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WTO DISPUTE SETTLEMENTS IN EAST ASIA

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I. Introduction

On January 13, 1995 when few experts could fully understand the newly established dispute settlement mechanism under the WTO, Singapore submitted the consultation request for dispute settlement against Malaysia concerning import prohibitions of polyethylene and polypropylene.[1] It was the very beginning of the WTO dispute settlement system that has been considered the core of the current world trading system.[2] This case was subsequently resolved with mutually agreed solution and so notified on July 19, 1995.

This birth history of the WTO dispute settlement showed an interesting fact that it was East Asian Members that opened the Pandora's box for the new era in the world trading system. Since then, East Asian Members have actively participated in utilizing and augmenting the WTO dispute settlement system. These experiences and lessons thereof are briefly discussed below.

II. GATT Dispute Settlements in East Asia

GATT/WTO Accession

Among East Asian Members, China was in fact one of the drafting Members of the GATT and joined the GATT in 1948. Then, Indonesia joined the GATT not by accepting the Protocol of Provisional Application, but instead by succeeding contracting party status under Article XXVI:5(c) in 1950.[3]

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[1] WTO, *Malaysia - Prohibition of Imports of Polyethylene and Polypropylene* (WT/DS1/1).

[2] During the very first month of the WTO, only two consultation requests were submitted to the WTO Dispute Settlement Body. The other case was *US – Standards for Reformulated and Conventional Gasoline* (DS2) that resulted in the first panel/Appellate Body proceedings.

[3] Malaysia, Singapore, Hong Kong and Macao also acceded to the GATT under Article XXVI:5(c). WTO, *Analytical Index: Guide to GATT Law and Practice* (Geneva, 1995), 1145-1146.

Japan acceded to GATT on September 1955 and, at the time of accession, 14 contracting parties invoked Article XXXV. Subsequently, 33 contracting parties invoked Article XXXV by succession in respect of Japan when they became liberated from Belgium, France and United Kingdom. Three other contracting parties also invoked Article XXXV when they later joined the GATT. All these Article XXXV invocations were later gradually disinvoked to normalize the GATT relationship with Japan.[4]

<Table 1. GATT/WTO Accession for East Asian Members: As of August 2003>

Countries	**GATT/WTO Accession Date**	**GPA**[1]	**TCA**[2]	**ITA**[3]	**BT**[4]
China	Dec. 11, 2001	N	Observer	Y	N
Taiwan	Jan. 1, 2002	Negotiating Accession	Y	Y	N
Hong Kong, China	April 23, 1986	Jan. 1, 1997	N	Y	Y
Indonesia	Feb. 24, 1950	N	Observer	Y	Y
Japan	Sep. 10, 1955	Jan. 1, 1996	Y	Y	Y
Korea	April 14, 1967	Jan. 1, 1997	Observer	Y	Y
Macao, China	Jan. 11, 1991	N	Y	Y	N
Malaysia	Oct. 24, 1957	N	N	Y	Y
Philippines	Dec. 27, 1979	N	N	Y	Y
Singapore	Aug. 20, 1973	Jan. 1, 1996	Observer	Y	Y
Thailand	Nov. 20, 1982	N	N	Y	Y

NOTE:
1. Plurilateral Agreement on Government Procurement
2. Plurilateral Agreement on Trade in Civil Aircraft (WT/L/434, dated on Nov. 26, 2001)
3. Ministerial Declaration on Trade in Information Technology Products
4. Basic Telecommunication Negotiations (annexed to the Fourth Protocol of the General Agreement on Trade in Services)

The Korean government first sought to join the GATT in 1950, when it eagerly tried to be recognized as an independent state in the international community after liberation from Japan. At that time, the Korean government delegation sent to Torquay, England finished the GATT accession negotiation and signed the relevant documents.[5] This first attempt, however, failed when the Korean government could not complete the requisite domestic ratification procedures due to the Korean War during 1950-1953.[6] The Korean government resumed its effort to accede to the GATT in 1965 when it vigorously pursued export promotion as the primary element of economic development policies. After extensive internal discussion on potential economic benefits and costs, the Korean government finally submitted its accession application to the

[4] WTO, *Analytical Index: Guide to GATT Law and Practice* (Geneva, 1995), 1034-1036.
[5] GATT, *Basic Instruments and Selected Documents (hereinafter 'BISD')*, Vol. II (1952) 33-34. At that meeting, Austria, Peru, Philippines and Turkey also finished the accession negotiation. While Austria, Peru and Turkey formally became contracting parties in 1951, the Philippines formally joined the GATT on 27 December 1979.
[6] Tae-Hyuk Hahm, 'Reflections on the GATT Accession Negotiations', *Diplomatic Negotiation Case* 94-1 (1994, *in Korean*), at 5.

GATT Secretariat on May 20, 1966, and conducted the tariff negotiations with 12 contracting parties from September to December 2, 1966.[7] Korea officially acceded to the GATT in 1967, in accordance with Article XXXIII of the GATT.[8] On the other hand, Korea invoked Article XXXV for non-application of GATT with respect to Cuba[9], Czechoslovakia[10], Poland[11], and Yugoslavia[12]. These Article XXXV invocations were all simultaneously withdrawn in September 1971.[13]

Korea began its formal participation as a contracting party at the Tokyo Round of the multilateral trade negotiation, although it was merely as a minor player.[14] Subsequently, Korea joined the four so-called 'Side Codes': Subsidies Code[15], Standards Code[16], Customs Valuation Code[17] and Anti-Dumping Code[18]. Korea had never joined the sectoral agreements on bovine meat, dairy products and civil aircraft, nor the Agreement on Import Licensing Procedures as a plurilateral agreement. Korea joined the Agreement on Government Procurement during the Uruguay Round and implemented it only from January 1, 1997, while all other signatories except for Hong Kong applied it from January 1, 1996.[19]

China was one of 23 original GATT contracting parties and signed the Protocol of Provisional Application on April 21, 1947. Subsequently, China participated the first two rounds of multilateral trade negotiation, Geneva and Annecy Rounds. After the People's Republic of China (PRC) was founded on October 1, 1949, the Taiwan authorities withdrew from the GATT in the name of the Republic of China. This withdrawal came into effect on May 5, 1950. China

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[7] The Working Party for Korea's accession included 14 contracting parties. Hahm, above n. 6, 23.
[8] GATT, 'Korea – Accession under Article XXXIII: Decision of 2 March 1967', BISD, No.15 (1968) 60.
[9] GATT, L/2783 (1967).
[10] GATT, L/2783 (1967).
[11] GATT, L/2874 (1967)
[12] GATT, L/2783 (1967).
[13] GATT, L/3580 (1971). See also WTO, above n. 7, at 1034-1036. On the other hand, it is noted that 50 contracting parties invoked Article XXXV in respect of Japan at its accession in 1955. Ibid.
[14] Chulsu Kim, 'Korea in the Multilateral Trading System: From Obscurity to Prominence', in The Kluwer Companion to the WTO Agreement (The Hague: Kluwer Law International, *forthcoming*).
[15] The Agreement on Interpretation and Application of Articles VI, XVI and XXIII. In Korea, it was signed on 10 June 1980 and entered into force on 10 July 1980 as Treaty No. 709. See Ministry of Foreign Affairs, Compilation of Multilateral Treaties, Vol.5 (*in Korean*).
[16] The Agreement on Technical Barriers to Trade. In Korea, it was signed on 3 September 1980 and entered into force on 2 October 1980 as Treaty No. 715. Ibid.
[17] The Agreement on Implementation of Article VII. The Customs Valuation Code entered into force on 1 January 1981 while the other three Codes entered into force on 1 January 1980. GATT, BISD, No.28 (1982) 40. In Korea, it was entered into force on 6 January 1981 as Treaty No. 729. Ministry of foreign Affairs, above n.22.
[18] The Agreement on Implementation of Article VI. Korea accepted the Anti-Dumping Code on 24 February 1986 and the Code entered into force for Korea on 26 March 1986 as Treaty No. 877. GATT, BISD, No.33 (1987) 207. See also Ministry of Foreign Affairs, Compilation of Multilateral Treaties, Vol.8 (*in Korean*).
[19] WTO, Agreement on Government Procurement, Article XXIV:3. Hong Kong also had one more year for implementation to apply from 1 January 1997.

tried to resume its GATT relations after it secured a seat at the UN in October 1971. In January 1984, the PRC became a Member of the GATT Committee on Textiles and in November 1984, an observer to the GATT Council and other subsidiary meetings.

On July 10, 1986, the PRC officially applied to resume China's status as a contracting party and the Working Party on China's accession was established on March 4, 1987.[20] The Working Party included 68 Members to be the biggest working party for GATT/WTO accession. Since then, China sent a delegation to the Uruguay Round negotiations and finally the head of the Chinese delegation signed the final documents of the Uruguay Round along with the other 125 Member countries.[21] Therefore, the Uruguay Round agreements are supposed to apply to China once it becomes a formal Member to the WTO. For bilateral negotiations concerning the China's accession, 37 Members requested negotiations with China.[22] China finally finished its accession negotiations with all those Members and signed the Membership agreement on November 11, 2001.[23] Since China already completed the domestic ratification procedure for its WTO accession on August 25, 2000, China becomes a formal Member on December 11, 2001, 30 days after the accession approval.

China committed, upon accession, to comply with the TRIMs Agreement, without recourse to the provisions of Article 5 of the TRIMs Agreement and to eliminate all subsidy programs falling within the scope of Article 3 of the SCM Agreement. In addition, China shall not maintain or introduce any export subsidies on agricultural products. Therefore, China did not get any special waiver period as a developing country. Moreover, the importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product. Once China has established, under the national law of the importing WTO Member, that it is a market economy, the above provision shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of non-market economy shall expire 15 years after the date of accession.

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[20] More technically, the China's application for accession was not to re-enter the GATT, but to resume a contracting party status of the GATT. The Chairman of the Working Party was Mr. P-L. Girard from Switzerland. GATT, C/M/207.

[21] Yang Guohua & Cheng Jin, "The Process of China's Accession to the WTO", 4 *Journal of International Economic Law* 297, 304 (2001).

[22] These countries include: Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Ecuador, European Communities, Guatemala, Hungary, Iceland, India, Indonesia, Japan, Kirghizstan, Latvia, Malaysia, Mexico, New Zealand, Norway, Pakistan, Peru, the Philippines, Poland, Singapore, Slovakia, South Korea, Sri Lanka, Switzerland, Thailand, Turkey, Uruguay, the United states, and Venezuela.

[23] The Chinese Membership agreement runs to 1,500 pages, and weighs 13 kilograms. <http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/min01_11nov_e.htm>.

In addition, China agreed to accept so-called "Transitional Product-Specific Safeguard Mechanism" against its products in cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products. The accession protocol of china defines that "market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry".[24] In other words, this special safeguard mechanism effectively lowers the threshold to invoke safeguard actions from serious injury to material injury that is normally required for unfair trade cases such as antidumping or countervailing measures. This special safeguard mechanism shall be terminated 12 years after the date of accession.

Limited Experience Except for Japan

<Table 2. GATT Disputes Involving Thailand>

As Complainant			
US-Measures Affecting the Importation and Internal Sale of Tobacco		DS44/R	
As Respondent			
Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes	US	BISD 37S/200	

<Table 3. GATT Disputes Involving Korea>

As Complainant			
EC – Article XIX Action on Imports into the U.K. of Television Sets from Korea		Settled	Cases under Article XXIII
As Respondent			
Korea – Restrictions on Imports of Beef	Australia, New Zealand, US	BISD 36S/202, 36S/234, 36S/268 (adopted on Nov. 7, 1989)	Cases under Article XXIII
Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States	US	BISD 40S/205 (adopted on April 27, 1993)	Case under the Tokyo Round Anti-dumping Code

During the GATT period, formal trade dispute settlements were not frequently utilized by East Asian countries except for Japan. Thailand had disputes concerning tobacco with the United States as both a complainant and a respondent. Korea was challenged twice at the GATT

[24] WTO, WT/ACC/CHN/49, para.16.4.

dispute settlement system and brought a complaint against the EC. Other East Asian countries were not visible at least in terms of the GATT dispute settlement system.

Japan was, however, one of the most frequent targets for complaints in the GATT dispute settlement system.[25] While it brought 12 complaints on 11 distinct matters mostly against the US and the EC, Japan was challenged in 28 cases on 23 distinct matters. Among 28 cases challenged, 13 cases went to a panel and only 6 cases ended with substantive panel reports. 12 complaints by Japan resulted in only 2 panel decisions. Under the GATT system, the EC and the US were the major disputing parties. It is noted that whereas Japan stood against the EC in 5 cases as both complainant and respondent, the US challenged Japan in 12 cases and was challenged by Japan in 4 cases. In terms of a subject matter, anti-dumping measures by trading partners were the primary target of Japan's complaints. To the contrary, import restrictive measures by Japan concerning agricultural, textile and leather products were major issues disputed by other GATT contracting parties.

<Table 4-1. GATT Cases: Japan as a Complainant[26]>

Case Name	Defendant	Date
Italian Import Restrictions – Consultations Under Art.XXII.1	Italy	July 1960
US – Suspension of Customs Liquidation (Zenith Case) – referred to a Working Party	US	May 1977
US – Tariff Measures on Light Truck Cab Chassis – Consultations under Art XXII.1 & XXIII.1	US	May 1980
Austria – Quantitative Restrictions on Import of Japanese Video Tape Recorders – Consultations under ArtXXII.1	Austria	Feb. 1981
EC- Import Restrictive Measures on Video Tape Recorders – consultation under Art.XXIII.1	EC	Dec. 1982
US – Unilateral Measures on Imports of Certain Japanese Products – consultation under Art XXIII.1	US	April 1987
EC – Regulation on Imports of Parts and Components – dispute settlement under the Anti-Dumping Agreement	EC	July 1988
*EC –Regulation on Import of Parts and Components	EC	Aug. 1988
Korea – Imposition of Anti-Dumping Duties on Imports of Polyacetal	Korea	Sep. 1991
EC – Treatment of Anti-Dumping Duties as a Cost In Refund Proceedings – consultations under the Anti-Dumping Agreement	EC	April 1992
*EC– Anti-Dumping Proceedings in the Europeans Community on Audio Tapes and Cassettes Originating in Japan	EC	May 1992
US – Provisional Anti-Dumping Measures against Imports of Certain Steel Flat Products – consultations under the Anti-Dumping Agreement	US	June 1993

(12 Cases on 11 distinct matters; 2 cases marked with*went to a penal)

[25] The United States and the EC had been the two most frequently challenged countries under the GATT dispute settlement systems. The next frequent target was Japan. See Robert Hudec, *Enforcing International Trade Law*, 590-608 (1993).

[26] Yuji Iwasawa, "WTO Dispute Settlement and Japan", in *New Direction in International Economic Law* (edited by M. Bronckers & R. Quick, 2000)473, at 486-488.

<Table 4-2. GATT Cases: Japan as a Defendant>

Case Name	Complainant	Date
**Uruguayan Recourse to Art. XXIII[27]	Uruguay	Nov. 1961
Japan-Tariff Treatment of Sea Water Magnesite– Consultations under Art. XXII.1	US	Jan. 1964
Japan – Restrictions on Imports of Beef and Veal –Consultation under Art XXII.1	Australia	Nov. 1974
*Japan – Measures on Import of Thrown Silk Yarn	US	July 1978
*Japanese Measures on Imports of Leather	US	July 1978
*Japan's Measures on Imports of Leather	Canada	Oct. 1979
*Japan – Restraints on Imports of Manufactured Tobacco from US	US	Nov. 1979
Japan – Measures on Imports of Leather	India	April 1980
Japanese Measures on Edible Fats – Consultation under Art.XXII.1	New Zealand	Oct. 1980
Japan – Certification Procedures for Metal Softball Bats – Dispute under the Standard Agreement	US	Sep. 1982
**Panel on Japanese Measures on Imports of Leather	US	Jan. 1983
Japan –Nullification and Impairment of Benefits and Impediment to the Attainment of GATT Objectives	EC	April 1983
Japan – Measures Affecting the World Market for Copper Ores and Concentrates-Consultations under Art. XXII.2 and Good offices of the Director-General	EC	March 1984
Japan – Single Tendering Procedures – Consultations under the Government Procurement Agreement	US	Nov. 1984
Japan – Quantitative Restrictions or Measures Having Equivalent Effect Applied on Imports of Various Product – Consultations Under Art.XXII.1	Chile	Nov. 1984
* Japan –Quantitative Restrictions on Imports of Leather Footwear	US	March 1985
** Japan –Restrictions on Imports of Certain Agricultural Products	US	July 1986
Japan – Restrictions on Imports of Herring, Pollack and Surimi	US	Oct. 1986
** Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines And Alcoholic Beverages	EC	July 1986
**Japan – Trade in Semi-Conductors	EC	Feb. 1987
** Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber	Canada	Nov. 1987
* Japan –Restrictions on Imports of Beef and Citrus Products	US	March 1988
* Japan – Restrictions on Imports of Beef	Australia	April 1988
Japan – Restrictions on Imports of Beef	New Zealand	May 1988
Japan – Restrictions on Imports of Certain Agricultural Products	US	Feb. 1991
Japan – Restrictions on Imports of Certain Agricultural Products	Australia	April 1991
Japan – Restrictions on Imports of Certain Agricultural Products	New Zealand	Aug. 1992
Japan – Measures Affecting Imports of Certain Telecommunications Equipment	EC	Oct. 1994

(28 cases on 23 distinct matters; 13 cases marked with * went to a panel; 6 cases marked with ** ended with substantive reports by panels.)

[27] Uruguayan submissions were related to the fifteen contracting parties; namely, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland and the United States.

As indicated above, Japan rarely used the GATT dispute settlement system as part of its trade diplomacy while Japan was frequently targeted at dispute settlement cases.[28] During the GATT regime, Japan was considered one of those countries that leaned toward pragmatism as opposed to other countries, notably the United States, that favored legalism[29]. Japan tried to resolve a dispute with mutual agreement, rather than actually litigate merits of cases through the dispute settlement system. Whereas a sizable number of cases were filed against Japan under the GATT dispute settlement system, Japan seldom brought a dispute to the GATT until the late 1980s. Moreover, Japan continued its efforts to settle the dispute amicably by agreement between the parties even after a case was referred to a panel. Thus, among 28 cases brought against Japan in the GATT, only six cases ended with a substantive report by the panel. Only two out of 12 cases Japan brought to the GATT dispute settlement system concluded with panel decisions.

Japan was not very eager to bring a dispute to the GATT so as to assert its rights under the GATT. Japan generally tried to avoid having recourse to more confrontational panel procedures. It was not until 1988 that Japan requested the establishment of a panel for the first time, 33 years after its accession to the GATT. But, since the *EC – Regulation on Import of Parts and Components* case ended with favorable decisions to Japan, the Japanese government changed its attitude and pursued more rule-oriented trade policies.[30]

III. WTO Dispute Settlements in East Asia

Overall Statistics

The Uruguay Round negotiation crucially augmented the GATT dispute settlement system[31], rectifying several systemic problems by instituting, *inter alia*, a quasi-automatic adoption mechanism, an appellate procedure and a single unified system.[32] As mostly

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[28] John H. Jackson, "Western View of Japanese Interntional Law Practice for the Maintenance of the International Economic Order", in *Japan and International Law: Past, Present and Future* (N. Ando, ed., 1999) 205, 213.

[29] Yuji Iwasawa, "WTO Dispute Settlement and Japan", in *New Directions in International Economic Law: Essays in Honor of John H. Jackson* (M. Bronckers & R. Quick, eds. 2000) 473, 474.

[30] Regarding the historical importance of *EC – Regulation on Import of Parts and Components* case in Japan, see *id.* at .

[31] After the Tokyo round negotiation that established nine additional so-called "Side Code", the GATT dispute settlement system suffered particularly from forum shopping problems. See generally John H. Jackson, *Restructuring the GATT System* (London: Council on Foreign Relations Press; 1990).

[32] For detailed discussion on the WTO dispute settlement system, see generally John H. Jackson, *The*

concurred, the WTO dispute settlement system has been working very effectively in resolution of trade disputes and become the core part of the WTO system. As of June 26, 2003, 295 cases have been brought to the WTO dispute settlement body. Among them, 71 panel and Appellate Body reports were adopted, while 44 cases were resolved with mutually agreed solutions and 24 cases were settled or inactive.[33]

<Table 5. Statistics on WTO Disputes by Parties (until 7.31.2003)>

Members	Number of Cases as a Respondent	Number of Cases as a Complainant	Total
East Asian Members			
China		1	1
Taiwan		1	1
Hong Kong, China		1	1
Indonesia	4	2	6
Japan	13	11	24
Korea	12	9	21
Malaysia	1	1	2
Philippines	4	4	8
Singapore		1	1
Thailand	1	10	11
Notable Others			
Argentina	15	9	24
Australia	9	7	16
Brazil	12	22	34
Canada	12	24	36
European Communities	59	62	121
India	14	15	29
Mexico	10	13	23
United States	81	75	156
Total by All Members	**299**	**326***	

*Note: The discrepancy between the numbers is due to the fact that, in some cases, there are multiple complainants against one respondent.

Japan

A. Japan as Complainant

World Trade Organization: Constitution and Jurisprudence (London: Royal Institute of International Affairs, 1998); David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (The Hague: Kluwer Law International, 1999); U.E. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer Law International, 1997); *Special Issue: WTO Dispute Settlement System*, 1 *Journal of International Economic Law*, No.2 (1998); Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute settlement* (London: Cameron May, 2002).

[33] WTO, WT/DS/OV/14 (dated 30 June 2003), ii. See also Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2002: A Statistical analysis', 6 *Journal of International Economic Law* 251 (2003).

As a complainant, the primary disputing party for Japan has been the United States. Up to date, seven out of ten complaints are against the United States. In terms of subject matters, trade remedy measures, particularly antidumping measures by the United States, were the major issue to be disputed. It is also noted that automotive industry in Japan has actively utilized the WTO dispute settlement system to address WTO-inconsistent trade barriers in foreign markets. In that regard, it is noteworthy that three complaints against Brazil, Indonesia and Canada are all concerned with measures related to an automobile industry. Considering the fact that the very first WTO complaint by Japan against the United States also dealt with automobile industry, the WTO dispute settlement mechanism appears to play a crucial role for rectifying unfair competitive conditions regarding Japanese automotive industries.

<Table 6. WTO Disputes Involving Japan>

As Complainant		
US – Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974	DS6	
Brazil – Certain Automotive Investment Measures	DS51	
*Indonesia – Certain Affecting the Automobile Industry	DS55	
*US – Measure Affecting Government Procurement	DS95	
*Canada – Certain Measures Affecting the Automotive Industry	DS139	
*US – Anti-Dumping Act of 1916	DS162	
*US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan	DS184	
*US – Continued Dumping and Subsidy Offset Act of 2000	DS217	
US – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan	DS244	
US – Definitive Safeguard Measures on Imports of Certain Steel Products	DS249	
As Respondent		
*Japan – Taxes on Alcoholic Beverages	DS8/ EC, DS10/ Canada, DS11/ US	
Japan – Measures Affecting the Equipment of Telecommunications Equipment	DS15/ EC	
Japan – Measures Concerning the Protection of Sound Recordings	DS28/ US, DS42/ EC	
*Japan – Measures Affecting Consumer Photographic Film and Paper	DS44/ US	
Japan – Measure Affecting Distribution Services	DS45/ US	
Japan – Measures Affecting Imports of Pork	DS66/ EC	
Japan – Procurement a Navigation Satellite	DS73/ EC	
*Japan – Measures Affecting Agricultural Products	DS76/ US	
Japan – Tariff Quotas and Subsidies Affecting Leather	DS147/ EC	

The very first complaint by Japan to the WTO DSB, *US – Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974* (DS6), indeed provided the Japanese government with profound confidence in the new system. Right after the

WTO began its work in 1995, the United States threatened the unilateral retaliation on Japanese automobiles under Section 301.[34] Instead of undertaking "negotiations" as previously done, the Japanese government resorted to the WTO dispute settlement system by challenging the Section 301 measures.[35] The United States finally withdrew the Section 301 threat and both parties notified the settlement of the dispute to the WTO on July 19, 1995.[36] The outcome of this case forcefully illustrated the effectiveness and usefulness of the WTO dispute settlement system as opposed to unilateralism.

B. Japan as Respondent

As a respondent, Japan has been challenged mostly by the European Communities and the United States. It is noted that whereas Japan has been challenged most by the European Communities, it has not raised so far any consultation request against the European Communities. Unlike other WTO Members, especially the United States and the European Communities that have frequently utilized trade remedy measures to protect domestic industries, Japan rarely relied on those measures to constrain importation. Accordingly, Japan has never been challenged concerning application of trade remedy measures that is in fact the most frequently disputed issue under the WTO dispute settlement system. Instead, the challenged area for Japan encompassed a range of issues from domestic tax system to distribution services and SPS measures for agricultural products.

Interestingly, complaints against Japan were concentrated during the early WTO years, particularly 1995-1997. The last consultation request against Japan was submitted to the WTO on October 8, 1998 by the European Communities concerning the management of the tariff quotas for leather and the subsidies allegedly benefiting the leather industry and "Dowa" regions. The consultation for this case is technically pending yet. Since then, Japan has not been challenged by other WTO Members. This may be explained by the fact that complaints against Japan under the WTO dispute settlement system have been concerning more systemic issues rather than case-specific actions such as trade remedy measures that are hardly used by the Japanese government. In other words, after somewhat intensive probing by other WTO Members in the early WTO years, systemic or legal inconsistency of domestic policy measures or legal systems were mostly addressed and modified to comply with the WTO disciplines. There remain, therefore, few systemic problems to be addressed at least in terms of the current WTO disciplines.

Among 9 challenged cases, *Japan – Measures Affecting Consumer Photographic Film*

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[34] The legal justification of this Section 301 measure was in fact controversial. See John H. Jackson, "US Threat to New World Trade Order", *Financial Times* (May 23, 1995), at 17.
[35] WTO, WT/DS6/1.
[36] Raj Bhala, *World Trade Law*, 1066-1068 (1998).

and Paper (DS44, 'Japan – Film') deserves more explanation. This case is so far the only case in which the primary complaint is based on non-violation claims.[37] Despite strenuous efforts by the United states to vindicate its claims, the panel ruled that the United States failed to demonstrate that, under GATT Article XXIII:1(b), the distribution "measures" nullify or impair benefits accruing to the United States.[38] This ultimate legal victory for Japan under the WTO dispute settlement system, after initiated by positive determination under the Section 301 proceeding, substantially strengthened the Japanese government's position concerning its domestic trade policies.[39] Typically, Japan has been vulnerable to blames for its convoluted non-tariff barriers. But, after this case, the Japanese government has become much more stubborn to accept its trading partners' claims concerning unjustified or unreasonable non-tariff barriers, at least administered by the government.

Under the WTO system, Japan's dispute settlement has predominantly dealt with the United States. In terms of subject matters, anti-dumping measures, particularly by the United States, have been a major area for dispute settlement. On the other hand, the European Communities brought the most complaints regarding trade barriers in Japan. It is noted that Japan has not raised any complaints against the European Communities under the WTO system, although the European Communities was the most frequent target of Japan's complaints under the GATT system. It is also noteworthy that Japan is now one of the most active third parties for the WTO dispute settlement. As a third party, Japan has showed a strong interest in disputes concerning measures by the US government.

Korea[40]

Under the WTO system, the Korean government changed a dispute aversion attitude and has become considerably more active in asserting its rights through the dispute settlement mechanism. Incidentally, since the middle 1990s, the trade balances with those major trading partners have been reversed and showed substantial deficits. For example, the trade deficit of Korea with respect to the United States began to occur from 1994 and remained throughout 1997, reaching $8.5 billion in 1997. This trend was again reversed in 1998 primarily due to the financial crisis which caused imports to plummet. Although there were some differences in the

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[37] James P. Durling and Simon N. Lester, "Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy", 32 *The George Washington J. of Int'l L. and Economics* 2 (1999).
[38] WTO, WT/DS44/R (adopted on April 22, 1998).
[39] For comprehensive coverage of the relevant legal proceedings and documents concerning Japan – Film case, see James P. Durling, *Anatomy of Trade Disputes* (London: Cameron May, 2001).
[40] This part is substantially drawn from Dukgeun Ahn, "Korea on the GATT/WTO Dispute Settlement System: Legal Battles for Economic Development", 6 *Journal of International Economic Law* (2003).

magnitude of the trade imbalances, the overall trends of trade balance were very much the same with respect to other major trading partners. The changes in such underlying economic circumstances would partly explain more aggressive attitude of the Korean government toward formal dispute resolution.

<Table 7. WTO Disputes Involving Korea>

As Complainant		
US – Imposition of Anti-Dumping Duties on Imports of Color Television Receivers from Korea	DS89	
* US – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea	DS99	
* US – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea	DS179	
* US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea	DS202	
Philippines – Anti-Dumping Measures regarding Polypropylene Resins from Korea	DS215	
* US – Continued Dumping and Subsidy Offset Act of 2000	DS217	
US – Definitive Safeguard Measures on Imports of Certain Steel Products	DS251	
US – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea	DS296	
EC – Countervailing Measures on Dynamic Random Access Memory Chips from Korea	DS299	
As Respondent		
Korea – Measures Concerning the Testing and Inspection of Agricultural Products	DS3, DS41/ US	
Korea – Measures Concerning the Shelf-Life of Products	DS5/ US	
Korea – Measures Concerning Bottled Water	DS20/ Canada	
Korea – Laws, Regulations and Practices in the Telecommunications Procurement Sector	DS40/ EC	
*Korea – Taxes on Alcoholic Beverages	DS75/EC, DS84/ US	
*Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products	DS98/ EC	
*Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef	DS161/ US, DS169/ Australia	
*Korea – Measures Affecting Government Procurement	DS163/ US	
Korea – Measures Affecting Trade in Commercial Vessels	DS273/ EC	

* Cases for which panel reports were issued.

A. Korea as Respondent

As of August 2003, Korea was challenged by 12 complaints on 9 distinct matters, as summarized in Table 7. It is noted that complainants against Korea have so far been raised mostly by the United States and the European Communities. The only two other complaints were filed by Australia and Canada. Since the Korean government commenced the litigation of WTO cases in *Korea - Taxes on Alcoholic Beverages*, it seems predetermined to exhaust the full

procedure of the dispute settlement system, at least if contested by other Members.

1. Settlement by Consultation: Not Yet Ready to Litigate

Korea was a respondent in some of the very early cases in the WTO dispute settlement, which concerned somewhat unfamiliar obligations under the SPS and TBT Agreements. The United States made a consultation request against Korea on April 6, 1995 (DS3) and basically on the same matter again on May 24, 1996 (DS41)[41]. Both cases were suspended because the United States did not take additional steps. On May 5, 1995, the United States made a consultation request regarding the regulation on the shelf-life of products (DS5). This case was settled with a mutually acceptable solution.[42] The Canadian request for consultation regarding the Korean regulation on the shelf-life and disinfection treatment of bottled water was also settled with a mutually satisfactory solution (DS20).[43] These four complaints were based on the SPS and TBT Agreements in addition to the GATT and could be settled promptly.

On May 9, 1996, the European Communities requested for consultations, alleging that the procurement practices for the Korean telecommunications sector were discriminatory against foreign suppliers, and that the bilateral agreement with the United States was preferential (DS40). The parties also agreed on a mutually satisfactory solution during the consultation.[44]

The Korean government basically tried to settle the first five complaints, rather than actually litigate the cases. This is partly because the merits of the cases were relatively clear and partly because the economic stakes at issue were not substantial. In addition, the Korean government was not sufficiently prepared to handle the newly instituted WTO dispute settlement system in the procedural aspect and unfamiliar legal issues concerning the SPS and TBT Agreements in the substantive aspect.

2. Full Litigation: Fight to the End

The very first case in which Korea experienced the whole WTO dispute settlement procedure was the *Korea – Taxes on Alcoholic Beverages* (‘*Korea – Soju*’) case (DS75 and

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[41] The second consultation request by the United States encompassed all amendments, revisions, and new measures adopted by the Korean government after the first consultation request. WTO, WT/DS41/1, dated 31 May 1996.

[42] WTO, WT/DS5/5, dated 31 July 1995.

[43] WTO, WT/DS20/6, dated 6 May 1996.

[44] WTO, WT/DS40/2, dated 29 October 1997. Korea and the European Communities signed the ‘Agreement on Telecommunications Procurement between the Republic of Korea and the European Community’ on 29 October 1997 and the Agreement entered into force on 1 November 1997. Subsequently, Korea entered into a similar bilateral agreement for telecommunications equipment procurement with Canada. See also Han-young Lie & Dukgeun Ahn, ‘Legal Issues of Privatization in Government Procurement Agreements: Experience of Korea from Bilateral and WTO Agreements’, 9 (2) *International Trade Law & Regulation* 54 (2003).

DS84). The European Communities and the United States contended that the Korean liquor taxes of 100% on whisky and 35% on diluted *soju* were not consistent with the national treatment obligation under Article III of the GATT. Basically, this case was considered as a 'revisited' *Japan – Taxes on Alcoholic Beverages* (*'Japan – Shochu'*) case (DS8, DS10 and DS11), in which the Japanese tax system to discriminate imported alcoholic beverages over *shochu* was found to be in violation of Article III of the GATT. As a legal strategy to distinguish this case from the *Japan-Shochu* case, the Korean government tried to inject more antitrust law principles and experts in the panel proceeding because a large price gap between *soju* and whiskey might be deemed to represent a non-competitive relationship of pertinent products in the antitrust law context.[45]

The panel and the Appellate Body held that the Korean taxes on *soju* and whisky were discriminatory and the Dispute Settlement Body (hereinafter 'DSB') adopted this ruling on February 17, 1999. The reasonable period for implementation was determined to be 11 months and two weeks, that is, from February 17, 1999 to January 31, 2000.[46] Subsequently, Korea amended the Liquor Tax Law and the Education Tax Law to impose flat rates of 72% in liquor tax and 30% in education tax, that entered into force on January 1, 2000.[47] The DSB recommendation was successfully implemented a month earlier than the due date.

This case awakened the Korean public about the role and influence of the WTO dispute settlement system. The media and newspapers closely covered every step pertaining to this case, from the consultation request to the panel proceeding and the Appellate Body ruling. It was not just because this case was the first WTO dispute settlement proceeding for Korea, but also because the popularity of the product concerned, *soju*, was probably incomparable to any other product in Korea. Despite objections by the general public as well as by *soju* manufacturers, the Korean government amended the tax laws to substantially increase liquor taxes on *soju*, instead of reducing the liquor tax on whisky to the original level on *soju*, in order to eliminate the WTO-illegal tax gap while minimizing the potential adverse impact on public health and consequent social costs.[48] By experiencing the impact of the WTO dispute settlement decision probably at the deepest and widest level of a daily life, this case played a crucial role to enhance the WTO awareness in Korea.

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[45] For example, the Korean government tried to include antitrust law experts regardless of their nationality as panelists, but failed due to the objection by the complainants. Hyun Chong Kim, 'The WTO Dispute Settlement Process: A Primer', 2 *Journal OF International Economic Law* 457 (1999), at 465-466. Except for this case, the Korean government as a respondent did not resort to the Director-General for the panel selection.

[46] WTO, WT/DS75/16, WT/DS84/14, dated 4 June 1999.

[47] WTO, WT/DS75/18, WT/DS84/16, dated 17 January 2000.

[48] See generally Korea Institute of Public Finance, *Monthly Public Finance Forum* (September 1999, *in Korean*) 82-102.

The first dispute settlement case under the Agreement on Safeguards also involved the Korean safeguard measure concerning dairy products (DS98)[49]. On August 12, 1997, the European Communities requested consultations with Korea regarding the safeguard quotas that went into effect on March 7, 1997 and was to remain in force until February 28, 2001.[50] The panel and the Appellate Body held that the Korean safeguard measures were inconsistent with the obligations under the Agreement on Safeguards. The DSB adopted those rulings on January 12, 2000 and the reasonable implementation period was agreed to expire on May 20, 2000. Korea, through its administrative procedures, effectively lifted the safeguard measure on imports of the dairy products as of May 20, 2000.

Since its inception in 1987 to 1994, the KTC had relied more on safeguard measures than on antidumping measures to address injury to domestic industries incurred by importation.[51] During 1987-1994, the KTC engaged in 25 safeguard and 12 anti-dumping investigations that resulted in 16 safeguard and 8 antidumping measures.[52] After this case, however, the KTC markedly abstained from using a safeguard measure whereas it substantially increased anti-dumping actions. For example, from 1997 to 2002, there were only 4 safeguard investigations but 46 anti-dumping cases.[53] Accordingly, subsequent safeguard actions by the KTC appeared seriously disciplined by the WTO dispute settlement system. The safeguard mechanism in Korea was further elaborated with new laws and regulations on trade remedy actions.[54]

On the other hand, it was reported that the importation of dairy products at issue was reduced by about $70 million during the period in which the safeguard measure remained in force. This result, along with the outcome from *Argentina – Safeguard Measures on Imports of Footwear* (‘*Argentina – Footwear*’)[55] case whose proceedings were conducted almost concomitantly, raised an important systemic issue for the WTO safeguard system. In the *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* case, the termination of illegal safeguard measures pursuant to the DSB recommendation was undertaken only 9 months

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[49] The first complaint brought under the Agreement on Safeguards was *US – Safeguard Measure against Imports of Broom Corn Brooms*. WTO, WT/DS78/1, dated 1 May 1997. This case was resolved without litigation although it remained technically pending. The actual panel decision concerning safeguard measures in the WTO system was issued for the first time in *Korea – Dairy Safeguards*. WTO, WT/DS98/R, adopted 12 January 2000.

[50] WTO, G/SG/N/10/KOR/1, dated 27 January 1997 and G/SG/N/10/KOR/1/Supp.1, dated 1 April 1997.

[51] On the other hand, the KTC has never even initiated a countervailing investigation to date. See Korea Trade Commission, *A History of 10 Years for the KTC* (1997, *in Korean*), 280-299.

[52] Ibid.

[53] Korea Trade Commission, *Summary Report of Trade Remedy Action* (February 2003, *in Korean*) 1.

[54] Act on Investigation of Unfair Trade Practice and Trade Remedy Measures, Law 6417; Implementing Regulation, Presidential Order No.17222.

[55] WTO, WT/DS121/AB/R, adopted 12 January 2000. See also WTO, WT/DSB/M/75, dated 7 March 2000, at 2.

prior to the original due date of the measures. In the *Argentina – Footwear* case, the implementation of the DSB recommendation by repealing the safeguard measure coincided with the original due date of the measure. Thus, the experience from these early safeguard cases raised imminent need for considering expeditious or accelerated dispute settlement procedures.

On February 1, 1999, the United States requested consultations with Korea in respect of a dual retail system for beef (‘*Korea – Beef II’*; DS161). On April 13, 1999, Australia also requested consultations on the same basis (DS169). On January 10, 2001, the DSB adopted the panel and the Appellate Body reports that held the Korean measures to be inconsistent with the WTO obligation. The parties to the dispute agreed that a reasonable implementation period would be 8 months and thus expire on September 10, 2001.[56] The Korean government subsequently revised the ‘Management Guideline for Imported Beef’ to abolish the beef import system operated by the Livestock Products Marketing Organization.[57] In addition, on September 10, 2001, the Korean government eliminated the dual retail system for beef by entirely abolishing the ‘Management Guideline for Imported Beef’.[58] Thus, Korea considered that it had fully implemented the DSB's recommendation in this case.[59]

The only dispute settlement case concerning the Agreement on Government Procurement (‘GPA’) to date is *Korea - Measures Affecting Government Procurement* (DS163).[60] On February 16, 1999, the United States requested consultations regarding certain procurement practices of the Korean Airport Construction Authority (‘KOACA’). The panel ultimately ruled that the KOACA was not a covered entity under Korea’s Appendix I of the GPA, even if the panel noted that the conduct of the Korean government with respect to the US inquiries in the course of pertinent negotiation “[could], at best, be described as inadequate”.[61] The United States did not make an appeal and the panel report was adopted on June 19, 2000.[62] One of the important lesson from this case for the Korean government was about the discrepancy between its organizational mechanism for governmental offices that is based on decision making structures and the WTO concession practice that is based on the institutional ‘entities’ in the context of the GPA. The Government Organization Act of the Republic of Korea prescribes various government entities that actually constitute mere positions of certain level.

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[56] WTO, WT/DS161, DS169/12, dated 24 April 2001.
[57] Ministry of Agriculture Notification 2000-82.
[58] Ministry of Agriculture Notification 2001-54.
[59] WTO, WT/DSB/M/110, dated 22 October 2001.
[60] This case is the fourth complaint concerning government procurement. The first complaint, *Japan – Procurement of a Navigation Satellite* (DS73), was settled with a mutually satisfactory solution. The second and third complaints, *US – Measure Affecting Government Procurement* (DS88, DS95), were in respect of the same issue. The panel’s authority lapsed as of February 11, 2000, when it was not requested to resume the proceeding after suspension of the works. WTO, WT/DS88, DS95/6 (dated Feb. 14, 2000).
[61] WTO, WT/DS163/R (adopted on June 19, 2000), para.7.80.
[62] WTO, WT/DS163/7 (dated Nov. 6, 2000).

Moreover, the Korean government has often established a special 'task force', 'group', or 'committee' with specific mandates, whose legal foundations are obscure.[63] This issue of how to determine the scope of covered entities in relation to a newly established governmental organ may require a more elaborate approach in the context of the GPA.

On October 24, 2000, the Committee of European Union Shipbuilders Associations filed a complaint under the trade barriers regulation ('TBR') procedure concerning divergent financial arrangements for Korean shipbuilding industries. Although the Commission was mindful of the extraordinary situation in Korea that was caused by the financial crisis in 1997, it found that parts of corporate restructuring programs and assistance through taxation for shipbuilding companies constituted prohibited subsidies within the meaning of the WTO Agreement on Subsidies and Countervailing Measures ('SCM Agreement').[64] On October 21, 2002, the European Communities made a formal request for a consultation with Korea under the WTO dispute settlement system on various corporate restructuring measures for the shipbuilding industry, alleging that they constituted prohibited subsidies under the SCM Agreement.[65]

This case was merely the beginning of much more controversial trade conflicts as regards corporate restructuring programs undertaken by the Korean government as parts of the IMF program to overcome the financial crisis. On July 25, 2002, the European Commission initiated a countervailing investigation on the Korean semiconductor producers, alleging that the governmental intervention in terms of debt-for-equity swaps and debt forgiveness for pertinent companies established illegal subsidies.[66] They concluded the countervailing proceeding with 35% of final duties. Apart from the EC's action against the Korean government, the US authorities also initiated a countervailing investigation in November 2002 that ended up with a final determination for countervailing duties up to 57.73%.[67] The final duty was slightly reduced to 44.29% when the US authorities corrected calculation mistakes.[68] These concomitant actions in the two major markets, if sustained in the final determinations, would risk the whole fate of the third largest semiconductor producer in the world. Furthermore, the legal validity of those actions would have significant implications for many other Korean

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[63] Young-Joon Cho, 'Review of the Panel Report for *Korea - Measures Affecting Government Procurement*', 33 *International Trade Law* 127 (2000, *in Korean*), at 152.
[64] Commission Decision 2002/818/EC, OJ 2002 L 281/15.
[65] WTO, WT/DS273/1, dated 24 October 2002.
[66] WTO, G/SCM/N/93/EEC, dated 12 March 2003.
[67] US Department of Commerce, *Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, <http://ia.ita.doc.gov/download/drams-korea-draft-prelim-fr-notice.pdf> (visited on April 12, 2003).
[68] US Department of Commerce, Notice of Amended Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea (C-580-851).

industries that experienced similar restructuring programs in the course of the IMF program during the past few years. The Korean government brought complaints against both actions to the WTO DSB to vindicate the legitimacy of its systemic and structural measures adopted during the IMF program. The outcome of the WTO dispute settlement related to this dispute would certainly be an interesting and important addition to the WTO jurisprudence.

3. Overall Comments

Considering the experience so far as a respondent in the WTO dispute settlement, the reaction by the Korean government appears to show a typical pattern as an average WTO Member. For half of the complaints, Korea tried to settle the trade disputes without resorting to legal procedures. But, as it obtained more experience and the WTO jurisprudence became more sophisticated, Korea has become determined to take a more legalistic approach in dealing with complaints by other Members.

When engaged in a WTO legal proceeding, Korea has been in full compliance with DSB recommendations. For all three cases in which Korea was found to be inconsistent with the WTO Agreements, Korea fully implemented the DSB recommendations within the determined or agreed reasonable periods of time, even in politically loaded areas such as taxes and agriculture. It is also noted that Korea made appeals for all three cases in which the panels found some violations for its own measures. Lastly, it should also be noted that the areas challenged by other Member countries are fairly diverse, ranging from SPS and TBT measures to government procurement, safeguard, domestic taxes and retailing distribution systems. This is starkly contrasted with the cases in which Korea brought complaints, which concentrated mainly on antidumping measures. Overall, the dispute settlement experience of Korea as a respondent in such divergent areas under the auspice of the WTO has played a significant role to enhance the public recognition of the importance of the multilateral trade norms in all aspects of economic activities and policy making.

B. Korea as Complainant

So far, the Korean complaints in the WTO dispute settlement system have focused primarily on the US trade remedy measures, especially antidumping measures. Five out of the total nine complaints concerned with antidumping matters and seven complaints were against the United States. Only one case was against the Philippines and the other against the European Communities. Two cases were concerning safeguard measures and the other two were concerning countervailing duties. In other words, the Korean complaints to the WTO dispute settlement system up to date can be simply summarized as exclusive concentration on trade remedy issues, predominantly caused by US antidumping measures.

While Korea had been challenged in the WTO dispute settlement system from the very early period[69], Korea appeared quite hesitant to bring complaints against other WTO Member countries. It was only in July 1997 that Korea began to use the WTO dispute settlement system as a complainant. The first WTO case Korea brought to the DSB was in respect of the US antidumping duties on Samsung color television receivers. On July 10, 1997, Korea requested a consultation, alleging that the United States had maintained an antidumping duty order for the past 12 years despite the cessation of exports as well as the absence of dumping. Subsequently, in response to the US preliminary determination of December 19, 1997 to revoke the anti-dumping duty order, Korea withdrew its request for a panel. On August 27, 1998, the United States made a final determination to revoke the anti-dumping duty order which had been imposed on Samsung color television receivers since 1984. At the DSB meeting on September 22, 1998, Korea announced that it definitively withdrew the request for a panel because the imposition of anti-dumping duties had been revoked.[70]

For a similar case regarding antidumping duty orders on DRAMS, however, the United States did not readily revoke the orders and, on November 6, 1997, Korea requested the establishment of a panel. The DSB established a panel at its meeting on January 16, 1998. On March 19, 1998, the Director-General completed the panel composition and thereby Korea began its first panel proceeding as a complainant. The Panel found the measures at issue to be in violation of Article 11.2 of the WTO Antidumping Agreement.[71] The United States did not make an appeal and the DSB adopted the panel report on March 19, 1999.

Incidentally, this first 'win' as a complainant in *US – DRAMS* came just 11 days after Korea lost its first WTO litigation as a respondent in *Korea – Soju*.[72] This somewhat fortunate timing of winning a WTO case contributed to alleviating the general concern and resistance of the Korean public about the fairness and objectivity of the WTO dispute settlement system.

The two parties agreed on an implementation period of 8 months, expiring on November 19, 1999. At the DSB meeting on January 27, 2000, the United States stated that it had implemented the DSB recommendations by amending the pertinent Department of Commerce ('DOC') regulation, more specifically, by deleting the 'not likely' standard and incorporating the 'necessary' standard of the WTO Antidumping Agreement. The DOC, however, issued a revised

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[69] In 1995, three consultation requests were brought against Korea. The first two requests for *Korea – Measures Concerning the Testing and Inspection of Agricultural Products* (DS3) and *Korea – Measures Concerning the Shelf-Life of Products* (DS5) were made on April 6 and May 5, 1995.

[70] WTO, WT/DS89/9, dated 18 September 1998.

[71] WTO Panel Report, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* ('*US – DRAMS'*), WT/DS99/R, adopted 19 March 1999.

[72] The Appellate Body report for *Korea – Soju* case was circulated on 18 January 1999, while the panel report for *US – DRAMS* case was circulated on 29 January 1999. See WTO, *Korea – Soju*, WT/DS75, DS84/AB/R, adopted 17 February 1999.

'Final Results of Re-determination' in the third administrative review on November 4, 1999, concluding that, because a resumption of dumping was likely, it was necessary to leave the antidumping order in place. On April 6, 2000, Korea requested the referral of this matter to the original panel pursuant to Article 21.5 of the DSU and the European Communities reserved its third-party right. On September 19, 2000, Korea requested the panel to suspend its work and, on October 20, 2000, the parties notified the DSB of a mutually satisfactory solution to the matter, involving the revocation of the antidumping order at issue as the result of a five-year 'sunset' review by the DOC.[73]

This case was the first case ever in which Korea won a favorable panel decision throughout the GATT/WTO system. Although it took one and half more years for the United States to satisfactorily comply with the DSB recommendation after the adoption of the panel report, the sheer fact of winning a WTO dispute concerning chronic trade barriers of the major trading partners furnished the Korean government with confidence in the new WTO dispute settlement system. Unfortunately, however, the dismal implementation by the United States after the panel proceeding compromised confidence of a relatively new user concerning the effectiveness and fairness of the WTO dispute settlement system.[74] In any case, *US – DRAMS* clearly led the Korean government to adopt a more legal approach by utilizing the WTO dispute settlement system to address foreign trade barriers in subsequent cases. In other words, the experience and confidence gained from this case clearly led the Korean government to move to the direction of 'aggressive legalism' in handling subsequent trade disputes.[75]

The *United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* ('*Korea-Stainless Steel*') case dealt with two separate antidumping actions by the US authorities concerning stainless steel plate in coils ('plate') and stainless steel sheet and strip in coils ('sheet'). For the antidumping case on plate, the DOC selected January 1 to December 31, 1997 as the period of investigation and issued the final dumping margin of 16.26%. The antidumping case for sheet covered April 1, 1997 through March 31, 1998 as the period of investigation and issued the final dumping margin of 58.79% for Taihan and 12.12% for other Korean exporters including POSCO. In this case, the panel was established on November 19, 1999 but actually composed on March 24, 2000.[76]

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[73] WTO, WT/DS99/12, dated 25 October 2000.

[74] For more positive assessment for Article 21.5 proceedings, see generally Jason Kearns and Steve Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5', 5 *Journal of International Economic Law* 331 (2002).

[75] For the discussion of "aggressive legalism" by the Japanese government to deal with trade disputes, see Saadia M. Pekkanen, 'Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy', 24 *World Economy* 707 (2001), at 707-737.

[76] It took 126 days to compose the panel, which is so far the longest period of time required for the panel appointment in cases involving Korea.

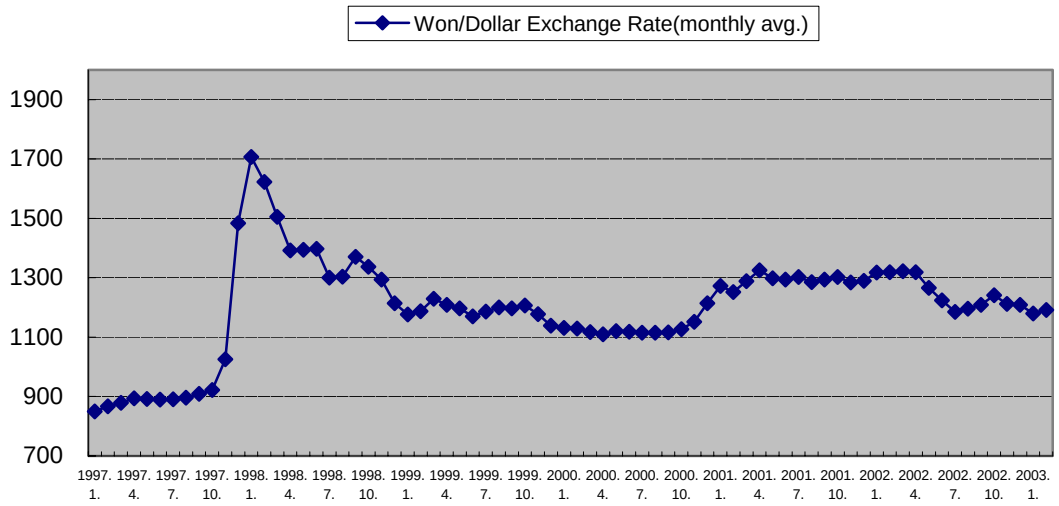

Figure 1. Won/Dollar Exchange Rate Trends[77]

The underlying economic situation for this case is remarkably aberrational.[78] The pertinent investigation periods included unprecedented fluctuation of exchange rates caused by the financial crisis. As illustrated in Figure 1, the value of the Korean currency, Won, precipitated to a half just in a time span of three months. The WTO panel found that the methodology adopted by the DOC to deal with such abnormity, including double currency conversion and the use of multiple averaging periods, were not consistent with the WTO obligations. Without the US' appeal, the DSB adopted the panel report on February 1, 2001.

This case showed how vulnerable exporters might be in terms of antidumping actions as the exchange rates became abnormally fluctuating. Since dumping margin calculation permits various price adjustment to find 'ex-factory' prices but no modification for volatile exchange rates except for averaging, unstable exchange rates can cause serious distortion in calculating dumping margins. This systemic problem may expose more exporters in developing countries that suffer from vacillating exchange rates to additional risks of being targeted by antidumping actions. Based on the Korean experience during the financial crisis, in which foreign exchange rates fluctuate at more than a normal or reasonable level, Members may consider suspension of antidumping actions at least for certain range of dumping margins that should reflect potential methodological errors. In other words, Members may consider an increase of the current *de*

[77] Bank of Korea, *Principal Economic Indicators* (March 2003). See also <http://www.bok.or.kr> (visited 25 March 2003).
[78] Timothy Lane et al., 'IMF-Supported Programs in Indonesia, Korea and Thailand: A Preliminary Assessment', *Occasional Paper 178* (Washington D.C.: International Monetary Fund, 1999).

minimis level for a period with exchange rate aberration.

On June 13, 2000, Korea made its fourth consultation request, again with the United States, in respect of the definitive safeguard measure imposed on imports of circular welded carbon quality line pipe. The definitive safeguard measure actually imposed by the President on February 11, 2000 was much more restrictive than that recommended by the International Trade Commission ('ITC'), disproportionately injuring the largest suppliers, i.e., Korean exporters.[79] The exemption of Mexican and Canadian suppliers from the safeguard measure led them to become the largest and third largest suppliers.

Korea considered that the US procedures and determinations that led to the imposition of the safeguard measure, as well as the measure itself, contravened various obligations under the Agreement on Safeguards and the GATT 1994. The panel concluded that the US measure was imposed in a manner inconsistent with the WTO obligations. In the Appellate Body proceeding[80], the Korea's argument on the permissible extent of a safeguard measure was accepted, which seems one of the key findings for the WTO jurisprudence on safeguard.[81]

It is noted that this appellate proceeding was the first WTO dispute settlement litigation handled entirely by Korean government officials. It was a substantial development for Korea in terms of capacity building for WTO dispute settlement, particularly considering the previous cases in which foreign legal counsels played primary roles in WTO litigations. Moreover, when considering the fact that Korea is one of the WTO Members that did contribute to set the procedural practices to permit private counsel in a dispute settlement proceeding, the outcome of the *US – Line Pipe* appellate proceeding substantially enhanced self-confidence and capacity in terms of much needed legal expertise.

When both parties agreed on the reasonable period of time for implementation with expiration on September 1, 2002, the arbitration under DSU Article 21.3 was suspended.[82] The US government agreed to increase the in-quota volume of imports to 17,500 tons and lower the safeguard tariff to 11%, with the termination due of March 1, 2003.[83] But, considering the original due date of the safeguard measure that was set at February 24, 2003, the practical impact of the WTO dispute settlement system was to increase the in-quota volume from 9,000 to 17,500 tons only for the period of September 1, 2002 to February 24, 2003, while the latter

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[79] The imports above the first 9,000 short tons from each country would be subject to a 19%, 15% and 11% duty for the first, second and third year. See WTO Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ('*US – Line Pipe*'), WT/DS202/R, adopted 8 March 2002, para.2.5.

[80] WTO Appellate Body Report, *US – Line Pipe*, WT/DS202/AB/R, adopted 8 March 2002. The United States initially filed an appeal on 6 November 2001 (WT/DS202/7), but withdrew it for scheduling reasons on 13 November (WT/DS202/8). The appeal was re-filed on 19 November 2001 (WT/DS202/9).

[81] See generally Dukgeun Ahn, 'Critical Review of the WTO Jurisprudence on Safeguard' (*mimeo*).

[82] WTO, WT/DS202/17, dated 26 July 2002.

[83] WTO, WT/DS202/18, dated 31 July 2002.

measure remained until the end of February 2003. Thus, this case again illustrated the systemic problem for implementation in a safeguard dispute.

On December 15, 2000, Korea requested consultations with the Philippines concerning the dumping decision of the Tariff Commission of the Philippines on polypropylene resins. This antidumping order was actually the first antidumping measure by the Philippines against Korean exporters, since the first antidumping investigation against Korean electrolytic tinplates was dismissed for lack of merit.[84] The Tariff Commission of the Philippines imposed the provisional antidumping duties on polypropylene resins ranging from 4.20% to 40.53% and subsequently the final duties at slightly lowered levels.[85] Following the consultation on January 19, 2001 under the purview of the WTO dispute settlement system, the Philippines withdrew the antidumping order on November 8, 2001 and Korea did not pursue further action in the DSB.[86] This case is so far the only trade dispute for Korea elevated to the formal dispute settlement procedure as opposed to a developing country.

The fifth WTO complaint by Korea against the United States was also related to antidumping matters. On December 21, 2000, Korea, along with Australia, Brazil, Chile, European Communities, India, Indonesia, Japan and Thailand, requested consultations with the United States concerning the amendment to the Tariff Act of 1930, titled 'Continued Dumping and Subsidy Offset Act of 2000' that is usually referred to as the 'Byrd Amendment'. By distributing the antidumping and countervailing duties to domestic petitioners, the Byrd Amendment aimed to create more incentives to bring trade remedy actions. As the third frequent target for antidumping and countervailing measures in the US market, Korean exporters were very keen on the outcome of this case.[87]

The panel established by the requests from 9 Members was later merged with the panel requested by Canada and Mexico. The panel and the Appellate Body found that the Byrd Amendment is inconsistent with the Antidumping and SCM Agreement. Furthermore, the panel suggested that the United States bring the Byrd Amendment into conformity by repealing it. On April 2, 2003, the arbitrator was appointed to determine a reasonable period of implementation under DSU Article 21.3.

Ironically, a subsidiary company of a Korean manufacturer received a substantial 'offset' disbursement under the Byrd Amendment. Zenith Electronics owned by LG Electronics

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[84] WTO, G/ADP/N/65/PHL, dated 21 September 2000.
[85] WTO, G/ADP/N/72/PHL, dated 6 March 2001.
[86] WTO, G/ADP/N/85/PHL, dated 22 February 2002.
[87] For antidumping measures, exporters from China and Japan are more frequent targets than those from Korea in the US market. US countervailing measures have targeted Italy, India, Korea and France. WTO, 'Statistics on Anti-dumping', <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> and 'Statistics on Subsidies and Countervailing Measures', <http://www.wto.org/english/tratop_e/scm_e/scm_stattab8_e.htm> (visited 9 April 2003).

received the disbursement of $24.3 million in 2001 and $9 million in 2002 from antidumping duties collected on Japanese television imports. The offset payment for Zenith Electronics in 2001 was indeed more than 10% of the total disbursement of $231.2 million in 2001.[88] In 2002, the total disbursement under the Byrd Amendment was increased to $329.8 million.[89]

On March 20, 2002, Korea requested consultation with the United States regarding the definitive safeguard measures on the imports of certain steel products and the related laws including Section 201 of the Trade Act of 1974 and Section 311 of the NAFTA Implementation Act. The DSB established a single panel to include complaints by other Members such as the European Communities, Japan, China, Switzerland, Norway, New Zealand and Brazil.[90] In addition to most complainants that reserved third party rights, Taiwan, Cuba, Malaysia, Mexico, Thailand, Turkey and Venezuela also participated as third parties in the proceeding. On July 25, 2002, the Director-General composed the panel. Taiwan later determined to become a more active participant and made an independent consultation request with the United States on November 1, 2002.[91]

Concerning this US Section 201 action, the Korean government made the first trade compensation request pursuant to Article 8 of the Agreement on Safeguards.[92] When the US government did not agree on satisfactory compensatory arrangements, several WTO Members, such as the European Communities[93], Japan[94], Norway[95], China[96], and Switzerland[97], notified to the Council for Trade in Goods of proposed suspension of concessions. Instead of proposing suspension of concessions, the Korean government notified the Council for Trade in Goods of the agreement that the 90-day period set forth in Article 8.2 of the Agreement on Safeguards and

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[88] US Customs and Border Protection, 'CDSOA FY2001 Disbursements Final', <http://www.customs.ustreas.gov/xp/cgov/import/add_cvd/> (visited 10 April 2003). On the other hand, it is noted that only two ball bearing companies, Torrington and MPB (The Timken Company), received more offset payments in gross than Zenith Electronics in 2001. Their total disbursements amount to $62.8 million and $25 million, respectively. But, the disbursement for Zenith Electronics is the second largest one in terms of individual claims, following $34.7 million offset payment for Torrington in relation to ball bearings dumping from Japan.

[89] US Customs and Border Protection, 'CDSOA FY2002 Disbursements Final', <http://www.customs.ustreas.gov/xp/cgov/import/add_cvd/> (visited 10 April 2003).

[90] WTO, WT/DS251/10, dated 12 August 2002.

[91] WTO, WT/DS274/1, dated 11 November 2002.

[92] About 12 % of trade remedy measures against Korean exports are safeguard actions. For example, as of 31 December 2002, Korean exporters are subject to 10 safeguard measures and 5 investigations in India, United States, Venezuela, China, Argentina, Canada, and European Communities. Korea Trade Investment Promotion Agency (KOTRA), 'Summary of Import Restrictions against Korean Exports 2002' (December, 2002; *in Korean*).

[93] WTO, G/C/10, dated 15 May 2002.

[94] WTO, G/C/15, dated 21 May 2002.

[95] WTO, G/C/16, dated 21 May 2002.

[96] WTO, G/C/17, dated 21 May 2002.

[97] WTO, G/C/18, dated 22 May 2002.

Article XIX:3(a) of the GATT shall be considered to expire on March 19, 2005.[98] This agreement to postpone potential retaliation for about three years, however, practically eradicates all real impact on balancing trade interests, since the original safeguard measure is supposed to end on March 20, 2005.[99] In other words, the Korean government tried to avoid the possibility to actually exercise the suspension of concession against one of its major trading partners without the DSB authorization, while it still maintained a political gesture that it exercised a legal authority specifically enunciated under the Agreement on Safeguards.

As described above, Korea has had major problems regarding the US antidumping practices. In some sense, its experience as a complainant in the WTO dispute settlement system almost exclusively against US antidumping practices is puzzling because, during the period of January 1, 1995 to June 20, 2002, it was the European Communities that initiated the most antidumping investigations against exported products from Korea, and it was South Africa and India that actually imposed the most antidumping measures.[100] This fact seems to imply that the US market still occupies an unbalanced economic importance for Korea.[101] Currently, Korea is actively engaged in pushing the agenda to revise the Antidumping Agreement in the Doha Development Agenda.[102]

For three cases in which the entire dispute settlement procedure including implementation ended, the major problem Korea faced was the failure to ensure prompt and effective implementation by a respondent. The implementation for the *US –DRAMS* and *US – Line Pipe* cases was in fact not much more than the mere expiration of the original trade remedy measures. This result raises concern for effectiveness and fairness of the WTO dispute settlement system, especially when dealing with the WTO litigation demands sizeable financial and human resources. In particular, the lack of legal systems to represent private parties' interest in line with Section 301 and TBR procedures would inevitably result in a less enthusiastic

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[98] WTO, G/C/12, dated 16 May 2002. On the other hand, Australia, Brazil and New Zealand extended the deadline for retaliation to 20 March 2005. See WTO, G/C/11, dated 16 May 2002 and G/C/13, 14, dated 17 May 2002.

[99] WTO, G/SG/N/10/USA/6, dated 14 March 2002.

[100] WTO, 'Statistics on Anti-dumping', <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (visited 9 April 2003).

<AD Actions against Korea (From 01/01/95 to 30/06/02)>

	Argentina	Australia	EC	India	South Africa	US	Others	Total
AD Initiation	9	11	21	18	13	19	54	145
AD Measures	6	4	9	13	13	11	18	74

[101] On the other hand, Japan, a country with similar trade structure and attitude toward trade dispute settlement, has shown much diverse interest as a complainant concerning its target markets. See generally Iwasawa, above n. 55, 473.

[102] For the Korean proposal regarding antidumping issues, see, for example, WTO, WT/GC/W/235/Rev.1, dated 12 July 1999; TN/RL/W/6, dated 26 April 2002; TN/RL/W/10, dated 28 June 2002.

approach for resorting to the legal activism for many WTO Members including Korea, because government officials in charge of WTO disputes may not have an incentive to initiate all those costly procedures merely for 'paper' winning.

Philippines

<Table 8. WTO Disputes Involving Philippines>

As Complainant		
*Brazil - Measures Affecting Desiccated Coconut	DS22	
United States - Import Prohibition of Certain Shrimp and Shrimp Products	DS61	
Australia - Certain Measures Affecting the Importation of Fresh Fruit and Vegetables	DS270	
Australia - Certain Measures Affecting the Importation of Fresh Pineapple	DS271	
As Respondent		
Philippines - Measures Affecting Pork and Poultry	DS74, DS102/ US	
Philippines - Measures Affecting Trade and Investment in the Motor Vehicle Sector	DS195/ US	
Philippines - Anti-Dumping Measures Regarding Polypropylene Resins from Korea	DS215/ Korea	

* Cases for which panel reports were issued.

The Philippines' experience under the WTO dispute settlement system showed a typical pattern for developing country Members with comparative advantage in agricultural industry sectors. Four complaints against its trading partners were all regarding import restrictive measures on agricultural products. In contrast, the Philippines were challenged twice concerning its own import barriers for industrial sectors, although it was also challenged once about import restriction on pork and poultry from the United States.

Thailand

Thailand is in some sense unique in a manner that uses the WTO dispute settlement system. Thailand is currently the most active developing country complainant in the WTO. Whereas Thailand was challenged only once so far by Poland concerning antidumping measures, it made 10 consultation requests against other WTO Members. The EC has been the most frequent target of Thailand's complaints. Other than the EC, Thailand's complaints were raised against various countries, including Colombia, Egypt, Hungary, Turkey and the United States. It is noted that Thailand's complaints are often raised against other developing countries. In terms of subject matters, Thailand's dispute settlement experience also showed a typical pattern of

developing countries by focusing mostly on foreign trade barriers on agricultural and textile products.

<Table 9. WTO Disputes Involving Thailand>

As Complainant		
EC - Duties on Imports of Rice	DS17	
Hungary - Export Subsidies in Respect of Agricultural Products	DS35	
Turkey - Restrictions on Imports of Textile and Clothing Products	DS47	
*US - Import Prohibition of Certain Shrimp and Shrimp Products	DS58	
Colombia - Safeguard Measure on Imports of Plain Polyester Filaments from Thailand	DS181	
Egypt - Import Prohibition on Canned Tuna with Soybean Oil	DS205	
*US - Continued Dumping and Subsidy Offset Act of 2000	DS217	
EC - Generalized System of Preferences	DS242	
EC - Export Subsidies on Sugar	DS283	
EC - Customs Classification of Frozen Boneless Chicken Cuts	DS286	
As Respondent		
*Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland	DS122/ Poland	

* Cases for which panel reports were issued.

Others

<Table 10-1. WTO Disputes As Complainants>

China		
United States - Definitive Safeguard Measures on Imports of Certain Steel Products	DS252	
Taiwan		
United States - Definitive Safeguard Measures on Imports of Certain Steel Products	DS274	
Hong Kong, China		
Turkey – Restrictions on Imports of Textile and Clothing Products	DS29	
Indonesia		
Argentina - Safeguard Measures on Imports of Footwear	DS123	
*United States - Continued Dumping and Subsidy Offset Act of 2000	DS217	
Malaysia		
*United States - Import Prohibition of Certain Shrimp and Shrimp Products	DS58	
Singapore	DS1	
Malaysia - Prohibition of Imports of Polyethylene and Polypropylene		

* Cases for which panel reports were issued.

No WTO Member has raised a formal complaint against China or Taiwan yet although they joined the WTO more than a year and half ago. This does not mean that trade policy measures of both Members are completely consistent with the WTO disciplines. In fact, as many Members are concerned, these two Members with substantial trade volumes may still

maintain numerous potentially controversial measures or laws, especially considering the short experience on multilateral trade disciplines. Although it is true that both Members have exerted strenuous efforts to bring their system into conformity with the WTO system, more dispute cases concerning both Members seem unavoidable for the future WTO dispute settlement system. In particular, the Chinese government has been very active in using trade remedy measures to protect domestic import markets.[103] Some of these measures may not be free from WTO challenges in the future.

<Table 10-2. WTO Disputes As Respondents>

Indonesia		
*Indonesia - Certain Measures Affecting the Automobile Industry	DS54, DS64/ Japan DS55/ EC, DS59/ US	
Malaysia		
Malaysia - Prohibition of Imports of Polyethylene and Polypropylene	DS1/ Singapore	

* Cases for which panel reports were issued.

Another interesting question is whether and how China would deal with Taiwan in terms of the WTO dispute settlement system. In case Taiwan raises a complaint against China and seeks to proceed to panel and the Appellate Body proceedings, there is no mechanism to block such procedures under the WTO dispute settlement system.[104] It would bring about a controversial situation in which China and Taiwan stand against each other with equivalent status in an international forum, which may cause a very difficult political dilemma for these Members. Since the WTO is the only international organization of which Taiwan is a full Member, Taiwan may have strong incentives to use the WTO dispute settlement system to promote the image as a political entity that is on par with China.[105] It remains to be seen how these Members agree to address this problem.

IV. East Asia in the WTO DSU Negotiation

The DSU review mandated by a 1994 Ministerial Decision started in the Dispute

[103] Up to the end of April 2003, the Chinese authority initiated 21 antidumping investigations. Among them, 17 cases involved Korean products.

[104] Under the GATT system, a respondent could block the proceeding by declining consensus for panel establishment. This was changed under the WTO dispute settlement system that mandates panel proceedings, if requested by a complainant, after 60 day consultation period. For more detailed accounts on the WTO dispute settlement proceedings, see generally Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute settlement* (London: Cameron May, 2002).

[105] Qingjiang Kong, 'Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes between China and Taiwan?', 5 *Journal of International Economic Law* 747, 756 (2002).

Settlement Body in 1997. The deadline stipulated as January 1, 1999 was extended to July 31, 1999, but there was no agreement by then. In November 2001, at the Doha Ministerial Conference, Member governments agreed to negotiate to improve and clarify the Dispute Settlement Understanding and conclude the negotiation not later than May 2003.

East Asian Members have actively participated in various areas of the Doha negotiations, including reforming the dispute settlement system. In addition to Japan, Korea and Thailand that have often resorted to the WTO dispute settlement system, China and Taiwan are also making substantial contribution by submitting their own proposals to the DSU negotiation.

Although they have shown different emphases on varying issues, their proposals invariably try to enhance efficiency and transparency of the dispute settlement mechanism, particularly with respect to the implementation phase of the current procedure. For example, Japan and Korea submitted elaborated proposals concerning Articles 21 and 22. The proposal by Japan includes a detailed provision for compliance panel procedures.[106] Korea proposed that the compliance panel proceed to determine the level of the nullification or impairment and to the extent that the legal findings and conclusions of the compliance panel are modified or reversed by the Appellate Body, thereby affecting the level of the nullification or impairment, the Appellate Body determine the final level of the nullification or impairment.[107]

China suggested improvement of special and differential treatment in the DSU to developing-country Members, including the least developed countries.[108] Claiming that China is a developing-country Member, China proposed that developed-country Members exercise due restraint in cases against developing-country Members. In other words, developed-country Members shall not bring more than two cases to the WTO Dispute Settlement Body against a particular developing-country Member in one calendar year. Moreover, while time periods applicable under the DSU for dealing with disputes involving safeguard and anti-dumping measures shall be half of the normal timeframe, the shortened time-frame shall not apply to the defending party that is a developing-country Member.

Taiwan made extensive proposal to improve third party rights in the WTO dispute settlement procedures.[109] But, Taiwan opposed some of the proposals made by other Members such as opening of meetings to the public, public access to submissions and developing guideline procedures for the handling of *amicus curiae* submissions.[110]

Malaysia made an interesting proposal concerning litigation costs.[111] It proposed that

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[106] WTO, TN/DS/W/32 (dated 22 January 2003).
[107] WTO, TN/DS/W/35 (dated 22 January 2003).
[108] WTO, TN/DS/W/57 (dated 19 May 2003).
[109] WTO, TN/DS/W/36 (dated 22 January 2003).
[110] WTO, TN/DS/W/25 (dated 27 November 2002).
[111] WTO, TN/DS/W/47 (dated 11 February 2003).

in a dispute involving a developing country Member and a developed country Member as a complaining party and as a party complained against, respectively, and where that dispute does not end with a panel or the Appellate Body finding against the former, the panel or the Appellate Body award litigation costs to the developing-country Member to the tune of US $500,000 or actual expenses, whichever is higher[112]. The litigation costs shall include lawyers' fees, charges and all other expenses for, preparation of necessary documents[113] and participation in, the consultations, panel and the Appellate Body proceedings. The litigation costs shall also include travel, hotel, per diem and other expenses for a reasonable number of the Capital based officials. In fact, litigation costs to deal with WTO disputes have become one of the most serious practical obstacles to utilize the WTO dispute settlement mechanism. Since private attorneys were permitted to panel and Appellate Body proceedings in early WTO years, their roles have quickly become indispensable elements of WTO litigations, probably except for a handful of Members. The legal expenses to procure such professional lawyers turned out, however, to be sometimes way beyond the scope of budgetary constraints of developing countries. These problems led some WTO Members to establish the "Advisory Centre on WTO Law" on October 5, 2001. Currently, Hong Kong, Philippines, and Thailand are signatories to the Centre. Thailand suggested that the Appellate Body be composed of nine persons, three of whom serve on any one case.[114] Furthermore, it proposed a new panel composition process, including a "Roster of Panel Chairs" comprised of individuals who may be appointed as Chair of a panel by lot.[115]

At its meeting on July 24, 2003, the General Council of the WTO agreed to extend negotiations in the Dispute Settlement Body Special Session which is reviewing DSU. The timeframe was extended from May 31, 2003 to May 31, 2004. How much proposals to improve the DSU can actually be agreed by Members by May 2004 remains to be seen.

V. National Complaining Procedures for Private Parties

The WTO dispute settlement system is primarily for Member governments. In other

[112] The expenses shall be calculated for each stage of dispute settlement proceedings, which include consultation, panel and the Appellate Body proceedings as well as the proceedings under Articles 21.3(c), 21.5, 22.6 and 25 of the DSU. The original panel and the panel established pursuant to Article 21.5 of the DSU shall take into account the expenses relating to the consultations preceding those panel proceedings for award of litigation costs. The award of litigation costs is binding on the parties and not subject to appeal.

[113] The documents include request for consultations, oral or written submissions and all other documents necessary for preparation and participation in the dispute settlement proceedings. They shall also include oral or written advice rendered prior to, during or after consultations, panel or the Appellate Body proceedings relating to the dispute.

[114] WTO, TN/DS/W/30 (dated 22 January 2003).

[115] WTO, TN/DS/W/31 (dated 22 January 2003).

words, private parties may not be able to bring complaints directly to the WTO dispute settlement system even if it is indeed private parties that are aggrieved by WTO inconsistent measures of other WTO Members. Those private parties have to persuade their own governments to raise complaints on behalf of their economic interests. This mechanism does not, however, function properly as the discretionary decision of Member governments on whether to bring a WTO complaint often does not in line with private parties' requests. Since the WTO Agreement is not normally directly applicable, the lack of systemic nexus between the WTO dispute settlement system and private parties causes fundamental problems in the WTO system. This problem becomes more and more serious as the scope of the WTO system tends to expand by encompassing intrinsically private legal issues such as investment and competition.

Currently, the most notable examples of linking private parties to the WTO dispute settlement system are Section 301 mechanism of the United States and the Trade Barriers Regulation system of the European Communities. Even if the unilateral retaliation has been the focal point of the Section 301, the most important aspect of the Section 301 mechanism in terms of trade policy is the establishment of the systemic procedures under which private parties can force the government to act on their petitions. The European Communities initially introduced so-called "New Trade Policy Instrument" by Regulation 2641/84[116], but substantially modified it pursuant to the WTO Agreement and adopted "Trade Barriers Regulation (TBR)" system.[117] In both the United States and the European Communities, many WTO complaints have been indeed initiated by petitions under those systems.

Despite rather long history and experience under multilateral trade system, Japan and Korea have not yet prepared such mechanisms in domestic legal or institutional systems. Most other East Asian countries do not have such systems, either. Interestingly, China prepared a TBR-like system that would allow private parties to raise complaints against foreign trade barriers under systemic procedures and in turn lead to formal WTO complaints by the Chinese government. The "Provisional Regulations for Investigation on Foreign Trade Barriers" enacted from November 1, 2002 stipulates that natural or legal persons representing domestic industries as well as domestic industries or companies can apply for investigations. The investigation procedure under this regulation may not exceed 6 months and 9 months in exceptional circumstances. Article 29 provides that the Ministry of Commerce (previously, MOFTEC) may take one of the following, if foreign trade barriers are found to be in violation of international agreements: 1) bilateral consultation, 2) multilateral dispute settlement, or 3) other necessary measures. Although the current provisions do not exclude unilateral retaliation by taking "other

[116] Council Regulation (EEC) No. 2641/84 of 17 September 1984.
[117] Council Regulation (EC) No. 3286/94 of 22 December 1994. For a thorough overview of the TBR, see Marco Bronckers, "Enforcing WTO Law Through the EC Trade Barriers Regulation", 3 *International Trade Law & Regulation* 76 (1997).

necessary measures", the overall structure of the system is much more focused in connecting the WTO dispute settlement system and aggrieved domestic private parties. This development should give important lessons for other WTO Members in general and East Asian Members in particular.

VI. Conclusion

The WTO dispute settlement system has become the core of the world trading system. Various trade disputes arising from divergent interpretation of the WTO agreements and *de facto* discriminatory impact of the domestic trade policy measures have been rectified by the legal rulings of the WTO panels and Appellate Body. Yet, there is huge discrepancy among the WTO Members, especially in East Asia, in the degree of utilizing the WTO dispute settlement system. Moreover, East Asian Members have shown strong tendency in settling the disputes rather than litigating the cases. This fact should not be considered to indicate that the WTO dispute settlement system has been malfunctioning to represent the legitimate WTO rights and interests in East Asia. To the contrary, it is shown that major economic sectors – industrial or agricultural – in East Asian Members have been able to use the WTO dispute settlement system for securing market environments with fair competition. The next question for these Members may be how to establish the domestic system to properly represent their private economic interests in a more balanced manner and make the WTO dispute settlement system a benign instrument for the entire economy, not a captive tool by a particular segment of industries.