

2002

Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession

Christopher Duncan

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Duncan, Christopher. "Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession." American University International Law Review 18, no. 2 (2002): 399-506.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

OUT OF CONFORMITY: CHINA'S CAPACITY TO IMPLEMENT WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT BODY DECISIONS AFTER ACCESSION

CHRISTOPHER DUNCAN*

| | |
|--|-----|
| INTRODUCTION | 402 |
| I. CHINA'S LEGISLATIVE AND ADMINISTRATIVE SYSTEMS | 411 |
| A. BASIC PRINCIPLES | 411 |
| 1. <i>Political Policy as Legal Instrumentality</i> | 411 |
| 2. <i>Unitary Form of Government</i> | 413 |
| B. STRUCTURE OF GOVERNMENTAL BODIES | 414 |
| 1. <i>Legislative Bodies</i> | 414 |
| 2. <i>Administrative Bodies</i> | 415 |
| C. LEGISLATIVE & REGULATORY PROCESSES | 416 |
| 1. <i>Initial Concerns</i> | 416 |
| 2. <i>Legislation: Law-Making in China</i> | 417 |
| a. Unitary Legislative Format | 417 |
| b. Legislative Drafting Process | 418 |
| 3. <i>Administration: Rule-Making in China</i> | 419 |
| a. Administrative Authority | 419 |
| b. Administrative Drafting Process | 420 |
| c. Disbursement of Administrative Power | 421 |
| 4. <i>Oversight</i> | 423 |
| a. Identifiable Problems | 423 |
| i. <i>Discrimination</i> | 423 |
| ii. <i>Failure to Implement</i> | 424 |
| iii. <i>Corruption</i> | 425 |

* Associate, Joan M. Wilbon & Associates, Washington, D.C. J.D., University of Hawaii, William S. Richardson School of Law (2000). LL.M., International and Comparative Law, Georgetown University Law Center (2002). This article is dedicated to Maureen Venti Duncan; my mother, my mentor and my inspiration.

| | |
|--|-----|
| b. Recent Oversight Reforms | 426 |
| i. <i>Legislative Oversight Reform: The Law-Making Law</i> | 426 |
| ii. <i>Administrative Oversight Reforms</i> | 428 |
| D. CHINA'S LEGISLATIVE AND REGULATORY SYSTEMS ARE INEFFECTIVE | 431 |
| II. COMPLIANCE WITH THE WTO DSB | 432 |
| A. ORIGINS OF THE DSB | 432 |
| B. DISPUTE SETTLEMENT PROCESS UNDER THE DSU | 434 |
| C. COMPLIANCE WITH DSB DECISIONS | 437 |
| 1. <i>Basic Principles</i> | 437 |
| 2. <i>Compliance Procedures That Have Raised Concern</i> .. | 439 |
| a. Compliance Deadline: "Reasonable Period of Time" | 439 |
| b. "Compliance Review": The Conflict Between Article 21.5 and Article 22 | 441 |
| c. Retaliation: Suspension of Concessions | 442 |
| 3. <i>Necessity of Compliance with DSB Decisions</i> | 444 |
| a. Integrity of the WTO | 444 |
| b. Present Level of WTO DSB Compliance | 445 |
| c. Potential WTO DSB Reforms | 446 |
| D. WTO REQUIRES STRICT COMPLIANCE WITH DSB RULINGS | 448 |
| III. THE PROTOCOL ON THE ACCESSION OF CHINA TO THE WTO | 450 |
| A. THE "ROAD TO ACCESSION" | 450 |
| 1. <i>China's Early Withdrawal from GATT</i> | 450 |
| 2. <i>China's "Open Door" Policy and the Re-Engagement of GATT</i> | 451 |
| 3. <i>China, GATT, and the Return of the "Taiwan Issue"</i> .. | 453 |
| 4. <i>Development of a Protocol on Accession and U.S. Involvement</i> | 454 |
| 5. <i>Finalization of the Protocol: Present and Future Concerns</i> | 456 |
| B. RELEVANT PROVISIONS OF THE PROTOCOL ON CHINA'S ACCESSION TO THE WTO | 459 |
| 1. <i>General Considerations</i> | 459 |
| a. Protocols on Accession in General | 459 |
| b. Transparency: A Primer | 460 |

| | |
|--|-----|
| 2. <i>Transparency Requirements of the Protocol</i> | 463 |
| a. Publication | 463 |
| b. Enquiry Point | 464 |
| c. Right to Comment | 465 |
| 3. <i>China and the Protocol: Future Prospects</i> | 467 |
| C. THE PROTOCOL DOES NOT ENSURE CHINA'S CAPACITY TO COMPLY WITH ALL WTO DSB DECISIONS | 471 |
| IV. CHINA'S POTENTIAL IMPLEMENTATION PROBLEM AREAS | 472 |
| A. RECENT CONCERNS ABOUT WTO DSB JURISPRUDENCE .. | 472 |
| B. PROBLEMS RELATED TO CHINA'S INABILITY TO IMPLEMENT DSB DECISIONS | 473 |
| 1. <i>General Issues Related to China's Involvement in the DSB</i> | 473 |
| 2. <i>Specific Implementation Problems for China</i> | 475 |
| a. Identification of the Appropriate Governmental Body | 476 |
| b. Political Will | 477 |
| c. Modifying an Offending Measure | 479 |
| d. DSU Time Limits | 482 |
| e. Local Government Congruence | 482 |
| C. CHINA WILL BE UNABLE TO EFFECTIVELY COMPLY WITH MANY WTO DSB DECISIONS | 485 |
| V. REALISTIC SOLUTIONS | 487 |
| A. CHINA IN THE WTO | 487 |
| 1. <i>China's Accession is a Positive Step</i> | 487 |
| a. The Exclusionary Approach Is Misguided | 487 |
| b. Membership Has Its Privileges... and Its Obligations | 488 |
| 2. <i>China's Compliance with DSB Decisions</i> | 491 |
| a. China Will Attempt to Comply | 491 |
| b. China Lacks the Capacity to Comply | 492 |
| B. REALISTIC SOLUTIONS | 493 |
| 1. <i>Other WTO Members: Greater Emphasis on Restraint and Consultations</i> | 493 |
| a. Possible Proliferation of WTO Cases Against China | 493 |
| b. Restraint | 495 |
| c. Consultations | 496 |

| | |
|--|-----|
| 2. WTO DSB: Greater Specificity on Methods of Implementation | 497 |
| a. China Should Not Receive Special Compliance Preferences | 497 |
| b. WTO DSB Should Take a Flexible Approach | 499 |
| c. Specific Suggestions on Methods of Compliance .. | 500 |
| C. CONCLUSION: CHINA'S IMPACT ON THE WTO | 505 |

INTRODUCTION

In 1947, the People's Republic of China ("China") was an original signatory to the General Agreement on Tariffs and Trade ("GATT"), a revolutionary new model of international economic liberalization.¹ Since that time, however, China's foreign economic policy has been characterized by severe restrictions on foreign trade and investment and a strongly protectionist economic ideology with its roots in China's socialist political philosophy.² Nevertheless, on September 17, 2001, the World Trade Organization ("WTO"), which administers the GATT and other liberal economic agreements, concluded negotiations on China's terms of membership,³ paving the

1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, 224-25, *repealed by* Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Apr. 15, 1994, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144, 1125 (1994) [hereinafter GATT].

2. See Sang Bin Xue & George D. Wilson, *Capital and Technology: China Rejoins the Modern Business World—An Analysis of China's Equity Joint Venture Law*, 25 U.S.F. L. REV. 511, 514 (1991) (describing China's economic reform in light of its ideology and history).

3. See Press Release, World Trade Organization ("WTO"), WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001) [hereinafter WTO Negotiations] (discussing parallels to China's accession process to both the GATT and the WTO), *available at* http://www.wto.org/english/news_e/pr243_e.htm (last visited Oct. 2, 2002). China's accession into the GATT and WTO has been continually conducted through a specialized Working Party, established in 1987, consisting of representatives from all interested GATT/WTO Member governments. *Id.* The initial GATT Working Party was only interested in China's trade policies for goods. *Id.* When the Working Party was incorporated into the WTO system in 1995, its agenda was broadened to encompass trade in services, new standards on

way for formal adoption of the Protocol on the Accession of China⁴ (“Protocol”) at the November WTO Ministerial Conference in Doha, Qatar (“Doha Ministerial”).⁵ On November 10, 2001, the Doha Ministerial approved the text of the agreement for China’s entry into the WTO (“Accession Agreement”),⁶ which China then signed and ratified on November 11, 2001.⁷ As a result, on December 11, 2001,

non-tariff measures, and rules dealing with intellectual property rights. *Id.* The WTO Working Party was charged with completing two tasks prior to China’s accession: (1) to create a report based on deliberations; and (2) to devise a Protocol on China’s Accession. *Id.* The Protocol is supplemented by the annexes, which have been at the center of Working Party negotiations, and are intended to signal China’s commitment to reform to other WTO Members and serve as a timetable for China to bring its trade regime into full compliance with the WTO’s policies. *Id.* The annexes account for most of the nearly nine hundred pages of text that was reviewed for approval at the Doha Ministerial. *Id.*; see also WTO, *Working Party on the Accession of China, Report of the Working Party on the Accession of China*, annexes 1A-9, WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter *Working Party Report*] (setting forth the negotiation processes that China underwent in becoming a member of the WTO), available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm (last visited Oct. 20, 2002).

4. See Protocol on the Accession of the People’s Republic of China, Nov. 10, 2001, WT/L/432 [hereinafter Protocol] (noting the steps that China must take to accede to the WTO), available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm (last visited Oct. 20, 2002).

5. See WTO Negotiations, *supra* note 3 (providing a brief description on the Working Party conclusions, explaining the negotiation process, and listing the commitments undertaken by China).

6. See Press Release, WTO, WTO Ministerial Conference Approve China’s Accession, (Nov. 10, 2001) (discussing the documents pertinent to China’s accession and noting the impact that WTO membership will have on China’s economy), available at http://www.wto.org/english/news_e/pres01_e/pr252_e.htm (last visited Oct. 20, 2002). The Accession Agreement encompasses: (1) the report of the Working Party for the Accession of China, (2) the Protocol of Accession with annexes, and (3) the schedule of China’s commitments on market access for goods and services. *Id.*; see also Press Release, WTO, China to Join on 11 December: Chinese Tapei’s Membership Also Approved (Nov. 11, 2001) [hereinafter Chinese Tapei Approval] (indicating that the entire membership agreement is approximately thirteen kilograms in weight and 1,500 pages in length), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_11nov_e.htm (last visited Oct. 20, 2002).

7. See Chinese Tapei Approval, *supra* note 6 (describing the formalities that led to the ratification of China’s WTO membership).

after nearly fifteen years of negotiations,⁸ China formally became the WTO's 143rd Member, and turned once again to the liberal economic goals that it had embraced nearly fifty-five years prior.⁹

While still ostensibly aspiring to achieve a state of "socialism with Chinese characteristics," the China of today is best described as a nation driven above all by economic development.¹⁰ At least one commentator has suggested that "the success of economic reforms has led many Chinese to lose what little faith they may have had in the ideology of Marxism-Leninism-Mao Zedong thought."¹¹ Although some historic Chinese political motivations still exist, including fears of disunity and a preoccupation with national security, China's overriding modern objective is the acquisition of global power through economic strength.¹² Within such a political framework, democratic initiatives, civil rights, and civil liberties are of little concern to the Chinese government.¹³

8. See WTO Negotiations, *supra* note 3 (explaining that China's negotiation process for WTO membership lasted approximately fifteen years). Negotiations began in 1986 when China formally notified the GATT of its intention to again become a signatory. *Id.*

9. See Evelyn Iritani, *China's WTO Challenge: Accord Reached; Now Firms Face Tests*, L.A. TIMES, Sept. 18, 2001, at C1, C10 (discussing the impact that China's WTO membership will have on corporations); see also WTO Negotiations, *supra* note 3 (noting that China agreed to open and liberalize its trade policy).

10. See James A. R. Nafziger, *A Comparison of Processes for Reforming Migration Laws in Transitional States: China, Kazakhstan, and Albania*, 70 WASH. L. REV. 757, 777 (1995) (comparing the migration laws of China, Kazakhstan, and Albania and discussing the impact of such laws on economic systems in these countries).

11. See Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 404 (2002); see also Nicholas R. Lardy, Issue in China's WTO Accession: The U.S.-China Security Review Commission, (May 9, 2001) (stating that appeals to ideology, although so endemic to the Mao era, are "long gone"), available at <http://www.brook.edu/views/testimony/lardy/20010509.htm> (last visited Oct. 12, 2002).

12. See Lardy, *supra* note 11 (placing emphasis on China's overriding economic strength and the role such strength will have due to China's WTO membership).

13. See JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION 232 (Paragon House, 1st ed. 1993) (suggesting that the Chinese

China has identified WTO membership as one key to fulfilling its global economic policy objectives.¹⁴ The sheer volume of legislation that China has generated in an effort to build the market-oriented substantive law essential for WTO participation is a testament to this supposition.¹⁵ As a result of this vigorous legislative activity, China now has an enormous body of legal rules.¹⁶ Whether this body of rules translates into a functional legal system, however, is subject to international debate.¹⁷

Global uneasiness over the state of China's legal system is a larger reflection of the WTO's mild apprehension regarding China's accession to membership.¹⁸ Just as with the WTO's predecessor, the GATT, the challenges of integrating new sovereign members within

government infringed on civil liberties by authorizing torture and tampering with the judicial system where highly political issues were involved).

14. See *Meeting of the Working Party on the Accession of China: Statement by H.E. Vice Minister Long Yongtu, Head of the Chinese Delegation, at the Eighteenth Session of the Working Party on China*, WTO NEWS, Sept. 17, 2001 (assuring that WTO accession was key to China's economic growth), available at http://www.wto.org/english/news_e/news01_e/wpchina_longstat_17sept01_e.htm (last visited Oct. 12, 2002). Although the head of the Chinese Delegation to the WTO, Vice Minister Long Yongtu, has stated that recent reforms are continuations of what has been China's goal of "establishing socialist market economic system," he noted that "the efforts made by China for its WTO accession have greatly accelerated the reform and opening-up process in China." *Id.*; see also Lardy, *supra* note 11 (setting forth the argument that WTO membership may provide a permanent impetus for economic reform, enhance national prestige and influence through participation in multilateral negotiations, maximize external demand for a Member's products, and attract more foreign investment); Zhen Kun Wang, *Join the Club*, WORLD TODAY, Oct. 1, 2001, at 26-27 (asserting that China's commitment to WTO membership is not in dispute).

15. See Lubman, *supra* note 11, at 386 (discussing China's sweeping legislative actions and explaining that new laws have been modeled after Western models to reflect the market-oriented approach behind the WTO's liberal economic policies).

16. See *id.* at 387 (discussing the large amount of legislation China now has).

17. See *id.* (suggesting that China's legislation may not serve as an actual legal system).

18. See David Blumental, "Reform" or "Opening"? *Reform of China's State-Owned Enterprises and WTO Accession: The Dilemma of Applying GATT to Marketizing Economies*, 16 UCLA PAC. BASIN L.J. 198, 200 (1998) (describing the difficulties associated with maintaining free trade ideals when the WTO admits new members).

a multilateral trading structure looms large.¹⁹ The WTO, however, has a broader scope, contemplates more diverse functions, contains a more cogent dispute resolution process, and enjoys a stronger institutional identity than the GATT.²⁰ As a result, the WTO must face the challenge of preserving its free trade ideology while simultaneously managing to continue to integrate new Members.²¹

China's accession, in particular, presents significant problems for the WTO in terms of compliance.²² As a large and developing country, China's failure to comply with basic WTO requirements could have a de-stabilizing effect on the already tenuous balance struck between the WTO's developed and developing Members.²³ In addition, despite China's legislative efforts to the contrary, China's economy still contains many non-market components.²⁴ The integration of countries with non-market economies, which, like China, have yet to fully implement the basic ideals of the WTO such as transparency, reciprocity, and the rule of law, leaves open the possibility for conflict concerning a Member state's sovereign right

19. *See id.* (asserting that the WTO will face challenges as new members join the WTO).

20. *See id.* (comparing and contrasting the role of the WTO to the that of the GATT).

21. *Id.* The seriousness of the WTO's ability to successfully integrate new members without sacrificing overall compliance with the liberal economic rules from which the WTO derives its influence cannot be understated. *Id.* As Blumental predicts, the WTO's ability to maintain compliance and order as its membership grows "will have a profound impact on the future of the WTO as a respected and effective world institution." *Id.*

22. *See id.* at 201-05 (discussing the balance between Chinese reform and compliance in light of China's accession to the WTO).

23. *See* Renato Ruggiero, Remarks at Beijing University (Apr. 21, 1997) (discussing the disproportionate number of WTO developing Member countries), available at http://www.wto.org/english/news_e/spr_e/china_e.htm (last visited Oct. 12, 2002). As of 1997, of the 130 WTO Members, eighty percent were considered by WTO officials as developing countries or economies in transition. *Id.*

24. *See* Lubman, *supra* note 11, at 389 (arguing that China faces several obstacles to complying with its new legislative commitments).

to implement its own domestic law if that law directly or indirectly conflicts with the states' WTO commitments.²⁵

China's status as a developing country with a significantly non-market economic structure raises a difficult question regarding the process of accession and potential compliance: should accession be withheld until a country demonstrates its implementation of basic WTO premises, or should the dispute resolution system itself be used to secure compliance with these requirements?²⁶ While the European Union signaled its support for the latter proposition early in China's accession negotiations, the United States has been less comfortable with such an arrangement and has displayed more interest in obtaining greater substantive compliance prior to accession.²⁷ The U.S. position has likely been supported by fears regarding the massive burden that frequent disputes concerning China's laws could place upon the WTO Dispute Settlement Body ("DSB").²⁸ These U.S. concerns have recently been alleviated, however, as demonstrated by the China-U.S. Agreement on Chinese Accession ("China-U.S. Accession Agreement"),²⁹ reached on June 11, 2001.³⁰

25. See Blumental, *supra* note 18, at 200 (discussing the conflict between adhering to WTO commitments and the spirit of a state's sovereign right to create law).

26. See *id.* at 201 (listing questions that reflect differing views on China's WTO membership).

27. See Lubman, *supra* note 11, at 417-18 (setting forth the U.S. concerns and demands with respect to China's commitments).

28. See *id.* (commenting that the U.S. fears that questions regarding China's compliance with WTO policies could potentially overload the dispute settlement process).

29. See China Legal Change, *New China-US WTO Agreement*, CHINA L. BRIEFS (2001) (listing the issues resolved between the U.S. and China prior to China's accession into the WTO), available at <http://www.chinalegalchange.com/archiv01/C0112040.html> (last visited Oct. 12, 2002).

30. See Press Release, WTO, Moore Welcomes China-U.S. Agreement on Chinese Accession (June 11, 2001) (expressing concern regarding the acceleration of China's accession and the settling of differences during the negotiation process), available at http://www.wto.org/english/news_e/pres01_e/pr230_e.htm (last visited Oct. 20, 2002). WTO Director-General Mike Moore was impressed with the "focus and determination" shown by the United States and China. *Id.* Mr. Moore suggested that: "China's clear commitment to a rapid accession as well as its unequivocal support for launching a new round of multilateral trade

The U.S. decision to go forward with China's accession in spite of significant questions over potential compliance reflects the modern international belief that participation in international institutions itself functions to enhance the incentives and capacity for compliance in the participating country.³¹ Given China's greater interaction with and engagement of the international community over the past decade and a half, and the marked effects that greater international involvement has had on Chinese legislation³² and institutional behavior,³³ there is cause to believe that, in terms of China's entry into the WTO, such a theory will hold true.

As noted above, the WTO mechanism through which China's non-compliance will be identified, and through which China will be compelled to remedy its non-conformity, is the WTO dispute settlement system.³⁴ The dispute settlement system is the central means by which the WTO monitors and controls compliance³⁵ for two reasons. First, the system fosters the independent identification of major deficiencies by fellow WTO Members, which generally have relatively substantial resources, rather than the WTO itself, which has scant resources.³⁶ Second, the dispute settlement system

negotiations bodes extremely well for the Doha Ministerial Conference and the future of the WTO." *Id.* He also reportedly recognized the declared intention of European Union Trade Commissioner Pascal Lamy to resolve outstanding EU issues with China. *Id.* In spite of its early support for China's accession, the European Union may have been waiting for the United States to complete an agreement prior to its own negotiations.

31. See Blumental, *supra* note 18, at 256-57 (arguing that China will likely comply with WTO commitments in hopes of avoiding retaliatory acts from other WTO Members).

32. See *supra* notes 14-17 and accompanying text (discussing Western influence on recent Chinese legislation).

33. See Blumental, *supra* note 18, at 256-57 (asserting the notion that a high probability exists that China will comply with WTO rules and obligations).

34. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 1, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 33 I.L.M. 1125, 1126 (1994) [hereinafter DSU] (describing the functions of the WTO dispute settlement body).

35. See *id.* art. 2 (establishing the Dispute Settlement Body as the system that will monitor compliance with WTO policies).

36. See Blumental, *supra* note 18, at 200-01 (opining that GATT regulations have influenced domestic Chinese legal reforms over the past twenty years).

contains powerful remedies, which ensure a high level of overall compliance.³⁷ Since virtually no Member, and particularly no new Member, is always in complete conformity with the WTO, the dispute settlement system provides the best means to ensure compliance by focusing only on important areas of non-compliance.³⁸ In light of these factors and the WTO's broad and ever-broadening scope of obligations, the ability of individual Member states to bring their domestic laws into conformity with a specific DSB decision, either through withdrawal or modification of the offending measure or practice,³⁹ is the truest gauge of a Member country's effective compliance with WTO rules.

This article operates under the assumption that because compliance with WTO DSB decisions is the most meaningful aspect of WTO membership, the capacity to comply⁴⁰ with such decisions through legislative or administrative action is the most important trait for a Member country to possess.⁴¹ The focus is on compliance with

37. See Jonathan C. Spierer, *Dispute Settlement Understanding: Developing a Firm Foundation for Implementation of the World Trade Organization*, 22 SUFFOLK TRANSNAT'L L. REV. 63, 96-7 (1998) (comparing the GATT and WTO enforcement mechanisms). GATT did not have the "teeth" necessary to enforce its rulings, whereas the WTO DSU gives Members greater incentive to comply with its decision. *Id.*

38. Countries generally do not enter the WTO in complete conformity. *But see infra* notes 198-203 and accompanying text (noting the strength of the DSB's enforcement mechanism due to the variety of options that violating Members may pursue in order to bring their laws into compliance with WTO regulations).

39. See *infra* note 199 and accompanying text (stating that violating Members may bring their laws into compliance with a DSB decision by modifying or withdrawing the offending provisions).

40. See WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WTDS58/AB/RW, para. 85 (Oct 22, 2001) [hereinafter *U.S.—Shrimp Recourse*] (stating the factors that the DSU panel must consider in determining compliance under Article 21.5), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Oct. 20, 2002). In determining compliance, the panel notes the distinction between Member laws that are found to be invalid on their face, versus as applied. *Id.* para. 98. For the purposes of this article, "comply" and "compliance," when used in relation to DSB decisions, connote a Member's ability to conform or adapt its laws or regulations in accordance with a DSB decision.

41. See discussion *infra* Part II.D (commenting about China's ability to comply with WTO decisions through administrative and legislative action); see also Peter

individual DSB decisions rather than overall compliance with WTO rules. Part I of this article examines China's present legislative and administrative systems⁴² and the substantive DSB provisions that require such an implementation apparatus.⁴³ This article determines that these systems are not an effective means by which to structurally withdraw or modify laws and regulations.⁴⁴ Part II discusses WTO dispute settlement requirements and processes and establishes that the WTO dispute settlement body, unlike its predecessor the GATT, requires strict compliance with its decisions through the "automatic" adoption of its decisions, the use of specified time limitations, and the allowance of potent remedies for non-compliance with its decisions.⁴⁵ Part III reviews the Protocol on the Accession of China and its potential role in securing China's capacity to implement WTO DSB decisions, and determines that the Protocol fails to ensure that such a capacity exists pre-accession.⁴⁶ This section explores China's capacity for compliance with DSB decisions and the steps that have been taken to ensure that such a capacity exists prior to accession. Part IV explores the specific difficulties that may render Chinese legislative and administrative systems unable to comply with WTO DSB decisions and ascertains that, after accession, China will likely meet many and varied WTO DSB dispute challenges to which it is unable to effectively respond through compliance.⁴⁷ Part V concludes that China's inability to conform its laws to WTO

Howard Corne, *Lateral Movements: Legal Flexibility and Foreign Investment Regulation in China*, 27 CASE W. RES. J. INT'L L. 247 (1995) (discussing China's legal system, including its legislative and administrative processes).

42. See discussion *infra* Part I (referring to the legislative and administrative systems through which China will implement DSB decisions).

43. For the purposes of this article, "implement" and "implementation" when used in conjunction with DSB decisions, connote the action by which a Member carries out or gives practical effect to a DSB decision.

44. See *infra* text accompanying notes 51-172 (discussing China's use of political policy as a legislative tool).

45. See *infra* text accompanying notes 173-269 (discussing the role of the WTO DSB).

46. See *infra* text accompanying notes 269-400 (analyzing whether China will be able to implement DSB decisions).

47. See *infra* text accompanying notes 401-480 (discussing the effect of China's legislative and administrative bodies on its ability to implement DSB decisions).

obligations after a DSB decision will have negative effects on both China and the WTO, and it suggests methods by which to limit these effects.⁴⁸ Finally, this article provides options in the event that China's post-accession inability to implement a DSB decision renders it out of conformity⁴⁹ with its obligations under the WTO.⁵⁰

I. CHINA'S LEGISLATIVE AND ADMINISTRATIVE SYSTEMS

A. BASIC PRINCIPLES

1. *Political Policy as Legal Instrumentality*

The recent development of legislation in pursuit of economic growth underscores China's modern use of law as a means for advancing policy.⁵¹ Under the leadership of Chairman Mao Zedong, the Chinese Communist Party ("CCP") directed state action solely through the use of policy.⁵² The CCP used legislation "only formalistically to declare such policy."⁵³ In spite of the adoption of a

48. See *infra* text accompanying notes 482-579.

49. For the purposes of this article, "conform" and "conformity" when used in relation to DSB decisions, connote the general act by which a country brings its laws or practices into agreement or harmony with WTO standards after a DSB decision is made.

50. See discussion *infra* Part V (contemplating solutions to China's potential inability to implement WTO decisions).

51. This article focuses exclusively on China's legislative and administrative systems. China's judicial system and its role in China's compliance with WTO DSB decisions are beyond the scope of this article.

52. See Lubman, *supra* note 11, at 384 (explaining that the policies under Mao were "imprecise, exhortational, tentative, and subject to unlegislated revision"). The CCP's use of law to support policy is most likely a modern reflection of Imperial China's centuries-old practice of using the local and broad practices to advance Imperial ideals throughout China. See *id.* at 399, 405-06 (asserting that the use of policy over formal lawmaking and adjudication is not only a mainstay of the CCP but also has its roots in the historical Chinese practice of resolving disputes by informal rather than formal means).

53. See *id.* (emphasizing further that China's policies under Mao were inadequate).

Constitution, Xianfa, in 1982 ("1982 Constitution")⁵⁴ and the recent increase in legislation, reforms have been slow to loosen the CCP's grip on dictating governmental activity.⁵⁵ Although at least one scholar has argued that recent Chinese reforms have brought about a "fundamental new orientation in China" in which formal legislation has become the major framework for the organization and operation of the Chinese government,⁵⁶ as even the Preamble to the 1982 Constitution reiterates, the CCP remains above the law.⁵⁷

The supremacy of the CCP has resulted in a fragmented polity, a separation of internal discipline from legality, vaguely drafted laws, and inconsistent administrative enforcement.⁵⁸ As a result, in spite of the CCP's motivations toward economic modernization through market socialism, implementation of this policy directive through legislation and administration has been largely ineffectual.⁵⁹ There is

54. See XIANFA, art. 57-92 (1982) (depicting the structure of the Chinese State whereby appropriate legislative bodies enacted laws intended for defining and implementing policy, although the actual implementation of the legislation is still greatly dependent upon the CCP), available at http://www.oefre.unibe.ch/law/icl/ch00000_.html (last visited Oct. 21, 2002).

55. See Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653, 655 (1989) (articulating China's preservation of CCP's historical role as leader of state society); see also Ta-Kuang Chang, *The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislative Process*, 28 HARV. INT'L L.J. 333, 336-37 (1987) (discussing the power that the NPC has over the Chinese legislative process). See generally Erik Eckholm, *In Drive on Dissidents, China Gives 4th Severe Sentence in Week*, N.Y. TIMES, Dec. 28, 1998, at A9 (reporting the sentence of a labor activist to ten years in prison for giving an interview to a radio station about farmer protests, and the conviction and sentencing to terms of eleven to thirteen years for subversion of three other men who attempted to organize a new political party). The trial relating to this sentencing illustrated the CCP's continued use of law as an instrument to maintain and carry out specific CCP policies.

56. See Lubman, *supra* note 11, at 384 (expressing the viewpoint that China has taken a more active role in formalizing legislation).

57. See Blumental, *supra* note 18, at 235 (explaining the CCP's position of supremacy articulated in the Preamble's Four Basic Principles of Chinese Philosophy).

58. See *id.* at 236-37 (asserting that the CCP's supremacy undermines the role and authority of the rule of law).

59. See Robb La Kritiz, Book Review, 11 EMORY INT'L L. REV. 267, 267-68 (1997) (reviewing PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* (1997)) (explaining that Corne discusses the law

reason to believe that China's implementation of WTO DSB decisions will achieve even less success.⁶⁰ Thus, although China's modern policy of reform and political opening (*gaige kaifang*) has promoted the development of a legal system (*fazhi jianshe*), the use of law as an instrumentality of policy probably will limit China's position as a conforming Member of the WTO.⁶¹

2. Unitary Form of Government

In support of CCP state control, China's government is organized in a unitary fashion, with supreme power resting in the central government.⁶² Furthermore, the organization of the bureaucratic apparatus represents a pyramid format.⁶³ Under this system, the central government delegates power to top officials within each tier of the state administration.⁶⁴ Thus, China's government has never placed significance on the division of power between the central government and localities, or the legislative and executive branches of government.⁶⁵

in today's China as purposefully "malleable, flexible, and pragmatic" in order to serve the interests of market socialism).

60. See Blumental, *supra* note 18, at 254-57 (arguing that due to the sheer scale of the undertaking and entrenched resistance, it will be difficult for Premier Zhu to quickly implement decisions).

61. See *id.* at 237 (believing that although reforms are vital for Chinese business to compete globally, they are only one step towards "full compliance with WTO/GATT requirements").

62. See Li Yahong, *The Lawmaking Law: A Solution to the Problems in the Chinese Legislative System?* 30 HONG KONG L.J. 120, 124 (2000) (explaining that China has a centralized government that retains the majority of the power).

63. See *id.* (discussing the pyramid-like governmental structure that China has).

64. See *id.* at 124-25 (noting that "only three of the 135 articles in the Chinese Constitution are relevant to this issue").

65. See *id.* (asserting that China has no concept of federalism despite its pyramid-like government).

B. STRUCTURE OF GOVERNMENTAL BODIES

1. Legislative Bodies

In China, both legislative and administrative governmental bodies have the power to fashion "legislative" enactments.⁶⁶ The 1982 Constitution established an essentially five-tier system to adopt legislation:⁶⁷ the National People's Congress ("NPC"), the Standing Committee of the National People's Congress ("SCNPC"), the State Council, local governments, and the Local People's Congresses.⁶⁸ However, the NPC and the SCNPC are China's central legislators.⁶⁹

Formally, under the 1982 Constitution, the NPC has powers to amend the Constitution and to enact and amend basic laws governing criminal offences, civil affairs, the state organs, and other matters.⁷⁰ The SCNPC has powers to enact and amend other laws and to partially supplement and amend laws enacted by the NPC when the

66. See Corne, *supra* note 41, at 252 (addressing the variety of "laws" formulated by the legislative and administrative bodies in China). This article often examines both processes together in order to best demonstrate China's promulgation of measures that may be later challenged before the WTO DSB.

67. See XIANFA, art. 57, 85, 95 (1982) (discussing the hierarchy of the Chinese government); see also Elizabeth A. R. Yee, Comment, *Hong Kong and China in 1997: an Examination of Possible Legal and Economic Implications for United States Businesses*, 36 SANTA CLARA L. REV. 595, 607 (1996) (providing insight about the power and the role of the NPC).

68. See Yee, *supra* note 67, at 607 n. 126 (describing the distinctions between the power that the NPC has and the limited power that Local People's Congresses have).

69. See XIANFA, art. 58 (1982) (vesting "the legislative power of the state" in these two bodies); see also Corne, *supra* note 41, at 252 (explaining the different entities that comprise China's national legislature and the relationship of such entities to the NPC); Edward J. Epstein, *China and Hong Kong: Law, Ideology, and the Future Interaction of the Legal Systems*, in *THE FUTURE OF THE LAW IN HONG KONG* 37, 58 n. 63 (Raymond Wacks ed., 1989) (placing emphasis on the size of cities and the role cities have in government because of their size). See generally Nafziger, *supra* note 10, at 762-63 (discussing the NPC's legislative process).

70. See XIANFA, art. 62, secs. 1, 3 (1982) (enumerating the powers of the NPC).

latter is not in session.⁷¹ Both the NPC and SCNPC commonly use administrative bodies to create drafts of basic laws, which they later modify and enact.⁷² Additionally, the NPC and the SCNPC review newly-promulgated administrative rules and regulations to guarantee their accordance with State policy.⁷³

2. Administrative Bodies

China's main administrative rule-making body is the State Council, which contains departments, commissions, agencies, and local offices.⁷⁴ Although the State Council has some measure of quasi-legislative power,⁷⁵ its chief role is to issue administrative laws, regulations, and rules,⁷⁶ which are subject to review by the NPC and SCNPC.⁷⁷ Importantly, the centralized decision-making characteristic of China's unitary form of government results in a

71. See *id.* art. 67, secs. 2-3 (discussing the enumerated powers of the Standing Committee).

72. See Nafziger, *supra* note 10, at 762 (noting that the 1985 migration law for aliens was drafted jointly by the ministries of Foreign Affairs and Public Security and approved by the State Council).

73. See *id.* (stating that both the NPC and SCNPC always conduct a review of the law).

74. See Corne, *supra* note 41, at 252 (stating that the comprehensive administrative structure of China is collectively known as *xingzheng jiguan*).

75. See *id.* (explaining that while the State Council is namely an administrative body, it also has the power to make rules).

76. See Nafziger, *supra* note 10, at 762 (acknowledging that the NPC and SCNPC also may require the State Council to draft laws).

77. See *id.* (explaining that if the NPC is not in session, the SCNPC reviews the rule); see also Li, *supra* note 62, at 131 (explaining that administrative regulations recently became an essential part of China's legislative process). Administrative regulations now reportedly "represent more than twice the number of laws made by the NPC and the [SCNPC]," and "the legislative proposals by the State Council comprise more than seventy percent of total proposals." *Id.* Although the expansion of the legislative power of the administrative branches may be a reason behind China's rapid economic growth, it also caused discrepancies between laws and regulations, as well as "the overlapping of powers among numerous departments of the State Council." *Id.* According to the 1982 Constitution, the State Council only can enact "administrative regulations to implement existing national laws," which must be consistent with the Constitution and laws, and "which must be reported to the [SCNPC]" for documentation. *Id.*

system where the CCP's predominance in the State Council grants it effective control over all national administrative functions.⁷⁸

C. LEGISLATIVE & REGULATORY PROCESSES

1. Initial Concerns

China's rapid development of a socialist market economy has exposed the Chinese legislative and administrative process to international public and political scrutiny not previously experienced under China's strictly conservative political and economic regimes.⁷⁹ As China has "opened its door" to international economic involvement, foreigners trying to enter China's market have experienced unfamiliar limitations and restraints, which they have been unafraid to complain about publicly.⁸⁰ Such criticisms include not only complaints relating to the formulaic vagueness⁸¹ and uncertainty⁸² of Chinese laws, but also include objections endemic to China's systematic structure, such as the lack of transparent processes,⁸³ abuse of power, and corruption.⁸⁴ Acknowledging that

78. See Yee, *supra* note 67, at 606 (describing the CCP's influence in the State Council). See generally Nicholas D. Kristof, *China Sees 'Market-Leninism' as Way to Future*, N.Y. TIMES, Sept. 6, 1993, at A1, A4 (examining China's transition from Communism towards free-market authoritarianism).

79. See Conita S. C. Leung, *Chinese Administrative Law Package: Limitations and Prospects*, 28 HONG KONG L.J. 104, 104 (1998) (discussing the measures taken by China to reform its administrative process).

80. See *id.* (highlighting how the Chinese leadership recognized the bureaucracy's failings and thus began implementing reforms).

81. See Corne, *supra* note 41, at 248 (explaining that some complaints relating to vagueness center around the resultant "vast discretionary power to interpret conferred on administrative authorities"). Other complaints criticize the law's changeability, and variations between central and local law and between legal interpretation and administrative directives issued. *Id.*

82. See *id.* (noting that some criticisms are directed towards the uncertainty revolving around the amendment of laws, regulations, and rules, and the resultant importance of "internal rules" in regulation).

83. See *id.* at 248 (stating that complaints related to a lack of transparency and predictability have focused on administrative decision making, especially in the conferring of licenses). Problems also include "the confusion and inefficiency caused by bureaucratic rivalry and the overlapping of departmental jurisdiction,"

such concerns have the potential to jeopardize China's aspirations of large-scale economic growth, the Chinese leadership has taken several recent steps toward reform in these areas.⁸⁵

2. *Legislation: Law-Making in China*

a. Unitary Legislative Format

In accordance with China's unitary form of government, all major legislation in China emanates from the central power organs.⁸⁶ Unlike power disbursement in a federal system, state governments in China are entirely subordinate to the central government,⁸⁷ receiving their authority solely from the statutory law of the NPC and SCNPC.⁸⁸ As a result, the central government may technically change or withdraw local authority at any time.⁸⁹ Unfortunately, in spite of the relatively unified sources of Chinese law, the Chinese legislative system remains plagued by the international criticism

as well as "protectionism and favouritism in implementation of law, and interference in management autonomy." *Id.*

84. See Leung, *supra* note 79, at 104-05 (discussing the abuse of power and corruption inherent in the cadre system of the communist party government).

85. See *id.* at 104 (mentioning that a new administrative law package is part of the Chinese reform process); see also Corne, *supra* note 41, at 248 n.2 (recognizing Chinese efforts to alleviate legal uncertainty, beginning with its agreements under The U.S.-China Memorandum of Understanding on Market Access).

86. See Corne, *supra* note 41, at 251 (explaining the hierarchy of China's legislative authority).

87. See Li, *supra* note 62, at 125 (discussing the division of the legislative powers between the central and local governments).

88. See *id.* (delineating the unitary system's division of powers and explaining that in contrast, in a federal system the authority of local governments is assured by a law which is superior to the statutory law of the central government, and which is also the source of authority of that law, such as a constitution). In other words, in federal countries like the United States, the federal legislature and state legislatures consist of two completely separate systems, the latter of which is not subordinated to the former with inalienable power that has been explicitly granted in the Constitution. *Id.*

89. See Corne, *supra* note 41, at 251 (defining the sources of power and distinguishing between the PRC and a federal system, where in the latter, the central and local governments have their authorities defined in the Constitution and is not easily amended).

mentioned above.⁹⁰ One scholar has opined that such complaints remain because the legislature has itself “grown into such a complicated bureaucracy that it can hardly deal efficiently with internal issues such as overlapping of powers, confusion of procedures, [and] inconsistency between laws”⁹¹

b. Legislative Drafting Process

The Chinese legislative drafting process is relatively simple.⁹² First, the Commission of Legislative Affairs prepares a first draft of a general law, which it submits to the Legal Committee of the NPC.⁹³ After several drafts, the Legal Committee proposes a final version to the NPC, and the SCNPC serves the above NPC functions when the NPC is not in session.⁹⁴

In order to best serve the broad and changing interests of the CCP, the committees, commissions, and congresses draft laws ambiguously to provide a brief summary of the parameters of regulation without foreclosing on the potential policy objectives important to the NPC.⁹⁵ As a result, Chinese legal drafting is characterized by: “principle-like pronouncements; vagueness and ambiguity; broadly worded discretions; undefined terms; omissions; and general catch-all clauses.”⁹⁶ Of greatest concern to commentators

90. See *supra* notes 80-86 and accompanying text (pointing out specific criticisms made regarding the Chinese legislative system).

91. See Li, *supra* note 62, at 123 (explaining how decentralization has worsened the problems in the law-making system).

92. See Nafziger, *supra* note 10, at 763 (discussing the Chinese law making process).

93. See *id.* (explaining the first step of the legislative process).

94. See *id.* (noting that when the NPC is not in session, the SCNPC serves NPC functions in the legislative drafting process).

95. See Corne, *supra* note 41, at 253 (describing the characteristics of legal drafting). The ambiguity in legal drafting represents the result of a contradiction in China between the relative utility of detailed law versus broad laws. *Id.* at 250. More detailed laws would assist China's economic development in the long run as it increases certainty, thus promoting market rational behavior on the part of entrepreneurs. *Id.* In the short run, however, detailed law limits the freedom that the CCP currently enjoys to respond quickly to political and economic change. *Id.*

96. See *id.* at 253 (exemplifying the legal flexibility in Chinese law via the characteristics of legal drafting).

is the broad discretion granted to administrative authorities through the use of overtly flexible language.⁹⁷ This “flexibility” allows administrators to alter the meaning of legislative language with the circumstances,⁹⁸ and leaves the door open for personal mischief of all sorts.

3. Administration: Rule-Making in China

a. Administrative Authority

Chinese administrative law covers the specification, implementation, and enforcement of central laws by certain state entities, including those concerning economic policy.⁹⁹ As merely the means through which central government legislation takes practical form, administrative rules in China are theoretically subordinate and complementary to legislation issued by the NPC and SCNPC.¹⁰⁰ However, in light of the broad discretion granted to the State Council and its lower regulatory offices, this characterization may no longer be true.

The State Council, which controls the central government’s executive branch, oversees more than sixty departments, ministries, commissions, administrations, and offices.¹⁰¹ This expansive set of governmental bodies not only possesses the authority to issue regulations to implement specific legislation under a grant of power by a central legislative body, but also possesses authority that stems from a general rule-making power, inherent in the agencies, and enables them to issue any rule that is necessary to carry out their

97. See *id.* at 250 (stating that the fact that these laws are expressed in terms of general standards renders them useless as a tool for dealing with the practical problems that occur during implementation).

98. See Lubman, *supra* note 11, at 391 (discussing the effects of the Chinese language and phrasing on legislation).

99. See La Kritz, *supra* note 59, at 268 (“Since all law in China is public law, administrative law also regulates China’s vast economy, as well as the relationship among its various actors.”).

100. See Corne, *supra* note 41, at 253 (noting that all enactments of the administrative bodies must not be at odds with the Constitution).

101. See Lubman, *supra* note 11, at 389-90 (describing the allocation of rule-making authority).

functions.¹⁰² In practice, the broad discretion conferred by the NPC and SCNPC, combined with its administrative authority, has, in many ways, raised the State Council administrative structure to the level of a *de facto* legislative body of substantial size and strength.¹⁰³

b. Administrative Drafting Process

The Chinese administrative drafting process, similar to the legislative drafting process, is relatively simple.¹⁰⁴ First, the Legal Bureau prepares drafts of regulations¹⁰⁵ for submission to the Legal Committee of the State Council.¹⁰⁶ After several drafts, the Legal Committee proposes final versions of the regulations to the State Council for approval as administrative regulations.¹⁰⁷

The State Council and its lower administrative organs also issue a variety of less formal "rules" designed to enforce their regulations.¹⁰⁸ In addition, the State Council and its highest administrative arms provide "clarification" of earlier statutes or regulations in accordance with prevailing policy objectives through the use of two methodologies: "specification" and "administrative interpretation."¹⁰⁹

102. See PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 56 (H.K. Univ. Press 1997) (describing the administrative organs and the process of enacting legislation).

103. See *supra* notes 75-78 (describing the functions of the State Council).

104. See Nafziger, *supra* note 10, at 763 (comparing the administrative drafting process with the legislative drafting process).

105. See Corne, *supra* note 41, at 253 (stating that the State Council ultimately issues a variety of documents known as "administrative regulations" (*xingzheng fagui*)). The organs under the State Council, however, can independently issue administrative rules (*xingzheng guizhang*). *Id.* "Local people's congresses issue local administrative regulations (*difang xingzheng fagui*) and local people's governments of provinces, municipalities, and 'quite big cities' may issue local administrative rules (*difang xingzheng guizhang*)." *Id.*

106. See Nafziger, *supra* note 10, at 763 (discussing the supervision by the State Council and noting that China's drafting process is "hermetic").

107. See *id.* (explaining the series of steps in drafting).

108. See La Kritz, *supra* note 59, at 272-73 (stating that the enforcement tools include: "administrative orders (*mingling*), instructions (*zhishi*), approvals (*pijun*), contracts, rewards, sanctions (*xingzheng zhicai*), disciplinary sanctions (*xingzheng jilu chufen*), and punishments (*chufa*)").

109. See Corne, *supra* note 41, at 263 (defining specification and administrative interpretation as applied to administrative regulation).

High-level administrative bodies practice specification by issuing internal normative documents to regulate certain technical areas under their specific jurisdiction, such as foreign investment.¹¹⁰ These same high-level bodies also possess the practical mandate to “construe law and regulations in a way that may reflect departmental policy and/or the social reality of the regulated” through administrative interpretation.¹¹¹

c. Disbursement of Administrative Power

During most of the first thirty years of communist rule, the administration performed in accordance with CCP policies “through the positioning of selected cadres in the bureaucracy.”¹¹² The main administrative function was simply to supply detail to basic laws in accordance with current CCP objectives.¹¹³ Administrative acts were nearly automatic, and close attention to formulaic, CCP-mandated procedures and forms ensured the legitimacy of such acts, rather than through popular political pressure.¹¹⁴ China’s current “open door” policy, however, has somewhat undercut the predictability of China’s regulatory system by reducing the emphasis on traditional CCP goals.¹¹⁵ Coupled with the State Council’s ample size and

110. *See id.* at 264 (explaining that the documents show prevailing policy and contain detailed information missing from the higher statutes or regulations and are only circulated to a small portion of the Chinese bureaucracy). Many of these internal directives are statutory law interpretations and often contradict relevant statutes. *Id.* The past has proven how these have been issued to redefine statutes in relation to temporary changes in China’s economy. *Id.*

111. *Id.*

112. *See* Leung, *supra* note 79, at 104 (explaining that administrative acts came at the direction of arbitrary political objectives rather than the law).

113. *See id.* (discussing Communist government administration historically in China).

114. *See id.* at 105 (noting that this characteristic is antagonistic to modern Western notions of administrative law and public administration where the administration’s legal function is to promote “openness, public participation, and fairness in decision-making,” values which are deemed essential to a “good” government).

115. China’s current openness to foreign influence and massive legislative undertakings have lessened the CCP’s need for a tight administrative grip to carry out CCP ideals. As a result, administrative agencies have been freed to pursue

administrative jurisdiction, the stage has been set for a gradual re-disbursement of power.

This re-disbursement of power has already occurred on several levels. On one level, the growing number of administrative bodies necessary to implement market economics has spread power more evenly across more government agencies.¹¹⁶ On another level, the divergence between the drafting of regulations and their "actual implementation" has also expanded power over various levels of government.¹¹⁷ In addition, local government officials, who are in charge of drafting, implementing, and enforcing new laws, are "free to apply provincial norms under the guise of carrying out their constitutional duties,"¹¹⁸ and thereby are free to infuse local protectionism into central laws.

This final level of power disbursement is the most antagonistic to China's potential compliance with WTO DSB decisions because it represents a level of regulatory action that is seemingly beyond the control of central government influence. The transference of the central government's power to provincial and local governments, whose policy interpretations often differ markedly from either the NPC's or State Council's, has created a law-making and rule-making structure that is seriously "fragmented."¹¹⁹ As a result, even where

other, non-traditional actions. *See generally* Corne, *supra* note 41 (discussing the development of Chinese administrative law).

116. *See generally id.* (discussing the devolution of administrative power).

117. *See id.* at 249-50 (distinguishing between implementation of the regulations and rules and lower normative documents and actual implementation); *see also* Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 733-34 (1994) (asserting that Chinese administrative agencies have the power to both issue and interpret their own rules, and to require that courts enforce them). Another effect is the ability of administrative agencies to simultaneously protect or increase the jurisdiction and advance their policies. Lubman, *supra* note 11, at 390. One practical effect of this is that administrative bodies and their officials can employ a personally-altered set of norms under the pretext of implementing the law enacted by the higher authority. Corne, *supra* note 41, at 249-50.

118. *See* La Kritz, *supra* note 59, at 268 (noting that as a result, although "central laws may seem attractive and familiar, local rules and regulations are colored by administrative parochialism and local reality"). This, in effect, creates an accountability vacuum where "corruption, nepotism, and *guanxi* are poorly sanctioned and thereby able to flourish." *Id.*

119. *See* Lubman, *supra* note 11, at 385 (pointing out that one scholar believes that this fragmentation is specifically caused by a monumental increase in "inter-

China's central government may take appropriate legislative or administrative action to comply with a DSB decision, incongruence at China's local administrative level may render actual compliance impossible.

4. Oversight

a. Identifiable Problems

i. Discrimination

The Chinese government has identified three main areas of concern regarding legislative and administrative action to which it has devoted a certain amount of effort towards reform.¹²⁰ One such area of concern is the discrimination endemic to a fledgling economic state aspiring to develop domestic financial viability.¹²¹ However, while states possessing developing economies are often tempted towards protectionist measures, certain characteristics of China's governmental apparatus make the advent of such measures more likely, and their adverse effects on foreign economic interests more acute.

One troublesome characteristic is simply China's socialist background. In the past, socialist economies have displayed a tendency to apply one set of laws to domestic businesses, and an entirely different, and less favorable, set of laws to foreign businesses and international joint ventures.¹²² In spite of fundamental shifts in China's official stance on foreign involvement, the Chinese bureaucracy, in particular, still harbors a deep mistrust for private

unit" bargaining, which has greatly complicated negotiation and consensus-building).

120. See Raj Bhala, *Enter the Dragon: An Essay on China's WTO Saga*, 15 AM. U. INT'L L. REV. 1469, 1526 (2000) (describing the discrimination occurring in relations with foreign business firms).

121. See *id.* (explaining how protectionist government measures are used in China against private companies).

122. See Yee, *supra* note 67 (citing Anne Carver, *Inventing a Legal Tradition*, in ADVANCES IN CHINESE INDUSTRIAL STUDIES 45 (Sally Stewart ed., 1995)) (describing the difference that develops in socialist economies for treatment for domestic and foreign business).

companies, which they view as beyond their control or influence.¹²³ This distrust results in a somewhat inhospitable economic climate for foreign firms, which continually face "discriminatory regulations implemented by protectionist government ministries."¹²⁴

Another aspect of China's governmental structure discriminating against foreign businesses is the widespread politicizing of what should theoretically be economic decisions.¹²⁵ For example, the reason that only a few private firms initially floated securities on the Shanghai stock market, despite an absence of regulations forbidding their involvement, was that approval depended on local governments' positive recommendations.¹²⁶ This arrangement has not only inserted a political factor within what should be a purely market decision (to buy or sell stock), but has also worked to place foreign companies, lacking significant access to local government officials, at a decidedly economic disadvantage.¹²⁷

ii. Failure to Implement

The failure of Chinese government officials even to implement the laws promulgated by the central government strikes at the heart of China's efforts to become a compliant WTO Member.¹²⁸ If there is a question whether basic NPC laws will receive full implementation

123. See Bhala, *supra* note 120, at 1526 (explaining that these officials resent the fact that the firms operate outside of the CCP system and are particularly wary of ownership over important infrastructure, such as water and power plants). This uneasiness is only heightened in relation to foreign private business interests. *Id.*

124. See *id.* (discussing the harsh climate surrounding private enterprises because of the discriminatory regulations protectionist government ministries implemented).

125. See *id.* at 1527 (describing the financial services sector as another example of where change is needed). As of January 2000, the state controlled all securities firms. *Id.*

126. See *id.* (stating that only a few private firms had floated securities on exchanges because recommendations from local governments were necessary to gain approval).

127. See *id.* at 1527 (criticizing the information and technology sectors in China).

128. See La Kritz, *supra* note 59, at 267 (discussing the uncertain legal system that plagues China); see also Blumental *supra* note 18, at 237 (contemplating China's efforts at WTO compliance).

throughout the Chinese administrative structure, it seems unlikely that the contentious enactments that may come in response to a WTO DSB decision will receive appropriate regulatory action.¹²⁹ As one commentator in the international investment sphere stated, “[t]he appearance of Western legal concepts may placate the fears of foreign investors, but local administrative implementation and enforcement of such norms is at best disconcerting.”¹³⁰ Moreover, the administration’s widespread and autonomous ability to implement central government laws will likely make any attempts to use national reforms to remedy the situation fruitless for the same systematic reason.¹³¹

iii. Corruption

Although the problem of corruption has only a peripheral effect on China’s ability to comply with WTO DSB decisions, its pervasiveness in the Chinese government makes it too relevant to overlook.¹³² As one commentator has opined:

The corruption problem seems only to worsen. So tightly knit are corrupt practices into the fabric of modern Chinese society that they are almost invisible. Invoice fraud, diversion of government investment capital, bribery and misappropriation of central and local government funds all seem to have become a way of life The universal assumption that all officials and corporate managers are corrupt is probably responsible for the speed with which disgruntled workers take to the streets; civil protest, mostly peaceful, is reported almost daily by the foreign (not Chinese) press in China.¹³³

In addition, some experts have claimed that the same gradual shift of power to localities that has resulted in many of the problems noted

129. See La Kritz, *supra* note 59, at 268-69 (reviewing the lawmaking process in China).

130. *Id.* at 268.

131. See *id.* at 268-69 (explaining lawmaking in China and its effects).

132. See Lubman, *supra* note 11, at 404 (stating that corruption is growing in China despite efforts to control it).

133. *Id.* at 404-05 (citing US-China Bus. Council, *China’s Political Developments*, in US-CHINA BUS. COUNCIL COMP., CHINA OPERATIONS ’98, at 5 (1998), which are materials from a China Operations ’98 conference).

above is also a root cause for corruption.¹³⁴ Under this scenario, local officials demand that enterprises pay various fees in order to continue to do business in the particular locality.¹³⁵

b. Recent Oversight Reforms

i. Legislative Oversight Reform: The Law-Making Law

China's main reform in the area of legislative oversight is the Law-Making Law of the People's Republic of China ("Law-Making Law"), promulgated by the third plenary meeting of the Ninth National People's Congress on March 15, 2000.¹³⁶ The Law-Making Law broadly aims to regulate China's disorderly legislative system¹³⁷ and foster legislative uniformity.¹³⁸ Specifically, the Law-Making Law focuses on reforming the procedural and technical aspects of legislation, in the hopes that a well designed procedure and filing system might eliminate internal inconsistencies and would eventually make the legislative process more democratic and scientific.¹³⁹ In

134. See STAFF OF HOUSE JOINT ECON. COMM., 102D CONG., CHINA'S ECONOMIC DILEMMAS IN THE 1990S: THE PROBLEMS OF REFORMS, MODERNIZATION, AND INTERDEPENDENCE 452 (Comm. Print 1991) (discussing the factories' complaints and the conditions that lead to corruption).

135. See Donald Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 37 (1991) (explaining that thriving businesses are seen as sources of wealth from which governments require payments). These fees or exactions are known in China as *tanpai*. *Id.*; see also Blumental *supra* note 18, at 234 (commenting that as localities gain power from reforms, corrupt officials require enterprises to pay fees).

136. See Li, *supra* note 62, at 120 (reporting that the legislative process for the new law began in 1993 and was lengthy, laborious, and resulted in several different drafts).

137. See Law-Making Law, art. 1 (P.R.C.); see also Li, *supra* note 62, at 120 (stating that China's Law-Making Law was promulgated to solve the problems plaguing the Chinese legislative system).

138. See Law-Making Law, art. 3; see also Li, *supra* note 62, at 120-22 (indicating that China's Law-Making Law was aimed at solving conflicts in legislative uniformity). The need for uniformity stems from the problems endemic to a disorderly legislative system, notably conflicts between laws, legislating without authority or in violation of procedures, and low quality legislation. *Id.*

139. See Law-Making Law, arts. 12-41; see also Li, *supra* note 62, at 136 (discussing the procedures and the goals in reforming the legislative process).

addition, perhaps in response to the rise in locally-operative administrative power, the Law-Making Law, for the first time in China's history, separates central and local legislative powers,¹⁴⁰ and specifically details the exclusive legislative powers of the central government.¹⁴¹

Although the Law-Making Law has received praise for both its clarification of the hierarchy of Chinese legislative enactments¹⁴² and its contribution to improved legislative transparency,¹⁴³ the Law-Making Law has also received its share of harsh criticism. Many critics have found the mere promulgation of the Law-Making Law

140. See Li, *supra* note 62, at 121 (relaying that for the first time in China's legislative history, the Law-Making Law divides the legislative powers of central and local governments).

141. See *id.* at 126 (listing the central government's exclusive legislative powers). The list of central government powers includes:

- (1) matters concerning national sovereignty;
- (2) election, organization and powers of the People's Congresses, People's Governments, People's Courts and People's Procuratorates at various levels;
- (3) the systems of autonomous regions, [Special Administrative Regions] and self-governance of citizens (*jiceng qunzong zizhi*) at the basic level;
- (4) crime and punishment;
- (5) restraining and penalizing citizens' political rights and personal freedoms;
- (6) appropriation of non-state-owned property;
- (7) the basic civil system;
- (8) the basic economic system and the basic systems of finance, taxation, customs, banking and international trade;
- (9) the systems of litigation and arbitration and
- (10) other matters that must be legislated by the NPC and its Standing Committee.

Id. The Law-Making Law does not, however, list specific legislative powers localities may exercise. *Id.* at 128. The Law-Making Law provides only the general guidance that localities may be involved in implementing laws and administrative regulations and matters related to the special circumstances and local affairs of the localities. Law-Making Law, art. 64.

142. See Lubman, *supra* note 11, at 394 (stating that while the new law on legislation somewhat clarified the enactments hierarchy, it did not develop institutions or doctrines to deal with the continuing need for legal interpretation).

143. See Li, *supra* note 62, at 136-39 (praising the new law on legislation for making the procedures more transparent while also acknowledging the need for more reforms); see also Law-Making Law, arts. 34, 58 (requiring both public and expert hearings to be held during the review of a bill).

inconceivable, because no other country has adopted such a law,¹⁴⁴ as well as unnecessary, because China had previously enacted comprehensive organizational and procedural rules governing legislative activities.¹⁴⁵ Additionally, the listing of the central government's exclusive legislative power was met with immediate disdain by some mainland China scholars, who skeptically viewed the list as a possible attempt by the central government to restrict local legislative power.¹⁴⁶ Others complained that the Law-Making Law contains substantive deficiencies, including insufficient guarantees on the use of local legislative powers, a lack of legislative supervision mechanisms, and an unclear delegation of the power to interpret laws.¹⁴⁷

ii. Administrative Oversight Reforms

As China attempts to use legislative action to reinforce Western economic laws, the belief has arisen that the legitimacy of this legislation rests on structural administrative reform.¹⁴⁸ Former Chinese leader Deng Xiaoping recognized the inherent problems of the Chinese bureaucracy in the early 1980s.¹⁴⁹ In his speech entitled "On the Reform of the System of Party and State Leadership,"¹⁵⁰

144. See Li, *supra* note 62, at 120-21 (reporting that there is no other country with a "law-making law").

145. See *id.* at 121 (contending that many believe that the law is unnecessary because China had already enacted rules governing legislative activities); see, e.g., XIANFA, arts. 62, 64, 67, 89, 91, 100, 116 (1982) (conferring legislative powers on the NPC, the SCNPC, the State Council, the ministries and commissions of the State Council, local people's congresses and their Standing Committees, and the people's congresses of autonomous regions).

146. See Li, *supra* note 62, at 126-127 (indicating that some mainland scholars initially disfavored the center's exclusive legislative power, seeing it as an attempt to further limit local legislative power).

147. See *id.* at 121 (expressing complaints about the new law).

148. See La Kritz, *supra* note 59, at 274 (quoting one scholar who opined that, in the absence of such a reconciliation, "Western legal norms will continue to brush against local administrative expediency and institutionalized corruption").

149. See Leung, *supra* note 79, at 104 (highlighting Deng Xiaoping's recognition of the inherent problems of bureaucracy in the 1980s).

150. See Commentary by World Economic Herald, *Rereading Deng Xiaoping's "On the Reform of Party and State Leadership,"* 20 CHINESE L. & GOV'T 15, 15-

Deng noted major deficiencies in the Chinese leadership and the CCP cadre system, including bureaucratism, over-concentration of power, patriarchal methods, life tenure in leading posts, and privileges of various kinds.¹⁵¹ Deng also criticized the Chinese bureaucracy for fostering widespread abuses of power, inefficient administration, irresponsible behavior, corruption, despotism, and nepotism, and called for reform of the bureaucracy, which he deemed necessary to complement the Open Door Policy and to enhance administrative efficiency.¹⁵² Remedying these concerns by modifying the administrative allocation of rule-making power that fostered them is essential to establishing the rule of law,¹⁵³ a commonly understood prerequisite to compliant WTO membership and thus a primary Chinese policy objective.

China has adopted five major pieces of legislation in response to these concerns and in order to reform the oversight of China's powerful administrative structure.¹⁵⁴ They are: (1) the 1989 Administrative Litigation Law ("ALL");¹⁵⁵ (2) the 1990

20 (1987) (commenting on Deng Xiaoping's speech given at an enlarged meeting of the Political Bureau of the Central Committee of the CCP on August 31, 1980).

151. *See id.* at 15 (reviewing passages from Deng's speech).

152. *See id.* at 16-17 (discussing the ramifications for the over-concentration and abuse of power in the Chinese bureaucracy).

153. *See* Lubman, *supra* note 11, at 389 (analyzing the Chinese bar and legal education while reviewing reform); *see also* Jan Hoogmartens, *Taking and Enforcing Mortgages in China: A Lender's Perspective*, 30 HONG KONG L.J. 520, 531-34 (2000) (discussing problems and interferences with enforcement of Court decisions in China).

154. The intricacy of these laws prevents them from being fully discussed in this article. *See infra* notes 137-144 and accompanying text (reviewing the Law-Making Law broadly).

155. *See Law of Administration Litigation Law of the Republic of China*, in CHINA LAWS FOR FOREIGN BUSINESS: BUSINESS REGULATION No. 4, at 24,551 (CCH Australia Limited 1999) (translating the P.R.C. Administration Litigation Law ("ALL") of 1989); *see also* Leung *supra* note 79, at 106 (discussing the administrative law package); Lubman *supra* note 11, at 392-393 (explaining the rights that the ALL provides). The ALL was lauded as the first piece of comprehensive legislation directed at providing a full review of administrative action by judicial organs. In essence, the ALL allows affected people or organizations the right to sue agencies acting "unlawfully" in the Chinese courts. *Id.*

Administrative Review Regulations ("ARR");¹⁵⁶ (3) the 1994 State Compensation Law ("SCL");¹⁵⁷ (4) the 1996 Administrative Penalty (Punishment) Law ("APL");¹⁵⁸ and, (5) the 1997 Administrative Supervision Law ("ASL").¹⁵⁹ While the ARR, SCL, and APL attempt to exercise supervision and place a check on the administrative organs, the scope and frequency of their application remains limited,

156. See Regulations on Administrative Reconsideration ("ARR") (1990) (amended 1994) (P.R.C.), available at <http://www.qis.net/chinalaw/prclaw43.htm> (last visited Oct. 13, 2002) (protecting the administrative groups of the government to do their duties). The promulgation of the 1990 ARR was intended to standardize the practice of "internal" review by legislation and to complement the operation of the ALL, which it is similar to in scope. See also Leung, *supra* note 79, at 107-108 (stating that Chinese legal scholars hope that the ARR will reform the legal system in-depth reform and promote the concept of the rule of law).

157. See State Compensation Law of the People's Republic of China (1994) (P.R.C.) [hereinafter SCL] (allowing remedies for illegal acts of the government), available at Lehman, Lee, & Xu, Chinese law partnership, http://www.lehmanlaw.com/lib/library/Laws_regulations/general/state_compensation.htm (last visited Oct. 25, 2002); see also Keith Hand, *Watching the Watchdog: China's State Compensation Law as a remedy for Procuratorial Misconduct*, 9 PAC. RIM L. & POL'Y 95, 137-38 (2000) (criticizing the SCL). Viewed as a law to supplement the ALL and facilitate its implementation, the SCL was adopted primarily to strengthen the supervision of the exercise of state powers by administrative organs. See Leung, *supra* note 79, at 108-109 (reviewing the SCL). The SCL defines the situations where governmental agencies may be liable for injurious consequences of their own official acts. See Lubman, *supra* note 11, at 392-93 (discussing what the APL provides). According to Article 33 of the SCL, foreign nationals and enterprises within Chinese territory can request state compensation for harms done to them. See SCL, art. 33 (1994).

158. See Administrative Punishment Law (1996) (P.R.C.) [hereinafter APL], published by Xinhua News Service, Mar. 21, 1996, FBIS, at 96-071 (Apr. 11, 1996) (introducing, for the first time in Chinese socialist legal history, the common law principles of procedural fairness, including the allowance of hearings to those who wish to oppose an administrative penalty imposed on them and to controvert allegations against them), available at <http://www.qis.net/chinalaw/prclaw46.htm> (last visited Oct. 13, 2002); see also Leung, *supra* note 79, at 110 (analyzing the APL). The APL also specifies that laws and regulations must provide the powers to impose administrative penalties. *Id.*; see also Lubman, *supra* note 11, at 392-393 (defining the APL). In addition, the APL defines the types of punishments that administrative agencies may impose on people and organizations. *Id.* at 392.

159. See Administrative Supervision Law (1997) (P.R.C.) [hereinafter ASL] (attempting to promote discipline and efficiency in the administration of the government by creating groups to supervise the administration), available at <http://www.qis.net/chinalaw/prclaw42.htm> (last visited Oct. 13, 2002); see also Leung, *supra* note 79, at 112 (discussing the ASL).

and, as a result, the effectiveness of these reforms is highly suspect.¹⁶⁰

In truth, China's administrative structure at accession to the WTO is practically the same as it was prior to these oversight reforms.¹⁶¹ Most legislation provides only vague instructions to administrative bodies, resulting in a high degree of administrative discretion and very little certainty.¹⁶² An increasingly decentralized administration has resulted in an unbalanced power structure and rapidly changing levels of policy distortion.¹⁶³ In short, legislative and administrative action in China is as unpredictable as it has ever been.¹⁶⁴

D. CHINA'S LEGISLATIVE AND REGULATORY SYSTEMS ARE INEFFECTIVE

As noted above, the Chinese legislative and administrative systems are characterized by the promulgation of vague and flexible laws and the predominance of an administrative body operating under a high degree of independent discretion.¹⁶⁵ Under the Chinese legal framework, China's ability to use these systems to comply with WTO dispute resolution decisions raises several questions.¹⁶⁶ Because administrative interpretation has varied, it is often unclear which governmental body is ultimately responsible for an individual law.¹⁶⁷ The lack of a clear separation of powers also potentially

160. See Blumental, *supra* note 18, at 237 (criticizing the effectiveness of the reforms).

161. See *id.* (analyzing China's accession to the WTO); see also Leung, *supra* note 79, at 116 (contending that "the rule of law is emerging, but without proper implementation and enforcement the end result may be the same as before").

162. See Leung, *supra* note 79, at 104 (describing the problems of arbitrary administrative acts).

163. See Blumental, *supra* note 18, at 23 (discussing the inherent problems stemming from the lack of separation of powers).

164. See *id.* (lamenting over China's problematic legal system).

165. See *supra* Part IA (citing the basic principles of the Chinese legal and administrative systems).

166. See Lubman, *supra* note 11, at 408-10 (discussing the effects of China's reforms).

167. See Blumental, *supra* note 18, at 237 (explaining that the vagueness of the reforms leads to a high degree of administrative discretion); see also Leung, *supra* note 79, at 116 (stating that politics often dictated administrative decisions).

inhibits China's ability to determine precisely how to modify a law or regulation with a specific goal in mind.¹⁶⁸ With a lack of uniformity and incongruence at the local level, it is doubtful that China could implement effective action within the WTO dispute resolution required time frames.¹⁶⁹ With many different political levels enforcing varying laws, China will need a substantial amount of political will to overcome legislative or administrative gridlock.¹⁷⁰

In light of these realities, it is unlikely that China has the capacity to withdraw or modify its laws and regulations upon a national—much less international—directive. The large amount of recent legislation by China demonstrates its ability to comply with overall economic goals.¹⁷¹ However, the seemingly chaotic nature of China's law-making and rule-making processes makes dispute settlement compliance extremely dubious.¹⁷²

II. COMPLIANCE WITH THE WTO DSB

A. ORIGINS OF THE DSB

The Dispute Settlement Understanding ("DSU"),¹⁷³ unlike most of the other Multilateral Trade Agreements developed during the

168. See Leung, *supra* note 79, at 139-40 (commenting on the problems which arise from the lack of specificity of the reforms); see also Blumental, *supra* note 18, at 235 (stating that the problematic structure of China's legal system poses a barrier for legal reform).

169. See 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, 729 (2000) (noting the challenges behind China's compliance with WTO decisions).

170. See Blumental, *supra* note 18, at 235-36 (asserting that, because the principles of reform place the leadership of the Party superior to the Constitution, the stature of the law is reduced because the Party remains above the law, and concluding that this results in legal instrumentalism, not the rule of law).

171. See Lubman, *supra* note 11, at 384 (noting the extensive recent accomplishments in Chinese law).

172. See Blumental, *supra* note 18, at 254 (alluding to issues that may arise when China gets involved in a DSB decision).

173. See DSU, *supra* note 34 (providing for WTO dispute settlement procedures).

Uruguay Round negotiations, was unfinished until 1993.¹⁷⁴ The drafting process was short because the DSU was essentially a mirror image of the dispute settlement system originally developed for the International Trade Organization ("ITO").¹⁷⁵ In order to ensure the DSU's comprehensive application, acceptance of the DSU was mandatory to WTO membership.¹⁷⁶

The United States was the main proponent of the DSU.¹⁷⁷ The United States and other developed countries hoped that the new procedures for implementing dispute settlement rulings would significantly improve the enforcement capacity that existed in the GATT dispute resolution system.¹⁷⁸ Whereas the GATT system allowed a party to "block" both the formation of a panel and the acceptance of the decision itself,¹⁷⁹ the DSU made adoption of its decisions practically automatic,¹⁸⁰ and reinforced their

174. *See id.* (noting 1993 as the date of completion).

175. *See* Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2278-88 (1997) (discussing the origins of the WTO).

176. *See The Final Act of the Uruguay Round: A Summary*, GATT FOCUS (WTO, Geneva, Switz.) Dec. 1993, at 5-15 [hereinafter GATT FOCUS] (discussing the obligations established at the Uruguay Round).

177. *See* Gleason & Walther, *supra* note 169, at 709 (recalling the United States' support for the DSU).

178. *See* Schleyer, *supra* note 175, at 2286 (contending that the modifications made by the DSU "show that the new WTO system is a much more powerful and authoritative tool for resolving disputes than the GATT system").

179. *See id.* (discussing the increased power of the DSU in the WTO). The GATT's practice is known as the Rule of Unanimity. *See id.* at 2283 (describing the GATT's requirement of full consensus on both panel formation and acceptance of decisions as effectively giving challenged and losing parties the ability to "block" such occurrences). The GATT dispute resolution system was itself an improvement on traditional international dispute resolution systems, such as that used by the World Intellectual Property Organization, which did not even require parties to register an appearance. *See id.* at 2283-84 (observing that the GATT system was initially successful in obtaining compliance). However, in spite of a solid track record, the GATT system was criticized for leaving open an "escape hatch" that could be employed by countries to avoid implementation of the most contentious decisions. *See id.* at 2284 (noting criticisms of the GATT system).

180. *See id.* at 2286-88 (analyzing the six important modifications made to the system for resolving trade disputes). This was mainly accomplished by replacing the Rule of Unanimity present in the GATT dispute resolution system with a Rule of Reverse Consensus. *See id.* at 2286 (noting that under the WTO system, panel

implementation through severe remedial measures for non-compliance.¹⁸¹ The United States, in particular, lauded the DSU as a superior means of enforcement, which Members could employ to more legitimately insist on the compliance of other Members following a successful challenge.¹⁸²

B. DISPUTE SETTLEMENT PROCESS UNDER THE DSU

The DSU, contained in the agreement establishing the WTO, describes the WTO's system for resolving disputes under its agreements.¹⁸³ The DSU identifies the DSB as the exclusive body overseeing all disputes and provides a procedural framework through

formation and decision implementation could only be stopped by a consensus against them).

181. See DSU, *supra* note 34, arts. 21, 22 (discussing compliance and sanctions for non-compliance with WTO rulings and recommendations); see also GATT FOCUS, *supra* note 176, at 14 (discussing how the DSU significantly strengthens the existing system). Although the GATT dispute settlement system had been strengthened and streamlined through certain reforms agreed to following the Mid-Term Review Ministerial Meeting held in Montreal in 1988, the continued ability to block adoption of decisions at that point limited the system's enforcement potential. *Id.*

182. See Gleason & Walther, *supra* note 169, at 709 (noting the pleased reaction of the U.S. Congress to the Uruguay Round Agreement Acts, which views the DSB as giving the United States improved leverage). The U.S. Congress noted its support for the DSB by stating the following during its ratification of the Uruguay Round:

[C]ountries that bring successful challenges will be authorized to withdraw Uruguay Round trade benefits from the offending country if, after a reasonable period following adoption of the panel or Appellate Body report, the matter cannot be settled in a mutually satisfactory manner. These changes mean that when the United States brings a successful challenge against another government under the DSU, the United States will have improved leverage to insist that the defending government remedy its violation. *Id.* at n.1 (citing H.R. Doc. No. 103-316, at 1034 (1994)).

183. See Schleyer, *supra* note 175, at 2276 (noting that the detail and structure of the DSU lends credence to its expected use as a premier tool of dispute resolution); Julia Cheng, *China's Copyright System: Rising To The Spirit of TRIPs Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 2003 (1998) (stating that the DSU includes a "settlement system for resolving international trade disputes"). These qualities differentiate the DSU from GATT dispute procedures, which have been criticized for being largely ad hoc, and thus vulnerable to political gamesmanship and diplomatic struggles among nations. *Id.* at 2003 n.455 (citing Schleyer, *supra* note 175, at 2276).

which WTO disputes must progress.¹⁸⁴ The DSB contains representatives from all WTO Member countries signed on to each particular agreement at issue, and, through comprehensive voting procedures, functions as the final arbiter of dispute rulings.¹⁸⁵

At the outset, the DSU requires a complaining party to consult in good faith with the challenged party or parties prior to formally initiating a dispute.¹⁸⁶ These consultations are important because they clarify the specific issues in dispute,¹⁸⁷ and because a complaining party is not generally allowed to modify its claims following the conclusion of consultations.¹⁸⁸ If disputing parties fail to reach a settlement within sixty days, the complaining party can request that

184. See DSU, *supra* note 34, arts. 2.1, 2.4 (identifying the DSB as the exclusive body overseeing all WTO disputes).

185. See *id.* (detailing the makeup and procedures of the DSB); see also Cheng, *supra* note 183, at 2003, 2003 n.456 (citing DSU, *supra* note 34, arts. 2.1, 2.4) (reporting that the DSU creates a single body to govern all disputes, which include the authority to “establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation, and authorize suspension of concessions in cases of non-implementation of recommendations”).

186. See DSU, *supra* note 34, art. 4, at 1228 (relaying the procedures that the DSU requires).

187. See *id.* art. 4.4 (establishing that a consultation must explain the reasons for the request, identifying the issues, including any legal bases). Consultations may also play an important role in easing China’s overall acquiescence to the WTO dispute settlement system. See Hoogmartens, *supra* note 153, at 533 (stating that Chinese society has long favored mediation to other modes of dispute settlement). In fact, many Chinese courts are still very cautious regarding the use of coercion in enforcing their judgments. See also Lubman, *supra* note 11, at 387 (explaining how Chinese courts, which were “formerly scorned as rightist institutions at the end of the 1950s and as bourgeois during the Cultural Revolution,” have only recently become used as forums in which to assert and protect legal rights). Even on the verge of WTO accession, most Chinese continue to prefer non-judicial solutions to disagreements that will “maintain or restore harmonious relations between the parties and also by a lack of judicial sophistication and experience.” *Id.* at 388.

188. See Lubman, *supra* note 11, at 397 (describing how Chinese government “undervalues the finality of judgments” and judges often prefer mediation because they lack judicial sophistication). As a result, Chinese trade negotiators at the WTO, who may be apprehensive toward judicial processes, will have incentives to resolve trade disputes at the consultations level so as to avoid the formal adjudication mechanics characteristic of the WTO DSB. *Id.*

the DSB convene a Panel to determine compliance.¹⁸⁹ The Panel is then composed within either a thirty- or sixty-day window and the parties issue their briefs.¹⁹⁰ Next, the Panel has six months¹⁹¹ to investigate the case and deliberate before it must submit a written decision to the DSB.¹⁹² As noted above, Panel decisions are essentially adopted automatically.¹⁹³ Automatic adoption will not occur only if either all the Member nations agree by consensus not to adopt the decision or if one of the parties requests an appeal of the decision.¹⁹⁴ If a party files an appeal, the Appellate Body¹⁹⁵ reviews

189. See DSU *supra* note 34, art. 4.7 (explaining the reasons to convene a panel); see also *id.* art. 6.1 (stating that panel establishment is done by request, unless the DSB decides by consensus against the establishment); Interview with C. Christopher Parlin, U.S. Trade Representative's Office ("USTR"), Negotiator during the Uruguay Round, and Legal representative during many WTO disputes (Oct. 23, 2001) (discussing how the request for a panel ("Panel Request") is the single-most important document in DSB process). Mr. Parlin explained that the Panel Request constricts Panel's terms of reference by specifying the precise measure at issue. *Id.* As a result, the Panel will forever look only at the specific measures listed and review only the specific issues mentioned in the Panel Request. *Id.* Thus, in order to avoid unfortunate legal occurrences, the Panel Request should be as comprehensive as possible. *Id.*

190. See DSU, *supra* note 34, art. 8.1-8.7 (providing the process to determine the composition of the panel members). The process includes the following rules: (1) no panel member may be from any country involved directly in the dispute; (2) the Secretariat proposes nominations from a list of individuals; (3) parties may not oppose the nomination without compelling reasons; (4) if the parties are unable to agree on a panel within twenty days, the Director-General appoints the panelists upon request from either party. *Id.*

191. See *id.* art. 12.8 (issuing the allotted time a panel has to conduct an examination); *id.* art. 12.9 (noting that the deadline may be extended to nine months in exceptional circumstances).

192. See *id.* art. 12.7 (describing the composition of the parties' reports).

193. See *id.* art. 16.4 (explaining the requirements in adopting the panel report).

194. See *id.*; see also *id.* art. 19.1 (providing that both the panel and Appellate Body reports issue recommendations for Members to bring any offending measure into conformity with that Member's WTO obligations); *infra* Part V (discussing in greater detail the potential role of Article 19.1 in aiding China's compliance with DSB decisions).

195. See DSU, *supra* note 34, art. 17.1 (stating that the Appellate Body is composed of seven members, three of whom will be chosen to adjudicate an individual dispute); see also *id.* art. 17.2 (adding that those appointed by the DSB serve a four-year term and may be reappointed once). See generally *id.* art. 8 (explaining the process of selecting panelists). Since the GATT did not have an appellate structure, the creation of the DSB Appellate Body is an inherent

the Panel decision for adherence to WTO rules and proper legal interpretation.¹⁹⁶ Acceptance of Appellate Body decisions is also virtually automatic because, like Panel reports, they can only be rejected if a consensus of all DSB members vote against them.¹⁹⁷

C. COMPLIANCE WITH DSB DECISIONS

1. Basic Principles

A DSB ruling leads to three basic scenarios.¹⁹⁸ One scenario is that the losing party simply complies with the DSB decision by either withdrawing or modifying the offending measure.¹⁹⁹ A second scenario is that the violating Member decides not to comply or cannot comply with the DSB decision within a “reasonable period of time.”²⁰⁰ Under this scenario, the complaining party may request negotiations to establish compensation in lieu of withdrawal of the measure.²⁰¹ A third scenario occurs where the losing Member fails to effectively comply with the DSB decision and negotiations do not lead to an agreed amount of compensation.²⁰² Here, the complaining Member can request that the DSB suspend concessions or other

improvement on the effectiveness and legitimacy of the WTO’s legal discourse, and the new WTO system as a superior tool for dispute resolution than the GATT system. Schleyer, *supra* note 175, at 2286.

196. See DSU, *supra* note 34, art. 17.6, 17.12 (outlining the Appellate Body’s procedure of addressing the issues of law and legal interpretations raised by the appeal); see also *id.* art. 17.13 (providing the Appellate Body’s procedure of review and noting that they “may uphold, modify, or reverse the legal findings and conclusions of the panel”).

197. See *id.* art. 17.14 (providing the method of DSB adoption of Appellate Body reports).

198. See Cheng, *supra* note 183, at 2003 (illustrating three options contracting parties have in reaction to a violation of international trade rules); see also Judith Hipper Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT’L L. 416, 417 (1996) (explaining the three actions members can take when their law is successfully challenged).

199. See Cheng, *supra* note 183, at 2003 (discussing DSU art. 21.3).

200. See *id.* (discussing DSU art. 21.3(a)-(c)).

201. See DSU art. 22 (describing the procedures for compensation and suspension of concessions).

202. See Cheng, *supra* note 183, at 2003 (discussing DSU arts. 22.3(a)-(d)).

WTO privileges of the losing Member.²⁰³ These scenarios reflect the strength of the DSB's enforcement mechanism and demonstrate the WTO's firm proclivity toward effective implementation of DSB rulings.

Although Members have generally accepted the DSU's rules on compliance as a major improvement over the GATT mechanism, there are three procedural areas of the rules that still raise concerns and may have important implications for China's compliance with DSB decisions.²⁰⁴ One area of concern relates to whether the guidelines clearly establish a compliance deadline by setting standards for a "reasonable period of time" in which to implement a DSB decision.²⁰⁵ Another area of concern relates to "compliance review" procedures when there is a dispute over whether the losing member has complied with a DSB ruling.²⁰⁶ A third area of concern focuses on available remedies for non-compliance, especially those procedures used in suspending concessions if a losing member fails to effectively implement WTO rulings, or fails to conform by its compliance deadline.²⁰⁷

203. See DSU, *supra* note 34, art. 22 (explaining the proper avenue to take when a Member does not follow a DSB decision); see also *id.* arts. 22.5-22.6 (stressing that authorization for suspension is automatic unless there is a consensus to deny the request or an agreement prohibiting the suspension); *id.* art. 22.2 (emphasizing that there are numerous principles that must be applied in order to determine suspension of concessions); *id.* art. 22.6 (adding that the concerned Member may ask that the matter be referred to an arbitrator for further review); Cheng, *supra* note 183, at 2003 n.469 (citing DSU art. 22(3)(a)-(d), explaining the order of concessions: "first, in the same sector in which the violation by the other party occurred, second, in different sectors covered by the same agreement, or third in areas covered by other agreements").

204. See Gleason & Walther, *supra* note 169, at 713 (emphasizing the problems not corrected by the implementation of the DSU).

205. See *id.* (describing the compliance deadline).

206. See *id.* (explaining the "compliance review" procedures).

207. See *id.* (indicating that an available remedy for non-compliance is suspension of concessions).

2. Compliance Procedures That Have Raised Concern

a. Compliance Deadline: “Reasonable Period of Time”

Losing parties must comply with DSB decisions within a time frame set by the Panel.²⁰⁸ Article 21 of the DSU requires that members promptly comply with DSB recommendations and rulings.²⁰⁹ When it is difficult to meet the terms of the Panel or Appellate Body Report, the affected member may have a “reasonable period of time” to comply with the order.²¹⁰ The “reasonable period of time” is not to exceed fifteen months from the adoption of the order, unless the parties otherwise agree.²¹¹ The DSU requires the

208. *See id.* at 714 (emphasizing that the DSU alleviates the open-ended time frame previously permitted to a losing party under the GATT).

209. *See* DSU, *supra* note 34, art. 21(1) (articulating that timely compliance is necessary for resolving disputes).

210. *See id.* art. 21.3 (describing the DSB meeting that is held 30 days after the order takes effect). Without expressly defining what constitutes a “reasonable period of time,” Article 21.3 describes it as either: (1) a period of time proposed by the Member concerned and approved by the DSB; or when there is a lack of approval; (2) a period of time mutually agreed upon by the concerned parties within forty-five days of panel or appellate body report adoption; or (3) a time-frame determined in binding arbitration within ninety days of panel or appellate body report adoption. *Id.* In the case of an arbitration determination, Article 21.3(c) provides arbitrators with the guideline that a “reasonable period of time” should not exceed fifteen months. *See id.* art. 21.3(c); Gleason & Walther, *supra* note 169, at 718 (detailing the initial fear that Article 21.3 automatically provided losing parties with an unintended, and, often unnecessary fifteen month grace period for compliance). In spite of several early WTO decisions embracing the fifteen month standard, there is a recent trend toward using the “shortest possible period” standard. *Id.*; *see also* WTO Status Report, United States—Standards for Reformulated and Conventional Gasoline, Status Report by the United States, WT/DS2/10 (Jan. 10, 1997) (following the early fifteen month grace period); WTO Award of Arbitrator, EC Measures Concerning Meat and Meat Products (Hormones), Arbitration under Article 21.3 of the Understanding on Rules Governing the Settlement of Disputes, WT/DS26/15 & WT/DS48/13 (May 29, 1998) (emphasizing a shift away from the fifteen month grace period).

211. *See* DSU, *supra* note 34, art. 21.4 (explaining that when the Panel or Appellate Body acts to extend the time for providing their reports, that time should be added to the fifteen months, and the new time limit should not exceed eighteen months unless the parties agree that there are “exceptional circumstances”); *see also id.* art. 21.3(c) (acknowledging that the reasonable period of time depends on the particular circumstances, and, therefore, may vary from the standard of fifteen months).

DSB to keep "under surveillance the implementation of adopted recommendations or rulings."²¹² The DSB then requires the losing party to submit status reports prior to the DSB's mandatory review of the losing party, which is six months into the implementation period.²¹³

The DSB's fifteen-month maximum and the trend towards requiring shorter time periods for compliance present significant challenges to China's effective implementation of DSB decisions.²¹⁴ The relatively long time periods between NPC sessions, the instability and disorder of the law-making and rule-making systems, and the potential unwillingness of various administrative entities to take mandated action make China's capacity to take prompt, effective action improbable in either the legislative or the administrative sphere.²¹⁵ China will likely find itself in a desperate struggle between the practical need for at least fifteen months to comply and the idealistic desire to "save face" within the WTO by making sincere efforts to implement quickly.²¹⁶ The inclusion of a broad mandate within DSU Article 21 that developed countries pay "particular attention" to the interests of developing countries that are subject to compliance with a DSB decision does little to remedy such an elemental quandary.²¹⁷

212. *Id.* art. 21.6 (requiring also that the issue of implementation be placed on the agenda of a meeting six months after the establishment of the "reasonable period of time").

213. *See* Gleason & Walther, *supra* note 169, at 719 (stating that such reports can be "as specific or vague as the losing Member elects to make [them].") These status reports are the only thing that may be required of the losing Member during its compliance period. *Id.*

214. *See* discussion *supra* note 210 (explaining that the DSB has recently begun to shift towards a shorter compliance period).

215. *See id.* (indicating the change in the compliance standard and some of the challenges posed by a shorter compliance period).

216. *See id.* (noting the possible result of the change in the compliance period).

217. *See* DSU, *supra* note 34, art. 21.2 (emphasizing that extra attention is due to the interests of those countries "which have been subject to dispute settlement").

b. “Compliance Review”: The Conflict Between Article 21.5 and Article 22

Tensions exist within the DSU’s own provisions as well.²¹⁸ In creating a mechanism for review of the compliance process, the DSU’s drafters failed to remedy a fundamental conflict between the allowance of judicial recourse through Article 21.5 and the allowance of remedial procedures pursuant to Article 22.²¹⁹ The WTO has not corrected the apparent conflict.²²⁰

Article 21.5 provides that where there is a disagreement between parties concerning the efficacy of compliance measures, the parties may take recourse through the DSB, and to the original panel itself if possible.²²¹ DSU Article 22 stipulates the consequences of noncompliance or failure to provide compensation within twenty days after the “reasonable period” of time expires.²²² Specifically, DSU Article 22.6 allows the DSB to grant authorization to suspend concessions or other obligations within thirty days of the expiration of the “reasonable period,” unless there is either a consensus among the DSB, or the losing party refers the requested suspension amount to arbitration.²²³ Arbitration, preferably conducted by the original

218. See Gleason & Walther, *supra* note 169, at 721 (noting the debate over DSU Articles 21.5 and 22 in late 1998).

219. See *id.* (analyzing the two possible approaches the DSU allows for non-compliance). The DSU also “fails to specify the relationship between Article 21.5 and Article 22.” *Id.*

220. See *id.* at 722-23 (“Hence, as written, Article 22 makes allowance for the ‘negative consensus’ rule only in accordance with a specifically delineated timetable. How the DSU drafters intended that timetable to be reconciled with the timetable of a potentially protracted compliance review pursuant to Article 21.5 is not clarified in the text.”).

221. See DSU, *supra* note 34, art. 21.5 (stating that “[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”); see also Gleason & Walther, *supra* note 169, at 723 (explaining that Article 21.5 leaves unclear precisely what procedures can be invoked and when they can be invoked).

222. DSU, *supra* note 34, art. 22.

223. See *id.* art. 22.6 (describing the way in which concessions are suspended under the DSU); see also *id.* art. 22.7 (explaining that the arbitrator must decide

panel, must conclude within sixty days of the expiration of the “reasonable period,” and the DSB must, upon request, authorize a suspension of concessions in accordance with the arbitrator’s determination.²²⁴ Thus, it is possible for dispute resolution concerning the effectiveness of implementation measures, and for arbitration over the amount of concessions to be suspended, to be occurring simultaneously.²²⁵ Moreover, it is also possible for the authorization of retaliatory measures to occur prior to the completion of a Panel or Appellate Body disposition on compliance efforts. Although this conflict applies to all Members, China, as a Member whose compliance capabilities are expectantly poor, is likely to be especially affected and may face harsh remedial measures.²²⁶

c. Retaliation: Suspension of Concessions

The specific remedies authorized under DSU Article 22 are compensation and the suspension of trade concessions.²²⁷ The suspension of trade concessions has traditionally been of great importance, both because international trade compensation figures are difficult to calculate and because of the positive correlation between retaliatory trade measures and compliance with mandated trade policies.²²⁸ For this reason, this article will only focus on the suspension of trade concessions.

whether the requested amount is “equivalent to the level of nullification or impairment”).

224. *See id.* art. 22.6-22.7 (providing the background information regarding arbitration).

225. *See* Gleason & Walther, *supra* note 169, at 727 (discussing WTO Communication from the Chairman of the Panel, Australia—Measures Affecting the Importation of Salmon, Recourse to Article 21.5 of the DSU by Canada, WT/DS18/17 (Dec. 13, 1999), a situation where “parties agreed to initiate concurrent procedures under Article 21.5 and Article 22.6”). Here, faced with conflicting timetables, Canada accepts “a delay in its right to suspend concessions well beyond the time table” currently provided in Article 22. *Id.*

226. *See id.* at 729 (noting that, “China, in particular, with its sprawling, developing economy and a long tradition of non-transparent trade regulations, will be a special challenge for the system”).

227. *See* DSU, *supra* note 34, art. 22 (explaining the remedies that are available if the rulings are not implemented within the “reasonable period of time”).

228. *See Draft Articles on State Responsibility, Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR, 51st Sess.,

DSU Article 22 provides several procedures and principles regarding the suspension of trade concessions. These include a procedure for deciding the priority of different types of concessions²²⁹ and the principle that the level of suspended concessions “be equivalent to the level of the nullification or impairment.”²³⁰ Additionally, the suspension of concessions is temporary and should be removed once the Member alleviates the problem.²³¹ Although there are noticeable advantages to allowing the suspension of trade concessions (*i.e.* forcing compliance), the severity of suspension raises concerns about the appropriateness of applying this remedy to a country like China, which has weak implementation capacities.²³² For example, systematic governmental limitations may mask China’s genuine efforts to comply with a DSB decision.²³³ In such a case, the imposition of brutal retaliatory trade sanctions is not sensible. If the continued accession of countries like

Supp. No. 10, at 131 (Ch. III), U.N. Doc. A/51/10 (1996) (stating that compensation and trade concession suspension are two among several types of remedies for international misbehavior), *available at* <http://www.un.org/law/ilc/archives/statfra.htm> (last visited Nov. 26, 2002). Starting from the least effacing and progressing toward the harshest remedial measure, these include: restitution, compensation, satisfaction, and assurances of non-repetition (including suspension of trade concessions). *Id.* Thus, the suspension of trade concessions ranks among the harshest of remedial measures. *Id.* It is for this reason that it is the last resort under the DSU. *See* Andrew S. Bishop, *The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War with European Union*, 12 INT’L LEGAL PERSP. 1, 11 (2001/2002) (explaining that the suspension of trade concessions serves “not to punish the offending nation, but merely to further the goals of the WTO by balancing the trade rights and obligations between nations involved in a dispute”).

229. *See* discussion, *supra* note 203 (explaining the way suspended concessions are prioritized under DSU art. 22.3(a)-(d)).

230. DSU, *supra* note 34, art. 22.4.

231. *See id.* art. 22.8 (stating that concessions “shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached”).

232. *See supra* note 226 and accompanying text (noting that China is especially susceptible to harsh remedial measures, as its compliance capabilities are relatively poor).

233. *See id.* (implying that certain remedies may not help, but rather, hinder China’s efforts to comply with a DSB decision).

China is to occur, perhaps it is time for the WTO to consider the inclusion of alternate remedies, such as administrative sanctions,²³⁴ reports, publication,²³⁵ and the informal utilization of media resources.

3. *Necessity of Compliance with DSB Decisions*

a. Integrity of the WTO

The powerful compliance obligations of the WTO DSU have found legitimacy in the theory that Member states must treat WTO DSB decisions equally to their own domestic law adjudication, or risk weakening the WTO and signaling its legal failure and practical impotency.²³⁶ This theory highlights one of the main dilemmas concerning China's accession and protection of the WTO's integrity through its dispute settlement system.²³⁷ Indeed, "[c]ompliance with [WTO] rulings is heavily influenced by the domestic rules operating within the Member countries."²³⁸ Under this framework, in which compliance with dispute settlement decisions is not only an important and beneficial aspect of the WTO, but is also essential to maintaining organizational integrity, the present state of China's

234. See generally discussion *supra* note 203 (indicating that a losing Member risks having its concessions suspended until it complies).

235. See Karl Jonathan Liwo, Note, *The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora During the 1990's*, 15 SUFFOLK TRANSNAT'L L.J. 122 (1991) (expressing how "the success of CITES ultimately depends upon the adequacy of domestic legislative enactments and the extent of enforcement efforts conducted by the individual party states"). See generally, Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. II(1), 12 I.L.M. 1055, 993 U.N.T.S. 234 (entered into force July 1, 1975) [hereinafter CITES].

236. See Yee, *supra* note 67, at 611 (explaining the pressure on Members to accept DSB decisions); see also ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 50 (1990) (stating the reasons why Member countries were compelled to accept GATT panel decisions).

237. See Yee, *supra* note 67, at 633 noting the difficulty in enforcing GATT rulings in Hong Kong and China due to the influence of domestic policy within these countries).

238. *Id.*

legal structure threatens to impose serious negative effects on the WTO's overall subsistence.²³⁹

b. Present Level of WTO DSB Compliance

Due to the relative infancy of the WTO DSB, its "dispute settlement implementation procedures are still being tested and debated."²⁴⁰ One may fairly say, however, that the WTO DSB system has functioned well overall, and that implementation to date has not presented a major problem.²⁴¹ As of July 24, 2001, only fifty-one²⁴² of the 234²⁴³ complaints notifying the WTO have resulted in Panel or Appellate Body Reports where the WTO DSB implicated implementation procedures.²⁴⁴ Only six²⁴⁵ of the adopted Panel or Appellate Body Reports have related to the implementation of WTO

239. Interview with Professor Edith Brown Weiss, Professor, Georgetown University Law Center (Oct. 19, 2001) [hereinafter Weiss Interview] (on file with author) (providing distinctions with regards to general compliance with international agreements). Here, compliance is separated into three levels, each with its own distinctive sphere of influence. *Id.* The first level is implementation, which includes the structural bodies through which legislation and administrative regulation are made to conform with the relevant agreement. *Id.* The second level is actual compliance, which involves the substantive and procedural means through which domestic law is made to comport with international standards. *Id.* The third level is effectiveness, which relates to a measure of the degree with which a particular obligation is complied. *Id.* Each level must be approached independently, and dealt with in its own unique way, to achieve real compliance. *Id.*

240. See Gleason & Walther, *supra* note 169, at 709 (reviewing WTO dispute settlement implementation through 2000).

241. See Park Young Duk, Statistical Overview of the WTO Dispute Settlement Process, Institute of International Economic Law, Georgetown University Law Center (Fall 2001) (on file with author) (noting that less than one-fifth of complaints to the WTO specified implementation procedures).

242. *Id.* This number does not include reports resulting from proceedings pursuant to Article 21.5 of the DSU. *Id.*

243. *Id.* This number encompasses all requests for consultations notified to the WTO, including those requests, which have led to Panel and Appellate Body review proceedings. *Id.*

244. *Id.*

245. *Id.* This number includes reports resulting from proceedings under Article 21.5 of the DSU. *Id.*

DSB rulings.²⁴⁶ Only five²⁴⁷ disputes reached the level where the WTO DSB authorized a suspension of trade concessions.²⁴⁸

In spite of this success, the accession of China could single-handedly reverse this trend.²⁴⁹ Since China is the WTO's largest member, it may not receive the lenient treatment afforded other developing states in terms of receiving WTO complaints.²⁵⁰ Unlike other developing country markets, China's market could negatively affect the markets of developing countries, as well as provide significant extrinsic gains.²⁵¹ Moreover, China's potential inability to comply with a possibly high number of negative DSB decisions could result in implementation issues never yet dealt with in DSB jurisprudence.

c. Potential WTO DSB Reforms

Due to the DSB's track record of success, the importance of DSB reform had not arisen early in its history.²⁵² China's accession may change this perception and the reality upon which it is based.²⁵³

246. Duk, *supra* note 241.

247. *Id.* This number covers authorizations granted by the WTO pursuant to Article 22.7 of the DSU and Article 4.10 of the Subsidies Agreement. *See id.*; *see also* Agreement on Subsidies and Countervailing Measures, Apr. 1, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 4.1, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 33 I.L.M. 112 (1994) [hereinafter Subsidies Agreement] (providing that the DSB shall authorize the complainant "to take appropriate countermeasures" upon noncompliance by the offending party).

248. Duk, *supra* note 241.

249. *See* John Jackson, *The Institutional Ramifications of China's Accession to the WTO*, in CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT, 75, 78-79 (Frederick M. Abbott ed., 1998) (discussing the potential for numerous "non-violation" dispute settlements if the WTO admitted China before China fully complied with various GATT trade rules).

250. *See id.* at 78 (commenting on the GATT's toleration of smaller developing states and their non-market economy systems).

251. *See id.* (discussing the differing effects China's economic system could have on world markets).

252. *See* Gleason & Walter, *supra* note 169, at 711 (commenting on the perceived effectiveness of the WTO implementation procedures).

253. *See* Blumental, *supra* note 18, at 257 (noting the "potential for disputes between China and its trading partners to overload the WTO DSB" and stating that

China's dominant economic role and the potential dire circumstances of its involvement in DSB proceedings makes it important to proactively examine possible dispute settlement reforms.²⁵⁴

Even modest procedural changes aimed at discouraging undue delay and inappropriate use of the "reasonable period" can help reduce the occurrence and duration of non-compliance.²⁵⁵ Furthermore, reforms to fortify the compliance review process, such as strengthening the procedural tools for hastening compliance and clarifying the ambiguities between Articles 21.5 and 22, would

"American policymakers and commentators worry that China's accession will deprive the U.S. of its leverage over China, exercised through annual review of China's MFN status"). China's failure to comply with adverse decisions could affect the integrity of the WTO dispute resolution mechanism and send a message that the WTO is an ineffectual enforcer. *Id.*; see also Jackson, *supra* note 249, 78-79 (commenting on how China's accession could lead to "non-violation" dispute settlements which could potentially damage the WTO's credibility); *Jackson Analysis on China PNTR*, 18 INSIDE U.S. TRADE 14, Apr. 7, 2000, at 8-9 (commenting on the affects of granting China Permanent Normal Trade Relations ("PNTR") status and the potential for China to discriminate against U.S. workers, farmers, and businesses); *U.S. Consideration of Permanent Normal Trade Relations with China: Hearings Before the Senate Comm. on Fin.*, 106th Cong. 100-02 (2000) (statement of Dr. Nicholas R. Lardy, Senior Fellow in Foreign Policy Studies, The Brookings Institution) [hereinafter PNTR Hearings] (providing three reasons why the United States should grant PNTR to China). First, voting against PNTR would only disadvantage the economic interests of the United States and provide advantages to other countries. *Id.* at 101. Second, voting against PNTR would undermine the position of reformers inside China and support their conservative opponents. *Id.* at 102. Third, voting against PNTR would undermine the position of U.S. negotiators in the drafting process of China's Protocol of Accession. *Id.* at 102. The U.S. decision to grant PNTR allowed the United States to avoid these pitfalls. However, concerns regarding China's lack of compliance fail to consider how China will balance its long-term economic interests with domestic problems that promote the violation of WTO commitments. Blumental, *supra* note 18, at 257; see also James V. Feinerman, *Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?*, in *CHINA'S LEGAL REFORMS*, 186, 186-91 (Stanley B. Lubman ed., 1996) (analyzing China's international legal behavior post-Mao).

254. See Gleason & Walther, *supra* note 169, at 735-36 (concluding that reforms of dispute settlement implementation procedures are increasingly important in light of China's accession into the WTO).

255. See *id.* at 734-35 (arguing for redefining the fifteen month "reasonable period" provision as the "shortest possible implementation period," in light of the "particular circumstances" of the case at hand).

improve the effectiveness of this somewhat cryptic process.²⁵⁶ The alternative remedies discussed above are also worthy of consideration.²⁵⁷

Not only should developed countries that use the DSB frequently, like the United States and the countries of the European Union, prefer such practical implementations, but developing countries like China would also benefit by gaining enforcement advantages over their wealthier counterparts.²⁵⁸ These reforms would also reduce China's risk of sustaining trade sanctions for non-compliance.²⁵⁹ In a rudimentary sense, the need for dispute settlement reforms stems from uncertainties over the sustained development of China's legal system, particularly regarding China's implementation capacity.²⁶⁰

D. WTO REQUIRES STRICT COMPLIANCE WITH DSB RULINGS

The automaticity of the WTO DSB's systemic and procedural structure grants a recognizable legitimacy not present in the original GATT dispute settlement system.²⁶¹ The automatic adoption of DSB rulings prevents a Member from blocking the dispute settlement process, thereby creating real interests in a dispute's outcome.²⁶²

256. See *id.* at 729 (emphasizing the ineffectiveness of current reasonable period, compliance review, and concession provisions).

257. See discussion *supra* Part II.C.2.c (discussing compensation and suspension of concessions).

258. See Gleason & Walther, *supra* note 169, at 735 (recognizing the importance of procedural changes in influencing a country's willingness to comply).

259. See *id.* (noting that even minor procedural reforms could decrease instances of non-compliance).

260. See Lubman, *supra* note 11, at 409 (stipulating that China's immense size and high levels of regional poverty hinder administrative tasks). Moreover, "revising the allocations of power within the Chinese bureaucracy and between government and Party present enormous difficulty." *Id.* While enhanced economic activity has lessened the difficulty of such undertakings, currently these troubles still threaten to hinder Chinese legal development, absent fundamental governmental changes and a complete withdrawal of CCP control. *Id.*

261. See GATT FOCUS, *supra* note 176, at 14 (stating that prior to the conclusion of the Uruguay Round and the inception of the WTO DSU, the "dispute settlement of the GATT [was] generally considered to be one of the cornerstones of the multilateral trading order").

262. See *id.* (detailing the DSU's timeline for adopting panel decisions).

DSU Article 21 imposes time restrictions that put a premium on a country's ability to respond efficiently to a negative DSB decision.²⁶³ Finally, the availability of retaliation through suspension of trade concessions creates genuine incentives for compliance with DSB decisions.²⁶⁴

The firm compliance requirements of the DSB raise additional questions regarding China's compliance capacity. China may lack the ability to implement compliance measures in the face of time constraints, and the potential for harsh sanctions is unclear.²⁶⁵ Deficiencies in legislative drafting, a diffuse allocation of bureaucratic power, and the overall involvement of the CCP in government affairs raise doubt on China's ability to comply with the requirements of the DSB.²⁶⁶ Reforms to the implementation system may help eliminate the above problems.²⁶⁷ However, the only sure answer is a reformation of the Chinese legislative and administrative processes.²⁶⁸ The Protocol on the Accession of China is a device that may ensure China's preparedness for WTO membership.²⁶⁹

263. See *id.* (discussing the DSU's compliance provisions). The parties have thirty days to accept the Appellate Body's report. *Id.* If the party cannot immediately comply with the adopted recommendations, the DSU affords a "reasonable period of time" to comply. *Id.* If a party requires the "reasonable period of time" for compliance, the parties must agree to a compliance deadline and obtain the approval of the DSB within forty-five days of the adoption, or ninety days through arbitration. *Id.*

264. See *id.* (outlining the provisions on suspension and compensation when implementation does not occur).

265. See *supra* note 260 and accompanying text (discussing the problems presented by China's size and bureaucracy).

266. See Lubman, *supra* note 11, at 385 (emphasizing that these deficiencies hinder the government structure's ability to control).

267. See Gleason & Walther, *supra* note 169, at 736 (stating that the WTO "system will only be as good as the procedures established to enforce them").

268. See discussion *supra* Part I.C.4 (outlining the deficiencies in the present legislative and administrative processes).

269. See Blumental, *supra* note 18, at 257 (opining that China's acceptance of "a realistic transition program with suitable provisions for mutual adjustment" would have a positive impact on China's future WTO compliance).

III. THE PROTOCOL ON THE ACCESSION OF CHINA TO THE WTO²⁷⁰

A. THE "ROAD TO ACCESSION"²⁷¹

1. *China's Early Withdrawal from GATT*

China has experienced a long and difficult accession to the WTO.²⁷² China was a founding Member of GATT in 1947.²⁷³ On October 1, 1949, however, the founding of the People's Republic of China forced the Nationalist government of Chiang Kaishek to flee to Taiwan.²⁷⁴ On March 6, 1950, the U.N. Secretary General received a communication from Nationalist government officials in Taiwan

270. Just as Part I, *supra*, which focused only on China's legislative and administrative systems, and not on its judicial system, Part III will discuss only the provisions of the WTO protocol implicating China's legislative and administrative systems. Each Member's legislative and administrative systems perform the implementation of DSB decisions. See Timothy M. Reif & Marjorie Florestal, *Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding*, 32 INT'L LAW. 755, 769-771 (1998) (discussing the effect of what is required for implementation of DSB decisions on time restraints). By contrast, a Member's judicial system serves to safeguard the integrity of law-making and rule-making activities discharged within these bodies. Therefore, a thorough examination of how the WTO protocol relates to China's judicial system is beyond the scope of this article.

271. See Bhala, *supra* note 120, at 1472-73 (discussing the three steps of the accession process). The first step involves the applicant's negotiation of bilateral concession agreements through an "accession Working Party," which includes each WTO Member requesting such an agreement. *Id.* at 1472. These "indispensable" agreements represent the applicant's specific bilateral trade concessions. *Id.* at 1472-73. The second step is the contracting parties' decision, pursuant to GATT Article XXXIII, whether to allow the accession in light of the applicant's status and commitments. *Id.* at 1473. If the decision is affirmative, the third step is the drafting and approval of a protocol of accession. *Id.*

272. See *id.* at 1477-81 (outlining the history behind China's accession to the WTO).

273. See GATT, *supra* note 1 (listing the twenty-three founding members of GATT, including Australia, Belgium, Brazil, Burma (Myanmar), Canada, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia (Zimbabwe), Syria, United Kingdom, and the United States).

274. See Bhala, *supra* note 120, at 1477 (noting that "internal political upheaval led to [China's] withdrawal" from the GATT).

“indicating ‘China’ was withdrawing from the GATT.”²⁷⁵ On May 5, 1950, the withdrawal took effect.²⁷⁶ Although the CCP contested this withdrawal, the GATT membership structure effectuated the withdrawal for more than twenty years while CCP-controlled China played almost no role within the GATT.²⁷⁷

2. China’s “Open Door” Policy and the Re-Engagement of GATT

The late 1970s marked a reversal in China’s inward-looking economic policies of protectionism and conservatism.²⁷⁸ Following CCP Chairman Mao Zedong’s death in 1976, the Chinese government began to look outward and engage the international community in an attempt to revitalize China’s struggling economy through an infusion of foreign technology and investment.²⁷⁹ In 1978, China adopted a formal “Open Door” Policy aimed at ending China’s economic isolation and welcoming foreign investment, trade, and the

275. See *id.* (summarizing the events leading up to the Chinese withdrawal).

276. See *id.* (providing dates for the withdrawal).

277. See *id.* at 1477-78 (discussing the opposing arguments on the validity of the withdrawal). The CCP argued that the PRC should be recognized as the legitimate successor government in China, making the actions of the Nationalist regime in Taiwan “null and void.” *Id.* at 1478. However, the Communist government on the mainland represented a separate sovereign entity, one that never joined GATT and therefore had no authority to speak for the “China” that signed onto the GATT. See *id.* Nevertheless, due in large part to Mao Zedong’s personal apathy to the agreement, PRC China made no attempt to engage in the GATT, which made these arguments practically moot. See *id.* China’s experience stands in stark contrast to Cuba’s. *Id.* at 1477. Even after the communist revolution of 1959 led by Fidel Castro, Cuba remained a part of GATT and subsequently became a founding member. *Id.*

278. See Blumental, *supra* note 18, at 205 (commenting on how “China began to look outward to the international community” during the late 1970s); see also Janice Marshall, *Current Developments in the People’s Republic of China: Has China Changed?*, 1 TRANSNAT’L LAW 505, 505 n.1 (1988) (discussing China’s adoption of the “Open Door” Policy in 1978).

279. See Marshall *supra*, note 278, at 509 (stating that Deng Xiaoping, the new leader of the CCP, expanded the economic development plan of China by “importing large quantities of foreign technology, encouraging the use of foreign experts, and sending Chinese students and scholars abroad for training”). This policy is antithetical to policies of isolation and exclusion promoted under Mao Zedong’s regime. *Id.* at 508-09.

transfer of technology, while recognizing the importance of international trade in realizing these efforts.²⁸⁰

China took material steps toward implementing the "Open Door" Policy in 1980 by joining the International Monetary Fund ("IMF") and World Bank,²⁸¹ as well as by applying to the GATT Secretariat in Geneva as a non-voting observer.²⁸² In 1982, the GATT Contracting Parties granted China's request, allowing China to "participate regularly as an observer in GATT meetings, including the Uruguay Round negotiations."²⁸³ Most importantly, China filed an official GATT membership application in 1986²⁸⁴ and began to implement the various economic programs necessary for re-entry.²⁸⁵

280. See Cheng, *supra* note 183, at 1941 (recognizing that the "Open Door" Policy served as notice to the rest of the world that China was ready to "come out"). Cheng proposed that China's economic structure had ripened for foreign investment, as well as acknowledging that the "Open Door" Policy was a policy of reform geared toward expanding China's economy to the outside world. See *id.* at 1941 n. 2 (citing Symposium, *Opportunities for Foreign Investment and the Process in Shanghai*, Shanghai Foreign Investment Commission (1998)). China realized the importance of importation of foreign technology, which was considered vital to China's economic development. See Marshall, *supra* note 254, at 509.

281. See Blumental, *supra* note 18, at 205 (indicating that China's first step towards a more outward approach to economic reform occurred when it joined these institutions). Recall that these institutions were originally founded at roughly the same time as the GATT. See Mary E. Footer, *1996-1997 Symposium-Institutions for International Economic Integration: The Role of Consensus in GATT/WTO Decision-Making*, 17 NW.J. INT'L L. & BUS. 653, 662 (1997).

282. See Bhala, *supra* note 120, at 1478 (noting that China's efforts to join as a non-voting observer "[coincided] with the post-Mao liberalization period").

283. *Id.* at 1479. During this time, senior economic officials warned top Beijing officials against a hastened entry into the WTO. See also Dede Nickerson, *Officials Warn on Fast Entry to WTO*, S. CHINA MORNING POST, July 15, 1995, at A1 (discussing warnings of WTO entry being too hasty).

284. See Yee, *supra* note 67, at 612 (commenting that China realized it needed GATT); see also Bhala, *supra* note 120, at 1479 (stating that China formally restored status on July 10, 1986).

285. See Yee, *supra* note 67, at 612 (citing Former U.S. Trade Representative Ambassador Clayton Yeutter, Address at the American Chamber of Commerce, Hong Kong (Feb. 5, 1988)).

3. China, GATT, and the Return of the "Taiwan Issue"

In response to a certain degree of domestic wariness concerning China's increasingly global economic policy,²⁸⁶ China clarified and justified its interests in joining the GATT during the late 1980s and early 1990s.²⁸⁷ China believes that GATT membership would serve China's self-interest through practical effects, such as lower tariffs on Chinese goods.²⁸⁸ China's membership also had an ideological impact by notifying other countries that the international economic community must now accept China as an equal partner.²⁸⁹ In an effort to counter opposition, the Chinese government asserted that, in terms of WTO membership, "the WTO is hardly worthy of its name—the World Trade Organization—until the world's most populous country has joined its ranks."²⁹⁰

In 1989, Taiwan complicated China's efforts to become a part of GATT, when it filed its own request for formal accession to the GATT, as "the Separate Customs Territory of Taiwan, Penghu (Pescadores), Kinmen and Matsu," together to be known as "Chinese

286. See Nafziger, *supra* note 10, at 760 (stating that one of China's most difficult tasks during the accession process was "to reconcile traditional attitudes of cultural superiority and wariness toward foreigners with the exigencies of economic development").

287. See, e.g., Blumental, *supra* note 18, at 201 (explaining that by trying to meet "the conditions for accession first to GATT, and now to WTO, Chinese market-oriented reformers have not only promoted domestic economic reform, but have also overcome political opposition at several crucial junctures during the 1980s and 1990s").

288. See Bhala, *supra* note 120, at 1479 (explaining that Most Favored Nation ("MFN") status and tariff binding principles of Articles I and II of GATT would create lower tariffs). A recent slow-down in China's economic growth, coupled with the tangential effects of the Asian Economic Crisis, resulted in China's consideration of a "New Growth Paradigm," no matter what it costs in terms of domestic unemployment. *PNTR Hearings*, *supra* note 253, at 182. The Chinese leadership "sees efficiency gains as stemming in part from reducing the restrictions that have previously constrained the private sector of the economy and in part from the increased international competition that will follow from opening up China more fully to the global economy." *Id.*

289. See Bhala, *supra* note 120, at 1480 (asserting that China's entry into the WTO would lead to the acceptance of China as an equal partner). China's entry, "in blunt Asian terms," would "give great 'face' to the PRC." *Id.*

290. *Id.*

Taipei.”²⁹¹ Taiwan’s action immediately aroused China’s continuing concerns over Taiwanese territorial issues and revived China’s anger over Taiwan’s ability to force a Chinese withdrawal from GATT in 1950.²⁹² An apparent “gentlemen’s agreement” in GATT, and now in the WTO, largely defused this situation, whereby China would accept the name “Chinese Taipei” for Taiwan’s representative status, but China must first accede to the WTO before Chinese Taipei would gain admittance.²⁹³ However, this issue is moot due to China’s, and subsequently Chinese Taipei’s, acceptance into the WTO and formal and independent admittance into the WTO in December of 2001.²⁹⁴

4. *Development of a Protocol on Accession and U.S. Involvement*

In 1987, GATT established a “Working Party on China’s Status as a Contracting Party,” and renamed it the “WTO Working Party on the Accession of China” (“Working Party”) following the birth of the WTO.²⁹⁵ The Working Party had to complete two tasks: (1) compile a Working Party Report based on its deliberations; and, (2) complete a Protocol on the Accession of China.²⁹⁶ The United States chaired the Working Party and played a dominant role in determining the

291. See Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan’s Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 81 (1998) (noting that Taiwan’s belief that WTO participation would result in more leverage with China largely motivated this action). As a demonstration of its commitment, Taiwan began actively amending its Intellectual Property system. *Id.*

292. See Bhala, *supra* note 120, at 6 (explaining that the former Republic of China was an original GATT contracting party, but withdrew from GATT on May 4, 1950, when officials in Taiwan contacted the U.N. Secretary General to inform him of China’s withdrawal).

293. See John Parry, *WTO: Taiwan Praised for Efforts in Forwarding Bid to Join WTO*, Int’l Trade Daily (BNA), at D5 (Mar. 3, 1997) (stating that although Taiwan possesses a readiness to conform to WTO rules, it must wait until China becomes a Member).

294. See *China Taipei Approved*, *supra* note 6 (announcing that at the Doha Ministerial Conference, China’s accession signing ceremony immediately followed formal approval of the membership of Chinese Taipei).

295. See Bhala, *supra* note 120, at 1481, 1481 n.2 (stating that GATT established the Working Party to review China’s application for entry into the international agreement).

296. See *id.* at 1491 (noting that the Working Party met more than twenty times to deliberate over the terms of the Protocol).

format and schedule of China's accession.²⁹⁷ The efforts of the United States towards China's accession to the WTO have focused on striking a balance between the WTO's goal of promoting the development and reform of China's economic system and U.S. concerns about access to China's markets and the growing U.S. trade deficit with China.²⁹⁸

The United States commenced an in-depth review of China's trade status in 1991, when the United States Trade Representative ("USTR") initiated an investigation into Chinese market barriers.²⁹⁹ The investigation reviewed several restrictive barriers, including: import licensing requirements; quantitative restrictions; and the "failure to publish trade-related laws, regulations, judicial decisions, and administrative rulings."³⁰⁰ In 1992, China and the United States resolved the investigation by signing a bilateral Memorandum of Understanding ("U.S.-China MOU").³⁰¹ China agreed to eliminate particular market access barriers over a five-year period, if the United States both liberalized certain U.S. export controls on goods for China and supported China's WTO membership.³⁰²

By 1994, however, the USTR still expressed numerous concerns about China's international trade law regime, including transparency, subsidies, and intellectual property ("IP") rights.³⁰³ By the end of 1998, it did not appear that either a bilateral concession agreement or

297. See Yee, *supra* note 67, at 612 (commenting that the United States was primarily concerned with "China's commitment to a free trade market").

298. See Blumental, *supra* note 18, at 203 (describing the key issues in negotiating China's accession protocol); see also Yee, *supra* note 67, at 612-13 (revealing the U.S. position that China falls short of meeting the minimum standards demanded of GATT members).

299. See Bhala, *supra* note 120, at 1485 (explaining that Section 301 of the Trade Act of 1974, as amended, authorized the USTR's investigation).

300. *Id.*

301. See *id.* (indicating that it took the U.S. and China one year to negotiate the U.S.-China MOU).

302. See *id.* (explaining that China's implementation of its U.S.-China MOU commitments would serve as a key indication of China's ability and willingness to undertake WTO obligations).

303. See *id.* at 1485-86 (outlining the USTR's concerns on transparency, tariffs, non-tariff barriers, subsidies, and intellectual property rights).

a WTO protocol on accession were likely.³⁰⁴ However, the development of a mutually agreeable WTO Basic Telecommunication Agreement eliminated a major stumbling block to negotiations.³⁰⁵ On November 15, 1999,³⁰⁶ the United States and China finally agreed on China's accession ("China-U.S. Accession Agreement").³⁰⁷ This agreement stemmed partly from the unique political situations of the two countries' respective leaders.³⁰⁸ The United States then granted China Permanent Normal Trade Relations ("PNTR"), setting the stage for a final draft of the Protocol on the Accession of China to the WTO.³⁰⁹

5. Finalization of the Protocol: Present and Future Concerns

As the Working Party on Accession moved to finalize a protocol on accession that would be in line with the bilateral accession agreements of concerned Members, including the United States and

304. See Bhala, *supra* note 120, at 1497 (commenting that the Chinese believed the "Americans were pushing too hard," while the United States believed "the Chinese approach was desultory").

305. See *id.* at 1515-16 (suggesting that the U.S. telecommunications lobby made telecommunications a major point of departure during U.S.-China accession negotiations). China's ultimate decision to abide by the WTO Basic Telecommunications Agreement, as well as forgo its equity investment and geographic telecommunications restrictions, made U.S. support of Chinese accession finally possible. See *id.*

306. See *id.* at 1511 (outlining the time frame of the U.S. and China's agreement on China's accession); see also Moore Welcomes China-U.S. Agreement on Chinese Accession, *supra* note 30 (recounting WTO Director-General Mike Moore's reaction to the announcement of the U.S.-China agreement).

307. See WTO Ministerial Conference Approve China's Accession, *supra* note 6 (explaining that the actual Accession Agreement encompasses three separate documents); see also *Working Party Report*, *supra* note 3; Protocol, *supra* note 4 [hereinafter, in the aggregate, China-U.S. Accession Agreement].

308. See Bhala, *supra* note 120, at 1511 (suggesting that both Chinese President Jiang and U.S. President Clinton wanted to secure a place in history by completing China's accession). At the time of the negotiations concerning China's accession, in contrast with Deng Xiaoping and his "open-door policy," President Jiang had no "defining moment to his tenure." *Id.* President Clinton was trying to recover from the "Monica Lewinsky scandal" and to redeem himself after previous foreign relations' failures involving China. *Id.*

309. Normal Trade Relations for the People's Republic of China, Pub. L. No. 106-286, §§ 102-104, 114 Stat. 880 (2000) (authorizing the extension of normal trade relations treatment to China).

the European Union, three important issues surfaced regarding the benefits of WTO membership that colored its progress. One issue concerned the real significance of China in terms of world trade.³¹⁰ Although China's market size and economic growth had recently expanded,³¹¹ China still commanded only a minor share of global gross national product.³¹² This realization was a factor during protocol negotiations because trading power is an inherent and inseparable component of WTO bargaining power.³¹³ A second issue was the precise effect of WTO membership on China's economic development. Since the WTO would help to accelerate China's economic development³¹⁴ and boost China's commitment to international trading norms, such as IP protection,³¹⁵ China's accession would likely provide a common benefit to both China and WTO Members.³¹⁶ A third issue concerns the crux of the debate over China's accession. China's willingness to comply with general WTO

310. See Lardy, *supra* note 11 (acknowledging that no other country has expanded its role in the global economy like China).

311. See *id.* (asserting that in the 1980s and 1990s, "China emerged as a major player in the global economy"). China's foreign trade increased over \$450 billion from the late 1970s to 2000. *Id.* For most of the 1990s, China was second to only the United States with respect to its receipt of foreign direct investment. *Id.* Chinese firms are also a major economic presence abroad. *Id.*

312. See Bhala, *supra* note 120, at 1471 (stating that in 1997, China accounted for only 3.5 percent of world GNP, ranking right behind Papua New Guinea at eighty-one with its global per capita GDP). In contrast, the United States, the WTO's most powerful Member, controlled 25.6 percent of world GNP and ranked number one in terms of per capita GDP. *Id.* China's present world GNP percentage, while small for its size, is still a vast improvement over its Mao-influenced 1977 figure of just 0.6 percent. *Id.*

313. See Lardy, *supra* note 11 (explaining that China was the largest trading country not participating in the WTO).

314. See *id.* (asserting that Chinese leaders were aware that becoming a Member of the WTO would increase the competition of its domestic market); see also *Hong Kong Officials Concerned over Growing U.S.-China Tensions*, Daily Rep. for Executives (BNA), at A26 (Feb. 8, 1995), available at LEXIS, Legnew Library, Curnws File (stating that in 1995, Hong Kong General Chamber of Commerce President, Ian Christie, estimated that GATT membership was worth approximately forty billion dollars to China).

315. See Lardy, *supra* note 11 (indicating that the protocol commits China to protecting intellectual property).

316. See Cheng, *supra* note 183, at 2013 (stating that a comprehensive intellectual property system would "benefit many of its Western trade partners").

obligations, specifically with WTO DSB decisions, presents a major concern for the WTO.³¹⁷ While some members of the Working Party questioned China's commitment to international dispute resolution,³¹⁸ most members agreed that China's need for the economic benefits of WTO membership will guarantee that China will make a strong effort to adhere to WTO principles and WTO DSB rulings.³¹⁹

The Working Party on Accession called for recognition of the unique problems associated with China's compliance capacity and required a unique response for its terms of accession.³²⁰ China's paradoxical "market socialism" economic hybrid makes rote application of strict principles difficult.³²¹ The inefficient legislative and administrative systems that China must use to implement WTO DSB decisions makes the blind dispensation of juridical requirements inadvisable.³²² Since the WTO's integrity is inherently tied to China's WTO compliance record, the protocol of accession devised by the Working Party needed to balance realistic objectives

317. See Yee, *supra* note 67, at 636 (explaining that the question remains whether China will recognize the new WTO dispute system).

318. See *id.* at 635-36 (predicting that China will claim that the WTO lacks the authority to adjudicate a dispute or enforce a settlement between Member countries). China currently refuses to recognize the jurisdiction of the International Court in the Hague and some fear that China will also refuse to recognize the power of the WTO DSB, causing disastrous results for the DSB. *Id.*

319. See *id.* (stating that China's need for membership will ensure an attempt to adhere to WTO rulings); see also Lardy, *supra* note 11 (explaining that there is nearly an unanimous view in the upper levels of Chinese leadership that economic growth is *sine qua non* for staying in power, and, in the wake of the Asian crisis, leaders feel that participation in the WTO is the only alternative for maintaining economic growth). Chinese leaders have expressed their willingness to abide by WTO rules, even at the great expense, both economically and politically, of severe job loss and degradation of state-owned enterprises. *Id.*

320. See Blumental, *supra* note 18, at 246, 255 (stating that China's accession is far different from Romania's accession to the GATT in 1971 because of institutional and circumstantial differences).

321. See *id.* at 246 (indicating that various factors of China's economy make application of Article XVII nearly impossible).

322. See *id.* at 257 (noting that if the Protocol of Accession commits China to a reasonable transition program than the Chinese government will be unlikely to permit violations of the GATT by its sub-national governments).

with the need for adequate conformity in order to be effective.³²³ Whether the Protocol on the Accession of China to the WTO has met this challenge is still uncertain.³²⁴

B. RELEVANT PROVISIONS OF THE PROTOCOL ON CHINA'S ACCESSION TO THE WTO

1. General Considerations

a. Protocols on Accession in General

A protocol of accession represents the basic terms of entry for a prospective member into the WTO.³²⁵ It is a contract between the acceding country and collective WTO Members.³²⁶ The contract also outlines the applicant's current trade laws and policies, pointing out any differences between these laws and the minimum GATT and WTO requirements.³²⁷ Most importantly, a protocol explains how and when the applicant plans to rectify the differences between its laws and the WTO requirements.³²⁸ Specifically, a protocol of accession highlights problem areas and then establishes a plan of action to address them.³²⁹

323. *See id.* at 255, 257 (explaining that negotiators should focus on creating realistic commitments for China because China's failure to adhere to WTO DSB resolutions will harm the WTO's integrity).

324. *See supra* Part II.B (discussing the future prospects of the Protocol on China's Accession to the WTO).

325. *See Bhala, supra* note 123, at 1473-74 (revealing that accession involves three steps: bilateral concession agreements, the decision, and the Protocol of Accession).

326. *See id.* at 1473-74 (noting that the protocol requires negotiation between the acceding country and the WTO as a whole).

327. *See id.* at 1474 (noting that a protocol explains that the applicant must correct any differences between their laws and the WTO requirements).

328. *See id.* (explaining that these discrepancies may create a gap between the applicant's sanitary rules and the SPS agreement).

329. *See id.* (stating that these problem areas might result from gaps between a country's copyright laws and the Trade-Related Aspects of Intellectual Property Rights).

b. Transparency: A Primer

The Protocol on the Accession of China to the WTO identifies transparency as China's main problem.³³⁰ While the precise meaning of transparency is unclear even in trade circles,³³¹ the term generally connotes the level of open and unimpeded access to, surveillance over, and review of a country's governmental operations by other countries.³³² The Organization for Economic Co-Operation and Development ("OECD") stated that governments must ensure transparency in order "[t]o ensure international market openness," because "foreign firms and individuals seeking access to a market . . . must have adequate information on new or revised regulations so that they can base their decisions on an accurate assessment of potential costs, risks, and market opportunities."³³³ The

330. See Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1, 12 (1998) (noting that transparency is one of the largest issues facing China's accession to the WTO). Recent criticism directed at the WTO DSB for being non-transparent makes it somewhat ironic that China's ability to fulfill its obligations to the DSB is subject to the same critique. See Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L. J. 608, 608 (2000) (stating that many Western commentators criticize the lack of transparency of WTO dispute settlement hearings).

331. See Ostry, *supra* note 330, at 1 (commenting that transparency's "genesis is obscure, its definition—captured in Article X of the 1947 GATT—is imprecise, and the extent and nature of its implementation is unknown"). Ostry has jokingly commented that the term transparency is "the most opaque [word] in the trade policy lexicon." *Id.*

332. See William Safire, *On Language; Transparency, Totally*, N.Y. TIMES, Jan. 4, 1998, sec. 6, at 4 (discussing the development of the word transparency to mean visibility and "openness of the operations"). See generally Ostry, *supra* note 330, at 9 (noting that since the establishment of the WTO, transparency has formed a radically different meaning that now includes publication requirements for laws, regulations, and the mode of administration in trade services).

333. See Vera Nicholas-Gervais et. al, *Background Report on Enhancing Market Openness Through Regulatory Reform*, in OECD REVIEWS OF REGULATORY REFORM: REGULATORY REFORM IN THE UNITED STATES 230 (1999) (explaining the importance of transparent regulations); cf., Asia Pacific Economic Cooperation Forum, *APEC Government Procurement Experts Group Non-Binding Principles on Government Procurement* (Sept. 2, 1999) (GPEG report on newly developed requirements) (identifying transparency as one of the new non-binding principles adopted by Asia Pacific Economic Cooperation Forum "APEC") at http://www.apecsec.org.sg/committee/gov_non_binding.html (last visited Oct. 13, 2002); SHERRY M. STEPHENSON & SOONHWA YI, PROMOTING TRANSPARENCY IN

WTO has specified three reasons for requiring transparency: (1) WTO Members should have relevant market information, (2) it facilitates monitoring of WTO obligations compliance, and (3) it facilitates multilateral trade negotiations.³³⁴ According to the WTO, transparency improves market efficiency and facilitates compliance review mechanisms, such as dispute settlement.³³⁵

GATT Article X contains the WTO's general transparency requirements.³³⁶ These requirements include: publication of laws, rules, and administrative regulations, as well as the establishment of adjudicative means to review and correct matters relating to customs regulations.³³⁷ The Protocol on the Accession of China into the WTO clarifies the categories of transparency and expands the requirements, thus raising the burden of transparency acquiescence

SERVICES SECTOR 1 (Rev. ed., 2001) (paper for APEC Group on Services meeting in Beijing, China) (explaining that transparency is critical to the facilitation of services trade by making discriminatory elements in market places visible to foreign businesses), at <http://www.apecsec.org.sg> (last visited June 17, 2002). A complete discussion of transparency's effect on curbing governmental corruption is beyond the scope of this article. For more information on this subject, please visit Transparency International's website at <http://www.transparency.org>.

334. See Roy A. Schotland, Professor of Law, Georgetown University Law Center, Tracking Transparency: An American Administrative Lawyer Stumbles into WTO-land, Speech in Shanghai, China (Feb. 2001) (explaining that those accessing a market should have legal information in order to assess their commercial risks). See generally WTO SECRETARIAT, WTO WORK ON TRANSPARENCY IN GOVERNMENT (Presentation at 9th International Anti-Corruption Conference) (explaining the importance of the transparency requirement in providing stability and predictability in the international trade arena), at http://www.transparency.org/iacc/9th_iacc/papers/day2/ws2/d2ws2_wto.html (last visited June 14, 2002).

335. See Schotland, *supra* note 334 (stating that transparency is necessary to provide stability, predictability, and the exchange of information in a rules-based trade regime and that transparency of the WTO dispute settlement procedure is an important issue).

336. See GATT, *supra* note 1, art. X (establishing the WTO's publication and administration of trade regulations requirements).

337. See *id.* (explaining that member countries must publish laws, rules, judicial decisions, and other administrative regulations, and that each member country shall maintain adjudicative processes to ensure review and correction of issues relating to customs matters).

and improving the visibility of Chinese laws.³³⁸ The Protocol extends transparency coverage “over goods, services, [Trade Related Aspects of Intellectual Property (“TRIPs”)], or control of foreign exchange,”³³⁹ and it supplements WTO requirements concerning: (1) publication, requiring publication before implementation, and enforcement only of published laws and regulations;³⁴⁰ (2) an enquiry point, including a time limit for response;³⁴¹ and, (3) a right to comment,³⁴² which requires a notification and consultation phase.³⁴³ These three categories represent the transparency requirements that Members demanded of China prior to its accession to the WTO.³⁴⁴ These Protocol provisions are also the only provisions that specifically implicate China’s capacity to comply with WTO DSB decisions.³⁴⁵

338. See Ostry, *supra* note 330, at 12 (explaining that the new transparency requirements supplement the prior requirements under the GATT Article X); see also Schotland, *supra* note 334 (stating that the Protocol “goes a bit beyond” regular WTO transparency requirements by creating a greater burden for China than for other WTO Members, thus leading one disenchanted Chinese government official to term the requirements “WTO-plus”).

339. See Protocol, *supra* note 4, pt. I.2(c)(1) (extending transparency coverage beyond the requirements of Article X of the GATT).

340. See *id.* (restricting China’s ability to enforce “only those laws, regulations and other measures. . . that are published and readily available to other WTO Members”).

341. See *id.* pt. I.2(c)(3) (establishing an official enquiry point where WTO Members may obtain any information China must publish under the Protocol requirements).

342. See *id.* pt. I.2(c)(2) (requiring China to create an “official journal dedicated to the publication of all laws, regulations, and other measures” and provide a reasonable period for comment prior to implementation of such measures); see also Ostry, *supra* note 330, at 12 (noting that the creation of an enquiry is not included in Article VIII of the GATT).

343. See Ostry, *supra* note 330, at 12 (stating that the Protocol modeled the right to comment and time limit after the U.S. Administrative Procedure Act (“APA”)). The APA requires the country to grant a consultation phase. *Id.*

344. See *id.* at 11-12 (indicating that “the draft Protocol of Accession encompasses the accession requirements for new membership” into the WTO).

345. See *id.* at 12 (stating that the new transparency requirements present difficult challenges for the Chinese legal system).

2. Transparency Requirements of the Protocol

a. Publication

GATT Article X states that WTO Members must ensure the publication and uniform application of all foreign trade laws and regulations.³⁴⁶ Although the word transparency does not appear in the text,³⁴⁷ Article X imitates most of the U.S. views of transparent government practices.³⁴⁸ The Protocol expands Article X publication requirements to include all laws or regulations falling within the WTO's mandate and details China's individual obligations through two specific undertakings.³⁴⁹

First, China may only enforce laws, regulations, or other measures that it has actually published.³⁵⁰ Second, if other WTO Members request information, then China must make all laws, regulations, and other measures falling within the WTO's mandate readily available.³⁵¹ These requirements, while seemingly simple, may

346. See Blumental, *supra* note 18, at 234 (explaining that the purpose of Article X is to require member countries to publish and uniformly apply all laws and regulations related to foreign trade).

347. See GATT, *supra* note 1, art. X(3)(b) (requiring publication of laws and regulations without using the term transparency in the publication requirements); *cf.*, 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, 33 I.L.M. 81, art. 63 (1994) [hereinafter TRIPs Agreement] (underlining the transparency issue by explicitly using the word as the heading for Article 63); Ostry, *supra* note 330, at 10 (noting that the TRIPs Agreement subjects member countries to a new, quasi-judicial process that will adjudicate disputes as well as provide notification of all regulations and administrative arrangements).

348. See Ostry, *supra* note 330, at 5 (stating that Article X articulates the rules for publication and administration of laws in accordance with the U.S. approach).

349. See *id.* at 12 (discussing the additional requirements contained in the Protocol that supplement Article X); *compare* Protocol, *supra* note 4, pt. I.2(c)(1) (requiring publication of all laws pertaining to or affecting “trade in goods, services, TRIPs, or control of foreign exchange”), *with* GATT, *supra* note 1, art. X (requiring only publication of trade regulations).

350. See Protocol, *supra* note 4, pt. I.2(c)(1) (allowing China to only enforce those laws, regulations, and rules that the government has published).

351. See *id.* (requiring China to provide, upon request by WTO Members, “all laws, regulations and other measures pertaining to or affecting trade in goods,

present a problem for China. Unlike developed countries such as the United States, whose democratic ideals have resulted in a long track record of widespread publication,³⁵² Chinese administrative practice involves the frequent use of unpublished informal regulatory documents.³⁵³ Although not specifically required by the Protocol, China could use the Internet, similar to recent U.S. Internet resource options,³⁵⁴ as a means to assemble all government information at a single point to increase transparency of Chinese laws and regulations and create a single enquiry point.³⁵⁵

b. Enquiry Point

The Protocol mandates that China must establish a single enquiry point, where any "individual, enterprise or WTO Member" may request all information concerning Chinese law, regulations, and other measures covered by the WTO.³⁵⁶ China must provide

services, TRIPS or the control of foreign exchange before such measures are implemented or enforced"). In emergency situations, China may delay publication until implementation or enforcement. *Id.*

352. See Schotland, *supra* note 334 (stating that "the U.S. does very well in publishing and making information readily available to the public generally"). Some note that the publication requirement has been in the "backwater, drab corner" of U.S. law. See JAMES O'REILLY, *FEDERAL INFORMATION DISCLOSURE*, 115, 116-17 (3d ed. 2000) (explaining that since 1966, U.S. courts have litigated only one hundred twenty cases involving the statutory right of availability publication requirement).

353. See Ostry, *supra* note 330, at 13 (noting that local administrative bodies use informal rules, "normative documents," that exist below the formal system of laws and regulations, despite the fact that these rules are not published); see also Corne, *supra* note 41, at 250 (stating that administrative rules and circulars issued by an implementing authority are "not necessarily published and are inherently changeable, subject to the whims of agency officials").

354. See Schotland, *supra* note 334 (stating that in 1996, Congress amended the publication laws and required every U.S. administrative agency to maintain an "electronic reading room"); see also Electronic Freedom of Information Improvement Act, S. 1090, 104th Cong. §552 (1996) (amending section 552 of title 5).

355. See WTO Ministerial Conference, *Report of the Working Party on the Accession of China*, WT/MIN(01)/3, pt. VII.3 (Nov. 10, 2001) (stating that Member countries noted the use of the Internet and other means to ensure a central assembly and enquiry point).

356. See Protocol, *supra* note 4, pt. I.2(c)(3) (requiring China to establish a single enquiry point).

responses to requests within thirty days of receiving the request, or in exceptional circumstances, within forty-five days.³⁵⁷ Requests directed to WTO Members must be “complete” and “represent the authoritative view of the Chinese government.”³⁵⁸ Requests directed toward individuals and enterprises must contain “accurate and reliable information.”³⁵⁹ The enquiry point requirement thus serves to both expedite compliance review by other Members and ensure that respondents base market decisions on factual economic data.³⁶⁰

China’s ability to fulfill the Protocol’s enquiry point requirement is presently in doubt because China currently does not possess any “single enquiry point” that provides a comprehensive account of all Chinese legislation and regulation.³⁶¹ However, since many WTO Members do not maintain single enquiry points for information, the enquiry point requirement appears dubious, unnecessary, and excessive. Some scholars believe that while enquiry points are essential to the distribution of relevant information, the WTO “must be realistic about how much or little authority [their responses] can have,”³⁶² especially when poor governmental and legal structures plague a country such as China.³⁶³

c. Right to Comment

The most intricate and intrusive of China’s transparency responsibilities that the Protocol demands is the notice and comment

357. See *id.* (stating that China must provide, in writing, notice of any delay in responding, and the reasons for the delay, to the interested party).

358. *Id.*

359. *Id.*

360. See WTO Ministerial Conference, *supra* note 355, pt. VII.3 (providing the emphasis of Members on the timely review of Chinese laws and regulations and on creating predictable trade relations).

361. See Ostry, *supra* note 330, at 13 (noting that China still did not possess an enquiry point); see also Keller, *supra* note 55, at 711 (stating that “in their disarray, the sources of Chinese law seem barely capable of providing the basic point of reference which all complex systems of law require”).

362. Schotland, *supra* note 334.

363. See Keller, *supra* note 55, at 711-12 (noting that China’s administrative and legal culture, along with the disarray of Chinese laws, create an environment “which work[s] against the uniform application of legal rules”).

requirement. The Protocol requires China to establish an "official journal" dedicated to the publication of laws, regulations, and other measures falling within WTO mandate.³⁶⁴ Following circulation of the journal,³⁶⁵ China must provide a "reasonable time for comment to the appropriate authorities" prior to the implementation of laws, regulations, and other measures.³⁶⁶ The Protocol allows an exception for laws, regulations, and other measures involving national security, specific foreign exchange rate-setting policies, other important monetary policies, and other measures the publication of which would impede law enforcement.³⁶⁷

The Protocol's notice and comment requirement is modeled on the U.S. Administrative Procedure Act,³⁶⁸ which U.S. scholars describe as "one of the most important advances in modern democracy," resulting from the requirement's positive impact on the promulgation of comprehensive laws and regulations.³⁶⁹ However, the Protocol's right to comment requirement is highly problematic for China.³⁷⁰ The central problem is that "[n]o Chinese legislation at either the highest level or the local level incorporates a mandatory requirement for consultation with either the general public or foreigners."³⁷¹ Although some consultation—even with foreigners—does occur during the legislative drafting process, Chinese legislation, specifically at the lower levels, does not involve consultation while

364. See Protocol, *supra* note 4, pt. I.2(c)(2) (requiring China to establish an official journal for the purpose of publishing all laws and regulations related to trade).

365. See *id.* (forcing China to publish the journal regularly and make copies available to individuals and enterprises).

366. See *id.* (mandating that China must reserve a reasonable time for comment before implementation of the laws and regulations in the journal).

367. See *id.* (providing for an exception to the publication and comment period).

368. See discussion *supra* note 344 (explaining transparency requirements in the WTO).

369. See Schotland, *supra* note 334 (noting that scholars admire the positive impact of the notice and comment requirements on laws and regulations).

370. See Ostry, *supra* note 330, at 14 (explaining that the right to comment rule is one of the many impediments to China's successful accession to the WTO).

371. *Id.*

drafting implementing regulations.³⁷² Cooperation with foreigners during the drafting process is itself a “foreign concept” in China, making the immediate establishment of the Protocol’s U.S. model extremely unlikely.³⁷³

3. *China and the Protocol: Future Prospects*

The Protocol functioned under two pragmatic limitations which now affect its future usefulness in setting a model of governmental practice for China. First, the Protocol had to define the basic processes necessary for WTO conformity that was realistically possible for China to achieve.³⁷⁴ The Protocol answered this limitation by using lofty, general descriptions of governmental “transparency.”³⁷⁵ Second, the Protocol had to set a reasonable timetable for China’s compliance in light of China’s operational constrictions.³⁷⁶ To this end, the Protocol instituted phase-in periods, typically of up to five years, which are designed to ease the integration process by preventing China’s non-compliance from

372. See *id.* (stating that local protectionism and lack of publication of many laws will impede China’s accession to the WTO).

373. See David Hsieh, *China’s Entry Into WTO: Protectionists at Home ‘the Main Stumbling Block,’* STRAITS TIMES, (Singapore) Sept. 20, 2001, at A3 (noting that regional protectionism in China threatens to become a stumbling block despite promises to “level the playing field” for foreigners).

374. See Blumental, *supra* note 18, at 262 (suggesting that China should be held to realistic commitments supported by mutual adjustment of all WTO Members in order to avoid major disruptions in the international trade arena); see also Weiss Interview, *supra* note 239 (listing five basic categories that Weiss believes are necessary for compliance with international agreements such as the WTO). These five categories were: (1) a strong judiciary, (2) federalized decentralization, (3) the involvement of non-governmental organizations, (4) democracy, and (5) the inclusion of a major global power such as the United States. *Id.* Although all of these categories may not be applicable or possible in China, China’s participation in the WTO includes only one of the categories: the inclusion of world powers within the WTO. *Id.*

375. See Protocol, *supra* note 4, pt. 1.2(a)-(c) (listing general transparency requirements and procedures for China).

376. See Blumental, *supra* note 18, at 257 (calling for a clear, realistic timetable of phased opening in the Protocol so that China will have enough time to make the necessary adjustments to its domestic economic structure and thereby avoid non-compliance).

being disputed by other Members.³⁷⁷ In addition, the Protocol established a Transitional Policy Review Mechanism ("TPRM")³⁷⁸ through which, one year after the entry into force of the Protocol,³⁷⁹ the various WTO councils and committees will begin conducting annual reviews of China's implementation of Protocol requirements.³⁸⁰

A Member's use of transparency guidelines to outline proper governmental practice is appropriate in a general sense because transparency's core definition "goes to the heart of a country's legal infrastructure, and more precisely to the nature and enforcement of

377. See David Murphy, *Riding the Tiger of Trade*, FAR E. ECON. REV., Nov. 22, 2001, at 38 (explaining that there are many problems ahead for China, despite the time allotted in the phase-in periods); Hsieh, *supra* note 373, at A3 (noting that phase-in periods range from two to six years depending on the industrial sector involved). However, since China agreed to no phase-in period for intellectual property protections guaranteed under the TRIPs agreement, China may theoretically be brought before the DSB immediately. See WTO Ministerial Conference, *supra* note 355, pt. V.A1, Table B (listing the dates for implementation in China of the various IP agreements); see also Wang, *supra* note 14 (stating that although many of the WTO commitments provide transition periods, there still may be dispute cases involving China). Part of the WTO agreements, the General Agreement on Trade in Services ("GATS"), also has obligations, including those related to telecommunications and banking services, which carry a phase in period up to five years for open market access. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 33 I.L.M. 1125 (1994) [hereinafter GATS]. See generally *Trade in Services: The People's Republic of China—Schedule of Specific Commitments*, GATS/SC/135, pt. II.2(c), II.8(b) (Feb. 14, 2002) (specifying China's commitments to the WTO in various sectors of their economy), available at <http://docsonline.wto.org/DDFDocuments/t/SCHD/GATS-SC/SC135.doc> (last visited Nov. 17, 2002).

378. See Protocol, *supra* note 4, pt. I.18 (discussing that the General Counsel will review implementation by China of policies required by the WTO and the Protocol).

379. See *id.* pt. III.2 (stating that the Protocol was set to enter into force thirty days after its acceptance, making the exact date of entry into force December 10, 2001); see also Chinese Taipei Approval, *supra* note 6 (announcing that the WTO approved the text of the Protocol on November 10, 2001).

380. See Protocol, *supra* note 4, pt. I.18 (specifying that the Transitional Policy Review Mechanism involves a unique ten year period of annual reviews that allows the WTO to keep China's progress in all areas of WTO compliance under close scrutiny).

its administrative law regime.”³⁸¹ China’s use of transparency principles in the Protocol, however, is inappropriate because current Chinese legislative and administrative legal infrastructure developed without regard to such principles.³⁸² As a result, in spite of the tangible negative effects that non-transparent structures may have on China’s economic development,³⁸³ China’s governmental bodies may, without more detailed guidance, resist the Protocol’s call for general transparency.³⁸⁴ This resistance, stemming from both systematic inadequacies³⁸⁵ and individual fears, relates to a loss of control.³⁸⁶ It is unlikely that China will overcome these internal challenges to meet the Protocol’s minimum standards within one year.³⁸⁷ This leaves open the possibility for protracted post-accession compliance negotiations through the Protocol’s TPRM.³⁸⁸ Inadequate

381. Ostry, *supra* note 330, at 2.

382. *See id.* at 4-5 (stating that a country’s administrative legal system directly affects the legal infrastructure).

383. *See Yee, supra* note 67, at 606, 606 n.111-14 (citing Anne Carver, *Inventing a Legal Tradition*, in *ADVANCES IN CHINESE INDUSTRIAL STUDIES* 31 (Sally Stewart ed., 1995) (noting that without set rules, foreign businesses and individual investors will be hesitant to invest, short- or long-term, in China)); *see also* W.F. JENNER, *THE TYRANNY OF HISTORY: THE ROOTS OF CHINA’S CRISIS* 147-49 (1992) (explaining that modern theories of economic development rest on the premise that as successful market “must be controlled through known and impersonal rules that can be enforced”).

384. *See Yee, supra* note 67, at 636 (indicating that China may be reluctant to implement transparent policies).

385. *See Ostry, supra* note 330, at 12 (stating that “the multi-layered complexity of the evolving Chinese legal system makes this apparently simple and straightforward requirement impossible to implement at present”). The recent passage of administrative procedural laws affected only the top level of the legislative system, leaving the legislative and administrative action at the local level to operate with very limited supervision and virtually no transparency. *Id.* at 12-13. This effect resulted in the problem of “local protectionism” that concerns most foreign investors. *Id.* at 12.

386. *See Yee, supra* note 67, at 636 (explaining that the WTO’s expansive transparency of making trade rules publicly available to all Member countries may cause Chinese government officials to sway on the issue of transparency because it is, for these officials, equivalent to a loss of control).

387. *See Ostry, supra* note 330, at 13 (discussing substantial obstacles that may prevent China’s timely implementation of the minimum transparent standards).

levels of Chinese governmental transformation even at this level could seriously damage the WTO in the long term.³⁸⁹

China's potential inability to abide by Protocol transparency requirements has spawned further criticism that the Protocol's emphasis on transparency is misguided.³⁹⁰ Noting the inherent structural problems in the Chinese legal and political system, such critics claim that the mere commitment of the Chinese central government to the Protocol is ineffectual.³⁹¹ They argue that the Protocol should have instead required more substantive changes, such as the enactment of rules to govern administrative procedures and the standards of evidence that support administrative agencies' decisions, and addressed the deficiencies in existing legislation that prevent challenges to administrative rules and discretion.³⁹² Although one critic has claimed that the absence of such provisions was due to a general lack of appreciation for the importance of the Protocol by WTO Members,³⁹³ Working Party reports from as late as September 2000 acknowledge the concern of some Working Party members over China's institutional trade dispute compliance mechanisms.³⁹⁴

388. See Protocol, *supra* note 4, pt. I.18 (indicating that the General Council will review China's implementation of provisions of the Protocol and the WTO Agreement, and may make recommendations pursuant to their review).

389. See *id.* at 2 (discussing the effect of China's integration).

390. See Blumental, *supra* note 18, at 234 (discussing the need to restructure the Chinese legal and political system to effectively comply with WTO standards).

391. See Lubman, *supra* note 11, at 416 (requiring China to undergo massive transformations to effectively integrate into the WTO).

392. See TRIPs Agreement, *supra* note 347 (detailing the Protocol's effectiveness in promoting China's capacity to comply with WTO DSB decisions and suggesting that the WTO need only look to its own actions in dictating the protection of intellectual property for a more promising model); see also Ostry, *supra* note 330, at 9-10 (explaining that in devising the TRIPs Agreement, and largely due to U.S. concerns about enforcement, the WTO augmented transparency considerations with the inclusion of a detailed enforcement procedure, which mirrored the administrative and judicial mechanisms in the United States, and a domestic challenge procedure, which created an avenue for extensive domestic litigation).

393. See Lubman, *supra* note 11, at 415 (noting that the perceived importance of Sino-American negotiations meant that Members paid less attention to drafting the Protocol).

394. See WTO, *Draft Report of the Working Party on the Accession of China to the WTO*, WT/ACC/SPEC/CHN/1/Rev.3, para. 72 (Sept. 11, 2000) (stating some

C. THE PROTOCOL DOES NOT ENSURE CHINA'S CAPACITY TO
COMPLY WITH ALL WTO DSB DECISIONS

The Protocol's reliance on broad transparency standards and failure to include more detailed substantive guidance on governmental practice mean that the Protocol will most likely fall short of its goal to assure Chinese governmental readiness.³⁹⁵ This is unfortunate because, although many WTO Members likely do not meet the Protocol's high standards, the Protocol presented an opportunity to "impart needed momentum to Chinese reform efforts."³⁹⁶ As it stands, however, other WTO Members "should entertain clear and realistic expectations about the limited results China can attain by even the most energetic and sincere efforts to create and operate the institutions required by GATT after China becomes a Member of the WTO," including a dispute settlement decision implementation regime.³⁹⁷

The Protocol still leaves open the potential for confusion within China regarding practical matters, such as which governmental body must withdraw or modify an offending law or regulation, how to modify such an offending law or regulation, and whether such a withdrawal or modification falls within DSB time limits.³⁹⁸ The Protocol also leaves unresolved China's systemic administrative deficiencies, which may inhibit effective implementation due to the overall lack of political will or non-cooperation at local levels.³⁹⁹ To be fair, in light of China's present governmental structure, the pre-accession resolution of these issues through a single document was

members of the Working Party expressed concern that China needed to improve its institutions and procedures for the prompt review of disputes over trade-related matters in China, in particular with respect to the independence of the administrative and judicial authorities for reviewing measures), *available at* <http://docsonline.wto.org/DDFDocuments/t/WT/ACCSPEC/CHN1R3.doc> (last visited Nov. 17, 2002).

395. See Lubman, *supra* note 11, at 416 (elaborating on the Protocol's ineffectiveness in readying China for entry into the WTO).

396. *Id.*

397. *Id.* at 418.

398. See *id.* (discussing the fact that very few high level officials realized the complex legal implications necessary for accession).

399. See *id.* (noting that local officials also did not realize that accession would affect local law as well as national law).

an impossible task. That does not change the likelihood, however, that the failure of the Protocol to ensure China's capacity for compliance with DSB decisions leaves China unprepared to effectively deal with the number and variety of WTO disputes that it will doubtlessly face in the near future.⁴⁰⁰

IV. CHINA'S POTENTIAL IMPLEMENTATION PROBLEM AREAS

A. RECENT CONCERNS ABOUT WTO DSB JURISPRUDENCE

Several recent DSB decisions, which have resulted in formal non-compliance, have cast doubt on the resiliency of the WTO dispute settlement system.⁴⁰¹ These recent disputes, which include *EC—Bananas*,⁴⁰² *EC—Beef Hormones*,⁴⁰³ *Australia—Salmon*,⁴⁰⁴ *Canada—Measures Affecting the Export of Civilian Aircraft*,⁴⁰⁵ and *U.S.—*

400. See Lubman, *supra* note 11, at 418 (remarking that change in Chinese law to meet Protocol requirements will only occur over an extended period of time, leaving China vulnerable to DSB actions).

401. See Gleason & Walther, *supra* note 169, at 712 (commenting that the DSU contains errors that need correction and is ambiguous at times).

402. See WTO Panel Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R (May 22, 1997) [hereinafter *EC—Bananas*] (finding that the EC import licensing was inconsistent with GATT obligations).

403. See WTO Appellate Body Report, European Communities—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC—Beef Hormones*] (finding that the European Communities must conform disputed measures with the Agreement on the Application of Sanitary and Phytosanitary Measures).

404. See WTO Panel Report, Australia—Measures Affecting Importation of Salmon, WT/DS18/R (June 12, 1998) [hereinafter *Australia—Salmon*] (recommending that Australia come into compliance with the Agreement on the Application of Sanitary and Phytosanitary Measures); see also WTO Appellate Body Report, Australia—Measures Affecting Importation of Salmon, WT/DS18/AB/R (Oct. 20, 1998) (further recommending that Australia comply with its obligations).

405. See WTO Panel Report, Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70/R (Apr. 14, 1999) (recommending that Canada withdraw its subsidies); see also WTO Appellate Body Report, Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R (Aug. 2, 1999) (stating that Canada needs to withdraw its subsidies according to its obligations).

Foreign Sales Corporations,⁴⁰⁶ have raised doubt because their complexity and contentiousness has required intensified usage of WTO implementation procedures, and not always with satisfying results.⁴⁰⁷ These cases highlight the fact that the DSU text on implementation contains “obvious ambiguities and drafting oversights” that need revisions in accordance with the objective of “prompt compliance” under strong sanctions.⁴⁰⁸ The gridlock present in discussions over WTO dispute settlement reforms, however, means that specific DSB decisions themselves, not the textual revisions, must deal with new implementation issues.⁴⁰⁹

B. PROBLEMS RELATED TO CHINA’S INABILITY TO IMPLEMENT DSB DECISIONS

1. *General Issues Related to China’s Involvement in the DSB*

Recently, some trade law circles have pronounced that China’s failure to meet its WTO obligations, “no matter how it is expressed, could well engender a considerable number of disputes” within the WTO DSB.⁴¹⁰ Some commentators claim that the vast amount of new, increasingly westernized legislation that China has produced over the last fifteen years could present fodder for the pursuit of claims.⁴¹¹ Others suggest that the minimum phase-in period

406. See WTO Appellate Body Report, United States—Tax Treatment for “Foreign Sales Corporations,” Recourse to Article 21.5 by the European Communities, WT/DS108/AB/RW (Jan. 14, 2002) [hereinafter *U.S.—Foreign Sales Corporations*] (holding that the U.S. tax exemptions are prohibited export subsidies).

407. See Gleason & Walther, *supra* note 169, at 712 (demonstrating the need for different implementation procedures than those currently offered by the WTO).

408. See *id.* (pointing out that some commentators called for increased sanctions and a more limited timetable in order to strengthen the overall compliance regime). Such actions, however, may only serve to frustrate China’s efforts at implementation by imposing blindly punitive remedies and raising standards to impossible levels. *Id.*

409. See *id.* at 729 (discussing the need to implement and apply specific WTO decisions in a uniform manner to all Members).

410. Lubman, *supra* note 11, at 418.

411. See Corne, *supra* note 41, at 247 (stating that this legislation and subsequent regulation, created in a “conveyor-belt fashion,” will leave Chinese

subscribed to under the Protocol will "cause friction between China and its major trading partners," leading to a profusion of disputes.⁴¹² Whatever the reason for such a phenomenon, however, most commentators agree that a sudden influx of DSB litigation would cause harm to China and possibly overload the DSB.⁴¹³

A related issue concerns whether DSB decisions alone should be the chief means by which to induce China's compliance.⁴¹⁴ On one hand, the WTO should limit the use of dispute settlement procedures to enforce China's adherence to WTO obligations, because excessive use will result in an overload of the DSB.⁴¹⁵ On the other hand, the use of DSB decisions to promote China's compliance will generally help to "ease the pressure on China's entry into the WTO" by providing a structured, cooperative process for devising an implementation strategy.⁴¹⁶ This issue also touches on the corollary issue concerning the extent to which the WTO dispute settlement process could serve to achieve other individual goals of complaining Members besides mere WTO compliance, such as the withdrawal of a separate WTO complaint or a change in domestic foreign relations

officials mired in a political framework based on antithetical socialist principles, unable to effectively respond).

412. See Blumental, *supra* note 18, at 254 (elaborating that such friction will "overload" the WTO's DSB).

413. See Lubman, *supra* note 11, at 418 (detailing that frequent non-compliance threatens to significantly increase the time period necessary in order to obtain and implement a DSB decision). See generally, Terence P. Stewart & Mara M. Burr, *The WTO Panel Process: An Evaluation of the First Three Years*, 32 INT'L LAW. 709, 721 (1998) (commenting that cases often last four to five years in the dispute settlement system before a country is brought into compliance).

414. See Stewart & Burr, *supra* note 413, at 721 (relating the problems with ineffective implementation of changes and inevitable delays).

415. See *supra* note 413 and accompanying text (explaining that frequent use of the DSB may significantly lengthen the time required to bring a country into compliance).

416. See Blumental, *supra* note 18, at 243 (reiterating the fact that, under the DSU, China's compliance must only be "mutually satisfactory," requiring parties to "work together to manage the challenges of international economic integration"); see also Samuel Berger, U.S. Policy in East Asia: Trade Relations with China, Remarks at the East Asian Institute, Columbia University (May 2, 2000) (stating that economic factors support giving China permanent normal trade relations, as well as not granting the relations would be risky), available at <http://usinfo.state.gov/regional/ea/uschina/berg0502.htm> (last visited Oct. 17, 2002).

policy by the responding Member. The issue of the use of DSB complaints as a “sword” for achieving alternate goals, while admittedly somewhat cynical, was implicated during the recent *U.S.—Foreign Sales Corporation* case.⁴¹⁷ For China, whose immense importance in global politics makes it a potentially abundant source for such alternate political exactions, the allowance of such a practice by the WTO should be of genuine concern.

2. *Specific Implementation Problems for China*

China’s dispute settlement problems do not end with the potential pitfalls caused by the over-zealousness of its fellow members.⁴¹⁸ Rather, the majority of China’s compliance problems are likely to stem from internal Chinese sources. As noted earlier in this article, China’s laws and regulations lack sufficient clarity and unity to serve all of the functional needs of a modern economic state.⁴¹⁹ Not surprisingly, however, it is the legislative and administrative bodies that created these laws and regulations that present the most serious difficulties to compliance.⁴²⁰ These problems include questions concerning: (1) determining the appropriate governmental body to implement a particular compliance program, (2) whether the political will exists to allow necessary implementation actions, (3) how to modify an offending law or regulation in order to comply with a DSB decision, (4) whether implemented compliance programs will fit within DSU time limits, and (5) whether an implementation program will find the necessary force at local government levels.

417. See *U.S.—Foreign Sales Corporations*, *supra* note 406 (discussing how the European Union knew the United States would not comply with regulations and used its challenge to U.S. Foreign Sales Corporations law to gain leverage over its own compliance in *EC—Bananas*); see also *EC—Bananas*, *supra* note 402 (describing how the U.S. ultimately conceded in *EC—Bananas*, agreeing to settle the dispute independent of DSB enforcement mechanisms).

418. See Keller, *supra* note 117, at 711 (noting that internal conflicts between legal authorities and social rules present another problem in China’s integration into the WTO).

419. See *id.* (describing China’s legal sources as a “disparate mass of laws and regulations”).

420. See *id.* (explaining that “[l]awyers and officials in China engage in a daily struggle to make sense of vague, inconsistent laws of often questionable legislative authority”).

a. Identification of the Appropriate Governmental Body

As noted earlier in this article, China is a unitary state in which, theoretically, “power flows downward from the central power organs.”⁴²¹ In reality, however, “governmental lawmaking power in China is diffuse.”⁴²² While the 1982 Constitution grants the NPC, SCNPC, and local congresses the exclusive power to draft and promulgate law, the State Council and its various lesser administrative bodies are left free to specialize and interpret these laws how they see fit.⁴²³ Chinese regulatory agencies also have the power to produce informal rules and regulations, which are often more potent than central government laws.⁴²⁴

This distribution of power has resulted in a “legal fragmentation” within China.⁴²⁵ Under this governmental framework of legislative and regulatory fragmentation, it would seem that no legal institution in China has the ability to impose order.⁴²⁶ Unfortunately, the Chinese government requires such an ability in order to determine which governmental body should respond to the particular compliance requirements demanded by a DSB decision. For example, in the DSB Appellate Body decision *U.S.—Shrimp*, the Appellate Body found a U.S. environmental law valid “on its face,” but discriminatory as it was “applied” by administrative bodies.⁴²⁷

421. La Kritz, *supra* note 59, at 269.

422. *Id.*

423. XIANFA arts. 62-63 (1982); *see also* Corne, *supra* note 41, at 263 (explaining the flexibility of the Chinese Constitution in allowing government authorities to interpret and apply rules and regulations in a flexible manner).

424. *See* La Kritz, *supra* note 59, at 269 (affirming the broad authority of government agencies to implement the law).

425. *See* Anthony Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, in CHINA'S LEGAL REFORMS 82, 108 (Stanley Lubman, ed., 1996) (describing the traditional limits on power with China's legal system and the conflicts and contradictions that stem from implementation of such a system).

426. *See* Keller, *supra* note 117, at 734 (clarifying the problem of China's incoherent legislative order where the problem lies in determining what regulations preempt other laws).

427. *See* WTO Panel Report, *U.S.—Import Prohibition on Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter *U.S.—Shrimp Panel*].

Here, the DSB needed only to take administrative action in order to implement the decision, because the law itself did not violate WTO obligations.

Such a scenario may present problems in light of China's ambiguous law-making and rule-making divisions.⁴²⁸ Because all central government law must theoretically come from either the NPC or SCNPC, these bodies may wish to devise a legislative solution. In spite of its broad powers, the State Council may attempt to avoid responsibility by deferring to these legislative bodies.⁴²⁹ Ultimately, it is likely that, faced with the same situation as the United States in *U.S.—Shrimp Recourse*, neither body acts effectively, and implementation of the DSB decision fails to proceed.

b. Political Will

A lack of political will within China is another reason that a compliance program may not pass its initial stages. In general, although countries are responsive to outside pressure to make changes, domestic pressure usually prevails in the end.⁴³⁰ Notwithstanding China's commitment to economic reform and WTO membership, Chinese leaders have made it clear that their primary goal is the maintenance of domestic stability.⁴³¹ In light of the fact that the often conservative-minded CCP essentially runs the Chinese government,⁴³² and that the Chinese populace is largely unfamiliar

(finding that the U.S. restrictions on shrimp imports do not comply with WTO art. XX).

428. See Corne, *supra* note 41, at 269 (noting the broad powers of the administrative agencies to undermine China's ability to create a consistent and effective system of laws).

429. See *id.* (explaining the process that state council departments use to specify ambiguous laws).

430. See Sun, *supra* note 291, at 168 (stating that "[a]n unequivocal commitment from the political leadership is perhaps the single most critical element to further momentum for reform").

431. See, e.g., Chan Yee Hon, *Premier Li Signals Caution on Reforms*, S. CHINA MORN. POST, Feb. 5, 1998, at 7 (paraphrasing the prime minister as saying "efforts would be made according to the situation in China and not according to Western values").

432. See Yee, *supra* note 67, at 624 (mandating the CCP to guide the state's leaders in accord with China's Constitution (Xianfa)).

and suspicious of domestic, much less international, legal, and judicial action,⁴³³ there will be a questionable level of political will in China for WTO DSB compliance.

This potential problem is made more acute by the reality that some of China's administrative officials, who possess the broad, quasi-legislative interpretation and enforcement powers necessary to ensure compliance with many DSB decisions,⁴³⁴ have been resistant to WTO membership.⁴³⁵ These officials often carry personal and professional vices that may be antithetical to DSB decision implementation.⁴³⁶ Among the substantive areas where political will may prevent compliance are subsidies restrictions⁴³⁷ and quota limits,⁴³⁸ both of which Chinese officials fear would greatly damage China's State Owned Enterprises ("SOEs") and undermine the system of patronage upon which many officials base their livelihood.⁴³⁹ China's likely inability to use any of the GATT Article

433. See Corne, *supra* note 41, at 262-63 (detailing the flexibility of Chinese laws to be interpreted by high government officials).

434. See La Kritz, *supra* note 59, at 269 (relating the extensive powers of administrative officials).

435. See Blumental, *supra* note 18, at 235 (suggesting that China's State Planning Commission and Ministry of Machine Building Industry both "recalcitrant in adhering to transparent sets of rules and in eliminating. . . non-tariff barriers," continually restrained the efforts of China's Ministry of Foreign Trade Investment to negotiate WTO membership).

436. See Wang, *supra* note 14 (relating that observing WTO rules will serve to weaken the relative power of elite officials over intervention and economic regulation). When threatened with the loss of the fruits of authoritarian communist rule, these officials are likely to seize on any incident of social unrest in order to undermine reformers and prevent WTO compliance. *Id.*

437. See Blumental, *supra* note 18, at 203, 211 (determining the political risk in reducing subsidies to state owned enterprises ("SOEs") is three-fold with large scale unemployment among the populace leading to political agitation, the possible insolvency of SOEs, and the tremendous pressure such insolvency could put on the banks and other financial institutions that formerly supported SOEs under the belief that their connection with the government would prevent such an occurrence).

438. See *id.* at 242 (explaining the GATT prohibition on quantitative restrictions).

439. See Murphy, *supra* note 377, at 38-39 (conveying the interlocking interests of domestic lobbyists and party bureaucrats, and the continued power and influence of the Communist party).

XX⁴⁴⁰ exceptions to legitimize such trade protections may further lessen the political will to implement.⁴⁴¹ Finally, Chinese officials have warned that if large WTO Members such as the European Union countries and the United States decide not to implement DSB decisions, the Chinese government will be unable to generate enough domestic support to comply either.⁴⁴²

c. Modifying an Offending Measure

Even if China were to decide on the appropriate governmental body for implementing a DSB decision and generate enough political will to initiate such a task, it is uncertain whether Chinese legislative and administrative systems have the capacity to comply in the manner suggested by the decision.⁴⁴³ Chinese attempts to formulate market socialism, while simultaneously maintaining control over China's vast territory, have led Chinese lawmakers to create "laws that are inherently flexible so that they may be adjusted according to the vagaries of human behavior."⁴⁴⁴ This has led to not only a set of laws and regulations that are inconsistent with each other, but inconsistent legislative and administrative practices as well.⁴⁴⁵ Such inconsistencies may inhibit China's ability to devise a compliance

440. GATT Article XX allows general exceptions in order to protect certain areas of importance, such as public morals, human life, national treasures, etc.

441. See Blumental, *supra* note 18, at 241 (explaining China's rampant use of local protectionism).

442. See Gleason & Walther, *supra* note 169, at 729 (reciting a Chinese diplomat's statement that if the WTO did not force the European Union to change its banana import laws, China would be unable to generate enough domestic resolve to comply itself); see also Bhushan Bahree, *Integrating China's Economy is Complex Task*, WALL ST. J. EUR., Nov. 17, 1999, at 2 (reiterating that ineffective pressure from the WTO will cause conflict with China's domestic laws and interests).

443. See Gleason & Walther, *supra* note 169, at 729 (stating that China's current position will not allow for successful compliance with WTO regulations, as they now stand).

444. CORNE, *supra* note 102, at 93.

445. See *supra* notes 425-29 and accompanying text (discussing the difficulties of implementation stemming from the Chinese organization of laws).

program that reflects the directive stated in a particular DSB decision.⁴⁴⁶

Nowhere are China's inadequacies at producing legislation that satisfies a stated goal more obvious than in its attempts to protect IP rights.⁴⁴⁷ In spite of China's recognition that IP protection plays a dominant role in the proper functioning of its social-market economy,⁴⁴⁸ Chinese IP reforms have failed, resulting in a further proliferation of IP piracy in China.⁴⁴⁹ Moreover, China's three main IP laws, the Trademark Law of 1982,⁴⁵⁰ the Patent Law of 1984,⁴⁵¹

446. See CORNE, *supra* note 102, at 93 (describing how vague laws can change according to societal changes).

447. See Andrew J. McCall, *Copyright and Trademark Enforcement in China*, 9 TRANSNAT'L LAW. 587, 594 (1996) (attributing continued intellectual property violations in part to China's inadequate and inconsistent enforcement of intellectual property laws).

448. See Cheng, *supra* note 183, at 1943 (citing Rouse & Co., *Hong Kong, PRC: Eleven Intellectual Property Decisions*, in IP ASIA 9 (Oct. 31, 1994)).

449. See McCall, *supra* note 447, at 594-95 (finding that despite China's adoption of additional intellectual property laws, U.S. industries in China suffered increasing losses due to copyright infringements); see also Marcus W. Brauchli, *China Could Face U.S. Trade Sanctions of over \$2 Billion Due to Piracy Losses*, WALL ST. J., Feb. 26, 1996, at A9 (estimating U.S. losses in 1995 of \$1.84 billion due to Chinese piracy, not including business software); Sun, *supra* note 291, at 70 (noting that the United States lost \$669 million in 1992 due to intellectual property violations in Taiwan). Taiwan's intellectual property abuses over the past two decades have led some in the U.S. industry to dub Taiwan the "pirate kingdom of the counterfeit world." *Id.*

450. Trademark Law of the People's Republic of China (1982) (codified as amended by Decision of the Standing Committee of the National People's Congress on Revising the Trademark Law of the People's Republic of China) (1993), translated in LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1993, at 56 (Science Press, 1st ed. 1995) [hereinafter Trademark Law].

451. Patent Law of the People's Republic of China (1984) (codified as amended by Decision of the Standing Committee of the National People's Congress on Amending the Patent Law of the People's Republic of China) (1992), translated in LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1990-1992, at 505 (Science Press, 1st ed., 1993) [hereinafter Patent Law]. Although China recently amended the Patent Law to comport with TRIPS, the changes made, which went into force on July 1, 2001, still do not bring China into compliance with TRIPS. See Thomas T. Moga, *China Changes Patent Law to Comply with TRIPS: Law's 2001 Amendments Are*

and the Copyright Law of 1992,⁴⁵² have not eliminated unnecessary and costly differences in IP protection between Chinese citizens and foreigners.⁴⁵³

This last deficiency is important because it is a central requirement within TRIPs—the WTO's agreement on IP protection.⁴⁵⁴ Complex litigation involving TRIPs could inhibit effective compliance in the event of a TRIPs violation by China.⁴⁵⁵ In contrast, spurned by having to respond to a large number of TRIPs disputes, China could attempt to use the DSU's retaliation or cross-retaliation enforcement mechanisms to legitimize its own non-compliance in the event that

Specifically Focused on the Trade Agreement, NAT'L L.J., July 23, 2001, at C15-16 (indicating that noncompliance is apparently still a concern in the areas of patent right entitlement limits, compulsory licensing, and enforcement).

452. Copyright Law of the People's Republic of China, *translated in* LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1990-1992*, at 77 (Science Press, 1st ed. 1993) [hereinafter Copyright Law].

453. See Nafziger, *supra* note 10, at 760 (observing China's difficulty in adopting a system of rights that uniformly benefits both citizens and aliens).

454. See Cheng, *supra* note 183, at 1948 (noting that TRIPs, concluded at the Uruguay Round in 1994, resulted from developed countries' efforts to create unified standards for international intellectual property protection and the countries' dissatisfaction with existing intellectual property conventions). The developed countries wanted to strengthen the treaties with amendments to provide more effective enforcement of intellectual property laws and to utilize formal dispute mechanisms to assure compliance. *Id.* Unsuccessful in their attempts to strengthen present international intellectual property conventions, the delegates to the Uruguay Round negotiations made trade-related intellectual property a priority, and the negotiations concluded with the WTO's TRIPs Agreement in 1994. *Id.* at 1948-49. Recall as well that China has no phase-in period in its obligations under TRIPs. *Id.*

455. See Lubman, *supra* note 11, at 410 (describing ideological and institutional challenges to future Chinese reform). One example may occur in the area of disclosure, as the decision to disclose intellectual property during the application process is a fundamental decision based on competing policy considerations, and a lack of knowledge in this area would prevent rational decision-making, which could then lead to a WTO dispute. See Nuno Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing the TRIPs Agreement: The Problem and The Solution*, 2 WASH. U. J.L. & POL'Y 371, 380 (2000) (discussing the disclosure conditions contained in Article 29 of the TRIPs Agreement).

China successfully challenges another Member.⁴⁵⁶ This possibility is clearly not in the best long-term interests of either China or the WTO.

d. DSU Time Limits

The novelty and complexity of WTO disputes may hinder China's ability to achieve "prompt compliance" as well.⁴⁵⁷ Faced with a negative DSB decision dealing with complicated subject-matter, it is uncertain whether China's legislative and administrative bodies can mold an effective implementation package within the roughly fifteen months allotted in Article 21 of the DSU.⁴⁵⁸ China's executive branch has expressed restraint in the past to applying even the decisions of its own courts.⁴⁵⁹

Furthermore, China lacks a legal tradition in non-government influences playing a role in the formation of law or regulation, and China's compliance with DSB decisions is likely to be slow and tedious.⁴⁶⁰ Thus, China may be subject to DSB reproach even where the DSB has legitimately sought implementation of a decision.⁴⁶¹

e. Local Government Congruence

Assuming that an effective compliance program is put in place within DSU time limits, however, there still exists the strong possibility in China that successful implementation will not occur. This possibility exists because one of the more pernicious aspects of

456. See DSU, *supra* note 34, art. 21.3 (stating that a Member must inform the DSB within thirty days of a recommendation or ruling of how the Member intends to come into compliance); see also Murphy, *supra* note 377 (stating that China is preparing for potential trade fights by developing anti-dumping cases against foreign firms).

457. See Lubman, *supra* note 11, at 391 (commenting on the disorder and arbitrariness of the Chinese bureaucracy).

458. DSU, *supra* note 34, art. 21.

459. See Lubman, *supra* note 11, at 390 (maintaining that "governmental agencies are not unified in their outlook toward rules or their application").

460. See *id.* at 410 (discussing the Chinese government's reluctance to adopt Western-style legal reforms).

461. See DSU, *supra* note 34, arts. 21-22 (detailing the period of time for compliance and the penalties for noncompliance with DSB decisions).

China's law- and rule-making system is the ability of local-level intransigence to disrupt and constrain even the most well-meaning central government compliance programs.⁴⁶² Three main causes explain this phenomenon.⁴⁶³

One root cause of this local-level disconnect is the traditional vagueness of Chinese laws, which has fostered a persistent tendency among administrators to interpret and apply new Chinese laws in the same manner as the discontinued policies that the new laws replace.⁴⁶⁴ Another factor affecting whether local levels give full effect to a Chinese law or regulation depends on whether lawmakers formally issued the law to the public, signaling greater local congruence, or simply announced it in an internal circular or document series, where local discretion dictates.⁴⁶⁵ A third factor includes the problems of local protectionism, irregularities, and inconsistencies in the law-making system, all of which have arisen in large part due to increased local autonomy and the development of local economies.⁴⁶⁶ The present trend of governmental

462. See Murphy, *supra* note 377 ("Beijing's [biggest] difficulty is whether it can ensure provincial and local government adherence to the pact that it made to the outside world."). This challenge is foreboding, especially when one considers that while WTO negotiations took fifteen years for a team of highly skilled negotiators to complete, WTO compliance must be implemented at every port and at every market by local officials and common citizens. See *id.* (noting that WTO enforcement in China, even with support from Beijing, will be a struggle). In particular, the relative freedom given to coastal cities in the south and east to experiment with new market reforms may ironically result in their present resistance to central government legislation that they perceive as a threat to their recent success. See Wang, *supra* note 14 (discussing the potential reluctance of local authorities to comply with WTO requirements).

463. See *infra* text accompanying notes 464-466.

464. See Lubman, *supra* note 11, at 391 ("[Chinese] bureaucrats may have difficulty distinguishing the current proliferation of normative documents from policy documents, a distinction that did not exist before reform.").

465. See La Kritz, *supra* note 59, at 270 (noting the possibility that Chinese administrative enactments may not have a binding effect).

466. See Li, *supra* note 62, at 124 (discussing some of the results of decentralization in China). One example of this protectionism is the 1999 "Battle of Cars" (*qiche dazhan*) in which provinces and cities passed discriminatory local regulations against automobile imports into their locality. *Id.*; see also Zha Quingjiu, *Market Economy Refuses "Dukes Separatism,"* LEGAL DAILY, Dec. 13, 1999. Some analysts predict that regional protectionism may inhibit China's record of WTO DSB compliance in spite of sincere efforts by the Chinese leadership in

decentralization has weakened the "Leninist structure" of the party-state, making the above-mentioned causes more acute.⁴⁶⁷ This decentralization has caused many local governments to ignore central directives and exhortations,⁴⁶⁸ deviate from central government policies without being checked,⁴⁶⁹ and undermine overall state power.

Even without knowing the root cause of local legal discord in China, such practice is nevertheless of genuine concern in terms of China's compliance with DSB decisions.⁴⁷⁰ One noted authority suggests that the Chinese government enforces only twenty percent of all laws passed in China.⁴⁷¹ Similar to the potential problems relating China formulating a compliant response and doing so within relevant WTO time limits, the largest degree of local irreverence occurs, and will likely continue to occur, in the area of IP

Beijing to implement DSB decisions. See Hsieh, *supra* note 373 (predicting that local governments and ministries may use loopholes to defy new rules or "drag their feet" on implementation of national legislation, and may lobby hard for longer grace periods). Although the State council has promised to set up agencies to enforce compliance with WTO rules, most analysts agree that "local protectionism will remain a fact of life for a long time." *Id.*

467. See Lubman, *supra* note 11, at 402 (discussing several factors that have led to the decline and decentralization of Chinese state authority). China's leadership probably never dreamed that by granting more power to local authorities to promote economic reform, they would unknowingly cause a diffusion of economic decision-making to local authorities and concentrate less political power in Beijing. Merle Goldman & Roderick MacFarquhar, *Dynamic Economy, Declining Party-State, Introduction to THE PARADOX OF CHINA'S POST-MAO REFORMS* 3, 25 (Merle Goldman & Roderick MacFarquhar eds., 1999).

468. See Goldman & MacFarquhar, *supra* note 467, at 26 (describing threats to the Chinese party-state). Chinese governmental agencies do not yet view their interpretation of laws and implementation of regulations as founded on a coherent understanding of the role of law in the governance of China. Lubman, *supra* note 11, at 385.

469. See Lubman, *supra* note 11, at 402 (discussing the decline of central party-state power under decentralization).

470. See *id.* (noting that such localism has negative consequences on legal development because non-uniformity in the application of legal rules inhibits the grow of a national legal system based on the rule of law).

471. CORNE, *supra* note 102, at 190.

protection.⁴⁷² Undoubtedly, IP protection is one of China's weakest areas of regulation, and Chinese expertise in IP should be augmented through better education and easing restrictions on foreign joint ventures.⁴⁷³ If China is to avoid serious reproach by the WTO DSB for its failure to remedy local-level violations, especially those related to IP protection,⁴⁷⁴ it must take affirmative steps to better define the role of local authorities and provide a check on their now rampant discretionary power.⁴⁷⁵

C. CHINA WILL BE UNABLE TO EFFECTIVELY COMPLY WITH MANY WTO DSB DECISIONS

At accession, serious questions still exist concerning which governmental body will need to comply with a particular DSB decision, whether the political will exists to allow compliance to proceed, how such an implementation should proceed, whether there will be enough time for China to comply, and whether local administrative authorities will properly implement Chinese

472. See Cheng, *supra* note 183, at 1983 (noting that the high degree of power that local governments now assert over administrative bodies means that local administrators do not neutrally enforce intellectual property protection laws).

473. See *id.* at 1988 (highlighting alternative cures to China's copyright problems aside from trade sanctions, administrative enforcement, and TRIPs).

474. See Wang, *supra* note 14, at 27 ("[L]ack of compliance at local levels would expose the central government to the risk of WTO dispute settlement actions.").

475. See Murphy, *supra* note 377 (stating that the central government will have to take steps to ensure local observance of global trading rules). As one Western diplomat suggests, a key test is whether the central government takes steps to ensure that the failure of local officials to comply with WTO rules and central government legislation that seeks to implement those rules will result in discipline from the CCP's powerful and strident central inspection commission. *Id.* A corollary concern is the extent to which unbridled regulatory discretion itself leaves China open to disputes such as that raised against the United States in regards to its Special 301 and § 337 laws. Cf. Press Release, Trade Policy Review Body: Review of United States TPRB's Evaluation (Sept. 2001) (indicating that even though the United States has used its Special 301 investigation provisions sparingly since 1999, concern still exists about such provisions' compatibility with WTO regulations), at http://www.wto.org/wto/english/tratop_e/tpr_e/tp173_e.htm (last visited June 20, 2002).

compliance measures.⁴⁷⁶ In light of the likelihood that China will attract a high number of complaints, China will be forced to respond frequently and in a variety of ways.⁴⁷⁷ Given that many disputes are likely to arise under the TRIPs agreement, and to a lesser extent in subsidies and quotas, China must press forward in developing a greater expertise in IP protection and other relevant trade rules that the WTO embraces.⁴⁷⁸

This will be difficult for China. In truth, China, at accession, lacks many of the prerequisites necessary for effective operation within the WTO DSB—most notably its own discordant legal system.⁴⁷⁹ WTO Members knew that China's legislative and administrative systems did not comport with DSB standards prior to China's accession. However, the Protocol of Accession drafted by the Working Party does not ensure that China's ability to comply with DSB decisions will be satisfactory anytime in the near future.⁴⁸⁰ As a result, the potential problem areas listed above are distinct realities.

Working from the relatively secure premises that China cannot remedy their legislative and administrative abnormalities in the near term, and that the WTO is likely to modify the DSU due to organizational gridlock, the responsibility for ensuring that China's experience in the dispute settlement system does not become a global debacle lies firmly in the hands of the DSB. Only the DSB has the authority and ability to control China's fate. Although options are relatively few, they do exist.

476. See discussion *supra* Part IV.B.2 (discussing China's specific implementation problems).

477. See, e.g., Wang, *supra* note 14 (anticipating that China will face numerous cases).

478. See *supra* text accompanying notes 472-73 (discussing local implementation of WTO intellectual property rules).

479. See discussion *supra* Part II.C (discussing the requirements for compliance with DSB decisions).

480. See discussion *supra* Part III.C (discussing China's impact on the WTO).

V. REALISTIC SOLUTIONS

A. CHINA IN THE WTO

1. *China's Accession is a Positive Step*

Most commentators agree that China's accession into the WTO was ultimately inevitable and that China's inclusion will likely enable the global community to reap political, economic, and social rewards for years to come.⁴⁸¹ However, some debate still exists concerning the timing of China's accession to membership and, more specifically, regarding China's preparedness to comply with WTO rules and procedures. Either the WTO should have forced China to substantially comply with key WTO obligations prior to accession or China's WTO membership itself is the most effective means to foster such compliance.

a. The Exclusionary Approach Is Misguided

Gregory Mastel, Vice President of the Economic Strategy Institute in Washington, D.C., has most convincingly argued the theory that the WTO should have forced China to fully comply with WTO rules prior to accession.⁴⁸² Mastel has argued that China's poor record of enforcing bilateral agreements with the United States regarding IP and market access make China's potential enforcement of the broad

481. See *supra* text accompanying notes 316, 319 (discussing ways in which other Members would benefit from China's WTO membership).

482. See Greg Mastel, *Clinton-Jiang Summit, Round Two*, J. COM., Dec. 3, 1997, at 7A (arguing that it is a mistake to admit China for membership in the WTO due to its failure to meet the qualifications for membership); see also *China's WTO Bid/Amplifier -3: Transition Key Question*, DOW JONES INT'L NEWS SERV., Apr. 23, 1997 (quoting Mastel's opinion), available at 4/23/97 DJINS 07:31:00. Mastel stated as follows:

It would be a grave mistake to admit China to the WTO when it is unable to deliver on the commitments it makes because of the remnants of communist economics and the lack of a reliable rule of law . . . [e]ven if WTO accession negotiations take several more years, China cannot afford to abandon the process.

Id.

WTO regime extremely dubious.⁴⁸³ The crux of Mastel's position is that "the rule of law in China . . . 'must precede WTO membership'."⁴⁸⁴ A number of factors, however, limit the potency of Mastel's arguments.⁴⁸⁵ For one, Mastel seemingly misinterpreted the meaning of several official Chinese statements, which served as the premise of his position.⁴⁸⁶ In addition, China's actual accession on November 11, 2001 and the initiation of China's membership on December 11, 2001 make Mastel's arguments somewhat moot.⁴⁸⁷ Perhaps most damaging, however, is the likelihood that Mastel was simply incorrect, as demonstrated by the wealth of commentary suggesting that WTO membership itself, rather than exclusion, is the best way to solve China's most troubling problems.⁴⁸⁸

b. Membership Has Its Privileges . . . and Its Obligations

In contrast to Mastel's opinion, the current popular belief is that a multilateral framework, such as that of the WTO, is the most effective mechanism to enforce international commitments, because such frameworks provide a forum for the "cooperation and constant communication necessary to achieve such a common strategy."⁴⁸⁹ Multilateral organizations should function more as "teams," in which the good of the whole rises with the enhanced production of individual members, than as "clubs," in which members only admit others that have already met success.⁴⁹⁰ Supporters claim that while

483. See Mastel, *supra* note 482 (noting the increase in piracy in China, despite a bilateral agreement to end intellectual property violations).

484. Blumental, *supra* note 18, at 252 (citing and quoting Gregory Mastel, *Is WTO Ready for China?*, May 8, 1997, FAR E. ECON. REV., at 29).

485. See *infra* text accompanying notes 486-508.

486. See Blumental, *supra* note 18, at 252 n.220 (noting Mastel's misapprehension of a statement by former NPC Chairman Qiao Shi).

487. See New Requests and Completed Accessions 2001-2002 (confirming December 11, 2001 as China's date of membership to the WTO), *available at* http://www.wto.org/wto/english/thewto_e/acc_e/newrequest_e.htm (last visited June 20, 2002).

488. See Blumental, *supra* note 18, at 256-57 ("[WTO] membership will promote China's compliance with international norms and do so far more effectively than have bilateral agreements or threats of retaliation.").

489. See *id.* at 256 (discussing the advantages of a multilateral institution).

490. *Id.*

legal policy must remain under sovereign state control, multilateral interaction through international institutions can have a positive influence on domestic legal development on these states.⁴⁹¹ Commentators have demonstrated that even prior to the initiation of the WTO, China's participation in the global community, while perfunctory, still heavily influenced Chinese governmental institutions.⁴⁹²

The provision allowing full rights and privileges of WTO membership should accelerate China's domestic adjustment to WTO principles in the long-term.⁴⁹³ In the short-term, however, China faces tremendous pressure from the WTO's central players—the United States and the countries of the European Union—to exercise the same balanced responsibility and temperance that have made it a valued Member of the World Bank and IMF.⁴⁹⁴ As with any multilateral interaction, China's rewards come with significant international expectations.⁴⁹⁵

This international pressure may be the greatest in terms of compliance with DSB decisions, where failure is tantamount to

491. See *id.* at 237-38 (stating that, although development of a legal system is a state matter, international institutions can have a significant impact on domestic reform).

492. See HAROLD K. JACOBSON & MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER 146 (Univ. of Mich. Press 1990) (commenting on the effect of international organizations on China's institutional design); see also Blumental, *supra* note 18, at 237 (discussing China's issuance of vast amounts of legislation concerning foreign trade and investment as being a result of international institution influence).

493. See Blumental, *supra* note 18, at 257-58 (discussing steps that major trading states are taking in order to ensure China's commitment to the WTO).

494. See *id.* at 258 (discussing China, and its membership to international institutions, as a source of economic stability in Asia); see also Gary Hufbauer, *China as an Economic Actor on the World Stage: An Overview*, in CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT 47, 48 (Frederick M. Abbott ed., 1998) (showing how China's efforts to maintain currency values against fluctuation had helped to stabilize the region during the Asian financial crisis).

495. See Blumental, *supra* note 18, at 258-59 (analyzing the benefits and responsibilities China faces as they enter the WTO).

directly harming other Members.⁴⁹⁶ Although China's leadership should expect proactive cooperation and flexibility in the dispute settlement process from other powerful WTO Members⁴⁹⁷ and may gain leverage over regional insurgents through certain WTO sanctions,⁴⁹⁸ WTO Members will not tolerate Chinese disaffection in the implementation of DSB decisions.⁴⁹⁹ Thus, while China's membership in the WTO can have positive benefits for all, Members cannot truly realize those benefits absent the complete devotion of all parties involved.⁵⁰⁰

In spite of these challenges, China's ultimate accession has put to rest the hard-line view held by Mastel and others.⁵⁰¹ Any desired attempt to further conduct global economic affairs in the absence of the world's largest trading partner is at the very least disingenuous, and at most maleficent.⁵⁰² Moreover, China's ability to independently achieve a high level of economic compliance while operating entirely outside of the WTO's strong system of international rules and obligations would be extremely tenuous.⁵⁰³ China's progression toward the rule of law and resultant WTO compliance is sure to be a

496. *See id.* at 254 (looking at the problems that may arise when trying to enforce DSB decisions against China and the effects that it might have on other Members of the WTO).

497. *See id.* at 259 ("The WTO, the U.S., and the E.U. must work together with China prospectively to create a mechanism for mutual adjustment.").

498. *See id.* ("The important sanctions that GATT and other WTO agreements provide may give the central government leverage in recalibrating the imbalance of power between the center and the regions.").

499. *See id.* at 258 (observing the potential for conflict between the policies of a Member state and international norms when the Member state is integrated prior to its complete implementation of GATT premises).

500. *See* Blumental, *supra* note 18, at 259 ("A proactive approach that encourages engagement and mutual adjustment is the key to systemic reform, greater transparency and more even enforcement of the laws.").

501. *See id.* at 260 (concluding that those who argued against China's membership were inaccurate and that China and the WTO have both benefited from China becoming a Member).

502. *See id.* (noting the short-sightedness of marginalizing or trying to contain China by blocking its membership in the WTO).

503. *See id.* at 262 (stating that the major trading states of the WTO would not consider China ready to join them if it were not for the system of international rules).

long and gradual process.⁵⁰⁴ It is, however, a development that the WTO may heavily influence⁵⁰⁵ and will benefit WTO Members greatly.⁵⁰⁶ As a result, efforts of resistance should be at a minimum, while offers of assistance should be many.⁵⁰⁷

2. China's Compliance with DSB Decisions

a. China Will Attempt to Comply

There is every indication that Chinese leadership will fully attempt to implement WTO DSB decisions that are decided against China's favor.⁵⁰⁸ Chinese leadership is fully committed to economic progress through WTO membership, as demonstrated by the expansive amount of trade and investment-related legislation that China has promulgated in order to assure accession⁵⁰⁹ and China's willingness to endure the domestic perils of liberal trade.⁵¹⁰ In addition, "as a developing country, China is more likely to choose to comply with the dispute settlement rulings because not doing so will inflict damage to its economic interests through compensation or

504. See *id.* at 238 (discussing the many steps that China needs to take in order to comply with the rules of the WTO).

505. See Blumental, *supra* note 18, at 237-38 (commenting on the international community's ability to influence domestic policy through international institutions).

506. See, e.g., Cheng, *supra* note 183, at 2012 (stating that China's entrance into the WTO will help improve China's copyright system by allowing the international community to enforce copyright protection in China).

507. See Blumental, *supra* note 18, at 262 (discussing that even though China's entrance into the WTO may cause some disruption, the Members' ability to fairly resolve issues and disputes, as well as mutually adjust, should make the transition easier).

508. See *infra* text accompanying notes 509-512.

509. See Cheng, *supra* note 183, at 2006 (showing how China's desire to enter the WTO motivated the country to adopt a set of laws bringing its intellectual property system into compliance with TRIPs); see also Nafziger, *supra* note 10, at 776 (showing that due to economic development requirements, China has taken on a more cooperative role in global society in comparison to its traditional views of foreign exclusion).

510. See Blumental, *supra* note 18, at 217 (noting that in a fragile domestic situation perils may include the closing of SOEs and the loss of Chinese jobs).

retaliation.”⁵¹¹ Another reason for China’s expected commitment to compliance with DSB decisions is the benefit China receives by belonging to a strong dispute system, especially the ability to force other Members to discontinue harmful trade practices against China.⁵¹²

b. China Lacks the Capacity to Comply

As concluded above in this article, several factors still exist at China’s accession that will inhibit its ability to comply with DSB decisions, including the identification of the complying governmental body, political will, the form of implementation programs, time limitations, and local intransigence.⁵¹³ Although the Chinese leadership has demonstrated its interest and desire to comply with DSB decisions, China’s capacity to realize these intentions remains considerably low.⁵¹⁴ As a result, “[e]xpectations in the United States [and other WTO Member states] about the effects of China’s accession would benefit from realistic perspectives on current Chinese conditions,”⁵¹⁵ and Members should restrain hope for genuine change in China’s political and legislative landscape.⁵¹⁶ Instead, Members should devise and examine realistic solutions, in an effort to minimize the risks of China’s activity in the WTO dispute settlement system, without limiting the benefits to China and

511. Cheng, *supra* note 183, at 2012. If China is unable to block requests for retaliation by complainants because of the Rule of Reverse Consensus, China may face severe economic penalties, threatening international cooperation with China on other issues. *Id.*

512. See, *cf.*, *U.S.—Shrimp Recourse*, *supra* note 40 (showing how the United States willingly complied with the dispute settlement system). The United States made great effort to comply with the *U.S.—Shrimp* decision because of the benefits that they gain from the WTO even though the compliance was costly and questionable. China, as another powerful actor in the global economy, should operate under the same principle in order to protect its long-term interest.

513. See *supra* text accompanying notes 496-512 (explaining why multilateral pressure would be effective to induce China’s compliance).

514. See Weiss Interview, *supra* note 239 (discussing an interest/capacity graph, which shows that China has high interest/low capacity).

515. Lubman, *supra* note 11, at 415.

516. See *id.* (referring to how China had to meet certain conditions before becoming a WTO Member).

all WTO Members that stem from China's inclusion in the global economic order.⁵¹⁷

B. REALISTIC SOLUTIONS

1. Other WTO Members: Greater Emphasis on Restraint and Consultations

a. Possible Proliferation of WTO Cases Against China

In spite of the various phase-in periods that accompany China's commitments for accession into the WTO, many dispute settlement cases involving China may arise.⁵¹⁸ China's large and growing economy, increasing global presence, and lack of compliance with many WTO rules ensure that there will be no shortage of potential trade disputes with other WTO Members.⁵¹⁹ Although such an eventuality may not prove ruinous to either the WTO DSB or China, it could result in a fair degree of harm and inhibit the development of WTO-compliant processes.⁵²⁰

517. See Cheng, *supra* note 183, at 2013 ("As a developing country, China should not be alone in its effort to establish a comprehensive intellectual property system, because such a system would benefit many of its Western trade partners.").

518. See, e.g., Wang, *supra* note 14 (stating that reform is necessary for the already over-burdened dispute settlement system to be able to handle cases involving China).

519. See Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L. L. & BUS. 49, 58 (1997) (noting that China is the most frequent victim of antidumping actions). Many WTO Members may be anxious to have finally obtained a powerful, multilateral device for combating what they perceive to be predatory trade tactics by China, where smaller Members may have felt powerless in the past because unilateral actions on their part proved either ineffective or disastrous in light of China's size and power. *Id.* at 98. "Antidumping duties . . . are necessary to counteract predatory price discrimination by exporters." *Id.*

520. *Contra* Wang, *supra* note 14 (arguing that, absent reform, a possible flood of cases involving China threatens to "break" the WTO DSB). Wang's opinion, however, seems a bit extreme. The WTO dispute settlement system has shown resiliency in the past, and there appears no substantial reason, at present, to believe that a proliferation of disputes will have such a major negative impact. See Murphy, *supra* note 377 (stating that although China will likely "jostle" with other Members, most conflicts can be resolved before they reach the dispute-resolution procedure). An example of this is China's adoption and amendment of trade-

Some WTO policies, such as the rules contained in the Antidumping Agreement,⁵²¹ have resulted in a proliferation of disputes because they offer a potent means of protecting domestic industry from dumping practices.⁵²² Developing countries, including China, have increasingly pursued international and domestic antidumping actions in the hopes of maintaining domestic industrial power.⁵²³ Despite China's growing use of antidumping legislation as a tool of domestic protection, China is likely to face the other end of the "antidumping sword" upon accession and may not be equipped to

related laws as an indication of its preparation to join the WTO. *Id.* China, presumably, has fully prepared itself for WTO entry such that an early demise of China's membership is also unlikely. *Id.*

521. See Agreement on Implementation of Article VI, General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 33 I.L.M. 112 (1994) [hereinafter Antidumping Agreement] (replacing the 1979 GATT Code and setting forth the current international precepts that WTO Members must implement and obey). Although the WTO limits the mechanisms that Member countries may employ to restrict imports, it allows for the protection of imports through antidumping legislation. *Id.* The Antidumping Agreement sets forth the rules under which each Member country may impose antidumping duties on imports of "unfairly" priced targeted merchandise. *Id.*

522. See Corr, *supra* note 519, at 109 (observing that the WTO, while calling for a significant reduction in tariffs and proscribing or limiting other import protections, also requires Members to ratify legislation in line with the Antidumping Agreement such that they acquire the dumping weapon, a powerful tool for import protection). "The result, an increase in antidumping actions, is manifest." *Id.*

523. See *id.* at 57 (stating that China drafted antidumping legislation and initiated its first antidumping case in 1997). "In 1990, developing countries accounted for less than ten percent of antidumping cases initiated, but by 1995 they accounted for forty-three percent." *Id.* at 56. As of 1997, China was the most frequent victim of antidumping actions. *Id.* at 57; see Press Release, WTO, Overview of Developments in International Trade and the Profiting System: Annual Report by the Commander-in-Chief, WT/TPR/OV/1, app., tbl. 6 (Dec. 1, 1995) (showing that exports from China were the targets in twenty percent of all cases in 1994) available at http://www.wto.org/wto/english/news_e/pres95_e/ov11.htm (last visited Oct. 17, 2002); WTO, WORLD TRADE ORGANIZATION ANNUAL REPORT 1996, at 105, tbl. V.5 (1996) (showing that exports from China were the targets in fifteen percent of all cases in 1995). China initiated its first antidumping case based on the aforementioned regulations in December of 1997. See *EU Adjusts Antidumping Law for Chinese, Russian Industries*, 15 INSIDE U.S. TRADE 51, Dec. 19, 1997, at 8 (stating that China initiated the case against newsprint from the United States, Korea, and Canada on December 12, 1997).

deal with a negative ruling by the DSB.⁵²⁴ Antidumping and subsidies rulings, in particular, may be difficult for China to implement because the WTO may demand more than simply modifying a particular law.⁵²⁵

b. Restraint

China's likely failure to implement DSB decisions such as those in an antidumping context should cause other Members to think twice about pursuing disputes in which China's structural deficiencies limit its capacity to comply.⁵²⁶ Because overt legislative or administrative inadequacy of fellow Members does not aid any one Member, the Members should weigh potential disputes for their importance to the potential complainant and their relevance to key issues of WTO policy.⁵²⁷ WTO Members should not pursue baseless claims against China, which would initiate a quasi-legal process whereby real success is virtually impossible.⁵²⁸ Such temperance on litigation would serve as a mutually beneficial method by which to informally, and thus non-publicly, grant China a temporary reprieve from the tedious necessities of the WTO dispute settlement process, allowing the country to divert more effort at proactive compliance.

There are, in turn, indications that the WTO's most powerful Members have decided to pay heed to this logic and embrace restraint.⁵²⁹ One European diplomat has confirmed that "the EU and

524. See, e.g., Wang, *supra* note 14 ("Although many of the WTO commitments provide for transition periods, there are bound to be many dispute cases involving China.").

525. See Antidumping Agreement, *supra* note 521, arts. 7-9 (discussing possible measures that the WTO can take pursuant to an investigation, such as asking China to revoke an order to reimburse duties, which leaders may not be able to accomplish).

526. See Blumental, *supra* note 18, at 254 (stating that issues may arise when Members try to enforce DSB decisions in China).

527. See *infra* text accompanying notes 518-519 (looking at the dispute resolution system and the role it plays in effecting Members of the WTO).

528. See Blumental, *supra* note 18, at 259 (discussing the importance of WTO Members working with China to facilitate China's accession into the WTO).

529. See Murphy *supra* note 377, at 44 (resolving trade disputes quietly with China through diplomatic means may be preferable to utilizing WTO dispute settlement procedures).

U.S. are not lining up to put China's house in order."⁵³⁰ These countries, the diplomat said, acknowledge that China will need time to adjust to WTO rules and practices.⁵³¹ Beliefs such as these make clear that, as China enters the WTO, "nobody is spoiling for a trade fight."⁵³²

c. Consultations

There are also indications that, should the DSB deem a dispute important enough to pursue, WTO Members may decide to emphasize consultations with China as opposed to formal DSB panels.⁵³³ As discussed above in this article, DSU Article 4 mandates a minimum level of consultations prior to the initiation of formal DSB procedures.⁵³⁴ In addition, China's traditional preference for mediation over other modes of dispute settlement may make China more amenable to early settlement of what could become a potentially divisive trade dispute.⁵³⁵

Not only are consultations likely favored by the Chinese, but they are also less expensive and require less specialized expertise than do formal DSB procedures.⁵³⁶ Informal discussions, therefore, would both lower China's political defenses to compromise and ease the strain on China's scant and rudimentary resources. Experience has demonstrated that WTO Members seek to guard their national

530. *Id.*

531. *See id.* (stating that European Union and United States are aware that China needs time to adjust to the WTO).

532. *See id.* at 40-41 (suggesting foreign companies prefer to try quiet resolution of problems with China before pressuring the government to take action).

533. *See id.* at 41 (explaining that Pat Powers, the director of the U.S.-China Business Council in Beijing, has indicated that "[m]ost conflicts . . . can be resolved before they reach the cumbersome dispute-resolution procedure in Geneva").

534. *See* DSU, *supra* note 34, art. 4 (delineating consultation procedures and guidelines).

535. *See* Murphy, *supra* note 321, at 44 (suggesting that "[u]ntil China's legal system matures . . . , seeking quiet resolution through high level contacts . . . could be the surest way to achieve WTO compliance").

536. *See supra* text accompanying notes 533-535 (discussing consultation procedures and why China favors consultations).

interest most often through negotiations.⁵³⁷ China's accession, and its accompanying need to avoid protracted litigation in the WTO, necessitate the DSB to continue and expand this practice to include all disputes, without regard to individual Member importance.

2. WTO DSB: Greater Specificity on Methods of Implementation

a. China Should Not Receive Special Compliance Preferences

As discussed above, China's Accession Agreement provides certain substantive preferences through the allowance of phase-in periods for some of China's WTO obligations.⁵³⁸ The GATT itself, however, also allows inherent means of exemption from WTO obligations to which perhaps Members should give China preferential access. The two means that are most applicable to China are the Article XIX "escape clause"⁵³⁹ and the developing country preferences described in GATT Part IV.⁵⁴⁰ Neither of these methods, however, appears to be particularly useful in light of China's unique national circumstances.

GATT Article XIX authorizes temporary emergency relief measures on imports of particular products and describes the requirements needed to invoke this escape clause. The Uruguay Round Agreement on Safeguards⁵⁴¹ details the specific measures that China may take once it properly invokes the escape clause.⁵⁴²

537. See Esther Lam, *China Near Success in Trade Grail*, S. CHINA MORNING POST, Sept. 17, 2001, at Business News 2 (explaining the negotiations leading up to the Protocol and accession agreements).

538. See discussion *supra* note 30 (giving a summary of the accession agreement with the United States).

539. See GATT, *supra* note 1, art. XIX (allowing for emergency action when large quantities of goods are suddenly imported).

540. See *id.* arts. XXXVI-XXXVIII (explaining the section entitled, "Trade and Development").

541. Agreement on Safeguards, Apr. 1, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 33 I.L.M. 112 [hereinafter Safeguards Agreement] (expounding on how and when the safeguard measures provided for in GATT art. XIX can be imposed).

542. See *id.* art. 6 (stating that tariff increases would be a proper provisional safeguard); see also Blumental, *supra* note 18, at 248 (indicating that the precise

Although the GATT only allows such relief on a temporary, limited basis, and only “to the extent necessary to prevent or remedy serious injury and to facilitate adjustment,” China’s preferential access to such a tool could prove dangerous.⁵⁴³ Allowing China an opportunity to argue that it has met the “escape clause” requirements would promote needless argumentation, serve to undermine China’s strong commitment to full WTO compliance, and raise the ire of other Members. China’s preferential use of safeguards would doubtlessly add an additional level of conflict to any dispute settlement process and would frustrate settlement consultations by providing Chinese negotiators an “out.” Employment of the Article XIX “escape clause” has been rare in the past and it should remain so, even in light of China’s probable deficiencies in compliance. Instead, Members should urge China, as a full WTO Member, to achieve the same level of high compliance as all other Members.

Another means by which China could receive special preference is through the language contained in GATT Part IV.⁵⁴⁴ GATT Part IV delineates “nonbinding commitments on trade and development and offers preferences for developing countries, which allow them to preserve their balance of payments and encourage infant industries through import substitution.”⁵⁴⁵ Although China’s uneven development and acute concentration of wealth make it a perfect candidate for such relief,⁵⁴⁶ China’s notable trade surplus and sustained economic growth make it unlike the “developing” countries contemplated in GATT Part IV.⁵⁴⁷ The WTO Decision on

measures allowed most commonly include a suspension of GATT obligations and the modification of a concession).

543. See Safeguards Agreement, *supra* note 541, art. 5 (allowing for quota restrictions if necessary).

544. See GATT, *supra* note 1, arts. XXXVI-XXXVIII (addressing exceptions for trade and development).

545. Blumental, *supra* note 18, at 249 (discussing GATT Part IV, Articles XXXVI-XXXVIII).

546. See *id.* at 250 (noting the discrepancy in wealth and growth between coastal regions and inland provinces).

547. See *id.* (discussing U.S. and EU opposition to China’s use of GATT Part IV). The United States and European Community have vehemently argued that GATT Part IV is meant to cover those countries that actually rely on such assistance in order to continue to function. *Id.* China, in contrast, is in no danger of

Implementation-Related Issues and Concerns,⁵⁴⁸ recently spelled out in the work program created at the Doha Ministerial,⁵⁴⁹ clarifies the question of interpretation by emphasizing the use of preferences to overcome the “resource constraints” of developing countries.⁵⁵⁰ However, the decision also highlighted the importance of providing assistance to fulfill WTO obligations, such as implementing DSB decisions rather than providing the means to avoid such responsibilities.⁵⁵¹ While China needs support to comply with its WTO commitments, China does not need the same exemptions as many of the WTO’s least developed Members. As such, special developing country preferences are largely inapplicable to China, and Members should discourage China’s use of such relief as an improper allocation of WTO resources.

b. WTO DSB Should Take a Flexible Approach

Although substantive preferences are not appropriate for China, it is clear that Members must assist China to implement WTO DSB decisions since China does not have the capacity to comply with them. China must take some alternate steps to enhance its compliance capacity in order to avoid damage to the WTO dispute settlement system and other Members. Because WTO Members

economic collapse and rather is a rising competitor to these global economic powers.

548. WTO Ministerial Conference, *Implementation-Related Issues and Concerns*, WT/MIN(01)/W/10 (Nov. 14, 2001) (draft decision).

549. See Press Release, WTO, Conference Ends with Agreement on New Programme, Doha WTO Ministerial 2001: Summary of 14 November (Nov. 14, 2001) [hereinafter Conference Ends with Agreement], at <http://www.docsonline.wto.org/DDFDocuments/t/wt/PRESS/225.doc> (last visited Oct. 15, 2002).

550. See WTO Ministerial Conference, *supra* note 548 (opening with language that the Ministerial Conference is “[d]etermined to take concrete action to address issues and concerns that have been 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”); Conference Ends with Agreement on New Programme, *supra* note 549 (spelling out the work program created at the Doha Ministerial).

551. See WTO Ministerial Conference, *supra* note 548 (requesting that technical assistance be focused on aiding developing countries to implement existing obligations).

allowed China to join the WTO in spite of its inability to successfully perform this most central aspect of WTO participation,⁵⁵² it should be the WTO itself, and specifically the DSB, that takes positive action to foster more effective implementation of DSB rulings by China.⁵⁵³

The WTO must take a flexible, proactive approach to dealing with this issue. Overall, "the WTO should seek to develop a common strategy that both anticipates the international consequences of China's admission while also giving China's reformers the ability to continue domestic reforms and gradually ensure compliance with WTO norms."⁵⁵⁴ More specifically, the DSB should show ingenuity and forethought in drafting decisions that go against China, because the only way to effectively deal with China's fluid and uncertain ability to act within the legal process is to employ a legal process that is similarly flexible.⁵⁵⁵ However, easing China's obligations through less strident decision-making would further lessen the legitimacy of China's membership. Rather, the DSB should effectively respond to China's limitations in implementing decisions with clearer and more detailed descriptions of what specific rulings require. The goal should not be to provide a different and less stringent result, but simply to make the same result more attainable.

c. Specific Suggestions on Methods of Compliance

One way for the DSB to make China's compliance with rulings more attainable is to provide a specific suggestion on a method of compliance within the Panel or Appellate Body decision. Although the DSB rarely includes such suggestions in their decisions, the DSU openly acknowledges them in the second sentence of Article 19, Paragraph 1, which states, "[i]n addition to its recommendations, the

552. See Murphy, *supra* note 377, at 38 (discussing how China's rudimentary legal system is still highly politicized and subject to the influence of local officials).

553. While the WTO should take responsibility for the fallout of including a Member that is not fully prepared to participate, it should also be agreed that China's accession is doubtlessly a positive step for both the WTO and China.

554. Blumental, *supra* note 18, at 204.

555. See Corne, *supra* note 41, at 299 (encouraging foreigners not to take the letter of Chinese higher law for granted, but to reinterpret laws within the context of national and local policy shifts).

panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendation.⁵⁵⁶ Specific suggestions on compliance would result in more effective implementation because, as a rule, the implementation of legal decisions, just as with the implementation of laws themselves, becomes easier as the decision becomes more precise.⁵⁵⁷

Panels and the Appellate Body may have failed to include specific suggestions in the past in an effort to avoid offending traditional notions of state sovereignty.⁵⁵⁸ The idea that individual members receive great liberty to devise their methods of compliance has received little attack over the course of the development of the GATT and WTO dispute settlement systems.⁵⁵⁹ More recently, some scholars have noted, however, that this arrangement has created an incentive for WTO Members to interpret recommendations in ways that favor the continuation of measures that, in reality, Members should best discard.⁵⁶⁰ China will be under great domestic pressure to embrace this incentive through the continuation of what are tantamount to WTO-illegal laws. Moreover, such suggestions would serve not as the only method of compliance, but simply as an example of how Members are certain to achieve compliance, thereby leaving the door open to the continued and non-infringed exhibition of national sovereignty. As a result, at least for China, Panels and the Appellate Body should abandon their *laissez-faire* approach to

556. See DSU, *supra* note 34, art. 19.1 ("In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendation.").

557. See Corne, *supra* note 41, at 250 (stating that precise laws are easier to implement than ambiguous laws).

558. See Bello, *supra* note 198, at 417 (discussing how the GATT/WTO system strives to accommodate the national exercise of sovereignty).

559. See Chi Carmody, Remedies under the WTO Agreement 5-6 (2001) (unpublished S.J.D. thesis, Georgetown University) (on file with the Georgetown University Law Center) (explaining that while the DSU calls for Members to bring measures into conformity as a remedy, the more express recommendations now permitted prevent the Panel or Appellate Body from undermining a contracting party's rights under the covered agreements).

560. See Reif & Florestal, *supra* note 270, at 786-87 (noting the efficacy of implementing DSB decisions with respect to the losing party's discretion in interpreting the rulings).

implementation and include more specific suggestions on methods to comply with their rulings that are allowed in DSU Article 19.

Although the WTO only requires Panel and Appellate Body decisions to include recommendations of conformity when the DSB finds a violation, Panels have employed several methods to qualify their final conclusions.⁵⁶¹ Several recent decisions exhibit this apparent trend towards greater specificity in decision-making.⁵⁶² However, the *U.S.—Shrimp Recourse* decision demonstrates the Appellate Body's continuing hesitance to suggest a detailed method

561. See Carmody, *supra* note 559, at 5-6 (describing how the DSB has provided case specific recommendations of conformity in spite of DSU language that appears to mandate uniform relief).

562. See, e.g., WTO Panel Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R (Jan. 29, 1996) (holding the United States in violation of GATT Article III:4 by imposing minimum quality standards on the gasoline imported into the United States); WTO Panel Report, Japan—Taxes on Alcoholic Beverages, WT/DS8/R (July 11, 1996) (finding Japan in violation of GATT Article III:2 by discriminately taxing imported alcohol); WTO Panel Report, United States—Measure Affecting Imports of Woven Wool Shirts and Blouses From India, WT/DS33/R (Jan. 6, 1997) [hereinafter *U.S.—Wool Shirts*] (declaring that the United States violated provisions of the Agreement on Textiles and Clothing by restricting Indian imports of textiles in an effort to prevent the disruption of U.S. domestic industry); WTO Panel Report, India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R (Sep. 5, 1997) (requesting that India seasonably implement procedures that would preserve the integrity of product patents); WTO Panel Report, European Communities—Customs Classification of Certain Computer Equipment, WT/DS62/R (Feb. 5, 1998) (finding that the European Communities acted inconsistently with GATT Article II:1 by disfavoring local area network equipment imports from the United States); WTO Panel Report, European Communities—Measures Affecting the Importation of Certain Poultry Products, WT/DS69/R (Mar. 12, 1998) (holding the European Communities in violation of the Agreement on Agriculture by disfavoring poultry product imports); *U.S.—Shrimp Panel*, *supra* note 427 (finding the United States in violation of GATT Article XI:1 for restricting the importation of shrimp and shrimp products that were not harvested using methods consistent with United States conservation regulations); WTO Panel Report, United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea, WT/DS99/R (Jan. 29, 1999) (determining that the United States unfairly restricted the import of Korean DRAMS, and acknowledging the Panel's ability to suggest methods of implementing their recommendations).

of implementation in spite of the obvious desires and potential need to do so.⁵⁶³

One instance in which a Member requested but did not receive a suggestion on implementation from a DSB panel was in *U.S.—Wool Shirts*.⁵⁶⁴ In that dispute, India requested that the Panel suggest to the United States a specific method of implementation, namely withdrawal of the measure in question.⁵⁶⁵ In answering the U.S. challenge that such action was outside the Panel's authority, India stressed that its request was made under the second sentence of DSU Article 19, Paragraph 1, and stated further:

The rationale of the second sentence of Article 19.1 of the DSU was procedural economy; it was designed to reduce the likelihood of a second proceeding about the implementation of the results of the first. It would thus be perfectly consistent not only with the wording but also the spirit of that provision if the Panel were to find that there were no alternatives to withdrawal in the present case and to suggest, therefore, that the United States implement the Panel's recommendation by withdrawing the measure.⁵⁶⁶

563. Compare *U.S.—Shrimp Panel*, *supra* note 427 (concluding that the parties to the dispute should agree upon joint conservation strategies without providing an express means to achieve these ends), with Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161, 187-188 (1996) (noting the need for dispute resolution to become independent from diplomatic arrangements), and Spierer, *supra* note 37, at 101 (discussing how decisions that withstand scrutiny can change the dynamics of the international system). But see Carmody, *supra* note 559, at 7 (arguing that in the *U.S.—Shrimp Panel* and the *U.S.—Shrimp Recourse*, the Panel and Appellate Body may have been motivated by a desire to comment in a helpful manner, rather than a formal suggestion, while also not suggesting that an alternative would fall under the WTO agreements).

564. See *U.S.—Wool Shirts*, *supra* note 562 (encouraging the disputing parties to reach an agreement, but failing to demarcate parameters of the agreement).

565. *Id.* para. 3.1.

566. See *id.* para. 3.4 (arguing that to find that "there were no alternatives to withdrawal in the present case" and to suggest that "the United States implement the Panel's recommendation by withdrawing the measure" would be consistent with both the wording and the spirit of the provision). The purpose of this provision was to reduce the chance of additional proceedings to review the implementation of the holding of the original proceeding. *Id.*

In spite of India's request, the Panel once again refused to issue a specific suggestion and, in January of 1997, issued a final report recommending that the DSB merely rule in favor of India.⁵⁶⁷

The best example of where the Panel issued a suggestion on a method of implementing a ruling was in *U.S.—Cotton Underwear*.⁵⁶⁸ In that dispute, Costa Rica contended that the measure at issue was so clearly impermissible under the WTO that withdrawal should be expressly mandated.⁵⁶⁹ Unlike in the *U.S.—Wool Shirts* dispute, the Panel here agreed and recommended in its decision:

We, consequently, recommend that the Dispute Settlement Body request the United States to bring the measure challenged into compliance with U.S. obligations under the ATC. We find that such compliance can best be achieved and further nullification and impairment of benefits to Costa Rica under the ATC best be avoided by prompt removal of the measure inconsistent with the obligations of the United States. We further suggest that the United States bring the measure challenged by Costa Rica into compliance with U.S. obligations under the ATC by immediately withdrawing the restriction imposed by the measure.⁵⁷⁰

Although the United States complied with the suggestion and immediately removed the measure, it is unclear how whether the suggestion made in this dispute will serve as a useful model for future claims against China. For one, the respondent was the United States, a country that, unlike China, has an undeniable capacity to implement virtually all DSB decisions.⁵⁷¹ In addition, the offending measure in *U.S.—Cotton Underwear* was so clearly in violation of WTO obligations that withdrawal was the only and obvious

567. See *id.* para. 8.1 (concluding in India's favor). It is also possible that the panel felt no suggestion was needed because the measure at issue had already lapsed, although the end result is that no suggestion was issued.

568. See WTO Panel Report, *United States—Restrictions on Imports of Cotton and Man-Made Fiber Underwear*, WT/DS24/R (Nov. 8, 1996) (recommending that the United States “immediately withdraw[] the restriction[s] imposed” by the challenged measure limiting Costa Rican textile imports into the United States).

569. See *id.* para. 3.2 (arguing that compliance would be best served by immediate withdrawal of the measure).

570. *Id.* para. 8.3.

571. See Gleason & Walther, *supra* note 169, at 710 n.4 (noting that the United States has implemented DSB decisions in all cases against it, with only the *U.S.—Shrimp Recourse* case being questioned as insufficient).

choice.⁵⁷² Moreover, the suggestion made is that this decision is so simple that it would likely have failed to avoid the implementation pitfalls that China, as opposed to the United States, could face. In any event, the decision provides at least some basis for the provision of specific suggestions by Panels and the Appellate Body as to how Members can achieve compliance.

Individualized allowance of specific suggestions on compliance methods for China would be both extremely novel and potentially divisive.⁵⁷³ However, if Members do not allow China this flexibility, the WTO's most populous Member would be unable to comply with most DSB rulings. It would appear that in relation to China, the DSB's continued use of bare commands to bring an offending measure "into conformity" will only result in China's recurring inability to implement decisions, leaving China ironically "out of conformity" and the WTO, as a whole, out of luck.

C. CONCLUSION: CHINA'S IMPACT ON THE WTO

China's accession into the WTO is a monumental event. China was far and away the largest economic power in the world that did not belong to the WTO.⁵⁷⁴ The inclusion of China enhances the WTO's global legitimacy and has the potential to transform China's economy, improve its relations with other countries, and foster a more democratic political system.⁵⁷⁵ For the first time, modern China will function under an agreed set of international economic rules, and, for the first time, those rules govern all of the major economic

572. See Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 43 (noting that the case was an easy victory for Costa Rica because the United States provided flawed information, and the little information that existed to support the U.S. claims was weak).

573. See *supra* notes 543-567 and accompanying text (discussing why individualized allowance of specific suggestions on compliance methods would be both novel and potentially divisive).

574. See Lardy, *supra* note 11 (describing the economic power China accumulated over the past twenty years).

575. See *id.* (explaining that China's WTO accession will be mutually advantageous for both WTO Member nations and China).

actors in the world.⁵⁷⁶ China has made the landmark decision to forgo a certain amount of its sovereign control, which it has guarded so vehemently since the dawn of the Chinese Empire, and bind itself to the wide-ranging systematic changes necessary in order to meet WTO commitments.⁵⁷⁷

At the outset, however, China's accession presents more challenges than it does rewards. China's lack of capacity to implement all WTO DSB decisions is a substantial problem, and one that deserves a large amount of examination and discussion. Solutions such as those presented in this article are easy enough to put forth in print, but a sustained effort must be made to test them in a practical environment and enforce their usage should they be recognized as valid. Thus, one should temper elation over China's entry into the WTO by a realistic acceptance of the formidable tasks that lie ahead.

Nevertheless, China's accession is an important step in China's continuing journey toward greater involvement in the global community.⁵⁷⁸ Although other WTO Members and foreign business interests are wise to remember that China's competing political, economic, and social forces will likely constrain true rule of law for a time, they should not underestimate the magnitude of China's effort nor the incredible opportunities that it is sure to deliver in the years to come.⁵⁷⁹ A full appreciation of both the achievement of accession but also its commensurate challenges, especially those in the dispute settlement context, is the only means through which the WTO and China can mutually realize their intertwined potentials. Through patience, creativity and diligence, the day will soon arrive when China will truly come "into conformity."

576. *See id.* (stating the benefits of China's greater involvement on the world stage under a standard set of rules).

577. *See id.*

578. *See* Lubman, *supra* note 11, at 423 (noting that accession more deeply engages both China and its legal institutions with other nations and citizens).

579. *See* Murphy, *supra* note 377, at 40 (emphasizing the tremendous prospects for foreign investment in China resulting from China's accession to the WTO); *see also* Lubman, *supra* note 11, at 419 (noting that "the absence of a unifying concept of law" in China will partially stunt the country's substantial economic growth potential).