

## ISSUE FOCUS

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# Rising Mega RTA? China-Japan-Korea FTA under the New Trade Dynamism

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*So far, eight rounds of China-Japan-Korea FTA negotiations have been conducted. From 2015 on, the negotiations are expected to make great progress. Accordingly, CJK FTA has drawn increasing attention of scholars from multidimensionality. Still, there lacks concerns over the possible arrangement of each specific issue under such framework. Building on prior scholarship, this paper attempts to view such fragmented debate from the perspective of building a new international economic order. It suggests a developing track for CJK FTA to consider in designing its details: WTO→CJK FTA→RCEP(OBOR)→TPP→A New Multilateral Order. Only by so viewing can the important trilateral FTA play an appropriate role in future regional and global governance, so as to obtain the Asian voice in restructuring the international rules. Based on that, this paper further exemplifies a possible stepping stone regarding regional antidumping regimes and proposes adopting the WTO ADA Plus in CJK FTA. Such a proposal would become a crucial 'blueprint' for restructuring the multilateral ADA mechanism.*

### Keywords

CJK FTA, RTA, RCEP, OBOR, TPP, WTO ADA Plus

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## I. Introduction

From September 24 to 25, 2015, the eighth round of negotiations on the China-Japan-Korea (“CJK”) FTA was held in Beijing.<sup>1</sup> The slow pace of the trilateral negotiations has been expected to be accelerated since China and Korea reached ‘effective conclusion’<sup>2</sup> towards a FTA on November 10, 2014.<sup>3</sup> In addition, the recently released blue book of the Japanese economy called “the Annual Report on Japanese Economy and Sino-Japanese Economic & Trade Relations” has claimed that the relation between China and Japan would be ameliorated in 2015.<sup>4</sup> Therein, the negotiation of CJK FTA is also speculated to achieve a ‘breakthrough’ this year.<sup>5</sup>

CJK FTA has drawn increasing attention of scholars from a multi-dimensional aspect. Current literature can be divided into three types.<sup>6</sup> The first examines the possible strategic impact of such a trilateral FTA on each of the three countries as well as the possible economic benefits gained, respectively.<sup>7</sup> Based on that, the second continues to observe the feasibility of establishing a comprehensive framework of FTA.<sup>8</sup> Most of the current literature falls under the above two categories.<sup>9</sup> A positive

<sup>1</sup> See Ministry of Commerce (China), FTA Network, available at <http://fta.mofcom.gov.cn/topic/chinarh.shtml>; Ministry of Foreign Affairs (Japan), Japan-China-Republic of Korea Free Trade Agreement, available at [http://www.mofa.go.jp/ecom/ep/page23e\\_000337.html](http://www.mofa.go.jp/ecom/ep/page23e_000337.html); Ministry of Foreign Affairs (Korea), FTA Status of ROK, available at [http://www.mofa.go.kr/ENG/policy/fta/status/negotiation/chinajapan/index.jsp?menu=m\\_20\\_80\\_10&tabmenu=t\\_4&submenu=s\\_9](http://www.mofa.go.kr/ENG/policy/fta/status/negotiation/chinajapan/index.jsp?menu=m_20_80_10&tabmenu=t_4&submenu=s_9) (all last visited on Oct. 21, 2015).

<sup>2</sup> See *China, South Korea Reach ‘Substantial Conclusion’ on FTA*, VOA, Nov. 10, 2014, available at <http://www.voanews.com/content/china-south-korea-reach-free-trade-agreement/2514313.html> (last visited on Oct. 21, 2015).

<sup>3</sup> Dukgeun Ahn, *Talking Points*, The 1st CJK Cooperation Dialogue (Nov. 13, 2014), available at [https://www.jef.or.jp/en\\_act/act\\_cjk.asp](https://www.jef.or.jp/en_act/act_cjk.asp); I. Park, *Regional Trade Agreements in East Asia*, NUPI Working Paper 823 (2013), 1-44, available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=177692> (all last visited on Oct. 21, 2015).

<sup>4</sup> LUOLIN WANG & JIFENG ZHANG (ED), BLUE BOOK OF JAPANESE ECONOMY: REPORT ON JAPANESE ECONOMY AND SINO-JAPANESE ECONOMIC & TRADE RELATIONS [日本经济蓝皮书 日本经济与中日经贸关系研究报告] <available only in Chinese> 1-416 (2015).

<sup>5</sup> See, e.g., *Blue Book of Japanese Economic, Sino-Japanese Economic & Trade Relations are Expected to be Comprehensively Improved in 2015* [《日本经济蓝皮书》：2015年中日经贸关系有望出现全面改善] <available only in Chinese>, XINHUANET, available at [http://japan.xinhuanet.com/2015-05/20/c\\_134253635\\_3.htm](http://japan.xinhuanet.com/2015-05/20/c_134253635_3.htm) (last visited on Oct. 21, 2015).

<sup>6</sup> Terms of Reference of the Joint Study for an FTA among China, Japan and Korea (“TOR”). See the official website of MOFCOM China FTA Network, available at [http://fta.mofcom.gov.cn/china\\_japan\\_korea/zhizefanwei\\_en.pdf](http://fta.mofcom.gov.cn/china_japan_korea/zhizefanwei_en.pdf) (last visited on Oct. 21, 2015).

<sup>7</sup> *Id.* art. 1.1.

<sup>8</sup> *Id.* art. 1.2.

<sup>9</sup> See generally JUNFANG HU, EMPIRICAL ANALYSIS ON TRADE EFFECTS OF CJK FTA [中日韩自由贸易区贸易效果的实证分析] 1-221 (2007); Guiyan Yang, RESEARCH ON CJK FTA [中日韩自由贸易区研究] 1-276 (2005); XIAOYU SUN, THE NEW START OF THE CJK ECONOMIC COOPERATION [中日韩经济合作的新起点] <all available only in Chinese> 1-346 (2004).

consensus on creating a trilateral FTA has been thus reached among the three countries. As the negotiations of CJK FTA are speeding up, there is a lack of research on the possible arrangement of each specific issue under such a framework.<sup>10</sup> Currently, only limited literature falls within this third category and the debate is out of the focal point.<sup>11</sup>

Building on prior scholarship, this research attempts to contribute to the above fragmented debate by viewing CJK FTA as a linchpin of a new international economic order. The paper is composed of seven parts including a short Introduction and Conclusion. Part two will briefly describe the ongoing negotiation of CJK FTA. Parts three, four and five will elaborate on three key elements that should be taken into account in designing the details of CJK FTA, i.e., regional trade agreements (“RTAs”) and reconstruction of the WTO; the rise of China and Asian Regionalism; and the US factor in Asia and the new rules of the Trans-Pacific Partnership (“TPP”). As a possible stepping stone aimed at improving the current international economic order, in Part six, a proposal of ‘WTO Antidumping Agreement (“ADA”) Plus’ in CJK FTA will be suggested in the end.

## II. Ambitious Steps towards the Trilateral FTA

### A. Background

CJK began promoting trilateral economic cooperation more than a decade ago.<sup>12</sup> As early as 1999, the heads of State from each of the three countries reached a consensus to hold yearly trilateral summits on the sidelines of the ASEAN+3 summits.<sup>13</sup>

The increasing importance of the economies of China, Japan and Korea in the

<sup>10</sup> TOR art. 1.3.

<sup>11</sup> *E.g.*, a few scholars have conducted comparative researches on issues of competition laws and the economic integration of East Asia. See TOSHIFUMI HIENUKI (ED.), THE EAST ASIAN COMMON MARKET DRIVEN TO ESTABLISH BY COMPETITION LAWS [競争法の東アジア共同市場] <available only in Japanese> 1-226 (2008); Makoto Kurita, *Current Status and Issues of Competition Laws in East Asia* [東アジア地域における競争法制定の現状と課題] <available only in Japanese>, 33 INTERNATIONAL BUSINESS LAW AND PRACTICE [国際商事法務] 631-45 (2005); Ying Bi & S. van Uytsel, *Could Predatory Pricing Rules Substitute for Antidumping Laws in the Proposed China–Japan–Korea Free Trade Agreement?*, 18 SOC. SCI. JAPAN J. 163-92 (2015), available at <http://ssjj.oxfordjournals.org/content/18/2/163.full.pdf+html> (last visited on Oct. 21, 2015).

<sup>12</sup> S. Madhur, *China-Japan-Korea FTA: A Dual Track Approach to a Trilateral Agreement*, 28 J. ECON. INTEGRATION 376 (2013), available at <http://dx.doi.org/10.11130/jei.2013.28.3.375> (last visited on Oct. 21, 2015).

<sup>13</sup> *Id.*

world has been long noted. As of 2010, the three countries have already occupied 19.6 percent of the world's total GDP, accounted for 18.5 percent of the world's exports and 16.3 percent of the world's imports.<sup>14</sup> However, substantial economic integration has not yet evolved in this region.<sup>15</sup> Studies have suggested that the intra-regional trade patterns among the three countries have evolved significantly in recent years, which constitutes a good rationale for a trilateral FTA.<sup>16</sup>

Therefore, it is anticipated that a possible trilateral FTA would be a milestone to “serve as an important vehicle that would strengthen the existing relations of the three countries not only by expanding trilateral and bilateral trade and investment among them, but also by providing a comprehensive and institutional framework in which a wide range of trilateral cooperation would evolve.”<sup>17</sup> Apart from that, the strengthened trilateral relations would also contribute to “making progress in the ongoing process of economic integration in East Asia” (*e.g.*, ASEAN+3, ASEAN+6, the Asia-Pacific region) and “fostering prosperity for the world as a whole.”<sup>18</sup>

## B. Negotiations

During the years 2008 to 2012, five Trilateral Summit Meeting were completed and a series of significant documents were issued before the negotiations of CJK FTA setting sail (Table 1).<sup>19</sup> Actually, a sixth meeting had been scheduled in April 2013 but had to be postponed due to the tension triggered again by the disputes over territorial and history issues.<sup>20</sup> In addition to official studies, the three countries had also conducted several rounds of unofficial studies on the pros and cons of CJK FTA during the years from 2002 to 2009.<sup>21</sup>

<sup>14</sup> See *Joint Study Report for an FTA among China, Japan and Korea* (Dec. 16, 2011), at 10, available at [http://www.mofa.go.jp/mofaj/press/release/24/3/pdfs/0330\\_10\\_01.pdf](http://www.mofa.go.jp/mofaj/press/release/24/3/pdfs/0330_10_01.pdf) (last visited on Oct. 21, 2015).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 146.

<sup>18</sup> *Id.*

<sup>19</sup> Hyo Sang Yoo, *China-Japan-Korea Free Trade Agreement (CJK FTA) and the Prospect of Regional Integration from the perspective of Northeast Asian Identity* (2014), at 55, Université du Québec à Montréal, available at <http://www.archipel.uqam.ca/6467/1/M13468.pdf> (last visited on Oct. 21, 2015).

<sup>20</sup> *Id.* at 72.

<sup>21</sup> *Supra* note 12, at 376.

Table 1: CJK Trilateral Summit Meetings

| Meeting | Date/Place                            | Contents   |
|---------|---------------------------------------|--|
| 1st     | December 13, 2008<br>(Fukuoka, Japan) | <ul style="list-style-type: none"> <li>• Trilateral Summit Meeting annualized</li> <li>• Trilateral cooperation agreed on</li> </ul>   |
| 2nd     | October 10, 2009<br>(Beijing, China)  | <ul style="list-style-type: none"> <li>• Joint Statement on the Tenth Anniversary of Trilateral Cooperation<sup>22</sup> released</li> <li>• Joint Statement on Sustainable Development<sup>23</sup> released</li> <li>• Joint study over trilateral FTA launched</li> </ul>   |
| 3rd     | May 29, 2010<br>(Jeju, Korea)         | <ul style="list-style-type: none"> <li>• Memorandum of Understanding over Trilateral Cooperation Secretariat (“TCS”)<sup>24</sup> signed</li> <li>• Trilateral Cooperation Vision 2020<sup>25</sup> published</li> </ul>   |
| 4th     | May 21, 2011<br>(Tokyo, Japan)        | <p>Profound progresses were achieved including:</p> <ul style="list-style-type: none"> <li>• Summit Declaration<sup>26</sup> released</li> <li>• Agreements on cooperation on nuclear safety, disaster, sustainable growth through recyclable energy efficiency<sup>27</sup> signed</li> <li>• The Commencement of TCS<sup>28</sup></li> </ul> |
| 5th     | May 12, 2012<br>(Beijing, China)      | <ul style="list-style-type: none"> <li>• The launch of CJK FTA negotiations finally agreed</li> <li>• A trilateral Agreement for the Promotion, Facilitation and Protection of Investment (CJK Investment Agreement)<sup>29</sup> signed</li> </ul>  |

Source: Compiled by the author.

<sup>22</sup> See Joint Statement on the Tenth Anniversary of Trilateral Cooperation among the People’s Republic of China, Japan and the Republic of Korea, available at <http://www.mofa.go.jp/region/asia-paci/jck/meet0910/joint-1.pdf> (last visited on Oct. 21, 2015).

<sup>23</sup> See Joint Statement on Sustainable Development among the People’s Republic of China, Japan and the Republic of Korea, available at [http://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/t620737.shtml](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t620737.shtml) (last visited on Oct. 21, 2015).

<sup>24</sup> See Memorandum on the Establishment of the Trilateral Cooperation Secretariat among the Government of Japan, the People’s Republic of China, Japan and the Republic of Korea, available at <http://www.mofa.go.jp/region/asia-paci/jck/summit1005/memorandum.html> (last visited on Oct. 21, 2015).

<sup>25</sup> See Trilateral Cooperation Vision 2020, available at <http://www.mofa.go.jp/region/asia-paci/jck/summit1005/vision2020.html> (last visited on Oct. 21, 2015).

<sup>26</sup> See Summit Declaration, available at <http://www.mofa.go.jp/region/asia-paci/jck/summit1105/declaration.html> (last visited on Oct. 21, 2015).

<sup>27</sup> See Ministry of Foreign Affairs of Japan, Japan-China-ROK Trilateral Summit, available at <http://www.mofa.go.jp/region/asia-paci/jck/summit.html> (last visited on Oct. 21, 2015).

<sup>28</sup> See The TCS website, available at <http://www.tcs-asia.org/dnb/main/index.php> (last visited on Oct. 21, 2015).

<sup>29</sup> Agreement among the Government of the People’s Republic of China, the Government of Japan and the Government of the Republic of Korea for the Promotion, Facilitation and Protection of Investment, available at <http://tfs.mofcom.gov.cn/article/h/at/201405/20140500584828.shtml> (last visited on Oct. 21, 2015).

On December 16, 2011, the Joint Statement of the Joint Study Committee (“JSC”) for an FTA among China, Japan and Korea was published, with the conclusion that CJK FTA is feasible and could bring benefits to all three countries.<sup>30</sup> It also announced that the Joint Study Report, serving as the fundamental document to guide the negotiation contents of CJK FTA, has been completed and released.<sup>31</sup> Therein, “discussion on CJK FTA should be commenced among government officials of the three countries” is recommended.<sup>32</sup>

Correspondingly, the parties agreed to launch the CJK FTA negotiations in the fifth Summit Meeting.<sup>33</sup> As the initial step, China, Japan and South Korea signed an important agreement on investment protection. Being the first legal document and institutional arrangement among the three countries for promotion and protection of investment activities in CJK, it is regarded as an important milestone in the CJK economic cooperation.<sup>34</sup> Afterwards, the CJK FTA negotiations officially proceeded and the starting round of the trilateral FTA negotiations was held in early 2013.<sup>35</sup> So far, eight rounds of negotiations covering various issues such as Trade in Goods, Trade in Services, Investment, Competition Policies, Intellectual Property have been conducted (Table 2).

<sup>30</sup> See Joint Statement of the Joint Study Committee for an FTA among China, Japan and Korea, available at [http://www.mofa.go.jp/mofaj/press/release/23/12/pdfs/1216\\_05\\_02.pdf](http://www.mofa.go.jp/mofaj/press/release/23/12/pdfs/1216_05_02.pdf) (last visited on Oct. 21, 2015).

<sup>31</sup> *Id.*

<sup>32</sup> *Supra* note 14, at 9.

<sup>33</sup> See Press Release on the Launch of the FTA Negotiations among China, Japan and Korea, available at [http://www.mofa.go.jp/mofaj/press/release/24/11/pdfs/20121120\\_02\\_01.pdf](http://www.mofa.go.jp/mofaj/press/release/24/11/pdfs/20121120_02_01.pdf) (last visited on Oct. 21, 2015).

<sup>34</sup> Yuechun Jiang, *Asia-Pacific Regional Economic Cooperation and CJK Cooperation*, 2 CHINA INT’L STUD. 123 (2013), available at [http://www.ciis.org.cn/english/2013-04/26/content\\_5908704.htm](http://www.ciis.org.cn/english/2013-04/26/content_5908704.htm) (last visited on Oct. 21, 2015).

<sup>35</sup> *Supra* note 30.

Table 2: CJK FTA Negotiations<sup>36</sup>

| Round | Date/Place                                 | Contents  |
|-------|--|---|
| 1st   | March 26-28,2013<br>(Seoul, Korea)         | • The scope and method of negotiations  |
| 2nd   | July 30-August 2,2013<br>(Shanghai, China) | • Trade in Goods, Trade in Services, Customs Procedures, Competition Policies etc.                |
| 3rd   | November 26-29, 2013<br>(Tokyo, Japan)     | • Trade in Goods, Trade in Services, Investment, Competition Policies, Intellectual Property etc. |
| 4th   | March 4-7, 2014<br>(Tokyo, Japan)          | • Trade in Goods, Trade in Services, Investment, Competition Policies etc.                        |
| 5th   | September 1-5, 2014<br>(Beijing, China)    | • Trade in Goods, Trade in Services, Investment, Competition Policies, Intellectual Property etc. |
| 6th   | January 16-17, 2015<br>(Tokyo, Japan)      | • Trade in Goods, Trade in Services, Investment etc.  |
| 7th   | May 12-13, 2015<br>(Seoul, Korea)          | • Trade in Goods, Trade in Services, Investment etc.  |
| 8th   | September 24 -25,2015<br>(Beijing, China)  | • Trade in Goods, Trade in Services, Investment etc.  |

Source: Compiled by the author

### C. Guiding Principles for CJK FTA Negotiations

The Joint Statement has recommended four guiding principles to be fully taken for CJK FTA negotiations, including: (1) A comprehensive and high level FTA; (2) Consistent with WTO rules; (3) Balanced Interests, to achieve a win-win-win situation on the basis of reciprocity and mutual benefit; and (4) Consideration to Sensitive Sectors, in a constructive and positive manner.<sup>37</sup>

Regarding the scope and coverage of the future CJK FTA, the Joint Study Report addresses the key issues covering: (1) Trade in goods (*e.g.*, Agriculture, Fishery and Forestry; Manufacturing; Rules of Origin; Customs Procedures; Trade Remedy); (2) Trade in services; (3) Investment; and (4) Other issues including (but not be limited to): technical barriers to trade (“TBT”), sanitary and phytosanitary measures (“SPS”), intellectual property rights, transparency, competition policy, dispute settlement mechanism, industrial cooperation, consumer safety, e-commerce, energy and

<sup>36</sup> Ministry of Foreign Affairs of Japan, Japan-China-Republic of Korea FTA, available at [http://www.mofa.go.jp/ecn/ep/page23e\\_000337.html](http://www.mofa.go.jp/ecn/ep/page23e_000337.html) (last visited on Oct.12, 2015).

<sup>37</sup> *Supra* note 14, at 147.

mineral resources, fisheries, food, government procurement and environment.<sup>38</sup>

## D. Prospect

Today, the CJK FTA negotiations have moved forward to the eighth Round. The progress was, however, not striking mainly because political tension such as the Senkaku/Diaoyu island controversy is often standing out as a hurdle to negotiations. ‘Asian paradox’ is used to describe the economic interdependence of the three countries while also experiencing political and security conflicts.<sup>39</sup> Nevertheless, it seems that all of the three countries are willing to put aside political differences for shared economic benefits.<sup>40</sup> As aforementioned, the negotiation of CJK FTA is expected to make great progress from this year on. However, an overall template of the agreement has not been within the vision yet.<sup>41</sup> With the negotiations of CJK FTA speeding up, intensive studies on the specific contents thereof are eagerly desired. In planning such a grand template, a global view is also indispensable in addition to an intra-regional angle among the three countries. In this regard, this paper intends to examine from the perspective of building a new international economic order. CJK FTA should not be designed separately from its role in the future regional and global governance.

## III. Element 1: CJK FTA under the WTO Rules

One of the most perplexing and complex problems relating to the world trading system today, is the proliferation of a wide variety of so-called “regional trade agreements.”<sup>42</sup> RTAs have become increasingly prevalent since the early 1990s. Up till April 7, 2015, 449 physical RTAs (counting goods, services and accessions together) have been notified to the WTO, 262 of which are currently in force.<sup>43</sup>

<sup>38</sup> *Id.* at 1-3.

<sup>39</sup> Mi Ae Choo, *Talking Points*, The 1st CJK Cooperation Dialogue (Nov. 13, 2014), available at [https://www.jef.or.jp/en\\_act/act\\_cjk.asp](https://www.jef.or.jp/en_act/act_cjk.asp) (last visited on Oct. 21, 2015).

<sup>40</sup> Jing Li, *Tough Times ahead for China–Japan–South Korea Joint FTA*, East Asia Forum (Dec. 6 2014), available at <http://www.eastasiaforum.org/2014/12/06/tough-times-ahead-for-china-japan-south-korea-joint-fta> (last visited on Oct. 21, 2015).

<sup>41</sup> *Id.*

<sup>42</sup> J. Jackson, *General Editor’s Preface*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM XX* (L. Bartles & F. Ortino eds., 2006).

<sup>43</sup> WTO, *Regional Trade Agreements*, available at [https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm) (last

Although East Asia has lagged behind western and Latin American countries in creating RTAs, the trend has intensified over the past two decades.<sup>44</sup> The main contribution to that preference is the ‘slow multilateralism,’ referring to the blocked WTO-led trade negotiations ever since Doha Round.<sup>45</sup> Accordingly, the unprecedented increase of RTAs has triggered the restructuring of the WTO, in terms of seeking for a better role of regionalism in the multilateral trade regime.

As an essential part of this trend, CJK FTA would obviously create a tremendous domino effect or chain reaction on the global trade system. China, Japan and Korea are major economic players in the world, and together recorded around one-fifth of the world’s total GDP, with a combined population of 1.5 billion.<sup>46</sup> Once reached, CJK FTA is anticipated to create the world’s third largest market (next to the EU and NAFTA) in the region, accounting for up to 20 percent of the total world GDP and amounting to USD 1.4 trillion with a population of 1.5 billion.<sup>47</sup> Hence, taken into account their economic power and competitiveness, an FTA among the three countries will certainly bring huge benefits to the world, in terms of achieving a high quality of liberalization and facilitation.<sup>48</sup> Furthermore, judging from the form of integration, the ‘trilateral’ CJK FTA differs from most of the other FTAs which are ‘bilateral.’ Similar to another trilateral NAFTA created by the US, Canada and Mexico, CJK FTA also consists of developed and developing countries, with divergent economic systems and everlasting political conflicts making the situation even more complicated among the three East Asian countries. In this sense, compared with bilateral FTAs, such trilateral FTAs obviously would take much more time and efforts to negotiation. Nevertheless, it also means that, once realized, CJK FTA would become a great breakthrough in gaining a successful coordination of structural differences and sensitivities, and thus would have a profound influence on the reconstruction of international economic order. Lastly, since CJK FTA also acts as the initial step toward a peaceful and prosperous Northeast Asia, it is of vital importance to the security and stability of multilateral trade regime.

Given its core function at the global level, the design of CJK FTA should take

visited on Oct.12, 2015).

<sup>44</sup> Mitsuo Matsushita & Yong Shik Lee, *Free Trade Agreements: WTO Disciplines and Development Perspectives*, in *LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW* 247 (Yong Shik Lee et al. eds., 2011).

<sup>45</sup> *Supra* note 12, at 378.

<sup>46</sup> See e.g., *MOFCOM: The Negotiations of CJK FTA is ‘Speeding Up’* [商务部: 中日韩FTA谈判正“快马加鞭”新轮谈判将启] <available only in Chinese>, CHINANNEWS, Aug. 14, 2015, available at <http://www.chinanews.com/cj/2015/08-14/7468707.shtml> (last visited on Oct. 21, 2015).

<sup>47</sup> *Supra* note 39.

<sup>48</sup> *Supra* note 14, at 69.

the relationship with the WTO as its primary consideration. As aforementioned, the Joint Statement has also recommended “consistent with WTO rules” as one of the guiding principles for the CJK FTA negotiations. In principle, the WTO recognizes the concept of RTAs. However, there has been no unequivocal understanding regarding the relationship between the two.<sup>49</sup> The debate is centralized around the interpretation of the well-known ‘ambiguous’ Article XXIV of the WTO Agreement.<sup>50</sup> Theoretically, this issue is complicated due to the dual character of RTAs. When a WTO member enters into a regional integration arrangement where it grants more favorable conditions to regional parties than to other WTO members, it deviates from its fundamental principle, i.e. most-favored-nation (“MFN”) treatment. In this respect, CJK FTA could be considered as a discriminatory system *vis-a-vis* outside parties.<sup>51</sup> Whereas on the other side, RTAs have allowed states to negotiate beyond what was possible at the time multilaterally, such as services, intellectual property, environmental standards, etc.<sup>52</sup> It means that CJK FTA could accomplish partial liberalization when trade negotiations at the WTO come to an impasse.<sup>53</sup>

Viewing the dual character of CJK FTA in terms of the relationship with the WTO, an important task is to prevent it from being too exclusive and discriminatory in relation to extra-regional parties.<sup>54</sup> In other words, it is necessary to differentiate between ‘WTO-plus’ and ‘WTO-instead’ issues subject to the negotiation of CJK FTA.<sup>55</sup> To be more concrete, in terms of the issues which are failed (such as services, intellectual property, environmental standards, investment, competition policies etc.) or unsuccessful (such as trade remedies) within the WTO framework, CJK FTA might fill in the lacunae as WTO-plus in leading a new international economic order. On the other hand, negotiations over those overlapping issues with the WTO should be very cautious in order to prevent the possible effects of WTO-instead. *E.g.*, it is suggested that in designing CJK trilateral FTA, the rules of origin should be kept as simple as possible, which could cover all trades substantially to make them WTO-compatible.<sup>56</sup> Regarding the potential WTO-instead or WTO-minus effects of CJK

<sup>49</sup> M. NSOUR, *RETHINKING THE WORLD TRADE ORDER: TOWARDS A BETTER LEGAL UNDERSTANDING OF THE ROLE OF REGIONALISM IN THE MULTILATERAL TRADE REGIME XI* (2010).

<sup>50</sup> *Id.* at 57-104.

<sup>51</sup> *Supra* note 44, at 248.

<sup>52</sup> WTO, *Regionalism: Friends or Rivals?*, available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm) (last visited on Oct. 21, 2015).

<sup>53</sup> *Supra* note 44, at 248.

<sup>54</sup> *Id.* at 249.

<sup>55</sup> *Supra* note 12, at 390.

<sup>56</sup> *Id.*

FTA, some scholars have proposed an interesting idea of ‘FTA Network,’ through which participants of various FTAs may join to exchange information with regard to detailed rules of the FTAs and to explore possibilities for reducing or minimizing difference of rules.<sup>57</sup>

## IV. Element 2: CJK FTA and the Asian Regionalism

Since the 1990s, intrigued by the development of (East) Asian regionalism, scholars began to attach more attention to ‘soft,’ *de facto* or informal regionalism.<sup>58</sup> The ASEAN has been the leading force in the promotion of such regional cooperation.<sup>59</sup> Literature has often referred to Asian integration as the so-called ASEAN way.<sup>60</sup> Nevertheless, from the beginning of 2000, China, Japan and South Korea which list as the 1st, 2nd, and 4th economies in Asia respectively, have also begun to actively engage in regional free trade arrangements. The above three great powers make up an integral part of the Factory Asia’s supply chains and production networks.<sup>61</sup> Statistics have shown that they in total constitute more than 70 percent of the ASEAN+3’s combined trade in goods and services, around 90 percent of the ASEAN+3’s GDP and about 70 percent of its total population.<sup>62</sup> Recently, China has even grown to the second largest economy in the world after more than three decades of reforming.<sup>63</sup> Hence, the ongoing formation of Asian regionalism seems entering into the new age of CJK-driven rather than the ASEAN-driven. A successful economic integration in the so-called East Asian community would largely depend on the strengthened relationship among China, Japan and South Korea as they are *de facto* the most effective and influential countries in the region.<sup>64</sup>

Viewing its core role in the converging Asian Regionalism, CJK FTA should be designed against the grand blueprint of the whole Asian community on top of an intra-regional perspective. To be more concrete, the details of CJK FTA should be

<sup>57</sup> *Supra* note 44, at 259.

<sup>58</sup> *Id.* at 14.

<sup>59</sup> *Supra* note 34, at 120.

<sup>60</sup> *Supra* note 44, at 17.

<sup>61</sup> *Supra* note 12, at 380.

<sup>62</sup> *Id.* at 378.

<sup>63</sup> *Supra* note 34, at 128.

<sup>64</sup> Caihua Zhu, *CJK FTA from a Political Economy Perspective*, Japan Economic Foundation, available at [https://www.jef.or.jp/PDF/cjk\\_07\\_Talking%20points.pdf](https://www.jef.or.jp/PDF/cjk_07_Talking%20points.pdf) (last visited on Oct. 19, 2015).

considered in link with two grand Asian plans, i.e., the Regional Comprehensive Economic Partnership (“RCEP”) and the Belt and Road Initiative.

## A. RCEP and CJK FTA

The RCEP plan was put forward by the ASEAN in 2011, with 10 ASEAN States and 6 Free Trade Agreement Partners (Australia, China, India, Japan, Korea and New Zealand) as its members, taking up around 30 percent of the total GDP in the world.<sup>65</sup> So far, the sixteen (16) parties have held eight rounds of negotiations from May 2013 until now.<sup>66</sup> RCEP aims at contributing to the formation of rule systems that accord with the development interests of East Asia; its members are mainly Asian developing countries.<sup>67</sup> Given that all three countries are participants in RCEP, CJK FTA and RCEP are closely linked to each other.<sup>68</sup>

On the one hand, RCEP stands as the next stage for CJK FTA to further extend its scope and become an enabling factor at a much wider regional level. Considering the harmful “spaghetti bowl effect” of overlapping FTAs and deepening production networks in this region, mega-lateral RTAs such as RCEP have been proposed and negotiated among the affected countries.<sup>69</sup> The formation of that RTA is a key recommendation has been made by recent studies on Asian economic integration.<sup>70</sup> Such a unified regional rule through negotiations and consultations is not only beneficial to relieving the “spaghetti bowl effect” of FTAs, but also could increase Asian voice in the new round of international rules game.<sup>71</sup> Hence, CJK FTA should place itself within the broader framework of RCEP. Only by so would CJK FTA assume an increasingly important role in the regional integration process.

On the other hand, CJK FTA serves as the backbone of the region-wide RCEP originated from East Asia and then continuously contributes to deepening the integration in Asia as a whole. The RCEP negotiations could hardly make any

<sup>65</sup> ASEAN, Nineteenth ASEAN Summit, Bali, Indonesia, Nov. 14-19, 2011, available at <http://www.asean.org/news/item/asean-structure-asean-summit> (last visited on Oct. 21, 2015).

<sup>66</sup> Ministry of Foreign Affairs & Trade (New Zealand), Regional Comprehensive Economic Partnership (RCEP), available at <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP> (last visited on Oct. 21, 2015).

<sup>67</sup> See Give play of China’s Important Role and Accelerate RCEP Negotiations, China FTA Network (Sept. 1, 2014), available at [http://211.88.9.76/enarticle/rcepen/enrcepenews/201411/18815\\_1.html](http://211.88.9.76/enarticle/rcepen/enrcepenews/201411/18815_1.html) (last visited on Oct. 21, 2015).

<sup>68</sup> Chang Jae Lee, *CJK FTA and RCEP: A Korean Perspective*, in JOINT U.S.-KOREA ACADEMIC STUDIES: ASIA’S UNCERTAIN FUTURE: KOREA, CHINA’S AGGRESSIVE, AND NEW LEADERSHIP 149-66 (KIEP ed. 2013), available at [http://www.keia.org/sites/default/files/publications/10\\_lee.pdf](http://www.keia.org/sites/default/files/publications/10_lee.pdf) (last visited on Oct. 21, 2015).

<sup>69</sup> Park, *supra* note 3, at 6.

<sup>70</sup> *Supra* note 12, at 376.

<sup>71</sup> *Supra* note 67.

breakthrough foreseen soon if a trilateral FTA among the three key Northeast Asian countries is not in place yet.<sup>72</sup> In other words, whether this mega-lateral RTA could be successfully formed and what kind of substantial agreements could be reached still lie with the CJK cooperation because they are the crux of the matter.<sup>73</sup>

## B. The Belt and Road Initiative and CJK FTA

In addition to RCEP, another notable grand plan is the Belt and Road Initiative. Since President Xi Jinping came to office at the end of 2012, China has been propelling to build a wider Asian community based on infrastructure links and historical and cultural linkages.<sup>74</sup> The ‘One Belt and One Road’ (“OBOR”) plan aims at promoting the connectivity of Asian, European and African continents and their adjacent seas, establishing and strengthening partnerships among the countries along the Belt and Road.<sup>75</sup> It connects the vibrant East Asia economic circle at one end and the developed European economic circle at the other, encompassing countries with huge potential for economic development as a whole.<sup>76</sup>

Although OBOR has just set sail with many details remaining indeterminate, it marks the launch of a new type of Asian regionalism. As the cornerstone of this far-reaching notion, CJK FTA could facilitate progress by moving forward the effective and substantial regional economic and trade cooperation established in East Asia to Middle and West Asia, in the sense of achieving a grand and profound Asian integration. Once a key trilateral CJK FTA is reached, a gradual extension of such experiences to include India, Russia and the like could also be anticipated.<sup>77</sup> Driven by CJK FTA and against such an ambitious economic vision of the Belt and Road Initiative, all of the existing bilateral and mega-lateral cooperation mechanisms within the whole Asia would be integrated and shuffled, resulting in a possible reshaping of global governance in the future. Therefore, it is deemed that CJK FTA would be “the best prospect of capitalizing on the regional trading arrangements

<sup>72</sup> *Supra* note 68.

<sup>73</sup> *Id.*

<sup>74</sup> Xiaotong Zhang & Xiaoyue Li, *China's Regionalism in Asia, The ASAN Forum* (2014), available at <http://www.theasanforum.org/chinas-regionalism-in-asia> (last visited on Oct. 21, 2015).

<sup>75</sup> Tian Shaohui, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, XINHUANET, Mar. 28, 2015, available at [http://news.xinhuanet.com/english/china/2015-03/28/c\\_134105858.htm](http://news.xinhuanet.com/english/china/2015-03/28/c_134105858.htm) (last visited on Oct. 21, 2015).

<sup>76</sup> *Id.* at III. (Framework).

<sup>77</sup> *Supra* note 12, at 378. See also Min Wei, *The Negotiation of CJK FTA and the Response from China* [中日韩自贸区谈判与中国的应对] <available only in Chinese>, 5 CONTEMP. WORLD [当代世界] 43 (2013), available at [http://www.cis.org.cn/chinese/2013-06/06/content\\_6010426.htm](http://www.cis.org.cn/chinese/2013-06/06/content_6010426.htm) (last visited on Oct. 21, 2015).

that Asia has been pursuing for more than a decade now.”<sup>78</sup>

Correspondingly, when designing the details of CJK FTA, concerning those issues that either have huge potentials of development (*e.g.*, the areas of new energy development and utilization, advanced electronics and technologies, as well as ship building and high-end equipment manufacturing, etc.),<sup>79</sup> or have already gained like-mindedness among the trilateral countries (*e.g.*, antidumping, etc.),<sup>80</sup> trilateral cooperation should be deepened and elaborated in a way that could not only benefit the three countries, but also create a chain reaction in the whole of Asia. While with regard to those sensitive and challenging issues including agriculture, manufacture, service, investment, government procurement, intellectual property rights, environmental protection etc.,<sup>81</sup> it is important to bear in mind that compromise and consensus should be reconsidered by adjusting the vision from a narrow intra-regional perspective to a long-run viewpoint towards the continuously deep-integrated Asian market against the grand blueprint of Asian Regionalism.

## V. Element 3: TPP and CJK FTA

Orienting CJK FTA in the ongoing reconstruction of New International Economic Order, the third key point concerns its relation with the new rules of Trans-Pacific Partnership (“TPP”) driven by the US. In 2009, President Obama announced the American intention to enter into negotiations for TPP, to conclude an ambitious, next-generation, Asia-Pacific trade agreement that reflects US economic priorities and values.<sup>82</sup> As of 2014, twelve countries throughout the Asia Pacific region have participated in negotiations on TPP such as Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam.<sup>83</sup> After years of efforts,<sup>84</sup> they finally reached agreement on October 5, 2015 and is awaiting approval from Congress.<sup>85</sup>

<sup>78</sup> *Supra* note 12, at 383.

<sup>79</sup> *Supra* note 34, at 125-6.

<sup>80</sup> Bi & Uytsel, *supra* note 11, at 168.

<sup>81</sup> *Supra* note 39.

<sup>82</sup> USTR, Overview of TPP, available at <https://ustr.gov/tpp/overview-of-the-TPP> (last visited on Oct. 21, 2015).

<sup>83</sup> *Id.*

<sup>84</sup> USTR, Trans-Pacific Partnership, available at <https://ustr.gov/tpp> (last visited on Oct. 21, 2015).

<sup>85</sup> J. Calmes, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress*, N.Y. TIMES, Oct. 5, 2015, at A1, available at [http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?\\_r=0](http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?_r=0)

The continued progress on TPP has been promoting forward the negotiations of CJK FTA all along. So far, only Japan has joined TPP. Korea is not part of the initial agreement, though she has shown interest in entering the TPP.<sup>86</sup> Still, China is not a member of TPP. Indeed, the rise of China and the formation of a China-centered regional economic integration have posed a great challenge to the US.<sup>87</sup> Mr. Obama stated that: “When more than 95 percent of our potential customers live outside our borders, we can’t let countries like China write the rules of the global economy.”<sup>88</sup> Hence, serving as the US’ rebalancing strategy to Asia (Pivot to Asia), TPP is exerting various impacts on possible Asian integration pathways.<sup>89</sup> Viewed from the other side, it also means that TPP has been acting as a powerful spur to speed up the negotiations of CJK FTA, which could facilitate the three great powers to gain a counter balance to the American economic influence in the Asia Pacific region. With TPP being finalized recently, CJK FTA could also be forecast.

Furthermore, the relation between CJK FTA and TPP connects with that between RCEP and TPP. Future regional economic integration is speculated to be most likely with a US-driven TPP on one hand and a China-driven RCEP on the other hand.<sup>90</sup> Both of them cover approximately similar percentage of global trade (around 26 percent).<sup>91</sup> The author would favor the viewpoint that RCEP and TPP need not be competitive but could be complementary to each other.<sup>92</sup> The main differences between RCEP and TPP lie in their objectives. RCEP aims at harmonizing the existing rules so as to build a unified market in the region, while TPP is much more ambitious with its focus on developing new standards and rules.<sup>93</sup> This could be seen from TPP’s much broader coverage of issues than RCEP, including labor, environment, as well as cross-cutting ‘horizontal issues’ such as regulatory coherence, competitiveness and business facilitation, development and Small and Medium Enterprises.<sup>94</sup> Therein, the core content is trade in service and investment.

(last visited on Oct. 21, 2015).

<sup>86</sup> Yoko Nishikawa, *South Korea Mulling U.S.-led TPP Trade Initiative: Report*, REUTERS, Nov. 13, 2010, available at <http://www.reuters.com/article/2010/11/14/us-apec-korea-idUSTRE6AD05L20101114> (last visited on Oct. 21, 2015).

<sup>87</sup> Min Hua Chiang, *The Potential of China-Japan-South Korea Free Trade Agreement*, 30 EAST ASIA 199-216 (2013), available at <http://link.springer.com/article/10.1007%2Fs12140-013-9196-5> (last visited on Oct. 21, 2015).

<sup>88</sup> *Supra* note 85.

<sup>89</sup> Jinbo Wang, *International Rules Restructuring and China’s Response*, 45 CHINA INT’L. STUD. 85-98 (2014), available at [http://www.ciis.org.cn/english/2014-06/20/content\\_6996254.htm](http://www.ciis.org.cn/english/2014-06/20/content_6996254.htm) (last visited on Oct. 21, 2015).

<sup>90</sup> *Supra* note 87.

<sup>91</sup> *Supra* note 12, at 382.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Shujiro Urata, *Japan’s FTA Strategy*, Proceedings of International Symposium on Institutional and Market-Driven

TPP together with the Transatlantic Trade and Investment Partnership (“TTIP”) and the Trade in Services Agreement (“TISA”), tend to offer “pre-establishment national treatment” plus ‘negative list.’<sup>95</sup> Under the US strategy of ‘sequential negotiations’ and the EU strategy of “promoting bilateral negotiations by multilateral ones,” TPP, TTIP and TISA are expected to lead to the formulation of new rules, new standards and new paradigms for global trade and investment.<sup>96</sup>

Accordingly, RCEP is considered to be “a comprehensive WTO-plus FTA,” whereas TPP is “a much more comprehensive 21st century FTA.”<sup>97</sup> CJK FTA could regard them as two developing stages towards a new round of international rules rather than exclusive to each other. In this sense, CJK FTA could act as a building block for both of the two mega-lateral RTAs.<sup>98</sup> Although only Japan among the CJK countries is a member of TPP so far, Korea may also join the Partnership in the near future. It is also possible and even desirable for China to be a member of TPP in the foreseeable future.<sup>99</sup> Right after the conclusion of TPP, China has expressed that she is “open to any mechanism” that follows the WTO rules.<sup>100</sup> Thus, when designing CJK FTA, China could first focus on addressing the WTO-related issues involved in RCEP, and then join TPP to negotiate on those challenging issues with her collective bargaining power. Such an approach could enable CJK FTA to contribute to open regionalism in Asia initially and global multilateral free trade eventually.<sup>101</sup>

## VI. WTO ADA Plus in CJK FTA: Reshaping International Rules

As analyzed above, this paper calls for examining the CJK FTA from the perspective of being a part of new international economic order, in addition to an intra-regional

Economic Integration in East Asia (2014), available at [http://web.waseda.jp/gsaps/caui/educational\\_program/PDF3/Information%20for%20International%20Symposium\(as%20of%207010\).pdf](http://web.waseda.jp/gsaps/caui/educational_program/PDF3/Information%20for%20International%20Symposium(as%20of%207010).pdf) (last visited on Oct. 21, 2015).

<sup>95</sup> *Supra* note 89.

<sup>96</sup> *Id.*

<sup>97</sup> Xiangning Wu, *Ongoing China-South Korea-Japan FTA and the Implication for East Asia Regional Cooperation*. See also *supra* note 94.

<sup>98</sup> *Supra* note 12, at 378.

<sup>99</sup> *Id.* at 383.

<sup>100</sup> *China Cautiously Welcomes Trans-Pacific Free Trade Deal*, BBC News, Oct. 6, 2015, available at <http://www.bbc.com/news/world-asia-34451326> (last visited on Oct. 21, 2015).

<sup>101</sup> *Supra* note 12, at 383.

angle. In this regard, it argues that the aforementioned three key elements point out a developing track for CJK FTA to follow in designing its details: WTO→CJK FTA→RCEP(OBOR)→TPP→A New Multilateral Order. Only by viewing so can the important trilateral FTA play an appropriate role in future regional and global governance, so as to obtain the Asian voice in restructuring the international rules. In order to illustrate such notion, a possible stepping stone regarding regional antidumping regimes in CJK FTA will be further exemplified in this part.

### A. Regional Antidumping Regimes

Trade remedy measures have always been central issues of the trade policies of East Asian countries.<sup>102</sup> CJK FTA negotiations have also recognized them as focal points as aforementioned. Among the three kinds of trade remedies, antidumping no doubts poses the most negative bar to the global free trade. With the proliferation of antidumping legislations as well as that of antidumping actions all around the world, their increasingly potential for protectionist abuse has been criticized in almost all of the current literature.<sup>103</sup> Recently, an increasing number of scholars have even started to argue its possible substitution by competition policy.<sup>104</sup> Unfortunately, the political reality is that antidumping is not likely to be abolished soon around the world.<sup>105</sup> The WTO practice showed that it was really hard to progress on negotiating stricter rules on antidumping measures, with the US as its strong supporter. Still, antidumping reform is not visible in the WTO.<sup>106</sup> Therefore, a step-by-step reform from regional to multilateral is deemed to be a feasible and realistic way.<sup>107</sup>

Accordingly, a few empirical studies have been conducted to track the intra-regional antidumping regimes, with the general conclusion that: most RTAs either do not state or merely restate their rights and obligations under the WTO Antidumping Agreement (“ADA”), whereas only a few RTAs make modifications thereto. Such modifications can be categorized into five models, namely: (1) Abolishment of Antidumping + Common Competition Law; (2) Abolishment of

<sup>102</sup> Dukgeun Ahn, *Emerging Diversity in Trade Remedy Systems: the Case of East Asian FTAs*, in EAST ASIAN REGIONALISM FROM A LEGAL PERSPECTIVE 147 (Tamio Nakamura ed., 2009).

<sup>103</sup> B. LINDSEY & D. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* viii (2003).

<sup>104</sup> Ying Bi, *Is Dumping Still Harmful? New Thinking on Antidumping in the Global Free Trade*, 6 J. EAST ASIA & INT’L L. 30-1 (2013).

<sup>105</sup> *Id.* at 48.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

Antidumping + Harmonization of national competition rules; (3) Abolishment of Antidumping; (4) WTO ADA-Substantive Plus; and (5) WTO ADA-Procedural Plus.<sup>108</sup>

## B. A Proposal of WTO ADA Plus in CJK FTA

In terms of CJK cooperation, the Trilateral Cooperation Vision 2020 stated that:

By the year 2012, we will endeavor to complete the Joint Study for an FTA among China, Japan and Korea, which was launched in May 2010. Furthermore, we will continue to work towards further economic integration of the three countries in the long-term, including the establishment of a common market in the region.<sup>109</sup>

Accordingly, the “abolishment of antidumping” would be an ultimate goal of the future “CJK common market.” As a RTA is continuously deepening from shallow level of integration<sup>110</sup> for achieving Common Market or higher,<sup>111</sup> however, antidumping is considered as a barrier to the market integration because a single market would prevent market segmentation and price discrimination.<sup>112</sup> The core issue here is: what would be the possible arrangement of intra-regional antidumping measures in CJK FTA? The author would propose the above modified models (4) and (5) as the initial step, namely, WTO ADA Plus (substantive/procedural) in CJK FTA.

Based on their consistent position towards the issue of antidumping, the trilateral countries would share the same viewpoint of further tightening the requirements of the WTO ADA. As huge exporters, all of the three have been subject to a large number of antidumping actions in the world. According to the latest WTO statistics

<sup>108</sup> See, e.g., T. Voon, *Eliminating trade Remedies from the WTO: Lessons from regional trade agreements*, 59 INT'L & COMP. L. Q. 625-67(2010); E. Emerson, *Trade Remedy provisions in regional trade agreements*, Asia Pacific Forum News (July 2008), available at <http://www.steptoe.com/assets/attachments/3465.pdf>; R. Teh et al., *Trade Remedy provisions in regional trade agreements*, WTO Staff Working Paper No.ERSD-2007-03(2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1019414&http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1019414](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019414&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019414) (all last visited on Oct. 21, 2015).

<sup>109</sup> *Supra* note 25.

<sup>110</sup> R. LAWRENCE, REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION 17(1995). See also B. Hoekman, *Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements*, World Bank Policy Research Working Paper No. 1950 (1998), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=620582](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=620582) (last visited on Oct. 21, 2015).

<sup>111</sup> According to the degree of integration, the classic theory has defined RTAs into four categories, i.e., free trade area, customs union, common market and economic union. See R. CARBAUGH, INTERNATIONAL ECONOMICS 272 (13th ed. 2010).

<sup>112</sup> P. Lloyd, *Anti-dumping and Competition Law*, in II THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 77 (P. Macrory et al. eds., 2005).

from early 1995 to the end of 2014, there are 1052 antidumping initiations in total against China (ranking 1st), 187 against Japan (ranking 5th) and 349 against Korea (ranking 2nd).<sup>113</sup> All of the three have joined the camp of Friends of Antidumping Negotiations (“FANs”) and have been long calling on the modifications of the WTO ADA.<sup>114</sup> It is worth mentioning that, before China’s accession to the WTO, Japan and Korea alleged on many occasions during the previous discussions in the Working Group on the Interaction between Trade and Competition Policy (“WGTC”) their attitudes of subjecting antidumping to competition law.<sup>115</sup> In the communication dated September 21, 1998 and May 28, 1999, *e.g.*, Japan asserted that both competition law and antidumping law deal with predatory pricing. Japan further claimed that since there is significant doubt about the economic validity of the criteria for imposing antidumping measures, the possible action of reforms would be to improve the criteria by introducing the perspective of competition policy.<sup>116</sup> In the communications dated March 30, 1998, September 3, 1998, and March 9, 2001, Korea also considered that unless predatory intent is confirmed, antidumping regulations do not make any economic sense, but merely incur anti-competitive and protective effects.<sup>117</sup>

Furthermore, an investigation into the antidumping initiations/measures among the trilateral countries shows that most cases involve China and Korea, while Japan is rather cautious hence seldom taking any antidumping actions. According to the latest statistics by the WTO during 1995 to 2014, China has launched a total of 218(176) antidumping initiations (measures), including 38(29) from Japan, 32(27) from Korea. Among 127(82) antidumping initiations (measures)

<sup>113</sup> WTO, Anti-dumping Initiations: By Exporter 01/01/1995 - 31/12/2014, available at [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_InitiationsByExpCty.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExpCty.pdf) (last visited on Oct. 21, 2015).

<sup>114</sup> WTO, The Doha Mandate, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/brief\\_e/brief08\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief08_e.htm) (last visited on Oct. 21, 2015).

<sup>115</sup> As a result of the Ministerial Conference in Singapore (1996), WGTC was established. In July 2004, the General Council of the WTO decided to terminate its function. See WTO, Interaction between Trade and Competition Policy, available at [https://www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm](https://www.wto.org/english/tratop_e/comp_e/comp_e.htm) (last visited on Oct. 21, 2015).

<sup>116</sup> WT/WGTC/W/92 (Communication from Japan, September 1998), available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=42923,22122,27089,16325,12157,32887,27071,35012,22090,28500&CurrentCatalogueIdIndex=7&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=42923,22122,27089,16325,12157,32887,27071,35012,22090,28500&CurrentCatalogueIdIndex=7&FullTextSearch=); WT/WGTC/W/123 (Communication from Japan, May 1999), available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=6910,11124,10217,16155,13044,25168,17387,25747,34883,26910&CurrentCatalogueIdIndex=8&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=6910,11124,10217,16155,13044,25168,17387,25747,34883,26910&CurrentCatalogueIdIndex=8&FullTextSearch=) (all last visited on Oct. 21, 2015). See also *supra* note 104, at 32-3.

<sup>117</sup> *Id.* WT/WGTC/W/73 (Communication from the Republic of Korea, March 1998), available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=29434,28165,11323,7728,27391,25298,45463,23306,5927,17940&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=29434,28165,11323,7728,27391,25298,45463,23306,5927,17940&CurrentCatalogueIdIndex=2&FullTextSearch=) (last visited on Oct. 21, 2015).

conducted by Korea, 26(21) against China, 20(16) against Japan.<sup>118</sup> (Table 3) Contrary to that, Japan has only taken 8(7) antidumping initiations (measures) in total, within which 2(1) against China, 1(1) against Korea.<sup>119</sup> Judging from such status quo, it is rather difficult to either replace antidumping rules entirely or supplant them by competition law straightforwardly. Nevertheless, it is noted that in the newly signed China-Korea FTA (“CK FTA”), which is expected as the basis for the future CJK FTA,<sup>120</sup> the model of WTO ADA-Substantive Plus has been adopted in Article 7.7 therein.<sup>121</sup> Accordingly, both China and Korea agree that no actions in an arbitrary or protectionist manner pursuant to the ADA shall be taken<sup>122</sup> and neither party shall apply any methodology based on surrogate value of a third country.<sup>123</sup> In addition, a Committee on Trade Remedies is established, opening the possibilities for adopting the model of WTO ADA-Procedural Plus.<sup>124</sup> Considering that such consensus has already been reached between China and Korea, CJK FTA could negotiate from that point on and move forward to introduce more rules concerning WTO ADA Plus, not only substantively, but also procedurally.

Table 3: Antidumping Initiations and Measures among CJK (1995. 1. 1-2014. 12. 31)

| Importer \ Exporter |                    | China | Japan | Korea |
|---------------------|--------------------|-------|-------|-------|
| China               | AD Initiation: 218 |       | 38    | 32    |
|                     | AD Measures: 176   |       | 29    | 27    |
| Japan               | AD Initiation: 8   | 2     |       | 1     |
|                     | AD Measures: 7     | 1     |       | 1     |
| Korea               | AD Initiation: 127 | 26    | 20    |       |
|                     | AD Measures: 82    | 21    | 16    |       |

Source: Compiled by the author

<sup>118</sup> WTO, Anti-dumping Initiations: Reporting Member vs Exporter 01/01/1995 - 31/12/2014, available at [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_InitiationsRepMemVsExpCty.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsRepMemVsExpCty.pdf); Anti-dumping Measures: Reporting Member vs Exporter 01/01/1995 - 31/12/2014, available at [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_MeasuresRepMemVsExpCty.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresRepMemVsExpCty.pdf) (all last visited on Oct. 21, 2015).

<sup>119</sup> *Id.*

<sup>120</sup> Kelly Gieop Na, *Designing Economic Integration of East Asia: An Outlook of the Korea-China Free Trade Agreement*, 1 CHINA & WTO REV. 124 (2015).

<sup>121</sup> CK FTA, available at [http://fta.mofcom.gov.cn/korea/korea\\_xdwb.shtml](http://fta.mofcom.gov.cn/korea/korea_xdwb.shtml) (last visited on Oct. 21, 2015).

<sup>122</sup> *Id.* art. 7.7.3.

<sup>123</sup> *Id.* art. 7.7.4.

<sup>124</sup> *Id.* art. 7.15.

Last but not the least, the proposal of WTO ADA Plus in CJK FTA not only represents the common interest of the three countries, but also serves as a good case to exemplify the developing track towards reshaping the whole international rules as suggested in this paper. In respect of Element 1, the WTO practice showed that it was really hard to progress the negotiation with stricter rules on antidumping measures in the multilateral field.<sup>125</sup> At the Doha Round, the negotiating mandate for antidumping from the beginning closed the door for any substantial changes.<sup>126</sup> This pessimistic prediction has been further demonstrated in the following discussion on the Draft Consolidated Chair Texts of the AD and SCM Agreements of 2007<sup>127</sup> as well as the New Draft Consolidated Chair Texts of the AD and SCM Agreements of 2008.<sup>128</sup> During the rules negotiations on June 25, 2015, FANs have pushed for establishing new disciplines on transparency and due process in anti-dumping proceedings. Once again however, a number of delegations were reluctant to engage in discussing the reform of WTO ADA rules barring progress of the ‘core’ Doha Round issues such as agriculture, services, etc.<sup>129</sup> Accordingly, together with the other modified models in RTA negotiations, WTO ADA Plus in CJK FTA might constitute an important steering booster for restructuring the multilateral ADA mechanism.<sup>130</sup>

Furthermore, such a proposal may act as a transitional step towards the final abolishment of antidumping rules in the future “CJK common market,” RCEP, or even fitting into the grand blueprint under OBOR as analyzed in Element 2. On the other hand, the proposal of WTO ADA Plus could also act as a bargaining chip for Asian countries *vis-a-vis* the US who is eager to raise the standards of trade in service and investment during the TPP negotiations as mentioned in Element 3.

In toto, taken into account the increasingly significant influence of the trilateral countries in the global economy, especially to be well-matched in strength with the US, the great supporter of antidumping system, it could be predicted that the new antidumping system as incorporated in CJK FTA would become a crucial ‘precedent setting’ for future augmentation of the world trading system.<sup>131</sup>

<sup>125</sup> *Supra* note 104, at 48.

<sup>126</sup> *Supra* note 114.

<sup>127</sup> Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/213 (2007), available at [https://www.wto.org/english/tratop\\_e/rulesneg\\_e/rules\\_chair\\_text\\_nov07\\_e.pdf](https://www.wto.org/english/tratop_e/rulesneg_e/rules_chair_text_nov07_e.pdf) (last visited on Oct. 21, 2015).

<sup>128</sup> New Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/236 (2008), available at [http://www.unep.ch/etb/areas/pdf/WTO%20submissions%20Fish/2008\\_12\\_19%20-%20tnrlW236.pdf](http://www.unep.ch/etb/areas/pdf/WTO%20submissions%20Fish/2008_12_19%20-%20tnrlW236.pdf) (last visited on Oct. 21, 2015).

<sup>129</sup> WTO, FANs Push Transparency, Due Process, but Members Reluctant to Engage in Rules Negotiations, available at [https://www.wto.org/english/news\\_e/news15\\_e/rule\\_25jun15\\_e.htm](https://www.wto.org/english/news_e/news15_e/rule_25jun15_e.htm) (last visited on Oct. 21, 2015).

<sup>130</sup> *Supra* note 102, at 164.

<sup>131</sup> Fujio Kawashima, *Regulation on Antidumping Measures in the Regional Economic Integration - A Cross-Comparative*

## VII. Conclusion

So far, eight rounds of CJK FTA negotiations have been conducted. From 2015 on, the negotiations are expected to make great progress. However, an overall template of the agreement has not been within the vision yet. In planning such a grand blueprint, in addition to an intra-regional angle among the trilateral nations, this author has deemed that a global view is also indispensable. CJK FTA should never be designed separately from its role in the future regional and global governance. In this regard, three elements should be taken into account when designing the details of CJK FTA, namely, (1) RTAs and reconstruction of the WTO; (2) the rise of China and Asian Regionalism; and (3) the US factor in Asia and the new rules of the TPP.

Regarding the first element, CJK FTA might fill in the lacunae as WTO-Plus in leading a new international economic order, while negotiations over those overlapping issues with the WTO should be very cautious in order to prevent the possible effects of WTO-instead. In terms of the second element, it has pointed out that CJK FTA negotiations should keep an eye on two grand Asian plans. The first one is RCEP. CJK FTA has the potential to become the backbone of such a more multilateral, region-wide RTA in East Asia initially and more generally in Asia as a whole. The second one is OBOR. Although such initiative has just set sail, it marks a new type of Asian regionalism and a possible reshaping of global governance in the future. As an important link therein, the negotiations of CJK FTA should also be designed against this grand blueprint of Asian society. Concerning the third element, it is suggested that being viewed as two stages towards a new round of international rules, RCEP and TPP need not be competitive but could be complementary. In this sense, CJK FTA could act as a building block for both mega-lateral RTAs. Thus, when designing CJK FTA, it could first focus on addressing the WTO-related issues involved in RCEP, and then join TPP to negotiate on those challenging issues with its collective bargaining power.

Only by taking the above three key elements into account can the trilateral FTA play an appropriate role in future regional and global governance, so as to obtain the Asian voice in restructuring the international rules. Based on this developing track (WTO→CJK FTA→RCEP(OBOR)→TPP→A New Multilateral Order), this paper has

further illustrated a possible steppingstone regarding regional antidumping regimes, suggesting adopting the WTO ADA Plus (substantive/procedural) in CJK FTA. Such a proposal would become a crucial 'blueprint' for restructuring the multilateral ADA mechanism.

