Research Proposal

I. Research Question

In 1994 the member governments of the General Agreement on Tariffs and Trade (GATT) agreed to replace the loosely structured GATT with the World Trade Organization (WTO)\(^1\). A new, more formal organization to govern international trade, the WTO differs from its GATT predecessor in several significant ways, most notably in the rules and procedures it sets forth concerning the settlement of disputes between member governments. Indeed, the WTO’s rules and procedures for settling disputes, as outlined in the “Understanding on Rules and Procedures Governing the Settlement of Disputes” (DSU), are far more detailed and formal than were GATT’s. Under GATT, member governments had the opportunity to bring their disputes before a panel. The panel’s rulings on a particular dispute, however, were not legally binding. The WTO, and more specifically the DSU, not only gives member governments an automatic right to bring their legal complaints before a dispute settlement tribunal, but also makes the legal rulings by tribunals binding upon the parties.

The creation of the new WTO dispute settlement procedure serves as the basis for my research project. Specifically, I am interested in researching how the new rules and procedures for settling disputes, as outlined in the 1994 DSU, have affected the way member governments negotiate trade disputes.

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\(^1\) The agreement establishing the WTO is the Marrakesh Agreement Establishing the World Trade Organization, in Results of the Uruguay Round of Multilateral Trade Negotiations (1994).
II. Literature Review

The creation of the WTO's new dispute settlement system has attracted the attention of several scholars, and has sparked a considerable amount of debate within the academic community. Despite the wide-spread attention the new rules have received, however, not much literature currently exists on how the changes set forth in the DSU have affected the way members governments negotiate trade disputes. Virtually no literature exists on whether and how the change from GATT to the WTO, and the creation of binding dispute settlement procedures, has changed the tactics that countries use when negotiating trade disputes. Similarly, no literature exists on whether the creation of a binding dispute settlement procedure has increased or decreased the tendency of member governments to settle disputes bilaterally, and outside of the GATT/WTO framework.

Rather than focus on the actual process of negotiation that member governments undergo when settling disputes, and attempting to determine if and how that process has differed since 1994, most scholars and researchers have limited themselves to simply gathering data on how the number and types of disputes filed under the WTO, differ from those filed under GATT. When comparing the number of disputes filed under GATT with those filed under the WTO, researchers have repeatedly found that cases are now filed more frequently under the WTO, than they were under GATT (Hudec, Busch and Reinhardt, Reinhardt, Sevilla). In his 1999 study of the first three years of the WTO, for example, Robert Hudec found that the volume of dispute settlement proceedings under the WTO was 90% greater than the highest volume of proceedings under GATT (Hudec, '99 16). He then attributes this increase in volume to the fact the Uruguay Round created several new legal obligations for member governments to abide by. As he reports in his study, of the 46 additional cases filed under the WTO, 20 (43%) of them were based on
“new obligations.” Using this data, Hudec concludes that substantially all the increase in WTO litigation can be traced to the new or intensified obligations of the Uruguay Round” (Hudec 21).

Several other scholars share Hudec’s contention that the number of trade disputes filed under the GATT/WTO is increasing. In his 2000 study, for example, Reinhardt indicates that since 1988, more disputes have been initiated under GATT and the WTO, than were initiated under the entire first 40 years of GATT. Reinhardt views this growth as a function of the rise in GATT/WTO membership, and in the increasing trade dependency of states (Reinhardt 3). He does not view the increase as a resulting from the 1994 Dispute Settlement Understanding’s institutional reforms. This view that the recent increase in the filing of trade disputes is simply a function of the increase in GATT/WTO membership, and that it cannot be attributed to institutional reform, however, is not universally shared.

Unlike Busch and Reinhardt, some scholars, such as Sevilla, view the recent increase in the filing of disputes as a direct result of the 1994 Dispute Settlement Understanding’s institutional reforms. In her 1998 study, Sevilla contends that there is a direct correlation between the 1994 reforms and the recent increase in the filing of disputes. According to Sevilla, by making panel rulings legally binding, the 1994 reforms have reduced the transaction costs countries incur when filing disputes. This provides member governments with a greater incentive to file disputes with the WTO, and makes bilateral negotiation less attractive (Sevilla 8-10). While Sevilla may be correct, the only way for the academic community to determine whether the 1994 reforms actually encourage countries to file complaints with the WTO, is to closely examine the negotiation process that member governments undergo when attempting to settle their disputes. Only by viewing the actual filing of a complaint with the WTO as part of a larger attempt by countries to settle their disputes, and by determining at what point in the
negotiation process countries decide it is in their interest to actually file a complaint, and comparing that point, to the point at which countries chose to file a similar complaint with the GATT, can the academic community determine if the 1994 reforms do in fact encourage countries to file complaints with the WTO. To date, however, this has not been done.

The disagreement over why the number of disputes filed with the GATT/WTO is increasing may be viewed as part of the larger debate currently taking place within the academic community over the scope of dispute settlement regime change. While some scholars believe the institutional changes resulting from the creation of the WTO and the DSU have been large in scope, and have significantly altered the way countries initiate and settle disputes, others disagree. Hudec, for example, has repeatedly argued that scholars tend to “overstate the difference between the new procedure and its GATT predecessor” (Hudec, ’99 4). According to Hudec, by the end of the 1980s, GATT had all ready developed its dispute settlement procedure into a “powerful legal instrument” (Hudec, ‘99 8). More significantly, Hudec contends that although, under GATT, the decisions of panels were not legally binding, countries almost always chose to abide by them. This is because a strong “norm of compliance” existed within the GATT community that compelled member governments to abide by the rulings of panels. The existence of this “norm” strengthened GATT’s dispute settlement system, and compensated for any procedural weaknesses (namely the fact panel rulings had to be adopted by consensus and were not legally binding,) that existed. As Hudec states,

the procedural weakness of the GATT procedure did not really have all that much impact on its overall success. Although the procedure was not compulsory, defendant governments almost always decided to cooperate with it. They did so under the pressure of a strong community consensus that every GATT member should have a right to have its legal claims heard by an impartial third party decision-maker. (Hudec 9).
From Hudec’s view, because members typically chose to comply with the rulings of GATT panels, international trade should not be significantly affected by the 1994 changes.

Like Hudec, Reinhardt also contends the institutional reforms set forth in the 1994 Dispute Settlement Understanding have not significantly changed the way member governments settle trade disputes. To support this assertion, Reinhardt cites data indicating that in the “developed world,” the number of disputes filed with the WTO is no greater than the number of disputes filed under GATT, and that there has been no increase in individual states’ propensity to file disputes over time (Reinhardt 19). Reinhardt and others attribute this lack of increase to the fact that under the WTO, member governments do not have any greater incentive to file complaints, than they did to file them under the GATT.

Although panel rulings are now legally binding, the WTO still lacks “enforcement power,” meaning there is no established mechanism or body to enforce panel rulings (Reinhardt 9). Additionally, the DSU creates many opportunities for member governments to delay the implementation of panel rulings (Horlick). Countries can delay the implementation of panel rulings for months by filing for appeal, and/or by requesting arbitration over either the amount of compensation they should be required to pay, or over the amount of time required for “reasonable compliance” with a panel ruling (Horlick, Reinhardt, Walther). Thus, and as Reinhardt and others have indicated, just as under GATT, under the WTO, there is still no guarantee that when a panel rules in a particular country’s favor, that country will gain anything from the ruling, as other countries can simply delay the implementation of panel rulings, or refuse to comply with them altogether.

In addition to disagreeing over whether the institutional reforms implemented in 1994 encourage countries to file disputes with the WTO, scholars also disagree over whether the given
reforms make it easier for member governments to settle disputes bilaterally, without having to depend on the rulings of a panel. Focusing on the WTO's new "consultation process," several scholars conclude that the 1994 reforms have in fact made it easier for countries to resolve their trade disputes. As these scholars point out, the Dispute Settlement Understanding of the WTO contains several new rules and procedures designed to encourage countries to settle disputes on their own (Parlin 566). Under the WTO, the dispute settlement process begins when a member government formally requests WTO consultations with another member. Once this request for consultations has been filed with the Dispute Settlement Body, members have sixty days to bilaterally negotiate an agreement. Only after sixty days have passed, and if no agreement has been reached, does the complaining party have the right to request the establishment of a dispute settlement panel.\textsuperscript{2} By mandating that members undergo a sixty day period of consultation before requesting the establishment of a panel, the drafters of the DSU were attempting to promote the resolution of disputes without recourse to panels (Parlin 566).

According to a study conducted by Christopher Parlin, 53\% of all disputes that are filed with the WTO are resolved during the consultation process, and without a panel ruling (Parlin 567). Interestingly, the percentage of cases settled under the WTO, is significantly higher than the percentage of cases settled under the GATT. According to Hudec, only 64 (31\%) of the 207 complaints filed under the GATT from 1948-1990, were settled bilaterally (Hudec,'93 275). To Parlin and others, this suggests that "the WTO has been quite successful in resolving disputes without resorting to a panel" (Parlin 567). Other scholars disagree with this assertion, and argue that the WTO's new consultation process does nothing to encourage the settlement of disputes. Olin Wethington, for example, holds that, "parties leverage to encourage settlement derives

\textsuperscript{2} See article 4 of the "Understanding on Rules and Procedures Governing the Settlement of Disputes," Marrakesh Agreement Establishing the World Trade Organization.
primarily from the threat of a panel decision on the merits, rather than from the fact that opposing parties have been required to sit down and talk” (Wethington 583). To support this assertion, Wethington cites data indicating that of the thirty two cases settled without a panel ruling from 1994-1999, nineteen of them were not resolved until after the complaining party had formally requested the establishment of a panel. This means that, “the Article 4 consultation process has facilitated settlement without requiring the panel process in less than 4.7% of the disputes brought to the WTO” (Wethington 584). From Wethington’s view then, it is not because of the consultation process that countries now tend to settle disputes bilaterally. Rather, they settle disputes because they fear that if they do not do so, a panel will issue an unfavorable, binding ruling against them.

Regardless of whether it is the threat of an adverse ruling, or having to go through the consultation process that has made it possible for a majority of the disputes filed with the WTO to be settled without recourse to a panel, the mere fact that member governments settle disputes bilaterally, and at a significantly higher rate than they did under the GATT, is very interesting, and presents several unique opportunities for research into why this is so. Yet, before one can understand why countries are able to settle their disputes bilaterally, he or she must gain adequate insight into the actual process of negotiation that member governments undergo when settling disputes, and compare the process to that which member governments underwent under the GATT. By comparing the two processes of negotiation, one can gain insight into whether and how the DSU’s institutional reforms have affected the way countries negotiate trade disputes. To date, however, no study has done this. There is, therefore, a lack of information available on how such institutional reforms as the introduction of a mandatory consultation process and binding panel rulings, have affected trade negotiations.
III. Research Plan and Operations

The goal of my research project is to gain a deeper understanding of how member governments negotiate trade disputes under the WTO, and to determine if and how the ways in which countries currently negotiate disputes, differs from how they negotiated disputes under the GATT. To accomplish this goal, I will use a qualitative research method. More specifically, I will select two countries, and study how those two countries negotiated with one another over a particular trade dispute under the GATT, and compare my findings to how they negotiated with one another over a similar trade dispute under the WTO. In order to determine whether and how the institutional changes resulting from the 1994 DSU have affected the way countries negotiate trade disputes I will keep as many variables constant as possible. To the best of my ability, I will ensure that the only variable that changes is time, or more specifically, whether the countries involved in my study were negotiating under the GATT, or whether they were negotiating under the WTO. For each of the two disputes/negotiations I study (e.g. one dispute taking place under the GATT, and one dispute taking place under the WTO), the countries involved will remain constant, as will the particular trade issue over which they negotiated. Doing this will allow me to attribute any changes in the ways the two countries negotiate with one another to the DSU’s institutional reforms.

While I am not completely sure which countries and which disputes I will focus on, I do have several possibilities in mind. At present, the most promising of the many disputes I have studied, are those between Japan, and the United States, and Japan and the European Union, over Japan’s taxation of alcoholic beverages. During the GATT period, both the United States and the European Community claimed that Japan’s liquor tax regime unfairly favored domestic distilled
Information I need in order to study the actual processes of regulation:

- Information on above disputes and determine for which of them I will be able to get the
- gather the most information. Over the next few weeks, I intend to gather as much information as
determination on which country disputes to study, I will see for which of the above cases I can

Union over hormone treated beef imports (1987 and Present).

Before making a final

United States and Mexico over hormone (1979 and 1995), of the United States and the European

Union over hormone treated beef imports in (1986 and 1995), the

above disputes, I have identified other possibilities. These possibilities include regulations

should I not be able to gather enough information about the regulation process in the

raises were adjusted to more equal levels, than they were when adjusted after the GATT rulings.

lowered its tax on imported beverages and raised its tax on shocked. This time, however, the tax

beverages. The WTO panel found Japan’s tax regime discriminatory, and Japan once again

establishment of a panel to address Japan’s discriminatory tax regime of imported alcoholic

Union under the WTO. In September of 1995 the U.S. EU, and Canada requested the

A similar dispute has been settled between Japan, the United States, and the European

whiskey and other imported alcoholic beverages (Hucce, 93, 399-40).

it charged on domestic spirits. As a result, Japan raised its tax on shocked and lowered its tax on
discrimination, and ordered Japan to cut taxes on imported alcoholic beverages to the same level

the EC over Japan’s Alcohol Taxation System. The panel ruled that Japan’s higher tax regime was

established at the request of the European Community (EC) in order to settle a dispute between Japan and

much higher than shocked. Japan’s lowered domestic beverage. In 1987 a GATT panel was

alcoholic beverages over imported ones by taxing whiskey and other imported beverages at a
When studying the negotiation process for each of the two disputes I do end up selecting, I will pay close attention to the negotiation strategies that each party uses. The following are some questions that I will most likely ask and attempt to answer for each case:

1. Did the parties involved use value-creating or value-claiming tactics?
2. At what point in the negotiation was a complaint filed with the GATT/WTO?
3. Did the parties reach an agreement bilaterally, without recourse to a panel?
4. If a bilateral agreement was reached, was it reached before or after the request for a panel?
5. Which party made the greatest concessions?
6. Where threats used during the negotiation? At what point?
7. For the dispute that takes place under the WTO, did either party feel threatened by the prospect of a binding panel ruling? If so, did the party make concessions?

To answer the above questions, I will consult newspaper, journal, and magazine articles published during the time period that each dispute took place. I will also obtain background information and, when appropriate, primary documents (panel rulings, etc.) from the WTO’s web-site. Since the United States is likely to be one of the countries involved in my study, I will also contact the Office of the United States Trade Representative to see what primary sources of information they can provide to me, and will possibly conduct interviews with negotiators.

After gathering the information necessary to answer the above questions for each dispute (e.g. the dispute under the GATT and the dispute under the WTO), I will compare my findings, and determine if and how they differ for each case. This will allow me to conclude whether and how the institutional reforms resulting from the change from the GATT to the WTO, have affected the way member governments negotiate trade disputes. It is my hope, that when I conclude my research, I will be able to answer the following pressing and currently unanswered questions:

1. Have the DSU’s institutional reforms encouraged countries to file complaints with the WTO?
2. Are countries more or less likely to settle disputes bilaterally under the WTO, than they were to settle them bilaterally under GATT?
3. Does the WTO’s mandatory consultation period really encourage countries to settle disputes, or is it the threat of an adverse, binding panel decision that does so?
4. Are countries more likely to use value-creating tactics under the WTO, than under the GATT? Are they more likely to use value-claiming tactics?
5. Do countries file complaints with the GATT/WTO to gain leverage over their counterpart in a trade negotiation?
Works Cited


