JAPAN AND INTERNATIONAL TRADE LAW

INSTITUTIONAL REFORM PROPOSAL FOR FURTHER LEGALISM

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1. Introduction

> Peace and prosperity in Asia, forevermore
> Japan for the rule of law
> Asia for the rule of law
> And the rule of law for all of us

The speech given by Japanese Prime Minister Shinzo Abe on May 30th, 2014 at the 13th IISS Asian Security Summit clearly declared the current Japanese attitude toward international law. Prime Minster Abe has proposed three principles for peace and prosperity in Asia: the first principle is that states shall make a claim based on international law; the second is that states shall not use force or coercion to achieve their claims; and the third is that states shall seek to settle disputes with peaceful means.[1] These principles are for security concerns in the South China Sea; however, they can also apply to the field of international trade. In another speech, Prime Minister Abe also discussed Japan's participation in the Trans-Pacific Partner (TPP) negotiation, as follows:

> The significance of the TPP is not limited to the economic impact on our country. Japan is creating a new economic zone with our ally, the United States. Other countries who share the universal values of freedom, democracy, basic human rights, and the rule of law are joining. I firmly believe that creating new rules in the Asia-Pacific region with these countries is not only in Japan's national interests, but also certain to bring prosperity to the world.[2]

Moreover, Japan's recent strong preference for *legalism* has been fostered through experiences in the arena of international trade. As many commentators point out, one of the Japanese economic boosters since the end of the Pacific War has been made by integrating the Japanese economy into international trade. For example, the White Paper on International Economy and Trade 1949, which was published shortly after the end of the war, emphasized that "Japanese economic independence could not be achieved without the promotion of trade."[3] In 1955, Japan joined the General Agreement of Trade and Tariff (GATT) as the first Asian country, and its economy expanded 20-fold in 20 years through international trade. In 1968, Japan became the world's second largest economy, behind the U.S. Japan's accommodation to the international trading system is closely related to Japan's economic recovery from the devastation of the war.

Before delving into my argument, I would like to define the term of *legalism* first. Pekkanen defines it as "extent, use, or invocation of law and legal process."[4] According to her definition, legalism can be understood as the reliance of states on international law and legal process to attain their national interests. In this paper, the term of legalism, however, also includes the preference of states over proactive engagement in international law-making. By doing so, the scope of this

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[1] Prime Minister Office, "The 13th IISS Asian Security Summit -The Shangri-La Dialogue - Keynote Address by Prime Minister Abe," May 30, 2014. https://japan.kantei.go.jp/96_abe/statement/201405/0530kichokoen.html.
[2] Prime Minister Office, "Press Conference by Prime Minister Shinzo Abe," March 15, 2013. https://japan.kantei.go.jp/96_abe/statement/201303/15kaiken_e.html.
[3] The author translates the original text into English. METI, *the White Paper on International Economy and Trade 1949*, 1949.
[4] Pekkanen, *Japan's Aggressive Legalism: Law and Foreign Trade Politics Beyond the WTO* (California: Stanford University Press, 2008), 4.

paper extends to the tendency of states to initiate FTA negotiations in order to attain their national interests.

This paper seeks answers to the following questions in the arena of international trade: how Japan's legalism has evolved in history after the Pacific War; what features Japan's legalism takes on; and how Japan has pushed its legalism in order to secure its national interests. Finding answers for these questions requires interdisciplinary analyses. A state's view on international law may be affected by culture and history, by the effectiveness of international law, or by relations with other states. Therefore, this paper contains many aspects of Japanese studies from the perspective of international trade law.

In this paper, I find that: (1) the improved enforcement of the dispute settlement mechanism (DSM) through the establishment of the World Trade Organization (WTO), i.e. automaticity in proceedings and manifestation of prohibiting unilateral sanctions and voluntary export restrictions (VERs), incentivizes Japan to push its legalism for resisting U.S. unilateral pressure; and (2) China's compliance with the WTO accelerates the evolution of Japan's legalism; however, that (3) at the same time, domestic factors, such as fragmented and overriding authority over trade policy, little legal accountability on the part of the government, and biased political interests in protecting import sectors, prevents Japan from going forward to further legalism. I also propose a couple of institutional reforms in order to eliminate obstacles for further legalism. All these recommendations essentially seek to restore the influence of exporting sectors by redressing too much bureaucratic leeway and top-down relations between the Japanese government and industries.

In section 2, through concrete trade disputes, I will articulate: (1) how the improved enforcement of the WTO DSM contributes to Japan's recent preference for legalism in relation to the U.S.; and (2) how China's compliance with the WTO accelerates Japan's legalism. Japan's trade policy is distinguished before and after the establishment of the WTO in 1995. Prior to the establishment of the WTO, that is, in the era of GATT, Japan favored bilateral consultations over trade disputes rather than adjudication. During the GATT period, Japan initiated only eight cases under the GATT DSM. This number is extremely small compared to 108 cases which were brought by the U.S. to the GATT DSM.[5] However, Japan shifted to employ a more proactive position toward adjudication after the establishment of the WTO. Japan has already litigated 23 cases before the WTO DSM in just the 20 odd years since the establishment of the WTO.[6] This tendency can be explained by the strong enforcement mechanism of the WTO DSM. The introduction of the "reverse consensus" rule makes proceedings automatic by rendering it impossible that a respondent simply blocks dispute settlement actions. The manifestation of abandoning unilateralism and VERs also provides Japan with an incentive to go to the WTO DSM. In addition to these systemic factors, China's compliance with the rulings made by the dispute settlement body (DSB) also accelerates Japan's recent legalism. Now that China is the largest trading country with Japan, China's legalism in the multilateral trading system (MTS) has significantly affected Japan's preference over its forum choice for resolving trade disputes.

In section 3, I will identify domestic factors which hinder Japan from further legalism. Despite the increase of its use of adjudication relative to the GATT period, Japan files fewer cases with the WTO DSM than other developed countries. Compared to 23 cases filed by Japan, 115 cases have been filed by the U.S. and 97 by the EU.[7] The difference in the number of files suggests

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[5] Davis, *Why Adjudicate?: Enforcing Trade Rules in the WTO* (New Jersey: Princeton University Press, 2012), 188.
[6] As of January 22, 2018. https://www.wto.org/english/thewto_e/countries_e/japan_e.htm
[7] As of January 22, 2018. https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm https://www.wto.org/english/thewto_e/countries_e/usa_e.htm

that Japan's legalism has evolved in a different manner from that of other developed countries, such as the U.S. and the EU. Although there are several factors (e.g. economic and cultural differences) which affect the attitude of a state toward legalism, many scholars focus on domestic variables such as bureaucratic institutions and government-industry relations. Davis argues that wide discretion of trade bureaucrats leads to a lower frequency of adjudication.[8] Shaffer argues that the form of "public-private relation" (i.e. a relation between a government and an industry) determines state's inclination to rely on litigation for resolving trade disputes.[9] In his explanation, "bottom-up public-private relation," in which an industry rather than a government takes a lead in litigating a trade dispute, is more inclined to choose litigation over consultation than "top-down public-private relation." Liao verifies this hypothesis in application to East Asian countries.[10] My main focus here is what mechanism inside the Japanese government creates large discretion over trade policy and top-down relationships between the government and industries. For doing this, I will focus on several distinctive characteristics seen in the decision-making process on Japanese trade policy: fragmented and overriding authority over trade policy, lack of legal accountability in the government, and biased political interests in trade policy.

In section 4, I will propose three institutional reforms in order to remove obstacles to (or, at least, to alleviate adverse effects on) further legalism. Due to domestic factors specified in section 3, the Japanese government is still in a struggle with its traditional propensity to avoid litigating trade disputes and to hesitate to initiate FTA negotiations which aim at high-level trade liberalization. All my recommendations reflect the interests of export sectors more on Japan's trade policy. My first proposal is to create a strong one-stop agency dealing with trade issues and with accompanied domestic economic changes. Thus far, Japan's trade policy has been determined by the consensual decision-making process among four ministries: Ministry of Foreign Affairs (MOFA), Ministry of Economy, Trade, and Industry (METI), Ministry of Agriculture, Forestry, and Fisheries (MAFF), and Ministry of Finance (MOF). I will argue that this consensual decision-making process leads to the propensity of the Japanese government to often tend to the preference for the protection of importing sectors over liberalization in foreign markets. This decision-making system compels the Japanese government to hesitate to initiate FTA negotiations with trading partners which strongly ask for the opening of the Japanese importing market. The creation of a one-stop agency will change Japan's attitude toward FTA negotiations into a more aggressive one. My second proposal is to create an advisory committee to Prime Minister on unfair trade policies of trade partners. In the current bureaucratic system, a similar advisory body to METI exists; however, this advisory committee is not sufficient to reflect the interests of exporting industries on Japan's trade policy as it is mere a subcommittee of the Industrial Structure Council, which is an advisory body to METI. The recommendations submitted by the subcommittee are not appropriately shared within the government and do not influence interests of other ministries. My third proposal is to establish a formal petition system on unfair trade policies of trade partners. Although business sectors can make a petition to METI tacitly even in the current system, accountability is not imposed on METI bureaucrats because of the lack of legal obligation. Therefore, the establishment of a formal petition system leads to lessen the discretion of trade bureaucrats.

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[8] Davis, *Why Adjudicate?: Enforcing Trade Rules in the WTO* (New Jersey: Princeton University Press, 2012),
[9] Shaffer, *Defending interests: Public-private partnerships in WTO litigation* (Washington, DC: Brookings Institution Press, 2003).
[10] Liao, *Developmental States and Business Activism: East Asia's Trade Dispute Settlements* (London: Palgrave Macmillan, 2016).

2. Evolution of Japan's legalism in international trade

2.1 Why states seek and comply with international trade law

Before delving into Japan's legalism, let us consider reasons why states generally pursue a legal framework and comply with international law in international anarchy. This question is fundamental in consideration of a state's legalism because the development of a state's legalism presupposes that other states also prefer to comply with international law. Many scholars have argued this question. Realists argue that international law is entirely a reflection of the distribution of power; thus, it is created by dominant states in order to foster stability within an order that serves their interests.[11] Institutionalists believe that states pursue an international framework because it facilitates cooperation among states by lowering transaction costs and by increasing information flow.[12] Social constructivists, however, aver that an international framework provides additional incentives for states to comply with international law as it serves as a platform to redefine interests and identities of states and to spread ideas and norms.

The high level of compliance with recommendations made by the WTO DSB suggests that the WTO provides a good foundation for the development of legalism. WTO members comply with the rulings of the DSB in approximately 90 percent of cases.[13] This high level of compliance, I believe, can be explained by the high cost of withdrawal from it, as institutionalists have argued. Once a state participates in the WTO, it gains a large number of benefits from the most-favored-nation principle (MFN principle). Even the U.S., which is the most powerful state in the world, would be hard pressed to completely withdraw from the WTO due to a great deal of uncertainty arising from then having to negotiate reciprocal MFNs with more than 160-member states, which is not acceptable to the U.S. Although it is known for its notorious unilateralism, even the U.S., therefore, is forced to play along within the system of the WTO. The extreme cost created by a complete withdrawal from the WTO explains the ambiguous policies taken by the Trump Administration. The Trump Administration has threatened to pull the U.S. out of the WTO since its inauguration because, as it claims, the WTO has not served U.S. interests.[14] On the one hand, the Trump Administration is taking measures to jeopardize the efficacy of the WTO, such as by blocking the appointment of new members of the appellate body;[15] on the other hand, as to the issue of China's market economy status, the U.S. is arguing against China over interpretation on specific provisions in WTO law, collaborating with Japan and the EU.[16] This ambivalent stance of the U.S. administration suggests that the cost accompanied with a complete withdrawal from the WTO would be enormous for the U.S.

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[11] Mearsheimer, "The False Promise of International Institutions", 7.
Strange, "Cave! hic dragones: a critique of regime analysis", 480.

[12] Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy,* 244

[13] WTO, "20 Years of the World Trade Organization: A Retrospective," 80.

[14] Chon, "Trump's Criticism of W.T.O. Hurts America First", *New York Times,* December 11, 2017, https://www.nytimes.com/2017/12/11/business/dealbook/wto-trump.html.

[15] Donnan, "WTO chief warns of risks to trade peace", *Financial Times*, October 1, 2017, https://www.ft.com/content/3459f930-a532-11e7-9e4f-7f5e6a7c98a2

[16] Lawder, "U.S. formally opposes China market economy status at WTO", *Reuter,* November 30, 2017, https://www.reuters.com/article/us-usa-china-trade-wto/u-s-formally-opposes-china-market-economy-status-at-wto-idUSKBN1DU2VH

2.2 WTO as a bulwark against U.S. unilateralism

In addition to the general incentive to remain within the international trade regime described above, the establishment of the WTO especially gave Japan three concrete incentives to push its legalism: (i) the prohibition of unilateralism; (ii) the "reverse consensus" procedure on the dispute settlement mechanism; and (iii) the prohibition of VERs. In the Uruguay Round, Japan was not in favor of "reverse consensus." Rather, Japan reluctantly accepted it in return for prohibiting unilateralism. However, as a result, these two elements have significantly changed Japan's preference over a choice of forum for resolving trade disputes.

During the era of GATT, the U.S.–Japan bilateral economic relationship primarily shaped Japan's trade policy. After Japan gained the full rights of GATT membership in the middle of the 1960s, Japan's trade partners feared the explosive growth of Japanese exports.[17] Especially, the U.S. accused Japan of unfair trade, reflecting strong concern from the U.S. Congress. The typical structure of the U.S.-Japan bilateral negotiations was that the U.S. asked Japan to redress its trade surplus and Japan responded with VERs. The U.S.-Japan automobile talks in the 1980s exemplified this. U.S. automobile makers maintained their advantage in manufacturing large vehicles; however, due to the second oil crisis in 1979, the preference of the U.S. consumers shifted to smaller and more efficient vehicles. As a result, in 1979 the U.S. imports of automobiles from Japan increased by 30.5 percent and the amount of production by domestic makers decreased by 10.5 percent. In order to cope with increased protectionism within the U.S., Japan announced its VER policy to restrict its export of automobiles to the U.S. by capping it at 1.68 million vehicles per year. Japan's VER on automobiles gradually relaxed the limitation on its maximum number of exports until 1993.[18] As shown in this example, the U.S. tended to choose bilateral consultations for trade disputes rather than the GATT DSM. This choice of forum was reasonable to the U.S. as asymmetric mutual dependence on security between Japan and the U.S. provided the U.S. with bargaining power over Japan in bilateral consultations. Also, Japan generally accepted the U.S. choice of bilateral consultations for trade disputes rather than file them with the GATT DSM. As described above, Japan initiated only eight cases under the GATT DSM. This number is much lower than that of other developed countries.

U.S. trade policy has adopted unilateralism through legislation as Japan-U.S. trade frictions escalated. Section 301 of the Trade Act of 1974 calls for the executive to respond to industry petitions regarding unfair foreign trade practices by negotiating with foreign governments and by imposing trade sanction when these foreign governments refuse to compromise. By the close of the Regan Administration in the late 1980s, the enormous U.S. trade deficit and the dissatisfaction of the Congress with the insufficient implementation of section 301 by the executive branch led to the legislation of the Omnibus Trade and Competitiveness Act of 1988. This trade law reduced presidential discretion to invoke unilateral trade measures against unfair foreign trade practices, and instead granted a wide range of authority to the United States Trade Representative (USTR). It also introduced "Super 301," which obliged the USTR to take automatic retaliatory measures against a designated priority country if it did not agree to redress its unfair trade practices within a year after initiating a negotiation.[19] In fact, in 1989, the USTR designated Japan (as well as India

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[17] Japan acceded to the GATT in 1955; however, 14 countries applied Article 35 of the GATT to Japan so that they could continue to apply their border measures on Japan.

[18] Abe, *The History of Japan's Policy on Trade and Industry*. Vol.2 "Policy on Commerce and Trade". (Available only in Japanese)

[19] METI, "Unilateral Measures," chap. 15 in *The 2016 Report on Compliance by Major Trading Partners with*

and Brazil) as a priority foreign country and specified Japan's trade practices on supercomputers, government procurement of satellites, and import restrictions on technology of forestry products as prioritized foreign practices to be addressed.[20] In sum, during the era of the GATT, the U.S. approach against Japan's trade practices was characterized by the choice of a bilateral forum and unilateral coercion based on Section 301.

However, the establishment of the WTO brought about a major change in this structure. The WTO has raised the cost of unilateral retaliation by manifesting unilateralism as a violation of international trade law punishable by sanctions. Firstly, Article 23 of Understanding on rules and procedures governing the settlements of disputes (DSU) clearly stipulates that "when WTO Members seek the redress of a violation of obligation or other nullification or impairment of benefits [...], they shall have recourse to, and abide by, the rules of and procedures of this Understanding." Even in the era of the GATT, it was a corollary of GATT laws that trade disputes relating to the GATT had to be resolved through the GATT DSM; however, the manifestation of prohibiting unilateralism in the Uruguay Round was at the top of the agenda for Japan. Secondly, the WTO has strengthened its DSM though the principle of "reverse consensus."[21] In the GATT DSM, a respondent country had a veto power to refuse to adopt an unfavorable ruling because the consensus rule was applied to the adoption of panel rulings. On the contrary, in the procedure of the WTO DSM, a respondent country needs consensus in order to block the adoption of panel rulings. The principle of "reverse consensus" makes the WTO DSM become more automatic. Thirdly, the prohibition of VERs as the result of the Uruguay Round has also affected Japan's legalism. Article 11 of the Safeguard Agreement newly agreed upon in the Uruguay Round states that "a Member shall not seek, take or maintain any voluntary export restraints."[22] Before the establishment of the WTO, Japan had often resorted to VERs to avoid accusations of unfair trade in bilateral consultations. Therefore, the prohibition of VERs has also contributed to the shift of Japan's preference toward litigation. These improvements through the establishment of the WTO has led Japan to become a more frequent user of WTO litigation. With regards to reform of the DSM, Japan clarified its keen interest in these two issues in the Uruguay Round by stating at a Ministerial meeting that:

> [We] should, first of all, reconfirm that we abandon unilateral measures and their threats inconsistent with GATT, that render the present system unstable. When this is attained, Japan is ready to give positive thought to strengthening the automaticity of the Panel procedures.[23]

Indeed, Japan filed against the U.S. before the WTO DSM for leverage in the 1995 U.S.-Japan auto and auto parts negotiations.[24] After the breakdown of bilateral talks, the USTR initiated an investigation into Japan's regulations of the aftermarket for auto parts in accordance with

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Trade Agreements – WTO, EPA/FTA, IIA -, June 8, 2016.
http://www.meti.go.jp/english/report/data/2016WTO/gCT2016coe.html.

[20] "Super 301," *Economic and Political Weekly*, May 19, 1990.
http://www.epw.in/journal/1990/20/uncategorised/super-301.html.

[21] Trachtman, "Trade," chapt. 16, in *The Oxford Handbook in International Organization*.

[22] Article 11 (2), Agreement on Safeguard. https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm#11

[23] General Agreement on Tariffs and Trade (GATT), "Japan: Statement by Dr. Taro Nakayama, Minister for Foreign Affairs," MTN.TNC/MIN(90)/ST/14, December 3, 1990. http://sul-derivatives.stanford.edu/derivative?CSNID=92120066&mediaType=application/pdf.

[24] See a case summary of DS6 at the WTO's homepage.
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds6_e.htm.

Section 301 in 1994. It then proposed a unilateral retaliation that would levy a 100 percent duty on Japanese luxury automobiles in 1995. As a response to this announcement, Japan filed a WTO complaint, contending that the U.S. had violated Article 23 of DSU. Although this trade dispute was eventually settled outside the WTO DSM, Japan's filing with the WTO resulted in the U.S. withdrawing its many demands on Japan.

2.3 China's compliance with WTO law

When we consider Japan's trade policy, the Sino-Japanese relation is also one of the decisive factors that influences Japan's preferences. Now that China is the largest trading country with Japan, China's behavior in the MTS has significantly affected the evolution of Japan's legalism. Since the end of the Second World War, on the one hand, China has risen as a significant trade partner with Japan. The Sino-Japanese relation has, on the other hand, embraced intricate issues appearing in the process of reconciliation with Japan's aggressive intrusion in the Second World War, including, for example, territorial disputes over islands in the East China Sea and differing views on the history of the Second World War.[25] This relationship has often been called "politically cold yet economically hot."[26] Such delicate political issues have often posed serious consequences for economic relations between the two. In 2005, for example, enraged by Japan's historical revisionist movement on its wartime atrocities appearing in newer editions of history textbooks, roughly 10,000 protesters in Beijing took to the streets, clashed with riot police, and stormed the Japanese embassy.[27] Demonstrators in Guangzhou and Shenzhen damaged Japanese storefronts and called for boycotts of Japanese goods.

This incident has made clear to Japanese policymakers how important it is to separate economic agendas from political issues. For example, the current Prime Minister, Shinzo Abe, points out in his book the importance of separation between political and economic issues existing between the two countries.[28] Indeed, he has tried to rebuild a "mutually beneficial" relationship with China in his first tenure as Prime Minister by setting aside political issues and by focusing on economic benefits for both sides.[29] Consequently, Japanese policymakers and bureaucrats have sought effective instruments which detach economic issues from political ones in the relationship with China.

It came to be a touchstone issue when Japan detained the captain of a Chinese fishing trawler which had been found fishing in Japan's twelve-nautical-mile territorial waters off the disputed Senkaku islands in September 2010. China retaliated against Japan's detention with an embargo on the export of rare earth minerals.[30] At that time, China produced about 97 percent of the global supply of these minerals, which are used in a variety of goods, including electronic devices. Japan relied on China for 90 percent of its imports.[31] Although it officially denied doing so, China

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[25] Smith, *Intimate Rivals: Japanese Domestic Politics and a Rising China* (NY: Columbia University Press, 2015).
[26] "Chinese commerce minister concerned about China-Japan trade," Xinhua News Agency, June 2, 2006.
[27] Bremner, Brain, Dexter Roberts, and Stan Crock, "Why Japan and China Squaring off," *Business week Onlin*e, April 25, 2005.
[28] Abe, *Toward a Beautiful Country* (Tokyo: Bungeishunju Ltd, 2006) (Available only in Japanese.).
[29] MOFA, "Japan-China Joint Press Statement," April 13, 2007. http://www.mofa.go.jp/region/asia-paci/china/pv0704/joint.html.
[30] Bradsher, "After Rare Earth Embargo, a New Calculus for Toxic Work," *The New York Times*, October 29, 2010. http://www.nytimes.com/2010/10/30/business/global/30rare.html.
[31] *Nikkei Shimbun*, July 24, 2010.

utilized a threat to cut economic ties with Japan in retaliation for this territorial issue. China's restriction on the export of rare earth minerals had already begun around 2000. It began to impose export quotas on mineral resources, including rare earths and export licenses in the mid-2000s. Since 2006, China has also initiated export duties on rare earth minerals as well as other mineral resources. In July 2010 (just before the detention of the Chinese fishing captain), the Chinese Ministry of Commerce (MOFCOM) announced a 40 percent reduction in the export quotas on rare earths from the previous year.[32] Following the detention, China eventually ratcheted up its export restriction on rare earth minerals to a total embargo.[33]

In order to resolve this trade dispute, Japan initially chose bilateral meetings, according to its traditional preference. In October 2010, METI Minister Ohata held a meeting with China's vice minister of commerce, Jian Yaoping, in Tokyo. Minister Ohata repeated Japan's request to resume the export of rare earth minerlas to Japan. The following month, Minster Ohata met with Zhang Ping, China's Director of the Development and Reform Commission, on the sidelines of the Yokohama APEC summit in order to deliver Japan's request again. However, such bilateral talks could not result in a complete resolution of the issue. Despite restarting to export rare earth minerals to Japan after the release of the detained captain, China continued its policy to restrict the export of these minerals.

As a result, Japanese bureaucrats started to contemplate filing this trade dispute with the WTO. Since its accession to the WTO, China has been challenged as a respondent in 40 cases. Intriguingly, as of April 2018, no Chinese case has gone into compliance proceedings, wherein an arbitration panel determines the costs of one country's non-compliance with other WTO members. This fact suggests that China is likely to redress its measures on restrictions of exports if such measures are recognized to be inconsistent with WTO law. In addition, the Appellate Body's ruling on a similar trade dispute pushed the Japanese government's decision to litigate against China in the WTO DSM. The Appellate Body had already ruled that China's export restraints, such as export duties and quotas, were not consistent with the relevant WTO provisions in the case concerning its export restrictions on raw materials as alleged by the U.S., the EU and Mexico. This ruling suggested that it would be highly likely that the Appellate Body would rule in the same manner in the rare earths' case.[34] Against this backdrop, in March 2012, Japan, along with the EU and the U.S., requested consultation at the WTO with China on its restraints on rare earth exports, which was deemed as a preliminary process for litigation before the WTO. This was the first challenge for Japan in asking for adjudication on a trade dispute with China. In March 2014, the panel released its report, which supported Japan's claims that China's measures on export restriction on rare earths were inconsistent with Article XI:1 of the GATT (i.e. elimination of quantitative restriction), paragraph 11.3 of the China's accession protocol (tax and charges levied on imports and exports). Moreover, in August 2014, the Appellate Body released its report that confirmed the rulings made by the panel.[35] At the DSB of the WTO meeting in September 2014, China declared its intention to implement the DSB's recommendation. In addition, Japan and China informed the DSB that both had agreed upon a reasonable period of time for China's

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[32] METI, "Export Restriction," in *The 2016 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, EPA/FTA and IIA*, June 8, 2016, http://www.meti.go.jp/english/report/data/2016WTO/pdf/02_05.pdf.

[33] Maeda, Risa and Chikako Mogi, "Japan Trade Min Hears China Rare Earth Export Halted," *Reuter*, September 24, 2010. https://www.reuters.com/article/us-japan-china-trade/japan-trade-min-hears-china-rare-earth-exports-halted-idUSTRE68N0T720100924.

[34] DS394, 395, 398. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm

[35] Ibid

implementation, that is, China agreed to redress its measures to become consistent with WTO laws by May 2, 2015. As promised, China finally terminated the export quotas on rare earths in January 2015, and also terminated export duties on them as of May 1, 2015.[36]

Japanese policymakers and bureaucrats came to recognize the efficacy of the WTO through this trade dispute with China. It was also confirmed that litigation before the WTO works favorably in the sense that it insulates economic issues from political ones. METI nicely captures the Chinese government's attitude toward this trade dispute by stating that:

> This is one of the good examples where trading partners utilized WTO dispute settlement procedures to achieve correction of China's measures, and it is also notable that China did not make it a political issue but earnestly responded consistent with the WTO rules. [...] As China is conforming to decisions by the WTO Dispute system [...] and is showing willingness to respect the rules, it is expected to be a primary player in the enforcement of the rules in the world.[37]

This trade case further encouraged Japan to develop its legalism in the field of international trade. Nevertheless, this begs the question: why did China abide by the recommendations ruled by the WTO DSM? Some American scholars argue that China, in the first place, is a challenger to the existing legal frameworks;[38] however, this assertion overlooks China's inclination to implement the DSB's recommendations. The institutionalist explanation, i.e. cost-and-benefit calculation, applies to China's adherence to the WTO. That said, China gains more benefits by remaining in the WTO than the cost for altering its laws and regulations to conform to the WTO's rulings. Although he criticized that China's compliance is merely "paper compliance," which means China follows the DSB's recommendations, but soon introduces similar regulations, Webster proposes a couple of explanations for China's inclination to implement the DSB's recommendations. He emphasized the reciprocity embedded in the WTO to explain China's adherence to it. He demonstrates this in comparison with its inclination not to comply with many of the recommendations by the International Labor Organization (ILO). Human rights abuse in one state condemned in the ILO recommendations does not affect the interests of another (although they may harm the reputation of the state); however, a violation to trade law imposes costs on another state, and in the end, it may receive retaliation.[39] He also presents another reason: the cost of altering a law in China is lower than in other developed countries. That is, changing a law is not arduous for an authoritarian state such as China, where one-party governs and there is less political friction than in Western states. His analysis on the cost and benefit for China in the WTO makes the institutionalist's explanation more reasonable.

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[36] METI News Release. "Termination of China's Export Duties on Three Raw Materials Including Rare Earths" http://www.meti.go.jp/english/press/2015/0501_01.html

[37] METI, "Column: WTO Dispute Settlement Procedures and China's Administrative Response," in *The 2016 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, EPA/FTA and IIA*, June 8, 2016. http://www.meti.go.jp/english/report/data/2016WTO/gCT2016coe.html.

[38] Bergsten, *China's Rise: Challenges and Opportunities*, 30.

[39] See Timothy Webster, "Paper Compliance: How China Implements WTO Decisions," *Michigan Journal of International Law* 35, no. 3 (2014): 525-78. He admits China's general tendency to implement the DSB rulings; however, he also contends that, in some disputes, China could not do so "within a reasonable period of time", and furthermore, it bypassed the redress of regulations by choosing bilateral negotiations with complaining states. Yet, his argument overlooks the role of bilateral negotiations in the WTO DSM. The DSU sees adjudication as the last resort in cases where the parties at issue cannot reach settlements in bilateral negotiations.

3. Japan's less litigious tendency and its governmental institution

3.1. Less litigious tendency of Japan

As seen in the previous section, the establishment of the WTO has impacted the evolution of Japan's legalism in the field of international trade. Nevertheless, the level of Japan's legalism has not yet reached the level of the U.S. or the EU in terms of the number of filed cases. As shown in Table 1, while the U.S. and the EU have respectively filed 115 and 97 cases with the WTO, Japan has only filed 23 cases since the establishment of the WTO. One may argue that the extent of utilizing the WTO DSM relies on the volume of exports as a country which exports more is expected to have more trade disputes. However, no clear relationship between the number of filed trade disputes and the share in world export has been observed (See Table 1). It suggests that there are other, hidden, significant factors which influence the tendency of a country's legalism.

Table 1: Country comparison in the number of dispute cases as complaint

Country	Year of Accession	Dispute Cases as Complaint	Share in World Export (%)
United States	1995	115	9.12
Europe Union (formerly European Community)	1995	97	15.44
Canada	1995	38	2.45
Brazil	1995	31	1.16
Mexico	1995	24	2.34
Japan	1995	23	4.04
India	1995	23	1.65
Argentina	1995	20	0.36
South Korea	1995	17	3.11
China	2001	15	13.15
Indonesia	1995	11	0.91
Australia	1995	8	1.19
Russia	2012	6	1.77
Turkey	1995	4	0.89
South Africa	1995	0	0.47
Saudi Arabia	2005	0	1.10

Note: The table is made by the dataset on the WTO homepage (as of January 2018). The share in the total world export expresses share in merchandized trade in 2016.

One explanation for this is that the tendency of a country's legalism relies on how much the executive of the country holds its discretion over foreign trade policy. This assertion mainly derives from the following two reasons. First is the state-centric characteristic of the WTO. Although litigation with the WTO aims at securing interests of an exporting industry by accusing another country of the inconsistency of its trade practice, the executive branch of a government is solely able to finally decide whether to go to the WTO DSM. As such, the final decision whether or not to litigate before the WTO DSM relies on the decision-making process in the executive branch. Secondly, in contrast to exporting industries, the executive of a country tends to have broader

interests in relations with other countries. On the one hand, exporting industries focus only on a foreign trade practice at issue; diplomatic relationship between countries, on the other hand, is not determined solely by relationships in the field of trade. The executive of a country must take into account the influence of litigation with the WTO on other fields of cooperation between countries such as security, and the environment, among others. Even assuming the executive branch has an interest only in trade, it, unlike exporting industries, must still worry about the consistency between its claim against another country and its existing trade practices. In other words, the executive branch of government must think of the defensive aspect in addition to the offensive one.

Davis also argues in her comparative analysis of Japan and the U.S. that democratic institutions for accountability positively relate to frequency in the use of adjudication in order to resolve trade disputes.[40] She makes a case that an executive branch with limited discretion has a propensity to use adjudication more frequently in order to present a hard-liner posture over unfair foreign trade measures to the legislative branch. The strong enforcement of the WTO enables such states to use adjudication as a tool for appealing to their constituencies without a situation escalating into a total trade war. Shaffer also argues that a form of "public-private partnership" (i.e. the relationship between a government and an industry) determines a tendency of a country to frequently turn to the WTO DSM for resolving trade disputes.[41] He points out that litigation in the WTO requires cooperation between a government and an industry: while the government is the primary actor in proceeding with a dispute settlement, it also needs inputs from the industry for information on a measure at issue, and a legal claim, for example. He further states that a state whose public-private relationship is "bottom-up" in the sense that firms and trade associations play a proactive role tends to file more trade disputes with the WTO than a state whose public-private relationship is "top-down" in the sense that a public authority plays the predominant role in trade disputes. Furthermore, Liao demonstrates that this hypothesis on WTO litigation behavior is also applicable to East Asian countries.[42] She concludes that South Korea is more of a "bottom-up" public-private partnership, which leads to filing more trade disputes with the WTO, while Taiwan is a "top-down" public-private partnership which ends in fewer appeals to the WTO DSM.[43]

One may argue that the lower propensity of Japan to litigate trade disputes with the WTO derives from the lack of a litigious culture of Japan. Kawashima, one of the most prominent Japanese legal scholars, noted that the "premodern" Japanese legal consciousness and views bear a penchant for resolving private disputes out of court.[44] However, it seems to be a leap in logic to conclude that individual perception on law directly impacts the national perception on international law. The finding that a demand for lawyers for domestic legal courts in Japan has remained constant, although Japan as a state has gradually taken on its legalism in the field of international law, offers counter-evidence. During the 1990s, the Japanese government initiated a judicial reform led by the Justice System Reform Council (JSRC). This reform targeted not only improving the legal infrastructure in Japan, but also encouraging litigants to participate in the Japanese judicial

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[40] Davis, *Why Adjudicate?: Enforcing Trade Rules in the WTO* (New Jersey: Princeton University Press, 2012), 20.
[41] Shaffer, *Defending interests: Public-private partnerships in WTO litigation* (Washington, DC: Brookings Institution Press, 2003).
[42] Liao, *Developmental States and Business Activism: East Asia's Trade Dispute Settlements* (London: Palgrave Macmillan, 2016).
[43] In the comparison among G20 countries in Table 1, South Korea seems to file fewer trade disputes (i.e. since 1995, South Korea has adjudicated only 17 files.). However, in comparison with Taiwan, South Korea has filed more than twice as many trade disputes as Taiwan (i.e. since 2002, Taiwan has adjudicated 6 cases as a complaint.).
[44] Kawashima, *Japanese Legal Consciousness* (Tokyo: Iwanami Shoten, Publishers, 1967). Available only in Japanese.

process. The JSRC publicized its final recommendation in 2001, which attempted to increase the number of legal professionals and to ensure popular participation in legal proceedings.[45] This recommendation resulted in the commencement of 68 new law schools. According to the Japan Federation of the Bar Association, the number of civil cases in district courts in 2015 was, however, almost the same level as that of 2006, while the number of lawyers has steadily increased more than 1.5 times of that in 2006.[46] These numbers suggest that Japan's judicial reform has failed to change the individual perception on legal proceedings, despite the Japanese government's efforts. That said, although the Japanese government has encouraged citizens to use legal proceedings for private disputes through judicial reform, Japanese citizens have not responded. Therefore, individual perception on law cannot fully explain Japan's recent legalism in the international arena.

3.2. Features of Japanese governmental institution

Thus far, I have argued that the degree of discretion granting the executive branch and the form of public-private relation are significant factors in affecting the evolution of a state's legalism, such as the tendency to litigate trade disputes before the WTO. In this subsection, I will focus on the features of Japanese governmental institution and political economy, broadening the scope concerning not only adjudication to the WTO, but also covering the formulation of trade policy on the whole. I find that: (1) Japanese bureaucratic authority over trade policy is fragmented and overriding; (2) the Japanese government is legally obliged little accountability; (3) political interests in trade policy are biased to protect importing sectors. Articulated as follow, every aspect of trade policy indicates the large bureaucratic discretion and the top-down relationship between the government and industries, which leads to less litigious propensity and a reluctant attitude toward FTA negotiations.

(1) Fragmented and overriding bureaucratic authority over trade policy

Japan's trade policy is basically formulated through interagency consultation among MOFA, METI, MAFF, and MOF. The significant characteristic in the formulation of Japan's trade policy is the duplication of each ministry's jurisdiction over trade policy. Each ministry has fragmented authority and responsibility on trade policy: MOFA is in charge of a general diplomatic relation with a foreign country, including the economic relationship; METI is responsible for revitalizing private economic activities in a foreign market; MAFF has authority to formulate agricultural policy, including the control of agricultural imports; MOF is responsible for customs measures, such as tariffs.[47] This fragmented and overriding authority leads to a less litigious tendency and the hesitant attitude toward FTA negotiations with states strongly requesting Japan to open its

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[45] JSRC, "Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century," June 12, 2001. https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html.

[46] Japan Federation of Bar Association, *White Paper on Attorney 2016*, 2016. https://www.nichibenren.or.jp/library/en/about/data/WhitePaper2016.pdf.

[47] Bureaucratic jurisdiction over trade policy is stipulated in each Act for Establishment of Ministry. See Article 4 of Act for Establishment of METI (http://www.kantei.go.jp/jp/cyuo-syocho/990427honbu/sankei-h.html.), Article 4 of Act for Establishment of MOFA (http://www.kantei.go.jp/jp/cyuo-syocho/990427honbu/gaimu-h.html.), Article 4 of Act for Establishment of MOF (http://www.kantei.go.jp/jp/cyuo-syocho/990427honbu/zaimu-h.html), Article 4 of Act for Establishment of MAFF (http://www.kantei.go.jp/jp/cyuo-syocho/990427honbu/nousui-h.html). Available only in Japanese.

importing sectors as it requires a consensus in order to achieve a conclusion in interagency consultation where each ministry pursues its own interests. METI, representing Japanese export industries, is the most vocal ministry which favors litigating trade disputes the most and initiating FTA negotiations. However, this strong preference is not reflected in a final conclusion after interagency consultation. METI is forced to compromise so as to reach a consensus among the relevant ministries. This phenomenon can be confirmed in (i) Japan's response to an unfair foreign trade measure and (ii) the decision to initiate an FTA negotiation.

i. Response to an unfair foreign trade measure

METI initiates interagency consultation to decide a response to an unfair foreign trade measure once it receives a petition from an industry. Options for a response include: (i) bilateral consultations; (ii) WTO DSM; (iii) FTA DSM (if a foreign country at issue is an FTA signatory); (iv) bilateral investment treaty (BIT) arbitration (if a foreign country at issue is a BIT); and (v) FTA Subcommittee on Improvement of Business Environment.[48] While METI prefers to take a decisive option, the other ministries are less inclined to resonate with this. For example, MOFA is generally unwilling to agree to litigate an unfair foreign trade measure because it has a concern that litigation will end to the detriment of a diplomatic relation. MAFF also has concerns that litigation will trigger retaliation from a foreign country. Complicating restrictions on the agricultural market is easy to target by a foreign country. Therefore, it is often the case that the relevant ministries choose a bilateral consultation for resolving a trade dispute in interagency consultation.

ii. Decision to initiate a FTA negotiation

In interagency consultation, METI, MOFA, MAFF, and MOF also discuss priority over FTA partners. The interagency consultation on FTAs is composed of a chief negotiator and Co-Chairs from each of the four ministries. Usually, the Deputy Foreign Minister (the MOFA senior official) serves as the chief negotiator and METI, MOFA, MAFF, and MOF respectively delegate a senior official as ministry Co-Chairs (See Fig. 1). The consensus rule also applies to this interagency consultation. A proposal reaching a consensus at the senior official level is supposed to be authorized by the ministerial level. It is rare that a proposal which does not reach a consensus at the senior official level will be discussed at the ministerial level because the consensus rule also applies to the ministerial level. This interagency consultation results in long deliberations and often ends in reluctance to initiate an FTA negotiation with a state which strongly requests to open the domestic market of import sectors.

This adverse effect can be confirmed in the level of trade liberalization between Japan and FTA partners. Japan's FTAs are concluded at around 87 percent of the level of trade liberalization in tariff lines' calculation. For example, Japan liberalizes respectively 86.8 and 87.2 percent of trade in goods in the Japan-Malaysia FTA and the Japan-Thailand FTA. On the contrary, other developed countries achieve over 95 percent of the level of trade liberalization with FTAs. South Korea liberalized 98.2 percent of trade in goods within 10 years after entry into force in the Korea-

[48] FTAs which Japan has signed to date often include the establishment of the Subcommittee on Improvement of Business Environment (e.g. Japan-Peru FTA, Japan-Mexico FTA, Japan-Chile FTA). One significant characteristic of the subcommittee is that business sectors, such as local Chamber of Commerce and industries can also participate in it.

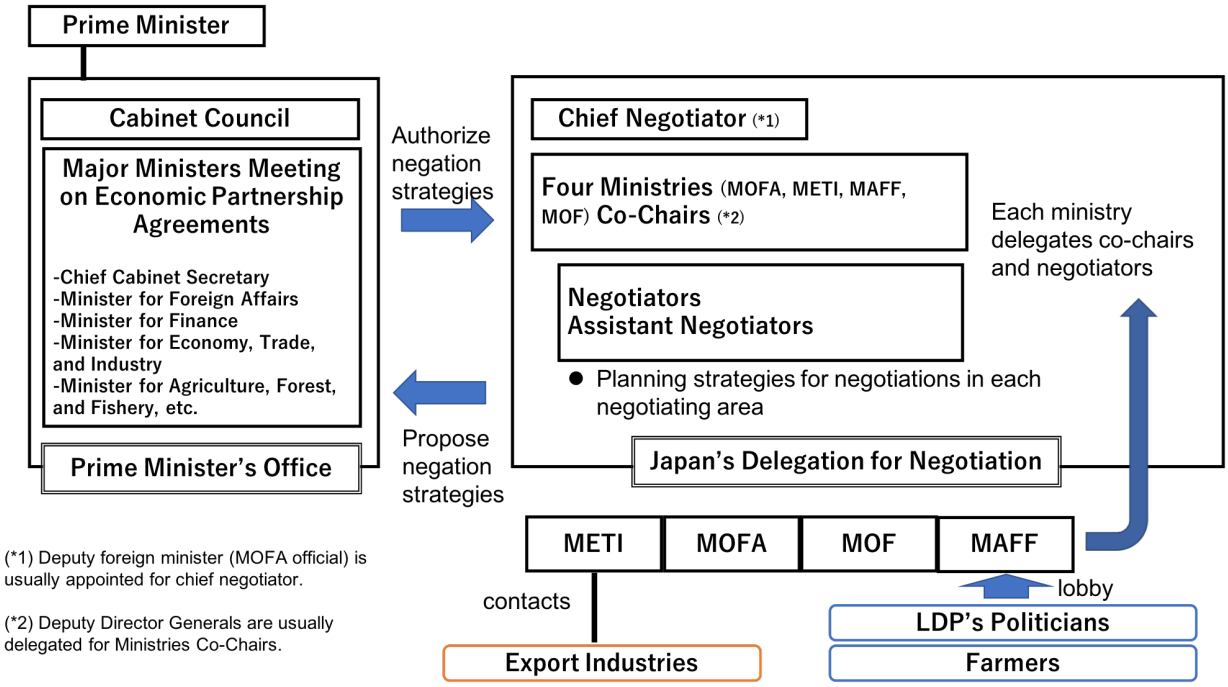

Fig. 1: Japan's Delegation for FTA negotiations
Note: Made by the author according to "Japan's Economic Partnership Agreement" published by Ministry of Foreign Affairs. http://www.mofa.go.jp/mofaj/gaiko/fta/pdfs/kyotei_0910.pdf (Accessed on Feb. 18, 2018. available only in Japanese)

US FTA. This lower rate of achievement in trade liberalization in Japan's FTAs generally reflects MAFF's claim of exceptions for some agricultural products.[49] The petitioning for exceptions makes it harder to initiate FTA negotiations with states which have keen interests in the Japanese agricultural market.[50]

(2) Little legal accountability

The two main laws for Japan's trade policy, the Custom Tariff Law (*Kanzai teiritsu ho*) and the Foreign Exchange and Foreign Trade Law (*Gaikoku kawase oyobi gaikoku boueki ho*) do not contain any positive obligation for actions. Whereas, as discussed in the previous section, Section 301 of the Trade Act mandates how the USTR shall monitor and respond to foreign trade barriers, including timelines to respond to industry petitions and conditions for when to take retaliations, no texts in Japan's trade-related laws specifically stipulate how the Japanese government shall act against an unfair trade measure. The Custom Tariff Law is basically limited to introducing the WTO law into the domestic legal system. For example, Article 6 requires the Japanese government to obtain authorization by the DSB or the Committee on Subsidies and Countervailing Measure

[49] The rate of trade liberalization represents the ratio of tariff lines which will be eliminated within 10 years after an FTA is brought into force. With regards to the data on trade liberalization, see the following Japanese government document (available only in Japanese). https://www.cas.go.jp/jp/tpp/pdf/siryou/150831ver_siryou.pdf (Accessed on Feb. 19, 2018)

[50] However, in recent regional FTA, Japan has committed to further liberalization in trade in goods. For example, in the Trans-Pacific Partnership (TPP), it is going to liberalize 95 percent of goods. I will articulate this change has been made through institutional reform below.

when it intends to impose retaliatory duties. Likewise, Article 7 stipulates the procedures for countervailing duties based on the Agreement on Subsidies and Countervailing Measures.[51] That said, Japan's overall trade policy rests with the executive branch.

Another significant fact is that the interagency consultation for decisions on trade policy is not subject to any laws or decrees. While the U.S. Trade Act enables the USTR to take a lead in interagency consultation by granting it a strong authority to monitor unfair foreign trade measures, METI's influence on interagency consultation is weaker than the USTR due to the lack of its legal legitimacy. Therefore, decisions made by the Japanese government are less inclined to reflect interests of industries.

In addition, no laws or decrees oblige METI on how to respond to an industry petition, different from case of the USTR. This leeway given to METI hampers its bargaining position as the representative from industries in interagency consultation as it may strategically choose to escape from the dilemma between other ministries and industries, for example, by asking to postpone a decision in interagency consultation. The lack of legal accountability exacerbates the Japanese government's inclination towards long deliberation and reluctance to bring a foreign country to the WTO DSM.

(3) Biased political interests

Political interests in trade policy are biased in favor of protection of the importing sector. Diet members of the Liberal Democratic Party (LDP) who specialize in agricultural policy are one of the most significant factors for this. Japanese politics have been dominated by the LDP for a considerable period, except for short periods when other parties gained the majority in the Diet (i.e. the coalition majority led by the Japan New Party of 1993, and the Japanese Democratic Party of 2009-2012). Historically, the LDP has a strong foundation in rural areas, where many farmers reside. They have established cooperation with an association of farmers, named the Japan Agricultural Cooperatives (JA) by protecting their interests in the formulation of agricultural policy in return for promised votes mobilized by the JA. Therefore, the LDP Diet members who represents farmers' interests (the so-called *nourin zoku*) have had a strong influence on Japan's agricultural policy since their emergence in the 1970s and 1980s. In contrast, Diet members in favor of trade liberalization have been less vocal. This phenomenon can be explained by the fact that the role of Diet members in economic policy has been marginalized for a long time. Although there is an argument about the role of the Ministry of International Trade and Industry (MITI, which was later replaced by METI) in Japan's economic miracle, it is widely accepted that MITI made a success in steering Japanese industries (often called "Japan Inc.") and led to a spectacular economic success by its industrial policies.[52] Due to this belief, Japanese export industries have tried to build close contacts with METI, rather than to lobby Diet members.

Political bias also affects bargaining powers in interagency consultation. The political pressure on the protection of the agricultural market consolidates MAFF's position while METI still holds its discretion over its position. In other words, MAFF has no choice but to continue to claim its position by exercising its veto power. Thus, biased political interests are inclined for the interagency consultation to reach a conclusion which emphasizes MAFF's concerns.

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[51] See the Custom Tariff Law translated into English by Japan Tariff Association http://www.kanzei.or.jp/kanzei_law/M43HO054.en.html#.E7.AC.AC.E4.B8.80.E6.9D.A1-.EF.BC.91.

[52] Johnstone, *MITI and the Japanese miracle: the growth of industrial policy 1925-1975*, California: Stanford University Press, 1982.

4. Institutional reform recommendations

In section 3, I identified three distinctive institutional features which hinder the evolution of Japan's legalism in the arena of international trade: fragmented and overriding authority over trade policy; little legal accountability; and biased political interests in protecting importing sectors. All these obstacles embedded in the Japanese government makes the voices from exporting sectors less influential in the decision-making process on trade policy. In this section, I will propose three reform recommendations in order to eliminate these obstacles: (1) the creation of a one-stop agency dealing with trade policy and domestic support policy; (2) the establishment of an advisory body to the Prime Minister on unfair foreign trade measures; and (3) the creation of a formal petition system from industries. All these recommendations aim at reflecting the interests of exporting sectors more on Japan's trade policy. As discussed in the previous section, exporting industries are the strongest supporters for pushing legalism in the sense that they prefer to litigate a trade dispute and to initiate high-level FTA negotiations. Serving their interests will lead to the further evolution of Japan's legalism.

(1) Creation of a one-stop agency

The creation of a one-stop agency aims at gathering the fragmented and overriding authority over trade policy. The transfer of the fragmented authority from METI, MOFA, MAFF, and MOF to this new agency will change Japan's reluctance to initiate FTA negotiations with states asking for opening Japanese importing sectors. One may suspect that the creation of a one-stop agency merely ends in shifting the place where the contention over legalism occurs from the inter-agent level to the intra-agent level. However, this is not the case. The essence of this reform is that this new agency will be charged with domestic support policy to adjust the disparity between winners and losers created by trade liberalization. By doing so, the new agency will lend itself to initiating FTA negotiations by softening the opposition. In the system of interagency consultation, such domestic support policy is usually planned by a ministry controlling importing sectors (i.e. MAFF) and a ministry in charge of budgets (i.e. MOF). However, these ministries do not have an incentive to prepare it for relieving the adverse effects caused by trade liberalization because it is much easier to exercise veto in interagency consolation to stop liberalization. Thus, the creation of a one-stop agency managing trade policy and domestic adjustment policy will eliminate the ministry's veto power and will enable Japan to take a step forward to further legalism.

Japan is, in fact, moving forward in this direction. Although it is temporary, Prime Minister Abe has established a new agency, entitled the "Trans-Pacific Partnership Headquarters (TPP Headquarters)," in order to deal with the TPP, which is of a great concern to Japanese citizens (See Fig. 2).[53] Staff for the TPP Headquarters are delegated mainly from MOFA, METI, MAFF, and MOF. The Minister for Economic Revitalization is appointed as the Chief of Headquarters. In addition to attending the TPP negotiations, the TPP Headquarters also serves as the secretariat for the "TPP Task Force," which is a ministerial council to determine domestic support policy to cope with adverse effects caused by the TPP. I find two significant characteristics of the TPP Headquarters, which dissolve the traditional interagency consultation process: (i) political appointment for the Chief of Headquarters; and (ii) political leadership for domestic support policy.

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[53] Prime Minister's decision on April 5, 2013. https://www.cas.go.jp/jp/tpp/pdf/2013/4/130405_tpp_sourikettei.pdf (Accessed on Feb. 22, 2018. Available only in Japanese).

i. Political appointment for the Chief of Headquarters

Compared to the traditional organization for FTA negotiations (see Fig. 1), the biggest change in the TPP Headquarters is that the Minister for Economic Revitalization serves as the Chief of Headquarters. In the traditional organization for FTA negotiations, due to the lack of a political appointee, negotiators delegated from the relevant ministries are inclined to report to their original ministers; in contrast, in the TPP Headquarters, negotiators who are still delegated from the relevant ministries are now required to report to the Chief of Headquarters. In addition, whereas, in the traditional organization, a consensus among the relevant ministries is needed before a Major Ministerial Meeting, which is the final decision body to authorize trade policy, such consensus is no longer necessary in the TPP because the Chief of Headquarters reports directly to the Prime Minister on a daily basis. The placement of the ministerial post at the Chief of Headquarters overcomes the inefficiency of bureaucracy and also enables the Japanese government to integrate authority on trade policy related to TPP negotiations.

ii. Political leadership for domestic support policy

The TPP Headquarters also made a success in making the MOF and MAFF plan and executing domestic support policy by the political leadership of the Chief of Headquarters. The first Chief of Headquarters position was occupied by Akira Amari, who is known as a political ally of Prime Minister Abe and was one of the fundamental ministers to sustain his administration. By using his political influence, the TPP Headquarters succeeded in persuading MOF to spend huge budgets for domestic adjustment policy. The TPP Headquarters proposed a "Comprehensive TPP-related Policy Framework"[54] to the TPP Task Force and eventually secured 345 billion yen (nearly 3.2 billion dollars) in order to alleviate the adverse effects in the agricultural sector.[55] With the domestic support policy, Japan was able to commit to a higher level of liberalization in the TPP than Japan's other FTAs. While in the traditional Japan's FTAs, the level of trade liberalization is limited to around 87 percent, Japan is expected to eliminate tariffs on 95 percent of products as the result of the TPP.[56]

It should be noted that the TPP Headquarters' success in obtaining budgets relies on unpredictable political appointments. Fortunately, the Chief of Headquarters is appointed with a strong political figure; however, it is uncertain if this tendency in political appointment will continue or not. In this sense, it is desirable that the Japanese government grants a mandate of domestic support policy to a new agency by a law or decree.

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[54] [54] METI, *White Paper on International Economy and Trade 2016*, 674. http://www.meti.go.jp/english/report/data/WP2016/wp2016.html

[55] See the FY2016 Supplementary Budget Proposal related TPP measures. https://www.cas.go.jp/jp/tpp/torikumi/pdf/161018_tpp_kanrenyosan03.pdf (Accessed on Feb. 22, 2018. Available only in Japanese.)

[56] "Japan to remove tariff on 95% products." *Nikkei Asian Review*, October 20, 2015. https://asia.nikkei.com/Features-archive/Trans-Pacific-Partnership/Japan-to-remove-tariffs-on-95-of-products (Accessed on Feb. 22, 2018.)

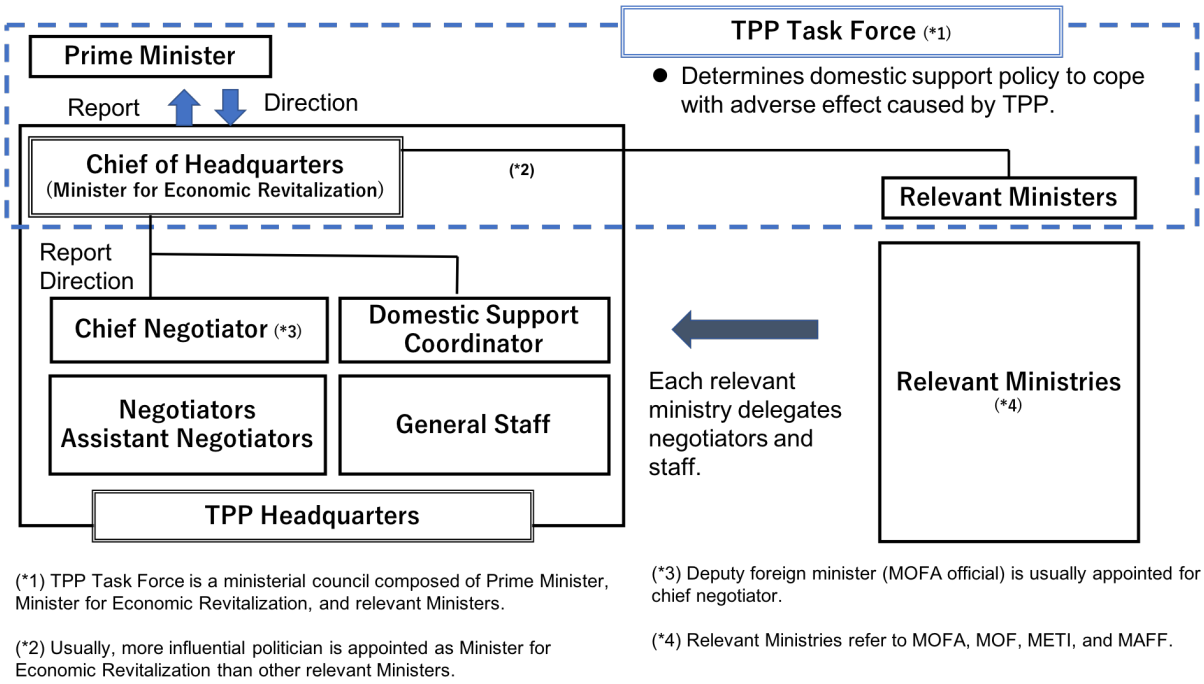

Fig. 2: Organizational Chart of TPP Headquarters
Note: Made by the author according to the homepage of TPP Headquarters. https://www.cas.go.jp/jp/tpp/pdf/2013/3/130326_tpp_taisei.pdf (Accessed on Feb. 21, 2018. Only available in Japanese.)

As the result of the TPP has shown, the creation of a one-stop agency is promising in the sense that Japan will become more accepting of a higher level of trade liberalization. The key points in this institutional reform are that: a new agency must eliminate the inefficient decision-making process among MOFA, METI, MAFF, and MOF; and that it must also have an authority to plan domestic support policy to cope with the disparity between winners and losers. The establishment of the TPP Headquarters goes along with my reform proposal. I recommend that the Japanese government establish a permanent trade agency from the lessons learned in the TPP.

(2) Establishment of an advisory body to the Prime Minister

The establishment of an advisory body to the Prime Minister is a goal which reflects more the interests of exporting industries on Japan's trade policy by countering the political bias toward importing sectors. The current system already equips an advisory body which monitors unfair foreign trade measures, called the "Subcommittee of Unfair Trade Policies and Measures;" however, this advisory body is a mere subsidiary body to advise the Minister for Economy, Trade, and Industry. This limitation results in marginalization of the interests of exporting industries within the Japanese government because the recommendations from the Subcommittee are not necessarily shared with the relevant ministries other than METI.

This reform proposal aims at countering the political bias toward importing sectors. To restore the balance of the interests between the importing and exporting sectors, the interests of exporting sectors must be much more emphasized. An advisory body can work as an intermediary to promote the interests of a specific group. In the example of the TPP, the proponents for the TPP

utilized the Council for Promotion of Regulatory Reform as an intermediary. After the announcement of Japan's participation in the TPP, JA strongly lobbied LDP politicians and formed a strong voice against the TPP. LDP politicians lobbied by JA came to succeed in adopting resolutions in the Diet, which demanded that five sensitive agricultural products (i.e. rice, wheat, beef, pork, and dairy) had to be exempted from the elimination of tariffs.[57] To counter opponents, supporters for the TPP inside the Abe Administration encouraged the Council for Promotion of Regulatory Reform to propose a drastic regulatory reform in agricultural policy, including the abolition of JA-Zenchu (the Central Union of JA). Finally, the Abe Administration made a success in the ratification of the TPP by quieting the opponents, presenting a much harsher choice to them. This illustration exemplifies the effectiveness of an advisory body to moderate a political bias. The council in this example deals with domestic reform agenda; however, we can expect a similar effect by juxtaposing the interests of exporting industries with those of importing sectors through an advisory body. The establishment of an advisory body to the Prime Minister regarding unfair foreign trade measures allows decision-makers to choose to promote legalism.

(3) Creation of a formal petition system from industries

A formal petition system will redress the lack of legal accountability. Although industries are free to appeal their concerns over foreign trade measures to METI even in the current system, METI holds large discretion over how to handle these petitions.[58] In other words, the lack of legal accountability is a determinant of the top-down relation between the government and industries. The creation of a formal petition system will reduce METI's discretion by obliging it to explain the government's decisions.

A similar proposal was made by the Japan Business Federation (*Keidanren*) in 2004.[59] METI opposed the establishment of a formal petition system in order to maintain its dominance in screening cases. However, the refusal to the proposal has ironically resulted in weak bargaining power in interagency consultation. The Japanese government should take this proposal seriously in order to develop legalism.

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[57] See the resolution on the House Standing Committee on Agriculture, Forestry and Fisheries. http://www.shugiin.go.jp/internet/itdb_rchome.nsf/html/rchome/Ketsugi/nousui025650A4D790637249257B5200029CA6.htm (Accessed on Feb. 23, 2018)

[58] Note that Japanese legal system has already imported a petition system for anti-dumping, countervailing duties, and safeguarding. However, the coverage under which Japanese industries are able to file their concerns on foreign trade measures are limited to these.

[59] Nippon Keidanren, "Call for a Petition System for Initiation of Investigations Regarding the Unfair Trade Practices of Foreign Nations," February 13, 2004. https://www.keidanren.or.jp/english/policy/2004/016.html (Accessed on Feb. 23, 2018)

5. Conclusion

In this paper, I have explored answers to the following questions: (1) why Japan has pushed itself into legalism in the arena of international trade; (2) what factors have made Japan less litigious in the arena of international trade; and (3) what institutional reforms are possible to further push its legalism in formulating international trade law.

Firstly, it is found that the establishment of the WTO in 1995 has largely contributed to Japan's legalism in international trade. The manifestation that unilateral measures and VERs are prohibited under WTO law and the increased enforcement of the WTO DSM mechanism due to the "reverse consensus" system has granted the Japanese government a powerful instrument to resist unilateral claims from the U.S. In addition, the establishment of the WTO has also operated favorably in the relation with China. The sizable benefit maintained by being in the WTO has made it hard for China to resist Japan's claim to separate political and economic issues. Despite Chinese intentions to use trade policy as a sanction toward Japanese actions on territorial issue, China finally corrected its trade policy to be consistent with WTO law within the due determined by the WTO DSM.

It is also found that the large discretion of the Japanese government is a significant factor to explain why Japan is less litigious in the WTO than other developed countries in light of the fact that the government is more inclined to be concerned about the deterioration of diplomatic relations resulting from filing a trade conflict with the WTO than any exporting industries. The features of the decision-making system over Japan's trade policy, such as overriding and fragmented authority over trade policy, the lack of legal accountability on trade policy, and the biased political interests in protection of agricultural products, keep bureaucratic discretion large and leads to the less litigious tendency of the Japanese government.

In the interests of pursuing further legalism, I have made three proposals on institutional reform: (1) the creation of a one-stop agency dealing with trade policy; (2) the creation of an advisory body to the Prime Minister regarding unfair foreign trade measures; and (3) the establishment of a formal petition system from industries. All my recommendations aim at reflecting the interests of exporting sectors more, which are the strongest supporters for legalism. The first proposal targets gathering the fragmented and overriding authority over trade policy. The second proposal aims at restoring the balance of the interests of the importing and exporting sectors. The third proposal helps to increase the accountability of the government, which leads to increasing the chance for exporting interests to be reflected more in trade policy. It seems that the Japanese government has moved in the right direction in the TPP negotiation. For example, the establishment of the TPP Headquarters largely eradicates interagency bureaucracy among ministries. In order to take a lead in formulating the international legal trade regime, Japan should develop its legalism further.

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