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9 WTO Dispute Settlements in East Asia

Dukgeun Ahn

9.1 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 a dispute settlement against Malaysia concerning import prohibitions on polyethylene and polypropylene.[1] It was the very beginning of the WTO dispute settlement system that is the essence of the current world trading system.[2] This case was subsequently resolved with a mutually agreed solution and so notified on July 19, 1995.

This birth history of the WTO dispute settlement showed the interesting fact that it was East Asian members that opened 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 in the following.

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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 DSB. The other case was *US—Standards for Reformulated and Conventional Gasoline* (DS2) that resulted in the first panel/Appellate Body proceedings.

9.2 General Agreement on Tariffs and Trade (GATT) Dispute Settlements in East Asia

9.2.1 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]

Japan acceded to GATT on September 1955 and, at the time of accession, fourteen contracting parties invoked Article XXXV. Subsequently, thirty-three contracting parties invoked Article XXXV by succession in respect to Japan when they became liberated from Belgium, France, and the 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 (WTO 1995, 1034–36). After the Tokyo Round negotiation, Japan accepted all nine new agreements, often termed as "Side Codes." (See table 9.1.)

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.[4] This first attempt, however, failed when the Korean government could not complete the requisite domestic ratification procedures due to the Korean War during 1950 to 1953.[5] 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 GATT secretariat on May 20, 1966 and conducted the tariff negotiations with twelve contracting parties from September to December 2, 1966.[6] Korea officially acceded to the GATT in 1967, in accordance with Article XXXIII of the GATT.[7] On the other hand, Korea invoked Article XXXV for nonapplication of GATT with respect to

3. Malaysia, Singapore, Hong Kong, and Macao also acceded to the GATT under Article XXVI:5(c). See WTO (1995, 1145–46).

4. See GATT (1952) *Basic Instruments and Selected Documents* (hereinafter *BISD*), vol. 2, 33–34. At that meeting, Austria, Peru, the 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 December 27, 1979.

5. See Tae-Hyuk Hahm (1994, at 5).

6. The Working Party for Korea's accession included fourteen contracting parties. See Hahm (1994, 23).

7. See GATT (1968, 60), Korea—Accession under Article XXXIII: Decision of 2 March 1967, *BISD,* no. 15.

Table 9.1 GATT/WTO Accession for East Asian members: As of August 2003

Country	GATT/WTO Accession date	GPA[a]	TCA[b]	ITA[c]	BT[d]
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
The 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

[a]Plurilateral Agreement on Government Procurement.
[b]Plurilateral Agreement on Trade in Civil Aircraft (WT/L/434, dated November 26, 2001).
[c]Ministerial Declaration on Trade in Information Technology Products.
[d]Basic Telecommunication Negotiations (annexed to the fourth protocol of the General Agreement on Trade in Services).

Cuba,[8] Czechoslovakia,[9] Poland,[10] and Yugoslavia.[11] These Article XXXV invocations were all simultaneously withdrawn in September 1971.[12]

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 (Kim, forthcoming). Subsequently, Korea joined the four Side Codes: Subsidies Code,[13] Standards Code,[14] Customs Valuation Code,[15] and Antidumping Code.[16] Korea had never joined the sectoral agreements

8. See GATT, L/2783 (1967).
9. See GATT, L/2783 (1967).
10. See GATT, L/2874 (1967).
11. See GATT, L/2783 (1967).
12. See GATT, L/3580 (1971). See also WTO (1995, 1034–36). On the other hand, it is noted that fifty contracting parties invoked Article XXXV in respect to Japan at its accession in 1955. See GATT, L/2783 (1967).
13. This is the agreement on Interpretation and Application of Articles VI, XVI, and XXIII. In Korea, it was signed on June 10, 1980 and entered into force on July 10, 1980 as Treaty no. 709. See Ministry of Foreign Affairs, *Compilation of Multilateral Treaties,* vol. 5 (in Korean).
14. This is the Agreement on Technical Barriers to Trade. In Korea, it was signed on September 3, 1980 and entered into force on October 2, 1980 as Treaty no. 715. See Ministry of Foreign Affairs.
15. This is the Agreement on Implementation of Article VII. The Customs Valuation Code entered into force on January 1, 1981, while the other three codes entered into force on January 1, 1980. See GATT (1982, 40), *BISD,* no. 28. In Korea, it was entered into force on January 6, 1981 as Treaty no. 729. See Ministry of Foreign Affairs.
16. This is the Agreement on Implementation of Article VI. Korea accepted the Antidumping Code on February 24, 1986, and the code entered into force for Korea on March 26, 1986 as Treaty no. 877. See GATT (1987, 207), *BISD,* no. 33. See also Ministry of Foreign Affairs, *Compilation of Multilateral Treaties,* vol. 8 (in Korean).

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.[17]

China was one of twenty-three original GATT contracting parties and signed the Protocol of Provisional Application on April 21, 1947. Subsequently, China participated in the first two rounds of multilateral trade negotiation, the 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 tried to resume its GATT relations after it secured a seat at the United Nations (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.[18] The Working Party included sixty-eight 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 (Yang and Jin 2001). Therefore, the Uruguay Round agreements are supposed to apply to China once it becomes a formal member of the WTO. For bilateral negotiations concerning China's accession, thirty-seven members requested negotiations with China.[19] China finally finished its accession negotiations with all those members and signed the membership agreement on November 11, 2001.[20] Having completed the domestic ratification procedure for its WTO accession on August 25, 2000, China became a formal member on December 11, 2001, thirty days after the accession approval.

China committed, upon accession, to comply with the Trade-Related Investment Measures (TRIMs) Agreement, without recourse to the provisions of Article 5 of the TRIMs Agreement and to eliminate all subsidy

17. See WTO, Agreement on Government Procurement, Article XXIV:3. Hong Kong also had one more year for implementation to apply from January 1, 1997.

18. More technically, China's application for accession was not to reenter 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. See GATT, C/M/207.

19. These countries include Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Ecuador, EC, 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.

20. The Chinese membership agreement runs to 1,500 pages and weighs 13 kilograms. See http://www.chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/min01_11nov_e.htm.

Table 9.2 GATT disputes involving Thailand

As complainant		
United States—Measures affecting the importation and internal sale of tobacco		DS44/R
As respondent		
Thailand—Restrictions on importation of and internal taxes on cigarettes	United States	BISD 37S/200

programs falling within the scope of Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM). 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 preceding 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 nonmarket economy shall expire fifteen years after the date of accession.

In addition, China agreed to accept the 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."[21] In other words, this special safeguard mechanism effectively lowers the threshold for invoking 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 twelve years after the date of accession.

9.2.2 Limited Experience Except for Japan

During the GATT period, formal trade dispute settlements were not frequently utilized by East Asian countries except for Japan. (See tables 9.2 and 9.3.) Thailand had disputes concerning tobacco with the United States

21. See WTO, WT/ACC/CHN/49, paragraph 16.4.

Table 9.3 **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, United States	BISD 36S/202, 36S/234, 36S/268 (adopted on Nov. 7, 1989)	Cases under Article XXIII
Korea-Antidumping duties on imports of polyacetal resins from the United States	United States	BISD 40S/205 (adopted on April 27, 1993)	Case under the Tokyo Round anti-dumping code

as both a complainant and a respondent. Korea was challenged twice at the GATT dispute settlement system and brought a complaint against the European Community (EC). Other East Asian countries were not visible, at least in terms of the GATT dispute settlement system. It is partly because those countries acceded to the GATT relatively late and partly because their trade volumes were not significant during the GATT period.

Japan was, however, one of the most frequent targets for complaints in the GATT dispute settlement system.[22] While it brought twelve complaints on eleven distinct matters, mostly against the United States and the EC, Japan was challenged in twenty-eight cases on twenty-three distinct matters. Among twenty-eight cases challenged, thirteen cases went to a panel, and only six cases ended with substantive panel reports. Twelve complaints by Japan resulted in only two panel decisions. Under the GATT system, the EC and the United States were the major disputing parties. It is noted that whereas Japan stood against the EC in five cases as both complainant and respondent, the United States challenged Japan in twelve cases and was challenged by Japan in four cases. In terms of a subject matter, antidumping 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. (See tables 9.4 and 9.5.)

As indicated previously, Japan rarely used the GATT dispute settlement system as part of its trade diplomacy, while Japan was frequently targeted in dispute settlement cases (Jackson 1999). During the GATT regime, Japan was considered one of those countries that leaned toward pragmatism as opposed to other countries, among which was notably the United States, which favored legalism (Iwasawa 2000, supranote 26). Japan tried

22. 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).

Table 9.4 GATT cases: Japan as a complainant

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

Source: Yuji Iwasawa (2000, 486–88).

Notes: Twelve cases on eleven distinct matters; two cases (in italics) went to a panel.

[a]This case does not seem to reach to the formal dispute settlement procedure as there is no official case number attached to this case. The Committee on Antidumping Practices simply noted that it was "informed of requests by Japan for bilateral consultations under Article 15:2 with Korea on anti-dumping duties on polyacetal resins." BISD 38S/85 (1992).

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 twenty-eight cases brought against Japan in the GATT, only six cases ended with a substantive report by the panel. Only two out of the twelve 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, thirty-three years after its accession to the GATT. But after the *EC—Regulation on Import of Parts and Components* case ended with favorable decisions to Japan, the

Table 9.5 **GATT cases: Japan as a defendant**

Case name	Complainant	Date
Uruguayan Recourse to Art. XXIII[a]	Uruguay	Nov. 1961
Japan-Tariff Treatment of Sea Water Magnesite—consultations under Art. XXII.1	United States	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	United States	July 1978
Japanese Measures on Imports of Leather	United States	July 1978
Japan's Measures on Imports of Leather	Canada	Oct. 1979
Japan—Restraints on Imports of Manufactured Tobacco from United States	United States	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	United States	Sept. 1982
Panel on Japanese Measures on Imports of Leather	United States	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	United States	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	United States	March 1985
Japan—Restrictions on Imports of Certain Agricultural Products	United States	July 1986
Japan—Restrictions on Imports of Herring, Pollack, and Surimi	United States	Oct. 1986
Japan—Customs Duties, Taxes, and Labeling Practices on Imported Wines and Alcoholic Beverages	EC	July 1986
Japan—Trade in Semiconductors	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	United States	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	United States	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

Notes: Twenty-eight cases on twenty-three distinct matters; thirteen cases (in italics) went to a panel; six cases (in bold) ended with substantive reports by panels.

[a]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.

Japanese government changed its attitude and has pursued more rule-oriented trade policies since.[23]

9.3 WTO Dispute Settlements in East Asia

9.3.1 Overall Statistics

The Uruguay Round negotiation crucially augmented the GATT dispute settlement system,[24] rectifying several systemic problems by instituting, inter alia, a quasi-automatic adoption mechanism, an appellate procedure, and a single unified system.[25] As mostly concurred, the WTO dispute settlement system has been working very effectively in resolution of trade disputes and to become the core part of the WTO system. As of December 31, 2003, 305 cases have been brought to the WTO dispute settlement body. Among them, 76 panel and Appellate Body reports were adopted, while 43 cases were resolved with mutually agreed solutions, and 24 cases were settled or inactive.[26] One provisional empirical observation is that trade tends to increase with more trade disputes.[27] This fact deserves a more rigorous empirical analysis, especially in respect to the simultaneity problem. (See table 9.6.)

The yearly trend of WTO dispute cases filed up to the end of 2003 is shown in figure 9.1. As illustrated in figure 9.1, WTO dispute cases were rapidly increased during the first three years and then averaged around thirty cases per year. Dispute cases concerning East Asian countries, however, show the interesting feature that the role of East Asian countries as complainants have increased recently compared to that as respondents. It is also noted that WTO disputes among East Asian countries are still rare. Instead, their complaints are predominantly focused on the United States, while the United States is also the most frequent complainant against the East Asian countries.[28] To the contrary, the EC has hardly been the target

23. Regarding the historical importance of *EC—Regulation on Import of Parts and Components* case in Japan, see (Iwasawa, 477).

24. After the Tokyo round negotiation that established nine additional so-called Side Codes, the GATT dispute settlement system suffered particularly from forum shopping problems. See, generally, Jackson (1990).

25. For detailed discussion on the WTO dispute settlement system, see, generally, Jackson (1998), Palmeter and Mavroidis (1999), U. E. Petersmann (1997), Special Issue, *WTO Dispute Settlement System, Journal of International Economic Law,* vol. 1, no. 2 (1998); and Waincymer (2002).

26. See WTO, WT/DS/OV/19 (dated 6 February 2004). See also Leitner and Lester (2004).

27. Professor Andrew Rose found this result using standard bilateral gravity models of trade. His provisional finding includes that this result does not depend on which country files against which country. I am very grateful for his sharing of this interesting empirical result. More rigorous econometric studies on this point will be presented by us.

28. As of December 31, 2003, 18 out of the total 42 complaints by the East Asian countries were against the United States. On the other hand, 14 complaints were filed by the United States against the East Asian countries.

Table 9.6 **Statistics on WTO disputes by parties (until December 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	10	22
Malaysia	1	1	2
The Philippines	4	4	8
Singapore		1	1
Thailand	1	10	11
Total	35	42	79
Notable others			
Argentina	15	9	24
Australia	9	7	16
Brazil	12	22	34
Canada	12	24	36
European Communities	59	63	122
India	15	15	29
Mexico	10	13	23
United States	81	76	157
Total by all members	305	333[a]	638

Source: See Leitner and Lester (2004, 171–72, note 31).

[a]The discrepancy between the numbers is due to the fact that, in some cases, there are multiple complainants against one respondent.

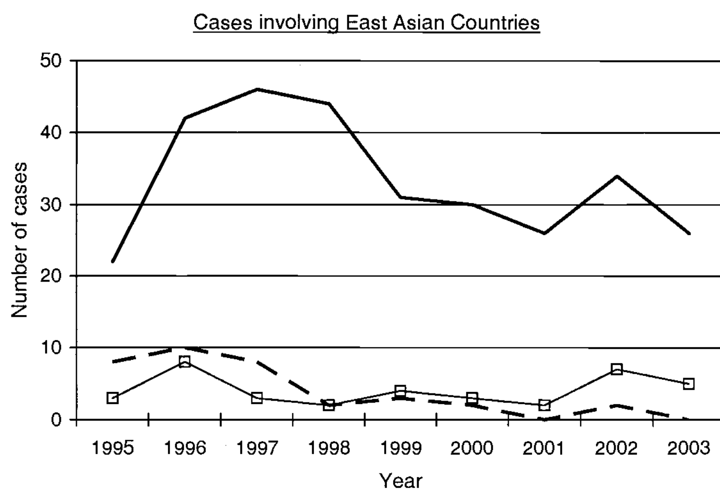

Fig. 9.1 Yearly trend of WTO dispute cases (until December 31, 2003)

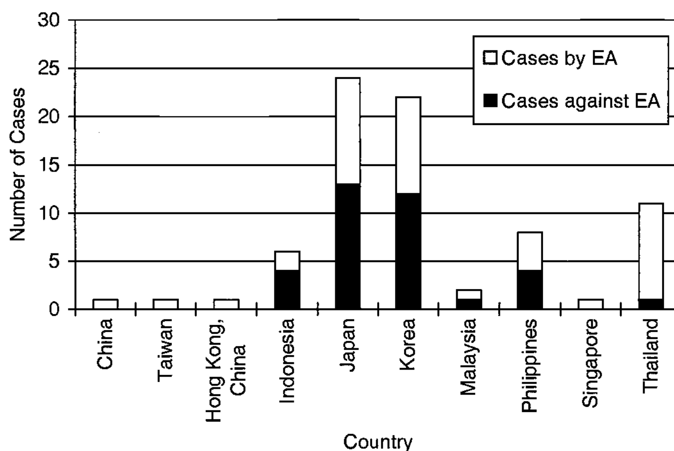

Fig. 9.2 WTO dispute cases for East Asian countries (until December 31, 2003)

for complaints by the East Asian countries, except for by Thailand, whereas it is the second most frequent complainant against them.[29] (See figure 9.2.)

9.3.2 Japan

Japan as Complainant

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. One interesting observation is that Japan's challenges were mostly accompanied by the EC. Six out of eight cases reaching the panel procedure were complained jointly with the EC. Even the *US—Sunset Review* case (DS244) may be viewed as joint efforts with the EC following the *US—German Steel CVD* case (DS213). These joint complaints were not just against the United States but also Canada and Indonesia.

It is also noted that the 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 the automobile industry. Considering the fact that the very first WTO complaint by Japan against the United States also dealt with the automobile industry, the WTO dispute settlement mechanism ap-

29. As of December 31, 2003, the EC was challenged by the East Asian countries in six cases, among which four cases were brought by Thailand.

Table 9.7 WTO disputes involving Japan

As complainant		
United States—Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974	DS6	Mutually resolved
Brazil—Certain Automotive Investment Measures	DS51	In consultation
Indonesia—Certain Affecting the Automobile Industry	DS55	P/AB report
Indonesia—Certain Automotive Industry Measures	DS64	P/AB report
United States—Measure Affecting Government Procurement	DS95	Inactive
Canada—Certain Measures Affecting the Automotive Industry	DS139	P/AB report
United States—Antidumping Act of 1916	DS162	P/AB report
United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan	DS184	P/AB report
United States—Continued Dumping and Subsidy Offset Act of 2000	DS217	P/AB report
United States—Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan	DS244	P/AB report
United States—Definitive Safeguard Measures on Imports of Certain Steel Products	DS249	P/AB report
As respondent		
Japan—Taxes on Alcoholic Beverages	DS8/EC, DS10/Canada, DS11/US	P/AB report
Japan—Measures Affecting the Equipment of Telecommunications Equipment	DS15/EC	Inactive
Japan—Measures Concerning the Protection of Sound Recordings	DS28/US, DS42/EC	Mutually resolved
Japan—Measures Affecting Consumer Photographic Film and Paper	DS44/US	P/AB report
Japan—Measure Affecting Distribution Services	DS45/US	In consultation
Japan—Measures Affecting Imports of Pork	DS66/EC	In consultation
Japan—Procurement of a Navigation Satellite	DS73/EC	Mutually resolved
Japan—Measures Affecting Agricultural Products	DS76/US	P/AB report
Japan—Tariff Quotas and Subsidies Affecting Leather	DS147/EC	In consultation
Japan—Measures Affecting the Importation of Apples	DS245/US	P/AB report

Notes: "P/AB Report" means panel and Appellate Body reports were issued. "In AB" means the case is currently in the Appellate Body proceeding. Cases in italics indicate that panel reports were issued.

pears to play a crucial role for rectifying unfair competitive conditions regarding Japanese automotive industries. (See table 9.7.)

The very first complaint by Japan to the WTO Dispute Settlement Body (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.[30] In-

30. The legal justification of this Section 301 measure was, in fact, controversial. See Jackson, "US Threat to New World Trade Order," *Financial Times* (May 23, 1995, 17).

stead of undertaking "negotiations" as previously done, the Japanese government resorted to the WTO dispute settlement system by challenging the Section 301 measures.[31] 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 (Bhala 1998, 1066–68). The outcome of this case forcefully illustrated the effectiveness and usefulness of the WTO dispute settlement system as opposed to unilateralism.

Japan as Respondent

As a respondent, Japan has been challenged mostly by the EC and the United States. It is noted that whereas Japan has been challenged most by the EC, it has not raised so far any consultation request against the EC. Unlike other WTO members, especially the United States and the EC 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, which 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 sanitary and phytosanitary (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 EC 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 ten challenged cases, *Japan—Measures Affecting Consumer Photographic Film and Paper* (DS44, *Japan—Film*) deserves more explanation. This case is so far the only case in which the primary complaint is based on nonviolation claims (Durling and Lester 1999). 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

31. See WTO, WT/DS6/1.

XXIII:1(b), the distribution measures nullify or impair benefits accruing to the United States.[32] 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.[33] Typically, Japan has been vulnerable to blame for its convoluted nontariff barriers. But after this case, the Japanese government has become much more reluctant to accept its trading partners' loose allegations concerning unjustified or unreasonable nontariff barriers, at least those administered by the government.

Under the WTO system, Japan's dispute settlement has predominantly dealt with the United States. In terms of subject matters, antidumping measures, particularly by the United States, have been a major area for dispute settlement. On the other hand, the EC brought the most complaints regarding trade barriers in Japan. It is noted that Japan has not raised any complaints against the EC under the WTO system, although the EC 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 U.S. government.

9.3.3 Korea

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.[34] 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 that caused imports to plummet. Although there were some differences in the 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 the more aggressive attitude of the Korean government toward formal dispute resolution.

Korea as Respondent

As of December 31, 2003, Korea was challenged by twelve complaints on nine distinct matters, as summarized in table 9.8. It is noted that complainants against Korea have so far been raised mostly by the United States

32. WTO, WT/DS44/R (adopted on April 22, 1998).
33. For comprehensive coverage of the relevant legal proceedings and documents concerning the *Japan—Film* case, see Durling (2001).
34. This part is substantially drawn from Ahn (2003).

Table 9.8 WTO disputes involving Korea

As complainant		
United States—Imposition of Antidumping Duties on Imports of Color Television Receivers from Korea	DS89	In consultation
United States—Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or above from Korea	DS99	Mutually resolved
United States—Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea	DS179	P/AB report
United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea	DS202	P/AB report
Philippines—Antidumping Measures regarding Polypropylene Resins from Korea	DS215	In consultation
United States—Continued Dumping and Subsidy Offset Act of 2000	DS217	P/AB report
United States—Definitive Safeguard Measures on Imports of Certain Steel Products	DS251	P/AB report
United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea	DS296	In panel
EC—Countervailing Measures on Dynamic Random Access Memory Chips from Korea	DS299	In panel
EC—Measures Affecting Commercial Vessels	DS301	In panel
As respondent		
Korea—Measures Concerning the Testing and Inspection of Agricultural Products	DS3, DS41/US	In consultation
Korea—Measures Concerning the Shelf Life of Products	DS5/US	Mutually resolved
Korea—Measures Concerning Bottled Water	DS20/Canada	Mutually resolved
Korea—Laws, Regulations, and Practices in the Telecommunications Procurement Sector	DS40/EC	Mutually resolved
Korea—Taxes on Alcoholic Beverages	DS75/EC, DS84/US	P/AB report
Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products	DS98/EC	P/AB report
Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef	DS161/US, DS169/Australia	P/AB report
Korea—Measures Affecting Government Procurement	DS163/US	P/AB report
Korea—Measures Affecting Trade in Commercial Vessels	DS273/EC	In panel

Note: Cases in italics indicate that panel reports were issued.

and the EC. 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.

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 Technical Barriers to Trade (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).[35] 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.[36] 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).[37] 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 EC requested 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.[38]

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.

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 DS84). The EC and the United States contended that the Korean liquor taxes of 100 percent on whiskey and 35 percent 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

35. 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. See WTO, WT/DS41/1, dated May 31, 1996.

36. See WTO, WT/DS5/5, dated July 31, 1995.

37. See WTO, WT/DS20/6, dated May 6, 1996.

38. See WTO, WT/DS40/2, dated October 29, 1997. Korea and the EC signed the Agreement on Telecommunications Procurement between the Republic of Korea and the European Community on October 29, 1997, and the agreement entered into force on November 1, 1997. Subsequently, Korea entered into a similar bilateral agreement for telecommunications equipment procurement with Canada. See Lie and Ahn (2003).

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 noncompetitive relationship of pertinent products in the antitrust law context.[39]

The panel and the appellate body held that the Korean taxes on *soju* and whiskey were discriminatory and the DSB adopted this ruling on February 17, 1999. The reasonable period for implementation was determined to be eleven months and two weeks, that is, from February 17, 1999 to January 31, 2000.[40] Subsequently, Korea amended the Liquor Tax Law and the Education Tax Law to impose flat rates of 72 percent in liquor tax and 30 percent in education tax that entered into force on January 1, 2000.[41] 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 whiskey 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.[42] By experiencing the impact of the WTO dispute settlement decision, probably at the deepest and widest level of daily life, this case has played a crucial role in enhancing WTO awareness in Korea.

The first dispute settlement case under the Agreement on Safeguards also involved the Korean safeguard measure concerning dairy products (DS98).[43] On August 12, 1997, the EC requested consultations with Korea regarding the safeguard quotas that went into effect on March 7, 1997 and

39. 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. See Kim (1999, 465–66). Except for this case, the Korean government as a respondent did not resort to the director general for the panel selection.

40. WTO, WT/DS75/16, WT/DS84/14, dated June 4, 1999.

41. WTO, WT/DS75/18, WT/DS84/16, dated January 17, 2000.

42. See, generally, Korea Institute of Public Finance (September 1999, 82–102). *Monthly Public Finance Forum* (in Korean).

43. The first complaint brought under the Agreement on Safeguards was *US—Safeguard Measure against Imports of Broom Corn Brooms.* See WTO, WT/DS78/1, dated May 1, 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.* See WTO, WT/DS98/R, adopted January 12, 2000.

were to remain in force until February 28, 2001.[44] 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 Korea Trade Commission (KTC) had relied more on safeguard measures than on antidumping measures to address injury to domestic industries incurred by importation.[45] During 1987 to 1994, the KTC engaged in twenty-five safeguard and twelve antidumping investigations that resulted in sixteen safeguard and eight antidumping measures.[46] After this case, however, the KTC markedly abstained from using a safeguard measure whereas it substantially increased antidumping actions. For example, from 1997 to 2002, there were only four safeguard investigations but forty-six antidumping cases.[47] 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.[48]

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*)[49] 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 nine months 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.

44. See WTO, G/SG/N/10/KOR/1, dated January 27, 1997 and G/SG/N/10/KOR/1/Supp.1, dated April 1, 1997.

45. 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,* in Korean (1997, 280–299).

46. Ibid.

47. See Korea Trade Commission, *Summary Report of Trade Remedy Action* (in Korean; February 2003, 1).

48. These are the Act on Investigation of Unfair Trade Practice and Trade Remedy Measures, Law 6417; and Implementing Regulation, Presidential Order no. 17222.

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

On February 1, 1999, the United States requested consultations with Korea in respect to 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 that the Korean measures to be inconsistent with the WTO obligation. The parties to the dispute agreed that a reasonable implementation period would be eight months and thus expire on September 10, 2001.[50] The Korean government subsequently revised the 'Management Guideline for Imported Beef' to abolish the beef import system operated by the Livestock Products Marketing Organization.[51] 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.[52] Thus, Korea considered that it had fully implemented the DSB's recommendation in this case.[53]

The only dispute settlement case concerning the Agreement on Government Procurement (GPA) to date is *Korea—Measures Affecting Government Procurement* (DS163).[54] 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 U.S. inquiries in the course of pertinent negotiation "[could], at best, be described as inadequate."[55] The United States did not make an appeal, and the panel report was adopted on June 19, 2000.[56] One of the important lessons 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. Moreover, the Korean government has often established a special task force, group, or committee with specific mandates, whose legal foundations are obscure (Cho 2000, 152). This issue of how to determine the scope of covered entities in relation to a newly established

50. See WTO, WT/DS161, DS169/12, dated April 24, 2001.

51. See Ministry of Agriculture Notification 2000-82.

52. See Ministry of Agriculture Notification 2001-54.

53. See WTO, WT/DSB/M/110, dated October 22, 2001.

54. 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 to 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. See WTO, WT/DS88, DS95/6, dated February 14, 2000.

55. See WTO, WT/DS163/R, adopted on June 19, 2000, paragraph 7.80.

56. See WTO, WT/DS163/7, dated November 6, 2000.

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 SCM.[57] On October 21, 2002, the EC 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.[58]

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.[59] They concluded the countervailing proceeding with 35 percent of final duties. Apart from the EC's action against the Korean government, the U.S. authorities also initiated a countervailing investigation in November 2002 that ended up with a final determination for countervailing duties up to 57.73 percent.[60] The final duty was slightly reduced to 44.29 percent when the U.S. authorities corrected calculation mistakes.[61] 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 industries that experienced similar restructuring programs in the course of the International Monetary Fund (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 dis-

57. See Commission Decision 2002/818/EC, OJ 2002 L 281/15.

58. See WTO, WT/DS273/1, dated October 24, 2002.

59. See WTO, G/SCM/N/93/EEC, dated March 12, 2003.

60. See U.S. 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.

61. See U.S. Department of Commerce, *Notice of Amended Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea* (C-580-851).

pute would certainly be an interesting and important addition to the WTO jurisprudence.

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 of 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. Last, 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 in enhancing the public recognition of the importance of the multilateral trade norms in all aspects of economic activities and policy making.

Korea as Complainant

So far, the Korean complaints in the WTO dispute settlement system have focused primarily on the U.S. trade remedy measures, especially antidumping measures. Five out of the total nine complaints concerned antidumping matters, and seven complaints were against the United States. Only one case was against the Philippines, and the other was against the EC. Two cases concerned safeguard measures, and the other two concerned 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 U.S. antidumping measures.

While Korea had been challenged in the WTO dispute settlement system from a very early period,[62] Korea appeared quite hesitant to bring com-

62. In 1995, three consultation requests were brought against Korea. The first two requests, *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.

plaints against other WTO member countries. It was not until 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 to the U.S. 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 twelve years despite the cessation of exports as well as the absence of dumping. Subsequently, in response to the U.S. preliminary determination of December 19, 1997 to revoke the antidumping duty order, Korea withdrew its request for a panel. On August 27, 1998, the United States made a final determination to revoke the antidumping duty order that 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 antidumping duties had been revoked.[63]

For a similar case regarding antidumping duty orders on dynamic random access memory semiconductors (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 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.[64] 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 eleven days after Korea lost its first WTO litigation as a respondent in *Korea—Soju.*[65] This somewhat fortunate timing of winning a WTO case contributed to alleviating the general concern and skepticism of the Korean public about the fairness and objectivity of the WTO dispute settlement system.

The two parties agreed on an implementation period of eight 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.

63. See WTO, WT/DS89/9, dated September 18, 1998.

64. See 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 March 19, 1999.

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

The DOC, however, issued a revised Final Results of Redetermination 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 EC 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.[66]

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 a 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.[67] 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.[68]

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 U.S. 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 percent. 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 percent for Taiwan and 12.12 percent for other Korean exporters, including POSCO. In this case, the panel was established on November 19, 1999 but actually composed on March 24, 2000.[69]

66. See WTO, WT/DS99/12, dated October 25, 2000.

67. For more positive assessment for Article 21.5 proceedings, see, generally, Kearns and Charnovitz (2002).

68. For the discussion of "aggressive legalism" by the Japanese government to deal with trade disputes, see Pekkanen (2001, 707–37).

69. 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.

The underlying economic situation for this case is remarkably aberrational (Lane et al. 1999). The pertinent investigation periods included unprecedented fluctuation of exchange rates caused by the financial crisis. As illustrated in figure 9.3, the value of the Korean currency, won, precipitated to a half in a time span of just 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 United States's 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. Because 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 fluctuated at more than a normal or reasonable level, members may consider suspension of antidumping actions at least for a certain range of dumping margins that should reflect potential methodological errors. In

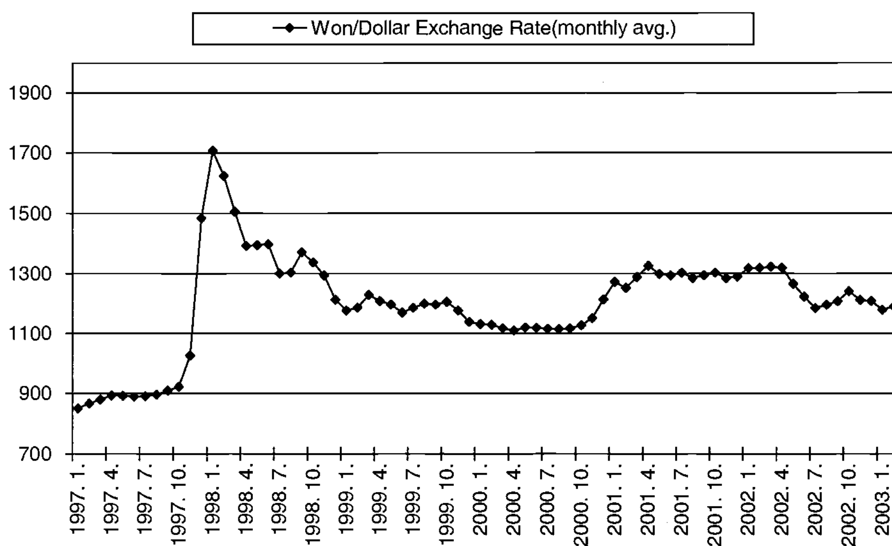

Fig. 9.3 Won/Dollar exchange rate trends

Sources: Bank of Korea, *Principal Economic Indicators* (March 2003). See also http://www.bok.or.kr.

other words, members may consider an increase of the current de 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 to 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, that is, Korean exporters.[70] 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 U.S. procedures and determinations to impose 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 U.S. measure was imposed in a manner inconsistent with the WTO obligations. In the Appellate Body proceeding,[71] 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.[72]

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 utilizing the WTO dispute settlement system, 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.[73] The U.S. government agreed to increase the in-quota volume of imports to 17,500 tons and lower the safeguard tariff to 11 percent, with the termination due of March 1, 2003.[74]

70. The imports above the first 9,000 short tons from each country would be subject to a 19 percent, 15 percent, and 11 percent 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 March 8, 2002, paragraph 2.5.

71. See WTO Appellate Body report, *US—Line Pipe,* WT/DS202/AB/R, adopted March 8, 2002. The United States initially filed an appeal on November 6, 2001 (WT/DS202/7) but withdrew it for scheduling reasons on November 13 (WT/DS202/8). The appeal was refiled on November 19, 2001 (WT/DS202/9).

72. See, generally, Ahn (2001).

73. See WTO, WT/DS202/17, dated July 26, 2002.

74. See WTO, WT/DS202/18, dated July 31, 2002.

But, considering that 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 measure remained until the end of February 2003. Thus, this case again illustrated the systemic problem in implementation of 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, as the first antidumping investigation against Korean electrolytic tinplates was dismissed for lack of merit.[75] The Tariff Commission of the Philippines imposed the provisional antidumping duties on polypropylene resins ranging from 4.20 percent to 40.53 percent and subsequently the final duties at slightly lowered levels.[76] 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.[77] 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, EC, 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 U.S. market, Korean exporters were very keen on the outcome of this case.[78]

The panel established by the requests from nine members was later merged with the panel requested by Canada and Mexico. The panel and the Appellate Body found that the Byrd Amendment was inconsistent with the Antidumping and SCM. Furthermore, the panel suggested that the United States bring the Byrd Amendment into conformity by repealing it. On

75. See WTO, G/ADP/N/65/PHL, dated September 21, 2000.

76. See WTO, G/ADP/N/72/PHL, dated March 6, 2001.

77. See WTO, G/ADP/N/85/PHL, dated February 22, 2002.

78. For antidumping measures, exporters from China and Japan are more frequent targets than those from Korea in the U.S. market. U.S. countervailing measures have targeted Italy, India, Korea, and France. See WTO, Statistics on Anti-dumping, http://www.wto.org/english/tratop_e/adp_e.htm and Statistics on Subsidies and Countervailing Measures http://www.wto.org/english/tratop_e/scm_e/scm_stattab8_e.htm.

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, 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 percent of the total disbursement of $231.2 million in 2001.[79] In 2002, the total disbursement under the Byrd Amendment was increased to $329.8 million.[80]

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 North American Free Trade Agreement (NAFTA) Implementation Act. The DSB established a single panel to include complaints by other members such as the EC, Japan, China, Switzerland, Norway, New Zealand, and Brazil.[81] 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 decided to become a more active participant and made an independent consultation request with the United States on November 1, 2002.[82]

Concerning this U.S. Section 201 action, the Korean government made the first trade compensation request pursuant to Article 8 of the Agreement on Safeguards.[83] When the U.S. government did not agree on satisfactory compensatory arrangements, several WTO members, such as the EC,[84] Japan,[85] Norway,[86] China,[87] and Switzerland,[88] notified to the Coun-

79. See U.S. Customs and Border Protection, CDSOA FY2001 Disbursements Final, http://www.customs.ustreas.gov/xp/cgov/import/add_cvd. 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 a $34.7 million offset payment for Torrington in relation to ball bearings dumping from Japan.

80. See U.S. Customs and Border Protection, CDSOA FY2002 Disbursements Final, http://www.customs.ustreas.gov/xp/cgov/import/add_cvd/.

81. See WTO, WT/DS251/10, dated August 12, 2002.

82. See WTO, WT/DS274/1, dated November 11, 2002.

83. About 12 percent of trade remedy measures against Korean exports are safeguard actions. For example, as of December 31, 2002, Korean exporters are subject to ten safeguard measures and five investigations in India, the United States, Venezuela, China, Argentina, Canada, and EC. See the Korea Trade Investment Promotion Agency (KOTRA) Summary of Import Restrictions against Korean Exports 2002 (in Korean, December 2002).

84. See WTO, G/C/10, dated May 15, 2002.

85. See WTO, G/C/15, dated May 21, 2002.

86. See WTO, G/C/16, dated May 21, 2002.

87. See WTO, G/C/17, dated May 21, 2002.

88. See WTO, G/C/18, dated May 22, 2002.

cil 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 ninety-day period set forth in Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT shall be considered to expire on March 19, 2005.[89] This agreement to postpone potential retaliation for about three years, however, practically wipes out all real impact on balancing trade interests, since the original safeguard measure is supposed to end on March 20, 2005.[90] In other words, the Korean government tried to avoid the possibility of actually exercising 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.

On September 3, 2003, Korea brought a complaint regarding the EC's subsidy policy on shipbuilding industry. This complaint is basically in retaliation of the EC's challenge against the Korean government's role during the financial crisis in the shipbuilding industry.

Antidumping actions against Korea (from January 1, 1995 to June 30, 2002)

	Argentina	Australia	EC	India	South Africa	United States	Others	Total
AD initiation	9	11	21	18	13	19	54	145
AD measures	6	4	9	13	13	11	18	74

As described previously, Korea has had major problems regarding the U.S. antidumping practices. In some sense, its experience as a complainant in the WTO dispute settlement system almost exclusively against U.S. antidumping practices is puzzling because, during the period of January 1, 1995 to June 20, 2002, it was the EC 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.[91] This fact seems to imply that the U.S. market still occupies an unbalanced economic importance in Korea.[92] Currently, Korea is actively engaged in pushing the agenda to revise the Antidumping Agreement in the Doha Development Agenda.[93]

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

90. See WTO, G/SG/N/10/USA/6, dated March 14, 2002.

91. See WTO, Statistics on Anti-dumping, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

92. On the other hand, Japan, a country with a similar trade structure and attitude toward trade dispute settlement, has shown much diverse interest as a complainant concerning its target markets. See, generally, Iwasawa (2000).

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

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 compliance 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 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.

9.3.4 Philippines

The Philippines' experience under the WTO dispute settlement system showed a typical pattern for developing-country members with comparative advantage in agricultural industry sectors. (See table 9.9.) 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.

9.3.5 Thailand

Thailand is in some sense unique in the manner that they use the WTO dispute settlement system. Thailand is currently the most active developing-country complainant in the WTO. Whereas Thailand was challenged

Table 9.9 WTO disputes involving the Philippines

As complainant		
Brazil—Measures Affecting Desiccated Coconut	DS22	P/AB report
United States—Import Prohibition of Certain Shrimp and Shrimp Products	DS61	In consultation
Australia—Certain Measures Affecting the Importation of Fresh Fruit and Vegetables	DS270	In panel
Australia—Certain Measures Affecting the Importation of Fresh Pineapple	DS271	In consultation
As respondent		
Philippines—Measures Affecting Pork and Poultry	DS74, DS102/US	Mutually resolved
Philippines—Measures Affecting Trade and Investment in the Motor Vehicle Sector	DS195/US	In panel
Philippines—Antidumping Measures Regarding Polypropylene Resins from Korea	DS215/Korea	In consultation

Note: See table 9.7 note.

Table 9.10 WTO disputes involving Thailand

As complainant		
EC—Duties on Imports of Rice	DS17	Inactive
Hungary—Export Subsidies in Respect to Agricultural Products	DS35	Mutually resolved
Turkey—Restrictions on Imports of Textile and Clothing Products	DS47	In consultation
United States—Import Prohibition of Certain Shrimp and Shrimp Products	DS58	P/AB report
Colombia—Safeguard Measure on Imports of Plain Polyester Filaments from Thailand	DS181	Inactive
Egypt—Import Prohibition on Canned Tuna with Soybean Oil	DS205	In consultation
United States—Continued Dumping and Subsidy Offset Act of 2000	DS217	P/AB report
EC—Generalized System of Preferences	DS242	In consultation
EC—Export Subsidies on Sugar	DS283	In consultation
EC—Customs Classification of Frozen Boneless Chicken Cuts	DS286	In consultation
As respondent		
Thailand—Antidumping Duties on Angles, Shapes, and Sections of Iron or Nonalloy Steel and H-Beams from Poland	DS122/Poland	P/AB report

Note: See table 9.7 note.

only once so far by Poland concerning antidumping measures, it made ten 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. (See table 9.10.)

9.3.6 Others

No WTO member has raised a formal complaint against China or Taiwan yet, although they joined the WTO more than a year and a half ago. (See table 9.11.) 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

Table 9.11 WTO disputes as complainants

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

Note: See table 9.7 note.

Table 9.12 WTO disputes as respondents

Indonesia		
Indonesia—Certain Measures Affecting the Automobile Industry	DS54, DS64/Japan DS55/EC, DS59/US	P/AB report
Malaysia		
Malaysia—Prohibition of Imports of Polyethylene and Polypropylene	DS1/Singapore	Inactive

Note: See table 9.7 note.

import markets.[94] Some of these measures may not be free from WTO challenges in the future. (See table 9.12.)

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.[95] It would bring about a

94. Up to the end of April 2003, the Chinese authority initiated twenty-one antidumping investigations. Among them, seventeen cases involved Korean products.

95. 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 a sixty-day consultation period. For more detailed accounts on the WTO dispute settlement proceedings, see, generally, Waincymer (2002).

diplomatically sensitive 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. Because 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 (Kong 2002). It remains to be seen how these members will agree to address this problem.

9.4 East Asia in the WTO Dispute Settlement Understanding (DSU) Negotiation

The DSU review mandated by a 1994 Ministerial Decision started in the DSB 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 DSU 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, who have often resorted to the WTO dispute settlement system, China and Taiwan are also making substantial contributions 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.[96] Korea proposed that the compliance panel proceed to determine the level of the nullification or impairment and, if the Appellate Body modified or reversed the legal findings and conclusions of the compliance panel, the Appellate Body determine the final level of the nullification or impairment.[97]

China suggested augmentation of special and differential treatment in the DSU to developing-country members, including the least-developed countries.[98] 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

96. See WTO, TN/DS/W/32, dated January 22, 2003.
97. See WTO, TN/DS/W/35, dated January 22, 2003.
98. See WTO, TN/DS/W/57, dated May 19, 2003.

members shall not bring more than two cases to the WTO DSB 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 antidumping measures shall be half of the normal time frame, the shortened time frame shall not apply to the defending party that is a developing-country member.

Taiwan made extensive proposals to improve third-party rights in the WTO dispute settlement procedures.[99] But Taiwan opposed some of the proposals made by other members such as the opening of meetings to the public, public access to submissions, and developing guideline procedures for the handling of amicus curiae submissions.[100]

Malaysia made an interesting proposal concerning litigation costs.[101] It proposed that 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.[102] The litigation costs shall include lawyers' fees, charges and all other expenses for preparation of necessary documents[103] and participation in the consultations, panel, and 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, the Philippines, and Thailand are signatories to the Centre. Thailand suggested that the

99. See WTO, TN/DS/W/36, dated January 22, 2003.

100. See WTO, TN/DS/W/25, dated November 27, 2002.

101. See WTO, TN/DS/W/47, dated February 11, 2003.

102. 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.

103. 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.

Appellate Body be composed of nine persons, three of whom serve on any one case.[104] Furthermore, it proposed a new panel composition process, including a Roster of Panel Chairs comprising individuals who may be appointed as chair of a panel by lot.[105]

At its meeting on July 24, 2003, the General Council of the WTO agreed to extend negotiations in the DSB special session that is reviewing DSU. The time frame was extended from May 31, 2003 to May 31, 2004. How many proposals to improve the DSU can actually be agreed upon by members by May 2004 remains to be seen.

9.5 National Complaining Procedures for Private Parties

The WTO dispute settlement system is primarily for member governments. In other 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 stand 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 the Section 301 mechanism of the United States and the Trade Barriers Regulation system of the EC. 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 EC initially introduced the so-called New Trade Policy Instrument by Regulation 2641/84,[106] but substantially modified it pursuant to the WTO Agreement and adopted the TBR system.[107] In both the United States and the EC, many WTO complaints have been indeed initiated by petitions under those systems.

104. See WTO, TN/DS/W/30, dated January 22, 2003.

105. See WTO, TN/DS/W/31, dated January 22, 2003.

106. See Council Regulation (EEC) no. 2641/84 of September 17, 1984.

107. See Council Regulation (EC) no. 3286/94 of December 22, 1994. For a thorough overview of the TBR, see Bronckers (1997).

Despite the rather long history and experience under the 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 six months and may be extended to nine months in exceptional circumstances. Article 29 provides that the Ministry of Commerce (previously, the Ministry of Foreign Trade and Economic Cooperation [MOFTEC]) may take one of the following, if foreign trade barriers are found to be in violation of international agreements: (a) bilateral consultation, (b) multilateral dispute settlement, or (c) other necessary measures. Although the current provisions do not exclude unilateral retaliation by taking "other 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.

9.6 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 a strong tendency in settling the disputes rather than litigating the cases. This fact should not be construed 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—of East Asian members have been able to use the WTO dispute settlement system for securing a level playing field. 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 how to make the WTO dispute settlement system a benign instrument for the entire economy, not a captive tool by a particular segment of industries.

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Comment Da-Nien Liu

This is an interesting paper, providing much valuable information on World Trade Organization (WTO) dispute settlement cases in the East Asia economies and greatly increasing the understanding of the participation of East Asia economies in the WTO dispute settlement system. Professor Ahn has done a thoroughly professional job in analyzing these Dispute Settlement Body (DSB) cases; most of the cases referred to in this article concern Japan and Korea because, for other East Asian countries, including Taiwan, DSB is a relatively new trade policy mechanism. I believe that there are valuable lessons to be learned from the experiences of these two countries; therefore, my comments are largely devoted to raising additional considerations and to questioning the areas in which more work could be done in the future.

I have four comments, the first of which is related to the issue of Japan as a complainant and a third party, while the second refers to a DSB case on Taxes on Alcoholic Beverages in Korea (the *Korea-soju* case, DS75 and DS84). The third question is related to the national complaint procedures for private parties, while the final question is on the subject of future amendments to the DSU in the East Asia economies.

First of all, as mentioned in the paper, the attitude of the Japanese government changed after 1998, when more DSB cases were initiated, and it is also noteworthy that Japan is now one of the most active third parties in WTO dispute settlement cases, where it has shown a strong interest in those cases concerning measures by the U.S. government. Here it may be

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more interesting to learn the overall strategy of Japan regarding its DSB participation. Why would Japan, with its abundant resources and considerable experience in dispute settlement cases, choose to be an active third party? In particular, why should any country that has a substantial interest in certain cases choose to be a third party rather than a party to the dispute? As we know, a third party in dispute settlement cases does not need to spend considerable time, effort, and money in bringing a complaint to the panel, and it can also attend the first meeting of the panel where it can present its own views (with the exception of confidential information hearings). Most important, if it stands alongside the plaintiff, which subsequently wins the suit, it can also enjoy the benefits of the case on a most-favored nation (MFN) basis (if the respondent complies with the recommendations or rulings of the DSB). For a new WTO member, such as Taiwan, being a third party in a case is an appropriate way of gaining experience, while spending relatively little as it learns to further integrate itself into the multilateral trading system.

Second, in section 9.3.3, Professor Ahn refers to the *Korea-soju* case noting that "by experiencing the impact of the WTO dispute settlement decisions, probably at the deepest and widest level of daily life, this case has played a crucial role in enhancing WTO awareness in Korea." After losing the case, Korea was forced to amend the Liquor Tax Law and the Education Tax Law, that is, to increase the tax rate on *soju* in order to comply with the recommendations and rulings of the DSB.

I believe that this is a very important issue because Taiwan was faced with a similarly difficult situation when it amended its regulations on tobacco and wine, leading to a significant increase in the tax rate on rice wine so as to comply with the national treatment principle of the WTO. Many people in Taiwan could not accept the result because they had enjoyed low tax rates on rice wine for decades, and many of these people continued to believe that rice wine was only for cooking, not for drinking. However, the United States did not accept this point, and, as a result, many people complained of the Taiwanese government's failure in its trade negotiations with the United States, leading to a fundamental misunderstanding and negative impression of the WTO. It would be interesting to see how a government can succeed in educating its people with regard to DSB outcomes and help to provide a better understanding of WTO principles. I believe that this is important, for both Korea and Taiwan, and I expect that Professor Ahn could provide the East Asian economies with the fine details of some Korean experiences.

The third point relates to the issue of national complaint procedures for private parties. The paper notes that China was the first country in East Asia to implement a trade barriers regulation (TBR)-like system that would allow private parties to raise complaints against foreign trade barriers under systemic procedures, which would in turn lead to formal WTO

complaints by the government; this is the so-called Provisional Regulations for the Investigation on Foreign Trade Barriers, which was enacted on November 1, 2002. It is also very interesting to consider the motivation behind China's application of this system. My question relates to whether, if the government concerned rejects the application of a private enterprise to raise a complaint, the private enterprise in question will have the right to appeal the government's decision through some administrative or judicial procedure based on an allegation that the discretionary decision of the government concerned is at odds with the interests of private parties. I think that this is also a very important point in assessing the functionality of the system.

Finally, I suggest that the paper could add more on the role that East Asia can play in future DSB negotiations. Although the DSB failed to complete its negotiations for amendments to the DSU before the end of May 2003, as mandated by the Doha Ministerial Declaration, the chairman of the DSB did present many proposals at the end of May.[1]

The following issues are also of considerable importance: improvements to third party rights, clarification of the controversy between the compensation and retaliation amendment of the "reasonable period of time," improvements to the implementation of the recommendations and rulings of the DSB, remand procedures of panel reports, and special considerations for developing countries (special and differential [S&D] treatments). All of these issues could have an impact on the East Asia countries in their application of the DSB mechanism and should call for further study. In particular I feel that the issues of compensation and retaliation, and the special treatment of developing-country members, are of significant importance.

Comment John Whalley

This is an extremely interesting paper that carefully documents World Trade Organization (WTO) dispute settlement cases primarily involving Japan, Korea, and Thailand since 1994 when, as part of the Uruguay Round decision and the relabeling of the General Agreement on Tariffs and Trade (GATT) as the WTO, major changes took place in dispute settlement procedures. These included consensus to reject over consensus to accept, time limits for various stages of proceedings, a permanent roster of panelists, and an appellate procedure. Prior to 1994, East Asian in-

1. See (JOB (03)/91/Rev.1).

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volvement in GATT dispute settlement was extremely limited and primarily involved cases against Japan. Japan in those years used GATT dispute settlement little in attempting to deal with problems of access and repeated violations of their GATT rights in North American and European markets. Professor Ahn shows how three leading East Asian traders are now much more aggressively pursuing WTO dispute settlement than before but (as table 9.5 shows) still far less aggressively than major non-Asian WTO members.

Relatively little, to my knowledge, has been written on the East Asian experience with WTO dispute settlement, and so this is a welcome contribution. Also, in my opinion, economists have relatively little to say in general about mechanisms for the enforcement of international legal arrangements, because if one accepts the folk theorem sets of trigger strategies rather than agreed procedures for the resolution of disputes should support international agreements. Let me further say, in passing, that the WTO itself (which is now really more of a World Everything but Trade Organization (WŦO; environment, IP, labor standards, etc.) or a World Time and Trade Organization (WTTO; with the inclusion of intertemporal intermediation services such as banking) poses myriad paradoxes for economists. Why is global policy bargaining only confined to trade policy (which it now of course is not since the WTO is really the World Bargaining Organization)? Why are there no side payments? Why is bargaining constrained by agreed prior rules, such as MFN, which seemingly forgo gains from bargaining? And many more. . . .

I will concentrate my remarks on three questions not posed directly by Professor Ahn but implicit in his discussion. Why such limited use of dispute settlement by East Asian economies prior to 1994? Why is there an elevation in use after? And is it really true, as he suggests, that the post-1994 system is an improvement?

Why such limited use of dispute settlement by East Asians prior to 1994? I believe there is no simple or single answer to this question; instead, numerous factors enter. The GATT as it evolved from 1947 through 1957 (Treaty of Rome) was de facto more of a bilateral European Union (EU) U.S. accommodation in which other parties participated through MFN guaranteeing each of the two major parties (the United States and the EU) access rights to agreements the other negotiated. The trading system never was and still is not an arrangement between entities of equal size. And given this, most early disputes were inevitably EU-United States. Add to this the enormous cultural differences as far as legal systems and transparency in policy are concerned between the Asia economies and the EU and the United States, and the strategic interest in both Japan and Korea in maintaining security arrangements with non-Asian partners at the expense of trade redress and, in my view, key factors are exposed.

Why the increase in use post-1994? Clearly the change in WTO arrange-

ments play some role as panels are automatic, and panel rulings can no longer be blocked. But there is more. One factor is the changed role and profile of legal arrangements generally in East Asia; another is the wider and more active country participation in WTO process; and yet another is the weakening of security considerations.

Is the post-1994 WTO process for resolving disputes really an improvement? Most WTO scholars seem to think so. Panels are effectively automatic, and panel rulings cannot be blocked. But as the late Bob Hudec so often documented, the overload of WTO cases and resulting impacts on the quality of WTO jurisprudence are major sources of concern. Added to these is the clear proliferation in panels as time limits for one panel process attempting to resolve a dispute spawn new and more panels (as happened in the *Banana's* case). True, there are no longer the ten-year-old delays as in the *EU-US DISC* case in the 1970s, but if parties with power do not accept panel rulings as fair and balanced and time limits are used to force their legal acceptance, further political (and eventually new legal) conflict ensues (as has happened).

Where are the East Asians headed in all this? My own view is into major conflict. The terms of China's WTO accession (especially in services such as banking) are breathtaking and may not be able to be implemented by 2007, inviting WTO dispute process and retaliation. If the Multifiber Arrangement (MFA) is replaced in 2005 by some new set of trade restricting measures against apparel in the Organization for Economic Cooperation and Development (OECD)-fresh WTO, conflict might well ensue, and the East Asians will be at the heart of this. How they use and foster dispute settlement may be key to their trade interests.