JAPAN AND THE WTO'S DISPUTE SETTLEMENT SYSTEM

Dr. Muhammad Ijaz Latif

Abstract

This article argues that since the creation of the WTO, Japan has been a more active participant in dispute settlement mechanism than it was in the GATT system. It has used the WTO dispute settlement process to tackle what it considers to be the other's abuses of international trade rules. The WTO's dispute settlement mechanism has served as a catalyst in greatly strengthening Japan's ability to better secure its interests, especially in confronting US unilateralism. Generally, though not always, Japan's participation in the dispute settlement system has accrued fairly positive results for itself and despite some unsuccessful cases, it has reaped important successes, especially with regard to antidumping issues. The article concludes that the multilateral legal rules have provided opportunities to Japan to promote its interests by invoking dispute settlement processes and though historically preferring a system relying on negotiation and compromise, it has come to support a more legalistic WTO dispute settlement system to resolve WTO-related disputes.

Japan participated in successive rounds of multilateral trade negotiations, under the framework of GATT, including the Tokyo Round of the 1970s. However, Japan has been relatively passive in its use of GATT's admittedly weak dispute settlement mechanism and other GATT-consistent forms of protection such as the antidumping measures.[1] It was also due to GATT's dysfunctional dispute settlement procedure that many trade conflicts involving Japan continued to be resolved bilaterally.[2]

While discussing various cases involving Japan in the WTO this article argues that the January 1, 1995 establishment of the WTO and its new and improved dispute settlement mechanism has contributed in bringing about an important change in Japan's external trade relations. It is argued in this context that it has significantly strengthened Japan's potential to oppose discriminatory trade protection by its trade partners.[3] The automobile dispute of 1995 can be cited in this changing scenario, where Japan refused to open its market under the US pressure and the US decided to settle the case according to the Japanese priorities. Similarly, there are other antidumping and TRIMs-related cases, where Japan has been able to secure its interests successfully in the new framework of the WTO.

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* *Head, Department of International Relations, The Islamia University of Bahawalpur, Bahawalpur, Pakistan*

The WTO's Dispute Settlement System and Japan

The establishment of the WTO dispute settlement system is one of the most significant changes adopted as a part of the Uruguay Round of multilateral trade negotiations. The system has worked to the benefit of the member states, providing a means to enforce their respective rights and contributing to greater compliance by WTO members. Japan attaches importance to using multilateral dispute settlement procedures of the WTO to address unfair trade policies and measures.[4] In the four years after the establishment of WTO in 1995, more than 150 cases were brought to the WTO and according to one report by METI, this fact demonstrates the credibility of the WTO dispute settlement procedures, and also shows how effectively the mechanism works.[5]

The creation of the WTO led to significant legal and institutional changes that increased the credibility and legitimacy of the dispute settlement system. Thus, it is argued that the WTO dispute settlement affords a number of benefits to the member states including Japan. Japan has achieved successes within the current rules; and the manner in which panels and the Appellate Body render findings in the area of antidumping, countervailing, and safeguard measures, means Japan and other members benefit from clarification and improvement.

Overall, in comparison to the dispute settlement options available under the WTO's predecessor, the GATT, the WTO dispute settlement mechanism has been found to be more reliable. It also defuses opportunities to block panel results, and is more comprehensive, in that it covers all the WTO agreements while the GATT system covered only goods. The element of 'automaticity' to the dispute resolution system is reflected in both the time-bound and negative consensus properties evident in the procedural rules of the DSU.

In the case of Japan, it is argued that, though historically preferring a system relying on negotiation and compromise, it has come to support a more legalistic WTO dispute settlement system to resolve WTO-related disputes.[6] Japan's interest in the dispute resolution procedures can be traced especially to its concern with handling trade problems with the US in the post-Cold War era especially since Japan and the US had been embroiled successively in high profile and contentious trade disputes over most of postwar era.[7]

According to a widespread view in the Japanese foreign policy establishment, Section 301 of the US Trade and Tariff Act of 1974 (updated in 1998), had allowed the US to be both judge and jury in trade disputes with Japan in the 1980s, and the measures had to be countered.[8] In this context, Japan, and also the EU, hoped that a strengthened WTO dispute settlement system would reduce US tendencies toward unilateral actions under Section 301 of the US 1974 Trade Act.[9]

However, while Japan has requested more consultations than under the GATT, its post-1995 requests appear small by comparison to the US and the EU.[10] It is argued that this difference 'may reflect a conscious decision by the Japanese authorities to pursue dispute settlement especially in cases in which its major export interests are in jeopardy' and 'to resist in cases in which its domestic firms are charged with ostensible restrictive behavior'.[11]

Overall, since the creation of the WTO, Japan has been a more active participant in dispute settlement mechanism than it was in the GATT system. It has used the WTO dispute settlement process to tackle what it considers to be the other's abuses of international trade rules. In this context, Japan has generally received satisfactory results in the cases where it was a complaining party. Moreover, the existence of the DSU rules made it somewhat easier for Japan to argue that the US could not proceed with unilateral action. For example, in the case concerning photographic film, against the US, Japan became able to extract an outcome in its favor.

In this case regarding consumer photographic film and paper[12], the US put to challenge various Japanese laws, regulations, and requirements concerning imports of photographic film and paper. This translated into a Section 301 action on behalf of Eastman Kodak against the Fuji Photo Film Company. As the consultations remained unsuccessful, the US requested the establishment of a panel that was set up formally in October 1996. In this case, what the US put up claims that certain laws, regulations, and requirements put in force by the Japanese government, with respect to the distribution and sale of imported consumer photographic film and paper, violated the existing WTO legal provisions, and thereby harmed the US interests. However, the panel remained unconvinced and dismissed all of the US objections. The US did not

move to appeal the ruling. The panel report was adopted by the WTO in April 1998, demonstrating Japan's success.

The Massachusetts case[13] was initiated because, in June 1996, the US state of Massachusetts passed a law barring the State from entering into contracts with any company that does business with Burma (Myanmar). Japan, however, claimed that this law was in violation of certain articles of the 1994 Government Procurement Agreement.[14] As the joint consultations, by Japan and the EU, with the US remained without any substantial development, Japan and the EU jointly requested the establishment of a panel in September 1998. However, in the meantime, a US District Court held that this law was unconstitutional and was thus invalid. The State of Massachusetts' motion for a stay pending appeal was rejected.[15] As this law has been declared invalid, Japan requested, along with the EU, to suspend the panel proceeding in February 1999.

Japan has asked the WTO to adjudicate several trade disagreements with the US and also other trading partners. In 1995, an important case on the issue of market access of auto exports was initiated by Japan against the US.[16] The case dealt with punitive duties on Japanese auto exports to the US. Japan filed its first complaint in the WTO in May 1995, which however, did not lead to the establishment of a panel.

In this case Japan alleged that the imposition of import duties on automobiles from Japan under Section 301 of the Trade Act of 1974 were in violation of the GATT. The dispute was settled in July 1995 when Japan and the US came to an agreement mainly favorable to the Japanese side. The automotive complaint against Indonesia (a TRIMs case), regarding discriminatory tax and tariff regimes in the Indonesian automobile sector, was also settled as Japan prevailed against Indonesia and Indonesia had to change its auto regime.

Japan also prevailed against Canada in the automotive sector. Its complaint against Canada involved the latter's import measures that especially favored the big three US automobile manufacturers (Autopact) by allowing these to import automobiles with zero percent tariff.[17] It had also been included in the Canadian deal that new members would not be added to the Autopact. In July 1998, Japan requested consultations with Canada followed by a similar request by the EU. Japan then requested

the establishment of a panel in November 1998, and a joint panel of Japan and the EU was established in February 1999.

Japan claimed that the Canadian duty exemptions violated specific legal provisions of the WTO. After deliberations, the panel report of February 2000 upheld almost all Japanese claims. Although Canada went on to appeal the ruling on March 2, 2000, the appellate body upheld the rulings, especially with respect to violation of the GATT articles. Thus practically Japan won its case against Canada.

Japan has also contested the US regarding various dumping complaints in the WTO. In one case, United States-Anti-Dumping Act of 1916 (March 2000),[18] Japan, (and also the EU), successfully challenged the US Antidumping Act of 1916 after a US steel company used it to sue several importers of Japanese steel. On 26 September 2000, the Dispute Settlement Body (DSB) adopted its recommendations and rulings in the case. At the DSB meeting on 23 October 2000, the US informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter.

On 19 May 2003, legislation repealing the 1916 Act and terminating all pending cases was introduced in the US Senate. Other bills repealing the 1916 Act were introduced in the US House of Representatives on 4 March 2003 and in the Senate on 23 May 2003. Moreover, the US administration has conveyed its intention to continue to work with its Congress to enact legislation, and that it will continue to confer with the EC and Japan, in order to reach a mutually satisfactory resolution of this matter.

In the case of Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan[19], Japan moved formally to challenge antidumping measures against some of its steel products in the US and requested a panel on February 24, 2000. By February 2001, the panel report made clear that Japan had prevailed in much of its legal case against the US. When the US appealed the panel's rulings, the appellate body similarly found that the US actions had violated certain provisions of the antidumping agreement, as argued by Japan, although not to the extent claimed by Japan.

In another case regarding steel safeguards[20], Japan and seven other complainants (the EC, South Korea, China, Switzerland, Norway, New Zealand, Brazil consolidated into one case), filed the original complaint

against the US in March 2002. The case was filed in reaction to the US president's imposed 'safeguard' tariffs of up to 30 percent on several types of imported steel on March 5, 2002. The US said objective was to restructure and help its ailing steel industry and it regarded its action as consistent with the WTO safeguard agreement, which allows countries to restrict imports temporarily if these threaten 'serious injury' to a specific domestic industry.

The Section 201 duties, imposed in March 2002 were reduced by 20 percent in March 2003, and further, imports from many developing countries and a number of steel products were excluded from the duties. However, Japan claimed the US move violated the WTO rules on the condition that there had not been a surge of steel imports into the US, a precondition for invoking the WTO safeguard rules.

The WTO panel issued its decision on July 11, 2002. It rejected the US arguments that the tariffs of between 8 and 30 percent, on selected types of steel imports, were needed because of increased steel imports that were hurting its domestic steel producers, thus deciding that US steel tariffs were without justification. The panel also rejected the US higher duty exclusions for free trade agreement (FTA) partners, Canada, Mexico, Israel and Jordan, even when the US included imports from those countries to demonstrate an increase in imports.

However, the US opted to appeal the WTO panel's final ruling against it and in the meantime kept in place the steel tariffs, originally introduced for three years. The steel dispute intensified as the EC drew up a list of potential US products to be hit with retaliatory measures if Washington failed to conform to the WTO ruling. In any event, Japan along with other complainants remained successful at the panel stage and later in the Appellate Body's decision. In this context, on December 4, 2003, the US President demolished controversial steel tariffs, mainly to avert the threat of retaliation from the EU and Japan, etc.

On 28 May 2008, Japan as a complainant requested consultations with the European Communities and its member states with respect to their tariff treatment of certain information technology products.[21] Japan claimed that the tariff treatment the European Communities and its member States accorded to certain information technology products did not respect their commitments to provide duty-free treatment for these products under the Information Technology Agreement (ITA) and

asserted that a number of EC customs classification legal instruments appeared to be inconsistent with the EC's and its member States' obligations under Article II:1(a) and II:1(b) of the GATT 1994 and their Schedules, and therefore nullified or impaired benefits accruing to Japan under the GATT 1994. However, in this case no panel had been established nor settlement notified.[22]

According to the request for consultations from Japan as a complainant on 24 November 2004, the US violated its WTO obligations with respect to certain measures relating to zeroing and sunset reviews.[23] On 4 February 2005, Japan requested the establishment of a panel. The Panel upheld Japan's claim relating to the use of zeroing when used by the USDOC by finding that it is inconsistent with Article 2.42 of the Anti-Dumping Agreement. It also agreed with Japan that the US zeroing methodology is a "norm" capable of being challenged in WTO dispute settlement proceedings. The Panel rejected Japan's claims that zeroing was prohibited in proceedings other than original investigations, i.e. periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews.

However, both the parties notified their respective decisions to appeal certain issues of law covered in the panel report and certain legal interpretations developed by the Panel. The Appellate Body upheld the Panel's finding that the United States' zeroing procedures constitute a measure which can be challenged, as such, and therefore dismissed the United States' claim that the Panel acted inconsistently with Article 11 of the DSU. It, however, reversed the Panel's finding that the United States does not act inconsistently with Articles 2.1, 2.4 and 2.4.2 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994. At its meeting on 23 January 2007, the DSB adopted the Appellate Body report and the Panel Report, as modified by the Appellate Body.

Afterwards the United States stated that it intended to comply with its WTO obligations and that it would need a reasonable period of time to do so, Japan requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU. Despite the Director-General's appointment of Mr. Florentino Feliciano to act as arbitrator, on 4 May 2007, the United States and Japan informed the DSB that they had mutually agreed that the reasonable period of time for the United States to implement the DSB

recommendations and rulings would be 11 months, expiring on 24 December 2007. However, on 10 January 2008, on the grounds that the United States had failed to implement the DSB recommendations and rulings, Japan requested the DSB authorization to suspend concessions pursuant to Article 22.2 of the DSU. The United States objected to the level of suspension and accordingly requested the matter to be referred to arbitration under Article 22.6 of the DSU and on 18 April 2008, the DSB agreed to refer to the original panel, if possible, the question whether the United States had complied with the DSB recommendations and rulings.[24]

On the negative side, there have been some adverse rulings involving Japan in the WTO dispute settlement system. In the alcohol taxes case[25], the US along with the EU and Canada, successfully challenged a discriminatory Japanese tax initiative that placed high taxes on some western-style spirits, while applying low taxes to a traditional Japanese spirit (shochu). The Appellate Body Report and Panel Report were adopted on December 24, 1996, while not deciding in favor of Japan. However, under a December 1997 deal, Japan agreed to eliminate tariffs on white spirits and to accelerate elimination of tariffs on brown spirits.

Japan could not win a case, Japan - Measures Affecting Agricultural Products[26], brought by the US, and eliminated on 31 December 1999 the varietal testing requirements and the relevant experimental guide described in the Panel Report (WT/DS76/R). The US had alleged that Japan's quarantine measures for imports of agricultural products, including apples, cherries, peaches, walnuts, etc., were inconsistent with certain Articles of the sanitary and phytosanitary agreement, Articles XI of the GATT, and Article IV of the Agreement on Agriculture. After failure of consultations under the WTO, in April 1997, the panel, established in October 1997, issued report supporting the US claim and recommended Japan to change the measures. Japan, however, filed an appeal in November 1998.

In February 1999, the Appellate Body upheld the panel's findings. At its meeting on 19 March 1999, the Dispute Settlement Body adopted the Appellate Body report (WT/DS76/AB/R) and the panel report (WT/DS76/R) as modified by the Appellate Body report. Thus, Japan agreed to eliminate various testing requirements for quarantine purposes

and lifted various restrictions on the imports of certain varieties of fruit, including apples and cherries. On 30 August 2001, Japan and the US communicated to the Chairman of the Dispute Settlement Body, that they have reached a mutually satisfactory solution regarding the matters raised by the US in 'Japan - Measures Affecting Agricultural Products' (WT/DS76) with respect to conditions for lifting import prohibitions on the fruits and nuts at issue in the dispute (covered products).

Japan also remained unsuccessful in the WTO case over apple quarantine.[27] On March 1, 2002, the US requested WTO dispute settlement consultations with Japan on its fire blight restrictions on imported US apples. Consultations remained unsuccessful and on May 7, 2002, the US requested that the WTO establish a panel to consider the Japanese restrictions. The US alleged that Japan's fire blight restrictions were inconsistent with various provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and also without sufficient scientific evidence. Japan imposed severe restrictions on imported US apples, allegedly to protect Japanese plants from fire blight, a plant disease that affects certain types of plants, including pear and apple trees, but does not affect humans.

Japan claimed that its restrictions on imports of US apples were necessary to prevent introduction of fire blight into Japan. Japan, which had no fire blight-related plant disease, required US exporters to provide evidence that the trees from which apples were picked for export to Japan had been free of the disease for several years. Japan also required US apple farmers to keep trees producing fruit for export at least 500 meters away from other apple trees.

The WTO panel concluded, in a substantial report issued on 15 July 2003 that Japan's quarantine measures for fire blight disease were inconsistent with the WTO Agreement on Sanitary and Phytosanitary Measures. The WTO panel found, among other things that, on the basis of the information available, there is not sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment or spread of fire blight within Japan. The WTO settlement panel concluded that the Japanese measures were excessive and without scientific foundation. Japan, however on 28 August 2003, filed an appeal against the WTO panel's conclusion.

On 14 March 2006, a complaint was filed by Korea requesting consultations with Japan concerning countervailing duties imposed by Japan on certain Dynamic Random Access Memories (DRAMs) from Korea.[28] Korea considered that the foregoing determinations were inconsistent with Japan's obligations under the GATT 1994 and under the SCM Agreement. On 18 May 2006, Korea requested the establishment of a panel. At its meeting on 19 June 2006, the DSB established a panel. The Panel in its report while rejecting some of the Korea's claims upheld some of the claims in light of its findings.

On 30 August 2007, Japan notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel report and certain legal interpretations developed by the Panel. The Appellate Body report was circulated to Members on 28 November 2007 and on 17 December 2007; the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report. At the DSB meeting of 15 January 2008, Japan announced its intention to implement the recommendations and rulings of the DSB in a manner consistent with its WTO obligations and was prepared to consult with Korea to reach an agreement on the reasonable period of time. On 25 February 2008, Korea requested that the reasonable period of time be determined through binding arbitration and both Korea and Japan requested Mr. David Unterhalter to act as arbitrator. The arbitrator determined that the reasonable period of time for Japan to implement the recommendations and rulings of the DSB would be eight months and two weeks from the date of the adoption of the Panel and Appellate Body reports.

Japan has also settled some challenges in the consultation stage, and an important case brought by the US/EU concerning sound recordings under the TRIPs Agreement was resolved without litigation. Japan changed its law to grant full copyright protection for sound recordings, thus bringing its copyright law into compliance with the WTO TRIPs Agreement.[29]

In another case in which Japan was a respondent,[30] Korea requested consultations with Japan on 1 December 2004 concerning Japan's import quotas on dried laver and seasoned laver. According to the request for consultations, Korea believed that Japan's extremely restrictive import quotas on dried laver and seasoned laver are inconsistent with, *inter alia*,

Articles X.3 and XI of the GATT 1994; Article 4.2 of the Agreement on Agriculture; and Article 1.2 and 1.6 of the Agreement on Import Licensing Procedures. On 4 February 2005, Korea requested the establishment of a panel. At its meeting on 21 March 2005, the DSB established the panel. However, on 23 January 2006, Korea and Japan informed the DSB of a mutually agreed solution under Article 3.6 of the DSU.

Japan has also made some proposals to improve the DSU, e.g., it has proposed that the DSU should be amended so that a complaining country may be allowed to take countermeasures only after a separate panel finds the member concerned has not complied with the recommendations or rulings of the Dispute Settlement Body.[31]

Conclusion

Japan has achieved successes within the current rules, and thus, it supports the WTO dispute settlement system. Although, Japan was relatively passive in its use of the GATT's relatively weak dispute settlement mechanism, its interests in the WTO framework have been considerably enhanced, especially after important successes in high profile cases with the US and other countries. The WTO's dispute settlement mechanism has served as a catalyst in greatly strengthening Japan's ability to better secure its interests, especially in confronting US unilateralism. In the context of the WTO's dispute settlement system, Japan, and also the EU, remain optimistic because the system tends to reduce the US inclinations toward unilateral actions.

Overall, Japan can be observed as a more active WTO member in the dispute settlement system. As a party to various disputes, it has remained quite actively involved in various important cases under the WTO dispute settlement system. Generally, though not always, its participation in the dispute settlement system has accrued fairly positive results for itself. The multilateral legal rules have provided opportunities to promote its interests and by invoking dispute settlement processes, Japan has legitimately tried to thwart external pressures and to protect its domestic interests to the extent possible.

Thus, Japan attaches importance to using the multilateral dispute settlement procedures of the WTO to address unfair trade policies and measures by its other trading partners. Despite some unsuccessful cases, Japan has reaped important successes, especially with regard to

antidumping issues. It also brings to light another high priority of Japan: to strengthen rules and disciplines related to antidumping, especially in its disputes with the US.

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