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Analysis of Japan's RTA and WTO Dispute Settlement Mechanism

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ANALYSIS OF JAPAN'S RTA AND WTO DISPUTE SETTLEMENT MECHANISM

By

Shunsuke Sato

B.Ec. Yokohama City University, 2007

A THESIS

Submitted in Partial Fulfillment of the

Requirements for the Degree of

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(in Global Policy)

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ANALYSIS OF JAPAN'S RTA AND WTO DISPUTE SETTLEMENT MECHANISM

By Shunsuke Sato

Thesis Advisor: Dr. Kristin Vekasi

An Abstract of the Thesis Presented
in Partial Fulfillment of the Requirements for the
Degree of Master of Arts
(in Global Policy)
May 2016

This thesis analyzes Japan's decision to use Dispute Settlement Mechanisms (DSMs) in trade agreements. International trade rules are effective when properly applied: they prevent abrogation of the obligations that come with membership in international economic organizations. The DSMs are important ways to enforce the international trade commitments agreed upon by signatory countries. To date, member countries have filed more than 500 cases through the World Trade Organization (WTO), effectively enforcing the rules of the largest multilateral trade organization. On the other hand, in Japan's regional trade agreements (RTAs), none of the DSMs have ever been invoked despite the presence of many potential disputes. This paper first looks through the previous literature related to the use/non-use of DSMs. After that it introduces originally collected data on Japan's DSMs in trade agreements and analyzes which variables affect Japan's decision to initiate a formal dispute settlement process in the World Trade Organization. It finds that the amount of export, the degree of democracy, and sectoral characteristics positively affect Japan's decision of using a DSM. On the other hand, Japan's decision to use or join a DSM is negatively affected by RTA with a disputing country, Southeast Asian category, the number of use times when Japan used

DSMs with that disputing country, and even the disputing country's Gross Domestic Product (GDP) per capita. The results of analysis implies that the Japan is concerned that using a DSM may worsen the relations with a disputing country. I suggest multilateral DSM would be a better option to mitigate Japan's concerns about using a DSM in its RTAs.

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LIST OF ABBREVIATIONS

AD	antidumping duties
AFTA	ASEAN Free Trade Area
ASEAN	Association of Southeast Asian Nations
CVD	countervailing duties
DSM	dispute settlement mechanism
DSU	Dispute Settlement Understanding
EC	European Community
EPA	Economic Partnership Agreement
EU	European Union
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
JIEPA	Japan-Indonesia Economic Partnership Agreement
JMC	Japan Machinery Center for Trade and Investment
KORUS	Korea- U.S. Free Trade Agreement
METI	Ministry of Economy, Trade, and Industry (Japan)
MFN	Most Favored Nations Treatment
MOFA	Ministry of Foreign Affairs (Japan)
MOF	Ministry of Finance (Japan)

NAFTA North American Free Trade Agreement

ODA Official Development Assistance

OECD Organisation for Economic Co-operation and Development

R&D Research and Development

RTA regional trade agreement

SPS Sanitary and Phytosanitary Measures

TBT Agreement on Technical Barriers to Trade

TPP Trans-Pacific Partnership

TRIMs Agreement on Trade-Related Investment Measures

TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights

WTO World Trade Organization

CHAPTER 1

INTRODUCTION

Both international trade and the legal institutionalization of trade have increased in the past decades. With the creation of the WTO in 1995, and rapid increase in RTAs, trade has been institutionalized and legalized to an extent never seen before.¹ One of the strongest indicators of increased legalization are formalized dispute settlement mechanisms (DSMs), wherein trade disputes can be settled through third-party, neutral arbiters. If the obligations of trade agreements cannot be enforced when one of signatories to a trade agreement fails to comply with the obligations, the practical value of the commitment of trade agreements decreases. Concurrent with the creation of the WTO, RTAs also began to develop highly formalized DSMs.² Settling disputes in a timely and structured manner helps to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players; disputes are settled on the basis of rules rather than allowing political power to determine the outcome.

¹ Hillman, J. (2009). Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO-What Should WTO Do. *Cornell Int'l LJ*, 42, 193; Mansfield, E. D., & Pevehouse, J. C. (2013). The expansion of preferential trading arrangements. *International Studies Quarterly*, 57(3), 592-604; Rosendorff, B. P. (2005). Stability and rigidity: politics and design of the WTO's dispute settlement procedure. *American Political Science Review*, 99(03), 389-400; Goldstein, J., & Martin, L. L. (2000). Legalization, trade liberalization, and domestic politics: a cautionary note. *International organization*, 54(03), 603-632.

² Froese, M. D. (2014). Regional Trade Agreements and the Paradox of Dispute Settlement. *Manchester Journal of International Economic Law*, 11(3), 367-396.

In the WTO, as of April 1, 2016, more than 500 cases have been filed.³ However, the use of most RTA DSMs is very limited.⁴ As RTAs give signatory states more preferable trade terms than larger international organizations such as the WTO, the limited use of RTA DSMs is startling: states are not taking full advantage of the beneficial trade agreements that they invested considerable resources in negotiating. Limited use of the RTA DSMs implies a systematic reason why RTA DSMs are not the preferred method to resolve the conflicts that inevitably rise within international trade.⁵ Japan, in fact, has not used any RTA DSM to resolve a dispute, despite the presence of many potential cases. This paper seeks to understand this puzzling non-use of the established institutional mechanisms, asking: Why is the use of the DSM different between the WTO and the RTA? What factors affect the state's decision to use the DSM?

Is Legalization Effective?

In order to resolve interstate disputes peacefully, efficacy of legalization of international system is important. Legally effective DSM removes the uncertainty of enforcement of international trade agreements. International trade rules can be effective when they are properly applied, and the highly legalized and institutionalized DSMs are important ways to enforce obligations committed in the international trade

³ WTO, Chronological list of disputes cases. Available: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

⁴ Chase, C., Yanovich, A., Crawford, J. A., & Ugaz, P. (2013). Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements-Innovative or Variations on a Theme?; Jung, Y. S. (2013). Dispute Settlement Mechanisms and Power Asymmetry in Regional Trade Agreements. Available at SSRN 2346569.

⁵ One may assume there may be no conflicts or disputes in RTAs. However, as is outlined in great detail in Chapter 4, there are numerous examples of conflicts within RTAs.

rules among signatory countries.⁶ Jo and Namgung mention RTA DSMs “have been shown to significantly influence the functioning RTAs and are associated with pacifying and trade-enhancing effects.”⁷ According to Yarbrough and Yarbrough, in the absence of an international authority with powers to impose sanction for non-compliance, if an agreement can automatically impose substantial costs on any party guilty of noncompliance, the agreement may be feasible.⁸ A system which allows a third party to judge and punish noncompliance provides an automatic enforcement mechanism. By explicitly embodying a credible threat of retaliation or reciprocal action, trade agreements become self-enforcing.

DSMs are set up in most trade agreements to ensure the agreements can be enforced and disputes can be settled.⁹ The WTO indicates on its website that effective DSMs are important to enforce obligations and commitments undertaken in trade agreements.¹⁰ The European Commission (EC) illustrates the importance of DSMs: “DSMs provide a rapid and effective means of settling disagreements on whether a country has acted in conformity with its international obligations. DSMs apply the agreements, and develop the interpretative understanding of the agreements. By

⁶ European Commission (“EC”), *Dispute Settlement*. Available:

<http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/>.

⁷ Jo, H., & Namgung, H. (2012). Dispute Settlement Mechanisms in Preferential Trade Agreements Democracy, Boilerplates, and the Multilateral Trade Regime. *Journal of Conflict Resolution*, 56(6), 1041-1068. P.1042; Kono, D. Y. (2007). Making anarchy work: International legal institutions and trade cooperation. *Journal of Politics*, 69(3), 746-759.

⁸ Yarbrough, B. V., & Yarbrough, R. M. (1986). Reciprocity, bilateralism, and economic ‘hostages’: Self-enforcing agreements in international trade. *International Studies Quarterly*, 30(1), 7-21.

⁹ EC, *supra* note 6.

¹⁰ WTO, Introduction to the WTO dispute settlement system. Available:

https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s1p1_e.htm.

preventing retaliation before a dispute settlement procedure has been completed, trade damaging unilateral action is avoided.”¹¹

Nevertheless, some debate does exist about the effectiveness of DSMs in trade agreements. According to Rosendorff, while many scholars have viewed the introduction of the WTO DSM as highly successful and effective, others disagree.¹² Some say the frequent use of the WTO DSM may be due to increased violations of treaty obligations, rather than an indicator of institutional effectiveness. Lewis and Bossche,¹³ and Kalderimis¹⁴ call the WTO DSM “the jewel of crown,” referring to the institution as a pinnacle of international legalization.

The WTO DSM is particularly an improvement over the General Agreement on Tariffs and Trade (GATT) DSM. The creation of the Appellate Body, adoption of the reverse consensus rule regarding the adopting the report of a panel and the Appellate Body, and creation of a procedure by which a Member may suspend concessions against the unsuccessful party are on improvements in the WTO DSM from the GATT DSM. The legalized WTO DSM has worked better than the GATT DSM.¹⁵ For example, the WTO DSM ended the de facto veto right of defendants in the GATT DSM.¹⁶

¹¹ EC, *supra* note 6.

¹² Rosendorff, B. P. (2005), *supra* note 1.

¹³ Lewis, M. and Bossche, P. (2013). What to do when disagreement strikes? : The Complexity of Dispute Settlement under Trade Agreements. *Trade Agreements at the Crossroads*, 9-25.

¹⁴ Kalderimis, K. (2013). Exploring the differences between WTO and investment treaty dispute resolution. *Trade Agreements at the Crossroads*, 46-65.

¹⁵ *Ibid.*

¹⁶ Davis, C. L. (2012). *Why adjudicate?: enforcing trade rules in the WTO*. Princeton University Press.

Davey also finds the WTO DSM has generally provided an effective mechanism through which WTO Members are able to resolve disputes since 1995.¹⁷ Davis also mentions the WTO DSM is quite effective in resolving disputes and shows the WTO DSM increases the probability of progress to resolve the complaint by one-third and is correlated with a reduction in the time to removal of the barrier.¹⁸ Iida analyzes the effectiveness of the WTO DSM with regard to several dimensions.¹⁹ According to Iida, in the 1980s, the United States in particular turned increasingly to unilateral measures authorized under Section 301 of the U.S. Trade Act of 1974 as a solution of international trade disputes. Iida found the WTO DSM has been most effective in disarming the U.S. Section 301 compared to the GATT DSM because the U.S. has rarely unilaterally resorted to Section 301 since the auto talks debates in the WTO DSM in 1995. Iida mentions the WTO DSM was constructed to fend off unilateralism. Iida also analyzed whether disputes in the WTO DSM have reached mutually agreeable solutions or if the decisions of the WTO DSM are implemented. Iida found the scorecard of the WTO DSM is good only in the first few years between 1995 and 2003, or that the ratio of “resolved” cases were high only before 1998. Since 1998, the stockpile of pending cases has been increasing in Iida.²⁰ As of March 1, 2016, a reexamination of Iida’s analysis using WTO case data finds that among 503 cases, 48.5% cases are “resolved”, 1.8% cases are “ongoing”, “pending”

¹⁷ Davey, W. J. (2005). The WTO dispute settlement system: the first ten years. *Journal of International Economic Law*, 8(1), 17-50.

¹⁸ Davis, C. L. (2012), *supra* note 16.

¹⁹ Iida, K. (2004). Is WTO Dispute Settlement Effective?. *Global Governance*, 10(2), 207-225.

²⁰ *Ibid.*

cases are 29.6%, “not known” cases are 19.1% and “failed to resolve” cases are 1.0%.²¹

Figure 1 presents the results and progress of the WTO cases.

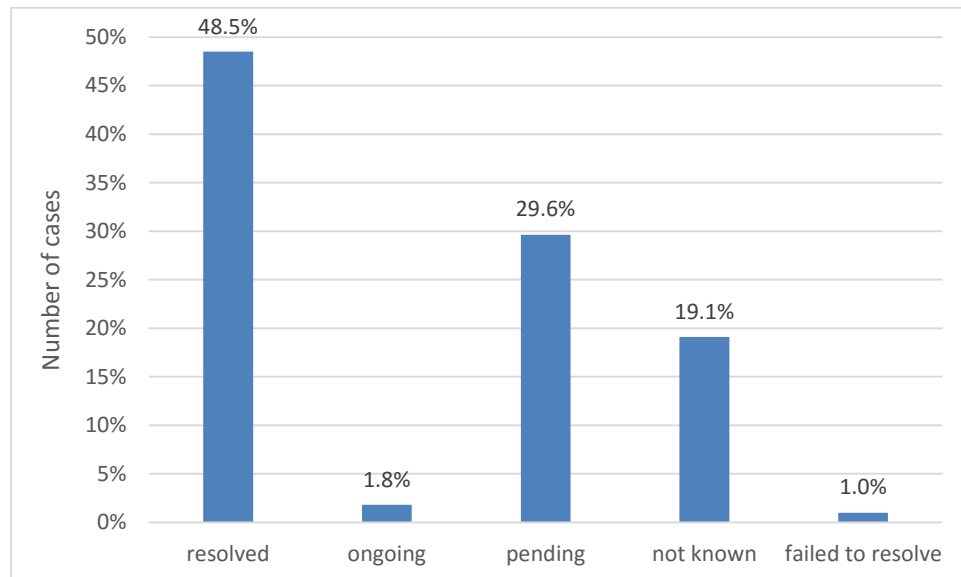


Figure 1. Results and Progress of Cases in the WTO DSMs²²

It is easy to interpret the “resolved” and “failed to resolve” but it is difficult to evaluate “ongoing”, “pending” and “not known” because some cases in these categories may be resolved in the future and some may not but no one cannot know the future result. When comparing only “resolved” cases and “failed to resolve” cases, the WTO DSM seems to work well.

In the case of the WTO DSM, procedures begin with a complaint stating the legal basis for the complaint by one or more countries against another, followed by consultation between the countries, a WTO panel report on the issue, and potentially

²¹ WTO, *Current status of disputes*. Available: https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm.

²² WTO, Chronological list of disputes cases, supra note 3.

trade sanctions against one of the countries.²³ On the other hand, contents of RTA DSMs vary across agreements.²⁴ For example, some RTAs have provisions of establishing standing tribunals or courts, whereas others use ad hoc tribunals for resolving disputes. Allee and Elsig mention how hundreds of international agreements with DSMs include various features associated with timely resolutions, selection of panelists, forum choice, and sanctions.²⁵

Given the general efficacy of the WTO DSM, states have been quick to imitate the institutional design when negotiating bilateral or regional trade agreements. According to Froese, there are three reasons why states which are heavily involved in the WTO DSM may wish to develop similar mechanisms in RTAs. First, DSMs are a statement of confidence in the RTA. Second, DSMs are a straightforward attempt to protect WTO-extra and WTO-plus agreements. Third, DSMs are an expression of confidence in an approach to dispute settlement that privileges judicial independence.²⁶

Not all RTAs adopt the same institutional structures as the WTO. The process of RTA DSM can range from diplomatic, power-based forms of resolution, to more judicial, rules based procedures.²⁷ For example, the Association of Southeast Asian Nations (ASEAN) Free Trade Area (AFTA) DSM includes diplomatic elements and therefore does

²³ Black's Law Dictionary Tenth Edition; Davis, C. L. (2012).

²⁴ Chase et al, supra note 4.

²⁵ Allee, T., & Elsig, M. (2014). Why do some international institutions contain strong dispute settlement provisions? New evidence from preferential trade agreements. *The Review of International Organizations*, 1-32.

²⁶ Froese, M. D. (2014), supra note 2.

²⁷ Lewis, M. and Bossche, P. (2013), supra note 13.

not function as a neutral and professional arbitration mechanism as well as the WTO.²⁸

Some RTAs such as, the India-Nepal Free Trade Agreement (FTA), adopt political consultations to reduce trade tensions instead of adopting third party adjudication while others like the North American Free Trade Agreement (NAFTA) have done so.²⁹ RTA DSMs without a third party adjudication system are susceptible to trade disputes being decided by political power rather than more neutral trade rules.

There are other alternative explanations for differences in institutional design. Li found countries belonging to the same RTA tend to have fewer trade conflicts between themselves.³⁰ Chase et al explain that even after signing an RTA, member states continue to use not the RTA DSMs but the WTO DSM to resolve disputes.³¹ Davey mentions that, for the most part, the formal procedures of RTA DSMs are not used much except in NAFTA and Mercosur and the WTO DSM seems to be more legitimate and effective.³² Jung says the relative disuse of a RTA DSM results from the superiority of the WTO DSM in minimizing inequality across with power asymmetry.³³ According to Busch, a liberal country prefers to use the WTO DSM from the point of forum shopping

²⁸ Puig, G. V., & Tat, L. T. (2015). Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solutions for the ASEAN Economic Community. *Journal of World Trade*, 49(2), 277-308.

²⁹ Jo, H., & Namgung, H. (2012), *supra* note 7.

³⁰ Li, T. (2014). What Affect Trade Disputes?.

³¹ Chase et al, *supra* note 4.

WTO Secretariat, "World Trade Report 2011 – The WTO and Preferential Trade Agreements: From Co-existence to Coherence" (WTO, 2011).

³² Davey, W. (2006). Dispute settlement in the WTO and RTAs: A comment. *Regional Trade Agreements and the WTO Legal System*, 343-57.

³³ Jung, Y. S. (2013), *supra* note 4.

considering a merit of making a case law.³⁴ Many scholars found countries prefer using the WTO DSM to using RTA DSMs. RTA DSMs seem to be inferior to the WTO DSM in institutional design.

The potential use of a DSM may work to solve a dispute in the negotiation stages. Once the DSM procedures start, it can be very costly for respondent countries to effectively litigate the case. As a result, respondent countries might want to avoid going to the DSM stage and subsequently may cease to violate the rules, making the DSM an effective deterrent. However, considering the important roles of the RTA DSMs to enforce obligations, the limited use of the RTA DSMs indicates current RTAs may allow countries to derogate from trade rules limiting the deterrence effect. Given the proliferation of RTAs, and continued regionalization of the international economy, the lack of formal legalization within RTAs is a serious challenge to the international trade system supported by RTA proliferation.

Japan's Problems of RTA DSMs

The number of RTAs are increasing around the world. As of February 1, 2016, 625 notifications of RTAs had been received by the GATT/WTO.³⁵ As of March 1, 2016, fourteen Japanese RTAs have been implemented.³⁶ Despite the increase in RTAs, the

³⁴ Busch, M. L. (2007). Overlapping institutions, forum shopping, and dispute settlement in international trade. *International Organization*, 61(04), 735-761.

³⁵ WTO, Regional trade agreements. Available: https://www.wto.org/english/tratop_e/region_e/region_e.htm.

³⁶ METI, *EPA/FTA/Toshi kyotei* (EPA/FTA/Investment Treaties). Available: http://www.meti.go.jp/policy/trade_policy/epa/index.html. The rules and procedures of Japanese RTA DSMs are in Appendix A.

usage of DSMs in trade agreements has not proportionally increased.³⁷ In particular for Japan, the country has not formally participated in a RTA dispute settlement procedure despite the existence of multiple potential disputes of Japan's RTAs, which are outlined in the reports of the Ministry of Economy, Trade and Industry of Japan (METI)³⁸ and Japan Machinery Center for Trade and Investment (JMC).³⁹

Japan has faced an Indonesian violation of Japan-Indonesia Economic Partnership Agreement (JIEPA) regarding the overcharge of import tariffs on Japanese automobiles since 2014. According to the Japanese news, it seems that Indonesia tries to protect local companies that collaborate with foreign companies.⁴⁰ Japan has held multiple Ministerial-level meetings with Indonesia to resolve this problem, but it has not yet been settled.⁴¹ Japan has the option to use the JIEPA's DSM but has not exercised that right and does not appear to be poised to do so in the future.

The JIEPA was signed in August 20, 2007 and came into effect in 1 July, 2008. Indonesia reviewed the import tariff rate for certain automobiles imported from Japan based on the JIEPA in 2012, but Japanese auto makers found the issues with the tariff rate and informed the Japanese government in January 2013. As Table 1.1 shows, there

³⁷ Chase et al, supra note 4.

³⁸ METI, Report on Compliance by Major Trading Trade Partners with Trade Agreements - WTO, FTA/EPA, BIT- and Report on the WTO Inconsistency of Trade Policies by Major Trading Partners. Available: http://www.meti.go.jp/english/report/index_report.html.

³⁹ JMC, Issues and Requests for Improvements on Trade and Investment Barriers in 2014. Available: http://www.jmcti.org/cgibin/main_e.cgi?Kind=Country.

⁴⁰ Ibid.

⁴¹ Mainichishimbun, *Jidousha kanzei: EPA hurikoude kyougi nihonnseihuiIndonesia to(Japanese government will have meeting with Indonesia about the non-implementation of EPA rules of automobile tariffs)*, 27 May 2015. Available: <http://mainichi.jp/shimen/news/20150527ddm008020053000c.html>, [published in Japanese].

are substantial differences in the tariff rate set for automobile import from Japan to Indonesia and the terms set forth in the JIEPA.

Table 1.1. Tariff Rate Indonesian Domestic Rule and JIEPA

	2012	2013	2014	2015	2016	2017	2018
IND rule	30.9%	28.1%	25.3%	22.5%	19.7%	16.9%	14.1%
JIEPA	20.0%	20.0%	20.0%	20.0%	5.0%	5.0%	5.0%

SOURCES: Appendix of the Regulation of the Minister of Finance of the Republic of Indonesia (No.209/PMK.011/2012) on Import duty Tariff setting of the JIEPA Appendix of the Regulation of the Minister of Finance of the Republic of Indonesia (No. 95/PMK.011/2008) on Import duty Tariff setting of the JIEPA; Ministry of Foreign Affairs of Japanese government (MOFA), the JIEPA Annex 1 referred to in Chapter 2 Schedules in relation to Article 20.

According to the JIEPA, the tariff rate is supposed to be 20% from 2012 and 5% from 2016. However, in the Indonesian domestic rule the tariff rate in 2012 is 30.9%, 28.1% in 2013, 25.3% in 2014, 22.5% in 2015, 19.7% in 2016, 16.9% in 2017, and 14.1% in 2018. Nikkei reports that Japanese automobile companies lost an estimated 2 billion yen (\$19 million) in 2013 due to the overcharge.⁴² In 2012 the difference between the Indonesian import tariff rate and JIEPA rate was 10.9% as seen in Table 1.1. The difference was 8.1% in 2013, 5.3% in 2014 and 2.5% in 2015. Details of the Indonesian domestic rule and the JIEPA are shown in the Appendix B. As Figure 2 indicates, the tariff rate of Indonesian domestic rule is higher than the tariff rate of the JIEPA.

⁴² Nikkei Asia Review, *Japan may sue Indonesia for tariff overcharge*, February 9, 2014. Available: <http://asia.nikkei.com/Politics-Economy/International-Relations/Japan-may-sue-Indonesia-for-tariff-overcharge>, [published in Japanese].

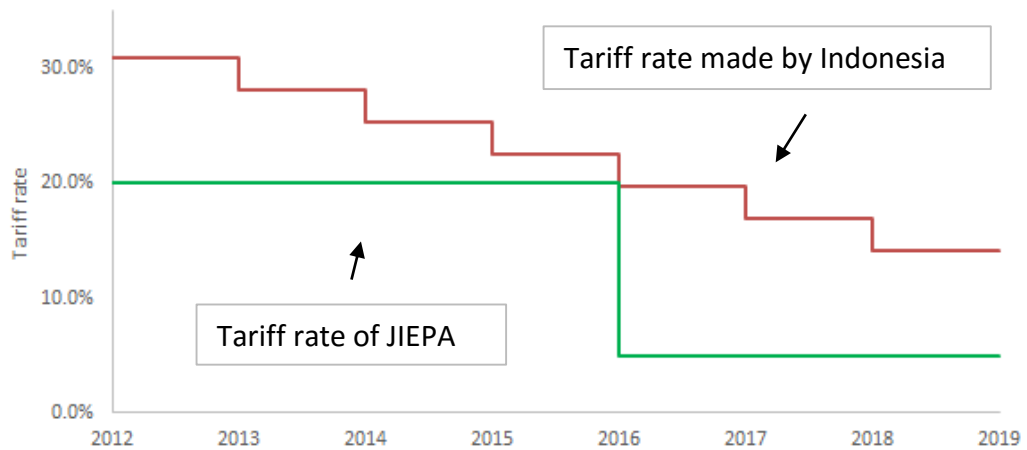


Figure 2. Difference of Automobile Tariff Rate between Indonesian Domestic Rule and JIEPA

It appears that Indonesia is trying to decrease automobile imports from Japan. According to the Japanese media, the Indonesian government is frustrated about the increased trade deficit with Japan after the implementation of the JIEPA.⁴³ Figure 3 plots automobile imports from Japan to Indonesia: they increased rapidly until 2012 and thereafter, automobile imports from Japan decreased as Indonesian adopted a higher tariff rate. If that was Indonesian intention in violating the JIEPA tariff rates, it was apparently quite successful.

⁴³ The Daily Jakarta Shimbun, "Boueki akaji, younin dekinai" EPA minaoshi motomeru kougyoushou soukyokutyou (The director general of the Ministry of Industry of Indonesia says "We cannot accept a trade deficit." Indonesia asks for the review of the JIEPA), 13 January 2015. Available: <http://www.jakartashimbun.com/free/detail/22753.html>, [published in Japanese].

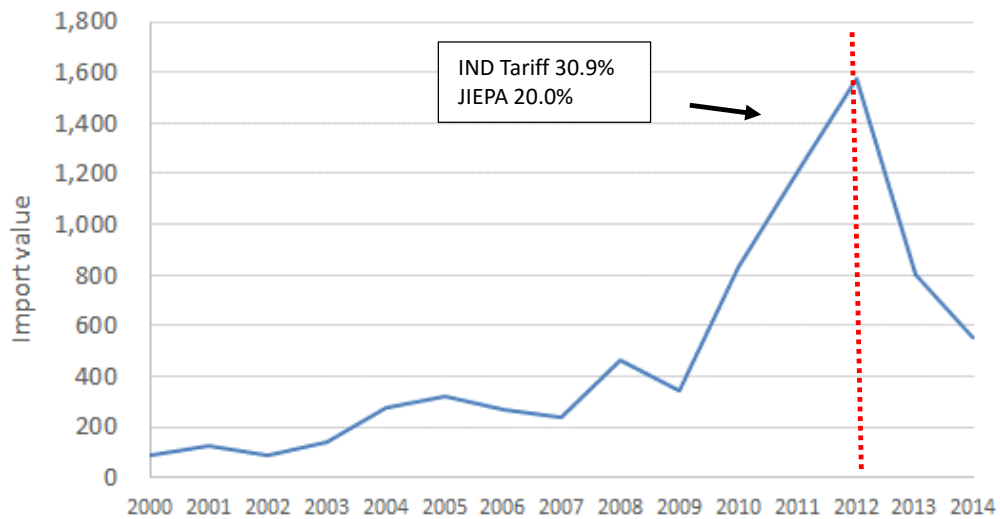


Figure 3. Import Value of Motor Vehicles by Japan to Indonesia (Million US\$), 2000-2014⁴⁴

In order to resolve the problem, the Japanese government discussed the issue with Indonesia first at the Trade Ministerial meeting during APEC in Surabaya in April 20 and 21, 2013. The Japanese government and Japanese industry requested that Indonesia fix the tariff issue in October 2013.⁴⁵ Japan and Indonesia again agreed to discuss the review of the JIEPA at the Japan-Indonesia Bilateral summit in Tokyo in March 23, 2015, and again at the Ministerial meeting of the review of the JIEPA held in Tokyo in May 27 and 28, 2015. However, this problem has not been resolved yet and Japan has not formally initiated a dispute settlement procedure based on the JIEPA as of March 1, 2016, and has no apparent plans to do so. This problem illustrates that instead

⁴⁴ Statistics Indonesia. Available: <http://www.bps.go.id/linkTabelStatis/view/id/1048>.

⁴⁵ Keidanren Times, *Nichi Indonesiakeizai godo forum wo Bali dekaisai-infra seibi business kankyo seibi nitsuite kannmin de ikennkoukann*, (The Indonesian-Japan Joint Economic Forum was held in Bali. The official and private sector exchanged views about improvement of infrastructure and business environment), 17 October 2013, No.3150. Available: https://www.keidanren.or.jp/journal/times/2013/1017_02.html, [published in Japanese].

of applying a DSM to the issue, Japan has not even invoked a formal dispute process in its RTAs even though Japan faces disputes of its RTAs with trading partners.

Outline of Thesis

The purpose of this paper is to analyze Japan's decision to use a DSM in trade agreements. I try to find what affects Japan's decision of joining a DSM in trade agreements. In this paper, I first look through the previous literature related to the use/non-use of DSMs in Chapter 2. Previous scholarship has found some theories about state's use and joining of DSM. Previous experience as complainants in the WTO DSM,⁴⁶ forum shopping,⁴⁷ herd behavior,⁴⁸ fear of crowds,⁴⁹ democracy,⁵⁰ and industrial difference⁵¹ affect the decision of joining disputes, as well as differences in institutional designs between RTA DSMs and the WTO DSM.⁵² There are also existing arguments about power politics and fear of retaliation of the state's use of DSM.⁵³ My research adds to the literature analysis about what affects Japan's decision of using a DSM not only in the WTO but also in its RTAs with recent data.

Chapter 3 introduces originally collected data on Japan's DSMs in trade agreements and analyzes which variables affect Japan's decision to join a formal dispute

⁴⁶ Gomez-Mera, L., & Molinari, A. (2014). Overlapping institutions, learning, and dispute initiation in regional trade agreements: evidence from South America. *International Studies Quarterly*, 58(2), 269-281.

⁴⁷ Busch, M. L. (2007), *supra* note 34.

⁴⁸ Iida, K. (2006). Legalization and Japan: the politics of WTO dispute settlement. *Cameron May*.

⁴⁹ Johns, L., & Pelc, K. J. (2016). Fear of Crowds in World Trade Organization Disputes: Why Don't More Countries Participate?. *The Journal of Politics*, 78(1), 000-000. P.289-290.

⁵⁰ Davis, C. L. (2012), *supra* note 16.

⁵¹ Davis, C. L., & Shirato, Y. (2007). Firms, governments, and WTO adjudication: Japan's selection of WTO disputes. *World Politics*, 59(02), 274-313.

⁵² Allee, T., & Elsig, M. (2014), *supra* note 25.

⁵³ Davis, C. L. (2012), *supra* note 16.

settlement process at the WTO using logit model. As well as successfully replicating the results of existing work, the analysis demonstrates that Japan's reluctance to use a DSM is related to the reluctance to sour political relations with a disputing country.

Chapter 4 introduces past WTO cases where Japan was a complainant or a third party and examines whether Japan could use a RTA DSM to these cases. After that, it explains how some important explanatory variables affect Japan's decision of using a DSM.

Chapter 5 concludes with suggestions for improvement of Japan's use of RTA DSMs. The analysis finds Japan is less likely to use or join a DSM when Japan has a RTA with a disputing country. When Japan has made claims many times to a disputing country, Japan is less likely to use or join a DSM with the country. The result of analysis implies Japan concerns using a dispute settlement may worsen the relations with a disputing country. If Japan thinks using a dispute settlement does not worsen the relations with a disputing country, Japan will use a DSM more. I suggest a DSM of multilateral trade agreement would mitigate Japan's concerns of initiating a DSM.

CHAPTER 2

PREVIOUS LITERATURES

As exemplified by the Indonesian automobile case, Japan has not used RTA DSMs. Regarding Japan's lack of experience in using the RTA DSM, previous literature provides some plausible theories as to why countries refrain. This chapter looks through the previous literature related to the use/non-use of DSMs. Generally, a country uses or joins a DSM when the benefit of initiating or joining a dispute settlement procedure is higher than the cost of using or joining the dispute settlement process. Adjudication raises costs related to administrative burden, legal precedent, and diplomatic stakes that concern the government.⁵⁴

In the WTO, however, when exporters have a sufficiently large share of the market to recoup benefits from improved access, they will use DSMs although exporters of other countries could free ride on their effort.⁵⁵ Possible reasons states refrain from using a dispute settlement procedures are (1) the issue is relatively new and it is in the stage of consultation, (2) the damage is not so high compared to the cost of an arbitration or setting a panel, and (3) the possibility of losing an arbitration or a panel. Previous literature provides empirical evidence for all of these aspects.

⁵⁴ Davis, C. L. (2012), *supra* note 16.

⁵⁵ Davis, C. L. (2012), *supra* note 16.

No Experience of Using the DSM in the RTA

Gomez-Mera and Molinari⁵⁶ indicate that countries with greater experience as complainants in the WTO are more likely to file complaints in the South American RTAs. By contrast, the assumption that countries with greater experience as complainants in the RTA disputes are more likely to file complaints at the regional level was not statistically significant.⁵⁷ The past use of RTA DSMs is not statistically correlated with the future use of RTA DSMs. This analysis indicates that multilateral experience has a stronger and more consistent effect than regional experience on the use of DSMs in South American countries.

Davis and Bermeo found that previous regional and the WTO experience, as either a complainant or respondent, influences the likelihood of initiating a DSM for developing countries.⁵⁸ Particularly for developing nations, they found that previous experience was a key indicator for use of DSMs at the GATT/WTO.⁵⁹ For developing countries, the startup costs associated with initiating a DSM can be reduced by learning how to use a DSM as either a complainant or respondent.⁶⁰ The experience increased a country's willingness to initiate future disputes in developing countries.

However, the results seen in South American countries and developing countries cannot directly apply to Japan. Although Japan has been involved with the

⁵⁶ Gomez-Mera, L., & Molinari, A. (2014), *supra* note 46.

⁵⁷ *Ibid.*

⁵⁸ Davis, C. L., & Bermeo, S. B. (2009). Who files? Developing country participation in GATT/WTO adjudication. *The Journal of Politics*, 71(03), 1033-1049.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

WTO DSM in more than 20 instances, it has never used any of its RTA DSMs. Hutnick found that a previous regional dispute experience increased the likelihood of initiating a current regional dispute in a particular subject area in the WTO.⁶¹ This literature also found that the effects of previous experience vary: they are conditioned by a state's learning capacity and the amount of previous experience. In the case of Japan, Japan seems to have learning capacity but Japan has not experienced regional DSMs. Therefore, it is challenging to verify this result. In summary, literatures on the analysis of the relation between past experiences of WTO/RTA DSM and future uses of RTA DSM cannot provide a justified explanation for why Japan has not used any RTA DSM.

Forum Shopping/Legal Precedent

Forum shopping is the practice of choosing the most favorable jurisdiction or court in which a claim might be heard.⁶² The theory of forum shopping is applicable to Japan when disputes are related to same rules of the WTO and RTAs but is not applicable when disputes are related only to rules of RTAs. Japan's RTAs include WTO-plus/extra rules. Forum shopping does not happen when disputes are related to WTO-plus/extra rules in RTAs.

Busch explains the concept of forum shopping between the RTA and the WTO DSM and finds that a liberal country choose multilateral forum such as the WTO while

⁶¹ Hutnick, J. A. L. (2014). A Regional Weapon of Choice: Forum Choice in International Trade Disputes (Doctoral dissertation, University of Pittsburgh).

⁶² Black's Law Dictionary Tenth Edition; Davis, C. L. (2012), supra note 23.

illiberal countries choose regional forum.⁶³ Davis mentions political lobbying is a key factor in the selection of institutional forum for trade negotiation.⁶⁴ Froese found that disputes tend to go to the WTO and that proliferation of RTA DSMs has not weakened the importance of the WTO DSM.⁶⁵ This finding is in line with Japan's current situation of using a DSM. Japan has used the WTO DSM many times but has not used a RTA DSM. Froese mentions further research is needed to examine the use of RTA DSMs.

Regarding legal precedent, governments may worry about the risk of losing the ruling, which represents a worse outcome than the status quo because a behavior that had been questionable before the ruling might be legitimated as case law.⁶⁶ According to Busch, a liberal country chooses a multilateral forum such as the WTO because it wants to not only win the case but also wants to use its case law in the future. On the other hand, an illiberal country chooses a regional forum because it wants to avoid being sued by other countries in the future by the case law. Based on his idea, Japan will prefer a multilateral forum because Japan is a liberal country, and will moreover prefer to utilize the WTO DSM over the RTA DSMs to resolve disputes.

This analysis is the same direction of Japan's situation of Indonesian violation of JIEPA, but the forum shopping concept has limited applicability when there is no overlap between institutional rules. With respect to Japan's current nonuse of RTA DSMs, WTO agreements do not cover the lower tariff rates seen in the RTAs. As the analysis can be

⁶³ Busch, M. L. (2007), *supra* note 34.

⁶⁴ Davis, C. (2006, October). The politics of forum choice for trade disputes: Evidence from US trade policy. In Annual Meeting of the American Political Science Association, Philadelphia, September.

⁶⁵ Froese, M. D. (2014), *supra* note 2.

⁶⁶ Davis, C. L. (2012), *supra* note 16.

applied only when a dispute is related to the violation of same rules in the WTO and RTAs, forum shopping is therefore not a viable approach. Usually some rules are same in the WTO and RTAs but some rules in RTAs are different from the WTO. Most of RTA rules are new and higher level than the WTO rules.

Using cases quite similar to Japan's, Puig and Tat analyzed the use of the ASEAN Free Trade Agreement (AFTA) DSM.⁶⁷ Similar to Japan's, the AFTA DSM has never been used. Puig and Tat pointed out the overlap of the AFTA DSM with the WTO DSM. In this point, Japan's RTAs are different from the AFTA DSM. The AFTA DSM allows member states to resort to fora outside of AFTA for the settlement of any disputes with other member states. All ASEAN member states are also members of the WTO. Therefore they can bring disputes arising from AFTA to either AFTA DSM or the WTO DSM as long as the disputes are related to similar or same rules of the WTO. On the other hand, Japan's RTA DSMs do not allow states to use both the RTA DSM and the other fora at the same. In their argument, Puig and Tat mention the risk of developing divergent case law between the AFTA DSM and the WTO DSM because of the overlap of two DSMs. Inconsistencies in case law bring unpredictability in the future disputes and lead to forum shopping. In the case of Japan, Japan cannot bring the same issue to the WTO DSM and RTA DSMs at the same time.

⁶⁷ Puig, G. V., & Tat, L. T. (2015), *supra* note 28.

Herd Behavior/Fear of Crowds

Herd behavior is a behavior that a country follows and files an identical or fairly similar case against the same defendant country when a major country decides to litigate a case against another.⁶⁸ Fear of crowds means the greater the number of other third parties are, the less likely a country will use a DSM because negotiations become more complicated as more parties join.

Iida points out that Japan's activism in the WTO DSM could be interpreted as a herd behavior.⁶⁹ In other words, Japan uses the WTO DSM only if other affected countries are bringing up the same issue. In his article, of the 11 cases in which Japan was a complainant, ten of them could be considered herd behavior, and only one case could be considered "independent" behavior. This theory seems to be able to explain Japan's less use of RTA DSMs because most of Japan's RTAs are bilateral.

Johns and Pelc similarly explain state behavior in joining a dispute settlement process as a third party as "fear of crowds".⁷⁰ However, Japan has participated in disputes as a third party many times. Japan seems not to have fear of crowds about joining a dispute.

⁶⁸ Iida, K. (2006), supra note 48.

⁶⁹ Iida, K. (2006), supra note 48.

⁷⁰ Johns, L., & Pelc, K. J. (2016), supra note 49.

Democratic or Non-Democratic

There are arguments regarding the relation between democracy and state's political behavior. Democracy and legalization are closely connected.⁷¹ Some scholars explain the democracy and the use of DSMs. Fang shows that democratic governments incur higher noncompliance costs than non-democratic countries.⁷² Lower cost non-democratic countries are more likely to use a DSM than higher cost democratic countries.⁷³ This result seems to be consistent with Japan's current situation because Japan is a higher cost democratic country.

According to Davis, democratic states are in favor of using courts to resolve international disputes. Davis says that there is a positive relationship between democracy and trade complaints in both the GATT and WTO and that authoritarian governments brought only ten disputes during the first decade of WTO adjudication.⁷⁴ Davis also shows that democracies are more likely to file legal complaints.⁷⁵

Industry Patterns

Davis and Shirato found that difference in industry patterns affected Japan's initiation of the WTO DSM by investigating three major industries using the concept of velocity.⁷⁶ According to Davis and Shirato, high-velocity industry is an industry which

⁷¹ United Nations, General Assembly, A/RES/67/1, Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, Para 5. Available: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1.

⁷² Fang, S. (2010). The strategic use of international institutions in dispute settlement. *Quarterly Journal of Political Science*, 5(2), 107-131.

⁷³ Id.

⁷⁴ Davis, C. L. (2012), *supra* note 16.

⁷⁵ Davis, C. L. (2012), *supra* note 16.

⁷⁶ Davis, C. L., & Shirato, Y. (2007), *supra* note 51.

faces environments in which there is rapid and discontinuous change in demand, competitors, technology or regulation. High-velocity industries have many product lines and face rapid product turnover. Low-velocity business environment are few product lines and low product turnover. They researched the causal mechanisms in the context of firm and government decision making of the use of the WTO DSM, finding that high-velocity industries such as the electronic industry were less likely to initiate a WTO DSM and low-velocity industries such as iron and steel industry were more likely to use a WTO DSM. For example, the Japanese electronics firm NEC chose not to ask its government to challenge U.S. antidumping duties on its supercomputers in the WTO because it had already moved on with other strategies to improve market share and did not want to wait for the WTO verdict.⁷⁷ This analysis may be able to apply to Japan's attitude of the use of RTA DSMs.

Institutional Design Issues in Japan's RTA

Regarding the institutional design problems of the DSMs in Japan's RTA DSMs, Davey's focus on institutional legitimacy is noteworthy.⁷⁸ He mentions that the WTO DSM is superior to the NAFTA DSM in systematic points such as the time period of procedures, how to choose panelists, monitoring system of implementation of the decisions, and the assistance of trained experts provided by the WTO secretariat to WTO panelists and Appellate Body members. He additionally points out a case in which the

⁷⁷ Davis, C. L. (2012), *supra* note 16.

⁷⁸ Chapter 14 Dispute Settlement in the WTO and RTAs: A Comment, William J. Davey, Lorand Bartels and Federico Ortino, *Regional Trade Agreements and the WTO Legal System*.

U.S. did not comply with the decision of the NAFTA DSM. A second problem with the NAFTA DSM is that there is no agreement on the identity of the panelists. According to Article 2009 of Chapter 20 in the NAFTA, the roster of the NAFTA DSM panelists is supposed to be appointed by consensus of member countries but the NAFTA member countries have not found consensus on the makeup of the roster.⁷⁹ Therefore, the roster for the DSM of the NAFTA Chapter 20 has yet been made public.⁸⁰ Different from NAFTA Chapter 20, the roster of the DSM based on the NAFTA Chapter 19 has been made public because the DSM based on NAFTA Chapter 19 does not require consensus to make the roster.⁸¹

The DSMs in the WTO are used more than the RTAs because of its greater legitimacy.⁸² In the WTO, panelists are neutral - different from the US-Canada FTA - and the WTO is less power-based and more rule-based than RTA DSMs. In the NAFTA DSM, Mexico has encountered some difficulties in obtaining compliance from the U.S.⁸³ Davey mentions that many US-Mexican and US-Canadian disputes were brought to the WTO instead of the NAFTA DSM in the same period. He concludes the principal system for resolving these disputes is the WTO DSM, not the NAFTA DSM for NAFTA countries.

⁷⁹ NAFTA Secretariat, *Chapter Twenty: Institutional Arrangements and Dispute Settlement Procedures*. Available: <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=ed3bd8c9-2d73-45fb-9241-d66364f8037a>.

⁸⁰ NAFTA Secretariat, Roster for NAFTA Dispute Settlement Panels and Committees. Available: <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Roster-Members#1>

⁸¹ Chapter 19 of NAFTA stipulated the DSM for antidumping, countervailing duty and safeguarding. Chapter 20 of NAFTA are applicable to all disputes regarding the interpretation or application of the NAFTA. See, *NAFTA Secretariat, Overview of the Dispute Settlement Provisions*. Available: <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions#chap19>.

⁸² Chapter 14 Dispute Settlement in the WTO and RTAs, *supra* note 78.

⁸³ Chapter 14 Dispute Settlement in the WTO and RTAs, *supra* note 78.

These points seem suggestive to improvement of Japan's RTAs. Davey's analysis can apply to current Japan's less use of RTA DSMs because Japan's RTA DSMs lack four key features of the WTO DSM: time period of consultation, automatic operation, neutral experts and the rules for monitoring the implementation. Japan can improve these points regarding its RTA DSMs.

According to Ahn, there are some structural drawbacks in RTA DSMs in their implementation stages.⁸⁴ In the case of retaliation by a complaining country, the party is allowed to raise RTA tariffs only up to the WTO Most Favored Nations Treatment (MFN) level. WTO member countries cannot raise their RTA tariff rates more than the WTO MFN level. Ahn mentions this makes the utility of RTA DSMs significantly reduced and therefore the complaining country will prefer the WTO DSM. Therefore any overlapping areas or legal issues among the WTO and RTAs are more likely to be addressed by the WTO DSM.

Ahn also points out some systematic institutional problems within Asian RTA DSMs.⁸⁵ For example, other than the AFTA Asian RTA DSMs do not have an appeal system or a secretariat to support dispute settlement procedures unlike the WTO DSM. The scope of DSMs is different among RTA DSMs and the WTO DSM. For example, monetary payment for settling disputes is allowed in the Korea-U.S. Free Trade Agreement KORUS DSM but not in the WTO DSM. In the KORUS, the complaining party

⁸⁴ Ahn, D. (2013). Dispute Settlement Systems in Asian FTAs: Issues and Problems. *Asian Journal of WTO & International Health Law and Policy*, 8(2), 421-438.

⁸⁵ Ibid.

may not suspend benefits if the responding party provides written notice to the complaining party that it will pay an annual monetary assessment.⁸⁶

Regarding Ahn's points, Japan's RTA DSMs don't have an appeal system and the secretariat. The scope of Japan's RTAs is different from the WTO DSMs. For example, Japan-Malaysia EPA DSM does not apply to Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS).⁸⁷ Japan's RTA DSMs don't have a system using monetary payment for settling disputes like KORUS.

Zangl et al analyze the effectiveness of international dispute settlement system from the points of three different ideas.⁸⁸ Realists assert that international law does not work without global authority. In the real world, the implementation of international law depends on the relation of power politics. In this position, considering the current world which does not have the world government over countries, the international legal system does not work. Rosendorff mentions the WTO has no enforcement powers, no jailhouse, no bail bondsmen, no blue helmets, no truncheons, and no teargas to induce compliance in contrast with national law.⁸⁹ Actually, there are some non-implemented cases in past WTO disputes. Between 1995 and 2000 in the WTO disputes, six out of 32 cases were not implemented.⁹⁰ Of these six cases, the U.S. was a respondent in four,

⁸⁶ KORUS, art. 22.13.5.

⁸⁷ Japan-Malaysia EPA, art. 67 and 72.

⁸⁸ Zangl, B., Helmedach, A., Mondré, A., Kocks, A., Neubauer, G., & Blome, K. (2011). Between law and politics: Explaining international dispute settlement behavior. *European Journal of International Relations*, 1354066110389832.

⁸⁹ Rosendorff, B. P. (2005), *supra* note 1; Bello, J. H. (1996). The WTO dispute settlement understanding: less is more. *The American Journal of International Law*, 90(3), 416-418.

⁹⁰ Zangl, et al, *supra* note 88.

consistent with the realist critique.⁹¹ If Japan does not use a DSM because of fearing of large power, this idea can apply to Japan' behavior of nonuse of RTA DSMs.

Second, institutionalists think states comply with international legal norm because following the international rules keeps their good reputation as a law-abiding member of the international community. If this is true, Japan can use a DSM with expectation that a respondent country will follow the decision of a panel or arbitration. Third, liberalists think international law can be effective only among democratic states. Japan may think democratic countries will abide by international rules and decisions by a panel or arbitration and may prefer to use its DSMs to democratic countries because non democratic countries may not follow the result of a panel or an arbitration. By applying these ideas to classification of explanatory variables, I can know which position can explain Japan's decision of joining a dispute settlement process in the trade agreements. According to Davis, trade disputes may arise through either a failure of implementation in which exporters never gained the promised market access or through a new barrier that has been imposed in response to changed economic or political conditions.⁹² Davis mentions low levels of liberalization would be less likely to lead to widespread cheating since compliance is easy, and as a result enforcement would rarely be a problem. On the other hand, deep liberalization commitments are more likely to give rise to incentives for

⁹¹ Davey, W. J. (2005). Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions. Illinois Public Law Research Paper, (05-16).

⁹² Davis, C. L. (2012), supra note 16.

cheating and encounter serious enforcement challenges.⁹³ If Japan's RTAs are low level of liberalization, this theory may apply to Japan's nonuse of RTA DSM. However, Japan faces potential violations of its RTAs by other signatory countries. It cannot say Japan's RTAs are low level of liberalization.

Table 2.1 shows the institutional differences of DSMs. The JIEPA does not have the appeal system, the Dispute Settlement Body, secretariat and third party system in its RTA DSMs different from the WTO DSM. Details of DSMs of the WTO and the JIEPA are shown in Appendix B.

⁹³ Ibid.

Table 2.1. Institutional Differences of DSM: JIEPA versus the WTO

	JIEPA	WTO
Members	2	162 as of April 8, 2016
Secretariat	×	○
Dispute Settlement body (DSB)	×	○
List of panelists or arbitrators	×	○
Expense of panelists or arbitrators	By the Parties in equal shares	From the WTO budget
Procedures for multiple complaints	×	○
Past cases	0	505 as of March 30, 2016
Third parties	×	○
Venue	Decided by mutual consent of the Parties, failing which it shall alternate between the Parties.(Art. 144.2)	WTO building (as a practice)
Appellate Body	×	○
Surveillance of implementation of recommendations and rulings	×	○

SOURCES: MOFA, the JIEPA; WTO, Annex 2 of the WTO Agreement, Understanding on rules and procedures governing the settlement of disputes; WTO, Chronological list of disputes cases.

Asian Characteristic/Japan's Political Context

There may be other probable reasons why Japan does not use RTA DSMs. For example, the assumption that Asian countries like Japan do not like to use an arbitration or a court to resolve disputes. For example, Davey mentions ASEAN countries are possibly more comfortable with negotiating compromises to resolve disputes.⁹⁴ However, this idea is not necessarily true in the case of Japan since Japan has already used many WTO DSMs in the past. Allee and Elsig additionally cast doubt on assertion that "Asian culture" is not amenable to formal dispute settlement from their research because they discover that Asian RTAs contain stronger dispute settlement rules, as do agreements among Americas.⁹⁵ Davey also stated that ASEAN countries have occasionally used the WTO system, even against each other. According to Puig and Tat,⁹⁶ as same as Japan's RTA DSMs, the AFTA DSM has never been used. Puig and Tat pointed out three problems of AFTA DSM. First is the overlap of the AFTA DSM with the WTO DSM. Second is the lack of standing of private parties under the AFTA DSM. Thirdly, Puig and Tat identified the imperfection of rules of law regarding AFTA DSM. Therefore the idea that Asian countries prefer negotiation to DSM for solving disputes is not universally true.⁹⁷

Regarding Japan's political context, Davis mentions the Japanese legislature grants considerable autonomy to the bureaucracy for management of foreign trade

⁹⁴ Chapter 14 Dispute Settlement in the WTO and RTAs, *supra* note 78.

⁹⁵ Allee, T., & Elsig, M. (2014), *supra* note 25.

⁹⁶ Puig, G. V., & Tat, L. T. (2015), *supra* note 28.

⁹⁷ Puig, G. V., & Tat, L. T. (2015), *supra* note 28.

policy. As a result, there should be lower demand for adjudication and less politicization of case selection for WTO disputes, because of the relative absence of political pressure on foreign economic policy in Japan.⁹⁸ When filing complaints, bureaucrats and industry take the lead with little interest from the legislature. Whereas U.S. officials face pressure to get tough with China, Japan has been able to pursue patient negotiations without the need to resort to adjudication to satisfy domestic demands. According to Davis, Japan follows a more selective adjudication strategy and initiates only a few cases for large industries with less obvious political influence on selection.⁹⁹

Concern for Retaliation/Bargaining Power/ Tit for Tat Filing

One of the plausible reasons behind Japan's reluctance to use the DSM to address Indonesian's violation of the EPA may be the concern of retaliation. The consequences of such retaliation may include restricting visas or interrupted investment activities. The cost of the DSM is also one of the concerns but the reprisal is deemed to have higher detrimental effect to Japanese industry. Davis and Shirato echoed the same points, reporting that how Japanese industries expressed the concern that China would view a complaint as a hostile act and retaliate through other policies that could be harmful for business regarding the use of the WTO DSM to China.¹⁰⁰ Davis mentions governments may fear that challenging a trade partner's barrier would be linked to

⁹⁸ Davis, C. L. (2012), *supra* note 16.

⁹⁹ Davis, C. L. (2012), *supra* note 16.

¹⁰⁰ Davis, C. L., & Shirato, Y. (2007), *supra* note 51.

other economic policies, whether by countersuits in WTO adjudication or in other policy areas.¹⁰¹ The foreign government could easily adopt small measures that may worsen the business environment for exporters or investors related to the dispute or those in completely different economic sectors without engaging in actual violation of trade rules.¹⁰²

In the analysis of Gent and Stephen,¹⁰³ bargaining power plays important role in the decision to pursue arbitration or adjudication. States with greater relative bargaining power will be reluctant to give up decision control to an arbitral panel or international court unless they expect to receive a favorable ruling because they can get better results in bilateral negotiations. Bargaining power is relative and many potential components affect the bargaining power of bilateral relations.

According to Davey suspension of concessions has been authorized and used only four times in the WTO DSM.¹⁰⁴ Davey mentions there is a general problem with suspension of concessions. It seems to work when threatened by a large country against a small country and has worked when implemented by one major power against another but it may not be effective remedy for a small country. On the other hand, Jung argues that a weaker state has less flexibility in a RTA DSM than the WTO DSM.¹⁰⁵ The WTO DSM is more efficient and sophisticated to deal with trade dispute among member

¹⁰¹ Davis, C. L. (2012), *supra* note 16.

¹⁰² Davis, C. L. (2012), *supra* note 16.

¹⁰³ Gent, S. E., & Shannon, M. (2011, August). Commitment Problems, Bargaining Power, and the Choice of International Arbitration and Adjudication. In APSA 2011 Annual Meeting Paper.

¹⁰⁴ Davey, W. J. (2005), *supra* note 91.

¹⁰⁵ Jung, Y. S. (2013), *supra* note 4.

countries by minimizing inequality across countries with power asymmetry. The more frequent use of the WTO DSM than the RTA DSMs might be of this reason.

Davis and Bermeo mention the idea of tit for tat filing, or the use of countersuits by respondents such as disputes between the U.S. and EC in the past WTO cases, in the use of DSMs in trade agreements.¹⁰⁶ Guzman and Simmons found this behavior did not have a significant effect on defendant selection in WTO disputes.¹⁰⁷

Analysis of Determinants of Participation in WTO DSM

Bown analyzed the determinants of participation of all members of the WTO in the WTO DSMs in period between 1995 and 2000.¹⁰⁸ His analysis shows export country's trade retaliatory capacity, legal capacity and international political relations affect the country's decision of using the WTO DSM. This analysis can apply to current Japan's use of RTA DSMs.

As seen above, some arguments in previous literatures may be applicable to explain Japan's decision of using the WTO DSM but there is no analysis which analyzes Japan's decision of using a RTA DSM. Based on the related previous literatures, I analyze what affects Japan's decision of using a DSM not only in the WTO but also in its RTAs in next chapter with recent data not utilized by other scholars. My analysis uses the data between 1995 and 2015 and the data comprise of the past WTO cases and potential disputes which might violate the rules of the WTO or Japan's RTAs.

¹⁰⁶ Davis, C. L., & Bermeo, S. B. (2009), supra note 58.

¹⁰⁷ Guzman, A. T., & Simmons, B. A. (2005). Power plays and capacity constraints: The selection of defendants in world trade organization disputes. *The Journal of Legal Studies*, 34(2), 557-598.

¹⁰⁸ Bown, C. P. (2005). Participation in WTO dispute settlement: Complainants, interested parties, and free riders. *The World Bank Economic Review*, 19(2), 287-310.

CHAPTER 3

ANALYSIS

Data of Japan's RTA DSMs

In this chapter, I systematically analyze Japan's use of the dispute settlement mechanism. Before the analysis, I present data from the WTO regarding Japan's disputes.¹⁰⁹ Figures 4 to 6 show the data when Japan was a complainant in the WTO disputes. As seen in Figure 4, Japan won the 66% of total cases in the WTO disputes when Japan was a complainant. Figure 5 shows the rules used in the WTO disputes when Japan was a complainant, GATT is most frequently used and followed by Agreement on Trade-Related Investment Measures (TRIMs), Subsidies, Anti-dumping, Marrakesh Agreement, and Safeguards. Figure 6 shows the classification of industries in cases of the WTO when Japan was a complainant. Automobile including tire industry, and iron and steel dominate more than half. These two industries plus Electric and Electronic industry, and Energy and natural resources industry cover more than 75%. The result reflects the interests of Japanese export industries.

¹⁰⁹ WTO, Chronological list of disputes cases, supra note 3.

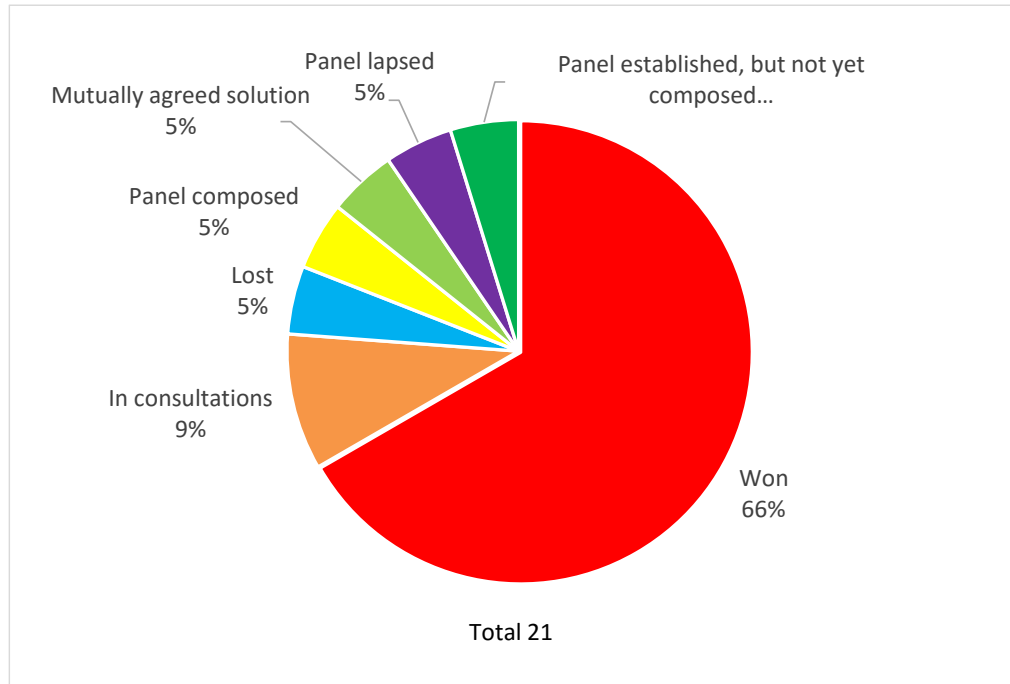


Figure 4. Result of Disputes in the WTO when Japan was a Complainant

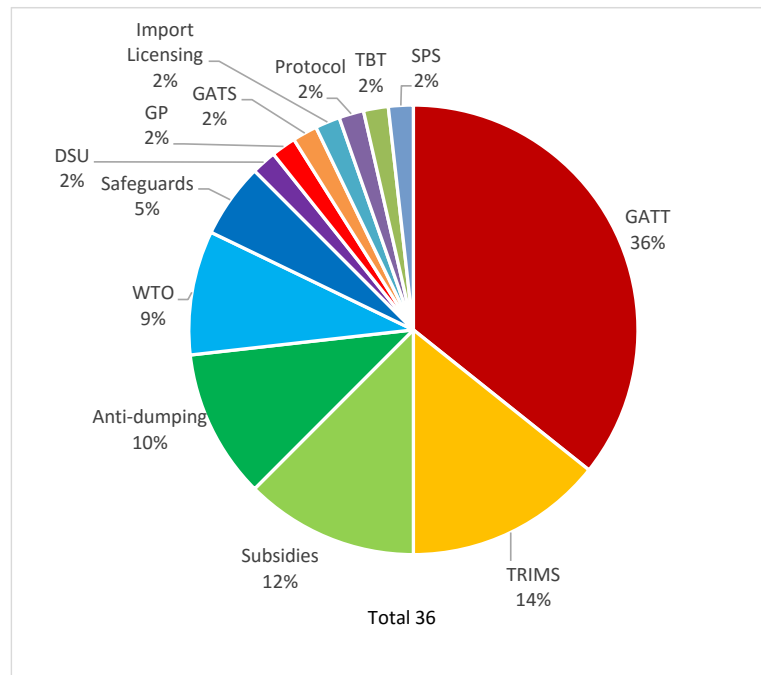


Figure 5. Classification of Rules used in Disputes in the WTO when Japan was a Complainant

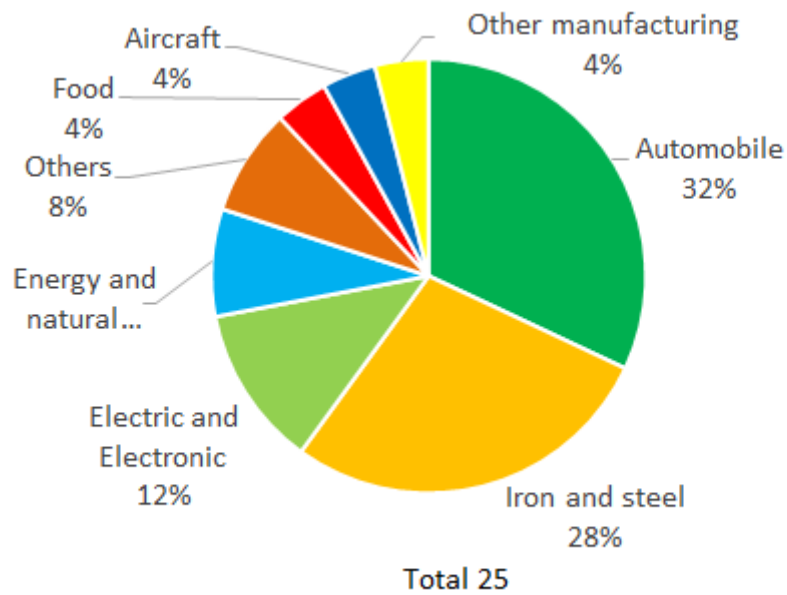


Figure 6. Classification of Industries in Disputes in the WTO when Japan was a Complainant

Figure 7 to 9 show the data when Japan was a third party in the WTO disputes. As seen in Figure 7, when Japan was a third party, they won 60% of cases and 8% of cases had mutually agreed solutions. Figure 8 shows the classification of rules used in disputes in the WTO when Japan was a third party. When Japan is a third-party, GATT is the most frequently used, Anti-dumping is the second, followed by Subsidies, Marrakesh Agreement, Agriculture, and Protocol of Accession. Figure 9 shows the classification of industries in disputes in the WTO when Japan was a third party. Manufacturing industries, Food and Agriculture industries cover more than half. The reason why the

food and agriculture are high when Japan is a third party third-party may be from the point of defense in order to prepare for future disputes as a respondent.

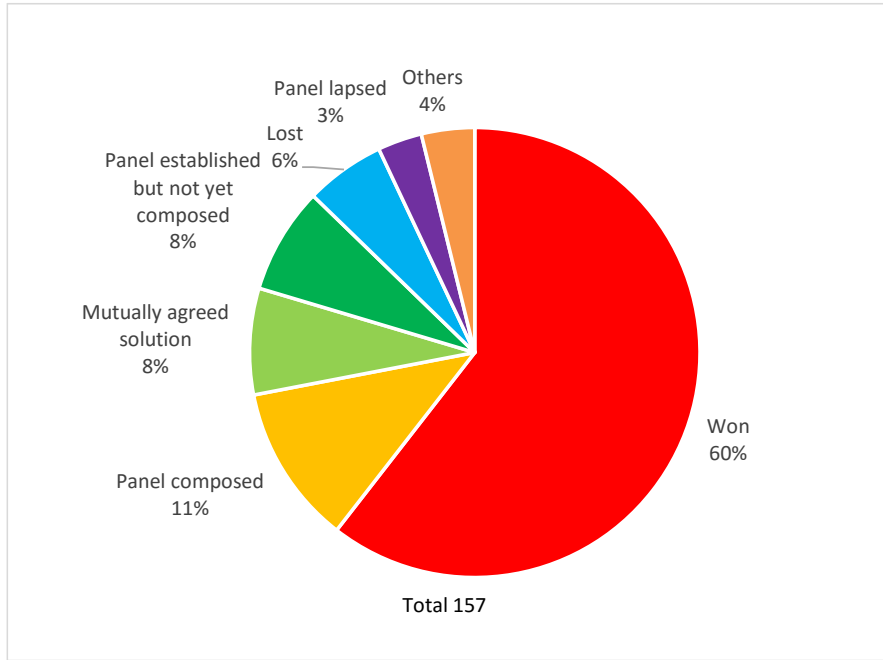


Figure 7. Result of Disputes in the WTO when Japan was a Third Party

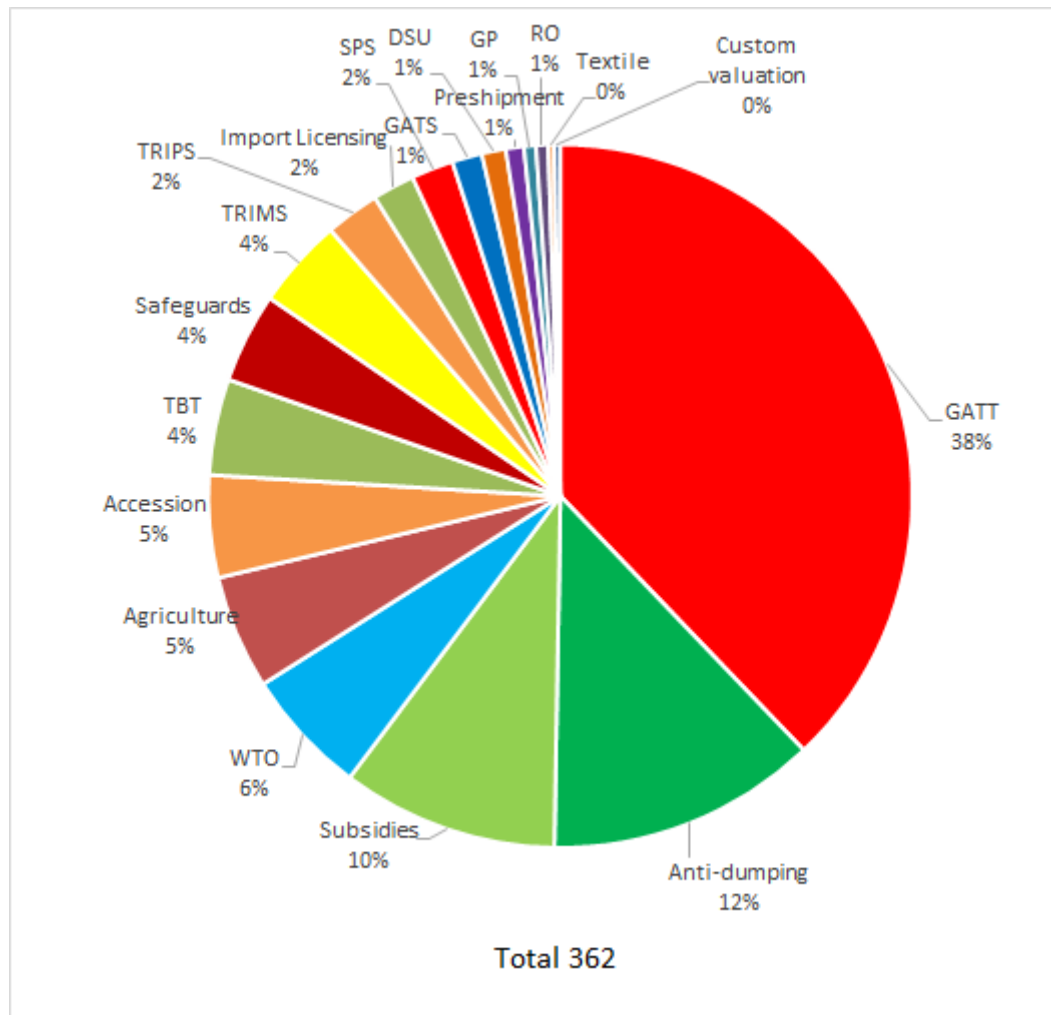


Figure 8. Classification of Rules used in Disputes in the WTO when Japan was a Third Party

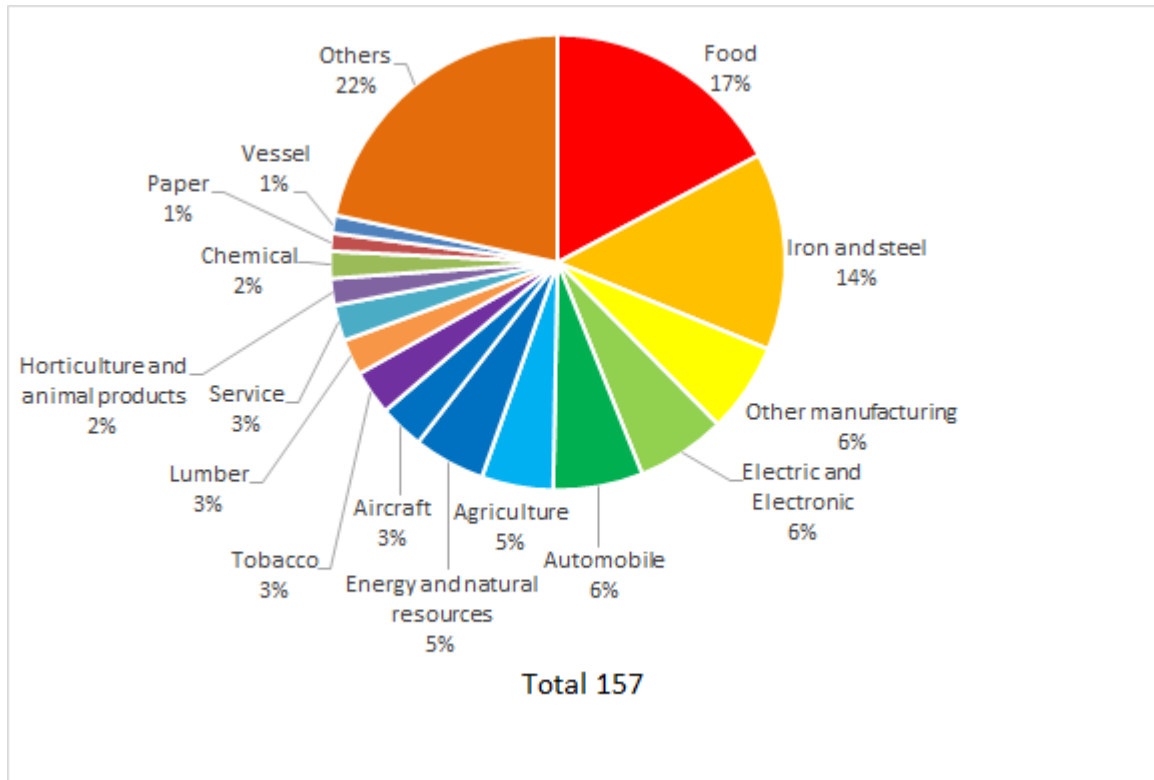


Figure 9. Classification of Industries in Disputes in the WTO when Japan was a Third Party

Logit Analysis

As seen in Chapter 1, the Indonesian EPA automobile case is a potential Japan's RTA violation. In addition, there must be other potential disputes regarding Japan's RTAs. In this chapter I systematically analyze which factors affect Japan's decision to participate in a dispute settlement procedure when Japan faces potential disputes. A methodological challenge in this project is determining the sample of potential DSM

cases. In order to determine potential, but not pursued, cases I coded disputes listed in the Ministry of Economy, Trade, and Industry reports.¹¹⁰

According to the METI reports,¹¹¹ while there are more than 200 potential disputes regarding the WTO and Japan's RTAs Japan has been a claimant in only 21 cases in the WTO and has participated in DSMs as a third party in 157 cases. In addition, Japan has never used any of its RTA DSMs. Following Bown's approach, but using an updated dataset, my research is able to take into account post-2000 changes in the global political economy such as China's 2001 accession to the WTO. Needless to say, China is a most important trade partner for Japan and the countries have many trade disputes. Further, after 2000, Japan has negotiated RTAs with important trading partners such as countries in Southeast Asia. In addition, not only BRICs but also many Southeast Asian countries have developed rapidly after 2000. With these changes in the global economy, the trade conflicts and disputes among these countries and Japan have increased. I need to consider these changes to analyze Japan's decision of using a RTA DSM. In addition, Bown's data include developing countries but Japan is a developed country with higher legal capacity, which means the result of Bown cannot necessarily apply directly to Japan's specific behavior. This chapter analyzes determinants of Japan's decision of participating a DSM in the WTO and RTAs using data from 1995 to 2015 referring to the method of Bown and other relevant literature.

¹¹⁰ Davis and Shirato also identified potential dispute cases using the METI report.

¹¹¹ METI, *supra* note 38.

Hypothesis of the analysis is that Japan is less likely to use or join a formal dispute settlement process when Japan thinks using a DSM worsens the relationship with a disputing country. I hypothesize explanatory variables related to political economic cost will negatively affect Japan's decision of using a DSM. The higher the political economic related variables are, the less likely Japan advocates a DSM in trade agreements.

Dependent Variable

As a dependent variable, I use potential disputes. The dependent variable has two categories: *participation* ($Y = 1$) where Japan has formally participated as a complainant or a third party in disputes of the WTO or Japan's RTAs; *non-participation* ($Y = 0$) where Japan did not formally participate in dispute settlement procedure in the WTO or Japan's RTAs. The data are from the annual METI reports,¹¹² the report of the JMC¹¹³ and the WTO website.¹¹⁴ The METI and JMC reports include not only cases which are brought to the WTO but also potential disputes which Japan think violate rules of the WTO or Japan's RTAs. Table 3.1 provides a descriptive summary of the variables.

Data obtained from these sources cover cases in the WTO and potential disputes in the WTO and Japan's RTAs between 1995 and 2015. There are 21 cases where Japan became a complainant in the WTO, although not all of cases have established a panel or are resolved. There are 157 cases where Japan joined the WTO

¹¹² METI, supra note 38.

¹¹³ JMC, supra note 39.

¹¹⁴ WTO, Chronological list of disputes cases, supra note 3.

disputes as a third party. These 21 cases plus 157 cases are counted as *participation* (Y = 1) in the analysis.

On the other hand, there are 108 cases which may potentially violate rules of the WTO or Japan's RTAs but Japan has not formally initiated the dispute settlement process. These 108 cases are counted as *non-participation* (Y = 0).

In the WTO, if a member country starts a dispute settlement procedure against other country, Japan can join the dispute as a third party without becoming a complainant. Because of the MFN rules of the WTO, if another country made a claim of the dispute to the WTO and wins the case, Japan can take the benefit of the result of the dispute. If Country A win the cases against Country B, country B must stop the measure violating the rules of the WTO. When Japan has incurred damage by the measure of the country B, if another country like country A wins the DSM, Japan can gain benefits of the result of the DSM without becoming a complainant. In the use of the WTO DSM, this type of free riding is not uncommon.¹¹⁵ Third-party participation is cheap but valuable: it allows countries to guard their interests during negotiations and to voice their views during litigation, without paying the cost of initiating a DSM and becoming a complainant.¹¹⁶ States can extract private benefits from settlements and voice their interests by participating as a third party. However, the greater the number of other third parties, the less likely a given country is to join because negotiations are more

¹¹⁵ Bown, C. P. (2005), *supra* note 108.

¹¹⁶ Johns, L., & Pelc, K. J. (2016), *supra* note 49.

complicated as more parties join, which lowers the likelihood of early settlement.¹¹⁷ Nevertheless, Japan's participation as a third party is high. Japan seems to highly evaluate the benefit from joining as a third party compared to the risk of delayed settlement. Therefore, not only non-participation in a dispute but also joining as a third party is a behavior of free rider. Different from the WTO, Japan cannot freely ride on disputes as a third party in its bilateral RTAs.

Considering the characteristics of a free rider in the use of the WTO disputes, Japan does not have to join the disputes as a third party. Japan can take advantage of the result of other countries' DSM without joining as a third party. Japan might have been interested in the some WTO cases where Japan did not join as a third party. However, it is difficult to know which cases Japan was interested in but did not join as a third party. Considering the fact that Japan joined 157 cases as a third party, cases in which Japan participated as a third party were important and related to Japan's trade interest. It is considerable that cases which Japan did not join as a third party were not important to Japan. Therefore, this analysis classifies Japan's participation in the DSM as a third party into *participation* ($Y = 1$) which means Japan has interest in these cases.

Explanatory Variables

Based on the results of previous literatures, this chapter analyzes the likelihood of Japan's initiation of a dispute settlement procedure using a measurements of political

¹¹⁷ Johns, L., & Pelc, K. J. (2016), *supra* note 49.

economic costs, expected benefits of formal participation of a dispute settlement procedure, the likelihood of success in a dispute, and effects of sector difference.

As explanatory variables, I consider four categories, with twelve variables that may affect the Japan's decision of using or joining a DSM as a complainant or a third party. Table 3.1 shows the summary of statistics for variables with author's predictions.

Table 3.1. Descriptive Statistics for the Variables Used in the Logit Model

Varibale		Predicted Sign	Mean	SD	Minimum	Maximum
- Dependent variable						
0 = nonpaticipant 1 = interested third party or complainant		(for= 0 or 1)	0.622	0.486	0	1
- Explanatory variables						
Category 1 : Political Economic Costs	1. Whether Japan has a regional trade agreement with a disputing country (RTA WITH)	-	0.143	0.351	0	1
	2. Whether a dispute country is South East Asia (SEA)	-	0.126	0.332	0	1
	3. Whether Japan became a respondent claimed by a disputing country (TIT FOR TAT)	Unknown	0.476	0.500	0	1
	4. Whether Japan has made a claim to a disputing party. (DSM USE)	Unknown	0.570	0.496	0	1
	5. The number of Japan's claim to a disputing country (NM DSM USE)	Unknown	2.304	2.984	0	8
	6. Log GDP per capita of a disputing country in t-1 (GDP PER)	-	4.107	0.531	3	5
Category 2: Expected Benefits of Formal Participation	7. Japan's exports sent to a disputing country as a share of Japan's total exports in t -1 (EXPORT)	+	0.127	0.101	0.000	0.307
	8. Log GDP of a disputing country in t-1 (GDP)	-	12.510	0.691	10	13
Category 3 : The likelihood of Success in a Dispute	9. The degree of democracy of a disputing country (DEMO)	+	7.353	3.659	0	10
	10. The share of the disputing country's total exports to Japan in t-1 (EXP TO JP)	+	0.068	0.045	0.0024	0.2706
	11. The amount of ODA from Japan to a disputing country in t -1 (AID)	+	0.942	0.351	0.0000	3.5700
Category 4: Sector effects	12.Velocity (VELOCITY)	-	0.070	0.086	0.0005	0.3410

Category 1: Political Economic Costs

1. Whether Japan has a preferential trade agreement with a disputing country (RTA WITH)

The RTA WITH is a measurement of political economy costs: Japan may not want to formally participate in a DSM against a member of Japan's RTAs because it would worsen relations with the country. Having RTA with countries shows that Japan has good relationship with these countries. Making RTAs requires a lot of efforts for negotiating countries. For example, Japan has negotiated a RTA with Australia for 7 years. The purpose making RTA is to strengthen the economic relationship with a country. Japan's RTAs include DSMs but using a DSM should not threaten relationship with a trading partner. Japan has made RTAs with a lot of Southeast Asian countries where many Japanese companies trade and invest. Stable political relations among countries are desirable for business. I predict Japan does not use a DSM to countries when Japan has its RTAs with these countries, which is in line with the result of Bown.¹¹⁸

2. Whether a dispute country is in Southeast Asia (SEA)

RTA WITH is mostly related to Southeast Asian countries because more than half of Japan's RTAs are with ASEAN countries. I use a dummy variable of SEA to see the effect of Southeast Asian countries. As of April 15, 2016, among 14 Japan's RTAs which have entered into,¹¹⁹ 8 RTAs are with Southeast Asian countries. I predict the explanatory variable RTA WITH and SEA would have similar result. If the RTA WITH

¹¹⁸ Bown, C. P. (2005), *supra* note 108.

¹¹⁹ METI, *EPA/FTA/Toshi kyotei* (EPA/FTA/Investment Treaties), *supra* note 36.

negatively affects Japan's decision of using or joining a DSM, SEA will also negatively affect Japan's decision. Southeast Asia is politically and economically important for Japan especially considering the emergence of China. The relation between Japan and Southeast Asia is going well.¹²⁰ Japan may not want to bring conflicts with Southeast Asian countries. I predict that Japan is less likely to use or join a DSM with Southeast Asian countries in order to prevent the possibility of economic disputes disrupting their deepening diplomatic ties.

3. Whether Japan became a respondent in past disputes of the WTO with the disputing trade partner (TIT FOR TAT)

This possible variable which may affect the Japan's decision of joining a DSM shows the economic conflicting relation between Japan and a disputing country. As Davis and Bermeo mention, this variable can test whether Japan behaved as tit for tat filing in the use of DSMs in trade agreements.¹²¹ If the result is positive, this variable might show Japan's retaliatory attitude against a disputing country about past legal action to Japan. For example, the European Union (EU)'s claim against the U.S. over the foreign corporations is seen as retaliation to the U.S. past two claims against EU.^{122,123}

4. Whether Japan made a claim at least one time to a disputing country in the WTO (DSM USE)

¹²⁰ Nguyen, P. (2016), Southeast Asia Dances to the Tune of Japan's Abe Doctrine, Southeast Asia from Scott Circle, 7(6).

¹²¹ Davis, C. L., & Bermeo, S. B. (2009), supra note 58.

¹²² WT/DS108.

¹²³ Iida, K. (2004), supra note 19.

This variable shows Japan's past experience to make a claim to a disputing country. If the result is positive, Japan tends to use or join a DSM to some specific countries more frequently than to other countries. Japan may think it is easy to make a claim or join the dispute as a third party to the specific country more than other countries from the point of political cost. Japan may think joining a dispute does not worsen the relation with these countries. If the result is negative, Japan may not want to formally participate in a DSM against some specific countries again. Japan may think joining a dispute worsens the relation with countries. The data are from the webpage of the WTO.¹²⁴

5. The number of Japan's claim to a disputing country (NM DSM USE)

This variable can show whether Japan tends to make a claim or join a dispute as a third party to specific countries. Japan may think it is easy to make a claim or join the dispute as a third party to specific countries more than other countries from the point of political cost. Japan may think joining a dispute does not worsen the relation with these countries. If the result is negative, Japan tends not to participate in a DSM again. Japan may think joining a dispute frequently to same countries worsens the relation with these countries.

6. Log GDP per capita of a disputing country in t-1 (GDP PER)

Some scholars such as Kim use a Log GDP per capita as a variable of legal capacity but at the same there are some discussions of the appropriateness of using this

¹²⁴ Ibid.

variable as a measurement of legal capacity.¹²⁵ For example, Busch et al question of using log GDP per capita as a measurement of legal capacity.¹²⁶ Considering the discussion, I use this variable as an economic measurement of country's development, rather than making conclusions about a country's legal capacity. Although some countries such as China and India have large GDP as a country but GDP per capita of these countries are low. Some small countries and jurisdictions such as Singapore and Hong Kong show high GDP per capita although their GDP is small. GDP per capita may positively affect Japan's decision of joining a dispute differently from GDP, which means Japan prefers to use a DSM to developed countries or negatively affect Japan's decision of joining a dispute settlement procedure. These data are from the World Bank¹²⁷ and the Taiwan's National statistics.¹²⁸ In the analysis of Kim¹²⁹, this variable was negative regarding imposition of antidumping duties (AD) and countervailing duties (CVD) and also negative in his 2 models regarding initiation of a request for consultation to AD/CVD. I predict Japan is less likely to use or join a DSM to a developed country because Japan may think the disputes would be solved by negotiation with developed country. Japan may think developed countries are more likely to respect the result of negotiation although it is not legally binding. On the other hand, Japan may think developing countries are more likely to overturn the non-binding result of negotiation, or that it is

¹²⁵ Kim, M. (2008). Costly procedures: divergent effects of legalization in the GATT/WTO dispute settlement procedures. *International Studies Quarterly*, 52(3), 657-686.

¹²⁶ Busch, M. L., Reinhardt, E., & Shaffer, G. (2009). Does legal capacity matter? A survey of WTO Members. *World Trade Review*, 8(04), 559-577.

¹²⁷ World Bank, GDP per capita (current US\$). Available: <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

¹²⁸ Taiwan, National Statistics. Available: <http://eng.stat.gov.tw/ct.asp?xitem=37408&CtNode=5347&mp=5>.

¹²⁹ Kim, M. (2008), supra note 125.

not easy to negotiate with developing countries because of their weak governance capacity. Developing countries also may not negotiate the issue sincerely without a formal compulsory dispute settlement process. For example, Venezuela tried to dismiss the award of the International Center for the Settlement of Investment Disputes.¹³⁰ If there is no legal binding dispute settlement system, countries like Venezuela may not negotiate to resolve disputes. Therefore Japan may think a legally binding DSM is preferable for resolving disputes with developing countries, whereas the country does not need to resort to a DSM to resolve disputes with developed countries.

Category 2: Expected Benefits of Formal Participation

7. Japan's exports sent to a disputing country as a share of Japan's total exports in t -1 (EXPORT)

A variable of Japan's exports sent to the disputing country as a share of Japan's total exports in year t -1 (EXPORT) is a measurement of the importance of the disputing country as an export market. Following Bown,¹³¹ I use the year before the initiation of the DSM. If the result of the analysis is positive, Japan tends to join the DSM as a complainant or a third party to the country to which Japan exports a lot. The data are from the Ministry of Finance of Japanese government (MOF).¹³² I predict EXPORT will have a positive effect on DSM initiation. It is natural to think that Japan formally initiates a dispute settlement process against a country to which Japan exports a lot. The amount

¹³⁰ Business Wire, Gold Reserve Reports U.S. District Court for the District of Columbia Enters Judgment against Venezuela in Excess of \$760 Million; Denies Motion to Stay Enforcement. Available: <http://www.businesswire.com/news/home/20151123005971/en/Gold-Reserve-Reports-U.S.-District-Court-District>.

¹³¹ Bown, C. P. (2005), supra note 108.

¹³² MOF, *Boueki toukei* (Trade Statistics of Japan). Available: <http://www.customs.go.jp/toukei/suii/html/time.htm>.

of damage from the violation of trade agreements is high when the amount of export from Japan is large. Japan's expected benefit from the winning of DSM is higher than the cost of DSM when EXPORT is high.

8. Log GDP of disputing country in year t-1 (GDP)

The GDP of a disputing country is a measurement of the size of economy of a disputing country. As Davis and Shirato mention, larger markets offer more economic opportunities for Japan's industry but at the same time larger markets may have more bargaining power.¹³³ Japan may be more active or less active to participate in a dispute settlement process against a large economy considering the size of economy. This variable is related to the idea of realism. If Japan does not want to make a claim to a larger economy, it may suggest Japan's behavior is close to realism position. The data are from the World Bank¹³⁴ and Taiwan's National statistics.¹³⁵ In the analysis of Davis and Shirato, this variable was not statistically significant but the coefficient was negative regarding a Japan's initiation of a WTO DSM. Considering the result, I predict negative to this variable.

Category 3: The Likelihood of Success in a Dispute

9. The degree of democracy of a disputing country (DEMO)

¹³³ Davis, C. L., & Shirato, Y. (2007), *supra* note 51.

¹³⁴ World Bank, GDP at market prices (current US\$). Available: <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

¹³⁵ Taiwan, *supra* note 128.

According to the analysis of countries' behaviors in international dispute settlement by Zangl et al,¹³⁶ it can be said the higher democratic ratio in the international organization would contribute to the higher level of judicialization. The declaration of United Nation also says "We reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing..."¹³⁷ Davis additionally mentions "the close connection between democracy and judicial institutions within a state is widely recognized."¹³⁸ In this analysis, I use a degree of democracy as variable for a measurement of the rule of law in a disputing country. According to Fang,¹³⁹ democratic governments incur higher noncompliance costs than their non-democratic states due to their exposure to domestic sources of noncompliance costs that non-democracies are not subject to. Domestic interests groups and free media in a democracy play a significant role in publicizing a government's failure in working with international institutions.

Japan may expect higher democratic countries will more follow the results of disputes because these countries respect the rule of law. This variable is related to the idea of liberalism. If the result is positive, Japan tends to initiate a DSM to democratic countries which is in line with the concept of liberalism.¹⁴⁰ The data are from the Polity

¹³⁶ Zangl, et al, supra note 88.

¹³⁷ United Nations, General Assembly, A/RES/67/1, Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, Para 5. Available: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1.

¹³⁸ Davis, C. L. (2012), supra note 16; LaPorta, R., Lopez-de-Silanes, F., Pop-Eleches, C., & Shleifer, A. (2003). Judicial checks and balances (No. w9775). National Bureau of Economic Research.; Stephenson, M. C. (2003). "When the devil turns...": The political foundations of independent judicial review. *The Journal of Legal Studies*, 32(1), 59-89.

¹³⁹ Fang, S. (2010), supra note 69.

¹⁴⁰ Zangl, et al, supra note 88.

IV, a standard measure of democracy used in the literature.¹⁴¹ The data of Hong Kong and the EU are missing in the data of Polity IV, and I used the variable mean for Hong Kong and used the average democracy of the EU member countries for the the EU. In the analysis of Kim¹⁴², this variable is positive regarding imposition of AD and CVD in his 2 models and also positive in initiation of a request for consultation to AD/CVD.

10. The share of the disputing country's total exports to Japan in t-1 (EXP TO JP)

Disputing country's exports sent to Japan as a share of disputing country's total exports in year t -1 means the Japan's trade retaliation capacity to the disputing country according to Bown.¹⁴³ This variable is a measurement of trade retaliation capacity of Japan and related to the idea of realism. Due to the self-enforcing nature of the WTO and RTA DSMs, exporting countries can enforce their rights only through actual or implicit threats of retaliation against trading partners. As an enforcement tool, Japan may increase the import tariff rates from the disputing country if the disputing country does not follow the decision of the DSM. Japan may be more likely to participate in a DSM when this variable is high. The data are from the Organisation for Economic Co-operation and Development (OECD) and the EC.¹⁴⁴ In the analysis of Bown¹⁴⁵, this variable is positive regarding likelihoods of becoming a complainant or a third party.

11. The amount of ODA from Japan to a disputing country in t -1 (AID)

¹⁴¹ Polity IV, Polity IV Country Reports 2010. Available: <http://www.systemicpeace.org/p4creports.html>.

¹⁴² Kim, M. (2008), supra note 125.

¹⁴³ Bown, supra note 108.

¹⁴⁴ OECD, OECD. Stat. Available: http://stats.oecd.org/Index.aspx?DataSetCode=BTDIXE_I4; EC, TRADE Market Access Database, Statistics. Available: http://madb.europa.eu/madb/statistical_form.htm.

¹⁴⁵ Bown, supra note 108.

Japan gives official development assistance (ODA) to developing countries. The amount of ODA in year t-1 is also a measurement of trade retaliation capacity of exporter to a disputing country.¹⁴⁶ Japan can decrease or stop ODA to disputing countries as an enforcement tool if they don't follow the result of the DSM. Japan may be more likely to participate in a DSM when this variable is high. These data are from the MOFA.¹⁴⁷ In his analysis Bown finds that the recipient of bilateral aid received from exporter was negative. Japan will not use or join a DSM when AID is high.¹⁴⁸

Category 4: Sector Effects

12. Velocity (VELOCITY)

Davis and Shirato¹⁴⁹ analyze how industry patterns affect the initiation of the WTO DSM. The analysis is also an important reference. Davis and Shirato used the Research and Development (R&D) ratio to total sale or production as the velocity to measure which may affect the probability of dispute initiation. Davis and Shirato explained the difference of velocity among industries. That is, higher velocity industries such as electronics industries are less likely to use the DSM but lower velocity industries such as iron and steel industries are more likely to use the DSM. In order to examine the affection of industrial difference to the Japanese DSM initiation, this thesis uses the R&D ratio to total value added of each industry as an explanatory variable. The R&D ratio to total value added means total R&D expenditures over the total value added in a year

¹⁴⁶ Bown, supra note 108.

¹⁴⁷ MOFA, *ODA Jisseki* (ODA results). Available: <http://www.mofa.go.jp/mofaj/gaiko/oda/shiryo/jisseki.html>, [published in Japanese].

¹⁴⁸ Bown, supra note 108.

¹⁴⁹ Davis, C. L., & Shirato, Y. (2007), supra note 51.

measured by current prices as a velocity of industry. This variable is used to measure the stability of a business environment, degree of technological instability, and innovativeness.¹⁵⁰

The data of R&D expenditures and the data of value added of each industry in Japan are from the OECD.¹⁵¹ I used 2008 data because 2008 data is most recent available in the OECD database regarding Japan. In the analysis of Davis and Shirato, total production is used but the OECD data do not show the total production of services, I used the value added instead to include service industries in the analysis. According to Davis and Shirato,¹⁵² the result is negative. For example, high velocity industries such as electronic industry are less likely to use a DSM but low velocity industries such as iron and steel industry are more likely to use a DSM. High velocity sectors are as follows. Chemical industry is 34.1%. Electric and electronic industry is 23%. Automobile industry is 17.8%. Manufacturing is 11.5%.

I examine this variable in this analysis with data from the WTO¹⁵³ and the METI and JMC report.¹⁵⁴ In the analysis of Davis and Shirato, this variable is negative regarding a Japan's initiation of a WTO dispute.

¹⁵⁰ Davis, C. L., & Shirato, Y. (2007), supra note 51.

¹⁵¹ OECD.Stat, STAN R&D expenditures in Industry (ISIC Rev. 3). Available: https://stats.oecd.org/Index.aspx?DataSetCode=ANBERD2011_REV3; OECD.Stat, STAN Database for Structural Analysis. Available: <https://stats.oecd.org/Index.aspx?DataSetCode=STAN08BIS>.

¹⁵² Davis, C. L., & Shirato, Y. (2007), supra note 51.

¹⁵³ WTO, Find disputes cases, available at https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results.

¹⁵⁴ METI, supra note 38; JMC, supra note 39.

Analysis

In the analysis, I use a logit model appropriate to the categorical nature of the dependent variable. In model 1, I use all of 12 explanatory variables. In the model 2, in order to check whether these variables are good to fit our model, I use the likelihood ratio test. As the result of the likelihood ratio tests, seven variables are fit to the model. I use these seven explanatory variables in model 2. In model 3, I replace RTA WITH by SEA because more than half of Japan's RTAs consist of Southeast Asian countries. The results are summarized in Table 3.2.

Table 3.2. The Result of the Logit Model 1 and 2

Explanatory Variable	Dependent Variable: Japan's participation of DSM			
		Model 1	Model 2	Model 3
Intercept		12.13746 (0.04740)	3.10547. (0.059218)	1.41132 (0.33574)
Category 1 : Political Economic Costs	1. Whether Japan has a regional trade agreement with a disputing country (RTA WITH)	-2.10116*** (0.000196)	-2.05996*** (0.000411)	-
	2. Whether a dispute country is South East Asia (SEA)	-4.32388** (0.00218)	-0.31928 (0.589214)	-1.39347** (0.00305)
	3. Whether Japan became a respondent claimed by a disputing country (TIT FOR TAT)	0.04687 (0.95495)	-	-
	4. Whether Japan has made a claim to a disputing party. (DSM USE)	-0.30726 (0.50588)	-	-
	5. The number of Japan's claim to a disputing country (NM DSM USE)	-0.10833 (0.24912)	-0.23432** (0.002027)	-0.23844** (0.00138)
	6. Log GDP per capita of a disputing country in t-1 (GDP PER)	-2.38342* (0.01853)	-1.15749* (0.012542)	-0.73860. (0.07600)
Category 2: Expected Benefits of Formal Participation	7. Japan's exports sent to a disputing country as a share of Japan's total exports in t-1 (EXPORT)	5.00196 (0.26407)	9.81048*** (0.000158)	10.51242*** (4.08e-05)
	8. Log GDP of a disputing country in t-1 (GDP)	0.12468 (0.796605)	-	-
Category 3 : The likelihood of Success in a Dispute	9. The degree of democracy of a disputing country (DEMO)	0.28779** (0.00115)	0.31368*** (8.26e-08)	0.27028*** (8.40e-07)
	10. The share of the disputing country's total exports to Japan in t-1 (EXP TO JP)	31.06082** (0.00247)	-	-
	11. The amount of ODA from Japan to a disputing country in t-1 (AID)	-0.92168* (0.01320)	-	-
Category 4: Sector effects	12. Velocity (VELOCITY)	-4.85744** (0.00447)	-5.04456** (0.001915)	-4.30484** (0.00637)

Signif. Codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1

Model 1 ; AIC 303.24, N 286

Model 2; AIC 315.2, N 286

Model 3; AIC 326.78, N 286

Results

Regarding the political economic variables in category 1, model 1 shows that RTA WITH, SEA and GDP PER are statistically significant and negative. In models 2 and 3, RTA WITH, NM DSM USE and GDP PER are statistically significant and negative. From the results, we can see that Japan is a risk-averse country in using or joining a DSM when it considers the political economy costs. Japan particularly tends to avoid using or joining a DSM when it has an RTA with a disputing country. This finding is same as Bown's finding that political economy costs of international relations make it less likely that an exporter will participate in a trade dispute when the respondent is politically important to the exporter.¹⁵⁵ More than half of Japan's RTAs are with Southeast Asian countries and others are countries in Asia Pacific region except Switzerland.¹⁵⁶ These countries are politically and economically important for Japan. Especially Japan and Southeast Asian countries share common interest against the threat of emerging China. In model 3, I replaced RTA WITH by SEA to see the effect of Southeast Asian countries. The result of SEA is statistically significant and negative, similar to RTA WITH in model 2. Japan is less likely to use or join a DSM with Southeast Asian countries, which shows Japan thinks Southeast Asia is politically important. Japan's behavior of using DSM reveals how the region is important for Japan.

Japan is also less likely to use or join a DSM when Japan has used DSMs with a disputing country. The more frequently Japan made claims to a disputing country, the

¹⁵⁵ Bown, C. P. (2005), *supra* note 108.

¹⁵⁶ METI, *EPA/FTA/Toshi kyotei* (EPA/FTA/Investment Treaties), *supra* note 36.

less likely Japan uses or joins a DSM to the country. The results of GDP PER show Japan is less likely to use a DSM to developed countries same as the prediction. Japan seems to prefer to use legally binding process to resolve disputes with developing countries. Developing countries might more easily and unreasonably overturn the non-binding agreement than developed countries or they may not sincerely negotiate the issue without formal compulsory dispute settlement process. Indonesia, India, Philippines, Egypt and China are five countries that have small GDP PER.

The control variables in categories 2 and 3 largely affirm the findings of previous studies. Regarding category 2, in models 1, 2 and 3, as I expected, EXPORT is positive. Disputes with highest amounts of Japan's export sent to a disputing party as a share of Japan's total export are mainly related to disputes with the United States. The top five values of EXPORT which are related to 35 disputes are disputes with the U.S. The variable GDP does not fit to the model in the result of likelihood ratio test.

Regarding category 3 in model 1, all three variables are statistically significant. DEMO and EXP TO JP are positive. AID is negative. In models 2 and 3, only DEMO is statistically significant as the result of likelihood ratio test. DEMO is positive in the model 1, 2 and 3 as I expected. This result is same as our prediction and is in line with the idea of liberalism. Countries with more than 9 score of democracy are Australia, Canada, Chile, EU, Hungary, India, Ireland, Israel, Mongolia, Poland, Taiwan, UK, and the U.S.

The result of EXP TO JP in model 1 is positive, which means Japan tends to join a dispute with a country to which Japan has a retaliatory capacity as expected. The result

of AID is negative which is different from expectation. Japan seems not to relate trade disputes with foreign aid. Japan may think ODA is just a tool to make a good relation with developing countries. The result may imply although Japan has a trade dispute with a developing country, Japan does not threat the country by stopping or decreasing ODA or may imply the amount of ODA cannot be used as a tool to retaliate to the disputing country when a trade dispute happens.

The U.S. is strongly related to EXPORT and DEMO. India is strongly related to GDP PER and EXP TO JP. These results are interesting. Japan is less likely to use or join a DSM with higher GDP per capita country.

Regarding category 4, the results of VELOCITY are statistically significant and negative in both models 1 and 2. These are same as the prediction and in line with Davis and Shirato. Japanese high velocity industries such electronic industries are less likely to use a DSM.

Figure 10 shows the marginal effects of model 2. Marginal effects of VELOCITY, RTA WITH, SEA, NM DSM USE, EXPORT and DEMO do not cover 0. Marginal effects of EXPORT and DEMO are positive and the marginal effect of others are negative. The marginal effect of EXPORT is positively high and VELOCITY is negatively high. Figure 11 shows the marginal effects of model 3. In model 3, VELOCITY, SEA, NM DSM USE, EXPORT and DEMO do not cover 0. Marginal effects of EXPORT and DEMO are positive and the marginal effect of others are negative.

Figure 10. Marginal Effect of Model 2

Marginal Effects with 95% Confidence Intervals

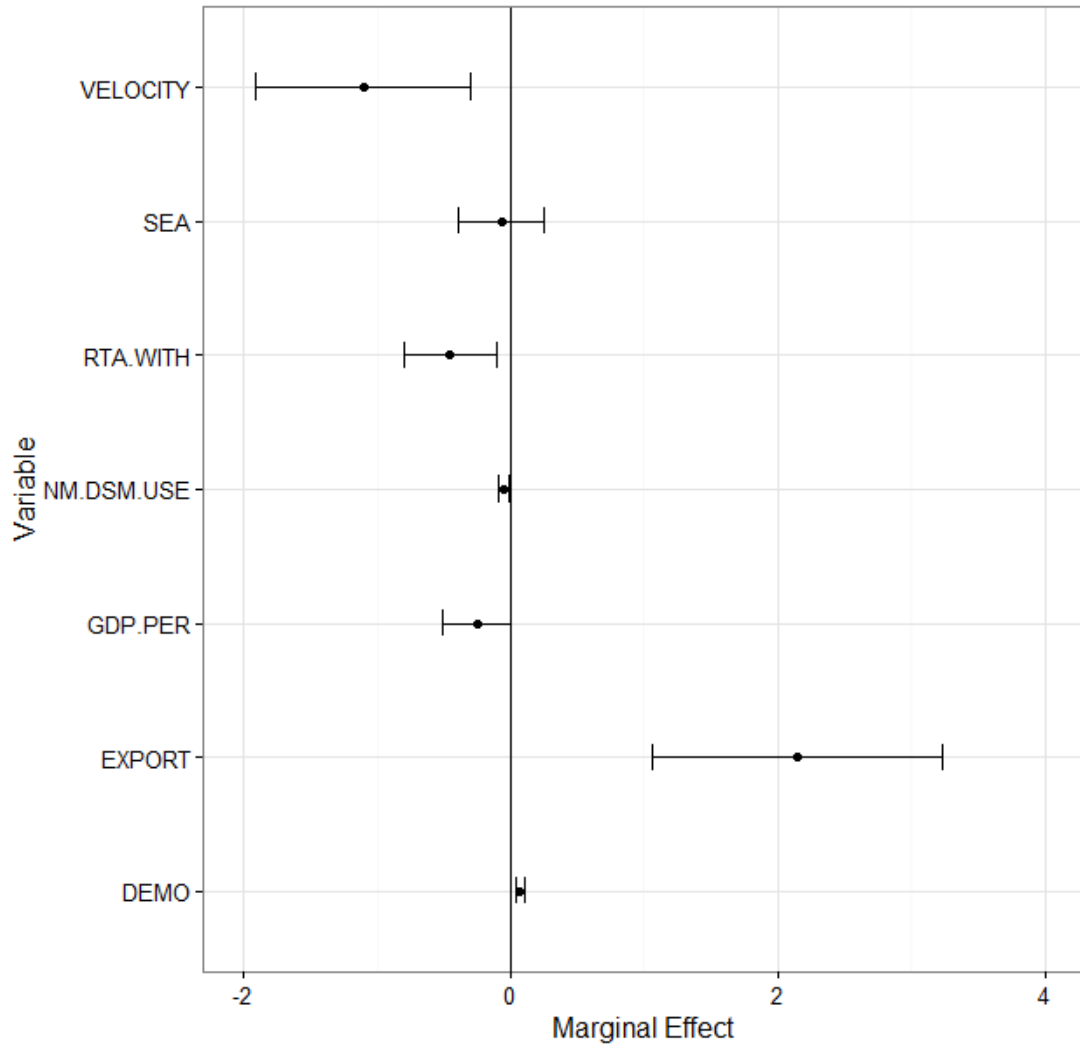
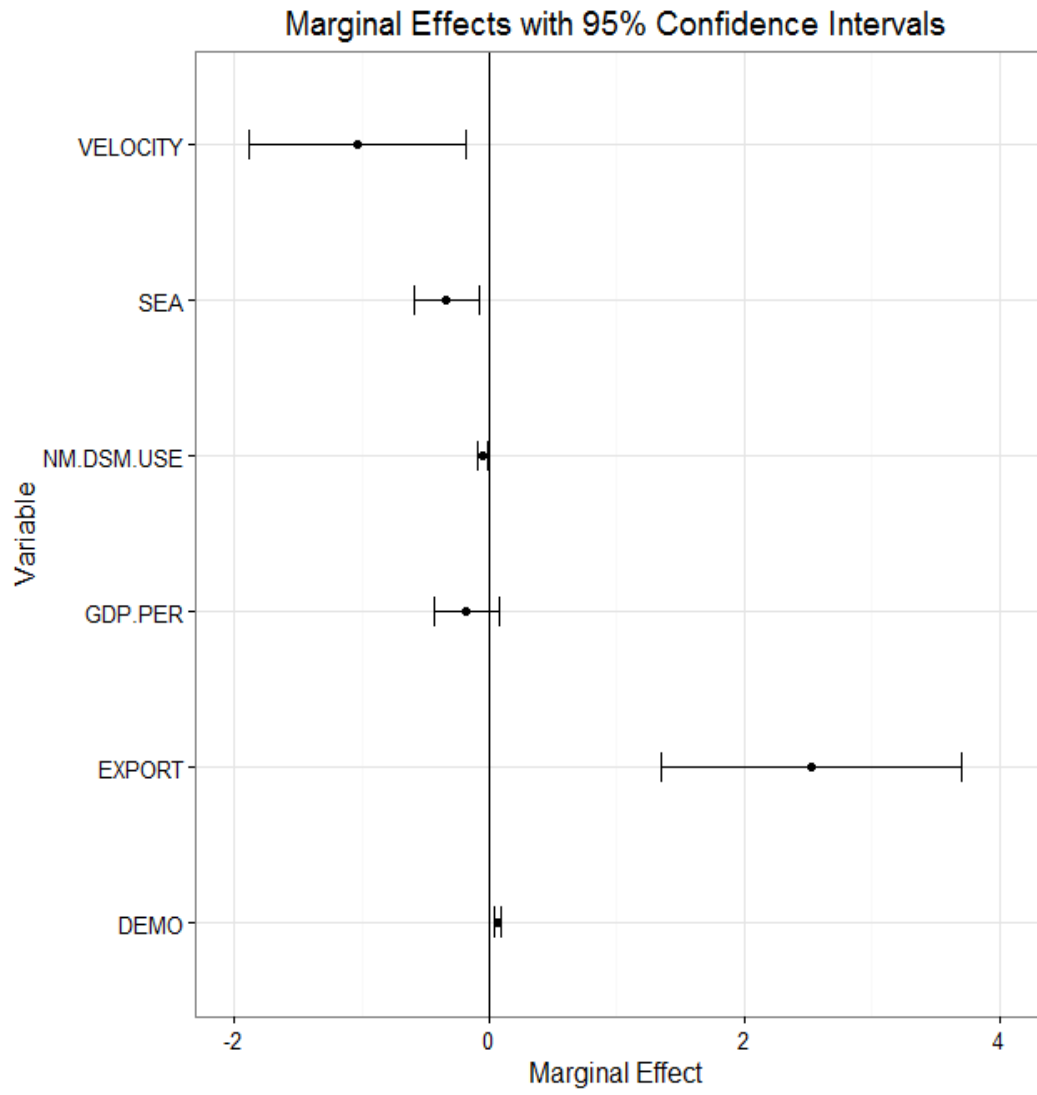


Figure 11. Marginal Effect of Model 3



Summary and Arguments

From the analysis, there are seven important variables which are statistically fit and affect Japan's decision of joining a DSM: 1. RTA WITH (-), 2. SEA (-), 3. NM DSM USE (-), 4. GDP PER (-), 5. EXPORT (+), 6. DEMO (+), and 7. VELOCITIES (-). I also found RTA WITH can be replaced by SEA.

First, Japan is less likely to use or join a DSM with countries Japan has RTAs. Having RTAs with countries means not only that Japan has economically binding rules with these countries but also that Japan has politically good relationship with these countries. If Japan does not trust a country, Japan cannot make agreements stipulating higher level of rules with these countries. Unfortunately, disputes happen in reality regardless of how they are close. Japan's RTAs are not unexceptional. Japan has disputes with some countries about Japan's RTAs but Japan is reluctant to initiate or join a DSM with these countries. Typical countries are ASEAN countries. In model 3, I replaced RTA WITH by SEA and I found SEA also negatively affects Japan's decision of using or joining a DSM. That shows Japan is less likely to use or join a DSM with Southeast Asian countries, which implies Japan does not want to worsen relation with these states by using a DSM in trade agreements. Maintaining good relationship with Southeast Asian countries are politically and diplomatically important considering the emerging influence of China in the region. Using a DSM may not bring severe diplomatic conflicts between countries but ideally there should not be any concern or dispute among countries. If the disputes are resolved by negotiation without formal legal process, that appears to be desirable

for Japan especially regarding disputes with Southeast Asian countries. Further research will be needed to isolate the effects of signed trade agreements versus regional geopolitical effects.

Second, Japan is less likely to initiate or join a DSM with countries with whom Japan previously has used a DSM. The more Japan has used DSMs with a country, the less Japan initiates or joins a DSM with the country. Japan seems not to want to use or join a DSM with same countries again. It seems that Japan does not want to worsen the relationship with countries by using DSMs many times.

Third, Japan is less likely to use or join a DSM with countries when their GDP per capita is high. Countries with high GDP per capita are developed countries. Japan may think it can be able to resolve disputes with developed countries without using DSMs. Developed countries would be more reasonably negotiable to resolve issues. On the other hand, negotiation with developing countries would be harder. Japan may think it needs to resort to formal dispute settlement process to resolve disputes when disputes are related to developing countries.

Forth, EXPORT has positive effect for Japan to join a DSM. Japan is more likely to join a DSM with a country Japan exports a lot. The typical countries are the U.S. and China.

Fifth, Japan is more likely to use or join a DSM with countries which have high degree of democracy. Not only developed countries but also some developing countries have higher score of democracy. In my data, countries that have more than 8 score of

democracy are Argentina, Australia, Belgium, Brazil, Canada, Chile, Hungary, India, Indonesia, Ireland, Israel, Korea, Mexico, Mongolia, Philippines, Poland, Taiwan, Turkey, UK and the U.S. Considering the result of GDP PER and DEMO, Japan seems to be more likely to use or join a DSM with countries that are democratic and developing countries with expectation that these countries will follow the adjudication of a panel or arbitration.

Finally, Japan is less likely to use or join a DSM regarding high velocities industries. This result is consistent with Davis and Shirato.¹⁵⁷

¹⁵⁷ Davis, C. L., & Shirato, Y. (2007), *supra* note 51.

CHAPTER 4

APPLICATION

This chapter introduces past WTO cases where Japan was a complainant or a third party and examines whether Japan could use a RTA DSM to these cases. After that, I explain how some important explanatory variables affect Japan's decision of using a DSM.

Past WTO Cases

Reviewing Japan's past 21 WTO cases in Table 4.1, there is no case where Japan had the option to use a RTA DSM. While there are 2 cases against Indonesia, these cases happened before the JIEPA entered into effect. For cases where Japan was a third party, Table 4.2 shows that there are 9 instances where Japanese RTA DSMs could have been used. Japan seemed to have joined cases related to agriculture, horticulture and animal from the point of defense for future disputes. A country does not make a claim from the point of defense. Japan seems to have offensive interests in iron and steel industry. From the point of offense, DS456 India Electric and Electronic, DS490 and DS496 Indonesia Iron and steel cases seem to be related to Japanese interests.

Table 4.1. Japan is a Complainant

	DS No.	Responder	Sector	Rule	Status
1	6	US	Automobile	DSU, GATT	Mutually agreed
2	51	Brazil	Automobile	GATT, Subsidies and Countervailing Measures, TRIMS	Consultation suspended.
3	55	Indonesia	Automobile	GATT, Subsidies and Countervailing Measures, TRIMS	won
4	64	Indonesia	Automobile	GATT, Subsidies and Countervailing Measures, TRIMS	won
5	95	US	Government Procurement	GP	Panel dissolved
6	139	Canada	Automobile	GATS, GATT, Subsidies and Countervailing Measures, TRIMS	won
7	162	US	Iron and steel	Anti-dumping, GATT, Agreement Establishing the WTO	won
8	184	US	Iron and steel	Anti-dumping, GATT, Agreement Establishing the WTO	won
9	217	US	Iron and steel, machine parts, bearings, aircraft equipments, forklifts, printing machine, belts for manufacturing	Anti-dumping, GATT, Subsidies and Countervailing Measures, Agreement Establishing the WTO	won
10	244	US	Iron and steel	Anti-dumping, GATT, Agreement Establishing the WTO	lost
11	249	US	Iron and steel	GATT, Safeguards	won
12	322	US	Iron and steel	Anti-dumping, GATT, Agreement Establishing the WTO	won
13	376	EU	IT products	GATT	won
14	412	Canada	Renewable energy	GATT, Subsidies and Countervailing Measures, TRIMS	won
15	433	China	Rare earths	GATT, Protocol of Accession	won
16	445	Argentina	Import restriction on broad industry	GATT, TRIMS, Import Licensing, Safeguards	won
17	454	China	Iron and steel	Anti-dumping, GATT	Be in progrss
18	463	Russia	Automobile	GATT, TRIMS, TBT	Consultation suspended.
19	468	Ukraine	Automobile	Safeguards, GATT	Be in progrss
20	495	Korea	Food	GATT, SPS	Be in progrss
21	497	Brazil	Automotive sector, the electronics and technology industry	GATT, TRIMS, Subsidies and Countervailing Measures	Be in progrss

Table 4.2. Japan is a Third Party

	DS No.	Complainant	Year	Respondent	Sector	Rule	Status
1	341	EC	2006	Mexico	Agriculture	Agriculture, GATT, Subsidies and Countervailing Measures	won
2	430	US	2012	India	Agriculture	SPS, GATT	won
3	455	US	2013	Indonesia	Horticulture and animal products	GATT, Agriculture, Import Licensing	Panel established, but not yet composed
4	456	US	2013	India	Electric and Electronic	GATT, TRIMS, Subsidies and Countervailing Measures	Panel composed
5	477	NZ	2014	Indonesia	Horticulture and animal products	GATT, Agriculture, Import Licensing, Preshipment Inspection	Panel composed
6	478	US	2014	Indonesia	Horticulture and animal products	GATT, Agriculture, Import Licensing, Preshipment Inspection	Panel established, but not yet composed
7	484	Brazil	2014	Indonesia	Food	SPS, TBT, Agriculture, Import Licensing, Preshipment Inspection, GATT	Panel established, but not yet composed
8	490	Taipei	2015	Indonesia	Iron and steel	GATT, Safeguards	Panel composed
9	496	Vietnam	2015	Indonesia	Iron and steel	GATT, Safeguards	Panel composed

Table 4.3. Potential Disputes

	Country	Non-use of the WTO DSM and RTA DSMs
1	Indonesia	Export Restrictions on Mineral Resources and Local Content Issue.
2	Indonesia	Local Content Requirement on Retails Services
3	Indonesia	Quantitative Import Restrictions
4	Indonesia	Import Restrictions (compulsory registration by the importers of pharmaceutical products, foods, beverages, footwear, electrical equipment, children’s toys, steel products, etc.)
5	Indonesia	Suspension of infringing goods at borders
6	Malaysia	Imposition on Internal Taxes on Automobiles and Import Restrictions on Automobiles based on the Approved Permit system
7	Malaysia	Excise Tax Exemption System on Domestic Automobile Parts
8	Malaysia	Export Restrictions on Logs
9	Philippines	Export Restrictions on unprocessed minerals
10	India	Local content requirements (domestic-product preferential subsidies) on domestically manufactured electronic products
		Non-use of RTA DSMs
1	Indonesia	Execution of the JIEPA Intellectual Property Chapter
2	Thailand	Violations of the schedule of elimination of tariffs in the Japan-Thailand EPA
3	Thailand	Unclear implementation of the rule of local procurement parts in the JTEPA
4	Indonesia	Violation of automobile tariff of the JIEPA

Application to Japan's Disputes

Figure 12 shows the correlation between the probability of Japan's use of a DSM and the ratio of Japan's export to a disputing country. The line of sample mean is the average score of each variable. As seen in Figure 12, the probability increases with the increase of export. The line goes down when a dispute is related to SEA or RTA, which means that when a disputing country is a Southeast Asian country or Japan's RTA country, Japan's possibility of using a DSM follows lower lines. The percentage of Japan's export to each Southeast Asian country is less than 0.1. In Figure 12, the width of dropping line is huge in the area below the 0.3. Southeast Asian countries are located in the lower left corner of lower lines. Japan's possibility to use a DSM to these countries are around 0.2 when the other variables are average. On the other hand, the line goes up when Japan does not have a RTA with a disputing country such as the U.S. Japan's export to the U.S. is around 0.3. When the other variables are average, Japan's probability of using or joining a DSM to the U.S. is around 0.9.

According to Figure 12, when the share of Japan's export to a disputing country is more than 0.4, the possibility of Japan's using or joining a DSM is almost 1, which means when the share of export to the disputing country is more than 40%, Japan will use a DSM regardless of political concerns. In the original data, there is no country to which the share is more than 20%, but the results indicate that as export dependence increases so too does Japan's willingness to litigate. If export dependence reaches numbers as high as 40%, we can predict that Japan will be far less hesitant to use a DSM

than is now observed. Under the current situation, Japan's use or joining of a DSM is determined by the balance of all other factors, such as whether a country is in Southeast Asia or sector-level variables.

Figure 13 shows the correlation between the probability of Japan's use of a DSM and VELOCITY. The probability decreases with the increase of VELOCITY. Same as Figure 12, RTA and SEA down the slope. For example Southeast Asian countries are follow the lower slope and the U.S. follows the higher slope in Figure 13. The velocity of automobile is around 0.178. Japan's probability to use or join a DSM to Southeast Asia is around 0.2 to 0.3 while to the U.S. is around 0.7 to 0.8 in Figure 13.

Different from exports, although velocity is 0, the probability of Japan's use or joining a DSM is less than 0.8, which means Japan may not use or join a DSM despite a disputing industry having low velocity. This result implies that Japan does not decide to use or join a DSM only by a request by an industry; if so, then we would expect a probably approaching 1 of DSM use when velocity is low. Although low-velocity industries do want the Japanese government use or join a DSM, the Japanese government considers the other factors such as political relations. For example, in Figure 3, if a disputing country is a Southeast Asian country, Japan is less likely to use or join a DSM although the relevant industries have low velocity.

A brief discussion of the case of Indonesian automobile tariff violations is illuminating. Indonesia is a Southeast Asian and its violation of Japan's RTA is related to relatively high velocity automobile industry. Japan has RTA with Indonesia. These

elements negatively affect the likelihood of using less DSMs generally in the statistical model, and help us understand why the Japanese government has not taken action despite the clear economic losses from the high tariff levels. According to the METI and JMC reports, there are at least 14 cases which may violate rules of either the WTO or Japan's RTAs. 10 cases might violate rules of both of the WTO and RTAs. Table 4.3 shows 4 potential cases with Japan's RTAs and all of 4 cases are related to Southeast Asian countries. On the other hand, among 21 Japan's claimant's cases in the WTO in Table 4.1, just two are from Southeast Asia, and are with Indonesia but 8 cases are with the U.S. These are in line with the probability analysis of Japan's using or joining a DSM in Figure 12 and 13. Figure 4.1 shows Japan started to use a DSM against China recently. That reflect the increase of Japan's export to China, which affects the Japan's probability to use or joining a DSM.

Figure 12. Export Dependence and DSM Use

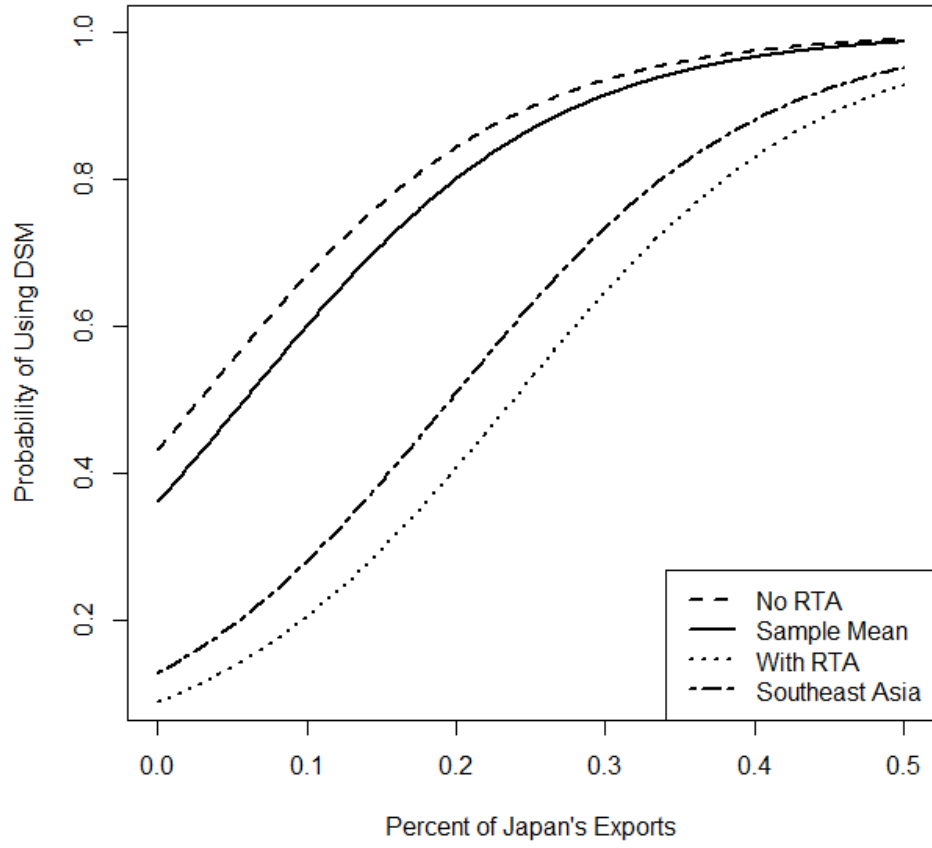
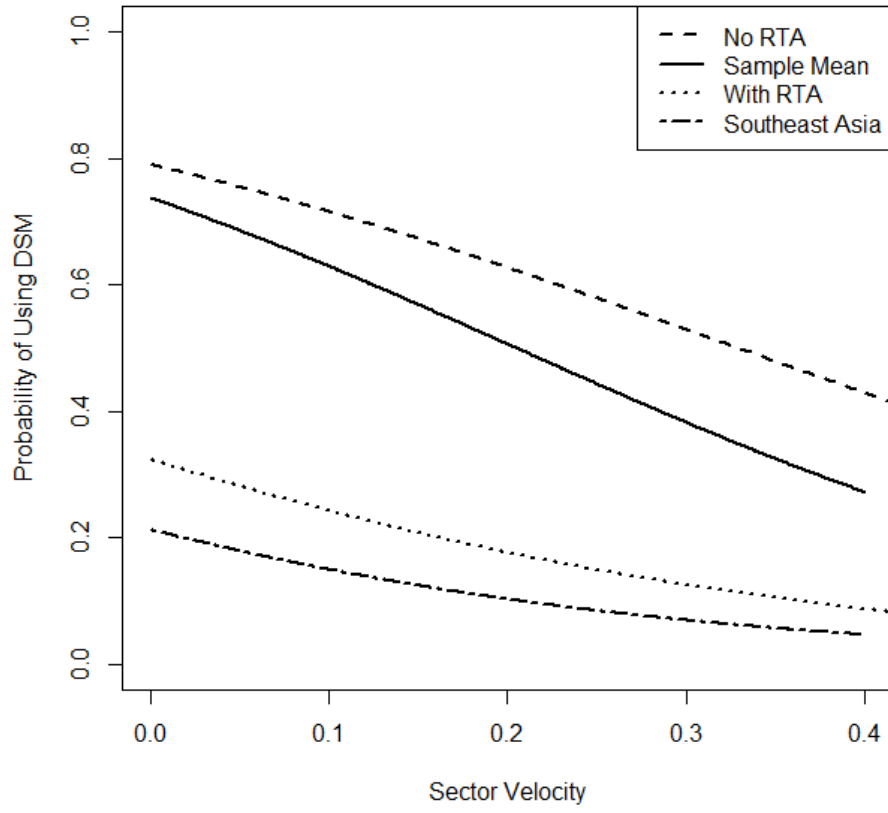


Figure 13. Sector Velocity and DSM Use



CHAPTER 5

CONCLUSION AND SUGGESTION

When a country decides whether it should use a DSM, it considers the costs and benefits. Two sets of costs are considerable: litigation costs such as hiring lawyers and payment for arbitrators and the political economy costs. Benefits are related to the damage brought by a disputing country's measure violating the international trade rules. When costs of using the DSM are higher than the benefits, a country will not pursue litigation. The analysis in Chapter 3 shows that the following seven variables affect Japan's decision of joining a DSM: RTA WITH (-), SEA (-), NM DSM USE (-), GDP PER (-), EXPORT (+), DEMO (+), and VELOCITY (-). Among them, I need to pay attention to variables that negatively affect Japan's decision of using or joining a DSM. Variables RTA WITH, SEA, NM DSM USE, GDP PER and VELOCITY negatively affect Japan decision of joining a DSM. Especially, RTA WITH, SEA, NM DSM USE and GEP PER are related to political economic cost and are related to Japan's concern for worsening relationship with disputing countries.

For example, in the dispute of "Indonesia, Export Restrictions on Mineral Resources and Local Content Issue", since the Indonesian Parliament passed the Mining Law in December 2008, Japanese government has expressed its concerns to the Indonesian government at least 16 times in many occasions.¹⁵⁸ Japan expressed their

¹⁵⁸ METI, 2014 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA -, Part I Problems of Trade Policies and Measures in Individual Countries and Regions, Chapter 2 ASEAN. Available: http://www.meti.go.jp/english/report/downloadfiles/2014WTO/01_02.pdf.

concerns to Indonesia in December 2009, February, June, September, October, and November 2011, February, June, August and October 2012, September, October and December 2013, March 2014 and May and June 2015. In this dispute, Japan has pursued negotiation to resolve the issue instead of using a DSM more than 7 years.¹⁵⁹ As seen in this case, Japan has avoided using the DSM. In this case, Japan seems to hesitate to use a DSM. Negotiating a same issue more than 7 years is too long. If Japan used a DSM, the issue would have been solved earlier than 7 years. Japan seems to avoid using a DSM caring relationship with Indonesia.

Ideally using a DSM should not affect the relation of countries. In order to improve Japan's non participation in a DSM because of fearing worsening diplomatic relations especially with Southeast Asian countries, there needs some systems which ensure using a DSM does not decrease political economic relations with a disputing country. If Japan thinks using a DSM does not worsen the relations with a disputing country, Japan will join a dispute settlement procedure more. Otherwise, Japan will continue to pursue unofficial negotiation to resolve the dispute rather than joining an official dispute settlement process. This is similar to the idea of herd behavior. Of course, when other variables which positively affect Japan's decision of using or joining a DSM are very high, Japan joins a DSM. When EXPORT is very high and VELOCITY is low, Japan will use a DSM. However, that means Japan allows countries to violate trade agreements in some conditions. In order to ensure fair business environment, this situation should

¹⁵⁹ Ibid.

be avoided. Regarding this Japan's RTA problems, Davey made interesting comments about the retaliation in case of non-compliance of the WTO DSM decisions.¹⁶⁰ Davey explained probably only the most powerful members like the U.S. and the EU can use retaliatory action as the ultimate sanction under the WTO rules. It appears that informal pressures to comply are much greater in the WTO than the RTA.

Considering the result of the analysis and Davey, multilateral international DSM including powerful members such as the U.S. and EU would be a solution to improve Japan's use of RTA DSMs. Although a country violates the rules of multilateral trade agreements, not only Japan but also other countries may try to resolve the problem. Japan does not have to be fear of worsening relation with the disputing country. In the past, Japan was fearful of using a DSM with China and Korea but Japan has started to use the WTO DSMs with both countries.¹⁶¹ The violation of rules of a disputing country is less likely to become bilateral problems in multilateral DSMs. Joint action seems suitable way for Japan in using a DSM in trade agreements. I suggest a DSM of multilateral trade agreement would mitigate Japan's concerns of using a DSM in trade agreements.

All of Japan's RTAs which have come into effect are bilateral. Therefore Japan cannot collaborate with other countries to make a claim to a disputing country in Japan's current RTAs, which means these disputes inevitably become bilateral issues between Japan and the disputing country. Therefore within the institutional structure of Japan's

¹⁶⁰ Davey, W. J. (2005), *supra* note 91.

¹⁶¹ Davis, C. (2003, August). Setting the negotiation table: the choice of institutions for trade disputes. In American Political Science Association Conference, at Philadelphia; WTO DS 433, 454, 495 and 504

current RTAs, political economic costs largely affect Japan's decision making. If the Trans-Pacific Partnership (TPP) is ratified in the future, these dynamics have the potential to change. The TPP consists of 12 countries and includes 4 Southeast Asian countries: Brunei, Malaysia, Singapore and Vietnam.¹⁶² After the TPP is implemented, Japan can collaborate with other TPP members to use a DSM, for example, when Japan faces disputes with a Southeast Asian TPP member, which will mitigate the Japan's concerns of worsening a relation with the disputing country. Multilateral DSMs will dilute the tension between two countries brought by disputes in trade agreements, and Japan will be able to avoid bilateral disputes in multilateral trade agreements.

Using a DSM can constitute a real diplomatic cost. Once formal litigation occurs between 2 countries, it becomes a diplomatic issue subject to domestic political pressures and media attention. However, if the disputes are not bilateral but multilateral, the situation will be different: the respondent country cannot effectively retaliate against many claimants and the dispute does not become bilateral diplomatic problems.

In the future, there is some room to expand my research. For example, I found the velocity of industry as an important explanatory variable for Japan's use of a DSM but the business strategy of each company in an industry may be different. Although A company and B company are in same industry, their supply chains may be different. The difference of business of a company may prefer different position to use a DSM. Japan's decision not to litigate in an automobile tariff dispute with Indonesia might have less to

¹⁶² United States Trade Representative, *the TRANS-PACIFIC PARTNERSHIP*. Available: <https://ustr.gov/tpp/>.

do with the velocity of the auto sector and more to do with firms' dependence on suppliers or component manufacturers in Indonesia and not wanting to disturb that status quo. If positions of a use of DSM among countries in an industry are different, the industry cannot ask their government to use a DSM. Further research can explore industry effects more as well as the effects of global supply integration.

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APPENDICES

Appendix A. Tables of Japan-Indonesia EPA Automobile Tariff Rates

The JIEPA came into effect in July 2008. In the JIEPA, the import tariffs to automobile classified as HS 8703.23 in the Schedule of Indonesia are as follows.

Table A.1. Schedule of Indonesia of the JIEPA¹⁶³

Column 1 Tariff Item Number	Column 2 Description of Goods	Column 3 Base Rate	Column 4 Category	Column 5 Notes
87.03	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars.			
8703.23	-- Of a cylinder capacity exceeding 1,500 cc but not exceeding 3,000 cc:			
	--- Motor cars (including station wagons, sports cars and racing cars) for the transport of 8 persons or less including the driver:			
	---- CBU/other:			
8703.23.21	----- Of a cylinder capacity less than 1,800 cc			
8703.23.21.10	----- Sedan/station wagons		P	13
	----- Other:			
8703.23.21.91	----- Two wheel drive (4x2) system		P	14
8703.23.21.92	----- Four wheel drive (4x4) system		P	14
8703.23.22	----- Of a cylinder capacity 1,800 cc and above but less than 2,000 cc			
8703.23.22.10	----- Sedan/station wagons		P	13
	----- Other:			
8703.23.22.91	----- Two wheel drive (4x2) system		P	14
8703.23.22.92	----- Four wheel drive (4x4) system		P	14
8703.23.23	----- Of a cylinder capacity 2,000 cc and above but less than 2,500 cc			
8703.23.23.10	----- Sedan/station wagons		P	13
	----- Other:			
8703.23.23.91	----- Two wheel drive (4x2) system		P	14
8703.23.23.92	----- Four wheel drive (4x4) system		P	14
8703.23.24	----- Of a cylinder capacity 2,500 cc and above			
8703.23.24.10	----- Sedan/station wagons		P	13
	----- Other:			
8703.23.24.91	----- Two wheel drive (4x2) system		P	14
8703.23.24.92	----- Four wheel drive (4x4) system		P	14

¹⁶³ MOFA, the JIEPA Annex 1 referred to in Chapter 2 Schedules in relation to Article 20. Available: <http://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/annex1.pdf>.

(Customs duties on originating goods classified under the tariff lines indicated with “P” shall be as provided for in the terms and conditions set out in the note indicated in Column 5 in each Party’s Schedule.)

Notes 13 and 14 in the schedule above mean as follows;

Part 3 Section 1 Notes for Schedule of Indonesia in the JIEPA Annex 1¹⁶⁴

13. The rate of customs duty shall be reduced in accordance with the following:

(a) 60.0 percent, as from the date of entry into force of this Agreement;

(b) 20.0 percent, as from January 1, 2012; and

(c) 5.0 percent or the rate of customs duty applied by Indonesia at the time of importation under the AKFTA, whichever is the less, as from January 1, 2016.

14. The rate of customs duty shall be reduced in accordance with the following:

(a) 45.0 percent, as from the date of entry into force of this Agreement;

(b) 20.0 percent, as from January 1, 2012; and

(c) 5.0 percent or the rate of customs duty applied by Indonesia at the time of importation under the AKFTA, whichever is the less, as from January 1, 2016.

¹⁶⁴ Ibid.

Table A.2. Appendix of the Regulation of the Minister of Finance of the Republic of Indonesia (No.209/PMK.011/2012) on Import Duty Tariff Setting in the JIEPA¹⁶⁵

NO.	POS/SUB POS HEADING/SUB HEADING	DESCRIPTION OF GOODS	BEA MASUK JIEPA / JIEPA IMPORT DUTY					
			2013	2014	2015	2016	2017	2018
(1)	(2)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
8847	8703.23.39.00	- - - Other	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8848	8703.23.40.00	- - Motor-homes	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
		- - Motor cars (including station wagons, SUVs and sports cars, but not including vans). Completely Knocked Down:						
	8703.23.51	- - - Of a cylinder capacity not exceeding 1,800 cc:						
8849	8703.23.51.10	- - - - Sedan / station wagons	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8850	8703.23.51.90	- - - - Other	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
	8703.23.52	- - - Of a cylinder capacity exceeding 1,800 cc but not exceeding 2,000 cc:						
8851	8703.23.52.10	- - - - Sedan / station wagons	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8852	8703.23.52.90	- - - - Other	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
	8703.23.53	- - - Of a cylinder capacity exceeding 2,000 cc but not exceeding 2,500 cc:						
8853	8703.23.53.10	- - - - Sedan / station wagons	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8854	8703.23.53.90	- - - - Other	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
	8703.23.54	- - - Of a cylinder capacity exceeding 2,500 cc:						
8855	8703.23.54.10	- - - - Sedan / station wagons	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8856	8703.23.54.90	- - - - Other	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
		- - Motor cars (including station wagons, SUVs and sports cars, but not including vans). Other:						
	8703.23.61	- - - Of a cylinder capacity not exceeding 1,800 cc:						
8857	8703.23.61.10	- - - - Sedan / station wagons	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
		- - - - Other:						
8858	8703.23.61.91	- - - - - Two wheel drive (4x2) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
8859	8703.23.61.92	- - - - - Four wheel drive (4x4) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	8703.23.62	- - - Of a cylinder capacity exceeding 1,800 cc but not exceeding 2,000 cc:						
8860	8703.23.62.10	- - - - Sedan / station wagons	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
		- - - - Other:						
8861	8703.23.62.91	- - - - - Two wheel drive (4x2) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
8862	8703.23.62.92	- - - - - Four wheel drive (4x4) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	8703.23.63	- - - Of a cylinder capacity exceeding 2,000 cc but not exceeding 2,500 cc:						
8863	8703.23.63.10	- - - - Sedan / station wagons	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
		- - - - Other:						
8864	8703.23.63.91	- - - - - Two wheel drive (4x2) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
8865	8703.23.63.92	- - - - - Four wheel drive (4x4) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	8703.23.64	- - - Of a cylinder capacity exceeding 2,500 cc:						
8866	8703.23.64.10	- - - - Sedan / station wagons	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
		- - - - Other:						
8867	8703.23.64.91	- - - - - Two wheel drive (4x2) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
8868	8703.23.64.92	- - - - - Four wheel drive (4x4) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
		- - Other vehicles, Completely Knocked Down:						
8869	8703.23.71.00	- - - Of a cylinder capacity not exceeding 1,800 cc	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8870	8703.23.72.00	- - - Of a cylinder capacity exceeding 1,800 cc but not exceeding 2,000 cc	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8871	8703.23.73.00	- - - Of a cylinder capacity exceeding 2,000 cc but not exceeding 2,500 cc	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
8872	8703.23.74.00	- - - Of a cylinder capacity exceeding 2,500 cc	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
		- - - Other:						
8873	8703.23.91.00	- - - Of a cylinder capacity not exceeding 1,800 cc						
	ex 8703.23.91.00	a . For the transport of 9 persons including the driver	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
	ex 8703.23.91.00	b . Other	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	8703.23.92	- - - Of a cylinder capacity exceeding 1,800 cc but not exceeding 2,000 cc:						
8874	8703.23.92.10	- - - - Two wheel drive (4x2) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
8875	8703.23.92.90	- - - - Four wheel drive (4x4) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	ex 8703.23.92.90	a . For the transport of 9 persons including the driver	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
	ex 8703.23.92.90	b . Other	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	8703.23.93	- - - Of a cylinder capacity exceeding 2,000 cc but not exceeding 2,500 cc:						
8876	8703.23.93.10	- - - - Two wheel drive (4x2) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
8877	8703.23.93.90	- - - - Four wheel drive (4x4) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	ex 8703.23.93.90	a . For the transport of 9 persons including the driver	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
	ex 8703.23.93.90	b . Other	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	8703.23.94	- - - Of a cylinder capacity exceeding 2,500 cc:						
8878	8703.23.94.10	- - - - Two wheel drive (4x2) system	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
8879	8703.23.94.90	- - - - Four wheel drive (4x4) system	20,0%	20,0%	20,0%	5,0%	5,0%	5,0%
	ex 8703.23.94.90	a . For the transport of 9 persons including the driver	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	ex 8703.23.94.90	b . Other	28,1%	25,3%	22,5%	19,7%	16,9%	14,1%
	8703.24	- Of a cylinder capacity exceeding 3,000 cc:						

¹⁶⁵ Appendix of the Regulation of the Minister of Finance of the Republic of Indonesia (No.209/PMK.011/2012) on Import duty Tariff setting of the JIEPA.

Table A.3. Appendix of the Regulation of the Minister of Finance of the Republic of Indonesia (No. 95/PMK.011/2008) on Import Duty Tariff Setting in the JIEPA¹⁶⁶

NO.	HS 2007	HS 2004	URAIAN BARANG	DESCRIPTION OF GOODS	1 Juli s.d. 31 Des 2008	1 Jan s.d. 31 Des 2009	1 Jan s.d. 31 Des 2010	1 Jan s.d. 31 Des 2011	1 Jan s.d. 31 Des 2012
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
		ex 8703.23.22.92	-----Sistem gardan ganda (4x4)	-----Four wheel drive (4x4) system	45,0	45,0	45,0	45,0	20,0
		8703.23.23	-----Dengan kapasitas silinder 2.000 cc dan di atasnya tetapi kurang dari 2.500 cc	-----Of a cylinder capacity 2,000 cc and above but less than 2,500 cc					
			-----Sedan / station wagon	-----Sedan / station wagons					
			-----Lain-lain :	-----Other :					
		ex 8703.23.23.92	-----Sistem gardan ganda (4x4)	-----Four wheel drive (4x4) system	45,0	45,0	45,0	45,0	20,0
			-----Lain-lain, untuk pengangkutan 8 orang atau kurang :	-----Other, for the transport of 8 persons or less :					
			-----Kendaraan gardan ganda, CKD	-----Four wheel drive vehicles, CKD					
			-----Kendaraan gardan ganda, CBU/ lain-lain :	-----Four wheel drive vehicles, CBU/ other :					
		ex 8703.23.32.00	-----Dengan kapasitas silinder 1.800 cc dan di atasnya tetapi kurang dari 2.000 cc	-----Of a cylinder capacity 1,800 cc and above but less than 2,000 cc	42,2	39,4	36,6	33,8	30,9
		ex 8703.23.33.00	-----Dengan kapasitas silinder 2.000 cc dan di atasnya tetapi kurang dari 2.500 cc	-----Of a cylinder capacity 2,000 cc and above but less than 2,500 cc	42,2	39,4	36,6	33,8	30,9
			-----Lain-lain, untuk pengangkutan 9 orang termasuk pengemudi :	-----Other, for the transport 9 persons including the driver :					
			-----Mobil (termasuk station wagon, mobil sport dan mobil balap) :	-----Motor cars (including station wagons, sports cars and racing cars) :					
			-----CKD	-----CKD					
			-----CBU/ lain-lain :	-----CBU/ other :					
		8703.23.52	-----Dengan kapasitas silinder 1.800 cc dan di atasnya tetapi kurang dari	-----Of a cylinder capacity 1,800 cc and above but less than 2,000 cc					

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NO.	HS 2007	HS 2004	URAIAN BARANG	DESCRIPTION OF GOODS	1 Juli s.d. 31 Des 2008	1 Jan s.d. 31 Des 2009	1 Jan s.d. 31 Des 2010	1 Jan s.d. 31 Des 2011	1 Jan s.d. 31 Des 2012
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
		8703.23.24	-----CKD	-----CKD					
			-----CBU/ lain-lain :	-----CBU/ other :					
			-----Dengan kapasitas silinder 2.500 cc dan di atasnya	-----Of a cylinder capacity 2,500 cc and above					
			-----Sedan / station wagon	-----Sedan / station wagons					
			-----Lain-lain :	-----Other :					
		ex 8703.23.24.92	-----Sistem gardan ganda (4x4)	-----Four wheel drive (4x4) system	45,0	45,0	45,0	45,0	20,0
			-----Lain-lain, untuk pengangkutan 8 orang atau kurang :	-----Other, for the transport of 8 persons or less :					
			-----Kendaraan gardan ganda, CKD	-----Four wheel drive vehicles, CKD					
			-----Kendaraan gardan ganda, CBU/ lain-lain :	-----Four wheel drive vehicles, CBU/ other :					
		ex 8703.23.24.00	-----Dengan kapasitas silinder 2.500 cc dan	-----Of a cylinder capacity 2,500 cc and above	42,2	39,4	36,6	33,8	30,9

NO.	HS 2007	HS 2004	URAIAN BARANG	DESCRIPTION OF GOODS	1 Juli s.d. 31 Des 2008	1 Jan s.d. 31 Des 2009	1 Jan s.d. 31 Des 2010	1 Jan s.d. 31 Des 2011	1 Jan s.d. 31 Des 2012
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
			8 orang atau kurang termasuk pengemudi :	transport of 8 persons or less including the driver :					
			-----CKD	-----CKD					
			-----CBU/ lain-lain :	-----CBU/ other :					
			-----Dengan kapasitas silinder 2.500 cc dan di atasnya	-----Of a cylinder capacity 2,500 cc and above					
			-----Sedan / station wagon	-----Sedan / station wagons					
			-----Lain-lain :	-----Other :					
		ex 8703.23.24.91	-----Sistem gardan tunggal (4x2)	-----Two wheel drive (4x2) system	45,0	45,0	45,0	45,0	20,0
			-----Lain-lain, untuk pengangkutan 8 orang atau kurang :	-----Other, for the transport of 8 persons or less :					
			-----Kendaraan gardan ganda, CKD	-----Four wheel drive vehicles, CKD					
			-----Kendaraan gardan ganda, CBU/ lain-lain	-----Four wheel drive vehicles, CBU/ other					
			-----Lain-lain, CKD	-----Other, CKD					
			-----Lain-lain :	-----Other :					
		ex 8703.23.44.00	-----Dengan kapasitas silinder 2.500 cc dan di atasnya	-----Of a cylinder capacity 2,500 cc and above	42,2	39,4	36,6	33,8	30,9
			-----Lain-lain, untuk pengangkutan 9 orang termasuk pengemudi :	-----Other, for the transport 9 persons including the driver :					
			-----Mobil (termasuk station wagon, mobil sport dan mobil balap) :	-----Motor cars (including station wagons, sports cars and racing cars) :					
			-----CKD	-----CKD					
			-----CBU/ lain-lain :	-----CBU/ other :					

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¹⁶⁶ Appendix of the Regulation of the Minister of Finance of the Republic of Indonesia (No. 95/PMK.011/2008) on Import duty Tariff setting of the JIEPA.

As seen in Table A.1, the tariff rate to Complete Build-up (CBU) motor cars whose cylinders are exceeding 1500cc and less than 3000cc are categorized as P13 or P14. Both P13 and P14 mean import tariff rates are supposed to be 20.0 percent from January 1, 2012 and 5.0 percent from January 1, 2016. However as seen in Table A.2 and A.3, the import tariff rates to automobiles other than Sedan and station wagons are higher than the rates of JIEPA. According to Table A.2 and A.3, Indonesia levied 30.9% of import tariff in 2012, 28.1% in 2013, 25.3% in 2014, 22.5% in 2015, 19.7% in 2016, 16.9% in 2017, and 14.1% in 2018.

Appendix B. The Rules of Japan's RTAs

The followings are the brief explanations of rules in Japan's RTAs.¹⁶⁷

1. General Provisions

The Chapter of General Provisions sets the general rules of the agreement such as the objectives, definitions of terms, administrative procedures, treatment of confidential information, exceptions, and joint committee.

2. Trade in Goods

The chapter of Trade in Goods stipulates the rules of trade in goods such as the national treatment, elimination of customs duties, export subsidies, and safeguard measures. The way of eliminating tariff is determined by the tariff elimination period, the tariff rate, and the tariff elimination formula. These elements are stipulated in the tariff schedule as an annex.

¹⁶⁷ METI, supra note 38.

3. Rules of Origin

The chapter of Rule of Origins specifies the rules of nationality of internationally traded goods. They can be generally classified into preferential sectors and non-preferential sectors. Rules of origin are comprised of (i) rules of origin and (ii) origin certification procedures.

4. Customs Procedures

The chapter of Customs Procedures have rules about customs procedures such as the transparency, the information exchange, and the sub-committee.

5. Investment

The chapter of Investment stipulates the rules of investment such as the national treatment, most-favored nation, fair and equitable treatment, prohibition of performance requirements, expropriation and compensation, and investor-state dispute settlement.

6. Trade in Services

The chapter of the Trade in Services stipulates the rules of trade in services such as the national treatment, most-favored nation, and market access.

7. Movement of Natural Persons

The chapter of the movement of natural persons has the rules of movement of natural persons between parties. Japan has made horizontal commitments only in three areas: intra-corporate transferees, professional services and temporary stays. The commitment on movement of natural persons is restricted to as intra-corporate

transferees and professional engineers. Unskilled workers are not covered by commitments due to labor market concerns of every country including Japan. It is extremely unlikely that an EPA/FTA would include a provision that would lead to a large number of unskilled workers coming into the country.

8. Energy and Mineral Resources

The chapter of Energy and Mineral Resources has rules to make stable trade of energy and natural resources such as the notification and consultation when adopting export restricting measures. Japan has this chapter only in EPAs with Brunei, Indonesia, and Australia.

9. Intellectual Property

The chapter of Intellectual Property has rules about protection of intellectual property such as the simplifying procedures and enhancing the transparency of procedures, strengthening the protection of intellectual property rights, and strengthening enforcement.

10. Government Procurement

The chapter of Government Procurement sets the rules of government procurement such as the national treatment, non-discrimination, fair and equitable procurement procedures, complaint filing systems, delisting of privatized entities, and offsets.

11. Competition

The chapter of Competition has rules of competition such as restricting anti-competitive practices; and establishing common understanding and cooperative framework between Parties.

12. Improvement of Business Environment

The chapter on the Improvement on the Business Environment provides for establishing a “business environment improvement subcommittee”, which is a discussion mechanism between the governments. If both parties agree, the representatives of companies can join the committee.

13. Cooperation

The chapter of Cooperation provides for the framework of technical assistance from Japan to developing countries in many fields.

14. Dispute Settlement

The chapter of Dispute Settlement sets procedures for dispute settlement between Parties such as the consultations, establishment of arbitral tribunals, and implementation of award.

15. Electronic Commerce

The chapter of Electronic Commerce has rules of electronic commerce such as the definition of electronic commerce, the classification of digital contents, and no imposing customs duties.

16. TBT and SPS

Some Japanese RTAs have rules of TBT and SPS to decrease trade barriers relating to measures of standards and conformity assessment systems.

17. Final Provisions

The chapter of Final Provisions sets the rules of amendment, the entry into force and the termination of the agreement.

18. Labor and Environment

Japan has not had independent chapter of Labor or Environment in its RTAs except TPP agreement. This chapter provides for the obligation to make an effort not to decrease the protection level of labor or environment to increase trade and investment.

The Procedure of a Dispute settlement

In the WTO and Japan's RTAs, a formal dispute settlement procedure starts by requesting a consultation. In the WTO, Annex 2 of the WTO Agreement, Understanding on rules and procedures governing the settlement of disputes (WTO DSU) provides for the procedure of a dispute settlement.¹⁶⁸ For example, when Japan requests a consultation to a disputing country, the country must start a consultation within 30 days in the WTO DSM.¹⁶⁹ If the consultation fails to settle a dispute within 60 days, Japan can request the establishment of a panel.¹⁷⁰ A panel is established unless Dispute

¹⁶⁸ WTO, DSU. Available: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

¹⁶⁹ WTO DSU, art. 4 (3).

¹⁷⁰ WTO DSU art. 4(7).

Settlement Body (hereinafter DSB) decides by consensus not to establish a panel.¹⁷¹ The panel is composed of three panelists and the Secretariat of the WTO proposes nominations for the panel.¹⁷² In the WTO DSM, any member having a substantial interest in a matter of panel, can make written submissions to the panel as a third party. The submission is reflected in the panel report.¹⁷³ When the parties to the panel have failed to develop a mutually satisfactory solution, the panel submits a report to the DSB. The report includes the findings of fact, the applicability of relevant provisions and the basic rationale behind its findings.¹⁷⁴ The period of the panel is within 6 months.¹⁷⁵ Within 60 days after the circulation of a panel report to the Members, the report is adopted at a DSB meeting unless a disputing party notifies the DSB to appeal or the DSB decides by consensus not to adopt the report.¹⁷⁶ When Japan appeals a panel report, the Appellate Body hear the appeal. The Appellate Body is composed of 7 persons.¹⁷⁷ The proceeding of the Appellate Body is within 60 days.¹⁷⁸ An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.¹⁷⁹ An appellate Body report is adopted by the DSB unless the DSB decides by consensus not to adopt the Appellate Body report. When a panel or the Appellate Body concludes that a measure is inconsistent with a rules of the WTO, it recommends that the Member

¹⁷¹ WTO DSU, art. 6(1).

¹⁷² WTO DSU, art. 8(5) and (6).

¹⁷³ WTO DSU, art. 10 (2)

¹⁷⁴ WTO DSU, art. 12(7).

¹⁷⁵ WTO DS art. 12(8).

¹⁷⁶ WTO DSU art. 16(4)

¹⁷⁷ WTO DSU art. 17(1)

¹⁷⁸ WTO DSU art. 17(5).

¹⁷⁹ WTO DSU art. 17(6).

bring the measure into conformity with the rules.¹⁸⁰ Compensation and the suspension of concession or other obligations are available as temporary measures if the recommendations and rulings are not implemented within a reasonable period of time.¹⁸¹

For another example, in the case of the JIEPA DSM, when Japan requests a consultation to Indonesia, Indonesia must start the consultation within 60 days.¹⁸² Japan can request the establishment of an arbitral tribunal to Indonesia if Indonesia does not start the consultation within 60 days after the receipt of the request or if the Parties fail to resolve the dispute through the consultations within 90 days.¹⁸³ The arbitral tribunal comprises three arbitrators.¹⁸⁴ Each Party, within 45 days after the receipt of the request for the establishment of an arbitral tribunal, appoints one arbitrator and proposes candidates to serve as the third arbitrator who is the chair of the arbitral tribunal.¹⁸⁵ The Parties agree on and appoint the third arbitrator within 60 days after the receipt of the request for the establishment of an arbitral tribunal.¹⁸⁶ The arbitral tribunal, within 90 days after the date of its establishment, submits to the Parties its draft award including both the descriptive part, and its findings and conclusions. A Party may submit comments in writing to the arbitral tribunal on the draft

¹⁸⁰ WTO DSU art. 19(1).

¹⁸¹ WTO DSU art. 22(1).

¹⁸² JIEPA art. 141(2).

¹⁸³ JIEPA art. 142(1).

¹⁸⁴ JIEPA art. 142(3).

¹⁸⁵ JIEPA art. 142(4).

¹⁸⁶ JIEPA art 142(5).

award within 15 days after the date of submission of the draft award.¹⁸⁷ The arbitral tribunal issues its award, within 30 days after the date of submission of the draft award.¹⁸⁸ The award of the arbitral tribunal is final and binding on the Parties.¹⁸⁹ Compensation and the suspension of concession or other obligations are available when the award is not implemented and the arbitral tribunal confirms it.¹⁹⁰

¹⁸⁷ JIEPA art. 144(7).

¹⁸⁸ JIEPA art. 144(8).

¹⁸⁹ JIEPA art. 144(10).

¹⁹⁰ JIEPA art. 146.

BIOGRAPHY OF THE AUTHOR

Shunsuke Sato was born in Yokohama, Kanagawa, Japan on August 31, 1983. He was raised in Zushi-city, Kanagawa, Japan and graduated from Yokosuka High School in 2002. He attended Yokohama City University and graduated in 2007 with a Bachelor's degree in Economics. He started to work at the METI in 2007. He entered the School of Policy and international Affairs at The University of Maine in the summer of 2014 financed by Government of Japan. After receiving his degree, he will return to the METI, to pursue his career in the field of International trade policy. Shunsuke is a candidate for the Master of Arts degree in Global Policy from The University of Maine in May 2016.