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Legalization in context: The design of the WTO's dispute settlement system

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Abstract

This article asks why the dispute settlement provisions of the multilateral trading system underwent significant reforms during the negotiations that led to the creation of the World Trade Organization (WTO) in 1995. Why did the leading trading powers accept a highly legalized system that departed from established political–diplomatic forms of settling disputes? The contribution of this article is threefold. First, it complements existing accounts that exclusively focus on the United States with a novel explanation that takes account of contextual factors. Second, it offers an in-depth empirical case study based on interviews with negotiators who were involved and novel archival evidence on the creation of the new WTO dispute settlement system. Third, by unpacking the long-standing puzzle of why states designed a highly legalized system, it addresses selected blind spots of the legalization and the rational design literatures with the aim of providing a better understanding about potential paths leading toward significant changes in legalization.

Keywords

Appellate Body, international courts, legalization, World Trade Organization

Introduction[1]

When in 1995 the World Trade Organization (WTO) opened its doors, the organization presented a reformed dispute settlement system (DSS). Some observers suggested that the new system represented the 'jewel in the crown' of the organization, others called it a 'radical reform' (Hudec, 1993: 362). Compared to dispute settlement provisions in other fields of international law, the WTO's DSS is characterized by a high level of legalization, streamlined and timely processes, and a high degree of formal compliance with treaty obligations.

Given the importance of the legal system in the WTO, there is little empirical work on explaining the creation of the DSS. Thompson (2007) tackles the question: why did the United States accept a highly legalized international court that has the authority to demand that the United States (in case of treaty violation) change its domestic laws? Using a two-level game metaphor, he suggests that US negotiators attempted to tie

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Congress' hands by using international law as a lock-in strategy. Goldstein and Steinberg (2008: 265) argue that the United States championed the negotiations 'contingent on a crucial proviso—that the substantive rules adopted […] had to be adequately specific and reflect U.S. policy objectives'. For Goldstein and Gowa (2002: 164), the US support for the new DSS was explained by a loss of credibility that led the United States to push for 'an institutional fix to demonstrate the US commitment'. Finally, Pelc (2010) similarly suggests that the legitimacy of US trade policy had to be improved through active support of the WTO DSS. While these are all plausible arguments, they are characterized by an exclusive focus on the United States and by a lack of conclusive evidence.

This article presents an alternative account to a US-centered argument and focuses on the context as an important explanatory variable for the observed outcome. Two contextual factors stand out. The article puts forward the argument that in order for a legalization leap to occur, two conditions are required. First, we need to observe a negotiation environment that privileges cooperative forms of bargaining. Second, expectations of key actors need to converge over time. This process is driven by experiential learning, namely experience with the existing DSS that leads to an updating of information and in turn to changes in preferences. I test this argument with new evidence from the negotiation process that led to the WTO's new DSS.

Legalization leap: Puzzling reform outcomes?

The term legalization encompasses three components: (1) obligation; (2) precision of international law; and (3) forms of delegation to the international level (including dispute settlement) (Abbott et al., 2000). Four changes that capture a significant increase in legalization deserve special mention.

First, the WTO offers a so-called 'right to a panel'. In the General Agreement on Tariffs and Trade (GATT) system, parties had to agree on bringing a case and convening an expert group of three panelists. This led to a de-facto veto over the creation of ad hoc panels. Second, the WTO created a standing appeals institution (Appellate Body (AB)) on top of the existing ad hoc panel system, where any of the disputing parties can refer the case to the AB for an additional review. Third, the findings of the dispute settlement bodies (both panels and AB) are quasi-automatically binding. During the GATT times, it took consensus by GATT contracting parties for a panel report to be adopted and hence legally binding. While panel decisions today can be appealed to the AB, decisions by the panels or the AB cannot be easily overturned. WTO Members would have to agree by consensus not to accept the ruling (so-called negative consensus) or agree among themselves on a different interpretation. These are, however, extraordinarily high thresholds for correction. Fourth, the rulings are implemented through a decentralized sanctioning mechanism. The DSS foresees implementation procedures in which the winning party is allowed to apply sanctions to remedy the situation in case of non-compliance by the losing party. In case of disagreement over the exact implementation, the AB (functioning as an arbitration panel) can again be called upon to engage in a compliance review.

Were these reforms foreseeable? Interviews with involved participants of the negotiations provide ample evidence that the ambitious outcomes could not have been predicted at the outset of the process. Clearly, the original idea to fix the system and the preferences of key actors can hardly explain final outcomes. The main GATT official who served the negotiation group remembered, 'I was very surprised to see agreement on issues such as

automaticity in accepting rulings'.[2] Another Secretariat official put it more strongly, 'I couldn't believe it myself. Why had the US accepted the creation of the Appellate Body?'[3] He stressed that 'the US argued in the past that the GATT will never be a tribunal'.[4] This article investigates the factors that account for the change of positions of the parties that eventually led to this remarkable and unprecedented leap in legalization.

Argument

The argument builds on the notion that context matters in the design of international institutions (Copelovitch and Putnam, 2014; Elsig and Eckhardt, 2015) and combines insights from the Principal-Agent (PA) and negotiation literature. The argument is presented in two steps. First, I focus on the determinants of the negotiation set-up which allow or hinder the development of a constructive negotiation environment. Second, I argue that experience within existing institutions provides important clues for negotiators in an attempt to find consensual solutions.

The negotiation environment: Mandates, autonomy, and negotiation techniques

Following conventional PA theory, I posit that the type of delegation defines the degree of autonomy for negotiators. There are multiple ways to measure delegation and unfolding autonomy (Hawkins et al., 2006), but here I focus on the mandate. The type of mandate relates to the nature of information agents receive from principals when starting negotiations. Information is a function of how clearly the objectives are communicated by principals. With respect to substantive preferences (such as gaining better access to a foreign market), states might have clear expectations regarding the type of market access concessions they wish to pursue. In this case, their mandate is most likely 'rule-based', 'the principal instructs the agent on exactly how the agent is supposed to do its job' (Hawkins et al., 2006: 27). This information is usually also available to interest groups and they will closely follow every step the negotiation agent takes. As a result, I expect little activism by the agent.

However, if the principal lacks clear ideas about the exact treaty design outcome, he or she will define general objectives for the agent to pursue (such as to fix the system). The latter type of mandate is called 'discretion-based' delegation. In this scenario, I expect that activism by agents is more pronounced. This mandate-based autonomy allows agents more wiggle room to table proposals without running the risk of constant and direct criticism from principals.

Autonomy not only translates into more activism but assists in the development of trust among negotiators and emergence of negotiation techniques that allow negotiations to evolve. Discretion-based mandates push agents to explore cooperative approaches in negotiations. Research has shown that with growing autonomy, the likelihood of value-creating (integrative) negotiation tactics relative to value-claiming (distributive) ones also increases (Odell, 2009). Distributive attempts are characterized by a defensive or posturing strategy. Integrative behavior, by comparison, allows for the development of general rules that are compatible with a great number of negotiation partners' interests and makes concessions-trading among negotiation partners—in order to overcome obstacles—more likely. Integrative negotiations allow for the exchange of viewpoints and support deliberation, and also allow for trust to build within negotiation groups.

Experiential learning and expectation convergence

While autonomy and trust can provide important stimulus for moving negotiations forward, they are not sufficient for achieving agreement on ambitious reform steps. Over the negotiation period, expectations need to converge so that the final outcome will be pareto-superior. The question is, how do agents estimate the effects of institutional re-design and build expectations about future behavior of their own governments and other states? Building on Elsig and Eckhardt (2015), I argue that agents will attempt to anticipate the distributional effects by drawing on existing experience. They will observe current actor behavior within existing institutions and infer how the projected design change might impact on existing practices. This is similar to what Copelovitch and Putnam (2014) describe more generally as prior agreements and behavior that matter for future cooperation. In other words, agents engage in a form of 'experiential learning'.[5] I consider learning as a form of Bayesian updating (Dobbin et al., 2007: 460), and expect that information is drawn from both observations as well as experience with the functioning of the current system (GATT DSS). Negotiators' proposals are coloured by how they have navigated the system in the past and how they interpret the behavior of other international organization (IO) members. This information is updated through observing the overall approach and the record of cases their countries have been party to in the past and during the negotiation period. If the updating of the information leads to a change in expectations about distributional consequences, a shift in country position may occur.

In summary, I expect that autonomy will lead to more constructive and value-creating bargaining characterized by a significant level of trust. This trust allows proposals to be developed in the direction of a significant and ambitious reform (legalization). The negotiation environment, however, is not sufficient for agreements to occur. Expectations of key actors need to converge as negotiators learn from experience (experiential learning) with the actual system and from observing the approach powerful states take.

The design of the new WTO DSS

In order to trace the causal impact of the above contextual factors, I present a single in-depth case study focusing on the creation of the WTO's DSS, and relying on process tracing (Mahoney, 2012). This exercise is not meant to be a direct test of the argument outlined above, but to illustrate through 'causal-process observation' (CPO) the plausibility of the argument (Collier et al., 2004; Mahoney, 2010). Two types of CPO tests stand out: first, I aim to gain leverage for causal inference by focusing on the explanatory variables (autonomy and experiential learning). This allows us to understand whether these causes were present (and control for alternative causes). Second, CPO allows us to trace the suggested causal pathway and focus on intermediate outcomes from the cause to the result.[6] Does autonomy causally lead to more integrative negotiation approaches? In addition, what information-related processes push negotiators to believe that a move away from the status quo is to their benefit? In sum, a case study allows us to trace causal explanatory variables and mechanisms described in the theoretical section. It also allows controlling for alternative explanations leading to a legalization leap and uncovering potentially omitted variables.

The evidence collected and presented here is based on the interpretation of formal documents on the negotiations to reform the DSS. In addition, 19 elite interviews with involved negotiators from the core group of negotiators, and with former Secretariat

officials who followed the negotiations, provide key information for reconstructing the negotiation set-up, mapping preferences of different actors and singling out events that affected the negotiations. Finally, triangulation and new evidence collected from the side of the GATT Secretariat allows us to correct for potential biases introduced by interviews with the stakeholders involved. I present the empirical results in three steps: first, I briefly summarize the key outcomes; second, I map the positions of the main actors and present the key developments during the negotiations; third, I discuss, based on interviewee evidence, how the negotiation environment led to the tabling of ambitious proposals and the emergence of trust among negotiators, and how experience with the system led to important dynamics that created consensus about the need for a legalization leap.

Main outcomes of the negotiations

The reform of the DSS was part of the Uruguay Round negotiations under the auspices of the GATT. The Uruguay Round negotiations (1986–1993) brought about important new obligations and covered areas that had not been tackled in the past, including trade in services, the protection of intellectual property rights, new agreements on technical barriers to trade and standards related to sanitary and phytosanitary rules, liberalization in agriculture, textiles, and so on. In terms of strengthening 'enforcement', the negotiations resulted in the agreement on the dispute settlement understanding (DSU). Four elements stand out from the DSU negotiations: (1) surrendering the veto power to stop the launching of disputes (right to a panel), (2) automaticity of recommendations by panels (and the AB) (negative consensus rule), (3) the creation of the AB and (4) rules governing implementation.

Milestones of the negotiations

Preparations and the mandate. When preparations for the negotiations started in the early 1980s, many parties considered that the DSS, based on the 1979 Understanding, was not functioning well. The original reform intentions were rather general.[7] Against this background, the 1986 ministerial conference that officially launched the negotiations suggested that the objective of the negotiations, in respect to dispute settlement, was:

> to improve and strengthen the rules and the procedures […] while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines […] negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations […].[8]

Start of the negotiations and early harvest. The negotiations on dispute settlement officially started in April 1987 in Group 13 under the chairmanship of Julio Lacarte, the Ambassador of Uruguay. Three types of views were voiced in the first meetings: one group continued to see the system as a conciliatory system (not a judicial system);[9] a second group suggested mutually reinforcing mechanisms such as consultations, mediation, conciliation, and arbitration; a third group favored designing rules with legally binding effects. Group 13 initially tackled less controversial issues such the overall nature of the DSS and procedural issues related to panel establishment, its work, and the role of developing countries and third parties (Stewart and Callahan, 1993: 2726).

While these discussions proceeded under the radar, in August 1988 the United States Congress enacted the Omnibus Trade and Competitiveness Act. It led to amendments in Section 301 of the 1974 Trade Act with the aim of providing greater unilateral enforcement of market access for US products and protection of intellectual property rights (Hudec, 1993: 226–227; Stewart and Callahan, 1993: 2760–2763). The European Union (EU) and other GATT parties criticized an alleged recourse to unilateral actions inconsistent with GATT principles (Stewart and Callahan, 1993: 2762). The United States responded to the critics that unilateral action was 'only necessary when GATT rules failed to provide an adequate remedy to enforce US rights, the United States seeks to strengthen GATT rules to cover new areas and ensure adequate settlement of disputes'.[10] This external event brought movement to the negotiations.

Ministers met in Montreal in December of 1988 to take stock of the negotiations and agree on areas of consensus. The only substantive issue was the agreement on the automaticity in panel establishment (Stewart and Callahan, 1993: 2745–2750). As Montreal ended in a deadlock over issues not related to the DSS, Ministers reconvened in April 1989. It was agreed that procedural reforms would be implemented as of 1 May 1989 until the end of the Round, but would remain provisional (Stewart and Callahan, 1993: 2759).

Turning toward more substantive issues and a new idea: The AB. The discussions within Group 13 picked up again in May 1989. Three topics dominated the work program: First, how should the adoption of panel reports be dealt with? Second, how should a review mechanism be designed? Third, how can compensation and retaliation measures give sharper teeth to implementation? Most importantly, these issues remained 'linked' until the end of the negotiations.

In late 1989, some negotiators started to propose ways of controlling the quality of panel reports in case more automatic adoption did occur. Originally, the discussion centered on modifying the roster of panelists. Later, negotiators discussed other options for controlling the quality, and in December 1989 the idea of an appeals instance was introduced. One delegation (Canada) outlined three different options. First, it suggested 'the establishment of a time-limited review […] with procedures that would discourage losing parties from routinely using the review process'.[11] This suggestion reflected the concern that reviews would only be used for prolonging the process unduly. Second, it proposed as an alternative 'the establishment of a standing review tribunal or a roster of panelists from which the Director-General would select an appellate panel on a case-by-case basis'.[12] This was the first indication of plans for a separate body, although still ad-hoc. Third, it launched a debate about a requirement that panels provide for 'an interim report […] to the parties for comment, in advance of issuing a final report'.[13] This suggestion reflected common concern among negotiators about bad panel reports and how they could be corrected during the process (interim report).[14] The issue of an interim report was discussed before the idea of the appeals instance began to receive more attention.[15]

Over time, all the important parties embraced the creation of an appeals mechanism (Stewart and Callahan, 1993: 2767–2768). The view developed within the group that an appeals instance could be of interest. The EC clearly supported such an appeal option for when parties believe panel decisions to be 'erroneous or incomplete'.[16] It supported the establishment of a group of experts who would be elected by the GATT Council, assisted by the Secretariat. They would review panel decisions, which would allow the EC to continue to control the composition. The United States was less enthusiastic, and

supported such a mechanism only if the appeals instance were for 'extraordinary cases' where a panel report contains legal interpretations that are questionable.[17] The review would further be limited to specific legal questions rather than to the entire report including factual assessments. This provision was another means to exert *ex ante* control over such an additional body. The former Japanese negotiator Saiki (1996: 411) writes, 'a proposal to institute a review mechanism or an Appellate Body was […] apparently linked to the maintenance of the practice of adopting panel reports by consensus'. It was meant to increase the acceptance of reports. However, the attention paid to designing a review option increased during the course of negotiations as forms of more automatic adoption became a likely option. Saiki (1996: 413) argues that moving away from solely focusing on the quality of reports, 'participants grew supportive of an idea to establish an appellate body as a safeguarding device against a new situation in which panel reports would be adopted quasi-automatically'.

While the issues of the 'adoption of rulings' and 'appeal' became inter-linked, the other issues that occupied the Membership were the questions of how to increase the odds of implementation and how to deal with the possibility of retaliation. Early on, the US negotiators suggested consultations between parties; if no agreement was reached then the winning party was entitled to compensation/retaliation. The United States further proposed that the 'winning party has an automatic right to retaliation if the other party failed to comply' (Stewart and Callahan, 1993: 2770).[18] Other negotiators - including the EC, Brazil, India, and Japan - strongly disagreed with this proposal, and suggested that the Council should authorize the withdrawal of concessions if implementation did not occur. Canada suggested arbitration to mediate between both positions.[19] In the end, the solution to implementation was a process in which the WTO Members in the Dispute Settlement Body would accept quasi-automatically the withdrawal of concessions, but recourse to different types of arbitration was possible for establishing the time-frame for implementation and for establishing the level of compensation. As for implementation, many countries demanded the strengthening of the political commitment to comply with rules and procedures that were negotiated. In particular, many Members feared that the United States would continue to rely on unilateral options further spurred by Section 301 of the Omnibus Act (Stewart and Callahan, 1993: 2777–2779). One GATT staffer recalled that 'The Norwegian Ambassador even read out loud some of the passages of the trade act to stress the need to address unilateralism'.[20] Many parties insisted on having strong wording in the final agreements to restrain the United States from resorting to unilateralism (Saiki, 1996: 414).[21] In the view of Pelc (2010: 92), 'Article 23 became the formal embodiment of the normative condemnation of unilateralism in the presence of a multilateral option'.

Reaching a final agreement. In July 1990, disagreement was still being reported on the:

> question whether Appellate Review Mechanism is necessary in order to overcome the blocking of the adoption of panel reports […], the question whether the right to retaliate in cases of non-implementation of panel recommendations should be automatic [… and the strengthening of the commitment by contracting parties […] to refrain from unilateral measures […].[22]

In the fall of 1990, Ambassador Lacarte produced another chairman text (19 October 1990) (Stewart and Callahan, 1993: 2779–2783): the text included, for the first time (although still in parentheses which suggested disagreement), the notions of negative

consensus on panel reports and the creation of an AB. There was also some wording related to obligations to strengthen the multilateral system (addressing unilateralism).

Later in 1990, the United States Trade Representative (USTR) reported to Congress about the progress of the negotiations, stressing, in particular, easier ways to invoke retaliation, time-limits, and the prospect of binding arbitration (see Stewart and Callahan, 1993: 2787–2788). The US Congress was mainly concerned that time periods in the DSU should be aligned with the time periods in the US Section 301 legislation, and that US demands for retaliation in cases it won would not be blocked by the process.[23] It was further suggested to Congress that automaticity would lead to quicker retaliation.[24]

Toward the end of 1991, parties moved toward agreement on the outstanding issues. However, the United States emphasized that 'the questions of decision making in the dispute settlement process and the draft text on "Strengthening of the Multilateral System" (*Article 23*) were issues that could not be resolved until the results of negotiations in all other areas were known'.[25] The US negotiators tried to water down the exact wording of Article 23. In late 1991, Director-General Arthur Dunkel submitted the Draft Final Act to the contracting parties for consideration.[26] As the contours of an appeals instance became accepted, negotiators started to draft more details regarding an AB, but time became an issue. The group stopped short of defining details regarding working procedures in the AB. The chief US negotiator reported that 'we ran out of time once the draft final act in late 1991 came out'.[27] Before the conclusion of the Round, mainly triggered by the Blair House Accord over agriculture between the United States and the EC in 1992 (Paemen and Bensch, 1995), the participants in the negotiations were asked in 1992 and 1993, as part of a legal drafting group, to finalize the texts (Stewart and Callahan, 1993: 2805–2808). This exercise involved largely technical revisions. However, questions related to the exact wording on requesting countries to follow the formal rules (Article 23 DSU) remained unresolved until the latest stage in the negotiations.[28] The agreement on the DSU as a part of the broader package was signed on 15 April 1994.

Key outcome: Legalization leap

The above section traced the negotiation process, highlighted key events, substantial changes and convergence of key actors' positions over time. In addition, it showed how the idea of the AB developed late in the negotiations and was a reaction to the acceptance of automatic adoption of panel reports. The next section focuses on the causal argument outlined in the theory section.

Autonomy and negotiation environment. As the United States and EC were involved in many GATT panels, they were the key actors in these negotiations. Other parties included Canada and Japan (as Member of the QUAD, i.e. Canada, European Union (EU), Japan, United States), emerging developing countries (such as Brazil, India, Mexico), and a number of other industrialized countries (including Australia, Switzerland, New Zealand). Negotiators worked with general mandates. The Canadian negotiator reported being told to 'make sure that the system works, we had no specific instructions'.[29] A US negotiator recalled that 'the guidance I got was very general, broad parameters'.[30] Japan for its part was mostly concerned about the United States acting unilaterally and the mandate reflected the broad objective to tame unilateralism.[31] The EC was rather skeptical about a move toward a more legalized system, not least because the negotiators were concerned that more stringent dispute settlement rules would be difficult for the agricultural support

system.[32] This concern was reflected throughout the negotiations by the insistence of the EC that for so-called non-violation complaints (which were mostly about agricultural measures) a different type of dispute settlement process should apply.[33] Overall, the EC mandate lacked clear guidance but was characterized by a defensive stance.

Evidence from interviews suggests that there were no explicit attempts to link DSS negotiations with other negotiations until late in the process. The Swiss negotiator described the environment in which the group operated as 'a world apart'.[34] Chief negotiators and interest groups at home were mostly concerned about the proposals on the table in other negotiation areas. The Japanese negotiator remembered that her chief negotiator only asked about progress in terms of containing unilateralism.[35] Washington did not closely watch over the negotiations. When staffers of the US Congress came to Geneva toward the end of the negotiations, they were much more concerned about market access and the continued use of US trade remedy law, in particular that the US anti-dumping practices would not be constrained by new obligations.[36] The US Congress was particularly concerned with dispute settlement in relation to trade remedies, but for a long time disregarded the negotiated draft texts on dispute settlement.[37]

While broad mandates (discretion-based delegation) coupled with a de-linking from other negotiations (in particular over market access and new behind-the-border rules) were important in enabling the emergence of a constructive negotiation environment, the existence of small groups and informality were instrumental in developing trust among negotiators, allowing ideas to be tabled and discussed at length. This environment fostered the development of an 'esprit de corps'. The EC chief negotiator Hugo Paemen wrote that in the context of dispute settlement, informal meetings were key to discussing sensitive issues among high officials (Paemen and Bensch, 1995: 167).

Canada was a pivotal actor as it was the only member that was at the same time a part of the De la Paix Group and the QUAD. The De la Paix Group was coordinated by Canada and included a number of interested parties, excluding the United States and the EC. There was agreement that Canada would 'hold the pen' and help guide the negotiations.[38] The proposal of the De la Paix Group was submitted 'as a proposal of interested countries in 1988' that formed the basis of the text accepted in Montreal later that year. There was a division of labor which developed between small informal groups. One US negotiator remembered, 'While the QUAD meetings allowed discussing contentious issues, the De la Paix Group provided many useful proposals to push negotiations forward. They had many meetings over breakfast and dinner'.[39] These types of informal meetings led to an 'increase of information in the group, to more open discussions […] and pushed members to engage with each other's arguments'.[40]

The negotiator from New Zealand recalled that there was a 'friendly atmosphere, it was less watched by capitals; […] you had an overall objective that was shared'.[41] The quality of exchange 'also allowed you to understand limits others had'.[42] Another US negotiator involved at this time summed up as follows: 'it was never as politicized as other areas; you didn't come in with antipathy. It was a group of technicians towards a common held goal (to fix the existing process)'.[43] One EC negotiator remembered that 'we had an enormous trust within the group'.[44] Another negotiator concluded that 'by the end of the negotiations, we all became friends, having spent most of our time locked in in Room F together'.[45]

Experiential learning and convergence of positions. As the argument suggests, overall autonomy and the negotiation environment contributes to developing ambitious reform ideas;

however, they are not sufficient for achieving agreement. Consensus over the re-design of institutions will materialize when contracting parties expect a move away from the status quo to be beneficial.

Negotiators were faced throughout the negotiations process with uncertainty. One negotiator put it as follows: 'We had no factual basis what happens after panels'.[46] The most important clues therefore came from existing GATT case law or, as the chief US negotiator put it, 'there is an incurable tendency to fight the old war and rewrite this experience with new rules'.[47] Past and ongoing panel cases strongly influenced the US view, which at the time could be characterized as that of an aggrieved member of the system that could not get action in the courts against the EC and some others.[48] Learning from this experience, the United States tried to address veto points for establishing panels, but also making panel recommendations binding. It also pushed for designing clear rules establishing that retaliation (in case of non-implementation) was possible. What is interesting is that the United States did not categorically demand full automaticity. The acceptance of automaticity grew over time. At the time of the Montreal Ministerial, the United States was still in favor of the 'consensus minus two' proposal. This proposal was much closer to the status quo than automaticity, characterized by negative consensus (the final outcome). US arguments suggested that blocking was not the result of 'fundamentally erroneous or inadequate panel conclusions', but unwillingness to implement. The concern about flawed panel reports, however, later dominated the discourse. On this issue, the United States first suggested the mechanism of an interim report. One US negotiator argued that 'we needed this instrument for the new system as we had it in the US-Canada Free Trade Agreement'.[49] While the AB idea was pushed by others, the main concern of the US negotiators was that processes would be unnecessarily prolonged and that creating another step in the process would not fit the time-frame of Section 301 (and therefore US internal legislation). Very importantly, the US negotiators were convinced that the United States would use the new dispute settlement as complainant with a fairly good chance of winning cases. The US 'chief negotiator's view was that we need a stronger DSM. She anticipated the US to be on the complainant side'.[50] Past experience and an optimistic anticipation about the future use of the system explains why the United States was favorable toward engaging in more legalization, notwithstanding the reluctance of the US Congress to submit its trade policy to the jurisdiction of international courts.

The EC was originally more reluctant than the United States to change the DSS. Before the Round, the EC had warned against taking an overly legalistic approach, as it felt that many of the existing rules made a number of its policies vulnerable to litigation. Its main negotiator in many instances pursued a laggard strategy which led to some frustration among other negotiators; he continued until the very end to retain a status quo position. However, the EC approach started to change after losing a panel case in the midst of the negotiations (see also Elsig and Eckhardt, 2015). This development led to important internal changes and re-orientation of an anti-law approach within the Commission. One negotiator remembered that the 'oilseed case in the end changed the balance between non-lawyers and lawyers'.[51] In this case, the EC was the defendant and lost. The well-known judge Pierre Pescatore acted in this case as a panelist and felt that the defense of the EC position was wrong and ridiculous.[52] He reported back to Brussels and went to see the President of the Commission and various Directorate-Generals. He told them that GATT panels had become more legalized and the EC representation lacked lawyers. He suggested that the Legal Service should become more involved.[53] This episode led to the setting up of a small litigation group for GATT matters within the division for External

Relations and Trade of the Legal Service. The Commission had decided that the monopoly for litigation in the field of trade would henceforth belong to the Legal Service, just as it had the monopoly on all Community litigation in Luxemburg. This move also increased the influence of diplomats with a legal background on the negotiations.[54] In addition, the EC started to win some cases (Elsig and Eckhardt, 2015). The EC realized that the nature of the trading regime was changing and it had to start to prepare for a more legalized system.[55] Toward the end, the EC was actively 'pushing for the AB'.[56]

Japan was very critical at the outset of the negotiations about increased legalization. Japan was mostly concerned about US unilateralism outside multilateral structures. This concern was based on past experience related to US unilateralism of the 1980s. But similarly to the EC approach, positive experience in panels helped slowly to reduce the opposition toward legalization. Early on in the negotiations, Japan was not an active user of the system. While it was targeted quite frequently and lost many cases, it was able to block reports or to constrain implementation (Hudec, 1993: 212–216). Later in the negotiations, however, it also started to score some wins (Hudec, 1993: 255–258). Over time, it accepted the legalization leap as it expected to use the system more actively and was satisfied with the legal texts that put constraints on US unilateralism.

Summary

The above findings illustrate how autonomy led to a constructive environment and the buildup of trust, shared objectives, and an 'esprit de corps'. The small group meetings helped to build mutual understanding, and privileged value-creating over value-claiming negotiation tactics. However, expectations about the design of the DSS differed early on and substantially between the main parties to the negotiations. While the right to a panel became accepted early in the negotiations, the remaining elements of the legalized system were agreed toward the end of the negotiations as expectations started to converge. This movement was mainly driven by experiential learning. The agreement on the 'legalization leap' did not happen overnight: early harvest (that is, the right to a panel), the sequential dynamics moving from automaticity to an appeals institution, experiential learning and the triggering effect of the Omnibus Trade Act, led to a growing acceptance among the negotiators. In the end, a more legalized system became acceptable to all.

Alternative explanations

How does the argument compare with other US-centric explanations prominent in the literature? I found no evidence that the move to law was a deliberate attempt by US negotiators to tie Congress' hands. The chair of the negotiation group stressed that 'the US fought hard until the very end that the wording to restrict the use of 301 was not too tough'.[57] Also, credibility versus its trading partners was not such a significant concern for US negotiators as has been suggested in the literature; negotiators knew that they had to offer some wording to play by the WTO rules. The realist-inspired argument that rules reflect US interests and the highly legalized system was a deliberate strategic choice is not confirmed either. The United States did not champion full automaticity and, in particular, was skeptical about an appeal instance. The final outcome went beyond what the United States had asked for. The United States suggested at the very beginning some form of binding arbitration 'used only if both parties agree ex ante' (Stewart and Callahan, 1993: 2727).

In addition, the decision by states to delegate autonomy (leading to a constructive negotiation environment) was not simply endogenous to states' underlying implicit agreement going into the negotiations. States opted for discretion-based delegation not out of a lack of concern about the distributional consequences, but because of the existence of uncertainty, which in turn hampered efforts by negotiators to formulate a rule-based mandate. Again, EC negotiators were very reluctant to change the status quo whereas the US administration was not ready to move toward a legalized system that went too far. The combination of negotiation set-up and increased agent autonomy as a result of the mandate took the negotiations out of the spotlight. The resulting lack of oversight was certainly related to the fact that trade negotiations in the past had been characterized by trade-offs on market access related issues and did not center on institutional questions. Therefore the leading negotiators were primarily focusing on the bread and butter of trade negotiations, namely bargaining over market access concessions in various areas (goods and services) and over behind-the-border measures. It is telling that there is no evidence that US economic interest groups did actively lobby on the DSS negotiations.

Again, the type of mandate was not a result of lack of politicization and absence of distributional consequences. The importance of the outcomes became visible when the US Congress discussed the WTO treaties with a view to their ratification (Odell and Eichengreen, 1998). Two Congressmen were able to extract some concessions from the Clinton administration. Most notably, Senator Robert Dole announced that the administration would support the creation of a WTO Dispute Settlement Review Commission composed of federal appellate judges. This Commission would be tasked with reviewing WTO rulings that went against the United States and if within a 5-year period at least three decisions were unsatisfactory and questionable, any member of Congress could request a vote on exiting the WTO (Odell and Eichengreen, 1998: 205). This internal agreement did not turn out to be a credible control instrument. The Commission was never created and in the first 5 years after the creation of the WTO, the WTO AB had rendered a number of rulings that went against the United States.

Additional pathways toward legalization and types of legalization

The argument presented here does not offer a unique theory on how legalization leaps occur. Its finding, focusing on one of the most important cases of legalization in recent world history, does not rule out that there could be other paths toward legalization. Earlier research on trade negotiations has shown that legalization may also occur as a result of issue-linkage. Davis (2004), for example, finds how obligations in the area of agricultural liberalization increased through issue-linkage with other sectors in the context of the GATT Uruguay Round negotiations.

In general, legalization leaps witnessed through a significant delegation to legal institutions are certainly rare. Future research may unpack the concept of legalization further and investigate whether explanatory factors for legalization leaps in obligation or in delegation (to judicial bodies) are fundamentally different because of the type of legalization approach. Finally, by focusing more explicitly on events where legalization did not occur, we can improve our understanding of the causal effects of contextual variables presented in this article and uncover potentially additional omitted variables. If autonomy and experiential learning that leads to convergence of positions produce non-events (lack of legalization), such outcomes would speak directly to the generalizability of the article's

findings. More theory-guided case studies can certainly contribute further to our understanding of the drivers of legalization in world politics.

Conclusion

The findings presented through the form of a case study suggest that focusing on context variables is important in understanding this remarkable move to law, or what Thompson (2010: 270) calls 'evidence on design process'. As to the principals' preferences, we observe that they *ex ante* lacked a clear understanding what type of DSS to create, which was reflected in discretion-based mandates. Over the course of negotiations, the United States was not opposed to a binding dispute settlement and was prepared to rely more on multilateral instead of unilateral action. The EC adapted its position from anti-legalization toward embracing a more legalized system as a result of negative experiences with the EC approach toward the evolving GATT legal system. In particular, this latter preference change proved pivotal for the observed outcome. In sum, the overall dynamics led to an outcome that was more than the United States had demanded at the outset (specifically full automaticity) and it was way beyond what would have been acceptable to the EC and Japan going into the trade round. The United States for its part pushed legalization based mainly on its experiences of blocked panels going into the round, the EC started to embrace a more legalized system mainly driven by internal changes, whereas Japan thought that it could help tame US unilateralism.[58] All these positions were shaped by past experience within existing legal institutions.

With hindsight, we can observe that some important expectations of the negotiators were not met. What stands out is that the United States became faced with more cases as a defendant than it originally anticipated. Another aspect that has received ample attention in the scholarship was the unfolding role of the AB. To quote Van den Bossche (2006: 294), the agreement on a standing appeals instance to protect against bad panel reports 'was an inspired afterthought, rather than the reflection of a grand design to create a strong, new international court'. The chair of the negotiations acknowledged that 'we thought that things would go on like in the past, evolving around the panel system, nobody expected that the AB would become as active'.[59] In light of these original expectations about the functioning of the WTO's dispute settlement, it is not surprising that we currently witness a backlash against the AB, exemplified through an increasing politicization of the appointment procedures (Elsig and Pollack, 2014; Shaffer et al., 2016). These recent developments provide a new context for current talks on a DSS reform.

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Notes

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2. Former Senior General Agreement on Tariffs and Trade (GATT) Official, 29 June 2009.
3. Former GATT Official (1), 24 April 2008.
4. Former GATT Official (1), 18 May 2009.
5. Our use of the concept of learning differs from the concept of adaptation, where actors react to shifts in behavior or to changing preferences of others (Elkins and Simmons, 2005).

6. See also George and Bennett (2005).
7. Preparatory Committee, GATT Doc. L/5395, 26 October 1982; Ministerial Declaration, GATT Doc. L/5424, 29 November 1982.
8. Draft Ministerial Declaration, MIN(86)/W/19, 20 September 1986.
9. For example, Communication from the Nordic Countries, MTN.GNG/NG13/W/10.
10. Stewart and Callahan (1993: 2762) referring to the Meeting of 22 September 1988, GATT Doc. No. C/M/224, 17 October 1988.
11. MTN.GNG/NG13/17, 15 December 1989.
12. See Note 11.
13. See Note 11.
14. Chair of the Negotiations, 30 April 2010.
15. Swiss Trade Diplomat, 19 June 2009.
16. MTN.GNG/NG13/W/39, 5 April 1990.
17. MTN.GNG/NG13/W/40.
18. MTN.GNG/NG13/W/6, 25 June 1987.
19. MTN.GNG/NG13/W/41, 28 June 1990.
20. GATT Official (2), 5 November 2009.
21. Paragraph 1 of Art. 23 DSU (dispute settlement understanding) reads,

    When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

22. Internal Memorandum from the GATT Secretariat to the Director-General, 20 July 1990 (AL/gm), on file with author.
23. US Trade Diplomat (1), 4 November 2009.
24. See Note 23.
25. Internal Note by GATT Official, 1 October 1991, on file with author.
26. MTN.TNC/W/FA, 20 December 1991.
27. US Trade Diplomat (1), 4 November 2009.
28. Internal Note by the GATT Secretariat, 13 June 1992 (AL/gm), on file with author.
29. Canadian Trade Diplomat (1), 29 April 2010.
30. US Trade Diplomat (2), 4 November 2009.
31. Japanese Trade Diplomat, 21 May 2010.
32. Trade Diplomat (1), 12 June 2009
33. In addition, a peace clause for agricultural disputes allowed World Trade Organization (WTO) Members more time to adjust their agricultural support schemes before they could be challenged through the dispute settlement system (DSS).
34. Swiss Trade Diplomat, 19 June 2009.
35. Japanese Trade Diplomat, 21 May 2010.
36. EC Trade Diplomat (1), 12 June 2009.
37. US Trade Diplomat (3), 12 April 2010.
38. Canadian Trade Diplomat (2), 30 May 2010.
39. US Trade Diplomat (2), 4 November 2009.
40. See Note 39.
41. New Zealand Trade Diplomat, 17 June 2010.
42. US Trade Diplomat (2), 4 November 2009.
43. See Note 42.
44. See Note 42.
45. US Trade Diplomat (3), 12 April 2010. Room F was a small room where the negotiation group met regularly.
46. US Trade Diplomat (2), 4 November 2009.
47. US Trade Diplomat (1), 4 November 2009.
48. US Trade Diplomat (3), 12 April 2010.
49. US Trade Diplomat (4), 4 November 2009.
50. US Trade Diplomat (4), 4 November 2009; see also Canadian Trade Diplomat (3), 15 July 2008.
51. EC Trade Diplomat (2), 3 June 2010.
52. Pescatore was one of the negotiators of the European Economic Community Treaty as a young Luxemburg official and a former judge of the European Court of Justice. His views were highly respected in Brussels.

53. The Legal Service is a service of the Commission that stands on an equal footing with the Directorate-General for Trade.
54. EC Trade Diplomat (1), 12 June 2009; EC Trade Diplomat (4), 10 April 2013.
55. The EC also started to win more cases which helped change its attitude vis-a-vis a more legalized system.
56. New Zealand Trade Diplomat, 17 June 2010.
57. Negotiation Chair, 30 April 2010.
58. Similar to Japan, other countries embraced more legalization mainly because of the Omnibus Trade Act. Brazil and India worked toward a commitment by the United States to stay within the legal processes.
59. Negotiation Chair, 30 April 2010.

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