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Paper Compliance: How China Implements WTO Decisions

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PAPER COMPLIANCE: HOW CHINA IMPLEMENTS WTO DECISIONS

*Timothy Webster**

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INTRODUCTION

China's growing economic and military clout generates scrutiny, optimism, insecurity, opportunism, opprobrium, and unease around the world, especially in the United States. Many question China's role on the world stage. Politicians and academics openly doubt China abides by interna-

* Director of East Asian Legal Studies & Assistant Professor of Law, Case Western Reserve University. I appreciate the insightful comments of Juscelino Colares, Frank Emmert, James Gathii, Peter Gerhart, Virginia Harper Ho, Jessie Hill, Nico Howson, Carl Minzner, Lawrence Mitchell, Craig Nard, Julia Qin, and Michael Scharf. For valuable feedback I am also indebted to the law faculties of University of Kansas, Loyola University Chicago, and Wayne State University; and to participants of conferences at City University of Hong Kong, Cleveland State University, ILA-ASIL Asia-Pacific Research Forum (Taipei), Indiana University Robert McKinney School of Law, and the Third East Asian Law and Society Conference (Shanghai Jiaotong University).

tional law and other global standards of state conduct promulgated by Western liberal democracies since the end of World War II. The game may change—international trade,¹ territorial and maritime disputes,² environmental law,³ human rights,⁴ arms control,⁵ riparian rights,⁶ cyber-

1. President Obama and Governor Romney both referenced China's trade violations during the 2012 presidential campaign. Obama complained that China's subsidies "directly harm working men and women . . . in the Midwest. It's not right; it's against the rules, and we will not let it stand." Mark Landler, *In Car Country, Obama Trumpets China Trade Case*, N.Y. TIMES, Sept. 18, 2012, at A1, available at <http://www.nytimes.com/2012/09/18/us/politics/in-car-country-obama-trumpets-china-trade-case.html>. Romney accused China of cheating and killing (presumably American) jobs. Philip Rucker & Jia Lynn Yang, *Obama Campaign Attacks Romney on Chinese Investments*, WASH. POST (Sept. 28, 2012), http://www.washingtonpost.com/business/economy/obama-campaign-attacks-romney-on-chinese-investments/2012/09/28/adfb8302-08cb-11e2-aff-d6c7f20a83bf_story.html. Romney wrote that "China seeks advantage through systematic exploitation of other economies" through subsidies, currency manipulation and theft of intellectual property. Mitt Romney, Op-Ed., *China Must Respect the Free-trade System*, WASH. POST (Oct. 13, 2011), http://www.washingtonpost.com/opinions/romney-china-must-respect-the-free-trade-system/2011/10/13/gIQAiffViL_story.html. If elected, Romney famously promised to brand China a currency manipulator on his first day in office. Tania Branigan, *Mitt Romney Renews Promise to Label China a Currency Manipulator*, GUARDIAN (Oct. 23, 2012, 06:32 AM), <http://www.theguardian.com/world/2012/oct/23/mitt-romney-china-currency-manipulator>.

2. China is currently embroiled in maritime and territorial disputes with India, Brunei, Japan, Malaysia, Philippines, Taiwan, and Vietnam. See Beina Xu, *South China Sea Tensions*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2013), <http://www.cfr.org/china/south-china-sea-tensions/p29790> (noting bilateral tensions between China and the Philippines, Vietnam, Taiwan, Malaysia, and Brunei); Gardiner Harris & Edward Wong, *Where China Meets India in a High-Altitude Desert, Push Comes to Shove*, N.Y. TIMES, May 2, 2013, at A4, available at <http://www.nytimes.com/2013/05/03/world/asia/where-china-meets-india-push-comes-to-shove.html> (noting bilateral disputes between China and India and China and Japan). China rejected a request by the Philippines to submit their dispute to the UN's International Tribunal for the Law of the Sea. See *China Rejects Philippines' Arbitral Request*, CHINA DAILY (Feb. 19, 2013, 8:33 AM), http://www.chinadaily.com.cn/china/2013-02/19/content_16238133.htm.

3. See Michael Faure & Song Ying, *Introduction*, in CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY: LEGAL REMEDIES FOR TRANSBOUNDARY POLLUTION 1, 5-6 (Michael Faure & Song Ying eds., 2008) (discussing legal remedies for environmental harm under domestic Chinese and international law).

4. The State Department and Human Rights Watch both issue annual reports—usually quite critical—reviewing China's human rights record for the previous year. See, e.g., U.S. DEP'T OF STATE, CHINA 2012 HUMAN RIGHTS REPORT, available at <http://www.state.gov/documents/organization/204405.pdf>; HUMAN RIGHTS WATCH, WORLD REPORT 2013: CHINA, available at <http://www.hrw.org/world-report/2013/country-chapters/china>. The United Nations Human Rights Council's most recent periodic review came out in 2009. See U.N. Human Rights Council, Working Grp. on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review – China*, A/HRC/11/25 (Oct. 5, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/162/99/PDF/G0916299.pdf?OpenElement>.

5. See WENDY FRIEMAN, CHINA, ARMS CONTROL, AND NON-PROLIFERATION 2-3 (2013) (noting a tendency among U.S. scholars to criticize Chinese arms control efforts using American standards, but a strong record of Chinese compliance using international standards).

6. See Andrew Jacobs, *Plans to Harness Chinese River's Power Threaten a Region*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/world/asia/plans-to-harness>

crime,⁷ endangered species⁸—but the concern remains the same: is China an international scofflaw?

Scholarly and popular discourses insist China's increased participation in international organizations has not effectuated deeper engagement with, or respect for, international law. Instead, the dominant discourse goes, China extracts the benefits of global institutions, but undertakes minimal commitments to the international legal regime.⁹ By minimizing new commitments, China fails to bring its laws, regulations, codes, international aid practices, and other legal norms into line with global standards. China's adherence to international law assumes greater urgency as it leapfrogs ahead of major world powers in economic growth, military capacity, technological sophistication, and other areas. Is China reaping the benefits of globalization without paying the costs? Or is China, like any other rational state actor, simply gaming the system?

Despite its prevalence, the "China as cheat" conceit does not capture China's dynamic and evolving relationship with international law. If China is indeed an international scofflaw,¹⁰ why would it ratify so many

chinas-nu-river-threaten-a-region.html ("So far China has been largely unresponsive to the concerns of its neighbors, among them India, Kazakhstan, Myanmar, Russia and Vietnam. Since 1997, China has declined to sign the [UN Convention on the Law of the Non-Navigational Uses of International Watercourses] that would govern the 13 major transnational rivers on its territory."). Yet the article omits two key facts: (1) the Convention itself has not taken effect because only sixteen (of thirty-five needed) states have ratified it, and (2) none of China's neighbors has signed or ratified the convention. In other words, China is similarly situated to its democratic and authoritarian neighbors. See Convention on the Law of the Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 36 I.L.M. 700, available at https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTS_ONLINE&tabid=2&mtdsg_no=XXVII-12&chapter=27&lang=en#Participants.

7. See Steve Holland, *Obama, China's Xi Discuss Cybersecurity Dispute in Phone Call*, REUTERS (Mar. 14, 2013, 6:03 PM), <http://www.reuters.com/article/2013/03/14/us-usa-china-obama-call-idUSBRE92D11G20130314>. In a press conference following his call to President Xi Jinping, President Obama stated "We've made it very clear to China . . . that . . . we expect them to follow international norms and abide by international rules." *Id.*

8. China faces criticism for consuming large amounts of shark fin, ivory, sea cucumbers, and other exotic creatures. See, e.g., Dexter Roberts, *Shark Fin Soup Still Sells Despite China's Extravagance Crackdown*, BLOOMBERG BUSINESSWEEK (Dec. 20, 2013), <http://www.businessweek.com/articles/2013-12-20/shark-fin-soup-still-sells-despite-chinas-extravagance-crackdown> ("China is the largest consumer of shark fin soup in the world."); Damian Grammaticas, *Uncovering China's Illegal Ivory Trade*, BBC (Feb. 13, 2014, 4:08 AM), www.bbc.com/news/world-asia-china-26167893 (noting that China is cracking down on smuggling of ivory amidst an "unprecedented surge in illegal trafficking").

9. See, e.g., Samuel S. Kim, *China's International Organizational Behaviour*, in CHINESE FOREIGN POLICY: THEORY & PRACTICE 401, 419 (Thomas W. Robinson & David Shambaugh eds., 1994) (arguing that China extracts maximal benefits from nuclear disarmament treaties, but has not disarmed itself and thus assumes minimal obligations). *But see* Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699, 701 (2007) (arguing that China selectively incorporates international norms most conducive to its economic growth and the preferences of its elites).

10. It is worth noting that scholars increasingly level the same criticism at the United States. See, e.g., David A. Koplow, *Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty?*, 37 FLETCHER F. WORLD AFF. 53, 71 (2013) (not-

treaties and join the vast majority of international organizations in the first place?¹¹ It could be solely for show; a country could join a body without ever intending adherence to its rules or tenets. Yet membership alone has not stanchd the criticisms that China does not play by the rules; many still posit that China lacks the capacity and political will to abide by international law. In practice, China has played a relatively passive role in many international institutions, at least for a country of its economic and demographic heft.¹² To the extent that China voices objections in global governance institutions like the United Nations, it normally aims to restrain the body from using force or applying sanctions.¹³ However, China's hesitancy has neither rendered the United Nations moribund nor subverted the creation and promulgation of new policies.

Instead, China selectively incorporates the norms promulgated by international institutions.¹⁴ A dynamic give-and-take, rather than disregard, characterizes China's interactions with international institutions.¹⁵ If China partially adheres to international law, it is more useful to examine those instances and contexts wherein its adherence is strong, weak, or equivocal. One can then devise tactics to bring China more in line with international norms. But a thorough analysis must precede such offerings. Branding China an outlaw may make for good stump speeches and op-ed pieces, but China's pattern of compliance actually requires more detailed examination. Like the United States, China exhibits *differential* levels of compliance, depending upon the particular regime under examination.¹⁶

ing that the US can "get away with" violating treaty obligations in the short run, but that lawless behavior in the long run "is profoundly not in the U.S. interest").

11. See generally ANN KENT, *BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY* 60 (2007) (noting that China had joined 273 multilateral institutions by 2000, most of them since 1979).

12. China cuts an international image of relative reluctance. But it does work closely with United Nations Development Program and United Nations Environmental Program to build environmental and infrastructural capacity. See Du Juan, *Spending Surge for Renewables*, CHINA DAILY (July 31, 2003, 7:22 AM), http://www.chinadaily.com.cn/cndy/2013-07/31/content_16854737.htm.

13. This position accords with China's long-held belief that national sovereignty is paramount. Any attempt to intervene in another country's "internal affairs" is viewed with great suspicion. Consequently, at the UN Security Council, China has vetoed, or abstained from, many resolutions to sanction threats to peace in states such as North Korea, Iran, Sudan, Syria, and Myanmar. According to one scholar, abstention is "China's preferred instrument for showing its opposition." Nicola Contessi, *China's Stance on Darfur in the UN Security Council*, 41 SECURITY DIALOGUE 323, 326 (2011). China likewise abstained in a UN Security Council resolution calling on members *not* to recognize the results of the Crimean referendum. Ben Brown, *Ukraine Crisis: Russia Isolated in UN Crimea Vote*, BBC (Mar. 15, 2014, 1:37 PM), www.bbc.com/news/world-europe-26595776.

14. See Potter, *supra* note 9, at 700.

15. KENT, *supra* note 11, at 4–5 (noting that China's compliance with international law has improved in the last few decades and is better in certain disciplines than in others).

16. The United States' adherence to international law is also variable, depending upon the particular regime. In monetary policy, human rights, international trade and other areas, observers note discrepancies between provisions of international law, and practices of US legal actors. See, e.g., JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RL32014, WTO DIS-

The main difference is that the United States largely *created* these institutions and shaped their rules, whereas China, in many instances, has only recently joined them.

This paper focuses on one index of China's compliance with international law: its implementation of rulings by the Dispute Settlement Body (DSB) of the World Trade Organization (WTO). Recent scholarship understands China's behavior in the DSB as part of its "socialization" into international law and broader acceptance of international law's mantle.¹⁷ Some see China as an increasingly sophisticated user of DSB procedural machinery.¹⁸ And while others have examined China's behavior in individual cases,¹⁹ no scholar has done the painstaking work of tracking whether and how China actually implements DSB rulings and recommendations. This paper fills that important gap by (1) specifying the inconsistent Chinese laws, (2) examining what efforts China has made to implement DSB rulings, and (3) articulating a theory of *paper compliance* to capture this aspect of China's behavior.

By articulating a theory of paper compliance in the context of China's DSB conduct, I fashion a tool to decode the question of international law compliance. The theory predicts China will revise its domestic laws and

PUTE SETTLEMENT: STATUS OF U.S. COMPLIANCE IN PENDING CASES (2011) (describing eleven cases where the United States has either partially or wholly failed to implement World Trade Organization [WTO] rulings); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 827 (2000) (noting that the United States has "a perfect record" of complying with IMF obligations on exchange rates and current account restrictions); Richard C. Dieter, *The US Death Penalty and International Law: US Compliance with the Torture and Race Conventions*, DEATH PENALTY INFORMATION CENTER (Nov. 12, 1998), <http://www.deathpenaltyinfo.org/us-death-penalty-and-international-law-us-compliance-torture-and-race-conventions> (noting that executions of juveniles, the mentally incapacitated and foreign nationals not informed of their consular rights violate the United States' obligations under the Convention against Torture, while its racially unequal application of the death penalty likely violates the Race Convention). To rework Henkin's oft cited maxim, all states do not obey international law some of the time. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979). See also Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 BROOK. J. INT'L L. 67, 115 (2004) (noting that the idea that the U.S. suffers an undeserved reputation for violating international law).

17. Marcia Don Harpaz, *Sense and Sensibilities of China and WTO Dispute Settlement*, 44 J. WORLD TRADE 1155 (2010). Harpaz writes that "when it has lost . . . China has complied with the panel/[Appellate Body] findings, by changing the measures deemed illegal, demonstrating willingness to accept third party adjudication." *Id.* at 1177. Harpaz apparently takes at face value China's assertions of full compliance. For reasons we explore in Part IV, I believe China has not fully complied in several cases.

18. Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker and Maybe Rule Maker?*, in *MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT* 153, 170 (Carolyn Deere Birkbeck ed., 2011).

19. See Julia Ya Qin, *Pushing the Limits of Global Governance: Trading Rights, Censorship and Jurisprudence – A Commentary on the China – Publications Case*, 10 CHINESE J. INT'L L. 271 (2011); Xiaohui Wu, Case Note, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 9 CHINESE J. INT'L L. 415 (2010).

regulations to implement DSB rulings in most cases. This matters because China has not shown such adherence in other international legal regimes.²⁰ But China's implementation of rulings tells us only part of the broader story about compliance.²¹ Looking at legal reform in a vacuum overlooks other modes of resistance China deploys to avoid complying with basic WTO norms. Even now, China promulgates policies clearly violating basic WTO disciplines, suggesting that even while the implementation record is strong (though imperfect), it is still contesting basic WTO norms in other areas.²² I develop paper compliance as a theoretical tool to distinguish description and behavior at a more nuanced level previously absent in debate over Chinese trade practices.

The article proceeds in four parts. Part I introduces the theory of paper compliance, placing it within the larger framework of international law and international relations theory. Part II reviews China's history of international law and institutions, detecting an abiding ambivalence, if not antipathy, between China and various international treaties and practices. Part III shifts the focus to the WTO, explaining WTO compliance mechanisms and then homing in on China's record of compliance more generally. Part IV examines the WTO cases against China, and the manner in which China implemented the DSB's rulings and recommendations. A brief conclusion reveals that China's record of compliance, impressive on paper, still reflects an imperfect attempt to absorb WTO norms.

I. PAPER COMPLIANCE: THEORY AND PRACTICE

Compliance with international law has generated debate for several decades. At the most basic level, scholars agree that the issue of compliance examines how and whether individual states conform to the rules, laws, and practices articulated in international law. Beyond this kernel of concurrence, however, compliance theorists disagree as to which aspects of state behavior best explain the issues and forms of adherence, absorption, deviation, or rejection of international law. International relations theory refracts the compliance issue into realist, liberalist, and constructivist (or institutionalist) frames, which highlight different elements of state

20. See *infra* Part II.B.

21. I appreciate the clarification of my colleague, Peter Gerhart. For this paper, compliance refers broadly to a state's conformity to the rules and norms of a particular international legal regime. Implementation narrowly refers to the discrete efforts and action a state takes to concur to the rules of a particular regime, or decisions rendered by an authoritative body. See Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538, 539 (Walter Carlsnaes, Thomas Risse-Kappen, & Beth A. Simmons eds., 2002).

22. See generally *China's Compliance with the World Trade Organization and International Trade Rules: Before the Cong.-Exec. Comm'n on China*, 113th Cong. 2-3 (2014) (written testimony of Elizabeth A. Drake, Partner, Stewart and Stewart), available at <http://www.cecc.gov/sites/chinacommission.house.gov/files/CECC%20Hearing%20-%20WTO%20-%20Elizabeth%20Drake%20Written%20Statement.pdf> (listing Chinese subsidies, local content and technology transfer requirements, and discrimination by state-owned enterprises against foreign companies, all of which violate WTO disciplines).

action.²³ While paper compliance aligns most closely to the basic realist insight that states operate merely to advance national interests, it also engages with liberal and constructivist insights. This article follows the example of “analytical eclecticism” to draw on all three schools, rather than privilege any one of them exclusively.²⁴ States operate on multiple stages, like their human operators. They advocate for themselves, induce others to agree, and then devise plans action to effectuate their goals. A multivalent frame captures these varied effects and efforts.

A. Realism

Realism views international law, and the related issue of compliance more generally, as *epiphenomenal*. In this view, foreign affairs unfold as powerful states jockey to enhance their power vis-à-vis competitors in single-minded pursuit of national interests. States abide by international law only insofar as its prescriptions support their positions or deliver concrete benefits. The realist view is encapsulated by the maxim that “international law ‘is not really law’ because it lacks effective institutions” and binding enforcement mechanisms.²⁵ To be sure, China’s pursuit of long-term and short-term interests generates insight into China’s behavior at the DSB.

B. Liberalism

Classic liberal theory depicts international law as coordinating state behavior along certain ideological lines developed during the Enlightenment: democracy, human rights, and market capitalism. The protagonists of this drama were the classical liberal jurisdictions: the United States, Western Europe, and a few Commonwealth countries. Illiberal nations—Russia, China, Cuba—did not subscribe to the particular mix of ideology, rights, and markets, and thus fell outside the scholarly focus.

For liberals, compliance is the default setting by which states enter international organizations. Cooperation is presumed by virtue of the fact that the state entered the agreement in the first place. In addition, the concurrence of the international organization’s values with those of participating states promotes compliance with its underlying message. The Chayes’ place special importance on “jawboning,” when states prod the “miscreant” state through repeated sessions of argumentation, exposition and persuasion.²⁶ Insuring compliance involves applying pressure on

23. See generally MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS* 1–5 (2010).

24. PETER KATZENSTEIN & RUDRA SIL, *BEYOND PARADIGMS: ANALYTICAL ECLECTICISM IN WORLD POLITICS* 2 (2010) (advocating a mixed methodological approach to study international relations, including the use of realist, liberal and constructivist lenses).

25. Terry Nardin, *Ethical Traditions in International Affairs*, in *TRADITIONS OF INTERNATIONAL ETHICS* 1, 13 (Terry Nardin & David R. Mapel eds., 1992). The realist tradition includes Thucydides, Machiavelli and John Austin as its advocates.

26. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 25–26 (1995) (“[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an

states to fulfill obligations, and the open dialogues help the parties air issues of mutual concern to the implementation effort.

This paper deepens that discussion by examining China, normally considered an illiberal or authoritarian state,²⁷ and analyzing its adaptation to the WTO, the archetypal neoliberal institution.²⁸ It will surprise some that illiberal states actually conform their behavior to international institutions. This is not a case of “beating us at our own game.” But it does show how one school’s fundamental assumptions—that liberal states best exemplify the rule of law on the international level—may creak a bit. China has a strong, though not spotless, history in implementing WTO rulings and recommendations. The reasons why and how China attains this level of compliance will be further elucidated in this article.

C. Constructivism

Constructivism assumes dynamism within states. Rather than acting as fixed monoliths, states interact with other states, international institutions, and various external actors, and shift their behavior and interests accordingly. Think of a student entering college. He matriculates with a core of set interests and a more or less fixed personality, a set of truths that accommodate his worldview, his beliefs about the exterior world, and his connection to it. But the school opens his mind to new inquiries, disciplines, activities, ideologies, and thought patterns. He may reconsider his beliefs and dogmas, test them against what he learns in class, and realign them to accommodate new insights and conflicting information. The school shapes or “constructs” him.

Constructivism posits that international institutions influence member states. Through repeated interactions by the human agents who represent them, states articulate their interests to other members of the organization, and seek to persuade other states to join them in an intended course of action.²⁹ This flux—that a state is as solidly constituted as the humans attending the meetings—may be the key contribution of constructivism to international relations and international legal theory. States are “always

iterative process of discourse among the parties, the treaty organization, and the wider public. We propose that this process is usefully viewed as management, rather than enforcement.”).

27. See Elizabeth J. Perry, *The Illiberal Challenge of Authoritarian China*, 8 *TAIWAN J. DEMOCRACY* 3, 4–5 (2012) (describing how agitation from Chinese civil society may actually sustain the authoritarian regime); FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 268 (2007) (noting how China is becoming increasingly liberal, even as it remains an authoritarian regime).

28. See Nitsan Chorev, *The Institutional Project of Neo-Liberal Globalism: The Case of the WTO*, 34 *THEORY & SOC’Y* 317, 320 (2005) (“[T]he establishment of the WTO marked a turning point in the governance of trade under neo-liberal globalism, from a ‘trade liberalization’ project, in which governments were allowed to compensate those suffering injuries due to the process of free trade, to a ‘trade neo-liberalization’ project, where such compensation was no longer permitted.”).

29. See PAUL R. VIOTTI & MARK V. KAUPPI, *INTERNATIONAL RELATIONS THEORY* 278 (5th ed. 2012).

under construction.”³⁰ Constructivism stresses the role that institutions play in effectuating change. Rather than fixed billiard balls, crashing into each other on the green felt of the world stage, constructivist states operate more like clay clumps, running into each other, partially peeling off onto other clumps, transferring information and practices, pushing others up against the walls of the institution, and bearing the imprints of contact with many other states.

Constructivists believe that institutions matter. Institutions influence states, reorganize their priorities and behaviors, and establish the rituals by which states meet and address disputes. Institutions regulate state behavior by telling states what they can and cannot do. The degree to which institutions inform state policy and conduct is of course variable. But it reflects an important element of international law and relations. States, little units of sovereignty bumping up against each another, engage internationally through either the intimacy of bilateral relations or the tightly articulated choreography of international institutions.

D. Paper Compliance

The theory of paper compliance builds on these foundations. It posits that China will entertain legislative and regulatory reform to achieve a result compliant with a WTO ruling. These efforts are important because international law theorists, and China’s own record of compliance, would not necessarily produce a strong record of compliance. China often reports to the DSB that it had achieved “full compliance” with its international obligations. But the matter is not always so simple.

The mere hazard of legislative reform does not, however, necessarily mean that China has fulfilled its implementation obligations. First, despite what China claims in status reports, it has not fully implemented a number of decisions. Jawboning in Geneva has improved China’s compliance record, as regular discussions with other states (including disputants), have induced China to acknowledge, accept, and adhere to its international obligations. The problem is that many regulations deemed inconsistent remain in effect. China has not gone back to scrub its legislative and regulatory codes clean of all inconsistent regulations. It has, in effect, carved a zone of autonomy beyond which the DSB may not penetrate. In the cases discussed below—DS 362 (involving intellectual property enforcement), DS 363 (trading rights for publications) DS 373 (financial information services)—China did not annul several regulations, or revise them so as to avoid the point of the ruling.³¹

30. *Id.* at 279.

31. *See infra* Part IV (analyzing China’s efforts to implement these three WTO rulings). Though beyond the temporal scope of this article, China’s implementation record in a couple of very recent cases has also raised questions. In the electronic payments case (DS 413), for example, the U.S. has questioned whether China has opened up its market to foreign credit card companies. *See* Doug Palmer, *U.S., China Spar on Electronic Payments*, POLITICO, Jan. 24, 2014. Likewise, in the grain oriented, flat-rolled electrical steel case (DS 414), the US has requested consultations with the Dispute Settlement Body (DSB) to determine if

Second, paper compliance captures the larger *resistance* China presses against the WTO. WTO litigation can cure, or at least target, inconsistent laws and regulations. But China continues to introduce policies that clearly run afoul of basic tenets of the multilateral trading system: minimizing subsidies, maintaining transparency, opening market access, protecting intellectual property, avoiding export restrictions, treating foreign entities equally, and so on. If international organizations influence state behavior, as constructivists predict, the degree of China's normative engagement with WTO rulings is quite limited. The United States and E.U. wield a tool to challenge China's domestic laws. But China blunts this tool by perpetuating policies that contravene basic WTO principles. With one exception, most disputes against China involve programs implemented after its accession in 2001. The DSB has not meaningfully influenced the development of China's political economy; the WTO litigation process can shear away layers of non-conformity (if the state agrees to do so), but cannot add them on.

Paper compliance also reflects China's "thin" domestic rule of law culture.³² Revising laws and regulations in China signifies less than it would in Western liberal democracies with robust legal institutions. The Chinese legal system can stop on a dime and change direction without undergoing the rough-and-tumble of democratic deliberation.³³ Under one-party rule and a unitary governance structure, the Chinese party-state dictates the passage of laws and regulations and coordinates changes among branches of government with minimal institutional friction. Not that there is an absence of tension between Chinese agencies. But they act with far less independence, and far fewer policy choices, than they would in the United States or other Western political systems.

Finally, it is important to situate China in a comparative context. But who are China's peers? Developing countries like India and Brazil or major trading powers like the United States and Japan? If we look at the United States and E.U.'s records of implementing WTO rulings, we also find significant non-compliance within the trade system. Both the United States and E.U. have refused to implement DSB rulings, and proceeded to arbitrate the amount of compensation owed. The United States has encountered implementation difficulties when dealing with certain issues, such as the Cuba embargo, important sovereign powers like taxation, or when a congressional act is at stake.³⁴ The E.U. has also refused or signifi-

China has failed to implement the body's recommendations. *See* Request for Consultations by the United States, *China-Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 1, WT/DS414/15 (Jan. 16, 2014).

32. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 5 (2002).

33. The United States Congress, for example, has earned a reputation for political paralysis due to sharp polarization between Democrats and Republicans. *See* Drew DeSilver, *Partisan Polarization, in Congress and Among Public, is Greater than Ever*, PEW RESEARCH CENTER (July 17, 2013), <http://www.pewresearch.org/fact-tank/2013/07/17/partisan-polarization-in-congress-and-among-public-is-greater-than-ever/>.

34. Bruce Wilson, *The WTO Dispute Settlement System and Its Operation: A Brief Overview of the First Ten Years*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST

cantly delayed rulings.³⁵ Perhaps these are exceptions that prove the otherwise strong rule of compliance with DSB decisions.³⁶ But compared with other liberal trading powers, China exhibits a high degree of compliance. China's pliancy is somewhat incongruous with its interactions with other international legal regimes.³⁷

II. CHINA'S ENGAGEMENT WITH INTERNATIONAL LAW: HISTORY AND THEORY

Before examining China's implementation of WTO decisions, we must understand more broadly its attitudes and interactions with international law. The WTO occupies an important niche among international organizations. China's 2001 accession completed its entry into the international community, at least in terms of membership in major postwar international institutions.³⁸ China's experience with international organizations remains a relatively recent phenomenon, providing a shorter track record to evaluate China as an international actor and the degree of its normative commitment. The People's Republic of China (PRC) only joined the United Nations in 1971, surmounting decades of opposition led by the United States.³⁹ The efforts by Western powers to exclude China from the United Nations informed China's approach towards international law

TEN YEARS 15, 23 (Rufus Yerxa & Bruce Wilson eds., 2005) (noting compliance is more difficult when legislative changes are needed). John Magnus suggests that decisions adverse to the U.S. touch on fundamental sovereign prerogatives such as raising and spending money. John Magnus, *Compliance with WTO Dispute Settlement Decisions: Is There a Crisis?*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT, *supra* note 34, at 244. In the "Havana Club" case, the US refused to enforce a Cuban trademark subsequently licensed to a French company due to the embargo on Cuban products. See Donald R. Dinan, *An Analysis of the United States-Cuba "Havana Club" Rum Case Before the World Trade Organization*, 26 FORDHAM INT'L L.J. 337, 337 (2002).

35. See, e.g., Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/RW2/ECU (Nov. 26, 2008). In November 1997, the DSB found Europe's import and licensing schemata for bananas violated GATT. After a decade of new regulations, compliance proceedings, and political negotiations, the dispute was formally resolved in 2009. See Press Release, World Trade Organization, Lamy Hails Accord Ending Long Running Banana Dispute (Dec. 19, 2009), available at http://www.wto.org/english/news_e/pres09_e/pr591_e.htm.

36. See Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397, 401 (2007) (noting members generally comply with adverse rulings, but the United States and E.U. have both "experienced residual compliance problems").

37. See *infra* Part II.B.

38. The People's Republic of China (PRC) has had a few spells of isolation from the rest of the world, or at least the West, especially during the Cultural Revolution and immediately after Tiananmen. Yet for the past two decades, it has engaged in a wide variety of international institutions and organizations. See Timothy Webster, *East Asia Institutionalises: China, Japan and the Vogue for Free Trade*, 77 NORDIC J. INT'L L. 301, 304–05 (2008).

39. See Jerome A. Cohen, *Hungdah Chiu, China, and International Law: A Life Well Spent*, 27 MD. J. INT'L L. 9, 17 (2012) ("The United States also opposed the PRC's entry into the United Nations under any formula.").

throughout the early years of the People's Republic and continue to do so today.⁴⁰

A. *History of Chinese Interactions with International Law*

China has had a long and complicated relationship with international law for most of the past 200 years. Throughout the nineteenth century, China was forced to sign dozens of unequal treaties with Western powers and, eventually, Japan.⁴¹ Public international law, and modern treaty practice more generally, came to China not as a guarantor of mutual benefit and sovereign equality, but as a harbinger of inequitable interactions with more powerful states. China's first modern international treaty, the Treaty of Nanjing (1842), ended the Opium War, which Britain waged to ply China with opium. In a peculiar foreshadowing of its WTO accession, the Treaty required China to extend "most-favored-nation treatment" to British traders.⁴² This was part of a broader schema of unequal treatment that, among other things, forced China to set low tariffs on imports from the West (but did not grant China reciprocal treatment for its exports to the West), granted British citizens extraterritorial legal status in China, and required China pay Britain a large indemnity.⁴³

During the twentieth century, several events impeded China's integration into the international community and colored its view of international law. After fighting alongside the Allies during World War I, China assumed an awkward place at the table of the Paris Peace Conference. As a victor eligible for the spoils, China expected preferential treatment in the negotiations, or at least treatment equal to that enjoyed by other victors. But China was not a member of the "Big Four" countries that dominated the Conference and set the terms of the Treaty of Versailles.⁴⁴ Especially galling was the Treaty's transfer of German territorial concessions on China's Shandong peninsula to Japan, not back to China.⁴⁵ Territorial

40. *Id.* at 18 ("China's distrust of the Western-controlled United Nations was matched by its distrust of the international law reflected in UN practice.").

41. *See generally* DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005). While the exact number of treaties is not known, China signed unequal treaties with over a dozen European states—including Britain (1842), France (1844), Sweden (1847), Russia (1851)—as well as the U.S. (1844) and Japan (1871). *Id.* at 10.

42. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 200 (2d ed., 2006).

43. *Id.* at 200-03. For a terrific account of unequal treaties between China and various Western powers, *see* TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW 122-130 (2013).

44. *See The Paris Peace Conference and the Treaty of Versailles*, U.S. DEPT. OF STATE, <http://2001-2009.state.gov/r/pa/ho/time/wwi/89875.htm> (last visited May 14, 2014).

45. Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, art. 156, 2 Bevens 43 (transferring German rights in Shandong territory, railways, mines and even submarine cables to Japan). Article 157 transferred all "movable and immovable property owned by the German State" to Japan. *Id.* art. 157. Article 158 transferred all "archives, registers, plans, title-deeds and documents" to Japan. *Id.* art. 158.

concessions in China may have felt natural to the Allies, many of which enjoyed colonial enclaves in other Chinese cities and throughout Asia and Africa. But the sense of betrayal was quite keen, so much so that the Chinese delegate did not sign the Treaty.⁴⁶

Despite China's objections, the Treaty later took effect. Nor did China forestall the establishment of the League of Nations, the fated forerunner of the United Nations, and other major consequences of the Treaty of Versailles. The League has won praise for fostering early twentieth century multilateralism, and opprobrium for its failure to prevent World War II.⁴⁷ But the League's response to Japan's 1931 invasion of China was ineffectual. Writing a few years after the invasion, Lauterpacht derided the "illusory value" of the League's "fundamental aspect": its ability to protect member states.⁴⁸ The first doubts about the League's capacity to reach its ambitions—collective security, world peace, halting aggression, multilateralism—were sown in its ineffectual response to the Mukden Incident.⁴⁹

The Japanese invasion of China violated the League's core principle of collective security, where an act of war against one member was "an act of war against all."⁵⁰ China and Japan were both members of the League, so Japan's invasion of China should have been interpreted as against all league members (which then included Britain, France and Germany, but not the United States). The League's Charter bound members to sever trade with Japan, prohibit "all intercourse" between their citizens and Japanese citizens and at least discuss, if not deploy, military support for China.⁵¹ But the League failed to muster the political will, economic resources, and military power necessary to expel Japan from China. Indeed, its lackluster response probably contributed to Japan's fuller annexation of northeast China and the founding of Manchukuo, a puppet regime installed by the Japanese government.

After the Anti-Japanese War, as World War II is known in Chinese, China again found itself on the margins of international law. During the war, the Republic of China (ROC) participated alongside the Allies at the major conferences in Dumbarton Oaks, Bretton Woods, Yalta, Potsdam,

46. LOUISE CHIPLEY SLAVICEK, *THE TREATY OF VERSAILLES* 65 (2010).

47. Some have praised the League's success in social, economic, humanitarian, and legal endeavors, including the establishment of both the International Labor Organization (ILO) and the Permanent Court of International Justice. See, e.g., RUTH HENIG, *MAKERS OF THE MODERN WORLD: THE LEAGUE OF NATIONS 174-75* (2010). But its failure to prevent World War II and to respond to the Japanese invasion of China left serious doubts about its efficacy and support for world peace. See *GCSE Bitesize: Two Important Events*, BBC, <http://www.bbc.co.uk/schools/gcsebitesize/history/mwh/ir1/manchuriaev1.shtml> (last visited May 14, 2014) (noting that the Japanese invasion of Manchuria, coupled with Italy's invasion of Abyssinia, "destroyed people's belief in the ability of the League to stop wars").

48. H. LAUTERPACHT, "Resort to War" and the Interpretation of the Covenant During the Manchurian Dispute, 28 AM. J. INT'L L. 43, 43 (1934).

49. See *id.*

50. League of Nations Covenant art. 16, ¶ 1.

51. *Id.*

and others. The Great Powers presiding at these conferences designed the institutional architecture of the postwar international order: the United Nations, International Monetary Fund, General Agreement on Tariffs and Trade (GATT), and World Bank. These organizations enshrined the norms and institutions to regulate international law disciplines such as finance, human rights, trade, and currency. As at Versailles, China technically sat at the table. Yet the Big Three (the U.K., United States, and U.S.S.R.) aimed to marginalize China and to diminish its influence. At Yalta, the Big Three signed a “secret agreement” to cede Chinese territorial interests from (vanquished) Japan to the (victorious) Soviet Union.⁵² As it did after World War I, China won the war but lost territory, a form of punishment normally meted out to the losers. And at Dumbarton Oaks, where the United Nations was designed, the Soviet Union refused to meet with the Chinese altogether,⁵³ requiring the Americans to host two conferences: a first conference of the Big Three that decided the major issues of designing the United Nations, and a second conference of China, the United States and the U.K., designed primarily to preserve “Chinese dignity”⁵⁴ after its exclusion in the first place.

The diplomatic legerdemain was not lost on the Chinese, who nonetheless had important ideas to impart to the United Nations. Ambassador Wellington Koo introduced Chinese philosophy to the group, but also sought to inject into the U.N. Charter values such as universality, social justice, self-determination, and racial equality.⁵⁵ Needless to say, the Big Three opposed these values; Britain’s extensive colonial holdings would be severely disrupted by the principle of self-determination, while the United States’ Jim Crow laws would be challenged by the concept of racial equality.⁵⁶ China’s forward-looking proposals—later enshrined in various U.N. human rights covenants—were tabled, if they were even entertained in the first place.

The Chinese civil war further frustrated China’s attempts to join the international community. Two Chinas, ideologically and diplomatically

52. At the Yalta Conference of February 1945, Roosevelt, Stalin, and Churchill planned how to end World War II and rebuild the postwar order. The three men also signed the “Far Eastern Agreement,” which would restore Russian rights to the commercial port of Dairen (Dalian) and Port Arthur (Lushun) and cede the Southern Manchurian Railroad from Japan to a Sino-Soviet joint venture to be established after the war. YEE WAH FOO, *CHIANG KAISHEK’S LAST AMBASSADOR TO MOSCOW: THE WARTIME DIARIES OF FU BINGCHANG* 163-64 (2011).

53. ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* 61 (1990). Not did Churchill believe China deserved a seat at the negotiations. PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 163 (2d ed. 2003).

54. HILDERBRAND, *supra* note 53, at 61.

55. LAUREN, *supra* note 53, at 163.

56. The conference took place during the Jim Crow era of the United States. In addition, the U.S. Congress had abolished the 1882 Chinese Exclusion Act some two years before (in 1943) to recognize China’s efforts during World War II. In short, racial equality was at best a distant ideal.

opposed, emerged from the rubble: the People's Republic of China and the Republic of China (Taiwan). The latter occupied the Chinese U.N. seat until 1971, enjoying the prestige, diplomatic relationships, and transnational linkages conferred by membership. The PRC, which repeatedly sought admission to the United Nations and other international organizations, was repeatedly rebuffed throughout the 1950s and 1960s.⁵⁷ Some saw China's alienation from the international community as the rightful consequence of its belligerence and aggression.⁵⁸ But the United Nation's persistent rejection also estranged China from many parts of the world, and the institutional structures that organize and promulgate international law. During this period China frequently expressed doubts about the project of international law, and the international system more generally.⁵⁹

The PRC would eventually oust the ROC from the United Nations in 1971. Concomitant with its joinder, the PRC has advanced along a distinct—but hardly *unilinear*—vector towards integration with the world, global governance institutions, and international law. China's 2001 accession to the WTO ended a nearly 15-year campaign described as the most difficult and exacting of any WTO accession.⁶⁰ China's assumption of greater burdens than other members shows how international law treats some parties less favorably than others. Far from crystallizing a neutral set of generally applicable rules, international law also perpetuates inequitable treatment, often to China's disadvantage. The long history of disparate treatment of China by international institutions has colored its receptivity towards international law. China aims to be part of the global community and the international institutions that comprise it, yet retains an underlying suspiciousness about the motivations and purposes underlying those institutions. This speaks to one underlying reason for paper compliance: as a statist country, China aims to exert maximal control over its economy; yet in so doing, it implements policies that contradict the basic WTO mandate.

57. See KENT, *supra* note 11, at 34.

58. See *id.* at 33. In a 1961 address to the UN, U.S. Ambassador Adlai Stevenson criticized China's "illegal and aggressive conduct" and called upon "these latter-day empire builders to abandon their warlike ways and accommodate themselves to the rule of law and the comity of nations." *Id.*

59. See *id.* at 34. See also JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW 283, 283 (reprinting the text of Foreign Minister Ch'en Yi's September 29, 1965, Press Conference) ("The United Nations has long been controlled by the United States . . . China need not take part in such a United Nations.").

60. PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 113-14 (2005). See also Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 521 (2003) ("Member-specific rule-making is . . . inherently inconsistent with the WTO rule of law. The WTO-plus obligations of China may be unique in scope and scale . . .").

B. Theories of Chinese Compliance

Scholars disagree about how closely China adheres to international law, depending upon the particular international regime, their own political leanings, the period in which they write, and their own findings. This section examines the gamut of scholarly opinion, including both holistic (multi-disciplinary) assessments and those made from a narrower (i.e. single-discipline) perspective.

Legal scholars such as James Feinerman, of Georgetown and Pitman Potter, of the University of British Columbia, examined a wide swath of Chinese conduct in fairly broad brushstrokes. Professor Feinerman surveyed Chinese engagement in the international law disciplines of trade, investment, environmental protection, arms control, human rights, and relations with Hong Kong.⁶¹ But he was unable to detect “a coherent pattern of compliance—or non-compliance—with international law on the PRC’s part.”⁶² In spite of substantial improvement since the Maoist era (1949–1976), he found that China still “frequently scoffs at international law.”⁶³

Writing a decade later in the same journal, Professor Potter concluded that “China’s participation in international legal regimes has increased substantially in the past ten years.”⁶⁴ Potter explained China’s compliance with international trade and human rights law in more nuanced terms, such as “selective adaptation,”⁶⁵ but deployed the realist frame described in Part I. China does not abide by *all* of the rules of the regime, but instead implements those norms comporting most readily with the preferences, policies, and practices at the local level. In particular, China adheres to norms already espoused by elites such as government officials, professionals, scholars, and others with specialized knowledge.⁶⁶ China has partially adopted international trade norms like transparency and the rule of law by enacting and revising laws in intellectual property, trade in services, and investment.⁶⁷ But China avoids assimilating to norms such as market access, IP protection, and anti-dumping that would reflect a fuller embrace of WTO obligations.⁶⁸ Potter finds similar selectivity in China’s compliance with international human rights norms and institutions.⁶⁹ That is, China adapts to international legal norms under its own terms.

61. See James V. Feinerman, *Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?*, 141 CHINA Q. 186 (1995).

62. *Id.* at 186.

63. *Id.* at 186–87.

64. Potter, *supra* note 9, at 714.

65. *Id.* at 700.

66. *Id.* at 701.

67. Though even in these improved areas, Potter points out problems with respect both to transparency and adherence to the rule of law. *Id.* at 705.

68. *Id.*

69. Specifically, China has increased attention to human rights issues by supporting academic exchange, as well as the publication and translation of international human rights

United States scholars have drawn particular attention to China's reputed obstruction of global trade. Fred Bergsten, of the Institute for International Economics, writes that "China's challenge to the existing norms, rules, and institutions of a growing number of components of the global economic order *could* be enormously disruptive both to the United States and to world stability."⁷⁰ The use of the word "could" is key because the substantive charges leveled at China—preference for bilateral over multilateral trade agreements and refusal to compromise on the Doha round—apply also to the E.U., United States, and other major trading nations.⁷¹ Likewise, Professor Andrew Nathan of Columbia and Doctor Andrew Scobell of RAND urge the United States "to push back against Chinese efforts to remake global legal regimes in ways that do not serve the interests of the West."⁷² But neither article cites hard proof of Chinese obstruction in the area of international trade. Both Bergsten, and Nathan and Scobell, overlook the considerable degree to which China is already enmeshed in these same institutions, including the WTO. China plays a cooperative, if not especially assertive, role in the international organizations that the West has maintained for over half a century. The main difference is that, now, the West must accommodate a large, interventionist, illiberal, and increasingly assertive authoritarian state.

The mismatch between China's conduct and international law resonates with many political scientists. Realists view China's behavior in international organizations as a way for it to reap the benefits of membership without paying the costs. After obtaining technical assistance, thickening transnational linkages, and participating in the creation of policy, China seeks exemptions from the organization's normative obligations and commitments to change domestic institutions. Samuel Kim, of Columbia, calls this the "maxi/mini principle."⁷³

While perhaps the most prevalent, the realist account is not the only heuristic to explain China's international behavior. Scholars have deployed other interpretative lenses to observe China's international law engagement.⁷⁴ Yet even constructivist or liberal exercises normally end with a realist invocation of China's national identity or national interests. Alastair Johnston, of Harvard, differentiates "adaptation" from "learning"

instruments. But serious problems of implementation remain in fields such as labor, discrimination, health, and gender. *Id.* at 709.

70. C. FRED BERGSTEN ET AL., *CHINA'S RISE: CHALLENGES AND OPPORTUNITIES* 30 (2008) (emphasis added).

71. *Id.* at 15.

72. Andrew J. Nathan & Andrew Scobell, *How China Sees America: The Sum of Beijing's Fears*, 91 *FOREIGN AFF.* 32, 47 (2012).

73. Kim, *supra* note 9, at 419–20 (discussing China's behavior with regard to arms control and disarmament).

74. See, e.g., Roda Mushkat, *China's Compliance with International Law: What Has Been Learned and the Gaps Remaining*, 20 *PAC. RIM L. & POL'Y J.* 41, 52–53 (2011) (noting the realist approach has been used more than "any other analytical paradigms").

in describing China's experiences in international arms control.⁷⁵ A state "adapts" when it tactically recalculates its position *vis-à-vis* the new organization, advances national interests, avoids taking on new obligations, and broadly pursues the same foreign policy objectives as before, but in a new arena.⁷⁶ By contrast, a state "learns" when it internalizes the goals of the international organization, shifts its understanding of policy objectives, and conforms its behavior to these new goals.⁷⁷

Professor Johnston concludes that adaptation better explains China's engagement with the arms control regime because China "free-rides" on efforts of other countries, resists restraints on nuclear arms, and seeks to dilute treaty obligations.⁷⁸ China has ignored constraints on arms sales, instead using its position in these organizations to weaken arms control. China thus has not learned or digested the body's norms and purposes, as both liberal theory and constructivism would posit.

While an important indicator of China's interaction with international law, arms control may not broadly represent Chinese attitudes or interests. Arms control is to some extent *sui generis*, tightly linked to national security and military interests, which are not fields where international cooperation blossoms. Furthermore, the People's Liberation Army's control over domestic arms production, coupled with its strong suspicion of outside institutions, limits China's degree of engagement.⁷⁹ So while arms control may have less predictive value for a nation's international behavior, the lesson remains that China maximizes benefits, minimizes obligations, and does not adjust its conduct to accommodate international norms.

A similar pattern emerges in China's engagement with the International Labor Organization (ILO). In analyzing China's relationship with the ILO, Ann Kent of the Australian National University distinguishes realist, or "instrumental," learning from constructivist, or "cognitive," learning.⁸⁰ She finds steady evidence of China's instrumental learning throughout its ILO membership. China has actively sought technical assistance and other concrete benefits, but at the same time has claimed exemptions from many international legal standards.⁸¹ By 1994, after two

75. Alastair Iain Johnston, *Learning Versus Adaptation: Explaining Change in Chinese Arms Control Policy in the 1980s and 1990s*, 35 CHINA J. 27, 28–29 (1996).

76. See, e.g., *id.* at 28.

77. The line between learning and adaptation is a fine one and may in fact reflect a matter of degree. Learning may simply involve a "process more fundamental than adaptation." *Id.* at 29. Nonetheless, the division reflects the broader debate between realists, who maintain that states promote their own interests at all costs and in all contexts, and constructivists, who believe that institutions shape and inform the strategies and behaviors of their members.

78. *Id.* at 58.

79. See generally Scott W. Harold, *Expanding Contacts to Enhance Durability: A Strategy for Improving U.S.-China Military-to-Military Relations*, 16 ASIA POL. 103 (2013) (analyzing recent Sino-U.S. military relations).

80. Ann Kent, *China, International Organizations and Regimes: The ILO as a Case Study in Organizational Learning*, 70 PAC. AFF. 517, 521 (1997–1998).

81. *Id.* at 520.

decades in the organization, China had ratified fewer than 10% of its 175 conventions. China used the ILO primarily to advance its own interests, and assumed none of the normative “redirections” a member state allegedly undergoes. But Kent also detects “a degree of cognitive learning” in China’s 1995 passage of the Labor Law.⁸² She points to “tripartism”⁸³ and collective bargaining as elements that China “learned” from the ILO and grafted into its domestic legal system.⁸⁴

China’s interactivity with the ILO is instructive in another regard. The ILO monitors labor rights in member states and investigates violations of international labor law through its Committee on the Freedom of Association (CFA). This sub-body has brought six cases against China, beginning with Case 1500, an inquiry into the Tiananmen Massacre of June 4, 1989.⁸⁵ Unaware it was subject to the CFA’s jurisdiction, China initially bristled at the request for information, stalling for over a year and claiming exemptions from ILO norms and procedures.⁸⁶ Eventually China provided information to the committee and fulfilled its *reporting* requirements.

China did not, however, implement most of the CFA’s legal recommendations: ending the administrative system of re-education through labor for labor activists, allowing workers to form independent trade unions, and enshrining this right in national law and regulation.⁸⁷ China went from denial, to grudgingly providing information, and finally complying with the ILO’s reporting requirements. In later cases, after accepting the reporting obligation, China communicated with the CFA on detained activists. China would also, on occasion, release or shorten the sentence of activists convicted of subversion or, more precisely, establishing indepen-

82. *Id.* at 531–32.

83. Tripartism is the core ILO principle that governments, employers, and workers should aim to discuss, cooperate, and formulate policies and standards. *International Labour Standards on Tripartite Consultation*, INT’L LABOUR ORG., [www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang—en/index.htm](http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang-en/index.htm) (last visited May 14, 2014).

84. Kent’s optimism seems premature. The Labor Law does not mention collective bargaining, nor a host of widely recognized international labor laws: the right to work, right to free association (forming and joining trade unions) and the right to strike. *See Kent, supra* note 80, at 530–31.

85. The Committee on the Freedom of Association (CFA) has brought six cases against China: 1500 (June 19, 1989), 1652 (June 2, 1992), 1819 (Jan. 30, 1995), 1930 (June 4, 1997), 2031 (June 4, 1999), and 2189 (Mar. 7, 2002). It filed three complaints, on June 2 and June 4, perhaps to commemorate the Tiananmen Massacre. *Freedom of Association Cases*, INT’L LABOUR ORG., <http://www.ilo.org/dyn/normlex/en/f?p=1000:20030:0:FIND:NO:::> (last visited May 14, 2014) (listing the cases that the CFA has brought against China).

86. Kent, *supra* note 80, at 527.

87. ILO WASHINGTON BRANCH OFFICE, CHINA RELATIONS WITH THE ILO 7, (Mar. 18, 2002) (Briefing Notes for U.S. Congressional – Executive China Commission Roundtable on Labor Rights), *available at* <http://www.cecc.gov/sites/chinacommission.house.gov/files/documents/roundtables/2002/CECC%20Roundtable%20Testimony%20-%20Tony%20Freeman%20-%20203.18.02.pdf>.

dent trade unions.⁸⁸ But China rarely reformed its laws and regulations to reflect international standards.⁸⁹ Kent calls Chinese engagement with the ILO in the 1990s “a tough, unrelenting process, with ILO officials persisting in the application to China of universal ILO standards against strong, and at times vituperative, Chinese opposition.”⁹⁰

Some degree of progress is detectable since Kent wrote. After a decade of prodding,⁹¹ China amended its Trade Union Law in 2001 to recognize the “right to organize or join trade unions according to law. No organizations or individuals shall obstruct or restrict them.”⁹² However, this too constitutes a form of paper compliance. To be sure, China’s new law made linguistic changes, including provisions described by the ILO as “more consistent with the expressions used in international conventions.”⁹³ But the substance of the law did not change. The Chinese government retained approval authority, meaning new trade unions could only be established with official benediction.⁹⁴ In practice, this has meant no new trade unions have been established. The revised Trade Union Law enshrines the “right to organize,” but simultaneously allocates approval authority to the All-China Federation of Trade Unions, a subsidiary organ of the Communist Party.⁹⁵ China does not intend to tolerate “independ-

88. *Id.* at 6–7.

89. Kent, *supra* note 80, at 528. Accord John Chen, *China and the ILO*, CHINA RTS. F., (2001), available at http://www.amrc.org.hk/alu_article/international_labour_organisation/china_and_the_ilo (observing China’s “procedural compliance[,] . . . increased willingness to employ [uncontroversial standards such as a minimum wage][,] . . . and a steadfast refusal to compromise on the issue of freedom to organise and join a trade union of one’s choice”).

90. ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE 143–44 (1999).

91. In Case 1930, the ILO requested the Chinese government amend articles 4, 5, 8, 9, 11, and 13 of the Trade Union Act and articles 79 to 83 of the Labor Law. Int’l Labour Org. [ILO], *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 316*, Case No. 1930 (China) (June 1999), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2904319. Case 1652 likewise concerned the Trade Union Act and harassing labor activists. ILO, *Report in Which the Committee Requests to be Kept Informed of Development – Report No. 292*, Case No. 1652 (China) (Mar. 1994) [hereinafter ILO Report No. 292], available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2902448.

92. Zhonghua Renmin Gongheguo Gonghui Fa (中华人民共和国工会法) [Trade Union Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1992, amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001), art. 3 (China), available at http://english.gov.cn/laws/2005-10/11/content_75948.htm [hereinafter Trade Union Law of 2001].

93. ILO, *Effect Given to the Recommendations of the Committee and the Governing Body – Report 324*, ¶ 44, Case No. 2031 (China) (Mar. 2001), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2905299.

94. Trade Union Law of 2001, *supra* note 92, art. 11.

95. See *id.* art. 3; Trini Leung, *ACFTU and Union Organizing*, CHINA LABOUR BULLETIN (Apr. 26, 2002), www.clb.org.hk/en/content/acftu-and-union-organizing (noting “the primary functions of ACFTU are to serve the interests of the [Communist Party] and the policies of the government”).

dent association” as that term is used internationally.⁹⁶ Each country is, of course, allowed a margin of appreciation to set the exact contours of its human rights protections. But China oversteps that boundary by harassing, beating, detaining, convicting (and sometimes sentencing to death) labor activists for organizing trade unions.⁹⁷ This facet of China’s non-compliance generates particular controversy. In sum, China has not embraced many of the ILO’s recommendations on revising its Labor Law.⁹⁸

What does this tell us about international trade? International trade law occupies a special niche in China and the world more broadly, reflecting the lengths states go to accommodate its norms, institutions and frameworks. It is no accident that we have a world trade court (the DSB), but not a world human rights court. Trade arguably serves state interests more readily than human rights or labor rights, and induces greater levels of compliance. Scholars have shown that certain disciplines—trade, security, finance—traditionally induce higher levels of compliance than human rights or humanitarian law.⁹⁹

Various explanations account for the disparate levels of adherence. Perhaps the most important factor lies in the fact that physical security and economic prosperity attract more governmental attention and resources than the well-being of the citizenry. Human rights may trigger moral concerns or spark popular outrage, but ultimately assume secondary importance when compared with the gravity of economics or national security. Likewise, these disciplines assume higher positions on the crowded agenda of diplomats and officials who coordinate, confer, and ultimately concoct international law. A second explanation involves reciprocity and calculability. It is easier to demonstrate how one country’s violation of trade law harms (imposes costs on) another state than it is to show how a human rights abuse in one state affects the interests of another.

Of course, it may be unfair or unwise to use the WTO as an evaluative yardstick for China’s compliance with international law. First, the WTO itself is an international organization largely constructed by, and for, de-

96. See *CLB Analysis of the New Trade Union Law*, CHINA LABOUR BULLETIN (Feb. 28, 2002), www.clb.org.hk/en/node/1582 (noting the revised law further entrenches the Chinese government’s “monopoly on trade union activities and organising”).

97. In Case 2031, the Committee called on China to amend sections 4, 5, 8, 9, 11, and 13 of the Trade Union Act. These sections contradicted the basic principles of free association. China reported it would revise 5, 8, and 9 to comply with international law. ILO, *Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 324*, Case No. 2031 (China) (Mar. 2001), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2905299. See also *CHRD Suggestions for UPR Recommendations to China*, CHINESE HUMAN RIGHTS DEFENDERS, <http://chrdnet.com/wp-content/uploads/2013/10/CHRD-UPR-Rec-2013-2.pdf> (last visited May 14, 2014) (noting harassment of human rights defenders).

98. For example, the CFA has requested amendments to the Labor Law to ensure the right to strike. See ILO Report No. 292, *supra* note 91, ¶ 344(c). It has also requested amendments to ensure collective bargaining rights. *Id.* ¶ 344(b).

99. Edward C. Luck, *Gaps, Commitments, and the Compliance Challenge*, in INTERNATIONAL LAW & ORGANIZATION: CLOSING THE COMPLIANCE GAP 303, 309-10 (Edward C. Luck & Michael W. Doyle eds., 2004).

veloped Western states.¹⁰⁰ It promotes a neoliberal economic paradigm—low tariffs, minimal regulation, limited government subsidies, strong protection of intellectual and private property—that reflects conventional wisdom about the role of government, circa 1995.¹⁰¹ Though the Great Recession has tarnished some of neoliberalism’s sheen, norms embedded in WTO Agreements ossify these preferences.¹⁰² For a state like China, with a long history of official intervention in all aspects of life, from economic activity (agriculture, manufacturing, technology, etc.) to social policy (family planning, education, social security), the neoliberal paradigm challenges core ideas about the role of government in society. In its contemporary form—a putatively communist government with a strong state-owned presence in key industries (banking, oil, natural resource extraction, steel, telecommunications)—the Chinese state lies far outside the neoliberal mandate.

Second, litigation remains foreign to Chinese legal culture. Traditional Chinese law encouraged disputants to resolve private differences informally, outside of officially prescribed channels.¹⁰³ Likewise, on the international level, “China prefers to use political and diplomatic methods such as consultations and negotiations to resolve intergovernmental disputes. China’s present participation in the DSB is clearly influenced by deeply rooted thinking and practices of traditional Chinese culture.”¹⁰⁴ China has settled half of the cases in which it appears as a respondent, which tracks the overall average of cases brought before the DSB.¹⁰⁵

100. The WTO grew out of GATT 1947, an agreement initially drafted by American and British officials in 1946. The US pushed a free trade agenda based on slashing tariffs, minimizing export quotas, and disrupting cartels. Many of these positions were weakened after discussions with the British. Still, the neoliberal mandate of low tariffs, light regulation, and minimal quantitative restrictions continued to guide the development of GATT and ultimately the WTO. See James Miller, *Origins of the GATT – British Resistance to American Multilateralism 2* (Jerome Levy Econ. Inst. at Bard Coll., Working Paper No. 318, 2000), available at <http://www.levyinstitute.org/pubs/wp318.pdf>.

101. See Elaine Hartwick & Richard Peet, *Neoliberalism and Nature: The Case of the WTO*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 190-92 (2003) (describing the neoliberal agenda of the Uruguay Round, which led ultimately to the 1995 founding of the WTO).

102. For a timely critique of neoliberal economic policy, see generally JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* (2012) (describing how U.S. economic policy has led to vastly unequal wealth distribution, and how these policies have spread around the world, at least in part through such U.S.-backed institutions as the IMF and WTO).

103. JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA: A NEW HISTORY* 185 (2d ed., 2006) (noting that private conflicts were resolved through customary and nonofficial channels, such as craft or merchant guilds, neighborhood associations, village elders, or clan organizations). A more recent campaign by the Chinese government has also pushed private litigants out of formal civil litigation and into informal mediation. See generally Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

104. MAO YANJING, *WTO ZHENGDUAN JIEJUE JIZHI WENTI YU GAIGE [DRAWBACKS AND REFORMATION OF THE WTO DISPUTE SETTLEMENT MECHANISM]* 230 (2010).

105. Kara M. Reynolds, *Why Are So Many WTO Disputes Abandoned?*, in *TRADE DISPUTES & THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT* 191, 198 (James C. Hartigan ed., 2009) (noting that 48.8% of cases

While traditional mores may influence China's repeated decisions to settle early, other factors—including its lack of experience with WTO and GATT litigation—may also help explain this tendency.¹⁰⁶

Third, the preference for formal adjudication benefits common law countries, such as the United States, to the direct detriment of member states outside of this tradition, such as China. Scholars trace the “highly contextualized, case-specific approach” of WTO dispute resolution back to United States dominance in treaty negotiations.¹⁰⁷ The inclination towards adversarialism likewise privileges United States legal culture, conferring a comparative advantage both in terms of the larger number of lawyers and firms that practice international trade law, and the practical and clinical training that students receive in law school. To the extent that better-trained lawyers, deploying tools familiar from practice and education, help the United States advance its cause, states like China compete at a significant disadvantage. The United States has brought the largest number of disputes against China, taking full advantage of its legal culture.

Beyond reasons specific to China, other factors caution prudence in viewing DSB implementation as a reliable index of a member's adherence to international law. The high success rate for complainants, between 83% and 91% by one estimate, has invited doubts about the objectivity of the DSB's adjudicative processes.¹⁰⁸ The DSB is overwhelmingly likely to find a WTO violation against any member. This is true whether the respondent is China (subject of a few dozen complaints, ten of which have concluded) or a more seasoned WTO litigator such as the United States or E.U.¹⁰⁹

China's international interactions in the areas of labor, arms control, and human rights are instructive. They evidence a reluctant interlocutor and loath participant in international organizations. To the extent China complies, it is largely discursive rather than digressive, focusing on words (reporting, discussing) rather than deeds (changing laws or behaviors). China's compliance with the WTO has exceeded its performance in other

brought during the WTO era have settled, including 33% which have no further action, 13.3% which settle before a panel is established, and 2.5% which are withdrawn).

106. See Henry Gao, *The Elephant in the Room: Challenges of Integrating China into the WTO System*, 6 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 137, 145 (2011). The WTO, and GATT before it, has provided dispute settlement procedures since 1948. China, however, only joined the WTO in 2001. See Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Dispute Settlement in GATT/WTO Disputes*, 24 *FORDHAM INT'L L.J.* 158, 163 (2000) (noting that approximately 52% of cases (155 of 298) brought during the before-GATT era settled).

107. JOSEPH A. CONTI, *BETWEEN LAW AND DEMOCRACY: THE SOCIAL CONTEXTS OF DISPUTING AT THE WORLD TRADE ORGANIZATION* 60 (2011).

108. See Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 *VAND. J. TRANSNAT'L L.* 383, 439 (2009) (attributing the 83% to 91% success rate of WTO complainants to decision-makers that both curtail respondents' substantive rights and create new obligations).

109. Both the United States and E.U. have been the subject of scores of disputes.

legal regimes.¹¹⁰ Yet as we will see in Part IV, China still refuses a broad patch of the WTO disciplines.

III. CHINA IN THE WTO

China's accession to the WTO was epochal.¹¹¹ One of the largest and most dynamic economies would finally "join the world," or *rushi* as the Chinese say.¹¹² The accession was widely expected to boost international trade, encourage China's restructuring towards a market economy, and discipline China's domestic legal system.¹¹³

Many welcomed China's entry into the WTO. President Clinton believed China's accession represented "a good agreement for China and for America and for the world. I think that all of us benefit when the most populous nation in the world is . . . part of a rule-based system that will

110. Kent contrasts China's "acceptance of more intense foreign and international scrutiny" from the WTO with its "lack of cooperation on issues of transparency and verification" in organizations such as the International Labor Organization, International Monetary Fund, United Nations Environment Program, and United Nations Committee against Torture. See KENT, *supra* note 11, at 238.

111. See *China Officially Joins WTO*, CNN (Nov. 11, 2001, 1:17 AM), <http://edition.cnn.com/2001/WORLD/asiapcf/central/11/10/china.WTO/> (featuring encomium from prominent officials, such as the U.S. trade representative, French finance minister, Nigerian trade minister, and WTO Director-General Mike Moore, who deemed China's accession a "major historic event").

112. When China joined the WTO in 2001, it was the sixth largest economy in world, slightly smaller than France. *World's Largest Economies*, CNN, http://money.cnn.com/news/economy/world_economies_gdp (last visited May 14, 2014). Prior to joining the WTO, in 2000, "China was the [seventh] leading exporter and [eighth] largest importer of merchandise trade." Press Release, World Trade Org., WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), available at www.wto.org/english/news_e/pres01_e/pr243_e.htm. The Chinese economy has grown at an average rate of 10% for thirty years. Many analysts currently see slow growth in the immediate future. See Damian Grammaticas, *China Growth Shows Signs of Pick-up from 13-year Low*, BBC NEWS (Jan. 18, 2013, 3:07 AM), <http://www.bbc.com/news/business-21071546>.

113. At the time of China's accession, in December 2001, the WTO had 144 member-states. By joining the WTO, each state accedes to the compulsory jurisdiction of the WTO's dispute settlement body. Other international tribunals, such as the International Court of Justice, have fewer members that accept compulsory jurisdiction. See Int'l Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, ICJ-CIJ.ORG, www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited May 14, 2014) (listing 70 members). The International Centre for Settlement of Investment Disputes, which had 139 member states in 2001, does not require member states to submit to its jurisdiction. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, pmbl., Mar. 18, 1965, 17 U.S.T. 1270 ("[N]o Contracting State shall by the mere fact of its ratification . . . of this Convention . . . be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."). Finally, the International Tribunal for the Law of the Sea has compulsory jurisdiction over all 166 member states in treaty interpretation and other matters provided by agreement. See *The Tribunal*, INT'L TRIBUNAL FOR THE LAW OF THE SEA, <http://www.itlos.org/index.php?id=15> (last visited May 14, 2014).

bring shared prosperity.”¹¹⁴ Many in the business community, academia, and government likewise expressed genuine, if guarded, optimism.

But others doubted the depth of China’s commitment. Some suspected China would not, indeed *could* not, withstand WTO obligations on market access, transparency, IP, or subsidies.¹¹⁵ Several cases in the DSB have focused on these very issues, suggesting that China’s accession to the WTO did not resolve all of them. Still others questioned whether China would abide by DSB rulings; an unfavorable decision might force China to revise its domestic laws, a clear infringement of its jealously-guarded sovereignty.¹¹⁶ Given China’s resistance to revising its labor laws and respecting arms control treaties, such doubts were well taken. One commentator expressed concern, due to China’s broad inconsistency with WTO disciplines, that the ensuing flood of disputes against China would simply overwhelm the DSB.¹¹⁷

For its part, China has invested considerable resources in joining the WTO, accepting the most onerous requirements placed on any member to join the organization in the first place.¹¹⁸ The WTO houses one of three major tribunals to which China presently submits to binding international adjudication, and the only one where cases have been brought against.¹¹⁹ Given China’s reluctance to cede sovereignty to international institutions, and adjudicatory institutions in particular, China’s behavior in the WTO is vital to understanding its role as an international legal actor, and in global governance regimes more generally.

A. *Mechanics of the WTO Dispute Settlement Body*

The inclusion of the Dispute Settlement Body into the World Trade Organization marked a major, if not *the* major, difference between the old GATT system and the new WTO.¹²⁰ By incorporating substantive law, dispute settlement procedures, and an adjudicatory body into one system, the WTO would “overcome the legal and procedural fragmentation of the

114. Remarks Following Discussions with President Suleyman Demirel of Turkey and an Exchange with Reporters in Ankara, 35 WEEKLY COMP. PRES. DOC. 46 (Nov. 22, 1999), available at www.gpo.gov/fdsys/pkg/WCPD-1999-11-22/html/WCPD-1999-11-22-Pg2378.htm.

115. See *China’s Accession to the WTO: Ready and Willing . . . But Able?*, CHINA LAW & PRACTICE, Jan. 1, 2002, sec. 22, available at 2002 WLNR 15139677.

116. Christopher Duncan, *Out of Conformity: China’s Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT’L L. REV. 399, 449 (2002) (citing badly drafted laws and diffuse governmental authority as internal challenges to China’s DSB compliance).

117. Sylvia Ostry, *WTO Membership for China: To Be and Not To Be: Is That the Answer?*, in CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 31, 37 (Deborah Z. Cass et al. eds., 2003).

118. See Qin, *supra* note 60, at 521 (describing the obligations placed on China’s accession as “unique in scope and scale”).

119. Julian Ku, *China and the Future of International Adjudication*, 27 MD. J. INT’L L. 154, 156 (2012).

120. John H. Jackson, *Dispute Settlement and a New Round*, in THE WTO AFTER SEATTLE 269, 269 (Jeffrey J. Schott ed., 2000).

old 'GATT à la carte' system."¹²¹ Under the old GATT system, members could (a) prevent the dispute from being adjudicated in the first place, (b) object to the adoption of the report as prepared by independent experts, or (c) refuse the authorization of countermeasures.¹²² The WTO formalized a procedure, with the possibility of sanctions, by which members may challenge the laws and regulations of any other member state, even without that state's permission.

At the beginning of the dispute settlement process, the parties engage in consultation to see if they can resolve the dispute without formal litigation.¹²³ If the dispute is not resolved in the consultation phase, a panel of three independent trade experts will convene.¹²⁴ The panel then conducts a highly fact-intensive inquiry and ultimately produces a report that can stretch to several hundred pages. Even then, there is no guarantee that the DSB will find a violation, although it typically does. Panel reports often exercise "judicial economy" with regard to certain legal claims, essentially dodging the question of a violation. An appeal may then follow. Finally, assuming a violation is found and the party exercises its right to appeal, the Appellate Body (AB) will then take perhaps another year to review the panel's findings. After the AB renders a final decision, the DSB will adopt the report, which then becomes binding upon the parties. The respondent country may reform its domestic legal system to accommodate the ruling, or ignore the ruling and accept sanctions (compensation or retaliation) in lieu of changing its domestic legal system. It is not unusual for a case to take five to seven years from the initial investigation to the conclusion.

Upon finding a violation, the DSB recommends that the offending member "bring the measure into conformity with [the WTO] agreement."¹²⁵ This happens in one of three ways. First, and optimally, the member withdraws the offending measure. The member can request a "reasonable period of time" in which to implement the ruling when it is "impracticable to comply immediately."¹²⁶ The result is that the world trading system suffers one fewer distortive law or measure; no attempt to compensate for the damage done by the inconsistent measure is made.

Second, when immediate withdrawal is impracticable, the DSB can order compensation, which eases the financial burden imposed when the

121. ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 202 (1997).

122. *See generally Historic Development of the WTO Dispute Settlement System*, WTO, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm (last visited on May 14, 2014).

123. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 [hereinafter DSU].

124. *Id.* arts. 4(7), 8(5).

125. *Id.* art. 19(1).

126. *Id.* art. 21(3).

losing party prolongs the inconsistent measure. The losing party lifts trade barriers on certain imported products to compensate for the losses, by lowering tariff rates on imports from the prevailing country.¹²⁷ In reality, compensation is rarely chosen.¹²⁸

Third, the DSB can authorize retaliation, whereby the prevailing party can suspend trade concessions to the losing party. Normally, this means that the prevailing party can *raise* tariffs on imports from the losing party, in an amount equivalent to the losses incurred by prolonging the inconsistent measure.¹²⁹ Often the prevailing country will retaliate in the same sector as the dispute: if the dispute centers on subsidies to goods, the retaliatory measure will target similar goods.¹³⁰ Or the WTO may authorize sanctions on similar products in the same sector.¹³¹ But the WTO has also authorized states to retaliate across sectors, as in the recent dispute between the United States and Antigua.¹³² The DSB calculates the approxi-

127. Whether only the prevailing party can obtain compensation, or whether all WTO members can obtain compensation by virtue of the WTO's principle of nondiscrimination, remains a theoretical dispute. See Joost Pauwelyn, *Enforcement & Countermeasures in the WTO: Rules Are Rules, Toward A More Collective Approach*, 94 AM. J. INT'L L. 335, 337 (2000) (relying on an early WTO DSB ruling to posit that all WTO members can avail themselves of compensation).

128. William J. Davey, *Evaluating WTO Dispute Settlement: What Results Have Been Achieved Through Consultations and Implementation of Panel Reports?*, in *THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* 98, 138 (Yasuhei Taniguchi et al. eds., 2007) (noting compensation has not often been used).

129. DSU, *supra* note 123, art. 22(4).

130. When the E.U. lost the Beef Hormone Dispute, the Appellate Body authorized the United States and Canada to impose tariffs on European foodstuffs. Canada imposed 100 percent duties on C\$11 million worth of European meats. *EU, Canada Move to End Long Hormone Beef Row*, INDEPENDENT (Mar. 20, 2011), <http://www.independent.co.uk/life-style/health-and-families/eu-canada-move-to-end-long-hormone-beef-row-2247711.html>. The United States took a more catholic approach, imposing a 100% duty on a variety of products from E.U. members, such as pork, onions, Roquefort cheese, fruit juice, coffee, and mustard. Implementation of WTO Recommendations Concerning E.C.-Measures Concerning Meat and Meat Products (Hormones), 64 Fed. Reg. 40638 (July 27, 1999). The annex lists the various products. *Id.* Negotiations continued until 2009, when the E.U. additionally agreed to eliminate tariffs on U.S. high-quality beef for four years (20,000 tons per year for three years, 45,000 tons in the fourth year). See Press Release, Office of the U.S. Trade Rep., USTR Announces Agreement with European Union in Beef Hormones Dispute (May 13, 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones->.

131. See Phoenix X.F. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25 EMORY INT'L L. REV. 151, 173 (2011).

132. In 2007, the Appellate Body determined that U.S. law (state and federal) blocking online gambling violated GATS. Because Antigua and Barbuda had little to gain through sanctions against the United States in the services sector, the DSB authorized Antigua and Barbuda to suspend concessions in various forms of intellectual property. See Press Release, Government of Antigua and Barbuda, Antigua to Pursue Sanctions against the United States in Decade-Long Trade Dispute (Jan. 28, 2013), available at http://ab.gov.ag/article_details.php?id=3846&category=38.

mate harm and then “charges” the offending nation an equivalent amount of trade in goods, services, or intellectual property appropriation.

Some question whether a WTO violation actually amounts to a breach of international law. Indeed, one could ask whether the WTO is itself an appropriate forum for studying compliance in the first place. To be sure, infringing WTO disciplines lacks the urgency of a war crime, torture or genocide; no one dies from illegal subsidies or loses blood from intellectual property theft. Certain U.S. scholars have expressed the belief that the WTO merely comprises “instrumental law . . . only worthy of compliance to the extent that compliance makes people better off. It thus seems attractive to allow states the flexibility to ‘buy’ their way out of at least some kinds of obligations by [compensating] other states.”¹³³ Such skepticism is grounded in “efficient breach” theory, which stipulates that party A upholds contractual obligations to party B only to the extent that it is less expensive (“efficient”) than breaching the contract and paying damages. If A’s interest is better served by breaching the agreement, selling the goods at a higher price to C, and paying compensation to B, A should do so.¹³⁴

While international law certainly is instrumental, that does not make its obligations any less binding. Some scholars argue that the WTO agreements, and DSB rulings in particular, constitute binding international law.¹³⁵ Support for this notion can be found sprinkled throughout the provisions of the Dispute Settlement Understanding,¹³⁶ as well as subsequent reports from the DSB.¹³⁷ Furthermore, the strong implementation record by member states suggests, by and large, that members act *as if* bound by DSB rulings.¹³⁸ At this point, a broad swath of academic literature now supports the idea that WTO and DSB rulings constitute binding international law.¹³⁹

133. Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT’L L. 127, 130 (2007).

134. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 56 (1972).

135. John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations*, 91 AM. J. INT’L L. 60, 63–64 (1997) (noting that WTO rules are binding in the international legal sense of having domestic legal effect).

136. Jackson acknowledges that the “the language of the DSU does not solidly ‘nail down’ this issue.” *Id.* at 62. Yet he does cite eleven clauses in the DSU that strongly support the notion that DSB recommendations are binding. *Id.* at 63.

137. Pauwelyn, *supra* note 127, at 341.

138. See, e.g., Mitsuo Matsushita, *Some Issues in Implementing DSB Recommendations*, 4 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 293, 295 (2009) (stating that most decisions result in compliance and only a “handful” of cases result in non-compliance); Wilson, *supra* note 36 (noting that in “virtually all” cases where the DSB has found a violation, the member state has complied with the recommendation).

139. See, e.g., Anu Bradford, *When the WTO Works, and How it Fails*, 51 VA. J. INT’L L. 1, 13 (2010) (“The WTO agreements are legally binding on all member states. If a WTO member violates its obligations, the WTO can authorize trade retaliation measures and hold states accountable through the DSM. The enforceability of WTO agreements challenges the common view that international law is always ‘soft’ and compliance with it voluntary.”); Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 25 (2005) (“Unlike GATT Article XXIII, which focused on maintaining a mere balance of concessions, the

B. *China's Record in the WTO*

Amidst a cacophony of divergent perspectives, however, one keynote emerges. Observers consistently claim that China's WTO compliance is, on the whole, "mixed."¹⁴⁰ They invariably praise its bold steps to implement parts of the WTO mandate: lowering tariffs, improving market access (i.e., opening its domestic market to foreign products), and increasing rule-based judicial adjudication. But commentators also criticize China's lack of transparency, weak intellectual property protection, and embrace of state capitalism. For example, the United States Trade Representative (USTR) oversees twenty federal agencies to monitor China's WTO compliance;¹⁴¹ its annual evaluation of China's WTO compliance has been perennially mixed or, in the bureaucratic vernacular, "complex."¹⁴² After customarily complimenting China's "many impressive steps to implement a set of sweeping commitments,"¹⁴³ the USTR catalogs areas where China has failed to discharge its WTO obligations: obstructing market access for foreign goods and companies, subsidizing industries, poorly enforcing intellectual property rights, and so on.¹⁴⁴ Of course, the USTR expressed these concerns long before China acceded to the WTO, going back well into the 1990s.¹⁴⁵

The United States, one of China's leading economic competitors, is hardly a disinterested observer of China's conduct. But the United States is not alone in criticizing China's compliance record. The WTO Secretariat has also enumerated many gaps between WTO requirements and China's domestic legal and regulatory systems, in areas such as transparency, technical barriers, sanitary measures, and export quotas.¹⁴⁶ In its biennial reviews, the WTO has raised questions about China's export re-

DSU . . . imposes a legally binding obligation to comply with WTO rules and WTO dispute rulings." But the idea continues to have its detractors. See Marco Dani, *European Legal Pluralism: The Fiamm and Fedon Litigation and the Judicial Protection of International Trade Systems*, 21 EUR. J. INT'L L. 303, 330 (2010) ("[E]ven when the Appellate Body suggests ways to implement the DSB recommendations, such suggestions are not binding on the losing party.").

140. Feinerman, *supra* note 61, at 210.

141. Gerald Chan, *China & The WTO: The Theory & Practice of Compliance* 12 (Royal Inst. of Int'l Affairs, Asia Program, Working Paper No. 5, 2003) (describing the U.S. government effort as the largest monitoring mechanism of any trade agreement).

142. U.S. TRADE REP., 2011 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 2 (2011) ("[T]he overall picture currently presented by China's WTO membership remains complex.").

143. *Id.*

144. *Id.* at 2–3. Similar concerns appear in previous reports. See, e.g., U.S. TRADE REP., 2007 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 6–8 (2007).

145. Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1485–86 (2000).

146. WTO Secretariat, *Trade Policy Review – China 2012*, ¶¶ 7, 9, 12, WT/TPR/S/264 (May 8, 2012).

strictions on natural resources, obstacles to foreign direct investment, and market barriers to services.¹⁴⁷

The USTR reports and WTO reviews do not necessarily prove a violation of WTO law. Proper determination of a WTO violation usually requires an enormous expenditure of time, resources and perseverance. The complaining state must conduct its own investigation, even though it may rely on private organizations, such as multinational corporations or public interest groups, to furnish specific information about trade barriers.¹⁴⁸ The complainant must then coordinate information flows from private actors and government agencies, formulate legal arguments based on these findings, and prepare extensive findings to proceed in its case. It then heads to Geneva for consultations.

IV. REVIEW OF THE CASES

It is easy to charge a country with violating international trade law; politicians do it often. But because the WTO adjudicative process is fact-intensive, proving a violation poses a far more serious challenge. This section examines the legislative and regulatory reforms that China has made, as well as those it has not made, to comply with DSB rulings and recommendations. Disputes currently before the DSB exceed the scope of this inquiry.¹⁴⁹ Likewise, violations of WTO law brought before domestic authorities for adjudication lie outside this inquiry.¹⁵⁰

Trade scholars use two factors to determine whether a member has complied with a ruling.¹⁵¹ First, the timeliness inquiry asks whether the

147. WTO Secretariat, *Trade Policy Review – China 2010*, ¶¶ 16, 19, 20, WT/TPR/S/230 (Apr. 26, 2010).

148. See, e.g., *China – Grants, Loans, and Other Incentives*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds387_e.htm (DSB 387). In this case, U.S. companies provided information to the U.S. Trade Representative about allegedly inconsistent local and provincial regulations. See Press Release, Office of the United States Trade Representative, United States Wins End to China’s “Famous Brand” Subsidies after Challenge at WTO; Agreement Levels Playing Field for American Workers in Every Manufacturing Sector (Dec. 18, 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/united-states-wins-end-china’s-”famous-brand”-sub>.

149. Several disputes are ongoing. See, e.g., *China – Measures Concerning Wind Power Equipment*, WT/DS419/1 (Jan. 6, 2011).

150. Domestic adjudicative bodies, such as the International Trade Administration and International Trade Commission in the United States, interpret U.S. domestic law to determine whether there has been a violation of U.S. statutory law, and hence whether a duty should be imposed. With respect to China, the United States has imposed anti-dumping duties in 61 of the 71 investigations brought. Gary Clyde Hufbauer & Jared C. Woollacott, *Trade Disputes Between China and the United States: Growing Pains So Far, Worse Ahead?*, 3 EUR. Y.B. INT’L ECON. L. 31, 51 (2012). China has challenged these investigations in three WTO disputes, proffering colorable claims that some of these duties may have violated WTO law.

151. See William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT’L L.J. 119, 119 (2009). A third factor is potentially salient in disputes against China. Namely, did China violate WTO agreements (generally applicable international law) or the China Accession Protocol or Working Party Report (China-specific international law)? The distinction is important because international law is supposedly a neutral set of general prin-

member implements the ruling within a “reasonable period of time.”¹⁵² The parties to the dispute determine the period of time, meaning an important part of the inquiry lies within the member’s power. Unless the parties agree otherwise, the reasonable period of time should not exceed fifteen months.¹⁵³ The problem with this inquiry is that it reduces compliance to a single metric. Since most members implement rulings in a timely manner, and developing states do, on average, a better job than developed states, timeliness is an insufficient gauge of compliance on its own.¹⁵⁴

The second factor, quality, examines how the member actually implemented the ruling. What laws did it change? What laws did it leave in place? Did it rescind the offending measure or revise it?¹⁵⁵ If it refuses to change, did the DSB authorize compensation or retaliation? Did the member state retaliate? Or did the state modify the measure, but in a way that does not address the DSB’s concern?¹⁵⁶ The quality inquiry addresses the heavy lifting of compliance: the domestic legal, administrative

ciples binding on all states. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 100 (2d ed., 2010). Yet the profusion of China-specific commitments belies the notion that international law proscribes equal treatment, and requires equal commitments, from all member states. Scholars describe the Accession Protocol as containing “WTO-plus obligations,” which impose more stringent disciplines on China than on other members, and “WTO-minus obligations,” which reduce China’s rights as a WTO member. For a compelling analysis, see Qin, *supra* note 60, at 490. The China-specific commitments are myriad, and include, *inter alia*, market access for both goods and services, freezing tariff rates, translating trade regulations into a WTO language (which no other member must do), prompt administrative review of trade matters in Chinese tribunals, and designation as a non-market economy (which makes it easier for WTO members to bring and win anti-dumping cases). *See id.* at 488–91.

152. The WTO prescribes three methods to determine what a reasonable period is. First, the DSB can set the period after the offending member proposes a course of action. Second, the parties themselves may set the period. Third, if the parties go to binding arbitration after adopting the recommendations, the period should not exceed fifteen months from the date of the adoption of the report. DSU, *supra* note 123, art. 21(3).

153. *Id.* art. 21(4).

154. Davey finds that developed countries timely comply in 50% of cases, whereas developing countries timely comply in 80% of cases. Davey, *supra* note 128, at 138.

155. For example, the U.S. has chosen not to repeal Section 211 of the Omnibus Appropriations Act, which the DSB determined violated the national treatment obligation of the Agreement on Trade Related Aspects of Intellectual Property Rights [TRIPS] Agreement in 2001. The United States told the DSB that it had “been working for more than ten years on the implementation of the DSB’s recommendations in this dispute,” but has not amended the law. Countries—including China—have routinely urged the United States to comply with the ruling. *See, e.g.*, World Trade Org. Dispute Settlement Body, Minutes of Meeting, ¶¶ 22–33, WT/DSB/M/316 (July 20, 2012) (noting the urging of twelve countries).

156. For instance, in *United States – Tax Treatment for “Foreign Sales Corporations”*, the U.S. revised laws that tax foreign corporations to comply with a previous DSB decision. But the European Communities (“EC”) believed that the revised law continued the violations and requested a compliance proceeding, which found that the revised law was still inconsistent with the decision. Recourse by the European Communities to Article 4.10 of the SCM Agreement and Article 22.7 of the DSU, *United States – Tax Treatment for “Foreign Sales Corporations”*, WTO/DSB108/26 (Apr. 25, 2003). For a summary of the case, see *United States – Tax Treatment for “Foreign Sales Corporations”*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm (last visited May 14, 2014).

and regulatory changes needed to discharge obligations under international law.

The DSB has resolved eight cases against China. In four disputes that went to final adjudication, the DSB found Chinese law violated WTO disciplines. In four disputes that settled, China agreed that some measures likewise violated WTO law. All eight cases found Chinese law to be inconsistent. The more interesting story is that, in five of the eight cases, China has revised laws, withdrawn measures and essentially addressed the complaining parties' concerns.¹⁵⁷ In the language of the two factors identified above, China achieved *qualitatively* sound compliance in a *reasonable period of time*. China revised its inconsistent measures so as to effectuate the DSB ruling, and thus achieve "paper compliance." But that does not capture the whole story.

In the three cases analyzed below, China has either failed to annul all inconsistent measures, or has revised them in questionable ways. In its worst performance—and it is worth stressing that China's non-compliance is mild by comparative standards¹⁵⁸—China neither abided by the reasonable period of time, nor annulled three (of eighteen) provisions that the DSB found inconsistent with WTO agreements.¹⁵⁹ In another case, China revised a regulation to perpetuate the harm initially challenged. This is the obverse, but equally important, side of paper compliance: small but significant tweaks to the revised legislation that *neutralize* parts of the ruling's intrusiveness. The following section examines three cases where China's implementation of DSB rulings has been inadequate.

Apart from the issue of domestic implementation, the WTO's Dispute Settlement Understanding (DSU) has its own compliance procedures. It is significant that in two cases, China did not submit a status report or notify the Dispute Settlement Body of outstanding compliance issues, as it must under the DSU.¹⁶⁰ Instead of putting the implementation issue on the agenda, China stated it "was glad to declare that it had brought its measures into conformity with the DSB's recommendations and rulings."¹⁶¹ But other members complained that China had violated procedure by failing to circulate an implementation report.¹⁶² China argued that the "closing date" to submit items for the agenda was August 20,

157. See *infra* App. 1 (listing outcomes for several cases).

158. For instance, the DSB has yet to authorize sanctions against China for failing to implement a decision. The DSB has done so, however, against both the E.U. and United States. See, e.g., World Trade Org. Dispute Settlement Body, Minutes of Meeting, ¶ 90, WT/DSB/M/273 (Nov. 6, 2009) [hereinafter November 6 Minutes]; *id.* ¶¶ 2-14 (listing members' comments on the United States' failure to implement the DSB's ruling and recommendations in U.S. – Section 211 Omnibus Appropriations Act of 1998); *id.* ¶ 19 (listing Japan's concerns about the United States' partial implementation of the DSB's ruling and recommendation in U.S. – Anti-dumping measures); *id.* ¶ 23 (listing the E.C.'s concerns about United States' "non-compliance" in U.S. – Section 110(5) of the U.S. Copyright Act).

159. See discussion *infra* Part IV.B.

160. DSU, *supra* note 123, art. 21(6).

161. November 6 Minutes, *supra* note 158, ¶ 90.

162. *Id.* ¶¶ 86-88.

2009—seven days prior to the August 27 deadline set by the DSU. China thus believed it need not place the implementation issue on the August 31 DSB meeting.

But its argument is unpersuasive. The DSU says nothing about a closing date for agenda submissions. China was obligated to place the issue on the agenda, even if such placement required action before the August 27 deadline. China knew of the August 31 meeting and could easily have submitted the issue to the DSB meeting agenda in a timely manner. China should have also provided the status report as required by the DSU. International law imposes on all member states a good faith requirement to implement treaty provisions.¹⁶³ While a procedural peccadillo in the grand scheme of things, China's failure to report suggests it is testing institutional boundaries and determining what forms of compliance are absolutely necessary.

A. *Protection and Enforcement of IPR (DSB 362, April 2007)*

The enforcement of intellectual property rights (IPR) perennially generates tension in U.S.-China relations. U.S. visitors to Beijing are stunned to find malls, such as the Silk Market, stocked with knock-off goods of their favorite brands.¹⁶⁴ Back in the United States, however, observers lament the rampancy of Chinese piracy, as they have for decades, if not longer.¹⁶⁵ Despite repeated expressions of concern, the United States has made little progress towards prodding China to protect IPR more robustly. This case asked whether the DSB might provide relief.¹⁶⁶

The United States challenged three aspects of China's IP regulatory scheme: (1) the unavailability of copyright protection for works not au-

163. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

164. *See Will China Protect Intellectual Property? New Developments in Counterfeiting, Piracy, and Forged Technology: Hearing Before the Cong.-Exec. Comm. on China*, 111th Cong. (2010) (statement of Greg Frazier, Executive Vice President, Motion Picture Association of America) (describing both the Silk Market and a store across the street where, despite three raids by Chinese authorities, one could still enter "a back room with virtually any pirated DVD [one] could want"), available at <http://www.cecc.gov/sites/chinacommission.house.gov/files/documents/hearings/2010/CECC%20Hearing%20Testimony%20-%20Greg%20Frazier%20-%20209.22.10.pdf>.

165. China's last empire, the Qing, introduced the country's first trademark regulation in 1904 and the first copyright law in 1910. *See* JIANQIANG NIE, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 179 (2006). Both laws were enacted in response to foreign pressure, applied in particular by Japan, the United States, and the U.K. *Id.* *See also* WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 36-37 (1995).

166. Most commentators agree that the United States did not achieve enhanced protection of IPR rights through this case. *See, e.g.,* Rogier Creemers, *The Effects of World Trade Organization Case DS362 on Audiovisual Media Piracy in China*, 31 *EUR. INTEL. PROP. REV.* 568, 575 (2009); Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 *NEB. L. REV.* 1046, 1083 (2011) ("For intellectual property rights holders, the most important question is . . . whether the resolution of this dispute would lead to substantive improvements in intellectual property protection and enforcement in China. The answer, unfortunately, is mostly negative.").

thorized for publication; (2) the disposal methods for counterfeit goods; and (3) the threshold of infringement necessary to initiate criminal proceedings under Chinese law.¹⁶⁷ In its ruling, the panel found for the United States on the first and second claims, but not the third. First, under the Trade Related Aspects of Intellectual Property Rights (TRIPS), a member state may prohibit the publication or distribution of certain works, but it cannot deny them copyright protection.¹⁶⁸ But China's Copyright Law specifically denied copyright protection to works whose publication or dissemination was prohibited by law.¹⁶⁹ Accordingly, the panel found that the unavailability of copyright protection under Chinese law, even to books it banned or censored, breached its obligations under TRIPS.¹⁷⁰

Second, the panel held that Chinese customs regulations also violated TRIPS.¹⁷¹ Chinese customs authorities permitted counterfeit goods to re-enter the stream of commerce once the infringing elements had been removed.¹⁷² In practice, that meant sellers of counterfeit goods could remove the alligator from a fake Lacoste shirt and then donate it to charity, sell it back to the manufacturer, or auction it off at a public sale. The panel found selling the product after simply removing the infringing trademark inconsistent with TRIPS.¹⁷³

The United States failed on its third claim, that China's criminal threshold for trademark or copyright infringement exceeded levels permissible under TRIPS.¹⁷⁴ The DSB determined that the United States had not satisfied its burden of proof to show that China's methods of calculating thresholds—which in fact were quite complicated—effectively shielded

167. Request for Consultations by the United States, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶¶ 1-3, WT/DS362/1 (Apr. 16, 2007).

168. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9(1), Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

169. See *Zhonghua Renmin Gongheguo Zhuzuoquan Fa* (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990), art. 4.

170. Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.181, WT/DS362/R (Jan. 26, 2009) [hereinafter DS362 January Panel Report].

171. *Id.* ¶ 7.395(c). The Customs Measures in fact refer to three different measures, but each deals with the disposal of infringing goods. *Id.* ¶ 7.196. Moreover, the panel only found that one of them, discussed below, actually violated TRIPS.

172. *Zhonghua Renmin Gongheguo Zhishi Chanquan Haiguan Baohu Tiaoli* (中华人民共和国知识产权海关保护条例) [Regulations on Customs Protection of Intellectual Property Rights] (promulgated by State Council of People's Rep. of China, Dec. 2, 2003, effective on Mar. 1, 2004), art. 27.

173. TRIPS Agreement, *supra* note 168, art. 46 (“[T]he simple removal of the trademark unlawfully affixed shall not be sufficient . . . to permit release of the goods into the channels of commerce.”) The Panel found that China's customs regulations allowed confiscated goods to be auctioned off once the infringing content had been removed. See *also*, DS362 January Panel Report, *supra* note 170, ¶ 8.1(b)(iii).

174. *Id.*, ¶ 7.681.

violators of IPR from criminal prosecution. Neither China nor the United States appealed the ruling, and China informed the DSB that it would implement the ruling within twelve months, by March 20, 2010.¹⁷⁵

Following the panel's ruling, China agreed to amend both its Copyright Law and the relevant customs regulations.¹⁷⁶ First, on February 26, 2010, the National People's Congress promulgated a revised Copyright Law, removing the denial of copyright protection to prohibited works.¹⁷⁷ According to one observer, this was the only amendment to the Copyright Law.¹⁷⁸ Yet the amendment did not dramatically alter the Copyright Law. Before the WTO case, Article 4 read "Works the publication or dissemination of which is prohibited by law shall not be protected by this Law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interest."¹⁷⁹ After the WTO case, China revised the law to state, "[c]opyright holders shall not violate the Constitution or laws or jeopardize public interests when exercising their copyright. The State shall supervise and administrate the publication and dissemination of works in accordance with the law."¹⁸⁰ China deleted the first sentence, kept the second sentence (now the first sentence of new Article 4) and added another sentence. The revisions halt the TRIPS's inconsistent practice of denying copyright protection to prohibited works. A copyright holder can, at least under international law, enjoy protection for his works, even if prohibited by domestic law. But the newly revised law continues to empower the state to decide what to publish and disseminate; it also positively grants copyright protection to prohibited or censored works.¹⁸¹

175. Communication from China and the United States Concerning Article 21.3(b) of the DSU, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS/362/13 (July 3, 2009).

176. See Status Report by China, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/14 (Jan. 8, 2010) (noting the amended law and regulations had been submitted to the State Council for consideration).

177. See Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, revised by Standing Comm. Nat'l People's Cong., Feb. 26, 2010), art. 4.

178. See Hong Xue, *A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law*, INFOJUSTICE 1, <http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf> (last visited May 14, 2014) (explaining that the sole revision in the amended law was to address the WTO concern).

179. Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990), art. 4.

180. Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, revised by Standing Comm. Nat'l People's Cong., Feb. 26, 2010), art. 4.

181. Admittedly, it would be odd for a law to grant copyright protection to a work it bans. Yet given the large number of works banned in China, and the number of works freely

Second, on March 17, 2010—two days before the reasonable period of time expired—the State Council issued a revised set of customs regulations.¹⁸² The new regulations addressed the concern about reintroducing counterfeit goods back into the channels of commerce by inserting one provision into Article 27: “[B]ut imported goods bearing a counterfeit trademark shall not, except in special circumstances, be permitted to enter the stream of commerce upon merely removing the trademark from the goods.”¹⁸³

At first blush, the revised regulation prevents counterfeit goods from reentering the channels of commerce, and thus addresses the United States’ concerns. But a closer reading suggests otherwise. The provision only applies to *imported* counterfeit goods: ones produced *outside* of China and then imported into China. The qualifier “imported” narrows the article’s scope and applicability: it does not cover counterfeits *produced in* China. Since China is the world’s largest producer of counterfeit goods, restricting the article’s scope to imported counterfeit products seems misplaced.¹⁸⁴

Moreover, it is bewildering that the revised regulations include the word “imported” at all. It does not elsewhere appear in Article 27, which deals with the disposal of counterfeit goods, not imports.¹⁸⁵ The only

flowing through underground channels, some positive grant of copyright protection would make clear that Chinese law adhered to TRIPS.

182. See Guowuyuan Guanyu xiugai <Zhonghua Renmin Gongheguo Zhishi Chanquan Haiguan Baohu Tiaoli> de Jueding (Quanwen) (《国务院关于修改〈中华人民共和国知识产权海关保护条例〉的决定》(全文)) [State Council Decision Concerning Revisions to the “Regulations on Customs Protection of Intellectual Property Rights of the PRC” (Complete)] (promulgated Mar. 17, 2010, effective Mar. 24, 2010) (China) (noting that the State Council Standing Committee passed the measures on March 17, 2010, and they become effective on April 1, 2010). An English summary of the revisions is also available. See *The State Council Decided to Amend IPR Customs Protection Regulations*, INTELLECTUAL PROPERTY PROTECTION IN CHINA (Mar. 30, 2010 11:35:32 AM), http://www.chinaipr.gov.cn/lawsarticle/laws/lawsar/others/201003/632083_1.html.

183. Guowuyuan Guanyu xiugai <Zhonghua Renmin Gongheguo Zhishi Chanquan Haiguan Baohu Tiaoli> de Jueding (Quanwen) (《国务院关于修改〈中华人民共和国知识产权海关保护条例〉的决定》(全文)) [State Council Decision Concerning Revisions to the “Regulations on Customs Protection of Intellectual Property Rights of the PRC” (Complete)] (promulgated Mar. 17, 2010, effective Mar. 24, 2010) (China), art. 27.

184. According to the United Nations, China is the world’s largest counterfeiter. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, TRANSNATIONAL ORGANIZED CRIME IN EAST ASIA AND THE PACIFIC: A THREAT ASSESSMENT 123 (2013), available at http://www.unodc.org/documents/southeastasiaandpacific/Publications/2013/TOCTA_EAP_web.pdf (detailing the prevalence of counterfeit goods in China and noting that between 2008 and 2010, “China was the departure point for roughly 67% of worldwide seizures”).

185. Paragraph three of Article 27 now reads “Where the confiscated goods that infringe on intellectual property rights can be used for the social public welfare undertakings, Customs shall hand such goods over to relevant public welfare bodies for the use in social public welfare undertakings. Where the holder of the intellectual property rights intends to buy them, Customs can assign them to the holder of the intellectual property rights with compensation. Where the confiscated goods infringing on intellectual property rights cannot be used for social public welfare undertakings and the holder of the intellectual property

other usage of the term “import” in this chapter of the regulations, on legal liability, references both imports and exports.¹⁸⁶ In sum, the revised regulations only address one small element of the problem of reintroducing counterfeit goods into channels of commerce: counterfeits *imported into* China. This deficiency calls into question analyses about China’s WTO commitments. One commentator has argued that the language of revised Article 27 “shows the country’s good faith effort in bringing its laws into conformity with the TRIPS Agreement” and “sends a strong signal to the international community that China takes its WTO obligations seriously.”¹⁸⁷ That seems to be an overly generous interpretation. By inserting the word “imported” into this provision, China dramatically shrank its applicability. Indeed, the revised regulation does not address the substantive problem raised by the panel, instead covering one small subset of counterfeit goods. The revised regulation arguably protects China’s counterfeit industry from imported competition.

At the March 19, 2010 DSB Meeting, China asserted that it had completed all necessary domestic legislative procedures to implement the ruling.¹⁸⁸ The United States, however, disagreed with this assessment, pointing out that the “reasonable period of time” would expire on March 20, 2010, the day after the meeting, and that China had still not made some required changes.¹⁸⁹ Since the regulations came into effect on April 1, 2010, shortly after the expiration time, the United States had a point. In a subsequent DSB Meeting, the United States noted China’s failure to present a status report.¹⁹⁰ The United States disagreed with China’s self-assessment of full implementation, but it did not specify those areas where implementation was flawed. The United States also noted it was working “bilaterally” with China to resolve lingering issues.¹⁹¹

rights has no intention to buy them, Customs can, after eradicating the infringing features, auction them off according to law. *But imported goods bearing counterfeit trademarks, except in special circumstances, shall not be permitted to enter the stream of commerce upon merely removing the trademark from the goods.* Where the infringing features are impossible to eradicate, Customs shall destroy the goods. Guowuyuan Guanyu xiugai <Zhonghua Renmin Gongheguo Zhishi Chanquan Haiguan Baohu Tiaoli> de Jueding (Quanwen) (《国务院关于修改〈中华人民共和国知识产权海关保护条例〉的决定》(全文)) [State Council Decision Concerning Revisions to the “Regulations on Customs Protection of Intellectual Property Rights of the PRC” (Complete)] (promulgated Mar. 17, 2010, effective Mar. 24, 2010) (China), art. 27.

186. *Id.* art. 29 (“Where the importation or exportation of goods infringing intellectual property rights constitutes a crime, the offender shall be prosecuted for criminal liability according to law.”).

187. Yu, *supra* note 166, at 1092.

188. See World Trade Org. Dispute Settlement Body, Minutes of Meeting, ¶ 58, WT/DSB/M/280 (May 28, 2010).

189. *Id.* ¶ 59.

190. See World Trade Org. Dispute Settlement Body, Minutes of Meeting, ¶ 83, WT/DSB/M/282 (June 18, 2010).

191. *Id.*

China implemented the ruling within a reasonable period of time, or reasonably close thereto. One could quibble about the timing of the customs regulations: does the timeliness inquiry target the State Council's approval of the revised regulations (March 17), public announcement of its approval (March 24), or the date the regulations became effective (April 1)? Regardless, all three dates are close enough to the March 20 expiry date to moot the issue for this analysis.

But the issue of quality is debatable. To be sure, China complied with the obligation to revise part of the Copyright Law. But China revised its customs regulations to avoid the clear language and purpose of the DSB. By covering only *imported* counterfeit goods, the revised regulation guts the provision of its primary effect, to limit agency discretion in disposing of seized counterfeits, and its secondary effect, to discourage Chinese counterfeiting. In reality, the revised regulation *protects* China's fake-goods industry by limiting this disposal method to *imported* counterfeits. This case highlights the thinness of paper compliance. China revised the regulations ostensibly to incorporate the DSB ruling, but the revisions benefit Chinese counterfeiters, harm foreign counterfeiters, and thwart the purpose of the ruling and the case itself.

B. *Trading Rights & Distribution Services for Publications & Audiovisuals (DSB 363)*

The Chinese government has long censored the importation of foreign cultural and informational products.¹⁹² Currently, the General Administration of Press and Publication (GAPP) is the primary agency that decides which books, newspapers, periodicals, audiovisual (AV) products and other publications may enter China.¹⁹³ GAPP does this directly, through monitoring content. But it also exercises indirect control by authorizing publishers, distributors, and Internet sites to import cultural products.¹⁹⁴ GAPP also coordinates with two other agencies—the State Administration on Radio, Film and Television¹⁹⁵ and the Ministry of Culture¹⁹⁶—to review content of these various media. In addition, the Ministry of Culture selects which entities may import finished audiovisual products such as CDs and DVDs.¹⁹⁷ In this way, the Chinese government

192. Qin, *supra* note 19, at 271-72.

193. *Agencies Responsible for Censorship in China*, CONG.-EXECUTIVE COMMISSION ON CHINA, <http://www.cecc.gov/agencies-responsible-for-censorship-in-china> (last visited May 14, 2014).

194. *Id.*

195. The State Administration on Radio, Film and Television (“SARFT”) performs final content review of films for theatrical release. See Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 159, WT/DS363/AB/R (Dec. 21, 2009).

196. The Ministry of Culture performs final content review of AV products. See *id.* ¶ 153.

197. Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 7.630–7.631, WT/DS363/R (Aug. 12, 2009) [hereinafter DS363 August Panel Report].

tightly controls informational flow within its borders, while ensuring that the authorizing agency remains under strict control. The entities selected to import cultural products remain, as far as is publicly known, state-owned enterprises.¹⁹⁸

In this dispute, the United States charged that Chinese laws and regulations restricted trading rights and market access for cultural products. First, the United States alleged that China reserved to state-owned enterprises (SOEs), the right to import publications, sound recordings, audiovisual home entertainment products (DVDs, VHS cassettes), and films for theatrical release. By excluding foreign firms from this type of trade, the United States argued, China violated national treatment principles found in both GATT and China's Accession Protocol.¹⁹⁹ Second, the United States claimed China limited the distribution of publications and audiovisual home products by foreign providers, violating the market access provisions of General Agreement on Trade Services (GATS).²⁰⁰ Third, the United States challenged various measures that restricted distribution channels for publications and limited the number of film distributors to two government-approved SOEs.²⁰¹

The panel report, nearly 500 pages long, found over two dozen WTO violations sprinkled throughout various Chinese regulations, catalogs, rules, opinions and other legal instruments.²⁰² In total, the panel found provisions of sixteen different regulations inconsistent with GATS, GATT or a China-specific instrument (AP, WPR).²⁰³ The Appellate Body upheld the panel's decisions both substantively and procedurally and further clarified the application of Article XX defenses to China's Accession Protocol.²⁰⁴ The AB's affirmation of the panel report suggests China's appellate arguments were not particularly strong. One could interpret

198. Qin, *supra* note 19, at 283.

199. DS363 August Panel Report, *supra* note 197, ¶ 2.3(a). Paragraphs 5.1 and 5.1 of the AP I requires. GATT XI(1) prohibits quotas and other trade-restrictive measures.

200. *Id.* ¶ 2.3(b).

201. *Id.* ¶ 2.3(c).

202. I count twenty-nine: twelve AP violations, fifteen GATS violations, and two GATT violations. See DS363 August Panel Report, *supra* note 197, ¶¶ 8.1(2)(a)–(d) (finding twelve provisions, from nine different regulations, to be inconsistent with China's commitments to open up trading rights in the Accession Protocol); *id.* ¶¶ 8.2(3)(a)–(c) (finding fifteen provisions, from eight different regulations, to be inconsistent with the national treatment provisions—Articles XVI and XVII—of GATS); *id.* ¶¶ 8.2(4)(a)(i), 8.2(4)(a)(iii) (finding two provisions, from three regulations, to violate the national treatment principle—Article III(4)—of GATT). This again suggests the difficulty of bringing WTO cases against China. The sheer number of provisions that may violate WTO agreements would overwhelm any country without a sophisticated trade department, expertise in Chinese law, wherewithal to comb through dozens of regulations (not all of them translated into English, despite China's WTO commitments), expertise to link a suspect provision with a corresponding WTO violation, and the resources to litigate in the WTO.

203. See *id.* ¶¶ 8.1(2)–8.2(4)(a)(iii). See also *infra* App. 3 (listing the sixteen articles, certain provisions of which were found to be inconsistent with WTO agreements).

204. The AB also upheld the procedural aspects of the Panel Report and delimited the boundaries of the “public morals” defense that China put forward as a defense. See generally

China's use of the appeal procedure as a ploy to postpone the ruling's effect, another indication of its increasing sophistication in deploying the DSB's procedural mechanisms. Given the radical overhaul of China's censorship system necessary to effectuate the ruling, delay was probably unavoidable. China may have bought itself some additional time through the appeal. But for the first time, China did not timely implement the DSB's recommendations.

Shortly after the DSB issued its report, China and the United States agreed fourteen months would constitute a "reasonable period of time" to implement the ruling and recommendations; China would achieve full compliance by March 19, 2011.²⁰⁵ A few days before the March 19 due date, China issued a status report, expressing "serious concerns" about the AB's and panel's judgments and highlighting the "complexity and sensitivity" of the measures singled out therein.²⁰⁶ Despite "tremendous efforts" to implement the DSB's rulings and recommendations, China would not be able to do so fully or in a timely manner.²⁰⁷ China did, however, note it had made some progress by issuing two regulations: one on AV products ("Decree 595") and one on publications ("Decree 594").²⁰⁸

The two regulations resolved some of the violations described in the panel report. For instance, the panel determined that China's Publications Regulations only permitted SOEs (but not foreign-invested or private enterprises) to import certain types of publications.²⁰⁹ Such a restriction violated China's obligations under the Working Party Report (WPR), which "confirmed that within three years after accession (i.e., 2004), all enterprises in China would be granted the right to trade."²¹⁰ Decree 594 ad-

Wu, *supra* note 19 (criticizing the literalist approach of WTO adjudicators and promoting a more holistic approach to interpretation).

205. See Status Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/17/Add.2 (Mar. 15, 2011).

206. See *id.*

207. *Id.*

208. *Id.* See also Guowuyuan Guanyu Xiugai 'Chuban Guanli Tiaoli' de Jueding (国务院关于修改“出版管理条例的决定”的决定) [State Council Decision Concerning Revisions to the 'Publishing Management Regulations'] (promulgated by the State Council, Mar. 16, 2011, effective Mar. 19, 2011) (China) [hereinafter Decree 594]; Guowuyuan Guanyu Xiugai 'Yinxiangzhipin Guanli Tiaoli' de Jueding (国务院关于修改“音像制品管理条例”的决定) [State Council Decision Concerning Revisions to the 'Audiovisual Product Management Regulations'] (promulgated by the State Council, Mar. 16, 2011, effective Mar. 19, 2011) [hereinafter Decree 595].

209. See DS363 August Panel Report, *supra* note 197, ¶ 7.398.

210. Working Party Report, *Report of the Working Party on the Accession of China*, ¶ 83(d), WT/ACC/CHN/49 (Oct. 1, 2001). The regulation also violated paragraph 84(a). *Id.* ¶ 84(a) ("China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO members, to export and import all goods . . . throughout the customs territory of China.").

dressed this problem by eliminating the regulation's specific phrase that only SOEs could qualify as importers.²¹¹

The panel further held that the Publication Regulations permitted Chinese government agencies to exercise discretion in granting the right to import newspapers and periodicals to foreign-invested enterprises.²¹² Yet the WPR required China to grant trading rights "in a non-discriminatory and non-discretionary way."²¹³ Despite China's commitments in the WPR, however, the Publication Regulations permitted GAPP to "designate" which entities could import newspapers and periodicals. This left GAPP "free to decide whom it wishes to designate from among [a list of approved entities]."²¹⁴ This exercise of discretion violated the explicit language of the WPR. Decree 594 excised language from the regulations granting GAPP the power to designate.²¹⁵

But the regulations did not fully resolve all the inconsistencies raised by the panel. In the status report, China claimed that it had "completed amendments to most measures at issue," specifically citing Decrees 595 and 594 as proof of "the sincerity of Chinese Government to implement the rulings and recommendations of the DSB."²¹⁶ The panel determined that China's audiovisual regulations, like the publication regulations discussed above, permitted government agencies to exercise discretion when deciding which entities to grant a license to import.²¹⁷ Moreover, the regulations contained neither processes by which an entity could submit applications, nor criteria for obtaining a license.²¹⁸

The WPR specifically prohibits Chinese agencies from exercising discretion when granting trading rights.²¹⁹ The challenged audiovisual regulations permitted the relevant government agency—here, the Ministry of Culture—to exercise discretion in granting trading rights. Decree 595, issued to cure problems outlined in the panel report,²²⁰ did not address the issue of discretion in licensing. The Decree does make some cosmetic changes. It changes the agencies responsible for certain tasks from the

211. Decree 594, *supra* note 208, art. XXI (eliminating the SOE requirement from Article 42(1)(ii)).

212. See DS363 August Panel Report, *supra* note 197, ¶ 7.437. A foreign-invested enterprise is an independent business entity backed by foreign (non-Chinese) capital. In China, the most common forms include contract joint ventures, equity joint ventures, and wholly foreign-owned enterprises.

213. Working Party Report, *supra* note 210, ¶ 84(b).

214. See DS363 August Panel Report, *supra* note 197, ¶ 7.436.

215. Decree 594, *supra* note 208, art. XX.

216. Status Report by China, *China – Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS373/17/Add.2 (Mar. 15, 2011).

217. DS363 Panel Report, *supra* note 197, ¶¶ 7.633, 7.656–7.657.

218. *Id.* ¶ 7.656.

219. *Id.* ¶ 7.657; see also Working Party Report, *supra* note 210, ¶ 84(b).

220. Status Report by China, *China – Measures Affecting Trading Rights and Distribution Devices for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/17/Add.2 (Mar. 15, 2011).

Ministry of Culture to GAPP.²²¹ In the context of determining which entities may import finished audiovisual products, it replaces the word “designate,” which implies the use of discretion, with “approve,” which suggests a formal process.²²² But it leaves intact Article 5, which the panel specifically found inconsistent.²²³ The Decree introduces no additional criteria for licensing, nor does it include an application process, problems that the panel specifically cited in its analysis.²²⁴ Instead, trading rights can still be granted in a discretionary manner, continuing the violation of which the United States first complained.

When the reasonable period of time passed in March 2011, China still had a lot to do. In a subsequent status report, China described these steps as yet to be completed: passing an additional regulation,²²⁵ publishing a draft catalog for public comment,²²⁶ repealing three measures,²²⁷ and re-

221. See Decree 595, *supra* note 208, art. I (changing the agency in charge of supervising imports from the Ministry of Culture to GAPP). Compare Yinxiang Zhipin Guanli Tiaoli (音像制品管理条例) [Regulations on Administration of Audio-visual Products] (promulgated by the State Council on Dec. 25, 2001, effective Feb. 1, 2002), art. 4 (splitting tasks between GAPP and the Ministry of Culture), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/14/content_1384239.htm. See also Decree 595, *supra* note 208, art. X (changing the responsible agency for approving entities to import finished audiovisual from Ministry of Culture to GAPP).

222. Decree 595, *supra* note 208, art. X.

223. *Id.*

224. DS363 August Panel Report, *supra* note 197, ¶ 7.656.

225. See Status Report by China, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications*, WT/DS363/17/Add.3 (Apr. 11, 2011) [hereinafter April 11 Status Report] (noting revisions to the *Provisions on the Administration of the Publications Market*). The revised Provisions establish requirements and procedures for distributors, wholesalers and retailers of various publications. Chubanwu Shichang Guanli Guiding (出版物市场管理规定) [Provisions on the Administration of the Publications Market] (promulgated by GAPP and Ministry of Commerce, effective Mar. 25, 2011), order no. 52 (China). The revised Provisions also repealed four regulations: (1) the 2004 version of the *Provisions*; (2) *Measures on Administering Wholesale, Retail and Rental of Audiovisual Products*; (3) *Publications Sub-Distribution Rule*; and (4) *Audiovisual Sub-Distribution Rule*. *Id.* art. 45.

226. See April 11 Status Report, *supra* note 225 (describing the publication of *Catalogue of Industries for Guiding Foreign Investment*). The new catalogue issued in late 2011 and can be subdivided into encouraged, restricted, and prohibited industries for foreign investment. Waishang Touzi Chanye Zhidao Mulu (2011 Nian Xiuding) (外商投资产业指导目录(2011年修订)) [Catalogue of Industries for Guiding Foreign Investment (2011 Revision)] (promulgated by the NDRC and Ministry of Commerce, Dec. 24, 2011) order no. 12 (China).

227. According to the status report, China repealed (1) GAPP & MOFTEC, order no. 18, *Measures for Administration of Foreign-Invested Book, Periodical and Newspaper Distribution Enterprises* (2003) (“Publication (Sub-) Distribution Rule”); (2) Ministry of Culture & Ministry of Commerce, order no. 28 *Measures for Administration of Sino-foreign Distribution Contractual Joint Ventures of Audiovisual Products* (2004) (“Audiovisual (Sub-)Distribution Rule”); and (3) GAPP, order no. 11, *Provisions on the Administration of Publishing Electronic Publications*, (1997) (“1997 Electronic Publications Regulation”). See Status Report by China, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/17/Add.15 (Apr. 13, 2012) [hereinafter April 13 Status Report]. The first two measures were repealed in the 2011 Provisions

vising four additional measures.²²⁸ China thus claimed—with the singular exception of foreign film releases, discussed below—it had “ensured full implementation of the DSB’s recommendation and rulings.”²²⁹ But this assessment remains premature, for several inconsistent regulations remain in effect. For example, the Panel found Article 4 of *Several Opinions on Introducing Foreign Capital into the Cultural Sector* to be inconsistent with China’s obligations under both GATS and the AP.²³⁰ This regulation prohibited foreign investment in various sectors, from establishing news agencies, radio stations, television stations, Internet service providers and motion picture import companies, to importing books, newspapers, periodicals, audiovisual products, and electronic publications.²³¹ The United States challenged certain aspects of this regulation, including those relating to motion picture import companies and the importation of books, newspapers and periodicals. Yet the regulation remains in effect. Indeed, years after the ruling, provincial and city-level governments encourage local offices of culture to “earnestly and thoroughly implement” the regulation.²³² Far from repealing this regulation, then, local Chinese government officials urge its application.

noted above. See April 11 Status Report, *supra* note 225. The third was repealed by a new set of provisions introduced in February 2008. See Provisions on the Administration of Electronic Publications (promulgated by General Administration of Press and Publication, Feb. 21, 2008) order no. 34 (China). Art. 63 repeals the 1997 Provisions. Together, the three regulations posed a total of seven violations: PSDR (4), ASDR (2), and EPR (1).

228. See April 13 Status Report, *supra* note 227, at 2. The status report mentioned three regulations described above: (1) *Regulations on the Management of Publications*, (2) *Regulations on the Management of Audiovisual Products*, (3) *Provisions on the Administration of the Publications Market*. See *id.* In addition, the status report noted revisions to (1) *Catalog of Industries for Guiding Foreign Investment*; (2) *Measures for Administration of Subscription of Imported Publications by Subscribers* (aka *Imported Publications Subscription Rule*); (3) *Measures on the Administration of Importation of Audiovisual Products* (aka *Audiovisual Products Import Rules*); (4) *Several Opinions of the Ministry of Culture on Development and Administration of Network Music*. See *id.*

229. *Id.*

230. See DS363 August Panel Report, *supra* note 197, ¶¶ 7.374, 7.1043 (finding violations of the Accession Protocol and GATS XVII).

231. Guanyu Wenhua Lingyu Yinjin Waizide Ruogan Yijian (关于文化领域引进外资的若干意见) [Several Opinions on the Introduction of Foreign Capital into the Culture Sector] (promulgated by the Ministry of Culture) order no. 19, art. 4 (2005), available at <http://wenku.baidu.com/view/c023b26048d7c1c708a14548.html>. See also DS363 August Panel Report *supra* note 197, ¶ 7.363.

232. The regulation is listed as valid on websites in both English and Chinese. See, e.g., Wenhuaabu, Guojia Guanbo Dianying Dianshi Zongju, Zinwen Chuban Shu, Guojia Fazhan He Gaige Wei Yuanhui, Shangwubu Guanyu Wenhua Lingyu Yinjin Waizideruogan Yijian (文化部、国家广播电影电视总局、新闻出版署、国家发展和改革委员会、商务部关于文化领域引进外资的若干意见) [Several Opinions of the Ministry of Culture, State Administration of Radio, Film and Television, General Administration of Press and Publication, National Development and Reform Commission, and the Ministry of Commerce on Canvassing Foreign Investment into the Cultural Sector] (effective June 7, 2005) (China) (listing the regulation as effective in English). Recently, several local and provincial government bodies have released notices directing local Cultural Affairs offices “earnestly and thoroughly to implement the regulation.” See, e.g., Shaanxisheng Wenhuating Zhuanfa

Several other inconsistent regulations remain in effect. For example, *Regulations on the Administration of Films*,²³³ *Film Enterprise Rule*,²³⁴ and *Network Music Opinions*²³⁵—all of which contained at least one inconsistent provision—remain in effect. It is possible that certain issues, such as importing films into Chinese cinemas, were resolved bilaterally between China and the United States. But the fact that these regulations remain on the books means that other WTO members may still not access various sectors of the Chinese internet, film, and publication markets. It also belies China’s claim of achieving “full implementation” of the DSB’s recommendations.

The final piece of the implementation puzzle took shape in a May 2012 MOU between the United States and China, resolving issues about distribution and the release of foreign films in Chinese theaters. China

Wenhua Budengbumen Guanyu Wenhua Lingyu Yinjin Waizide Ruogan Yijiande Tongzhi (陕西省文化厅转发文化部等部门关于文化领域引进外资的若干意见的通知) [Notice from the Shaanxi Province Ministry of Culture Telling the Office of Culture and Other Departments about Several Opinions on Introducing Foreign Capital into the Cultural Sector] (effective Sept. 4, 2012) (China), available at govinfo.nlc.gov.cn/shanxsxz/xxgk/sxswht/201209/t20120904_2515104.shtml? classid=401.

233. *Dianying Guanli Tiaoli* (电影管理条例) [Regulation on the Management of Films] (promulgated by State Council Dec. 25, 2001) order no. 342 (China) [hereinafter *Film Regulation*], available at <http://www.sarft.gov.cn/articles/2007/02/16/20070913144431120333.html>. The panel found Article 30 gave SARFT discretion to designate film-importing entities, in violation of the Working Party Report. DS363 August Panel Report, *supra* note 199, ¶ 7.576. The State Council listed this regulation as “adjusted” in its *Sixth Decision to Cancel and Adjust Administrative Approval Programs*. See Guowuyuan Guanyu Diliupi Quxiao he Tiaozheng Xingzheng Shenpi Xiangmude Jueding, (国务院关于第六批取消和调整行政审批项目的决定) [Sixth Decision to Cancel and Adjust Administrative Approval Programs], order 52 (2012), available at http://www.gov.cn/zwgg/2012-10/10/content_2240096.htm. Yet the *Decision* merely states that provincial level agencies, instead of the central-level SARFT, will oversee the regulation’s implementation. See *id.* app. 2, arts. 64–65. It does not state whether its provisions—including Article 30, which violated China’s Accession Protocol—have been amended. Several government websites indicate that the regulation is still in effect. See, e.g., *Faliu Fagui Shujuku*, (法律法规数据库) [*Law and Regulation Database*], FAZHIWANG [LEGAL DAILY], http://law.legaldaily.com.cn/law_content.php?law_id=ebe922af8d4560c73368a88eeac07d167626&key_word (last visited May 14, 2014) (listing the regulations as in effect). Legal Daily is a Chinese newspaper run by the Ministry of Justice. See also Jiangyin City Cultural Broadcasting News and Publication Bureau, <http://wgxj.jiangyin.gov.cn/swgxj/sitePages/subPages/1350750001183742.html> (listing the regulations as in effect).

234. *Dianying Qiye Jingying Zige Zhunru Zanxing Guiding* (电影企业经营资格准入暂行规定) [Provisional Rules on Entry Criteria for Operating Film Enterprises] (promulgated by SARFT & Ministry of Commerce) (2004), available at <http://www.sarft.gov.cn/articles/2004/11/10/20091203144241960335.html>. The panel found Article 16, which vested the approval of film-importing enterprises in SARFT, inconsistent with GATS. See DS363 August Panel Report, *supra* note 197, ¶ 7.598 (“[B]y providing in Article 16 that only SARFT-approved enterprises may import films, China has failed to ensure that all enterprises in China have the right to import films.”). This violated the trading rights provisions of the Working Party Report, paras. 83(d) and 84(a). *Id.*

235. *Wangluo Yinyue Fazhan he Guanlide Ruogan Yijian* (网络音乐发展和管理的若干意见) [Several Opinions on the Development and Management of Network Music] (promulgated by Ministry of Culture, Dec. 11, 2006) (China).

would permit fourteen “enhanced-format” films (3D, IMAX, etc.) per calendar year, in addition to the twenty films currently permitted under China’s GATS schedule.²³⁶ Most germane to the present discussion, “China agreed that the licensing of [film] distributors would be conducted in a *non-discretionary* and *non-discriminatory* manner.”²³⁷ This language addresses various cases wherein the panel determined Chinese agencies exercise discretion in the approval process.

But some skepticism is warranted. Many inconsistent laws remain in effect, and their influence is amplified by provincial and local-level regulations that cite to them. Even if Chinese officials negotiated the Memorandum of Understanding [MOU] in good faith and pledged that licensing would take place in a certain manner, local authorities may not heed their call. With inconsistent regulations still on the books, local authorities can invoke them to promote local interests. Indeed, by transferring approval authority from the central level to the provincial level, as certain regulations do,²³⁸ it is now *less* likely that the central government can control the approval process as envisioned in the MOU. More likely, a local official will exercise his newfound control in a discretionary or discriminatory manner. The local official may simply not know about the MOU, or may have plausible reasons—promoting a local company at the expense of a foreign one, for example—to ignore its mandate.

In this case, China failed to implement its WTO commitments. Qin writes the failure is “not surprising.”²³⁹ Full implementation would have required completely dismantling the Chinese government’s monopoly on importing information and culture, as well as the vast censorship regime embedded within it. China made good-faith efforts, as outlined above, to implement the decision. And the United States and China both signed an MOU ending the dispute. Yet a number of regulations remain in effect, suggesting that China did not even reach paper compliance here. But the United States, by signing the MOU, chose to end the dispute, perhaps because the film industry was satisfied with, or at least resigned to the inevitability of, the terms.

C. *Financial Information Services (DSB 373, March 2008)*

A similar case involved Chinese restrictions on financial-information providers. The United States—later joined by the European Communities and Canada—alleged that China restricted market access and applied discriminatory requirements to foreign providers.²⁴⁰ In its March 2008 re-

236. Joint Communication from China and the United States, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/19 (May 11, 2012).

237. *Id.* ¶ 5 (emphasis added).

238. See, e.g., DS363 August Panel Report, *supra* note 197, ¶ 7.1680(D).

239. Qin, *supra* note 19, at 272.

240. See Request for Consultations by the United States, *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373/1, S/L/320 (Mar. 5, 2008).

quest for consultations, the United States submitted a dozen Chinese regulations that obstructed foreign companies from supplying financial information to PRC end-users.²⁴¹

The United States claimed that foreign providers had to channel their services through a commercial entity designated by Xinhua News Agency, itself a government department. Xinhua, however, ran a competing financial information service called “Xinhua 08,” creating a conflict of interest.²⁴² The United States further alleged that China prohibited users from directly subscribing to services provided by foreign suppliers. Finally, and perhaps most controversially, foreign providers had to hand commercially valuable information—including confidential information about services and customers—over to China’s Foreign Information Administration Center. This case thus also challenged China’s monopoly on commercially valuable knowledge, part of the informational infrastructure and censorship complex. The sum of these requirements accorded foreign service-providers less favorable treatment than comparable Chinese providers, such as Xinhua. The United States claimed these measures prevented foreign suppliers from establishing a meaningful commercial presence in China, violating GATS and the Accession Protocol.

The case settled quickly, perhaps so China could keep its informational infrastructure intact. On December, 4, 2008, China and the United States informed the DSB that they had signed a three-pronged MOU.²⁴³ First, by January 31, 2009, China agreed to appoint a new regulator of financial information services not accountable to another financial information provider. China further guaranteed that the instrument appointing this new regulator would supersede a 1995 Circular, which “will no longer be implemented.”²⁴⁴ Second, China agreed to issue new measures by April 30, 2009 that would “replace” the licensing scheme established under a 2006 regulation.²⁴⁵ These measures would permit foreign providers to supply financial information without a Chinese agent or intermediary, would accord them treatment no less favorable than that received by Chinese providers, and would conform to commitments China made in the Working Party Report.²⁴⁶ Third, China would issue new measures by January 31, 2009 so that foreign providers would be subject to the new regulator.

241. *Id.* at 2–3.

242. See European Comm’n, Directorate-General for Trade, *China – Measures Affecting the Supply of Financial Information Services (“Xinhua”): State of Play 1* (June 25, 2009), available at http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144159.pdf.

243. See Joint Communication from China and the United States, *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373/4, S/L/320/Add.1 (Dec. 9, 2008).

244. See *id.* ¶ 2(f).

245. *Id.* ¶ 2(a).

246. *Id.* ¶ 2(b).

On January 29, 2009, China's State Council issued Order 548.²⁴⁷ The Order transferred approval authority from Xinhua to the State Council Information Office.²⁴⁸ It did not, however, annul the 1995 Circular, a serious omission of the pledge to "replace" the 1995 Circular. Moreover, various Chinese government websites—including Legal Daily, an official news outlet administered by the Ministry of Justice—list the 1995 Circular as "in effect."²⁴⁹ As above, local- and provincial-level agencies cite the Circular as effective law, and make policy and approval decisions accordingly. Since the 1995 Circular significantly disadvantages foreign enterprises, the possibility of new obstacles for foreign news - and information - providers remains distinct.²⁵⁰

On April 30, 2009, China issued new administrative measures ("2009 Measures"),²⁵¹ which take steps towards insuring the DSB's ruling. First, the 2009 Measures designate the State Council Information Office [SCIO] as the new regulator and require it to protect commercially valuable information received in the approval process.²⁵² Second, the Measures also specify the procedures and requirements a foreign provider must meet in order to supply financial information services in China.²⁵³ The SCIO will make the decision to approve, or not, within 30 days of the application; if the office disapproves an application, it will notify the applicant with written reasons.²⁵⁴ Third, the Measures allow foreign providers to supply financial information directly to customers in China, instead of going through an intermediary like the China Economic Information Service.

247. Guowuyuan Guanyu Xiugai "Guowuyuan Dui Quexu Baoliude Xingzheng Shenpi Xiangmu Sheding Xingzheng Xukede Jueding"

(国务院关于修改“国务院对确需保留的行政审批项目设定行政许可的决定”) [Decision of the State Council to Amend the "Decision on Establishing Administrative Permission for the Administrative Examination and Approval of Items that Must Be Retained"] (promulgated by the State Council of the People's Rep. of China, Jan. 29, 2009, effective Jan. 29, 2009).

248. *Id.* art. 2 (transferring authority to approve financial information service providers); *Id.* art. 3 (transferring authority to approve foreign news agencies).

249. *See, e.g.*, Guowuyuan Bangongting Guanyu Shouquan Xinhua Tongxunshe Dui Waiguo Tongxunshe Ji Qi Suoshu Xinxi Jigou Zai Zhongguo Jingnei Fabu Jingji Xinxi Shixing Guikou Guanli Tongzhi [State Council on the Implementation of the Notification Authorized Xinhua News Agency Centralized Management of Foreign News Agencies and Their Information Agencies Released Economic Information in China] (effective Dec. 31, 1995), http://law.legaldaily.com.cn/law_content.php?law_id=3556a3018c3e3076e27dbbf9645b44d58956&key_word= [hereinafter Circular].

250. *See, e.g., id.* art. 5 ("No department or unit may directly subscribe to a foreign news agency, or its informational affiliates, for economic information.").

251. Provisions on Administration of Provision of Financial Information Services in China by Foreign Institutions [Waiguo Jigou zai Zhongguo Jingnei Tigong Jinrong Xinxi Fuwu Guanli Jueding] (promulgated by State Council Information Office, Ministry of Commerce, and State Administration for Industry and Commerce, Apr. 30, 2009, effective June 1, 2009), http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144158.pdf.

252. *Id.* arts. 4, 12.

253. *Id.* arts. 5–6.

254. *Id.* art. 7. If implemented, this provision would go a long way towards shedding light on China's opaque administrative decision-making.

Fourth, foreign providers may now independently establish a full commercial presence in China, through a fully foreign-invested enterprise, and engage in a broader array of commercial activities. The 2009 Measures derive from the SCIO and Ministry of Commerce, placing them above Xinhua in the legal hierarchy.

China timely implemented most of the commitments made in the MOU, passing two regulations to level the inequality of treatment between foreign and domestic providers. But this only provides paper compliance. By leaving the 1995 Circular in effect, China still subjects foreign service-providers to onerous requirements. The 2009 Measures address many problems of the 1995 Circular, including a catch-all provision to annul prior regulations “inconsistent” with the 2009 Measures. But the offending provisions of the 1995 Circular do not directly contradict the 2009 Measures; rather, they impose obligations on foreign providers not placed on Chinese ones.²⁵⁵ As in the audiovisuals case (DS 363), China leaves regulations in effect that could prejudice foreign companies. China achieved paper compliance by introducing the two new regulations, but also left in effect a regulation that could be used to discriminate against foreign companies.

Since the number of WTO cases involving China is small, certitude about China’s future conduct in the DSB would be inapt. But certain patterns are clear. First, in the majority of cases, China has revised its legal and regulatory systems to comply with the DSB rulings. It has done so typically within the reasonable period of time in which it agreed to do so and has accumulated a strong record in terms of the quality of its implementation. Moreover, as of July 2013, no Chinese case has gone into compliance proceedings, wherein an arbitration panel determines the costs of one country’s non-compliance to other WTO members. This is a significant difference from other major trading partners, such as the United States, E.U., and Japan, all of which have been respondents in compliance proceedings.²⁵⁶ Some of these cases have dragged on for more than a decade, indicating a resistance to WTO rulings far and above anything that China has exhibited.

Second, China has found ways to resist WTO rulings and norms. Inconsistent regulations remain in effect. In the three cases discussed above—DS 362 (intellectual property enforcement), DS 363 (trading rights for publications) DS 373 (financial information services)—inconsistent regulations either continue in effect or were revised so as *not* to effec-

255. See Circular, *supra* note 249, art. 5 (“No department or unit may directly subscribe to a foreign news agency, or its informational affiliates, for economic information.”). This provision does not contradict any language in the 2009 Measures.

256. See, e.g., *Japan – Measures Affecting the Importation of Apples*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds245_e.htm (last visited May 14, 2014) (DS 245); *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (last visited May 14, 2014) (DS 26); *U.S. – Measures Relating to Zeroing and Sunset Reviews*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds322_e.htm (last visited May 14, 2014) (DS 322).

tuates the purpose of the ruling. This lacuna could be a function of institutional capacity. China's capacious bureaucratic institutions produce reams of regulations; it is unclear whether many of them keep close tabs on the various regulations they produce, and quite definite that some of them have not *repealed* regulations found to be inconsistent. Or there may be a more sinister explanation: China wants to keep the inconsistent regulations in place, and understands that its regulatory maze may be too labyrinthine for other WTO members to navigate. Whether by design or neglect, a number of inconsistent regulations continue to plague China's compliance record. Moreover, local and provincial-level regulations often amplify the effects of inconsistent national regulations. In cases such as DS 363 and DS 373, lower-level government agencies have promulgated policies that reference regulations that were either revoked or found inconsistent. This means that WTO-inconsistent regulations will cast a regulatory afterglow at various levels of the Chinese legal system.

The most striking case of non-compliance, so far, has been the trading rights case (DS 363). The revisions suggested by the DSB challenged China's censorship regime and long-held monopoly on cultural information. Not only did China not comply within a reasonable period of time, but it also left in place several regulations that the DSB deemed inconsistent with WTO disciplines. This suggests that, in particularly sensitive areas, China will not fulfill its implementation obligations. As China continues to gain experience with WTO litigation, instances of non-implementation are likely to increase. China has, in essence, learned that it can "get away" without fully complying with DSB rulings and recommendations. Indeed, as noted above, two recent rulings show just how far China is willing to push the implementation envelope.

Third, reforming laws in China means less than it would in Western liberal democracies with robust legal institutions. One-party rule, coupled with a unitary governance structure, allow the party-state to control the passage of laws and regulations, dictate revisions to the domestic legal environment, and coordinate changes with a maximum of speed and minimum of institutional friction. China has tinkered with the literal letter of its law, but it continues to produce a whole range of programs that violate WTO principles. It is perhaps unrealistic to think the DSB can induce compliance more broadly, that is, outside of the regulation challenged. But it is doubtful that China's domestication of DSB rulings has meaningfully influenced the development of its political economy. Many basic norms—market capitalism, deregulation, strong protection of intellectual property, limits on subsidies—remain alien to China.

Fourth, many WTO violations take place in the interstices of law, areas where government officials exercise discretion: whether or not to register a foreign company, to issue it a business license, or to prosecute someone for IP theft. Likewise, China distributes trade regulations to governmental agencies as "internal guidance" (*neibu cankao*) that should be published under China's WTO transparency obligations, but in fact

never are.²⁵⁷ The dispute settlement system provides a very rough tool by which to reshape a member's domestic legal system and to monitor its implementation of WTO commitments. A range of violations takes place, either below the radar or without meaningful recourse for investors or manufacturers outside of China.

Finally, China deploys the tactical features of the dispute settlement system to buffer the ruling's impact. China settles "easy" cases early and prolongs decisions that seriously disrupt its political system, harm core economic interests, or require significant internal reform to implement. Like any other national actor, China seeks to maximize its interests and minimize disruptions that international law and institutions may inflict upon its domestic legal and regulatory systems.

CONCLUSION

When China first joined the WTO, its conduct in the Dispute Settlement Body was more or less exemplary. Many questioned whether an authoritarian country with communist leanings and a long history of government intervention could transition to the neoliberal blueprint of the WTO. To date, China has timely complied with the rulings and recommendations of the DSB in a qualitatively sound manner in most (five out of eight) cases. Still, implementation problems have arisen recently, because China did not annul all regulations as it pledged to do (in cases that settled) or as it was directed to do (in cases where the DSB issued a final ruling). China has learned the rules of the game, and understands that a record of complete compliance is neither necessary nor expected of great trading powers. This has implications for both realist literature, with its emphasis on interest maximizing behavior, as well as constructivist perspectives, which predict that a state will adapt to the expectations and behaviors of other institutional members. It may also reflect an increasingly assertive China, one willing to push the limits of the international order, but not completely dispensing with it.

Viewed in this light, China's implementation efforts are best understood as paper compliance. Despite amendments to its legal and regulatory structures, China continues to implement policies that contravene the WTO's neoliberal prescription of low tariffs, minimal export restrictions, market access, equal treatment of foreign investment, and strong intellectual property rights. And in several cases, China has subverted the DSB's ruling by maintaining inconsistent laws or revising regulations in a non-compliant manner. As China continues to grow in size, stature and economic power, it will continue to push up against the boundaries of the international system. China has yet to transgress well-established boundaries, at least in the sphere of international trade, but instead seems to treat

257. *Testimony Before the Cong.-Exec. Comm'n on China*, 112th Cong. 2-3 (2011) (testimony of Claire Reade, Assistant U.S. Trade Representative for China Affairs), available at <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2011/december/testimony-assistant-united-states-trade-rep>.

the rules of international trade as many other large economies do: a set of norms and practices to be obeyed when fairly practicable, and overlooked when they cannot.

APPENDIX 1: CHART OF RESOLVED CASES

This summarizes the five disputes where China fully complied (as far as is publicly known) with the DSB ruling. Pertinent information includes the disposition, violating laws and regulations, a summary of the remedial action, and whether China achieved compliance in a timely (T) or qualitatively sound (Q) manner.

No.	Violating Laws	T?	Q?	Remedial Action	Disposition
309	6 regulations	Y	Y	Eliminated refunds to firms	S
340	3 regulations	Y	Y	C pledged to change law	A
358	6 bundles	Y	Y	Amended 4 bundles, challenged 2	S
387	118 regulations	Y	Y	Took steps to eliminate measures	S
394	4 regulations	Y	Y	Eliminated export restrictions	A

APPENDIX 2: CHART OF UNRESOLVED CASES

No.	Violating Laws	T?	Q?	Remedial Action	Disposition
363	1 law, 2 regulations	Y	N	Regulations limited by "imported"	A
372	16 regulations	N	N	Inconsistent regulations remain in effect	A
372	2 regulations	Y	N	Inconsistent regulations remain in effect	S

APPENDIX 3: CHINESE REGULATORY VIOLATIONS IN CASE 363

Because of the large number of regulations, this case deserved its own appendix. The sections follow the format used in the panel report. But the numbering of the regulations is mine. Because certain regulations violated both the Accession Protocol and GATS, I chose not to double-count them. Accordingly, each regulation is numbered only the first time it appears.

I. AP Violations

1. National Development and Reform Commission and Ministry of Commerce, No. 57, *Catalog of Industries for Guiding Foreign Investment* (2007) (“Catalog”)
2. State Council, no. 346, *Regulations Guiding the Orientation of Foreign Investment* (2002) (“Foreign Investment Regulation”)
3. Ministry of Culture, SARFT, NDRC, GAPP, Ministry of Commerce, order no. 19, *Several Opinions on the Introduction of Foreign Capital into the Cultural Sector* (2005) (“Several Opinions”)
4. State Council, order no. 343, *Regulations on the Management of Publications* (2001) (“Publications Regulation”)
5. State Council, order no. 342, *Regulations on the Management of Films* (2004) (“Film Regulation”)
6. SARFT & Ministry of Commerce, no. 43, *Provisional Rules on Entry Criteria for Operating Film Enterprise* (2004) (“Film Enterprise Rule”)
7. State Council, order no. 341, *Regulations on the Management of Audiovisual Products* (2001) (“2001 Audiovisual Products Regulations”)
8. Ministry of Culture and GAC, no. 23, *Rules for the Management of the Import of Audiovisual Products* (2002) (“Audiovisual Products Importation Rule”)
9. Ministry of Culture & Ministry of Commerce, no. 28, *Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products* (2003) (“Audiovisual (Sub) Distribution Rule”)

II. GATS violations

10. GAPP, order 27, *Rules for the Management of Subscribers Placing Subscriptions for Imported Publications* (2004) (“Imported Publications Subscription Rule”)
11. GAPP & MOFTEC, order no. 18, *Rules for the Management of Foreign Invested Enterprises Sub-Distributing Books, Newspapers and Periodicals* (2003) (“Publications Sub-Distribution Rule”)
12. GAPP, *Administrative Rules for the Publications Market* (2004) (“Publications Market Rule”)
13. GAPP, order no. 11, *Regulations on the Management of Electronic Publications* (1997) (“1997 Electronics Publication Regulation”)
14. Ministry of Culture, *Notice on Some Issues Relating to Implementation of the “Interim Rules on the Management of Internet Culture”* (2003)

(“Circular on Internet Culture”) (with below)

15. Ministry of Culture, no. 27, *Interim Rules on the Management of on Internet Culture* (2003) (“Circular on Internet Culture”) (with above)

16. Ministry of Culture, *Several Opinions on the Development and Management of Network Music* (2006) (“Network Music Opinions”)

III. GATT Violations

1. *Imported Publications Subscription Rule* (see 10, above)

2. *Publications Sub-Distribution Rule*, conjoined with *Publications Market Rule* (see 11 &12, above)