

Eliminating Anti-Dumping Measures in Regional Trade Agreements

The European Union Example



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Executive Summary

In recent years, the number of regional trade agreements has proliferated. The great majority, about 90 %, of the regional trade agreements allow member countries to use anti-dumping measures against one another. There are only 11 regional trade agreements that have eliminated the use of anti-dumping measures.

Due to the fact that about 75 % of all regional trade agreements include provisions on competition rules, it may be possible to replace anti-dumping measures with competition rules if there is emphasis placed on this during the trade negotiations. The elimination of anti-dumping measures in regional trade agreements is also in line with the World Trade Organization's (WTO) provisions.

The European Union (EU) is probably the best example of a regional integration scheme that has, in practice, replaced the use of anti-dumping measures between the member states with common competition rules and a common competition authority to enforce these rules. In the case of the EU, the harmonisation of other policy areas has also contributed to the possibility to eliminate the use of anti-dumping measures between the member states following the enlargement. However, in its regional trade agreements with third countries, the EU maintains the right to use anti-dumping measures, despite provisions on competition being included in most agreements.

This report argues that the inclusion of competition rules and other forms of policy harmonisation between member countries is a possible substitute for the use of anti-dumping measures in regional trade agreements. The possibility of replacing anti-dumping measures with competition rules and other relevant harmonisation provisions should be considered by the EU and other countries in future regional trade agreements. Regional trade agreements could, for example, establish a common competition authority in order to render the provisions on competition meaningful.

If successful, the replacement of anti-dumping measures with competition rules in regional trade agreements could, ultimately, be seen as a stepping stone and an example to follow in multilateral trade negotiations. 'Unfair competition' should be addressed by efficient competition rules rather than the use of anti-dumping measures.

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Introduction

In recent years, there has been a proliferation in the number of regional trade agreements. The experiences of deeper integration in regional trade agreements could be seen as a stepping stone towards future multilateral trade rules.

In the great majority of regional trade agreements, the rules allow member countries to use anti-dumping measures against one another. At the same time, most regional trade agreements include competition rules that address 'unfair competition'.

This report analyses whether the anti-dumping measures could be replaced by competition rules in regional trade agreements.

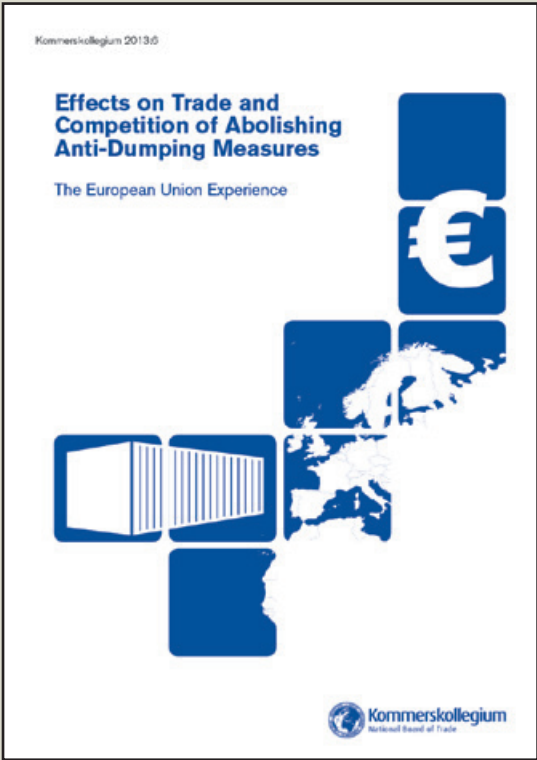
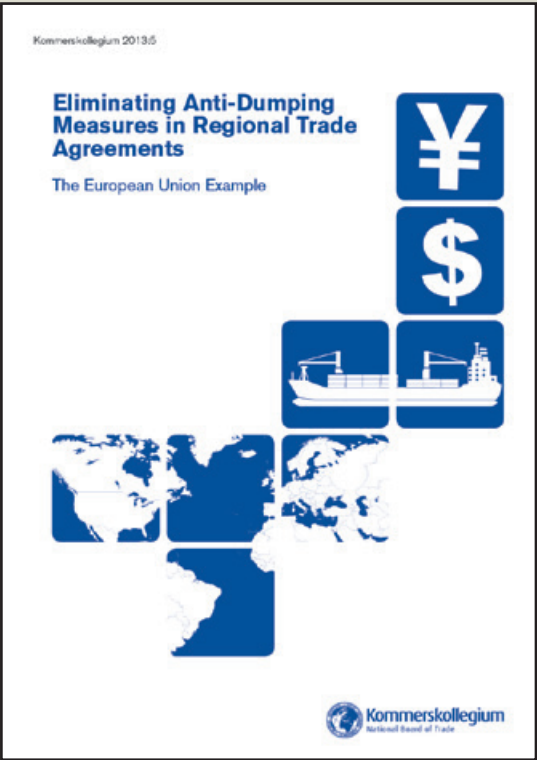
The report provides an overview of the relevant World Trade Organization (WTO) rules on the elimination of anti-dumping measures in regional trade agreements. The report also identifies those regional trade agreements that have eliminated the use of anti-dumping measures.

The European Union (EU) is one of the few regional trade agreements where the anti-dumping measures that were in place have been eliminated between the member states as they are integrated. The EU is also one of the few regional trade agreements that have established common competition rules.

This report analyses whether the example set by the EU in replacing the anti-dumping measures with common competition rules in its internal market could be applied in other regional trade agreements, including the EU's regional trade agreements with third countries.

[The report "*Effects on Trade and Competition of Abolishing Anti-Dumping Measures*", by the National Board of Trade, Sweden, 2013, provides an empirical analysis of the effects of abolishing anti-dumping measures within the EU at the time of its enlargement in 2004.]

Reports



1. The Elimination of Anti-Dumping Measures in Regional Trade Agreements: An Overview

A number of regional trade agreements (RTAs) have eliminated the use of anti-dumping measures on an intra-regional basis. This chapter identifies those RTAs that have eliminated anti-dumping measures between their member countries (see Annex 1: Legal basis for the elimination of anti-dumping measures in regional trade agreements). The focus is exclu-

sively on anti-dumping measures. This implies that even though certain RTAs have eliminated the use of anti-subsidy measures and safeguard measures, only anti-dumping measures are considered for the purpose of this analysis. The chapter also identifies to what extent the anti-dumping measures have been replaced by competition rules.

Facts

Different approaches to anti-dumping rules in regional trade agreements

It is possible to group the regional trade agreements (RTAs) into three broad categories according to how they treat anti-dumping measures (see Annex 2: Legal texts eliminating or restricting anti-dumping measures in existing regional trade agreements). In this context, it must be taken into consideration that there may be differences between the *de jure* and the *de facto* application of anti-dumping provisions in the RTAs.

Those in the first category (**'WTO provisions'**) make reference to the WTO rights and obligations or contain established rules that are in all material respects similar to the WTO rights and obligation. In cases where the RTAs make no reference at all to any anti-dumping provisions, the multilateral regime continues to apply. This category of RTAs does not "discriminate" between RTA parties and third countries in anti-dumping proceedings. This is the category to which about 90 % (176) of the RTAs belong. This is also where most of the EU's RTAs are to be found.

Those in the second category (**'WTO-plus provisions'**) contain specific provisions for the initiation of anti-dumping investigations and/or the imposition of anti-dumping measures that are more restrictive than the WTO rules, for example, higher *de minimis* levels and/or a shorter duration for the measures imposed on imports from RTA member countries, compared to the rules for anti-dumping measures on imports from third countries. Only about 3 % (4) of the RTAs belong to this category. There is also one example of an RTA that has included a 'best endeavour' clause not to impose anti-dumping measures. The RTAs that have WTO-plus provisions are: Singapore-New Zealand, Singapore-Jordan, Taiwan-Panama and Taiwan-Nicaragua. The RTA with a 'best endeavour' clause is EFTA-South Korea.

Those in the third category (**'elimination of anti-dumping measures'**) explicitly eliminate the use of anti-dumping measures between the members of the RTA. This is a category to which about 7 % (11) of the RTAs belong. This category of RTAs is the focus of this study, in particular the case of the EU (see Table 1).

The vast majority, about 77 %, of the RTAs, as of today, have been concluded between parties that have never reported the use of any anti-dumping measures against products originating in their member countries prior to the establishment of the RTA. Given this, and the fact that only 11 RTAs have eliminated the intra-regional use of anti-dumping measures, a large percentage of RTAs incorporate regional legal frameworks that maintain the right to use a trade defence measures that the parties have never before used in their previous bilateral relationships. This is supported by the fact that in about 81 % of the RTAs, as of today, the parties have never reported the use of any anti-dumping measure against products originating in their member countries following the establishment of the RTA, even though they are entitled to use this provision.

Most countries which are party to RTAs that have eliminated anti-dumping measures on an intra-RTA level have tended to reduce their use of anti-dumping measures against third countries. Given the limited number of RTAs that have eliminated anti-dumping measures and other external circumstances, it is not possible to make further conclusions.

Source: Based on Teh *et al.* (2007), Rey (2012) and data from the National Board of Trade, Sweden



1.1 Which regional trade agreements have eliminated anti-dumping measures?

As of today, there are about 200 notified RTAs in force. Each of these RTAs has, whether explicitly or implicitly, established a regional legal framework for the application of intra-regional anti-dumping actions (see Facts). A vast majority, about 90 %, of the RTAs have established regional anti-dumping regimes which keep the World Trade Organization (WTO) rights and obligations essentially unchanged (Rey, 2012). Currently, there are only 11 RTAs (free trade areas or customs unions) that have eliminated intra-regional anti-dumping measures (see Table 1).

The RTAs that have eliminated the use of anti-dumping measures have different characteristics. The RTAs may be bilateral (Australia–New Zealand, Canada–Chile, China–Hong Kong and China–Macau), regional (EU and EFTA), between a country and a free trade area/customs union (EU–Andorra, EU–San Marino, EFTA–Chile and EFTA–Singapore) or between free trade areas/customs unions (EU–EFTA). They are established between neighbouring countries (EU, EU–Andorra, EU–San Marino, EFTA, EU–EFTA, Australia–New Zealand, China–Hong Kong and China–Macau) and between parties on different continents (EFTA–Chile, EFTA–Singapore and Canada–Chile). They are also established between frequent users of the instrument (for example, EU and China) and countries that have

Table 1. Regional trade agreements currently in force that have eliminated anti-dumping measures on intra-regional trade

RTA	Type of agreement	Anti-dumping measures prohibited	Anti-subsidy measures prohibited	Safeguard measures prohibited	Competition Chapter	Date the elimination of anti-dumping measures came into force
European Union (EU)	CU	x	x	x	x	01/01/1958
Australia–New Zealand	FTA	x		x	x	01/07/1990
EU–Andorra	CU	x	x	x		01/07/1991
EU–San Marino	CU	x	x	x		01/04/2002
EU–EFTA, European Economic Area (EEA)	FTA	x	x		x	01/01/1994
Canada–Chile	FTA	x			x	05/07/1997
European Free Trade Association (EFTA)	FTA	x	x		x	01/06/2002
EFTA–Singapore	FTA	x			x	01/01/2003
EFTA–Chile	FTA	x	x		x	01/12/2004
China–Hong Kong	FTA	x	x			01/01/2004
China–Macau	FTA	x	x			01/01/2004

Note: Regional trade agreements that have eliminated safeguard measures, but not anti-dumping or anti-subsidy measures are: Australia–Singapore, Canada–Israel, New–Zealand–Singapore and MERCOSUR (Teh *et al.*, 2007). MERCOSUR has the intention to eliminate intra-regional anti-dumping measures once the national competition laws have been harmonised between the member countries (Hoekman 2002).

Source: Based Teh *et al.* (2007), Rey (2012) and data from the National Board of Trade, Sweden

never used anti-dumping measures (for example, EFTA). The fact that many free trade areas have eliminated the use of anti-dumping measures suggests that a common trade policy vis-à-vis non-members is not required.

The most active parties today in eliminating anti-dumping measures in RTA negotiations, apart from the EU itself in its successive enlargements, are the EFTA (3 RTAs), the EU (3 RTAs), Chile (2 RTAs) and China (2 RTAs).¹ The progressive deepening of certain regional integration processes can result in a renunciation of the right to use anti-dumping measures during the integration process (for example, Australia–New Zealand and the EU–EFTA). In a few cases, RTAs have, from the outset, prohibited the use of anti-dumping measures as a trade policy instrument (for example, EFTA–Chile, EFTA–Singapore and Canada–Chile). The parties to most of the RTAs that have eliminated the use of anti-dumping measures (9 of 11 RTAs) had never used anti-dumping measures against their RTA members. Only the EU and Australia–New Zealand have abolished anti-dumping measures that were previously in force between member countries (National Board of Trade, Sweden, 2013).

1.2 Which regional trade agreements have replaced anti-dumping measures with competition rules?

The promotion of “*conditions of fair competition*” between RTA member countries is considered as one of the principal objectives of the RTAs (Teh, 2009). The provisions on competition in RTAs can range from non-binding language and provisions on cooperation and/or coordination between domestic competition authorities, to common competition policy and a regional competition authority. In addition, the competition policy may be used differently in different countries.

Accordingly, RTAs increasingly include chapters and provisions on rules related to competition. As of today, more than three-quarters of the RTAs have a competition policy chapter. About 40 % of the RTAs that have a competition policy identify its objective as that of preventing the gains in market access that result from the agreement being eroded

by any anti-competitive behaviour which may be tolerated by RTA member countries. Provisions on the abuse of a dominant position feature in about 75 % of the RTAs with provisions on competition policy (Teh, 2009).

In certain agreements, there are provisions on the application of RTA-specific safeguard mechanisms in the chapter on competition (Solano and Sennekamp, 2006). The competition provisions in RTAs often refer to the multilateral rules on anti-dumping and other trade defence instruments as interim regulating texts that are applicable until the members’ competition policies are enacted (Teh, 2009).

In Australia–New Zealand, EFTA–Chile and EFTA–Singapore, the elimination of anti-dumping measures between the parties is specifically linked to the application of provisions on competition.² In other agreements, such as the EU, the EFTA, the EEA and Canada–Chile the elimination of the use of anti-dumping measures has, in practice, been replaced by the use of competition rules and/or other agreement-specific harmonisation rules that are linked to the process of integration.³

Looking at existing RTAs, there is no apparent link between the inclusion of competition rules and the elimination of anti-dumping measures in RTAs.⁴ RTAs that have eliminated the use of anti-dumping measures have tended to replace them with the right to apply safeguard measures or, in certain cases, the right to include provisions on safeguards in the chapter on competition (Teh, 2009). This is probably because anti-dumping measures and competition rules, despite a common origin, have deviated in practice and serve different purposes (Bienen *et al.*, 2013).⁵

In RTAs that have eliminated both intra-regional anti-dumping measures and safeguard measures, such as the EU and Australia–New Zealand, it seems that the high levels of integration and harmonisation of conditions and standards between the member countries is a prerequisite (National Board of Trade, Sweden, 2013). The possibilities to include provisions of this kind in RTAs could be explored to a greater extent than today. The experiences of deeper integration in RTAs can also serve as models for multilateral agreements, provided the integration is successful.

2. The Elimination of Anti-Dumping Measures by the EU: An Example

This chapter focuses on the EU's provisions on anti-dumping in its RTAs. The EU has abolished anti-dumping measures within its internal market. In practice, the anti-dumping measures have been replaced by common competition rules and a common competition authority to enforce the rules. The harmonisation of other policy areas has also contributed to the possibility to eliminate the use of anti-dumping measures between member states following the enlargement. However, in its RTAs with third countries, the EU maintains the right to use anti-dumping measures, even though most of these agreements include provisions on competition.

2.1 The elimination of anti-dumping measures by the EU in regional trade agreements

The EU is currently the only RTA that has abolished the application of all three trade defence instruments, including anti-dumping measures, between its members. This implies, for instance, that anti-dumping measures are reserved for dumping from outside the EU. The Treaty of Rome prohibited the use of anti-dumping measures on intra-EU trade once the transition period for full implementation of the treaty had expired.

The Treaty of Rome states that “*if, during the transitional period, the Commission /.../ finds that dump-*

ing is being practiced within the common market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them. Should the practices continue, the Commission shall authorise the injured Member State to take protective measures. /.../ As soon as this Treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect.” This rule has later been applied in all successive EU enlargements in 1973, 1981, 1986, 1995, 2004, 2007 and 2013 when the EU expanded from 6 to 28 member states.

The EU member states have traditionally been intensive users of anti-dumping measures among themselves, but the successive enlargements have significantly changed this pattern. The EU is, accordingly, one of very few RTAs that have abolished anti-dumping measures that were previously in place.⁶ The EU has also eliminated the use of the anti-dumping instrument in two of its three customs unions, as well as in one of its free trade agreements. The EU's customs unions that have abolished anti-dumping measures are those with Andorra (with the exception of agriculture) and San Marino.⁷ The free trade agreement that has abolished anti-dumping measures (with the exception of agriculture and fish products) is the European Economic Area (EEA).⁸



2.2 The EU's use of anti-dumping measures in regional trade agreements

The EU has opted to include anti-dumping provisions, which are in line with the general WTO provisions (see Facts), in most of its 23 current free trade agreements, as well as in its customs union with Turkey.⁹ Once they have come into force, anti-dumping measures have been used in fewer than half of these agreements, but only to a limited extent (see Table 2). Anti-dumping measures have been imposed on six products after the free trade agreements came into force and on four products

in the customs union with Turkey. In eleven cases, anti-dumping measures that were already in place have continued following the signing of the RTAs. In general, however, the EU makes no difference in using anti-dumping measures against RTA member countries and other third countries.¹⁰

In line with this, and as a consequence, RTA member countries may also use anti-dumping measures against the EU's exports. This implies that the use of the anti-dumping instrument in RTAs may also be detrimental to the EU's interests. In addition to anti-dumping measures, many RTA member countries use safeguard measures on the EU's exports.

Table 2. Anti-dumping measures imposed in EU's RTAs (in chronological order)

Country	RTA in force	Anti-dumping measure (year)
Turkey	Customs Union (31/12/1995)	<i>Polyester staple fibres (17/12/1988)</i> <i>Polyester yarn (14/06/1996)</i> Steel ropes and cables (14/08/2001) Welded tubes and pipes of iron or non-iron steel (27/09/2002) Tube and pipe fittings, of iron or steel (29/01/2013)
Morocco	Association Agreement (01/03/2000)	Steel ropes and cables (anti-circumvention) (30/10/2004)
Israel	Association Agreement (01/06/2000)	PET film (anti-circumvention) (18/11/2004)
Mexico	Economic Partnership and Economic Cooperation Agreement (01/07/2000)	<i>Magnetic discs (13/04/1996)</i> <i>Lighters (06/03/1997)</i> <i>Steel ropes and cables (17/08/1999)</i>
South Africa	Trade, Development and Cooperation Agreement (01/07/2000)	<i>Steel ropes and cables (17/02/1999)</i> <i>Hot rolled coils (05/02/2000)</i> <i>Manganese dioxides (13/03/2008)</i>
FYR Macedonia	Stabilisation and Association Agreement (01/05/2004)	Ferro-silicon (28/02/2008)
Egypt	Association Agreement (01/06/2004)	Ferro-silicon (28/02/2008)
Algeria	Association Agreement (01/09/2005)	<i>Urea ammonium nitrate solutions (22/09/2000)</i>
Bosnia & Herzegovina	Interim Agreement on Trade and Trade Related Matters (01/07/2008)	Zeolite A powder (14/05/2011)
South Korea	New Generation Free Trade Agreement (01/07/2011)	<i>Tube and pipe fittings, of iron or steel (24.08.2002)</i> <i>Silicon metals (19/01/2007)</i> <i>Steel ropes and cables (11/05/2010)</i> <i>PET (30/11/2010)</i>

Note 1: The anti-dumping measures already in use when the RTAs came into force are marked in *italics*. Investigations that did not result in definitive measures or measures that lapsed before the RTAs came into force are not considered. In addition to the anti-dumping measures, the EU also imposed anti-subsidy measures on imports of *polyester fibres and yarns* from Turkey in 28/09/1991.

Note 2: Croatia became an EU member state as of 01/07/2013 and its RTA (Stabilisation and Association Agreement, established 01/02/2005) with the EU ceased to exist. When the RTA came into force, anti-dumping measures on imports of *seamless pipes and tubes* had been in use since 18/02/2000. While the RTA was in force, the EU imposed anti-dumping measures on imports of *seamless pipes and tubes, of iron or steel* from Croatia from 29/06/2006. This has also been the situation for previous EU accession countries.

Source: Based on data from the National Board of Trade, Sweden



2.3 The EU's inclusion of competition rules in regional trade agreements

At the EU enlargements, the accession countries are required to adjust their legislation in all fields to the EU's *acquis communautaire*. These harmonisation rules imply stringent conditions with regard to production, labour rights, health standards, environmental standards, consumer quality standards etc. and create the prerequisites for 'a level playing field'. The harmonisation requirements, in combination with a common mechanism for enforcing the rules, make "competitive advantages" less likely on these grounds.

In addition to the harmonisation rules, the EU has established common competition rules that aim to guarantee 'fair competition'. The competition rules have, in practice, replaced the anti-dumping measures between the EU's member states, even though the prerequisites for 'a level playing field' also stem from the harmonisation rules (National Board of Trade, Sweden, 2013).

The EU also advocates the inclusion of competition rules in its RTAs with third countries. The RTAs negotiated by the EU normally contain strong language regarding anti-competitive agreements and the abuse of a dominant position. In general, the provisions are similar to Articles 101, 102 and 106 of the Treaty of the Functioning of the Euro-

pean Union. However, the EU's RTAs with third countries only contain limited provisions when it comes to coordination and cooperation with regard to the exchange of information (Solano and Sennekamp, 2006). The most important feature is, in any case, that the RTAs do not establish a common authority for the enforcement of the competition rules. This implies that the provisions on competition are not as easily enforceable in RTAs as they are within the EU's internal market.

As is evident from the comparison between the EU's internal market and the EU's RTAs with third countries, it is not simply the competition rules which it is relevant to consider with regard to the elimination of the use of anti-dumping measures; the harmonisation of conditions and standards are also important to the creation of a common set of rules (National Board of Trade, Sweden, 2013). Furthermore, there is a link between the elimination of the use of anti-dumping measures and the use of structural funds and other adjustment measures to counter the possible social costs that are a consequence of competition (Teh *et al.*, 2007).

To make it possible for the EU to eliminate the use of anti-dumping measures in its RTAs with third countries, the negotiations should focus on the harmonisation provisions to a greater extent than they do today. The EU should also advocate the establishment of a common enforcement authority in order to render the provisions on competition in the RTAs meaningful.

Conclusions

This report shows that a number of regional trade agreements have managed to eliminate the use of anti-dumping measures. The elimination of anti-dumping measures in regional trade agreements is also in line with the WTO provisions.

The EU is the most evident example of a regional integration scheme in which past use of anti-dumping measures between the member countries has, in practice, been replaced by common competition rules. In the case of the EU, the harmonisation of other policy areas has also contributed to the possibility to eliminate the use of anti-dumping measures between member states following the enlargement. The EU shows that it is possible to replace anti-dumping measures between major trading partners with competition rules, e.g. within the EU, consisting of 28 countries,

and the European Economic Area, consisting of 30 countries.

This report argues that the EU and other countries should consider replacing anti-dumping measures with competition rules and other relevant harmonisation provisions in future regional trade agreements. The regional trade agreements could, for example, establish a common competition authority in order to render the provisions on competition meaningful.

The replacement of anti-dumping measures with competition rules in regional trade agreements, if successful, may ultimately be regarded as a stepping stone and an example to follow at the multilateral level. 'Unfair competition' should be addressed by efficient competition rules rather than by the use of anti-dumping measures.



Annex

Annex 1: The legal basis for the elimination of trade defence measures in regional trade agreements

Regional trade agreements (RTAs) and trade defence instruments are both exemptions from the World Trade Organization (WTO) principle of non-discrimination. This annex presents an overview of the legal basis for the potential elimination of anti-dumping measures in RTAs, according to the WTO rules.

The basics of the WTO provisions on regional trade agreements and trade defence instruments

The WTO allows member countries to establish RTAs. The establishment of RTAs, in particular, free trade areas and customs unions, is an accepted exemption from the WTO principle on ‘most favoured nation’.¹¹ RTAs provide opportunities for deeper integration if the member countries share certain characteristics and/or ideas about the integration. The experiences of deeper integration in RTAs can also serve as models for multilateral agreements, provided the integration is successful (Ravenhill, 2011). RTAs can be established between individual countries, one country and a group of countries or between blocs of countries. RTAs have

grown in number and importance over the course of the past decade. As of today, about 200 notified RTAs are in force.

In RTAs, it is possible for members countries to grant preferential treatment to products originating in other RTA members countries if this treatment is consistent with Article XXIV of the GATT. RTAs that are established with the aim of liberalizing trade between their members are often accompanied by trade defence instruments that provide the member countries with a “safety net” that allows them to take defensive measures in order to temporarily restrict the access of other RTA members to their markets. The WTO allows its member countries to make use of trade defence instruments provided that certain conditions are fulfilled. The trade defence instruments are: (i) anti-dumping measures against dumped imports, (ii) anti-subsidy measures against subsidized imports and (iii) safeguard measures against sudden import increases.¹²

In some RTAs, the trade defence instruments are replaced by competition rules, state aid regulations, structural funds that aim to reduce regional disparities or other related policies. This is mostly the case in those RTAs that have reached a higher level of economic and political integration (Teh *et al.*, 2007).



Analysis of the possibilities to eliminate trade defence measures in regional trade agreements

The primary economic objective of RTAs is to eliminate barriers to intra-regional trade between member countries (Ravenhill, 2011). In this regard, it is also reasonable to expect RTA member countries to eliminate the use of trade defence measures on intra-regional trade, in particular, in customs unions. If intra-regional trade defence measures are permitted in a customs union, characterized by a harmonised external tariffs and free intra-regional circulation of goods, then rules of origin administration would be needed in order to determine which goods will be subject to these measures. In practice, this would result in a failure of the free intra-regional circulation of goods, which is the basic premise of a customs union (Denner, 2013).

It is sometimes claimed that the elimination of trade defence measures, in particular, anti-dumping measures and anti-subsidy measures, is a requirement according to Article XXIV of the GATT (Teh *et al.*, 2007).¹³ In Paragraph 8(a) and (b) of Article XXIV of the GATT, RTA members are required to eliminate duties and other regulations restricting trade. However, Article XXIV allows RTA member countries to exclude certain GATT articles from the general requirement to eliminate all trade barriers.

The article states that “[a] free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories” (WTO, 1994).

The articles covering trade defence instruments, Article VI (anti-dumping and/or anti-subsidy measures) and Article XIX (safeguard measures), are not explicitly included among the articles that may be excluded in the RTAs. If the intention was to permit Article VI to be excluded in RTAs, a reference to the article should have been made in the Paragraph (Teh *et al.*, 2007). The absence of Article VI and Article XIX from the list of excluded articles could be interpreted as implying that the use of trade defence instruments in RTAs may be inconsistent with GATT rules.

As of today, it has not been established whether the list of excluded articles is exhaustive or only illustrative as there is no consensus or dispute settlement understanding in the WTO with regard to its interpretation. If the list is *illustrative*, the articles on trade defence instruments need not to be eliminated upon the formation of RTAs; if the list is *exhaustive*, the articles on trade defence instruments, which are not on the list, should be eliminated upon the formation of RTAs (Teh *et al.*, 2007).

Annex 2: Legal texts eliminating and restricting anti-dumping measures in existing regional trade agreements

Legal text eliminating the use of anti-dumping measures

<p>European Economic Area (EEA) [Article 26] [Protocol 13 on the Non-Application of Anti-Dumping and Countervailing Measures]</p>	<p><i>"Anti-dumping measures ... attributable to third countries shall not be applied in relations between the Contracting parties, unless otherwise specified in this Agreement".</i></p> <p><i>"The application of Article 26 of the Agreement is limited to the areas covered by the provisions of the Agreement and in which the Community acquis is fully integrated into the Agreement."</i></p> <p>[This acceptance was made conditional on the correct application by the EFTA member states of the full enforcement of EEA competition rules in the EFTA member states against prices leading to injurious dumping on the EU market.]</p>
<p>European Free Trade Agreement (EFTA) [Article 36]</p>	<p><i>"Anti-dumping measures ... attributable to third countries shall not be applied in relations between the Member States."</i></p>
<p>Australia-New Zealand (ANZCERTA) [Article 4, Paragraphs 1 and 2] [Detailed provisions are presented in Paragraphs 2 (a-e)-5.]</p>	<p><i>"The Member States agree that anti-dumping 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 Member States on 1 July 1990 and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods."</i></p> <p><i>"From 1 July 1990, neither Member State shall take antidumping action against goods originating in the territory of the other Member State."</i></p>
<p>EFTA-Singapore [Article 16, Paragraphs 1 and 2]</p>	<p><i>"A Party shall not apply anti-dumping measures as provided for under the WTO Agreement on [Antidumping] in relation to products originating in another Party."</i></p> <p><i>"In order to prevent dumping, the Parties shall undertake the necessary measures as provided for under Chapter V [on Competition Rules]."</i></p>
<p>EFTA-Chile [Article 18, Paragraphs 1 and 2]</p>	<p><i>"A Party shall not apply anti-dumping measures as provided for under the WTO Agreement on [Antidumping] in relation to goods of a Party."</i></p> <p><i>"The Parties recognize that the effective implementation of competition rules may address economic causes leading to dumping".</i></p>
<p>Canada-Chile [Article M-01 and M-04]</p>	<p><i>"[E]ach Party agrees not to apply its domestic antidumping law to goods of the other Party. Specifically: (a) neither Party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Party; (b) each Party shall terminate any on-going anti-dumping investigations or inquiries in respect of such goods; (c) neither Party shall impose new anti-dumping duties or other measures in respect of such goods; and (d) each Party shall revoke all existing orders levying anti-dumping duties in respect of such goods."</i></p> <p>The Parties might in "exceptional circumstances" possibly applicable to situations of "dumping" to take defensive measures, such as anti-dumping measures:</p> <p><i>"Either Party may request, in writing, consultations with the other Party regarding exceptional circumstances that may arise with respect to the operation of this Chapter. ... Exceptional circumstances may include significant changes in recent trading conditions. ... In the consultations, the Parties shall make every attempt to arrive at a mutually satisfactory resolution of the particular matter, with a view to promptly restoring recent trading conditions."</i></p>
<p>China-Hong Kong [Article 7]</p>	<p><i>"The two sides undertake that neither side will apply antidumping measures to goods imported and originated from the other side."</i></p>
<p>China-Macau [Article 7]</p>	<p><i>"The two sides undertake that neither side will apply antidumping measures to goods imported and originated from the other side."</i></p>

Legal texts on WTO-plus provisions on anti-dumping measures

Singapore-New Zealand [Article 9]	<i>"(a) the de minimis margin of 2 per cent ... is raised to 5 per cent; (b) the new de minimis margin of 5 per cent ... is applied not only in new cases but also in refund and review cases; (c) the maximum volume of dumped imports which shall normally be regarded as negligible ... is increased from 3 per cent to 5 per cent ... (d) the time frame to be used for determining the volume of dumped imports ... shall normally be at least 12 months; (e) the period for review and/or termination of anti-dumping duties ... is reduced from five years to three years."</i>
Singapore-Jordan [Article 2.8]	<i>"(a) the de minimis margin of 2 per cent ... is raised to 5 per cent; (b) the volume of dumped imports normally regarded as negligible ... is raised from 3 per cent to 5 per cent ... (d) Article 14 of the WTO Anti-Dumping Agreement shall not be applied by the Parties; (e) the time frame to be used for determining material injury [and] calculation of the volume of dumped imports ... shall normally be at least 12 months; (f) any anti-dumping duty shall be terminated on a date not later than 3 years from the date that the duty was imposed ... (g) if a decision is taken to impose anti-dumping duty ... the Party taking such a decision, shall where possible, apply the 'lesser duty' rule..."</i>
Taiwan-Panama [Article 7.02, Paragraphs 1 and 2]	<i>"The importing Party may end an investigation with respect to an interested party, where its competent authority determines that the dumping margin ... is de minimis ... or where its competent authority determines that the volume of the dumped ... imports is insignificant."</i> <i>"(a) the dumping margin is de minimis when it is less than 6%, expressed as a percentage of the export price ... and (c) the volume of the dumped ... imports is insignificant if it represents less than 6% of the total imports of the like products of the importing Party."</i>
Taiwan-Nicaragua [Article 7.5]	<i>"Any definitive anti-dumping or countervailing duty imposed by a Party on a good imported from territory of the other Party shall be terminated on a date not later than four years from its imposition, notwithstanding the right to review in accordance with the WTO Agreement included in Article 7.01".</i>

Legal text with 'best endeavour' clause to not impose anti-dumping measures

EFTA-South Korea [Article 2.10, Paragraph 1]	<i>"The Parties shall endeavor to refrain from initiating antidumping procedures against each other".</i> <i>"If a Party takes a decision to impose an anti-dumping duty ... the Party taking such a decision shall apply the 'lesser duty' rule by imposing a duty which is less than the dumping margin where such lesser duty would be adequate to remove the injury to the domestic industry."</i> <i>"Five years after the entry into force of this Agreement, the Parties shall in the Joint Committee review whether there is need to maintain the possibility to take antidumping measures between them. If the Parties decide, after the first review, to maintain the possibility they shall thereafter conduct biennial reviews of this matter in the Joint Committee."</i>
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Source: Based on Rey (2012) and data from the National Board of Trade, Sweden

Notes

- 1 The customs unions between EU-Andorra and EU-San Marino, as well as the free trade agreements between China-Hong Kong and China-Macau, could, however, be considered as particular cases, as they are more geopolitical than trade-related.
- 2 The RTA between Australia and New Zealand (ANZCERTA) has not created common competition policies, but it has ensured that the competition policies are harmonised between the member countries (Hoekman, 2002).
- 3 During the EEA negotiations, the EFTA states agreed to adopt the majority of the EU's common competition policies. In the EEA, two supranational bodies, the European Commission and the EFTA Surveillance Body, are responsible for the enforcement of the EEA competition principles (Hoekman, 1998). The Canada-Chile free trade agreement has been able to eliminate the use of anti-dumping measures between the member countries without the harmonisation of competition policies or the creation of a supranational competition body (Denner, 2013).
- 4 There is, on the contrary, a clear correlation between common rules on state aid and the elimination of anti-subsidy measures (Teh *et al.*, 2007).
- 5 The first anti-dumping laws that were introduced in Canada in 1904 and in New Zealand in 1905 were motivated by concerns about predation. The US Anti-Dumping Act of 1916 was a material extension of its anti-trust law. However, as early as 1921, the scope of US anti-dumping law widened to provide relief against any instances of dumping, regardless of intent. This latter standard has prevailed in WTO law and general practice ever since (Bienen *et al.*, 2013). While anti-dumping measures aim to protect domestic competitors, competition policy aims to protect domestic competition.
- 6 With the exception of the EU, the only RTA that has abolished anti-dumping measures already in place was the free trade agreement between Australia and New Zealand. Between 1983 and 1988, Australia imposed ten anti-dumping actions against products from New Zealand. In 1988, a revision of the Australia-New Zealand Closer Economic Agreement (ANZCERTA) prohibited anti-dumping actions among the parties (Rey, 2012).
- 7 For the EU Customs Unions with Andorra and San Marino, Article 7 requires the countries to *"apply ... the laws, regulations and administrative provisions applicable to customs matters in the Community and necessary for the proper functioning of the Customs Union ... [as well as] the common commercial policy of the [Union]..."* As a consequence, the EU, Andorra and San Marino apply a common anti-dumping regime against third countries (Rey, 2012). In any case, Andorra and San Marino are not part of EU's common competition rules.
- 8 The free trade agreements between the EU and the EFTA member states (Liechtenstein, Switzerland, Iceland and Norway), which came into force in 1973, were altered in 1994 with the establishment of the European Economic Area (EEA). The changes resulting from the EEA prohibit intra-regional anti-dumping measures. Switzerland is a special case, as, in contrast with the other three EFTA member states, Switzerland could not ratify the agreement, as it was rejected by a national referendum. As a result, Switzerland and the EU negotiated a number of bilateral agreements. The legal framework for anti-dumping measures between the EU and Switzerland has not been substantially affected by these bilateral agreements (Rey, 2012).
- 9 The EU's 23 free trade agreements in force, as of today, are formed with: Albania, Algeria, Bosnia & Herzegovina, European Economic Area, CARIFORUM, Chile, Eastern and Southern Africa States, Egypt, Faroe Islands, Israel, Jordan, Lebanon, Macedonia, Mexico, Montenegro, Morocco, Palestinian Authority, Pacific States, Peru, Serbia, South Africa, South Korea and Tunisia.
- 10 WTO-plus provisions, i.e. the 'lesser duty rule' and the 'public interest test', are only considered in the recent free trade agreements with South Korea and Peru. This is also the case in a number of the ongoing free trade negotiations. In the European Partnership Agreements (EPAs) in force, it is stated that before imposing definitive anti-dumping measures on products imported from EPA member countries, the EU *"shall consider the possibility of constructive remedies as provided for in the relevant WTO agreements"*.
- 11 The 'most favoured nation' principle, as established in Article I of the GATT, implies that each WTO member has to treat all other members equally, without discrimination, as their most favoured trading partners. If a country improves the benefits that it gives to one trading partner, it has to treat all other WTO members the same. The permitted exceptions in trade in goods are: (i) regional trade agreements, (ii) anti-dumping and anti-subsidy measures and (iii) special and differential treatment for developing countries (WTO webpage).
- 12 According to the WTO, anti-dumping and/or anti-subsidy measures may be imposed if (i) producers in third countries are dumping and/or subsidizing their exports to a third country market, i.e. the exports take place at a level below the domestic price level (or a calculated 'normal value'), (ii) the dumped and/or subsidized imports are causing injury to the producers in the importing country market, and (iii) there is a causal link between dumping/subsidization and injury.
- 13 Anti-dumping measures and anti-subsidy measures have different objectives and effects on trade, compared to safeguard measures. The use of anti-dumping measures and anti-subsidy measures, which, by their very nature, discriminate between countries, is an accepted exemption from the 'most favoured nation' principle. Safeguard measures, on the other hand, may not discriminate between different countries. According to certain interpretations, the imposition of safeguard measures among RTA member countries may not be excluded, due to the fact that the WTO Agreement on Safeguards explicitly stipulates the non-discriminatory principle that *"[s]afeguard measures shall be applied to a product being imported irrespective of its source"* (WTO, 1994).

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