

Korea and Japan Economic Relations: An Analysis through the World Trade Organization

Caroline S. Dutra, Tatiana C. Squeff

Abstract—It is well known that the history between South Korea and Japan influences their international relations; thus, also encompassing their economic relations. In this sense, it is impossible to analyze the latter without understanding the development of the former, which is known for episodes of hostility, like on Japanese colonization, but also had moments of cultural and trade interexchange. Indeed, since 1965, with the establishment of diplomatic relations between both countries, their trade relations have improved, especially after both nations have signed the General Agreement on Tariffs and Trade (GATT). Thereafter, with the establishment of the World Trade Organization (WTO) in 1995, another chapter of their diplomatic and economic relations have been inaugurated. Hence, bearing in mind this history between both nations, this research intends to examine their relations through the analysis of the WTO panels they have engaged in between each other, which are, in chronological order, “DS323: Japan – Import Quotas on Dried Laver and Seasoned Laver”, “DS336: Japan – Countervailing Duties on Dynamic Random Access Memories from Korea”, “DS495: Korea – Import Band, and Testing and Certification Requirements for Radionuclides”, “DS553: Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars” and “DS571: Korea – Measures Affecting Trade in Commercial Vessels”. The objective of this case analysis is to point out what are the areas that are more conflictual between Japan and South Korea in regard to their economic relations so that it is possible to assert on their future (economic) relations and other possible outcomes. And in order to do so, bibliographic and documental research will be made, particularly those involving the WTO and the nations under consideration. Regarding the methods used, it is important to highlight that this is applied research in the field of international economic relations and international law, which follows a hypothetic-deductive model.

Keywords—International economic relations, Japan, South Korea, World Trade Organization

I. INTRODUCTION

THE relationship between Japan and South Korea presents, in historical terms, troubling moments because of the constant territorial dispute between them over the centuries. Since 1965, with the establishment of diplomatic relations between both nations, and the recognition of South Korea to be the only legitimate government of the entire peninsula, their trade relations have improved, especially after both countries have signed the GATT – Japan in September 1955 and South Korea in April 1967 (just two years after the signature of the ‘Treaty on Basic Relations between Japan and

the Republic of Korea), through which trade liberalization talks were evolving [1], [2].

Particularly after WTO, the growth of South Korean economy in regard to the total world exports from 2.7% to 3.2% and the shrinking of Japan from 7.4% to 3.9% between 2000 and 2017, shows that South Korea has become more competitive. It is said so because the number of disputes between both countries at the WTO level is increasing, amounting to five direct cases so far (thus, excluding their engagement as third parties) [1], [2].

Although South Korea and Japan are, economically, important partners nowadays, South Koreans still have serious discontents and apprehension with Japan due rights violations committed by the Japanese Empire until the mid-twentieth century, the period when the region was dominated. However, even with the several attacks South Korean population suffered from, including the prohibition of the use of Korean names and the use of their language, forced prostitution, cultural repression, slavery, among other atrocities, after the Second War, no conflict followed, and several economic agreements involving both countries were adopted.

II. NIPO-KOREAN ECONOMIC RELATIONS IN THE AFTERMATH OF THE SECOND WORLD WAR

According to Keun Lee and Chung Lee (1992), authors of “Sustaining economic development in South Korea: Lessons from Japan” [3]:

“The state in both Japan and South Korea has been characterized as the developmental state, as opposed to the regulatory state of the West, because it has played an active, intervening role in economic development. The East Asian tradition of the ‘hard’ state, nurtured through the influence of Confucianism and nationalism, has helped make the state a mobilizer of resources for the national goal of economic development. Their growth ideology supported by the political stability of authoritarianism has contributed to the lengthening of the time horizon of business undertakings and has made manufacturing a feasible alternative to commerce as a field of entrepreneurial activities” (p. 14).

Korean weak Won was favored against the Japanese strong Yen on the following decades after WWII, enabling enormous economic growth. After U.S. forceful occupation in both countries in 1945, their priority was to realign Nipo-Korean economic relations, just as it was during the Japanese occupation before WWII. The Korean-Japanese relations were normalized after 1965’s “Treaty on Basic Relations Between Japan and the Republic of Korea”, confirming that all treaties

C. S. Dutra is with the Department of International Relations of the Institute of Economy of the Federal University of Uberlândia, Uberlândia, MG 38400-902 BRA (e-mail: caroline.dutra@ufu.br).

T. C. Squeff is with the Department of Law of the ‘Jacy de Assis’ Law School of the Federal University of Uberlândia, Uberlândia, MG 38400-902 BRA (e-mail: tatiana.squeff@ufu.br).

and agreements made before August 22, 1910, were null and void, and economic cooperation were settled [4]. Right after that, both countries came to an agreement 'on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation' (1965) [5], which, on the first clause of Article II, settles all bilateral problems concerning:

"[...] property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951[...]" (p.260).

In Article II, paragraph 1, both countries agreed to financially reward Korea within 10 years after ratifying the Agreement. As stated on "Toward Peace: War Responsibility, Postwar Compensation, and Peace Movements and Education in Japan" [6]:

"Japan provided South Korea with \$300 million in economic aid through products and services and \$200 million in loans with products and services over the next 100 years (1965-1975), together with \$300 million in loans for private trust" (p.21).

On the other hand, Korea had to pay 300,000 won (approximately 300 U.S. dollars) "per person to 8,552 surviving family members of Korean soldiers and army/naval civilian employees of the Japanese military" [6].

From the 1970s to the 1990s Japan and Korea experienced great moments of economic growth. Japan had an economic, financial and technological expansion, influencing their own sense of nationalism; and Korea, now independent, had a development of international interests and activities [7].

III. NIPO-KOREAN ECONOMIC RELATIONS UNDER THE AUSPICES OF THE WTO

South Korea is a member of the WTO since its beginning, January 1st of 1995, and is an active participant of the Organization's Dispute Settlement Body (DSB). It had already participated in 20 cases as complainant, 18 as respondent and 126 as a third-party. By its turn, Japan is also a member since January 1st 1995 and is also very active member of the DSB: it had taken part in 26 cases as complainant, 15 as respondent and 105 as a third-party. As already mentioned, both countries signed the GATT, Japan in 1955 and Korea in 1967 [1], [2]. Thus, if considering such active history, it is surprising that their first case against each other happened only in 2004 with the case on "Import Quotas on Dried Laver and Seasoned Laver". Since then, however, other discussions were brought before the WTO DSB between them [1], [2], which shall be analyzed as it follows.

A. Japan – Imported Quotas on Dried Laver and Seasoned Laver

The first case, "Imported Quotas on Dried Laver and Seasoned Laver" [8], started in December 2004, where South Korea contacted Japan on the grounds that the Japanese delegation, by establishing strict import quotas on dried laver

and seasoned laver, was acting in disagreement with its obligation under Article XI of GATT 94 and Article 4.2 of the Agreement on Agriculture (AoA). In addition, the manner in which quotas were administered affected Article X of GATT 94 and Articles 1.2 and 1.6 of the Import Procedure and Licensing Agreement. The violation of such articles would be intervening in the relationship between countries in addition to disregarding the principles of GATT 94 and other agreements within the scope of the WTO. The consultations carried out by the countries, however, did not result in an agreement, since Japan claimed that its established quotas dated back 50 years before the creation of the WTO. In any case, Korea contested that this fact was inconsistent with the obligations established by Article XI - which prevents the use of quantitative restrictions (prohibitions and quotas) as a means of protection and that tariff quotas can only be used in special cases where the country has included in its list of commitments.

The South Korean prosecution included the argument that, in this way, Japan prevented Korean producers from taking advantage of limited market access, thus being inconsistent with Article 1.6 of the License Agreement, because its procedures are unreasonable. Therefore, the DSB is asked to establish a panel to decide on the issue. Then, on March 21, 2005, the panel was established, composed on May 30 by Manzoor Ahmad in the presidency, and José Alfredo Graça Lima and Helge Seland as a member. In addition, China, the European Community, New Zealand and the United States of America were interested in the discussion. The panel was expected to close in March 2006 so the parties would have enough time to send evidence to support their arguments.

In response to the Korean argument, Japan claimed that the seaweed import quota regime was outside the scope of the Agreement on Agriculture, in addition to being justified by Article XI:2 of GATT 94, as well as being consistent with Article X:3 of the same agreement. However, both countries, after some meetings, entered into a mutual agreement and informed the DSB.

The annex stated the allocation of an Annual Import Quota for "Laver Products" in an exclusive issue to South Korea, in which Japan would commit to supplying an amount in excess of 340 million sheets in 2006. Such annual value would increase to over the years so that in 2015 it should be allocated to no less than 1.2 billion sheets. Both parties were determined to discuss a form of conversion to also include laver that is not in sheet form.

In Annex A, "Laver Products" is established as (a) dried laver as all seaweed (*Hoshi nori*) classified under 1212.20-1; (b) seasoned laver that do not contain sugar as all those seasoned seaweed classified in accordance with 2106.90-2-(2)-E-(b); and (c) laver products other than sugar-free dry or seasoned laver.

Among the topics of the agreement is included the clause in which the Japanese import quotas system will also cover the sub-quota established in Annex B of the same document. Any other imported Korean Laver product must be under the sub-quota standard. If more than 5% of the allocated Annual Import Quota Quantity is not used, that amount will be

reallocated to any applicant who wishes to import such Korean products within the time established by Annex C¹ of the document.

Both countries agreed to cooperate to promote an efficient process and encouraged the organization to hold auctions one or more times a year, with the details of such auctions to be discussed between the two countries. Consultations would be held annually, and there may be additional ones, in order to discuss the implementation of issues, starting as early as possible although not later than 30 days from the date of receipt of a request for consultations, unless otherwise decided.

B. Japan – Countervailing Duties on Dynamic Random Access Memories from Korea

In March 2006, the delegation of Korea contacted the DSB and the delegation of Japan to inform some determinations by the Government of Japan that Korea believes were inconsistent with its obligations under some agreements both countries were part of, as well as GATT 94. Korea argued that Japan's actions were conflicting with Article 1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), as well as Articles 2, 10, 12, 14, 15, 15.5, 19, 19.1, 21, 22 and 32.1 of the same Agreement, that, in short, stated that Japan was not contributing as an interested party on this affiliation that involves material of also a Korean company [09].

In a nutshell, Korea requested consultations with Japan because of countervailing duties imposed by the defendant country on specific Dynamic Random Access Memories (DRAMs) from the complainant. In March, the United States of America and the European Communities requested to join the consultations as third parties, and on 18 May, Korea requested the establishment of a panel, that was formulated in the next month. The panel was expected to end in May 2007, as informed by the Chairman of the Panel.

At the end of the consultations, the Panel denied some of the Korean claims against Japan, including that (a) Japan treated improperly Hynix (a Korean company that works with DRAMs) creditors as “interested parties”; (b) Japan unduly failed to determine if a benefit continued to prevail or not following changes in Hynix ownership as a result of the October 2001 and December 2002 restructurings, disaffirming Article 1.1(a)(1)(i) of the SCM Agreement, (c) Japan also failed to determine if those 2001 and 2002 restructurings were specific, going against Article 2 of the SCM Agreement; and (d) that Japan, wrongly, did not show that the subsidized imports were inflicting damage, contradicting Article 15.5 of the SCM Agreement.

Thus far, the Panel upholds that (a) Japan used inappropriate methods to estimate the amount of benefit accord the October 2001 and December 2002 restructurings on Hynix, going against Articles 1.1(b) and 14 of the SCM Agreement, also (b) using a system not provided for in its “national legislation or implementing regulations”, dealing against the *chapeau* of Article 14 of the same agreement; and (c) Japan inadequately collected countervailing duties in 2006

to counteract some of the subsidies from the October 2001 restructuring, as well as other claims. Furthermore, according to the Panel, Japan did not act contrary to Articles 1, 2, 19.4 and 32.1 of the SCM Agreement, along with Article VI:3 of the GATT 94. Still, because of some inconsistent actions with SCM Agreement provisions, Japan had nullified or impaired benefits amassed to Korea under the same Agreement. It was also recommended that the DSB requested Japan to bring its measure system into conformity under its obligations on the SCM Agreement.

On a later document, dated of August 30th 2007, Japan requested a review on the conclusions of the Panel from the Appellate Body, arguing that some methods used by the Panel were limiting the scope of the analysis, that was still needed more solid evidence on the findings and that Japan acted improperly about the Agreement, also about the system Japan used to calculate the amount of benefit provided in Japan's legislation or implementing regulations.

Korea likewise questioned four legal conclusions and related findings and legal interpretations on the Panel's conclusion, such as the Panel misinterpretation of Articles 1.1(b) and 14 of the SCM Agreement, once it demands a separate analysis of if the government action constituted a “financial contribution” as a consequence of government expectation or direction of non-governmental entities, along with if these government actions were conferred a “benefit”. Also, according to the Korea delegation, the Panel also had not enough evidence that supports the possibility that the volume or price of the imports, or the injury to the domestic industry, would have been any different in case of no subsidies. Besides, the Panel did not have an interpretation correctly about the legitimate meaning or with the context of the term “interested party”, consequently authorizing Japan to “subject an exporter to punitive duties based on the non-responsiveness of entities over which the exporter had no influence or control”.

The Appellate Body report was circulated to the Members in November 2007 and announced, in a nutshell, that (a) the JIA's evidence, in its totality, was wrongfully examined; (b) JIA acted inconsistently with Articles 1.1(b) and 14 of the SCM Agreement when determining that the December 2002 restructuring conferred a benefit to Hynix; (c) JIA also miscalculated the amount of benefit from October 2001 and December 2002 according to Articles 1.1(b) and 14 of the SCM Agreement; (d) the methods used by Japan to calculate the amount of benefit were not determined by their national legislation or implementing regulations, as required under the *chapeau* of Article 14 of the SCM Agreement; and (e) Japan acted contrary with Article 19.4 of the SCM Agreement as they charged countervailing duties on imports while having no subsidies at the time. This report was adopted by the DSB on December 17th 2007, and on January 15th 2008 Japan communicated its intention on following the recommendations and rulings the DSB suggested, in accordance to its WTO obligations. In February, Korea and Japan informed that their agreement would happen through arbitration, as prescribed by the DSB rules of procedure.

In March of 2009, Korea registered that the consultations were still happening, and heading to a mutual agreement, and the compliance panel suspended its work.

C. Korea – Import Bans, and Testing and Certification Requirements for Radionuclides

Japan forwarded a letter through the WTO to Korea's delegation on May 21st 2015 requesting consultations regarding Korea's inconsistency with Article XXII:1 of GATT 94 and another 8 articles of Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) along with Annex B and C as the country established import bans, additional testing and certification requirements for nucleotides that affects food products importation from Japan and a series of supposed omissions about transparency obligations under the SPS Agreement [10].

The panel request was made on August 20th 2015 and the establishment was deferred very quickly on August 31st. China, the European Union, Guatemala, India, New Zealand, Norway, the Russian Federation, Chinese Taipei, and the United States were accepted as third parties on the panel, which then was composed in January 2016 and had its panel report on February 22nd 2016.

Korea had imposed new measures in 2011 after the Fukushima Dai-ichi Nuclear Power Plant accident on Japan that affected food importation from Japan since it demanded import bans on sea products (like fishery) from some Japanese prefectures, as well as testing and certification requirements on certain products. In 2013, more import bans were established on all Japanese fishery from Aomori, Chiba, Fukushima, Gunma, Ibaraki, Iwate, Miyagi, and Tochigi. Beyond that, since 2011, and then even more in 2013, with more tests looking for *radionuclides*, Korea had been performing "random at-the-border" testing on imports to verify if the quantity of *Cesium* or *Iodine* were within the tolerance levels imposed by the regulations. Japan alleged that these Korean attitudes were falling within the scope of the SPS Agreement and GATT 94; however, the Panel did not agree and found that Japan also did not demonstrate that Korea acted at variance with its obligation under the articles and annexes from SPS Agreement. By the time Korea had imposed those measures, it was not discriminatory, yet maintaining the tests for so long was inconsistent with its obligations. It was also understood by the Panel that Korea had failed to comply with its transparency obligations within the SPS Agreement.

Korea, not agreeing with the Panel's decision, notified the DSB of its decision to resort to the Appellate Body, arguing that the panel report had some issues regarding law and legal interpretations.

The Appellate Body reversed the Panel's findings of Article 5.6, "more trade-restrictive than required", Article 2.3 about the non-discrimination, Article 7 and Annex B(3) and changed some of the findings of Article 7 and Annex B(1) of the SPS Agreement while agreed with others. Since none of the parties utilized Article 5.7 as a claim of inconsistency or as a defense, it was moot and of no legal effect for the Appellate Body.

Korea also claimed that the Panel acted inconsistently with Article 11 of the DSU, and the Appellate Body upheld that by not addressing the evidence that proved the argument.

Japan claimed once about the Panel's findings, arguing that the interpretation of Annex C(1)(a) treated Japanese products and Korean domestic products as "like". Despite that, the Appellate body was not convinced about that and uphold the Panel findings. Both parties claimed that the Panel did not right in its treatment of evidence about Korea's measure under Articles 2.3 and 5.6 of the SPS Agreement, while Korea also argued that the Panel conflicted with its actions with Article 11 of the DSU while appointing two experts in "disregard" of Korea's due process rights. The Appellate Body analyzed the Panel's findings of Articles 2.3 and 5.6 and declared it moot and of no legal effect, but did not reconsider Korea's claim about the experts, agreeing with the Panel about their responses.

After the Appellate Body report and its acceptance by the DSU, Korea informed on June 4th 2019 that it had completed the implementation of the recommendations.

D. Korea – Sunset Review of Antidumping Duties on Stainless Steel Bars

There is no final agreement on the case "Sunset Review of Antidumping Duties on Stainless Steel Bars" yet, being it still in the composition of the panel stage. Still, being one of the last cases Japan brought before the WTO, the motives for its establishment shall be explored.

Japan requested consultations under WTO on June 18th 2018 related to the continuous imposition of anti-dumping duties on stainless steel bar from Japan by Korea. This decision came from Korea based on the "Resolution of Final Determination on the Sunset Review of Anti-Dumping Duties on Stainless Steel Bars from Japan, India and Spain" from the Korea Trade Commission (KTC) and the "Final Report on the Sunset Review of Anti-Dumping Duties on Stainless Steel Bars from Japan, India and Spain" from the Office of Trade Investigation [11]. Regarding this, Japan requested the consultations under the argument that this decision of Korea is inconsistent with Articles 1, 11.3, 11.4, 6.5, 6.5.1, 6.8, 6.9, 12.2, 12.3, 12.2.2 and Annex II of the Anti-Dumping Agreement (AD Agreement) and Article VI of the GATT 94. Into these Articles, it is included that Korea did not properly inform all interested parties about the essential facts analyzed to reach this conclusion and did not provide sufficient details the findings and conclusions reached.

The consultations happened on August 13th 2018 and failed to reach a mutually satisfactory solution. Therefore, Japan requested on September 13th 2018 the establishment of a panel. The panel was established and China, the United States, the European Union, the Russian Federation, India, Kazakhstan, and Chinese Taipei had their rights reserved to participate as third parties in the case. The Panel is still in process and still did not publish its findings.

E. Korea – Measures Affecting Trade in Commercial Vessels

In the case “Measures Affecting Trade in Commercial Vessels”, last to be presented [12], which there is also no final agreement yet reached, Japan requested consultations with Korea with respect to Korea’s range of measures reaching financial support to their own shipbuilders in a way to maintain its market presence, long periods of lower prices and stimulate sales for Korean shipbuilders and their customers. Besides that, those measures provide a series of subsidies that are irreconcilable with Korea’s obligations under the SCM Agreement and GATT 94. Based on that, Japan’s argument is that it is not consistent with Articles 1.1, 2, 3.1(a), 3.2, 5(a), 5(c), 6.3(a), 6.3(b), 6.3(c), Articles 3.1(b) and 3.2 of the SCM Agreement and Articles III:4 and VI of the GATT 94.

The European Union and Chinese Taipei requested to join the consultations in November 2018, and the last document on the WTO website is from Korea, accepting these requests. Thus, it is still in the pre-panel phase.

F. Other Cases before the DSB

It should be stressed that South Korea and Japan are involved in two more cases on WTO that were not analyzed in this paper, “DS504: Korea — Anti-Dumping Duties on Pneumatic Valves from Japan” [13], and “DS590: Japan — Measures Related to the Exportation of Products and Technology to Korea” [14]. Regarding the former, there was an Appellate Body report published in September 2019, which culminated in an agreement between the countries in November of the same year; and on the latter, there was only a consultations request made in September 2019. And they were not analyzed since from the second half of 2019, the DSB is paralyzed because of the retirement of two of its last three appointed permanent appeal judges. As it is established by the WTO, there should be at least 3 judges to manage the cases on the DSB, meaning that the work of the DSB has been suspended until new nominations occur, which are far from happening, since it depends on the Trump administration not to block (again) any nominations.

As a result, many cases, as some involving South Korea and Japan, are still waiting for a decision while new consultations rounds are on hold. Nonetheless, it should be stressed that there are also other methods that could temporarily solve the cases, such as provisional measures or unilateral settlements [15], even though these are much harder to implement – especially in a scenario of transactions’ decline between both nations.

IV. CONCLUSION

In the second semester of 2019, Japan and Korea were involved in a new sanction question after Japan excluded Korea from its list of “trustworthy (export) countries”. A Korean wave of canceling travels to Japan and boycotting Japanese products caught Japan’s attention, provoking even more the sanctions that came after that [16]-[19]. Thus, even though both nations have increased their commercial activities throughout the second half of the 20th Century, particularly

after the 1965 “Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation”, as it is demonstrated by the number of cases involving both countries at the WTO, it is important to note that their commercial transactions are in decline, which may impact in both nation’s gross domestic product (GDP) and even in their active participation before the DSB between each other.

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Caroline S. Dutra was born on Rio de Janeiro, Brazil, on 18 August, 1999 and is currently a B.A. in International Relations. Candidate at the Federal University of Uberlândia, Uberlândia/MG - Brazil.

She is a member of the simulations club Osvaldo Aranha from Federal University of Uberlândia, is one of the directors from VII Universidade Federal de Uberlândia Model United Nations (UFUMUN) who are publishing an article about Winter War (1939-1940) for the Joint Crisis Committee (CCC), and researches about East Asia.

Tatiana C. Squeff holds a PhD in International Law from the Federal University of Rio Grande do Sul, Porto Alegre/RS - Brazil (2018), and a LLM in Public Law from the Vale do Rio dos Sinos University, São Leopoldo/RS - Brazil (2012)

She is an associate professor of international law at the 'Prof. Jacy de Assis' Law School at the Federal University of Uberlândia (UFU), Uberlândia/MG - Brazil, and a member of the International Law Association (ILA) - Brazilian branch.