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# Implementation of the WTO Agreements: Framework and Reform

Xin Zhang\*

## I. INTRODUCTION

The World Trade Organization (WTO)<sup>1</sup> aims to establish an “integrated, more viable and durable” multilateral trading system.<sup>2</sup> The WTO plays a central role in setting the rules necessary for orderly trade liberalization and providing a common institutional framework for the trade-related conduct of the Members under the WTO Agreements.<sup>3</sup> The four key objectives of the WTO are: (1) to set and enforce rules for international trade; (2)

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<sup>1</sup> The WTO came into existence on January 1, 1995, and is formally established by the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994) [hereinafter Final Act]. There were 144 Members as of January 1, 2002.

<sup>2</sup> Final Act, *supra* note 1, at pmb1., ¶ 4.

<sup>3</sup> The WTO Agreements were finalized on December 15, 1993 and took effect on January 1, 1995. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter *Agreement Establishing the World Trade Organization*], the four Annexes to this Agreement (Annex 1A contains the *Multilateral Agreements on Trade in Goods*; Annex 1B contains the *General Agreement on Trade in Services*; Annex 1C contains the *Agreement on Trade-Related Aspects of Intellectual Property Rights*; Annex 2 contains the *Understanding on the Rules and Procedures Governing the Settlement of Disputes*; Annex 3 contains the Trade Policy Review Mechanism [hereinafter TPRM]; and Annex 4 contains the Plurilateral Trade Agreements), the Ministerial Decisions and Declarations that accompany the Agreements, and the Understanding on Commitments in Financial Services that accompanies the Agreements. In this article, the term “WTO Agreements” refers to the components of the WTO Agreements package on an individual basis.

to provide a forum to negotiate and monitor trade liberalization; (3) to improve policy transparency; (4) and to resolve trade disputes.<sup>4</sup> In particular, the WTO shall “facilitate the implementation, administration and operation, and further the objectives” of the WTO Agreements.<sup>5</sup> The realization of these objectives depends on the completeness, effectiveness and efficiency of implementing the WTO Agreements, whose legitimacy and credibility are to a great extent reinforced by the demonstrated success of implementation.

There are two distinct but interactive levels for implementing the WTO Agreements. First, by the WTO as an international institution that enforces the implementation mechanisms and methods embedded in the WTO Agreements. Second, by each Member at its national level through legislative, administrative and judicial actions that entrench the WTO Agreements into the domestic legal system. This article will focus on the first level, by exploring the general theories and practices of how the WTO Agreements design a set of mechanisms, techniques and channels that ensure its implementation at the WTO level.

The term ‘implementation’ has two meanings in the WTO context. The general meaning refers to all the modalities, mechanisms, and instruments that assist in the application of the WTO Agreements. A more recent meaning, highlighted by the Doha Development Agenda, addresses the ‘implementation-related issues and concerns’ such as those “raised by many developing-country Members regarding the implementation of some WTO Agreements and Decisions, including the difficulties and resource constraints that have been encountered in the implementation of obligations in various areas.”<sup>6</sup> In this regard, the WTO implementation issue refers to the abilities of developing-country Members to implement the existing WTO Agreements and to benefit more from the multilateral trading system, and how the WTO and other Members can help them promote such abilities.

The implementation of the WTO Agreements can be analyzed as one umbrella topic. Generally, there are two targets of implementing a multilateral treaty. The first target is to ensure that all Members have the capacity to enjoy the treaty rights or benefits and abide by the treaty obligations (for example, with an effective and honest bureaucracy, economic resources, institutional structures, technical expertise and public support).<sup>7</sup> The second

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<sup>4</sup> Kym Anderson, *The Future Agenda of the WTO*, in THE WTO SECRETARIAT, FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM 7, 8 (Kluwer Law International, 2000).

<sup>5</sup> Final Act, *supra* note 1, at art. III, ¶ 1.

<sup>6</sup> WTO Secretariat, *Implementation-Related Issues and Concerns*, pmbl., ¶ 3, Draft Decision of the Ministerial Conference, Fourth Session, WT/MIN(01)/W/10 (Nov. 14, 2001).

<sup>7</sup> Kathryn S. Youel, *Theme Plenary Session: Implementation, Compliance and Effectiveness*, 91 ASIL PROC. 50, 57 (1997).

target is to ensure that all Members act in compliance with the treaty and refrain from breaching, by the means of surveillance, supervision or sanction. The first target (the capacity) is always a condition of the second (the compliance).<sup>8</sup> When the Members have no capacity to implement the negotiated WTO obligations, the treaty is noncompliant with the WTO Agreements. In addition to the implementing capacity, other parallel factors such as the intention, the political context and the economic situation of one Member will effectively determine the outcome of implementation and play a more important role in this process.<sup>9</sup> From this perspective, the significance of the Doha Development Agenda is to specify the meaning of 'implementation' to cover the mechanism of capacity building as one precondition of the final success of implementation. The WTO undertakes the capacity building of developing-country Members (especially the Least-Developed Countries, or "LDCs") by delivering technical assistance from both the WTO and other Members. As the Doha Ministerial Declaration states:

We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. ... We agree that negotiations on outstanding implementation issues shall be an integral part of the -Work Programme we are establishing....<sup>10</sup>

Part II of this article proposes an analytical framework for the implementation issue of the WTO Agreements by incorporating the modalities, mechanisms and implementing instruments into an 'implementation matrix.' Part III analyses in detail several core implementing instruments and comments on their advantages and disadvantages. Part IV discusses the directions of reform to strengthen the implementation of the WTO Agreements. Part V presents a short concluding remark.

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<sup>8</sup> Another factor affecting the implementation of international agreements is the signatories' intention to comply, depending on the national leaders and the citizenry's understanding that it is in their self-interest to comply and on their acting on this understanding. The intention may be presumed by the facts that they negotiate and conclude the agreements. EDITH BROWN WEISS, *STRENGTHENING NATIONAL COMPLIANCE WITH TRADE LAW: INSIGHTS FROM ENVIRONMENT 458* (Marco Bronckers & Reihard Quick eds., 2000).

<sup>9</sup> JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* 4 (1984).

<sup>10</sup> WTO Secretariat, *Implementation-Related Issues and Concerns*, Draft Ministerial Declaration, Ministerial Conference, Fourth Session, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001) [hereinafter Doha Ministerial Declaration].

## II. IMPLEMENTING THE WTO AGREEMENTS: AN ANALYTICAL FRAMEWORK

### A. Modalities of the Implementation Process

The implementation of the WTO Agreements is a process that involves the interaction among the WTO Agreements, the WTO and its Members, within different but interrelated functions and modalities. The WTO Agreements prescribe the sources and forms of implementation in their texts, providing "the code of conduct and the constitutional framework within which the code operates."<sup>11</sup> As an international institution, the WTO is authorized to employ implementing measures and ensure compliance with the WTO Agreements by each Member. In this respect, the WTO will act as an overseer, a supervisor, or an enforcer, as well as a forum to host trade negotiations or consultations among Members. The WTO Members are entitled to complain in response to the non-compliance of the WTO Agreements by other Members, and obliged to observe and implement the WTO obligations at their national level.

The implementation process can be perceived from different time-frameworks.<sup>12</sup> They can be categorized into four modalities or functions: (1) the *facilitation of compliance*; (2) the *assurance of compliance*; (3) the *deterrence of non-compliance*; (4) and the *correction of non-compliance*. The core of the four modalities is compliance with the WTO Agreements, the first two concerning the positive aspects of compliance and the latter two concerning the negative aspects. The positive aspects of compliance cover the implementing mechanisms that facilitate or encourage the Members to act in line with the WTO obligations. In contrast, the negative aspects of compliance involve the threat or use of implementing mechanisms that deter the Members from breaching the WTO obligations or enforcing those obligations to correct such breaches. The collective effect of these modalities is to increase the degree of Members' compliance with the WTO Agreements.

There is an inherent logic between the four modalities of the implementation process. The WTO shall invest its resources or channel other Members' resources to help a Member (mainly a developing-country Member) build up the capacity to implement the WTO Agreements and to participate more actively in the progress of trade liberalization so as to facilitate the compliance. When the Members have the implementation capacity, the WTO needs to ensure that they are implementing the WTO

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<sup>11</sup> ASIF H. QURESHI, *THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS* 49-50 (Manchester Univ. Press 1996).

<sup>12</sup> *Id.* at 50.

Agreements in a WTO-consistent way, and performing the WTO obligations in an on-going status at any given time. After Members act in compliance with these guidelines, efforts may be directed at pre-empting the non-compliance with the WTO Agreements in a Member's implementation at an early stage. Pre-empting at this level will deter the breach of obligations by setting out the ways that the Members shall perform and subject the sign of breach to the scrutiny of the WTO and other Members at an early stage. Finally, when the non-compliance by a Member cannot be solved by diplomatic negotiations between Members, the WTO will provide a correction function by settling the disputes and enforcing the decisions to remedy the non-compliance.

## B. Mechanisms of Implementing the WTO Agreements

There are four mechanisms employed by the WTO to implement the WTO Agreements, as generalized from the texts of agreements, the ministerial decisions and the WTO practices: *capacity building*, *monitoring*, *supervision*, and *enforcement*.

### 1. Capacity building

The issue of capacity building mainly concerns developing-country Members (particularly the LDCs). Developing countries constitute the majority of the WTO Members (over 80 percent of the 144 Members as of January 1, 2002). The functions of the WTO and the multilateral trading system will be fundamentally undermined if the majority Members cannot implement the WTO Agreements due to lack of capacity.

The Uruguay Round leading to the establishment of the WTO adopted a 'single undertaking' approach in the negotiation.<sup>13</sup> This agreement covered 15 negotiating areas and the commitments assumed under the General Agreement on Tariffs and Trade ("GATT"), and each of these areas have been incorporated into a single legal instrument—the *Agreement Establishing the World Trade Organization*—which must be accepted in its totality.<sup>14</sup> The key advantage of this approach is to strengthen the rule system by persuading Members to accept less favorable rules in one area if they are compensated by rules allowing higher benefits in other areas.<sup>15</sup> Under the single undertaking, developing countries are presumed to be equipped to take on obligations similar to industrialized countries which have reached

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<sup>13</sup> Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in *ESSAYS ON THE LEGAL STRUCTURE, FUNCTIONS & LIMITS OF THE WORLD TRADE ORDER* 119, 147 (Cameron May ed., 2000).

<sup>14</sup> Final Act, *supra* note 1, at art. XIV, ¶ 1.

<sup>15</sup> Anderson, *supra* note 4, at 158-59.

far higher levels of economic development,<sup>16</sup> but are entitled to enjoy a “special and differential treatment” (“S&D treatment”). This treatment for developing countries covers five headings: lower level of obligations, more flexible implementation timetables (e.g., certain years of transition period), commitments by developed countries to take into account developing country interests, more favorable treatment for LDCs, and promises of technical assistance and training.<sup>17</sup> However, most of the 97 provisions in the WTO Agreements calling for S&D treatment of developing countries are ‘best endeavor’ commitments and are not binding on developed countries.<sup>18</sup> The only tangible concession granted to developing countries under most WTO agreements is a slightly longer time for implementation.

The experiences of implementing the WTO Agreements by developing countries in the last seven years suggest three types of implementation concerns. The first concern involves the ability of developing countries to implement the large number of WTO Agreements before the transition periods expire. Implementing these obligations requires the necessary legislative and administrative capacity, sound legal and institutional infrastructure, financial sources and expertise. Developing countries, especially smaller countries and LDCs, generally lack the capacity to apply the WTO Agreements fully or participate effectively in the continuous work of the WTO. The potential result of these deficiencies is not only the breach of their obligations but also the failure to gain the full benefit of WTO membership.<sup>19</sup>

The second implementation concern is to encourage the developed-country Members to deliver on their promises and commitments to developing countries under the best-endeavored obligations.<sup>20</sup> Many S&D provisions provide in broad terms that developed countries should help developing countries in specific areas (such as technology transfer under intellectual property protection) without defining exactly what action is needed.<sup>21</sup> In practice, developed countries have shown less consideration of developing country interests than anticipated, especially in those areas of interest to developing countries (for example, exports of textiles, clothing

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<sup>16</sup> KEVIN WATKINS & PENNY FOWLER, *RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALISATION, AND THE FIGHT AGAINST POVERTY* 235 (2002).

<sup>17</sup> See generally, e.g., Alice Alexandra Kipel, *Special and Differential Treatment for Developing Countries*, in *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 617-94* (Terence P. Stewart ed., A.B.A., Section of Int’l Law & Practice 1996).

<sup>18</sup> BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 392-393 (Oxford Univ. Press 2001).

<sup>19</sup> JOHN CROOME, *RESHAPING THE WORLD TRADE SYSTEM: A HISTORY OF THE URUGUAY ROUND* 336 (1995).

<sup>20</sup> HOEKMAN & KOSTECKI, *supra* note 18, at 398.

<sup>21</sup> *General Council Approves Work Programme on Implementation Problems of Developing Countries*, 46 WTO Focus, May-June 2000, at 3.

and agricultural products).<sup>22</sup> The developing countries also require more assistance to improve their capacity to enjoy these benefits, while developed countries were reluctant to transfer the resources required to either the WTO or the individual country itself.<sup>23</sup>

The third concern is whether and to what extent the substantive rules of some of the WTO Agreements are compatible with national development priorities of developing countries. Developing countries expect the multi-lateral trading system to enable them, within a broad-based system of accepted rules, to implement the policies needed to generate growth and reduce poverty.<sup>24</sup> The WTO had noted as early as 1996 that "some Members have expressed dissatisfaction with certain aspects" of the implementation issue.<sup>25</sup> The Doha Development Agenda unambiguously recognizes that the development issue is one major topic, which can be promoted by "enhanced market access, balanced rules, and *well targeted, sustainably financed technical assistance and capacity building programmes*"<sup>26</sup> (emphasis added).

In reviewing the implementation concerns, it is clear that capacity building is inherent in the implementation issue. The capacity building relates the ability of developing countries to implement the WTO Agreements within the allowed period, to observe the WTO obligations on a continuous basis, to integrate into the world trading system, and to combine the trade policy with the broader aim of development. The importance of capacity building has been fully addressed in the Doha Development Agenda, which states:

We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. ... The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including draw-

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<sup>22</sup> See generally Asoke Mukerji, *Developing Countries and the WTO: Issues of Implementation*, 34 J. WORLD TRADE 33, 39-51 (Dec. 2000).

<sup>23</sup> HOEKMAN & KOSTECKI, *supra* note 18, at 398-99.

<sup>24</sup> For example, India expressed that trade should be "an instrument of development, to raise standards of living, expand production, keeping in view, particularly, the needs of developing countries and least-developed countries." Ramakrishna Hegde, *WTO Issues and India's Concerns: Speech at the Second Ministerial Conference of the WTO in Geneva* (May 18-20, 1998), in *INDIA AND THE WTO: A MONTHLY NEWSL. OF THE MINISTRY OF COM.*, ¶ 6 Feb. 1999, available at <http://commerce.nic.in/wtofeb.htm>.

<sup>25</sup> WTO Secretariat, *Singapore Ministerial Declaration*, ¶ 10, WT/MIN(96)/DEC (Dec. 18, 1996).

<sup>26</sup> Doha Ministerial Declaration, *supra* note 10, at ¶ 2.



ing on the benefits of an open, rule-based multilateral trading system.<sup>27</sup>

This statement from the Doha Development Agenda illustrates the status of capacity building in the overall implementation issue of developing countries and the purposes of capacity building.

In contrast to the implementation concerns that have been addressed, two tendencies may exist in the delivering of trade-related capacity building to developing countries. The first tendency is that it is predictable that the more efficiently the capacity building is performed, the more demanding the beneficiaries become. The second tendency is that a more efficient delivery will result in the developing countries playing a more proactive role in the trade negotiations, which makes the multilateral process more complicated. The first tendency should be balanced with the secure and predictable funding and the priorities of capacity building, taking into account the factor that there are limited resources for this purpose. The second tendency, although as a strongly practical concern, cannot justify any reluctance to the mechanism of capacity building under the auspice of the WTO. Arguably, it will contribute to a healthy and highly necessary democracy in the trade negotiation and facilitate a consensus in the final outcome. The purpose of the multilateral trade negotiation is to find a win-win solution for all Members, rather than to technically achieve the agreement in trade documents by making use of the inexperience of some participants and damaging the confidence of the trading system in the long run.

## 2. Monitoring

Monitoring is a mechanism to collect and evaluate information in accordance with a particular standard. In some literature, this mechanism is also called a 'surveillance'<sup>28</sup> or 'review function.'<sup>29</sup> In essence, monitoring is a "non-intrusive, almost discreet, information-gathering activity of 'watch' or 'observation,'"<sup>30</sup> and may impose a transparency obligation on the monitored nation. The monitor receives, collects and reviews the information from the monitored nation through the ways and means established in the international agreements. However, the monitoring function itself does not authorize the monitor to correct the behavior of the moni-

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<sup>27</sup> *Id.* ¶ 38.

<sup>28</sup> Qureshi uses this term to describe the information-collection and review functions of the WTO and tries to distinguish between the non-intrusive or 'teleological approach' from the intrusive, more coercive function of supervision. See generally QURESHI, *supra* note 11, at 51-61.

<sup>29</sup> G.J.H. van Hoof & K. de Vey Mestdagh, *Mechanisms of International Supervision*, in SUPERVISORY MECHANISMS IN INT'L ECON. ORG. 3, 11 (P. van Dijk ed., Kluwer Law Int'l, 1984).

<sup>30</sup> QURESHI, *supra* note 11, at 52.

tored or require the monitored to act in a specified manner. The corrective function is usually provided by the mechanisms of supervision and enforcement.

Under the WTO framework, the monitored are the Members, and the subject of such monitoring can be the trade policies and practices of Members and the progress of implementing the WTO Agreements at the national level. In addition, the WTO will also monitor the general trends in international trade and policies. The methods to carry out the monitoring function include the publication of information by Members, the exchange of information between the WTO and a Member or between Members through notification and reporting, and the review of such information (which may demonstrate the situation of implementation) by the WTO or other Members.

The monitoring mechanism serves several important functions of the WTO and the multilateral trading system. First, one of the most important objectives of GATT and WTO is to expand the world production of and trade in goods and services, by "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."<sup>31</sup> The collection and exchange of information concerning restrictions on trade by Members and their trade policies is a vital weapon to monitor the Members' trade policies and practices.<sup>32</sup> Without the complete, updated and accurate information available in various aspects of international trade policies and practices, there is no chance for the WTO to understand what happens and bring the situation of one Member under the spotlight. Second, the WTO can review the behavior of one Member on the basis of the information provided or collected, and recommend the Member to act in compliance with the WTO Agreements. Other Members can also have access to the information obtained through various monitoring channels. From this perspective, the monitoring mechanism significantly reduces the information costs of the WTO and its Members and makes the most efficient use of such information by acting as a central depository and access point. Third, the information and the results of review from the monitoring can trigger other implementation mechanisms such as supervision or enforcement, especially when the information reveals some WTO-inconsistent behaviors.

A number of WTO bodies have transparency and information exchange functions. Many committees are set up to oversee the functioning of specific agreements and review the relevant policies of members at inter-

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<sup>31</sup> *Agreement Establishing WTO*, *supra* note 3, at pmb1., ¶ 3.

<sup>32</sup> SUPERVISORY MECHANISMS IN INT'L ECON. ORG., *supra* note 29, at 68.

vals varying between three months and two to three years.<sup>33</sup> There are two types of monitoring powers. The first type is the observation, collection and evaluation of information that is generally available or specifically provided by Members under the WTO obligations, without more active a role than that of an objective observer.<sup>34</sup> The second type is the "requesting of information, invitations to consult or even country visits with permission" of the Member for one particular issue, in which the monitors play a more active role as the information collector rather than as passive information receivers.<sup>35</sup> The effectiveness of the monitoring depends on the adequacy of the organs in charge of and the procedures in relation to this mechanism.<sup>36</sup> While the procedures are in general sound and workable, the WTO may lack the manpower and budget to carry out the independent data collection and verification.

### 3. Supervision

Supervision is a mechanism to oversee the behavior of the supervisee (similar to monitoring) and requires the supervisee to act in accordance with a particular standard, either substantively or procedurally. It represents a kind of intrusive and coercive power of the supervisor to interfere with the affairs of the supervisee, usually arising from a pronounced hierarchical relationship between the supervisor and the supervisee.<sup>37</sup> An effective supervision mechanism will have the functions of guidance, persuasion, and of potentially more coercive powers (such as sanctions). The essence is to ensure the supervisee is acting in line with the set principles and rules and voluntarily correcting the non-compliance, the failure of which may lead to the informal or formal measures of enforcement. In this regard, supervision can be viewed as a semi-strong implementation mechanism between monitoring (weak) and enforcement (strong).

The supervision mechanism in the WTO suggests that the Members have suspended to a considerable extent their sovereignty in a particular sphere to the WTO. As a general rule, States are reluctant to transfer parts of their sovereign powers in favor of a more effective international institution.<sup>38</sup> In order to balance the Members' sovereignty concerns and the

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<sup>33</sup> HOEKMAN & KOSTECKI, *supra* note 18, at 64. Discussion of some committees' monitoring functions will be discussed *infra*.

<sup>34</sup> This type of monitoring power falls within the traditional meaning of monitoring.

<sup>35</sup> QURESHI, *supra* note 11, at 57.

<sup>36</sup> Van Hoof & de Vey Mestagh, *supra* note 29, at 35.

<sup>37</sup> QURESHI, *supra* note 11, at 61.

<sup>38</sup> See generally John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 157-88 (1997) (debating the issue that the Congress of the United States has a deep concern and doubt over the loss of the sovereignty to an international organization such as

WTO's supervisory function, the WTO Agreements focus more on the procedural standards, especially the consultation procedures, for the Members to follow before or after certain actions, rather than expanding the substantive rules (such as prior consent from the WTO, which is rare in the WTO Agreements). The consultation procedures do not guarantee a certain outcome, but only provide a forum for negotiation between Members. This approach avoids the Members' viewing the WTO as a far-reaching intrusion into their sovereignty.

#### *4. Enforcement*

Enforcement is a mechanism to force compliance with a particular standard through informal or formal procedures of dispute settlement and decisions implementation, which "implies compulsion to obedience."<sup>39</sup> It has the strongest sense of coercion, immediacy and particularity among four implementation mechanisms. Dispute settlement procedures constitute the core element of this mechanism, serving to adjudicate disputes between the Members, to recognize violations by the Members, and to force the offending Members to act in line with the agreed upon rules through efficient sanctions.

The WTO is a rule-oriented system.<sup>40</sup> The degree of its implementation, to a great extent, relies on the effectiveness of the enforcement mechanism. If the WTO Agreements lack the coercive mechanisms to police the Members' behavior and correct non-compliance, the whole system will be fundamentally flawed. It is suggested that the success of the WTO is largely determined by the fact that it has changed the 'toothless' feature of the former GATT system. Under the GATT, the dispute settlement system was subject to substantial time delays through actions of the parties, and the losing party could block the adoption of panel reports under the consensus rule of the Contracting Parties, rendering the process uncertain even for the winners.<sup>41</sup> As a result, GATT dispute settlement was more like a kind of trade diplomacy or quasi-adjudicative process. The panels could refrain from being overly assertive for the purpose of avoiding an adverse reaction

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the WTO).

<sup>39</sup> See QURESHI, *supra* note 11, at 51-53. In this context, the term 'enforcement' is used in its narrower literal meaning. Some scholars argue that this term can have a wider meaning to include non-coercive measures designed to induce adherence to norms by the state (for example, the transparency obligations). In this regard, they actually expand the meaning of 'enforcement' to cover all means of implementation.

<sup>40</sup> For the classical description of the 'rule-oriented' system and the 'power-oriented' system, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109-111 (MIT Press 1997).

<sup>41</sup> For a detailed review of the GATT dispute settlement system, see ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (Butterworth Legal Pub. 1993).

from the losing party, which had the power to block the report's adoption.<sup>42</sup> In contrast, the WTO substantially promotes the adjudicative nature of its disputes settlement system, as well as the prospects of implementation.

The *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (the Disputes Settlement Understanding, or DSU) rectifies the most egregious problems that plagued the GATT dispute settlement system in four respects, namely, delays, blockage, compliance, and remedial action.<sup>43</sup> The last two aspects are central to the enforcement mechanism and mainly concerned with the implementation of the DSB recommendations and rulings by Members, so they will be thoroughly discussed in Part III. The first two aspects that contribute to the increased effectiveness of DSU will be briefly outlined here. First of all, the DSU establishes fixed time periods for every stage of the dispute resolution process. The primary goal of the DSU is the 'prompt settlement' of the disputes to secure positive solutions between the complaining Member ("the complaining party") and the offending Member ("the respondent").<sup>44</sup> Accordingly, disputes among WTO Members are resolved under a relatively swift and predictable timetable, generally within one year for the adoption of the panel or appellate report and within two and a half years for the retaliation action. Second, a single Member such as the losing party cannot block the adoption by the DSB of a panel or appellate report under the DSU. In accordance with the 'negative consensus' rule, there must be a consensus of WTO Members (including the winning party) not to adopt such a report, where 'consensus' means that no Member offers a formal objection.<sup>45</sup> Likewise, it is no longer possible for a single Member to block the creation of a panel to hear a dispute.<sup>46</sup> This feature greatly improves the predictability and credibility of the WTO enforcement mechanism.

In essence, the DSU requires all WTO Members to submit disputes to its jurisdiction and abide by the DSU rules and procedures, thus strengthening the enforcement of the WTO.<sup>47</sup> Any Member cannot unilaterally judge the violation of the WTO Agreements by one Member and then adopt the retaliation measures without recourse to the DSU procedure.<sup>48</sup> On the other

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<sup>42</sup> Christopher Thomas, *Litigation Process under the GATT Dispute Settlement System: Lessons for the World Trade Organization?*, 30 J. WORLD TRADE 57 (1996).

<sup>43</sup> Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. 159, 164-165 (1997).

<sup>44</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 33 I.L.M. 1226, art. 3.3 (Sept. 1994) [hereinafter *DSU*].

<sup>45</sup> *Id.* at art. 2.4, 2.4 n.1, 16.4, 17.14. Theoretically it is still possible not to adopt a report if all Members agree not to do so, including the winning party (which may be for political reasons).

<sup>46</sup> *Id.*, at art. 6.1.

<sup>47</sup> *Id.*, at art. 23.1.

<sup>48</sup> *Id.*, at art. 23.2.

hand, the winning party can expect the availability of sanction measures in the end, even if it is after a period of two to three years of dispute resolution.

### C. Implementing Instruments

Implementing instruments are the ways and means used by the different implementing mechanisms, under different modalities, to effectuate the functions of international agreements.<sup>49</sup> The WTO Agreements design the following categories of implementing instruments: technical assistance, transparency measures, supervisory measures, and dispute resolution and implementation. It is notable that one instrument may be employed by different mechanisms and play a similar or different role in that particular context.

#### 1. Technical assistance

The WTO defines the objectives of technical assistance and cooperation as “to improve knowledge of multilateral trade rules and WTO working procedures and negotiations” and “to assist in the implementation of commitments in the multilateral trading system and full use of its provisions, including the effective use of the dispute settlement mechanism.”<sup>50</sup> These works will be administered by the Secretariat and reviewed by the Members. The Committee on Trade and Development will approve a three-year plan adjusted on an annual basis, including the budget consideration, and submit the plan to relevant WTO bodies for implementation. The Secretariat is responsible for organizing and overseeing the implementation of the plan, by preparing an annual report, a financial report and an *ad hoc* status report on the implementation programs. The Committee will evaluate the results of technical assistance activities in order to ensure optimum use of resources on an annual basis.<sup>51</sup>

The technical assistance follows the framework of a multi-year programme for beneficiaries (i.e., developing countries, LDCs and transition economies, etc.). The broad objectives at the country level are first, to provide general information on the multilateral trading system, and second, to improve the country’s participation in this system through training on negotiating techniques, the use of the Integrated Data Base, and dispute settlement courses. The next objective is to deepen beneficiary countries’ knowledge of the trading system through specialized workshops/seminars and the training of trainers activities. Last but not least is the domestic im-

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<sup>49</sup> Van Hoof & de Vey Mestdagh, *supra* note 29, at 20-21.

<sup>50</sup> WTO Committee on Trade and Development, *Guidelines for WTO Technical Cooperation*, ¶ 1, WT/COMTD/8 (Oct. 16, 1996).

<sup>51</sup> *Id.* ¶ 2.4.

plementation of multilateral trade agreements. This involves the legislative process, notifications, and institutional development, as well as specific training on the domestic operations of certain agreements.<sup>52</sup>

The WTO organizes a variety of technical assistance activities, both in Geneva and in the regions. Technical assistance is mainly delivered in the following forms: courses, seminars, workshops and technical missions covering a range of subjects, briefings sessions, Reference Centres, and daily advice to delegations. Examples include the Short Trade Policy Courses, the Dispute Settlement Workshops and Courses, Trade Negotiation Simulations, and the establishment of WTO Reference Centres. In addition, an Advisory Centre on WTO Law (ACWL) was established after the 1996 Singapore Ministerial Conference to provide legal assistance to developing-country Members involved in dispute settlement, whose activities are financed partly by donor countries and cost-sharing by assisted countries.

The WTO will cooperate with other international organizations (e.g., World Bank, IMF, ITC, UNCTAD, UNDP) to deliver technical assistance in a coherent policy framework, with relation to the trade-related technical assistance to LDCs, under an integrated framework. The WTO also works together with donor countries or regional organizations to jointly engage in these activities, either as a co-operator or as a channel.<sup>53</sup> Following the Doha Ministerial Declaration's instructions to develop a plan ensuring long-term funding for WTO technical assistance, the General Council adopted on December 20 2001, a new budget that would increase technical assistance funding by 80% and establish a Doha Development Agenda Global Trust Fund with a proposed core budget of 15 million Swiss francs.

## 2. *Transparency measures*

Transparency measures are related to all implementation mechanisms and serve as the basic implementing instrument, but have a particular relevance to the monitoring mechanism. Transparency at the WTO and at national levels is essential to reduce uncertainty and enforce the agreements.<sup>54</sup> The measures include publication, notification, and review. Notification and review will be analyzed in Part III.

The WTO Agreements impose an obligation of publication on Members in three aspects. The primary obligation is to publish trade-related laws, regulations, judicial decisions and administrative rulings with general

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<sup>52</sup> WTO Committee on Trade and Development, *WTO Programme for Technical Assistance: Three-Year Plan (2001-2003)*, WT/COMTD/W/84 (May 11, 2001).

<sup>53</sup> For example, the WTO announced its cooperation with Arab Monetary Fund (May 3, 2002) and Asian Development Bank (May 9, 2002), respectively, for delivering technical assistance to Arabian countries and Asian and Pacific countries.

<sup>54</sup> HOEKMAN & KOSTECKI, *supra* note 18, at 61.

applicability, in a prompt manner.<sup>55</sup> The General Agreement on Trades in Services further limits such a publication to be at the least by the time of their entry into force.<sup>56</sup> The publication obligation also extends to the subsequent changes of these trade legislation and measures. Second, the Members are required to publish more specific information about the trade regulatory measures, especially for certain non-tariff barriers. For example, in relation to agricultural or fisheries products, a Member shall give advance public notice of quantitative restrictions that are imposed to enforce governmental measures controlling the quantity of like domestic products marketed or produced within the country,<sup>57</sup> with the details of quotas fixed.<sup>58</sup> For import licensing, publication must normally be at least twenty-one days prior to the licensing requirements being made effective; for non-automatic licenses, the publication of the licensing conditions must include sufficient information for the traders and Members concerned to understand the basis of the grant of the license.<sup>59</sup> Thirdly, the Members are required to establish enquiry points that can act as the information center and the access point for queries. Examples include the *Agreement on Technical Barriers to Trade* ("TBT")<sup>60</sup> and the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPM").<sup>61</sup> Similarly, GATS also requires Members to establish enquiry points to facilitate the dissemination of information to other Members, and developed-country Members shall establish contact points to facilitate access to information of their markets for service suppliers from developing countries.<sup>62</sup>

Third, there are more onerous requirements of publication in the TBT and SPM. Under the TBT, the Members are required to publish a notice on the proposed regulation. The notice must indicate the objective of the regulation and its rationale and the deviation from international standards, if

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<sup>55</sup> General Agreement on Tariffs and Trade, art. X, 33 I.L.M. 1154 (Sep. 1994) [hereinafter GATT 1994]; General Agreement on Trades in Services, art. III, 33 I.L.M. 1167, 1170 [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, art. 63, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

<sup>56</sup> GATS, *supra* note 55, at art. III:1.

<sup>57</sup> GATT 1994, *supra* note 55, at art. XI.

<sup>58</sup> *Id.* at art. XIII:3(b).

<sup>59</sup> GATT, *supra* note 55, at art. III, *Agreement on Import Licensing Procedures*, at [http://www.wto.org/english/docs\\_e/legal\\_e/23-lic.pdf](http://www.wto.org/english/docs_e/legal_e/23-lic.pdf) (last visited Feb. 25, 2003).

<sup>60</sup> *Agreement on Technical Barriers to Trade*, Mar. 1980, art. 10, B.I.S.D. § 265/8-32, available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) (last visited Feb. 25, 2003) [hereinafter *TBT Agreement*].

<sup>61</sup> *Agreement on the Application of Sanitary and Phytosanitary Measures*, Annex B, ¶ 3, at [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) (last visited Feb. 25, 2003) [hereinafter *SPM Agreement*].

<sup>62</sup> GATS, *supra* note 55, at art. IV.



any, and allow time for the issuing authority to take into account of comments of other Members.<sup>63</sup> Under the SPM, except in urgent circumstances, the Members shall allow a reasonable interval between the publication of a regulation and its entry into force in order to allow time for interested exporters to adapt to the standards.<sup>64</sup>

The opportunity for public comment will provide a chance for other Members and affected traders to take part in the decision process and somewhat influence the outcome. The OECD regards this public notice and comment procedure as a key element of the prior consultation procedure, enhancing the efficiency of regulatory measures, and observing a tendency toward prior consultations in countries.<sup>65</sup> It evaluates the function of this procedure as:

[P]rior consultation should be seen as an opportunity for regulatory authorities to gather information to feed into their consideration, *inter alia*, of whether measures are unnecessarily trade restrictive, rather than as a formal process for foreign parties to resolve issues directly with regulatory authorities. Foreign parties' comment could be helpful for estimating the trade impact of proposed measures and illuminating relative trade restrictiveness of different alternatives. They may thus constitute an early warning system for trade disputes that may arise with respect to new or modified regulations.<sup>66</sup>

### 3. Supervisory measures

The WTO undertakes the supervisory function through the following measures:

- Mandatory requirements of transparency;
- Request by the WTO<sup>67</sup> or by other Members<sup>68</sup> on one

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<sup>63</sup> TBT Agreement, *supra* note 60, at art. 2, 5.

<sup>64</sup> SPM Agreement, *supra* note 61, ¶ 2.

<sup>65</sup> OECD, *Trade and Regulatory Reform: Insights from the OECD Country Reviews and Other Analysis*, 13 WORLD TRADE & ARB. MATERIALS 31-32 (Apr. 2001).

<sup>66</sup> *Id.* at 32.

<sup>67</sup> For example, under Article VIII of GATT 1994, the WTO Council can request a Member to review the operation of its laws in relation to fees and formalities of international trade. Generally, each WTO Committee in charge of specific trade or trade-related areas has the right to seek information from all sources, in particular by request of the Members subject to review.

<sup>68</sup> For example, Article VIII of GATT 1994 allows a Member to request other Members to review its laws in relation to fees and formalities of international trade, Article XII allows one Member to request the information of the administration of import licenses by other Members, and Article XVII (state trading) allows one Member to request other Members to supply information on the prices of products when a state enterprise operates as an import monopoly; Article 5 of SPM allows a Member to request other Members to explain the reasons of SPMs that deviate from international standards; Article 2 of TBT allows a Member to request other Members to explain the justification of a technical regulation that has sig-

- Member for the provision of information or the explanation of specific issues;
- Consultation procedures between the Members or between the WTO and one Member (including the prior consultations);<sup>69</sup>
  - Reporting to the WTO;<sup>70</sup>
  - Examination by the WTO (including advice and recommendations from the WTO),<sup>71</sup> and
  - Prior approval from the WTO for certain behaviors.<sup>72</sup>

The sequence of these measures represents an increase of the coercive factor, in which the transparency requirements (e.g., publication of laws or notification to the WTO of certain actions) are in one polar and the prior consent are in the other polar. Nevertheless, the obligation of one Member to consult or negotiate with other Members or to obtain approval from the

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nificant impact on trade; Article 6 of the Agreement on Trade-Related Investment Measures requires the Members to accord sympathetic consideration to requests for information on any matters arising from this Agreement by other Members; under Article VIII of GATS, a Member may request the WTO Council for Trade in Services to obtain information concerning the operation of a monopoly supplier of a service in another Member.

<sup>69</sup> See Part III *infra* for details.

<sup>70</sup> For example, Article 25.11 of the *Agreement on Subsidies and Countervailing Measures* [hereinafter *SCM Agreement*] requires the Members to report without delay to the Committee on SCM all preliminary or final actions of countervailing duties; Article 16 of the *Agreement on the Implementation of Article VI of GATT 1994* ("Agreement on Antidumping") requires the Members to report on a semi-annual basis anti-dumping actions in the preceding six months to the Committee on Anti-dumping Practices.

<sup>71</sup> For example, the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* ("Agreement on Customs Valuation") establishes the Technical Committee on Customs Valuation, which may examine specific problems in the administration of customs valuation by Members and advise accordingly (Article 18 and Annex II). The *Agreement on Rules of Origin* authorizes the Committee on Rules of Origin to examine and advise on matters arising from the daily administration of rules of origin in Members. Article 12 of SPM requires the Committee on SPM, upon the initiative of a Member, to invite a relevant international organization to examine the explanations given by a Member for the non-use of the recommended international standards. Article 26 of SCM allows the Committee on SCM to examine notifications and reports about countervailing duties from Members. Article 9 entitles the Committee to recommend the modification of the subsidy program or authorize countermeasures in relation to a non-actionable subsidy of the subsidizing Member. Article XVIII:12 and Article XII of GATT 1994 requires the Council to advise on the modification or recommend the conformity with a specified period if the balance-of-payment restrictions by a Member are inconsistent with GATT articles and damage to the trade of another Member occurs.

<sup>72</sup> For example, Article 14 of the *Agreement on Antidumping* requires the importing Member to obtain the approval from the WTO Council for Trade in Goods before starting an anti-dumping action on behalf of a third country; Article XVIII Section D of GATT 1994 requires a Member to obtain the approval of the WTO before imposing restrictions on balance-of-payment to promote a particular industry for the development purpose, and Section A requires a developing Member to obtain the WTO approval before withdrawal or modification of a concession in order to promote a particular industry if there is no fruitful negotiation with the affected Members.

WTO before applying a trade policy will be inevitably viewed as an erosion of the national sovereignty and regulatory autonomy in the economic sphere. Although these are strongly effective supervisory measures, the WTO Agreements only authorize their use in very extreme circumstances, the importance of which justify such a degree of interference. Therefore, the consultation procedures, and other procedures connected with the request of consultation, are the main supervisory measures.

#### *4. Dispute resolution and implementation*

A thorough discussion of the dispute settlement system is beyond the scope of this article, but the stages of compliance and implementation of the recommendations and rulings in a panel or Appellate Body report (collectively referred as “the final report”) that are adopted by the DSB (“the DSB recommendations and rulings”) are the most significant to the enforcement mechanism. Usually, the DSB recommendations and rulings are that the losing party shall withdraw its WTO-inconsistent measures or bring such measures in compliance with the WTO Agreements. There are three implementing instruments in this respect: the DSB recommendations and rulings to withdraw inconsistent measures by the losing party, compensation, and retaliation. Part III will give a comprehensive analysis to this category.

#### **D. An Analytical Framework: the Implementation Matrix**

The combination of implementing instruments, categorized under the four mechanisms of implementation, is employed to serve the functions of different implementation modalities. If we use the modalities as the vertical axis and the mechanisms as the horizontal axis, we can establish a framework to analyze the policy choices of implementing the WTO Agreements. Part IV will use this matrix to suggest the future directions of reform, as it reveals in which aspects the implementation would be strong (so to maintain and balance) or weak (so to strengthen and improve).

TABLE 1: IMPLEMENTATION OF THE WTO AGREEMENTS: AT THE WTO  
LEVEL

MECHANISMS

	Capacity Building	Monitoring	Supervision	Enforcement
Facilitate Compliance	- Technical assistance	- Report - Review	- Review	
Ensure Compliance		- Publication - Notification - Review	- Consultation - Reporting - Examination - Requests	
Deter Non-compliance		- Notification - Review	- Prior approval by WTO - Advice by WTO - Consultation	
Correct Non-compliance			- Consultation - Recommendation by WTO	- Recommendation and rulings by DSB - Sanctions

III. ANALYZING CORE IMPLEMENTING INSTRUMENTS

Four core instruments – notification, review, consultation, and implementation of the DSB rulings and recommendations – constitute the backbones of the implementation framework of the WTO Agreements. They are applied in various implementation modalities and mechanisms.

A. Notification

*1. The WTO requirements*

Notification is the basic implementing instrument to obtain necessary information from one Member. It enables the WTO and other Members to evaluate the status of compliance, supervise the implementation of the

WTO Agreements at the national level, and initiate further supervisory and enforcing mechanisms. It shows how Members are fulfilling their commitments under the WTO Agreements. Further, the increased emphasis on notification requirements will assist Members in bringing complaints, and act as a deterrent to those that might otherwise hope to break the rules unobserved.<sup>73</sup>

The GATT system had over a dozen provisions requiring Member notification of their trade measures. Dissatisfaction with the implementation of these requirements led to the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, under which the Members undertook to notify in advance, or failing this, promptly afterwards, their adoption of trade measures affecting the operation of GATT, to the maximum extent possible.<sup>74</sup>

The WTO Agreements strengthen the notification requirements on Members, and expand the scope of notification to all covered areas. There are over 200 notification requirements contained in various WTO Agreements, or mandated by Ministerial and Council decisions. In 1995, the General Council adopted a Decision on Notification for the improvement and review of notification procedures. The decision contained an Indicative List of notifiable measures, including:

- Tariffs (including range and scope of bindings, GSP provisions, rates applied to Members of free-trade areas/customs unions, other preferences);
- Tariff quotas and surcharges;
- Quantitative restrictions, including voluntary export restraints and orderly marketing arrangements affecting imports;
- Other non-tariff measures (such as licensing and mixing requirements and variable levies);
- Customs valuation;
- Rules of origin;
- Government procurement;
- Technical barriers;
- Safeguard actions;
- Anti-dumping actions;
- Countervailing actions;
- Export taxes;
- Export subsidies, tax exemptions and concessionary export financing;
- Free-trade zones (including in-bond manufacturing);
- Export restrictions (including voluntary export restraints and

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<sup>73</sup> EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY ¶ 2.12 (Globefield Press 1996) (1986).

<sup>74</sup> *Id.* at ¶ 2.41.

- orderly marketing arrangements);
- Other government assistance (including subsidies, tax exemptions);
- Role of state-trading enterprises;
- Foreign exchange controls related to imports and exports;
- Government-mandated countertrade; and any other measure covered by the Multilateral Trade Agreements in Annex 1A to the WTO Agreement.<sup>75</sup>

It also established a Central Registry of Notifications in the Secretariat, which operates in parallel with existing systems (e.g., notification requirements to specific committees) and records the details of the measure's purpose and trade coverage, and the relevant notification requirement. Members will be given an annual list of their regular notification requirements, and be informed of their unfulfilled requirements.

In addition, a Working Group on Notification Obligations and Procedures was established to review notification requirements under the WTO Agreements on trade in goods, with a view to simplifying, standardizing and consolidating them and improving compliance. The working group's 1996 report introduced a number of reforms, including the production of a six-monthly comprehensive listing of notification obligations, and compliance herewith.<sup>76</sup> The Secretariat has published a series of handbooks on notification requirements for the benefit of developing countries.<sup>77</sup> In 1998, the notification obligations under GATT 1947 relating to import licensing procedures were eliminated upon the recommendation of the working group.

## *2. Types*

There are two types of notification obligations: first, the Members must provide a consolidated notification, including all changes in laws, regulations, policy statements or public notices, to the Secretariat each year;<sup>78</sup> second, the Members must satisfy the notification obligation for specific

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<sup>75</sup> *Decision on Notification Procedures, Annex*, available at [http://www.wto.org/english/docs\\_e/legal\\_e/33-dnotf.pdf](http://www.wto.org/english/docs_e/legal_e/33-dnotf.pdf) (last visited Feb. 25, 2003).

<sup>76</sup> *Report of the Working Group on Notification Obligations and Procedures*, G/L/112 (1996), available at <http://docsonline.wto.org> (last visited Feb. 25, 2003).

<sup>77</sup> The handbooks were published in the series WT/TC/NOTIF/.

<sup>78</sup> This consolidated notification obligation originated as early as 1964. In that year, the Contracting Parties (as one institutional body) of GATT adopted a resolution in which they recommended that each Contracting Party (as the members of GATT) forward promptly to the Secretariat copies of the laws, regulations, decisions, rulings and agreements of the kind described in paragraph 1 of Article X of GATT 1947 (on publication and administration of trade regulations), together with such other information they consider relevant to the objectives of this recommendation. Recommendation of Mar. 20, 1964, BISC, 12<sup>th</sup> Supplement, pp. 49-50.

trade-related measures, whether on a regular/periodic (i.e., semi-annual, annual, biannual or triennial) or a one-off basis, under various WTO agreements, as applicable. For example, the working group identified 175 notification requirements in the WTO Agreements, of which 26 were of a regular or periodic character and the remainder were ad hoc or one-time-only requirements. The Listing of Notification Obligations has been revised and updated in an on-going manner, the latest version being released on June 5, 2002.<sup>79</sup> This Listing gives the details of the notification requirements in the WTO Agreements.

It is necessary to bear in mind that notifications are without prejudice to views on the consistency of the measures with, or their relevance to, rights and obligations under the WTO Agreements.<sup>80</sup> They are simply the provision of required information. Moreover, the notification requirements per se do not appear to be accompanied by penalties for non-compliance.<sup>81</sup> It seems that the failure of one Member to satisfy the notification obligations *itself* would not entitle other Members to initiate the WTO dispute settlement procedure.

While the importance of notification as a basic implementing instrument is fully appreciated, it has been the heavy burden of almost all Members to meet the widespread notification requirements.<sup>82</sup> This problem is particularly prominent in relation to smaller developing countries and LDCs, which are most ill-equipped to handle the essential duty of informing the WTO and other Members about their trade policy and practice. Due to the heavy burden and the lack of capacity, many Members cannot make notifications on time, nor ensure the adequacy and accuracy of the matters notified. Since the WTO only acts as a central depositary or a channel for information sharing, it plays no role in verifying or evaluating the reliability of the notification. From this perspective, the notification obligations on Members are more of a procedural issue.

### B. Review

Review is a typical power of international organizations and is exercised to judge the behavior of States against a rule of international law.<sup>83</sup> Reviews by the WTO or its bodies can oversee and evaluate the Members' status in implementing the WTO Agreements (that is, a monitoring role to

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<sup>79</sup> The WTO Council for Trade in Goods, *Updating of the Listing of Notification Obligations and the Compliance therewith as Set Out in Annex of the Report of the Working Group on Notification Obligations and Procedures*, G/L/223/Rev.8 (June 5, 2002), available at <http://docsonline.wto.org>.

<sup>80</sup> *Decision on Notification Procedures*, *supra* note 75, at ¶ 1.

<sup>81</sup> QURESHI, *supra* note 11, at 95.

<sup>82</sup> CROOME, *supra* note 19, at 335.

<sup>83</sup> Van Hoof & de Vey Mestdagh, *supra* note 29, at 11.

ensure the compliance). The results of review can highlight the existing problems of the Members subject to review, and thus may induce the Members to act in line with the recommendations or advice (a supervisory role in preventing or correcting the non-compliance). Other Members may also initiate the consultations or even the dispute settlement procedure for WTO-inconsistent measures, based on the information revealed through the reviews.

There are three types of review in the WTO system: first, reviews by specified WTO bodies for their designated trade-related areas, on a regular or periodic basis; second, the Trade Policy Review Mechanism established by the WTO Agreements as a comprehensive review of the Members' trade policies and practice; third, the comprehensive, special annual review as applicable to the People's Republic of China ("China"), titled as 'Transitional Review Mechanism.'

### *1. Committee reviews*

One of the main tasks of WTO committees is to review and evaluate the information from the Members. Members are obliged to provide information (through notification or reporting) in specified trade areas to the committee in charge. The regular reviews serve the essential purpose of establishing a common understanding of how the paper commitments in the WTO Agreements are being carried out by Members and to what extent they are implemented in practice. When the responsible committee finds an inconsistency, it can recommend corrective action. Further, when the results of reviews are circulated among all Members, the Member about which there is concern is brought under immediate strong pressure to come into line with the agreements and refrain from going too far on its freedom to set national trade policies.<sup>84</sup>

The committee reviews prescribed in the WTO Agreements can be classified as on-going reviews and regular/periodic reviews. Under the on-going review process, the responsible committee may review and examine Members' specific problems, and dispense advice or observations. This is a general task of WTO bodies, which are responsible to review the information upon Members' notification, examine and advise on specific problems from the Members, study the relevant trade areas and prepare reports. Besides acting as a passive information receiver, in the context of customs valuation, subsidies and antidumping, the relevant committees have the power to seek information from within the a Member's jurisdiction, with the consent of that Member. In TRIPs, this requirement of consent seems to be absent.<sup>85</sup> Undoubtedly, the committees with the positive information-

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<sup>84</sup> CROOME, *supra* note 19, at 334.

<sup>85</sup> TRIPS, *supra* note 55, at art. 68.



seeking powers can discharge their monitoring and supervision functions in a more effective way.

Under the regular/periodic review process, the WTO or its responsible bodies will review the implementation and operation of the relevant WTO Agreements, which will cover not only the whole scenario of a particular agreement but also the implementation issues met by Members. There are three types of regularity in general: annual review,<sup>86</sup> biannual review,<sup>87</sup> and triennial review.<sup>88</sup> The results of review may reveal ambiguities in the agreement texts that need to be solved, possibly by seeking understandings on how the language concerned should be interpreted.

## 2. Trade Policy Review Mechanism ("TPRM")

TPRM is the successor to a GATT arrangement of the same name created in 1989. The creation of this mechanism was largely caused by the increasing recognition among Members of the inherent value of domestic transparency of government decision-making on trade policy. A trade policy review is supposed to be an objective observation against "the background of the wider economic and developmental needs, policies and objectives of the Member concerned."<sup>89</sup> The TPRM has been a standing general monitoring device that scrutinizes, catalogues and discusses each contracting Member's trade policies as a whole since 1989. The purpose of TPRM is to:

[C]ontribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system.<sup>90</sup>

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<sup>86</sup> For example, see the Agreement on Rules of Origin (art. 6.1, by the Committee on Rules of Origin), the Agreement on Antidumping (art. 16.1, by the Committee on Anti-Dumping Practices), and the Agreement on Safeguards (art. 13.1(a), by the Committee on Safeguards).

<sup>87</sup> For example, see the Agreement on Preshipment Inspection (art. 6, by the Ministerial Conference, two years after the establishment of WTO and every three years thereafter), the Agreement on Import Licensing Procedures (art. 7.1, by the Committee on Import Licensing), and TRIPs (art. 71.1, by the Council for TRIPs).

<sup>88</sup> For example, see *SPM Agreement*, *supra* note 61, at art. 12.7, by the Committee on SPM, and *SCM Agreement*, *supra* note 70, at art. 26.1, by the Committee on SCM.

<sup>89</sup> TPRM, *supra* note 3, at ¶ A(ii).

<sup>90</sup> *Id.* at ¶ A(i).

However, TPRM is not intended to serve as a basis for the enforcement of specific obligations under the WTO Agreements, for dispute settlement procedures, or to improve new policy commitments on Members that should otherwise be done through the multilateral negotiation.<sup>91</sup> The Trade Policy Review Body ("TPRB") assumes the task of operating this mechanism.

Therefore, TPRM has two basic tasks: first, to examine the impact of a Member's trade policies and practices on the multilateral trading system; and second, to increase the transparency of Members' trade policies and practices and the relevant decision-making process, thus contributing directly to the monitoring function and indirectly to the supervisory function of the WTO.<sup>92</sup> Although it is not an enforcement mechanism *itself* through which specific WTO obligations are enforced in a legal sense, it facilitates the enforcement in the sense that information revealed in a TPRM may be used by Members as a basis for enforcement.<sup>93</sup> Furthermore, the review process, which involves questioning and criticism by TPRB and other Members, may also be a pressure or a public shame on that Member to correct the WTO-inconsistent trade policies and practices.

The frequency of review depends on one Member's share of world trade. The four Members with the greatest shares (presently Canada, the EC, Japan and the U.S.) are reviewed every two years, the next 16 every four years, and all others every six years (longer periods may be set for the LDCs).<sup>94</sup> From 1989 to the end of 2001, 150 reviews were carried out in total, and 74 out of 130 Members have been subject to reviews (counting the EU as one Member). TPRB has conducted 15 reviews in the year 2001 and plans 17 reviews in 2002.<sup>95</sup>

The operation of TPRM is summarized as follows. For the purpose of review, two reports are prepared, one is the Country Report (by the particular country under review) and the other is the Secretariat Report (by the Trade Policies Review Division of the Secretariat). The Country Report will describe the trade policies and practices pursued by the Member, based on the prescribed format. The Secretariat Report will provide a review on its own account. It is based on the information from the Member under review, through some questionnaires or a visit to the capital of the Member to gather information. The Secretariat Report normally contains six chapters and a summary of observations.<sup>96</sup> After the completion of the Reports, a

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at ¶¶ A, B.

<sup>93</sup> QURESHI, *supra* note 11, at 494.

<sup>94</sup> TPRM, *supra* note 3, at ¶ C(ii).

<sup>95</sup> Report of the Trade Policy Review Body for 2001, WT/TPR/101, (Sept. 18, 2001).

<sup>96</sup> *See id.* The chapters deal with the following topics: the economic environment; the trade policy regime, framework and objectives; trade-related aspects of the foreign exchange

review meeting will be held, usually two days per Member. During the meeting, it is usual for some Members to actively participate in the meeting and comment on the trade policies of the Member under review or criticize inconsistent matters. The Member under review will have a chance to reply to other Members' comments or criticism and explain its positions. The Country and Secretariat Reports, together with the minutes of the review meeting, shall be published promptly after review.<sup>97</sup>

### 3. *Special annual review*

The Protocol on the Accession of China ("the Accession Protocol") sets up a 'transitional review mechanism' under Article 18. It requires the subsidiary bodies<sup>98</sup> of the WTO which have a mandate covering China's commitments under the WTO Agreements or the Accession Protocol to review the implementation by China of the covered agreements and provisions of the Protocol, within one year of China's accession.<sup>99</sup> The General Council shall also review China's implementation within one year of accession.<sup>100</sup> This annual review of China's implementation progress and status will take place after accession each year for eight years, and then there will be a final review in the tenth year or at an earlier date decided by the General Council.<sup>101</sup>

Under this transitional review mechanism, China shall provide relevant information specified in Annex 1A to the Accession Protocol to each subsidiary body in advance of the review. After review, each body shall promptly report the results to the relevant Council or the General Council if applicable.<sup>102</sup> The information required by Annex 1A is wide enough to cover virtually all important aspects of China's economy and trade policies and practices. It includes the economic data, economic policies, framework for making and enforcing policies, policies affecting trade in goods, policies affecting trade in services, TRIP regime, and any specific questions in the context of the transitional review mechanism (received by the General Council or relevant subsidiary bodies from other Members).<sup>103</sup>

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regime; trade policies and practices by measure; trade policy and practices by sector; trade disputes and consultations.

<sup>97</sup> TPRM, *supra* note 3, at ¶ C(vi).

<sup>98</sup> These bodies include Council for Trade in Goods, Council for Trade-Related Aspects of Intellectual Property Rights, Council for Trade in Services, Committees on Balance-of-Payments Restrictions, Market Access, Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Rules of Origin, Import Licensing, Trade-Related Investment Measures, Safeguards, Trade in Financial Services. The list covers almost all WTO bodies.

<sup>99</sup> Accession of the People's Republic of China, WT/L/432 art. 18(1).

<sup>100</sup> *Id.* at art. 18(2).

<sup>101</sup> *Id.* at art. 18(4).

<sup>102</sup> *Id.* at art. 18(1).

<sup>103</sup> *Id.* at Annex 1A.

The annual review by the General Council is to be conducted in accordance with the framework set out in Annex 1B and in the light of the results of any review held by subsidiary bodies. According to Annex 1B, the General Council will review the reports and the issues by each subsidiary, the development of China's trade with WTO Members and other trading partners (including the volume, direction and composition of trade), and recent developments and cross-sectoral issues regarding China's trade regime. China is obliged to submit any information and the documentation relating to the review no later than 30 days prior to the date of review.<sup>104</sup> "The General Council may make recommendations to China and to other Members in these respects."<sup>105</sup>

This unprecedented review mechanism has some special features. First, the scope of review and the WTO bodies involved are much wider than the regular committee reviews and the TPRM as aforementioned. It involves sixteen subsidiary bodies of the WTO, each in charge of China's commitments in the area of that body's mandate. The General Council will have a review on the basis of these individual reviews. From this perspective, China is subject to a consolidated reviewing framework, incorporating the monitoring and supervision from all aspects of the WTO Agreements. In contrast, the TPRM is conducted by the TPRB, neither involving so many subsidiary bodies nor a higher level of the comprehensive review by the General Council. Second, this review would be more intrusive in the sense that it aims to evaluate not only the general economic and trade policies, but also the specific progress of implementing the WTO Agreements (for example, the progress in withdrawing or amending inconsistent legislations, the situation of accepting certain rules, etc.). The latter contents are beyond the normal scope of TPRM. In this regard, it is fair to say that the transitional review mechanism is toward an 'implementation status' review, rather than a mere 'trade policy' or broad 'economic policy' review. Third, this review supplements the normal committee reviews and the TPRM rather than supplanting them. Given its rank in the current international trading system, China will be subject to a TPRM every four years.<sup>106</sup> In addition, involved subsidiary bodies will also carry out regular reviews. Of course, considering that China's provision of information on an annual basis is quite frequent, their reviews under the transitional mechanism may to a large degree satisfy the function of regular review.

The design of a transitional review mechanism for China illustrates the deep concerns of the WTO and other Members regarding China's capacity and intention to implement its widespread commitments. This is partly

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<sup>104</sup> *Id.* at Annex 1B.

<sup>105</sup> *Id.* at art. 18(2).

<sup>106</sup> NICHOLAS R. LARDY, *INTEGRATING CHINA INTO THE GLOBAL ECONOMY* 104 (2002).

owed to the fact that China has a somewhat special 'socialist market economy' system, with certain distinct characteristics not found in the normal market economy. For example, the state interference or influence into the economy and the enterprise operation (especially those state-owned enterprises) is still strong and may exist for quite a long period. Some market elements, e.g., foreign exchange rate, land, labor and financing, are still immature or distorted by government policies. Further, the one-party system may not provide the correct checks and balances to ensure that China honors its commitments to the WTO. Therefore, the transitional review mechanism is put in place to impose a stronger monitoring and supervision on China's implementation of the WTO Agreements.

The operation of this special review mechanism will be a challenge not only to China but to the WTO itself. China is under stringent reviews by the WTO and other Members, and the annual review process would be an administrative challenge requiring the tremendous amount of information and documentation to be provided to the relevant WTO bodies. More significantly, China is now under a spotlight for the progress and steps of implementing the WTO commitments, and has an obligation to report to the WTO. The international pressure created by the review mechanism may induce China to act in line with the WTO Agreements and its commitments. On the other hand, the WTO assumes the annual review task, also increasing its administrative burdens. Whether and how the WTO can function well in this new mechanism may be important to its credibility and reliability as an international institution. It is interesting to see whether other countries with backgrounds similar to China, such as Russia and Vietnam, will be subject to this special mechanism upon their accession to the WTO.

### C. Consultation

Consultation is a negotiation between parties aiming to settle the issues concerned. With an informal character, it is a flexible instrument of implementation that is extremely suitable when States are reluctant to relinquish sovereign powers.<sup>107</sup> There is no obligation to reach the agreement after consultation, but the existence of this procedure provides a channel for one party to supervise the behaviors of another party and to seek an explanation, to persuade another party to keep in line with specified principles and rules, or to find out an acceptable solution for potential disputes. In this respect, the consultation will also facilitate the enforcement of rules and serve the function of correcting non-compliance. When the consultation procedure is mandatory before performing one kind of behavior or triggering formal dispute settlement procedures, its deterrence and correction

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<sup>107</sup> Van Hoof & de Vey Mestdagh, *supra* note 29, at 195.

functions will be further strengthened.

Within the WTO framework, there are two types of consultation: non-contentious consultation and contentious consultation. Contentious consultation refers to the mandatory consultation procedure within the dispute settlement system, as prescribed by the DSU, which must be carried out between the complaining party and the respondent before the complaining party can request to establish the panel to hear the case. Non-contentious consultation, in contrast, refers to all other consultations which are not a pre-condition of entering into the dispute settlement procedure, although the failure to reach agreement may cause the complaining party to initiate the contentious consultation later.<sup>108</sup>

### *1. Non-contentious Consultation*

Article XXII:1 of GATT 1994 is the basic provision on the non-contentious consultation with a general character. It says that each Member “shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another [Member] with respect to any matter affecting the operation of this Agreement”. Article XXII:2 further authorizes the WTO, upon request of a Member, to consult with any Member in respect to any matter for which it is not possible to find a satisfactory solution through the mutual consultation under Article XXII:1.<sup>109</sup> The consultation procedure, either as mutual between two Members or between one Member and the WTO acting on behalf of another Member, serves the function of the WTO as a forum among its Members concerning their multilateral trade relations.<sup>110</sup> More specifically, the various WTO committees will act as the forum for consultations in relation to the operation and objectives of the relevant agreement.

There are at least three types of non-contentious consultation dealing with the subject matter: the existence of one Member’s behavior; the prospective actions of one Member; and the coordination of Members’ behavior. The first type relates to the negotiation between two Members concerning the existence of a trade-related behavior of one party. It is a

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<sup>108</sup> Some scholars hold that consultations under Article XXIII:1 are the first step in dispute proceedings. See MCGOVERN, *supra* note 73, at ¶ 2.231. However, this view only focuses on the contentious nature of the consultations as the first step of dispute resolution, but ignores other functions of consultation not directly relating to the disputes. From a point of dispute proceedings, any consultation that occurred before the proceedings but failed to achieve the agreements can be said to be the first step of dispute proceedings, if such proceedings are finally triggered.

<sup>109</sup> One example is the restrictions on balance-of-payment. When the adversely affected Member and the Member imposing the restrictions fail to have a fruitful mutual consultation, the first Member can request the Committee on Balance-of-Payments Restrictions to step in to the consultation. GATT 1994 art. XII.

<sup>110</sup> Final Act, *supra* note 1, at art. III:2.

kind of post-consultation. For example, where a Member is not being accorded the concession in its schedule because of a ruling under the domestic law of another Member with respect to the classification of a product, the Members involved, together with other Members substantially interested, shall enter into negotiations for compulsory adjustment.<sup>111</sup>

The second type is in essence a kind of prior consultation before one Member can adopt certain actions affecting another Member. This is a strong form of supervision in the implementation framework, because it allows other Members to interfere in an early stage based on the evaluation of one Member's prospective actions. For example, one Member shall consult other Members whose products are the subject of investigation before the initiation of a countervailing duty investigation, aiming to arrive a mutually agreed-upon solution.<sup>112</sup> For the restrictions for economic development purposes, where the restrictions relate to products that are the subject of concession in one Member's schedule of concessions, that Member is to consult with other Member(s) with which the concession was initially negotiated, or any other Members substantially interested.<sup>113</sup> Under the Agreement on Safeguard, the Member contemplating to initiate a safeguard measure shall provide adequate opportunities for the prior consultation with other Members having substantial interest in the export of any related product.<sup>114</sup>

The third relates to the coordination of certain trade-related behaviors between two Members and is in most cases a 'best-endeavor' process. For example, Members are encouraged to enter into consultation with a view to entering into bilateral or multilateral arrangements on the recognition of equivalent sanitary and phytosanitary measures.<sup>115</sup>

Notably, there is no absolute borderline between the non-contentious and the contentious consultations, especially for the first and second types of the non-contentious consultations. When the Member initiating the consultation has a view that the subject matter under consultation would be in violation of the WTO Agreements, it can also choose to start the contentious consultation procedure under the DSU directly. When the Member is invited to be consulted in advance, the failure of achieving agreements may urge it to start the dispute settlement procedure immediately after the adoption of that action by another Member.

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<sup>111</sup> GATT 1994, *supra* note 55, at art. II:5.

<sup>112</sup> *SCM Agreement*, *supra* note 70, at art. 13.

<sup>113</sup> GATT 1994, *supra* note 55, at art. XVIII.

<sup>114</sup> Agreement on Safeguards, *supra* note 86, art. 12.3.

<sup>115</sup> *SPM Agreement*, *supra* note 61, at art. 4.

## 2. Contentious consultation

The consultation requirement in the DSU is a fundamental component of the WTO dispute settlement system. This process is essentially a political one, aimed at producing a mutually agreed-upon solution consistent with the WTO rules.<sup>116</sup> Its basic purpose as set out in the DSU is to encourage Members to “obtain satisfactory adjustment of the matter”.<sup>117</sup> This accommodates the overall goal of WTO dispute settlement procedure. Article 3.7 of the DSU states: “[T]he aim of the dispute settlement mechanisms is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the [WTO] Agreements is clearly to be preferred.”

The WTO dispute settlement procedure starts when a Member formally requests the consultation of another Member. The consultation request must be in writing, it must identify the measures of the other Member that are being challenged, and provide “an indication of the legal basis for the complaint” (i.e., the provisions of the substantive WTO Agreements that the other Member has allegedly violated).<sup>118</sup> The requests of consultation shall be notified to the DSB and the relevant WTO Councils and Committees by the complaining party.<sup>119</sup> Unless otherwise agreed, a reply to the consultation request must be made within 10 days, and the consultations should begin within 30 days of the receipt of the request. Failing to do this will entitle the complaining party to proceed directly to the establishment of a panel.<sup>120</sup> When the consultation begins, it shall be held in confidence and without prejudice to the rights of any Member in any further proceeding.<sup>121</sup> During the process of consultation, the Members can voluntarily use three other mechanisms to solve the disputes: good offices, conciliation, and mediation.<sup>122</sup>

If consultation fails to settle a dispute within 60 days of being requested (or earlier if agreed), the complaining party may request the establishment of a panel.<sup>123</sup> It is estimated that the minimally required consultation period would be 71 days, the minimum period of 60 days for consultations plus the advance notice for the DSB meetings to establish the

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<sup>116</sup> William J. Davey, *WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding “Over-Legalization,”* in *NEW DIRECTION IN INTERNATIONAL ECONOMIC LAW* 292-93 (M. Bronckers & R. Quick eds., 2000).

<sup>117</sup> DSU, *supra* note 44, at art. 4.5.

<sup>118</sup> *Id.* at art. 4.4.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at art. 4.3.

<sup>121</sup> DSU, *supra* note 44, at art. 4.6.

<sup>122</sup> *Id.* at art. 5.

<sup>123</sup> *Id.* at art. 4.7.



panel.<sup>124</sup> Since the consultation is confined to the parties, the complaining party need not show that the issue referred for consultations was actually discussed in depth, but only that they took place, or were at least requested, and that 60 days elapsed before the panel request was made.<sup>125</sup>

It is clear that the intention of this consultation procedure is to promote and enhance the resolution of disputes without the need for establishing a panel, i.e., a filtering effect. As of January 1, 2002, 242 requests for consultation have been made, and 128 out of the total 242 cases have been settled, within which 70 cases were resolved by the DSB rulings and recommendations, 39 cases were settled bilaterally and 19 cases were concluded in other ways (such as amendment or expiration of the measures in dispute, withdrawal of the complaints, settlement through inaction, or a new request for consultations superseding the former matter).<sup>126</sup> None of the disputes was resolved by diplomatic means of settlement such as good office, conciliation or mediation under Article 5 of DSU. Therefore, the rate of bilateral settlement is around 30 percent of the total settled cases. In this regard, it is fair to say that the WTO is quite successful in resolving disputes without resorting to a Panel. Since the DSU contemplates that parties, by mutual agreement, may desire to continue the consultation after the expiration of the 60-day period, the actual period of consultation would be much longer. For example, it is observed that most disputes resolved through the consultation process before 2000 appeared to be settled within a five-to-fifteen month period subsequent to the initial notification of the dispute, while only two of the disputes were settled within the 60-day period.<sup>127</sup> On the one hand, this tendency shows the possible delays of the consultation process; on the other hand, it also suggests that the involved Members may mutually accept such a delay as a way to avoid the formal panel procedures, reflecting the diplomatic nature of the consultation and the political aspect of the DSU.

While recognizing that the consultation procedure *does* serve the filtering effect and function to solve disputes bilaterally, it should have an objective assessment of its status in the implementation mechanisms. There are some doubts about the efficacy and utility of this procedure. In some cases,

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<sup>124</sup> Davey, *supra* note 116, at 293-94.

<sup>125</sup> Reports of Panel on European Communities – Regime for the Importation, Sale, and Distribution of Bananas (“the Banana case”), WT/DS27/ECU, WT/DS27/GTM, WT/DS27/HND, WT/DS27/MEX, ¶ 7.19 (Sept. 9, 1997); Report of panel on Korea – taxes on alcoholic beverages, WT/DS75/R, WT/DS84/R, ¶ 10.19 (Sept. 17, 1998).

<sup>126</sup> Young Duk Park & Marion Panizzon, *WTO Dispute Settlement 1995-2001: A Statistical Analysis*, 5 J. INT’L ECON. L. 221, 227-29 (2002).

<sup>127</sup> Olin L. Wethington, *Commentary on the Consultation Mechanism under the WTO Dispute Settlement Understanding During its First Five Years*, 31 LAW & POL’Y INT’L BUS. 583, 585 (2000).

the respondent does not negotiate in good faith, especially when the prospects of resolving the disputes by a panel are inevitable.<sup>128</sup> Under this circumstance, the consultation is in effect a tactic of delay. It is partly because in most cases, the dispute settlement procedure is invoked after extensive effort to resolve differences outside the WTO context, so the entry into consultation is merely a procedure before reaching a panel decision.<sup>129</sup> Generally speaking, consultations will encourage the resolution of disputes in the relatively straightforward cases, in the absence of overwhelming domestic political pressures.<sup>130</sup> Even for those settled, the consultation itself is only a procedure to bring the parties to the table for serious negotiations and acts as one of the factors leading to the settlement, rather than as the single contribution to the resolution.

#### D. Implementation of the DSB Recommendations and Rulings

Articles 21 and 22 of the DSU govern the implementation of the DSB recommendations and rulings against the losing party. It recognizes that “prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”<sup>131</sup> The DSU establishes three implementation procedures.<sup>132</sup> The first are the procedures and guidelines for establishing a compliance deadline, or “reasonable period of time” for coming into compliance. The second are the ‘compliance review’ procedures to be used when there is a disagreement over whether the losing party had complied with the recommendations and rulings. The third are the procedures for the suspension of concessions if the losing party fails to implement the DSB recommendations and rulings or otherwise satisfy the winning party by its implementation deadline. Under these procedures, the DSB recommendations and rulings can be implemented in three ways: (1) withdrawal of the WTO inconsistent measures (“withdrawal”), achieved by the losing party’s changing laws, regulations and/or practices; (2) compensation to the winning party; and (3) retaliation authorized by the DSB if the losing party fails to comply and refuses to pay compensation.

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<sup>128</sup> For example, the EC argued in the *Bananas III* case that the consultations in that case did not serve the purpose for which they were intended. It is clear that this case could only be resolved after a panel ruled whether the discriminatory aspects were WTO-consistent or not. The Banana case, WT/DS27/ECU, ¶ 7.18 (May 22, 1997).

<sup>129</sup> Wethington, *supra* note 127, at 588.

<sup>130</sup> *Id.* at 586.

<sup>131</sup> DSU, *supra* note 44, at art. 21.1.

<sup>132</sup> Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL’Y INT’L BUS. 709, 713 (2000).

*1. The implementation process*

There are three phases for the implementation process under the DSU: the acceptance of the implementation plan, the monitoring of the implementation, and the compensation/retaliation.

(a) Acceptance of the implementation plan

If the final report finds that a Member has acted inconsistently with its WTO obligations, or nullifies or impairs benefits accrued to other Members, Article 21.3 requires that the Member notify the DSB of its plan for implementing the DSB recommendations and rulings at a DSB meeting held within 30 days after the report is adopted. If it is "impractical to comply immediately with the recommendations and rulings," the Member shall have a "reasonable period of time" to do so.<sup>133</sup>

There are three alternative methods to determine a "reasonable period of time." The first option, under Article 21.3(a), is "the period of time proposed by the Member concerned provided that such period is approved by the DSB," that is, the time period acceptable to the winning party and all other DSB Members. Second, "in the absence of such approval," Article 21.3(b) provides that a "reasonable period of time" is "a period of time agreed by the parties to the dispute within forty-five days" after the date of adoption of the final report. Finally, "in the absence of such agreement," Article 21.3(c) provides that "a reasonable period of time" will be "determined through binding arbitration within ninety days" after the date of adoption of the final report. It further provides that "[a] guideline for the arbitrator should be that the reasonable period of time ... should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the *particular circumstances*" (emphasis added).

Consequently, the disputed issues are usually how long such a reasonable period of time should be and what kinds of "particular circumstances" the arbitrator should take into account.

In early arbitrations, the arbitrators acted as though there was a presumption in favor of the 15-month period.<sup>134</sup> However, the *EC-Hormones* case marks the end of the 15-month guideline model, and introduces the "immediate compliance" model. In the award, the reasonable period of time was authoritatively defined as "the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."<sup>135</sup> Arbitrators draw a line between legislative and administra-

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<sup>133</sup> DSU, *supra* note 44, at art. 21.3.

<sup>134</sup> MCGOVERN, *supra* note 73, at ¶ 2.24.

<sup>135</sup> Report of arbitration on EC measures concerning meat and meat products (hormones), WT/DS26/15, WT/DS48/13, ¶ 26 (May 29, 1998).

tion actions taken by the losing party to implement the recommendations and rulings. The *Canada – Patent* award held:

[I]f implementation is by administrative means, such as through a regulation, then the ‘reasonable period of time’ will normally be shorter than for implementation through legislative means. It seems reasonable to assume, unless proven otherwise due to unusual circumstances in a given case, that regulations can be changed more quickly than statutes. To be sure, the administrative process can sometimes be long; but the legislative process can oftentimes be longer.<sup>136</sup>

Nowadays, a losing party usually has 8 months for administrative implementing measures or 12 months for a legislative action.<sup>137</sup> However, the losing party is not obliged to use an extraordinarily legislative procedure,<sup>138</sup> although it is expected to take the flexibility in such procedures.<sup>139</sup> The choice and timing of the detailed operating steps in enacting a new law are properly left to the party itself.

Once the losing party chooses the implementing means, the debate focuses on the “particular circumstances” upon which the reasonable period of time may be shorter or longer. Arbitrators have accepted the delays caused by the complexity of a Member’s rule-making processes,<sup>140</sup> by the procedures that officials must normally follow even if they are not legally binding (e.g., administrative guidelines),<sup>141</sup> and by the developing country status and the disastrous economic and financial situations.<sup>142</sup> They refused to consider the factors such as the controversial nature of the measure,<sup>143</sup> the political party balance in parliament,<sup>144</sup> the summer vacation<sup>145</sup> or the need

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<sup>136</sup> Report of arbitration on Canada—patent protection of pharmaceutical products, WT/DS114/13, ¶ 49 (Mar. 17, 2000).

<sup>137</sup> Pierre Monnier, *The Time to Comply with an Adverse WTO Ruling: Promptness within Reason*, 35 J. WORLD TRADE 825, 831 (2001).

<sup>138</sup> Report of panel on Korea—taxes on alcoholic beverages, *supra* note 125 (June 4, 1999).

<sup>139</sup> See Report of arbitration on United States—Section 110(5) of the US Copyright Act, WT/DS160/12, ¶ 39 (Jan. 15, 2001).

<sup>140</sup> See, e.g., Report of arbitration on EC—regime for the importation, sale, and distribution of bananas, WT/DS27/15, ¶ 19 (Jan. 7, 1998); see also Report of arbitration on EC, *supra* note 135, at ¶ 47.

<sup>141</sup> Report of arbitration on Canada, *supra* note 136, at ¶ 41.

<sup>142</sup> Report of arbitration on Indonesia—Certain Measures Affecting the Automobile Industry, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, ¶ 24 (Dec. 7, 1998).

<sup>143</sup> Report of arbitration on United States—Section 110(5) of the US Copyright Act, WT/DS160/12, ¶ 41 (Jan. 15, 2001).

<sup>144</sup> Report of arbitration on Canada—term of patent protection, WT/DS170/10, ¶ 60 (Feb. 28, 2001).

<sup>145</sup> Report of arbitration on Canada—patent protection of pharmaceutical products, WT/DS114/13, ¶ 61 (Aug. 18, 2000).

for structural adjustment.<sup>146</sup> To generalize, the arbitrators tend to take into account the complexity of the domestic legislative or regulatory system, the constraints on the speed and flexibility of legislators and administrative officials, and occasionally, the special consideration to developing countries (especially which are in the deep economic recession).

(b) Monitoring the implementation

The second phrase is the monitoring during the implementation period as determined in the first phrase. The winning party has two principal ways to compel a losing party's compliance with the final report.

First, Article 21.5 provides:

[W]here there is disagreement as to the *existence or consistency* with a covered agreement of *measures taken to comply with the recommendations and rulings* such dispute shall be decided through recourse to *these dispute settlement procedures*, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it (emphasis added).

In other words, if the losing party at any point during the implementation period takes an action that it claims to be in compliance with the recommendations and rulings, and the winning party disagrees, the winning party can request a ninety-day review by a panel for the WTO consistency of such actions. The arbitration can even be requested before the expiration of the reasonable period if the measures are sufficiently certain to permit arbitration. Further, the purpose of Article 21.5 is to review the compliance by the losing party, including its actions and no-actions, so the phrase "measures taken" needs to be read as 'measures taken or should be taken.' Otherwise, a mere no-action by the losing party will never create a measure, so there is no chance to initiate the Article 21.5 compliance review because there is no 'existence' of such a measure at all. The Appellate Body has clarified that the "measures" means the measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings.<sup>147</sup>

However, there are two critical issues in relation to the operation of this "compliance review" arbitration procedure. First, suppose the losing party refuses to take any action to withdraw its inconsistent measures or bring them in compliance with the DSB recommendations and rulings during the implementation period. Could the winning party directly request the

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<sup>146</sup> See, e.g., *id.* at ¶ 52.

<sup>147</sup> Report of Appellate Body on Canada—measures affecting the export of civilian aircraft—recourse by Brazil to DSU Article 21.5, WT/DS70/AB/RW, ¶ 36 (July 21, 2000).

arbitration before the expiration of the implementation period, or must it wait until the expiration of that period? This situation occurred in the *EC-Bananas* case. In this case, EC's import regime for bananas was held to be inconsistent with the WTO Agreements in a number of aspects. Six months before its reasonable period expired, the EC approved the "reforms," which were viewed by the winning parties as still WTO-inconsistent and had been strongly opposed during the process of its proposal and adoption.<sup>148</sup> The U.S. proposed to have an Article 21.5 compliance review immediately by the original panel, but the EC rejected this request for several months, insisting that such a review could not be undertaken until the EC's reasonable period had fully expired.<sup>149</sup> From the text of Article 21.5, in order to decide whether there is an existence or non-existence of the compliance measures by the losing party, the winning party does have to wait until the expiration of the implementation period, because theoretically it is possible for the losing party to implement the recommendations and rulings on the last day of the implementation period. But from another view, Article 21.5 may be merely a tool for buying several months of additional time by the losing party to evade its obligations.

Secondly, should Article 21.5 require the winning party to follow normal WTO dispute settlement procedures in order to challenge the new measures (i.e., consultations, request for a panel, a ninety-day panel review, an Appellate Body review, and another reasonable period)? Again, the EC raised this argument in the *EC-Bananas* case. The root for this issue is the ambiguities in the phrase 'these dispute settlement procedures' of Article 21.5, without a precise definition. In the *EC-Bananas* case, the EC acknowledged that the reasonable period of time can only be used once: if the implementing measures are found in the Article 21.5 proceeding to be illegal as well, the other party can proceed to a request for retaliation and need not await any further Article 21.5 proceedings to assess any possible new implementing measures taken after the end of the reasonable period of time.<sup>150</sup> Although such an argument emerges less frequently in subsequent Article 21.5 compliance reviews, it is necessary to clarify whether these reviews should be less than normal dispute settlement procedures when the Members are negotiating the amendment of the DSU.<sup>151</sup>

The second way of implementation is the DSB's ongoing surveillance. Article 21.6 provides that "the DSB shall keep under surveillance the im-

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<sup>148</sup> Gleason and Walther, *supra* note 132, at 720-24.

<sup>149</sup> *Id.* at 723.

<sup>150</sup> Allan Rosas, *Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective*, 4 J. INT'L ECON. L. 131, 142 (2001).

<sup>151</sup> This point has already been addressed in the Draft Decision Regarding the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/MIN(99) (Dec. 2, 1999).

plementation of adopted recommendations or rulings.” Further, the winning party can raise the issue of implementation at any time following their adoption. Unless otherwise decided by the DSB, the issue of implementation shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB’s agenda until the issue is resolved. During this process, the losing party is required to submit a “status report” in writing of its implementation progress ten days before each such meeting of the DSB.<sup>152</sup> This mechanism aims to impose a public pressure and shame on the losing party, urging its prompt implementation. However, there are no detailed requirements on the manner and the contents of the status report, and the losing party can simply report that “significant progress” has been made and then satisfy the Article 21.6 reporting. When an issue sensitive to domestic politics is concerned, it is not unusual that the government of a losing party will ignore the international pressure in return for the domestic support.

### (c) Compensation/Retaliation

Article 22.2 provides that if the losing party does not implement the recommendations and rulings within the reasonable period of time, the winning party may seek compensation. The losing party shall enter into consultations “with a view to developing mutually acceptable compensation.” If no acceptable compensation has been agreed within twenty days after the expiration of the reasonable period of time, the winning party may “request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”<sup>153</sup> In accordance with Article 22.4 and 22.6, within thirty days of the end of the reasonable period, the DSB is required to authorize the retaliation if the parties have not agreed to compensation, equivalent to the level of the nullification or impairment. Under Article 22.3, the winning party should first seek the suspension with respect to the same sector(s) in which the final report has found the breach by the losing party (the same-sector retaliation); if it considers the same-sector retaliation not practicable or effective, the retaliation may be aimed at other sector(s) under the same agreement (the cross-sectoral retaliation); if it considers the cross-sectoral retaliation not practicable or effective and the circumstances are serious enough, the retaliation may be aimed at other agreements (the cross-agreement retaliation). The retaliation should be temporary in nature, and shall only be applied until such time as the WTO-inconsistent measure has

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<sup>152</sup> DSU, *supra* note 44, at art. 21.6.

<sup>153</sup> *Id.* at art. 22.2.

been withdrawn, or the satisfactory solution has been provided by the losing party or been achieved mutually.<sup>154</sup>

There are only two exceptions to this mandatory DSB-authorized retaliation. First, the DSB may decide by consensus to reject the request of retaliation by the winning party, which is unlikely in practice. Second, an Article 22.6 arbitration is initiated by the losing party. If the losing party “objects to the level of suspension proposed, or claims that the principles and procedures [of suspension under Article 22.3] have not been followed,” the matter should be arbitrated by the original panel (if members are available) or by an arbitrator.<sup>155</sup> The arbitration shall be completed within 60 days after the date of expiry of the reasonable period of time.<sup>156</sup> The arbitrator is mandated to determine whether the level of the suspension is equivalent to the level of nullification or impairment and whether the proposed suspension is allowed under the covered agreement, as well as the claims that the winning party’s proposed retaliation does not follow the principles and procedures of Article 22.3.<sup>157</sup> Upon issuance of the arbitrator’s decision, the DSB, upon request, must authorize the retaliation consistent with that final decision.<sup>158</sup>

One key issue is that there is a potential conflict between Articles 21.5 and 22. Article 21.5 sets out the compliance review on the existence and consistence of the measures taken by the losing party for implementation. Article 22 provides that the winning party can request the DSB to authorize the retaliation if the losing party fails to implement the recommendations and rulings before the expiration of the implementation period. However, should the Article 22 authorization be conditional on the findings of the Article 21.5 compliance review (in other words, only after the Article 21.5 review finds that the implementation measures are not satisfactory can the winning party request the DSB authorization), or initiated automatically once the implementation period expires (that is, irrespective of whether there exists the Article 21.5 review or such a review is still pending)? There is no clear sequence of these two procedures in the DSU, and again, such an ambiguity was fully argued by the EC in the *EC-Bananas* case.<sup>159</sup> Common sense suggests that the panel must make a finding of non-compliance before a party can seek authorization to retaliate for failure to comply, otherwise it would be a kind of unilateral decision by the winning party on the losing party’s implementation status, rather than with recourse

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<sup>154</sup> *Id.* at art. 22.8.

<sup>155</sup> *Id.* at art. 22.6.

<sup>156</sup> *Id.* at art. 22.6. In practice, Article 22.6 arbitration often exceeds the 60-day period.

<sup>157</sup> DSU, *supra* note 44, at art. 22.7.

<sup>158</sup> *Id.* at art. 22.7.

<sup>159</sup> In the *Bananas* case, the EC eventually required an Article 22 arbitration on the level of the US’s proposed suspension of concessions.



to the WTO dispute settlement procedures as required under Article 23 of the DSU. However, the sequencing conflict between Articles 21.5 and 22 cannot be solved unless the DSU is amended by Members to address this issue.<sup>160</sup> In practice, the parties to disputes have adopted the approach of bilateral agreements to clarify the sequencing of proceedings under these two articles, most of which require awaiting the result of the Article 21.5 compliance review before the request of retaliation.<sup>161</sup>

## *2. Evaluating the effectiveness of the implementation process*

To evaluate the effectiveness of the implementation process, two criteria are the most important: speed and completeness.

There is a relatively clear timetable for each phrase of the implementation process. In general, the time from the initiating of dispute settlement procedures to the implementation of the final report may be in the area of 2-3 years. For the implementation process, the maximum time-frame from the adoption of the final report to the retaliation authorized by the DSB would be about 24 to 25 months, and the average time in practice would range from 12 to 16 months. Such a waiting period *itself* is not a problem, because all Members agree and accept it under the WTO Agreements. However, the problem is that the existing system provides the losing party a chance to exploit the procedures to their fullest extent and thus may create an undesirably long timetable for the injured party. The usual delay tactics may include the Article 21.3 arbitration for the reasonable period of time, the Article 21.5 compliance review and the Article 22.6 arbitration on suspension. By using these procedures, the losing party can at least earn about six more months before it actually implements the recommendations and rulings.

The current DSU system has in effect some incentives for the losing party to try delaying the implementation of recommendations and rulings, especially for those which may arouse strong domestic resistance. Besides the employment of the ambiguities and drafting oversights of the DSU and the full-extent use of all available delay tactics, one fundamental feature of the WTO enforcement mechanism—the lack of reparative damages—acts as the most significant incentive to the delay. As mentioned above, the DSU prefers the withdrawal of the WTO-inconsistent measures, which can occur only before the expiration of the reasonable period. When the with-

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<sup>160</sup> On January 25, 1999, the General Council referred this matter to the DSB to be dealt with in the context of the scheduled DSU Review. No consensus was reached for amendment to the DSU, so this matter has not been fully resolved. EC - Authoritative Interpretation under Article IX:2 WTO Agreement, WT/GC/W.133 (Jan. 25, 1999).

<sup>161</sup> For details, see S. A. Rhodes, *The Article 21.5/22 Problem: Clarification Through Bilateral Agreements*, 3 J. INT'L ECON. L. 553, 555-56 (2000).

drawal is not achieved, two parties concerned can negotiate for compensation. Only if the negotiation of compensation does not work or the winning party gives up such a negotiation chance will the suspension of concessions be authorized by the DSB—even so, it is still in a temporary nature.<sup>162</sup> Therefore, the remedies under the WTO system are *prospective* and forward-looking (that is, the losing party commits to withdraw the inconsistent measure and avoid causing *future* injury), rather than *retrospective* (that is, the losing party shall commit to avoid future injury and also to be liable to compensate past injuries). As the EC expressed unequivocally its view in one case, which has been broadly agreed with by US and other countries:

The absence of remedy for past and consummated violations is a well-known feature of the GATT/WTO system. First, it is inherent in the principle that DSB rulings do not have retroactive effect. Second, it is established and accepted that it can lead in some cases to there being no remedy at all for the complaining party.<sup>163</sup>

In other words, the losing party takes no liability of compensation for introducing a WTO-inconsistent measure, and at least can maintain such a measure before and during the panel procedures and until the expiration of the implementation period. For the winning party, the damages to its affected industries before the withdrawal of this measure—which is the most ideal outcome of the enforcement mechanism—cannot be compensated. Therefore, in an extreme case, it is fully available for one Member to introduce a WTO-inconsistent measure, even intentionally, in order to serve some most urgent needs (e.g., subject to the domestic political pressures), and then wait to be challenged by another Member and withdraw it after the adverse finding of the final report—still in a good reputation of implementing the WTO rulings in time.

The second criterion is the completeness of the implementation of recommendations and rulings. The withdrawal of the inconsistent measure is the primary objective of the implementation, and the DSU provides various mechanisms to monitor and enforce this objective. However, there is a fundamental problem: what if the losing party refuses the withdrawal? Under such a scenario, can the losing party pay compensation to the winning party or even accept the retaliation in return for the maintenance of such measure? Is there any further mechanism to redress this situation? Even this problem may not arise to the full extent in practice; the answers will reveal the nature of the dispute settlement procedures as well as the ultimate effectiveness of the implementation process.

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<sup>162</sup> DSU, *supra* note 44, at art. 22.8.

<sup>163</sup> Report on United States – Import Measures on Certain Products from the European Communities, WT/DS165/R, ¶ 5.12 (July 17, 2000).

The provisions of DSU stipulate that the compensation and the suspension of concessions shall be “temporary” and only be applied until the losing party fully implements the recommendations and rulings.<sup>164</sup> However, the term “temporary” is not defined, so it could be a considerable period of time. The reason for refusing the compensation as a replacement of the withdrawal of inconsistent measures is to prevent the losing party from seeking the “purchase of impunity” through compensation, which would otherwise create a system where Members with sufficient financial resources would have been able to maintain inconsistent measures indefinitely, thus putting less resourceful Members at a disadvantage.<sup>165</sup> Similarly, the authorization of retaliation for small developing countries against giant developed countries (e.g., US and EU) may not have the practical effect, because of the political and broader economic considerations. Therefore, allowing the retaliation as a substitute to the withdrawal of inconsistent measures would result in a double jeopardy to the weaker Members in international economy: the WTO-inconsistent measures of the losing party still exists, but the winning party may not be able to actually carry out the retaliation or even to find enough imports from the losing party for the suspension of concessions.

Although the DSU texts clearly demonstrate the priority and the expectation of compliance, it does not stipulate the consequences for the losing party’s refusal of the full implementation, which shows the DSU’s deliberate silence on this point. Therefore, if the losing party chooses to negotiate compensation, or if the negotiation fails to accept the retaliation, there is no prohibition in the DSU. The DSU enforcement mechanism has been exhausted, and there is no supplementary mechanism available to the winning party to enforce the recommendations and rulings instead. The losing party will still be subject to the DSB surveillance and the public pressure, and of course may change its position afterwards. However, such a change is more likely to be caused by other factors such as political and domestic elements. This nature has already been articulated by the U.S. and the EC. In the U.S., the Statement of Administrative Action (SAA) to the 1994 *Uruguay Round Agreement Act* emphasizes the ability of the Congress to decide whether any change to US law will be made in response to a panel decision: “if a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.”<sup>166</sup> SAA further states:

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<sup>164</sup> DSU, *supra* note 44, at art. 22.8.

<sup>165</sup> Patricio Grane, *Remedies Under WTO Law*, 4 J. INT’L ECON. L. 755, 762-63 (2001).

<sup>166</sup> *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. 103-316, 103d Cong. 2d Sess. 1016 (1994).

The DSU recognizes that it may not be possible for a government to agree to the removal of a measure that a panel has found to be inconsistent with a Uruguay Round agreement. Accordingly, it provides for alternative resolutions, including the provision of trade compensation and other negotiated settlements, or the suspension of benefits equivalent to the ‘nullification or impairment’ of benefits caused by the offending measure.<sup>167</sup>

Similarly, the European Court of Justice acknowledges in *Portugal v. Council*<sup>168</sup> that the compensation under Article 22.2 is of a temporary nature, but adds that,

[T]o require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.<sup>169</sup>

It strongly suggests that even if the compensation (and similarly, the retaliation) is temporary, it is a full legitimate alternative to the losing party under the DSU; when there is no time limit on the “temporary” period, these measures with a temporary nature can virtually last an indefinite period of time.

### 3. Comments

In summary, there is strong evidence in the DSU that compensation and retaliation are only temporary measures, and compliance by withdrawal of inconsistent measure is preferred,<sup>170</sup> but there is no further adverse consequence and redress mechanisms to prevent the losing party from accepting compensation and retaliation as valid options. Therefore, the implementation process of DSB recommendations and rulings is, as I will argue, only of a semi-legal, semi-political nature.

The existing rules of implementing the recommendations and rulings have already shown the legal nature. On the other hand, the apparent ambiguities in some key issues represent the respect to the political wills of the Members to choose the final form of implementation, and the aim to achieve a political balance within the WTO system. This feature is in conformity with the general nature of political compromise in international trade agreements. As one commentator correctly observes, which is also

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<sup>167</sup> *Id.*

<sup>168</sup> Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395 (1999).

<sup>169</sup> *Id.* at I-8437.

<sup>170</sup> For the typical academic view, see John H. Jackson, *The WTO Dispute Settlement Understanding - Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60 (1996).

applicable to the WTO system:

An international trade agreement will always be in the nature of a compromise by each of the State Parties between each State's aspiration to attain the economic benefits introduced by the agreement, and each State's desire to preserve optimum sovereignty. On the one hand, every international agreement naturally contains limitations on the freedom of action of each State and constrains the policy options open to it. On the other hand, the economic benefits which each State wishes to attain through the trade agreement, will not be achieved in their entirety unless there is reciprocal honouring of the obligations contained in the agreement. The first consideration, the preservation of sovereignty and prevention of restrictions on courses of action, creates a tendency towards preferring non-binding agreements and agreements which leave the optimum freedom of action to the State, for example, by flexible or vague drafting, and use of 'escape clauses' and weak enforcement procedures. Such agreements allow flexibility in honoring obligations and retain scope for diplomatic maneuvering.<sup>171</sup>

While the whole WTO system is a rule-oriented one, it is not an absolutely rule-based one, or at least, not in the aspect of implementation. The dispute resolution and implementation procedures are based on a set of legal rules, but these rules are the product of political negotiations and compromises among Members, which are characterized by the abstractness, ambiguities and best-endeavour nature in a few points, so as to leave a scope of maneuverability that is enjoyed by the legislative and administrative organs of Members. Rather, this shows the strong existence of the political nature of the multilateral trading system, that is, its success cannot be absolutely based on pure, self-imposed legal rules, but should take into account all factors including the different powers of each Member, the political will of the governments of Members, the domestic acceptability of the trading system (including the observance of a ruling imposed by a supranational body) and the political balance among Members. One simple phrase may well generalize the reasons why Members are reluctant to have a more stringent DSU or a more powerful DSB: "Today's complainant may be tomorrow's respondent."

#### IV. REFORMING THE IMPLEMENTATION FRAMEWORK OF THE WTO AGREEMENTS

We can approach the topic of reforming the WTO implementation framework from academic, political and institutional perspectives. From the *academic* perspective, it is open to scholars to suggest proposals to

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<sup>171</sup> Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 775-76 (1996).

strengthen the powers of implementation by the WTO and improve the relevant legal rules in the WTO Agreements. From the *political* perspective, whether the proposals could be accepted by the Members to become a part of multilateral trading system depends on the intention and capacity of governments of Members, as well as the degree of domestic support. The process of political-diplomatic compromise and trade-off among Members will to a greater extent shape the multilateral trading system, in particular within the sphere of negotiating and drafting its legal rules. Considering the deep concerns from Members, especially from developing-country Members, for the balance between their sovereignty and the rule-oriented WTO system with an increasing mandate, it is predictable that any proposals to strengthen the WTO's implementation powers will be subject to heated debate and the final outcome would have a significant discount to the original ones. From the *institutional* perspective, the WTO has the ability to improve its system from a technical point, especially in some procedural upgrades. But this "technical" reform is also under two constraints: first, when it amounts to an interpretation of the WTO Agreements or significantly influences the balance of rights and obligations of the Members, the power will rest on the Ministerial Conference and the General Council.<sup>172</sup> Second, the increased powers of the WTO—and increased responsibilities—will require more administrative capacity and budget of the institution to carry it out, which may also restrain the actual scope of such reforms.

This part will put more emphasis on the potential reforms available from the political and institutional perspectives. First, it proposes that the implementation framework of the WTO Agreements can consider incorporating some incentives for compliance, with an increasing nature of "incentive-based" compliance. Second, it discusses possible reforms in some implementing instruments.

#### A. Direction of Reform: Incentive-Based Compliance

From the "implementation matrix" of Part II, it is observed that the existing implementation framework of the WTO Agreements has its focus on assurance of compliance and correction of non-compliance through the mechanisms of monitoring and supervision and using the basic implementing instruments such as notification, reporting, review and consultations. There are several weak aspects: first, the facilitation of compliance by using the capacity building mechanism has only a limited role to play, not being incorporated into other modalities of implementation; second, the enforcement mechanism—the dispute settlement procedures—is only applied to correct non-compliance, and plays no role in other modalities; third, the major instrument of supervision is the consultation procedures, which only

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<sup>172</sup> Final Act, *supra* note 1, at art. IX:2.

provides a chance of negotiation but cannot assure the outcome; fourth, there is very limited role of supervision from the WTO in the form of prior consultation or prior consent. Comparatively, the monitoring mechanism plays the best function, especially for the notification and reporting requirements.

Therefore, from an academic view, there are two directions for the reform. The first one is to strengthen the supervisory and enforcement functions of the WTO. More specifically, the scope of prior consultations and consents from the WTO can be expanded so as to have a better control over the Members' behavior in some key areas, the dispute settlement procedures may be extended to cover more "causes of actions" (for example, the failure to perform the notification obligations), and the enforcement mechanisms should provide the retrospective reparation to the injured parties in the form of damages or compensations. However, as mentioned above, the political reality of the multilateral trading system will be very reluctant and cautious to accommodate these reforms, and unless the multilateral negotiations can have some real breakthrough, such reforms will largely be confined to papers.

The second direction of reform, as I will propose, is to focus more on the rationale of encouraging the compliance of the WTO Agreements by Members and to build up the implementation framework as a combination of incentive-based and obligation-based mechanisms. This direction will accommodate the existing constraints and gain the utmost support from Members' governments. From the point of incentive-based compliance, the basic principle is to design a framework in which positive incentives can be channeled and allocated to encourage the target Members to comply with the WTO Agreements, and reform the existing mechanisms to convenient and urge the Members to choose the compliance, rather than leading to the stage of disputes resolution. From the point of obligation-based compliance, Members have already assumed a number of obligations to implement the WTO Agreements under the existing framework, so the next step is to consider whether there is room to reduce or consolidate some obligations to facilitate the compliance without reducing the necessary level of requirements.

## B. Some Proposals to Reform the Implementing Instruments

### *1. Technical assistance*

The incentive strategy assumes that many compliance problems exist because Members do not have the capacity to comply.<sup>173</sup> The technical as-

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<sup>173</sup> WEISS, *supra* note 8, at 460.

sistance plays the basic role in this strategy.

For the technical assistance by the WTO, it needs to establish more concrete objectives into which the limited resources can be invested to gain the maximum output. These objectives may include: first, to increase the capacity and expertise of Members to understand the WTO Agreements and to make necessary legislative and administrative adjustment of existing regime in compliance with the WTO obligations; second, to improve the ability of Members to participate into the trade negotiation and to use the WTO dispute settlement system to protect their legal interests; third, to help educate the public for the public awareness of the WTO and the recognition of the benefits of the multilateral trading system; and fourth, to provide assistance to institutionalize the legal and regulatory infrastructure that are basis of the complete and effective implementation of the WTO Agreements (for example, the legal system in conformity with the market economy, the administrative regime and procedures in harmony with the objectives of trade liberalization, etc.).

The current technical assistance programs are mainly about the knowledge of the WTO Agreements, including how to use the dispute settlement procedures. Within the Doha Development Agenda, it will be more useful to engage in quality-based assistance, that is, the assistance in direct relation to the scope of the negotiating challenges faced by the developing countries such as the widespread negotiation topics and the tight deadline of negotiation. In the long run, the technical assistance should improve the development objectives of the Members, especially for the legal and institutional infrastructures.

## *2. Notification and Review*

The transparency measures of the WTO Agreements have already served as the backbones of implementation. Since the satisfaction of the heavy obligation of notification is a burden to most developing-country Members, the WTO should consider whether it is possible to consolidate or simplify some notification obligations. Further, the possibility of linking the technical assistance and the performance of notification obligations (as the basic Member obligations), for example, a special fund that will be used to provide more training programs to the Members who will perform the notification obligation, could be considered.

For the reviews, the WTO bodies in charge of reviews should be encouraged to play a more active role in providing advice and recommendations to the Members under review. It is also necessary to induce the developing countries to participate more in the review meetings of TPRM.



### 3. Consultation<sup>174</sup>

The main area of reform would be in the contentious consultations as the first step of dispute settlement procedures. The purpose is to encourage the bilateral settlement, so it is vital to design some procedural incentives to encourage the settlement. The current procedure has some obvious shortcomings. For example, the consultation process requires only one meeting of the parties,<sup>175</sup> and the 60-day period is too long for the cases that will inevitably arrive at the panel stage. Therefore, it is possible to increase the quantity of meetings to two (as a legal requirement), and to encourage a greater use of conciliation and mediation as a third-party aid and a diplomatic means to solve the disputes at the consultation stage.<sup>176</sup>

### 4. Implementation of the DSB Recommendations and Rulings

The ambiguities and conflicts in the DSU texts, such as the sequencing between Article 21.5 and Article 22, can only be solved upon the amendment of the DSU. Whether and to what extent the implementation process can be improved will finally be decided by the willingness of Members.

One issue worthy of consideration is the role of retrospective remedies. The absence of the retrospective remedies under the current system, especially in the form of damages to the past wrongdoings by the losing party, reflects the political natures of the WTO Agreements. An increase of powers of the DSB to mandate specific conduct from Members might cause more defiance on the part of the governments that the WTO impinges to a greater extent on their sovereignty, so to have a counter-effect on the promotion of compliance. Therefore, it seems that a full recognition of the retrospective remedies in the WTO law is unlikely in the near future. Nevertheless, it is suggested that a limited retrospective remedy would be acceptable by Members and provide the incentives for compliance. Two limited reforms in this respect—to increase the retrospective effect of the recommendations and rulings—have the feasibility under the existing system. First, it will have more incentives on the losing party to adopt the full implementing measures, if there is a limited retrospective compensation starting from the expiration of the reasonable period when the Article 21.5 finally holds the non-consistence of the implementing measures. This factor can be taken into account under the Article 22.6 arbitration to decide the level of suspension. Second, the retrospective restitution in the form of re-

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<sup>174</sup> Some Members already submitted the proposals for reforming the dispute settlement system, including the consultation procedures. For a general summary, see C. Christopher Parlin, *Operation of Consultations, Deterrence, and Mediation*, 31 LAW & POL'Y INT'L BUS. 565, 570-71 (2000).

<sup>175</sup> Wethington, *supra* note 127, at 585-86.

<sup>176</sup> Davey, *supra* note 116, at 295.

fund or reimbursement may be allowed in limited agreements. For example, under the *Agreement on Antidumping*, the losing party which is held by the final report to violate the WTO rules on imposing and collecting the anti-dumping duties against the exporters from the winning party may be required to reimburse the wrongly-levied duties. Another example might be the *Agreement on Subsidies and Countervailing Measures*. In the *Australia-Automobile Leather* case, the panel has decided that the term “withdrawal of the subsidy” under Article 4(7)<sup>177</sup> was not limited to a prospective measure, but could also entail reimbursement and, therefore, constitutes a corrective measure with retrospective effect; consequently, the full reimbursement of the export subsidy granted by Australia was necessary in order to effectively withdraw the subsidy.<sup>178</sup> Whether this approach can be accepted into the WTO law depends on the attitude of the Appellate Body when the next case comes to its jurisdiction.

## V. CONCLUSION

The WTO Agreements establish a coherent and articulated approach to the implementation. The four mechanisms—capacity building, monitoring, supervision, and enforcement—consist of the key parts of the implementation framework, and serve the functions to ensure compliance and prevent non-compliance under four distinct but interactive modalities. Apart from the TPRM and the dispute settlement procedures that are traditionally categorized as the implementing measures, other instruments including technical assistance, notification, reporting, reviews and consultations are also employed to achieve the objective of compliance by Members. The political nature of the multilateral trading system illustrates the reluctance of the system to adopt radical reforms for strengthening the implementation powers, due to the difficulty of coordination and compromise among Members. Therefore, the direction of reform in a feasible and practical sense should be the transfer to a combination of the incentive-based and the obligation-based compliance models. The WTO should play a more active role in reforming the implementation framework in technical aspects. The Members, who are both the makers and the observers of the rule-oriented multilateral trading system, will have an ultimate decision on how to improve the degree of implementation of the WTO Agreements.

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<sup>177</sup> Article 4(7) provides that “if the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay.” See Report on Australia—Subsidies Provided to Producers and Exporters of Automobile Leather—Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW (2000).

<sup>178</sup> *Id.* The two parties reached a solution in regard to implementation of the findings, so there is no chance for the Appellate Body to rule on this issue.

