

Japan's Trade Policy in the Midst of Uncertainty



Yuka FUKUNAGA

February 2020

The Institut français des relations internationales (Ifri) is a research center and a forum for debate on major international political and economic issues. Headed by Thierry de Montbrial since its founding in 1979, Ifri is a non-governmental, non-profit organization.

As an independent think tank, Ifri sets its own research agenda, publishing its findings regularly for a global audience. Taking an interdisciplinary approach, Ifri brings together political and economic decision-makers, researchers and internationally renowned experts to animate its debate and research activities.

The opinions expressed in this text are the responsibility of the author alone.

ISBN: 979-10-373-0127-7

© All rights reserved, Ifri, 2020

How to cite this publication:

Yuka Fukunaga, “Japan’s Trade Policy in the Midst of Uncertainty”,
Asie. Visions, No.112, Ifri, February 2020.

Ifri

27 rue de la Procession 75740 Paris Cedex 15 – FRANCE

Tel.: +33 (0)1 40 61 60 00 – Fax: +33 (0)1 40 61 60 60

Email: accueil@ifri.org

Website: ifri.org

Author

Yuka Fukunaga is Professor at Waseda University, where she teaches public international law and international economic law. She is the winner of the Waseda Research Award in 2017. She is also an Executive Council Member of the Japan Chapter of the Asian Society of International Law (AsianSIL) and a Council Member of the Japan Association of International Economic Law.

Professor Fukunaga was an assistant legal counsel at the Permanent Court of Arbitration (PCA) (The Hague, 2012-2013) and an intern at the Appellate Body Secretariat, World Trade Organization (WTO) (Geneva, 2002). She was also a government-appointed assistant to Mr. Shinya Murase, a Japanese member of the International Law Commission (ILC) during the ILC 68th session (Geneva, 2016).

Professor Fukunaga holds an LL.D. (2013) and an LL.M. (1999) from the Graduate Schools for Law and Politics, University of Tokyo, and an LL.M. (2000) from the School of Law, University of California, Berkeley. Professor Fukunaga has published a number of articles and chapters in the field of international trade and investment law, including “Securing Compliance with International Economic Agreements and Dispute Settlement: The Role and Limits of the WTO Dispute Settlement and Investment Arbitration” (Yuhikaku, 2013) and “Introduction to WTO/FTA Law” (Horitsu Bunkasha, 2016, co-authored).

Executive Summary

The multilateral trading system under the World Trade Organization (WTO) has been of the utmost importance for Japan's trade policy. In particular, Japan strongly supports the WTO's rule-based dispute settlement mechanism, and frequently uses it. At the same time, in recent years, the adoption and implementation of regional and mega-regional trade agreements have become critical in Japan's trade policy, with the stalling of the Doha Round negotiations in the WTO.

Although the core of its trade policy remains the same today, Japan has been forced to rethink and modify it in response to the aggressive and unilateral trade policy of the Trump administration.

First, Japan had to change its approach to regional trade agreements because of the withdrawal of the United States (US) from the Trans-Pacific Partnership (TPP) Agreement. In September 2018, Japan and the US decided to enter into negotiations for a bilateral Trade Agreement on goods, as well as on other key areas including services. The negotiations were conducted at an unprecedented pace, mainly due to the political pressure from the US agricultural sector. On 7 October 2019, Japan and the US signed a trade agreement and a digital trade agreement, which entered into force on 1 January 2020. Prime Minister Abe hailed the Trade Agreement as a "win-win" for both countries because it covers products of interest for both sides. However, the agreement provoked mixed reactions in Japan on the following three points. First, the Trade Agreement could be detrimental to the Japanese beef and pork industry in the long run. Second, the agreement is not satisfactory for the Japanese automotive industry either, because it does not reduce tariffs on automobiles and automotive parts. Third and finally, there is potentially a question of consistency with Article XXIV:8(b) of the General Agreement on Tariffs and Trade (GATT), which requires duties and other restrictive regulations of commerce to be eliminated on "substantially all the trade" within an FTA.

After the withdrawal of the US from the TPP, Japan also intensified its efforts to conclude the Japan-European Union (EU) Economic Partnership Agreement (JEEPA). On 17 July 2018, Japan and the EU signed the JEEPA, which entered into force on 1 February 2019. The JEEPA is expected to increase Japan's real GDP by around 0.99% and

facilitate broader cooperation between Japan and the EU. Japan is also participating in the negotiation of the Regional Comprehensive Economic Partnership (RCEP), which were launched on 20 November 2012 between Japan, China, Korea, Australia, New Zealand, India and the ASEAN countries. Although their liberalization commitments and rules are less ambitious compared to those of the TPP or the JEEPA, the RCEP, if concluded, would cover about half of the world's population and about 30% of the world's trade. However, the future of the RCEP has become precarious after India expressed its intention to withdraw from the deal following a meeting in November 2019.

Another change in Japan's trade policy is the increasing importance of national security considerations. For example, the potential threat of the imposition of additional tariffs on automobiles and automotive parts for national security purposes under Section 232 overshadows the post-TPP bilateral negotiations with the US. The issue of national security has also become controversial in trade relations between Japan and South Korea. On 4 July 2019, Japan tightened its licensing policies and procedures on the export of certain controlled products and their relevant technologies destined for Korea. According to the Japanese government, the measures can be justified for national security reasons pursuant to the national security exception under Article XXI of the GATT in the light that "the Japan-[Republic of Korea (ROK)] relationship of trust including in the field of export control and regulation has been significantly undermined" and that the government "has recently found that certain sensitive items have been exported to the ROK with inadequate management by companies". However, South Korea requested consultations with Japan in the WTO dispute settlement mechanism on the matter, claiming that Japan's measures violated the WTO agreements and were not justified by Article XXI of GATT. The two countries held consultations, but failed to reach a mutually satisfactory solution. At this point, it is unclear whether they will be able to reach a mutually satisfactory solution through consultations. If not, the matter will be taken to a panel review.

Finally, Japan seeks to take leadership in the WTO reform talks. Currently, the WTO faces existential challenges, with its rulemaking and dispute settlement functions impaired. As a champion of the multilateral trading system under the WTO, Japan takes initiatives to modernize and reinvigorate the organization. In terms of rulemaking, the Japanese government considers it essential to update the WTO rules to fit the technological developments. More specifically, the government tries to take leadership in negotiations to make new rules for electronic

commerce. In terms of dispute settlement, the most urgent problem for all WTO members is the paralysis of the Appellate Body. Although the Japanese government has not clearly articulated its position on the reform of the Appellate Body, it could play a critical role in bridging differences among WTO members regarding the Appellate Body.

Table of Contents

INTRODUCTION	7
THE LONG AND WINDING ROAD TO A BILATERAL TRADE DEAL WITH THE UNITED STATES	9
Rising US pressures.....	9
Negotiating a trade agreement on goods.....	10
A win-win agreement, really?	11
TIGHTENING ECONOMIC RELATIONS WITH CHINA AND THE EU ...	14
Japan’s softening stance on China	14
Defending shared values with the EU	16
TRADE CONFLICTS WITH SOUTH KOREA	18
Japan’s export control measures	18
Other trade disputes with South Korea	21
WTO REFORM.....	24
Electronic commerce	24
Dispute settlement	27
CONCLUSION	29

Introduction

The multilateral trading system under the World Trade Organization (WTO) has been of the utmost importance for Japan's trade policy. In particular, Japan strongly supports the WTO's rule-based dispute settlement mechanism, and frequently uses it. Japan has participated in WTO dispute settlement proceedings in 26 cases as a complainant and in 16 cases as a respondent.¹ At the same time, in recent years, the adoption and implementation of regional and mega-regional trade agreements have become critical in Japan's trade policy, with the stalling of the Doha Round negotiations in the WTO. The Japan Revitalization Strategy, approved by Prime Minister Abe's cabinet on 14 June 2013 as the third pillar of so-called Abenomics, set out with the goal of raising the free-trade agreement (FTA) coverage ratio² from 19% at the time to 70% by the year 2018.³

Although the core of its trade policy remains the same today, Japan has been forced to rethink and modify it in response to the aggressive and unilateral trade policy of the Trump administration.

First, Japan had to change its approach to regional trade agreements because of the withdrawal of the United States (US) from the Trans-Pacific Partnership (TPP) Agreement. To maintain momentum for the adoption of regional trade agreements, Japan intensified its efforts to conclude the Japan-EU Economic Partnership Agreement (JEEPA), as well as the Regional Comprehensive Economic Partnership (RCEP) with China and other Asian trading partners. While negotiations on the latter have been protracted, the JEEPA successfully entered into force in February 2019.

Second, national security considerations are becoming more closely connected to trade policy. Additional tariffs on steel and aluminum imposed by the US for national security purposes under Section 232 apply to products imported from Japan. More importantly, the potential threat of the imposition of additional tariffs on automobiles and automotive parts for national security purposes under Section 232 overshadows the post-TPP

1. "Disputes by Member", WTO News, available at: www.wto.org.

2. The Japanese government defines the "FTA ratio" as "the ratio of trade value with countries which have FTAs already signed or entered into force with Japan to the total trade value", in "Diplomatic Bluebook 2018: Japanese Diplomacy and International Situation in 2017", Japanese Ministry of Foreign Affairs (MOFA), p. 304, available at: www.mofa.go.jp.

3. "Japan Revitalization Strategy – JAPAN is BACK", Prime Minister's Cabinet, 14 June 2013, p. 24, available at: www.kantei.go.jp.

bilateral negotiations with the US. While negotiations between Japan and the US are ongoing, the two countries concluded a mini trade deal, which entered into force in January 2020. Interestingly, the issue of national security has also become controversial in trade relations between Japan and South Korea. Japan adopted trade-restrictive measures against South Korea and justified them for national security reasons. South Korea questioned the justifiability of the measures and brought the matter to WTO dispute settlement. The trade conflict between Japan and South Korea has damaged their already fragile relations.

Finally, Japan seeks to take leadership in the WTO reform talks. Currently, the WTO faces existential challenges, with its rule-making and dispute-settlement functions impaired. Various efforts to reinvigorate the WTO have not produced any tangible results due to the diverging and often conflicting views and positions among WTO members, particularly the US, China and the EU. Having a good relationship with all three key WTO members, Japan may be able to bridge their differences and find a path toward a consensus.

The sections below discuss recent developments in Japan's trade policy toward its major trading partners, i.e. the US, China, the EU and South Korea. It also analyzes Japan's approach to WTO reform.

The Long and Winding Road to a Bilateral Trade Deal With the United States

The US is Japan's most important ally, not only on the economic but also on the political and military fronts. Since the Japanese government decided to join the TPP negotiations in July 2013, the top priority in its trade policy has been to adopt the TPP Agreement to strengthen the Japan-US alliance and use it to counterbalance China's growing power. In addition, the successful conclusion of the TPP 12, including the US, was expected to raise Japan's FTA coverage ratio. However, the withdrawal of the US from the TPP forced the Japanese government to change its strategy.

Rising US pressures

At least for a while after the Trump administration decided to withdraw from the TPP Agreement in January 2017, the Japanese government hoped to persuade the US to return to the agreement. While the US expressed an interest in making a bilateral trade deal with Japan rather than returning to the TPP Agreement, the Japanese government considered a bilateral free-trade agreement with the US politically unacceptable because the agricultural sector, which the ruling party counts on for support, was strongly concerned that the US would require Japan to liberalize agricultural trade beyond the liberalization commitments under the TPP. In addition, since the Trump administration criticized not only China but also Japan about currency manipulation and trade deficits, the Japanese government was afraid that the US would make exorbitant requests in the bilateral negotiations, such as the inclusion of a currency clause. The Japanese government appeared to expect that economic dialogue, established following the first official meeting between Prime Minister Abe and President Trump in February 2017,⁴ would substitute for a bilateral trade deal.

However, the economic dialogue, held first in April 2017 and then in October 2017 between Deputy Prime Minister Aso and Vice-President Pence, was not successful in dissuading the US from pursuing a bilateral

4. Joint Statement, 10 February 2017, available at: www.mofa.go.jp.

trade deal with Japan. Rather, the demand from the US for a bilateral trade deal intensified as the trade war between the US and China escalated. In particular, the US agricultural sector, hit hardest by additional tariffs imposed by China, urged the Trump administration to strike a deal with Japan to compensate for the loss in trade with China. Moreover, the conclusion of the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) in March 2018 and the JEEPA in July 2018 put the US in a relatively disadvantaged position in trade with Japan vis-à-vis the contracting parties to these agreements.

Japan also began to see merits in engaging in bilateral trade negotiations with the US as the US started to take unilateral tariff measures aggressively in 2018. While many of these measures target China, some of them, such as national security measures against the imports of steel and aluminum taken under Section 232 of the US Trade Expansion Act, also apply to imports from Japan. There was growing fear that Japan would become the next target in the Trump administration's unilateral trade sanctions unless it addressed the US trade concerns. The commencement of an investigation on the imports of automobiles and automotive parts under Section 232 in May 2018 gave a final push to the launch of bilateral talks.⁵

Negotiating a trade agreement on goods

In a joint statement released in September 2018, Japan and the US finally decided to “enter into negotiations, following the completion of necessary domestic procedures, for a Japan-US Trade Agreement on goods, as well as on other key areas including services, that can produce early achievements.”⁶ The term “trade agreement on goods (TAG)” was chosen instead of an “FTA” or an “economic partnership agreement (EPA)” in consideration of the strong aversion to the idea of a “Japan-US FTA”, particularly in the Japanese agricultural sector. The government explained that the joint statement ensured that Japan would not be required to make liberalization commitments regarding agricultural products beyond its commitments under the TPP Agreement. The joint statement also stipulated that Japan and the US would “refrain from taking measures against the spirit of this joint statement during the process of these consultations”. According to the Japanese government, this paragraph ensured that the US would not impose additional tariffs on automobiles during the negotiations.

5. A. G. Mulgan, “The ‘Trump Factor’ in the US-Japan Trade Deal”, East Asia Forum, 13 October 2019, available at: www.eastasiaforum.org.

6. Joint Statement of the United States and Japan, 26 September 2018, available at: www.mofa.go.jp.

The negotiations were conducted at an unprecedented pace, mainly due to the political pressure from the US agricultural sector. On 7 October 2019, Japan and the US signed a trade agreement and a digital trade agreement. The Japan-US Trade Agreement responds to the most urgent demand of the US by reducing Japan's tariffs on US agricultural products such as beef and pork, while reducing or eliminating tariffs on certain industrial goods on the side of the US. The limited liberalization commitments by the US allowed the agreement to enter into force without US congressional approval. On 4 December 2019, the Trade Agreement and the Digital Trade Agreement were approved by the Japanese Diet, where the ruling coalition parties have a stable majority. On 1 January 2020, these two agreements entered into force.

A win-win agreement, really?

Prime Minister Abe hailed the Trade Agreement as a “win-win” for both countries because it covers products of interest for both sides. For the Japanese government, the fact that it did not allow liberalization in agricultural trade beyond the TPP level and did not make any liberalization commitments in rice particularly, signifies a “win” for Japan. However, the agreement provoked mixed reactions in Japan because of the following three points.

First, while the Trade Agreement may be a relief for Japanese rice farmers, it could be detrimental to the Japanese beef and pork industry in the long run. In view of the growing international competitive pressure after the CPTPP and the JEEPA's entry into force, some livestock farmers have voiced serious concerns about the potential impact of the agreement. In response, the Japanese government has expressed an intention to intensify financial support for the agricultural sector.

Second, the agreement is not satisfactory for the Japanese automotive industry either, because it does not reduce tariffs on automobiles and automotive parts. It simply stipulates that “customs duties on automobile and auto parts will be subject to further negotiations with respect to the elimination of customs duties”.⁷ Moreover, the agreement does not include any US commitment on the potential imposition of additional tariffs on automobiles and automotive parts under Section 232 investigation. The joint statement, issued on 25 September 2019, simply reiterates the commitment of the joint statement issued in September 2018 that both countries “will refrain from taking measures against the spirit of these

7. Japan-US Trade Agreement, Annex II, par. 7.

agreements and this Joint Statement”⁸ The additional tariffs on automobiles and automotive parts, if imposed, could be detrimental to the Japanese economy.⁹

Third and finally, there is potentially a question of consistency with Article XXIV:8(b) of the General Agreement on Tariffs and Trade (GATT), which requires duties and other restrictive regulations of commerce to be eliminated on “substantially all the trade” within an FTA. During a debate on the Japan-US Trade Agreement in the Japanese Diet, the opposition parties claimed that the agreement, in which the US has agreed to liberalize less than 60% of its trade in goods, did not meet the requirement. In addition, they argued that the agreement could not be justified as an “interim agreement” because it does not contain “a plan and schedule for the formation ... of a free-trade area within a reasonable length of time”, as required by Article XXIV:5(c) of GATT.¹⁰ The Japanese government appears to consider the agreement as meeting the requirements of Article XXIV:8(b) of GATT because it is expected to cover 92% and 84% of the trade value in goods of the US and Japan, respectively, *when* the two sides reach agreement on automobiles and automotive parts. However, the idea that mere expectation can be considered to meet the trade liberalization commitments required under the provision is questionable. As of the end of January 2020, the agreement has not been notified to the WTO either as a regional trade agreement (or FTA) or an interim agreement.

Among these issues, the remaining possibility of an imposition of additional tariffs on automobiles and automotive parts under Section 232 is the most serious concern for Japan. In a report of the Secretary of Commerce to the US President in February 2019, the Secretary concluded that “automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security,” as defined in Section 232, and recommended actions to adjust automotive imports so that they would not threaten to impair national security.¹¹ In May 2019, President Trump delayed a decision on whether to take actions as recommended until November 2019 and instead directed the United States Trade Representative (USTR) to pursue trade negotiations with Japan and other countries to address the threatened impairment of national security

8. Joint Statement of Japan and the United States, 25 September 2019, available at: www.cas.go.jp.

9. J. J. Schott, “Next Up in the Trade Wars: Autos”, Peterson Institute for International Economics, 21 February 2019, available at: www.piie.com.

10. L. A. Bartels, “Interim Agreements’ Under Article XXIV GATT”, *World Trade Review*, Vol. 8, No. 2., p. 339-350, available at: tradeblog.files.wordpress.com.

11. D. Trump, “Adjusting Imports of Automobiles and Automobile Parts Into the United States”, 17 May 2019, par. 8-11, available at: www.whitehouse.gov.

regarding imported automobiles and automotive parts.¹² President Trump did not make any decisions before the November 2019 deadline, but it is unclear whether he has lost the authority to do so after the deadline.¹³ In any event, given that the Japan US Trade Agreement does not contain any commitments from Japan that would address the alleged “national security concern” of the US, the possibility of imposing tariffs on automobiles and automotive parts has not been completely removed. In the second phase of the trade negotiations between the two sides, which is scheduled to start shortly,¹⁴ Japan may have to accept a tougher deal under the continued threat of additional tariffs on the imports of automobiles and automotive parts.

12. *Ibid.*, par. 15.

13. “Ross: Auto Tariffs Still Possible; Critics Don’t Understand’ Section 232”, Inside U.S. Trade’s, 23 January 2020, available at: insidetrade.com.

14. According to the Joint Statement of September 2019, the second phase will be aimed at reaching broader agreement on “customs duties and other restrictions on trade, barriers to trade in services and investment, and other issues in order to promote mutually beneficial, fair, and reciprocal trade”.

Tightening Economic Relations With China and the EU

China is Japan's biggest trading partner. Although Japan and China have had both positives and negatives in their political relations, their economies have been growing increasingly interdependent. Despite the escalating trade wars between the US and China, Japan successfully maintains positive relations with the latter.

The EU is Japan's third-largest trading partner. The JEEPA, along with the Japan-EU Strategic Partnership Agreement (SPA), which was signed on the same day as the JEEPA, is expected to not only strengthen their trade relations but also promote their cooperation on broader global concerns. In particular, their collaboration is essential to the success of WTO reform. This section discusses Japan's economic relations with China and the EU.

Japan's softening stance on China

While Japan and China have had diplomatic difficulties over time, their relationship has been improving over the last few years. This is partly because the heads of the two countries have been stably in power for a long period and can deal with thorny historical issues in a more pragmatic way. In addition, the escalating trade war between the US and China has made them put aside their disagreements and further their common interests, particularly in the economic field. There are currently three main subjects in their economic relationship.

The first is China's Belt and Road Initiative (BRI) and Japan's position toward it. Recently, Japan has softened its originally extremely cautious approach to the BRI while it remains vigilant and maintains its Free and Open Indo-Pacific initiative,¹⁵ which could work as a counterbalance against the BRI. The turning point was marked by Prime Minister Abe's speech in June 2017, where he noted that the BRI would "contribute to the peace and prosperity of the region and the world" and stated that "Japan is ready to

15. "Free and Open Indo-Pacific", Japanese Ministry of Foreign Affairs, 31 October 2019, available at: www.mofa.go.jp.

extend cooperation from this perspective”.¹⁶ In the more than two years since then, Prime Minister Abe and President Xi Jinping have held six meetings, compared to only four during the nearly five years before that. This atmosphere of a thaw shows Japan's willingness to cooperate with the BRI if the BRI meets internationally recognized standards.¹⁷

The second is the negotiations of the RCEP, which were launched on 20 November 2012 between Japan, China, Korea, Australia, New Zealand, India and the ASEAN countries.¹⁸ According to the guiding principles and objectives then agreed, the negotiations seek to “achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement”, which will cover trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement and other issues.¹⁹ Although their liberalization commitments and rules are less ambitious compared to those of the TPP or the JEEPA, the RCEP, if concluded, would cover about half of the world's population and about 30% of the world's trade. It would not only enhance the transparency and predictability of the business environment in the region, but also send a strong message to the world that Asia continues to support trade liberalization. However, the future of the RCEP has become precarious after India expressed its intention to withdraw from the RCEP following a meeting in November 2019. India explained its withdrawal by stating that the RCEP would harm Indian industries and consumers. The remaining negotiating parties are still hoping to sign the deal by the end of 2020, but their path will be thorny. While China is showing its willingness to proceed even without India, the RCEP without India would not be acceptable for Japan because it would overly increase China's economic and political influence in the region. From the Japanese perspective, India is essential to the RCEP for geopolitical reasons. Nevertheless, Japan's continuing efforts to persuade India to return to the RCEP negotiations have been unfruitful so far.

16. “Asia's Dream: Linking the Pacific and Eurasia”, Shinzo Abe at the Banquet of the 23rd International Conference on The Future of Asia, 5 June 2017, available at: japan.kantei.go.jp.

17. Prime Minister Abe has suggested that the BRI should be implemented in consideration of the common standards of international society, such as the openness, transparency, and efficiency of infrastructure as well as the financial health of borrowing countries. Prime Minister Abe's intervention at a meeting of the Committee on Budget of the House of Councilors, 25 March 2019, available at: kokkai.ndl.go.jp (Japanese only).

18. “Announcement of the Launch of Negotiations for the Regional Comprehensive Economic Partnership (RCEP)”, MOFA, 20 November 2012, available at: www.mofa.go.jp.

19. “Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership”, MOFA, 20 November 2012, available at: www.mofa.go.jp.

Third, Japan, together with China and Korea, launched negotiations on 20 November 2012 to conclude a trilateral FTA.²⁰ The goal of this FTA is to establish ambitious commitments that would go beyond those under the RCEP. The most recent round of negotiations was held in April 2019.²¹ However, given the deteriorating relations between Japan and South Korea, together with the protracted negotiations for the RCEP, the future of the negotiations is far from clear.

Defending shared values with the EU

The EU is one of the most important trading partners for Japan not only because of the size of the trade but also because of shared values and principles. On 17 July 2018, Japan and the EU signed the JEEPA,²² which entered into force on 1 February 2019 after being approved by the Japanese Diet and the EU Parliament respectively.²³ JEEPA's entry into force has raised Japan's FTA ratio to 51.6%.²⁴ The Japan-EU Strategic Partnership Agreement (SPA), which was signed on the same day along with the JEEPA,²⁵ also started to apply provisionally on 1 February 2019.²⁶ While it is too early to assess the impact of the JEEPA, it is predicted to increase Japan's real GDP by around 0.99%.²⁷ Moreover, it is expected to facilitate broader cooperation between Japan and the EU, particularly in the following areas.

First, the JEEPA will promote collaboration between Japan and the EU in fighting against unilateralism and defending multilateralism. One of the motivations behind the conclusion of the JEEPA was to send a message to the world that the two sides embrace the value of free trade. In fact, the JEEPA gave another reason to the US to conclude a trade agreement with Japan. The two sides should cooperate more actively in the discussion of WTO reform. In addition to cooperation in trade matters, certain chapters of the JEEPA, such as

20. "Press Release on the Launch of the FTA Negotiations Between China, Japan and Korea", MOFA, 20 November 2012, available at: www.mofa.go.jp.

21. "Fifteenth Round of Negotiations on a Free Trade Agreement Between Japan, China and the Republic of Korea", MOFA, 12 April 2019, available at: www.mofa.go.jp.

22. "The 25th Japan-EU Summit", MOFA, 17 July 2018, available at: www.mofa.go.jp.

23. "The Japan-EU Economic Partnership Agreement", MOFA, 1 February 2019, available at: www.mofa.go.jp (Japanese only).

24. "Follow-up of the Growth Strategy", 21 June 2019, p. 67, available at: www.kantei.go.jp (Japanese only).

25. "The Japan-EU Strategic Partnership Agreement (SPA)", MOFA, 25 March 2019, available at: www.mofa.go.jp.

26. "The Notification of Ratification by Japan and Application Pending Entry Into Force of the Japan-EU Strategic Partnership Agreement (SPA)", MOFA, 21 December 2018, available at: www.mofa.go.jp.

27. "Economic Impact Assessment of the JEEPA and Others", Japanese Government's TPP Headquarters at the Cabinet Secretariat Office, 21 December 2017, available at: www.cas.go.jp (Japanese only).

Chapter 16 on Trade and Sustainable Development, would facilitate cooperation between the two sides on non-trade issues such as climate change.

Second, as guardians of shared values and principles, such as democracy, the rule of law, human rights, and good governance, Japan and the EU share concern over the rise of China. In September 2019, Prime Minister Abe and EU Commission President Juncker signed a document titled “The Partnership on Sustainable Connectivity and Quality Infrastructure between Japan and the European Union”, which confirms the commitment of Japan and the EU to establish a Connectivity Partnership based on sustainability as a shared value, quality infrastructure and their belief in the benefits of a level playing field.²⁸ In this context, the two sides have confirmed that they will cooperate in the field of development.²⁹ While China has been aggressively investing under the BRI to meet the infrastructure demands of the developing world, the Connectivity Partnership is expected to offer an alternative model of infrastructure investments that is more financially and environmentally sustainable.

Third, the JEEPA could enhance regulatory coherence and cooperation between the two sides. There is growing interest among Japanese industries in participating actively in the rulemaking process abroad as they increasingly recognize a need to transform themselves from the current rule-takers to active rule-makers in order to remain globally competitive. In this regard, a chapter of the JEEPA on “Good Regulatory Practices and Regulatory Cooperation” could have a subtle but profound impact on the business environment for the industries.

Finally, Japan and the EU should make the utmost efforts to find a middle ground on issues concerning investment protection and investment dispute settlement. Given that the EU is Japan's largest source of foreign investment as well as Japan's second largest investment destination, the lack of a full-fledged investment chapter is critical. Although both sides continue negotiations on investment, one cannot be too optimistic about the future of these negotiations. Their positions on the investment dispute settlement remain divided, since Japan is strongly opposed to the idea of the permanent investment court proposed by the EU. The contrast in their positions is also evident in the United Nations Commission on International Trade Law (UNCITRAL) Working Group, which has started a long journey of discussions on the Investor-State Dispute Settlement Reform.³⁰

28. “Prime Minister Abe's Attendance of the Europa Connectivity Forum”, MOFA, 27 September 2019, available at: www.mofa.go.jp.

29. *Ibid.*

30. UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, available at: uncitral.un.org.

Trade Conflicts With South Korea

Despite their strong economic ties, Japan and South Korea have had a number of diplomatic difficulties over time, ranging from a territorial dispute over an island to compensation for comfort women. At present, the two countries have some ongoing trade conflicts that could affect the direction of Japan's overall trade policy.

Japan's export control measures

The most politically sensitive trade conflict between the two countries involves Japan's export control measures. On 4 July 2019, Japan tightened its licensing policies and procedures on the export of certain controlled products and their relevant technologies³¹ destined for Korea, in accordance with Article 25(1) and Article 48 of the Foreign Exchange and Foreign Trade Act of Japan.³² Japan justified these measures by arguing that "the Japan-[Republic of Korea (ROK)] relationship of trust including in the field of export control and regulation has been significantly undermined" and that the government "has recently found that certain sensitive items have been exported to the ROK with inadequate management by companies".³³ The Japanese government further clarified that the measures were justified for national security reasons pursuant to the national security exception under Article XXI of the GATT.³⁴

The legitimacy of the invocation of the national security exception was contested by the South Korean government. It argued that Japan's justification of the measures was "unclear and unfounded" under the WTO agreements.³⁵ It also claimed that the measures were taken as economic retaliation against "the judgment of [the South Korean] judicial body."³⁶

31. The products are primarily used for the production of smartphones and semiconductors.

32. "Update of METI's Licensing Policies and Procedures on Exports of Controlled Items to the Republic of Korea", Japanese Ministry of Economy, Trade and Industry (METI), 1 July 2019, available at: www.meti.go.jp.

33. *Ibid.*

34. Press Conference by Minister Seko, METI, 9 July 2019, available at: www.meti.go.jp (Japanese only).

35. "Trade Minister Yoo's Remarks at Meeting Held to Discuss Japan's Export Controls Against the ROK", Korean Ministry of Trade, Industry and Energy, 5 July 2019, available at: english.motie.go.kr.

36. *Ibid.*

In order to get the full picture of this trade conflict, the background and essence of the “judgment” of the South Korean Supreme Court needs to be understood. In its judgment of 30 October 2018, it upheld a ruling by the Seoul High Court that ordered New Nippon Steel Corporation, a Japanese company, to pay 100 million won to each plaintiff who sought compensation for “forced labor”³⁷ during World War II.³⁸ The case, which had originally been brought to but dismissed by the Seoul District Court and the Seoul High Court respectively, was remanded to the Seoul High Court on 24 May 2012 by the Korean Supreme Court, which found that a state could not waive an individual right of its citizens to make a claim for compensation.³⁹ This finding of 24 May 2012 became the basis of the judgment of the Seoul High Court in the remanded case on 10 July 2013 that the Agreement on the Settlement of Problems concerning Property and Claims and the Economic Cooperation between Japan and the Republic of Korea signed in 1965 (“Claims Agreement”) did not prevent the plaintiffs from exercising their individual right to claim compensation for “forced labor”.⁴⁰ This judgment was confirmed by the judgment of the Korean Supreme Court of 30 October 2018 mentioned above.

The Japanese government severely criticized the judgment as “extremely regrettable and totally unacceptable”, insisting that Article II of the Claims Agreement stipulates that “problems concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) as well as concerning claims between the Contracting Parties and their nationals are ‘settled completely and finally’ and [that] no contention shall be made thereof”.⁴¹ It “strongly demand[ed] that the Republic of Korea take appropriate measures” and added that, “if appropriate measures are not taken immediately, Japan will examine all possible options, including international adjudication, and take resolute actions accordingly”.⁴² In the absence of a response from South Korea, Japan requested consultations with South Korea in accordance with Article III:1 of the Claims Agreement in January 2019⁴³ and then referred the matter to arbitration in accordance with Article III:2 of the Claims

37. The Japanese government uses the term “former workers from the Korean Peninsula” instead of “forced labor” because it considers that the plaintiffs were not “forced” to work.

38. S. Lee, “Decisions of the Korean Courts on Japanese Forced Labor re New Nippon Steel Corporation”, *Korean Journal of International and Comparative Law*, Vol. 2, No. 1, 24 April 2014.

39. *Ibid.*

40. *Ibid.*

41. T. Kono, “Regarding the Decision by the Supreme Court of the Republic of Korea, Confirming the Existing Judgments on the Japanese Company”, MOFA, 30 October 2018, available at: www.mofa.go.jp.

42. *Ibid.*

43. “Request for Consultations on the Matter Related to Former Workers From the Korean Peninsula in Accordance With the Claims Agreement Between Japan and the ROK”, MOFA, 9 January 2019, available at: www.mofa.go.jp (Japanese only).

Agreement in May 2019.⁴⁴ South Korea did not respond to either the consultation request or the reference to arbitration. The Japanese government claimed that the failure of the South Korean government to respond constituted a violation of the Claims Agreement.⁴⁵

It is against this background that Japan tightened its licensing policies and procedures. Although the Japanese government explained that the measures had been taken in view of the “inadequate management by companies” of certain sensitive items exported from Japan to South Korea and were *not* related to the judgment, some initial statements from inside the government implying that they were in fact related raised suspicions that the measures had been motivated by the Japanese government’s frustration with the judgment.

On 11 September 2019, South Korea requested consultations with Japan in the WTO dispute settlement mechanism on the matter, claiming that Japan’s measures violated the WTO agreements and were not justified by Article XXI of GATT.⁴⁶ The two countries held the first meeting of consultations on 11 October 2019.⁴⁷ They did not reach a mutually satisfactory solution and decided to hold a second session of consultations.⁴⁸

At this point, it is unclear whether they will be able to reach a mutually satisfactory solution through consultations. If not, the matter will be taken to a panel review. Whatever conclusions a panel reaches in its report, they are unlikely to resolve the matter definitely. Rather, they could have negative impacts not only on the relationship between the two countries but also on the dispute settlement mechanism as a whole. First, while the party losing at the panel stage would be likely to appeal the panel report, the Appellate Body would not be available to review it because of the paralysis of the Appellate Body.⁴⁹ Consequently, the panel report would remain unadopted and would end up being irrelevant. Second, even if the panel report remains unadopted, its conclusions could cause distrust with the dispute settlement mechanism in either of the two countries. While Japan would consider it intolerable if the panel finds violations in relation to the highly political issues, South Korea

44. *Ibid.*

45. T. Kono, “Failure of the Republic of Korea to Comply With Obligations Regarding Arbitration Under the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea”, MOFA, 19 July 2019, available at: www.mofa.go.jp.

46. Japan – Measures Related to the Exportation of Products and Technology to Korea, Request for Consultations by the Republic of Korea, WT/DS590/1, G/L/1325, G/TFA/D3/1, G/TRIMS/D/45, S/L/431, IP/D/42, 16 September 2019.

47. “Japan Held Consultations with the Government of the Republic of Korea under the WTO Agreement Regarding Japan’s Update of Licensing Policies and Procedures on Exports to the ROK”, METI, 12 October 2019, available at: www.meti.go.jp.

48. *Ibid.*

49. See Section V.

would not be satisfied if the panel finds otherwise. Third, a panel report on this matter would deepen a divide that already exists among WTO members as to the appropriate standard of review concerning the national security exception under Article XXI of GATT. That is, the questions of whether a panel has the authority to review the issue of Article XXI, and if so, to what extent it should accord deference to the judgment of a WTO member as to its national security interests are highly controversial and remain unanswered. To avoid these negative impacts, Japan and South Korea should work together to find a solution to the matter in a conciliatory manner.

Other trade disputes with South Korea

Another trade dispute with South Korea, which has already been ruled by the Appellate Body, formed the background of the dispute mentioned above, although in a subtle way.

In the aftermath of the Fukushima Dai-ichi nuclear power plant accident in Japan on 11 March 2011, a number of countries, including South Korea, introduced import bans and restrictions on agricultural and fishery products from Japan. While some of the countries later abolished the bans and restrictions, South Korea maintains the measures, along with some other countries.

On 21 May 2015, Japan requested consultations with South Korea in the WTO dispute settlement mechanism, claiming that South Korea had violated its obligations under the Application of Sanitary and Phytosanitary Measures (SPS) Agreement.⁵⁰ Having failed to reach a mutually satisfactory solution through consultations, on 20 August 2015⁵¹ Japan requested the establishment of a panel, which was set up on 28 September 2015. On 22 February 2018, the panel upheld most of Japan's claim and found that South Korea's measures at issue were inconsistent with Articles 5.6, 2.3, 7 and Annex B(1) and B(3) of the SPS Agreement.⁵² However, in its report of 11 April 2019, the Appellate Body reversed the panel's findings of inconsistency with Articles 5.6 and 2.3 of the SPS Agreement by pointing to the lack of sufficient analysis to support the panel's findings.⁵³

50. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides, Request for Consultations by Japan, WT/DS495/1, G/L/1116, G/SPS/GEN/1410, 1 June 2015.

51. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides, Request for the Establishment of a Panel by Japan, WT/DS495/3, 21 August 2015.

52. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides, Report of the Panel, WT/DS495/R, 22 February 2018.

53. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides, Report of the Appellate Body, WT/DS495/AB/R, 11 April 2019.

Japan was more frustrated by what the Appellate Body did not do rather than what it did: the Appellate Body did not make any findings on whether the measures would be found inconsistent if a sufficient analysis were undertaken. As a result, the dispute between the countries as to the consistency of the measures remains. On the one hand, Korea takes a view that the maintenance of its import bans and restrictions is legitimized by the Appellate Body report, except in a few procedural aspects.⁵⁴ On the other hand, Japan questions the appropriateness of the Appellate Body's findings, noting that the factual findings of the panel on the safety of Japanese food products are undisputed.⁵⁵ Moreover, it criticizes the Appellate Body for its failure to reach final conclusions as to the consistency with the SPS Agreement, and raises a systemic concern that the "Appellate Body Report is not conducive to settlement of the dispute and contradicts the principle stated in the DSU [(Understanding on Rules and Procedures Governing the Settlement of Disputes)] that prompt settlement of disputes is essential to the effective functioning of the WTO".⁵⁶

Arguably, the Appellate Body refrained from completing its analysis and reaching final conclusions as to the consistency of the measures at issue in the light of the recent criticism by the US that the Appellate Body had been consistently overreaching its mandate.⁵⁷ In any event, the dispute could have been resolved definitively if the Appellate Body had the remand authority. The dispute not only raised concerns in Japan, which highly appreciated the dispute settlement mechanism in the past, but also clouded the outlook for the relationship between Japan and South Korea.

More recently, the dispute concerning Korea's anti-dumping measures on the imports of certain types of valves has added another complication to the relationship between Japan and South Korea. In this dispute, the panel dismissed a substantial part of Japan's claims as falling outside its terms of reference, in accordance with Article 6.2 of the DSU.⁵⁸ In its recently issued report, the Appellate Body reversed most of the panel's findings regarding Article 6.2 and found that some of Japan's claims dismissed by the panel did

54. Korea claimed that it has brought the measures consistent with the SPS Agreement by way of re-publishing the details of the relevant measures. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides, Communication from Korea, WT/DS495/15, 5 June 2019.

55. Statement from H.E. Ambassador Junichi Ihara of the Permanent Mission of Japan to the International Organizations in Geneva, Adoption of the Reports of the Appellate Body and the Panel on "Korea – Import Bans, and Testing and Certification Requirements for Radionuclides" in the WTO Dispute Settlement Procedures, 26 April 2019, available at: www.mofa.go.jp.

56. *Ibid.*

57. See Section V in this paper.

58. Korea – Anti-Dumping Duties on Pneumatic Valves from Japan, Report of the Panel, WT/DS504/R, 12 April 2018.

in fact fall within the panel's terms of reference.⁵⁹ Nevertheless, due to the absence of relevant factual findings, sufficient undisputed facts on the panel record and sufficient exploration of these issues by the panel, the Appellate Body was unable to make final findings on the unreviewed claims.⁶⁰

Following the adoption of the panel and Appellate Body reports, South Korea expressed its view that it would not need to revoke the measures at issue in the light of the limited violation findings.⁶¹ In the meantime, the Japanese government called on South Korea to "faithfully and promptly bring its WTO-inconsistent measures into conformity with its obligations under the Anti-Dumping Agreement".⁶² This dispute has once again highlighted a systemic problem with the WTO dispute settlement mechanism caused by the lack of the remand authority in the Appellate Body. Moreover, the different views on the impact of the Appellate Body findings could provoke another dispute between the two countries regarding the implementation of the findings.

59. Korea – Anti-Dumping Duties on Pneumatic Valves from Japan, Report of the Appellate Body, WT/DS504/AB/R, 10 September 2019.

60. *Ibid.*

61. "WTO Finalizes Ruling on S. Korea-Japan Anti-Dumping Dispute Over Pneumatic Valves", Yonhap News Agency, 30 September 2019, available at: en.yna.co.kr.

62. Issuance of the Appellate Body Report Concerning "Korea – Anti-Dumping Duties on Pneumatic Valves from Japan" in the WTO Dispute Settlement Procedures, 11 September 2019, available at: www.mofa.go.jp.

WTO Reform

A stable and effective multilateral trading system is essential in today's uncertain world. As a champion of the multilateral trading system under the WTO, Japan takes initiatives to modernize and reinvigorate the organization. Modernization is required on two fronts: rulemaking and dispute settlement. In terms of rulemaking, the Japanese government considers it essential to update the WTO rules to fit the technological developments. More specifically, the government tries to take leadership in negotiations to make new rules for electronic commerce. In terms of dispute settlement, the most urgent problem for all WTO members is the paralysis of the Appellate Body. Although the Japanese government has not clearly articulated its position on the reform of the Appellate Body, it could play a critical role in bridging differences among WTO members regarding the Appellate Body.

Electronic commerce

WTO members have been working earnestly to reinvigorate the rulemaking function of the organization. Several plurilateral initiatives are underway to make new rules under the WTO. Among these various initiatives, the Japanese government has been applying its most extensive efforts on the creation of new rules for electronic commerce.

Its efforts have partly been realized in the context of bilateral and regional agreements. For example, a chapter of the CPTPP on electronic commerce provides for rules on various issues such as online consumer protection and personal information protection rules, cross-border transfer of information by electronic means, and prohibition of intrusive regulations on location of computing facilities and source code. Moreover, the Japan-US Digital Trade Agreement goes beyond the rules of the CPTPP by inserting provisions on emerging issues such as taxation, interactive computer services, open government data and cryptography. Many of these provisions mirror the language of the chapter on digital trade in the US-Mexico-Canada Agreement (USMCA). Although the CPTPP and the Japan-US Digital Trade Agreement bring little changes to the laws and policies on electronic commerce of Japan and the US, these rules are expected to present a model for future negotiations in plurilateral and multilateral frameworks under the WTO.

Japan also takes a leading role in discussions on adopting a plurilateral or multilateral agreement on electronic commerce. It considers that the adoption of such an agreement would modernize WTO rules and result in a breakthrough in the dysfunctional rulemaking in the WTO. Following the Joint Statement on Electronic Commerce issued at the Ministerial Conference in December 2017, built upon the Work Programme on Electronic Commerce established in September 1998, around one-third of WTO members, including Japan, the EU and the US, have initiated exploratory work together on future WTO negotiations on trade-related aspects of electronic commerce.⁶³ Moreover, a joint statement setting out their “intention to commence WTO negotiations on trade-related aspects of electronic commerce”⁶⁴ was signed by 76 WTO members, including China, at the informal ministerial meeting in Davos in January 2019. Since then, around 80 WTO members have been actively exchanging their views on a future agreement on electronic commerce. Japan, which is among the most active participating members, has made three proposals, two of which have been made public. In particular, Japan has proposed four elements that should be included in a future agreement on electronic commerce: 1) creation of regulatory frameworks facilitating electronic commerce; 2) establishment of an open and fair-trading environment; 3) protection of intellectual property, and 4) enhanced transparency.⁶⁵ Some of the elements are already included in the digital trade chapter of the CPTPP and the Japan-US Digital Trade Agreement.

Another essential element of Japan's strategy on adopting new rules on digital trade is the so-called “Osaka Track”. It was launched at a special side event of the G20 summit in Osaka in June 2019, attended by 27 state leaders including Japan, the EU, the US and China, with a view to promoting “international rule-making on trade-related aspects of electronic commerce at the WTO”.⁶⁶ The Osaka Track was first mentioned in Prime Minister Abe's speech at the World Economic Forum annual meeting in January 2019, where he called for the launch of the Osaka Track “under the roof of the WTO” to build a regime for “Data Free Flow with Trust” (DFFT).⁶⁷ The idea of the DFFT is endorsed by the G20 Osaka Leaders' Declaration, which reads, “data free flow with trust will harness the opportunities of the digital economy”.⁶⁸ Japan hopes

63. Ministerial Conference, Joint Statement on Electronic Commerce, WT/MIN(17)/60, 13 December 2017.

64. Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019.

65. Joint Statement on Electronic Commerce Initiative, Proposal for the Exploratory Work by Japan, INF/ECOM/4, 25 March 2019.

66. Osaka Declaration on Digital Economy, available at: www.g20.org.

67. Speech by Prime Minister Abe at the World Economic Forum Annual Meeting, “Toward a New Era of ‘Hope-Driven Economy’”, 23 January 2019, available at: www.mofa.go.jp.

68. G20 Osaka Leaders' Declaration, par. 11, available at: g20.org.

that DFFT will be a guiding principle in the adoption of an agreement on electronic commerce in the WTO.

However, it is not an easy task to bridge profound disagreements among WTO members, particularly between the US and the EU.⁶⁹ On the one hand, the US seeks “a high-standard agreement that creates strong, market-based rules ... that [are] enforceable and [have] the same obligations for all participants”.⁷⁰ On the other hand, the EU prefers flexible and pragmatic negotiations that “should result in a multilateral legal framework that consumers and businesses, especially smaller ones, could rely on to make it easier and safer to buy, sell and do business online”.⁷¹ Moreover, an attempt to include China in the new agreement could create another impediment to the negotiations.

A further complicating factor is the unclear future of the moratorium on custom duties on electronic transmissions. In every WTO ministerial declaration since 1998, the WTO members have declared that they will continue their practice of not imposing customs duties on electronic transmissions.⁷² There is a common understanding, at least among developed countries, that the moratorium is “a feature of the multilateral trading system”.⁷³ On 10 December 2019, the WTO members agreed to extend the moratorium until the 12th Ministerial Conference in June 2020.⁷⁴ However, India and South Africa have expressed their concern that “the moratorium on customs duties would result in higher revenue loss” for developing members, and requested an examination of the revenue implications of the moratorium.⁷⁵ In addition, Indonesia introduced a regulation to establish tariff lines for digital products transmitted electronically, which could lead to the imposition of duties on digital products inconsistently with the moratorium.⁷⁶ The future of the moratorium beyond June 2020 remains uncertain.

69. M. E. Janow & P.C. Mavroidis, “Digital Trade, E-Commerce, the WTO and Regional Frameworks”, *World Trade Review*, Vol. 18, No. 1, April 2019, available at: www.cambridge.org.

70. “USTR Robert Lighthizer on the Joint Statement on Electronic Commerce”, USTR Press Release, 25 January 2019, available at: ustr.gov. Benin later joined the group, which raised the number of participating Japan Revitalization Strategy to 77. Joint Statement on Electronic Commerce: Communication Submitted by Benin, INF/ECOM/18, 1 April 2019.

71. “76 WTO Partners Launch Talks on E-Commerce”, European Commission News Archives, 25 January 2019, available at: trade.ec.europa.eu.

72. See, e.g., “Declaration on Global Electronic Commerce Adopted on 20 May 1998”, Ministerial Conference, WT/MIN(98)/DEC/2, 25 May 1998.

73. Remarks by Director-General Roberto Azevêdo, 29 April 2019, available at: www.wto.org.

74. “WTO Members Agree to Extend E-Commerce, Non-Violation Moratoriums”, WTO News, 10 December 2019, available at: www.wto.org.

75. Work Programme on Electronic Commerce: Moratorium on Customs Duties on Electronic Transmissions: Need for a Re-Think: Communication from India and South Africa, WT/GC/W/747, 13 July 2018.

76. “2019 National Trade Estimate Report on Foreign Trade Barriers”, USTR, p. 270.

Dispute settlement

The WTO dispute settlement mechanism is a key part of Japan's trade policy. Japan is one of the most frequent users of the mechanism as a complainant, following the US, Canada and Brazil; 13 panelist positions were held by Japanese nationals⁷⁷ and three Japanese nationals served as Appellate Body members.⁷⁸

The paralysis of the Appellate Body, caused by the US blocking of the appointment of Appellate Body members, poses an existential threat to the WTO dispute settlement mechanism as a whole.⁷⁹ Reform of the Appellate Body and the WTO dispute settlement mechanism is one of the highest priorities in Japan's trade policy.

The debate on the Appellate Body reform is led by the EU, which has submitted several proposals, along with other WTO members. In particular, around two-thirds of the WTO members, including the EU, co-sponsored a proposal to launch selection processes to fill the vacancies in the Appellate Body.⁸⁰

Japan expressed its support for the proposal to launch the selection processes in the past DSB meetings⁸¹ but it has not joined the co-sponsors. To a certain extent, it has distanced itself from the co-sponsors and has shown sympathy for some of the concerns expressed by the US. For example, it shared the concern expressed by the US that the Appellate Body made "advisory opinions" that were not necessary to resolve specific disputes before it.⁸² It also echoes the US criticism of the so-called absent "cogent reasons" approach taken

77. Count of WTO Panelists, by country, WorldTradeLaw, available at: www.worldtradelaw.net.

78. "Appellate Body Members", WTO, available at: www.wto.org.

79. E.-U. Petersmann, "How Should WTO Members React to Their WTO Crises?", *World Trade Review*, Vol. 18, No. 3, July 2019.

80. Dispute Settlement Body, Appellate Body Appointments Proposal by Afghanistan; Angola; Argentina; Australia; Benin; Plurinational State of Bolivia; Botswana; Brazil; Burkina Faso; Burundi; Cabo Verde; Cameroon; Canada; Central African Republic; Chad; Chile; China; Colombia; Congo; Costa Rica; Côte D'Ivoire; Cuba; Democratic Republic of Congo; Djibouti; Dominican Republic; Ecuador; Egypt; El Salvador; Eswatini; The European Union; Gabon; The Gambia; Ghana; Guatemala; Guinea; Guinea-Bissau; Honduras; Hong Kong, China; Iceland; India; Indonesia; Israel; Kazakhstan; Kenya; Republic Of Korea; Lesotho; Liechtenstein; Madagascar; Malawi; Malaysia; Maldives; Mali; Mauritania; Mauritius; Mexico; Republic of Moldova; Morocco; Mozambique; Namibia; Nepal; New Zealand; Nicaragua; Niger; Nigeria; North Macedonia; Norway; Pakistan; Panama; Paraguay; Peru; Qatar; Russian Federation; Rwanda; Senegal; Seychelles; Sierra Leone; Singapore; South Africa; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Tanzania; Thailand; Togo; Tunisia; Turkey; Uganda; Ukraine; Uruguay; The Bolivarian Republic of Venezuela; Viet Nam; Zambia And Zimbabwe, Revision, WT/DSB/W/609/Rev.16 (17 January 2020).

81. See, e.g., Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 28 May 2019, WT/DSB/M/429 (30 July 2019), par. 8.9.

82. Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 29 October 2018, WT/DSB/M/420, 27 February 2019, par. 4.25.

by the Appellate Body, pointing out the lack of clarity and lack of textual basis in the DSU.⁸³

Japan's concern about the Appellate Body was heightened further when it issued a report on Korea's import bans and restrictions on certain food products from Japan, introduced in the aftermath of the Fukushima nuclear power plant accident.⁸⁴ In this report, the Appellate Body reversed the panel's violation findings because of the insufficiency of the analysis but did not complete the analysis on the WTO consistency. Japan found the Appellate Body report "troubling," stating at a DSB meeting that the report "was not conducive to settlement of the dispute and contradicted the principle stated in the DSU that prompt settlement of disputes was essential to the effective functioning of the WTO".⁸⁵ Japan also submitted a communication insisting that, "should the Appellate Body fail to make findings necessary to assist the DSB in making the recommendations or in giving the rulings provided for the covered agreements in a particular dispute, the dispute would be left unresolved and, as a result, the dispute settlement system would fail to fulfil its function to secure a positive solution to that dispute" (footnote omitted).⁸⁶

The Japanese government may be hoping that its "middle ground" position enables it to bridge the gap between the US, on the one hand, and the EU and other majority members, on the other, concerning the functioning of the Appellate Body. Its hope is reflected partly in its proposal, co-sponsored by Australia and Chile, to adopt a decision or decisions at the DSB to affirm and clarify the mandate of the Appellate Body.⁸⁷ In the hope of taking leadership in WTO dispute settlement reform discussions, the Japanese Ministry of Foreign Affairs reportedly decided to request the doubling of its WTO-related budget for the next fiscal year. However, how the debate on the Appellate Body reform will progress and what role Japan can play in this debate remain unclear.

83. Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 18 December 2018, WT/DSB/M/423, 4 April 2019, par. 4.31.

84. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides, Report of the Appellate Body, WT/DS495/AB/R, *op. cit.*

85. Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 26 April 2019, WT/DSB/M/428, 25 June 2019, par. 9.3.

86. Towards the Proper Functioning of the Dispute Settlement Mechanism Communication from Japan, JOB/DSB/3, 18 April 2019.

87. Informal Process on Matters Related to the Functioning of the Appellate Body, Communication from Japan, Australia and Chile, Revision, WT/GC/W/768/Rev.1, 26 April 2019.

Conclusion

For Japan, trade relations with the US, its most important trading partner and most important ally, have been and will continue to shape the basic structure of its trade policy. Since President Trump took up office, the biggest concern of the Abe administration was how to maintain a good trade relationship with the US despite Trump's repeated attacks on Japan's trade practices. It appears that the Abe administration has been successful so far in avoiding being a major target of US unilateralism, although the threat of additional tariffs on auto and auto parts may persist. In addition, Japan has been building and fortifying trade relations with other partners such as China and the EU. The cooperative relationships with these trading partners could help Japan take leadership in discussions on WTO reform. However, Japan's deteriorating relationships with South Korea could not only cause distrust in Japan with the multilateral trading system but also harm Japan's reputation as a champion of free trade.



French Institute
of International
Relations