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Legalization of the GATT/WTO and Distribution of its Dispute Settlement
Benefits between Developed and Developing Countries

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Abstract

Legalization of the GATT/WTO and Distribution of its Dispute Settlement Benefits between
Developed and Developing Countries

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How does legalization of international institution distributes its benefits between developed and developing countries? This dissertation answers the question by investigating how the legalization of the GATT into the WTO affects the distribution of its dispute settlement benefits between them. Existing studies present two arguments to this question - the capacity argument and the legalization argument. According to the capacity argument, the legalized WTO continues to favor developed countries in its dispute settlement, just like the less legalized or non-legalized GATT. On the other hand, according to the legalization argument, the legalized WTO favors developing countries more than the GATT because it reduces the impact of bargaining power on dispute settlement.

If we look at the use of the dispute settlement mechanism by its member countries, the early years of the WTO and the entire period of the GATT support the capacity argument, but the later period of the WTO does not support this argument. There are significant increases of developing countries participation as the complainants in WTO dispute settlement in its later period. This change in dispute settlement participation by developed and developing countries negates the capacity argument, but it also raises a question to the legalization argument: why has the effect of international legalization taken place conspicuously in the later period of the WTO, not in the early years of the WTO?

I argue that legalization of international institution makes socialization of its member countries with it important for their use of the dispute settlement mechanism. This research hypothesizes that the effects of capacity and socialization on the dependent variables - the frequency of its use, the method of its use (bilateral or multilateral), the progress of its procedure, the length of time spent for decisions, and adjudicative results - change depending on legalization of international institution.

The results of this study support my argument that legalization of international institution has made the impact of socialization very positive on the use of the dispute settlement mechanism. This explains why there is an increase of its use by developing countries in the WTO, especially in its later period.

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DEDICATION

This dissertation is dedicated to my parents for their endless love and support.

Chapter 1. Introduction

1.1 Puzzle

The GATT/WTO (General Agreement on Tariff and Trade, World Trade Organization) is an international trade institution which promotes free trade among its member countries, and its dispute settlement mechanism is a means which prevents its member countries from violating its rules. Many international institutions have dispute settlement mechanisms, but most of them take consensual, mediating and nonbinding approaches to dispute settlement, while a very small number of them adopts a process of binding formal adjudication. The dispute settlement mechanism of the GATT used to be consensual, mediating and nonbinding, but that of the WTO is now a binding adjudicative process.

In domestic dispute settlement, only the binding dispute settlement mechanism is said to be legalized. The nonbinding one cannot be said to be legalized, but may be said to be less legalized or non-legalized. The same applies to the international dispute settlement mechanism. The dispute settlement mechanisms of international institutions may be placed somewhere in a continuum between the absolutely consensual, mediating and nonbinding mechanism and the absolutely adjudicative, compulsory and binding one.

According to Abbott et al., the concept of international legalization involves obligation, precision and delegation: “*obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments,” “*precision* means that rules unambiguously define the conduct they require, authorize, or proscribe,” and “*delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve

disputes; and (possibly) to make further rules.”¹ The WTO dispute settlement mechanism obligates its members to observe them with the binding adjudicative process, have precise dispute resolution procedures with time limit, and delegate authority of dispute settlement to third parties of panel and the Appellate Body. The GATT dispute settlement mechanism did neither obligate its members to observe them nor have precise procedures with time limit. Although the GATT delegated the authority of adjudication to third parties of panel, their decision was not binding, but subject to its members’ consensual approval, as noted earlier. Abbott *et al.* construct eight gradations in the forms of international legalization, and place the WTO in the most or the second most legalized form where all three dimensions are highly graded.²

How does this legal transformation of the GATT into the WTO affect the distribution of benefits between developed and developing countries? Does it favor developed countries more than developing countries? This research seeks to answer this question by examining the impact of the legal transformation of the GATT into the WTO on the distribution of benefits between developed and developing countries. However, before delving into answers to this question, it is necessary to note what benefits of the GATT/WTO mean and which countries are developed and developing ones in this study.

Benefits the GATT and WTO distribute among their respective member countries are of two kinds: economic benefits and dispute settlement benefits. Economic benefits refer to trade gains each member country obtains from its membership in the trade institution, and dispute

¹ Kenneth Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” *International Organization*, Vol. 54, No. 3 (Summer 2000), pp. 401-419. See also Alec Stone Sweet and James A. Caporaso, “From Free Trade to Supranational Polity: The European Court and Integration,” in *European Integration and Supranational Governance*, ed. Wayne Sandholtz and Alec Stone Sweet (Oxford: Oxford University Press, 1998), pp. 92-133.

² Kenneth Abbott *et al.*, p. 406.

settlement benefits refer to benefits it obtains from being a participant in its dispute settlement process. The success or failure of the GATT/WTO depends on how well it distributes trade benefits between developed and developing countries, but it also depends on how well it distributes dispute settlement benefits between them. How well it protects trade interest of developed and developing countries through its settlement process of trade disputes is important not only for the distribution of trade benefits between them but also for the maintenance of free trade system in general. This study deals with the distribution of dispute settlement benefits between developed and developing countries.

Dispute settlement benefits in a narrow sense refer only to the dispute settlement results over trade disputes between its member countries, but in this study they are used in a broad sense, which means participation, the choice between bilateral and multilateral procedures of dispute settlement, the procedural progress of the dispute settlement mechanism, the length of time spent for dispute settlement, and the final adjudicative outcomes. How developed and developing countries fare respectively in these five aspects of dispute settlement process constitutes their respective dispute settlement benefits. Dispute settlement benefits are important themselves because they lead ultimately to trade benefits.

Which countries are developed or developing countries? The WTO does not have its own definition of developed and developing countries, but classifies its members into the developed, developing and least developed countries. Developed and developing countries are designated as such according to the declaration of its members themselves about whether they are developed or developing. The least developed countries are those designated as such by the United Nations.³ In this study the member countries of the OECD (Organization for Economic Cooperation and

³ “Understanding the WTO: The Organization, Least-Developed Countries,” *World Trade Organization*, accessed April 6, 2015, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

Development) as of 1995 and the per capita Gross National Income (GNI) of which was above \$20,000 in 2005 are developed countries and the rest of them excluding the least developed countries designated by the UN are developing countries.

Then, does more legalized WTO dispute settlement mechanism affect developed countries more favorably than the less legalized GATT dispute settlement mechanism? Or does the former affect developing countries more favorably than the latter? Most investigators answer this question on the basis of the frequency of participation in dispute settlement mechanism by developed and developing countries. They are not interested in the results of dispute settlement, but are very concerned only with participation in it. There is almost no study which argues that the results of dispute settlement are illegitimate or unfair. This may be because of their tendency to think that the results of the third party adjudication are on the whole legitimate and fair.

Answers to the question as to whether the legalized WTO favors developed or developing nations more than the less legalized GATT in terms of participation are of two kinds. One answer is that the legalized WTO, like the less legalized GATT, continues to inhibit developing countries from using the dispute settlement mechanism actively. In other words, the legalization of international institution does not matter much and it continues to favor developed countries. The other is that it induces developing countries to use the dispute settlement mechanism more frequently than the GATT. In other words, legalization matters much, and favors developing countries more than non-legalization.

There are a few grounds for the first argument. One ground is a difference in the market size between developed and developing countries. Developed countries with large market economy file complaints with violators of free trade rules more frequently because their economic stakes are large enough to outweigh the costs of litigating a dispute. In contrast,

developing countries and the least developed countries are discouraged to initiate a dispute if their economic stakes are too small to outweigh the costs of WTO litigation.⁴ Costs of litigation are more burdensome for developing countries than for developed ones. Another ground is the self-help system of compliance enforcement and the asymmetry in enforcement capability between developed and developing countries. They encourage developed countries to use the dispute settlement mechanism frequently, while making developing countries use it far less frequently. Weak developing countries lack enforcement power even if they win the case against the powerful developed countries in the WTO dispute settlement process. If the powerful countries do not obey the panel/Appellate Body rulings voluntarily, the weak countries have no means to enforce them.⁵ A third ground is the discrepancy of the legal resources between developed and developing countries. Developed countries are rich in legal resources, but developing countries usually do not have many qualified legal experts and enough information that are needed for the dispute settlement process.⁶ In sum, differences in economic and legal capacities of member countries of the WTO lead to differences in their use of its dispute settlement mechanism. As empirical studies on this subject use economic capacity such as GDP, per capita GDP or trade volume as a proxy or index of legal capacity,⁷ economic capacity is the

⁴ According to Nordstrom and Shaffer, a WTO litigation costs over half a million dollars and demand substantial commitments from the litigating state. Hakan Nordstrom and Gregory Shaffer, "Access to Justice in the World Trade Organization: A Case for a Small Claim Procedure?" *World Trade Review*, 7:4 (2008), p. 588.

⁵ Chad P. Bown, "Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders," *World Bank Economic Review*, Vol. 19, No. 2 (2005), pp. 287–310.

⁶ Kim Van Der Borgh, "The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate," *American University International Law Review*, Vol. 14 (1999), pp.12; Bernard M. Hoekman and Norstrom Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance," *The World Economy*, 23(4) (2000), pp.527-542; Gregory Shaffer, "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies," in *Towards A Development-Supportive Dispute Settlement System in the WTO*, ICTSD Resource Paper No.5 (March 2003), pp.1-65, and Gregory Shaffer, "Power, Governance, and WTO: A Comparative Institutional Approach," in *Power in Global Governance* ed. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005), pp. 130-160.

⁷ Marc L. Busch, Eric Reinhardt and Gregory Shaffer, "Does legal capacity matter? A Survey of WTO Members," *World Trade Review*, 8:4 (2009), pp. 559-577.

main factor which determines the frequency of the use of the dispute settlement mechanism by the WTO member countries.

The ground for the second argument that more legalized WTO dispute settlement mechanism favors developing countries is the effect of legalization which reduces a role of bargaining power in dispute settlement and helps to secure the equality of rights and obligations between unequally powerful member countries. Kuruvila says that “the attitudes of developing countries have been to use the GATT dispute settlement system to solve a variety of their problems, but the GATT law was inadequate for this purpose.” She finds more participation by developing countries in the WTO dispute settlement system than in the GATT system, and attributes it to legalization of the GATT into the WTO.⁸ Steger and Hainsworth contend that legalization of dispute settlement process benefits the smaller countries because if there are no strict rules and obligations it would be difficult for the smaller countries to have bargaining power vis-à-vis the bigger countries.⁹ More generally, Weil says that “it is law with its rigor that comes between the weak and the mighty to protect and deliver.”¹⁰ Alter says that less powerful states in the EU constitute the major force for the expansion of the European Court of Justice (ECJ) powers.¹¹ Smith finds that agreements among economically highly unequal countries do

⁸ Pretty Elizabeth Kuruvila, “Developing Countries and the GATT/WTO Dispute Settlement Mechanism,” *Journal of World Trade*, 31:6 (December 1997), pp. 171-208 and p. 172.

⁹ Debra P. Steger and Susan M. Hainsworth, “New Directions in International Trade Law: WTO Dispute Settlement,” in *Dispute Resolution in the WTO*, ed. James Cameron and Karen Campbell (London: Cameron May, 1998), pp. 28-58.

¹⁰ Prosper Weil, “Towards Relative Normativity in International Law,” *American Journal of International Law*, 77 (1983), p.442.

¹¹ Karen J. Alter, “Who are the Masters of the Treaty? European Governments and the European Court of Justice,” *International Organization*, Vol. 52, No. 1 (Winter 1998), pp. 121-147.

not have very legalized dispute settlement mechanisms.¹² Beth Simmons associates asymmetry in power with less likelihood of the third party adjudication.¹³

If we look at the use of the dispute settlement mechanism by its member countries, the early years of the WTO tend to support the argument of capacity theorists that the WTO favors developed countries more than developing ones, and that there is little difference in this respect between the GATT and WTO. However, the later period of the WTO does not seem to support this argument. There are significant increases of developing countries participation as complainants in WTO dispute settlement in its later period.

Shaffer and Melendez-Ortiz, who argued in the early years of the WTO that the dispute settlement of the WTO had been favoring the rich and powerful countries,¹⁴ list a set of statistics, which may negate his early judgment in his recent works on this subject, as in the following: as at 5 November 2009 “seven out of the top eleven most frequent complainants are developing countries...; over the forty per cent of all complaints have been initiated by developing countries; of the forty WTO members to have initiated at least one WTO dispute, twenty-nine have been developing countries; and the US and the EC, between them, have been respondents in approximately forty per cent of all cases”.¹⁵ The later period of the WTO seems to support the argument that the legalized WTO may favor developing countries more than the less legalized or non-legalized GATT. The capacity argument explains the early years of the WTO, but cannot explain a significant increase of developing countries participation in the later period of the WTO.

¹² James McCall Smith, “The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts,” *International Organization*, Vol. 54, No. 1 (Winter 2000), pp. 137-180.

¹³ Miles Kahler, “Conclusion: The Causes and Consequences of Legalization,” *International Organization*, Vol. 54, No. 3 (Summer 2000), p. 666.

¹⁴ See Gregory Shaffer (2003) and (2005).

¹⁵ Gregory Shaffer and Ricardo Melendez-Ortiz, ed., *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge: Cambridge University Press, 2010), p. 2.

The legalization thesis may find support from the results of dispute settlement outcomes in the later period of the WTO, but cannot explain the early years of the WTO. Then, why is there a change in the distribution of the frequency of participation by developed and developing countries between the early WTO and the late WTO?

This change in dispute settlement participation by developed and developing countries negates the capacity argument, but it also raises a question to the legalization argument: why has the effect of international legalization taken place conspicuously in the later period of the WTO, not in the early years of the WTO? The legalization argument does not offer the process through which more frequent use of or participation in the dispute settlement mechanism of the WTO has been taking place, and answer to this question lies in this process.

This difference in participation between the early and later periods of the WTO may seem to be natural because a certain period of time is necessary for its member countries to use its dispute settlement mechanism. However, what is puzzling is that this kind of participation difference did not take place under the less legalized GATT.

Socialization process may be helpful to explore an answer to this question. Use of the dispute settlement mechanism may depend not only on the capacity of its member country but also on the extent of its socialization with the dispute settlement mechanism. Economically high capacity country which has a high stake in free trade will be more inclined to use it than economically low capacity country which has a low stake in it. However, unless it is familiar with or accustomed to the use of the dispute settlement mechanism, even economically high capacity country will be less likely to use it. On the other hand, even economically low capacity country will be more inclined to use it if it is familiar with or accustomed to its use.

The impact of economic capacity and socialization on the use of the dispute settlement mechanism will be different depending on the degree of its legalization. The impact of economic capacity on it will be high while that of socialization will be low, when it is non-legalized or less legalized. On the other hand, the impact of socialization on it will be high while that of economic capacity will be low, when it is legalized.

Socialization with the dispute settlement mechanism of international institution may be a key to solve a puzzle as to why there is an increased developing countries participation in dispute settlement under the legalized WTO and especially substantially increased participation in its later period. Under the less legalized GATT developing countries can avoid the third party adjudication by employing their veto power, but under the legalized WTO they cannot do so, and have to accept the results of the third party adjudication. Therefore, under the legalized WTO they cannot but socialize themselves more with its dispute settlement mechanism than under the less legalized GATT, if they want to protect their trade interest.

Many developing countries have actually been adapting to or socializing with the challenge of the legalized WTO since its establishment. Shaffer and Melendez-Ortiz record socialization efforts of developing countries to cope with the legalized dispute settlement mechanism of the WTO. They include governmental reorganization, coordination among government, private sector and law firms, and development of legal education.¹⁶ Thirty developing countries and ten developed countries established the Advisory Center on WTO Law (ACWL) in 2001 the purpose of which was to provide legal advice for the dispute settlement of the developing and least developed countries, and the establishment of the ACWL can also be

¹⁶ Gregory Shaffer and Ricardo Melendez-Ortiz, ed. (2010).

regarded as efforts to socialize with legalism on the part of developing countries.¹⁷ The substantial increase of the use of the dispute settlement mechanism by developing countries in the later period of the WTO, not in its early period, is due to the time they need to socialize themselves with the challenges of the legalized WTO. Especially, the new member states should familiarize themselves with legal procedures before they may begin to use the WTO dispute settlement mechanism.

Developed countries of the WTO can be said to be advantageous over developing ones in this respect, too, because they had been using the procedure of dispute settlement during the GATT period, although it was more diplomatic than legal. Developing countries had not used them as often as developed ones during the GATT, making them disadvantageous in dispute settlement practices in the WTO period. Developing countries have been struggling to overcome this disadvantage by socializing themselves with the legalized dispute settlement mechanism of the WTO. However, socialization is more a matter of time than economic capacity. Developed countries may be faster in socialization than developing countries, or developing countries may be slower in socialization than developed countries. Nevertheless, developing countries can catch up with developed countries in legal socialization faster than in economic capacity.

It should be added here that developed countries also has to socialize themselves with the legalized rules of the WTO, for instance, by shifting power from domestically oriented governmental organs to internationally oriented ones and by strengthening orientation toward more aggressive legalism. Chorev¹⁸ points out the shift of power from Congressional actions or the Department of Commerce to the Office of the U.S. Trade Representative (USTR) in trade

¹⁷ Chad P. Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Washington D.C., Brookings Institution Press, 2009), pp.138-174.

¹⁸ Nitsan Chorev, "The Institutional Project of Neo-Liberal Globalism: The Case of the WTO," *Theory and Society*, Vol.34, No.3 (June 2005), pp. 317-355.

matters. Pekkanen¹⁹ points out similar shift of power from domestically oriented officials of the Ministry of International Trade and Industry (MITI) to its internationally oriented officials in Japanese government. The U.S. used the dispute settlement mechanism of the WTO very frequently especially in its early years, and Japan, which used to be reactive in using the dispute settlement mechanism under the GATT, has begun to use it actively or aggressively under the legalized WTO.

However, socialization is based not only on such internal socialization, but also on external socialization. Many member countries of a certain international institution are also members of many other international institutions, which have dispute settlement rules with varying degree of legalization. Socialization of the GATT and WTO members with other international organization may be called external socialization, and it may also have impact on their use of the dispute settlement mechanism.

This study will attempt empirically to find out how these socialization variables work under the less or non-legalized GATT and under the legalized WTO.

1.2 Review of Existing Studies

The focus of this study is on the distribution of the dispute settlement benefits or results of the GATT and WTO between developed and developing countries, and on the explanation for differences in the distribution of these benefits for developed and developing countries between the less legalized GATT and the legalized WTO. However, most existing studies deal either with the dispute settlement of the GATT/WTO together or only with the GATT or WTO dispute settlement, and they deal with the dispute settlement of the GATT and WTO with partial

¹⁹ Saadia M. Pekkanen, "International Law, the WTO, and the Japanese State: Assessment and Implications of the New Legalized Trade Politics, *Journal of Japanese Studies*, Vol. 27, No.1 (Winter 2001), pp. 41-79 and *Japan's Aggressive Legalism: Law and Foreign Trade Politics beyond the WTO* (Stanford: Stanford University Press, 2008).

evidence, but not with comprehensive statistical data covering the entire period of both the GATT and WTO. Nevertheless, it is necessary to review the existing studies on the dispute settlement of the GATT and WTO to see the area of research covered by them and data they used, and the gaps they leave in their respective researches.

Hudec (1934-2003) compared the identity of the complainants and respondents under the GATT, 1980-1994 and under the WTO, 1995-1998. Under the GATT the U.S., EC, other developed countries, and developing countries constituted respectively 26%, 19%, 25% and 31% of total complainants, but under the WTO they constituted respectively 32%, 22%, 16% and 31%. In other words, there is no significant change in the rates of participation as the complainants in the GATT and WTO between developed and developing countries. However, there is a significant change in the rates of participation as respondents in the GATT and WTO between developed and developing countries. Under the GATT the U.S., EC, other developed countries, and developing countries constituted respectively 36%, 28%, 22%, and 13% of total respondents, but under the WTO they constituted respectively 21%, 20%, 20%, and 39%. As respondents, developed countries showed a significant decrease while developing countries displayed a significant increase under the WTO.²⁰

Hudec offered empirical evidence that GATT dispute settlement favored the strong countries much more than the weak ones, and found no change in this respect during the period of the first three years of WTO dispute settlement. However, he did not foresee more frequent participation of developing countries in WTO dispute settlement in its later period.

Goldstein and Martin reject the legalists' argument that the legalized WTO prevents opportunistic behavior of its member countries because of the lack of power for them to veto its

²⁰ Robert E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years," *Minnesota Journal of Global Trade*, Vol. 8:1 (Winter 1999), pp.22-25.

dispute settlement ruling. Legalists' hypothesis is that "*the existence of veto power deters some states from bringing disputes, and with the loss of veto power these states are no longer deterred*". More concretely speaking, under the GATT developing countries were deterred from bringing disputes against developed countries because of the latter's power to veto the rulings of its dispute settlement mechanism, and legalists anticipated that developing countries would no longer be deterred from bringing disputes against developed countries because the latter countries have lost such veto power under the legalized WTO. They say that according to this hypothesis "*we should expect the proportion of complaints against developed countries to rise under the WTO*". However, according to their investigation, as of 2000 the legalized WTO is no better than the less legalized GATT in the proportion of developing countries complaints against developed countries.²¹

Their judgment that legalists' hypothesis was wrong may be valid in the early years of the WTO, but is completely wrong in its later period. Like Hudec, they think that capacity or power is the most important factor affecting dispute settlement not only under the GATT but also under the WTO. Like Hudec, they did not foresee the effects of legalization which would appear gradually through socialization of the member countries, especially developing ones, with the legalized WTO.

Busch and Reinhardt compare the dispute settlement cases of the GATT and WTO. They refute the argument of such observers as Kuruvila and Lacarte-Muro and Gappab that the legalized WTO will help developing member countries to participate more in dispute settlement process and reap more benefits from it than the GATT which failed to insulate them from

²¹ Judith Goldstein and Lisa L. Martin, "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note," *International Organization* 54, 3 (Summer 2000), p. 627.

diplomatic power politics.²² The ground of their refutation lies in early settlement of dispute cases before the rulings of the panel or Appellate Body. According to them, the complainant country can obtain greater concessions from the respondent country when the former settles dispute with the latter early in the consultation stage or at the panel or Appellate Body stage before ruling. However, developing countries engage in early settlements far less frequently than developed countries. This situation has been so from the beginning of the GATT up to the present (2000) WTO. Developing countries participate more actively in dispute settlement in the WTO period than in the GATT, but developed countries gain more benefit than developing countries because developed countries as complainants use the opportunities of early settlement far more frequently than developing countries as complainants. They stress that developing complainant countries are missing out on early settlement in which the complainants can extract more concessions from the respondents than in the panel or Appellate Body stage.²³

The problem with this study is that they compare the GATT of 1980-1994 with the early WTO of 1995-2000 in which the effects of legalization through socialization have not appeared sufficiently. The present research expects that developed countries as complainants will obtain early settlement from developing respondent countries less frequently under the WTO than under the GATT as developing countries are more inclined to undergo all the stages of litigation under the WTO than under the GATT. Busch and Reinhardt in their later study find that participation of the third parties in dispute settlement of the WTO lower the prospects of early settlement and

²² Pretty Elizabeth Kuruvila (1997), and Julio Lacarte-Muro and Petina Gappah, "Developing Countries and the WTO Legal and Dispute Settlement system: A View from the Bench," *Journal of International Economic Law*, 3 (2000), pp. 395-401.

²³ Marc Busch and Eric Reinhardt, "Developing Countries and GATT/WTO Dispute Settlement." *Journal of World Trade*, Vol. 37, No. 4 (2003), pp.719-735.

increase the likelihood of a panel and Appellate Body ruling.²⁴ Many developing countries have actually participated as the third parties frequently under the WTO.

Bown investigates the dispute cases of the GATT/WTO from 1973 to 1998 to see whether the cost from retaliation threat induces the defendant countries to comply with the rulings for trade liberalization. He finds that retaliation threat is a core factor that determines defendants' liberalization commitments. He also finds that the complainant country, whether developed or developing, gains from trade liberalization of the defendant country.²⁵ He finds that the participation in the WTO litigation is less likely when a country does not have capacity to retaliate and to absorb legal costs. He also sees that, if a country is engaged in a preferential trade agreement with a defendant or it is relying on a bilateral assistance from it, it is less likely for this country to use the dispute settlement process.²⁶ In another study, Bown investigates determinants that make WTO members take antidumping and related trade remedies of the U.S. to its dispute settlement process. He finds that not only the market size of the defendant but also the capability of reciprocal antidumping from it reduces the possibility of WTO members to take the case to its dispute settlement mechanism.²⁷ He presents similar argument in his book-length study which deals only with developing countries and WTO dispute settlement.²⁸

The lack of capacity to retaliate and to absorb legal costs, and concerns over extra-WTO counter-retaliation by developed respondents such as blocking foreign aid to the complainants and the complainants' preferential access to their markets or, in a word, the lack of economic

²⁴ Marc L. Busch and Eric Reinhardt, "There's a Crowd: Third Parties and WTO Dispute Settlement," *World Politics*, 58 (April 2006), pp. 446-477.

²⁵ Chad P. Bown, "On the Economic Success of GATT/WTO Dispute Settlement." *The Review of Economics and Statistics*, Vol. 86, No. 3 (2004), pp. 811-823.

²⁶ Chad P. Bown, "Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders," *World Bank Economic Review*, Vol. 19, No. 2 (2005), pp. 287-310.

²⁷ Chad P. Bown, "Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?" *The Journal of Legal Studies*, Vol. 34, No. 2 (June 2005), pp.515-555.

²⁸ Chad P. Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (2009).

capacity inhibits developing countries participation in dispute settlement as complainants in both the GATT and legalized WTO. The problem with his study is that he analyzed dispute cases of the GATT and WTO together and failed to find out the effects of legalization on the participation of developing countries in WTO dispute settlement.

Moon compares dispute settlement outcomes of the GATT (1947-1994) with those of the early years of the WTO (1995-2000). He finds that developed countries used the dispute settlement mechanism more frequently under the WTO than under the GATT, and that they targeted developing countries as defendants more frequently under the WTO than under the GATT. He contends that substantive trade rules of the WTO favor developed countries more than developing countries as they include the rules on such new areas as service, intellectual property rights and investment.²⁹

Kim compares divergent effects of legalization in the GATT/WTO dispute settlement procedures by focusing on conflicts regarding anti-dumping duties and countervailing duties during the period of 1984-2004. He, like Moon, finds that developed countries use the legalized dispute settlement procedure of the WTO more frequently than developing countries compared to the GATT era between 1984 and 1995. He also shows that developed countries obtain adjudication benefits disproportionately more than developing countries under the WTO. He shows statistically that this discrepancy of benefits between developed and developing countries is due to the discrepancy of the bureaucratic and administrative capacity to meet the costs of complex legal procedures of the WTO. As an index of this capacity, he used data on the quality of bureaucracy published in the International Country Risk Guide. He argues that contrary to neoliberal expectations “the legalization of dispute settlement procedures under the WTO has not

²⁹ Don Moon, “Equality and Inequality in the WTO Dispute Settlement System: Analysis of the GATT/WTO Dispute Data.” *International Interactions*, No.32, Vol. 3 (2006), pp. 201–28.

leveled the playing field for less powerful, developing countries against more powerful, developed countries.”³⁰

The problem with Moon’s and Kim’s studies is, like the previous studies noted in the above, that they compare the GATT with only the early period of the WTO between 1995 and 2000 in which the effects of legalization did not appear fully yet. The present research expands the scope of research to cover the whole period of both the GATT and WTO. It will also investigate how capacity and legalization affects procedural and substantive outcomes of its dispute settlement throughout the whole period of the less legalized GATT and the legalized WTO.

Busch, Reinhardt and Shaffer, who have argued that the legalized WTO favors developed countries more than developing countries, have questioned the reliability of per capita income or number of delegates in Geneva as a measure of legal capacity, and constructed an index of Members’ WTO legal capacity using their responses to five questions about their professional staff, bureaucratic organization at home, bureaucratic organization in Geneva, experience handling general WTO matters, and involvement in WTO litigation. They suggest on the basis of their interviews of WTO members that legal capacity is the main variable affecting their access to dispute settlement.³¹ However, these indices are the indices which help the member countries to socialize themselves with the legalized WTO. The more professional staff, the more competent bureaucracy at home and abroad, the more experience with general WTO matters, the more involvement in WTO litigation a member country may have, the more socialized it will get with WTO dispute settlement. It may be said that they have recently begun to shift their attention

³⁰ Moonhawk Kim, “Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures,” *International Studies Quarterly*, Vol. 52, No.3 (September 2008), pp. 657-686 and p. 658.

³¹ Marc L. Busch, Eric Reinhardt and Gregory Shaffer (2009), pp. 559-577.

from economic capacity to socialization factor as independent variable explaining dispute settlement participation, although they call socialization factor legal capacity.

Shaffer and Melendez-Ortiz investigate WTO dispute settlement from a developing country perspective. They think that WTO dispute settlement system reflects asymmetry of power between developed and developing countries favoring developed countries, while it leaves most developing countries with limited economic and legal capacity struggling to use it for their benefits. After their examination of the use of WTO dispute settlement system by many developing countries in South America, Asia and Africa, they conclude that the legalized dispute settlement system of the WTO has helped to level the playing field between its weaker and stronger members, while having raised the bar in terms of human and financial resources required for the effective use of the system. They argue that the WTO dispute settlement system can benefit developing countries, only if they develop their capacity to use it.³² This is actually a reversal of their early argument that the WTO favor developed countries more than developing countries.

The investigators noted in the above, in their early studies dealing with the GATT and the early WTO, at first presented arguments that the WTO favored developed countries and that legalization of international institution did not help developing countries significantly. Some of them have recently seemed to modify these arguments as they now see more active participation of developing countries in WTO dispute settlement. However, there are other investigators who suggested that the legalized dispute settlement mechanism of the WTO was helping developing countries to participate in and benefit from it more than the less-legalized or non-legalized GATT from the early years of the WTO. For them legalization of dispute settlement matters very much because it has been leveling the playing field for developing countries.

³² Gregory C. Shaffer and Ricardo Melendez-Ortiz (2010).

Kuruville contends that the legalization of dispute settlement under the WTO was helping developing countries to participate in it more actively as of April 1997. The WTO dispute settlement mechanism has compulsory, binding, and enforcing provisions, while the GATT mechanism did not have such provisions. These adjudicative characteristics of the WTO encourage their participation in it as complainants, while the non-adjudicative characteristics of the GATT discouraged such participation. She also argues that this adjudicative mechanism helps developing countries when the latter are engaged in bilateral negotiations with developed countries. When they cannot agree with developed countries, they can take dispute cases to the binding adjudicative process of the panel and the Appellate Body. This is a leverage they can wield against developed countries in their negotiations under the WTO. They did not have such binding leverage under the GATT.³³

Steger and Hainsworth say that “one of the major new and encouraging trends has been a greater involvement of smaller and developing countries in WTO disputes, although the Quad countries (the U.S., the EC, Japan and Canada) remain the most frequent users of the dispute settlement system”. They judge that “in the first two and one-half years of its existence, the WTO dispute settlement system is working extremely effectively as an important vehicle for ensuring compliance with the extensive rules and obligations contained in the *WTO Agreement*”.³⁴

Lacarte-Muro and Gappah stress the fairness of the Appellate Body in its adjudication over trade disputes. They say that “of the seven original Appellate Body Members, three were from developing countries,” and that “this system works to the advantage of all members, but it

³³ Pretty Elizabeth Kuruville (1997).

³⁴ Debra P. Steger and Susan M. Hainsworth (1998), p.34 and p.58.

especially gives security to the weaker Members who often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests”.³⁵

These authors’ argument that developing countries participated as complainants more actively in WTO dispute settlement than in the past GATT is not well-grounded in view of the fact that developed countries participated in it far more actively than developing countries in the early years of the WTO. Nevertheless, these authors kept the optimistic view about developing countries participation in the future, and their optimistic view has recently turned out to be true. In other words, their view has come to be true over some time after the establishment of the WTO, during which its member countries, especially developing countries, get socialized with it.

Davis and Bermeo deal with developing country participation in GATT/WTO adjudication between 1975 and 2003. They examine various factors which might have helped the participation of developing countries in GATT/WTO dispute settlement as complainants. The factors they examine include previous experience as a complainant or a defendant, legal aid, democracy, GDP, population, share of export in GDP, agriculture export share, language, and government effectiveness. Their examination shows that “previous experience with trade adjudication, either as a complainant or defendant, is an important predictor of how often a developing country initiates a dispute.” They argue that “high start-up costs make initial use of the system difficult, but these costs decrease with experience.”³⁶ They strongly present an experience hypothesis about developing country participation in trade disputes. Their study is important in the sense that it approaches participation problem through experience or socialization. Participation in adjudication process is not merely a function of economic capacity

³⁵ Julio Lacarte-Muro and Petina Gappah (2000), p. 396 and pp. 400-401.

³⁶ Christina L. Davis and Sarah Blodgett Bermeo, “Who Files? Developing Country Participation in GATT/WTO Adjudication,” *The Journal of Politics*, Vol. 71, No. 3 (July 2009), p.1047.

but also a function of learning or socialization with dispute settlement process over a long period of time.

However, Davis and Bermo do not ask the question as to whether there is a difference in the effects of participation experience or socialization on the use of the dispute settlement mechanism between the less-legalized GATT and the legalized WTO. The present research will address this question.

1.3 Hypotheses

The basic purpose of this study is to find out more adequate explanation for the changes in the use and outcomes of the dispute settlement mechanism under the GATT and under the legalized WTO for developed and developing countries than the two contending arguments, capacity and legalization arguments.

Whether there are changes in the use and outcomes of the dispute settlement mechanism between the GATT and WTO is itself an important question which deserves more empirical studies on them. Almost all existing studies on them only emphasize that there is little or no difference in the use and outcomes of the dispute settlement mechanism between them. These studies neither cover the entire periods of the GATT and WTO nor compare them to find out the differences in the use and outcomes of the dispute settlement mechanism.

One of the main factors that affect the use and outcomes of the dispute settlement mechanism lies in the capacity of the member countries, as most existing studies contend. The higher the capacity of the member countries, the higher the use and benefits of the dispute settlement mechanism for them. However, the impact of the capacity of the member countries on the use and benefits may vary depending on the degree of the legalization of international

institution. If it is less legalized, the impact of capacity on the use and benefits of the dispute settlement mechanism may become more significant as capacity plays an important role, while legal equality is not firmly established. This study hypothesizes that the capacity of the member countries has more impact on dispute settlement in the less legalized GATT than in the more legalized WTO. Five sub-hypotheses follow from this hypothesis.

First, (H1-1) under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to use the dispute settlement mechanism to deal with trade disputes. Second, (H1-2) under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to resort to the multilateral procedure of the dispute settlement mechanism. Third, (H1-3) under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to settle their disputes in the final stage of the dispute settlement mechanism. Fourth, (H1-4) under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to settle their disputes in the longer period of time. Fifth, (H1-5) under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to be the winner of the case.

On the other hand, if international institution becomes more legalized, the impact of capacity on the use and benefits of the dispute settlement mechanism may become less significant as legal equality or equality of rights before the law plays more active role. However, what makes capacity less important and equal legal rights more important is not legalization itself, but through socialization of the member countries with legalization. If the member countries are not socialized with it, its effects will be minimized. If they are socialized with it, its effects will be maximized. In other words, if they internalize the contents of legalization through

their socialization with them, its effects will be maximized, and if not, its effects will be minimized.

Both the WTO and GATT are the agents of this socialization, but they socialize their respective member countries differently. In the strongly legalized WTO its member nations including many weak capacity countries are forced to socialize themselves with it because its dispute settlement mechanism is compulsory, and they cannot avoid it. Furthermore, a group of developing countries established the Advisory Center for WTO Law (ACWL) in 2001 to provide legal helps for low capacity countries.³⁷ This center is an agent of socialization with the WTO for developing countries. There was no such agent of socialization during the GATT period. However, socialization takes time, and the effect of socialization under the legalized WTO will increase as the length of its existence increases.

On the other hand, in the less legalized GATT the member countries are not forced to socialize themselves with its dispute settlement mechanism because its dispute settlement mechanism is consensual, and they can avoid it with their respective veto powers. It will socialize developed countries to use it, while socializing developing countries not to use it because under its capacity of a member country affects dispute settlement strongly. However long socialized its member countries are with the less legalized GATT, the length of socialization will not necessarily encourage its member countries to use its dispute settlement mechanism more. It may socialize developed countries to use it more, but it may continue to socialize weak developing countries not to use it. The length of existence of the GATT will not affect the use and benefits of the dispute settlement mechanism very much.

³⁷ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, 4th Edition (London: Routledge 2013), p.619.

However, it is difficult to measure the levels of socialization of the member countries with the agents of socialization. This study presumes that their levels of socialization reflect their socialization experiences. Their prior experiences of dispute settlement as the complainants or respondents, the length of their respective memberships, and their experiences in other international organizations may be some of the factors affecting the level of socialization of the member countries. This study hypothesizes that, under the legalized international institution or dispute settlement mechanism, these socialization experiences will affect the use and benefits of the dispute settlement mechanism for developed and developing countries significantly, while mitigating the influence of their capacity on them. Five sub-hypotheses follow from this hypothesis.

First, (H2-1) under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to use the dispute settlement mechanism to deal with trade disputes. Second, (H2-2) under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to resort to the multilateral procedure of the dispute settlement mechanism. Third, (H2-3) under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to settle their disputes in the final stage of the dispute settlement mechanism. Fourth, (H2-4) under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to settle their disputes in the longer period of time. Fifth, (H2-5) under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to be the winner of the case.

1.4 Research Design

This research attempts to explain the uses and outcomes of dispute settlements of the GATT/WTO from 1947 to 2014 in terms of the properties of both the institution and its member states. The dependent variables of this analysis are how dispute settlement mechanism is used and how the dispute cases are resolved through this mechanism. The independent variables for this research are the degree of legalization of the institution (GATT/WTO), capacity of its member countries, and their socialization experiences with the institution. This research attempts to find out the impact of the independent variables on the dependent variables under the GATT and the WTO the properties of which are different particularly in terms of the degree of legalization. This section will introduce the definition and measurement of these dependent and independent variables, and presents the methodologies employed to test the hypotheses of this research.

Dependent Variables

There are two main dependent variables for this research – the use and outcomes of dispute settlement of the GATT from 1947 to 1994 and the WTO from 1995 to 2014. The use of the dispute settlement mechanism by its member countries refers to the frequencies of using the dispute settlement mechanism and the procedures through which the dispute cases are dealt with. The outcomes of the dispute settlement mechanism refer to the extent of the procedural progress of dispute settlement, the length of time for dispute settlement, and the adjudication results. These two kinds of the dependent variables will show how favorable or unfavorable they are for the complainants and the respondents respectively.

How do the member countries of the GATT/WTO use its dispute settlement mechanism? First, how frequently do the member countries file complaints as the complainants and how frequently are they targeted as the respondents by other complainants? Frequencies of being complainant and respondent by each member country of the GATT/WTO will be counted.

Second, which process of dispute resolution do the disputants choose, the bilateral procedure or multilateral procedure involving the third party (the panel and Appellate Body)? The bilateral procedure means a dyadic resolving procedure between the two parties of a dispute case and the multilateral procedure means a triadic resolving procedure where there is the third party tribunal involved in dispute settlement. When a dispute case is filed at the GATT/WTO, both the complainant and respondent countries will pursue a strategy that will promote their interest most. In many dispute cases, they adopt a procedure which relies on the bilateral negotiation between the complainant and the respondent without resorting to the multilateral process of adjudication. This is also the procedure that the GATT/WTO officially encourages for its member countries to adopt. However, they can also choose a multilateral procedure which pursues the decision of the panel and Appellate Body for dispute settlement.

Then, what are the outcomes of the dispute settlement cases? How are the dispute cases resolved? This question will be examined in terms of the procedural progress in the dispute settlement mechanism, the length of time for dispute settlement, and the adjudication result.

First, the procedural progress refers to the extent to which the dispute settlement mechanism proceeds. The stages of the dispute settlement start with the consultation between the disputants after the complainant files a complaint against the respondent who violated the rules of the GATT/WTO in the complainants' view. If bilateral negotiation fails in this stage of consultation, then a panel is established for dispute settlement. The panel submits the panel

report to the disputants and other member nations. Finally, the Council of the GATT or the Dispute Settlement Body of the WTO should approve or disapprove the panel report or the ruling of the Appellate Body, and the losing party should comply with it. A dispute case may be resolved in consultation stage, in panel, in the Appellate Body or not be resolved at all without any progress.

Second, the length of time is time spent for the settlement of each dispute case. The dispute settlement under the GATT had no time limit for each procedure, while the WTO has a time limit for each stage of the dispute settlement mechanism. The WTO stipulates that each dispute case should be resolved within a year if there is no appeal and within fifteen months if there is an appeal. But this time limit is not strictly observed and often prolonged longer than expected. It also takes some time to implement the panel reports or the Appellate Body rulings. This study will investigate the length of time until the circulation of panel reports, and the length of time until the complete dispute settlement including implementation.

Third, the adjudicative results of dispute settlement cases refer to the winning or losing of the disputant countries in the last stage of the dispute settlement mechanism. The results will be of the two kinds: either a winner or a loser. If the complaint from the complainant country against the respondent country is accepted, the complainant is the winner. If it is not accepted, the respondent is the winner.

There are many dispute cases the results of which are somewhere between the winner and loser as in negotiated settlement of disputes under both the GATT and the WTO, but they are not the adjudicative results of the third party.

Independent Variables

The main independent variables for this research include both the properties of the institution itself and those of its member countries. How the properties of the GATT/WTO have changed in terms of its degree of legalization over a long period of past 68 years will be introduced in Chapter 3 of this study. This section will only introduce the indicators of independent variables for the properties of its member countries employed in this study.

The properties of the member countries are of the two kinds. One is capacity of the member countries and the other is the level of their socialization with the GATT/WTO.

First, the capacity of the member countries refers to its economic capacity. Economic capacity is here represented by gross national income (GNI)³⁸ for each member country and its share of total world trade. This research uses data from the World Development Indicators of World Bank Database.³⁹ The total GNI per year is logged due to high dispersions of the data.

Second, the level of socialization is represented by socialization experiences. Socialization experiences of a member country refer to its prior experiences as a complainant or respondent, the number of years in its membership, and the number of its memberships in other international organizations.⁴⁰

Besides these independent variables, the share of trade out of GDP and the total population for each member country are added as control variables.

³⁸ GNI refers to the total incomes of the all residents of the country including the incomes gained by them outside of the country, but excluding the domestic incomes generated by the foreigners.

³⁹ “World Development Indicators”, *The World Bank*, accessed March 31, 2015, <http://data.worldbank.org/data-catalog/world-development-indicators>.

⁴⁰ Data on experiences of other IOs are from “Intergovernmental Organizations”, *The Correlates of War Project*, <http://www.correlatesofwar.org>.

For the regressions of the GATT period, the indices of independent variables are from the year of 1970. For the regressions of the WTO period, the indices of independent variables are from the year of 2005.

Methodology

The main hypothesis of this research is that the more legalized international trade institution is, the less subject it is to the influence of the capacity of the member countries and the more subject it is to the level of their socialization with the legalized institution. Under the non-legalized GATT the capacity of the member countries explain the dependent variables, while under the legalized WTO the socialization experiences of the member countries explain the dependent variables. These hypotheses have three independent variables – non-legalization or legalization, capacity, and socialization, and involve interaction effects between legalization and capacity and those between legalization and socialization. These hypotheses contend that the effects of capacity and those of socialization change depending on the legalization of international institution or depending on the non-legalization of international institution.

This research tests the impact of capacity and socialization experiences of the member countries on (1) the use of the dispute settlement mechanism, (2) the methods of dispute settlement, (3) the degree of the procedural progress of the dispute cases, (4) the length of time spent for dispute settlement, and (5) the adjudicative results of the dispute cases resolved in the final stage of the dispute settlement mechanism. This research has two separate samples: samples under the non-legalized GATT and those under the legalized WTO. It compared the impacts of capacity and socialization on the use of the dispute settlement mechanism and its results under the non-legalized GATT with those under the legalized WTO. If there is an interaction effect

between legalization and each of these two variables, the impacts of these two variables on dispute settlement will be different between the GATT and the WTO. On the other hand, if there is no interaction effect, the impacts of these two variables will be the same both under the GATT and under the WTO.⁴¹

Negative binomial regression model is employed to test the impacts of independent variables on the first dependent variable. The first dependent variable of the frequency of the use of the dispute settlement mechanism is overdispersed with a high level of variance in which a small number of the member countries have high values on participation frequency and more than half of them have low values on it. Negative binomial regression model is useful because it can deal with such dependent variable adequately.

Binary logit regression model is employed to test the impacts of independent variables on the second dependent variable and on the fifth dependent variable. This regression model is employed because the second (e.g., bilateral or multilateral methods of dispute settlement) and fifth (e.g., winner or loser) dependent variables are binary. Ordered probit regression model is employed to test the impacts of independent variables on the third (e.g., the degree of procedural progress) and fourth (e.g., the length of time for dispute settlement) dependent variables because these variables are ranked in order or are ordinal in their characteristics.⁴²

The first dependent variable is used to test H1-1 and H2-1, the second dependent variable is used to test H1-2 and H2-2, the third dependent variable is used to test H1-3 and H2-3, the fourth dependent variable is used to test H1-4 and H2-4 and the fifth dependent variable is used to test H1-5 and H2-5.

⁴¹ There are two methods of testing interactive effects: separate-sample versus pooled-sample estimation of interactive effects. What I did in my research belongs to the separate-sample estimation of interactive effects. See Robert J. Franzese and Cindy Kam, *Modeling and Interpreting Interactive Hypotheses in Regression Analysis* (Ann Arbor: University of Michigan Press, 2007), pp.103-130.

⁴² J. Scott Long, *Regression Models for Categorical and Limited Dependent Variables* (SAGE Publications, 1997).

H1-1: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to use the dispute settlement mechanism to deal with trade disputes.

H1-2: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to resort to the multilateral procedure of the dispute settlement mechanism.

H1-3: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to settle their disputes in the final stage of the dispute settlement mechanism.

H1-4: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to settle their disputes in the longer period of time.

H1-5: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to be the winner of the case.

H2-1: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to use the dispute settlement mechanism to deal with trade disputes.

H2-2: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to resort to the multilateral procedure of the dispute settlement mechanism.

H2-3: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to settle their disputes in the final stage of the dispute settlement mechanism.

H2-4: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to settle their disputes in the longer period of time.

H2-5: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to be the winner of the case.

1.5 Chapter Plan

There are five chapters to follow. Chapter II reviews how (neo)realists, neoliberals, and constructivists see international (soft) law, international institution and its legalization, and how they see the distribution of benefits from them between developed and developing countries. This chapter proposes an eclectic approach to the study of international institution, and points out the usefulness of the constructivists' perspective for the study of international law and the legalization of international institution. Chapter III presents how the legal properties of the GATT/WTO have changed over its history of 68 years and how the preferences and interests of

the U.S., West European countries, Japan and developing countries are reflected in the establishment of the GATT and its legal transformation into the WTO. Chapter IV examines how the properties of the member countries - capacity and socialization experiences – affect their use of the dispute settlement mechanism and their choice between the bilateral and multilateral procedures under the less legalized GATT and under the legalized WTO. It tests capacity hypotheses for the less legalized GATT, and socialization hypotheses for the legalized WTO, and finds these hypotheses valid. Chapter V examines how the properties of the member countries affect the procedural progress of the dispute settlement mechanism, the length of time spent for dispute settlement, and the adjudicative outcomes of the dispute settlement mechanism. It tests capacity hypotheses for the less legalized GATT, and socialization hypotheses for the legalized WTO, and finds these hypotheses partly valid. Chapter VI is the conclusion of this study that the legalized WTO benefits developing countries more than the less legalized GATT because the former socializes them with its dispute settlement mechanism better than the latter.

Chapter 2. Thoery

2.1 Introduction

How has international legalization as shown in the WTO distributed benefits between developed and developing countries? Has it distributed more to developed countries than the less legalized or non-legalized GATT? Or has it distributed more to developing countries than the GATT? Whatever the answers to these questions maybe, why are they so? This chapter will review how three main theories of international politics view the distribution of benefits of international legalization for developed and developing countries, and will explore a theory which can answer this question appropriately.

Three main perspectives of international politics will answer these questions differently from one another. Realism and neorealism may see international legalization having little effect or consequence. If it has effect, they may see it favoring powerful developed countries and harming weak developing countries. In this perspective, international legalization does not matter much, but power, capacity or capability of a country matters very much, and distribution of benefits of international institutions depends on this power. Neoliberalism may see legalized international institutions increasing the efficiency gains of both developed and developing countries because they reduce uncertainty, transaction cost and opportunistic cheating between them more efficiently than non-legalized or less legalized one. However, it may also see a difference in the distribution of benefits between them which results from their bargaining over them, although most of its adherents tend to ignore such difference. Constructivists contend that beliefs in international norms, rules and laws are important because they provide both constitutive and regulative rules of international politics, and explore why many states, whether

developed or not, comply with it. They do not deal particularly with the distribution of benefits between developed and developing countries which derives from international law and its legalization, but tend to think that this distribution depends on them.

This study holds that none of these three perspectives alone can explain the distribution of benefits from international institution and its legalization between developed and developing countries satisfactorily. It holds that this distribution can be explained better by applying these three perspectives eclectically to the analysis of international institution and its legalization.⁴³

2.2 Realism and International Legalization

International legalization involves a high degree of obligation, precision and delegation, as noted earlier, and realists and neorealists generally see such international legalization limited in scope and in the number of states consenting to it. Nevertheless, how do they see international legalization?

The representative thinkers of realism such as E. H. Carr and Morgenthau view international law as primitive law lacking basic functions of legal system – legislation, adjudication and enforcement. Kenneth Waltz, Joseph M. Grieco and Michael Mastanduno see relative gains concerns of states as obstacles to international legalization. Robert Gilpin emphasizes the importance of a hegemonic power as supporter of international regime and its legalization. Steinberg even argues that the legalization of international institution is no more than the ‘organized hypocrisy’.

According to E. H. Carr, law, whether domestic or international, is important because it provides society with stability and continuity, but law is a result of constant political struggle

⁴³ Rudra Sil and Peter J. Katzenstein, *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics* (New York: Palgrave Macmillan, 2010).

between competing political forces.⁴⁴ He criticized “a strong inclination to treat law as something independent of, and ethically superior to, politics,”⁴⁵ and asserted that “every system of law presupposes an initial political decision, whether explicit or implied, whether achieved by voting or by bargaining or by force, as to the authority entitled to make and unmake law.”⁴⁶ This applies to both domestic and international law.

However, international law differs from domestic law in two respects. First, unlike domestic law, it lacks three institutions of domestic law: a court giving judicial decisions, an executive enforcing judicial decisions, and a legislature making law. It is a primitive type of law.⁴⁷ Second, in domestic law, all disputes are justiciable at least theoretically, but “in international law, all disputes are not justiciable; for no court is competent unless the parties to the dispute have agreed to confer jurisdiction on it and to recognize its decision as binding.”⁴⁸ According to him, the applicability of judicial procedure in international politics depends on political agreement, and this agreement is usually restricted to the spheres which do not involve the security and survival of the state. It is in these spheres that the judicial settlement of disputes or international legalization can take place.⁴⁹

Hans Morgenthau shares Carr’s perception of international law: “it is a primitive type of law primarily because it is almost completely decentralized law,” which is in turn “the inevitable result of the decentralized structure of international society”.⁵⁰ According to him, “international law owes its existence and operation to two factors, both decentralized in character: identical or

⁴⁴ E. H. Carr, *The Twenty Years Crisis, 1919-1939* (London: Palgrave Macmillan, 2001), pp. 164-166.

⁴⁵ *Ibid.*, p. 159.

⁴⁶ *Ibid.*, p. 166.

⁴⁷ *Ibid.*, pp. 159-160

⁴⁸ *Ibid.*, pp. 178-179.

⁴⁹ *Ibid.*, pp. 178-183.

⁵⁰ Hans J. Morgenthau, *Politics Among Nations*, Sixth Edition (New York: Alfred A. Knopf, 1985), p. 295.

complementary interests of individual states and the distribution of power among them.”⁵¹ The distribution of power or the balance of power works to support international law when it is violated as in North Korean invasion of South Korea in 1950. On the other hand, identical or complementary interests of individual states work as the lifeblood of international law. However, these interests work as a decentralizing force on three basic functions of any legal system: legislation, adjudication and enforcement. The decentralized character of international law makes it easy for the powerful states both to violate and enforce it, while making it hard for the weak states both to violate and enforce it.⁵²

For Carr and Morgenthau, international law is not important for security or survival of a state, but may be important in economic matters in which states have identical and complementary interests. Both powerful and weak countries may observe it voluntarily, although it still is a primitive law.

Probably inheriting Carr and Morgenthau on the possibility of international cooperation in the sphere of identical or complementary interests, neoliberals contend that states can cooperate through an international regime or institution as it can provide its member states with absolute gains. A legalized regime or institution can be more efficient in this respect as it forces its members to observe it.

Contemporary realists or neorealists refute this contention with the arguments of relative gain and hegemonic stability. Waltz contends that “the first concern of states is not to maximize power but to maintain their position in the system”.⁵³ This implies that what is important for the survival of states is not the maximization of absolute gains but that of relative gains. Joseph M. Grieco says explicitly that “*the fundamental goal of states in any relationship is to prevent others*

⁵¹ Ibid., p.296.

⁵² Ibid., pp.296-313.

⁵³ Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979), p.126.

*from achieving advances in their relative capabilities,*⁵⁴ and that “states fear that their partners will achieve relatively greater gains...”.⁵⁵ In a word, a state will not cooperate with another state, if the latter state gains more than the former. Michael Mastanduno has examined the US policy toward Japan in three areas of aircraft, satellites, and high-definition television in the late 1980s, and found that “relative gains concerns – concerns that economic interaction with Japan, while mutually beneficial, may benefit Japan more than the United States and thereby posing a threat to American national security, broadly defined – have a significant influence on official US thinking and policy”.⁵⁶

Neorealists also tend to accept what David A. Baldwin called fungibility of capabilities, which refers to “the ease with which capabilities in one issue-area can be used in other issue-areas”.⁵⁷ In the long period of past colonialism, military capabilities were used to increase economic capabilities, but now they are no longer efficient means of economic gains. However, economic capabilities can easily be used to increase military capabilities, and realists contend that economic cooperation will be that much harder to achieve.

If this neorealist perspective is applied to the legalization of international regime or institution, legalization itself will be hard to accomplish, and even if it is accomplished, relative gains problem may make its member states less compliant with it.

Some realists argue that international regimes are maintained primarily by a hegemonic leadership. Robert Gilpin contends that the hegemonic leadership of the U.S. is the basis of

⁵⁴ Joseph M. Grieco, “Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism,” in *Neorealism and Neoliberalism*, ed. David A. Baldwin (New York: Columbia University Press, 1993), p. 127.

⁵⁵ *Ibid.*, p. 128.

⁵⁶ Michael Mastanduno, “Do Relative Gains Matter? America’s Response to Japanese Industrial Policy,” *International Security*, Vol 16. No.1 (Summer 1991), p. 74.

⁵⁷ David A. Baldwin, “Neoliberalism, Neorealism, and World Politics,” in *Neorealism and Neoliberalism*, ed. David A. Baldwin (New York: Columbia University Press, 1993), p. 20.

liberal economic order and of many international economic institutions in the postwar period.⁵⁸ Stephen Krasner finds in his study of international economic order for the past 200 years that the periods of openness in the world economy correlate with period in which one state is clearly dominant.⁵⁹ What is more important is not international regime or its legalization, but a hegemonic leadership which supports it.

Richard Steinberg applies this realist perspective to the GATT/WTO. He says that the legalized rules of the WTO were formally made on the basis of consensus among the members of the GATT, its predecessor, in the Uruguay Round of trade talks between 1986 and 1994. However, he calls the consensus rule of the GATT and WTO “organized hypocrisy” after Krasner who called sovereignty organized hypocrisy.⁶⁰ This hypocrisy serves as a device to legitimate the trade institution. He contends that relative market size of a state, not consensus, is an underlying source of bargaining power at the GATT/WTO. Trade rounds of the GATT have proceeded in accordance with law-based bargaining, but the agendas of these rounds have been set by powerful states, and they are concluded not in the spirit of consensus but in the shadow of power. He says: “The procedural fictions of consensus and the sovereign equality of states have served as an external display to domestic audiences to help legitimize WTO outcomes. The raw use of power that concluded the Uruguay Round may have exposed those fictions, jeopardizing the legitimacy of GATT/WTO outcomes and the decision-making rules, but weaker countries cannot impose an alternative rule. Sovereignty equality decision-making rules persist at the

⁵⁸ Robert Gilpin, *US Power and the Multinational Corporation* (New York: Basic Books, 1975) and *The Challenge of Global Capitalism* (New Jersey: Princeton University Press, 2000).

⁵⁹ Stephen D. Krasner, “State Power and the Structure of International Trade,” *World Politics* 28:3 (April 1976), pp. 317-347.

⁶⁰ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

WTO because invisible weighting assures that legislative outcomes reflect underlying power, and the rules help generate a valuable information flow to negotiators from powerful states.”⁶¹

In sum, for realism, international law is either not important or favors powerful developed countries. Powerful developed states are advantageous in the spheres where there are international regimes or their legalizations because they only come after political agreement in which power or material capability matters much.

2.3 Neoliberalism and International Legalization

What benefits do neoliberals see from the legalized international institution? Do they see it benefitting powerful developed countries more than weak developing ones, or favoring weak developing countries more than powerful developed ones?

Robert Keohane, a leading neoliberal, does not deal with the distribution of benefits of international institutions, whether legalized or not, among its member countries. Andrew Moravcsik’s theory of bargaining may suggest that international institutions favor developed countries more than developing countries. Kenneth Abbott and Duncan Snidal analyze benefits and costs of international legalization which have implication for the distribution of benefits between developed and developing countries, and conclude that both types of international institutions favor developed countries more than developing countries. James Caporaso and Alec Stone Sweet point out the autonomy of legalized dispute settlement process from the principals which originally agreed to establish it.

Keohane contends that international institutions, whether legalized or not, can promote international cooperation because they provide their members with absolute gains by preventing

⁶¹ Richard Steinberg, “In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO,” *International Organization*, Vol. 56, No. 2 (March 2002), pp. 339-374 and p. 342.

cheating and by reducing transaction costs and uncertainty.⁶² However, Keohane and most other neoliberals neglect to deal with the question of the distribution of benefits of international institution among its member countries. Moravcsik makes an exception, and deals with this question by suggesting a theory of bargaining for the establishment of international institution like the European Union.

According to him, negotiation for the establishment of international institutions has “a causal sequence of three stages: national preference formation, interstate bargaining, and institutional choice”.⁶³ He regards state preferences as the first important determinant of state behavior. He says: “States first define preferences – a stage explained by liberal theories of state-society relations. Then they debate, bargain, or fight to particular agreements – a second stage explained by realist and institutionalist (as well as liberal) theories of strategic interaction.”⁶⁴ For both realists and neoliberals state preferences are given exogenously, but for Moravcsik they are formed domestically and transnationally.

Neoliberals agree that states obtain efficiency gains when they agree to establish a regime or institution dealing with such matters as security, economy or environment, but there are differences in the gains each of them obtains after efficiency gains. Moravcsik argues that these differences reflect three specific factors: “(1) the value of unilateral policy alternatives relative to the status quo, which underlies credible threats to veto; (2) the value of alternative coalitions, which underlies credible threats to exclude; and (3) the opportunities for issue linkage or side-payments, which underlie ‘package deals’”.⁶⁵

⁶² Robert Keohane, *After Hegemony* (Princeton: Princeton University Press, 1984), pp. 244-245.

⁶³ Andrew Moravcsik, *The Choice for Europe* (Ithaca: Cornell University Press, 1998), p. 20.

⁶⁴ Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics,” *International Organization* 51, 4, (Autumn 1997), p. 544.

⁶⁵ Andrew Moravcsik, *The Choice for Europe*, p. 63.

If we apply these three factors to the negotiation between developed and developing countries, the negotiated outcome will favor developed countries more than developing ones. Developed countries like the U.S. have more credible threats to veto the negotiation and to initiate alternative coalition excluding the targeted country than developing countries like South Korea. Issue linkage is more difficult to achieve in developed countries than in developing countries. For instance, if developed countries have competitiveness in industrial trade, while developing countries have it in agricultural trade, both groups of countries can exchange concessions in trade matter with developed and developing countries making concessions respectively in agricultural trade and industrial trade. However, it will be very difficult for developed countries to make concession in agricultural trade because agricultural workers of developed countries are politically influential domestically. It is because of this situation that there is presently far less free trade in agricultural goods between developed and developing countries.

Does legalized international institution provide its members with more benefits than the non-legalized or less legalized international institution? This question is not easy to answer because legalization of international institution can incur costs such as contracting cost, sovereignty cost and inflexibility cost while providing its members with more benefits.

Abbott and Snidal compare the advantages of hard and soft legalizations of international institution. Hard legalization refers to legalization in which the degrees of obligation of the member states, that of precision of rules, and that of the third- party delegation for interpretation and implementation of the rules are all high, whereas soft legalization means legalization in which the degrees of obligation, precision and delegation are all low, or at least one or two of them are low.

According to them, there are four advantages in hard legalization. It enhances credible commitments, reduces transaction costs, allows states to adopt a strategy of legal approach to international agreements, and handles problems of incomplete contracting.⁶⁶ Then, what are the disadvantages of hard law or legalization? They do not directly specify them. However, they list four advantages of soft law, and these four advantages of soft law are tantamount to the four disadvantages of hard legalization. First, hard legalization enhances the benefits of international institution like the reduction of transaction costs, but increases contracting costs. Soft legalization cannot yield all the benefits of hard legalization, but it decreases contracting costs. Second, hard legalization entails high sovereignty costs especially because states should accept the third-party interpretation and implementation of their agreements. Soft legalization does hardly infringe sovereignty of states because it does not allow such third-party interpretation and implementation. Third, soft legalization with low degree of obligation, precision and delegation can provide flexibility to cope with uncertainty. Fourth, soft legalization is useful for a compromise between the states with different capabilities and preferences. Compromise between them will be more difficult if their agreements entail a high degree of obligation, precision and delegation.⁶⁷

In sum, hard legalization of international agreements can bring about higher efficiency gains, but it has many costs like contracting costs, sovereignty costs, inflexibility costs, and difficulty in compromise. Soft legalization can generate relatively low efficiency gains, but will not have many costs hard legalization should pay.

Then, how do hard and soft legalization distribute their respective benefits between developed and developing states? Abbott and Snidal do not deal directly with this question of

⁶⁶ Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization*, Vol. 54, No. 3 (Summer 2000), pp. 424-434.

⁶⁷ *Ibid.*, pp. 434-450.

distribution of benefits. But they say that hard legalization is advantageous to states with large legal staffs, and this means that it is advantageous to western developed states. They also say that “powerful states have the greatest influence on the substantive legal rules, and the institutions associated with (soft) international legalization are frequently constructed to ensure them a leading voice.”⁶⁸

They admit that both hard and soft legalizations favor powerful developed countries, but do not tell us which form of legalization is more favorable or less favorable for powerful developed countries or for weak developing countries. They do not answer the main question of this study, whether legalization, which means hard legalization here, favors developed countries more than soft legalization or whether it favors developing countries more than soft legalization. For them, the answer to this question may be different depending on issue areas, and therefore can be either way.

However, in general they support the less legalized international institution more than the legalized institution as a solution to secure international cooperation among states with power differentials. Judith Goldstein and Lisa L. Martin join them as they warn against potential negative effects of the legalized WTO. As noted earlier, according to them, the legalized WTO provides information, reduces transaction costs, and monitors membership behavior more efficiently, making it harder for states to renege on its free trade rules, but it may paradoxically undermine free trade in the long run if it mobilizes protectionist groups domestically. They contend that the less legalized GATT may be as good as the legalized WTO for the promotion of free trade because it, while promoting free trade successfully, is less likely to mobilize protectionist forces domestically than the legalized WTO.⁶⁹

⁶⁸ Ibid., p.450.

⁶⁹ Judith Goldstein and Lisa L. Martin (2000), pp. 603-632.

How does such legalization fare for developed and developing countries? Sovereignty costs deriving from legalization may be higher for powerful developed countries than for weak developing countries. Abbott and Snidal argue that “since they have less direct control over their own fates, small states also incur lower sovereignty costs from hard legalization.”⁷⁰ Powerful developed countries will be relatively free from sovereignty costs if there is no legalization, but weak developing countries are more likely to endure them even without legalization because they have lower bargaining power than powerful developed countries. In this perspective legalized international institution may be better than less legalized institution for developing countries, if developing countries use legalized institution as frequently as developed countries and both of them have an equal chance of winning their respective cases. However, if capacity of a country intervenes in the use of legalized institution, this proposition may not hold.

Caporaso and Stone Sweet do not deal with distribution of benefits among the countries with power differentials, but notes the autonomy of legalized institution from the principal states which created it. They start with principal-agent framework in the study of public administration. In public administration, the principals are elected officials and the agents are the actual administrators of the policies. Principals delegate their authority to agents for the implementation of their policies, while the agents carry out the task that the principals delegate to them. However, there are always tensions between the principals and agents because of the problem of information asymmetry. The agents who usually have more information about the actual implementation of the policy may not perform the task in the way as the principals demand in order to reduce the cost imposed on them and increase their own self-interests. In other words, the agents can be autonomous from the principals. In the case of European Court of Justice they examine, the members of the EU, who are the principals, have delegated their judicial authority

⁷⁰ Kenneth W. Abbott and Duncan Snidal (2000), p. 448.

to ECJ. They contend that since after this delegation ECJ has been no longer under the control of their principals but autonomous from them and their autonomous judicial decisions have contributed to European integration.⁷¹

Stone Sweet elaborates furthermore about why legalized international institution does not necessarily reflect the preferences and capabilities of its member states. He models the self-sustaining process of emergence and evolution of its governance system into four stages: normative structure, dyad, triad, and triadic rulemaking. He presents the judicialization of the GATT/WTO as an exemplary case of his model by which governance systems evolve. When a normative structure of trade, the GATT, was agreed on by its participants in 1947, there was no triadic dispute resolution, and dispute resolution was up to the negotiations between the two disputants (dyad). But soon in the 1950s, the panel system in which diplomats were panel members emerged, and in the 1970s and 1980s, the panel system in which jurists and trade specialists, not diplomats, were panel members began to develop. In particular, the GATT specified dispute settlement procedure in 1979, and since then there has been a great development in the judicialization of the international trade regime. However, it remained on the level of consensual triadic dispute resolution during the GATT period. This consensual triadic dispute resolution of the GATT was transformed into the compulsory system when its members agreed to establish the WTO in 1995, or in other words, to transform the less legalized or softly legalized GATT into the legalized WTO.⁷² There are the causal linkages connecting dyad, consensual or compulsory triad, triadic rule-making and normative structure. Based on these causal linkages or path dependence, triadic rule-making (e.g., case law and precedent) contributes to building the relative autonomy of normative structure, which in turn affects dyad,

⁷¹ Alec Stone Sweet and James A. Caporaso (1998).

⁷² Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies*, Vol. 32, No. 2 (April 1999) pp. 147-184.

triad and triadic rule-making again. Applying this argument to the WTO, he predicted: “in the WTO, a powerful supranational governmental authority will emerge, litigation will steadily rise, and judges will generate an expansive legal discourse that will gradually reshape the interstate discourse on trade.”⁷³

Keohane’s theory of international institution does not deal with the distribution of benefits between developed and developing countries. Moravcsik’s theory of bargaining is useful for the analysis of bargaining among European countries, but if applied to bargaining between developed and developing countries, it may propose that international bargaining, whether explicit or implicit, favors developed countries more than developing countries. Abbott and Snidal say that legalization, whatever form it make take, may favor powerful developed countries, but they leave room for possibilities that hard legalization may not necessarily favor them because of many costs it entails. Caporaso and Stone Sweet do not say about whether legalized institution favors developed states or developing states, but contend that it is autonomous from particular preferences and capabilities of the member countries.

2.4 Constructivism and International Legalization

How do constructivists see international legalization? Constructivists do not deal directly with international legalization which involves the third-party adjudication and enforcement mechanism, but treat norms and international soft law which do not have such adjudication and enforcement mechanism. They, unlike realists, think that these norms and soft laws are important. They contend that ideas, values and norms, and culture are determinants of international political order. International law, whether it is hard or soft, is based on norms for

⁷³ Ibid., p. 180.

them, while it is based on power for realists, and on common interest for neoliberals. In other words, constructivists focus their attention on norms, while realists and neoliberals emphasize, respectively, power and common interest, for their study of international law.

They contend that international law is an independent variable which constitutes and regulates international politics. Friedrich Kratochwil contends that international norms and laws provide states with constitutive rules of defining states themselves and their power games. James G. March and Johan P. Olsen suggest that states act not only according to logics of consequence which realism and neoliberalism emphasize, but also according to logics of appropriateness constructivism stresses. Harold Honju Koh suggests that nations obey international rules through transnational legal process of interaction, interpretation and internalization.

Kratochwil rejects the assumption of anarchy in realism and is not fully satisfied with utilitarian treatment of norms and international legal order. He thinks that international power game does not take place in anarchy, but is embedded in a certain normative structure or international legal order. According to him, “the international legal order exists simply by virtue of its role in defining the game of international relations.”⁷⁴ Through a discursive process guided by norms and rules states come to define themselves and power game between them. As the market is not a natural outcome but came into existence after a set of conventions such as the acceptance of money and property rights, a system of states is dependent upon the emergence of norms which define states and regulate their practices.⁷⁵

March and Olsen distinguish between logic of expected consequences and logic of appropriateness as action basis of international actors such as groups and states. For both realists and neoliberals, logic of consequences, which in turn rests on utilitarian calculation of power and

⁷⁴ Friedrich V. Kratochwil, *Rules, Norms, and Decisions* (Cambridge: Cambridge University Press, 1989), p. 251.

⁷⁵ *Ibid.*, p. 257.

interest, is a main principle of international politics. However, constructivists tend to think that logic of appropriateness, in which actors behave according to appropriateness which can be found in norms, is important. They perceive “international society as a community of rule followers and role players with distinctive sociocultural ties, cultural connections, intersubjective understandings, and sense of belonging.”⁷⁶ International law is maintained by power and/or common interest for realists and neoliberals, but it is observed by appropriate norms for constructivists. For them, norms matter independently of power or interest of the member states of international society.

Koh introduces the two contemporary legal schools explaining why nations comply with international law, and then adds his own constructivist explanation as their complement.⁷⁷

One school is the “management” school represented by Abram Chayes and Antonia Handler Chayes.⁷⁸ They contrast two alternative models of treaty compliance, (1) the “enforcement” model with the various coercive devices of military or economic sanctions and membership sanctions and (2) the “management” model with instruments such as transparency, reporting and data collection, verification and monitoring, capacity-building, consensual dispute settlement, and the adaptation and modification of treaty norms. For them, the “management” model is superior to the “enforcement” model for treaty compliance. They contend that “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used,”⁷⁹ while “an iterative process of discourse among the parties, treaty organization, and the wider public”⁸⁰ with non-coercive instruments of treaty management makes

⁷⁶ James G. March and Johan P. Olsen, “The Institutional Dynamics of International Political Orders,” *International Organization*, Vol.52, No.4 (Autumn, 1998), p. 952 and pp.943-969.

⁷⁷ Harold Hongju Koh, “Why Do Nations Obey International Law?”, *The Yale Law Journal*, Vol. 106, No.8, (June 1997), pp. 2599-2659.

⁷⁸ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge: Harvard University Press, 1995).

⁷⁹ *Ibid.*, pp. 32-33.

⁸⁰ *Ibid.*, p. 25.

nations compliant with treaties or international laws. The impetus for nation's compliance with international law is not fear of sanctions, but fear of diminution of status through loss of reputation. According to them, the WTO, a quasi-enforcement model, is not better than the GATT, a "management" model, to elicit its members' compliance with its trade rules, although this skepticism about the WTO has turned out to be wrong as of now.

Another school is the philosophical school which inherits Kantian tradition. Thomas M. Franck represents this school. Franck rejects the thesis that international law is powerless because it does not have the third-party adjudication and a central enforcement mechanism like domestic law. It is correct that international law does not have such mechanism, and this is why Carr and Morgenthau called it a primitive law. However, he observes that "some, indeed *many*, international rules of conduct are habitually obeyed by states,"⁸¹ and asks why they are *habitually* obeyed. What is a factor which has contributed to habitual compliance of states with international law? According to him, this factor is legitimacy of international law. According to him, "*legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.*"⁸² Legitimacy, not coercive authority, exerts a pull to compliance of states with international law.

He suggests "four indicators of a norm's legitimacy: its rule-clarity or determinacy; its symbolic validation by rituals and other formalities; its conceptual coherence; and its adherence to 'right process,' or conformity with the organized hierarchy of the international rule system". As the meaning of rule's conceptual coherence is not so clear here as the meanings of rule's

⁸¹ Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), p.20.

⁸² *Ibid.*, p. 24.

determinacy, symbolic validation, and adherence, it is necessary to introduce what Franck means by rule's conceptual coherence.

By rule's coherence he means "its connectedness, both internally (among the several parts and purposes of the rule) and externally (between one rule and other rules, through shared principle)". According to him, "this connectedness between rules united by underlying principles – both manifest in a rule's mandate and, often, also in its textured exceptions and exculpations – manifests the existence of an underlying rule-skein which connects disparate *ad hoc* arrangements into a network of rules 'governing' a community of states, the members of which perceive the coherent rule system's powerful pull towards voluntary compliance". Underlying this assertion is an assumption that there is a community of nations or international society. National community endows its citizen with various rights, and as a member of this community its citizen has an obligation to comply with its domestic laws, and this way of thinking can be transferred to international community and its member states.⁸³

In his later study he calls legitimacy procedural fairness, and contends that to pull nations toward compliance with international law, legitimacy or procedural fairness is not sufficient, but substantive fairness or fairness in the distribution of the consequences of international treaties and agreements is also necessary.⁸⁴

According to these two schools, nations voluntarily comply with international law if it is managed with an appropriate legal process and if it is fair in terms of both its procedures and consequences. However, Koh asks furthermore why nations still comply with it in these two cases, and answers that they do so because norms of international law are *internalized* into domestic legal system through transnational legal process. Transnational legal process has three

⁸³ Ibid.,pp. 180-181.

⁸⁴ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

phases. “One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but *internalize* the new interpretation of the international norm into the other party’s internal normative system. The aim is to ‘bind’ that other party to obey the interpretation as part of its internal value set.” He goes on to say the following. “Such legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even identities of the participants in the process”.⁸⁵

Such interaction between nations surrounding international rules, interpretation of international rules, and domestic internalization of interpreted rules are none other than a part of socialization process of nations with international law. In the dispute settlement process of the GATT/WTO the complainants interact with the respondents for the interpretation of its rules, the panel or the Appellate Body interprets the rules for adjudication, and the losing party should modify their trade practices, measures or rules in conformity with the interpretation of the panel or internalize them domestically. If these transactions take place repetitively, nations will internalize or socialize themselves with the rules of the GATT/WTO furthermore.

If international rules are legalized with the third-party adjudication and enforcement mechanism, such legalization will promote internalization of international rules or the socialization of the member states with them more successfully. Under the circumstances of international legalization, the member states will internalize or socialize themselves with it more actively because they will meet sanctions or punishment if they don’t do so. Repetition of this

⁸⁵ Harold Hongju Koh (1997), p. 2646.

process over a long period of time may produce a change of culture about international law from Hobbesian (realists') or Lockean (utilitarian) culture to Kantian culture of international law. Time needed for such changes in international legal culture may be long, probably a matter of centuries, but it may be said that such change has begun to take place especially in many liberal nations.⁸⁶

For Kratochwil, March and Olsen, Chayes, Frank, and Koh, international law, which is not legalized like domestic law, is important independently. Nations comply with it not primarily owing to power or interest but owing to their internalization of or socialization with its normative character of appropriateness, legitimacy or fairness. If all nations, over a long period time, come to have internal consciousness or culture that international law is fair, and therefore should be obeyed, international law will play a much greater role in international politics. Underlying this assertion is the philosophical assumption that states constitute international community or society, however loose it may be. This assumption means that international community or society bestows rights upon its member states, and the member states have obligation to comply with its norms, rules and laws.

2.5 Toward an Eclectic Approach to International Institution and its Legalization

What is the important factor which affects the distribution of benefits of the international institution between developed and developing countries, and how does its legalization affect the distribution of benefits?

⁸⁶ Alexander Wendt, "Why a World State is Inevitable," *European Journal of International Relations*, Vol.9, No.4 (2003), pp. 491-542 and Anne-Marie Slaughter, "International Law in a World of Liberal States," *European Journal of International Law*, Vol 6 (1995), pp. 503-538.

For realism and neorealism, it is the distribution of capacity, capability or power among states, and international institution favors powerful developed countries because it is the result of political agreements between states in which capability or power matters very much. They do not think legalization of international institution is possible or desirable as it would undermine the sovereignty of states.

Applying this perspective to the GATT/WTO, Steinberg, as noted earlier, asserts that the GATT/WTO was established in the shadow of power, although it was formally founded with the unanimous consent of its member countries, and its trade rules have advantaged developed countries much more than developing countries. Many capacity theorists noted earlier also contend that the dispute settlement mechanism of both the GATT and WTO have favored developed countries much more than developing countries in terms of the frequency of its use. In particular, they contend that legalization of the GATT into the WTO has not affected such characteristics of international trade institution. In sum, international institution is founded by the will of the powerful countries, its substantive rules favor them, and its dispute settlement, regardless of the degree of its legalization, favors them, too.

For neoliberalism, the important factor affecting the distribution of benefits of international institution may be the bargaining power of each member state, but most neoliberals are silent about it with emphasis on the efficiency gains of international institution which all of its member countries can obtain in common. Legalization of international institution may increase its efficiency gains although many costs such as sovereignty and flexibility costs are accompanied with it.

According to this perspective, the consenting states have established the GATT/WTO to promote their common trade interest, and developed countries may obtain more benefits from it

than developing countries as the former has more bargaining power than the latter. Some liberals argue that legalized dispute settlement mechanism of the WTO should help developing countries to compensate for the lack of their bargaining power over developed countries. On the other hand, some liberals contend that the less-legalized GATT is better than the legalized WTO for the support of free trade system.

For constructivism, the important factors affecting international institution, whether legalized or not, are beliefs, norms, or culture. Nations should have beliefs that benefits of international institution are distributed appropriately, legitimately or fairly to its member nations. For it, whether nations create, maintain, or modify international institution depends most importantly on whether nations have beliefs, norms, or culture favoring its establishment, maintenance or modification.

If we apply this perspective to the GATT/WTO, nations which have kept favorable beliefs in free trade have established this international institution. For neoliberals, nations may comply with the rules of the GATT/WTO so far as they obtain gains from them, and may not comply with them if they do not acquire any gain from them. However, for constructivists, nations have favorable beliefs in free trade, socialize themselves with the rules of the GATT/WTO, and internalize them into their domestic practices and legal system through transnational legal process. As nations internalize them domestically, they come to observe them voluntarily owing to their beliefs in them. Beliefs may be based on the calculation of interests, and undermined by it. But beliefs may last longer than the short-term calculation of interests, may be conducive to the long-term calculation of interests, and may even affect the calculation of interests for the sake of beliefs.

The dispute settlement mechanism of the GATT/WTO is an instrument to make its member nations comply with its rules. The member nations will also socialize themselves with its use naturally as they are involved in dispute settlement as the complainants or respondents. However, under the less legalized GATT, nations could avoid their involvement in dispute settlement as they have the right to veto it, but under the legalized WTO they cannot do so as they do not have such right. Developing countries, unlike developed countries, did not participate in dispute settlement actively in both the GATT and in the early period of the WTO, but they have come to participate in it or to protect their interest more actively in the later period of the WTO as its legalized character promotes their socialization with it.

Stone Sweet said “judicialization is socialization.” When he said it, he meant: “As states gained experience with dispute settlement, as panels performed their dispute resolution functions, as a stable case law enhanced legal certainty, GATT members could afford to view triadic rule-making as a useful, cost-effective guarantor of regime reciprocity.” Nations will use the compulsory triadic rule making mechanism of the legalized WTO more frequently than the consensual triadic rule-making of the less legalized GATT because the former dispute settlement mechanism is more cost-effective than the latter one as Stone Sweet asserts.⁸⁷

In sum, for realism and neorealism both the less legalized GATT and the legalized WTO definitely favor developed countries. For neoliberalism they favor both developed and developing countries, but favor developed countries more as they have more bargaining power than developing countries. The legalization of this trade institution may or may not help developing countries. For constructivism they benefit both of them on the ground that the member nations regard observance of its rules as being not only beneficial but also appropriate, but the legalized WTO may help developing countries to protect their interest more actively than

⁸⁷ Alec Stone Sweet (1999), p. 172.

the less legalized GATT as legalization induces them to socialize themselves with its dispute settlement mechanism.

What strength does each of these perspectives have for the explanation of the GATT/WTO, and how valid is it? Realists' strength lies in their emphasis on the primacy of capability, capacity or power in the establishment of international institution like the GATT/WTO. Whether it is legalized or not does not matter because it is power which supports it. It is the initiative of the U.S. which designed and founded the GATT as free trade institution, and it is also its initiative which legalized this institution as the WTO. The U.S. has been a main power which has supported the maintenance of the GATT/WTO since its foundation. In view of these facts, Gilpin's hegemonic stability theory holds. On the other hand, the U.S. did not allow the Soviet Union and its satellite states any economic gains as they could not join the free trade system of the GATT under the U.S. auspices. It has allowed memberships for China and Russia only after it won the Cold War or after these two countries were no longer threatening powers against the United States. In view of these facts, Grieco's argument about relative gain also holds. However, what if a country like China, a rising power, would continue to obtain much more relative gain than the U.S. from the WTO, and eventually surpass the U.S. in terms of economic capabilities in the future? Would the U.S., nevertheless, continue to support the WTO or would it rather attempt to undermine it? This realists' question will remain valid for the long time to come.

However, realists' contention that the rules of the GATT/WTO favor developed countries more than developing countries is not consistent with facts about its performances. This contention is usually based on the observation that its consensus rule-making procedure is only a façade underneath which invisible weighting of bargaining power of each state matters very

much. This study does not wholly agree with this observation, but even if we concede that it is more or less correct, we think that it should be assessed in view of dispute settlement and trade outcomes of the GATT/WTO. As we will analyze dispute settlement outcomes in later chapters of this study, we will here introduce statistics about trade outcomes of the GATT/WTO in terms of the changes in the respective shares of world merchandise exports for its member countries. According to these statistics, West European countries and Japan have obtained more gains than the United States, and developing countries have obtained more gains than developed countries. During the period of the less legalized GATT, Japan's share of world merchandise exports trade grew from 0.4% in 1948 to 9.9% in 1993, Germany's share from 1.4% in 1948 to 10.3% in 1993, and the share of six East Asian countries from 3.4% in 1948 to 9.7% in 1993, while that of the United States fell sharply from 21.7% in 1948 to 12.6% in 1993. Under the less legalized GATT Japan and Germany rose as major economic powers, and six East Asian countries succeeded in developing their economies, while the U.S. fell sharply in terms of its share of world merchandise exports. Under the legalized WTO, China's share of world merchandise exports grew sharply from 2.5% in 1993 to 9.1% in 2008, and Middle East's share increased from 3.5% in 1993 to 6.5% in 2008, although this increase could be attributed to a rising price of oil. Brazil's share increased from 1.0% in 1993 to 1.3% in 2008, and India's share from 0.6% in 1993 to 1.1% in 2008. On the other hand, the U.S. share decreased from 12.6% to 8.2%, the German share from 10.3% to 9.3%, and the Japanese share from 9.9% to 5.0% between 1993 and 2008. Trade statistics show that under the legalized WTO developed countries' share decreased considerably, the least developed countries' share increased a little, and developing countries' share increased considerably, although this increase was largely due to the increase of China's share. For these trade gains, economic competitiveness of each member country is important, but

free trade opportunity is also important. Most developing countries, especially China, could not have accomplished economic growth without global free trade and their memberships in the WTO.⁸⁸ In terms of the growth of the share of the world merchandise export, the less legalized GATT favored Western European countries, Japan and some developing countries much more than the U.S., and the legalized WTO has favored developing countries more than developed countries.

Both the less legalized GATT and legalized WTO have so far survived realists' skepticism of international cooperation through international institution which cannot but generate differences in relative gains among its member countries.

The strength of neoliberals lies in their emphasis on interest promotion through the efficiency gains of international institution, whether legalized or not. Under the GATT/WTO world merchandise exports increased from 59 billion dollars in 1948 to 3676 billion dollars in 1993 and to 15717 billion dollars in 2008. World merchandise exports increased almost 265 times between 1948 and 2008, and nearly 4.3 times between 1993 and 2008, which is the WTO period. Such increases in exports may be owing to many factors such as technological development, the end of the Cold War and globalization, but nobody would deny that they are partly owing to the liberalization of trade the GATT/WTO has so far promoted. The membership of the GATT/WTO grew from 23 in 1947 to 160 in 2014, and the share of its member countries' export volume out of the world total increased from 62.8% in 1948 to 93.4% in 2008.⁸⁹

Brown, Deardorff and Stern, using the Michigan Model of World Production and Trade, simulated the economic effects of the Uruguay Round on the major developed and developing countries over the ten-year period from 1995 to 2005, and found that the WTO trade rules

⁸⁸ For trade statistics, "World trade developments in 2008", *World Trade Organization*, accessed March 22, 2010, http://www.wto.org/english/res_e/statis_e/its2009_e/its09_world_trade_dev_e.htm.

⁸⁹ Ibid.

benefited both the developed and developing countries equitably. According to their simulation, the Uruguay Round increased global economic welfare by 73.0 billion dollars. The developed countries overall had an estimated welfare gain of 53.8 billion dollars, and the developing countries an estimated welfare increase of 19.2 billion dollars.⁹⁰

These facts mean that all of both the GATT and WTO members have gained benefits from the reduction of transaction cost which derives from the principle of non-discrimination, transparency, increased certainty about trading conditions, and simplification and standardization of customs procedure enshrined in the multilateral trading system.

Most neoliberal theorists are silent about the distribution of gains from international institution, but Moravcsik suggests that countries with high bargaining power obtain more gains than countries with low bargaining power. Economically, the U.S. used to have more bargaining power than West European countries and Japan throughout the Cold War period, and developed countries consisting of these countries have kept more bargaining power than developing countries for a long time. Then, how can we explain faster growth rate of trade of West European countries and Japan than the U.S., and of developing countries than developed countries?

This may be partly owing to the concessions or benevolence of the U.S. for the sake of promoting economic recovery and development of West European countries, Japan, and some developing countries in the Cold War period. The trade rules of the GATT and its dispute settlement rules were more favorable than the WTO for them. West European countries, Japan and developing countries were more exempt from free trade rules in the GATT than in the WTO,

⁹⁰ Drusilla K. Brown, Alan V. Deardorff, and Robert M. Stern, "Computational Analysis of Multilateral Trade Liberalization in the Uruguay Round and Doha Development Round," in *The World Trade Organization: Legal, Economic and Political Analysis Vol. II*, ed. Patrick F. Macrory, Arthur E. Appleton, and Michael G. Plummer, (New York: Springer, 2005), pp. 23-42. They did not consider the effects of the Agreement on TRIPS in their computational analysis. Here the developed countries are Australia & New Zealand, Canada, EU and EFTA (European Free Trade Association: Switzerland, Norway, Iceland, Lichtenstein), Japan, and the US, while the developing countries refer to India, Sri Lanka, Rest of South Asia, China, Hong Kong, South Korea, Singapore, Indonesia, Malaysia, Philippines, Thailand, Mexico, Turkey, Central Europe, and Central & South America.

and could veto its dispute settlement procedures. They are less exempt from free trade rules in the WTO than in the GATT, and cannot veto its dispute settlement procedures. This difference between the GATT and the legalized WTO may be due to change in world order from the bipolar one to the unipolar one after the end of the Cold War. During the Cold War period the United States should have to pay more attention to the interest of its allies than in the post-Cold War period as the communist Soviet Union allegedly charged it with exploiting the latter economically. The United States, freed from paying special attention to them after the end of the Cold War, has made the rules of the WTO more favorable for its interest than the GATT, although with the promise to attend to the interests of developing countries in the Doha Development Round of the WTO.

This observation is in line with Mastanduno's discussion on economics and security in statecraft. According to him, during the early Cold War period, U.S. economic policy was to support its security objectives against the Soviet Union. Because of its security objectives, the U.S. encouraged the formation of a European customs union, although it discriminated against U.S. exports, and the U.S. allowed Japan high tariff and nontariff barrier, and transferred technology which would enhance Japanese competitiveness in trade. However, by the late 1960s when European and Asian alliance system led by the U.S. was firmly consolidated, the U.S. freed its economic policy from its security policy and pursued economic policy to maximize its economic gains. In the 1970s and 1980s the U.S. Congress legislated 301, Super 301 and Special 301 to attack entry barriers to foreign markets, although the U.S. government tolerated them in the 1950s and 1960s.⁹¹ In the post-Cold War period the U.S. has been embracing economically

⁹¹ Michael Mastanduno, "Economics and Security in Statecraft and Scholarship," *International Organization* 52:4 (Autumn 1998), pp. 825-854. See also James A. Caporaso, "False Divisions: Security Studies and Global Political Economy," *Mershon International Studies Review*, Vol. 39, No.1 (April 1995), pp. 117-122.

China and Russia, former security rivals, to induce their constructive behavior in security matters.

It may be said from this observation that the distribution of material or military capabilities, which is the prime concerns of realists, affects interests or preferences of nations and their bargaining power, which are the prime concerns of neoliberals, for the establishment, maintenance, and modification of international institution.

The strength of constructivists lies in their emphasis on the importance of beliefs of nations in the rules of the GATT/WTO, or on the normative effects of these rules which realists and neoliberals tend to ignore. Realists may argue that powerful developed countries promote the legitimacy or appropriateness of international norms and laws among states, and that their interest is hidden in such efforts. Carr pointed out a hidden interest of Great Britain and the U.S. in their utopian discourse emphasizing international norms and laws in the twenty years' crisis period after the First World War.⁹² In fact, this discourse failed to take root in European nations because some of them including Germany did not accept it. However, the legitimacy or appropriateness of international norms or laws cannot be formed among states without their voluntary consent and commitment to them especially in the contemporary world. This holds true to a considerable extent for the rules of the GATT/WTO, which its member countries decide on consensus basis, although realists still perceive such consensus as a façade, not reality.

Nations' beliefs in free trade rules induced them to establish the GATT in 1947 and to legalize it into the WTO, to overcome many protectionist challenges to free trade system for last 68 years, and to oppose backsliding to protectionism when they met economic crises domestically and internationally in recent years. The increase of the number of its member

⁹² See E. H. Carr.

countries from 23 in 1947 to 160 in 2014 means that nations believing in free trade has increased that much.

However, nations reinforce these beliefs through their socialization especially with its dispute settlement mechanism. Its dispute settlement mechanism is a means to protect its free trade rules. It makes its member nations interact legally as the complainants and respondents, makes them seek after interpretation of free trade rules from the panel or the Appellate Body, and makes them internalize interpreted rules domestically. This process itself is an important part of socialization process. Nations may socialize themselves with trade rules by complying with them in their trade with other nations, or by their experience with other international organizations. Socialization through experience in dispute settlement is particularly important because it directly induces internalization of interpreted rules into nations' domestic legal system. However, under the less legalized GATT the use of the dispute settlement mechanism was limited mostly to developed countries, while under the legalized WTO it has been widened to many developed and developing countries, though not to the least developed countries. This difference is owing to the legalization of trade institution as noted earlier. Legalization of the GATT into the WTO has made its member nations socialize with its dispute settlement mechanism more actively. In other words, it has made socialization of its member countries with the WTO and its dispute settlement mechanism more robust so that they may cope with its legal character.

This argument is consistent with the following observation of Niall Meagher, former senior counsel at the ACWL, who worried about the lack of financial and legal capacity of developing countries in dispute settlement: "Nevertheless, in WTO dispute settlement as in everything else in life, practice makes perfect. Developing countries that are involved more

frequently in dispute settlement proceedings will over time develop internal capacity to match that of the United States or the European Communities. Brazil is an example of a WTO member that has become an extremely effective user of the process... India has also been a successful user of the system. Other WTO members, such as Thailand, and several Latin American countries, are developing similar expertise and using the system to their advantage...⁹³

In sum, how does legalization of economic international institution affect the distribution of its benefits between developed and developing countries? International law and legalization are not the primary concern of realists and neoliberals. For realists they are secondary to power, and for neoliberals they are also secondary to common interest of international institution. For realists and neoliberals the rules of institution are important for the distribution of its benefits because its legalization only enhances its efficiency gains by reducing its cheating and transaction costs more efficiently. For realists, these rules may definitely favor only strong powers or developed member countries, while for neoliberals they may favor both strong and weak powers or both developed and developing countries.

On the other hand, international law and legalization are the primary concern of constructivists. They tend to think that nations voluntarily comply with international law, which Carr and Morgenthau regarded as being primitive because of the lack of its legislative, adjudicative and executive organs which domestic law is provided with. They tend to think that nations voluntarily comply with such law because it reflects not only common interest of nations or the logic of consequences but also procedural and substantive fairness or the logic of appropriateness, and because nations internalize it through what Koh calls transnational legal process. Legalization of international law will reinforce this transnational legal process which in

⁹³ Niall Meagher, "Representing Developing Countries in WTO Dispute Settlement Proceedings," in *WTO Law and Developing Countries*, ed. George A. Bermann and Petros C. Mavroidis, (Cambridge: Cambridge University Press, 2007), pp. 225-226.

turn will make this law an independent variable for international order. Such law will favor both strong and weak powers or both developed and developing countries, but may be considered to favor weak powers or developing countries more in view of the long history of nations in which weak powers had been subordinated to strong powers.

Any one of these theories does not explain the establishment of the GATT and its legalization into the WTO sufficiently. Realists' theory of hegemonic stability is strong in emphasizing the role of a hegemonic power, the U.S., for its establishment, maintenance and modification, but is weak in emphasizing the importance of nations' common interest and of nations' beliefs, ideals and norms for them. Neoliberal theory of international institution is strong in emphasizing the common interest of its member nations, but weak in emphasizing the role of a hegemonic power and of beliefs and norms for the establishment, maintenance and modification of international institution. Constructivism is strong in emphasizing the role of intangible belief in the appropriateness of international law and legalization, but is weak in emphasizing a role of a hegemonic power and of tangible common interest of nations.

Then, how can we use the three perspectives to explain the establishment of the GATT and its legalization? We may use them eclectically to explain it more adequately. Realists' perspective may be employed to explain how the U.S. went about establishing the GATT and its legalization into the WTO. To win against the Soviet Union, it was willing to provide the rules of the GATT which were more favorable for West European countries, Japan and developing countries than for her. The benefit of this policy was the end of the Cold War, but its cost was the decline of the U.S. economic capability. To stem its further economic decline or to promote its economic capability, it took initiative to transform the GATT into the WTO which expanded the scope of free trade and legalized its dispute settlement mechanism. However, neoliberal

perspective is necessary to explain why nations that opposed the U.S. effort of legalization came to accept it eventually. This is because nations judged that they could still obtain gains through the legalized WTO. Almost all the members of the world are now its members, and they have common interest in the WTO because it promotes their economic wellbeing. These two perspectives are not sufficient yet to explain the success of the GATT/WTO fully. Nations should also have a belief in the free trade rule and its dispute settlement mechanism. This may be a subjective, intangible side of an objective, tangible material interest, but it is a necessary component for the maintenance of international institution like the GATT/WTO. There have long been many leftist challenges to free trade including Marxists' criticisms and recent anti-globalism, but nations have come to have belief in the free trade rule and its dispute settlement mechanism. This belief is formed over a long period of time in which its member nations have socialized themselves with them. Legalization of international institution may help such socialization process. It is to explore such subjective side of international institution that constructivists' approach comes in.

This observation may be summed up again as in the following. First, international distribution of material or military capabilities, or in other words, geopolitical interest, affects economic interests or preferences of nations and their bargaining power for the establishment, maintenance and modification of economic international institution. Second, economic international institution thus established, maintained, or modified may induce its member nations to build or construct beliefs in or socialize its member nations with its rules, especially its dispute settlement mechanism, but the legalized institution may socialize its member nations with its rules and its dispute settlement mechanism more actively than the less legalized institution.

Chapter 3. Legal Transformation of the GATT into the WTO

3.1 Introduction

How were the GATT and the WTO designed to distribute their benefits between the U.S. and other developed countries and between developed and developing countries? Were they designed to benefit the U.S. more than other developed countries of West European countries and Japan or to the contrary? Were they designed to benefit developed countries more than developing countries or to the contrary? This chapter will examine how the properties of the GATT/WTO have changed over a long period of time since its foundation, what preferences the U.S., West European countries, Japan and developing countries had respectively in the establishment of the GATT and its legal transformation into the WTO, and how their respective preferences were reflected in them.

The United States, unlike Britain of the nineteenth century, had not been a champion of trade liberalization. For the first 150 years of its history it had tended to be often protectionist in international trade, and in 1930 its Congress passed the Smoot-Hawley Tariff Act which raised its tariffs to the highest level in its trade history. However, after the end of the Second World War it has emerged as a champion of trade liberalization, and played a leading role to establish international institution for free trade.

For several years after 1945 the State Department of the U.S. maintained a double-track trade strategy to establish International Trade Organization (ITO) and the General Agreement on Tariffs and Trade (GATT). It planned to make the ITO a comprehensive U.N. organ, with worldwide membership and a large permanent Secretariat, which deals not only with free trade of goods but with competition, employment, investment and development. The U.S., while

pursuing the establishment of the comprehensive ITO, also initiated an effort to reduce tariff barriers to international trade, and the result of this effort was the GATT which 23 countries signed on in 1947, and which was effective from the beginning of 1948. It had been understood at that time that the GATT would be absorbed into the ITO later, but the U.S. abandoned a grand design to found the ITO in 1951 because it failed to receive the support of the Congress. U.S. efforts to create these two institutions had overlapped until 1951, and the GATT contained many stipulations which were written for the ITO. The GATT, which was an agreement, did not require the ratification of the Congress which used to be a problem for the U.S. at that time.

How did the U.S. go about for the creation of international institution like the ITO and GATT? The most important thing for it is the decision-making rule. How should the participants in the negotiations over trade rules make decisions on them? Should they make them by consensus rule or by majority rule? Should they have equal voting rights or unequal voting rights? When the U.S. led negotiation on the ITO, it initially wanted voting power commensurate with its share of world trade, Britain and Commonwealth states demanded a more lightly weighted voting rights, and other thirty five states called for one-nation, one-vote rule. The U.S. abandoned its initial demand, and accepted one nation, one vote with a simple majority or two thirds majority rule for the decisions of the ITO. For the GATT the U.S. accepted one nation, one vote with unanimity rule on the important issues such as MFN (the Most-Favored Nation) treatment, changes in concessions, and amendments of the charter.⁹⁴

How should we interpret the U.S. willingness to accept one-nation, one-vote consensus rule instead of weighted voting rules for the ITO and the GATT? We may find answers to it in

⁹⁴ John H. Barton, Judith L. Goldstein, Timothy E. Josling, and Richard H. Steinberg, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (Princeton: Princeton University Press, 2006), pp. 27-38.

the two factors in which the U.S. found herself in the few years after the Second World War. One is its Cold War with the Soviet Union, and the other is its superior bargaining power.

The Cold War has two elements: containment of the Soviet Union and U.S. economic aid to the states under its sphere of influence in the postwar era. George F. Kennan, a junior officer in the American Embassy in Moscow, called for a “long-term, patient but firm and vigilant *containment* of Russian expansive tendencies” in as early as February 1946 in his “long telegram” to the State Department. He then advised Secretary of State, George Marshall, to announce the European Recovery Plan or the Marshall Plan in June 1947. One main premise of the Marshall Plan was that “the gravest threat to western interests in Europe was not the prospect of Soviet military intervention, but rather the risk that hunger, poverty and despair might cause Europeans to vote their own communists into office, who would then obediently serve Moscow’s wishes.” The U.S. needed to accept one-nation, one-vote consensus rule and to concede to the demands of West European countries and developing countries to fight the Cold War against the Soviet Union. We can see such instances throughout many trade rounds of the GATT.⁹⁵

The superior bargaining power is based on the fact the U.S. had about half of total GDPs of the world after the Second World War and it, even after the sharp decline of this share to less than its half, has still been the largest economy in the world throughout the entire postwar era. According to Steinberg, the U.S. has been able to complete many trade rounds of the GATT and the Uruguay round which established the WTO successfully, and the consensus rule of the decision-making has not prevented it from accomplishing what it wanted in many rounds of trade negotiations. This success is due to its superior bargaining power vis-à-vis other member countries, and in particular to its dominant position in the agenda-setting process of the GATT/WTO. He says that “whether trade bargaining takes the form of mutual promises of

⁹⁵ John Lewis Gaddis, *The Cold War: A New History* (London: Penguin Books, 2005), p.29 and p.32.

market opening, threats of market closure, or a combination of both, larger, developed markets are better endowed than smaller markets in trade negotiations.” The U.S. has accepted one-nation, one-vote consensus rule because its superior bargaining power can help it to overcome difficulties deriving from such consensus rule.⁹⁶

Steinberg regards both factors as having been important for the rule-making of the GATT/WTO, but emphasizes the superior bargaining power of the U.S. as the most important determinant of the GATT/WTO rules in an ultimate sense, while not emphasizing the importance of the Cold War that much. Or his arguments are contradictory because he stresses the importance of superior capacity or power of the U.S. while acknowledging it was constrained very much by the Cold War. Any way, we cannot emphasize the importance of the Cold War too much in view of the fact that the U.S. had not used its superior bargaining power to advance its trade interest to full extent during the Cold War period, while it has used it to such extent in the post-Cold War period as shown in the establishment of the WTO.

3.2 Establishment of the GATT in the Early Cold War Period

When the Second World War ended, American and European nations already had bitter experience of tariff wars in the wake of the 1929 great depression, which subsequently made international economy very unstable. As a result of this experience, these nations shared a belief that they should liberalize trade for economic prosperity. Developing nations or many new nations born after 1945 did not necessarily share this belief. They tended to believe that free trade or import of goods from developed countries may hamper the development or industrialization of their own economy. However, the goal of the U.S. was to establish the GATT

⁹⁶ Richard H. Steinberg (2002), p.347 and pp. 339-374.

primarily with West European nations, and many developing countries came to join it in the 1960s and 1970s. The balance of the GATT membership between developed and developing countries shifted from 13-10 in 1948, to 21-16 in 1960, and to 25-52 in 1970.⁹⁷

The GATT had three principles: “(1) non-discrimination, multilateralism, and the application of MFN to all signatories, (2) expansion of trade through the reduction of trade barriers, and (3) unconditional reciprocity among all signatories”. However, there were many exceptions to these principles such as the British Commonwealth, the permissibility of a European customs union, and many safeguards provisions. The U.S. encouraged European economic integration, and allowed many countries such as Japan, which joined the GATT in 1955, to maintain high tariff and non-tariff barriers under the GATT in the early Cold War period from 1947 to the 1970s. The GATT granted most developing countries exceptions to the principle of reciprocity by allowing them to protect their own domestic industries from its harmful effect. The U.S. opened its market more generously than other member countries of the GATT, and provided the latter with the largest market to export their goods. Nevertheless, the GATT was the framework within which the U.S. sought after the reduction of trade barriers through many trade rounds afterwards.⁹⁸

The GATT provides for exchange of information and regular review about international trade among its member states, and these procedures induce them to comply with its rules. However, disputes frequently arise between its member states about the interpretation and compliance of trade rules, and the dispute settlement mechanism is an important instrument to support rule compliance and enforcement. Trade rules will be meaningless unless they are

⁹⁷ Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, NH: Butterworth Legal Publishers, 1991), p.12.

⁹⁸ Robert Gilpin, *The Political Economy of International Relations* (Princeton: Princeton University Press, 1987), pp. 190-191.

observed by the member states, and they will be observed better with the dispute settlement mechanism than without it. It may be said that the effectiveness of trade rules depends on that of the dispute settlement mechanism.

Hudec says that the establishment of an international regulatory structure like the dispute settlement mechanism requires nations to have a shared perception about it, and asserts that “this shared perception exists prior to, and independent of, the regulatory structure itself”.⁹⁹ However, nations have different perceptions about this regulatory mechanism, and within a nation the executive branch and the Congress do not necessarily have the same perceptions about it as in the case of the United States. This is partly because international regulatory mechanism may make conflicts with the sovereignty of a state each nation perceives as being more or less sacrosanct. This is also partly because different branches of the government like U.S Congress and President represent different constituencies in an immediate sense with the former tilting toward special interests of various sectors of economy and the latter toward a nation as a whole and international society.

He introduces the two schools of thought about the dispute settlement mechanism which existed at that time and has continued to exist since then. One is a legalist thought and the other is an anti-legalist thought. With regard to them, he says: “A ‘legalist’ viewpoint has supported the effort to write clearly defined rules and has urged the importance of a third-party adjudication procedure that can objectively apply such rules in disputed cases. An ‘anti-legalist’ viewpoint has emphasized the complexity of the political, social, and economic forces involved in any government’s trade policy, as well as the limited power of international legal obligations in the face of such forces. This latter view has admitted that rules may have some value as guidelines,

⁹⁹ Robert E. Hudec, “GATT Dispute Settlement After the Tokyo Round: An Unfinished Business,” in *The World Trading System, Volume II: Dispute Settlement in the World Trading System*, ed. Robert Howse, (London: Routledge, 1998), p. 107.

but has sought to discourage resort to adjudication, favoring more loosely structured consultation procedures in which governments seek to resolve conflicts through negotiation.”¹⁰⁰

What preferences did the participants in trade negotiations have for the dispute settlement mechanism? What kind of the dispute settlement mechanism did the U.S. and West European nations suggest respectively, and how did they compromise their preferences on this matter? We can see that the U.S. did not adhere to its initial plan about the dispute settlement mechanism and accepted European demand as it did in its negotiations about trade rules. A cursory review of talks on the dispute settlement mechanism in both the ITO and GATT negotiations will be an evidence for this observation.

The United States proposed a three step procedure as the dispute settlement mechanism of the ITO. First, the Executive Board of the ITO, consisting of eighteen members, will investigate and rule upon complaints. Second, participants in disputes can appeal its rulings to the Conference, the plenary body of all members, if they are not satisfied with them. Third, they can further appeal rulings of the Conference to the International Court of Justice (ICJ), if they are not satisfied with them yet, but under the condition of the consents of the Conference.¹⁰¹

How did European nations respond to the initial U.S. proposal of the dispute settlement mechanism of the ITO? A number of delegations, led by the Netherlands, Belgium and France, objected to the condition of the Conference consents, and demanded the deletion of the consent requirements and the stipulation of automatic right to appeal to the ICJ. They worried about the influence of the United States and United Kingdom on the Executive Body and the Conference, and about the possibility that their legal rulings might well be political rather than objective.

¹⁰⁰ Ibid.,p. 108.

¹⁰¹ Robert E. Hudec, “The GATT Legal System: A Diplomat’s Jurisprudence,” in *The World Trading System* Robert, ed. Howse (1998), p. 13.

In response to controversy over the Conference consents, the United Kingdom (UK) submitted a memorandum in which it supports the condition of the Conference consents, but changed the meaning of ICJ rulings as an advisory opinion. The British government supported U.S. position on the Conference consents, but argued that the appeal to the ICJ should take the character of seeking after its advisory opinion, not its binding adjudication. The memorandum also said: “The making of rulings under the Charter...should ...be the function of the ITO itself and not of an outside body such as the International Court whose proper function is to determine questions of law and not to appraise economic facts...In almost every conceivable case arising under the Charter, the issues will of their nature involve the element of economic appraisal and assessment and will not be purely legal in character, and it will be impossible to say where economic judgment ends and legal judgment begins.”

Then, Benelux delegation made concession by abandoning its demand of the automatic right to appeal to the ICJ, and accepted the British proposal of the advisory opinion procedure. It said: “...an advisory opinion procedure will facilitate the settlement of disputes by sparing political susceptibilities of States, which can subsequently take advantage of the light thrown on a case by public hearing and the opinion of the Court to arrive at a compromise among themselves by diplomatic means...the Court’s action in an advisory capacity should create an ‘atmosphere’ which will encourage the parties to seek a solution to their dispute.”¹⁰²

The U.S. did not stick with its proposal which was legalistic or at least more legalistic than European one, and conceded to accept European proposals on the dispute mechanism of the ITO, and more detailed talks on this issue continued until after the signing of the GATT. The dispute settlement mechanism of the 1947 GATT was vaguer or less specific than that of the ITO. It had neither three or two step procedure nor an appeal to International Court of Justice. It

¹⁰² Ibid., pp. 14-15.

only provided its General Council with the right to investigate and rule on the complaints of its member states by consensus. It was not written in legalistic spirit, but in anti-legalistic or diplomatic spirit.

The dispute settlement mechanism of the GATT rested on its Articles XXII and XXIII. Article XXII:1 obligates its member to consult with a complainant when the latter requests the former to do so on any matter concerning the General Agreement. Article XXII:2 provided for multilateral consultation with all of the GATT members when bilateral consultations failed to find a solution to disputes. Article XXIII provided for investigation and ruling by the GATT Council consisting of all of its members in the case where a complainant alleged that a nullification or impairment of a GATT benefit occurred. This applied not only to the cases where nullification or impairment derived from violations of the GATT but also to other circumstances or non-violation nullification and impairment complaints as well. Nowhere in the GATT was the panel procedure stated explicitly, but it had gradually developed from Article XXIII which provided for investigation and ruling by the GATT Council.¹⁰³

How did the panel procedure develop from Article XXIII, which did not stipulate any specific procedure of dispute settlement? It developed from the practices of dispute settlement among its members or the Contracting Parties which constituted the Council. The first complaints came from the Netherlands and the United States at the second session of 1948 GATT Council meeting. The Netherlands complained of Cuba's consular taxes as violating Article 1 (MFN) of the GATT, and the U.S. complained of Cuba's textile regulations. The complaint of the Netherlands was referred to the Chairman of the Council. He ruled against Cuba, and Cuba complied with this ruling a few months later. There was no voting for this

¹⁰³ R. Plank, "An Unofficial Description of how a GATT Panel Works and Does not." in *The World Trading System*, ed. Robert Howse (1998), p.61.

ruling by its members. Unless a dissent was raised against the ruling explicitly in the Council meeting, the ruling was regarded as a consensus decision, and such decision-making practice continued throughout the entire period of the GATT. As to the U.S. complaint against Cuba, the working party consisting of GATT representatives from Canada, India, the Netherlands, Cuba and the U.S. was set up to investigate the matter, and it succeeded in finding a compromise solution satisfactory to both disputants. Representatives of these five countries acted according to the instructions from their respective governments, and they tried to find a compromise solution diplomatically. This working party practice which included both disputants and other state representatives for dispute settlement had continued until 1952. But, in the seventh session of the 1952 Council meeting, the panel procedure which excluded disputants as panel members came into existence, and this marked a beginning of third-party adjudication for the GATT. However, until the agreement of its Tokyo round in 1979, panel members had been diplomats, not lawyers or trade experts, their proceedings had been informal and diplomatic, and their rulings had not been strict but vague leaving plenty of room for further negotiation between the disputants. Hudec called this panel procedure “A Diplomat’s Jurisprudence.”¹⁰⁴

The developed countries, the U.S., U.K. and other European nations played a major role in establishing the GATT and in developing practices of its dispute settlement. Developing countries followed mostly what these countries agreed on trade matters. Developing countries used its dispute settlement mechanism far less frequently than developed countries despite special procedures of dispute settlement for developing countries.

Brazil and Uruguay suggested special procedures of dispute settlement helpful for trade and economic development of developing countries, and the GATT Council approved the modified version of their proposal in 1966. The 1966 procedures included the assistance of the

¹⁰⁴ Michael Trebilcock, Robert Howse and Antonia Eliason (2013), p. 173. See also Robert E. Hudec (1998)

offices of its Director-General for developing countries. First, the Director-General was to intervene in consultation between developed and developing countries if they fail to resolve dispute themselves through bilateral consultation. Second, if they cannot reach a resolution with this intervention after two months, he was to report it to the Council upon request by one of the disputants. Third, the Council would establish the panel for the examination of the dispute, but it was emphasized that the panel should take into account developmental needs of the disputing parties, and submit its recommendation to the Council within sixty days. Fourth, the disputant to whom the recommendation was addressed should inform the GATT of its action taken in accordance with the recommendation.¹⁰⁵ For dispute cases between developed countries, the intervention of the Director-General, developmental needs, and time limits for various stages of dispute settlement were not stipulated explicitly.

The dispute settlement mechanism processed 59 claims up to mid-1963, and could be said that the mechanism worked to protect the GATT, although with the style of diplomat's jurisprudence. However, there were no formal legal claims from mid-1963 to 1969.¹⁰⁶ Why did GATT dispute settlement mechanism atrophy by the end of the 1960s?

For reasons of the non-use of the dispute settlement mechanism under the GATT, Hudec listed three problems: ordinary noncompliance, inoperative rules and overtaxing the procedure. Ordinary noncompliance referred to the rulings on many dispute cases which were not complied with by the respondent states because of their peculiar political or economic situations. Second, inoperative rules are those GATT rules deviation from which had become so widespread as to become inoperative. Such phenomena appeared especially in the cases involving the provisions of agricultural trade, the escape or safeguard clause, and the MFN. Overtaxing the procedure was

¹⁰⁵ Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Vol. II (Boston: Kluwer and Taxation Publishers, 1993), pp.2678-2679.

¹⁰⁶ Robert E. Hudec, *Enforcing International Trade Law*, (1991), p.13.

found in the cases the resolution of which was beyond the capacity of the panel procedure. The 1961 Uruguay complaint was an example: it listed over 600 import restrictions imposed by fifteen developed countries, and asked the panel to rule on the legality of this matter. Although the panel produced respectable outcome, many countries felt that such complaints were too heavy and time-consuming for the panel to deal with.¹⁰⁷

In sum, the executive branch of the U.S. wanted to establish more legalistic free trade system, but European nations pressed for the establishment of more diplomatic free trade system. The U.S. simply accepted European nations' demand without confrontation primarily because the early Cold war with the Soviet Union induced the U.S. to help economic recovery of West European nations including its former enemy states, Germany and Italy. The Cold War also made the U.S. assist economic recovery of Japan, another former enemy state. In 1955 the U.S. was instrumental in helping Japan to join the GATT despite some European resistance. The government officials of the U.S. may have thought that it would be a predominant force in the GATT, regardless of the level of its legalization, because it had by far the largest market in the world and accordingly by far the largest bargaining power vis-à-vis European and other member nations of the GATT. The U.S. was the most open market to them under the GATT in the 1950s and 1960s, and by utilizing it fully Japan and West European economies recovered fast and prospered unprecedentedly, while U.S. share of world GDPs declined from about a half to about a quarter. Consideration of relative capabilities against its rival, the Soviet Union, resulted in the decline of its relative capabilities vis-à-vis its allies in the early Cold War period. Developing countries were mostly exempt from free trade obligations of the GATT, and they often in vain pressed developed countries to open their markets in compliance with free trade rules of the

¹⁰⁷ Robert E. Hudec, "GATT Dispute Settlement After the Tokyo Round" (1998), pp. 113-117.

GATT. The dispute settlement mechanism of the GATT worked through the early 1960s in non-legalistic, diplomatic way, but even this mechanism almost broke down by the end of the 1960s.

3.3 The Tokyo Round of the GATT in the Late Cold War Period

In the early 1970s the U.S., despite the Vietnam War, had firm alliance systems in both Western Europe and Northeast Asia on the one hand, and West European countries and Japan emerged as economic powers on the other hand. In addition, Hong Kong, Singapore, South Korea and Taiwan began to rise as newly industrializing countries (NICs), and some other countries began to follow their footsteps. At the beginning of the Cold War, the U.S. worried about the poverty of these nations because it could become a cause for an appeal of Soviet communism, and could not separate its economic concerns from its security concerns. However, in the early 1970s it could throw such worries away, and separate its economic concerns from its security concerns to some extent, but not completely yet.

In the early 1970s, while Europe, Japan and some developing countries were rising economically, the U.S. began to decline economically in a relative sense. The U.S. began to face the first trade deficit since 1893, the rising domestic pressures for protectionism, and a massive outflow of gold the value of which was linked to that of the dollar. President Nixon, in response to these economic crises, unilaterally announced the suspension of the convertibility of the dollar into gold, the imposition of a surcharge on U.S. imports, and the establishment of wage and price controls on August 15, 1971.¹⁰⁸

A new wave of protectionism also appeared in other member states of the GATT, and its members came to launch another trade round to deal with new challenges to the GATT.

¹⁰⁸ Robert Gilpin, *The Political Economy of International Relations* (1987), p.140.

Immediately after the Kennedy Round in 1967 which successfully reduced tariffs, the GATT Council or the Contracting Parties established committees to identify remaining problems among which non-tariff measures were prominent. In February 1972, the U.S. moved to start a new round of the GATT, and consulted with the EC and Japan for this purpose. They agreed on a comprehensive review of international economic relations in the framework of the GATT. The developing countries such as Brazil, India, Egypt, and Argentina supported this move in principle, but emphasized that the new round should give a priority to their development concerns. The Ministerial meeting of the GATT declared at its Tokyo meeting in September 1973 that it would conduct multilateral trade negotiations on the basis of “mutual advantage, mutual commitment and overall reciprocity,” but that “the developed countries do not expect reciprocity for commitments made by them in the negotiations to reduce or to remove tariff and other barriers to the trade of developing countries.”¹⁰⁹ Then, Tokyo Round of the GATT, which was concluded in December 1979, actually started from February 1975 after the U.S. Congress passed the legislation (the Trade Act of 1974) which delegated authority to negotiate with other countries on trade matters to the President.

The Trade Act of 1974 included Section 301, which was a revision to Section 252 of the Trade Expansion Act of 1962, and which was revised twice in 1979 and in 1988. Hudec described its contents as in the following. “The statute required the President to take all appropriate and feasible steps within his power, including trade retaliation, to obtain the removal of unfair trade measures imposed by foreign governments. It also created a private complaints

¹⁰⁹ This statement was qualified to indicate that developing countries would not provide concessions contrary to their developmental needs.” See Terence P. Stewart, ed. (1993), p. 2681 and footnote 91 of p. 2684.

procedure that required an investigation by the Administration and a report to the Congress on the disposition of these complaints.”¹¹⁰

The Tokyo Round took much more years to reach a conclusion than the previous trade rounds. It was partly due to difficult economic situations including the first oil crisis, the ensuing balance-of-payments difficulties and stagflation in which many countries found themselves. However, it was successful in reducing tariffs furthermore, and in reaching agreements on the non-tariff measures. It reduced tariff rates of developed countries on manufactured goods by about 33% on the average. It also reached agreements on nontariff measures which consisted of the antidumping code, the subsidies code, the government procurement code, the customs valuation code, the standards code, arrangement on bovine meat, the international dairy agreement, agreement on civil aircraft, and import licensing code. The developing countries, which constituted the Informal Group of Developing Countries, did not sign on the antidumping code and the subsidies code, but they received all the benefits of these codes on an MFN basis.¹¹¹

What suggestions did the U.S., EC, Japan and the developing countries make for the dispute settlement mechanism of the GATT in the Tokyo Round? As noted earlier, the GATT did not have any specific dispute settlement procedure except its Article XXIII which stipulated that its members could take their complaints to the GATT Council if their benefits were nullified or impaired. However, its members developed the procedures including the panel procedure from their practices of dispute settlement, and these practices were not written down as rules. As also

¹¹⁰ Robert E. Hudec, “GATT Dispute Settlement After the Tokyo Round” (1998), p. 111.

¹¹¹ Ryutaro Komiya and Motoshige Itoh, “Japan’s International Trade and Trade Policy, 1955-1984,” in *The Political Economy of Japan, Volume 2: The Changing International Context*, ed. Takashi Inoguchi and Daniel I. Okimoto (Stanford: Stanford University Press, 1988), pp. 203-205. See also Terence P. Stewart, ed. (1993), pp. 2699-2703 and John H. Barton, *et al.* (2006), pp. 65-66.

noted earlier, its members recognized the special needs of the developing countries in dispute settlement from 1966.

The immediate questions the GATT members faced with regard to the dispute settlement mechanism in its Tokyo Round were (1) whether to write down these customary practices as written rules, (2) whether to make these customary practices more specific in the procedures of notification, consultation, adjudication, panel decisions, enforcement and review period, and (3) whether to strengthen these rules with additional improvements. In a word, the question was whether to make the dispute settlement mechanism more legalistic or not.

The United States proposed to write down the customary practices, to make them more specific and to make further improvements. For further improvements, it proposed “(1) precise time-limits in the panel process, (2) a requirement that panel reports be issued with full written explanations for the basis of their findings, and (3) the formulation of a roster of eligible governmental experts to improve the panel process.” It also “recognized the special needs of the developing country members and supported consideration of enhancing the 1966 procedures.”

What the U.S. supported for the developing countries was what Brazil had advocated prior to the U.S. proposals. They were “(1) greater participation by the Director-General in disputes involving developing country members; (2) prior notification of any measures that would affect a developing country member; (3) additional procedural improvements to consultations under Art. XXIII; and (4) more stringent surveillance methods”. Many developing countries supported these proposals of Brazil, and came to support the U.S. proposals to improve the dispute settlement mechanism of the GATT. The Swiss delegation and the Nordic countries also supported the U.S. proposals in general.¹¹²

¹¹² Terence P. Stewart, ed. (1993), pp. 2688-2690.

However, Japan and the EC strongly opposed the U.S. proposal. They had initially opposed the inclusion of this issue in the agenda of the Tokyo Round, and once it was included in the agenda, they opposed any move to make the Articles XXII and XXIII more specific and effective.

Japan was not a founding member of the GATT, but was the beneficiary of the GATT as the second largest economy since the mid-1960s. Japan contended that “Article XXII and XXIII provided a basically sound framework for addressing disputes,” and that “amending GATT provisions might lead to further complications in the system rather than improving the system”.¹¹³

The EC did not favor the position of the U.S. and developing countries for the improvement of the dispute settlement mechanism. First, it questioned the authority of the Framework Group to deal with the dispute settlement mechanism. Brazil initiated the establishment of this Group, and this Group was the seventh negotiating group of the Tokyo Round. The dispute settlement mechanism was included as one area of its agenda, but under the condition that its work would not overlap with the work of other six negotiating groups. It argued that as other six groups addressed the issue of dispute settlement in their respective areas of agenda, further discussion about this matter in this Group was unwarranted. Second, it asserted that “the Group should be cautious in codifying any reforms to the system as codification might lead to results opposite to what we are all aiming at”. Third, it opposed “any reform that would bestow differential treatment in dispute settlement to developing countries, alleging that such treatment would be inappropriate and unworkable”.¹¹⁴

¹¹³ Ibid., p. 2690.

¹¹⁴ Ibid., p. 2691.

Despite this confrontation between the U.S. and developing countries on the one hand and Japan and the EC on the other, the Framework Group endeavored to reach a compromise between these conflicting positions, and succeeded in producing the “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (1979 Understanding), which included an Annex, “Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)”.

The Understanding basically codified many customary practices which the member countries of the GATT had used for dispute settlement previously. However, it paid special attention to the improvement of the panel procedure. It specified the procedures regarding the composition and operation of the panel. It reiterated the primary objective of the panel as helping the disputants to reach a mutually satisfactory solution. If it fails to attain this goal of a mutual solution, it was to submit its findings in written form first to the disputants before the circulation to the contracting parties. It stated that the panel should deliver its findings without undue delay, and the contracting parties which had consensus decision-making rule should promptly consider the panel reports. It stated that the complainant could request the contracting parties for suitable measures if the recommendations of the panel reports were not implemented within a reasonable period of time. It also emphasized the special treatment of less-developed contracting parties, and guaranteed technical assistance to them upon their request.¹¹⁵

The Annex of the Understanding stressed the goal of mutually satisfactory solutions to disputes through bilateral consultations. It stated that if this was unattainable, the contracting parties would endeavor to secure withdrawal of GATT inconsistent measures. It also stated that

¹¹⁵ Ibid., p. 2697-2698.

if this withdrawal is impractical, the contracting parties could use compensation as a temporary remedy, leaving authorized retaliation as a remedy of last resort.¹¹⁶

In addition to these improvements on the dispute settlement mechanism, various non-tariff measure (NTM) codes came to have their respective dispute settlement provisions. In general they specified three steps of dispute settlement in the NTMs: “(1) mandatory, good-faith consultations, (2) conciliation under the respective code committee, and (3) resort to a panel after both of these failed to achieve a resolution”.¹¹⁷

The Understanding and Annex stipulated the procedures of dispute settlement, especially panel procedures, more specifically on the one hand, but they also emphasized the solution of disputes through bilateral consultations with good faith on the other hand. The member countries of the GATT came to use the dispute settlement mechanism again more actively even before the conclusion of the Tokyo Round, and by the time of its conclusion they were using it as frequently as in the 1950s. In the 1980s they filed 115 legal complaints among which there were 47 legal decisions by panels. The dispute settlement mechanism which lost its importance in the 1960s regained it in the 1970s and 1980s. However, as Hudec reports, “In a number of cases involving highly sensitive issues, governments used their veto power under consensus decision-making practice to block creation of panels or adoption of adverse panel reports. The MTN (Multilateral Trade Negotiation) Subsidies Code compiled the unenviable record of having adoption blocked in five out of five disputes brought under its provisions.”¹¹⁸

It should be noted here that in 1979 the U.S. Congress passed the amendment of the Section 301 in light of the agreement on the dispute settlement mechanism in the Tokyo Round.

¹¹⁶ Ibid., p. 2698.

¹¹⁷ Ibid., pp. 2699-2703.

¹¹⁸ Robert E. Hudec, *Enforcing International Trade Law* (1991), pp.13-14.

It included “(1) effective assurance of use of an improved GATT dispute settlement mechanism and (2) enforcement of U.S. rights in matters beyond the GATT’s authority”.¹¹⁹

The U.S. did not accept the position of Japan and the EC which opposed the codification and the improvement of the dispute settlement mechanism of the GATT. The U.S. adhered to its position on this matter, and Japan and the EC could not but follow its lead as it was the largest market for them or it had a greater bargaining power than they. The U.S. could exercise its bargaining power on this issue because it was constrained far less by the Cold War context in its late period than in its early period.

Developing countries supported U.S. position because they were allowed to have many exceptions to the principle of reciprocity or they were exempt from many obligations of the GATT for their economic development. They asked for more stringent compliance of the developed countries with the GATT rules or for the opening of markets of the developed countries to them. They complained of the non-compliance of the developed countries often in vain.

On the other hand, the U.S. could not exercise its bargaining power over the developing countries as it wished mainly because of the Cold War context which was still underway at that time. As noted earlier, the developing countries were allowed to participate in the agreements of the Tokyo Round on a code-by-code basis, and to enjoy the benefits of these codes on the MFN basis even if they did not sign in them. According to Steinberg’s investigation which included interviews with trade officials and State Department officials, this was not what the U.S. had intended in the Tokyo Round. The U.S. wished to establish a single undertaking principle which required all the members of the GATT to sign in all of its codes if they wanted to share their benefits. But the consensus decision-making rule of the GATT enabled the developing countries

¹¹⁹ Terence P. Stewart, ed. (1993), p. 2704.

to reject this principle, and to sign selectively among various codes. He says that “some Special Trade Representative (STR) negotiators wanted to break the developing countries’ law-based leverage by threatening to create an alternative preferential regime” in which the U.S. the EC and Japan could deepen trade liberalization among themselves. According to him, if they had pursued this policy, the result would have been a two-tiered global trade regime, but the State Department did not want to alienate the developing countries in the Cold War context, and strongly opposed STR negotiators’ move.¹²⁰

The U.S. was far less constrained to pursue its trade interest in the late Cold War period than in the early Cold War period, but still constrained by the Cold War context.

3.4 Establishment of the Legalized WTO in the Post-Cold War Period

The Cold War, which may be said to have started with the Soviet takeover of East Germany, Poland and Hungary immediately after the end of the Second World War, had begun to decline since Mikhail Gorbachev took power in the Soviet Union in 1985. He adopted a policy of perestroika (restructuring) and glasnost (openness) in 1987, and agreed to the scaling-back of the arms race between the U.S. and the Soviet Union. In East European countries democratic revolution from the below toppled the communist governments, culminating with the fall of the Berlin Wall in November 1989. The Soviet Union could not stem the tide of democratic revolutions in its block, and the Soviet Union itself came to be dissolved with the announcement of its official dissolution on December 25, 1991. The U.S. won the Cold War without war against the Soviet Union.¹²¹

¹²⁰ Richard H. Steinberg (2002), pp. 356-359.

¹²¹ John W. Young and John Kent, *International Relations since 1945*, Second Edition (Oxford: Oxford University Press, 2013), pp. 416-458.

On the other hand, the U.S. trade deficits with Japan, Europe and the NICs grew more massively in the 1980s despite the trade liberalization the Tokyo Round of the GATT accomplished. Americans began to have a strong feeling from the 1970s that these massive trade deficits were due to unfair trade practices of its trading partners. The Congress reflected these feelings of American people, and Section 301 the Congress enacted in 1974 was one of its results. However, Section 301 and the Tokyo Round of 1979 did not show any effect for the improvement of American trade deficits. Trade protectionism rose again domestically in the U.S., and Congressman Richard Gephardt and Senator Lloyd Bentsen conceived a bill requiring the President to implement mandatory bilateral trade deficit reduction. This Congressional threat made the U.S. administration employ Section 301 more frequently and initiate a series of bilateral trade talks especially with Japan with which the U.S. used to have several tens of billion dollars' trade deficit annually.¹²² Gilpin wrote about this atmosphere of the U.S.: "Previously, European and Japanese discrimination against American goods had been tolerated as essential to the revival of these economies and consolidation of alliance relations; however, demands for 'reciprocity' began to increase in the 1980s, suggesting a much more aggressive posture toward other countries."¹²³

It was under this economic situation that the U.S. proposed talks on a new round of the GATT in 1982, three years after the conclusion of the Tokyo Round. This U.S. proposal received scant support at the 1982 GATT ministerial meeting, and it was in 1986 that a GATT ministerial declaration to launch a new round was announced in Uruguay. The conclusion of the Uruguay Round came in 1994 and the establishment of the WTO in January 1995 after eight long years of

¹²² Allan WM. Wolff, "U.S.-Japan Relations and the Rule of Law: The Nature of Trade Conflict and the American Response," in *Japan's Economic Structure: Should It Change?* ed. Kozo Yamamura (Seattle: Society for Japanese Studies, 1990), pp. 156-157.

¹²³ Robert Gilpin, *The Political Economy of International Relations* (1987), p. 372.

negotiations. The Uruguay Round was agreed to include a broad area of trade issues including both traditional (*e.g.*, textiles and agriculture) and new issues (*e.g.*, service and intellectual property rights) as well as the improvement of the dispute settlement mechanism. The U.S. desired further liberalization of agriculture, elimination of EEC export subsidies, liberalization of trade in services (banking and telecommunication), protection of intellectual property rights, and the establishment of the principle of a single undertaking. It also wanted the legalization of the dispute settlement mechanism to secure the compliance and enforcement of the trade agreements the Uruguay Round sought to reach. It was able to accomplish what it wanted far more in this round than in the previous rounds.

Steinberg was right when he asserted that the U.S. obtained this accomplishment because the talks of the Uruguay Round had proceeded under the shadow of power, not under the shadow of law. The consensus decision-making rule could have prevented the U.S. from accomplishing its goal in this trade round, but the end of the Cold War released it from the geopolitical constraints of the Cold War and enabled it to wield its superior bargaining power to achieve its goal despite objections from its trading partners.¹²⁴

Trade rules of the WTO agreed on in the Uruguay Round are different from those of the GATT in two important respects. Firstly, the GATT regulated trade, mostly trade in goods at the border. The WTO not only regulates trade in goods but also deals with far broader range of trade issues including service, intellectual property, labor, and environment, the issues which used to belong to the sovereignty of the nation-state. The developing countries opposed such expansion of the scope of liberalization of trade, whereas the US, EC and Japan supported it. In particular, the developing countries opposed Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which the US proposed with the support of the EU and Japan. However, the

¹²⁴ Richard H. Steinberg (2002), pp. 356-360.

developing countries came to accept the proposal of the developed countries with the promise of the developed countries to open their markets in textiles and agricultural products more to the developing countries

Secondly, as noted earlier, the GATT allowed the developing countries to have the MFN status in various codes in which they refused to sign, but the WTO came to have a single undertaking principle which required all of its member countries to sign in all of its codes or agreements.¹²⁵ The developing countries expressed their intention not to sign in the agreements on intellectual property, investment measures, or services, but they could not succeed in their endeavors because the US, EU and Japan refused to accept their demand, supporting a single undertaking principle. The U.S. did not concede to the demand of the developing countries as it did in the Tokyo Round in the late Cold War period.

As Steinberg says, “the EC and the United States withdrew from the GATT 1947 and thereby terminated their GATT 1947 obligations (including its MFN guarantee) to countries that did not accept Final Act and join the WTO,”¹²⁶ and the developing countries had no choice but to join it because the original status quo, the GATT, existed no longer. Final Act of the Uruguay Round includes the GATT 1994 and all other new Uruguay Round multilateral agreements such as the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Trade-Related Investment Measures (TRIMs), the Subsidies Agreement, and the Anti-dumping Agreement. As a sort of compensation for what the developing countries were forced to concede to the developed countries in the Uruguay Round, the developed countries promised to hold the Doha Development Round of the WTO specifically dedicated to improving the trading environment of

¹²⁵ See John H. Barton, *et al.* (2006), pp. 65-66.

¹²⁶ Richard H. Steinberg (2002), p. 360.

the developing and least developed countries. However, as of now, 20 years after the establishment of the WTO, the Doha Round has not progressed at all.

What preferences did the U.S., Japan, European countries and developing countries have for the legalization of the dispute settlement mechanism? Under the GATT each member state had the right to veto the various stages of dispute settlement, especially the panel stage decisions. It can block the adoption of the panel decisions, if it wishes to. What preferences did the U.S., Japan, European countries and developing countries express for the prevention of blocking of panel reports or, in other words, for the adoption of the panel reports in the course of the Uruguay Round talks?

The United States, in 1987, floated four ideas to solve this problem: (1) making the panel reports “as binding on all involved parties without further action by the Council or the Contracting Parties”; (2) making them “binding with the complainants receiving rights to take action/compensation only if there exists no consensus *against* adopting the report”; (3) “adoption of panel reports excluding the disputing parties”; and (4) “a formal affirmation by the Contracting Parties to accept and implement panel decisions”.¹²⁷ Later, the U.S. came to strongly advocate the second option that made the adoption of panel reports compulsory unless there was a consensus not to adopt them. The U.S. also expressed its opposition to the third option on the ground that a surrogate of the disputing parties could block their adoption.

Japan submitted its proposal on this issue in February 1988. It contended that “the rule of adoption by consensus should remain in practice.” It emphasized that “adoption by consensus makes the panel’s decisions binding on the disputing parties *‘as a result* of their agreeing to or not obstructing the adoption of the panel report (*pacta sunt servanda*), and thereafter it becomes no longer permissible by any means for the parties to a dispute to deny or ignore the findings of

¹²⁷ Terence P. Stewart, ed. (1993), pp. 2733-2734.

the panel report in seeking solution of the dispute.” On the same ground, it also opposed the adoption of panel reports with consensus absent the disputing parties. It “attributed the ‘obstruction of adoption’ to the lack of clarity in the panel findings,” and called for the improvement of the quality of panels.¹²⁸

The EC also submitted a proposal on this issue about the same time. The EC, like Japan, contended that adoption by consensus should remain in practice. But the EC suggested considering panel reports in two stages. “The first stage would be consideration of interpretation of GATT provisions, requiring the existing consensus. The second stage would be consideration of recommendations which would be more flexible.” The EC seemed to suggest a certain modification to the consensus rule on the adoption of panel reports, but it was clear that it wanted the maintenance of the consensus rule.¹²⁹

Developing countries did not express a strong opinion on this issue. They were more interested in strengthening the 1966 procedures and the subsequent 1979 decisions which required a special attention to trade disputes in which the developing countries were involved. Brazil was particularly active in this respect with a proposal which would provide greater equity and differential treatment for the developing and least developed countries.¹³⁰

While the difference of positions regarding this issue between the U.S. on the one hand and Japan and the EC on the other loomed large in their negotiations, the U.S. Congress enacted a comprehensive trade bill known as the Omnibus Trade and Competitiveness Act of 1988, and amendments to Section 301 of 1974 were included in it. This Trade Act of 1988 “vested the United States Trade Representative (USTR) with authority for enforcing and implementing

¹²⁸ Ibid., p. 2740.

¹²⁹ Ibid., p. 2742.

¹³⁰ Ibid., p. 2744 and pp. 2751-2752. In this book on the negotiating history of the Uruguay Round I cannot find any developing country expressing its position on this issue of the veto right.

Section 301 rather than the President,” and “clarified the meaning of unreasonable, unjustifiable, or burdensome activities under Section 301.” The 1988 amendments to Section 301 also had “Special 301” and “Super 301”. “Special 301” mandated “the USTR to identify those countries failing to provide adequate protection of, or market access for, U.S. intellectual property rights.” “Super 301” mandated “the USTR to identify foreign practices such as import barriers and other trade distorting measures that burdened U.S. commerce.” Under this law, private business groups could petition the USTR to investigate whether foreign governments were unfairly blocking U.S. access to their markets. These “Special 301” and “Super 301” mandated the USTR to investigate unfair trade practices of foreign countries and to punish them for remedy.¹³¹

Many U.S. trading partners issued an alarming cry over Section 301, Special 301 and Super 301. The EC, Japan and the developing countries criticized the expansion of Section 301 and U.S. unilateralism based on it as being inconsistent with and undermining the multilateral trade system of the GATT. In response to this criticism, the U.S. emphasized that it would resort to these 301s “only when GATT rules failed to provide an adequate remedy to enforce U.S. rights,” and that “the U.S. was seeking to both strengthen GATT rules to cover new areas and ensure adequate settlement of disputes.”¹³² The Congress made it clear that “the weak GATT dispute resolution system made Section 301 a necessity.”¹³³

The 301 powers of the USTR made the EC and Japan back away from their original position on the adoption of panel reports by consensus and accept the U.S. proposal to adopt panel reports unless there was a consensus not to adopt them. However, as a condition to accept the U.S. proposal, they insisted that all contracting parties should bring their domestic legislation

¹³¹ Ibid., pp. 2760-2761.

¹³² Ibid., p. 2762.

¹³³ G. R. Shell, “Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization,” Robert Howse, ed. (1998) p. 340.

into conformity with GATT dispute settlement rules. In other words, they demanded the U.S. to repeal Section 301. The U.S. responded that “Section 301 was not a topic for negotiation in the context of the Round,” and that if the GATT strengthen the dispute settlement mechanism, “the U.S. would have less need to resort to Section 301 for matters under GATT’s jurisdiction.”¹³⁴ The U.S. had adhered to its initial proposal throughout the entire period of the Uruguay Round, and had not conceded to the wishes of the EC, Japan and the developing countries as it used to do in the Cold War period. The EC, Japan and the developing countries eventually came to accept the U.S. proposal without requiring it to bring Section 301 in line with GATT rules.¹³⁵

The Uruguay Round agreed on many other improvements in the dispute settlement mechanism. It made the various dispute settlement procedures of the previous GATT into the single dispute settlement process contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It established the Appellate Body to which the losing party could appeal if it was not satisfied with the panel report. It set time limits for the various stages of dispute settlement. It established the Dispute Settlement Body (DSB) of which all the contracting countries were members. It charged the DSB with surveillance of implementation of the panel or the Appellate Body rulings. It also agreed to provide for special and different treatment to developing countries and the least developed countries (LDCs), which included legal assistance, restraint in bringing disputes against the LDCs, and consideration of their developmental needs. However, the most important improvement was to make the decision-making rule of the dispute settlement mechanism a negative consensus rule. If the member states are not satisfied with the rulings of the Appellate Body, they can turn to the legislative

¹³⁴ Terence P. Stewart, ed. (1993), pp. 2778-2779.

¹³⁵ For a whole process of negotiations on the dispute settlement mechanism, see John Croome, *Reshaping the World Trading System: A History of the Uruguay Round*, Second and Revised Edition (Hague: Kluwer Law International, 1999), pp. 123-129, pp. 224-229, pp. 277-283, and pp. 313-315.

mechanism of the WTO, its Council, to change the rules themselves on which the rulings are based, but this is almost impossible because the amendment of the rules requires consensus of all of its member countries. The negative consensus rule of the DSB has made all the rules of the WTO binding on its member countries.¹³⁶

3.5 A Concluding Remark

The U.S. entered into the Cold War against the Soviet Union shortly after the end of the Second World War. To win this war or not to lose it at least, the U.S. subordinated its economic policy toward Western Europe, Japan and developing countries to its security policy against the Soviet Union. Such subordination was necessary and strong in the early Cold War period, less necessary and less strong in the late Cold War period, and is not necessary and weak in the post Cold War period. This is reflected in the establishment of the GATT and its legalization into the WTO. Interplay of geopolitical interests and economic interests of the U.S., the EC, Japan and the developing countries has shaped the evolutionary course of development from the less legalized or non-legalized GATT to the legalized WTO.

In the early Cold War period when the U.S. began to establish its alliance system in Europe and Asia, the U.S. allowed many exceptions to the principle of non-discrimination and reciprocity of the GATT for the EC, Japan and developing countries to help their economic recovery. The U.S. also accepted an anti-legalist position or “a diplomat’s jurisprudence” of European countries instead of its legalist preference for its dispute settlement mechanism.

¹³⁶ For a concise description of the WTO dispute settlement procedures, see Valerie Hughes, “The WTO dispute settlement system – from initiating proceedings to ensuring implementation: what needs improvement?”, in *The WTO at Ten: the Contribution of the Dispute Settlement System*, ed. Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (Cambridge: Cambridge University Press, 2006), pp. 193-234.

In the late Cold War period when the U.S. consolidated its alliance system in Europe and Asia, during the Tokyo Round of the GATT, the U.S. succeeded in reducing tariff barriers substantially, and also succeeded in writing down or codifying the previous practices of dispute settlement and in improving them more specifically despite a strong opposition from the EC and Japan. The U.S. did not concede to the wishes of the EC and Japan for dispute settlement as it did in the early Cold War period. However, in this Round it could not establish the single undertaking principle for the GATT when the developing countries opposed it with a leverage of the consensual decision-making rule. Steinberg's interviews with U.S. officials show that they did not want to alienate the developing countries. The U.S. conceded to the wishes of the developing countries as it used to do in the early Cold War period.

In the post Cold War period when the U.S. has emerged as a unipolar power with a strong alliance system, during the Uruguay Round of the GATT, the U.S. succeeded both in expanding the scope of free trade including services and intellectual property rights and in establishing the single undertaking principle despite a strong opposition from the developing countries. The U.S. also succeeded in legalizing the GATT into the WTO by adopting the negative consensus decision-making rule for the DSB despite a strong opposition from Japan and the EC. The U.S. Congress threatened them with the enactment of unilateral Section 301 powers including Super 301 and Special 301, and they had no choice but to accept the U.S. proposal to legalize the GATT into the WTO.

The U.S., the hegemonic power, has played a leading role in both establishing the GATT and legalizing it into the WTO. It did not employ its bargaining power as the largest market fully in the Cold War period, but employed it fully in the legalization of the GATT into the WTO in the post Cold War period.

If the GATT/WTO had benefitted only the U.S., the strongest bargainer, it would not have persisted for so long years from 1948 to 2015. It has been persisting so far because it has been providing all of its member countries with absolute economic gains. During the period of the GATT, the U.S. obtained less relative economic gains than Japan, the EC and some developing countries, and during the period of the WTO, developed countries have been obtaining less relative economic gains than developing countries, especially China which is a country with a population of about 1.4 billion or which is a country equivalent to more than 20 medium size countries. The GATT/WTO, although established, maintained and legalized by the hegemonic leadership of the U.S., has grown up to become a global trade organization in which almost all the countries of the world have stakes and without which all of them may lose absolute economic gains.

Geopolitical interests and economic interests do not exhaust the explanation for the development of the GATT into the WTO and the maintenance of this international trade institution. Geopolitical and economic interests belong to the dimension of tangible material interests. However, there is the dimension of intangible ideational interest such as beliefs, ideas, norms and culture, which has affected the development of the GATT into the WTO and their maintenance.

Nations' beliefs in free trade are important to establish and maintain free trade institution. If nations do not have beliefs in free trade, they will endeavor neither to establish nor to maintain free trade institution. Number of nations that had beliefs in free trade was not large, but small when they signed in the GATT in 1947. It was only 23. However, it increased from 23 in 1947, to 37 in 1960, to 77 in 1970, to 128 in 1994 and to 160 in 2014. There had been many ideological criticisms against free trade by Marxism, imperialism, dependency theory, and world system

theory through most of the Cold War period, and there are still the criticisms of anti-globalists in the present period. Theories and practices of free trade have overcome all of these criticisms to a considerable extent, and almost all the nations of the world, even Communist China, have come to have beliefs in free trade.

Most founding nations of the GATT were skeptical of its legalization in 1947. The UK argued, as noted earlier, that it was not wise to settle trade disputes through legal court system because it was impossible to say where economic judgment ends and legal judgment begins for many dispute cases. In contrast, the U.S. had preference for more legalistic dispute settlement mechanism for the ITO and the GATT, but gave up its legalistic preference to accept anti-legalistic or diplomatic way of dispute settlement advocated by European countries. According to Shell, “this disagreement has been philosophical, reflecting domestic cultural differences between the United States and Europe.” On these differences he elaborates: “The United States, comfortable with the notion of a strong legal system serving as a unifying force within its federal system, has viewed the GATT primarily as a ‘legal’ organization. The Europeans, used to seeking negotiated, power-based solutions to differences among European states, have thought of the GATT as a ‘diplomatic’ institution.”¹³⁷ This confrontation had been existent throughout the entire period of the GATT, but it was resolved to adopt the U.S. proposal to strengthen the GATT as a legal organization, after the U.S. enacted the expansion of Section 301 powers with Super 301 and Special 301 in 1988. European nations judged that it was better for them to accept the legalization of the GATT to restrain American’s unilateral use of 301s. The developing countries and least developed countries judged similarly, and also judged that the legalized WTO would provide them with better access to the large markets of the developed countries. However,

¹³⁷ Shell, p. 339.

it may be said that, in the early 1990s, the member nations of the GATT came to share a belief that the legalized free trade system could solve the prisoner's dilemma of cheating and reduce transaction cost more efficiently than the less legalized or non-legalized free trade system. The U.S. employed its superior bargaining power to induce the EC, Japan and developing countries to accept the legalization of the GATT, but the latter countries also might have seen March's and Olson's logic of appropriateness or Franck's legitimacy and fairness in the U.S. proposal for the legalization of free trade.

Chapter 4. Legal Transformation of the GATT into the WTO and the Use of its Dispute Settlement Mechanism

4.1 Introduction

How has legalization affected the use of dispute settlement mechanism of the GATT/WTO by developed and developing countries? Has the legal transformation of the GATT into the WTO increased its use by developed or developing countries more? Has it increased the bilateral or multilateral dispute settlement more?

The use of the dispute settlement mechanism by both developed and developing countries is important for free trade system. Active use of dispute settlement mechanism by both groups of countries can prevent them from violating free trade rules. If only developed countries use dispute settlement mechanism, it means that dispute settlement mechanism works only to protect trade interest of developed countries. Procedures of dispute settlement are also important for its outcome. Balance of bargaining power or capacity between disputants may work more in bilateral procedures in which the two parties engage in negotiated settlement than in multilateral procedures which involve the third- party adjudication.

This chapter first presents statistical data on the use of the dispute settlement mechanism by developed and developing countries, and also presents statistical data on the use of the bilateral or multilateral procedures by them under the GATT and under the WTO. Then, it analyzes factors which have brought about such uses of the dispute settlement mechanism. It measures the impact of economic capacity and socialization experiences of a member country on its use under the less legalized GATT and the legalized WTO. In measuring this impact it employs negative binomial regression and binary logit regression.

4.2 Frequency of the Use of the Dispute Settlement Mechanism

(1) Overall Participation in Dispute Settlement

How frequently have developed and developing countries used the dispute settlement mechanism during the periods of the less legalized GATT and the legalized WTO? Is there a change in the use of dispute settlement by developed and developing countries between the two periods?¹³⁸

As noted earlier, the answer of the existing studies to this question was that there was no change in this respect between the GATT and WTO. That is, the legalized WTO, just like the GATT, benefitted developed countries more than developing countries in the sense that the former countries used its dispute settlement mechanism far more frequently. These studies used the data about the participation of developed and developing countries in the WTO dispute settlement mechanism in its early period, mostly in about five years' period after its establishment, and did not foresee the narrowing of this gap at the time of their writings. However, as the following statistical data about the use of the dispute settlement mechanism under the GATT and under the WTO will show, there has been the narrowing of this gap and even more frequent participation by developing countries in its later period.

Table 4.1¹³⁹ presents the data on the frequency of participation in the GATT dispute settlement mechanism by each member country, and Table 4.2¹⁴⁰ the data on the same frequency of participation by developed and developing countries from 1948 to 1994. As in Table 5.2,

¹³⁸ The developed countries are the early members of the OECD (before 1995) with per capita GNI over \$20000 in 2005 (WB databank). The developed countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, UK and US.

¹³⁹ Data from 1947 to 1989 can be found at Hudec, Robert E..*Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, 1991), pp. 587-608. Data from 1990 to 1994 can be found at *GATT Digital Library: 1947-1994* (<http://gatt.stanford.edu/page/home>). There are total of 249 cases that include 12 cases with multiple complainants and 2 cases with multiple respondents.

¹⁴⁰ EEC is counted as a developed country.

during the entire period of the GATT from 1948 to 1994, among a total of 285 complainants of the dispute settlement cases, 207 or 72% of them belonged to 19 developed countries, while only 78 complainants or 28% of them belonged to 29 developing countries. Among a total of 265 respondents, 235 respondents or 89% of them belonged to 20 developed countries, while 30 respondents or 11% of them belonged to 15 developing countries.¹⁴¹ As a whole nineteen developed countries raised two and half times more complaints than 29 developing countries, and 20 developed countries received almost eight times more complaints than 15 developing countries. In a word, participation in the dispute settlement mechanism either as a complainant or as a respondent, was concentrated in developed countries under the GATT.

Table 4.1 and Table 4.2 divide the GATT into the two periods. As noted earlier, the first period of 1948-1979 is the period in which there were no specific written rules of dispute settlement, and the second period of 1980-1994 is the period in which customary practice of dispute settlement of the first period was written down or codified as specific dispute settlement rules. The comparison of these two periods shows some impacts of codified rules of dispute settlement on the use of the dispute settlement mechanism. First, the second codified period of 15 years records almost twice more complaints than the first customary period of 32 years. The codified rules of dispute settlement socialized nations to use them more frequently than the unwritten customary rules of dispute settlement. Second, a more noteworthy fact is that developing countries raised about three and half times more complaints in the second codified period than in the first customary period, while developed countries raised one and half times more complaints in the second period than in the first period. The codified rules of dispute settlement socialized developing nations more to use them than the developed nations. Third, as

¹⁴¹ The number of complainants and respondents exceeds the number of total cases because there are multiple complainants and respondents for the individual dispute settlement cases of the GATT.

in Table 4.1, in the first period the U.S. raised complaints 33 times, EEC 4 times, Netherlands 6 times, Denmark 5 times, UK 5 times, Germany 3 times, and each of Norway, France and Canada twice, but in the second period the U.S. raised complaints 46 times, EEC 34 times and Canada 24 times. The U.S. was the frequent user of the dispute settlement mechanism from the first period, while EEC was so from the second period.

Table 4.1 and Table 4.2 divide the GATT into the two periods. As noted earlier, the first period of 1948-1979 is the period in which there were no specific written rules of dispute settlement except Articles XXII and XXIII, and the second period of 1980-1994 is the period in which customary practice of dispute settlement of the first period was written down or codified as specific dispute settlement rules. The comparison of these two periods shows some impacts of codified rules of dispute settlement on the use of the dispute settlement mechanism. First, the second codified period of 15 years records almost twice more complaints than the first customary period of 32 years. The codified rules of dispute settlement socialized nations to use them more frequently than the unwritten customary rules of dispute settlement. Second, a more noteworthy fact is that developing countries raised about three and half times more complaints in the second codified period than in the first customary period, while developed countries raised one and half times more complaints in the second period than in the first period. The codified rules of dispute settlement socialized developing nations more to use them than the developed nations. Third, as in Table 4.1, in the first period the U.S. raised complaints 33 times, EEC 4 times, Netherlands 6 times, Denmark 5 times, UK 5 times, Germany 3 times, and each of Norway, France and Canada twice, but in the second period the U.S. raised complaints 46 times, EEC 34 times and Canada 24 times. The U.S. was the frequent user of the dispute settlement mechanism from the first period, while EEC was so from the second period.

Table 4.1. Participants of the GATT DS

Complainant	1948-1979	1980-1994	Total	Respondent	1948-1979	1980-1994	Total
USA	33	46	79	USA	14	51	65
EEC	4	34	38	EEC	11	49	60
Canada	2	24	26	Japan	6	15	21
Australia	7	7	14	Canada	4	12	16
Brazil	2	11	13	France	13	0	13
Chile	3	6	9	Italy	9	0	9
Netherlands	6	1	7	UK	7	0	7
Argentina	0	6	6	Germany	5	1	6
India	1	5	6	Greece	6	0	6
Denmark	5	0	5	Belgium	5	0	5
Nicaragua	0	5	5	Brazil	2	3	5
UK	5	0	5	Norway	2	3	5
Colombia	0	4	4	Australia	1	3	4
Italy	4	0	4	Chile	1	3	4
Japan	1	3	4	Argentina	0	3	3
Belgium	3	0	3	Cuba	3	0	3
Czechoslovakia	3	0	3	Finland	1	2	3
Finland	0	3	3	India	1	2	3
Germany	3	0	3	Korea	0	3	3
Guatemala	0	3	3	Netherlands	3	0	3
Hong Kong	1	2	3	Spain	1	2	3
New Zealand	0	3	3	Sweden	2	1	3
Norway	2	1	3	Denmark	2	0	2
Venezuela	0	3	3	Switzerland	1	1	2
Austria	1	1	2	Austria	1	0	1
Costa Rica	0	2	2	Czechoslovakia	1	0	1
Cuba	1	1	2	Indonesia	0	1	1
France	2	0	2	Jamaica	1	0	1
Greece	2	0	2	Mexico	0	1	1
Mexico	0	2	2	New Zealand	0	1	1
Sweden	1	1	2	Pakistan	1	0	1
Thailand	0	2	2	Peru	1	0	1
Turkey	2	0	2	Poland	0	1	1
Czech Republic	0	1	1	Thailand	0	1	1
Dominican Rep.	0	1	1	Turkey	1	0	1
El Salvador	0	1	1	35 countries	106	159	265
Israel	1	0	1				
Korea	1	0	1				
Luxembourg	1	0	1				
Pakistan	1	0	1				
Peru	0	1	1				
Philippines	0	1	1				
Poland	0	1	1				
Portugal	0	1	1				
South Africa	0	1	1				
Uruguay	1	0	1				
Yugoslavia	0	1	1				
Zimbabwe	0	1	1				
48 Countries	99	186	285				

Table 4.2. Distribution of Participants of the GATT DS
between Developed and Developing Countries

GATT Complainants	1948- 1979	1980- 1994	Total	GATT Respondents	1948- 1979	1980- 1994	Total
19 Developed Countries	82	124	207	20 Developed Countries	94	141	235
29 Developing Countries	17	62	78	15 Developing Countries	12	18	30
	99	186	285		106	159	265

Table 4.3¹⁴² presents the data on the frequency of participation in the WTO dispute settlement mechanism by each member country, and Table 4.4¹⁴³ the data on the same frequency of participation by developed and developing countries from 1995 to 2014. During the period of the WTO from 1995 to 2014, among a total of 516 complainants of the dispute settlement cases, 280 or 54% of them belonged to 9 developed countries, while 236 or 46% of them belonged to 39 developing countries. Among a total of 499 respondents, 276 or 55% of them belonged to 15 developed countries, while 223 or 45% of them belonged to 36 developing countries. In sum, there is not much difference in the use of the dispute settlement mechanism between developed and developing countries.

Table 4.3 and Table 4.4 divide the WTO into the two periods. Unlike the periodic division of the GATT this division is quite arbitrary. Between these two periods there was no change in the dispute settlement rules as found under the GATT. However, there are two noteworthy differences between them.

¹⁴² Data from WTO homepage (<http://www.wto.org>). There is a total of 488 DS cases from 1995 to 2014. A total number of the complainants and respondents exceeds the number of DS cases due to 7 cases with multiple complainants and 5 cases with multiple respondents.

¹⁴³ EC/EU is counted as a developed country.

Table 4.3. Participants of the WTO DS

Complainant	1995-2004	2005-2014	Total	Respondent	1995-2004	2005-2014	Total
USA	80	27	107	USA	88	35	123
EC&EU	68	27	95	EC&EU	51	29	80
Canada	26	8	34	China	1	31	32
Brazil	22	5	27	Argentina	15	7	22
Mexico	13	10	23	India	17	5	22
India	16	5	21	Canada	13	5	18
Argentina	9	11	20	Australia	9	6	15
Japan	12	7	19	Brazil	12	3	15
Korea	12	5	17	Japan	14	1	15
Thailand	11	2	13	Korea	13	1	14
China	1	11	12	Mexico	12	2	14
Chile	9	1	10	Chile	10	3	13
Guatemala	5	4	9	Indonesia	4	7	11
New Zealand	6	3	9	Turkey	7	2	9
Indonesia	3	6	9	Dominican Rep.	2	5	7
Honduras	6	2	8	Philippines	4	2	6
Australia	7	0	7	Peru	4	1	5
Panama	2	5	7	Russian Fed.	0	5	5
Colombia	4	1	5	Colombia	1	3	4
Costa Rica	3	2	5	Egypt	3	1	4
Hungary	5	0	5	France	3	1	4
Philippines	4	1	5	South Africa	2	2	4
Norway	1	3	4	Belgium	3	0	3
Switzerland	4	0	4	Ecuador	3	0	3
Taiwan	2	2	4	Ireland	3	0	3
Pakistan	2	2	4	Netherlands	1	2	3
Peru	2	1	3	Pakistan	2	1	3
Poland	3	0	3	Slovak Republic	3	0	3
Ukraine	0	3	3	Spain	1	2	3
Ecuador	2	1	3	Thailand	1	2	3
Turkey	2	0	2	United Kingdom	2	1	3
Vietnam	0	2	2	Czech Republic	2	0	2
Russian Fed.	0	2	2	Germany	1	1	2
Antigua&Barbuda	1	0	1	Greece	2	0	2
Bangladesh	1	0	1	Guatemala	2	0	2
Cuba	0	1	1	Hungary	2	0	2
Czech Rep.	1	0	1	Nicaragua	2	0	2
Denmark	0	1	1	Romania	2	0	2
Dominican Rep.	0	1	1	Trinidad&Tobago	2	0	2
El Salvador	0	1	1	Ukraine	0	2	2
Hong Kong	1	0	1	Venezuela	2	0	2
Malaysia	1	0	1	Armenia	0	1	1
Moldova	0	1	1	Croatia	1	0	1
Nicaragua	1	0	1	Denmark	1	0	1
Singapore	1	0	1	Malaysia	1	0	1
Sri Lanka	1	0	1	Moldova	0	1	1
Uruguay	1	0	1	Panama	0	1	1
Venezuela	1	0	1	Poland	1	0	1
48 countries	352	164	516	Portugal	1	0	1
				Sweden	1	0	1
				Uruguay	1	0	1
				51 countries	328	171	499

Table 4.4. Distribution of Participants of the WTO DS between Developed and Developing Countries

WTO Complainants	1995-2004	2005-2014	Total	WTO Respondents	1995-2004	2005-2014	Total
9 Developed Countries	204	76	280	15 Developed Countries	193	83	276
39 Developing Countries	148	88	236	36 Developing Countries	135	88	223
	352	164	516		328	171	499

First, as in Table 4.3 and 4.4, the number of complainants of the second period of the WTO dropped to less than half of the first period. There may be a few reasons for this difference. First, the first period may be considered an exceptional period of disputes. The first ten years of the WTO had more disputes than the entire 47 years' period of the GATT. The number of trade disputes in the second period of the WTO may be a normal number. Second, the member nations of the WTO may be more faithfully complying with its trade rules in the second period than in the first period. Third, the member nations of the WTO may come to use other means of dispute settlement in other regional trade organizations more frequently in the second period.

Second, as in Table 4.4, developing countries raised more complaints than developed countries in the second period of the WTO. For the first ten years of the WTO period, among a total of 352 complainants, 204 or 58% of the total complainants are developed countries, while 148 or 42% of the total complainants are developing countries. Among a total of 328 respondents, 193 or 59% of the total respondents are developed countries, while 135 or 41% of the total respondents are developing countries. Developed countries far exceed developing ones in participation as the complainants and respondents in the early ten years' period of the WTO dispute settlement mechanism.¹⁴⁴

¹⁴⁴ The number of complainants and respondents exceeds the number of total cases because there are multiple complainants and respondents for the individual dispute settlement cases of the WTO.

However, for the next ten years of the WTO from 2005 to 2014, among a total of 164 complainants, 76 complainants or 46% of the total complainants are developed countries, while 88 complainants or 54% of them are developing ones. Among a total of 171 respondents, 83 respondents or 48% of the total respondents are developed countries, while 88 respondents or 52% of the total respondents are developing countries. Between the two periods of the WTO, developed countries' participation as the complainants decreased from 58% to 46%, and that as the respondents decreased from 59% to 48%. In contrast, developing countries' participation as the complainants increased from 42% to 54%, and that as the respondents increased from 41% to 52%. If we compare the GATT with the WTO of post-2005 period, the developed countries' participation as the complainants decreased from 72% to 46%, and that as the respondents decreased from 89% to 48%, whereas developing countries' participation as the complainants increased from 28% to 54%, and that as the respondents increased from 11% to 52%.

The statistics of the four tables show the effects of legalization on the use of the dispute settlement mechanism by developed and developing countries very clearly. These effects can be described in two ways. First, if we compare the legalized compulsory WTO with the less legalized consensual GATT, the legalized WTO has made the member nations, especially developing member nations, use the dispute settlement mechanism much more frequently than the less legalized GATT, and as a result the big gap in the use of the dispute settlement mechanism between developed and developing nations under the GATT has disappeared under the WTO. Second, if we compare the least legalized GATT (1948-1979), the less legalized GATT (1980-1994), and the legalized WTO (1995-2014), the more legalized this trade institution is, the more frequent use of its dispute settlement mechanism by its member nations, especially its developing ones, and the less gap in its use between developed and developing

nations. In addition to this, legalization increased the number of the developing country participants in dispute settlement. During the GATT, there were 29 and 15 developing complainant and respondent countries. These numbers increased to 39 and 36 developing complainant and respondent countries during the period of the WTO from 1995 to 2014.

However, it should be noted here that more than half of the member countries of the GATT or the WTO have not used the dispute settlement mechanism at all. During the period of the GATT, among the total of 128 member countries 50 countries participated in the dispute settlement mechanism either as a complainant or a respondent. Yet, the remaining 78 countries did not participate in the dispute settlement mechanism. Among the 78 countries, two countries belong to developed countries.¹⁴⁵ During the period of the WTO from 1995 to 2014, among the total of 159 member countries, 65 countries participated in the dispute settlement mechanism either as a complainant or a respondent. Yet, the remaining 94 countries did not participate in the dispute settlement mechanism. Among the 94 countries, five countries belong to developed countries.¹⁴⁶ There are currently 34 least developed countries that are the members of the WTO.¹⁴⁷ Among them only one country – Bangladesh – has once used the dispute settlement mechanism. Although there is a large increase in the participation of developing countries in it under the WTO, this increase is concentrated in some developing countries excluding the least developed countries.¹⁴⁸

¹⁴⁵ Two developed countries that are the non-participants are Ireland and Iceland.

¹⁴⁶ Five developed countries that are the non-participants are Austria, Finland, Iceland, Italy and Luxemburg.

¹⁴⁷ Thirty four LDC members are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lao People's Democratic Republic, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Vanuatu, Yemen and Zambia. (https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm)

¹⁴⁸ David Evans and Gregory C. Shaffer, *Dispute settlement at the WTO: The Developing Country Experience* (Cambridge, 2010), pp.1-18.

(2) Participation in Bilateral or Multilateral Procedures of Dispute Settlement

Bilateral and multilateral methods of dispute settlement are the two major types of dispute settlement procedures. Both the GATT and WTO have been encouraging the use of the bilateral procedures of dispute settlement between the two disputants. Generally speaking, the bilateral procedure may favor developed countries more than developing ones because developed countries usually have more bargaining power over developing ones.

As noted earlier, according to Busch and Reinhardt, the complainant countries can obtain greater concessions from the respondent countries when the former settles disputes with the latter early in the consultation stage or at the panel or Appellate Body stage before the ruling or, in other words, through the bilateral procedures. They found that developed countries succeeded in solving disputes through the bilateral procedures more frequently than developing countries under both the GATT and the WTO. They saw no difference between the GATT and the WTO in this respect or found little impact of legalization on the use of the bilateral or multilateral procedures.¹⁴⁹ However, their data are limited to the early WTO. The comparison of the entire periods of the GATT and the WTO shows that there is the impact of legalization on the use of the bilateral or multilateral procedures, although it is not as large as the impact of legalization on the member nations' participation in the dispute settlement mechanism.

Which dispute cases belong to the cases of the bilateral procedures and those of the multilateral procedures? Under the GATT the cases of the bilateral procedures are the cases resolved through bilateral consultations, the cases for which the panel was requested, but not established, and the cases for which the panel was established, but cancelled due to bilateral agreement between the two disputants. The cases of the multilateral procedures are also of a few kinds. As noted earlier, under the GATT, the chairman of its plenary meeting ruled on the first

¹⁴⁹ Busch and Reinhardt (2003).

dispute case, after this one the working party ruled on the dispute cases until 1952, and then the panel ruled on them. The practice of the consensual approval of the plenary meeting was established in 1952, when the practice of the panel decisions started, and before that decisions on the dispute cases were adopted without the process of consensual approval or in spite of a dissenting opinion against them. All of these cases are counted as belonging to the multilateral procedures.

As in Table 4.6, among the 249 dispute cases under the GATT, 140 cases or 56% of the total dispute cases resorted to the bilateral procedures and 109 or 44% of them resorted to the multilateral procedures. As in Table 4.5, among 140 bilateral cases 97 or 70% of them belonged to the disputes between a developed complainant country and a developed respondent country, 16 or 12% to those between a developed complainant and developing respondent, 23 or 16% to those between a developing complainant and a developed respondent, and 4 or 2% to those between a developing complainant and a developing respondent. Among 109 multilateral cases 76 or 70% of them belonged to the disputes between a developed complainant country and a developed respondent country, 8 or 7% to those between a developed complainant and a developing respondent, 24 or 22% to those between a developing complainant and a developed respondent, and 1 or 1% to those between a developing complainant and a developing respondent.

Table 4.6 compares the proportions of the multilateral and bilateral procedures the disputants took under the GATT and under the WTO. According to the GATT part of this Table, first, slightly more cases resorted to the bilateral procedures than to the multilateral ones. Second, the proportion of the bilateral procedures was the highest when both the complainants and respondents were developing countries, the second highest when the complainants were

developed countries and the respondents developing ones, and the third highest when both the complainants and respondents were developed countries. Third, the proportions of the bilateral and multilateral procedures were about the same when the complainants were developing countries and the respondents developed ones, although very slightly more cases resorted to the multilateral procedures than to the bilateral ones in these disputes.

Many dispute cases of the WTO were also resolved bilaterally between the two disputants. Dispute cases of the WTO with the statuses of “mutually agreed solution” and “withdrawn” resolved or terminated conflict are the cases which are resolved bilaterally between the two disputants without multilateral procedures of dispute settlement.¹⁵⁰ There was a total of 61 “mutually agreed solution” cases and in these cases panels were not established at all or panel reports were not adopted although panels were established.¹⁵¹ Withdrawn cases were those cases which the complainants withdrew when they agreed with the respondents or when the respondents fixed the complaints before the initiation of multilateral procedures or even after the establishment of the panels¹⁵² There were 27 such withdrawn cases under the WTO. In addition, many cases have not shown any clear progress and remained in a status of “in consultation”. These cases have not resorted to the multilateral procedures either because certain satisfactory settlement was reached or the complainants decided not to resort to further procedures. There was a total of 141 cases under “in consultation” stage.¹⁵³ The total number of these three kinds of the bilateral cases is 229.

¹⁵⁰ DS 27, 292, 293, 344 and 382 also reached “mutually agreed solution,” but after they completed the multilateral procedures of dispute settlement. These cases are excluded from the cases of bilateral resolution of trade disputes.

¹⁵¹ DS 7, 12, 14, 21, 35, 43, 72, 190, 199, 210, 237, 250, 261, 281, 287, 323, 327 and 391 had the establishment of the panels.

¹⁵² DS 32,193,227,358,359 established the panels, but the panels were suspended soon.

¹⁵³ There is a total of 153 “in consultation” cases from 1995 to 2014. However, 12 cases that are filed in 2014 are excluded in the statistics because sufficient time has not passed after these cases were filed. These cases may progress to multilateral procedures in the near future.

On the other hand, the cases of the multilateral procedures were the cases for which the panels and the Appellate Body had worked for their rulings, and the total number of these cases amounted to 247.

As in Table 4.5, among 229 bilateral cases of the WTO, 61 or 26% of them belonged to the disputes between a developed complainant country and a developed respondent country, 60 or 26% to those between a developed complainant and developing respondent, 44 or 20% to those between a developing complainant and a developed respondent, and 64 or 28% to those between a developing complainant and a developing respondent. Among 247 multilateral cases of the WTO, 83 or 34% of them belonged to the disputes between a developed complainant country and a developed respondent country, 65 or 26% to those between a developed complainant and developing respondent, 71 or 29% to those between a developing complainant and a developed respondent, and 28 or 11% to those between a developing complainant and a developing respondent.

Table 4.6 compares the proportions of the multilateral and bilateral procedures the disputants took under the GATT and under the WTO. According to the WTO part of this Table, first, slightly more cases resorted to the multilateral procedures than to the bilateral ones. Second, the proportion of the multilateral procedures was the highest when the complainants were developing countries and the respondents developed ones, the second highest when both the complainants and respondents were developed countries, and the third highest when the complainants were developed countries and the respondents developing ones. Third, the proportion of the bilateral procedures was higher than that of the multilateral procedures when both the complainants and respondents were developing countries.

Table 4.5. Distribution of the Use of the Multilateral and Bilateral Procedures

Complainant	Respondent	GATT		WTO	
		Multilateral	Bilateral	Multilateral	Bilateral
Developed	Developed	76 (70%)	97 (70%)	83 (34%)	61 (26%)
Developed	Developing	8 (7%)	16 (12%)	65 (26%)	60 (26%)
Developing	Developed	24 (22%)	23 (16%)	71 (29%)	44 (20%)
Developing	Developing	1 (1%)	4 (2%)	28 (11%)	64 (28%)
		109 cases	140 cases	247 cases	229 cases

Table 4.6. Comparison of the Use of the Multilateral and Bilateral Procedures by Developed and Developing countries

Complainant	Respondent	GATT			WTO		
		Multilateral	Bilateral	Total	Multilateral	Bilateral	Total
Developed	Developed	76 (44%)	97 (56%)	173	83 (58%)	61 (42%)	144
Developed	Developing	8 (33%)	16 (67%)	24	65 (52%)	60 (48%)	125
Developing	Developed	24 (51%)	23 (49%)	47	71 (62%)	44 (38%)	115
Developing	Developing	1 (20%)	4 (80%)	5	28 (39%)	64 (61%)	92
		109 (44%)	140(56%)	249	247 (52%)	229(48%)	476

If we compare the GATT with the legalized WTO on the use of bilateral or multilateral procedures of dispute settlement, the following differences are conspicuous or the impact of legalization is clear, although the impact is not so strong as the impact on dispute settlement participation in general. First, under the WTO the multilateral procedures were employed a little more frequently than the bilateral ones, while under the GATT the bilateral procedures were employed a little more frequently than the multilateral procedures. The use of the multilateral procedure increased from 44% of both the multilateral and bilateral procedures under the GATT to 52% under the WTO. Second, the increase of the multilateral procedures under the WTO appeared in all four kinds of trade disputes: disputes between developed complainants and developed respondents, those between developed complainants and developing respondents, those between developing complainants and developed respondents, and those between developing complainants and developing respondents. Third, the use of the multilateral

procedure especially by developing countries has increased considerably under the WTO. The use of the multilateral procedure in the disputes between developed complainants and developing respondents has increased from 33% under the GATT to 52% under the WTO. The use of the multilateral procedure in the disputes between developing complainants and developed respondents has increased from 51% under the GATT to 62% under the WTO. That between developed complainants and developed respondents has increased from 44% under the GATT to 58% under the WTO, but this 14% increase is still less than 19% increase in that between developed complainants and developing respondents.

On the other hand, the GATT and WTO share the following characteristics. First, under both the GATT and WTO, bilateral solutions occurred most frequently between the developing complainant and respondent countries, and the second most frequently between the developed complainant and developing respondent countries. Second, under both of them bilateral solutions occurred the least frequently between the developing complainant and developed respondent countries.

In sum, the legalization of the GATT into the WTO has tremendously increased the participation of both the developed and developing countries, especially developing countries in the dispute settlement mechanism. It has also triggered an increase in the use of the multilateral procedures of dispute settlement and a decrease in the use of the bilateral procedures of dispute settlement, although this increase is not large.

4.3 Analysis: Hypotheses Testing

The existing studies, which dealt with the early years of the WTO, found a large gap in the use of the dispute settlement mechanism by developed and developing countries both under

the GATT and under the WTO. Authors of these studies did not foresee the future narrowing of this gap at the time of their writings because they attributed this large gap to the differences in economic capacity between them. If economic capacity determines nations' use of the dispute settlement mechanism, a large difference in its use between developed and developing countries cannot but persist. However, as just introduced, there is no such gap between developed and developing countries under the present WTO. Another important independent variable other than economic capacity must have worked to produce this result.

This study hypothesizes that not only economic capacity of the member nations but also their socialization experiences with dispute settlement affect their respective participations in it and their participation in its bilateral or multilateral procedures under the GATT and under the legalized WTO differently. This section will attempt to see how differently the two independent variables of economic capacity and socialization experiences affect participation of the member nations in dispute settlement under the GATT and under the WTO.

As noted in chapter 1, a nation's share of total world trade and its GNI are used as its indices of capacity. Prior experiences of dispute settlement under the GATT/WTO, the length of membership and the number of memberships in international organizations are used as indices of socialization. This study assumes that legalization of international institutions take effect through its members' socialization with its dispute settlement mechanism, but the number of memberships in IOs is also included to see whether it has effect on their use of the dispute settlement mechanism. The percentage of a nation's trade over its Gross Domestic Product (GDP) and the size of its population are used as control variables.

Two different regression models – negative binomial regression and binary logit regression - are employed to test the hypotheses of this study about dispute settlement participation.

First, negative binomial regression is implemented to test the hypotheses about the independent variables and overall participation in dispute settlement under the GATT and under the WTO by their respective member countries. The regression is run based on the two different datasets – frequency of participation of the member countries which have used the dispute settlement mechanism as complainants and frequency of participation of all the member countries including those countries which have not participated in it at all. For both of the datasets regressions are implemented for the late GATT period, early WTO period and late WTO period respectively. A nation's participation in dispute settlement in the early GATT period is used as its prior experience in the late GATT, and therefore the early GATT period is excluded for regression. Comparison of these three periods presents how the independent variables affect the frequency of the use of the dispute settlement mechanism as complainants. This regression tests the following two hypotheses.

H1-1: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to use the dispute settlement mechanism to deal with trade disputes.

H2-1: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to use the dispute settlement mechanism to deal with trade disputes.

Second, binary logit regression is implemented to test the hypotheses about the independent variables and participation in the bilateral or multilateral procedures of dispute settlement. For both dispute cases of the GATT and the WTO, it is coded as 1 if the participants resorted to the multilateral procedure and 0 if the participants resorted to the bilateral procedure. This regression tests the following two hypotheses.

H1-2: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to resort to the multilateral procedure of the dispute settlement mechanism.

H2-2: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to resort to the multilateral procedure of the dispute settlement mechanism.

(1) Participation in Dispute Settlement

Tables 4.7 and 4.8 present the results of negative binomial regression on the frequency of a nation's use of the dispute settlement mechanism as a complainant, and test the hypotheses H1-1 and H2-1 of this study. For the Models in Table 4.7, regressions are implemented on only the member countries which have actually used the dispute settlement mechanism under the GATT and under the WTO, and for the Models in Table 4.8 regressions are on all the member countries including those which have not used it at all. For the regression models for the period of the WTO, 15 early members of the EC/EU are excluded since none of these countries except Denmark filed a complaint on its own.¹⁵⁴ Each Model has two regressions, one including the prior experience as a complainant and the other including the prior experience as a respondent.

Table 4.7 presents the regression results for the countries that have been complainants more than once under the GATT and under the WTO. Model 1 is the regression results for the late GATT, Model 2 for the early WTO and Model 3 for the late WTO. Model 1-1, 2-1 and 3-1 are regression results with an independent variable of the number of previous experiences as a complainant, and Model 1-2, 2-2 and 3-2 with an independent variable of the number of previous experiences as a respondent.

Model 1-1 and 1-2 of the late GATT period show that a nation's share of total world trade increases the use of its dispute settlement mechanism and that a nation's GNI also increases

¹⁵⁴ The 15 early members of the EC include Austria, Belgium, Denmark, Greece, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom.

it (Model 1-2). The greater a nation's share of the total world trade, and the larger the GNI, the more frequently it raises complaints against the violators of the GATT rules in its view. However, neither a nation's prior experiences as either a complainant or a respondent nor the length of its membership years affect the frequency of a nation's use of the dispute settlement mechanism as a complainant. Under the late GATT, capacity of a nation affects the use of the dispute settlement mechanism as a complainant positively, but its socializing experiences do not affect it.

Table 4.7. Frequency of Using the DSM for the Users (Negative Binomial Regression)

	Model1 (1980-1994)		Model2 (1995-2004)		Model3 (2005-2014)	
	1-1	1-2	2-1	2-2	3-1	3-2
Trade share	12.1211** (3.7305)	13.8153*** (3.9749)	-2.6936 (2.8533)	-6.8876 (4.1379)	-0.4872 (3.2239)	-1.5160 (3.5366)
log(GNI)	0.4685 (0.2892)	0.6072* (0.2819)	0.2262 (0.1368)	0.2030 (0.1466)	0.1438 (0.1553)	0.1283 (0.1588)
year of member	-0.0113 (0.0146)	-0.0127 (0.0147)	-0.0058 (0.0071)	-0.0066 (0.0073)	0.0171* (0.0078)	0.0168* (0.0078)
complainant experience	0.0135 (0.0386)		0.0303** (0.0116)		0.0129* (0.0065)	
respondent experience		-0.0663 (0.0958)		0.0424* (0.0187)		0.0146* (0.0074)
# of IOs	-0.0825** (0.0251)	-0.0866*** (0.0249)	0.0321* (0.0153)	0.0375* (0.0162)	0.0162 (0.0163)	0.0195 (0.0168)
% of trade	-0.0235 (0.0135)	-0.0243 (0.0135)	0.0022 (0.0028)	0.0028 (0.0029)	-0.0044 (0.0044)	-0.0036 (0.0044)
log(pop)	-0.3528 (0.2890)	-0.4161 (0.2786)	0.0308 (0.1283)	0.0444 (0.1355)	0.1396 (0.1450)	0.1497 (0.1467)
(Intercept)	22.5983 (30.1913)	23.5268 (30.2862)	3.6662 (14.3460)	5.2335 (14.7466)	-40.0737* (15.7477)	-39.5646* (15.6868)
theta	1.131 (0.409)	1.137 (0.410)	2.289 (0.866)	2.134 (0.773)	2.40 (1.23)	2.40 (1.23)
2*log-likelihood	-167.248	-166.913	-220.001	-221.157	-175.673	-175.812
N	41	41	45	45	45	45

***p< 0.001, ** p<0.01, *p<0.05, standard errors in parentheses.

Model 1-1 and 1-2 show that under the GATT the increase of a nation's membership in IOs decreases the frequency of its use of the dispute settlement mechanism as a complainant. A nation's external socialization experiences did not trigger an increase in its use of the dispute settlement mechanism, but it rather discouraged its use. This may be due to the influence of consensual dispute settlement rule of the GATT. This consensual triadic dispute resolution rule may have made internationally more experienced nations restrain litigation.

In contrast to Model 1 of the GATT period, Model 2 and Model 3 of the two WTO periods show that a nation's socializing experiences affect the use of the dispute settlement mechanism as a complainant positively, but its capacity does not affect it. Model 2-1 and 2-2 show the positive impact of a nation's prior experiences as a complainant or a respondent and the number of its memberships in IOs on the frequency of its use of the dispute settlement mechanism as a complainant. Model 3-1 and 3-2 show the positive impact of a nation's prior experiences as a complainant or a respondent and the beginning year of its membership on the frequency of its use of the dispute settlement mechanism as a complainant. However, Model 2-1, 2-2, 3-1 and 3-2 show that neither a nation's share of the total world trade nor its GNI affects the frequency of its use of the dispute settlement mechanism as a complainant.

These regression results of Table 4.7 for those member nations of the GATT/WTO that have used its dispute settlement mechanism as complainants at least more than once support the hypotheses H1-1 and H2-1 of this study very clearly. They negate the argument of many capacity theorists that both the less legalized GATT and the legalized WTO favor developed countries more than developing countries in terms of the frequency of their respective uses of the dispute settlement mechanism. They are right in that the less legalized GATT favor developed countries, but are wrong in that the legalized WTO also favor developed countries. The legalized WTO

favors high socialization countries more than low socialization countries. Legalization of trade institution has made socialization variables, not capacity variables, the most important independent variable affecting the use of its dispute settlement mechanism.

Legalization has also made a nation's IO memberships working differently from the less legalized GATT period. Under the GATT it discourages its use of the dispute settlement mechanism, but under the legalized WTO it encourages it. This may be due to the difference in the rules of dispute settlement. The compulsory triadic dispute resolution rule of the WTO may have made internationally more experienced member nations use it more actively, while the consensual rule may have constrained their use of this rule as noted earlier.

Table 4.8 presents the regression results on the use of the dispute settlement mechanism for all the member nations of the GATT/WTO. These results are partly similar to and partly different from the results of Table 4.7.

Model 4-1 and 4-2 of the late GATT period show that a nation's GNI positively affects the frequency of its use of the dispute settlement mechanism as a complainant. Model 4-2 shows that a nation's share of total world trade also affects its use of the dispute settlement mechanism positively. However, socialization variables including a nation's prior experiences as a complainant or respondent, the beginning year of its membership, and the number of its IO memberships do not affect its use of the dispute settlement mechanism.

Model 5-1 and 5-2 of the early WTO period show that a nation's GNI and the number of its IO memberships positively affect the frequency of its use of the dispute settlement mechanism as a complainant. However, they also show that a nation's share of the total world trade affects its use of the dispute settlement mechanism negatively. This may mean that big trading nations are cautious in using it. Nevertheless, in the early period of the legalized WTO one capacity

variable and one socialization variable affect the use of the dispute settlement mechanism positively.

Table 4.8. Frequency of Using the DSM for All Members (Negative Binomial Regression)

	Model4 (1980-1994)		Model5 (1995-2004)		Model6 (2005-2014)	
	4-1	4-2	5-1	5-2	6-1	6-2
Trade share	5.4308 (4.4975)	10.1273* (4.7820)	-10.7223* (4.1890)	-13.7590* (6.0075)	-8.8484 (4.7746)	-8.8958 (5.2455)
log(GNI)	0.7891** (0.2845)	0.9856*** (0.2640)	0.5358*** (0.1394)	0.5482*** (0.1419)	0.4173** (0.1562)	0.4235** (0.1568)
year of member	0.0009 (0.0178)	-0.0025 (0.0175)	-0.0058 (0.0093)	-0.0067 (0.0095)	0.0204* (0.0104)	0.0198 (0.0103)
complainant experience	-0.0058 (0.0517)		0.0351 (0.0183)		0.0187 (0.0102)	
respondent experience		-0.1798 (0.1063)		0.0376 (0.0277)		0.0167 (0.0115)
# of IOs	-0.0159 (0.0276)	-0.0236 (0.0268)	0.0703*** (0.0176)	0.0740*** (0.0180)	0.0470* (0.0185)	0.0492** (0.0188)
% of trade	-0.0377* (0.0147)	-0.0386** (0.0145)	0.009** (0.0035)	0.0092* (0.0036)	0.0022 (0.0048)	0.0027 (0.0047)
log(pop)	-0.5812 (0.3193)	-0.6749* (0.3033)	0.0514 (0.1480)	0.0436 (0.1513)	0.2506 (0.1648)	0.2449 (0.1647)
(Intercept)	-7.8554 (36.1158)	-3.6931 (35.5060)	-8.5802 (18.8334)	-7.1187 (19.1825)	-58.8266** (21.0178)	57.8186** (20.9654)
theta	0.524 (0.177)	0.582 (0.205)	0.795 (0.248)	0.768 (0.237)	0.759 (0.294)	0.759 (0.300)
2*log-likelihood	-204.542	-202.432	-284.245	-285.443	-226.467	-227.294
N	86	86	130	130	130	130

***p< 0.001, ** p<0.01, *p<0.05, standard errors in parentheses.

Model 6-1 and 6-2 of the late WTO period show similar results to Model 5-1 and 5-2 of the early WTO period. Model 6-1 and Model 6-2 show that a nation's GNI on the one hand and the number of its IO memberships affect its use of the dispute settlement mechanism positively. As in Models 3-1 and 3-2, Model 6-1 also presents that the beginning year of its membership have positive impact on the use of dispute settlement. In other words, the more recent the

beginning year of a nation's membership in the WTO is, the more frequently it makes use of its dispute settlement mechanism. This means that its more recent members are socialized with its dispute settlement mechanism more quickly than its less recent members. This tendency is reflected in its frequent use by its recent members such as China and Russia.

The regression results of Table 4.8 for all the members of the GATT/WTO support the hypothesis H1-1 of this study: under low level of legalization a nation's high capacity affects its use of the dispute settlement mechanism positively. However, they do not wholly support the hypothesis H2-1 that under high level of legalization a nation's high socialization affects its use of the dispute settlement positively. They show that both capacity and socialization experience affect the use of the dispute settlement mechanism positively.

In sum, regressions for the users of the dispute settlement mechanism under the GATT/WTO support the hypotheses H1-1 and H2-1 of this study fully, and negate the argument of capacity theorists that legalization still favors the high capacity or developed nations more than the low capacity or developing nations. However, regressions for all the members of the GATT/WTO support the hypothesis H1-1 of this study, but only partially support the hypothesis H2-1 in that not only socialization variables but also capacity variables affect the use of the dispute settlement mechanism.

We can choose either way of regression analysis, but this study chooses the first way which includes only the users of the dispute settlement mechanism because trade share of these user countries, which amount to about one third of all the member countries of the GATT/WTO, approximates more than 95% of all the members' total trade volume.

The following logit regression results of Table 4.9 tests the hypotheses H1-2 and H2-2 of this study about the use of the multilateral procedures of dispute settlement. The dependent

variable of this logit regression is binary where 1 refers to the use of the multilateral procedure. Model 7 presents the logit regression results for the entire period of the GATT, and Model 8 for the entire period of the WTO. Each model includes three regressions – one for the properties of complainants, another for the properties of respondents and the third including the properties of both complainants and respondents. For the third regression, economic capacity variables are represented by the gap of trade share and GNI between the complainant and the respondent. The gap is calculated by subtracting the respondent's capacity from the complainant's capacity.

Model 7-1 of the entire GATT period shows that the properties of a complainant of a dispute case, whether capacity or socialization experiences, do not affect the use of the multilateral procedure. However, Model 7-2 shows that the properties of a respondent affect it. When a respondent of a dispute case has high GNI, the case is more likely to have the multilateral procedure. However, when a respondent of a case has many IO memberships, the case is less likely to have the multilateral procedure. This is consistent with the finding of Model 1 in which active IO countries restrained their use of the consensual dispute settlement mechanism. Once these countries raise complaints, they may seek after negotiated settlement through the bilateral procedure. Model 7-3, which includes the properties of both a complainant and a respondent, presents that a capacity gap or a GNI gap between a complainant and a respondent (complainant minus respondent) affects their use of the multilateral procedure negatively, and that socialization experiences of a complainant or a respondent do not affect it.

Table 4.9. The Use of Multilateral Procedure (Binary Logit Regression)

	GATT (1947-1994)			WTO (1995-2014)		
	Model7			Model8		
	7-1	7-2	7-3	8-1	8-2	8-3
C_trade share	1.8635 (2.3920)			6.9265** (2.2154)		
R_trade share		1.4671 (2.4337)			1.0484 (2.1790)	
C-R trade share			0.1425 (1.7739)			2.1542 (1.6137)
C_log(GNI)	0.0110 (0.1864)			0.3640** (0.1395)		
R_log(GNI)		0.6136** (0.2251)			0.1676 (0.1406)	
C-R log(GNI)			-0.3393* (0.1696)			0.0255 (0.1107)
C_length of membership	-0.0016 (0.0122)		0.0184 (0.0213)	-0.0004 (0.0083)		0.0010 (0.0087)
R_length of membership		-0.0194 (0.0142)	-0.0251 (0.0240)		0.0041 (0.0079)	0.0033 (0.0082)
C_# of GATT use	-0.0056 (0.0061)		-0.0026 (0.0064)	-0.0191*** (0.0042)		-0.0030 (0.0036)
R_# of GATT use		-0.0055 (0.0056)	-0.0028 (0.0057)		-0.0038 (0.0043)	0.0059 (0.0039)
C_# of WTO use				0.0093*** (0.0026)		0.0072* (0.0030)
R_# of WTO use					0.0092** (0.0028)	0.0069* (0.0032)
C_# of IOs	-0.0062 (0.0254)		0.0210 (0.0243)	-0.0531**** (0.0149)		-0.0229 (0.0121)
R_# of IOs		-0.0551** (0.0198)	-0.0334 (0.0183)		-0.0269 (0.0138)	-0.0047 (0.0121)
C_% of trade	-0.0054 (0.0151)		-0.0109 (0.0157)	-0.0080 (0.0044)		-0.0034 (0.0042)
R_% of trade		0.0383* (0.0162)	0.0408** (0.0153)		-0.0026 (0.0054)	-0.0008 (0.0053)
C_log(pop)	-0.0930 (0.2489)		0.2078 (0.2548)	-0.1900 (0.1155)		-0.0383 (0.1050)
R_log(pop)		-0.1346 (0.3162)	0.1129 (0.2678)		0.0022 (0.1136)	0.0696 (0.1038)
(Intercept)	1.6837 (4.8450)	-10.9054 (5.8613)	-5.8024 (4.5801)	-1.3695 (3.0223)	-2.6548 (3.2285)	1.2249 (2.2357)
log-likelihood	-161.4499	-160.6004	-154.0633	-308.9617	-307.474	-298.3959
N	237	246	234	472	476	472

***p<0.001, ** p<0.01, *p<0.05, standard errors in parentheses.

Model 8-1 of the entire WTO period shows that the properties of a complainant are important for it. It shows that a nation's share of the total world trade and high GNI on the one hand and its prior experiences as either a complainant or a respondent under the WTO positively affect the use of the multilateral procedure. In other words, both capacity and socializing experiences have positive effect on it. However, Model 8-1 also shows that among socializing experiences a complainant's experience under the GATT and the number of its IO memberships affect the use of the multilateral procedure negatively. Experience of consensual triadic dispute resolution and international experiences in IOs may contribute to the choice of the bilateral procedure of negotiated settlement. Model 8-2 shows that unlike under the GATT the properties of respondent do not have any effect under the WTO, except that its prior experiences under the WTO has a positive effect on the use of the multilateral procedure. Model 8-3, which includes the properties of both a complainant and a respondent, presents that a nation's prior experiences as a complainant or respondent under the WTO affect the use of the multilateral procedures positively, and that a capacity gap between a complainant and a respondent does not affect it.

The logit regression results of Table 4.9 support the hypothesis H1-2 and H2-2 of this study. Model 7 for the entire GATT shows that the properties of a respondent (Model 7-2), not those of a complainant (Model 7-1), affect the use of the multilateral procedure. Model 7-3, which includes the properties of both a complainant and a respondent, shows that a capacity gap between a complainant and a respondent affects their use of the multilateral procedure negatively, and that their respective socialization experiences do not affect it. These results support the hypothesis H1-2 of this study only when the member countries in the hypothesis mean the respondent member countries: under low level of legalization, if the respondent

member countries have high level of capacity, it will be more likely for them to resort to the multilateral procedure of the dispute settlement mechanism.

Model 8 for the entire WTO shows that the properties of a complainant (Model 8-1), not those of a respondent (Model 8-2), affect the use of the multilateral procedure. Model 8-3, which includes the properties of both a complainant and a respondent, shows that their respective prior experiences as a complainant or a respondent under the WTO affect their use of the multilateral procedure positively. In other words, it supports the hypothesis H2-2: under high level of legalization, if the member countries (both a complainant and a respondent) have more socialization experiences, it will be more likely for them to resort to the multilateral procedure of dispute settlement.

4.4 A Concluding Remark

How has legalization of trade institution affected the use of its dispute settlement mechanism by developed and developing countries? The simple comparison of statistics about the use of the dispute settlement mechanism under the GATT and under the legalized WTO shows that it has tremendously increased nations' use of the dispute settlement mechanism in general, that it has increased especially developing nations' use of it very conspicuously, and, as a result, that the big gap in the use of the dispute settlement mechanism between developed and developing countries under the GATT has almost disappeared under the WTO. Judith Goldstein and Lisa L. Martin, as noted in chapter 1, contended in 2000 that the elimination of veto power of the member states against the rulings of the dispute settlement mechanism under the WTO had not helped developing countries to bring disputes more actively.¹⁵⁵Data on the participation of

¹⁵⁵Judith Goldstein and Lisa L. Martin (2000), pp. 603-632.

developing countries in the dispute settlement mechanism under the WTO from 1995 to 2014 proves that their contention was simply premature and absolutely wrong.

How has legalization affected the choice of dispute settlement procedures between the bilateral and multilateral procedures by developed and developing countries? The simple comparison of statistics about the use of the multilateral procedure shows that legalization has increased the member nations' use of it from 44% under the GATT to 52% under the WTO. It also shows that the use of the multilateral procedure especially by developing countries has increased considerably under the WTO. The use of the multilateral procedure in trade disputes between developed complainants and developing respondents has increased from 33% under the GATT to 52% under the WTO.

How can we explain this conspicuous change in the nations' use of the dispute settlement mechanism in general?

Capacity theorists argued that legalization or the legalized WTO favored developed countries in terms of their use of the dispute settlement mechanism, and that it was due to the gap in economic capacity between developed and developing countries. This argument is doubly wrong. First, it is factually wrong in view of statistical data of the entire WTO period. Second, the results of this study show that capacity cannot satisfactorily explain the increasing use of the dispute settlement mechanism by the member countries, especially by the developing member countries.

This study argues that socialization experiences of the member nations with the dispute settlement mechanism help to explain this change. The negative binomial regression analysis on the use of the dispute settlement mechanism by its users only found that under the GATT economic capacity affected its use positively, while under the WTO economic capacity did not

affect its use, but the level of socialization represented by previous experiences as a complainant or respondent during the GATT and memberships in other international organization affected its use positively. The results of the same analysis for all the members of the GATT/WTO found that under the GATT like the analysis just noted, economic capacity affected its use positively, but under the WTO not only economic capacity but also socialization experiences affected its use positively.

How can we explain the change in the use of the multilateral procedure? Binary logit regression analysis on the use of multilateral procedures of dispute settlement found that under the GATT, if the respondent member countries had high level of capacity, it was more likely for them to resort to the multilateral procedure of dispute settlement. However, it found that under the WTO their respective prior experiences as a complainant or a respondent under the WTO affected their use of the multilateral procedure positively. Under the GATT, capacity was an important variable, while under the WTO socialization experiences were an important variable.

Chapter 5. Legal Transformation of the GATT into the WTO and the Outcomes of its Dispute Settlement Mechanism

5.1 Introduction

How has legalization affected the outcomes of the dispute cases of the GATT/WTO for developed and developing countries? Has the legal transformation of the GATT into the WTO favored developed countries more or developing ones more in terms of the progress of triadic dispute settlement, the length of time for dispute settlement, and adjudicative outcomes?

How has the legal transformation of the GATT into the WTO affected the procedural progress of triadic dispute settlement? The GATT has the consensual triadic dispute settlement mechanism, and the WTO the compulsory triadic dispute settlement mechanism. How has this legal change affected the progress of dispute settlement for developed and developing countries? How has the legal transformation affected the length of time spent for the circulation of the panel reports and for a complete dispute settlement including the implementation of the panel or Appellate Body ruling? Has it helped developed or developing countries to shorten the length of time? How has the legal transformation affected the adjudicative outcomes of dispute cases? Has it produced more winners among developed or developing countries?

This chapter will first present statistical data on the procedural progress, the length of time, and the adjudicative outcomes of the dispute cases by developed and developing countries. Then, it analyzes factors which have brought about such outcomes of the dispute cases. It will assess the impact of economic capacity of the disputants and their socialization experiences on the three outcomes of dispute settlement under the GATT and under the legalized WTO. In measuring the impacts of these two independent variables on the three dependent variables this study will employ the method of ordered probit regression and binary logit regression.

5.2 The Outcomes of the Dispute Settlement Mechanism

(1) Procedural Progress

The dispute cases of the GATT/WTO end in one of the four stages of the dispute settlement mechanism. The first stage is the purely bilateral consultation stage between the two disputants without the involvement of the third party or the panel (dyad). The second stage is the stage in which the involvement of the third party or the panel establishment is requested but is not realized in the case of the GATT, and in which the panel establishment is realized with little progress in its proceedings in the case of the WTO (dyad failing to start triad). The third stage is the stage in which the panel is established and its report is in progress or completed but the disputants agree to solve the disputes bilaterally (dyad abandoning triad). The final fourth stage is the stage in which the panel report or the Appellate Body ruling is approved (consensual or compulsory triad). The disputants settle their disputes in one of these four stages. Both the GATT and the WTO encourage them to settle their disputes before the rulings of the third party.

We dealt with the bilateral and multilateral procedures of dispute settlement in the previous chapter, and the bilateral stage roughly overlaps with the first, second, third stages and the multilateral stage with the final fourth stage. The focus of the previous chapter is on the method of dispute settlement: whether it is dyadic or triadic, and how legalization affects a choice between them. The focus of this chapter is on the process of dispute settlement: whether dispute settlement ends early in the process or late in the process, and how legalization affects this process, that is, whether it makes the process ends early or late. The rules of the WTO according to which either disputant is able to take its dispute case to the final fourth stage without facing a veto power may affect dispute settlement in the previous three stages.

Table 5.1 presents the varying status of procedural progress of the dispute cases under the early and late periods of both the GATT and the WTO. Above all, it shows that there is no big difference in the distribution of procedural progresses between them. The proportion of the dispute cases which proceed to the final triadic stage is similar under both the GATT and the WTO. Legalization has not affected dispute settlement process in this respect.

Table 5.1. Procedural Status of the GATT/WTO Dispute Cases¹⁵⁶

	1947-1979	1980-1994	GATT Total	1995-2004	2005-2012	WTO Total
1 st stage	24(27%)	59(39%)	83 (34%)	159(50%)	40 (30%)	199(44%)
2nd stage	4 (5%)	17 (11%)	21 (9%)	13 (3%)	18 (14%)	31 (7%)
3rd stage	20(22%)	18 (11%)	38 (16%)	23 (7%)	13 (11%)	36 (8%)
4th stage	41(46%)	59(39%)	100 (41%)	129 (40%)	59(45%)	188 (41%)
	89	153	242 ¹⁵⁷	324	130	454 ¹⁵⁸

As noted earlier, Stone Sweet found the self-sustaining evolutionary process of the GATT from normative structure of free trade rules, to dyad, to consensual triad of the GATT, to compulsory triad of the WTO and triadic rulemaking, and predicted the emergence of a powerful supranational governmental authority in the WTO. However, a powerful supranational governmental authority has not emerged in the WTO yet, and dyadic and triadic dispute settlement processes coexist in the WTO in a similar proportion as in the GATT. As also noted earlier, Chayes and Chayes distinguish between the management model and the enforcement model of international institution. The WTO is regarded as belonging to the quasi-enforcement model because of its compulsory dispute settlement mechanism and its quasi-enforcement mechanism approving the retaliation of the complainant against the losing respondent in case the

¹⁵⁶ For the data from 1947 to 1989, see Hudec (1991), pp.588-608, and for the data from 1990 to 1994, see GATT digital library (<http://gatt.stanford.edu/page/home>). The later cases are categorized based on Hudec's criteria. For the data from 1995 to 2012, see the WTO homepage (www.wto.org).

¹⁵⁷ There are also 7 cases that have followed alternative procedures (Dispute cases 61, 77, 82, 96, 101, 170 and 201). See Hudec (1991), p.588.

¹⁵⁸ The cases after 2012 are excluded since sufficient amount of time has not passed after the initiation of the dispute settlement.

latter fails to implement its ruling within a reasonable period of time, and the GATT as belonging to the management model because of its consensual dispute settlement mechanism and the lack of such enforcement mechanism. However, the distribution of the procedural progresses of the GATT and the WTO shows that the WTO contains both the management model and the quasi-enforcement model.

Table 5.1 also shows that the proportion of the early settlement in the first stage increased from 27% of the least legalized GATT to 39% of the less legalized GATT to 44% of the legalized WTO. Legalization or the compulsory triadic dispute settlement mechanism has worked to increase the early settlement between the disputants or to press them for the early compromise. However, on the other hand, legalization has helped to decrease the early settlement from 50% in the early WTO to 30% in the late WTO. Under the WTO the passage of time helped its member nations to resist the early negotiated settlement. The impact of legalization is different between the two periods of the WTO. This decrease in the early settlements under the late WTO may in general be considered to be beneficial for developing countries that do not have a superior bargaining power over developed countries.

How do developed and developing countries fare in this distribution of procedural progresses? Table 5.2 presents how the process of the dispute settlement mechanism progressed depending on the development level of a complainant and a respondent under the GATT and under the WTO.

Above all, the GATT and the WTO share the following characteristics. First, developed complainant and respondent countries are more likely to settle their disputes in the final stage of the dispute settlement mechanism than in the first and middle stages. Second, developed complainant and developing respondent countries are more likely to settle their disputes in the

first stage of the dispute settlement mechanism than in the middle and final stages. Third, developing complainant and developed respondent countries are more likely to settle their dispute in the final stage of the dispute settlement mechanism than in the first and middle stages. Fourth, developing complainant and respondent countries are more likely to settle their disputes in the first stage of the dispute settlement mechanism than in the middle and final stages.

Table 5.2. Developmental Character of the Disputants and Procedural Progress

Complainant	Respondent	GATT				WTO					
		1st stage	2 nd & 3rd stage	final stage	Total	1st stage	2 nd & 3rd stage	final stage	Total		
Developed	Developed	52(30%)	47(28%)	70(41%)	169	54(38%)	18(12%)	71(50%)	143		
Developed	Developing	10(42%)	6(25%)	8(33%)	24	51(45%)	15(14%)	48(42%)	114		
Developing	Developed	17(39%)	6(13%)	21(48%)	44	37(34%)	21(20%)	50(46%)	108		
Developing	Developing	4(80%)	0	1(20%)	5	57(64%)	13(15%)	19(21%)	89		
					242						454

However, the GATT and the WTO also show the following differences. First, developed complainant and developed respondent countries increased their final stage settlement from 41% under the GATT to 50% under the WTO, increased their first stage settlement from 30% under the GATT to 38% under the WTO, and decreased their middle stage settlement from 28% under the GATT to 12% under the WTO. Second, developed complainant and developing respondent countries increased their final stage settlement from 33% under the GATT to 42% under the WTO, and decreased their middle stage settlement from 25% under the GATT to 14% under the WTO.

In sum, legalization of the GATT into the WTO did not bring about a radical change in terms of the distribution of the procedural progresses of the dispute settlement mechanism. The dispute settlement of the GATT, which consisted of the early negotiated settlement, the late negotiated settlement, and the final adjudicative settlement, continues to persist in similar proportion in that of the WTO. However, developed complainants and developing respondents

settled their disputes more in the final adjudicative stage under the WTO than under the GATT. Developing respondent countries are less likely to concede to the complaints of developed countries in the early stages of dispute settlement under the WTO than under the GATT.

(2) The Length of Time for Dispute Settlement

The GATT does not have a stipulated time frame to finish each stage of the dispute settlement mechanism, but the WTO has a stipulated time frame for it. Under the WTO, the first step of dispute settlement is bilateral consultation between the disputants. If bilateral consultation fails to find solution within 60 days, a disputant may request a panel establishment, and the Dispute Settlement Body (DSB) must establish it no later than at its second meeting unless there is a consensus not to establish it. After its establishment, panel examination should not exceed 6 months in general or 3 months in cases of urgency, and the DSB should adopt its report within 60 days unless there is a consensus not to adopt it. If it is appealed, Appellate Review should not exceed 60-90 days, and the DSB should adopt it within 30 days unless there is a consensus not to adopt it. The WTO stipulates totally 12 months or 15 months in case of appeal for the final third party ruling on the dispute cases. The losing respondent should implement the rulings of the panel or the Appellate Body within a reasonable period of time which is usually 15 months. The WTO expects 27 months altogether for the completion of dispute settlement including implementation.¹⁵⁹

This study uses two kinds of the length of time as dependent variables. The first is the length of time spent from a member nation's request for consultation, which is the beginning of a dispute, to the circulation of panel report to the members of the GATT or the WTO. The WTO

¹⁵⁹ "Dispute Settlement System Training Module: Ch.6", *World Trade Organization*, accessed June 18, 2014, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p5_e.htm.

has one more stage of the Appellate Body ruling, but this study excluded this stage of the WTO for a comparative purpose, although its many panel reports are appealed. The second is the length of time spent from the request for consultation to the final ruling and implementation. The GATT includes the time spent for the circulation of panel report and for its implementation, and the WTO the time spent for the circulation of the final ruling, whether it is panel report or the Appellate Body ruling, and for its implementation.

First, under the GATT, the average length of time spent for the 90 dispute cases for which panel reports are issued is about 15 months ranging from less than a month to 47 months. Among these cases, the average length of time for the cases between developed complainant and developed respondent countries is about 16 months, that between developed complainant and developing respondent countries is about 8 months, and that between developing complainant and developed respondent countries is about 13 months. The differences in the average length of time among these three categories of disputants are relatively large. It takes much longer time for the panel to reach its decision when the respondent countries are developed countries, and much shorter time when the respondents are developing countries.

Under the WTO, the average length of time spent for the 207 dispute cases for which panel reports are issued is about 22 months ranging from 9 months to 69 months. Among these cases, the average length of time for the cases between developed complainant and developed respondent countries is about 23 months, that between developed complainant and developing respondent countries is about 23 months, that between developing complainant and developed respondent countries is about 20 months, and that between developing complainant and developing respondent countries is about 20 months. The differences in the average length of time among these four categories of disputants are small. It should be added here that most of

their cases took much more than stipulated timeframe for their solution, and only 13 cases or 6% of these 207 cases finished the circulation of the panel reports within a stipulated timeframe of one year.

The background against which the WTO stipulated the timeframe for each stage of its dispute settlement mechanism is its slow process under the GATT. However, it turned out that the average length of time for the circulation of panel report was longer under the WTO than under the GATT. It also turned out that under the GATT it tended to be shorter when the respondent was a developing country than when it was a developed country, while under the WTO it tended to be similar whichever the respondent may be.

Second, under the GATT, the average time spent for the completion of dispute settlement including implementation for its 80 cases, among which the cases that have not shown a clear completion after the circulation of panel report are not included, is 30 months ranging from less than a month to 138 months. The average length of time for such completion of dispute settlement between developed complainant and developed respondent countries is 30 months, that between developed complainant and developing respondent countries is 32 months, and that between developing complainant and developed respondent countries is 30 months. The average lengths of time for such a complete dispute settlement for these three categories of the disputants are similar.

Under the WTO, the average time spent for the complete dispute settlement including appeals to the Appellate Body and implementation for its 150 cases, among which the cases that have not shown a clear completion after the circulation of panel reports or Appellate Body rulings are not included, is 39 months ranging from 14 to 176 months. Among these cases, the average time for such a complete dispute settlement between developed complainant and

developed respondent countries is 43 months, that between developed complainant and developing respondent countries is 37 months, that between developing complainant and developed respondent countries is 36 months, and that between developing complainant and developing respondent countries is 40 months. The average lengths of time spent for such a complete dispute settlement including implementation is similar for these four categories of the disputants.

Legalization has not shortened time for dispute settlement, but it has rather lengthened it, and made differences in dispute settlement time between developed and developing countries almost negligible.

(3) Adjudicative Outcomes

The adjudicative outcomes of dispute settlement under both the GATT and the WTO are of two kinds – those favoring the complainant and those favoring the respondent.

For the dispute cases of the GATT and the WTO the outcomes refer to the final rulings of the dispute settlement mechanism. For the GATT they are the panel rulings approved by its Council meeting according to its positive consensus rule, and for the WTO they are the panel or Appellate Body rulings approved by the DSB according to its negative consensus rule. If there is a ruling which accepts the complaints of the complainant country, such dispute settlement can be said to favor the complainant country. On the other hand, the outcome of dispute settlement favors the respondent if the ruling of the panel does not accept the complaints of the complainant country, or if the ruling does not require the respondent country to take any action.

Under the GATT, among 79 dispute cases for which the panel has issued a public decision, 63 cases or 80% favor the complainant, and 16 cases or 20% the respondent. Under the WTO, among 127 dispute settlement cases that have entered the implementation phase of the

rulings, 108 cases or 85% favor the complainant, and 19 cases or 15% favor the respondent. Under both the GATT and the WTO an overwhelming majority of the complainants are winners against the respondents, although there are slightly more winners under the WTO than under the GATT.

As in Table 5.3, under the GATT, among 63 cases with the complainant winner, 47 cases or 75% of them are between developed complainants and developed respondents, 5 cases or 8% between developed complainants and developing respondents, 11 cases or 17% between developing complainants and developed respondents. On the other hand, among 16 cases with the respondent winner, 12 cases or 75% of them are between developed complainants and developed respondents, 1 case between developed complainants and developing respondents, 3 cases or 19% between developing complainants and developed respondents.

Table 5.3. Distribution of the Adjudicative Outcomes

Complainant	Respondent	GATT		WTO	
		Complainant Winner	Respondent Winner	Complainant Winner	Respondent Winner
Developed	Developed	47 (75%)	12 (75%)	28 (26%)	12 (63%)
Developed	Developing	5 (8%)	1 (6%)	40 (37%)	2 (10.5%)
Developing	Developed	11 (17%)	3 (19%)	30 (28%)	3 (16%)
Developing	Developing	0	0	10 (9%)	2 (10.5%)
Total		63 cases	16 cases	108 cases	19 cases

Table 5.4. Comparison of the Adjudicative Outcomes by Developed and Developing Countries

Complainant	Respondent	GATT			WTO		
		Complainant Winner	Respondent Winner	Total cases	Complainant Winner	Respondent Winner	Total cases
Developed	Developed	47 (80%)	12 (20%)	59	28 (70%)	12 (38%)	40
Developed	Developing	5 (83%)	1 (17%)	6	40 (95%)	2 (5%)	42
Developing	Developed	11 (79%)	3 (21%)	14	30 (91%)	3 (9%)	33
Developing	Developing	0	0	0	10 (83%)	2 (17%)	12
Total		63 (80%)	16 (20%)	79	108 (85%)	19 (15%)	127

Under the WTO, among 108 cases with the complainant winner, 28 cases or 26% of them are between developed complainants and developed respondents, 40 cases or 37 % between developed complainants and developing respondents, 30 cases or 28% between developing complainants and developed respondents, and 10 cases or 9 % between developing complainants and respondents. On the other hand, among 19 cases with the respondent winner, 12 cases or 63% of them are between developed complainants and developed respondents, 2 cases or 10.5% between developed complainants and developing respondents, 3 cases or 16% between developing complainants and developed respondents, and 2 cases or 10.5% between developing complainants and developing respondents.

How has legalization affected the outcomes of dispute settlement? First, under the GATT an overwhelming majority or 75% of the outcomes is between developed complainants and developed respondents, and the rest 25% between developed complainants or respondents and developing complainants or respondents. However, under the WTO a large majority or 65% of the outcomes is between developed complainants or respondents and developing complainants or respondents, and only 26% is between developed complainants and developed respondents, while the remaining 9% is between developing complainants and developing respondents.

Second, according to Table 5.4, the winning rate of the complainants is similar between the GATT and the WTO, respectively being 80% and 85%. However, the winning rate of the complainants between developed complainants and developed respondents decreased from 80% under the GATT to 70% under the WTO. On the other hand, this rate between developed complainants and developing respondents increased from 83% under the GATT to 95% under the WTO, and that between developing complainants and developed respondents from 79% under the GATT to 91% under the WTO.

In sum, how has legalization of the GATT into the WTO affected the outcomes of dispute settlement in terms of the distribution of its procedural progresses, the length of time spent for it, and the final outcomes of the winners or losers? The legalized WTO, like the less legalized GATT, encourages the settlement of disputes through dyadic process, and the dispute settlement process of the WTO, like that of the GATT, is still pretty much a combination of dyadic and triadic processes or a combination of the management and quasi-enforcement. However, legalization has made the member nations settle their dispute slightly more in the final stage of triadic process than in the first and middle stages of the dispute settlement mechanism. Legalization has not shortened time spent for dispute settlement, but lengthened it, and has made differences in this time depending on the developmental level of the complainants and respondents almost negligible. Legalization has made the outcomes of the disputes between developed and developing countries constituting the largest proportion of the outcomes of the total disputes, and has also made their respective complainants, especially developing countries, winning more.

5.3 Analysis: Hypotheses Testing

This study hypothesizes that economic capacity of the member nations and their socialization experiences affect the distribution of its procedural progresses, the length of time spent for it, and the final outcomes of the winner and losers in dispute settlement. This section will attempt to see how differently two independent variables of economic capacity and socialization experiences affect the three dependent variables of the outcomes under the GATT and under the legalized WTO.

This chapter employs the same indicators of independent variables of economic capacity and socialization experiences and the same control variables as the previous chapter. The method of ordered probit regression analysis is employed to test the hypotheses about the procedural progress and the length of time (H1-3, H2-3, H1-4, and H2-4), and that of binary logit regression analysis is employed to test the hypotheses about the final outcomes of winners and losers (H1-5 and H2-5).

H1-3: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to settle their disputes in the final stage of the dispute settlement mechanism.

H2-3: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to settle their disputes in the final stage of the dispute settlement mechanism.

H1-4: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to settle their disputes in the longer period of time.

H2-4: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to settle their disputes in the longer period of time.

H1-5: Under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to be the winner of the case.

H2-5: Under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to be the winner of the case.

(1) Procedural Progress of the Dispute Settlement Mechanism

The procedural progress of the dispute settlement is divided into the four stages under both the GATT and WTO. For the total 249 cases of the GATT, 83 cases under the first stage are coded as 1, 21 cases under the second stage as 2, 38 cases under the third stage as 3 and 100 cases under the fourth stage as 4.¹⁶⁰ For the total 454 cases of the WTO, 199 cases under the first stage are coded as 1, 31 cases under the second stage as 2, 36 cases under the third stage as 3 and 188 cases under the fourth stage as 4.

¹⁶⁰ Seven cases with alternative procedures are excluded from the regression.

Table 5.5 presents the impact of economic capacity and socialization experiences on the procedural progress of the dispute settlement mechanism under the GATT and under the legalized WTO. Each model includes three regressions – one for the properties of complainants, another for the properties of respondents and the third including the properties of both complainants and respondents.

Models 1-1 and 1-2 of the GATT period show that only the properties of the respondent, not those of the complainant, have impact on the procedural progress. Model 1-2 shows that the GNI of the respondent affects the procedural progress of the dispute settlement mechanism positively. It also shows that the share of a respondent's trade out of its GDP, a control variable, also affects it positively. However, it shows that a nation's number of the memberships in the IOs affects it negatively. While economically strong respondent countries tend to settle their disputes in the final stage of the dispute settlement mechanism, internationally experienced respondent countries tend to settle their disputes in the first dyadic stage of the dispute settlement mechanism. As economically strong countries are usually active IO countries, they face the two pulls – one toward the final triadic stage and the other toward the first dyadic stage. This is reflected in the concentration of dispute settlement of developed respondent countries in both the first stage and the final stage. The results of Model 1-3, which includes the properties of both complainants and respondents, are similar as those of Model 1-2.

Table 5.5. The Procedural Progress (Ordered Probit Regression)

	GATT(1947-1994)			WTO(1995-2012)		
	Model1			Model2		
	1-1	1-2	1-3	2-1	2-2	2-3
C_trade share	1.3624 (1.4027)		0.7047 (1.5277)	3.3998 (1.3051)		3.0026 (1.1909)
R_trade share		-1.4170 (1.3257)	-1.2968 (1.4086)		0.7294 (1.2799)	1.1877 (1.1969)
C_log(GNI)	0.1406 (0.1099)		0.0314 (0.1239)	0.2427 (0.0807)		0.1602 (0.0813)
R_log(GNI)		0.3486 (0.1227)	0.2944 (0.1362)		0.1503 (0.0827)	0.1090 (0.0796)
C_length of membership	-0.0068 (0.0071)		0.0018 (0.0119)	0.0034 (0.0050)		0.0021 (0.0053)
R_length of membership		-0.0094 (0.0076)	-0.0104 (0.0141)		0.0039 (0.0051)	0.0043 (0.0052)
C_# of GATT use	-0.0024 (0.0034)		-0.0016 (0.0036)	-0.0105 (0.0024)		-0.0062 (0.0027)
R_# of GATT use		-0.0048 (0.0031)	-0.0033 (0.0034)		-0.0016 (0.0025)	0.0005 (0.0026)
C_# of WTO use				0.0038 (0.0015)		0.0034 (0.0018)
R_# of WTO use					0.0029 (0.0016)	0.0013 (0.0018)
C_#of IOs	-0.0100 (0.0147)		0.0016 (0.0163)	-0.0287 (0.0086)		-0.0259 (0.0084)
R_#of IOs		-0.0281 (0.0102)	-0.0246 (0.0107)		-0.0172 (0.0083)	-0.0177 (0.0084)
C_% of trade	-0.0014 (0.0087)		-0.0052 (0.0091)	-0.0046 (0.0027)		-0.0049 (0.0026)
R_% of trade		0.0299 (0.0089)	0.0270 (0.0095)		0.0004 (0.0032)	-0.0012 (0.0031)
C_log(pop)	-0.1648 (0.1519)		-0.0873 (0.1616)	-0.1193 (0.0681)		-0.1161 (0.0698)
R_log(pop)		0.1478 (0.1635)	0.1488 (0.1725)		0.0020 (0.0695)	-0.0388 (0.0742)
log-likelihood	-281.808	-285.6745	-272.9907	-486.6966	-486.3366	-474.2064
N	230	239	227	450	454	450

p<0.05 in bold, standard errors in parentheses.

Model 2 of the WTO period presents that the properties of the complainant and respondent affect the procedural progress of their dispute settlement. Model 2-1 shows that a complainant's share of total world trade and its GNI on the one hand and a complainant's prior dispute settlement experiences under the WTO on the other affect the procedural progress of the dispute settlement mechanism positively. However, it also shows that a complainant's prior experiences under the GATT and its number of IO memberships affect it negatively. Model 2-2 shows that a respondent's GNI and its prior dispute settlement experiences under the WTO affects the procedural progress of the dispute settlement mechanism positively. However it also shows that a respondent's IO memberships affect it negatively. Model 2-3, which includes the properties of both a complainant and respondent, shows similar results as Model 2-1. Models 2-1, 2-2, and 2-3 show that both economic capacity and WTO socialization experiences affect the procedural progress of the dispute settlement mechanism positively.

The results of Model 1 support the hypothesis H1-3 of this study only when the member countries mean the respondent member countries¹⁶¹: under low level of legalization, if the respondent member countries have high level of capacity, it will be more likely for them to settle disputes in the final stage of the dispute settlement mechanism. The high capacity respondents can afford to legally fight against the complainants up to the final stage of the dispute settlement mechanism, and this will not harm their interest because the penalties for violations are not retrospective, but prospective.

The results of Model 2 only partially support the hypothesis H2-3 of this study: under high level of legalization, if the member countries (both the complainants and respondents) have

¹⁶¹ In the hypothesis H1-3 we have not distinguished between the complainant and respondent member countries, but named both of them as the member countries. However, the result of our analysis shows that this hypothesis is valid only when the member countries mean the respondent member countries.

high level of socialization, it will be more likely for them to settle disputes in the final stage of the dispute settlement mechanism. However, the regression results show that not only high level of socialization experiences but also high economic capacity is also necessary for them to settle disputes in the final stage of the dispute settlement mechanism.

(2) The Length of Time

As noted earlier, the length of time refers to two kinds of the length of time. One is the length of time spent from a request for consultation up to the circulation of panel reports to the member countries, and the other is the length of time spent for a complete dispute settlement including implementation.

For the dispute cases of the GATT, the length of time for the circulation of the panel report is coded into three categories – 1 if less than a year, 2 if more than a year and less than two years and 3 if more than two years. Thirty nine cases are coded as 1, 39 cases as 2 and 12 cases as 3. For the cases of the WTO, the length of time for circulation of the panel report is coded into four categories – 1 if less than a year, 2 if more than a year and less than two years, 3 if more than two years and less than three years and 4 if more than three years. Thirteen cases are coded as 1, 138 cases as 2, 42 cases as 3 and 14 cases as 4.

For the dispute cases of the GATT, the length of time for their complete settlement can be coded into three categories – 1 if less than 18 months, 2 if it is more than 18 months and less than three years and 3 if more than three years. Twenty nine cases are coded as 1, 30 cases as 2 and 21 cases as 3. For the dispute cases of the WTO, the length of time for their complete settlement is coded as 1 if it is less than 18 months, 2 if more than 18 months and less than three

years, 3 if more than three years and less than five years and 4 if more than five years. Ten cases are coded as 1, 79 cases as 2, 44 cases as 3 and 17 cases as 4.

Table 5.6, which includes the properties of both the complainants and respondents, presents the impact of economic capacity and socialization experiences of the member countries on the two kinds of the length of time spent for dispute settlement under the GATT and under the legalized WTO.

Model 3-1 of the GATT period shows that a respondent nation's share of total world trade affects the length of time for the circulation of panel reports negatively, while a complainant nation's length of its membership affects it positively. Model 3-2 of the GATT also shows that a respondent nation's share of total world trade affects the length of time for a complete dispute settlement negatively, while socialization variables do not affect it. According to both models, the higher a respondent nation's share of total world trade, the shorter the length of time for dispute settlement, although a complainant nation's length of membership may work to increase it.

This result may seem odd in view of the facts that, under the GATT, the average length of time spent for the circulation of panel reports in the disputes between developed complainant and developed respondent countries is about 16 months, while that between developed complainant and developing respondent countries is about 8 months. However, it should be noted that the number of the latter cases are very small compared with that of the former cases. Under the GATT, almost 90% of the respondents were developed countries, and this result informs that the respondents with large trade are likely to settle their disputes relatively speedily.

Table 5.6. The Duration for Circulation of Panel Report & Complete Settlement of Dispute Cases (Ordered Probit Regression)

	GATT(1947-1994) Model 3		WTO(1995-2012) Model 4	
	3-1(Report circulation)	3-2 (completion)	4-1 (Report circulation)	4-2 (completion)
C_trade share	2.8225 (4.0468)	4.5480 (3.3669)	0.1793 (1.8379)	0.7284 (2.0313)
R_trade share	-5.8433 (3.0748)	-16.5000 (3.3950)	2.3117 (2.0861)	2.2451 (2.0625)
C_log(GNI)	-0.0237 (0.2373)	-0.0954 (0.2375)	0.0413 (0.1298)	-0.0376 (0.1285)
R_log(GNI)	0.1181 (0.4414)	-0.1237 (0.4824)	-0.1618 (0.1379)	-0.1037 (0.1277)
C_length of membership	0.0901 (0.0433)	-0.0010 (0.0562)	0.0154 (0.0089)	0.0171 (0.0097)
R_length of membership	-0.0007 (0.0466)	0.0452 (0.0659)	0.0079 (0.0094)	0.0039 (0.0103)
C_# of GATT use	-0.0047 (0.0072)	0.0002 (0.0072)	-0.0068 (0.0039)	-0.0007 (0.0040)
R_# of GATT use	-0.0024 (0.0059)	0.0024 (0.0072)	-0.0121 (0.0047)	0.0001 (0.0046)
C_# of WTO use			0.0039 (0.0028)	-0.0010 (0.0029)
R_# of WTO use			0.0134 (0.0029)	-0.0006 (0.0032)
C_#of IOs	-0.0182 (0.0389)	0.0009 (0.0337)	0.0172 (0.0123)	0.0029 (0.0151)
R_#of IOs	0.0337 (0.0245)	0.0107 (0.0203)	0.0059 (0.0154)	-0.0068 (0.0152)
C_% of trade	0.0015 (0.0228)	-0.0396 (0.0213)	0.0033 (0.0051)	0.0000 (0.0057)
R_% of trade	0.0456 (0.0162)	0.0659 (0.0148)	0.0081 (0.0054)	0.0019 (0.0055)
C_log(pop)	0.2205 (0.3770)	-0.2657 (0.3581)	-0.0748 (0.0979)	-0.0704 (0.1005)
R_log(pop)	0.5409 (0.5677)	1.9740 (0.6506)	0.1971 (0.1232)	0.1264 (0.1171)
log-likelihood	-61.5701	-64.5856	-155.3603	-161.5283
N	85	75	206	149

p<0.05 in bold, standard errors in parentheses.

Model 4-1 of the WTO period shows that a complainant nation's length of its membership and a respondent nation's prior experiences of the WTO affect the length of time for the circulation of panel reports positively, but economic capacity variables do not affect it. It also shows that the complainant's and respondent's prior experiences of the GATT shorten the time spent for the circulation of the panel report. Model 4-2 of the WTO shows that a complainant's membership years affect the length of time for a complete dispute settlement positively. In both cases, economic capacity variables do not affect the length of time for dispute settlement. The longer the socialization experiences, the longer the length of time for dispute settlement, although the complainant's and respondent's prior experiences of the GATT works to decrease the length of time.

The results of Model 3 of the GATT do not support the hypothesis H1-4 of this study: under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to settle their disputes in the longer period of time. The regression results are on the whole to the contrary. The properties of the complainant member countries do not affect the length of time except the length of their membership which affects it positively. The respondent countries with capacity of large trade do not prolong the length of dispute settlement time, but shorten it. They may be sensitive to the violation charge of free trade rules, and may want to settle their disputes in the shorter period of time to minimize the damage on their reputation as free trade nations.

The results of Model 4 of the WTO support the hypothesis H2-4 of this study: under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to settle their disputes in the longer period of time. The results show that

socialization experiences of the complainants or the respondents work to increase the length of time for dispute settlement.

(3) Adjudicative Outcomes

Who are the winners and losers for the dispute cases? The dependent variable – winner and loser of each dispute settlement case – is coded as 1 if the final adjudicative outcome favors the complainant, and as 0 if it favors the respondent, for both the GATT and the WTO. For the GATT, among the cases with the adjudicative outcomes, 63 cases are coded as 1, and 16 cases as 0. For the WTO, 108 cases are coded as 1, and 19 cases as 0.

Models 5 and 6 of Table 5.7, which include the properties of both the complainants and respondents, present the impact of their economic capacity and socialization experiences on the adjudicative outcomes of the dispute cases under the GATT and under the legalized WTO.

Model 5 of the GATT shows that the complainant's share of total world trade affects the winning positively, while the respondent's GNI affects it negatively. In other words, the larger the complainant's trade is, the more it wins, while the higher the respondent's GNI is, the less the complainant wins. However, the larger the complainant's number of IO memberships is, the less it wins, while the larger the respondent's number of IO memberships is, the more the complainant wins.

Model 6 of the WTO shows that the complainant's share of total world trade affects the winning positively, while all other factors including socialization experiences do not affect it. In other words, the larger the complainant's trade, the more the winning.

Table 5.7. The Outcomes of the Dispute Cases under the GATT and WTO
(Binary Logit Regression)

	GATT (1947-1994)	WTO (1995-2012)
	Model 5	Model 6
C_trade share	63.8513* (28.3704)	28.4389* (14.3376)
R_trade share	14.5216 (15.9589)	0.6771 (8.4911)
C_log(GNI)	2.1046 (1.3549)	-1.2722 (0.9345)
R_log(GNI)	-8.3783* (3.6600)	-0.3654 (0.5518)
C_length of membership	-0.4406 (0.3064)	0.0408 (0.0314)
R_length of membership	0.1732 (0.3056)	-0.0203 (0.0327)
C_# of GATT use	0.0154 (0.0334)	-0.0164 (0.0145)
R_# of GATT use	0.0513 (0.0342)	-0.0046 (0.0171)
C_# of WTO use		0.0012 (0.0089)
R_# of WTO use		0.0035 (0.0110)
C_#of IOs	-0.7564* (0.3047)	-0.1347 (0.0778)
R_#of IOs	0.6625* (0.2681)	-0.0046 (0.0531)
C_% of trade	0.1074 (0.0883)	-0.0441 (0.0303)
R_% of trade	-0.5789* (0.2397)	0.0128 (0.0247)
C_log(pop)	-1.7675 (2.0076)	-0.2782 (0.3560)
R_log(pop)	-2.0176 (2.8218)	0.5603 (0.4516)
Intercept	252.1673* (105.1098)	54.8429 (37.0448)
log-likelihood	-19.7420	-44.1054
N	74	126

***p< 0.001, ** p<0.01, *p<0.05, standard errors in parentheses.

The results of Model 5 support the hypothesis H1-5 of this study: under low level of legalization, if the member countries have high level of capacity, it will be more likely for them to be the winner of the case. This hypothesis does not specify what the member countries mean. If the member countries mean the complainants, it will be more likely for them to be the winner of the case. However, if the member countries mean the respondents, it will be less likely for the complainants to be the winner of the case.

The results of Model 6 do not support the hypothesis H2-5 of this study: under high level of legalization, if the member countries have high level of socialization, it will be more likely for them to be the winner of the case. According to the results of Model 6, socialization experiences do not affect the adjudication outcomes, but like under the GATT the complainant's share of total world trade affects the winning positively. This is because most complainants are likely to win their dispute cases and because they are likely to be the members with large trade.

5.4 A Concluding Remark

How has the legal transformation of the GATT into the WTO affected the outcomes of dispute settlement? Compared with the less legalized GATT, has the legalized WTO benefitted developed countries more than developing countries as most previous studies on this subject argued? Or has it benefitted developing countries more than developed countries? This question is examined here in view of the procedural progress, the length of time for dispute settlement, and adjudicative outcomes.

Procedural progress in the dispute settlement mechanism refers to the extent to which a dispute case proceeds in its settlement procedures. Legalization supporters argue that it provides

developing countries with legal instrument to constrain the bargaining power of developed countries. Seen from this perspective, long procedural progress means that the disputants use legal instrument longer, while short procedural progress means that they use it shorter. Then, does the legalized WTO show more use of longer procedures than the less legalized GATT? Do developing countries use longer procedure more under the WTO than under the GATT?

The dispute settlement process of the WTO, like that of the GATT, is still pretty much a combination of dyadic and triadic processes or a combination of the management and quasi-enforcement models. However, legalization has made the member nations settle their dispute slightly more in the final stage of the dispute settlement mechanism than in its first and middle stages. It has also made developed complainant and developing respondent countries increase their final stage settlement from 33% under the GATT to 42% under the WTO.

Regression on the procedural progress in dispute settlement shows the variables of capacity and socialization work differently under the GATT and under the legalized WTO. Under the GATT, the respondent member countries with high level of capacity tended to settle their disputes in the final stage of the dispute settlement mechanism, as this study hypothesized. However, under the WTO not only economic capacity but also socialization experiences of the complainants and the respondents worked to settle their disputes more in the final stage of the dispute settlement mechanism.

The length of time for dispute settlement is firstly the time spent up to the circulation of panel reports, and secondly the time used for a complete dispute settlement including the implementation. Legalization has not shortened the time spent for dispute settlement, but lengthened it, and has made differences in this time depending on the developmental level of the complainants and respondents almost negligible.

Regression analysis on the length of time presents more accurate account of the impact of capacity and socialization variables on it. Under the less legalized GATT, the respondent member countries with large share of total world trade tended to settle their disputes in the shorter period of time, unlike the hypothesis of this study which is to the contrary. They may be more sensitive to their reputation, and want to settle their disputes in the shorter period of time. Under the WTO, the socialization experiences of the complainants or the respondents affected the length of time for dispute settlement positively, as the hypothesis of this study contended.

Legalization has made the adjudicative outcomes of the disputes between developed and developing countries constituting the largest proportion of the adjudicative outcomes of the total disputes, and has also made their respective complainants, whether developed or developing countries, winning more. Regression analysis on the adjudicative outcomes shows that under both the GATT and WTO the complainant's share of total world trade affect the adjudicative outcomes positively. The regression results for the GATT support the hypothesis of this study which emphasizes the importance of capacity under low level of legalization, but those for the WTO do not support the hypothesis which stresses the importance of socialization under high level of legalization. This may be due to the tendency that most complainants win and they are usually the countries with large trade.

Chapter 6. Conclusion

A representative neoliberal journal, *International Organization*, published a special issue on legalization and world politics in 2000. In its introductory chapter, Goldstein, Kahler, Keohane, and Slaughter stated:

“In many issue areas, the world is witnessing a move to law...The European Court of Human Rights ruled that Britain’s ban on homosexuals in the armed forces violates the right to privacy, contravening Article 8 of the European Convention on Human Rights. The International Criminal Tribunal for the Former Yugoslavia indicted Yugoslav president Slobodan Milosevic during a NATO bombing campaign to force Yugoslav forces out of Kosovo...In economic affairs, the WTO Appellate Body found in favor of the United States and against the EU regarding European discrimination regarding certain Latin American banana exporters. A U.S. district court upheld the constitutionality of the North American Free Trade Agreement against claims that its dispute-resolution provisions violated U.S. sovereignty...These actions taken in the course of a single year, were representative of a longer term trend: some international institutions are becoming increasingly legalized. The discourse and institutions normally associated with domestic legal system have become common in world politics...”¹⁶²

How does this legalization of international institution affect the distribution of benefits between developed and developing countries? Does it favor developed countries more than developing countries or to the contrary, and if it does so, why does it so? This research seeks to answer this question by examining the impact of the legal transformation of the GATT into the WTO on the distribution of its dispute settlement benefits or results between developed and developing countries.

Existing studies present two arguments to this question. One argument, which an overwhelming majority of existing studies contends, is that legalization of the GATT into the WTO does not affect the distribution of dispute settlement benefits between developed and developing countries. The legalized WTO, like the less legalized or non-legalized GATT, continues to favor developed countries in its dispute settlement. The other argument, which a

¹⁶²Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, “Introduction: Legalization and World Politics,” *International Organization*, Vol.54, No.3 (Summer 2000), pp. 385-386.

small minority of studies contends, is that legalization affects the distribution of these benefits. The legalized WTO favors developing countries more than the less legalized or non-legalized GATT in its dispute settlement.

As shown in the literature review, Hudec, Goldstein and Martin, Busch and Reinhardt, Shaffer, Bown, Moon, and Kim, who treated the early years of the WTO as their object of investigation, are the proponents of the first argument. According to them, the reason why legalization does not affect the distribution of dispute settlement benefits between developed and developing countries, or why both the GATT and the legalized WTO consistently favor developed countries more than developing countries is because economic capacity of a country affects the dispute settlement of the GATT/WTO regardless of the degree of its legalization. Economically high capacity countries use its dispute settlement mechanism more because they have high stakes in this trade institution, have enforcement or retaliation power against the losing party, and have high legal capacity to pursue the remedy of their complaints throughout the entire dispute settlement process.

Kuruvila, Steger and Hainsworth, and Lacarte-Muro and Gappah, who also investigated the early years of the WTO, are the proponents of the second argument which contradicted the first one. According to them, the reason why legalization of the GATT into the WTO helps developing countries is because it encourages them to use its dispute settlement mechanism more frequently. The non-binding, consensual and non-enforcing characteristics of the GATT dispute settlement mechanism inhibited developing countries from using it, while the binding, compulsory and enforcing characteristics of the WTO has encouraged them to use it more frequently.

However, the use of or the participation in the dispute settlement mechanism by developed and developing countries in both the early and later years of the legalized WTO makes these two contradictory arguments unsatisfactory. On the one hand, the early five years of the WTO supports the first argument of economic capacity, but its later years do not support, but reject it. Developing countries have come to use the dispute settlement mechanism of the WTO as frequently as or even more than developed countries in the latter half period of the WTO (2005-2014). On the other hand, the early five years of the WTO do not support the second argument of compulsory binding legalization. In this period, the use of the dispute settlement mechanism by developing countries was far less frequent than developed countries and the increase in their use of the dispute settlement mechanism was not conspicuous. But the later years of the WTO support it as shown in a conspicuous increase of the use of its dispute settlement mechanism by developing countries.

In view of the records of the use of the dispute settlement mechanism by developed and developing countries under the GATT and the legalized WTO, the economic capacity argument is not valid under the WTO, but the legalization argument is not valid, either, in its early years, while it is valid in its later years. Then, why is the legalization argument valid not in its early years but in its late years? This study contends that it takes some time for socialization experiences of the member countries with the dispute settlement mechanism to take effects under the legalized international institution.

Legalization of international institution does not guarantee that its members are legally bound by its rules and that they comply with them voluntarily. Even though international institution is legalized, for both realists and neoliberals its members comply with its rules so far as its rules are supported by power or beneficial for them, and they do not comply with them

otherwise. For instance, at the time of the WTO foundation, Hudec was not sure about whether the U.S., the initiator of legalization of the GATT into the WTO, would consistently support it, or undermine it by showing noncompliant behavior often as under the GATT.¹⁶³ However, for constructivists, its members comply with them independently of power or interest because they socialize with or internalize them. Legalization shows its effects through the process of socialization which its members undergo.

International institution and its legalization are not the primary concern of realists. For them, they are secondary to power, distribution of capabilities of the states, or relative gains. International institution is the primary concern of neoliberals, but its legalization is not their primary concern. Legalization of international institution may enhance its efficiency gains for its member countries, but entails many costs such as high contracting costs, sovereignty costs, and inflexibility costs. However, on the other hand, international (soft) law and (hard) legalization of international institution are primary concerns of constructivists. For them, international law entails not only the logic of consequences on which realists and neoliberals depend, but also the logic of appropriateness which constructivists emphasize, and nations are socialized with or internalize such international law. Legalization of international law or international institution reinforces this process of socialization or internalization. The goal of this study is to show the impact of such socialization in legalization of the GATT into the WTO on the distribution of dispute settlement benefits between developed and developing countries.

However, not only constructivists' perspective but also realists' and neoliberal perspectives or eclectic applications of these three perspectives are necessary to explain the establishment of the GATT and its legal transformation into the WTO. The GATT was

¹⁶³ Robert E. Hudec, D.L.M. Kennedy and M. Sgarbossa, "A Statistical Profile of GATT Dispute Settlement Cases: 1948-89," in *The World Trading System*, Volume II, ed. Robert Howse (London: Routledge, 1998), p.240.

established to promote economic welfare of its member nations with free trade rules in 1948. There was a belief that free trade would promote economic welfare among some developed and developing nations, which had experienced tariff wars and the ensuing economic difficulties before the Second World War. For constructivists, this belief in free trade is important. However, there is also a hegemonic power, the U.S., which initiated its establishment and its legalization into the WTO. For realists, this hegemonic power is important, and its geopolitical interest is important. Its geopolitical interest or its concern about the distribution of power among nations affects its foreign economic policy. The U.S. on the whole respected the preferences of West European and developing countries when they negotiated on the trade and dispute settlement rules of the GATT. The U.S. subordinated its economic interest to its geopolitical or security interest, which was to contain the Soviet Union and communism. Such subordination of economic interest to geopolitical interest on the part of the U.S. was conspicuous in the early Cold War period, weak in the late Cold War period, and has been weaker in the post Cold War period. When the U.S. succeeded in legalizing the GATT into the WTO in 1995, it did so despite strong oppositions of West European countries and Japan against its legalization and despite strong oppositions of developing countries against a single undertaking principle. Nevertheless, West European countries, Japan, and developing countries agreed on the legalized WTO and the single undertaking principle because they still see absolute gains in those arrangements. For neoliberals these absolute gains are important.

International institution thus established, maintained, and modified socializes its member countries to comply with and use its rules for dispute settlement. But under the pre-legalized international institution, it may not socialize its members to use its dispute settlement mechanism actively because it allows them to avoid it. Under this circumstance economic capacity of its

member countries may affect the use of its dispute settlement mechanism more than their socialization experiences. However, under the legalized international institution, it may socialize them to use its dispute settlement mechanism more actively than the less legalized or non-legalized institution because it does not allow them to avoid it. Under this circumstance their socialization experiences may affect the use of its dispute settlement mechanism more than their economic capacity.

This study has tested the hypothesis that under the less legalized or non-legalized GATT economic capacity of its member countries is important for the distribution of its dispute settlement benefits, whereas under the legalized WTO its members' socialization experiences are important for this distribution. It has explored the extent of the impacts of economic capacity and socialization experiences on the distribution of dispute settlement benefits respectively under the GATT and under the legalized WTO. It has assessed the impact of economic capacity which realists and neoliberals emphasize, and that of socialization experiences which constructivists regard as being important.

The investigators of the GATT/WTO regard the use of the dispute settlement mechanism itself as being tantamount to its benefit regardless of its outcomes. This may be because the complainants usually win, and the results of dispute settlement are helpful for all the member countries of the GATT/WTO as the respondents remedy their violations. In this study, dispute settlement benefits refer not only to the frequency of the use of the dispute settlement mechanism but also to choice between the bilateral or multilateral procedures of dispute settlement, the extent of the procedural progress of dispute settlement, the length of time spent for dispute settlement, and the adjudicative outcomes.

The results of this study on the whole show that legalization of international institution makes its member nations' capacity less important or unimportant, while making their socialization experiences important for the distribution of dispute settlement benefits between developed and developing countries. The followings are more specific results of this study.

First, how has legalization of the GATT into the WTO affected the use of the dispute settlement mechanism by developed and developing countries? Statistics about the use of the dispute settlement mechanism under the GATT and under the legalized WTO show that it has tremendously increased its member nations' use of the dispute settlement mechanism in general, that it has increased especially developing nations' use of it very conspicuously, and, as a result, that the big gap in the use of the dispute settlement mechanism between developed and developing countries under the GATT has almost disappeared under the WTO.

How can we explain this change in the use of the dispute settlement mechanism between developed and developing countries? This study conducted the two negative binomial regression analyses on the use of the dispute settlement mechanism, one by its users only and the other by all of the member states including the non-users. The analysis on its use only by its users shows that under the GATT a nation's economic capacity affected its use as a complainant positively while socialization experiences did not do so. In other words, the greater a nation's share of the total world trade and the larger its GNI, the more frequently it raises complaints against the violators of trade rules in its view. However, under the GATT, a nation's previous experiences as a complainant or a respondent and the length of its membership years had no impact on its use of the dispute settlement mechanism, and the number of its memberships in other IOs affected its use even negatively. Its socialization experiences did not encourage or even discouraged its use

of it as a complainant under the GATT, and this is what we hypothesized from the beginning of this study.

However, under the legalized WTO a nation's socialization experiences have affected its use of the dispute settlement mechanism as a complainant positively while its economic capacity has not shown any impact. Under the early WTO (1995-2004), its prior experiences as a complainant or a respondent and the number of its memberships in other IOs affected its use of the dispute settlement mechanism as a complainant positively. It should be noted here that its IO memberships affect its use of the dispute settlement mechanism differently under the GATT and under the early WTO. They discourage it under the GATT, while encouraging it under the early WTO. This may be because they make a nation more adaptive to the characteristics of international institution. The non-binding consensual dispute settlement mechanism of the GATT may make it avoid it as much as possible, while the binding compulsory dispute settlement mechanism of the WTO may make it use it so far as necessary. Under the late WTO (2005-2014) its prior experiences as a complainant or a respondent and the beginning year of its membership in the WTO affected its use positively. How did the beginning year affect its use positively? In other words, why is it that the more recent the year it joined the WTO, the more frequently it used the dispute settlement mechanism. This may be because the late WTO socializes a new member nation with the dispute settlement mechanism more quickly than the early WTO. Under both the early and late WTO neither a nation's share of world trade nor its GNI affected its use of the dispute settlement mechanism as a complainant.

These results negate the argument of many capacity theorists that the legalized WTO is not different from the less legalized or non-legalized GATT in favoring the developed countries in terms of the use of the dispute settlement mechanism. Statistics shows even more frequent use

by developing countries than by developed ones under the late WTO, and the reason is because the important variable affecting this use under the WTO is not economic capacity, but socialization experiences of its member nations.

However, this is not to say that capacity theorists are utterly wrong. The negative binomial regression analysis on this use by all the member nations not excluding the non-users shows that their economic capacity, together with their socialization experiences, still affects it positively under the legalized WTO. According to the results of this analysis, under the late GATT a nation's GNI and its share of world trade affected its use of the dispute settlement mechanism positively, but socialization variables of its prior experiences as a disputant, its memberships in other IOs, or the beginning year of its membership did not affect it. However, under both the early and the late WTO a nation's GNI and its membership in other IOs affected it positively. Especially under the late WTO the more recent the beginning year of its membership is, the more frequently it used the dispute settlement mechanism. If we consider all the member nations for the analysis of the use of the dispute settlement mechanism, even under the legalized WTO, just as under the GATT, economic capacity still affects it positively, but together with some socialization variables.

If we analyze the use of the dispute settlement mechanism only for its users, legalization makes economic capacity unimportant, but if we do so for all the member nations including the non-users, legalization makes not only economic capacity but socialization experiences important.

Second, how has legalization of the GATT into the WTO affected the choice of the dispute settlement methods between the bilateral and multilateral third party procedures? Statistical data on them show that it has increased the choice of the multilateral third party

procedure to some extent by both developed and developing countries. The use of this procedure has increased from 44% of both procedures under the GATT to 52% under the legalized WTO. This increase under the WTO is a little larger in the disputes between developed and developing countries than in those between developed countries.

The results of the logit regression analysis on the use of this procedure show that under the GATT a respondent nation's GNI affected the use of it positively while its memberships in other IOs affected it negatively. Properties of a complainant such as economic capacity and socialization experiences did not affect it. However, these results also show that under the legalized WTO a complainant nation's share of world trade and GNI on the one hand and its prior experiences as either a complainant or a respondent under the WTO on the other hand have affected it positively, while the properties of a respondent do not affect it. For the use of the multilateral third party procedure, under the GATT economic capacity of a respondent is important, but under the legalized WTO both economic capacity and socialization experiences of a complainant are important.

Third, how has legalization of the GATT into the WTO affected the progress in the dispute settlement process? This study divides the process into the first, second, third and fourth stages. The choice between the bilateral and multilateral third party procedures does not show how far or long each dispute settlement process goes. The bilateral procedure may overlap with the first, second, or third stages, and it can end in one of these three stages. For instance, the third stage is the stage in which the panel is established and its report is almost completed. But even in this third stage the disputants can choose the bilateral procedure by agreeing to solve their disputes bilaterally, and, therefore, the dichotomy between the bilateral and multilateral procedures does not show the progress or length of the dispute settlement process sufficiently.

Our data show that on the whole legalization has increased the early first stage ending of dispute settlement process from 34% of the total dispute cases under the GATT to 44% under the WTO, decreased the proportion of the second and third stage ending, and not affected that of the late final stage ending, which is 41% for both of them. However, developed complainant and developed respondent countries has increased their final stage ending from 41% under the GATT to 50% under the WTO, and developed complainant and developing respondent countries has increased it from 33% under the GATT to 42% under the WTO.

The results of ordered probit regression on the procedural progress of dispute settlement show that under the GATT the respondent nation's GNI affected the procedural progress of the dispute settlement mechanism positively, while its memberships in other IOs affected it negatively. They also show that under the WTO complainant or respondent nation's share of world trade and/or its GNI on the one hand and its prior dispute settlement experience under the WTO has affected it positively. These results are similar to the results of the logit regression analysis on the use of the multilateral third party procedure of dispute settlement.

Fourth, how has legalization affected the length of time spent on dispute settlement in the panel stage? This question excludes the dispute cases which were solved bilaterally, and includes only the cases which produced the panel reports. According to data on this subject, under the GATT the average length of time for the 90 dispute cases for which the panel reports were issued is about 15 months, whereas under the WTO this length of time for 207 cases with panel reports is about 22 months. The WTO aimed at shortening this length of time more than the GATT, but legalization has not shortened, but lengthened the time required for the panel reports. There are also differences in the length of time between dispute cases, depending on whether they are between developed countries or between developed and developing countries. The latter cases

took far less time than the former cases under the GATT. However, under the WTO such time differences are negligible.

The results of the ordered probit regression analysis on this length of time show that under the GATT a respondent nation's share of world trade affects this length of time negatively while a complainant nation's length of its membership affects it positively. In other words, if a large trade nation is charged with having violated free trade rules, it does not block or prolong the process of dispute settlement but expedites it, and if a complainant nation has a membership over a long period of time, it tends to prolong it. On the other hand, under the WTO a complainant nation's length of its membership and a respondent nation's prior experiences in the WTO dispute settlement affect it positively, while its economic capacity does not affect it. For a lengthy dispute settlement, under the WTO socialization experiences are important, while economic capacity is not so.

Fifth, how has legalization affected the adjudicative outcomes of dispute settlement? This question includes only the cases which have adjudicative outcomes, whether they are panel reports or the Appellate Body rulings. First, under the GATT an overwhelming majority or 75% of the adjudicative outcomes are those of the disputes between developed countries, while under the WTO a large majority or 65% of the adjudicative outcomes are those between developed and developing countries. Second, the winning rate of the complainants is similar between the GATT and the WTO, respectively being 80% and 85%. However, the winning rate of the complainants in the disputes between developed complainants and developing respondents has increased from 83% under the GATT to 95% under the WTO, and that between developing complainants and developed respondents from 79% under the GATT to 91% under the WTO.

The results of the binary logit regression on the adjudicative outcomes show that under the GATT the complainant's share of world trade affects its winning rate positively, while the respondent's GNI affects the complainant's winning rate negatively. The results also show that under the WTO the complainant's share of world trade affects its winning rate positively, while all other factors including socialization experiences do not affect it.

The use of the dispute settlement mechanism under the legalized WTO is radically different from that under the less legalized or non-legalized GATT. There is almost no difference in it between developed and developing countries under the WTO, while there is a big difference between them in favor of the developed countries under the GATT. For this tendency, economic capacity is important under the GATT, but socialization experiences are important under the WTO. However, the dispute settlement process of the legalized WTO, like that of the GATT, is still pretty much an equal combination of dyadic and triadic process or of the management and quasi-enforcement models of dispute settlement, although legalization has made the member nations, specially developing ones, settle their disputes a little more frequently in the final multilateral third party stage. For this tendency, economic capacity is important under the GATT, but both economic capacity and socialization experiences are important under the WTO. There is almost no difference in the length of time required for panel report cases between developed and developing countries under the WTO, although there was some difference in it in favor of developed countries under the GATT. For this tendency of the WTO, socialization experiences are important. Under both the GATT and the WTO, the winning rates for adjudication cases are similar between developed and developing countries, and the complainant's share of world trade affects the winning rates positively.

Figure 6.1 sums up these results. It presents how capacity and socialization variables impact the five dependent variables of this research. Under the GATT, capacity variables have positive impacts on most of the dependent variables, while socialization variables have positive impacts on none of the dependent variables. However, under the WTO, socialization variables have positive impacts on most of the dependent variables, while capacity variables also have positive impacts on them. Socialization matters only under the WTO, while capacity matters under both the GATT and the WTO. This means that, under the WTO, there are interactive effects of legalization and socialization, while there are no such interactive effects of legalization and capacity. Legalization and socialization under the WTO interacted to produce the distribution of its dispute settlement benefits different from the GATT.

	Frequency	Multilateral	Progress	Length	Outcome
GATT →					
Capacity	+	+	+	- (H1-4 Rejected)	+
Socialization	X	X	X	X	X
	(Under the GATT, external socialization variable even presents negative impact on Freq, Multi and Progress.)				
↓ Legalization					
WTO →					
Capacity	X	+	+	X	+
Socialization	+	+	+	+	X (H2-5 Rejected)

Note: “+” indicates positive impact, “-” indicates negative impact and “X” indicates no impact of the independent variables – capacity and socialization - on the five dependent variables.

Figure 6.1. Legalization of the GATT/WTO and the Impact of Capacity and Socialization of a Member Country on the Dependent Variables

How has the legalization of the GATT into the WTO affected the distribution of dispute settlement benefits between developed and developing countries? The results of this study show that the legalized WTO has favored developing countries more than the less legalized or non-legalized GATT especially in terms of the use of the dispute settlement mechanism. They also show that this is because the legalization of the GATT into the WTO has on the whole made a member nation's economic capacity less important or unimportant and its socialization experiences important for the distribution of its dispute settlement benefits.

In view of these results, more legalization of the WTO dispute settlement mechanism will be helpful for developing countries. E. H. Carr regarded international law as being primitive because it lacked three institutions of domestic law: a court, an executive enforcing its judicial decision, and a legislature making law. The rules of the WTO are not such a primitive international law. They have a panel and an Appellate Body as a court, a Secretariat as an executive, and Council as a legislature. However, the Secretariat of the WTO does not enforce the decisions of the panel or Appellate Body. The enforcement is entrusted to the complainants themselves. The complainants decide whether the losing respondent countries are complying with the decisions of the panel or Appellate Body, and should enforce them themselves if they don't comply with them. This is a problem for developing complainant countries if they don't have retaliation capacity against the losing respondent countries. A reform which will entrust the enforcement to the Secretariat will be a step forward for more legalization. However, it is not likely to happen soon because the consensus rule of the Council requires the consensus of all the member states to enact it and many developed countries oppose it.

The other such legalization will be more legalization of the whole process of dispute settlement. The WTO now encourages negotiated settlement between the parties involved

throughout the whole process of its dispute settlement. It encourages early settlement in the consultation stage before the establishment of panel, and negotiated settlement during the panel and Appellate Body processes. In a word, it puts as much emphasis on negotiated settlement as on adjudication for trade disputes. Developed countries have advantages in these negotiated settlements because they can wield their bargaining power over developing countries. More legalization will deprive them of these advantages. However, such legalization is not likely to happen, either, because developed countries will oppose it.¹⁶⁴

¹⁶⁴ Other suggestions for further legalization of the WTO include “the creation of a public prosecutor to independently challenge trade policies in violation of WTO law, the creation of a small claims procedure, or making WTO remedies compensatory rather than merely prospective.” Michael Trebilcock, Robert Howse and Antonia Eliason (2013), p. 620. For the creation of a small claims procedure, see Hakan Nordstrom and Gregory Shaffer, “Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?” *World Trade Review*, 7:4 (October 2008), pp. 587-640.

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