From Rule Takers, Shakers to Makers: How Japan, China and Korea Shaped New Norms in International Economic Law

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While the rise of Asia in the international economy has been widely noted, much less appreciated is the way in which that rise has interacted with the forces of international economic law (IEL). Perhaps the most dominant perception among both legal scholars and social scientists is still that formal law does not play much of a role in the East Asian region – that its institutions are weak, that it has a preference for non-legalistic methods and non-binding commitments which also extend to dispute settlement mechanisms, and that in contrast to highly legal systems as, for example in Europe, far more weight should be given to the competition of national economies and ethnic groups in growing markets than legal dimensions in the case of Asia even today.¹

This very conceptualization that goes within and across Asian countries has also been extended to their behavior at the multilateral and international levels. Yet even those holding to the contrast between high levels of legalization in Europe and North America and low ones in the case of Asia in the early 2000s had also begun to note the increasing role of formal law in Asia.² This shift towards legalism has been most prominent at the global multilateral level as a number of works have stressed the importance of law and legal processes by and for Asian countries in contexts such as the World Trade Organization (WTO) as well as through burgeoning Free Trade

Agreements (FTAs) and Bilateral Investment Treaties (BITs). In this paper we go further and take the first systematic steps towards a comparison of the activities of the dominant players in contemporary Asia, namely China, Japan, and Korea (CJK) with the goal of bringing them into mainstream debates and controversies in IEL.

Using an interdisciplinary approach combining political economy approaches with legal scholarship, we aim to show how legalization has become a force to contend within Asia. By legalization we mean specifically that, in significant contrast to the past, Asian countries have begun to stress the dimensions of precision (unambiguous rules to require, authorize, or proscribe action), obligation (rules or commitments to bind action), and delegation (third parties to implement, interpret, and apply the rules for disputes or further rule-making) in a wide range of their economic relations. To be clear, we are not stressing that by doing so they are moving toward legal integration, where like the European and Andean cases, formal or informal moves

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help create a seamless rule of law affecting domestic actors and international tribunals.\(^5\) Rather, driven by their activities at the global, multilateral and now increasingly regional levels, the moves toward legalization should be seen as an evolutionary move toward the creation of the rule of law across borders. Thus as Asian states have begun to stress the dimensions of precision, obligation, and delegation in their economic relationships at present, the sum total of their moves may well go on to have significant implications for the creation of such rule of law systems in the future particularly in their foreign economic diplomacy.

Put simply, then, our main contention in this paper is that Asian states are no longer merely passive rule-takers in a system of IEL still widely thought to be dominated by Western countries, principally the United States and European Communities. Rather, as their economic clout has risen at both the global and regional level, key Asia states such as CJK have become aggressive users of the dispute settlement system of the WTO with novel directions in their domestic institutional landscapes; and they have also moved well beyond the narrow confines of the WTO-centered system to shape even regional and cross-regional legal frameworks to their advantage. How and why did things come to this? What exactly are the legal consequences both for IEL and these countries’ domestic legal systems? What does the sum total of these sequential changes portend for the rule of law in CJK and other Asian countries more broadly?

The remainder of the paper is in three parts. The first part provides an analytical framework that stresses the rise and significance of commercial interests operating across borders, irrespective of whether the source is public or private in nature. Thus we are less concerned with whether a government or a business is responsible for economic flows across borders than with the fact that those flows are taking place. It also provides a brief statistical

\[^5\text{See, for example, Laurence R. Helfer, Karen J. Alter, and M. Florencia Guerzovich, “Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community,” American Journal of International Law 103(1) 2009, pp. 1-47.}\]
background, placing Asia’s economic weight in global and regional context. Although we look at East Asia more broadly in the paper, we focus on the relative weight of dominant regional players, namely CJK which also go on to form the bulk of the analysis in this paper. The second part turns to the empirical evidence, focusing on substantial changes at both the international and domestic levels over the past twenty years that deserve close attention. At the international level, in breaking with their own tradition of being reluctant litigants, CJK along with other East Asian states have started to “shake” the existing power structure by actively using the existing legal rules to advance and defend their own interests in a policy shift to “aggressive legalism.” This ongoing policy shift is one of the core elements for fortifying the “rule-based” WTO system, as well as strengthening the trend toward regional interaction on the basis of rules. But these same states have also moved well beyond the WTO-centered system in the 2000s more visibly, as they have actually started to “make” new norms by proposing new rules at the multilateral level and creating a web of legal agreements at the inter-regional and intra-regional level that aim to reflect their own interests. These instruments span trade, investment, and finance, and are a harbinger of the continued legalization of Asian economic relations. The third part concludes, focusing on the implications of the analytical and empirical evidence for the future of the rule of law in the multilateral and regional system more broadly.

Analytical and Economic Overview

In this paper, we are primarily interested in understanding why we have begun to see rapid and even aggressive legalism on the part of Asian actors. What might account for the shift toward legalism, and what might that also portend for our theoretical understanding of the rise of
legalization in other regions of the world? Below we lay out an analytical framework that informs the rest of the paper, as well as a statistical overview that highlights some key relationships.

Our argument is simple: The very same rise of commercial and economic interests, whether public or private in origin, that have enmeshed Asian countries in the global and regional orders, have also changed the calculus of law for all actors concerned. The logic is that commercial and economic flows across borders require a credible legal framework to ensure their continuation. More specifically, as they acquire heavier stakes in material economic advantages in cross-national settings, the actors behind such flow need calculability and predictability in the interest of their operations. The importance of repeat-playing – not just in terms of the outcomes of litigation but also with the very contents of rules on which litigation and decisions turn in the first place – is equally important for public and private actors whose economic interests naturally extend and need to be safeguarded across borders and over time.

From the perspective of both industries and governments enmeshed in transnational economic settings, law becomes not only the most legitimate but also the most efficient weapon to wield. Operationally, interacting on the basis of pre-agreed rules allows actors to take the high moral ground and voids the need to reinvent rules all the times when troubles do arise in foreign economic relations. Realistically, law is also the only means through which home actors can hope to exert some control over rule-making and litigation outcomes in their favor in global

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7 For the classic setup pitting the ideal-type of “repeat players” against “one shotter” see Marc Galanter, “Why the ‘Haves’ Come out Ahead: Speculation on the Limits of Legal Change.” Law & Society Review 9(1) 1974, esp. 97-104.

8 The following section is from Saadia M. Pekkanen, *Japan’s Aggressive Legalism*, pp. 3-4.
and foreign contexts. Both private and public interests are thus aligned. Private actors seek to perpetuate their position of economic advantages through stable transnational legal rules – rules that stabilize market access, guarantee favorable investment environments, shelter their direct and indirect assets and personnel, reduce discriminatory treatment, and generally protect against the arbitrary whims of foreign governments. Public actors, sometimes confronted with lobbying efforts by private actors especially in the domestic economies, seek in turn to provide or interact on the basis of such rules in the same transnational setting – rules that allow them to monitor shirking and opportunism abroad, exert diplomatic and reputational pressures that constrain their trade partners as needed, and strategically also ensure a pivotal role for themselves in mediating the forces of economic globalization. The lineup of these incentives makes it clear that the greater the concrete economic advantages to defend in the global political economy, the more we can expect to see the appropriate actors resort to aggressive interaction on the basis of law.

Relative Economic Standing

It is certainly true that both the historical and global-institutional context matters greatly in the shift toward legalization. But we maintain that the rise of Asian private and public economic flows, and thereby Asian interest in maintaining those flows, is even more critical. It is therefore helpful to begin with some understanding of the relative standing of East Asian countries, particularly China, Japan, and Korea in the global economy. Some pertinent facts are as follows: ⁹

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• First, these three countries are among the top 13 economies in the world, with China\textsuperscript{10} ranked third, Japan fourth, and Korea thirteenth in terms of gross domestic products of 2008 measured in purchasing power parity.\textsuperscript{11}

• Second, in terms of the world’s merchandise exportation, China was ranked second, Japan fourth, and Korea eleventh.\textsuperscript{12}

• Third, in terms of the world’s merchandise importation, China is ranked third, Japan fourth, and Korea thirteenth.\textsuperscript{13}

• Fourth, as of June 2009, China is the first and Japan the second largest holder of foreign exchange reserves, with Korea ranked sixth.\textsuperscript{14}

• Fifth, as of 2009, Japan is ranked ninth in terms of the stock of FDI abroad, with China ranked twenty-fifth and Korea twenty-seventh in terms of the same. (Note: Hong Kong China is ranked fifth.)\textsuperscript{15}

• Sixth, as of 2007, in terms of the stock of FDI at home, China is ranked eleventh, Japan is ranked twenty-second, and Korea is ranked twenty-third. (Note: Hong Kong China is ranked fourth.)\textsuperscript{16}

\textsuperscript{10} The data for China below excludes those figures of Hong Kong, Macau, and Chinese Taipei.  
\textsuperscript{13} Id.  
\textsuperscript{14} Each country’s foreign exchange reserves are $2,132 billion for China, $1,019.2 billion for Japan, $226.8 billion for Korea. Data are available at <http://www.imf.org/external/np/tr/stat/colist.htm> and People’s Bank of China <http://www.pbc.gov.cn/>.  
\textsuperscript{16} Id.
From Rule-Takers to Rule-Shakers: Dispute Settlement in and Beyond the WTO

In this section, we provide a comparison of the dispute settlement activities of CJK arising both under the WTO agreements and, where known, those arising under other agreements such as BITs.

**a. CJK Related Litigation under WTO Agreement**

**Japan**

Unlike its behavior under the GATT, Japan has been a far more aggressive user of the WTO dispute settlement system. Well into the 1980s Japan appeared predominantly as a defendant. But by the end of the 1990s it was filing almost as many complaints as it was defending in the newly-constituted WTO dispute settlement system. As of 2009, Japan has been a complainant in 13 cases. It is the complainant side of the activity that is of most interest from the perspective of aggressive legalism, since it was a direct historical response to the aggressive unilateralism of the United States. Here three things stand out to date: The bulk of Japan’s most concerted litigation efforts have involved antidumping issues, its complaints have been filed most predominantly against the United States, and almost every dispute involves the fate of some of its most globally competitive firms such as automobiles, steel, and electronics.

**[TABLE 1. WTO Disputes involving Japan as Complainant: 1995-2009]**

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Dispute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States -- Imposition of Import Duties on Autos from Japan under Section 301 and 304</td>
<td>DS6</td>
</tr>
<tr>
<td>Brazil -- Certain Automotive Investment Measures</td>
<td>DS51</td>
</tr>
<tr>
<td>Indonesia -- Certain Measures Affecting the Automobile Industry</td>
<td>DS55</td>
</tr>
<tr>
<td>Indonesia -- Certain Automotive Industry Measures</td>
<td>DS64</td>
</tr>
<tr>
<td>United States -- Measures Affecting Government Procurement</td>
<td>DS95</td>
</tr>
<tr>
<td>Canada -- Certain Measures Affecting the Automotive Industry</td>
<td>DS139</td>
</tr>
<tr>
<td>United States -- Antidumping Act of 1916</td>
<td>DS162</td>
</tr>
<tr>
<td>United States -- Antidumping Measures on Certain Hot-Rolled Steel Products</td>
<td>DS184</td>
</tr>
</tbody>
</table>
Apart from higher activity in terms of direct complaints, there are also two other significant forms of the Japanese government’s engagement with the WTO dispute settlement system. First, from the start, using the new DSU rules Japan has been particularly active in terms of asserting its rights as a third-party through which it can claim a substantial interest in a matter and have its protests registered formally.\(^{17}\) While this is an extremely important aspect of Japan’s legal strategy altogether, it is often overlooked by many analysts. As many officials have stressed, this kind of participation has allowed Japan to strategize and learn within legal constraints. Second, it is not just the number of the cases, but rather their qualitative impact, both in terms of setting precedents and affecting other unanticipated trade-related areas that turns out to be critical in terms of assessing the discursive impact of law. In this regard, even Japan’s more defensive actions as a respondent in the WTO dispute as noted below settlement system are important. As of 2009, Japan has been involved in 15 cases as a respondent. WTO cases, such as the agriculture-related ones, in which the Japanese government has often been defeated have alerted all the private and public actors about the importance of legal rules in structuring economic outcomes. One seminal case that pushed the Japanese government towards aggressive legalism was *Japan-Film*, in which the Japanese government was able to challenge and push back US claims about the Japanese marketplace. Overall these cases have also been extremely

\(^{17}\) On point here are both DSU Article 4.11 and Article 10.
important for the diffusion of legalization as a whole, as even losers or winners have to learn how to legitimate their arguments and positions on the basis of the underlying rules.

**[TABLE 2. WTO Disputes involving Japan as Respondent: 1995-2009]**

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Dispute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan -- Taxes on Alcoholic Beverages, Brought by EC (29 Jun 1995)</td>
<td>DS8</td>
</tr>
<tr>
<td>Japan -- Taxes on Alcoholic Beverages, Brought by Canada (17 Jul 1995)</td>
<td>DS10</td>
</tr>
<tr>
<td>Japan -- Taxes on Alcoholic Beverages, Brought by US (17 Jul 1995)</td>
<td>DS11</td>
</tr>
<tr>
<td>Japan -- Measures Affecting the Purchase of Telecommunication Equipment, Brought by EC (24 Aug 1995)</td>
<td>DS15</td>
</tr>
<tr>
<td>Japan -- Measures Concerning the Protection of Sound Recordings, Brought by US (14 Feb 1996)</td>
<td>DS28</td>
</tr>
<tr>
<td>Japan -- Measures Concerning Sound Recordings, Brought by EC (4 Jun 1996)</td>
<td>DS42</td>
</tr>
<tr>
<td>Japan -- Measures Affecting Consumer Photographic Film and Paper, Brought by US (21 June 1996)</td>
<td>DS44</td>
</tr>
<tr>
<td>Japan -- Measures Affecting Distribution Services, Brought by US (20 Jun 1996)</td>
<td>DS45</td>
</tr>
<tr>
<td>Japan -- Measures Affecting Imports of Pork, Brought by EC (22 Jan 1997)</td>
<td>DS66</td>
</tr>
<tr>
<td>Japan -- Procurement of a Navigation Satellite, Brought by EC (1 Apr 1997)</td>
<td>DS73</td>
</tr>
<tr>
<td>Japan -- Measures Affecting Agricultural Products, Brought by US (9 Apr 1997)</td>
<td>DS76</td>
</tr>
<tr>
<td>Japan -- Tariff Quotas and Subsidies Affecting Leather, Brought by EC (14 Oct 1998)</td>
<td>DS147</td>
</tr>
<tr>
<td>Japan -- Measures Affecting the Import of Apples, Brought by US (6 Mar 2002)</td>
<td>DS245</td>
</tr>
<tr>
<td>Japan -- Import Quotas on Dried Laver and Seasoned Laver, Brought by Korea (3 Dec 2004)</td>
<td>DS323</td>
</tr>
<tr>
<td>Japan -- Countervailing Duties on Dynamic Random Access Memories from Korea (14 Mar 2006)</td>
<td>DS336</td>
</tr>
</tbody>
</table>

**China**

Since its withdrawal from the GATT in 1950, China has shunned the multilateral trading system for several decades. This is in line with the orthodox theory of the communists, which views international law and international organizations as nothing but efforts by the rich capitalist countries to oppress and exploit poor developing countries. In the 80s, however, China started to realize that the GATT, with its mandate to liberalize trade and emphasis on the rule-based trade regimes, can help China to further develop its export-oriented economy and lock in the fruits of domestic economic reforms. In late 2001, after a marathon negotiation spanning 15 years, China finally became a member of the WTO. As the price for its accession, China
accepted many discriminatory clauses. These include two categories: first, WTO-plus obligations such as the transitional trade policy review mechanism, national treatment for foreign persons, and translation of all foreign trade laws and regulations; and second, WTO-minus rights, which include the non-market economy status in antidumping investigations, alternative benchmarks in subsidy and countervailing measures (SCM) investigations, special textile safeguard mechanism, and transitional product-specific safeguard mechanism.\(^{18}\) One can’t help wondering why China would accept such harsh conditions. The reasons are that: First, after being an outsider for so many years, China was very eager to join the most important economic international organization in the world. Indeed, the top leadership in China made joining the WTO a political task. For the Chinese officials, the real question was not how much China will have to pay, but how soon China can join the WTO. Second, China did not want to repeat the fate of Japan, which was subject to the invocation of the article of non-application when it joined the GATT in 1955. While the risk of invoking the article of non-application might seem to be rather tenuous in hindsight, for the Chinese negotiators then, it was a risk too serious to take.

Regardless of the fairness of its accession terms, for the first few years after its accession, China has simply accepted the legitimacy of these terms and tried its best to implement these obligations. For example, from the end of 1999 to end of 2005, the Central Government of China adopted, revised or abolished more than 2,000 pieces of laws, administrative regulations and department rules.\(^{19}\) They cover trade in goods, trade in services, trade-related intellectual property rights protection, transparency and uniform application of trade measures.\(^{20}\)

\(^{18}\) For a detailed discussion of those terms, see Henry Gao, China’s Participation in the WTO: A Lawyer’s Perspective, Singapore Year Book of International Law, 2007, pp. 41-74.


\(^{20}\) Id.
In trade disputes, for the first four years, China has taken a rather cautious approach. Usually, the disputes were settled quickly through private bilateral consultations rather than the formal panel process. For example, in the case concerning value-added tax rebates on integrated circuits, the US made the request for consultations in March 2004, and the dispute was settled just four months later. The same period also saw China cave in only two months after the EC made the threat to bring a formal WTO complaint against China’s export quota regime on coke, an essential raw material for the production of steel. The climax of this approach is reached in the kraft linerboard case, in which the US complained of inconsistencies with the Antidumping Agreement when the MOFCOM imposed antidumping duties on US kraft linerboard imports in September 2005. On Friday, January 6, 2006, the US finally threatened with formal WTO complaint. On the next working day, i.e., Monday January 9, 2006, the Chinese government made an announcement to scrap the antidumping duties in this case.

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Dispute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>China – Value-Added Tax on Integrated Circuits</td>
<td>DS309</td>
</tr>
<tr>
<td>China – Measures Affecting Imports of Automobile Parts</td>
<td>DS339, 340, 342</td>
</tr>
<tr>
<td>China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments</td>
<td>DS358, 359</td>
</tr>
<tr>
<td>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</td>
<td>DS362</td>
</tr>
<tr>
<td>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</td>
<td>DS363</td>
</tr>
<tr>
<td>China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers</td>
<td>DS372, 373, 378</td>
</tr>
<tr>
<td>China – Grants, Loans and Other Incentives</td>
<td>DS387, 388, 390</td>
</tr>
<tr>
<td>China – Measures Related to the Exportation of Various Raw Materials</td>
<td>DS394, 395</td>
</tr>
</tbody>
</table>

One might argue that China settled for good reasons in these cases as it did not have good legal arguments in these cases. This is not necessarily the case: as the author has argued elsewhere, at least for some of the cases such as the coke case, China could have found some
decent arguments in its favor in the rule books of the WTO. However, what is most important is not the merits of China’s legal arguments in these cases: it is China’s attitude in handling these disputes. If China was indeed to believe in aggressive legalism, China should not be hesitant to actively use WTO rules to “stake out positions, to advance and rebut claims, and to embroil all concerned in an intricate legal game”. Instead, China went through great length to avoid formal legal confrontation in these cases. There are several reasons for China’s initial reluctance to use the WTO dispute settlement mechanism. First, as a newcomer to the multilateral trading regime represented by the WTO, China had a blind faith in the status quo. One of the reasons driving China’s application to become a Member of the WTO is to reform its domestic economic system according to market economy principles embodied in WTO rules. Thus, whenever an allegation of inconsistency with WTO rules was made, China would assume that its regulations were indeed wrong and is willing to settle the case according to the demands made. Second, China was unfamiliar with WTO rules and lacked experience in WTO dispute settlement. On the other hand, the US and EC are veterans in the GATT/WTO system and well-versed in the intricacies of the rules. Thus, when China was challenged by the US and EU, it simply assumed that the complainants were right; otherwise they would not have raised the complaint to start with. These factors also explained why China did not initiate any complaint by itself during these years. Instead, the only complaint brought by China during this period, the US-Steel Safeguard case, was only filed after the EU, Japan and Korea have filed their complaints in the same dispute. As the author has argued elsewhere, this case has actually confirmed China’s general reluctance

23 In this case, the consultation request by the EC was filed on March 7, 2002, those by Japan and Korea were both filed on March 20, and the request by China was filed on March 23.
to engage in WTO disputes as China would not have joined in the complaint but for the combination of several unique features in this case.\textsuperscript{24}

Even though China was initially reluctant to participate in WTO disputes as main parties, it was quite interested in participating in WTO proceedings as third parties. In the words of Dr. Yang Guohua, Director of the WTO Division of the Treaty and Law Department of MOFCOM,\textsuperscript{25} there are many benefits from participating as third parties, with the main one being enhancing the capacity and expertise of the Chinese team in handling WTO disputes.\textsuperscript{26} China’s participation as third party can be divided into three stages.\textsuperscript{27} First is the observer stage: From December 2001 to July 2003, China was a third party to only three out of the 26 panels established by the DSB during the period. Since August 2003, China entered the “full participation” stage by joining in all newly-established panels as a third party. From the beginning of 2007, China adjusted its policy again and only participated in the most important and relevant cases on a selective basis.

Through its participation in these cases, China has gained valuable experience in the WTO dispute settlement procedures and became more and more confident in using the dispute settlement system. Such growing confidence is evident in the statements made by China’s top trade officials during this period. For example, on December 8, 2002, China’s WTO ambassador Sun Zhenyu explicitly stated that “one of the most important objectives of China’s accession to the WTO is to use its dispute settlement mechanism to settle trade disputes and restrain

\textsuperscript{25} This Division assumes the main responsibility for dealing with WTO disputes faced by China.
protectionism”. According to Sun, while China does not wish to hastily engage in legal battles with other WTO Members, it shall also be prepared to be sued or even lose a case in the WTO. He argued that the WTO dispute settlement system is not a world court; instead, its panels are simply authorized by the Members to conduct independent analysis on the legal merits of the cases. The ultimate aim of the WTO dispute settlement system is to make sure that the Members will observe the rules and implement the commitments. Thus, there is nothing to be ashamed of even if the WTO dispute settlement panel rules that a trade measure is inconsistent with WTO rules. Similarly, when asked whether China would bring complaints in the WTO against the countries that imposed restrictions against Chinese textile exports, Minister Bo Xilai of MOFCOM made the following statement on May 30, 2005:

“First, China has the right to resort to WTO dispute settlement mechanism. We should not hesitate to use this right when needed. Second, while bilateral consultation has its own benefits, if each side sticks to its own view, the problem won’t be solved as there is no neutral arbiter. Thus, in addition to one-to-one consultations, sometimes it’s more effective to have the disputes reviewed in the multilateral setting. Third, the restrictions against Chinese products are inconsistent with WTO rules and discriminatory. We strongly oppose such measures. Of course, it’s up to us to decide whether to take any legal action against such measures and when to do so.”

Equipped with this enlightened new attitude towards WTO dispute settlement mechanism, China has taken a markedly different approach since March 2006, when the US, EC and Canada brought a joint-complaint against a new Chinese regulation that treats some imported automobile parts as whole-car imports and imposes additional charge equivalent to the difference between

29 Id.
30 Id.
31 Id.
32 Id.
the higher tariff for whole-car imports and the lower tariff applicable to automobile parts. Legally speaking, this is a rather simple case as the illegality of the Chinese measure seems to be quite obvious, especially as China has made specific commitment to impose only a 10% tariff on automobile parts imports in its accession package. However, rather than continuing the old practice of settling the disputes privately, China has decided this time around not to concede defeat unless it has given a good fight. Over the next two and half years, the case would go all the way from the Panel to the Appellate Body until the Appellate Body finally issued its Report in December 2008. The strategy taken by China is well summarized by an article by Dr. Ji Wenhua, the official in charge of dispute settlement activities at China’s WTO Mission, in the China WTO Tribune, a monthly journal on trade policy published by the MOFCOM and edited by Dr. Zhang Xiangchen, Director-General of the Department of Treaty and Law of MOFCOM, in July 2006, when the consultations for this case was still ongoing. In that article, after reviewing the litigation strategy taken by Mexico in the Soft Drinks case, which was generally regarded as a weak case for Mexico, Ji noted the following:

“In this case, Mexico’s legal position was rather weak, but it has made an unrelenting effort by raising many arguments which are tenuous at best and fighting a losing battle. While we should not publicly praise such litigation strategy and attitude, this case still offers us some worthy lessons: under certain circumstances, we should try to employ some strategies, including resorting to sophistry and delay tactics. As a respondent, we should try to come up with as many factual and legal arguments as possible. Even if such arguments are mere sophistry, or made for purposes such as creating artificial difficulties for the panel, gaining sympathies, diverting the attention of other parties, or delay the progress of the case, they are justified so long as they serve to protect our own interest.” (emphasis original)

34 Ji Wenhua, Huang Cui, Some Thoughts on WTO Litigation Strategy Inspired by the Mexico-Softdrinks Case, China WTO Tribune, 2006, Volume 7, pp. 62-64.
Starting with the Auto Parts case, China has only settled two out of the total of seven cases brought against it in the WTO. It is no longer a passive taker of WTO rules; instead, China has become willing to shake the existing rules by standing up to foreign pressure in dispute settlement activities, just as its East Asian neighbors Japan and Korea have done.

### TABLE 4. WTO Disputes involving China as Complainant: 2001-2009

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Dispute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>US – Definitive Safeguard Measures on Imports of Certain Steel Products</td>
<td>DS252</td>
</tr>
<tr>
<td>US – Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China</td>
<td>DS368</td>
</tr>
<tr>
<td>US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</td>
<td>DS379</td>
</tr>
<tr>
<td>US – Certain Measures Affecting Imports of Poultry from China</td>
<td>DS392</td>
</tr>
</tbody>
</table>

**Korea**

Although Korea had longer experience of dispute settlement procedures than China, the reaction as a respondent in the WTO shows a similar pattern to that of China. The first five complaints against Korea were settled by mutually agreed solutions or informal compromises. The fear to be litigated in the newly established dispute settlement procedures of the WTO was generated from the GATT experience.

The first GATT dispute brought against Korea, *Korea-Beef* case, resulted in not only the repeal of the beef import ban but also disinvocation of GATT Article XVIII:B exception that provided a legal cover for various import restrictions since 1967 accession to the GATT. The

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only other case litigated under the GATT dispute settlement system, *Korea-Polyacetal Resins* case, was about the very first antidumping action of the Korea Trade Commission (KTC) that is responsible for trade remedy investigations. The GATT panel in the *Korea-Polyacetal Resins* case found the injury determination by the KTC to be seriously flawed because it was illogical and lacked the sufficient evidence.

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**[TABLE 5. WTO Disputes involving Korea as Respondent: 1995-2009]**

<table>
<thead>
<tr>
<th>Cases Name</th>
<th>Complainant</th>
<th>Dispute Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Korea - Measures Concerning the Testing and Inspection of Agricultural Products</td>
<td>US</td>
<td>DS3 &amp; DS41</td>
</tr>
<tr>
<td>Korea - Measures Concerning the Shelf-Life of Products</td>
<td>US</td>
<td>DS5</td>
</tr>
<tr>
<td>Korea - Measures Concerning Bottled Water</td>
<td>Canada</td>
<td>DS20</td>
</tr>
<tr>
<td>Korea - Laws, Regulations and Practices in the Telecommunications Procurement Sector</td>
<td>EC</td>
<td>DS40</td>
</tr>
<tr>
<td>Korea - Taxes on Alcoholic Beverages</td>
<td>EC, US</td>
<td>DS75 &amp; DS84</td>
</tr>
<tr>
<td>Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products</td>
<td>EC</td>
<td>DS98</td>
</tr>
<tr>
<td>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</td>
<td>US, Australia</td>
<td>DS161 &amp; DS169</td>
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<tr>
<td>Korea - Measures Affecting Government Procurement</td>
<td>US</td>
<td>DS163</td>
</tr>
<tr>
<td>Korea – Measures Affecting Trade in Commercial Vessels</td>
<td>EC</td>
<td>DS273</td>
</tr>
<tr>
<td>Korea – Anti-dumping Duties on Imports of Certain Paper from Indonesia</td>
<td>Indonesia</td>
<td>DS312</td>
</tr>
<tr>
<td>Korea — Measures Affecting the Importation of Bovine Meat and Meat Products from Canada</td>
<td>Canada</td>
<td>DS391</td>
</tr>
</tbody>
</table>

Such experience in the GATT system intimidated the Korean government so much to avoid actual litigation after the WTO was established with more complicated procedures and binding legal nature. The fact that the early cases were mostly about unfamiliar subjects such as sanitary and phytosanitary measures, technical regulations, and government procurement also explained rather passive attitude towards dispute settlement.

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It was only in *Korea-Alcoholic Beverages* case\(^{38}\) that the Korean government determined to litigate the merits of the legal argument. The possibility for defending the domestic discriminatory tax system appeared very low particularly after the *Japan-Alcoholic Beverages* case\(^{39}\) in which a similar tax system was ruled to be WTO-inconsistent. But, unlike the previous cases, the Korean government would not simply be able to modify the tax laws that can be amended only by the National Assembly. The sentiment of the National Assembly towards the WTO was still very hostile because of the agricultural market liberalization undertaken under the auspices of the WTO. Therefore, the Korean government needed at least the recommendation by the WTO Dispute Settlement Body in the nature of international obligation to persuade the National Assembly for the required amendment. The decision to appeal to the Appellate Body was controversial because the chance for reversing the adverse panel ruling appeared even lower. Moreover, due to the Asian financial crisis of 1997-1998, the financial burden for the Korean government to hire foreign lawyers was substantially increased. Despite such concern, the Korean government did make the first appeal to the Appellate Body.

This first experience of the WTO dispute settlement procedure led the Korean government to dramatically change the approach for trade conflicts. Firstly, since the Korea-Alcoholic Beverages case, the Korean government always pursued the appeal procedure in the defending case even without the realistic chance of winning. It is apparent that Korea does not attach non-legal sentiment or meaning to the loss in the WTO disputes any more. Although there was no public remark by any high ranked officer as in the Chinese case, the exhaustion of all legal procedures available at the WTO dispute settlement system seems preferred or even

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required before implementation of the WTO recommendation is formally considered by
government bodies or the National Assembly in Korea.

Secondly, the Korean government became much more aggressive in bringing cases
against other WTO Members. As shown in Table 3, trade remedy actions, especially
antidumping actions, of the United States still remain the major issues for WTO complaints. This
is quite similar to the situation for Japan. In addition, the Korean government brought two cases
against the EC subsidy policies for the shipbuilding industry when its own program was sued by
the European Communities. Regarding the indirect subsidy issues concerning a semiconductor
manufacturing company, Hynix, Korea did not hesitate to bring cases against all Members
imposing countervailing duties – the United States, European Communities and Japan.

Moreover, the Korean government sued the import quota program of sea laver in Japan to
the WTO while they struggled on this issue in the FTA negotiation. The Japan-Laver Quota
case\textsuperscript{40} can be a good example to demonstrate how far the WTO dispute settlement system is
utilized by a new rule shaker. A WTO complaint against an FTA partner in the middle of the
negotiation would not be easily perceivable unless the impartiality and neutrality of the WTO
dispute settlement system is seriously taken. The other interpretation of this dispute is that the
WTO dispute settlement might work as the solution to resolve the political stalemate. For Japan,
it would be almost politically impossible to make a concession for sea laver markets as part of
FTA negotiations. So, the WTO recommendation might be the only plausible excuse to its
domestic constituents for modifying the existing import restriction. In fact, Japan and Korea
reached to a mutually agreed solution right before the panel report was issued. The fate of the
currently suspended FTA negotiation between Japan and Korea is not clear yet. But, the outcome

\textsuperscript{40} WTO, Japan – Import Quotas on Dried Laver and Seasoned Laver, WT/DS323/R (circulated on Feb. 1, 2006).
from this WTO dispute will clearly make a significant contribution to an FTA negotiation if it can be resumed in the future.

<table>
<thead>
<tr>
<th>TABLE 6. WTO Disputes involving Korea as Complainant: 1995-2009</th>
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<tbody>
<tr>
<td><strong>Case Name</strong></td>
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<tr>
<td>US – Imposition of Anti-Dumping Duties on Imports of Color Television Receivers from Korea</td>
</tr>
<tr>
<td>US – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea</td>
</tr>
<tr>
<td>US – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</td>
</tr>
<tr>
<td>Philippines – Anti-Dumping Measures regarding Polypropylene Resins from Korea</td>
</tr>
<tr>
<td>US – Continued Dumping and Subsidy Offset Act of 2000</td>
</tr>
<tr>
<td>US – Definitive Safeguard Measures on Imports of Certain Steel Products</td>
</tr>
<tr>
<td>US – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</td>
</tr>
<tr>
<td>EC – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</td>
</tr>
<tr>
<td>EC – Measures Affecting Commercial Vessels</td>
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<tr>
<td>EC – Aid for Commercial Vessels</td>
</tr>
<tr>
<td>Japan — Import Quotas on Dried Laver and Seasoned Laver</td>
</tr>
<tr>
<td>Japan – Countervailing Duties on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</td>
</tr>
</tbody>
</table>

Thirdly, the Korean government becomes considerably more confident with the WTO dispute settlement procedure after it won – or at least it thought – the most recent three consecutive cases challenged by other Members. In the *Korea-Government Procurement* case, the panel ruled that the entity at issue in charge of the new airport construction was not the covered entity for Korea in the Agreement on Government Procurement. The US did not pursue an appeal when its company, OTIS, acquired the Korean company, LG Elevator, and thus indirectly won the bidding for airport construction contracts. The panel in the *Korea-Commercial Vessels* case found that actual granting of pre-shipment loan and advance payment refund guarantee by the Export-Import Bank of Korea was prohibited subsidies in the SCM Agreement. But, those measures were already terminated at the time the final ruling was issued. Therefore,

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although Korea did not make an appeal, there was no practical duty for Korea to modify or repeal any existing measures. In the Korea-Paper case\textsuperscript{43}, the panel found the methodology and practices adopted by the KTC for an antidumping investigation mostly consistent with the Antidumping Agreement, except for minor procedural matters. Korea did not make an appeal for this case, either. But, Indonesia was tenacious to initiate an Article 21.5 panel procedure that was the first compliance panel proceeding for Korea. Again, the panel ruled WTO inconsistency on a minor procedural aspect of the review process, but rejected other substantive claims.

This result is indeed unusual and rather coincidental. There is no special reason or reasonable pattern for Korea to win – or maybe not to badly lose – these recent challenged cases. The vastly different nature of three cases made it difficult to draw any general conclusion on the legal capacity in terms of the WTO dispute settlement. However, this experience obviously fortified the confidence of the Korean government on the WTO dispute settlement system, which, in turn, substantially improved the level of the WTO consistency for government policy implementation.

Lastly, as in the case of China and Japan, Korea also becomes much more active in the third party participation of the WTO dispute settlement system compared to the GATT period. As of July 2009, Korea joined as a third party in 26 disputes which involve, \textit{inter alia}, many antidumping cases, environment related cases, and agricultural cases.

\textbf{b. CJK Related Litigation under Other Agreements}

Where possible, we provide information on each country.

\textsuperscript{43} WTO, Korea – Anti-dumping Duties on Imports of Certain Paper from Indonesia, WT/DS312/R (adopted on Nov. 18, 2005).
Japan

Japan has thus far been known to be party to one arbitration case under the UNCITRAL Arbitration Rules, namely *Saluka Investments BV v. The Czech Republic*. At first blush, a Japanese investor did not appear to be directly involved in a case that began in 2001 with the filing of a Notice of Arbitration by a Dutch company under a Netherlands-Czech Republic BIT. It transpired, though, that Saluka was the Dutch-incorporated subsidiary of the Japanese Nomura Group, a major international provider of banking and financial services that operates through a complex of associated and subsidiary companies worldwide. The Nomura Group had had considerable experience in the Czech economy since around 1990, serving in an advisory capacity to the Czech government on the privatization of Czech breweries and banking services. Since mid-1996 Nomura had begun negotiations for the purchase of the Czech state’s shares in IPB, which was one of the four banks whose privatization was begun by the Czech government in the early to mid 1990s as the country transitioned away from a Communist model. IPB, which came out of a merger in December 1993, had both a financial portfolio (provision of banking services) and an industrial one (beer production). After a long series of financial negotiations and cross-border transactions, Saluka was vested with the ownership of the controlling shares in IPB (and thus also control over IPB’s other assets) in October 1998.

As the Arbitration panel noted, Saluka’s rights of ownership were exercised according to the directions from Nomura Europe or other elements of the Nomura Group. Thus although

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Saluka was the registered holder of the IPB shares, which were the subject matter of the arbitration, the case really did pit Nomura against the Czech government. What was the essence of Saluka’s case? As with the other privatized banks, IPB too was afflicted with non-performing loans, faced inadequate legal provisions for debt repayments, and confronted a tough new regulatory framework. It was eventually put under forced administration in June 2000, coupled with a quick sale to another strategic investor who enjoyed guarantees of State aid that turned out to be dubious under Czech law. While the Arbitration Panel certainly considered Saluka’s claim under Article 5 here that the Czech government had crossed the line and engaged in unlawful expropriation, it rejected any such claim wholesale. Rather, the Panel asserted that the Czech government’s measures at issue could be justified as lawful and permissible regulatory action in light of the then economic conditions. Saluka had also claimed that, given the economic problems and continuing bank runs for all privatized players, the Czech government had nevertheless used different standards in its treatment of IPB as compared to the other three banks. As such, Saluka was claiming that the Czech government had violated the “fair and equitable treatment” obligation in Article 3 of the BIT. The Arbitration Panel agreed that the Czech government had indeed done that in two ways only – first by excluding IPB from the early financial assistance that was extended to the other three banks, and second by unreasonably frustrating IPB and its shareholders’ good faith efforts to resolve the bank’s crisis through proposals that should have been treated objectively and transparently.

Saluka, and thus Nomura, walked away with a partial victory but with a sizable pecuniary outcome in the end. Although the Czech government started parallel arbitration under the terms of the original share purchase with Nomura, hoping to recoup huge sums of money from the Japanese bank, it withdrew its contractual counter-claim. Instead, it struck a deal with the various
parties to cap the amount of damages. During the damages phase of arbitration proceedings, the tribunal was able to calculate the value of the IPB bank before it collapsed financially and was put under forced administration. The Czech government eventually paid Saluka approximately $236 million.

_Saluka_ is of course one case, and it is only a partial award. But its impact may turn out be seminal for Japanese investors. As they enmesh themselves in cross-border transactions, as they become cognizant that their operations can be advantaged by the expanding network of Japan’s investment-related agreements, and as _Saluka_ itself makes a historical name for itself in the public and private spheres in Japan, there may be a greater shift toward aggressive legalism on the part of Japanese players all around. These elements will give an even more concerted push to investment-related rule-making on Japan’s part— even as _Saluka_ has shown that private investors, by structuring their corporate structure strategically, can advantage themselves across the globe through agreements that are not even signed by their home sovereign governments. Indeed, even those observers who express doubts about legal aggressiveness in Japan’s foreign trade relations, whether with respect to rule-making or litigation, nevertheless note that that may not continue to hold with respect to investment disputes even in the East Asian context.45

### Rule-Makers on the Rise? How CJK Began to Shape New Rules

As before, we focus on rule-making activities by CJK both under the WTO and other venues.

#### a. Rule-Making Activities under the WTO

45 Junji Nakagawa, “No More Negotiated Deals?: Settlement of Trade and Investment Disputes in East Asia,” _Journal of International Economic Law_ 10(4) 2007, esp. pp. 840-841. Nakagawa also believes that we can possibly expect more aggressive legalism in disputes relating to intellectual property protection and trade remedies.
Japan

The Japanese government has focused systematically on the reform of antidumping rules during the Uruguay Round, making it one of its top negotiating priorities. \(^{46}\) In large part this was because the application of such rules was having an adverse impact on the operation of its transnational businesses. The Japanese government has also systematically continued its focus on reforming the underlying antidumping rules subsequent to the formation of the WTO in 1995 – a systemic strategy prompted no doubt by the fact that about 40 percent of the disputes adjudicated under the dispute settlement system have been related to antidumping. \(^{47}\)

The concerns expressed by the Japanese government before the Negotiating Group on Rules in the WTO from 2002 onwards reflect those of Japanese businesses who had borne the brunt of antidumping duties in the global economy as they rose in competitive prominence. \(^{48}\) For such businesses the AD Agreement is fundamentally about the validity of the price of their exported goods in foreign markets – whether their prices are normal or fairly constructed, or whether they are being dumped to the injurious detriment of their rivals in that foreign market. At a practical level this affects their ability to compete in such markets and of ensuring fair treatment. By this is meant that their prices are not subjected to arbitrarily or, in turn, what they

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46 See, for example, Mark Manyin, “Revisiting Japanese Behavior in the Uruguay Round: Japan’s Antidumping Campaign,” in Breaking the Silence: Japanese Negotiating Behavior in the Tokyo and Uruguay Rounds of the GATT,” Doctoral Dissertation, The Fletcher School of Law and Diplomacy, Tufts University 1999; and for an elaboration of the points raised in this section, see Saadia M. Pekkanen, Japan’s Aggressive Legalism, pp. 59-62, 111-114.


48 For a general overview see WTO TN/RW/W/6, Antidumping: Illustrative Major Issues – Paper from Brazil; Chile; Columbia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand and Turkey, 26 April 2002; WTO TN/RW/W/63, Senior Officials’ Statement on Antidumping Negotiations – Communication from the Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; Thailand and Turkey, 12 February 2003; WTO TN/RW/W/171, Senior Officials’ Statement – Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Mexico; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Turkey, 15 February 2005.
deem to be unfairly calculated dumping margins. Thus it is not a surprise that the main thrust of Japan’s concerns – investigative procedures which determine whether dumping is taking place based on a certain set of facts, whether dumping margins should be imposed, and if imposed what the level or duration of the dumping margins should be.

To focus on antidumping rules in particular, Japan has usually submitted proposals jointly with some set of countries who are also concerned with their use and abuse. Altogether, their general argument is that the abusive increase in antidumping remedies against legitimate exports – leading to the protection of domestic industries well beyond offsetting injurious dumping – needs to be disciplined through the clarification and improvement of the existing AD rules. 49 They assert that the protectionist-driven antidumping remedy works to the detriment of downstream consumers and industries, has significant chilling effects on companies, and also undermines market access achievements. From the very first proposal submitted in 2002 through to early 2006, a range of concrete deficiencies in the existing AD Agreement identified by Japan and its partner Members reflect these very concerns. The table below sets them out, with a focus on extracting the focal points across all the proposals. 50

49 The narrower focus on the reform of the existing rules stems from six broad objectives identified in the Senior Officials statement in 2005 which are worth noting directly: mitigating the excessive effects of antidumping measures, preventing antidumping measures from becoming “permanent,” strengthening due process and enhancing the transparency of the proceedings; reducing costs for authorities and respondents; terminating unwarranted and unnecessary investigations at an early stage, and providing disciplines to improve and clarify substantive rules for dumping and injury.

submitted alone, which focus in more detail on rules, for example, for determining material injury, sunset provisions, and zeroing, also stem from the same underlying concern with protecting its exporters’ interests in foreign markets. It is these same concerns that are also reflected in Japan’s formal antidumping disputes with the US in the WTO.

[TABLE 7. AD Rules of Interest to Japan et. al., 2002-2006]

| Clarifying the determination of "normal value" |
| Clarifying the definition of "affiliated parties" |
| Clarifying the determination of a "fair comparison" of export price and normal value |
| Altering from non-mandatory to mandatory the "lesser duty rule" |
| Clarifying guidelines for accepting and rejecting "price undertakings" |
| Prohibiting the practice of "zeroing" negative dumping margins |
| Reducing excessive reliance on secondary sources of "facts available" |
| Enforcing the existing "sunset" provision |
| Altering the current "de minimis margin" of dumping |
| Modifying the current test for determining the "negligible imports" exception |
| Inserting substantive and procedural rules for antidumping "reviews" |
| Reducing excessive "cost drivers" in AD investigations |
| Inserting a new "public interest" obligation |
| Clarifying methodologies and benchmarks for determining "material injury" |
| Clarifying meaning of "dumped imports" |

China:

For the past thirteen years, China has assumed the dubious honor of being the primary victim of antidumping measures initiated by all other countries in the world. Thus, China presumably has a keen interest in antidumping negotiations. However, in recent years, China itself has also become one of the most frequent users of antidumping measures. Thus, unlike Japan and Korea, it has been very difficult for China to articulate a consistent and coherent position on the anti-dumping negotiations. China’s awkward position is the result of its unique status: On the one hand, as the third largest trader in the world, China’s interest is more aligned with other major traders, most of which are developed countries. On the other hand, as a founding member of the G20, it is politically incorrect for China to openly advocate any position that is different from the G20 party-line. The inherent tension created by China’s dual-role is reflected on many other negotiating issues as well. In agricultural negotiations, for example, the main demand of G20 is the reduction of export subsidies and domestic support by developed countries. While China has a large farming population, it is also a major importer of many agricultural products (such as cotton and wheat) due to the demand created by its enormous population. As reducing agricultural subsidies will probably lead to the increase in the prices of the agricultural products, it is probably not in China’s interest to toe the G20 party–line here. On NAMA, major developed countries have been pressing developing countries to reduce tariffs. As the “factory of the world”, China stands to gain tremendously from the reduction of industrial tariffs. Again, China finds its interest to be at odds with those of most developing countries. Because of the conflict between China’s trade interest and its political position, China has so far taken a very low profile in the negotiations. There are very few proposals tabled by China alone, and most were submitted along with other countries. In the rare instance where China made proposals on its own, such proposals generally focus on either the procedural aspects or the
special and differential treatment provisions for developing countries (which are usually non-binding) and do not touch on the substantive aspects of the issue.

This does not mean, however, that China has not made any attempt to change the rules to reflect its own interests. Instead, China has been doing so, though not through the negotiating tables of the WTO, but through the chambers of the dispute settlement panels. In the article advocating China’s participation in WTO dispute settlement activities as third parties, Dr. Yang Guohua noted the following:

“During the dispute settlement process, the WTO panel and Appellate Body may provide creative interpretations on WTO rules, which will enrich the rules framework of the WTO. In addition, some disputes were initiated because the problem could not be solved by the multilateral negotiations under the WTO. For example, some of the cases on agricultural subsidies between the US and EC were attempts to break the deadlock in WTO negotiations through dispute settlement. In these cases, China expressed its views on these issues through its submissions and participation in the hearings, and made contributions to the development of WTO rules.”

The claim made here is doubtful for the following reasons: First, the cases referred to seem to be inaccurate. So far, the main cases on subsidies were the US – Cotton and the EC – Sugar cases. However, none of the cases were brought directly between the US and EC. Both countries were merely third parties like China in the dispute brought against the other country. Second, in most cases, the submissions by third parties only play a minor role and it’s very rare that the panel or Appellate Body will change the rules based on third party submissions. Third, as discussed above, China could not even formulate a coherent position on agricultural subsidy, let alone “changing the rules”.

Nonetheless, as a general point, using WTO dispute settlement system is worth exploring. Indeed, as Dr. Yang quite rightly pointed out in his article, more and more Members have

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realized the potential of the WTO dispute settlement system as a shortcut to finding solutions to problems that could not be readily solved by the slow-moving negotiating apparatus of the WTO. Formally speaking, only the political branch of the WTO, i.e., the General Council or the Ministerial Conference could make new rules in the WTO. In reality, however, WTO panels and Appellate Body have been breaking new grounds in the rule book of the multilateral trading system through aggressive use of their power to “clarify the rules” and “secure a positive solution to a dispute”. In theory, such solutions are temporary as the Members may always re-write the rules through negotiations. However, as anyone who is familiar with the way the WTO works will know, it will be very difficult, if not impossible, for the WTO to change a rule once it has worked its way into the system, be it through the appropriate approach or not.

When China acceded to the WTO, it had to accept many special rules tailor-made for itself due to its unique nature as a former command economy in transition to market economy. When China later discovered the real-world implications of these discriminatory terms, it has the following choices: first, withdraw from the WTO and seek new accession on more equitable terms; second, seeking amendment of its accession protocol. The first option is obviously not feasible. With regard to the second option, the difficulties are that: First, the WTO agreements never explicitly set out how the accession commitments may be amended. Second, even if assuming that Article X of the Marrakesh Agreement applies, it would be extremely difficult for China to obtain the consensus needed\(^52\) to approve the amendment as several key Members are very likely to thwart any effort to do so. This left China with only the last option, i.e., changing rules through WTO dispute settlement system.

\(^{52}\) While there were different voting requirements depends on the nature of the decision, in practice the WTO has decided that all decisions shall be taken by consensus. See General Council Decision on Decision-Making Procedures Under Articles IX and XII of the WTO Agreement, 15 November 1995, WT/L/93.
In the very first case China participated in the WTO, the *US-Steel Safeguard* case, China has made an attempt to change the rules. The issue here is the developing country status of China. The WTO has no fixed criteria for deciding whether a country is a developing country. Instead, developing country status is traditionally a matter of self-declaration by the Member concerned, even though other WTO Members may challenge such declaration. While this is not a problem for most other countries, it is a big problem for China due to its size. Thus, WTO Members have taken a practical approach in China’s accession and decided to tackle the issue on an agreement-by-agreement basis. As the result, China did not get the developing country treatment with regard to some agreements. In the Steel Safeguard case, China argued that the US violated Article 9.1 of the Safeguards Agreement by failing to recognize China as a developing country and provide the appropriate special and differential treatment.\(^5^3\) While the issue was side-stepped in the end as the entire safeguard measure was struck down on other grounds, this is an interesting attempt by China to clarify (or even change) the rule.

Another example is the *US — Anti-Dumping and Countervailing Duties* case. In this case, China challenged the decision by the US authorities to impose both antidumping and countervailing duties against several products imported from China, including circular welded carbon quality steel pipe, pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks. In addition to the garden-variety claims under the GATT, the AD Agreement and the SCM Agreements, two claims made by China are particularly interesting:

The first claim is that the US violated China’s Accession Protocol by failing to follow the proper methodology for the determination of the existence and amount of subsidy benefits. Under 15(b) of China’s Accession Protocol, in subsidy investigations, other WTO Members could “use methodologies for identifying and measuring the subsidy benefit which take into

\(^{53}\) Panel Report, at paras. 7.1863 – 7.1884
account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks”. Similar to subparagraph (b) of the same article, which allows other WTO Members to use surrogate prices in antidumping investigations against Chinese firms, this provision was introduced to address the concern that prices in China do not reflect the true costs as China is not a full market economy. However, unlike the NME status in antidumping investigations, which is scheduled to expire 15 years after China’s accession, the alternative benchmark methodology does not have an expiration date. Thus, theoretically speaking, it could be invoked even one hundred years after China’s accession to the WTO. As discussed above, it would have been very hard for China to try to change the provision through negotiations in the WTO. Instead, China decided to limit the applicability of the provision by giving teeth to some seemingly innocuous terms in the provision, i.e., first, the US failed to make a finding there were “special difficulties” in applying the prevailing terms and conditions in China as the basis for the determination of the existence of benefits; and second, the US failed to notify the SCM Committee the methodologies it used.\footnote{54 Request for the Establishment of a Panel by China , WT/DS379/2.} This is a very clever way to try to reduce the utility of the provision. If the Panel and Appellate Body give a strict interpretation to the term “special difficulties”, it might greatly reduce the attractiveness of the provision and even effectively make the provision void.

The second claim is that the US violated the relevant provisions in the Antidumping and Safeguards Agreements through its dual application of both antidumping and countervailing duties against the same products. While the same product may be subject to both antidumping and SCM investigations, in practice, the US have always avoided the imposition of both antidumping and countervailing duties for the same product if they are imported from market economies. However, non-market economies do not receive the same treatment and may be
subject to both antidumping and countervailing duties. While Article VI.5 of the GATT prohibits the dual application of both antidumping and countervailing duties in the same case, it only refers to export subsidies and does not include actionable domestic subsidies. Of course, to the extent that the dual application results in over-compensation, this might violate the “lesser duty rule” under both the AD and SCM Agreements. This is where the rules are currently unclear and China hopes to make new rules through this case. As the expiration date for the non-market economy status in antidumping investigations draws closer and closer, subsidy investigations will become the main problem facing Chinese firms. Hopefully, China will be able to change the rules in its favor through the clarification of these terms in dispute settlement activities so that Chinese firms will have an easier time when the day comes.

**Korea**

After Korea joined GATT in 1967, it remained as a passive observer in ruling making activities undertaken during the GATT negotiations until the Uruguay Round negotiation. But, Korea became more active in the Uruguay round negotiation based on its strengthened status as a major trading nation. Korea made some 25 written proposals during the Uruguay Round. They covered issues such as dispute settlement, safeguards, anti-dumping, subsidies, agriculture, services, and intellectual property. The most extensive Korean proposal was in the area of anti-dumping, where Korea proposed amendments in at least 13 issues of the Tokyo Round Anti-dumping Code.\(^{32}\)

Korea’s role in the WTO became much more visible, particularly in the area of rules negotiation of the Doha Development Agenda. Korea, along with Japan, has led the so called “Antidumping Friends Group”, in which Brazil, Chile, Colombia, Costa Rica, Hong Kong/China,

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Israel, Mexico, Norway, Separate Customs Territory of Taiwan Penghu Kinmen and Matsu, Singapore, Switzerland, Thailand, and Turkey often work together to make various proposals for amending the current Antidumping Agreement. Generally speaking, Korea’s interest lies in the elimination of ambiguities in the agreement and stemming abuse of anti-dumping measures by all countries because it is still the most frequent target for antidumping actions on the basis of trade weighted terms.\(^\text{55}\) Therefore, at the initiation of DDA, Korea proposed that the “negotiations for reviewing the AD Agreement should be conducted in the new round, with a view to preventing abuse of anti-dumping measures, thereby achieving a new balance of interests among all Members.”\(^\text{58}\) As explained in the earlier section for Japan, Korea actively cooperated with Japan in the Antidumping Friends Group to make proposals ranging from procedural issues to prohibition of zeroing and mandatory lesser-duty rules.

On the other hand, an interesting observation recently witnessed among government agencies in charge of rules negotiations and interested business sectors is that the attitude towards disciplining antidumping actions has changed to reflect concerns of users instead of victims more. When tariffs become constantly lower as opposed to major trading countries due to FTAs, the need for using antidumping actions to address domestic industry injury also rises. Moreover, aggressive or abusive use of antidumping actions by developing countries such as Argentina, Brazil, China and India as well as developed countries made Korea reconsider its position in rules negotiations. It is premature to anticipate the change of Korea’s position in antidumping negotiations. But, unlike China or Japan, it would not be completely implausible for

\(^{55}\) Between 1995-2008, China was subject to 677 antidumping investigations whereas Korea was targeted by 252 investigations. But, considering the China’s export volume four times larger than Korea’s, Korea’s export appears the most frequent victim of the antidumping action. <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (visited on July 7, 2009).

Korea to change its stance embracing more users’ perspectives at least compared to its position at the initial stage of the negotiation. Similar situation for other key developing countries of the DDA including Brazil, China, and India that become incidentally active antidumping users may shed some light on the fate of the current rules negotiations.

Another area in which Korea has worked visibly in terms of WTO rule making is negotiation on fisheries subsidies. The development of new rules for fisheries subsidies has been controversial from the very beginning. In this rule making negotiation, Korea took the center place, working closely with Japan, as opposed to the “Friends of Fish” group that includes the US, Argentina, Chile, Iceland, New Zealand, Norway and Peru. Korea and Japan have rarely taken such major roles in rule making negotiations under the auspice of the GATT/WTO. After the EC joined the “Friends of Fish”, albeit weak in disciplining fisheries subsidies, Korea and Japan, together with Chinese Taipei, turned out to be the last hurdle to establish the new rules. As explained in the previous section, China’s position for this issue is also ambiguous.

Therefore, the situation in this negotiation for Korea and Japan is completely opposite from the AD negotiations. The outcome of the fisheries negotiations will provide another important implication for rule making capacity of East Asian countries.

b. Rule-Making Activities Beyond the WTO

Japan

Japan has also been strongly interested in establishing comprehensive rules on investment, first through the multilateral setting and, when that failed, through also bilateral and

56 WTO, TN/RL/W/82.
57 See for example, TN/RL/W/94.
regional agreements. At the multilateral level, Japan made strong attempts to institute a more coherent set of rules than the existing ones under the TRIMs Agreement. Among the first indications of Japan’s interest in the WTO, for example, came with its official communications to the Working Group on the Relationship between Trade and Investment (WGTI), which was established by a decision taken at the WTO Ministerial Conference in Singapore in 1996. Between 1997 and 2003, Japan submitted seventeen proposals that reflected its interests in such rules. From Japan’s perspective the trade liberalization game had expanded from border restrictions such as tariffs to restrictions within borders such as those on foreign direct investment (FDI). Its many industries had spread their production across countries, particularly in the Asian region, and a multilateral set of rules would be both fair and efficient. Japan pragmatically urged that gaps in the TRIMs Agreement as well as any proposed multilateral rules needed to pay attention to the actual investment behavior and decision of private firms – much as it was doing. The TRIMs Agreement certainly prohibited certain types of performance but did so in a limited fashion from the perspective of Japanese corporations. No provisions existed, for

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58 The emphasis on investment rules was confirmed on many fronts by both government officials and lawyers. Interview, MOFA Official, Tokyo, 20 July 2004; and interview, Attorney-at-Law, Tokyo, 20 July 2004. This section draws on Saadia M. Pekkanen, Japan’s Aggressive Legalism, pp. 252-267.

example, on requirements related to local employment, local financing ratios, exports, and technology transfers. No provisions existed on concerns related to expropriation and compensation, repatriation of profits, or foreign exchange guarantees.

At the bilateral level, Japan pointed to a handful of its own BITs, whose formation preceded EPAs in terms of its preferential diplomacy. Rules within the BITs – such as a comprehensive definition of investment, or treatment of FDI, or investor-state dispute settlement mechanisms – were put forth by the Japanese government for consideration in negotiating more comprehensive WTO rules. At the regional level, the 1987 ASEAN Agreement for the Promotion and Protection of Investments (APPI) also encouraged a broader definition of investment that tallied with Japan’s more comprehensive understandings in its BITs. Additionally, the 1998 Framework Agreement on the ASEAN Investment Area (AIA) showed how national treatment could be extended to ASEAN investors at both the admission and establishment stages, while excluding sensitive industries and matters on a temporary basis. At the multilateral level, Japan pointed generally to the importance of incorporating principles of non-discrimination in the WTO such as national treatment and MFN in a global investment treaty. More specifically, it also referred to the existing GATS mode 3 which, unlike FDI in the goods area, provides certain treatment to foreign investors when they establish “commercial presence” in services abroad, and thus is of relevance to any future investment rules. Japan’s larger point about substantive disciplines on FDI through GATS was to highlight the systemic imbalances in investment rules between service and non-service sectors in the WTO. Asserting that half of FDI was carried out in the non-services sectors, and that 70 percent of FDI towards developing countries was also in the non-service sector, the existing TRIMs Agreement was insufficient.
Although it was rigorous in pursuing rule-making on investment, Japan could not make much headway in the WTO. This was because controversies surrounding the investment issue led to their being dropped altogether from the Doha Round by the July 2004 decision. Unlike the past where it might well have eschewed formal legalism in its foreign trade relations, Japan found other high-profile and largely bilateral venues to channel its rule-making interests on investment. It is fair to say that for corporations of course it did not matter whether rules on investment were codified in multilateral or preferential routes like EPAs or BITs. Thus in keeping with the trends worldwide it is not a surprise to find that Japan’s rule-making efforts on investment are now largely focused on either BITs or investment chapters in its EPAs.  

As of August 2008, Japan had 9 traditional BITs (focusing on protection only), 4 recent BITs (focusing on both liberalization and protection), and also investment chapters in 8 of its EPAs (also focusing on both liberalization and protection). Irrespective of the forum, it is a virtual certainty that Japan will continue its rule-making efforts in investment vigorously because the net income surplus from Japanese investments abroad has exceeded the net trade surplus for three consecutive years since 2005.

Korea

One of the recent phenomena in trade rule making is to use an FTA for the purpose of setting precedents in the WTO or international economic system in general. For example, the United States included the investment chapter in the FTA with Central American countries that permits appellate procedure for investment dispute settlement. Another attempt to influence

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61 Free Trade Agreement between the Dominican Republic, Central America and the United States, Article 10.20:10 & Annex 10-F.
WTO rules through FTAs has been undertaken for trade remedy systems.\textsuperscript{62} In this regard, Singapore initiated various experiments in its FTA to adopt modified antidumping rules. The Singapore-Jordan FTA, for example, changed \textit{de minimis} margins to 5\%, eliminated the concept of a third country dumping, shortened the sunset review timing and mandated a less duty rule.

After Korea concluded an FTA with Singapore that also included a mandatory less duty rule and prohibition of zeroing practices, it is now pushing this idea very strongly in the subsequent FTA negotiations. Even against the United States that is known for a rigid position not to touch the current trade remedy rules, internationally as well as domestically, Korea could reach to an agreement that embraced mandatory advance consultation before the initiation of an investigation, more favorable consideration of price undertaking proposals and establishment of the Committee on Trade Remedies.

This “rule diversification” phenomenon is indeed unprecedented. Regional trading arrangements have been considered an exceptional market access route under the consistent trading norms. But, as more FTAs were concluded between or among like minded countries, heterogeneous legal disciplines proposed by only a subset of WTO membership were introduced through backdoors in the world trading system. This situation is particularly worrisome due to intrinsically inefficient nature of diversified trade remedy disciplines.\textsuperscript{63} Regardless of its legitimacy, some countries including Korea are vigorously trying to incorporate such modified trade remedy rules in FTAs. In this regard, the Japan-Korea FTA appears to be a cornerstone for rule diversification in terms of trade remedy rules since they are probably most like minded for the issue, share long experience of the Doha rules negotiations and are very likely to actually apply those modified rules for real trade instead of keeping them at the statute. In case they agree


\textsuperscript{63} For more detailed discussion, see D. Ahn, \textit{Ibid}, 119-132.
on substantially modified trade remedy rules in their FTA, it will become another important evidence of legal activism practiced by East Asian countries in the world trading system.

China-Japan-Korea (CJK)

There is a concerted plurilateral effort underway in Asia that, if it comes to fruition, will reverberate outward to affect both other regional as well as bilateral investment instruments across the globe. This involves the slow but nevertheless ongoing negotiations over a China-Japan-Korea (CJK) investment treaty, which has not attracted much attention thus far.\(^64\) This is despite the fact that Asian governments have begun to expand their networks of investment agreements, given that the combined annual outward FDI across Asia has been exceeding $100 billion annually since 2003.\(^65\) Contrary to popular views of a non-legalistic Asian way, the spread of investment agreements is testimony to the fact that Asian governments want to increasingly safeguard their investors and hedge against risks through formal legal means. Nor are Asian investment agreements only paper treaties; already they have socialized Asian investors, such as those in Malaysia, Singapore, and even China, to begin engaging in successful investment litigation with their BIT partners.

Several indicators suggest the seriousness with which Japanese investors in particular take the protection of their investment in the Asian region, and the ways in which the Japanese government has responded concretely with attempts to construct treaty-based protections for

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\(^64\) The following discussion draws on Saadia M. Pekkanen, *Japan’s Aggressive Legalism*, pp. 270-271. The information on the CJK treaty is also updated through Correspondence, METI Official, Tokyo, Japan, 1 April 2008; Correspondence, METI Official, Tokyo, Japan, 13 November 2008; Correspondence, METI Official, Tokyo, Japan, 19 November 2008.

them. For over a decade, Japan has been urging and cajoling its prominent neighbors, especially China and Korea, to focus on exactly such protections. Japan already has an older BIT with China, which came into effect in 1989. It also has more recently concluded a BIT with South Korea, which came into effect in January 2003. But Japan is not satisfied with the bilateral BIT structure, preferring instead a formal trilateral treaty among them all that can serve as a building-block to an East Asia FTA in the near future and that can also put the whole of Asia on the global institutional-legal map more cohesively than might otherwise be possible. To that end, in November 1999, Japan, China and Korea used a trilateral summit meeting in the Philippines to discuss the possibilities of stronger economic cooperation, which is a modest objective that is endorsed annually. While China and Korea have shown interest in moving forward with a broad trilateral FTA, it is fair to say that Japan is most interested in the establishment of a narrow trilateral CJK investment treaty toward that goal. In some ways, this is unsurprising, as Japan is the second largest foreign investor in China and the third largest one in Korea, and official studies all suggest that there is far greater FDI potential in both countries for Japanese businesses.

In October 2003, China, Japan and Korea issued a joint declaration on the promotion of tripartite cooperation, with one of the fourteen focus areas including direct investment. The three governments then launched an informal joint study group to explore the possibilities of a more formal investment pact among the three countries. The study groups have turned into formal

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rounds of negotiations. In November 2006, the tripartite investment negotiations began in earnest. Starting in 2007, the pace picked up with successive trilateral investment agreement negotiation rounds – the first in March, the second in July/August, and the third in November. As of 2008, two further negotiating rounds were added – the fourth in March, and the fifth in November. Since a CJK investment treaty is seen as a critical step to a formal trilateral FTA as well, work on it has progressed beyond rhetoric to actual contestation over specific provisions such as pre-establishment national treatment.

Although officials are reluctant to discuss many of the details with respect to this treaty at this stage, hopeful signs are emerging that the three nations are moving toward closer cooperation – a process which is now even blessed by the top political leadership in all three countries. This was evidenced by the first ever CJK summit in Fukuoka, Japan in December 2008, that was attended by Japanese Prime Minister Taro Aso, Chinese Premier Wen Jiabao, and South Korean President Lee Myung Bak. The summit was notable primarily for the fact that it was the first ever CJK one to be held independently of other multilateral meetings. At that point, the three countries, which together make up about 75 percent of East Asia’s GDP and about 17 percent of the world GDP, made moves toward coming up with action plans in various fields. If indeed CJK negotiations on the investment treaty are given an impetus by such high-level political summits, which promise to be annual events in the foreseeable future, then we could well be looking at a very different legal makeup in Asia in the not too distant future.

PRELIMINARY CONCLUSION

This paper has focused on showing some of the ways in which, in contrast to our scholarly and policy understanding in the past, China, Japan, and Korea have begun to use law and legal rules as part of their economic diplomacy. We believe that legalization does not have a straightforward impact but rather a diffuse ideological one that changes the context of interaction among principal actors. To put it simply, these rules structure the terms of debates among actors, who use them primarily to gain advantages over their adversaries or to change outcomes more in their favor. Having to make arguments within the framework of substantive legal rules lends this self-interested behavior an aura of legitimacy that masks bitter conflicts with substantial stakes between the principal players. An ensuing secondary effect is that the rules reshuffle the balance of power among the principal actors, moving it towards those actors who are most capable of legitimating their claims and staking out their positions on the underlying legal basis.

Rules, in other words, are made to matter to results and outcomes, and in the process benefit some actors over others – which is exactly what China, Japan, and Korea have learned. At the international level, they have engaged in both litigation and rule-making in areas of keen interest to them. This is not so much an issue of numbers or levels, but rather a qualitative shift in the way law is transforming their engagement in both the global and regional economic order. Although we do not do so in the paper here, at the domestic level, there have also been considerable moves that portend a similar movement toward more aggressive uses of legal rules. A significant number of new institutions have sprung up that attest to the importance of setting and spreading a rule-based economic diplomacy. Additionally, although there are no formal mechanisms that allow for direct effects, there have nevertheless already been cases that show
their importance in novel ways. In all, we believe that slow but consistent moves by China, Japan, and Korea toward the use of rules signals a move toward aggressive legalism.