effective implementation

We explore policies for implementing China's FTAs effectively. First, more substantive procedural provisions for the bilateral safeguard measures will lead to the effective implementation. China's FTAs stipulate a variety of rules on the application of bilateral safeguard measures, but they fail to touch upon the rules on the investigation procedures. Thus, China and its trading partners are encouraged to discuss the investigation procedural rules for implementing the provisions on bilateral safeguard measures Trade remedies in the effective and transparent manner.⁷²

The second policy is related to the notification of pertinent information on global safeguard investigations. Pursuant to China-Korea FTA, the Party intending to take global safeguard measures may provide immediately ad hoc written notification of all pertinent information on the initiation of a safeguard investigation, the preliminary determination and the final determination of the investigation.⁷³ But the FTA fails to elaborate the information to be included. Thus, the detailed rules on the information to be included in the notification could be helpful in the implementation of FTAs.

In the previous subsection, we examine a WTO-plus provision which requires the investigating authorities to examine carefully an anti-dumping application against a particular good from the other Party. In particular, the authorities shall examine carefully any application for the initiation of an anti-dumping investigation on a good originating in the other Party and on which anti-dumping measures have been terminated in the previous 12 months as a result of a review.⁷⁴ Besides the nature of being WTO-plus, a number of issues shall be tackled for the effective implementation of the special rule. One of the issues to be clarified is the scope of reviews. We may ask a question of whether the provision is applied to interim review, sunset review and new shipper review or some of them. Also it is essential to develop guidelines on what kinds of special regard could be given. Another question to be raised is why there does not exist a similar rule concerning the examination of a countervailing duty application.

⁷¹ Article 6.74 of China-Australia FTA

⁷² Sohn (2015a).

⁷³ Article 7.5.2 of China-Korea FTA.

⁷⁴ Article 7.12 of China-Korea FTA.

2. Policies for the future FTAs

It is widely understood that one of main goals of FTAs is to achieve further and deeper trade liberalization and then to increase national interest, primarily economic interest. The goals could be realized through the improved FTAs. Thus, we discuss the policies which would contribute to fulfilling the goals. It is noted that introduction of WTO-plus provisions does not necessarily result in the improved FTAs.

We may consider a number of policies or rules which are recommended to be put on the future FTA negotiation tables. Moreover, since China is the top target country of anti-dumping measures by the WTO Members, it is critical for China to play a vital role in exploring anti-dumping provisions which help the abusive use by some countries. The policies or rules to be examined include the mandatory lesser duty rule, public interest rule and the rules on anti-dumping sunset review determination.

The WTO Anti-Dumping Agreement stipulates the lesser duty rule. Under the lesser duty rule, if the duty which is less than the margin of dumping is adequate to remove the injury to the domestic industry, it is desirable to impose the lesser duty rather than the full amount of dumping margin.⁷⁵ While the lesser duty rule in the AD Agreement is not mandatory, some WTO Members such as the European Union⁷⁶ and Korea⁷⁷ adopt the mandatory lesser duty rule. It is widely understood that the implicit purpose of the anti-dumping measures is to help the domestic industry of the importing country which suffered injury as a result of the dumped imports. Thus, introduction of mandatory lesser duty rule in China's FTAs is expected to the further trade liberalization.

It is meaningful to apply the public interest rule to the imposition of anti-dumping and countervailing duty in the future FTAs. After determining that the dumped imports caused injury or threatened to cause injury to the domestic industry, the investigating authorities shall calculate the amount of anti-dumping duty. Normally they set the amount of anti-dumping at the level equal to the dumping margin found. However, while the domestic industry requesting for the investigation would enjoy benefits from the imposition of anti-dumping duty, certain interested parties such as consumers and importers of the good under public interest rule, the authorities shall take into account effects on a variety of interested parties before finalizing the amount of anti-dumping duty. Some countries including the European Union⁷⁸ and Canada⁷⁹ apply the public interest rule to the anti-dumping duty investigations.

⁷⁵ Article 9.1 of the WTO AD Agreement.

⁷⁶ Articles 7.2 (provisional measures), 8.1 (undertakings) and 9.4 (definitive measures) of Council Regulation (EC) No 1225/2009.

⁷⁷ Article 65.1 of Decree of Customs Act.

⁷⁸ Article 21 of Council Regulation (EC) No 1225/2009.

⁷⁹ Article 45 of Special Import Measures Act and Article 40.1 of Special Import Measures Regulations.

There are cases where, after considering the effects of anti-dumping duty on a wide range of interested parties, the authorities decided to impose the anti-dumping duty which is smaller than the amount of dumping margin. Thus it is desirable to introduce explicitly the public interest provision in the FTA's anti-dumping duty rules.

Finally we may add to the FTAs a safeguard provision which exempts the imports originating in the other Party from the application of global safeguard measure. At a first glance, the provision fits most as a preferential treatment for the other Parties. Certain FTAs⁸⁰ include the exemption rule. In practice, this provision has been at the center of several WTO disputes⁸¹. In those disputes, the key issue was the methodology for determining whether the conditions for application of safeguard measures are satisfied. In other words, when the importing country authorities examine the evidence including those related to its Parties and conclude that all conditions are met, the importing country shall apply the safeguard measure to imports from the other Party mainly because of the requirement to apply the measure to a product irrespective of its source⁸².⁸³ If China and its trading partners design the exemption rule taking into account the ruling of various WTO disputes, it would lead to an increase in their economic interest to some degree.

V. Conclusion

We analyze the trade remedies, SPS and TBT provisions of China's FTAs with a view to exploring guidance for their effective implementation and the future FTA negotiations. After examining key provisions of the FTAs, we discuss whether trade remedies, SPS and TBT provisions are consistent with their related WTO Agreements. Also we analyze whether FTAs contain some WTO-plus provisions which could help China and its trading partners to make further trade liberalization.

We find that most provisions of China's FTAs mirror the provisions of the related WTO Agreements. In addition, while China and its trading partners agreed to introduce so-called "WTO-plus" provisions which are clarified or improved in comparison with those in the related WTO Agreements, there are provisions which could be deemed to be in conflict with the WTO Agreements or affect the Parties' rights and obligations under the WTO Agreements.

Next we suggest policies for the effective implementation of China's FTAs and for the future FTA negotiations such as RCEP⁸⁴. They include detailed rules on the bilateral

⁸⁰ Article 802.1 of NAFTA and Article 10.5.1 of Korea-US FTA.

⁸¹ *Argentina-Footwear, US-Wheat Gluten, US-Line Pipe and US-Steel Safeguard*.

⁸² Article 2.2 of the WTO SG Agreement.

⁸³ This logic is called as "parallelism".

⁸⁴ Sixteen countries have participated in the Regional Comprehensive Economic Partnership (RCEP). Its

safeguard investigation procedures, introduction of mandatory lesser duty rule and public interest rule, and guidance for adaptation to regional sanitary or phytosanitary conditions.

FTAs are outcome of interaction between negotiating Parties. Also they reflect various aspects of two Parties, including their competitiveness in sensitive and core sectors, strength and preferences of their industries, and divergent domestic interests. Thus, it is not surprising to see that there are substantial variations in China's FTAs. Also it is important to recognize that the more divergent the FTAs are, the greater the compliance costs are.⁸⁵ The growing compliance costs could lead to adverse effects on China's trade. Therefore, there is a need for China to design FTA policies and to set related negotiation strategies in a manner to cause as little compliance costs as possible.

When each Party sets up its positions on various negotiating issues, there is a need for the positions to be based on analyses of their economic effects. While a Party's positions on certain issues have been sometimes shaped by non-economic objectives or desirability, if they are supported by or based on economic analyses, where feasible, the Party will be able to evaluate and review its positions more objectively, and then derive the improved positions. Even after the FTA negotiations are concluded, the economic analyses could provide a useful guidance for the effective implementation of FTAs. Thus, it is essential to conduct economic analysis for issues which are of substantial interest to the Party.

Finally, China and its trading partners need to demonstrate leadership individually or collectively by tackling new challenges which have affected or are expected to affect the international trade to a growing extent. The new global challenges include the genetically modified organisms (GMOs)⁸⁶ and the climate change⁸⁷. They can tackle the issues by putting them on the FTA negotiation table and seeking mutually acceptable rules. Once China and its trading partners are able to derive any tangible outcome, it could have far-reaching effects on international trade with potential repercussion to other FTAs as well as the multilateral trading system. Moreover, FTAs could play as a catalyst for the economic reform.

member countries are 10 ASEAN member countries, China, Japan, Korea, Australia, New Zealand and India. They held its 18th round of negotiations in Manila on May 2017.

⁸⁵ Compliance costs become an increasingly important issue in implementing a variety of rules of origin under FTAs. It is estimated that the compliance costs concerning the various rules of origin account for up to 5% of prices of goods in transaction.

⁸⁶ There is one WTO dispute case concerning GMO policies, *EC-Biotech*.

⁸⁷ China and its trading partners may agree on new rules to tackle appropriately the climate change which is expected to affect increasingly international trade and, in turn, would be affected by the international trade. Shodikhodjao (2015) emphasized the need for new rules for climate-friendly subsidies.

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