

***University of New South Wales Law Research Series***

# **CHINA'S IMPLEMENTATION OF THE RULINGS OF THE WORLD TRADE ORGANIZATION**

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(Hart Publishing, 2019)  
[2019] *UNSWLRS* 82

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## CHAPTER 1

### Introduction

#### I. INTRODUCTION

The establishment and development of the rules-based system of the World Trade Organization (WTO) has taken considerable time, effort, and resources by all countries and stakeholders involved. However, the efficacy of WTO rules would be significantly weakened “if there is no effective system to clarify the meaning of those rules and to enforce them.”<sup>1</sup> The dispute settlement mechanism (DSM) of the WTO, in serving this key function, is commonly regarded as “the jewel in the crown” of the multilateral trading system.<sup>2</sup> The success of the DSM is widely recognised. The fact that WTO Members have extensively used the DSM, as well as the impressive records of compliance with the rulings of the WTO’s dispute settlement tribunals, show that there is significant confidence in, and respect for, the system. Indeed, the DSM has managed over 500 trade disputes since commencing its operation in 1995;<sup>3</sup> and the caseload continues to increase<sup>4</sup> notwithstanding the unprecedented challenges that the system currently faces.<sup>5</sup> The overall compliance rate is

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<sup>1</sup> William Davey, ‘The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges’ (2014) 17(3) *Journal of International Economic Law* 679, 679.

<sup>2</sup> WTO, ‘WTO Disputes Reach 400 Mark’ (6 November 2009), available at <[https://www.wto.org/english/news\\_e/pres09\\_e/pr578\\_e.htm](https://www.wto.org/english/news_e/pres09_e/pr578_e.htm)>.

<sup>3</sup> WTO, ‘Dispute Settlement’, available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)>.

<sup>4</sup> WTO, *Annual Report 2018* (Geneva, WTO, 2018) 128, available at <[https://www.wto.org/english/res\\_e/booksp\\_e/anrep18\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep18_e.pdf)>. For a comprehensive data analysis of the caseload, see Joost Pauwelyn and Weiwei Zhang, ‘Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload’ (30 April 2018) CTEI Working Papers 2018-02.

<sup>5</sup> Tetyana Payosova, Gary Clyde Hufbauer and Jeffrey J Schott, ‘The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures’ (*Peterson Institute for International Economics*, March 2018), available at <<https://piie.com/system/files/documents/pb18-5.pdf>>. The pressing challenge essentially concerns the appellate function of the DSM which will soon become paralysed if the United States continues to block the appointment of Appellate Body members. For a recent discussion of the major concerns of the United States and some possible solutions, see Jennifer Hillman, ‘Three Approaches to Fixing the World Trade Organization’s Appellate Body: the Good, the Bad and the Ugly?’, IIEL Issue Briefs, 10 December 2018, available at <<https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>>.

beyond 80% although there have been cases where compliance took a long period of time and some “hard cases” where compliance has yet to be achieved.<sup>6</sup>

However, whether the DSM is designed to induce compliance remains subject to debate, just as no agreement has ever been reached on whether certain Members have fully implemented adverse WTO rulings. In this regard, China has generated longstanding concerns. Amid the ongoing crisis surrounding the WTO, issues such as whether China is a trustworthy player in the global trading system have attracted even greater attention. An assessment of China’s compliance with the rulings of the WTO would undoubtedly contribute to the understanding of China’s behaviour in the system. Yet, existing scholarship has not explored this issue in a comprehensive, thorough and systemic manner. This book undertakes this task by investigating and analysing a host of issues, including:

1. the quality of China’s implementation of WTO rulings;
2. the strategies and approaches that China has undertaken in such implementations;
3. the factors behind China’s compliance or non-compliance; and
4. the major implications for China’s trading partners as well as the DSM.

This chapter provides an overview of the basic elements and core function of the DSM (Section II), overall records of compliance under the DSM (Section III), and China’s participation in the DSM (Section IV). Section V sets out the scope, analytical framework and outline of the book.

## **II. THE DSM AND ITS FUNCTION**

The DSM is governed by the Dispute Settlement Understanding<sup>7</sup> (DSU), one of the cornerstones of the 1994 Marrakesh Agreement Establishing the WTO. The DSM provides a forum for WTO Members to resolve disputes relating to their rights and obligations under the covered WTO agreements.<sup>8</sup> Disputants are required to engage in consultations prior to

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<sup>6</sup> See Davey, above n 1, 689-90. See also generally Bruce Wilson, ‘Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date’ (2007) 10(2) *Journal of International Economic Law* 397.

<sup>7</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 2, 1869 UNTS 401. [hereinafter DSU].

<sup>8</sup> *ibid*, art 1.1. ‘Covered agreements’ include all of the multilateral trade agreements (i.e. annexes 1A-1C and 2) and the four plurilateral trade agreements (i.e. annex 4) concluded during the Uruguay

adjudications.<sup>9</sup> The first stage of the adjudication process involves the establishment of an *ad hoc* WTO panel to rule on a dispute.<sup>10</sup> The panel's decisions, produced in an official report, may be appealed to a standing WTO Appellate Body which may uphold, modify, or overrule the decisions of the panel in its final report on the dispute.<sup>11</sup> The panel's and/or Appellate Body's reports making findings and recommendations on the dispute need to be adopted by the Dispute Settlement Body (DSB) represented by all WTO Members based on a "negative consensus" rule.<sup>12</sup> This means that adoption is automatic in practice as non-adoption requires consensus by all Members including the winning party. Once the reports are adopted, the defaulting party is expected to comply with the rulings and recommendations promptly or within a reasonable period of time.<sup>13</sup> If the prevailing Member believes that the defaulting Member has failed to implement the rulings within the relevant timeframe, it may bring this matter to a panel (usually the original panel), known as a compliance panel.<sup>14</sup> The report of the compliance panel may be appealed to the Appellate Body, which makes final rulings on the legal issues raised on compliance. Where satisfactory implementation has not been achieved, the defaulting Member may offer or suffer temporary remedies in the form of voluntary compensation or suspension of concessions or other obligations (known as retaliation or sanction) by the prevailing Member.<sup>15</sup> Throughout the dispute settlement process, the disputing parties are entitled to reach a mutually agreed solution (MAS) to their dispute.<sup>16</sup>

Shortly after the establishment of the WTO, the function of the DSM was vigorously debated. The central issue was whether the dispute settlement rules established by the DSU impose an obligation of compliance or merely require compensation by a losing party in disputes. In defending the "binding" nature of the DSM, Jackson forcefully criticised the view that the implementation of WTO rulings is not compulsory as long as the defaulting Member provides compensation or accepts retaliation so that the overall balance of

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Round negotiations for the establishment of the WTO except the Trade Policy Review Mechanism (i.e. annex 3).

<sup>9</sup> *ibid*, art 4.

<sup>10</sup> *ibid*, arts 6, 8, 12.

<sup>11</sup> *ibid*, arts 16-17.

<sup>12</sup> *ibid*, art 17.14.

<sup>13</sup> *ibid*, arts 21.1 and 21.3.

<sup>14</sup> *ibid*, art 21.5.

<sup>15</sup> *ibid*, art 22.

<sup>16</sup> *ibid*, art 3.6.

negotiated commitments is maintained.<sup>17</sup> To Jackson, adopted panel and Appellate Body reports establish “an international law obligation upon the member in question to change its practice to make it consistent with the rules” of the WTO; and therefore “the ‘compensation’ (or retaliation) approach is only a fallback in the event of non-compliance.”<sup>18</sup> Jackson referred to a list of provisions of the DSU to show that compliance is a preferred solution to disputes.<sup>19</sup>

This initial debate over the function of the DSM provoked broader and deeper discussions. Based on the public choice literature and the economic theory of contracts, Schwartz and Sykes proposed an “efficient breach” theory arguing that compliance with WTO rulings is required only when it “will yield greater benefits to the promisee than costs to the promisor” such that deviations from WTO rules or non-compliance is permitted “whenever the costs of compliance to the promisor exceed the benefits to the promisee.”<sup>20</sup> This argument was quickly rejected by Jackson. In a more elaborated analysis, Jackson established that an interpretation of the WTO treaty particularly the DSU based on the rules set out in the Vienna Convention on the Law of Treaties<sup>21</sup> (VCLT) provides no support for the “efficient breach” theory but lends strong support to the view that “compliance with the panel/appellate report is obligatory”.<sup>22</sup> In Jackson’s view, compensation or retaliation are merely temporary remedies to allow some additional time for the government of a losing Member to fend off some pressure of full compliance in its domestic political system.<sup>23</sup> However, despite the availability of the temporary remedies, Jackson concluded that

the ultimate idea that full compliance is an international law obligation can still be crucial to the notion of a rule-oriented system that is objective and creditable and

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<sup>17</sup> See Judith Hippler Bello, ‘The WTO Dispute Settlement Understanding: Less is More’ (1996) 90(3) *American Journal of International Law* 416; John H Jackson, ‘The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation’ (1997) 91(1) *American Journal of International Law* 60.

<sup>18</sup> See Jackson, above n 17, 60-61.

<sup>19</sup> *ibid*, 63-64.

<sup>20</sup> Warren F Schwartz and Alan O Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization’ (2002) 31(1) *The Journal of Legal Studies* 179, 181.

<sup>21</sup> Vienna Convention on the Law of Treaties 1969, 23 May 1969, 1155 UNTS 331.

<sup>22</sup> John H Jackson, ‘International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?’ (2004) 98(1) *American Journal of International Law* 109, 115-17.

<sup>23</sup> *ibid*, 122.

provides a basis of security and predictability for all members of the organization, as well as nongovernmental beneficiaries of the system.<sup>24</sup>

Many other leading commentators in the field echoed and further developed Jackson's analysis. For example, Mavroidis argued that "the basic obligation imposed on WTO members is an obligation of result ... (compliance with the WTO contract)", although there may be different paths than the one suggested by WTO tribunals to fulfil that obligation.<sup>25</sup> He shared Jackson's view that the temporary remedies based on compensation or retaliation are merely "the means that induce eventual compliance with the WTO contract."<sup>26</sup> McRae reached the same conclusion based on an interpretation of the objectives of the WTO.<sup>27</sup> Charnovitz explained how the function of retaliation has shifted from one of rebalancing under the General Agreement on Tariffs and Trade<sup>28</sup> (GATT), the predecessor of the WTO, to one of enforcement under the WTO.<sup>29</sup> Pauwelyn treated WTO rules as "international legal obligations to the benefit of all members and economic operators in domestic and global market places" and hence the removal or correction of WTO-unlawful conduct as "the target of the DSU ... in pursuit of public goods."<sup>30</sup> Pelc challenged the foundation of the "efficient breach" theory and expounded that "efficient breach goes against the very purpose of international trade agreements" by effectively "increasing the returns to domestic industries from lobbying for protection, and empowering the very groups with preferences against trade liberalisation."<sup>31</sup> This is why, in Pelc's view, efficient breach is hardly a desirable approach to dispute settlement in practice.<sup>32</sup> Through an assessment of WTO Members' practice,

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<sup>24</sup> *ibid.*

<sup>25</sup> Petros C Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11(4) *European Journal of International Law* 763, 785.

<sup>26</sup> *ibid.*, 800.

<sup>27</sup> Donald McRae, 'Measuring the Effectiveness of the WTO Dispute Settlement System' (2008) 3(1) *Asian Journal of WTO & International Health Law and Policy* 1, 8.

<sup>28</sup> General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 61 Stat A-11, TIAS 1700, 55 UNTS 194. The GATT *Contracting Parties* held eight rounds of negotiations to further trade liberalisation. The last GATT round – the Uruguay Round negotiation completed in 1994 – established the WTO.

<sup>29</sup> Steve Charnovitz, 'Rethinking WTO Trade Sanctions' (2001) 95(4) *American Journal of International Law* 792, 800-8.

<sup>30</sup> Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward A More Collective Approach' (2000) 94(2) *American Journal of International Law* 335, 342.

<sup>31</sup> Krzysztof J Pelc, 'Eluding Efficiency: Why Do We Not See More Efficient Breach at the WTO' (2010) 9(4) *World Trade Review* 629, 631, 639.

<sup>32</sup> *ibid.*, 631-33.

Shaffer and Ganin observed that “complainants are driven primarily by the aim of compliance, not rebalancing.”<sup>33</sup> Ehring found that the EU’s use of trade sanctions has been intended to induce compliance and deter future WTO breaches by the same defaulting Members.<sup>34</sup>

While Jackson’s position on the function of the DSM has been influential, there are different voices. For example, Mercurio pointed out that the aims and objectives of the DSU are not clearly set, thereby leaving the function of the DSM a systemic issue to be settled.<sup>35</sup> Looking through the lens of “law in action”, Trachtman argued that “States that violate WTO law are not subject to enforceable specific performance-type remedies”.<sup>36</sup> Sykes reiterated the facts that the DSU does permit the other types of remedies as a practical matter and that compliance with adverse rulings has yet to be a universal practice, let alone prompt compliance.<sup>37</sup>

The above is not intended to provide a comprehensive review of the DSU or the existing literature on the function of the DSM. However, it demonstrates that the function of the DSM should be to enforce implementation of WTO rulings has been a predominant view, although the system allows some flexibility for delayed compliance or even non-compliance in practice.

### III. COMPLIANCE UNDER THE DSM

WTO Members do not implement adverse rulings in every case. In a recent statistical analysis of the effectiveness of the DSM between 1995 and 2016, Reich observed that (1) of the 35 reports issued by compliance panels, full compliance was not achieved in 33 cases (or almost 92%); (2) of the 33 cases, retaliation was authorized in 21 cases (or 64%); and (3) the

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<sup>33</sup> Gregory Shaffer and Daniel Ganin, ‘Extrapolating Purpose from Practice: Rebalancing or Inducing Compliance’ in Bown and Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge, Cambridge University Press, 2010) 73, 85.

<sup>34</sup> Lothar Ehring, ‘The European Community’s Experience and Practice in Suspending WTO Obligations’ in Bown and Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge, Cambridge University Press, 2010) 244, 245.

<sup>35</sup> Bryan Mercurio, ‘Why Compensation Cannot Replace Trade retaliation in the WTO Dispute Settlement Understanding’ (2009) 8(2) *World Trade Review* 315, 324, 336.

<sup>36</sup> Joel Trachtman, ‘The WTO Cathedral’ (2007) 43(1) *Stanford Journal of International Law* 127, 146.

<sup>37</sup> Alan O Sykes, ‘The Dispute Settlement Mechanism: Ensuring Compliance?’ in Daunton, Narlikar and Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford, Oxford University Press, 2012) 560, 563.

US and the EU, two of the most active users of the DSM, have also been the most frequent targets in compliance proceedings and retaliation requests.<sup>38</sup> The timely updated data provided by [www.worldtradelaw.net](http://www.worldtradelaw.net) shows that by December 2018 there have been 64 compliance reports issued by panels and the Appellate Body<sup>39</sup> and 46 requests for retaliation.<sup>40</sup> A list of unresolved disputes due to the lack of full compliance remain on the agenda of the DSB,<sup>41</sup> as required under Article 21.6 of the DSU. In addition, the latest statistical analysis of the WTO's caseloads between 1995 and 2018, conducted by Pauwelyn and Zhang, revealed that around 22% "of disputes filed were formally settled before the circulation of a panel report" in the first 15 years of the WTO while such early settlement reduced significantly in more recent periods.<sup>42</sup> In these cases, the issue of potential violations of WTO rules would arise, as will be elaborated in Section V.

Thus, while the overall implementation records are remarkable, many agree that the enforcement mechanism has its shortcomings.<sup>43</sup> Indeed, some studies have tried to show that retaliation has played a role in influencing government trade policy decisions.<sup>44</sup> Other studies, however, have considered factors other than retaliation as the underlying reasons for a decision to comply. For example, Davey observed that the overall good record of compliance is attributable "mainly to the good faith desire of WTO members to see the dispute settlement system work effectively", rather than the use of compensation or retaliation.<sup>45</sup> Wilson opined that timely compliance is more likely to be achieved if the compliance involves merely

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<sup>38</sup> Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (2017) EUI Working Papers Law 2017/11, 17-20.

<sup>39</sup> WorldTradeLaw.net, 'Panel and Appellate Body Reports in Article 21.5 Disputes', available at <<http://www.worldtradelaw.net/databases/art215reports.php>>.

<sup>40</sup> WorldTradeLaw.net, 'List of All Suspension Requests under the DSU in WTO Disputes', available at <<http://www.worldtradelaw.net/databases/retaliationrequests.php>>.

<sup>41</sup> See, eg, WTO, DSB, Minutes of Meeting Held in the Centre William Rappard on 27 March 2018 (WT/DSB/M/410, 26 June 2018) 2-7.

<sup>42</sup> Pauwelyn and Zhang, above n 4, 10-11.

<sup>43</sup> See, eg, Pauwelyn, above n 30, 343-6; McRae, above n 27, 8-11; Trachtman, above n 36, 167; Charnovitz, above n 29, 808-12; Yuka Fukunana, 'Securing Compliance through the WTO Dispute Settlement System: Implementation of DSB Recommendations' (2006) 9(2) *Journal of International Economic Law* 383, 399-426.

<sup>44</sup> See, eg, Chad P Bown, 'On the Economic Success of GATT/WTO Dispute Settlement' (2004) 86(3) *The Review of Economics and Statistics* 811, 812; Sherzod Shadikhodjaev, *Retaliation in the WTO Dispute Settlement System* (The Netherlands, Kluwer Law International, 2009) 183-184.

<sup>45</sup> See William J Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) 42(1) *Cornell International Law Journal* 119, 125.



administrative action as opposed to legislative action.<sup>46</sup> Mitchell emphasized that the indirect costs associated with breach of international obligations or loss of reputation play an important role in enforcing WTO rules.<sup>47</sup> This was confirmed by a recent empirical study showing that reputational costs have been a main reason for responding Members to agree to an early resolution of WTO disputes.<sup>48</sup>

More specifically, there have been studies of compliance by individual WTO Members. For example, Krikorian's analysis of the impact of the DSM on the domestic policy-making in the US and Canada revealed that the US government would only comply with WTO rulings if it would serve its best interests.<sup>49</sup> The Canadian government has adopted "a series of strategies and avoidance technique" in implementing WTO rulings in order to mitigate the impact of the rulings, especially when highly contested social issues were involved.<sup>50</sup> Looking into the domestic political system in the US, Chilton and Brewster observed that it is the domestic political actors involved in the policy process that determine how the US responds to adverse WTO rulings, and that non-compliance or delayed compliance is most likely to occur when congressional involvement is required in the compliance process.<sup>51</sup> A recent study of the EU's WTO compliance demonstrated that the EU's decisions on whether to comply have been affected more by domestic competing industries than by exporting interests.<sup>52</sup> In addition, Princen opined that "the role of trade officials ... is crucial in determining" the EU's WTO compliance.<sup>53</sup> In contrast with democracies such as the US, Zhang and Li argued that choice of compliance in authoritarian countries like China would

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<sup>46</sup> Wilson, above n 6, 397.

<sup>47</sup> See generally Shannon K Mitchell, 'GATT, Dispute Settlement and Cooperation: A Note' (1997) 9(1) *Economics and Politics* 87.

<sup>48</sup> See generally Jiwon Lee and Teresa Wittgenstein, 'Weak vs Strong Ties: Explaining Early Settlement in WTO Disputes' (June 2017) University of Hamburg, Institute of Law and Economics, Working Paper 2017 No 7, available at <<https://www.econstor.eu/bitstream/10419/162700/1/ile-wp-2017-7.pdf>>.

<sup>49</sup> Jacqueline D Krikorian, *International Trade Law and Domestic Policy* (Vancouver, UBC Press, 2012) 81.

<sup>50</sup> *ibid*, 197.

<sup>51</sup> Adam S Chilton and Rachel Brewster, 'Supplying Compliance: Why and When the US Complies with WTO Rulings' (2014) 39(2) *Yale Journal of International Law* 201, 203.

<sup>52</sup> Aydin Yildirim and Dirk De Bievre, 'Leader or Laggard? Political Determinants of The EU's Compliance with WTO Dispute Settlement Rulings' (January 2015) Leuven Centre for Global Governance Studies, Working Paper No. 145, 14-15.

<sup>53</sup> Sebastiaan Princen, 'EC Compliance with WTO Law: The Interplay of Law and Politics' (2004) 15(3) *European Journal of International Law* 555, 571, 573-74.

face fewer domestic constraints from special interests and “is largely shaped by the perception of a small group of individuals of the material and reputational costs of noncompliance, which in turn is influenced by the relative power of the state and its degree of reliance on the good will [and cooperation] of the” other WTO Members.<sup>54</sup>

Again, the review of the literature above is not intended to be comprehensive. However, one may safely conclude that WTO Members are likely to consider multiple factors in determining how to react to adverse WTO rulings. These may include, amongst others, economic, social, political, legal, institutional and reputational considerations, the impact of which would vary in different cases. Given the mixed considerations, Members may fully or selectively comply with WTO rulings, or not comply on a temporary basis or for a longer period of time depending on their own values and interests.

#### IV. CHINA’S PARTICIPATION IN THE DSM

On 11 December 2001, China’s accession to the WTO marked the history of the multilateral trading system. In joining the WTO, China made unparalleled commitments some of which even exceeded the expectations of WTO Members.<sup>55</sup> To implement these commitments, China has undertaken massive economic, regulatory and structural reforms,<sup>56</sup> and has experienced tremendous impacts and adjustments.<sup>57</sup> However, concerns about China’s observance of WTO obligations remain at large and have recently intensified. In particular, the United States Trade Representative (USTR) has been monitoring China’s compliance

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<sup>54</sup> Xiaowen Zhang and Xiaoling Li, ‘The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China’ (2014) 23(85) *Journal of Contemporary China* 143, 149-50.

<sup>55</sup> See Hearing before the H Subcomm on Trade of the Comm on Ways and Means, 106<sup>th</sup> Cong 43 (2000) (statement of Charlene Barshefsky). For an overview of China’s WTO commitments, see Nicholas Lardy, *Integrating China into the Global Economy* (Washington DC, Brookings Institution Press, 2002) 65-105; Ching Cheong and Hung-Yee Ching, *Handbook on China’s WTO Accession and Its Impacts* (Singapore, World Scientific Publishing, 2003) 31-161.

<sup>56</sup> See, eg, Zhenyu Sun, ‘China’s Experience of 10 Years’ in Melendez-Ortiz, Bellmann and Cheng (eds), *A Decade in the WTO: Implications for China and Global Trade Governance* (Geneva, International Centre for Trade and Sustainable Development, 2011) 11-14; Ling-Ling He and Razeen Sappideen, ‘Reflections on China’s WTO Accession Commitments and Their Observance’ (2009) 43(4) *Journal of World Trade* 847.

<sup>57</sup> See, eg, Julia Ya Qin, ‘Trade, Investment and Beyond: The Impact of WTO Accession on China’s Legal System’ (2007) 191 *The China Quarterly* 720; Ligang Song, ‘The State of the Chinese Economy – Structural Changes, Impacts and Implications’ in Cass, Williams and Barker (eds), *China and the World Trading System: Entering the New Millennium* (Cambridge, Cambridge University Press, 2003) 83.

since 2002 with a Report to Congress on China's WTO Compliance (China Compliance Report) published on a yearly basis.<sup>58</sup> In general, these reports provide a review of China's implementation of WTO commitments in various areas of trade as well as China's compliance with adverse WTO rulings.<sup>59</sup> The reports have claimed that China has failed to fully deliver its WTO commitments and in certain cases, to implement WTO rulings. With the release of the latest China Compliance Report in January 2018, the Trump administration accused China of not complying with WTO rules and undermining the entire trading system in many occasions.<sup>60</sup> Various US reporters followed suit to criticise China's failure in fulfilling WTO obligations and Members' expectations.<sup>61</sup>

Unfortunately, existing scholarly works do not provide an adequate response to the question of whether China has complied with unfavourable WTO rulings. For example, while Ji and Huang provided an overview of China's involvement in WTO disputes and records of compliance by 2010, they did not discuss the compliance measures adopted by China in detail.<sup>62</sup> Webster examined the timeliness and quality of China's WTO compliance merely in three disputes which do not include the most recent ones and many important ones.<sup>63</sup> Lately and before the completion of this book, Bacchus, Lester and Zhu offered a summary of China's compliance in all the disputes China lost by 2018.<sup>64</sup> However, this summary provides no analysis of the details of China's compliance measures and the quality of compliance. Despite the inadequate studies so far, these works show disagreement among scholars on

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<sup>58</sup> See Office of the US Trade Representative, *Report to Congress on China's WTO Compliance*, available at <<https://www.loc.gov/item/2011230506/>>.

<sup>59</sup> These reports will be considered throughout the book.

<sup>60</sup> See, eg, Lesley Wroughton, 'Trump Administration Says U.S. Mistakenly Backed China WTO Accession in 2001' (*Reuters*, 20 January 2018), available at <<https://www.reuters.com/article/us-usa-trade-china/trump-administration-says-u-s-mistakenly-backed-china-wto-accession-in-2001-idUSKBN1F82U1>>.

<sup>61</sup> See, eg, Fareed Zakaria, 'Trump is Right: China's A Trade Cheat' (*The Washington Post*, 5 April 2018), available at <[https://www.washingtonpost.com/opinions/global-opinions/trump-is-right-chinas-a-trade-cheat/2018/04/05/6cd69054-390f-11e8-8fd2-49fe3c675a89\\_story.html?noredirect=on&utm\\_term=.f49fefe6f6c2](https://www.washingtonpost.com/opinions/global-opinions/trump-is-right-chinas-a-trade-cheat/2018/04/05/6cd69054-390f-11e8-8fd2-49fe3c675a89_story.html?noredirect=on&utm_term=.f49fefe6f6c2)>.

<sup>62</sup> See generally Wenhua Ji and Cui Huang, 'China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective' (2011) 45(1) *Journal of World Trade* 1.

<sup>63</sup> See generally Timothy Webster, 'Paper Compliance: How China Implements WTO Decisions' (2014) 35(3) *Michigan Journal of International Law* 525.

<sup>64</sup> See generally James Bacchus, Simon Lester and Huan Zhu, 'Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented?' (15 November 2018) CATO Institute Policy Analysis Number 856, available at <<https://object.cato.org/sites/cato.org/files/pubs/pdf/pa856.pdf>>.

China's records of compliance, in sharp contrast with the one-way criticism of China by the US government and media.

Compared with the study of compliance, most of the scholarly works have been dedicated to discussing China's engagement in the DSM in general.<sup>65</sup> The shared view has been that China has taken an incremental approach starting as a "rule-taker", and then gradually becoming a "rule-shaker" and now a "rule-maker".<sup>66</sup> Some of these and other relevant studies have also offered some explanations for the Chinese approach to participating in the DSM.<sup>67</sup> These works are relevant to the analysis of China's approach to settling trade disputes or implementing WTO rulings in this book and will be considered in subsequent chapters.

By December 2018, China has been a complainant in 20 WTO disputes, a respondent in 43 disputes, and a third party in 163 disputes.<sup>68</sup> These figures suggest that China has been playing an increasingly active role in the system as it continues to accrue experience and legal expertise, which enables it to better use the system to defend its own interests.<sup>69</sup> To explore China's compliance with WTO rulings, this book will focus on the 43 disputes in which China has been a respondent. These disputes involved a total of 30 matters and can be divided into four categories, including trade in goods, trade in services, trade-related

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<sup>65</sup> See, eg, Marcia Don Harpaz, 'Sense and Sensibilities of China and WTO Dispute Settlement' (2010) 44(6) *Journal of World Trade* 1155; Bryan Mercurio and Mitali Tyagi, 'China's Evolving Role in WTO Dispute Settlement: Acceptance, Consolidation and Activation' in Herrmann and Terhechte (eds), *European Yearbook of International Economic Law*, vol 3 (Berlin, Springer, 2012) 89-123; Lisa Toohey, 'China and the World Trade Organization: The First Decade' (2011) 60(3) *International and Comparative Law Quarterly* 788; Matthew Kennedy, 'China's Role in WTO Dispute Settlement' (2012) 11(4) *World Trade Review* 555; Guohua Yang, 'China in the WTO Dispute Settlement: A Memoir' (2015) 49(1) *Journal of World Trade* 1.

<sup>66</sup> See generally Henry S Gao, 'China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?' in Carolyn Deere-Birkbeck (ed), *Making Global Trade Governance Work for Development* (Cambridge, Cambridge University Press, 2011) 153.

<sup>67</sup> See, eg, Yenkong Ngangjoh Hodu and Qi Zhang, *The Political Economy of WTO Implementation and China's Approach to Litigation in the WTO* (Cheltenham, Edward Elgar Publishing, 2016).

<sup>68</sup> The WTO member information page of China provides a list of WTO disputes involving China, available at <[https://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/china_e.htm)>.

<sup>69</sup> For a discussion of China's reluctance in participating in WTO disputes, see generally Henry S Gao, 'Aggressive Legalism: The East Asian Experience and Lessons for China' in Gao and Lewis (eds), *China's Participation in the WTO* (London, Cameron May, 2005) 315, 348-51; and generally Henry S Gao, 'Taming the Dragon: China's Experience in the WTO Dispute Settlement System' (2007) 34(4) *Legal Issues of Economic Integration* 369. For a comprehensive review of how China strived to build up capacity in WTO litigation, see Gregory Shaffer and Henry Gao, 'China's Rise: How It Took on the U.S. at the WTO' 2018(1) *University of Illinois Law Review* 115.

intellectual property rights (IPRs), and trade remedies (i.e. disputes over the application of anti-dumping, countervailing, or safeguard measures). These disputes are set out below in chronological order under each of the categories:

1. “trade in goods” disputes: (1) *China – VAT on Integrated Circuits*<sup>70</sup> (DS309); (2) *China – Auto Parts*<sup>71</sup> (DS339, 340, 342); (3) *China – Taxes*<sup>72</sup> (DS358, 359); (4) *China – Publications and Audiovisual Products*<sup>73</sup> (DS363); (5) *China – Grants, Loans and Other Incentives*<sup>74</sup> (DS387, 388, 390); (6) *China – Raw Materials*<sup>75</sup> (DS394, 395, 398); (7) *China – Wind Power Equipment*<sup>76</sup> (DS419); (8) *China – Rare Earths*<sup>77</sup> (DS431, 432, 433); (9) *China – Autos and Auto Parts*<sup>78</sup> (DS450); (10) *China*

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<sup>70</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Value-Added Tax on Integrated Circuits* (DS309) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds309\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds309_e.htm)>.

<sup>71</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Affecting Imports of Automobile Parts* (DS339) (EC), (DS340) (US), (DS342) (Canada), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds339\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds339_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds340\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds340_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds342\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds342_e.htm)>.

<sup>72</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments* (DS358) (US), (DS359) (Mexico), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds358\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds358_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds359\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds359_e.htm)>.

<sup>73</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (DS363) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm)>.

<sup>74</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Grants, Loans and Other Incentives* (DS387) (US), (DS388) (Mexico), (DS390) (Guatemala), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds387\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds387_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds388\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds388_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds390\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds390_e.htm)>.

<sup>75</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Related to the Exportation of Various Raw Materials* (DS394) (US), (DS395) (EC), (DS398) (Mexico), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds394\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds395\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds395_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds398\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds398_e.htm)>.

<sup>76</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures concerning Wind Power Equipment* (DS419) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds419\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds419_e.htm)>.

<sup>77</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (DS431) (US), (DS432) (EU), (DS433) (Japan), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds431\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds432\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds432_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds433\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds433_e.htm)>.

– *Apparel and Textile Products*<sup>79</sup> (DS451); (11) *China – Demonstration Bases*<sup>80</sup> (DS489); (12) *China – Aircraft*<sup>81</sup> (DS501); (13) *China – Raw Materials II*<sup>82</sup> (DS508, 509); (14) *China – Agricultural Products*<sup>83</sup> (DS511); (15) *China – TRQs*<sup>84</sup> (DS517); (16) *China – Aluminium*<sup>85</sup> (DS519); (17) *China – Additional Duties on Certain Products*<sup>86</sup> (DS558); and (18) *China – Imports of Sugar*<sup>87</sup> (DS568).

2. “trade in services” disputes: (1) *China – Publications and Audiovisual Products* which also involved issues on services; (2) *China – Financial Information Services*<sup>88</sup> (DS372, 373, 378); and (3) *China – Electronic Payment Services*<sup>89</sup> (DS413).

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<sup>78</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Certain Measures Affecting the Automobile and Automobile-Parts Industries* (DS450) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds450\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds450_e.htm)>.

<sup>79</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Relating to the Production and Exportation of Apparel and Textile Products* (DS451) (Mexico), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds451\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds451_e.htm)>.

<sup>80</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Related to Demonstration Bases and Common Service Platforms Programmes* (DS489) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds489\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds489_e.htm)>.

<sup>81</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Tax Measures Concerning Certain Domestically Produced Aircraft* (DS501) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds501\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds501_e.htm)>.

<sup>82</sup> For a summary of the disputes, see WTO, Dispute Settlement, *China — Export Duties on Certain Raw Materials* (DS508) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds508\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds508_e.htm)>; *China — Duties and other Measures concerning the Exportation of Certain Raw Materials* (DS509) (EU), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds509\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds509_e.htm)>.

<sup>83</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Domestic Support for Agricultural Producers* (DS511) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds511\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds511_e.htm)>.

<sup>84</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Tariff Rate Quotas for Certain Agricultural Products* (DS517) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds517\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds517_e.htm)>.

<sup>85</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Subsidies to Producers of Primary Aluminium* (DS519) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds519\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds519_e.htm)>.

<sup>86</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Additional Duties on Certain Products from the United States* (DS558) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds558\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds558_e.htm)>.

<sup>87</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Certain Measures Concerning Imports of Sugar* (DS568) (Brazil), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds568\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds568_e.htm)>.

<sup>88</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers* (DS372) (EC), (DS373) (US), (DS378) (Canada), available at

3. “trade-related IPRs” disputes: (1) *China – IPRs*<sup>90</sup> (DS362); (2) *China – IPRs II*<sup>91</sup> (DS542); and (3) *China – Transfer of Technology*<sup>92</sup> (DS549).
4. “trade remedies” disputes: (1) *China – Fasteners*<sup>93</sup> (DS407); (2) *China – GOES*<sup>94</sup> (DS414); (3) *China – X-Ray Equipment*<sup>95</sup> (DS425); (4) *China – Broiler Products*<sup>96</sup> (DS427); (5) *China – Autos (US)*<sup>97</sup> (DS440); (6) *China – HP-SSST*<sup>98</sup> (DS454, 460); and (7) *China – Cellulose Pulp*<sup>99</sup> (DS483).

Not all of the cases have been adjudicated – some were resolved before a panel was established or a panel report was issued, while others are new disputes in which the

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<[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds372\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds372_e.htm)>;

<[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds373\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds373_e.htm)>;

<[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds378\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds378_e.htm)>.

<sup>89</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Certain Measures Affecting Electronic Payment Services* (DS413) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds413\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm)>.

<sup>90</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (DS362) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm)>.

<sup>91</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds542\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm)>.

<sup>92</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Certain Measures on the Transfer of Technology* (DS549) (EU), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds549\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds549_e.htm)>.

<sup>93</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union* (DS407) (EU), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds407\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds407_e.htm)>.

<sup>94</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* (DS414) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds414\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds414_e.htm)>.

<sup>95</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union* (DS425) (EU), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds425\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds425_e.htm)>.

<sup>96</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* (DS427) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds427\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds427_e.htm)>.

<sup>97</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* (DS440) (US), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds440\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds440_e.htm)>.

<sup>98</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (‘HP-SSST’) from Japan and the EU* (DS454) (Japan), (DS460) (EU), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds454\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds454_e.htm)>; <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds460\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds460_e.htm)>.

<sup>99</sup> For a summary of the dispute, see WTO, Dispute Settlement, *China — Anti-Dumping Measures on Imports of Cellulose Pulp from Canada* (DS483) (Canada), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds483\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds483_e.htm)>.

adjudication process has not commenced or has not been completed. There was one dispute which was resolved partly via mutually acceptable compensation after China lost the dispute. Notably, China has never been subject to request for authorisation of retaliations so far, which indicates that China has managed to implement WTO rulings in a satisfactory manner. Accordingly, the 43 disputes involving 30 matters can be further broken up into five sub-categories which are set out in Table 1 below.

**Table 1: Categories and sub-categories of WTO disputes in which China is a respondent**

<b>Areas of Trade</b>	<b>Adjudicated disputes</b>	<b>MAS or disputes resolved before adjudication</b>	<b>Compensation after adjudication</b>	<b>Pending disputes</b>
Trade in goods	DS339, 340, 342; DS363; DS394, 395, 398; DS431, 432, 433.	DS309; DS358, 359; DS387, 388, 390; DS419; DS450; DS451; DS489; DS501.	DS363 <sup>100</sup>	DS508, 509; DS511; DS517; DS519; DS558; DS568.
Trade in services	DS363; DS413.	DS372, 373, 378	N/A	N/A
Trade-related IPRs	DS362	N/A	N/A	DS542; DS549.
Trade remedies	DS414; DS425; DS427; DS440; DS454, 460; DS483.	DS407	N/A	N/A

Thus, in 12 cases, adverse WTO rulings were issued and China was required to implement these rulings. In ten other cases, the parties agreed to a MAS or other means to resolve the disputes without adjudication by WTO tribunals. These figures do not show a clear pattern of China's participation in the DSM or why China chose to resolve a dispute in a particular way.

<sup>100</sup> While this dispute was largely resolved by China's implementation of WTO rulings, one element of WTO-inconsistencies was resolved via a MAS. This will be discussed in Chapter 3.



These issues will be discussed in subsequent chapters of the book. However, Table 1 provides a basis for the structure of the book as will be elaborated below.

## V. THE BOOK

The proper functioning of the multilateral trading system hinges largely on WTO Members' compliance with the rules of the system. Such compliance comprises two essential components, namely, observance of the rules established by the WTO membership (i.e. the first order compliance) and implementation of the findings and recommendations of WTO tribunals adopted by the DSB (i.e. the second order compliance).<sup>101</sup> In discussing China's implementation of adverse WTO rulings, it is necessary to consider both China's observance of WTO rules and compliance with WTO rulings. However, the focus of this book will be on the latter.

### A. Analytical Framework

Measuring compliance with WTO rulings is a formidable and complex task which has yet to be fulfilled adequately so far.<sup>102</sup> However, the literature review conducted above has provided the materials for establishing an analytical framework for measuring China's implementation of WTO rulings in an objective and structured manner.

Firstly, an assessment of the extent to which compliance has been achieved must be strictly based on the violations found by WTO tribunals in specific disputes.<sup>103</sup> Thus, a detailed analysis of WTO rulings and the implementation measures adopted by China is generally required to determine the quality of compliance.<sup>104</sup> In cases where a complaining Member challenges the adequacy of China's implementation, the challenge does not in itself prove non-compliance. Rather, the relevant rulings of the compliance panel and/or the Appellate Body must be assessed.

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<sup>101</sup> See generally Gregory Shaffer, 'How the World Trade Organisation Shapes Regulatory Governance' (2015) 9 *Regulation & Governance* 1.

<sup>102</sup> Manfred Elsig, 'WTO Dispute Settlement and the Study of Compliance' (2015) 14(3) *Journal of International Trade Law and Policy* 112.

<sup>103</sup> Manfred Elsig, Joost Pauwelyn and Thomas Bernauer, 'Dispute Settlement Mechanism – Analysis and Problems' in Daunton, Narlikar and Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford, Oxford University Press, 2012) 485, 499.

<sup>104</sup> John H Jackson, Robert E Hudec and Donald Davis, 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism [with Comments and Discussion]' in Collins and Rodrik (eds), *Brookings Trade Forum 2000* (Washington DC, Brookings Institution Press, 2000) 179, 221.

Secondly, the quality of compliance may be affected by the time that China takes to achieve full compliance, and especially if China fails to implement the relevant rulings within the required timeframe.<sup>105</sup> WTO-illegal measures will continue to impact trade as well as the predictability and security that the DSM seeks to maintain until the measures are brought into conformity with WTO rules.

Thirdly, when a MAS is reached, or when China voluntarily removes, replaces, or modifies the measures in question to the satisfaction of a complainant before the findings of WTO tribunals, there are, strictly speaking, no WTO rulings to implement because the measures involved cannot be deemed to be WTO-inconsistent.<sup>106</sup> While the disputing parties are expected to notify a MAS to the DSB and the relevant WTO Councils and Committees,<sup>107</sup> in practice such notifications are not always lodged or when lodged, may be limited to a statement that a MAS has been reached without disclosing the substance of the solution. In these cases, an analysis of compliance would be subject to not only the availability of the relevant information but also the caveat that the WTO-consistency of the contested Chinese measures remains unsettled.<sup>108</sup>

Fourthly, when a compensation deal is reached in a dispute after the contested Chinese measures have been found to be WTO-unlawful, compliance would not be achieved. The Chinese measures will remain in force, leading to uncertainties as to when they may be modified, replaced, or removed to achieve WTO-consistency.

By applying the analytical framework, I seek to provide a comprehensive, thorough and systemic analysis of the quality of China's implementation of adverse WTO rulings. However, this book goes beyond a mere legal analysis of China's WTO compliance in three important aspects. Firstly, I offer a detailed analysis of the possible explanations for China's approaches to resolving trade disputes or implementing WTO rulings. Secondly, I discuss the potential post-compliance issues such as the practical application of revised measures by Chinese authorities, non-transparency in decision-making, and repetitive violation of similar

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<sup>105</sup> Davey, above n 45, 119-20.

<sup>106</sup> DSU, above n 7, art 23.2.

<sup>107</sup> *ibid*, art 3.6.

<sup>108</sup> The WTO-inconsistencies of a measure may be more obvious in some cases than others. Thus, it must be conceded that there are instances of non-compliance by China and other Members even when there is no ruling to that effect. However, it must also be noted that Article 23.2(a) of the DSU requires all Members to not make a determination of whether a violation has occurred and instead to resort to the WTO dispute settlement mechanism for such determinations.

WTO rules using similar measures. While these issues do not necessarily affect the adequacy of China's compliance in individual disputes, they show that compliance in a specific dispute would not prevent China from prioritising domestic policy objectives over the observance of WTO rules. Thirdly, drawing on the discussions of the first two aspects, I offer some observations on the implications of China's behaviour for WTO Members and the DSM. Indeed, an analysis of China's approach to, and reasons for, compliance as well as its post-compliance activities would facilitate a better understanding of the relevant Chinese regulatory regime and assist WTO Members in strategically managing future trade disputes with China. In addition, it would also reveal the deficiencies of the DSM in inducing observance of, and compliance with, the rules of the multilateral trading system.

## B. Structure

This book consists of eight chapters, which are organised according to the categories and sub-categories of the disputes set out in Table 1. I will primarily focus on the completed disputes and will only consider a pending dispute when it is closely related to a completed one.

Chapter 2 begins with an examination of the ten cases in which China decided to settle via a MAS and without resorting to adjudication. This chapter will analyse China's approaches to resolving the disputes and the reasons for such approaches.

Chapters 3-7 will discuss the 12 cases in which China lost and was required to implement unfavourable WTO rulings. Each of the chapters will start by providing a brief overview of the relevant Chinese regulatory regime, China's WTO commitments and observance of such commitments in the relevant areas of trade. They will then offer a detailed analysis of the disputes including the background, the Chinese measures, the WTO rulings, China's implementation measures, the quality of implementation, the possible explanations for China's approaches to compliance, and the implications for WTO Members and the DSM.

Specifically, chapters 3 and 4 will discuss the four "trade in goods" disputes with chapter 3 dealing with two disputes involving China's regulation of imports (i.e. *China – Auto Parts* and *China – Publications and Audiovisual Products*) and chapter 4 covering two disputes concerning China's regulation of exports (i.e. *China – Raw Materials* and *China – Rare Earths*).

Chapter 5 then moves on to analyse China's implementation of WTO rulings against its regulatory regime affecting trade in services in two disputes, i.e. *China – Publications and Audiovisual Products* and *China – Electronic Payment Services*.

Chapter 6 examines China's regulatory regime for IPR protection and enforcement and China's implementation of the WTO decision in *China – IPRs*. This chapter also offers some observations on the prospects of the two pending "trade-related IPRs" disputes, i.e. *China – IPRs II* and *China – Transfer of Technology*.

Chapter 7 explores the six "trade remedies" disputes in which China's anti-dumping and/or countervailing practices were found to be WTO-incompatible. This chapter discusses the drivers for China's resort to anti-dumping and countervailing actions and expounds the distinctive features of China's approach to compliance in comparison to its compliance in the other categories of disputes.

Chapter 8 reflects upon the conclusions that have already been made in each of the previous chapters of this book. It underlines the overall record of compliance that China has achieved in all the disputes, the factors that have affected China's approaches to compliance, and the likelihood that China will continue to prioritise the pursuit of domestic policy goals over the observance of WTO rules. This chapter highlights that China's record of compliance compares favourably with those of the other major players in the system such as the US, and that the probability of breach of WTO rules for domestic policy reasons after compliance in one dispute remains as high in every WTO Member as it is in China. In the face of the ongoing crisis in the DSM, this chapter stresses that the DSM is indispensable for the multilateral trading system given its effectiveness in enforcing WTO rules and inducing compliance as amply demonstrated in the examination of the Chinese practices in this book.