

# From GATT to WTO: The Legalization of Compliance Procedures in Trade Dispute Settlement \*

Guang Ma \*\* & Jiang Li \*\*\*

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From the twentieth century on, legalization process has been evident in international relations. As a core issue of international law and relation, dispute settlement between States has been evolving from its tit-for-tat strategy to diplomatic and then legal control. Based on the GATT DSP, the WTO DSM has achieved significant progress in legalization. In particular, as more DSM decision have been complied by member States, legalization process of trade dispute resolution via WTO is regarded promising. From the viewpoint of the legalization theory, in comparison to the GATT, the compliance of the WTO DSM's decisions have become more precise. The WTO members have granted more authorities to its panel of the AB or DSB. It means that in the aspect of compliance of the WTO DSM's decisions, the degree of delegation to the DSB has been lifted to a higher level.

**Keywords:** WTO DSM, GATT DSP, Compliance, Legalization, Precision, Obligation, Delegation.

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\* 'Compliance procedures' under GATT or WTO not only includes the legislative, judicial or administrative actions of the contracting parties or members to comply with the recommendations and rulings of the panel, working party, or the Appellate Body, but also involves the following procedures when the recommendations and rulings are not followed by the concerning contracting parties or members. The "trade dispute settlement system" is defined as a substitute for the legal framework governing trade dispute settlement under the GATT Dispute Settlement Procedures and the WTO Dispute Settlement Mechanism.

\*\* Associate Professor of Law at Zhejiang University Guanghua Law School. LL.B. (CUPL), LL.M. / Ph. D.(Korea Univ.) <http://orcid.org/0000-0002-0548-8450> The author may be contacted at: [hobright@163.com](mailto:hobright@163.com)

\*\*\* A postgraduate of international law department at Zhejiang University Guanghua Law School. <http://orcid.org/0000-0003-1234-4903> The author may be contacted at: [lijiangjiang@163.com](mailto:lijiangjiang@163.com)

## I. INTRODUCTION

Peaceful settlement of dispute is a highly topical issue of international legal studies. Today, disputes arising among sovereign States should be settled by neutral, impartial and technical judicial measures, called international dispute settlement mechanisms (“IDSMS”).<sup>1</sup> It may be described as the “movement of legalization.”<sup>2</sup>

In the course of ‘legalization,’ - judicialization<sup>3</sup> on the issue of dispute settlement, or even a form of institutionalization<sup>4</sup> - the members of the international community such as sovereign States and Non-State Actors (“NSAs”) have tried to seek mutually accepted solutions governing dispute settlement in a precise manner. Nonetheless, the international disputes are not often legalized mainly because each State tends to avoid judicial settlement when the dispute may seriously impair its core national interests.<sup>5</sup> Thus, ‘compliance’ is always a very critical momentum to the legalization of the international society.<sup>6</sup>

One of the noticeable examples in the compliance of IDSMS is the course evolving from the General Agreement on Tariffs and Trade (“GATT”) dispute settlement procedures (“DSP”) to the World Trade Organization (“WTO”) dispute settlement mechanism (“DSM”). At this turning point, the international community has installed the ‘teeth’ for compliance such as the ‘retaliation,’ ‘judicialization’ or fundamental ‘conversion’ of instruments leading to the resolution of international trade disputes with solid and strong aegis; it changes the way domestic-level political process approaches concerning trade policies.<sup>7</sup> Dichotomous discrepancies can be found between the GATT DSP and the WTO DSM; the former purports to restore the “balance of concessions” of the contracting parties, while the latter commits itself to induce compliance with the obligations therein.<sup>8</sup> It can be inferred that the legalization of compliance procedures serves as an imperative comprising the cornerstone of providing security and predictability for the multilateral trading system. In this case, the members could have more confidence and expectation so that the obligations should be conducted under the cooperative legal framework and thus the defaults are supposed to be redressed. Actually, the WTO DSM can be conducted effectively and legitimately on the basis of ‘compliance’ by the members.<sup>9</sup> The purpose of invoking the system is to seek ultimate solutions which could be realized by shielding the

arena from the dynamics of international politics. Compliance procedures are the final resort for members to retain their rights and fulfill obligations under the multilateral trading system. Here, the legalization of compliance procedures is to realize trade justice.<sup>10</sup> Therefore, it is necessary to figure out the legalization of compliance procedures of IDSMS.

The legalization of compliance procedures is a very significant research topic for China who has frequently been and are still likely to be brought to the WTO DSM. After China's accession to WTO, it is not unusual for China to be the respondents in trade cases filed mainly by the US and the EU.<sup>11</sup> In those cases, when China defended unsuccessfully, the question of compliance may arise. On January 13, 2014, *e.g.*, the US requested to establish a compliance panel to adjudicate the case on "Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States" (WT/DS 414).<sup>12</sup> It was the first compliance proceeding lodged against China under the WTO DSM.<sup>13</sup> Since joining WTO, China has been actively trying to incorporate its rules into her domestic legal system through legislation.<sup>14</sup> China has also been endeavoring to implement the decisions of the WTO DSM. In this course, China's record of compliance is overall satisfactory.<sup>15</sup> However, China has been severely criticized for the compliance level to the WTO decisions. *E.g.*, China's institutional capacity and normative tension are referred to as the evidence of her future default in the compliance of WTO decisions.<sup>16</sup> 'Paper compliance' theory accuses that China has adopted a duplicity or avoidance strategy in the WTO compliance.<sup>17</sup> The compliance is thus a litmus paper for the legalization the WTO DSM in a country.

The main purpose of this research is to answer the following questions: What obligations, to what extent, and in which ways the legalization of compliance procedures are imposed on the members? Such a fundamental question can be divided into those sub-inquiries: How rules governing the compliance, especially the implementation of recommendations and rulings, are to stipulate contents, methods and degrees of compliance on the members?; How precise are these rules to be?; What are the implications of such precision on the members?; To what authorities have the members granted to the DSB or the compliance panel?; and What are the limitations of these delegations?

This paper is composed of five parts including Introduction and Conclusion.

Part two will introduce the legalization of IDSMS in the international sphere. Parts three and four will analyze three crucial elements of legalization in the GATT DSP and the WTO DSM. From a comparative viewpoint, a normative approach will be adopted to argue and demonstrate the upward legalization of compliance procedures. These parts will emphasize the significant rules and norms under the GATT DSP and the WTO DSU. Part five will share a brief conclusion on the comparison between the GATT DSP and the WTO DSM. Some reflections on the topic from the vantage point of legalization theory will also be made.

## II. LEGALIZATION OF INTERNATIONAL TRADE DISPUTE SETTLEMENT

The twenty-first century's globalization has taken a multi-dimensional shape continuously developing at a high speed.<sup>18</sup> As the globe has been getting much smaller, the international cooperation has been expanding unprecedentedly. In this process, legalization would increase the credibility for the compliance of international commitment, reduce the transaction costs, and thus, are favored by domestic actors.<sup>19</sup> In spite of many difficulties, legalization is regarded as a general trend of contemporary world community.<sup>20</sup>

Since the early twenty-first century, the academics and practitioners of international law and relations have carried out significant research in the theory of legalization.<sup>21</sup> According to them, the concept of legalization consists of precision, obligation, and delegation.<sup>22</sup> It can be also categorized through two parts, i.e., legislation and compliance, which can be further divided into the development of international law, strengthening the role of international law, the adoption or incorporation of international law in domestic legal system,<sup>23</sup> and the compliance of international law.<sup>24</sup> Both approaches have their own advantages to conceptualize legalization: the former may focus more on 'analysis' and the latter concentrate more on 'expression.' However, the author will pragmatically choose the three elements of legalization as the methodological ground to this research. Such a stance can serve better to examine the multi-dimension of legalization in the contemporary global society.<sup>25</sup> Theory will always be a ground to find more advanced principles in their respective fields.<sup>26</sup>

In the meantime, the legalization process of the international arena is different from that of the domestic society,<sup>27</sup> which usually maintains a top-down and unitary governance system. Since there is no central authority in the international society, no member can monopolize the use of force under international law for the compliance of IDSM's decisions.<sup>28</sup> As a result, they would set up IDSMs through international negotiations in a horizontal layout of legal arrangement.

In modern times, international disputes are largely resolved by diplomatic measures rather than armed forces.<sup>29</sup> After the end of the Cold War, particularly, judicial and quasi-judicial ways began to be widely adopted.<sup>30</sup> IDSM not only promotes world peace,<sup>31</sup> but also represents the systematic transformation of international law from substantive to procedural legal system.<sup>32</sup> In this course, the tension between legalization and sovereignty should be mitigated. Also, IDSM should be realized with the constant interaction between politics and law.<sup>33</sup>

In recent, almost all governing sectors of the international society have been legalized. Alongside this development, the international trade system has certainly been instrumental in establishing rule of law<sup>34</sup> with considerable experience of legalization.<sup>35</sup> The theory of legalization is a useful tool to analyze the development of international trade regulations, not only in a general panoramic way,<sup>36</sup> but also specific issues like anti-dumping in an in-depth manner.<sup>37</sup>

The WTO DSM is the core of current multilateral trade system. As the "Jewelry of the Crown," it has legalized the international trade dispute mechanism<sup>38</sup> to a high level.<sup>39</sup> Noticeable is the Understanding of Rules and Procedures governing the Settlement of Disputes ("DSU"), which is a significant achievement of the Uruguay Round. DSU prescribes rules for adopting and complying the WTO DSM's decisions. A key part of the WTO DSM is that the compliance of its decisions has been brought into the trajectory of legalization.<sup>40</sup> The 'teeth' in DSM has contributed significantly to the WTO system, by effectively increasing legalization levels of multilateral trade system. From the GATT DSP to the WTO DSM, the 'compliance' in trade dispute settlement can be legalized under the three dimensions: the precise rules concerning the compliance of the WTO DSM decisions; the obligation of the member States to comply with the DSM's decisions; and the grant of authority to the panel, the Appellate Body ("AB") or the Dispute Settlement Body ("DSB").

### III. THE STRENGTHENING OBLIGATION OF COMPLIANCE FROM THE GATT DSP TO THE WTO DSM

In the WTO DSM and the GATT DSP, the obligation is considered as ‘fundamental.’ The term ‘obligation’ means that States or NSAs are bound to rules or other commitments.<sup>41</sup> DSM *de jure* obliges members to comply with its decisions. It is different from DSP which contains more political weight.

After World War II, the US-led western group of States tried to rebuild the world trade order. Their main interest was to legalize the international trade. The GATT, a part of the International Trade Organization (“ITO”), was actually brought into interim operation when ITO was aborted due to the US failing to ratify.<sup>42</sup> Since the GATT was drafted merely as trade rules,<sup>43</sup> it did not make clear distinctions between diplomatic, judicial or quasi-judicial methods. According to Article 23 of the GATT, when the interests accrued to any contracting party under the GATT are nullified, impaired or the attainment of any objective of the GATT are impeded, the Contracting Parties (“CPs”) can undertake investigation, recommendation, ruling and consultation procedures. If the violations did occur, the CPs can decide to authorize the injured contracting party to suspend the application to the concerning contracting party or parties of such concessions or other obligations under the GATT. During the early days of the GATT, trade dispute settlement was often relied on the efforts of the Executive President of the CPs. As the number of contracting parties increased, however, it was gradually accepted as the main pattern of trade dispute settlement that the working party consisted of staff from the contesting parties and representatives from neutral contracting party. Apparently, the agreement between parties can hardly be accessed, leaving the working party ineffective. Under such an arrangement, it was ultimately prospected either to face the impasse between the parties who had to adopt the tit-for-tat strategy, or to recur political and diplomatic ways outside the GATT. It is a noticeable feature of the GATT DSP.<sup>44</sup> As shown in *Allocations Families* case,<sup>45</sup> the GATT began handling trade disputes with an independent panel.<sup>46</sup> It was a great leap from the politics to a rule-based direction in the course of legalizing DSP.<sup>47</sup>

Up until the establishment of WTO, the GATT DSP had been legalized in

steady stages.<sup>48</sup> Nonetheless, the GATT did not have a chance to develop the issue of compliance. As an important document of the Tokyo Round, the “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance” in 1979 (hereinafter the Understanding) confirmed the ‘obligation’ of the contracting party to implement the panel or working party’s recommendations and rulings in a declarative way.<sup>49</sup> Paragraph 21 of the Understanding stipulates that the CPs should give prompt consideration to the report of the panel or working party.<sup>50</sup> Paragraph 22 provides that when the recommendations and rulings of the CPs are not implemented within a reasonable period of time, the contracting party may bring the case to ask the CPs to make suitable efforts with a view to finding an appropriate solution.<sup>51</sup> To simplify, the GATT has not exerted direct legal obligation to implement the panel or working party’s recommendations and rulings. Under the GATT DSP, the ‘obligation’ to implement is left to diplomatic and political deliberations of the contracting party, which is in congruence with the politically dominated track in the DSP system.<sup>52</sup> In 1989, the Montreal Ministerial Conference adopted the decision of “Improvements to the GATT Dispute Settlement Rules and Procedures” (hereinafter the Decision). The Decision, in its first paragraph of Part I, provides the compliance as follows:

Prompt compliance with recommendations or rulings of the CPs under Article 23 [of the GATT] is *essential* in order to ensure effective resolution of disputes to the benefit of all contracting parties. [Emphasis added]

Undoubtedly, there is a wide gap between the wordings “is essential to implement” and “is obliged to do so.” The latter denotes that no leeway for the contracting parties concerned to decide on the question of implementation, while the former grants the power concerning compliance to the States (or regions). It was true that legalization began to develop in DSP when the panel was composed for the first time. However, legalization in the area of compliance did not catch up to the same level.

The ‘obligation’ of member States to comply with the WTO DSM’s decisions originates from the WTO DSU, which has formulated ‘rules net’ prescribing the members’ obligations of compliance.<sup>53</sup> First, Article 19 of DSU stipulates that when the panel or the AB concludes that a trade measure is inconsistent with the

pertinent covered agreement, the panel and the AB shall recommend the concerning members to bring that measure into conformity with the covered agreement, which is deemed the primary remedial mean under DSM.<sup>54</sup> Second, similar to the expression of the Decision, Article 21.1 of DSU sets the basic principle of compliance; prompt implementation of the panel or the AB's recommendations and rulings is essential for the benefit of all members. Since Articles 19 and 21.1 have no direct and clear prescription that the implementation is a *de jure* obligation, Article 23.1 endows a legitimate obligation.<sup>55</sup> Third, Article 23 of DSU lays down that when disputes arise under the WTO framework, the members shall have recourse to, and abide by, the rules and procedures of DSU. Thus, the members are to settle disputes through multilateral DSU procedures rather than unilateral action, including the compliance procedures following the panel report of the AB.<sup>56</sup> Article 3.10 of DSU, in connection with Article 23, elaborates the obligations of the members to use multilateral procedures and redress trade grievances in good faith.<sup>57</sup> Pursuant to Article 23.2 of DSU, members shall follow procedures set forth in Articles 21 and 22 such as those governing the determination of the reasonable period of time and authorization or suspension. It imposes legal obligation of compliance to the members.<sup>58</sup>

Moreover, the obligation of compliance is also well founded on "Marrakesh Agreement on Establishment of the World Trade Organization" (hereinafter WTO Agreement). On the one hand, the implementation of recommendations and rulings usually take the legal category of *restitutio in integrum* as their contents can be regarded as a double-layer intensified obligation exerted by the WTO system. Apart from the obligation to bring inconsistent measures into conformity with relevant covered agreement, the WTO Agreement sets to ensure their legislation, judiciary and administration in conformity with the covered agreement.<sup>59</sup> Probably, we can envisage the obligation set forth in the WTO Agreement as a 'meta-obligation,' from which the obligation to comply with the panel or the AB's recommendations and rulings would originate. Now that the nature of the obligation of compliance in DSU - the 'secondary obligation'- remains largely moot, based on *pacta sunt servanda*, the basic obligation of compliance of the members by the WTO Agreement and covered agreements shall not be ignored in anyway. Moreover, it is not insisted that the obligation of compliance in DSM, especially the obligation to bring inconsistent measures in conformity with the



concerning covered agreement, apply separately from the one contained in the WTO Agreement and other in the covered agreement. Rather, in the dispute settlement procedures, the panel or the AB makes efforts to find existence of such obligations in the WTO Agreement and DSU either individually or in the covered agreements. Then, DSB orders the members concerned to observe obligations of DSU.<sup>60</sup> Thus, the obligation of compliance in DSM is mandatory, stemming from the constitutional ground of the WTO system. The recommendations or rulings is not only the mandate of DSU itself, but also legal obligations in the WTO Agreement and subsequent covered agreements. Those are grounds for the legitimacy of the WTO system.

On the other hand, according to Annex II of the WTO Agreement, DSU is an integral part of a group of binding agreements accepted by the WTO members.<sup>61</sup> They must comply with the obligations of DSU as well as follow the WTO DSM's decisions. Therefore, the implementation of the DSB's recommendations and rulings are binding the members. In a nutshell, mainly due to the different rules of DSP, compliance with the DSM's decisions is just a legal obligation having binding forces on the members. As a result, under the WTO Agreement and DSU, IDSMS have made a significant step forward towards the rule of law.<sup>62</sup> Compared to DSP, the legalization of compliance procedures in DSM has been duly enhanced. Conversely, the process has changed the binding force of multi-lateral trade system effectively.<sup>63</sup>

#### **IV. THE HEIGHTENING OF PRECISION OF RULES GOVERNING THE COMPLIANCE OF THE WTO DSM'S DECISIONS**

The term 'precision' here means that the rules unambiguously define the conduct they require, authorize, or proscribe.<sup>64</sup> The WTO DSM denied vague principles governing the time and content of compliance, thereby filling up loopholes concerning compliance. It increases the precision of rules and provides relatively clear guidance to the members. The precision of rules is closely connected with the compliance condition. There are two set of rules acting as the criteria of

compliance in DSM: (1) the reasonable period of time to implement; and (2) the quality of compliance.<sup>65</sup> According to the relevant provisions of the GATT and WTO, the precision of rules about compliance can be analyzed in the following four parts: (1) the informing of intentions to implement; (2) the confirmation of the reasonable period of time to implement; (3) the content of compliance; and (4) the determination of compliance condition.

### **A. The Informing of the Intentions to Implement**

Both DSP and DSM have the rules on informing intentions of implementation. DSM, however, set time limits for the procedure thereof. Originally, there was no content about the intentions to implement in the GATT text. The rule was first created by the Decision. The second paragraph of Part I of the Decision provides that the contracting party should inform the council of its intentions of implementing the DSM's recommendations and rulings. DSU has the same provision. Article 21.3 of DSU provides that within 30 days after the date of adoption of the panel or AB report, the member concerned shall inform DSB of its intention to implement the recommendations and rulings of DSB. While informing the intentions to implement, the rule containing time limit in DSU helps to impede delays occurring in the informing process. Instead, the rules in the Decision could not prescribe when the relevant party shall carry out the informing procedure. Obviously, the precision of the rules governing the informing of intentions to implement in DSM is a little higher than that of the Decision. Both DSU and the Decision, however, have no further explication on what the word 'intentions' means. DSU and the Decision may have granted the discretionary power to decide on the connotation of intentions to the parties themselves. But DSU, in footnote 11, adds that, when the DSB conference is not scheduled, a meeting shall be held for the informing procedure specially. It signifies that DSM emphasizes more about the timeliness of compliance.<sup>66</sup>

### **B. The Determination of the Reasonable Period of Time**

Compared to the rules about the "reasonable period of time" in DSP, those determining the reasonable period of time in DSM are much stricter. As the concerning legislation, regulation or measures need a period of time to be amended or repealed. It is natural for the party to have a period of time to implement the rec-

ommendations and rulings. This can be regarded as an ‘exception’ to implement promptly, but not an inherent right enjoyed by the party concerned.<sup>67</sup> The purpose of creating “reasonable period of time” in DSP and DSM is to advance the solution of trade disputes effectively and benefit all members or contracting parties. The concept of “reasonable period of time” first emerged in the US case filed by Holland and Denmark on restrictions of the import of dairy products in 1951, in which the CPs concluded that the US violated the rules under the GATT and consented to grant her a reasonable period of time to annul the restriction measures.<sup>68</sup> Subsequently, the content of “reasonable period of time” was legalized into the GATT DSP formally. According to the texts of the Understanding, the reasonable period of time was not stipulated directly; the content that the contracting party may enjoy “reasonable period of time” can only be inferred from the provisions indirectly. Paragraphs 21 and 22 of the Understanding read as follows:

The CPs should take appropriate action on reports of panels and working parties within *a reasonable period of time*... If the CPs’ recommendations are not implemented within *a reasonable period of time*...

[Emphasis added]

Afterwards, the 1982 Ministerial Conference of the GATT declared the Decision on Dispute Settlement (hereinafter the Declaration) which confirmed the content of the Understanding, including those rules about reasonable period of time.<sup>69</sup> According to the Declaration, before making the recommendation or ruling on the basis of the panel report, the council may allow the concerning party a specific reasonable period of time to consider the proper actions it shall take for a satisfactory solution.<sup>70</sup> Also, in the process of implementation, the concerning party could have a specified period of time to report or explain its condition for implementation. Unfortunately, what the party in question can rely on is still vague, prescribing the reasonable period of time in the traditional ambiguous way. The Decision, however, has clearly stipulated the “reasonable period of time” granting the concerning party such a ‘right’ explicitly. Paragraph 2 of Part I in the Decision reads as follows:

If it is impracticable to comply immediately with the recommendations or rulings, the contracting party concerned *shall have*<sup>71</sup> a reasonable period of time in

which to do so. [Emphasis added].

Compared to the rules in the Understanding and the Declaration, the Decision made great progress in the precision of the rules governing the grant of time. Notwithstanding that the rules of time limit for implementation grew more concretely, there was still no concrete provision under the GATT DSP determining such issues. As a result, because neither the panel nor the injured party could decide the span of the period, the concerning party could take the reasonable period of time as the ‘legitimate’ excuse to avoid prompt compliance.

The period of time rules contributed to clearly implementing the WTO DSM’s decisions. It also promoted the overall legalization level of DSM. Regarding the reasonable period of time, Article 21.3 of DSU is similar to the second paragraph of Part I in the Decision. Article 21.3, however, provides three sequencing ways to determine how long the reasonable period of time should be,<sup>72</sup> by making the rules functional and feasible for compliance. Furthermore, Article 21.3(c) sets the ceiling of the reasonable period of time, i.e., from the date of adoption of a panel or AB report, it should be implemented within 15 months.<sup>73</sup> Meanwhile, DSU flexibly prescribes that the time decided in the above ways may be shorter or longer than stipulated, depending on circumstances.<sup>74</sup> In conclusion, the rules governing the reasonable period of time in DSM are more precise than those in DSP.<sup>75</sup>

### **C. The Content of Compliance**

DSU has clearer and more precise rules than DSP on the recommendations and rulings of the panel or the AB. Article 23 of the GATT stipulates that when the CPs considers the circumstances seriously enough, this provision can authorize the injured party to suspend application of concession under the GATT, without furthering compliance. Although both the Understanding and the Decision provide the dictions such as ‘compliance with’ or ‘comply with,’ they have not yet laid down the contents guiding directly the behaviors of the concerning parties. Under such circumstances, the concrete measures the parties concerned should take according to the recommendations of the CPs may only be subject to the discretion of the concerning parties.

Article 19 of DSU is guiding the compliance more precisely than the WTO

DSM's decisions. It stipulates as follows:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned *bring* the measure *into conformity with* that agreement.<sup>76</sup>

It is clear that the content of compliance is to maintain the conformity between the adopted inconsistent measures and the relevant covered agreement. Article 22 of DSU adds that when the recommendations and rulings of the panel or the AB are not implemented within a reasonable period of time, some temporary measures are available in that event which are compensation and suspension of concessions or other obligations. Comparing to the following procedures of compliance, however, the compensation and suspension of concession are regarded as sub-optimal approaches.<sup>77</sup> Taking another way, the crux of compliance with the DSM's decision is to rectify inconsistent measures by introducing new laws or regulations, modifying or repealing existing ones and taking other necessary legislative, judicial or administrative actions. There is also a peripheral or complementary approach. When the implementation of the recommendations and rulings is not feasible, the compensation rendered *motu proprio* and the forceful countermeasures can be used as means to ensure compliance temporarily.<sup>78</sup> Although the meaning of "bring the measure into conformity" is still obscure,<sup>79</sup> the precision of the rules to confirm the content of compliance is growing much higher than that under DSP.

#### **D. The Judgment of Condition of Compliance**

The rules governing the judgment of compliance condition in DSU are more precise than those of DSP. Neither the Understanding nor the Decision provides for a clear guidance in this matter. The Understanding, in Paragraph 22, just mentions that when the recommendations and rulings are not implemented by the party concerned, the CPs should make suitable efforts to find an appropriate solution, *a fortiori*, instructing the relevant body to adjudge implementation of the decisions and its extent. Similarly, the Decision, in Paragraph 3 of Part I, explains that any contracting party seeking judgment on the compliance condition, at any time following the adoption of the decisions, may raise the issue of implementa-

tion to the council, when there is no statement on what the council can invoke.

Article 21.6 of DSU absorbs the rules regulating the judgment of compliance conditions of the Understanding and the Decision. With only a few changes in terms of wordings, this provision also contains that the member concerned should provide a status report in writing of its progress in relation to the implementation of the recommendations or rulings to DSB. However, DSU sets the yardstick for the compliance condition in Article 22.2. It provides as follows:

If the Member concerned fails to *bring the measure* found to be inconsistent with a covered agreement *into compliance therewith* or otherwise *comply with the recommendations and rulings* within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall...  
[Emphasis added].

Actually, Article 22.2 of DSU provides for two sets of standards instructing the judgment on compliance condition: the actions to bring the measures in conformity with the covered agreement; and to comply with the recommendations and rulings. In comparison to DSP, DSM may have not achieved a breakthrough in the precision dimension of the rules governing the judgment of compliance condition.<sup>80</sup> In view of the theory of legalization, however, the precision of rules and the delegation can be mutually complementary.<sup>81</sup>

### **E. The Advancement of Delegation on the Compliance in the WTO DSM**

The term 'delegation' is defined as the grant of authority by two or more States or regions to an international body to make decisions or take actions.<sup>82</sup> There are such types of delegations as:<sup>83</sup> delegation of adjudication, monitor and enforcement,<sup>84</sup> regulation,<sup>85</sup> research (or investigation), and advice (or recommendation). Originally, the GATT was created just as the forum for negotiation with a set of non-binding and relatively ambiguous rules guiding the trade conducts.<sup>86</sup> Dispute settlement was just a peripheral function.<sup>87</sup> However, DSM, equipped with binding jurisdiction and forceful means of compliance, built a quasi-judicial body with more delegation types and higher degrees of delegation granted by members. Therefore, from the perspective of trade dispute settlement, the delegation of DSM and the legalization thereof, is much higher than DSP.

## F. The Augmentation of the Delegation Types

In DSP, the contracting parties grant the power to authorize suspension of concession and judge compliance conditions to the CPs.<sup>88</sup> The delegations to the CPs include the authority to monitor the compliance, enforce the decisions, investigate and recommend. There is no a critical type of delegation, i.e., the delegation of adjudication.<sup>89</sup> Under DSP, when the disputes arise and are referred to the CPs, the CPs can recommend on the basis of investigation and authorize the injured party to suspend the application of concession *vis-a-vis* the party concerned.<sup>90</sup> From the aspect of legalizing compliance, the category of delegation under WTO is richer than under the GATT. Concretely, Article 23 of the GATT contains the delegation to enforce and recommend the decisions.<sup>91</sup> The Decision contains the delegation of surveillance in paragraph 3 of Part I which stipulates that the council should keep surveillance on the implementation of the recommendations and rulings adopted under Article 23.

The general instruction delegates that the authorities concerning the compliance of the DSM's decision is mentioned in Article 2.1, the part with the chapeau 'Administration' in DSU. The provision puts as follows:

The Dispute Settlement Body is hereby established to *administer* these rules and procedures... Accordingly, the DSB shall have the authority to *establish panels, adopt panel and Appellate Body reports (delegation of regulation, investigation, adjudication and recommendation), maintain surveillance of implementation of rulings and recommendations (delegation of surveillance), and authorize suspension of concessions and other obligations (delegation of enforcement)* under the covered agreements. [Notes and Emphasis added].

In this general provision, we can sift through the issue of delegation of regulation, investigation, adjudication, recommendation (or advice), surveillance (or monitoring), and enforcement. Specifically, Article 19 of DSU clarifies that the panel and the AB shall recommend the concerned member to bring the measure, found to be inconsistent with the covered agreement, in conformity with that agreement. This provision shows the content of recommendatory delegation. In addition, the panel or the AB may suggest the ways for the member to implement such recommendations. Articles 21.6 and 22.8 of DSU grant the authority or responsibility of surveillance to DSB, prescribing that the Body shall keep

under surveillance, the implementation of adopted recommendations or rulings, providing the compensation and the suspension of concessions. The delegation of enforcement was granted in Article 22.2, empowering DSB to authorize suspension of concession at request when the recommendations and rulings of the panel or the AB are not implemented accordingly.

The central type of delegation in respect of compliance with the DSM's decisions - delegation of adjudication - are presented in Articles 21.3, 21.5, 22.6 of DSU in an orderly, systematic and gradational pattern. First, Article 21.3 grants the authority to adjudicate on the reasonable period of time to the panel. Then, as to disagreement on the condition of implementation, Article 21.5 allows the parties to resort to arbitration herein on the issues of the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. Lastly, at the end of the compliance procedure, when the member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in Paragraph 3 have not been followed by the opposite party, the matter can be referred to and heard by the adjudication with the act of suspension pending.<sup>92</sup>

There are no clear rules granting the delegation of regulation and investigation on the compliance of the DSM's decisions. Because regulation and investigation are the ground of other types of delegation discussed above, however, these delegations can definitely be inferred from the DSU text implicitly.<sup>93</sup> Additionally, re-delegation<sup>94</sup> - a special type of delegation - exists in the compliance procedure of DSM. On the one hand, there is no distinction among objects of delegation such as DSB, the panel and the AB. Thus, as a corollary, it can be regarded as re-delegation between DSB and the panel or the AB. On the other hand, re-delegation happens within different types of delegation. Article 22.6 of DSU contains, *e.g.*, the delegation of enforcement, granting DSB to authorize suspension. Further, when the parties have contentious views on the levels of suspension and the principles and procedures on which the decision of suspension have been made, they can resort to 'arbitration.' Regarding the compliance with the DSM's decisions, re-delegation connects the delegation of enforcement with adjudication, making the delegation system relatively complete.<sup>95</sup> In conclusion, with regard to compliance, the delegation in DSM is much more systematic than DSP.



### **G. The Promotion of the Delegation Degree**

In terms of compliance with the recommendations and rulings of the DSM's decisions, *ceteris paribus*, the delegation degree of DSM is much higher. Regardless of the adjudication delegation that is omitted under DSP, surveillance and enforcement present some distinction on the delegation degree. The different degrees of surveillance delegation under DSM and DSP are mainly reflected upon the extent of authority granted to the third body such as the CPs or DSB, while different degrees of enforcement delegation can be embodied by the operability of the authority granted by the members or the contracting parties. This will be discussed and demonstrated below.

First, DSM enjoys richer authorities to monitor compliance of recommendations and rulings than DSP. As the bedrock to DSP, Article 23 of DSU has no unambiguous guidance on the issue of surveillance. Nonetheless, if deeply analyzed on the text, the provision is found to have combined the surveillance and the enforcement delegation together, attempting to attain the purpose of monitoring compliance through intimidation to authorize retaliation. The Understanding, in Paragraph 22, took a step further and put down the contents of surveillance in the text authorizing the CPs to monitor the compliance of recommendations and rulings. Notwithstanding the progresses abovementioned, Paragraph 24 reads that the CPs agree to conduct a regular and systematic review of developments in the trading system. Whether the review is aimed at the compliance of recommendations, the rulings remains unknown. The word 'agree' therein, however, may not be equivalent to the meaning of delegation. The Decision, in Paragraph 3 of Part I, had detailed prescriptions governing the surveillance delegation, which were highly influenced by Article 21.6 of DSU, with only small changes to the objects of the delegation such as the council replaced by DSB. Along with the expansion of the contents of enforcement delegation, DSU extends the surveillance delegation into the ending phase of compliance. It means that DSB should continue to monitor the suspension of concession and the compliance of recommendations and rulings still remaining effective.

Second, as for the delegation of enforcement, a palpable loophole of DSP is that the rules therein lack practical operability. DSM has made significant advancements in this regard. Article 23 of DSU only explains that the CPs can, when considering circumstances seriously enough, authorize the complainant to

suspend the application of concession to the losing party. However, no further word is available on the content, extent and methods of countermeasures. Paragraph 22 of the Understanding mentions that, in case of ambiguity, the CPs can try to seek appropriate solution from the party, which is shaded in ambiguity.

The contents of enforcement delegation expand more largely in DSM than DSP. By connecting the delegation of adjudication with surveillance, the operability of the enforcement delegation has improved to a large extent compared to DSP. The general provision of enforcement delegation is laid down at Article 22.2 of DSU. It states that when the decisions of DSB are not implemented within a reasonable period of time,<sup>96</sup> and the negotiation between the concerning parties fails within 20 days after the expiry of the reasonable period of time, any party invoking DSM can request DSB to authorize retaliation. Then, for the determination of “whether be implemented or not,” the adjudication delegation, as stipulated in Article 21.5, can authorize the panel to hear and decide on the disagreement regarding the existence or consistency with a covered agreement as the measures taken to comply with the recommendations and rulings.<sup>97</sup> In relation to the question on “how to apply the suspension,” however, Article 22.3 of DSU supplies the prevailing party with three methods based on different circumstances.<sup>98</sup> Also, Article 22.4 states that the level of suspension shall be commensurate with the level of the nullification or impairment.<sup>99</sup> Through the expansion of contents and strengthening of precision pertaining to the application of suspension, the operability has been enhanced.<sup>100</sup> At the end of the spectrum of the compliance procedure, when parties disagree with those issues as to, *e.g.*, whether suspension is compatible with the covered agreement, the ways and the level of suspension, the principles and procedures upon which the authority of suspension based, the matters shall be referred to arbitration.<sup>101</sup> Briefly concluding, the enforcement delegation under DSM is equipped with higher operability and authority through coordination with the arbitration delegation, which contributes to the development of legalization of compliance procedures and underpins further the legality of DSM.

## V. CONCLUSION: THE POTENTIAL LACUNAE OF LEGALIZATION IN THE COMPLIANCE OF THE WTO DSM'S DECISIONS

The legalization of compliance with the WTO DSM's decisions is overcoming some crucial obstacles of the GATT period. Today, there is a progress in three elements of legalization: precision of rules concerning compliance; the obligation of the members to comply with the decisions; and the delegation empowering the competent bodies to perform authorities on compliance. The legalization of compliance procedures *vis-a-vis* the WTO DSM's decisions provides a set of rules governing matters as such and the baseline to assess the compliance condition. It has also laid down the foundation for the following round of legalization.

### A. The Basis of the Extant Legal Framework

The legalization of compliance of the WTO DSM's decisions would be shaped more completely in the future. As mentioned above, the compliance system under DSM is not so perfect. Rather, the recalcitrance of concerning members to implement the recommendations and rulings of the panel or the AB is still a serious threat to DSM.<sup>102</sup> As to the lacunae of legalization, compliance issues could be explained and illuminated from a broader and more flexible perspective, so that it would maintain operation and normativity of the whole system.<sup>103</sup> However, the positive perspective *per se* does not explain and solve non-compliance and "lesser than optimal" compliance problems, which, in turn, spotlights salient questions and the potential for developing the legalization. Accordingly, the precision, obligation and delegation may be imbalanced in the process. As a result, in the process of legalization, the laggard may offset the progresses that other elements have achieved. It means that the overall level of legalization may not be improved. Article 19.1 of DSU exerts, *inter alia*, the obligation to implement the recommendations and rulings on the members, but has no further elucidation on the meaning of "bring the measure into conformity with the covered agreement." Also, the following paragraph of Article 19.1 just puts that the panel or the AB may suggest the ways for the concerning member to implement the recommendations in an expressive parlance and forceless manner. Consequently, in spite of the progresses in the delegation and precision dimension, the compliance proce-

ture in DSM still lacks direct legal channels in domestic legal framework.<sup>104</sup>

Additionally, the current approach to legalization is not always compliance-oriented. The design and composition of precision, obligation and delegation may have no direct or powerful influences on compliance, which also exists in the process of compliance-based legalization such as DSM. As mentioned above, Article 19 of DSU sets the obligation to implement the recommendations and rulings for the members, and Articles 21 and 22 expound the terms, procedures, contents and methods of compliance, respectively. Most of the efforts for legalizing DSM are still normative, focusing more on the “ought to be.” In other words, the members should comply with the rules herein, while less on ‘what is’ where the members will or will not, can or cannot comply with the decisions in practice. As to the retaliation mechanism, *e.g.*, direct retaliations based on multilateral background take harder effect than bilateral one; the effects of retaliations in simple and short term relationships are more limited than the ones under complex, ongoing relationship.<sup>105</sup> With regard to the legalization of compliance in DSM, however, compensation has to be carried out consistent with the most favored nation treatment, leaving the kind of compliance almost useless in reality except for rare cases.<sup>106</sup> Apart from a few procedural terms, the DSU rules seem to leave political and economic imbalance in world trade neglected, and the facial “equality on status” among the members ignore the capacity of those small and medium developing countries to carry out decisions.<sup>107</sup> In a sense, the possibility or the opportunity to recover trade benefits is one thing, while the intention or the capacity to enjoy them is another. As a consequence, the legalization of DSM should place emphasis on compliance in order to improve the binding force of DSM.<sup>108</sup>

Meanwhile, the legalization of DSM may have some negative impacts on domestic politicians and their constituencies. The obligations of the GATT 1994 regarding safeguard measures, *e.g.*, are likely to deprive the government of a useful tool to regulate the international trade, and the process of legalization may pose an immediate threat to domestic political support of the WTO.<sup>109</sup> Likewise, it might have negative side effects for domestic society, which may change the members’ attitude and behavior towards DSM in adverse direction.

## B. Theory of Legalization as a Valuable Tool

The theory of legalization is not only a valuable tool in analyzing the compliance procedures, but also the basis to recognize and assess compliance practice under DSM. As mentioned above, IDSMS are framed through international consensus. The members with the authority, *a priori*, will not comply with the decisions of IDSMS beyond what they have transferred.<sup>110</sup> Therefore, the States or regions will naturally comply with the DSM decisions within the category of obligations set by the legalization framework.<sup>111</sup> As the corollary, the compliance condition of the WTO members could be reviewed and assessed on the basis of the DSU system and regard the legalization framework as the boundary.<sup>112</sup> On the compliance of the WTO DSM's decisions, some scholars would predict and judge the compliance condition of specific member based on factors such as the history of their involvement in the international system, the litigation tradition, prior compliance conditions, capacity to implement, etc.<sup>113</sup>

Paradoxically, when scholars study the question of compliance, their logic and rationale wander beyond the framework of legalization. Restricted by the embedded and entrenched mind set, the conclusion they draw from this kind of research cannot avoid political prejudice and ideological discrimination. It would be neither objective nor acceptable.

## REFERENCES

1. K. Abbott & D. Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 3-32 (1998).
2. The term "movement of legalization" can be traced in articles discussing legalization. See e. g., Kenneth W. Abbott, et al., *Hard and Soft Law in International Governance*, 54 INT'L ORG. 447 (2000).
3. For details see J. Charney et al., *The 'Horizontal' Growth of International Courts and Tribunals: Challenges and Opportunities*, 96 AM. SOC'Y INT'L L. ANN. MEETING PROC. 372 (2002).
4. For details, see K. Abbott, et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 387-8, 396 (2000). See also K. Abbott, *The Many Faces of International Legalization*, 92 AM. SOC'Y INT'L L. ANN. MEETING PROC. 59 (1998).
5. R. Yerxa, *The Power of the WTO dispute settlement system*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 3-4 (R. Yerxa & B. Wilson eds. 2006).

6. J. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 195 (2006). The compliance record of the ICJ, especially toward orders relating to interim measures, has been far from perfect. Nonetheless, the measure of ICJ's success must be made in consideration to its contribution to the confinement and resolution of disputes. See J. COLLIER & V. LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 263 (2009).
7. R. Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 261-82 (2006).
8. B. McGivern, *Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives*, 36 INT'L LAW. 144-5 (2002).
9. For details, see L. Helfer & A. Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 287-90 (1997); Y. Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, AM. J. INT'L L. 225-70 (2012); A. Chayes & A. Chayes, *On Compliance*, 47 INT'L ORG. 178-87 (1993).
10. For details, see F. Garcia, C. Barry & S. Esserman, *Why Trade Law Needs a Theory of Justice*, 100 AM. SOC'Y INT'L L. ANN. MEETING PROC. 376-86 (2006).
11. Hitherto, China acts as respondents in 32 DSM cases, among which 15 cases, approximately half of the whole data, are raised by the US and 7 cases by the EU, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited on Feb. 4, 2015).
12. DSU art. 21.5.
13. WT/DS 414 is the first case in which China acted as respondent in the compliance panel stage. See *China-GOES*, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds414\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds414_e.htm) (last visited on Feb. 4, 2015). According to Article 21.5 of DSU, the first compliance panel China requested to establish was the case of Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS 397), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds397\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds397_e.htm) (last visited on Feb. 4, 2015).
14. Julia Ya Qin, *Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*, 191 CHINA Q. (2007). For China's ever-positive attitude and growing capacity towards the WTO DSM, see P. Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997-1036 (2010).
15. Wen Hua Ji & Cui Huang, *China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective*, 45 J. WORLD TRADE 37 (2011).
16. P. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699-715 (2007).
17. T. Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525-77 (2014).

18. L. BOULLE, *THE LAW OF GLOBALIZATION: AN INTRODUCTION* 4-10 (2009).
19. M. Kahler, *Conclusion: Causes and Consequences of Legalization*, 54 INT'L ORG. 662-72 (2000).
20. For details on ongoing negotiations on the Transatlantic Trade and Investment Partnership, see e. g., S. Lester & I. Barbee, *The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*, 16 J. INT'L ECON. L. (2013).
21. For details, see generally *Legalization and World Politics*, 54(Special Issue) INT'L ORG. (2000), available at <http://journals.cambridge.org/action/displayIssue?decade=2000&jid=INO&volumeId=54&issueId=03&iid=164744> (last visited on Feb. 4, 2015).
22. K. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401-19 (2000).
23. For details on the doctrine of transformation or adoption, see M. SHAW, *INTERNATIONAL LAW* 128-62 (5th ed. 2003).
24. Chongli Xu, *Legalization of International Society: Contemporary Picture and Trend* [国际社会的法制化：当代图景与基本趋势], 5 LEGAL SYS. & SOC. DEV. [法制与社会发展] (2009).
25. Some criticisms exist in that the concept of legalization has neither been enough theorized, nor provide clear instruction to the empirical studies. See M. Finnemore & S. Toope, *Alternatives to 'Legalization': Richer Views of Law and Politics*, 55 INT'L ORG. 743-58 (2001). On the legalization theory, see L. Belanger & K. Fontaine-Skronski, *'Legalization' in International Relations: A Conceptual Analysis*, 51 SOC. SCI. INFO. 238-62 (2012).
26. For study of legalization in international trade, see e. g. YAN LUO, *ANTI-DUMPING IN THE WTO, THE EU, AND CHINA: THE RISE OF LEGALIZATION IN THE TRADE REGIME AND ITS CONSEQUENCE* 31-50 (2010). On legalization in international anti-corruption, see e.g., K. Abbott & D. Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. LEGAL STUD. 141-78 (2002). On the legalization in international human rights, see e. g. L. Helfer, *Overlegalizing Human Rights: International Relation Theory and the Commonwealth Caribbean Backlash against Human Rights Regime*, 102 COLUM. L. REV. 1839-41 (2002).
27. For details, see Wenyi Huang, *Rule of International Law in the Era of Globalization: from Basis of the Concept of Formal Law* [全球化时代的国际法治：以形式法治为基准的考察] 4 JILIN U. J. SOC. SCI. ED. [吉林大学社会科学学报] 24-5 (2009).
28. T. Ginsburg & R. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1233 (2004).
29. L. HENKIN, *HOW NATIONS BEHAVE* 1 (2d ed. 1979).
30. For the legalization of IDSMS and their legal characteristics, see R. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457-70 (2000).

31. Article 2 of the United Nations Charter elaborates the principle of peaceful settlement of international disputes. The fundamental principle imposes great influences on legalization of dispute settlement. See J. COLLIER & V. LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 19-20 (2009). See also Zuxue Gu, *On the Idea of International Law* [论国际法的理念], 1 SCI. L. REV. [法学评论] (2005).
32. Guoqing Jiang, 2 SCI. L. REV. [国际法实施机制与程序法律制度的发展] 133-4 (2004).
33. For details on the interaction or struggle between politics and law see e. g. J. Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 9-29 (2005). See also Abbott et al., *supra* note 22, at 415.
34. Hui Zeng & Zhixiong Huang, 'Rule of Law in Trade' beneath the 'Politics of Power': Some Reflections on WTO Legal System [“权力政治”下的“贸易法制：对WTO法律体系几点反思], 3 WUHAN U. J. (PHILOSOPHY & SOC. SCI. ED.) [武汉大学学报 (哲学社会科学版)] 59-60 (2013).
35. On the key consequence of legalization, see Abbott et al., *supra* note 4, at 397-98. Some scholars, however, think dialectically that the legalization of international institutions has divergent effects on member countries. See Moonhawk Kim, *Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures*, 52 INT'L STUD. Q. 657-86 (2008). For different opinions, see J. Greenwald & L. Fox, *The WTO's Emphasis on Adjudicated Dispute Settlement May be More Drag than Lift*, 24 ARIZ. J. INT'L & COMP. L. 133-40 (2007); L. Helfert & A. Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 931-41 (2005).
36. J. Goldstein & L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603-32 (2000).
37. LUO, *supra* note 26.
38. For details on the legalization of the WTO DSM, see J. CONTI, *BETWEEN LAW AND DIPLOMACY: THE SOCIAL CONTEXTS OF DISPUTING AT THE WORLD TRADE ORGANIZATION* 171-3 (2011).
39. P. Sutherland, *Concluding the Uruguay Round: Creating the New Architecture of the World Economy*, 24 FORDHAM INT'L L. J. (2000).
40. On the process of judicialization in the GATT and the WTO, see B. Zangl, *Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO*, 52 INT'L STUD. Q. 827-31 (2008).
41. Abbott et al., *supra* note 22.
42. For the details on the creation and negotiation of GATT, see D. IRWIN ET AL., *THE GENESIS OF THE GATT* 72-97 (2009).
43. M. Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 155-6 (1993).



44. John Jackson once denominated the transformation from DSP and DSM as a change from power based system to rule based one. See J. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109-12 (2d ed. 1997).
45. Belgian family allowances [Allocations Familiales], available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/gt47ds\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm) (last visited on Feb. 4, 2015).
46. See The 1979 Understanding Annex on customary practice ¶ 6(ii), reprinted in Article XXIII-Nullification or Impairment, at 632, available at [http://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art23\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art23_e.pdf) (last visited on Feb. 4, 2015).
47. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF GENERAL AGREEMENT ON TARIFFS AND TRADE* 174 (1969).
48. JACKSON, *supra* note 6, at 138-45. The legalization of GATT dispute settlement is based on Article 23 of the GATT. However, the most significant improvements were those adopted by the CPs. For details of the legalization of DSP, see A. ALAVI, *LEGALIZATION OF DEVELOPMENT IN THE WTO: BETWEEN LAW AND POLITICS* 130-4 (2009). For details, see Article XXIII-Nullification or Impairment, available at [http://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art23\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art23_e.pdf) (last visited on Feb. 4, 2015).
49. See The Understanding, available at [https://www.wto.org/english/docs\\_e/legal\\_e/tokyo\\_notif\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/tokyo_notif_e.pdf)
50. *Id.* ¶ 21.
51. *Id.* ¶ 22.
52. The legalization of compliance under GATT inherits the traditional politic-oriented legalization way of the whole system.
53. *Supra* note 33, at 25.
54. Article 3.7 of DSU lays down that, in the absence of a mutually accepted solution, the first objective of the WTO DSM is to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.
55. For details, see S. BHUIYAN, *NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM* 109-12 (2011).
56. P. BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 172 (2d ed. 2008).
57. DSU art. 3.10. For details, see A. MITCHELL, *LEGAL PRINCIPLES IN WTO DISPUTES SETTLEMENT* 125-7 (2008).
58. Articles 21 and 22 are further evidence of the shift towards a legalistic approach in WTO DSM. See J. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 213 (5th ed. 2011).
59. WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, art. XVI:4, Apr. 15, 1994, 1867 U.N.T.S. 154, reprinted in 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement], available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm) (last visited on Feb. 13, 2015).

60. Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, art. 1:1, 1869 U.N.T.S. 401, *reprinted in* 33 I.L.M. 1226 (1994) [hereinafter DSU].
61. WTO Agreement art. II:2.
62. In practice, the members may choose not to comply at the cost of compensation or retaliation. See B. Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure*, 99 AM. POL. SCI. REV. 389-400 (2005). In the circumstance where the international society lacks the monopoly of force, we ought to always adopt a dialectic and comprehensive approach on the matter of compliance. See BHUIYAN, *supra* note 55, at 108-9. On the political characteristics of the WTO DSM, see ALAVI, *supra* note 48, at 135-37.
63. JINSONG YU, NEW EXPLORATION OF CHINESE FOREIGN ECONOMIC LEGAL ISSUES [中国涉外经济法律问题新探] 159 (1999).
64. *Supra* note 22.
65. W. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT'L L. J. 119 (2009).
66. Xingguo Fu, *The First Step of Implementation of the Decisions of WTO Dispute Settlement Mechanism: Informing the Intentions to Implement* [WTO争端解决机制裁决机制的第一步: 通报执行裁决的意向] 1 INT'L ECON. COOPERATION [国际经济合作] 90-1 (2009).
67. The WTO Appellate Body confirmed this view in the case "United States - Measures Relating to Zeroing and Sunset Reviews" (WT/DS 322). See Xingguo Fu, *The Problem of Reasonable Period of Time in the Implementation of Decisions of WTO* [WTO裁决执行的合理期限问题], 2 INT'L ECON. COOPERATION [国际经济合作] 81 (2009).
68. See Resolution of the Contracting Parties on the United States Import Restrictions on Dairy Products Imposed under Section 104 of the United States Defence Production Act, GATT/CP.6/51 (Oct. 25, 1951), available at <http://sul-derivatives.stanford.edu/derivative?CSNID=90070398&mediaType=application/pdf> (last visited on Feb. 4, 2015).
69. Ministerial Declaration of 29 November 1982 [Decision on Dispute Settlement], at 636-7.
70. The Decision on Dispute Settlement (29S/13) art. (vii).
71. The expression 'shall have' here does not mean that the reasonable period of time is an inherent right or power which shall be granted to the concerning party.
72. DSU art. 21.3.
73. The period of 15 months will not be enjoyed by the concerning party automatically. The panel will actually give a ruling about the period of time to implement based on the specific circumstances.

74. DSU art. 21.3 (c).
75. For details, see W. Davey, *The WTO Dispute Settlement System: the First Ten Years*, 8 J. INT'L ECON. L. 17 (2005).
76. DSU art. 19. [Emphasis added].
77. Neither compensation nor the suspension of obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. See DSU art. 22.1.
78. J. JACKSON, INTERNATIONAL LAW STATUS OF WTO DISPUTE SETTLEMENT REPORTS: OBLIGATION TO COMPLY OR OPTION TO "BUY OUT"?, 98 AM. J. INT'L L. 109-25 (2004).
79. LUO, *supra* note 26, at 49.
80. The 'breakthrough' here means that, e.g., the rules enlist the situations in which the compliance happens.
81. On the relationship between the precision and the delegation, see, e.g., Finnemore & Toope, *supra* note 25, at 743-58. See also C. Bradley & J. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 21-2 (2008).
82. *Id.* at 3.
83. *Id.* at 10-7.
84. *Id.* at 12-4.
85. *Id.* at 14
86. M. Busch & E. Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, in TRANSATLANTIC TRADE DISPUTES: THE EU, THE US, AND THE WTO 721 (E. Petersmann & M. Pollack, eds. 2003).
87. CONTI, *supra* note 38, at 167-8.
88. GATT art. 23.2.
89. For details on the delegation of investigation, advice, regulation and enforcement under DSP, see JACKSON, *supra* note 6, at 138. In the GATT dispute settlement, the CPs has once exercised the function resembling adjudication, such as *Canada - Alcoholic Drinks* case and *EEC - Oil seeds* case between the US and the EU. See Xingguo Fu, *On the Review Issues of Implementation of WTO' Recommendations and Rulings* [WTO裁决执行的复审问题], 3 INT'L ECON. COOPERATION [国际经济合作] 81 (2009).
90. Naigen Zhang, *On the Implementation of Recommendations and Rulings of the WTO Dispute Settlement* [试析WTO争端解决的履行], 9 INT'L L. REV. WUHAN U. [武大国际法评论] 4-5 (2009).
91. GATT 1994, art. 23, 1867 U.N.T.S. 187, *reprinted in* 33 I.L.M. 1153 (1994) [hereinafter GATT]. It stipulates that: "If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the complaining party can refer the case to the CPs..."
92. DSU art. 22.6.

93. GATT art. 22.3.
94. *Supra* note 81, at 17. ‘Re-delegation’ means that one international body further delegates its authority to another entity.
95. The delegation system in DSM is not fully complete. For details, see ALAVI, *supra* note 48, at 59-64. In practice, parties would agree that the procedure for examining the WTO-consistency of implementing measures need to be terminated before the authorization for retaliation measures may be granted. See BOSSCHE, *supra* note 56, at 306-7.
96. As mentioned above, the content of implementation can be deconstructed into two categories: one is to bring the inconsistent measure into conformity into the relevant covered agreement; the other, to implement the recommendations and rulings of the panel of the AB.
97. DSU art. 21.5.
98. On a specific kind of retaliation, see Qianqian Qi, *The Legal Standard and Arbitration Practice of Determining the Retaliation Methods in WTO* [确定WTO报复形式的法律标准和仲裁实践] 4 THE COMP. L. STUDY [比较法研究] 96-101 (2013).
99. There is neither rules guiding the authority to discern the amount of nullification and impairment, nor norms interpreting the methods to compare the level between the suspension and the injury the concerning member suffered.
100. However, the author would personally opine that the enhancement of operability, especially the strengthening of precision in this regard equals to the improvement of delegation degree, because there may be inverse relation between the precision and delegation.
101. Different from the arbitration procedure laid down in Article 21.5 of DSU, the matters should be referred to it firstly. In addition, the arbitration carried out on Articles 22.6 & 22.7 is final. Thus, the arbitration waged under Article 22.6 is the end of the compliance procedure in DSM.
102. J. Colares, *The Limits of WTO Adjudication: Is Compliance the Problem?* 14 J. INT’L ECON. L. 404 (2011).
103. Some scholars argue that the non-compliance in DSM is not so serious and the rare instances of non-compliance do not deprive the all the gains the prevailing parties have obtained. See *id.* at 404-5.
104. Xiaofu Li & Xuanyu Xiong, *Research on Cases of DSB between China and US (2001-2012)* [中美DSB争端案件考察(2001-2012)], 3 WORLD TRADE ORG. FOCUS [世界贸易组织动态与研究] 48-9 (2013).
105. A. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1868-71 (2002).
106. The compensation usually adopts non-pecuniary forms, namely trade barriers lifting by the losing party, such as tariff reductions or increases in import quotas. See J.

- Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 91 AM. J. INT'L L. 347 (2000). See also, Xingguo Fu, *The Issue of Compensation in WTO DSM* [WTO争端解决机制中的补偿问题], 4 INT'L ECON. COOPERATION [国际经济合作] 91-3 (2009).
107. G. Schaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 15 WORLD TRADE REV. 194-8 (2006). See also C. Horlick & K. Fennell, *WTO Dispute Settlement from the Perspective of Developing Countries*, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW 163-70 (Yong-Shik Lee et al., eds. 2012).
  108. For the potential compliance-based measures or reforms in WTO compliance procedures, see *supra* note 65, at 125-9.
  109. J. Cohee, *The WTO and Domestic Political Disquiet: Has Legalization of the Global Trade Regime Gone Too Far?* 15 IND. J. GLOBAL LEGAL STUD. (2008).
  110. Yerxa, *supra* note 5, at 4.
  111. This view was also underpinned by the report of the Appellate Body. See the Appellate Body Report of *Japan-Taxes on Alcoholic Beverages* (WT/DS8), at 15, available at <http://www.mofa.go.jp/policy/economy/wto/cases/WTDS8RPT.pdf> (last visited on Feb. 13, 2015).
  112. B. Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 774-84 (2003).
  113. For details, see C. 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. 399-505 (2002).