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### Final Thesis

## **The Evolution of Japan's Legalism under the World Trade Organization.**

**An analysis of Japan's activity in the WTO dispute settlement system since 2006.**

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## 概要

本論文は世界貿易機関（以下 WTO）の下に見られる日本の法治主義の進化について論じている。特に、WTO の法律で日本の法治主義は 2005 年から今までどうやって変わってきたことに集中する。

まず、法治主義的行動とはなんだろうか？法治主義的行動とは、法律の厳格な適用によって国際関係の中で行動するという事だ。日本は最初からこのような行動をとっていたわけではないが、徐々に自国の貿易の自由化が進むと共にいわゆる法治主義的な態度をとってきた。

日本の貿易自由化は IMF と GATT への加盟から始まったにも関わらず、日本は GATT の下でまだ受動的な行動をし、外国から（特に米国とヨーロッパから）貿易の自由化の要望に抵抗をせず受動的にその要求に答えた。しかし、日本は 1995 年に WTO に加盟した後、新しい貿易の場裏に入った結果、外国の貿易政策に影響を及ぼすためにより法治主義的な態度が必要だとわかってきた。それに、法治主義的に行動をするため、WTO の法的な背景として完璧だったことも注目する必要がある。Pekkanen S.M. の 2008 年の「Japan's Aggressive Legalism」という研究では WTO の下で日本の法律の適用が攻撃的だといわれ、この態度の使い方のパターンも見出した。実際に、日本は米国に反しての紛争で、世界的に競争力を持っていた産業に関しての紛争だけでこの対決姿勢をとったことを注意できた。なぜかという、もちろんその時、米国は日本の一番大事な貿易相手だったし、貿易量が大量で紛争の確率が高かったからだ。これだけではなく、次の点も理由として挙げられる。世界的に競争力を持ってない産業は保護貿易から利益を得ることが当たり前で、貿易の自由化へ向かう確率が高い世界貿易機関の紛争解決のルールの下で農業のように非競争的な産業の問題を解決するためにより対立しない手続のほうが良いと認識する。これはその農業のような保護主義的な企業の貿易の問題は WTO のルールで解決できないという意味ではないが、保護的な企業の国内市場の自由化を避けるために、WTO のルールを採用することが減多に行われなくするようにするという意味だ。これに対して、輸出の増加から利益を得られる世界的に競争力が高い産業は、目標になる他国だけでなく自国の貿易の自由化を WTO の紛争解決に通して得られる。それに、当然だが、WTO の紛争解決の制度を使う場合は相手の国が不当な貿易政策を策定したと思われる時、この政策から消極的な影響を与えられている企業は情報を集めて政府に問題を提起する。この研究は、まず WTO の多国間協定の下に日本の法治主義的行動が産業と相手によって違うことを確認する。しかし、これは国際収支の変化があった場合、WTO の紛争制度の使い方にも影響を与えられるという意味になる。そのため、Pekkanen の研究から整理し直す。2005 年から近年までの日本の WTO 紛争活動は前の活動と比べるとどんな違いがあるかという問題は、この研究の主なポイントになる。

まず、ポイントになる課題をよく理解するため、戦後から日本の経済成長と貿易自由化の政策の進化について第一章に詳しく論じる。日本は第二次世界大戦の後、非常に深刻な経済状況に陥った。1949 年に政府は「外国為替及び外国貿易法」という政策を設定し、外国貿易が厳格に管理だけではなく、もちろん自由に外国貿易をすることが禁止された。その貿易障壁の状態を生かして、日本政府は自国の経済を立て直すことを最優先事項にした。この時期に工業を復活するためにいくつかの財政援助の政策が策定され、この政策に含められた基幹産業、つまり鉄鋼、石炭、輸送などは利益を得るからこそ、70 年代から 90 年代まで、世界的に競争力のある産業になった。50 年代から、日本の経済は驚くべき速度で成長し始めたため外国にも注目されることも増加し、貿易自由化の工程をより進展するため米国とヨーロッパなどに圧力をかけられた。その結果、1960 年に「貿

易・為替自由化計画大綱」という政策が策定され、貿易の成長に従って、経済成長もさらに高まり、1988年にピークに達した。この間、日本の自動車、鉄鋼、ハイ・テックと機械産業の製品が世界中に大量に輸出され、特に米国の市場でどんどん広がっていき、更に米国と比べ国際収支統計では黒字になった。この時期がまさしく Pekkanen の研究で詳しく説明されている日米の貿易戦争の時期で、日本はこの時期から WTO のルールを攻撃的に使うことを始めた。しかし、80年代の終わりにバブル崩壊のせいで停滞期に入る。それから現在までの経済的な状況と、現在の一番重要な貿易相手と重要な産業の変化についてもこの章は記す。

この第1章は次の章がわかるため必要な基盤になる。実際に、第二章では最近の WTO の下に見られる韓国と日本の関係、つまり日韓の紛争の提起と解決を分析しながら、韓国に対して日本の法治主義的態度を論ずる。おそらく日韓の関係は外交でもあまり良くないと知られていることが、最近日韓の貿易関係を悪化させているとも見える。この章では、日本と韓国の貿易の現状、すなわち最大の輸出品と輸入品から始まり、この貿易の特徴は紛争の提起に影響を与える点であるということも論ずる。詳しくいうと、アジア四小龍の一国として韓国の強烈な経済成長に従ってハイ・テクノロジーと自動車などの産業が強くなり、日本の産業と競争相手になった。しかし、いくつかの産業について韓国は日本の輸入品にまだ頼っており、例えばこの章で分析する半導体を作るためのフッ化ポリイミド、レジスト、フッ化水素の商品のケースからお互いの国の依存関係を理解できる。それに、真のケースのパネル（小委員会）報告と上級委員会の報告を検討し、韓国に対して今まで見えなかった日本の法治主義的態度を日本の主張から見ることができる。本論文で検討したケースは日本から提起した空気圧バルブとステンレス鋼商品のアンチ・ダンピングのケースに加え、逆に韓国から提起した半導体メモリ（DRAM）の相殺関税のケースもある。最後に、最近起きた韓国から日本の半導体輸出制限のケースについても手短かに説明する。この DRAM の相殺関税のケースと半導体輸出制限のケースから、日本は自分の弁護をしている時も WTO の法律を厳格で攻撃的な使い方をすることも理解できる。

第三章では日本と中国の WTO の下で貿易関係の発展について論ずる。第一節では、現在の日中の貿易関係は19世紀あるいは20世紀の関係と比べるとどんな違いがあるかを検討する。実は韓国のように中国も70年代の終わりから急速な経済成長に従ってハイ・テック産業と鉄鋼産業などが発展しているので、以前日本への輸出が多かった綿織物と食料品が減って、これに反して現在電気機器と一般機器が輸出品の全額の5割を占めている。その一方で、中国はハイ・テックの商品を作るために不可欠な原料の産出国なので、その原料を中国に依存している国が多い。日本は当然その一国であり、日中の希土類元素の輸出制限の紛争のケースでも見える。第二節では、日中の WTO 紛争の活動を分析する。希土類元素のケースに加えて、他の二つのケースはステンレス鋼の製品のアンチ・ダンピングのケースである。この節の重要な点は、日本が中国に反してアンチ・ダンピングの紛争を提起したことが初めてであるということだ。21世紀に入って中国は米国よりも貿易量が上回り、日本の最大の貿易相手になっても、2012年前に常に中国に対して日本は非対審的な扱いをしてきた。Pekkanen でよく論じている日本の中国に対して非対審的な態度は、その時期の日中貿易と行われた貿易紛争があまり競争しない産業（例えば農業）に巡り、日本は法治主義的態度を使うべきではなかった可能性がある。しかし、中国との貿易が変わった後、紛争の種類と紛争解決制度の下で日本がとっている攻撃的態度は、中国の輸出に依存している多数の日本の企業を守るために必要になった。

第四章では、日本の法治主義的態度は最近の EPAs と BITs のいわゆる WTO-Plus 投資の折衝と規則でも見えるようになったという点を論じる。この章では、まずはじめに 2002 年のシンガポールと結んだ EPA から、近年 21 EPAs と 38 BITs に達して、なぜこのような増加したのかという質問について記す。さらに、この EPAs と BITs の投資規定は 2012 年から始めた変化、特に ISA の規定の問題について論じる。日本は自国の企業の利益を得るために、この EPAs と BITs の協定で WTO の法則が総合的に扱わない課題について規則を設定しているのだ。

結論として、日本の経済成長と外国貿易の政策の進化に関する分析から最近の日本の経済がもちろん、WTO 多国間協定の場裏での行動も本研究でわかるようになった。それに、Pekkanen の研究でよく説明されているように WTO で日本の法律的対決姿勢のパターンが近年でも続いていることを主張できる。

しかし、前世紀に日本が欧米に対してあった法治主義的な態度が 2005 年から近年まで、アジア地域の国々へ徐々に向けられている。その原因はアジア地域の経済発展の一つだけである。特にこの研究で確認したように貿易額が高い相手、つまり中国と韓国に対し、日本の一番競争的な産業に関して紛争へ向かう態度である。第二、三章では、法律を厳格的に使う日本は、日本が提起したハンチ・ダンピングのケースで見えるが、答弁として行動している日本も何よりもこの二国に反してこういう態度を使う場合もあることが分かる。それに、Pekkanen の研究に反して、2012 年から日本の対決姿勢は中国に対しても見えてきた。Pekkanen の研究が正しくないということではないが、Pekkanen が分析した時期は中国と日本の紛争が農業のような保護的な産業に関して行われていたので、その時の日本の態度はより法律的に安閑だった。一方、本研究では中国でハイ・テックと鉄鋼などの産業が発展している時期だけでなく、世界的に重要な貿易相手になった時期も分析しているので、日本だけではなく、世界的な中国の外国貿易政策に注目している。ある論文では、この日本の態度は韓国と中国との歴史的な外交的問題のつながりがあると主張するが、この研究で分析したケースの中で外交的問題の後に行われたケースは少なく、その外交的問題のせいで行われたことを証明する根拠がないので、確実とは考えられない。

更に、注目すべきポイントは、法律の厳格な適用をあまりしないとよく考えられているアジアの国々が WTO の場裏でどんどんこの態度をとっていることだ。確かに、WTO はふさわしい法律的な背景を備えているが、最近の上級委員会がマヒ状態になったので、次の年にこの状況を解決できなかった場合、紛争解決のため二国間協定に頼ることになるそう。近年 WTO で日本の貿易戦争の目標国は欧米ではなく自国の隣国、とりわけ中国と韓国になったことが確実だと言える。

## Abstract

In the recent years, the activity of Japan under the WTO dispute settlement system has been changing together with the evolution of Japan's international trade relations.

In 2008, Pekkanen's research "*Japan's Aggressive Legalism*" highlighted Japan's aggressive use of legalism under the WTO dispute settlement system. Through this study, Pekkanen was able to demonstrate how Japan's strict use of law in the WTO dispute settlement arena was specifically directed towards the US. Not only, as Pekkanen's research goes on, another central finding is that Japan's strict use of legalism is employed specifically in cases concerning its most globally competitive and trade dominant industries.

One explanation of this phenomenon relied first of all in the growing trade relation with the US at the time and as a consequence in the evolution of the Balance of Payments in favor of Japan, which increased the probability of conflict. Another explanation was the competitiveness of both countries in the automotive sector at the time, which concurred in the inception of a trade war towards further liberalization of respective markets. On the other hand, when analyzing disputes with China, Pekkanen noticed a display of a "*muted legalism*" by Japan. This could not be explained in terms of quantity of trade, as Japan was growing its exports to China as well, but it could be justified by the non-competitive nature of the sectors involved in the WTO litigations that took place between these two countries.

While there have been a number of studies concentrating on specific dispute cases where Japan took part, until now there have been no comprehensive studies focusing on how Japan's legalism has been changing. The aim of this study is to take from where Pekkanen's analysis was left and examine how Japan's aggressive legalism has been used against different interlocutors and for different trade dominant sectors over the years. In order to do so, the first chapter covers the economic background of Japan starting from the post-World War II period and the economic and industrial changes that made the country globally trade competitive in specific sectors as steel and technology. Moreover, it explains how Japan's international trade relations has evolved to be always more engaged in trade with its neighbor Asian countries. Finally, this chapter also presents an overview of the recent activity of Japan in the WTO dispute settlement arena. While Japan's activity in the WTO as a complainant is of particular interest, Japan's activity as a respondent and third party is also taken into consideration.

The first chapter is fundamental to understand why Japan acts in a certain way in its WTO litigations which are discussed in more details in the following chapters. Starting with a detailed description of recent trade relations and evolution of commodity exchange between South Korea and Japan in the recent years, the second chapter then moves on to the analysis of the stance that Japan has been showing



recently in litigations with Korea. A better understanding is provided by the analysis and discussion of three dispute settlement cases between the two countries.

Chapter three, on the other hand, discusses the evolution of Japan's trade relations with China. As a result of the infrastructure and economic development of China, this chapter explains how the commodity exchange between the two countries has changed over the years. First, an explanation of how this is connected to the way Japan reacts to Chinese foreign trade policies is made. Finally, three WTO dispute cases are presented as an example of how Japan's use of international trade law against China has changed in WTO litigations.

The fourth chapter objective is to make a brief presentation on how Japan has started since the 2000s to look for more legalization of its trade relations even outside the WTO international law framework. Japan promotion of the stipulation of new Regional Trade Agreements with the aim of increasing liberalization is discussed and more specifically, a particular attention is made in Japan's investment provisions included in trade agreements or investment agreements per se.

The study confirms that Japan's use of legalism is indeed aggressive when concerning trade liberalization in favor of its competitive industries, but it also finds that Japan use of legalism has been directed towards different interlocutors in the recent years. While in the 80s and 90s the US was the main target, the growing importance of South Korea and China as trade partners for Japan and their growing competitiveness in sectors as technology, automotive and steel became a menace for Japanese exports. As a result, this research finds that in contrast to the muted legalism that Pekkanen detected in the first cases of China-Japan litigations, Japan is now very attentive to bring Chinese and Korean foreign trade policies into conformity with WTO international trade law.

Finally, the study finds that Japan's legalism has been growing at the bilateral level as well. As a matter of fact, in the last chapter it is shown how Japan has been looking to increase its bilateral trade regulations in order to maintain and expand the competitiveness of its trade dominant industries.

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## Introduction

This text is a study about how the Japanese foreign trade law developed historically, not only under the framework of the WTO, but also with the growing interconnections built through bilateral agreements, which the government of Japan is still actively promoting.

Even if Japan entered GATT already in 1955, it was not until 1995, when Japan entered the newly established organization (WTO), that the country found itself in a new trade arena where it could understand how the norms regulating trade relations are a fundamental element affecting the behavior of States.

Being a good observer before and a good user later, of the possibilities of law in international disputes, Japan appeared to be “aggressive”, as professor S.M. Pekkanen exhaustively described in her work *Japan’s Aggressive Legalism*<sup>1</sup>, both as a respondent and as a complainant. Starting from the work of professor Pekkanen this study wants to inspect how, in recent years, Japan is handling its international relations and disputes under the WTO and wants to determine whether the use of legalism in a confrontational and aggressive way has changed over the years.

Given the fact that a belligerent behavior at the international level is quite often determined by the involvement of the most competitive industries in the disputes settlement processes, this text will start off by presenting broadly the economic scenery of Japan, and the reasons that caused some industries to be more competitive than others. After this introduction, the work will examine the recent activity of Japan under the WTO dispute settlement system and what has changed in terms of interlocutors as a consequence of changes in the global trade interconnections.

We will see that while Japan still holds an aggressive attitude in certain dispute settlements cases, particularly when concerning the globally competitive industries, for instance steel, automotive, electronics and technology, at the same time litigation counterparts are slowly geographically moving towards East Asia.

Therefore, while in the previous century Japan and the US had different trade frictions, in recent years the trade relationship between the two countries has changed in a way that made disputes not as common as before. On the other hand, we will see how Japan is growingly involved in disputes with

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<sup>1</sup> Pekkanen Saadia. M., *Japan’s Aggressive Legalism Law and Foreign Trade Politics Beyond the WTO*, Stanford University Press, Stanford, 2008

its neighbor countries, and we will analyze specifically its relations with the Republic of Korea and the People's Republic of China.

Lastly, since the work wants to discuss Japan's legalistic behavior in the global trade framework, it is also important to point out the recent trends that push towards a more bilaterally interconnected scenery. Since the WTO seems to be increasingly outdated, especially during the recent Appellate Body crisis, reforms are felt as a necessary action for a better functioning of the system itself. Resulting not only from the Dispute Settlement Understanding crisis but also from the growth of globalization of trade, the importance of bilateral agreements is growing, and has recently become a major theme of discussion among countries, as to not be cut out of the international trade system. Hence, the importance of discussing this matter in the final part of this work, where we will see how Japan has become more and more entangled in this kind of agreements.

## 1. Chapter 1: Japan Economic Background

Although, the main objective of this work is to examine the current behavior of Japan in the international arena, this analysis demands a knowledge and understanding of basic information about the economic and historical background of Japan.

In fact, considering that the foreign trade policy of a country has major influence on its economy, especially when such country's economy is reliant on its exports as Japan is, it is important to review, even if briefly, some economic aspects that characterize Japan and simultaneously observe the evolution of its trade policies overtime.

Moreover, given the fact that the main industries of the country are related, in a way that is examined in the following chapters, to the eventual initiation of disputes in the international arena, the comprehension of the overall economic outlook of the country holds some relevance.

Controversies between Japan and the US during the latter years of the 20<sup>th</sup> century have been thoroughly discussed by many scholars over the years and as this argument slightly diverts from the purpose of this study, only a quick mention will be made with the aim of giving an historical prospective of how a more legalistic stance of Japan unfolded under the international organization umbrella.

Therefore, as mentioned, in this first chapter the overall historical background that brought Japan to its actual economic shape is presented in the first part, while an overview of the economic situation in the latest years, focusing specifically on the global trade economy of Japan and its main figures, is disclosed in the second part.

### 1.1 Japan's Postwar Economy Overlook and Concurrent Foreign Trade Evolution

Japan has always been known to be a country with scarce natural resources and therefore to depend greatly on imports of raw materials<sup>2</sup>. The expansion of the Empire before WWII had allowed Japan to procure raw materials more freely and easily<sup>3</sup>, but already immediately after the war, with the loss of

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<sup>2</sup> Satō Kazuo, Japan's Resource Imports, *The Annals of the American Academy of Political and Social Science*, Vol. 513, Japan's External Economic Relations: Japanese Perspectives, pp. 76-89, 1991

<sup>3</sup> Asia for Educators, Japan's Quest for Power and World War II in Asia, Colombia University, 2021

its colonies, its access to food and natural resources needed for industrial production, for instance oil, iron ore, bauxite, wool and rubber, put Japan fall in critical conditions.

While during the war the GDP per capita and the industrial activity fell far behind the pre-war levels, prices started soaring together with the growing need of a prompt recovery.

The objectives of an economic restoration started with the demilitarization and democratization of the country conducted by US authorities together with the government of Japan led at the time by prime minister Yoshida Shigeru<sup>4</sup>.

The conditions of foreign trade were critical as well. In fact, while imports of certain material were still important during the war, and the immediate post-war period, export was overlooked and kept shrinking, consequently deteriorating the balance of payments of the country<sup>5</sup>.

In the first place, to restore the chronic trade deficit conditions and the striking increase in prices, the government promptly took several steps (as currency conversion reform, restrictions of use of bank deposits, increased taxation of capital etc.) with the aim of stabilizing the situation: however, with little result<sup>6</sup>. Furthermore, in this period when the priority was economic recovery and Japan's industry was greatly weakened due to the collapse of output caused by the war, Japan trade policy was characterized by heavy import barriers<sup>7</sup>.

It is with the implementation of the Dodge Line<sup>8</sup> in 1949 that Japan saw a first period of deflation.

The plan which provided 9 points towards economic stabilization, focused on a reform of the financial situation and a restrictive credit policy. Moreover, it also established a fixed exchange rate of 360 Yen to the USD which slowed down the price increase, favoring the exports activity<sup>9</sup>.

The outbreak of the Korean war in 1950 caused a boost to Japan's industrial production and exports. During the conflict in the Korean peninsula, Japan was assigned the role of supplier of valuable

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<sup>4</sup> Yoshioka Shinji, Kawasaki Hirofumi, Japan's High-Growth Postwar Period: The Role of Economic Plans, Economic and Social Research Institute, Cabinet Office, Tokyo, 2016.

<sup>5</sup> Ozaki Robert S., Trade, Growth, and the Balance of Payments of Post-War Japan, Sir Arthur Lewis Institute of Social and Economic Studies, University of the West Indies, 1967

<sup>6</sup> Cohen Jerome B., Japan's Postwar Economy, Indiana University Press, 1958

<sup>7</sup> Okazaki T., Korenaga T., "The Foreign Exchange Allocation Policy in Postwar Japan: Its Institutional Framework and Function", University of Chicago Press, January 1999.

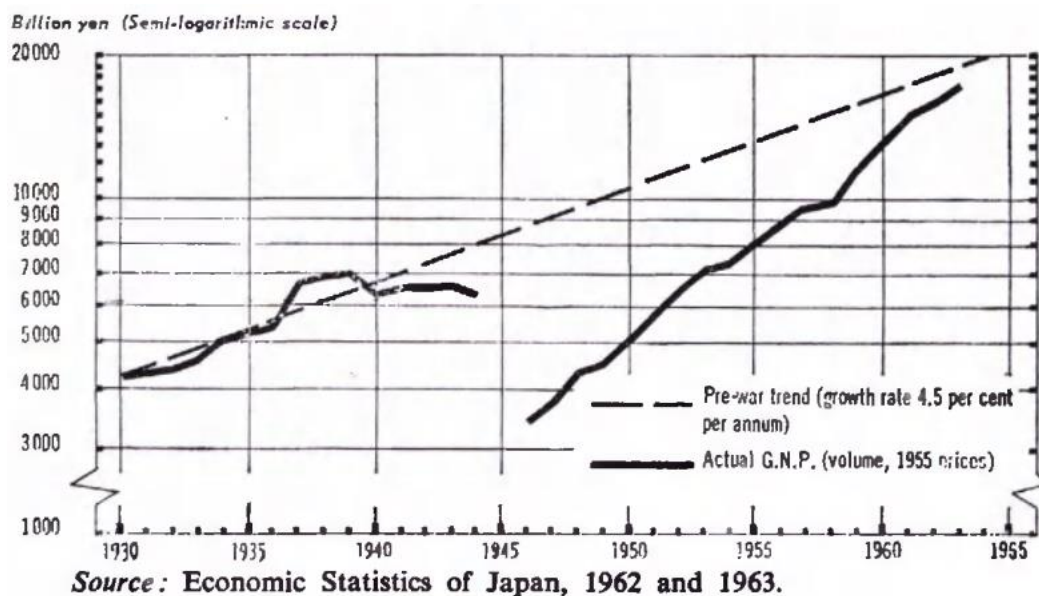
<sup>8</sup> The policy takes the name from the American banker Joseph Dodge that was named by the Occupation Authorities as an economic policy consultant.

<sup>9</sup> Yoshioka Shinji, Kawasaki Hirofumi, Japan's High-Growth Postwar Period: The Role of Economic Plans, Economic and Social Research Institute, Cabinet Office, Tokyo, 2016

procurement orders for goods and services by the UN<sup>10</sup>, which resulted in a growth of industrial activity and finally starting the virtuous circle that put Japan on the road to restoration.

In graph 1 we can see the growth of Japan GNP from the pre-war period to the post-war striking growth until 1955.

Graph 1: Pre-war G.N.P. Trend and Actual G.N.P., 1930-1963



Source: OECD, Japan Economic Survey 1964, pp. 13.

In 1952 the American occupation was finally over and in the same year Japan joined the International Monetary Fund (IMF), while in 1955 entered the General Agreement on Tariffs and Trade (GATT): in an initial phase, as a country under GATT Article XII, hence entitled to practice imports restrictions due to reasons of international balance of payments, given the economic restoration that was underway<sup>11</sup>.

However, as the country was recovering and becoming more influent in the world economy, the international scenery started to call for its trade liberalization, which in turn was officially announced in 1960 with the implementation of The Outline of Trade Liberalization and therefore the application of Article XI (which prohibits quantitative restrictions on importation and exportation of any goods) under GATT<sup>12</sup>.

<sup>10</sup> Ibid.6

<sup>11</sup> Ibid.9

<sup>12</sup> Ibid.



As mentioned above, during the post-war period until 1964, Japan's foreign trade policy was strict. In an initial phase, any transaction was controlled by the Supreme Commander for the Allied Powers (SCAP, General Douglas MacArthur) while private foreign trade was prohibited.

The policy implemented in 1949 to control foreign trade was the Foreign Exchange and Foreign Trade Control Law which was the legal framework that regulated the system of imports and exports control which in turn was organized around the central Foreign Exchange Budget<sup>13</sup> (FEB).

In a first time, exports were controlled as much as imports, but after the enactment of the law, restrictions on exports were eased, notwithstanding the exclusion of some selected categories of commodities<sup>14</sup>.

A turning point in the economic recovery plan was undoubtedly the boosting of the industrial output. Starting from 1947 the government also started implementing several regulations aiming at the recovery of industry activity. One of the policies implemented was the Priority Production Policy<sup>15</sup>, which required the concentration of scarce resources towards a few key industries. According to this policy, the growth of activity in major industrial sectors was expected to support the growth of other industries as well<sup>16</sup>. Quite obviously the selected fields were steel, coal, heavy oil, rubber, and transport equipment. At the time, coal was the main source of energy of Japan and the rise of production of coal meant more energy to be distributed among other industries: hence the expectation of growth of other sectors as well.

However, while the aim of this policy was to raise the overall industrial activity, at the same time, it had the side effect of leaving behind, at least for some time, other industries such as textile<sup>17</sup>, which was a fast-growing industry in prewar Japan and was already facing the consequences of international competition.

On the other hand, it is worth mentioning that some of the industries selected for the implementation of the policy, mainly heavy industries, are still nowadays globally competitive.

From 1960 to 1970 Japan experienced a decade of great growth and the very first setback of the "*economic miracle*" eventually started in 1971 with its peak in 1973 when the Nixon Shock and the

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<sup>13</sup> Okazaki T., Korenaga T., "The Foreign Exchange Allocation Policy in Postwar Japan: Its Institutional Framework and Function", University of Chicago Press, January 1999.

<sup>14</sup> Ibid.

<sup>15</sup> Also called PPS or Priority Production System.

<sup>16</sup> Okazaki Tetsuji, *Industrial Policy in Japan: 70-year History since World War II*, Tokyo, Japan Economic Foundation, 2017

<sup>17</sup> Ibid.

termination of the US gold standard together with the breakout of the Arab Israeli war unleashed the oil crisis resulting in a period of economic disorder.

Nevertheless, unlike most of the rest of the world, Japan was one of the few countries together with West Germany, to be able to rebound back to growth in a short time.

In fact, while the balance of payments deteriorated in 1974, signs of recovery appeared as early as 1975<sup>18</sup>. In this latter half of the decade, despite the Yen appreciation, Japanese exports sharply increased generating an impressive account surplus in comparison with the rest of the world (table 1). As for foreign trade policy, the Japanese market reached its highest levels of liberalization since the war with the Ikeda and Satō Cabinets (1960-1972). Thanks to the bold foreign policies of the government in the first years of 1960s, which promoted a greater market openness with the aim of further boosting the economy expansion, Japan's market openness was increased up to 93%<sup>19</sup>.

Moreover, in terms with the guidelines of the IMF (of which Japan became an Article 8 country, that implies that it cannot impose control on foreign exchange) the government abolished any type of restriction of foreign exchange and currency transactions and finally acceded to the Organization for Economic Co-operation and Development (OECD)<sup>20</sup>.

The shift of the industrial system was also an important matter at this point. The industrial structure in this period went from agricultural to manufacturing and from light industries as textile to heavy industries as steel which activity accelerated as a result of the increased production capacity following the post war industrial policies, that in turn boosted exports.

From 1971 the country started to witness its first economic downturn since the war. Although, in the *Vision for Trade and Industry Policy* of 1970, MITI clearly stated the need to develop and improve the international relations of the country and proposed an industrial plan, aimed at improving the efficiency of key industries, protecting the newly emerging ones and finally promoting technological development and research, the vision objectives were put aside as the Nixon Shock and the rise in oil prices resulted in a soaring inflation and a temporary deterioration of output<sup>21</sup>.

In these years, the government mainly focused on regulating prices of primary goods, petroleum supply and demand, and generally introduced austerity policies which will be effective enough to get Japan

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<sup>18</sup> OECD Japan Economic Survey, 1979.

<sup>19</sup> Jimintō, Chapter Four Period of President Ikeda's Leadership, <https://www.jimin.jp/english/about-ldp/history/104278.html>

<sup>20</sup> Ibid.

<sup>21</sup> Chikara Higashi, G. Peter Lauter, *The internationalization of the Japanese Economy*, New York, Springer Science+Business Media, 1987.

out of recession quickly<sup>22</sup>. By the end 1976, thanks also the temporary fiscal stimulus used to achieve real growth rates, Japan became soon the fastest growing country among highly industrialized countries (Table 1).

Table 1: Current Balances, International Comparison

	U.S. \$ billion							
	1971	1972	1973	1974	1975	1976	1977	1978
United States	-4.0	-9.9	-0.4	-2.3	11.6	4.3	-15.3	-16.0
Germany	0.9	0.8	4.3	9.8	4.0	3.8	3.7	8.0
Netherlands	-0.2	1.3	2.4	2.1	1.7	2.4	1.4	-2.5
Switzerland	0.1	0.2	0.3	0.2	2.6	3.5	3.4	5.0
Japan	5.8	6.6	-0.1	-4.7	-0.7	3.7	10.9	16.5
Other OECD	7½	4	3	-36½	0	-36½	31	-5
Total OECD	10	7½	9½	-27½	½	-18½	-27	6
OPEC	½	1½	7½	59½	27	36½	29	6
Non-oil developing countries	-9½	-5½	-6½	-23½	-37½	-25½	-23	-36½

Source: OECD Secretariat.

Source: OECD Japan Economic Survey, 1979, pp. 23.

Nonetheless, by the end of the decade the expansion of exports started to aggravate relations with major trade partners. As a matter of fact, it would not take much time before the international community noticed the unique conditions of Japan in comparison with much of the rest of the world. Particularly, the US, backed by the European Economic Community (EEC) started to raise complaints towards the increasing imports coming from Japan (mainly metal goods, machinery and equipment and electronic goods<sup>23</sup>) against the not so impressive growth of imports of foreign products in Japan<sup>24</sup>. The US will be the most important trade partner from the post-war period up until the early years of the 21<sup>st</sup> century and although trade conflicts with the US were present even before, the US already considered the Japanese import procedures “*a painful exercise in frustration*” to use the words used by a US senator in the *Report to the Committee on Finance* in 1971<sup>25</sup>, it is in the latest period of the 1970s that the *US-Japan trade war* will begin and as it is going to be discussed later, it will be the cause of many negotiations that will pressure Japan to review its foreign trade policy.

<sup>22</sup> OECD, Japan Economic Survey, 1979

<sup>23</sup> OECD, Japan Economic Survey 1980, pp. 87.

<sup>24</sup> Ibid. 21

<sup>25</sup> Senator Ribicoff A., Trade Policies in the 1970s, Report to the Committee on Finance United States Senate Russell B. Long Chairman, U.S. Government Printing Office, Washington, 1971.

In the first half of the decade from 1980 to 1990, while the world economy was still slowed down and started to recover from the oil crisis, Japan's GDP and trade surplus against the US were still growing. Particularly, while the GDP kept growing with an average rate of 4%<sup>26</sup> the trade surplus with US increased from 10 billion dollars in 1978 to 60 billion dollars in 1987<sup>27</sup>.

During the 70s industries such as, metal, petrochemical, machine, and precision industries kept growing following the path started in the 60s, the automobile industry also became globally competitive together with electronics and technology industries resulting in turn in an impressive growth of exports of these products<sup>28</sup>.

Between the end of the 70s and the beginning of the 80s, Japan's response to the growing external pressures, was the implementation, under the Suzuki cabinet of a 3-stage plan to promote market openness: this not only reduced tariffs over several products but also simplified import inspection procedures to grant an easier access to foreign products<sup>29</sup>. This, however, was not enough to affect Japanese imports and avoid further external pressure.

Table 2 shows how, between 1981 and 1984, exports to the US increased by 55% while imports increased of a meagre 4% in the same period and it is not surprising that US pressures and critics on Japan trade policies came about during the periods of registered surpluses.

Table 2: Japanese and United States global trade balances: 1981-1984 (in \$ millions)

<i>Year</i>	<i>Country</i>	
	<i>Japan</i>	<i>United States</i>
1981	19,967	- 27,978
1982	18,079	- 36,444
1983	31,454	- 67,216
1984	44,257	- 114,107

Source: Chikara Higashi, G. Peter Lauter, *The internationalization of the Japanese Economy*, New York, Springer Science+Business Media, 1987.

<sup>26</sup> World Bank National Accounts Data, GDP Growth (annual %).

<sup>27</sup> 河村 徳士、武田 晴人、通商産業政策 (1980-2000 年)の概要 2) 通商・貿易政策 —阿部 武司 編著『通商産業政策史 2 通商・貿易政策』の要約、RIETI、2014。

<sup>28</sup> Ibid. 21

<sup>29</sup> Jimintō, Chapter Ten Period of President Suzuki's Leadership, <https://www.jimin.jp/english/about-ldp/history/104290.html>

Admittedly, starting from 1985, Japan held a series of negotiations with the US to tackle this trade issue, which will result in the Action Program of 1985 and the Maekawa Report of 1986.

The Program proposed policies for a more sustainable market access to be implemented in the following 3 years period, specifically elimination and reduction of tariff barriers, improvements of non-tariff barriers and regulations over imports, simplification of certifications requirements, improvements for a more transparent policy formalizing process to foreign representatives and promotion of imports through JETRO, as well as the implementation of Voluntary Export Restraints (VER)<sup>30</sup>.

The Report reported several cross-ministerial and comprehensive policies that could restructure the Japanese economy from an export-led one to a domestic demand-led one and therefore fill the gap of Japanese account surpluses.

In 1985 the Plaza Accord also took place, the G5 meeting held by President Reagan, in which Japan took part. The accord was concluded with the decision to depreciate the USD to reduce the account deficit of the US, which was facing a serious recession since the beginning of the decade. The decision of an appreciation of the YEN to USD is believed to be, in different studies, the agreement that will prepare the foundations towards the assets price bubble.

Jointly, the changes in foreign trade policy of Japan, the relaxed monetary policy held by the government, with low interest rates and low loans interests, along with the deregulation of the financial market implemented in the 1980s, stimulated financial speculation which in turn aggravated the condition and contributed to the rise of land and shares prices which reached its peak in 1989<sup>31</sup>.

Finally, with the burst of the bubble, Japan officially entered “*the lost decade*”, characterized by economic stagnation and deflation and despite some weak signs of recovery in the early years of the 90s, the crisis eventually aggravated with the Asian Financial Crisis of 1997-1998 and with the increase of the VAT tax from 3% to 5%, introduced by the MOF due to preoccupation over the public debt that was increasing as a result of the financial stimuli used to improve the fiscal system conditions<sup>32</sup>.

Moreover, in 1994 the final draft of the GATT Uruguay Round was signed and in January 1995 the World Trade Organization (WTO) was established<sup>33</sup>.

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<sup>30</sup> Ibid. 21

<sup>31</sup> OECD, Japan Economic Survey 1989 and 1990.

<sup>32</sup> OECD, Japan Economic Survey, 1997 and 1998

<sup>33</sup> Ibid. 21

At the international level Japan was still facing criticism for the difficulties of accessing the market and in 1993 the “Interim recommendation” report was issued<sup>34</sup>. With this report, it became clear that results were not to be obtained with the simple deregulation of the import system that were previously implemented. According to the report the system needed to be backed up by a suitable institutional framework, therefore putting forward the idea of an institutional reform.

Also, the promotion of deregulation policies proceeded to be implemented as a consequence of the Structural Impediment Initiative talks of 1989 and the US-Japan Framework for New Economic Partnership established in 1993<sup>35</sup>.

An acceleration of growth in 2002 raised hopes for a full recovery of the country, thanks also to the government’s reforms that helped kickstarting the virtuous cycle starting from reforming and strengthening the banking system.

The upturn was stimulated not only by the expansionary monetary policy but also by external demand coming mainly from other Asian countries, however the economic expansion later evolved into a recovery sustained by domestic demand in 2005 which accounted for more than 90% of the economic growth<sup>36</sup>.

Finally, by the beginning of 2006 the trend of deflation inverted towards an increase of prices and in the same year the government proposed the “Globalization Strategy” with the aim of enhancing the competitiveness that Japan has been losing overtime<sup>37</sup>.

However, the rise in hopes would not last long. In the following years, Japan will be struck both by the Global Financial Crisis in 2008 and by the Great East Japan Earthquake in 2011, which inevitably increased the public spending of the government, raising public debt up to 200% of GDP<sup>38</sup>.

After these two shocks Japan fell back to depression, boosted by sluggish output due to ageing population and shrinking of the labor force, which are issues that have been hindering the country for years and are still a major problem. Furthermore, the external global condition weakened by the global financial crisis and the yen appreciation will deteriorate exports even more<sup>39</sup>.

Needless to say, deflation that seemed to halt around 2006-2007, appeared again determining yet another economic crisis for Japan, that will be overcome with the implementation of the first two

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<sup>34</sup> Committee on the History of Japan’s Trade and Industry Policy RIETI, Dynamics of Japan’s Trade and Industrial Policy in the Post Rapid Growth Era (1980-2000), RIETI, Tokyo, 2020.

<sup>35</sup> Ibid.

<sup>36</sup> See OECD, Japan Economic Survey 2006, pp. 22.

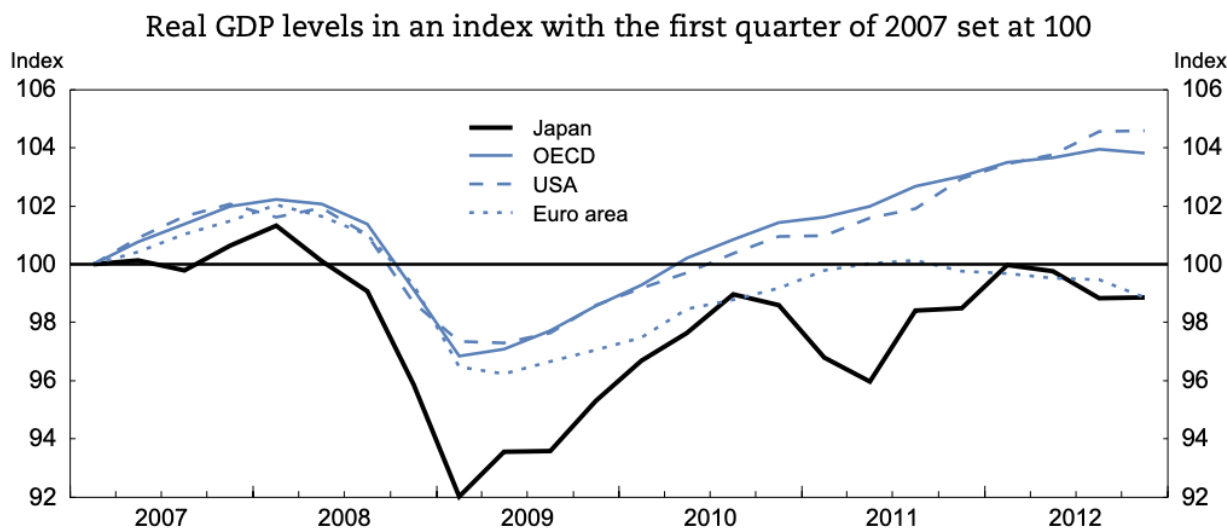
<sup>37</sup> See OECD, Japan Economic Survey 2006, pp.171

<sup>38</sup> See OECD, Japan Economic Survey 2006, pp. 13-14

<sup>39</sup> Ibid.

arrows of the Abenomics (Quantitative and Qualitative Easing, Fiscal consolidation), that will show its first positive impact in 2015<sup>40</sup>.

Graph 2: Real GDP Levels of Japan 2007-2012



Source: OECD Japan Economic Survey Overview 2013, pp. 13.

At this point in time, Japan had already a market open to foreign products: however non-tariff barriers remain a big problem for the penetration of foreign product and FDI as well. For this matter, the “revitalization strategy” was proposed with the aim of doubling the inflow of people, goods and investments by 2020<sup>41</sup> and together with this Japan has also been seeking bilateral and multilateral agreements outside the WTO arena since 2002.

## 1.2. Recent Years Economy

Since 2012 the economy of Japan has been growing at a slow and stable pace (average growth rate fluctuating around 1%)<sup>42</sup>. The implementation of the aggressive monetary policy through quantitative easing and the flexible fiscal policy which promoted investment provided by the Abenomics

<sup>40</sup> See OECD, Japan Economic Survey, 2017, pp. 16-20

<sup>41</sup> Kantei, JAPAN: Japan Revitalization Strategy: Japan’s Challenge for the Future, 2014

<sup>42</sup> See OECD, Japan Economic Survey, 2019, pp. 17-32

implementation started to show its first signs of effectiveness when in 2020 the world was hit by Covid-19 pandemic<sup>43</sup>.

In the recent years after the pandemic, Japan's economy has slowed down in growth but seems to have gotten back up promptly. Still the ageing population and decreasing labor force issue, which greatly affects the country's productivity and the public spending, will be a hindrance that cannot be overdue. Although, exports fell sharply in 2020, they rebounded back quite quickly as well and are expected to keep growing with the recovery of the major trading partners.

After the pandemic the government decided to enhance the expansionary monetary policy, on the other hand the financial sector was able to withstand the shock relatively well thanks to the efforts in strengthening the sector after the 2008 Global Crisis. However, the increase of public expenses further aggravated the public account balance which gross debt is now one of the highest worldwide<sup>44</sup>.

### 1.3. The role of WTO in the recent years

Japan joined the new international organization of WTO in 1995, as soon as it was established as per agreement in the Uruguay Round. In contrast to the GATT's dispute settlement system, which had shown several flaws (i.e., possibility of a party of blocking the establishment of a panel, scarce details on procedures, power of the parties to supervise the dispute settlement process etc.)<sup>45</sup>, the WTO dispute settlement system was born through the adoption of the Dispute Settlement Understanding (DSU) at the Uruguay Round, taking into account the improvement of these weaknesses. During the initial phase of existence of the WTO, the number of cases filed at the Dispute Settlement Body (DSB) seemed to be very high in comparison to its predecessor, however, it must be noted that several dispute cases not solved yet under GATT, were passed on to the new Dispute Settlement Body. Nonetheless, we shall consider as well that the improvement of these procedures might have influenced the proneness of a party to file a dispute case<sup>46</sup>.

Moving on to more recent data, it is important to notice how the activity of the Dispute Settlement Body under WTO is starting to show signs of abating. Looking at the numbers of requests for consultations there is quite a clear trend toward a decrease in the use of the system. In the graph below

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<sup>43</sup> Ibid.

<sup>44</sup> OECD, Japan Economic Survey, 2021

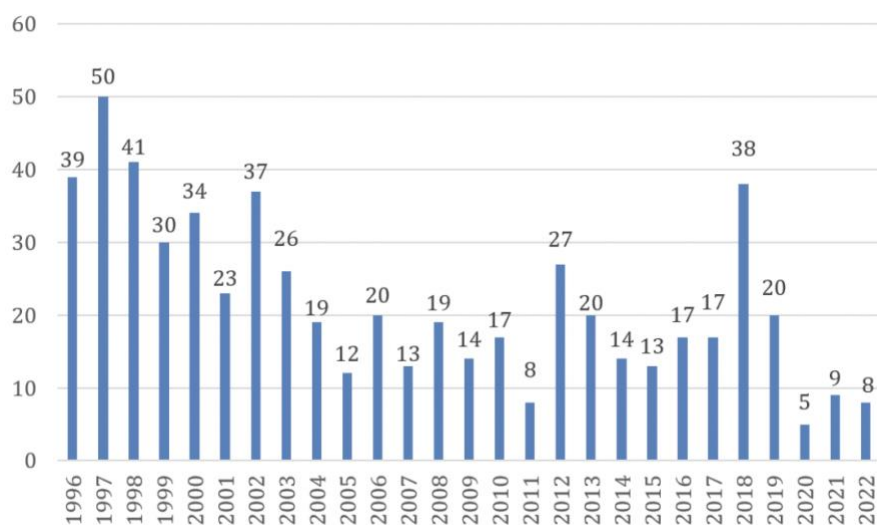
<sup>45</sup> John H. Jackson, Robert E. Hudec, Donald Davis, The Role and Effectiveness of the WTO Dispute Settlement Mechanism, Brookings Trade Forum, 2000, pp. 179 – 236.

<sup>46</sup> Ibid.



of a total of 590<sup>47</sup> requests for consultations, 311 were filed in the first 10 years of activity (1995-2005), while the other 279 were filed in a 16-year period (2006-2022)<sup>48</sup>.

Graph 3: Requests for Consultations (1995-2022)



Source: Disputes statistics taken from [www.wto.org](http://www.wto.org) (22 September 2023).

Apart from the numbers, which show an overview of the situation, another relevant element that surely contributed to the slowdown of activity in the recent years, is the interference of the US to the Appellate Body (AB) activity. The AB is a “*standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO Members*”<sup>49</sup> and even if its decisions are not binding it is a key body in the resolutions of disputes that could not be fully resolved by the panel and always had a major role in preventing retaliation. However, since 2017 the US delegation has refused to give consensus for the appointment of the new adjudicators of the AB, which in 2019 was comprised of only one last member. This is due to the complaints introduced by the US regarding the practice of judicial activism by the WTO and concerns over its sovereignty<sup>50</sup>.

While the WTO influence in the world trade arena seems to be taking a downturn, even if attempts to reform and improve the actual dispute settlement system are being taken into account, there will always be a need for the organization to keep up with the times and to respond to the global trade demands

<sup>47</sup> To be precise, the number reported in the WTO disputes statistics at [www.wto.org](http://www.wto.org) reported 615 requests, but I hereby attained to the numbers reported in the graphic.

<sup>48</sup> [www.wto.org](http://www.wto.org)

<sup>49</sup> Cited from WTO, Appellate Body, [www.wto.org](http://www.wto.org)

<sup>50</sup> Kawase T., *The WTO's Appellate Body Crisis and Roles to Be Played by Japan*, RIETI, 2019

and while Japan together with other members is at the front of a call for restoration and strongly believe in the need of a multilateral organization as the WTO in the international trade scenery, it is also clear how bilateral agreements are becoming more valuable in the regulation of trade matters.

The following paragraph will focus on the activity of Japan under WTO from where was left off in professor S.M. Pekkanen's work in order to see how Japan's stance in the dispute settlement system has changed both on a quantitative and qualitative basis.

#### 1.4. The activity of Japan in the WTO since 2006

Since the entrance of Japan as an economic power in the world of multilateral organizations, the attitude of the country towards the active employment of the instruments of dispute settlements has changed considerably.

If Japan was quite reluctant in recurring to the dispute settlement under GATT, with a preference towards bilateral negotiations, the reluctance decreased under WTO, which brought Japan from being a passive user, only responding to foreign pressure, to being an active one and filing as many complaints as it was responding. This was the case for the period enclosed from 1995 to 2005, which is the period analyzed in Pekkanen's work and which saw Japan entangled in a series of disputes against the US. However, from 2006 until the recent years Japan's attitude has changed, also in the optic of a different economic framework, which is not anymore that of the 80s.

Figures 1.1 and 1.2 show the difference of the activity of Japan under the WTO dispute settlement system in the two periods of time, while Annex 1.1 reports a more detailed list of the disputes in which Japan took part from 2006 to 2021<sup>51</sup>.

Looking at the figures, is undeniable that Japan's activity mainly consists of participation as a third party, which increased up to 90% in the second period examined. On the other hand, the decrease in the activity as a respondent could give space to different theories, one of which could be that Japan is no longer seen as a threat due to the loss of competitiveness in some of the Japanese major industries, such as automobile and steel, or, apart from the 2 cases in the list, Japan simply did not rely to the enforcement of trade measures which arose the need of a dispute settlement.

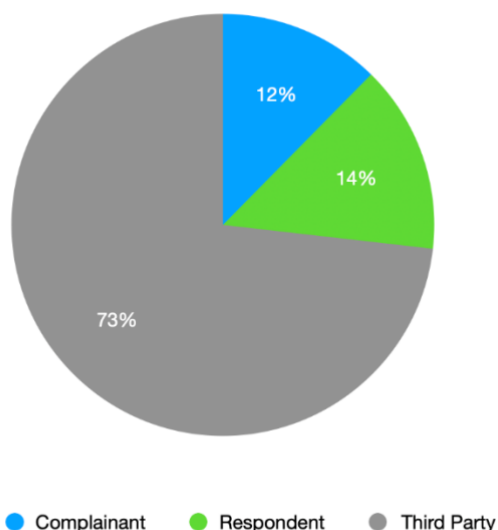
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<sup>51</sup> Data from [www.wto.org](http://www.wto.org)

Regarding the complainant activity, from 1995 to 2005 Japan filed 12 complaints and from 2006 to 2023 it filed 16 complaints. While it may seem a slight increase, it is important to consider that we are comparing a 10-year period with a 16-year period, making it, in turn, a slight decrease.

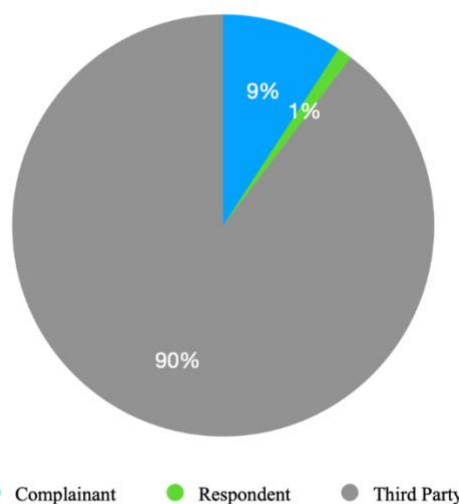
Nonetheless, sheer numbers don't have much of a meaning if not placed in context. Taking a better look, in fact, the type of activity that Japan held in regard to certain industrial sectors, can actually imply different useful information. As we mentioned earlier, the legalism of Japan activity came about only after the establishment of the WTO, which provided the right legal framework for Japan and other countries to act in the dispute settlement system<sup>52</sup>. Still nowadays there is a common perception of Japan as a country that tends to avoid legal conflicts. Indeed, if we compare the activity of Japan under the DSU to the activity of the United States or Europe, which are among the most active countries, it is true that Japan's participation rate is way lower, however when compared to the activity of Japan under GATT, Japan results to be way less passive than before.

Figure 1.1: Japan's Activities Under WTO (1995-2005)



Source: [www.wto.org](http://www.wto.org) accessed on 22 September 2023

Figure 1.2: Japan's Activities Under WTO (2006 -2023)



Source: [www.wto.org](http://www.wto.org) accessed on 21 September 2023

Indeed, it is well-known that Japan's use of legalism at the international level is quite adept at pointing out nullification or impairment of benefits resulting from measures, trade acts or non-tariff practices adopted by its major trade partners, and this is true especially when the infringements of the WTO rules happen towards specific industrial sectors<sup>53</sup>.

<sup>52</sup> Pekkanen S.M., 2008

<sup>53</sup> Ibid.

From the analysis of the Annex 1.1 is quite easy to identify the trends that characterize the activity under WTO of the country. These trends regard not only the industrial sector on which the country is focusing on, but the trade partners as well. Particularly, Japan has its attention still focused over the automobile and the steel industry and in the recent years also on the ICT industry, which all together represent the economic fortune of the country<sup>54</sup>. In fact, most of the requests for consultations coming from Japan regard these industries in the field of tariff measures and anti-dumping, especially for steel industry concerned dispute cases, for instance the cases of anti-dumping measures on stainless steel products against China (DS 454 and DS 601).

But this is no surprise since the industries cited above are the most globally competitive ones and are extremely reliant on exports and therefore always ready to voice out their complaints when a foreign country imposes regulations which in turn could affect their benefits.

The concern towards the benefits of the industries cited above is also noticeable by the activity as a third party. Here below in table 1.1 the categorization by product of the DSU activity of Japan from 2006 to 2023 is presented. While Japan is active as a complainant mainly for those global competitive industries, the table also reports that Japan refrains its activity as a complainant for the agriculture industry for which Japan has always been a protectionist country, while on the other hand it is very active in disputes concerning agricultural matter as a third party.

Table 1.1 Japan DSU Activity by Product Categorization (2006-2023)

Sector	As Complainant	As Respondent	As Third Party
<b>Agriculture/food (vegetables, fruits, fisheries, meats, grains, dairies, beverages etc.)</b>	–	–	42
<b>Automobile/Transport</b>	4	–	13
<b>Steel/metals</b>	4	–	22
<b>Chemicals</b>	–	–	4
<b>Textiles</b>	–	–	–
<b>Leather</b>	–	–	–
<b>Lumber and wood products</b>	–	–	2
<b>Electrical machinery/electronics/ICT</b>	1	1	14
<b>Other</b>	4	–	20
<b>Unclassified</b>	3	1	34

Source: Based on data available at [www.wto.org](http://www.wto.org)

<sup>54</sup> 日本貿易の現状, Foreign Trade 2022, Japan Foreign Trade Council, Inc., Vol. 47, 2022.

This is understandable, in the sense that, if a sector is not a competitive one, the domestic market will be more closed to the penetration of foreign competitive products in order to protect the domestic industry. At the same time this means that matters concerning this sector will not be taken in a DS process in a confrontational and aggressive way, which could have the possibility of threatening the protection of the sector itself. On the other hand, this is the total opposite for those sectors that enjoy a certain competitiveness and strive for openness of markets<sup>55</sup>.

Even so, the reason why Japan is keen to embrace the legalism under WTO for the sake of benefits of some industries rather than others, remains a question to be answered and to respond to this, it is important to understand what are the factors that play a role in the initiation or not of a dispute case. The initiation and most of all, the protraction of a dispute settlement procedure is very costly and the reason of initiation usually is the detection of the use or the declared intention to use trade measures that falls outside the WTO rules from a foreign country. First of all, only the government can file a dispute and has the power to decide, based on the information that it has obtained, whether initiate a litigation under the WTO regulations or not<sup>56</sup>. This usually happens after negotiation has been conducted without results at the bilateral level and going to DSU is not necessarily a consequence. In fact, in this complex process the first step is to spot the non-compliant measure, which is something that governments cannot do on their own struggle, as the import/export measure do not affect the government in the first place. Therefore, industries have a key role in the dispute initiating process. As governments rely on industries to identify and gather information over foreign trade barriers, dispute initiation typically happens when industries or associations put forward their demands and when there is a public-private partnership. In order to file a complaint, first of all the industry must identify the trade barrier, then it must gather all sort of information and calculate economic costs of disputes and eventual returns and finally present the findings to the government and lobby it to initiate the dispute<sup>57</sup>. But what are the factors determining the willingness of a government to step out in the international trade arena to defend the interests of an industry? And why do we observe trends of higher engagement in the dispute settlement process when concerning specific industrial sectors rather than others? Although states are always more interconnected in a global net of multilateral agreements, this does not mean that they progressively put aside their domestic interests. Contrarily, domestic interests are

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<sup>55</sup> Fattore Christina, Interest Group Influence on WTO Dispute Behaviour: A Test of State Commitment, *Journal of World Trade* 46, No.6, 2012, pp. 1261–1280

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

the main priority. This is true for their economy in which trade plays an important role but also for the political influence that the specific industry holds. Therefore, states are willing to enter adjudication, with the aim of protecting goods whether from export barriers or competitive imports (depending on the type of industry). With these premises, it is logical to say that the more influence has the industry on the economy of the country, the more the government would be willing to pursue its interests<sup>58</sup>. In the case of Japan, this translates into a government more willing to file cases against exports restraints imposed by foreign countries, when we are talking about the steel and automobile sector, on the other hand, we will have a government more willing to protect the agricultural sector from foreign competition.

However, while it has become clear that when major industries are involved, it is more likely that the government would act in a more legalistic and aggressive way, and how Japan has been wielding legalism towards different trade partners as the global trade balance has change over time will be explained in the following chapter.

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<sup>58</sup> Ibid.

## Annex 1.1: Japan activity in the WTO 2006-2023

Complainant	Respondent	Third Party
DS376 European Communities - Tariff Treatment of Certain Information Technology Products, Brought by Japan (and other two co-complainants) (28 May 2008)	DS336 Japan - Countervailing Duties on Dynamic Random Access Memories from Korea, Brought by Republic of Korea (14 March 2006)	DS327 Egypt - Anti-Dumping Duties on Matches from Pakistan, Brought by Pakistan (21 February 2005)
DS412 Canada - Certain Measures Affecting the Renewable Energy Generation Sector, Brought by Japan (and one co-complainant) (13 September 2010)	DS590 Japan - Measures Related to the Exportation of Products and Technology to Korea, Brought by Republic of Korea (11 September 2019)	DS331 Mexico - Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, Brought by Guatemala (17 June 2005)
DS433 China - Measures related to the Exportation of Rare Earths, Tungsten and Molybdenum, Brought by Japan (and two co-complainants) (13 March 2012)		DS332 Brazil - Measures Affecting Imports of Retreaded Tyres, Brought by European Communities (20 June 2005)
DS445 Argentina - Measures Affecting the Importation of Goods, Brought by Japan (and two co-complainants) (21 August 2012)		DS335 United States - Anti-Dumping Measure in Shrimp from Ecuador, Brought by Ecuador (17 November 2005)

DS454 China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan, Brought by Japan (and one co-complainant) (20 December 2012)

DS463 Russian Federation - Recycling fee on Motor Vehicles, Brought by Japan (24 July 2013)

DS468 Ukraine -Definitive Safeguard Measures on Certain Passenger Cars, Brought by Japan (30 October 2013)

DS495 Korea - Import Bans, and testing and Certification Requirements for Radionuclides, Brought by Japan (21 May 2015)

DS497 Brazil - Certain measures Concerning Taxation and Charges, Brought by Japan (and one co-complainant) (2 July 2015)

DS504 Korea - Anti-Dumping Duties on Pneumatic Valves from Japan, Brought by Japan (15 March 2016)

DS337 European Communities - Anti-Dumping Measure on Farmed Salmon from Norway, Brought by Norway (17 March 2006)

DS339 China - Measure Affecting Imports of Automobile Parts, Brought by European Communities (30 March 2006)

DS340 China - Measure Affecting Imports of Automobile Parts, Brought by United States (30 March 2006)

DS341 Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities, Brought by the European Communities (31 March 2006)

DS342 China - Measures Affecting Imports of Automobile Parts, Brought by Canada (13 April 2006)

DS343 United States - Measures Relating to Shrimp from Thailand, Brought by Thailand (24 April 2006)



DS518 India - Certain measures on Imports of Iron and Steel Products, Brought by Japan (20 December 2016)

DS344 United States - Final Anti-Dumping Measures on Stainless Steel from Mexico, Brought by Mexico (26 May 2006)

DS553 Korea - Sunset Review of Anti-Dumping Duties on Stainless Steel Bars, Brought by Japan (18 June 2018)

DS345 United States - Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, Brought by India (6 June 2006)

DS571 Korea - Measures Affecting Trade in Commercial Vessels, Brought by Japan (6 November 2018)

DS347 European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft (Second Complaint), Brought by United States, (31 January 2006)

DS584 India - Tariff Treatment on Certain Goods, Brought by Japan (10 May 2019)

DS350 United States - Continued Existence and Application of Zeroing Methodology, Brought by European Communities (2 October 2006)

DS594 Korea - Measures Affecting Trade in Commercial Vessel (second complaint), Brought by Japan (31 January 2020)

DS352 India - Measure Affecting the Importation and sale of Wines and Spirits from the European Communities, Brought by European Communities (20 November 2006)

DS601 China - Anti-Dumping Measure on Stainless Steel Products from Japan, Brought by Japan (11 June 2021)

DS353 United States - measure Affecting Trade in Large Civil Aircraft (Second Complaint), Brought by European Communities (27 June 2005)

DS355 Brazil - Anti-Dumping Measures on imports of Certain Resins from Argentina, Brought by Argentina (26 December 2006)

DS357 United States - Subsidies and Other Domestic Support for Corn and Other Agricultural Products, Brought by Canada (8 January 2007)

DS358 China - Certain measures Granting Refunds, Reduction or Exemptions from Taxes and Other Payments, Brought by United States (2 February 2007)

DS359 China - Certain measures Granting Refunds, Reduction or Exemptions from Taxes and Other Payments, Brought by Mexico (26 February 2007)

DS360 India - Additional and Extra-Additional Duties on Imports from the United States, Brought by the United States (6 March 2007)

DS362 China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights, Brought by United States (10 April 2007)

DS363 China - Measures Affecting Trading rights and Distribution Services for Certain Publications and Audiovisuals Entertainment Products, Brought by United States (10 April 2007)

DS365 United States - Domestic Support and Export Credit Guarantees for Agricultural Products, Brought by Brazil (11 July 2007)

DS367 Australia - Measures Affecting the Importation of Apples from New Zealand, Brought by New Zealand (31 August 2007)

DS369 European Communities - Certain Measures Prohibiting the Importation and Marketing of Seal Products, Brought by Canada (25 September 2007)

DS375 European Communities - Tariff Treatment of Certain Information Technology Products, Brought by United States (28 May 2008)

DS377 European Communities - Tariff Treatment of Certain Information Technology Products, Brought by Chinese Taipei (12 June 2008)

DS379 United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, Brought by China (19 September 2008)

DS381 United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Brought by Mexico (24 October 2008)

DS382 United States - Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange juice from Brazil, Brought by Brazil (27 November 2008)

DS383 United States - Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, Brought by Thailand (26 November 2008)

DS384 United States - Certain Country of origin Labelling (COOL) Requirements, Brought by Canada (1 December 2008)

DS386 United States - Certain Country of Origin Labelling Requirements, Brought by Mexico (17 December 2008)

DS391 Korea - Measures  
Affecting the Importation of  
Bovine Meat and Meat Products  
from Canada, Brought by Canada  
(9 April 2009)

DS394 China - Measures Related  
to the Exportation of Various  
Raw Materials, Brought by  
United States (23 June 2009)

DS395 China - Measures Related  
to the Exportation of Various  
Raw Materials, Brought by  
European Communities (23 June  
2009)

DS397 European Communities -  
Definitive Anti-Dumping  
Measures on Certain Iron and  
Steel Fasteners from China,  
Brought by China (31 July 2009)

DS398 China - Measures related  
to the Exportation of Various  
Raw Materials, Brought by  
Mexico (21 August 2009)

DS399 United States - Mesures  
Affecting Importa of Certian  
Passenger Vehicle and Light  
Truck Tyres from China, Brought  
by China (14 September 2009)

DS400 European Communities -  
Measures Prohibiting the  
Importation and Marketing of  
Seal Products, Brought by Cana  
da (2 November 2009)

DS401 European Communities -  
Measures Prohibiting the  
Importation and Marketing of  
Seal Products, Brought by  
Norway (5 November 2009)

DS402 United States - Use of  
Zeroing in Anti-Dumping  
Measures Involving Products  
from Korea, Brought by Korea  
(24 November 2009)

DS404 United States - Anti-  
Dumping Measures on Certain  
Shrimp from Viet Nam, Brought  
by Viet Nam (1 February 2010)

DS405 European Union - Anti-  
Dumping Measures on Certain  
Footwear from China, Brought  
by China (4 February 2010)

DS413 China - Certain Measures  
Affecting Electronic Payment  
Services, Brought by United  
States (15 September 2010)

DS414 China - Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States, Brought by the United States (15 September 2010)

DS420 United States - Anti-Dumping measures on Corrosion-resistant Carbon Steel Flat producta from Korea, Brought by Korea (31 January 2011)

DS422 United States - Anti-Dumping measures on Shrimp and Diamond Sawblades from China, Brought by China (28 February 2011)

DS425 China - Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union, Brought by European Union (25 July 2011)

DS426 Canada - Measures Relating to the Feed-in Tariff Program, brought by European Union (11 August 2011)

DS427 China - Anti-Dumping and Countervailing Duty measures on Broiler Products from the United States, Brought by the United States (20 September 2011)

DS429 United States - Anti-Dumping Measures on Certain Shrimp from Viet Nam, Brought by Viet Nam (20 February 2012)

DS430 India - Measures Concerning the Importation of Certain Agricultural Products, Brought by United States (6 March 2012)

DS431 China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Brought by United States (13 March 2012)

DS432 China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Brought by European Union (13 March 2012)

DS434 Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Brought by Ukraine (13 March 2012)

DS435 Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Brought by Honduras (4 April 2012)



DS437 United States -  
Countervailing Duty Measures  
on Certain Products from China,  
Brought by China (25 May 2012)

DS438 Argentina - Measures  
Affecting the Importation of  
Goods, Brought by European  
Union (25 May 2012)

DS440 China - Anti-Dumping  
and Countervailing Measures  
Duties on Certain Automobiles  
from the United States, Brought  
by the United States (5 July  
2012)

DS441 Australia - Certain  
Measures Concerning  
Trademarks and Other Plain  
Packaging Requirements  
Applicable to Tobacco Products  
and Packaging, Brought by  
Dominican Republic (18 July  
2012)

DS444 Argentina - Measures  
Affecting the Importation of  
Goods, Brought by United States  
(21 August 2012)

DS449 United States -  
Countervailing and Anti-  
Dumping Measures on Certain  
Products from China, Brought by  
China (17 September 2012)

DS455 Indonesia - Importation of horticultural Products, Animals and Animal Products, Brought by United States (10 January 2013)

DS456 India - Certain Measures Relating to Solar Cells and Solar Modules, Brought by United States (6 February 2013)

DS458 Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Brought by Cuba (3 May 2013)

DS460 China - Measures Imposing Anti-Dumping Duties on high Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union, Brought by the European Union (13 June 2013)

DS462 Russian Federation - Recycling Fee on Motor Vehicles, Brought by European Union (9 July 2013)

DS464 United States - Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea, Brought by Korea (29 August 2013)

DS467 Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Brought by Indonesia (20 September 2013)

DS469 European Union - Measures on Atlanto-Scandian Herring, Brought by Denmark (4 November 2013)

DS471 United States - Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China, Brought by China (3 december 2013)

DS472 Brazil - Certain measures Concerning Taxation and Charges, Brought by European Union (19 December 2013)

DS475 Russian Federation - - measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union, Brought by the European Union (8 April 2014)

DS477 Indonesia - Importation of Horticultural Products, Animals and Animal Products, Brought by New Zealand (8 May 2014)

DS478 Indonesia - Importation of Horticultural Products, Animals and Animal Products, Brought by United States (8 May 2014)

DS479 Russia - Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy, Brought by European Union (21 May 2014)

DS480 European Union - Anti-Dumping Measures on Biodiesel from Indonesia, Brought by Indonesia (10 June 2014)

DS483 China - Anti-Dumping Measures on Imports of Cellulose Pulp from Canada, Brought by Canada (15 October 2014)

DS484 Indonesia - Measures Concerning the Importation of Chicken Meat and Chicken products, brought by Brazil (16 October 2014)

DS485 Russia - Tariff Treatment of Certain Agricultural and Manufacturing Products, Brought by the European Union (31 October 2014)

DS487 United States - Conditional Tax Incentives for large Civil Aircraft, Brought by the European Union (19 December 2014)

DS489 China - Measures Related to Demonstration Bases and Common Service Platforms Programmes, Brought by United States (11 February 2015)

DS490 Indonesia- -Safeguard on Certain iron or Steel Products, Brought by Chinese Taipei (12 february 2015)

DS493 Ukraine - Anti-Dumping Measures on Ammonium Nitrate, Brought by Russian Federation (7 May 2015)

DS494 European Union - Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint) (7 May 2015)

DS496 Indonesia - Safeguard on Certain Iron or Steel Products, brought by Viet Nam (1 June 2015)

DS499 Russia - Measures Affecting the Importation of Railway Equipment and Parts Thereof, Brought by Ukraine (21 October 2015)

DS505 United States - Countervailing Measures on Supercalendered Paper from Canada, Brought by Canada (30 March 2016)

DS508 China - Export Duties on Certain Raw Materials, Brought by United States (13 July 2016)

DS509 China - Duties and Other Measures Concerning the Exportation of Certain Raw Materials, Brought by the European Union (19 July 2016)

DS510 United States - Certain Measures Relating to the Renewable Energy Sector, Brought by India (9 September 2016)

DS511 China - Domestic support for Agricultural Producers, Brought by United States (13 September 2016)

DS512 Russia - Measures Concerning Traffic in Transit, Brought by Ukraine (14 September 2016)

DS513 Morocco - Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey, Brought by Turkey (3 October 2016)

DS516 European Union - Measures Related to Price Comparison Methodologies, Brought by China (12 December 2016)

DS517 China - Tariff rate quotas for Certain Agricultural Products, Brought by United States (15 December 2016)

DS521 European Union - Anti-Dumping Measures on Certain Cold-Rolled Flat Steel products from Russia, Brought by Russian Federation (27 January 2017)

DS522 Canada - Measures Concerning Trade Commercial Aircraft, Brought by Brazil (8 February 2017)

DS523 United States - Countervailing Measures on Certain Pipe and Tube Products, Brought by Turkey (8 March 2017)

DS526 United Arab Emirates - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Brought by Qatar (31 July 2017)

DS529 Australia - Anti-Dumping Measures on A4 Copy Paper, Brought by Indonesia (1 September 2017)

DS533 United States - Countervailing Measures on Softwood Lumber from Canada, brought by Canada (28 November 2017)

DS534 United States - Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada, Brought by Canada (28 November 2017)



DS536 United States - Anti-Dumping Measures on Fish Fillets from Viet Nam, Brought by Viet Nam (8 January 2018)

DS538 Pakistan - Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates, Brought by United Arab Emirates (24 January 2018)

DS539 United States - Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available, Brought by Korea (14 February 2018)

DS541 India - Export Related Measures, Brought by United States (14 March 2018)

DS542 China - Certain Measures Concerning the Protection of Intellectual Property Rights, Brought by the United States (23 March 2018)

DS543 United States - Tariff Measures on Certain Goods from China, Brought by China (4 April 2018)

DS544 United States - Certain Measures on Steel and Aluminium Products, Brought by China (5 April 2018)

DS545 United States - Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, brought by Korea (14 May 2018)

DS546 United States - Safeguard measure on Imports of Large Residential Washers, Brought by Korea (14 May 2018)

DS547 United States - Certain Measures on Steel and Aluminium Products, Brought by India (18 May 2018)

DS548 United States - Certain Measures on Steel and Aluminium Products, Brought by European Union (1 June 2018)

DS550 United States - Certain Measures on Steel and Aluminium Products, Brought by Canada (1 June 2018)

DS551 United States - Certain Measures on Steel and Aluminium Products, Brought by Mexico (5 June 2018)

DS552 United States - Certain Measures on Steel and Aluminium Products, Brought by Norway (12 June 2018)

DS554 United States - Certain measures on Steel and Aluminium Products, Brought by Russian Federation (29 June 2018)

DS556 United States - Certain measures on Steel and Aluminium Products, brought by Switzerland (9 July 2018)

DS557 Canada - Additional Duties on Certain Products from the United States, Brought by the United States (16 July 2018)

DS559 European Union - Additional Duties on Certain Products from the United States, Brought by the United States (16 July 2018)

DS558 China - Additional Duties on Certain Products from the United States, Brought by the United States (16 July 2018)

DS560 Mexico - Additional Duties on Certain Products from the United States, Brought by the United States (16 July 2018)

DS561 Turkey - Additional Duties on Certain Products from the United States, Brought by the United States (16 July 2018)

DS562 United States - Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, Brought by China (14 August 2018)

DS564 United States - Certain Measures on Steel and Aluminium Products, Brought by Turkey (15 August 2018)

DS566 Russian Federation - Additional Duties on Certain products from the United States, Brought by the United States (27 August 2018)

DS567 Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights, Brought by Qatar (1 October 2018)

DS573 Turkey - Additional Duties on Imports of Air Conditioning Machines from Thailand, Brought by Thailand (5 December 2018)

DS576 Qatar - Certain Measures Concerning Goods from the United Arab Emirates, Brought by United Arab Emirates (28 January 2019)

DS577 United States - Anti-Dumping and Countervailing Duties on Ripe Olives from Spain, Brought by European Union (29 January 2019)

DS578 Morocco - Definitive Anti-Dumping Measures on School Exercise Books from Tunisia, Brought by Tunisia (21 February 2019)

DS579 India - Measures Concerning Sugar and Sugarcane, Brought by Brazil (27 February 2019)

DS580 India - Measures  
Concerning Sugar and  
Sugarcane, Brought by Australia  
(1 March 2019)

DS581 India - Measures  
Concerning Sugar and  
Sugarcane, Brought by  
Guatemala (15 March 2019)

DS582 India - Tariff Treatment  
on Certain Goods in the  
Information and  
Communications Technology  
Sector, Brought by European  
Union (2 April 2019)

DS583 Turje - Certain Measures  
Concerning the Production,  
Importation and Marketing of  
Pharmaceutical Products,  
Brought by European Union (2  
April 2019)

DS585 India - Additional Duties  
on Certain Products from the  
United States, Brought by United  
States (3 July 2019)

DS588 India - Tariff Treatment  
on Certain Goods in the  
Information and Communication  
technology Sector, Brought by  
Chinese Taipei (2 September  
2019)

DS589 China - Measures  
Concerning the Importation of  
Canola Seed from Canada,  
Brought by Canada ( 9  
September 2019)

DS591 Colombia - Anti-  
Dumping Duties on Frozen Fries  
from Belgium, Germany and the  
Netherlands, brought by the  
European Union (15 November  
2019)

DS592 Indonesia - Measures  
Relating to Raw Materials,  
Brought by the European Union  
(22 November 2019)

DS593 European Union - Certain  
measures Concerning Palm Oil  
and Oil Palm Crop-Based  
Biofuels, Brought by Indonesia (9  
December 2019)

DS595 European Union -  
Safeguard Measures on Certain  
Steel products, Brought by  
Turkey (13 March 2020)

DS597 United States - Origin  
Marking Requirement, Brought  
by Hong Kong and China (30  
October 2020)

DS598 China - Anti-Dumping and  
Countervailing Duty Measures  
on Barley from Australia,  
Brought by Australia (16  
December 2020)

DS600 European Union - Certain  
measures Concerning Palm Oil  
and Palm Oil Crop-Based  
Biofuels, Brought by Malaysia  
(15 January 2021)

DS602 China - Anti-Dumping and  
Countervailing Duty Measures  
on Wine from Australia, Brought  
by Australia (22 June 2021)

DS603 Australia - Anti-Dumping  
and Countervailing Measures on  
Certain Products from China,  
Brought by China (24 June 2021)

DS604 Russian Federation -  
Certain measures Concerning  
Domestic and Foreign Products  
and Services, brought by  
European Union (22 July 2021)

DS605 Dominican Republic -  
Anti-Dumping measures on  
Corrugated Steel Bars, Brought  
by Costa Rica (23 July 2021)



DS610 China - measures  
Concerning Trade in Goods,  
Brought by European Union (27  
January 2022)

DS611 China - Enforcement of  
Intellectual Property Rights,  
Brought by European Union (18  
February 2022)

DS616 European Union -  
Countervailing and Anti-  
Dumping Duties on Stainless  
Steel Cold-Rolled Flat Products  
from Indonesia, Brought by  
Indonesia (24 January 2023)

## 2. Chapter 2: Japan Use of Legalism Under WTO: an analysis of what is happening in the recent years.

Even before World War II, the US has been Japan's number one trade partner at least until 2009 when it was replaced by the emerging economic power of China<sup>59</sup>. In that period, while the US was greatly penetrated by Japanese goods, the opposite did not happen for Japan, whose limited imports from the US was the cause of the account surplus that brought the two countries many times to negotiations. As we saw in the first chapter, this economic surplus was the cause of the initiation of several disputes under, first under GATT and then under WTO.

Besides the fact that the US was always an active country under the DS<sup>60</sup>, since the establishment of the WTO and until 2005 Japan and the US started a trade war in the automobile and steel industry in which Japan had become the leader exporter country.

Nowadays, although after the economic bubble and the subsequent crisis things have changed greatly, Japan still manages to be the third cars producer<sup>61</sup> and the third steel producer in the world<sup>62</sup>, making these two industries the most globally competitive ones for Japan.

Simultaneously, the US has not managed to remain as important as before in terms of trade with Japan. In fact, due to the tremendous growth of other Asian countries as South Korea, Taiwan, Singapore and Hong Kong, it is understandable how not only Japan's trade network, but the global trade arena changed in general, bringing always more focus in this area of the world<sup>63</sup>.

In addition, as a result of opening its market to foreign trade and investment and thanks to the implementation of free- markets reform, China's economic growth started escalating since the end of 70s<sup>64</sup>. Since then, China has been among the fastest growing countries in the world and in 2009 took the place of the US as the major trading partner of Japan both for exports and imports.

Quite obviously these changes later translated in an increase of presence of these Asian countries in the WTO dispute settlement system. In particular, we will see that South Korea and China started to

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<sup>59</sup> Japan Customs, Trade Statistics, [www.customs.go.jp](http://www.customs.go.jp)

<sup>60</sup> Data from [www.wto.org](http://www.wto.org)

<sup>61</sup> Data from International Organization of Motor Vehicle Manufacturers, [www.oica.net](http://www.oica.net)

<sup>62</sup> Data from World Steel Association, [www.worldsteel.org](http://www.worldsteel.org)

<sup>63</sup> Stern Ernest, Developing Asia: A New Growth Pole Emerges, International Monetary Fund, 1994.

<sup>64</sup> Morrison M. Wayne, China's Economic Rise: History, Trends, Challenges, and Implications for the United States, Congressional Research Service, 2019.

gain a certain importance as Japan's trade partners and as a consequence as Japan's trade "enemies" under the WTO dispute settlement system.

In the next paragraphs we are going to analyze Japan's relations with its major trade partners and how the new balance in the international trade shifted Japan's attention from the US foreign trade policies to its neighbor countries' ones. Therefore, a selection of cases will be presented to see how the Japanese use of legalism switched towards a new set of trading partners.

## 2.1. Japan – US Recent Dispute Settlement Activity

The Japan – US chain of disputes under the WTO that characterized the international trade relations between the two countries until the beginning of the 21<sup>st</sup> century, attracted a considerable amount of academic attention as the first steps of Japan towards the use of multilateral rules in a legalistic manner were first witnessed<sup>65</sup>. That was when Japan initiated a number of disputes against US, which brought to what is called a trade conflict between the two countries. However, this was when Japan and the US were at the top of the world economy and due to the amount of trade occurring between them, they obviously had high reciprocal interests in each other's market. As the US importance in Japanese trade has diminished, and the Japanese account gap with the US decreased over time<sup>66</sup>, Japan's dispute initiation towards the US appears to be shelved in recent years. As mentioned previously, the initiation of litigation under the WTO is mainly a countermeasure to the threats that a foreign country's trade measures represent to the globally competitive industries of another country. Cases could be raised also for non-competitive industries, but this is less common as those industries are less capable of sustaining foreign competition, and could be threatened by the opening of the market. Finally in the initiation of the case the ability to gain information and to lobby the government into bringing the issue under the DSU and initiate the dispute. Now, it is understandable that while Japan was a threat for the US industries before, in the recent years trade with China has been increasing making the US market flooded Chinese imports.

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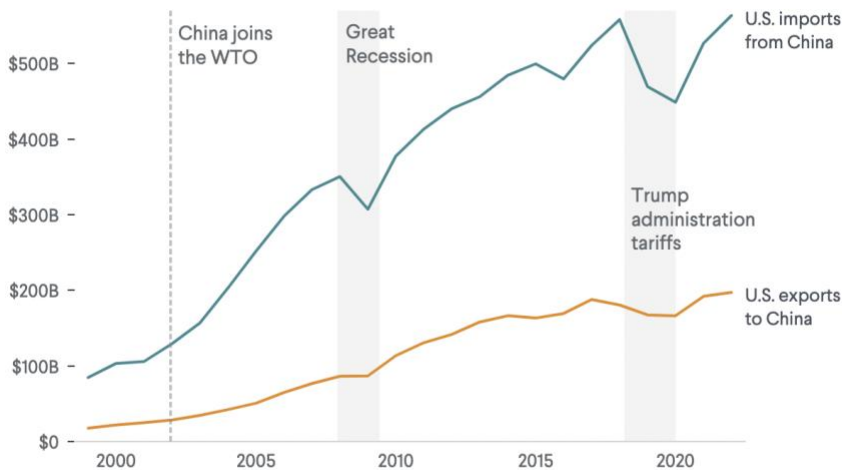
<sup>65</sup> Pekkanen S. M., *Japan's Aggressive Legalism Law and Foreign Trade Politics Beyond the WTO*, Stanford University Press, Stanford, 2008.

<sup>66</sup> Japan Customs, Trade Statistics, [www.customs.go.jp](http://www.customs.go.jp)

Graph 1

### U.S.-China Trade Surged Over the Past Two Decades

Trade in goods and services



Source: U.S. Bureau of Economic Analysis.

COUNCIL on  
FOREIGN  
RELATIONS

Source: Siripurapu A., Berman N., The Contentious US-China Trade Relationship, Council on Foreign Relations, 2023.

As a consequence, while the US has been busy in the recent trade war with China, the same Japan has found itself in dealing always more with its neighbor country.

Therefore, the period of time we are taking into account, it is clear that the behavior of Japan towards the US is not as confrontational as before. In fact, in Annex 1.1 we can see that Japan intervenes as a third party against the US in a numerous number of cases and mostly concerning agriculture and steel industry but the times of the aggressive contentious between US and Japan are left behind as a new common major trade partner as China has approached.

## 2.2. Japan – ROK Trade Relationship and Trade War

It is well known that Japan and the Republic of Korea (ROK) diplomatic relations are affected by the results of the colonization conducted by Japan. Although for a long time the conflict was confined in the diplomatic realm alone, while the trade relations of the two neighbor countries were always kept in good terms, in the recent years conflict started to affect the trade exchange between them, giving

space to theories of a causal link between diplomatic events and trade decisions<sup>67</sup>. Trade relations between Japan and ROK have been going on for centuries and are currently more active than ever, as Korea is one of Japan's major trading partners. In fact, in 2021 Korea was registered to be Japan's 4<sup>th</sup> major market for exports and the 5<sup>th</sup> for imports<sup>68</sup>. On the other hand, in 2002 Japan registered as Korea's 4<sup>th</sup> major market for exports and 3<sup>rd</sup> for imports<sup>69</sup>. As major trade partners, it is not shocking that the two countries have some trade related frictions. In a first phase, trade frictions were almost nonexistent: for instance from 1995 to 2005 Japan never filed a complaint against Korea, and Korea filed only one complaint regarding import quotas on dried laver (DS 323). In the same period Japan participated in third party activities against Korea only 4 times, of which two regarding measures on testing and inspection and shelf-life of food products<sup>70</sup>. In contrast to this, in the recent years is possible to witness a more confrontational approach from both countries. While the reason behind this cannot be attributed to a simple matter of quantity of trade as Korea has always been a good trade partner for Japan, it is plausible to look for a connection between the downturn of diplomatic relations and economic ones, as different studies point out. However, the reasons for the increase in the legalistic approach can be traced back to the growth of the Korean competitiveness on the same industrial sectors where Japan has big interests on.

As a matter of fact, Korea has always been a great exporter of electrical machinery and electronics, while at the beginning of the 21<sup>st</sup> century the second most competitive market was the one of nuclear reactors, as we can see from the Korea Customs data in the tables below, in 2022 the second market for exports value was the one of vehicles and passenger cars which is the most trade competitive sector in the case of Japan.

As we can see in the charts below, Korea also registered overtime a downturn of the shipbuilding sector and an upturn of iron and steel production, again a sector that is on top of Japanese trade economy.

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<sup>67</sup> Ronkin Noah, Japan and South Korea on the Brink: International Affairs and Trade Relations Experts Elucidate the Conflict between the Two U.S. Allies, Stanford University, 2019.

<sup>68</sup> Japan Customs, Trade Statistics, [www.customs.go.jp](http://www.customs.go.jp)

<sup>69</sup> Korea Customs Service, Trade Statistics, [www.customs.go.kr](http://www.customs.go.kr)

<sup>70</sup> World Trade Organization, Disputes Settlement Data, [www.wto.org](http://www.wto.org)

Table 1

## Export of Korea by Product Category in 2000

Unit: Thousand Dollars USD, Ton

Period	H.S Code	Items	Export Weight	Export Value
2000	85	Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles	2,144,176.0	46,365,814
2000	84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof	2,378,653.2	29,732,191
2000	87	Vehicles other than railway or tramway rolling-stock, and parts and accessories thereof	2,778,477.5	15,265,527
2000	27	Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes	40,003,168.9	9,375,503
2000	89	Ships, boats and floating structures	7,216,050.0	8,229,445
2000	39	Plastics and articles thereof	6,984,473.2	7,279,677
2000	72	Iron and steel	12,500,324.9	5,954,688
2000	29	Organic chemicals	8,528,903.1	4,969,520
2000	54	Man-made filaments; strip and the like of man-made textile materials	1,006,532.2	4,804,218
2000	60	Knitted or crocheted fabrics	364,401.9	2,522,109
2000	73	Articles of iron or steel	2,407,455.8	2,467,003
2000	61	Articles of apparel and clothing accessories, knitted or crocheted	146,995.4	2,402,050
2000	71	Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal, and articles thereof; imitation jewellery; coin	12,071.3	2,332,503
2000	62	Articles of apparel and clothing accessories, not knitted or crocheted	122,308.6	2,149,856
2000	40	Rubber and articles thereof	1,148,882.1	2,002,871

Source: Data taken from Korea Customs Service, Trade Statistics, www.tradedata.go.kr

Table 2

## Export of Korea by Product Category in 2022

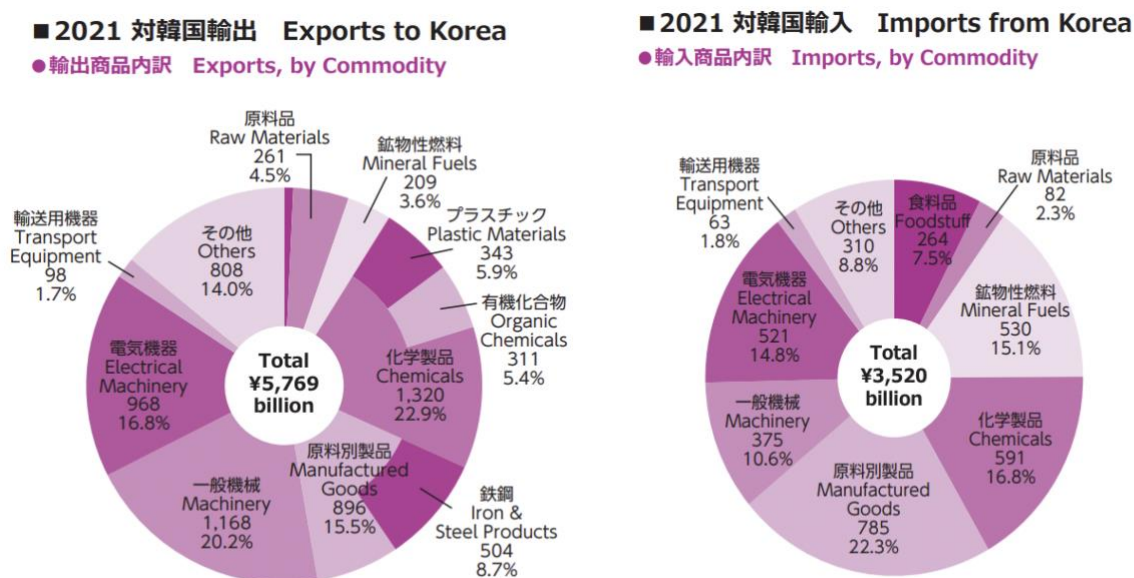
Unit: Thousand Dollars USD, Ton

Period	H.S Code	Items	Export Weight	Export Value
2022	85	Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles	2,525,099.6	210,434,594
2022	87	Vehicles other than railway or tramway rolling-stock, and parts and accessories thereof	7,086,061.5	75,474,476
2022	84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof	5,050,462.1	73,033,189
2022	27	Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes	66,513,641.6	64,751,329
2022	39	Plastics and articles thereof	17,469,487.6	41,158,081
2022	72	Iron and steel	23,923,100.6	28,108,456
2022	29	Organic chemicals	18,622,316.2	24,304,090
2022	90	Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof	219,096.6	18,208,567
2022	89	Ships, boats and floating structures	7,504,294.6	17,137,707
2022	28	Inorganic chemicals; organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of isotopes	5,289,245.7	15,643,201
2022	73	Articles of iron or steel	3,712,374.5	11,787,099
2022	38	Miscellaneous chemical products	1,224,340.0	8,907,668
2022	33	Essential oils and resinoids; perfumery, cosmetic or toilet preparations	363,266.0	7,803,551
2022	40	Rubber and articles thereof	2,685,068.4	7,570,232
2022	74	Copper and articles thereof	749,842.8	7,003,732

Source: Data taken from Korea Customs Service, Trade Statistics, www.tradedata.go.kr

However, this is the picture for Korean exports worldwide. Moving on to the analysis for trade between Korea and Japan, we can see that while chemicals, machinery and electrical machinery represent almost 60% of Japan total exports to Korea in 2021, on the other side the biggest share of imports is represented by manufactured goods (in which iron and steel are included), chemicals and mineral fuels, which represent 44% of total imports. Finally, we can also see that in 2021 Japan register a surplus in its balance of payments with Korea.

Graph 2: Japan's Exports to and Imports from South Korea by Commodity in 2021 (%).



Source: 日本貿易の現状, Foreign Trade 2022, Japan Foreign Trade Council, Inc., Vol. 47, 2022.

### 2.3.The Anti-Dumping Cases Against ROK

#### Republic of Korea – Anti-Dumping Duties on Pneumatic Valves from Japan

On 15 March 2016 Japan requests consultations under the WTO dispute settlement system against Korea over anti-dumping measures on pneumatic valves<sup>71</sup>. While it was not certainly the first complaint of Japan against its neighbor country in the DS system, it is the very first complaint against Korea regarding anti-dumping measures, which is also one of the reasons why this case is attracted more attention than the previous ones. Moreover, the measures implemented by Korea regarded pneumatic valves, which as described by METI:

*“...are parts (valves) which control the flow of compressed air in extending, retracting and rotating pneumatic cylinders by making use of the air, which are applied to assembly or conveyor equipment in semiconductor or automobile manufacturing plants”<sup>72</sup>.*

While semiconductor and automobile plants production are not the only end uses of pneumatic valves, which are in fact used widely in factory automation, medical and food processing equipment and more<sup>73</sup>, we can easily understand that the definition provided by METI tends to point out the end uses which are most important and influential in the two countries and in the case in question. The decision of Korea to implement these measures on Japanese pneumatic valves derived from the publication of the report by the Office of Trade investigation (OTI) and of the Korea Trade Commission (KTC), which in turn was based on the application filed by TPC Mechatronics Corporation and KCC Co., Ltd. Based on these terms, in January 2015 the KTC issued its final resolution that its domestic industry was injured by Japanese imports and therefore recommended the imposition of anti-dumping duties of 11,66% for SMC Corporations and of 22,77% for CKD Corporation and Toyooki Kogyo Co., Ltd., for 5 years<sup>74</sup>. Only three months after the request for consultations, Japan demanded the establishment of a panel: the request was accepted and the panel formed in July 2016.

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<sup>71</sup> WTO Panel Report WT/DS504/R

<sup>72</sup> METI, Korea’s Anti-Dumping Duties on Pneumatic Valves from Japan were Eliminated, 2020.

<sup>73</sup> National Fluid Power Association, What is Pneumatics?, 2013.

<sup>74</sup> PA, WT/DS504/R par. 2.1-2.5.



Japan brought forth a total of 13 claims<sup>75</sup> to the panel attention, of which 7 concerning KTC's injury determination. All the 7 claims report article 3.1 of the AD Agreement, which states that the determination of injury "*shall be based on positive evidence and involve an objective examination*"<sup>76</sup> for both volume and effect on price of the dumped product and also its impact on domestic producers. This broader statement is then integrated with other subparagraphs of article 3 and in 1 case together with article 4.1. Specifically, Japan claims that Korea failed to make an objective examination based on positive evidence of these elements: definition of the domestic industry of the same product which brought to the finding of injury (article 3.2 and 4.1), evaluation of volume of the dumped imports and effects of the dumped imports on prices (article 3.1 and 3.2), impact of the dumped imports on the domestic industry (article 3.1 and 3.4). Finally, Japan presented three claims on causation, which analysis was considered flawed due to inconsistency of volume and price effects wrong evaluation, failure to establish a causal link between dumped imports and alleged injury and conduction of non-attribution analysis (article 3.1 and 3.5)<sup>77</sup>.

However, the majority of the claims mentioned above were not further discussed by the panel. The reason behind it, is that Korea claimed that the request of the panel establishment made by Japan, was inconsistent with article 6.2 of the DSU which provides that:

*"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."*<sup>78</sup>

Therefore, in all the cases presented above, the request of Japan was found to be not sufficient and lacking the explanation of "*how and why*"<sup>79</sup> Japan considers the measures at issue inconsistent. As a result, with the exception of the evaluation of some economic factors as ability to raise capital and magnitude of the margins of dumping, encompassed under the claim of impact of the dumped imports on domestic industry and some of the causation claims, the rest of the claims was considered outside the panel's terms of reference and could not be examined in depth. On the other hand, Japan presented other claims regarding the treatment of information. In fact, the KTC was found to be inconsistent with

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<sup>75</sup> PA, WT/DS504/R, par. 3.1-3.4.

<sup>76</sup> WTO, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Part 1: Article 3 Determination of Injury, para. 3.1.

<sup>77</sup> PA, WT/DS504/R, par. 7.3.3-7.12.4.

<sup>78</sup> WTO, Request for the Establishment of a Panel, Art. 6.2, cited from PA par. 7.18.

<sup>79</sup> PA, WT/DS504/R, par. 7.35, words chosen by the panel on the basis of previous dispute cases.

article 6.5 and 6.5.1 of the AD Agreement, due to Korea treatment of some information as confidential without prove of good cause. Also, the claim on failed disclosure of essential facts, failed provision of findings under article 12.2 and 12.2.2 and the consequential claims under article 1 and article V of GATT 1994, were all determined to be outside the panel terms of reference, leaving Japan with a smaller action range.

On the 28 of May 2018 Japan decides to appeal to the Appellate Body to review the panel's decisions and to review its interpretation of article 6.2 of the DSU, which according to Japan was made without considering the language used by many other WTO members in previous cases and not applying the legal standard from the text of the article but rather focusing on a phrase used by the Appellate Body in another occasion, "*the need to explain how and why*"<sup>80</sup>.

The Appellate body started its report by analyzing and reversing the interpretation of the requirements under article 6.2 by the Panel, which are central to the establishment of the jurisdiction of the Panel. Therefore, according to the Appellate Body the majority of the claims that were considered outside of the panel's terms of reference were reversed and considered under the terms of reference of the Panel<sup>81</sup>. In its reconsideration and evaluation of those claims that were not discussed by the Panel, the AB was not able to get to conclusions due to the lack of factual findings resulted from the absence of further examination of the Panel.

Finally, Korea was recommended to streamline the measures for which inconsistency was proven and the two countries established a reasonable period of time for Korea to implement the recommendations of the DSB. As a result, the KTC issued a re-investigation in accordance with the findings of the panel and the AB, which was published in May 2020<sup>82</sup>.

As a significant part of Japan's claims could not be discussed in detail, it is difficult to assign a victory to one of the parties for this case. Yet, it is clear that this case represents the first attempt of Japan to defend one of its major industries at the international level against South Korea. However, while the stance of both countries in this case was quite defensive, in the next case we will see a more offensive stance of Japan. This was only the first of a few cases that have been warming the economic relations between Japan and Korea in the recent years, which were already not in good terms. The next paragraphs, will examine more important cases brought by Japan.

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<sup>80</sup> AB, WT/DS504/AB/R, par. 4.1.

<sup>81</sup> AB, WT/DS504/AB/R, par. 5.1- 6.33.

<sup>82</sup> AB, WT/DS504/AB/R, Par. 6.34.

## 2.4. Republic of Korea – Sunset Review on Anti-Dumping Duties on Stainless Steel Bars

The next is the first anti-dumping case which sees Japan in the DS arena against Korea. On 13 September 2018 Japan requested the establishment of a panel over the decision resulted from the sunset review brought out by the Korea Trade Commission (KTC), to continue the imposition of certain anti-dumping duties on stainless steel bars (SSB) coming from Japan<sup>83</sup>.

KTC's final determination extended the imposition of anti-dumping duties on stainless-steel products, that Korea had been imposing since 2004 and had already extended twice. Undeniably, the imposition of duties resulted in a slowdown of stainless-steel products exports to Korea in the following years<sup>84</sup>. In Korea's opinion, lifting the duties would have led to recurrence of injury, as a result of the decrease in the Japanese prices and an increase of imports of the same products<sup>85</sup>. Although bilateral negotiations were held, they were not fruitful: hence Japan's request for the establishment of the panel. In its request, Japan claimed that the determinations of the KTC were inconsistent with the Anti-Dumping Agreement, as Japan considered that KTC's determination did not "*rest on sufficient factual basis and reasoned and adequate conclusions*"<sup>86</sup> under different aspects. Specifically, Japan pointed out that some findings were not based on positive and objective examination, as claimed already in the previous anti-dumping case against Korea. This firm claim is already revealing about the stance of Japan in this case, which is everything else than muted or submissive.

Regarding the determination of recurrence of injury, consequently to the imposition of the AD duties, Japan reported that Korea was inconsistent with article 11.3 of the AD agreement. The reason for this claim was, first of all, that KIA used cumulative assessments of the effects of imports from Japan, India and Spain that in Japan's opinion were not based on positive evidence, second because KIA did not consider other factors, rather than dumping, that were likely to result in injury of the domestic market<sup>87</sup>. Given that the KIA took the decision to confirm the duties only upon consideration of a decrease of the Japanese products' prices as a consequence of the subtraction of the amount equal to the AD dumping duty, the panel found the KIA evaluation on the facts not to be unbiased and objective<sup>88</sup>.

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<sup>83</sup> PA, WT/DS553/R, par. 1.1.

<sup>84</sup> Japan Customs, Trade Statistics, [www.customs.go.jp](http://www.customs.go.jp)

<sup>85</sup> PA, WT/DS553/R, par. 7.11.

<sup>86</sup> PA, WT/DS553/R, par. 3.1-a.

<sup>87</sup> PA, WT/DS553/R, par. 7.121-7.125.

<sup>88</sup> Ibid.

Why was that so? In the specification of the claim made by Japan under article 11.3, the analysis of volume and price effect were reported to be not reasoned and adequate because of bias and failure to examine the condition of competition among relevant products<sup>89</sup>. While Korea stated that upon termination of the AD duties “*it is predicted that a steep fall in the price of the dumped imports will lead to an increase in exports to Korea and weaken the price competitiveness of Like Products*”<sup>90</sup>, Japan’s responded that the exporters in question are focusing on a higher end segment of consumers, which counts for higher prices of the products that even upon subtraction of the AD duty amount, would still maintain an higher price when compared to third-countries imports and comparable domestic products<sup>91</sup>. Therefore, the price gap and the mixes of different products were enough for the panel to determine that Korea was not able to present an objective and unbiased evaluation of facts and therefore acted inconsistently under article 11.3. However, Japan was not able to demonstrate inconsistency under article 11.3 when referring to the lack of consideration of variables such as imports from other countries, costs of raw materials and weak domestic demand as a possible cause of injury<sup>92</sup>. And again, the determination of likelihood of injury was found to be inconsistent with article 11.3 and article VI of the GATT 1994 because Korea was imposing AD duties without properly demonstrate the threat of material injury to the domestic industry. In the evaluation of the Panel, the intermediate finding that the possible “*increase in volume*” of Japanese exports could cause injury to the domestic market, resulted to be a central point for KIA’s conclusions in the sunset review. Nonetheless, given that the findings concerning the sufficient room for exports were deficient, the panel concluded that KIA determination was not valid<sup>93</sup>.

Japan then claimed inconsistency of KIA’s determination of production capacity under article 6.8 and 11.4 and some subparagraph of Annex II because the KIA adopted the International Stainless-Steel Forum (ISSF) data rather than the data submitted by the Japanese exporters. KIA’s argument about this was that Japan refused access and did not provide the necessary information. However, the panel found that Japan submitted the data requested by KIA in the first questionnaire, which was the company-specific production capacity data of Japanese exporters, while KIA failed to inform Japanese exporters of the change of the preferred parameters that became the production capacity data for the determination of Japan’s capacity utilization rate<sup>94</sup>. Therefore, given that Japanese exporters didn’t

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<sup>89</sup> PA, WT/DS553/R, par. 7.58-7.61

<sup>90</sup> PA, WT/DS553/R, par. 7.59

<sup>91</sup> PA, WT/DS553/R, par. 7.62-7.105

<sup>92</sup> PA, WT/DS553/R, par. 7.121-7.125

<sup>93</sup> PA, WT/DS553/R par. 7.126-7.183

<sup>94</sup> PA, WT/DS553/R par. 7.184-7.187

refuse to provide the requested data, according to the panel KIA acted inconsistently under article 6.8 and 11.4 due to the recourse to the “*facts available*” over Japan’s production capacity. Here, we have another demonstration of Japan’s confrontational stance as it states that Korea used those “*facts available*” rather than the data provided by Japan for its own benefit and therefore wrongly attributed the effects of other factors to Japan<sup>95</sup>.

Claims concerning confidentiality treatment under article 6.5, 6.5.1. and 11.4 of the Anti-Dumping Agreement was brought forth by Japan in this case as well, together with claims of failure of information of essential facts to the interested parties<sup>96</sup>. For this matter, the KIA was presumed to have used the standards of the Korean laws in its treatment of information as confidential. As a consequence, it was unable to show good cause for confidentiality treatment of every piece of information challenged. Finally, the panel decided to use judicial economy over a number of claims made by Japan and on the basis of what was explained above, the DSB demanded Korea to bring its measures into conformity. On February 2021 Korea appealed the decisions of the panel to the AB and Japan, which won the case, given the non-operational conditions of the AB, reserved its rights to do the same.

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<sup>95</sup> PA, WT/DS553/R par. 7.126 -7.183

<sup>96</sup> PA, WT/DS553/R par. 7.197-7.223

## 2.5. Japan – Countervailing Duties on Dynamic Random Access Memory from Korea

In the recent years, the use of legalism by Japan under the WTO system, started to be visible not only in those dispute when Japan is the claimant, but also when it is respondent. Provided that, to be in the respondent position in a dispute settlement case means that measures and regulations of various type have been imposed to imports from a foreign country, it follows that in order to do so, an investigation of the actual or possible threat to the domestic market has been conducted and a legal justification has already been examined.

The following case is not one that concerns anti-dumping duties and even so is a clear demonstration of aggressive legalism put in place by Japan. Japan is a country that has seldomly recurred to countervailing measures or safeguards. Indeed, while quite confrontational at the exports level, as we expect an export led country to be, Japan has never displayed the same attitude on the imports side for fear to be considered too protectionist, as it was considered in the 80s and 90s by the US.

Moreover, the case that is going to be presented below is the very first case of a countervailing duty imposed by Japan in the high-tech sector, which bring up a contrast to the fame of Japan as a more protectionist country on the agricultural sector<sup>97</sup>.

On 14 March 2006 Korea requested consultations with Japan in regard to the imposition of certain countervailing duties on Dynamic Random-Access Memories (DRAMs) from Korea, specifically produced by Hynix Semiconductor Inc. and in regard to some aspects of the investigation and examination that led to the imposition the duties. DRAMS are a common type of semiconductor memory that is typically used for the data or program code needed by a computer or processor to function<sup>98</sup>. Japan used to have up to 80% of global market share on semiconductors between the 80s and the 90s<sup>99</sup>. However, things changed during the 90s when Japan was facing an economic crisis and on the other hand, Korea and other south Asian countries, mainly Taiwan, started to make huge investments on the semiconductor industry, which for Korea granted its place among the top countries of the global market with Samsung and Hynix<sup>100</sup>.

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<sup>97</sup> Horiuchi Y., Saito J., *Cultivating Rice and Votes: The Institutional Origins of Agricultural Protectionism in Japan*, *Journal of East Asian Studies*, 2010.

<sup>98</sup> Burr James B., Peterson Allen M., *Digital Signal Processing Systems: Implementation Techniques, Control and Dynamic Systems*, 1995.

<sup>99</sup> Medina Catalina, *Case study: Managed Trade: The US and Japanese Semiconductor Industries, 1970-2002*, *Journal for Global Business and Community*, Vol. 2, 2011

<sup>100</sup> Kang Joonkyu, *A Study of the DRAM Industry*, Sogang University, 2001

In 2006, after the US and the EC did the same, Japan publicly noticed its final determination of imposing a countervailing duty rate of 27.2% on imports of Hynix's DRAMS from Korea<sup>101</sup>. The decision is a result of the investigation requested by the Japanese DRAMS producing companies Elpida Memory and Micron Japan Ltd. and conducted by the Japanese Investigation Authority (JIA) which found that Hynix Inc. entered some debt restructuring programs which were recognized as countervailable subsidies<sup>102</sup>.

In its request for consultations Korea claimed that JIA did not have sufficient basis to prove that the Korean government “*entrusted or directed*”<sup>103</sup> the creditors to participate in the debt restructurings and that based its findings on the presumption that no creditors would want to invest in or make loans to Hynix from a commercial point of view<sup>104</sup>. Together with the inconsistency of other findings that the JIA made in its investigation report, Korea claimed that Japan improperly treated creditors as interested parties in the October 2001 restructuring and failed to determine that a benefit continued to exist and that this benefit was causing injury to the domestic market<sup>105</sup>. All these claims were rejected by the panel. However, a number of claims were upheld in light of the second restructuring of December 2002<sup>106</sup>. For instance, the claim that Japan improperly found government “*entrustment and direction*” of the Four Creditors and that this restructuring caused benefit to Hynix for the amount calculated by JIA, was upheld when concerning the restructuring of 2002<sup>107</sup>. Japan's position is already strongly presented in the first written submission where it states that Korea fails to meet its burden of proof and therefore to present a *prima facie* case, as it does not provide adequate and reasoned analysis for the alleged violations<sup>108</sup>.

Although, Japan's defense was effective for a number of claims, on the 30 of August 2007 Japan decided to appeal to the AB, which in turn found that the panel erred in the examination of JIA's evidence and erred in applying the proper standard of review which led the AB to reverse the Panel finding that JIA's determination of entrustment and direction of the Four Creditors was inconsistent in respect to the December 2002 restructuring<sup>109</sup>. Moreover, the AB reversed the Panel finding that the

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<sup>101</sup> PA, par. 2.1-2.4

<sup>102</sup> PA, par. 2.2

<sup>103</sup> PA, par. 4.21

<sup>104</sup> PA, par. 4.64-4.69

<sup>105</sup> PA, par. 4.21-4.34

<sup>106</sup> PA, par. 8.2

<sup>107</sup> Ibid. 48

<sup>108</sup> PA, par. 4.52

<sup>109</sup> AB, par. 280 a

methods used by JIA to calculate the amount of benefit to Hynix were not provided by the Japanese national legislation and therefore were inconsistent with article 14 of the SCM Agreement<sup>110</sup>. On the other hand, the AB upheld the rest of the Panel findings that Japan asked to review in its appeal which are: inconsistency in the JIA's determination of conferment and calculation of benefits to Hynix in the December 2002 restructuring, in Japan's levying of countervailing duties on imports which at the time were not subsidized, in including certain financial institutions as "*interested parties*". And again, the AB established that JIA's determination of conferment of benefits regarding October 2001 restructuring, that characterization of the transactions as "*direct transfers of funds*" and the lack of a separate demonstration of presence of injury were not inconsistent with SCM Agreement. At this point, Japan declared its willingness to implement the DSB recommendations and was ready to consult with Korea over the reasonable period of time, which was then established by arbitration.

## 2.6. Japan – Measures Related to the Exportation of Products and Technology to Korea

A quick mention needs to be done to this last case. On the 1<sup>st</sup> July 2019 Japan officially decided to strengthen the control over exports of high-tech products to the Republic of Korea "*in order to ensure appropriate implementation of Japan's own export control and regulation*"<sup>111</sup>. In Japan's opinion the measure taken are justifiable on the basis of alleged inadequate management of dual-use products by Korean companies. More specifically Japan alleged that South Korea was indirectly exporting these products to North Korea. The products in question are fluorinated polyimide, resist polymers and hydrogen fluoride, which are important chemicals in the semiconductor production<sup>112</sup> and are therefore important elements for the South Korean hi-tech industry. Following the announcement of the implementation of the measures, Japan downgraded Korea from the status of trusted partner, therefore not included anymore in the so called "whitelist" of those countries that benefited abbreviated export procedures<sup>113</sup>. As a response, South Korea requested consultations to the DSB. In the request for consultations Korea find Japan's measures to be inconsistent under GATT 1994<sup>114</sup>, the Trade

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<sup>110</sup> AB, par. 280 d

<sup>111</sup> METI, Update of Licensing Policies and Procedure of Export Controlled Items to the Republic of Korea, 2019.

<sup>112</sup> Capchem, Fluorinated Polyimide Monomers for Semiconductor and Flexible Display Screens, 2021

<sup>113</sup> Ibid. 53

<sup>114</sup> Articles I, VIII, X, XI:1, XIII:1 and XIII:5



Facilitation Agreement<sup>115</sup>, the TRIMS Agreement<sup>116</sup>, the TRIPS Agreement<sup>117</sup> and under the Marrakesh Agreement<sup>118</sup>. Moreover, in the request for consultation Korea alleged that Japan used these trade measure as “*politically motivated, disguised restrictions on trade*”<sup>119</sup>. In fact, as already mentioned in the previous paragraphs, Japan and Korea have a questionable diplomatic relation and it is important to specify that this case flared up after the Korean Supreme Court ruled that Mitsubishi Corporation and Nippon Steel should compensate the descendants of the individuals that were forced to work for them<sup>120</sup>. Needless to say, the timing of this trade move from Japan, was generally reconducted to a response to the political issues that were being discussed at the time and triggered even more the already existing theory of Japan using geo-economics as a form of political power<sup>121</sup>. In March 2023 Korea withdrew the complaint, after Japan agreed to enforce the lifting of the curbs and the two countries decided to restore their position as trusted countries<sup>122</sup>.

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<sup>115</sup> Articles 2, 6, 7, 8 and 10

<sup>116</sup> Article 2

<sup>117</sup> Articles 3.1, 4.1 and 28.2

<sup>118</sup> Article XVI:4

<sup>119</sup> Korea request for consultation, WT/DS590/1

<sup>120</sup> Supreme Court of Korea, Supreme Court en banc Judgment 2013Da61381 Rendered October 30, 2018 【Damages (Others), 2018

<sup>121</sup> Mulgan Aurelia George, Is Japan Weaponising Trade Against South Korea?, UNSW Canberra, 2019

<sup>122</sup> Borowiec Steven, Japan Lifts Final South Korea Trade Restriction, Nikkei Asia, 2023



### 3. Chapter 3: Japan – China Trade Relationship and Trade Conflicts

The cause of the deterioration of the diplomatic relationship with China, relies mainly on the historical events of the Japanese colonization and the war crimes related to it. The historical and territorial disputes<sup>123</sup> are still difficult themes to discuss for both governments. Even so, it seems like the two countries always strived to stabilize their economic relations despite diplomatic issues. Although its economic growth has been slightly slowing down in the latest years<sup>124</sup>, the People's Republic of China (PRC) remains Japan's major trading partner<sup>125</sup>. The trade relationship between the two countries started to grow after World War II<sup>126</sup>, and was based on strong political ties established during the 70s. A major step forward in their trade relations was the settlement of the Long-Term Trade Agreement in 1978<sup>127</sup>. The agreement met the needs of both countries and while Japan assented to expand its oil and coal imports from China, it was exporting an equivalent amount of industrial plants and construction equipment to China<sup>128</sup>. Eventually, the trade relations kept growing until China became the major trade partner of Japan, taking the place of the US in 2002<sup>129</sup>. Meanwhile, the normalization of the China - Japan relations went hand in hand with the growth of trade. In fact, despite the historical and territorial issues that still came back from time to time, the two countries were able to build a mutually beneficial economic relationship at least until the 21<sup>st</sup> century. The collapse of the Soviet Union in 1990, together with the presence of leaders with different perceptions at the beginning of the new century (Jian Zemin for China and Koizumi Junichirō for Japan) were the reasons of a deterioration of the reciprocal image of the two countries. Moreover, Chinese growing economic strength, which outgrew Japan economic power in 2010, causing the decrease of China economic dependence on Japan, contributed to worsen the relation. It is also worth mentioning that the territorial

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<sup>123</sup> Nanjing Massacre and Senkaku Islands dispute.

<sup>124</sup> The World Bank, Sustained policy support and deeper structural reforms to revive China's growth momentum - World Bank Report, Press release, 2023

<sup>125</sup> Japan Customs, Trade Statistics, [www.customs.go.jp](http://www.customs.go.jp)

<sup>126</sup> Nagy Stephen, Territorial Disputes, Trade and Diplomacy: Examining the repercussions of the Sino-Japanese territorial dispute on bilateral trade, China Perspective, 2013, pp. 49-57.

<sup>127</sup> Min-Hua Chiang, Contemporary China-Japan Relations: The Politically Driven Economic Linkage, Springer, Singapore, 2019.

<sup>128</sup> Ibid.

<sup>129</sup> Japan Customs, Trade Statistics, [www.customs.go.jp](http://www.customs.go.jp)

issues over the Senkaku Islands had no small effect on trade. As a matter of fact, the purchase of a part of the islands by Japan in 2012, led to the breakout of several anti-Japanese riots and to boycott Japanese brands, which in turn had a direct effect on imports and exports and on FDI of Japan in the Chinese market<sup>130</sup>. As a perceivable example, the Japanese automotive market's sales of new vehicles from major companies took a hit with a registered decrease from 35% up to 49%<sup>131</sup>. In the next paragraph we will examine the composition of trade between the two countries.

### 3.1. Japan-China Trade Relations

Trade between China and Japan has also changed over time in terms of commodity exchange. After World War II, the main imports coming from China were textiles, food and raw materials especially crude oil and coal. On the other hand, Japan was mainly exporting metal products (steel and iron), chemical products and machinery<sup>132</sup>. This type of commodity exchange started to stabilize after the trade agreement of 1978 and was also seen as beneficial for both countries. In fact, thanks to this exchange Japan was able to diversify its sources of raw material and at the same time China could rely on Japanese technologies to develop its infrastructures. As a matter of fact, the agreement did not only of regulate certain aspects of trade, but it also guaranteed a regular source of foreign exchange aimed at financing imports of technology and advanced equipment which played a key role in the support of the goals of modernization and economic development set by Beijing<sup>133</sup>.

Table 3.1. shows how already at the end of the 90s, Japanese imports of foodstuff and raw materials from China registered a decrease, going from representing a 16% of Japan's total imports in 1990 to a 5% in 2015. In the same period was registered an increase in imports of machinery and electrical machinery which went from a mere 4% in 1990 to a 45% of total imports in 2015.

On the other hand, apart from a decrease in metals exports, no other significant changes were registered on the exports side.

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<sup>130</sup> Nagy Stephen, *Territorial Disputes, Trade and Diplomacy: Examining the Repercussions of the Sino-Japanese Territorial Dispute on Bilateral Trade, China Perspective*, 2013, pp. 49-57.

<sup>131</sup> The Guardian, *Japanese Car Sales Plunge in China after Islands Dispute*, Associated press, 2012.

<sup>132</sup> Tomozo Morino, *China-Japan Trade and Investment Relations*, Academy of Political Science, Vol. 38, No. 2, *The China Challenge: American Policies in East Asia* (1991), pp. 87-94.

<sup>133</sup> *Ibid.*

Table 3.1.: Japan's Main import and export items with China 1980-2015. As % of Japan's total imports from and exports to China

	1980	1985	1990	1995	2000	2005	2010	2015
Japan's main import items from China								
Textile (1995–2005)/manufactured goods (2010 and 2017)	12	15	27	35	30	17	15	12
Machinery and electrical machinery	0	0	4	14	26	36	43	45
Foodstuffs	11	14	16	13	11	7	5	5
Raw material and mineral fuel	67	59	33	10	7	5	2	2
Others	10	12	20	28	26	35	35	36
Japan's main export items to China								
Machinery and electrical machinery	34	38	42	50	47	47	45	43
Metals	33	28	31	26	23	16	15	13
Chemicals	11	6	12	9	13	13	13	15
Transport equipment	8	17	2	4	4	5	10	9
Precision instruments	0	0	2	2	4	5	4	3
<sup>1</sup> Others	14	11	11	9	9	14	13	17

Source: *Japan Statistical Yearbook*, 1981, 1986, 1991, 1997, 2002, 2007, 2012, and 2016, Statistics bureau, Ministry of Internal Affairs and Communications, Japan [38]

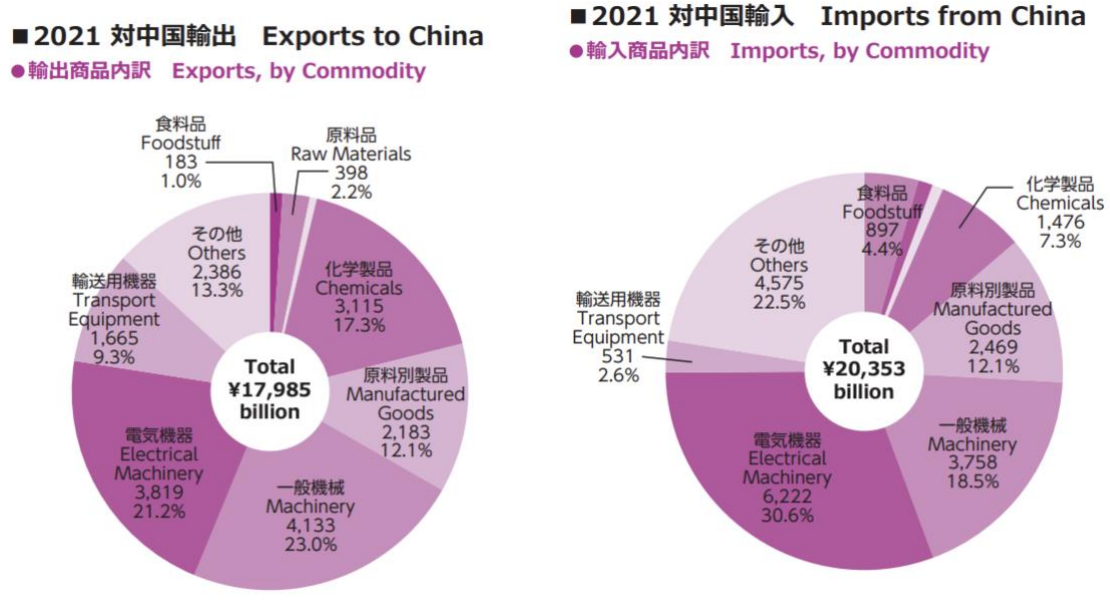
Source: Min-Hua Chiang, *Contemporary China-Japan Relations: The Politically Driven Economic Linkage*, Springer, Singapore, 2019, p. 282.

These changes are an evident demonstration of the industrial catch up that China carried out overtime. The industrial upgrading of China caused a change in the commodity imports of Japan, which went from energy resources during the 80s to manufactured goods in the 90s and finally moved to heavy industrial goods after the 2000s. Not only, but it also caused a decrease in Japanese exports to China. As a consequence, the downturn of exports led to a trade deficit of Japan, especially in the machinery and electrical machinery industry, which went in contrast to the trade surplus that Japan was enjoying in the 80s<sup>134</sup>.

The trade balance of Japan with China is still to these days in a deficit, even if it is narrower compared to that registered in the first decade of the 2000s. In fact, while the exports to China amount to 18 billion Yen the imports are at more than 20 billion Yen (Graph 1).

<sup>134</sup> Hong N. Kim, *Japan and China in the 1980's*, *Current History*, Vol. 84, No. 506, Japan, 1985, pp. 426-430.

Graph 3.1.: Japan's Exports to and Imports from China by Commodity in 2021 (%).



Source: 日本貿易の現状, Foreign Trade 2022, Japan Foreign Trade Council, Inc., Vol. 47, 2002

When looking at the commodity exchange in Graph 3.1, it is clear that machinery and electrical machinery still represent the biggest share of the market between the two countries. This is a very important detail to understand better how trade disputes between the two Asian giants has evolved overtime. In Pekkanen's work, the trade exchange between Japan and China was analyzed on the base of year 2003 and the main exports to China were textiles, metals, and chemicals while the main imports were again textiles machinery, equipment and metals<sup>135</sup>. The changes mentioned above are also the cause of changes that we can identify in the way Japan approaches China under the DSU system and this is the subject that we will analyze in the next paragraph.

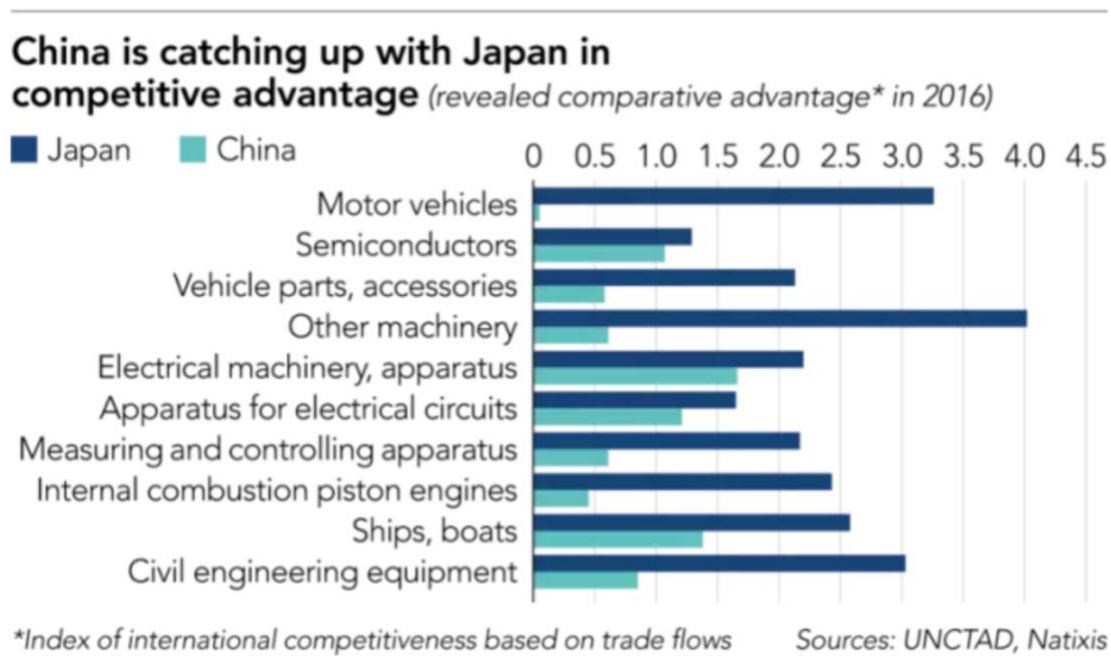
<sup>135</sup> Pekkanen S. M., 2008

### 3.2. Dispute Settlement – From Muted to Aggressive Legalism

Since Pekkanen’s analysis of the trade frictions between Japan and China, there have been changes both at the economic and trade level which led to changes in the Japanese attitude in litigations with China. We have already mentioned that the economic upgrade of China, in which Japan had an important role<sup>136</sup>, has caused an increase of competitiveness of Chinese industrial sectors as machinery, steel and electronics that were not competitive before. In contrast to this, the competitiveness of industries such as textiles and agriculture has decreased over time. Although China is still depending on a labor-intensive segment in high-tech products, which have lower prices than Japanese high-quality products<sup>137</sup>, the growth of Chinese global competitiveness on these sectors could also coincide with an erosion of the competitiveness of the corresponding Japanese sectors.

In the graph below we can see the Chinese catch up in competitiveness registered in 2016 for those sectors that represent also the most globally competitive sectors for Japan.

Graph 3.2.



Source: Alicia-García Herrero, Japan must Boost R&D to keep rising Chinese Rivals at Bay, Nikkei Asian Review, 2018.

<sup>136</sup> Hong N. Kim, Japan and China in the 1980’s, Current History, Vol. 84, No. 506, Japan, 1985, pp. 426-430.

<sup>137</sup> Alicia-García Herrero, Japan must Boost R&D to keep rising Chinese Rivals at Bay, Nikkei Asian Review, 2018

As a result, we can observe some differences in the types of litigation that the two countries have held under the WTO dispute settlement system. In fact, in Pekkanen's analysis the attitude of Japan towards China in the WTO arena was mainly depicted as "*muted legalism*". Since all cases of litigation at the time were concerning safeguard measures in non-competitive and protectionist industrial sectors, as agriculture and textiles<sup>138</sup>, the legalism of Japan against China at the time aimed at defending trade of certain products in the domestic market rather than expanding trade and pushing for opening the market abroad. Therefore, even if already in Pekkanen we can appreciate the active use of legalism in the resolution of trade issues, it is in the following paragraphs that we will be witnessing how this use of legalism has matured and has brought to more confrontational disputes. As a matter of fact, the growing competitiveness of China in some of the Japanese globally competitive sectors, have brought to a more confrontational approach in the litigation management of the two countries. When checking in Annex 1.1 the cases brought by Japan against China from 2005 up to now, we can see that Japan has initiated a total of 3 cases. Although this might seem a small number, it is important to highlight that while the first case concerns measure affecting exportation of rare earths, the other 2 cases concern Anti-Dumping on Stainless Steel products and represent the very first time Japan is filing Anti-Dumping cases against China.

### 3.3. China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum

In March 2012, Japan requested consultation with China concerning some export duties and export quotas over rare earths, tungsten, and molybdenum. Rare earths are, as described in the panel report, "*either naturally occurring minerals or materials that have undergone some initial processing*" and China has the biggest reserves worldwide<sup>139</sup>. It is interesting to point out that rare earths are key components for high-technology products as screen cameras, smartphones, hard disks, automotive systems etc.<sup>140</sup>, which belong to those main competitive industries discussed previously. Therefore, even if indirectly, the case is connected to high-tech industry, which explains the action by Japan under WTO dispute settlement.

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<sup>138</sup> Pekkanen Saadia. M., *Japan's Aggressive Legalism Law and Foreign Trade Politics Beyond the WTO*, Stanford University Press, Stanford, 2008, Chapter 3

<sup>139</sup> PA, WT/DS433/R, par. 2.2-2.7

<sup>140</sup> Van Gosen B., Verplanck P.L., Long K.R., Gambogi J., Seal II R.R., *The Rare-Earth Elements— Vital to Modern Technologies and Lifestyles*, US Geological Survey, Reston, 2014



Moreover, this case is quite interesting, due to the moment in which it started. In fact, the measures were imposed by China almost immediately after the issue of the purchase of the Senkaku Islands<sup>141</sup>, and was cited in different occasions as an example of the Chinese government use of economic measures as a “punishment” to geopolitical issue. An important comment by Paul Krugman for the New York Times was very critical of China which was showing “*no hesitation at all about using its trade muscle to get its way in a political dispute, in clear if denied violation of international trade law*”<sup>142</sup>. In contrast to this, there are many articles published later stating that Japan did not actually register a uniform drop in imports even if almost 90% of its rare earths come from China, and pointing out that some drops were registered even before the Senkaku Island issue came about<sup>143</sup>.

Getting into details, Japan claims in this case are that the exports duties and quotas imposed by China are inconsistent respectively with paragraph 11.3, 5.1 and 1.2 of the China’s Accession Protocol and GATT 1994 Art. XI:1. China on the other side, claims that the exports duties and quotas imposed are justified under article XX of GATT 1994 and by the fact that commitments under paragraphs 5.1 of the accession protocol “*do not prevent the use of prior export performance and minimum registered capital requirements as criteria to administer the quotas*”<sup>144</sup>. Paragraph 11.3 of China’s accession protocol states that “*China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this protocol or applied in conformity with the provision of Article VIII of the GATT 1994*”<sup>145</sup>. After having verified that the rare earths at stake are not included among those products that could be subject to duties in Annex 6<sup>146</sup>, the panel went on to examine the possibility for paragraph 11.3 to be subject to general exceptions in article XX of GATT 1994. In fact, China also justified the duties and quotas imposed with the reason of being “*necessary to protect human, animal or plant life or health*” and therefore subject to those general exceptions included in GATT Art. XX<sup>147</sup>. However, not only did the Panel find paragraph 11.3 not to be subject to GATT art. XX, but it also found that China failed to demonstrate the importance of these duties and quotas in the protection of human, animal or plant life or health. Meaning that the export duties and quotas are not justifiable under WTO law. A key observation, brought by Japan, is that China could have adopted different

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<sup>141</sup> 2010 Senkaku Islands [il riferimento sembra incompleto]

<sup>142</sup> Krugman P., Rare and Foolish, The New York Times, 2010.

<sup>143</sup> King A., Armstrong S., Did China Really Ban Rare Earth Metal Exports to Japan?, East Asia Forum, 2013.

<sup>144</sup> PA, WT/DS433/R point 3

<sup>145</sup> China’s Accession Protocol A.0.1.10 China- Raw Materials, paras. 280, 284–285, 287, www.wto.org.

<sup>146</sup> PA, WT/DS433/R para. 7.31 of 7.3.1 p. 43.

<sup>147</sup> Gatt XX Art ...

measures (production tax and pollution tax) to address the environmental harm caused by the mining of these metals, but at the same time avoid restrictions to foreign trade<sup>148</sup>.

The observation was quite important in highlighting that the measures discussed were not indeed necessary as claimed by China. Finally, given that China failed to respond to Japan's WTO consistent alternatives of an increased resource tax, and for all the other reasons stated before, the panel upheld the claims made by the complainant.

Furthermore, about export quotas, the panel noted that export quantitative restrictions in this case did not correspond to restrictions in the domestic market, making the export quotas appear as a mean to reserve rare earths for domestic consumption<sup>149</sup>. Again, Japan was ready to point out that, even if China has already adopted consumption limits (as extraction quotas) on rare earths, it remains unexplained why China is not able to control consumption<sup>150</sup>. Consequently, Japan proceeds to provide a valid alternative such as sales quotas covering both the domestic sales and exports, demonstrating that China had more adequate alternatives in respect to the measures adopted. In this way the panel findings reported China's measures to be inconsistent for all of the claims presented by Japan together with the EU and the US.

In 2014, China presented to the DSB the decision to appeal to the Appellate Body, which however did not change the decision of the Panel<sup>151</sup>.

#### 3.4. China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan

In its Notices No. 21 and No. 72 of 2012, the Ministry of Commerce of the People's Republic of China (MOFCOM) officially announced the findings of the investigation carried out on high-performance stainless-steel imports from Japan and the European Union. The investigation determined the existence of dumping and its causal link to injury of the domestic market. As a result of the findings, MOFCOM announced the imposition of anti-dumping duties of 9,2% for Sumitomo Metal Industries, Ltd., 14,4% for Kobe Special Tube Co., Ltd., and 14,4% for all the other Japanese companies<sup>152</sup>. While China

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<sup>148</sup> PA, WT/DS433/R para 7.183 of 7.3.2.2.2.4. p. 81.

<sup>149</sup> PA, WT/DS433/R para 7.601 of 7.6.2.3. p. 166.

<sup>150</sup> Ibid.

<sup>151</sup> AB, WT/DS431/AB/R, par. 6.1-6.3

<sup>152</sup> Ministry of Commerce People's Republic of China, Foreign Trade Administration, Announcement No. 21 and 72 of 2012

might have levied the duties in protection of the domestic market, the foreign trade move was not well accepted by both Japan and the European Community. First of all, it must be noted that in a scenery where the steel industry is slightly slowing down<sup>153</sup>, trade competition for the market is likely to increase in the near future. Moreover, the inclusion of the revival of the iron and steel industry in the Chinese 12<sup>th</sup> Five-Year Plan<sup>154</sup> as a priority point made the dispute more strategically important for China. Not only, since China is the second market for Japanese steel exports<sup>155</sup>, the case was strategically important for Japan as well.

As a matter of fact, in December 2012 Japan immediately reacted and proceeded to request consultations with China concerning the measures enacted. In its request for consultations Japan presented a total number of 10 claims of inconsistency under the Anti-Dumping Agreement and GATT 1994<sup>156</sup>. Specifically, Japan claimed that China had failed to provide an objective examination based on positive evidence in regards to the analysis of volume and price effect of the imported goods, of the causal relation, and of the impact of imports into the domestic market (Art. 3.1, 3.2, 3.4, 3.5, 5.3, 5.8. of the Ad Agreement). Several claims addressed the treatment of information and the insufficient disclosure of relevant information (6.5, 6.5.1, 6.8, 6.9, 12.2, 12.2.2 of the AD Agreement). Furthermore, Japan claimed that MOFCOM improperly applied the facts available and did not fully disclose the essential facts. In Japan's opinion, China failed to provide all the relevant information and reasons that led to the final determination of imposing anti-dumping measures, resulting in inconsistency with Art. 6.8 of the AD Agreement<sup>157</sup>. The Panel's decision was then circulated in 2015 and while most of the claims were upheld in the complainants' favor, some were rejected. In particular, the Panel upheld almost all substantial claims under Art. 3, apart from the claims that MOFCOM failed to assess whether the price undercutting had negative effects on the domestic product. In fact, Japan's claim that MOFCOM failed to properly account for quantitative differences in the comparison of domestic products was upheld. However, MOFCOM's consideration of the price undercutting effect on the domestic equivalent product and its extension of the findings of price undercutting to the equivalent domestic product as a whole (including products falling under different subcategories) was determined to be inconsistent. On the other hand, the Appellate Body, to which both Japan and China

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<sup>153</sup> Data from World Steel Association, [www.worldsteel.org](http://www.worldsteel.org)

<sup>154</sup> OECD, Strategic Policies for the Steel Industry, 2015

<sup>155</sup> Global Steel Trade Monitor, Steel Exports Report: Japan, 2019

<sup>156</sup> Japan's Request for Consultation, WT/DS454/1

<sup>157</sup> Ibid.

appealed, reversed the Panel ruling in favor of Japan as the price undercutting analysis requires “*a dynamic assessment of price developments and trends in the relationship between the prices over the entire POP*”<sup>158</sup>. Contrarily, the Panel characterized that the price undercutting can be determined simply on the basis of mathematical difference between the prices of the dumped imports and the domestic-like product, which in turn cannot provide a proper basis for proof of price undercutting<sup>159</sup>.

The panel also rejected the claims under Art. 6.8 and 6.9. In fact, Japan alleged that China did not provide all the relevant information and data that the investigation authority used as a basis of the decision whether to apply the anti-dumping measures or not. In this regard, the Panel decided that since article 6.9 does not require the respondent to disclose the entirety of the essential facts, MOFCOM indeed provided all the necessary information. On the other hand, the Panel upheld the inconsistency of MOFCOM disclosure of its dumping margin calculation methodology. In its report, the Appellate Body states that it is not sufficient to disclose “*the essential facts under consideration*” but the investigation authority must provide all the essential facts “*in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping*”<sup>160</sup>. Finally, the Appellate Body evaluation basically reversed all the rejected claims of the panel and therefore determined Chinese measures to be inconsistent for all the claims presented by Japan<sup>161</sup>.

The above case represents the very first anti-dumping case brought by Japan against China. In comparison to the analysis that professor Pekkanen made in 2008, the litigation presented is clearly not resigned in tone and employs an aggressive use of legalism. This also represents the very first case between the two countries concerning the steel industry and it is quite logical to imagine that this might be the reason why Japan was ready and quick to respond to menaces posed by the Chinese measures.

### 3.5. China - Anti-Dumping Measures on Stainless Steel Products from Japan

The second anti-dumping case that Japan issued against China is fairly similar to the previous one. In March 2019 MOFCOM announces the imposition of anti-dumping duties over stainless steel billets

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<sup>158</sup> AB, WT/DS460/AB/R, par. 5.159

<sup>159</sup> Ibid. par. 5.164 -5.172

<sup>160</sup> AB, WT/DS460/AB/R, par. 5.131

<sup>161</sup> AB, WT/DS460/AB/R, par. 6

and hot-rolled stainless-steel plates and coils<sup>162</sup> coming from Japan, Indonesia, South Korea and EU. MOFCOM decides to impose duties of 18,1% to Nippon Yakin Kogyo CO., LTD, and of 29% on all other companies. Three months later, Japan makes his move and requests consultations under the WTO<sup>163</sup>. Similarly, to the previous case Japan started off enumerating its substantial claims that MOFCOM determination of the domestic industry, analysis of price effects, impact of imports in the domestic market and the causation analysis was inconsistent under article 3 and 4.1 of the AD agreement. While the Panel rejected a few points of Japan's claims, its final findings elucidated that Japan was able to establish inconsistency of MOFCOM determination and analysis for the main substantial claims<sup>164</sup>.

In particular, MOFCOM failed to provide a reasoned and adequate explanation of its findings that the production of the firms included in the domestic industry represented a "*major proportion*" of the total production of all Chinese producers<sup>165</sup>. Moreover, MOFCOM findings in terms of price comparability of the products and price comparison between the imported products and the domestic-like ones, was found not to be based on objective examination of positive evidence<sup>166</sup> as well as for the causation and impact on domestic industry analysis<sup>167</sup>.

In its request for consultation and similarly to the previous case, Japan presented procedural claims concerning treatment of information (Art. 6.5 and 6.5.1) and disclosure of essential facts (Art. 6.9). While the first were rejected, Japan was able to establish inconsistency under Art.6.9 as China failed to disclose essential facts regarding the category of the product, price effects findings and brand effects on subject imports<sup>168</sup>.

Because of all the above, the Panel found MOFCOM measures to nullify and impair benefits accruing to Japan and therefore recommended that China bring the measures into conformity<sup>169</sup>.

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<sup>162</sup> Ministry of Commerce People's Republic of China, Foreign Trade Administration, Announcement No. 9 of 2019

<sup>163</sup> PA, WT/DS601/R, par.1.1

<sup>165</sup> PA, WT/DS601/R, par. 7.5-7.57

<sup>166</sup> PA, WT/DS601/R, par. 7.101-7.171

<sup>167</sup> PA, WT/DS601/R, par. 7.179-7.262

<sup>168</sup> PA, WT/DS601/R, par. 7.319

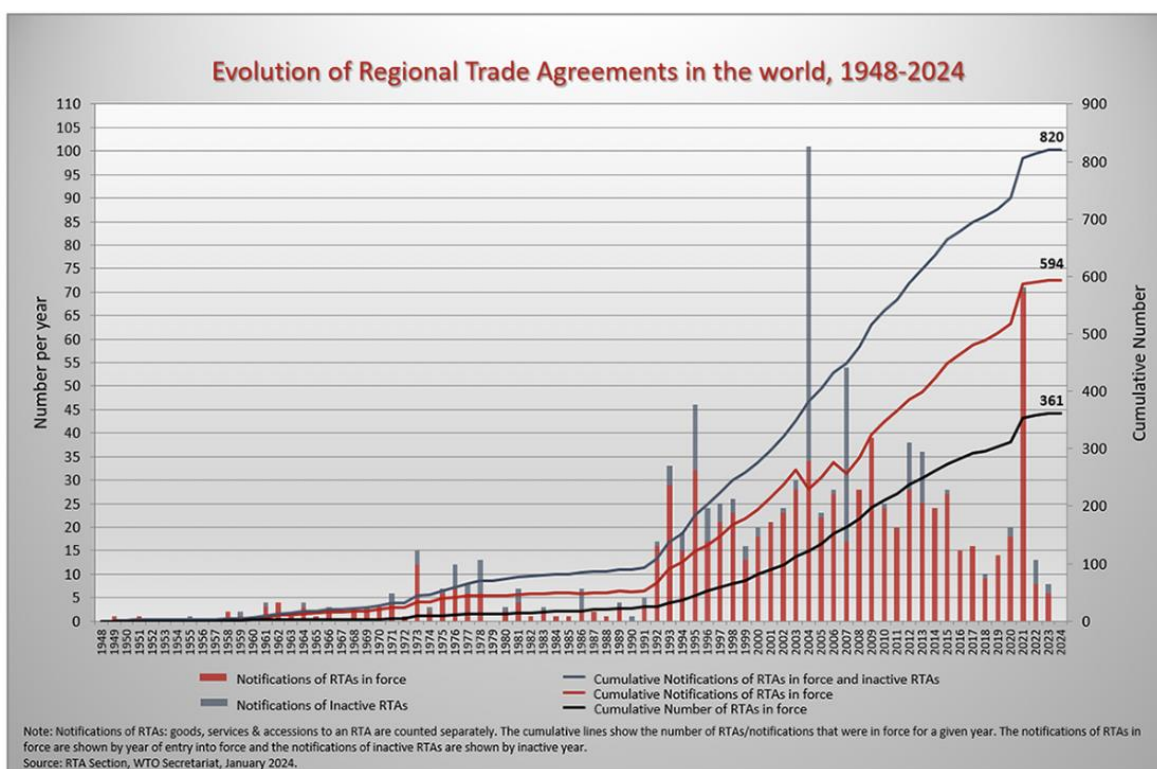
<sup>169</sup> PA, WT/DS601/R, par. 8.2-8.3



#### 4. Chapter 4: Regional Trade Agreements in the World

Japan signed its very first bilateral agreement in 2003 with Singapore. Since then, Japan has been working towards the stipulation of bilateral free trade agreements in a very active way, resulting in a total of 21 agreements between Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs)<sup>170</sup>. However, Japan is not the only country that has been working towards an improvement of its bilateral relations. In fact, as reported by WTO (Graph 1), the number of Regional Trade Agreements<sup>171</sup> among countries has been growing globally in the recent years.

Graph 4.1.



Source: [www.wto.org](http://www.wto.org)

RTAs are the only type of preferential trade agreements authorized under WTO that can take place between two or more partners and that are. In a way not to enter in conflict with WTO rules, RTAs

<sup>170</sup> Data from MOFA, [www.mofa.go.jp](http://www.mofa.go.jp)

<sup>171</sup> To be noted that FTAs and EPAs are a subset of RTAs.

aim, as clearly stated at the Uruguay Round, “*should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories*”<sup>172</sup>. However, RTAs still maintain its exclusive nature and inevitably establish a preferential treatment among the contracting parties that somehow clashes with the Most Favored Nation (MFN) principle of the WTO. While there is discussion over the reasons why RTAs started to develop so quickly in the latest years, one of the causes may be found in the WTO crisis. In fact, since 2017 it has become always more difficult to appeal to the Appellate Body until 2019 when the AB activity was forced to halt. The interference that the US has been posing to the appointments of new Appellate Body Members, led in 2019 to the inability of the AB to hear appeals<sup>173</sup>. As a consequence, WTO members found themselves without a functioning binding dispute settlement system and some of them engaged in the establishment of new bilateral agreements that would appoint alternative systems of dispute settlement, as arbitration, or simply establish commitment to avoid appeal<sup>174</sup>.

Although the non-functioning state of the Appellate Body is surely concurring to the development of the phenomenon, it cannot be the only element that plays a role. Besides, preferential trade agreements have been developing even before the beginning of the WTO crisis. In fact, apart from the slowdown at the multilateral level, a key role is also played by competition and domestic politics influenced by competitive multinational firms. Considering the case of Japan, it is quite logical to say that, if Japan seeks to obtain benefits and advantages for its export-led industrial sectors through the strict use of international trade law under the WTO, the same strategy can be applied outside the WTO as well. This translates into the regulation of bilateral trade relations, aimed at obtaining the best trade agreements and maintaining the competitiveness of the industry. This is also the reason why most of Japan’s RTAs are with developing countries. In fact, while developing countries are looking to attract FDI, simultaneously they offer low wages that attract multinational firms. Finally, the benefit that multinational firms get from these wages is through the offshore of some labor-intensive stages of the productive process. Hence, the importance for Japan and Japanese companies to negotiate better tariffs and be more competitive in comparison to other developed countries<sup>175</sup>.

Concerning the negotiation process of the agreements, another aspect that is important in RTAs, is the fact that the parties are not merely following the rules and attempting to bend them in their favor. In

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<sup>172</sup> Uruguay Round, Part III, Art. XXIV, par. 4, pp 457-460

<sup>173</sup> Kawase Tsuyoshi, *The WTO's Appellate Body Crisis and Roles to Be Played by Japan*, RIETI, 2020

<sup>174</sup> Vidigal Geraldo, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, *Journal of World Investment & Trade*, 2020

<sup>175</sup> Manger M. *Competition and Bilateralism in Trade Policy: the Case of Japan's Free Trade Agreements*, *Review of International Political Economy*, 2006



the RTAs agreement the parties become rule-makers and negotiate between them the best solutions. Of course, RTAs are still included in the WTO legal framework therefore it does not mean that counterparts are free to negotiate whatever rule they wish, however we can say that the parties can enjoy the benefits of the preferentialism sought in the stipulation of these types of agreements.

In the next paragraph we are going to see how Japan has been actively engaging in the pursuit of new RTAs in the recent years, further increasing legalization in its international relations as a response to an always more urgent need for regulation outside of the WTO as well.

#### 4.1. Japan's Growing Net of Regional Trade Agreements

As said before Japan undertook its way to the establishment of FTAs or EPAs starting from the Singapore agreement in 2003, which is quite late compared to other countries. In the previous paragraph, it was mentioned how the situation has evolved at a quick pace as Japan has reached 21 signed trade agreements. The reasons behind this impressive growth and the importance that Japan is attributing to the development of Regional Trade Agreements, is not only the further trade liberalization in goods that these agreements grant, and which is already extensively covered in the WTO legal framework. As a matter of fact, of particular interest in the negotiation of trade agreements, are the “WTO-plus” regulations that the RTAs allow the involved states to put into force. Especially when discussing about Japan, its focus on the regulation of investment is clear. A discussion of investment issues was actually included in the Doha Agenda, but the plan to provide a multilateral regulation framework was later on dropped. On the other hand, investment provisions are included in WTO's TRIMS agreement and GATS but they still do not deal with the issues in a comprehensive way and leave space for interpretations<sup>176</sup>. As a consequence, while the first investment agreement of Japan was signed in 1977 with Egypt, in a period when Japan strongly advocated for multilateral negotiation over investment-related issues<sup>177</sup>, Japan's policy later shifted towards aggressive International Investments Agreements (IIAs) or Bilateral Investments Treaty (BITs) negotiations in favor of a further investment liberalization<sup>178</sup>. A key role in setting a certain eagerness towards the definition of investment-related provisions either included in EPAs or discussed autonomously in BITs,

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<sup>176</sup> Matsushita Mitsuo, “Proliferation of Free Trade Agreements and Development Perspectives”, Law and Development Institute Inaugural Conference, Sydney, 2010

<sup>177</sup> WTO Ministerial Conference, Second Session, Japan's Position on WTO Issues, 1998

<sup>178</sup> Ishikawa Tomoko, A Japanese Perspective on International Investment Agreements: Recent Developments, in International Investment Treaties and Arbitration Across Asia, Nijhoff International Investment Law Series, 2018

is definitely played by trade-dominant industries. Usually addressing issues through the Nippon Keidanren organization, the influence that trade dominant industries have on the way Japan undertakes its RTAs negotiations and more specifically in the provisions that should be discussed and included in the agreements, was already stressed in Pekkanen<sup>179</sup>. In its 2011 Proposal for Japan's Trade Strategy, Keidanren makes clear that the investment regulations of the EPAs agreements concluded until then were not sufficient and *“do not include investment arbitration clauses, place limits on the scope of investment, contain no provisions for fair and equitable treatment, a frequent point of dispute in arbitration judgments, limit the scope of prohibition of performance requirements to the WTO Agreement on Trade-Related Investment Measures (TRIMs), or provide for a level of liberalization that goes no further than maintaining the current situation”*<sup>180</sup>. The organization then suggests that Japan concludes quickly the EPAs and the investment treaties that are under negotiation. An important element, in support of the competition theory to which RTAs and BITs are clearly bounded, as explained in the previous paragraph, is the multiple references that is made to South Korea. While it would not be standing out if the references were made to take Korea as an example on how to handle the foreign policy, this is not the case. In fact, the references are made to Korea as a fierce competitor. When urging Japan to further promote EPAs to ensure its position internationally, a note is made in reference to the Korean automobiles and electronics share of trade with FTAs, which stands at about 20% more than the Japan share of trade with FTAs in the same sectors<sup>181</sup>. Since 2011, Japan has signed 21 new BITs (Table 4.1) and 7 new EPAs including investment provisions (table 4.2).

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<sup>179</sup> Pekkanen, 2008

<sup>180</sup> Nippon Keidanren, Proposals for Japan's Strategy, 2011

<sup>181</sup> Ibid.

Table 4.1

Japan's BITs 1977-2023					
No.	Partner	Status	Date of signature	Date of entry into force	Date of termination
1	Egypt	In force	28/01/1977	14/01/1978	
2	Sri Lanka	In force	01/03/1982	07/08/1982	
3	China	In force	27/08/1988	14/05/1989	
4	Turkey	In force	12/02/1992	12/03/1993	
5	Hong Kong, China SAR	In force	15/05/1997	18/06/1997	
6	Pakistan	In force	10/03/1998	29/05/2002	
7	Bangladesh	In force	10/11/1998	25/08/1999	
8	Russian Federation	In force	13/11/1998	27/05/2000	
9	Mongolia	Terminated	15/02/2001	24/03/2002	07/06/2016
10	Korea, Republic of	In force	22/03/2002	01/01/2003	
11	Viet Nam	In force	14/11/2003	19/12/2004	
12	Cambodia	In force	14/06/2007	31/07/2008	
13	Lao People's Democratic Republic	In force	16/01/2008	03/08/2008	
14	Uzbekistan	In force	15/08/2008	24/09/2009	
15	Peru	In force	21/11/2008	10/12/2009	
16	Papua New Guinea	In force	26/04/2011	17/01/2014	
17	Colombia	In force	12/09/2011	11/09/2015	
18	Kuwait	In force	22/03/2012	24/01/2014	
19	Iraq	In force	07/06/2012	25/02/2014	
20	Saudi Arabia	In force	30/04/2013	07/04/2017	
21	Mozambique	In force	01/06/2013	29/08/2014	
22	Myanmar	In force	15/12/2013	07/08/2014	
23	Kazakhstan	In force	23/10/2014	25/10/2015	
24	Uruguay	In force	26/01/2015	14/04/2017	
25	Ukraine	In force	05/02/2015	26/11/2015	
26	Oman	In force	19/06/2015	21/07/2017	
27	Iran, Islamic Republic of	In force	05/02/2016	26/04/2017	
28	Kenya	In force	28/08/2016	14/09/2017	
29	Israel	In force	01/02/2017	05/10/2017	
30	Armenia	In force	14/02/2018	15/05/2019	
31	United Arab Emirates	In force	30/04/2018	26/08/2020	
32	Jordan	In force	27/11/2018	01/08/2020	
33	Argentina	Signed	01/12/2018		
34	Morocco	In force	08/01/2020	23/04/2022	
35	Côte d'Ivoire	In force	13/01/2020	26/03/2021	
36	Georgia	In force	29/01/2021	23/07/2021	
37	Bahrain	In force	23/06/2022	06/09/2023	
38	Angola	Signed	09/08/2023		

Source: UNCTAD, accessed 20/01/2014

Table 4.2

Japan's EPAs with Investment Provisions				
No.	Short title	Status	Date of signature	Date of entry into force
1	Japan - Singapore EPA (2002)	In force	13/01/2002	30/11/2002
2	Japan - Mexico EPA (2004)	In force	17/09/2004	01/04/2005
3	Japan - Malaysia EPA (2005)	In force	13/12/2005	13/07/2006
4	Japan - Philippines EPA (2006)	In force	09/09/2006	11/12/2008
5	Chile - Japan EPA (2007)	In force	27/03/2007	03/09/2007
6	Japan - Thailand EPA (2007)	In force	03/04/2007	01/11/2007
7	Brunei - Japan EPA (2007)	In force	18/06/2007	31/07/2008
8	Indonesia - Japan EPA (2007)	In force	20/08/2007	01/07/2008
9	ASEAN - Japan EPA (2008)	In force	28/03/2008	01/12/2008
10	Japan - Viet Nam EPA (2008)	In force	25/12/2008	01/10/2009
11	Japan - Switzerland EPA (2009)	In force	19/02/2009	01/09/2009
12	India - Japan EPA (2011)	In force	16/02/2011	01/08/2011
13	Japan - Peru EPA (2011)	In force	31/05/2011	01/03/2012
14	Australia - Japan EPA (2014)	In force	08/07/2014	15/01/2015
15	Japan - Mongolia EPA (2015)	In force	10/02/2015	07/06/2016
16	TPP (2016)	Signed	04/02/2016	
17	Comprehensive and Progressive	In force	08/03/2018	30/12/2018
18	EU - Japan EPA (2018)	In force	17/07/2018	01/02/2019
19	Japan - United Kingdom CEPA (2020)	In force	23/10/2020	01/01/2021
20	RCEP (2020)	In force	15/11/2020	01/01/2022

Source: UNCTAD, accessed 20/01/2014

Among the EPAs in Table 4.2 the one signed with the US in 2020 does not appear, as it does not include an investment provisions chapter<sup>182</sup>. In response to the needs of Japanese businesses, in the 2013 Revitalization Strategy, the government of Japan expressed its willingness to push for early achievement of the agreements under negotiation at the time and promote negotiations with new partner as the EU, China and Korea<sup>183</sup>. Incidentally, in its 2011 Proposal for Japan's Trade Strategy, Nippon Keidanren urged an increase in trade agreements specifically with developed countries as the EU and the US. As a response, Japan recently concluded trade agreements with the EU and the US in 2019 and finally with UK in 2020.

Concerning its investment provisions, Japan does not have a model BIT, therefore does not have a model of standard terms or language and every BIT is defined during the negotiation process<sup>184</sup>. However, in the investment treaties signed from 2012 on, there are some changes that are worth notice. First and foremost, it is quite clear from Table 4.1 how the geographical scope of investment agreement has been increasingly focusing towards African and Middle Eastern countries. On the other hand, the scope of general definition in the latest treaties is defined in a much broader way, apart from a few agreements, namely the TPP and the Uruguay BIT that contain further specification<sup>185</sup>. Furthermore, it is possible to note a tendency towards an increased specificity of Fair and Equitable Treatment (FET) clauses, even if it is quite difficult to detect a general trend as this clause is widely different from one agreement to another. Nonetheless, while in the early agreements this clause was very flexible, and some did not even have a FET clause, the latest treaties tend to include more comments and notes. Finally, another important provision that has been included in all the recent treaties of Japan, made exception of Australia and the EU, is the Investor-State Arbitration (ISA) provision. During the negotiations of the TPP agreement, this provision attracted no little criticism, and it was also claimed to be infringing state sovereignty<sup>186</sup>. However, always more detailed ISA provisions for the regulation of investment related dispute settlement systems are being included in the recent agreements<sup>187</sup>.

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182 Trade Agreement Between Japan and the United States of America, 2019

183 Kantei, Japan's Revitalization Strategy, 2013

184 Ishikawa Tomoko, A Japanese Perspective on International Investment Agreements: Recent Developments, in *International Investment Treaties and Arbitration Across Asia*, Nijhoff International Investment Law Series, 2018

185 Hamamoto S., *Debates in Japan over Investor-State Arbitration with Developed States*, Investor-State Arbitration Series, Vol. 5, CIGI, 2016

186 Ishikawa Tomoko, A Japanese Perspective on International Investment Agreements: Recent Developments, in *International Investment Treaties and Arbitration Across Asia*, Nijhoff International Investment Law Series, 2018

187 *Ibid.* 16

Even if Japan tends to adapt its negotiation practice depending on the counterpart, it is possible to say that the proposal made by Keidanren are being taken into account and play a role in the way Japan conducts its free trade agreement negotiations.

## Conclusions

This work aims at researching how the Japanese strict use of legalism both at the multilateral and bilateral level has been evolving and developing since the publication of Professor Pekkanen's work in 2008. Japan foreign trade policy and major foreign trade partners have changed due to the economic development of Asian countries, most precisely the Republic of Korea and the People's Republic of China. In contrast with Pekkanen's research where the trade war between Japan and the US was the protagonist, in this work we have seen how Korea and China economic and infrastructure development has brought over time to an increase of trade with Japan and therefore to the increase of trade legalization of Japan with its neighbor countries. On the other hand, a constant since Pekkanen's research is the competitiveness and trade dominance of sectors as steel, automotive and technology, which represent a fundamental element in the direction of active use of legalism under the WTO dispute settlement arena.

In fact, in this work we have found how the growth of competitiveness of Korea and China in these same sectors is posing the risk of an erosion of competitiveness of Japan's trade dominant industries. This translates in turn to an increase of Japan sensibility to foreign trade policies changes of these two countries and specifically when concerning the above industrial sectors. As a result, in contrast to the dismissed activity against the US under the WTO arena, with this work we have detected how Japan has been keener to file complaints against these two countries under WTO in the latest years and we presented some dispute cases as an example.

Finally, in the last chapter a quick note is made on how Japan's use of legalism is growing at the bilateral level as well, represented by the increasing number of trade agreements and investment agreements that Japan has been signing in the latest years. However, we have found that Japan legalism is not only exhibited in the number of agreements signed but is also used as a mean to obtain benefits for trade-dominant industries.

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