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The Law of the World Trade Organization and Its Domestic Implementation: With Special Reference to the People's Republic of China

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With Special Reference to the People’s Republic of China

Submitted to
an S.J.D. Committee composed of:

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April 2006
Acknowledgements

I owe a debt of deep gratitude and admiration to my supervisor, Distinguished Professor of International and Comparative Law, Dr. Sompong Sucharitkul for his academic inspiration, enlightening instruction, and unwavering encouragement. My special debt of gratitude is also due to Professor Dr. Christian Okeke and Professor Dr. Sophie Clavier for their careful review of this dissertation and valuable guidance.
Table of Contents

**PART I  EMERGENCE AND DEVELOPMENT OF THE LAW OF THE WTO UNDER PUBLIC INTERNATIONAL LAW (1)**

**INTRODUCTION (2)**

**CHAPTER 1  RELATIONSHIP BETWEEN WTO LAW AND PUBLIC INTERNATIONAL LAW (8)**

I. The law of the GATT/WTO is Part and Parcel of Public International Law (8)
II. The Law of the WTO Represents Certain "New Frontiers" of Public International Law (13)

**CHAPTER 2  SOURCES OF THE LAW OF THE WTO (17)**

I. Treaties (21)
   1. 1994 Uruguay Round Agreements (22)
   2. Post-1994 Agreements, Protocols and Schedules of Commitments (27)
   3. Other International Agreements (29)
II. International Custom (30)
III. General Principles of Law (31)
IV. Reports of "Prior" Panels and the Appellate Body as Judicial Decisions (33)
V. Teachings of the Most Highly Qualified Publicists (39)

**CHAPTER 3  NATURE OF THE LAW OF THE WTO (42)**

I. The WTO as A Legal System (44)
   1. Hart’s Theory on A Legal System (44)
   2. The WTO as A Legal System (48)
      A. The WTO’s Primary Rules (49)
      B. The WTO’s Secondary Rules (50)
         (a) Rules of recognition (50)
PART II THE RELATIONSHIP BETWEEN THE LAW OF THE WTO AND INTERNAL LAW OF ITS MEMBERS (69)

INTRODUCTION (70)

CHAPTER 1 THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW (76)

I. A Theoretical Dichotomy of Dualism and Monism (77)

II. A Pragmatic Approach Based upon the Theories of “Co-ordination” (79)

III. The Relation between International Law Obligations and Domestic law (81)
1. In International Sphere (82)
2. In the Municipal Sphere (85)
   A. General Issues and Their Significance (85)
   B. Some Basic Concepts (89)
   C. Notes for the Subject of This Study (93)

IV. Role of Municipal Authorities in Domestic Implementation of Treaties (95)
1. Status of Treaties in Municipal Constitutional Arrangements (95)
   A. Validity of treaties in domestic law (96)
   B. Power to implement treaties in domestic sphere (97)
   C. Choice between direct application of treaties and an act of transformation under the domestic legal system (97)
   D. “Hierarchical status” of treaties in domestic law (98)
   E. Domestic treaty-making process (101)
2. Transformation of Treaties by Municipal Legislature (102)
3. Application of Treaties by Municipal Courts (105)
   A. Municipal Courts’ Position towards Domestic Legal Effect of Treaties (108)
CHAPTER 2 THE RELATIONSHIP BETWEEN WTO LAW AND THE INTERNAL LAW OF WTO MEMBERS (123)

I. Nature of the Relationship between WTO Law and Internal Law of WTO Members (123)

II. Status of Internal Law of WTO Members within the WTO Legal System (125)
   1. Pacta sunt servanda in the Context of WTO Law (125)
   2. WTO Treaty Requirements for Internal Law of WTO Members (128)
      A. Issue of “Domestic Implementation” as Specified in WTO Agreements (128)
      B. Role of Domestic Courts as Defined in WTO Agreements (131)
      3. Status of Internal Law of WTO Members in WTO Dispute Settlement (133)

III. Status of WTO Law in the Internal Law of WTO Members (135)
   1. General Issues (135)
   2. Rethinking the Concept of “Direct Effect” (139)
   3. Academic Discussions on Domestic Legal Effect of WTO Agreements (142)
      A. Advocates of the Direct Effect of WTO Agreements (142)
      B. Critics of Direct Effect of WTO Agreements (144)
      C. Consistent Interpretation: Possible Coordination between WTO Legal Obligations and Internal Law of WTO Members (147)
   4. Status of WTO Agreements in Internal Law of WTO Members (149)
   5. Status of WTO Rulings in Internal Law of WTO Members (151)
      A. *Res Judicata, Stare Decisis* and the “Interplay” between WTO Dispute Settlement Process and Judicial Proceedings of WTO Members (152)
      B. “Intermediate Position” Doctrine and Some Further Reflections (154)

PART III DOMESTIC IMPLEMENTATION OF WTO LAW: AN EMPIRICAL STUDY OF THE U.S. AND THE EC EXPERIENCES (159)

CHAPTER 1 IMPLEMENTATION OF WTO LAW UNDER THE U.S. LEGAL SYSTEM (164)

I. Legal Effect of Trade Agreements in the U.S. Law (164)
II. Uruguay Round Agreements Act (URAA) and the U.S. WTO implementation (169)
   1. Domestic Legal Effect of WTO Law under the URAA (170)
   2. Statutory Role of the U.S. Congress and the Executive Branch in the WTO Implementation (175)
III. Treatment of WTO Law before the U.S. Courts (178)
   1. Role of the U.S. Courts in International Trade Regulation (178)
   2. The Rise of WTO Issues in the U.S. Courts and the Application of the Charming Betsy Doctrine (182)
      A. The Charming Betsy Doctrine and the Availability of Standings (183)
      B. About the “WTO Issues” (184)
      C. “Chevron Test” v. Charming Betsy Doctrine (185)
      D. The Role of the Charming Betsy Doctrine: Some Reflections (192)
   3. The Position of the U.S. Courts towards WTO Law (196)
IV. Prospects and Conclusions (204)

CHAPTER 2 IMPLEMENTATION OF WTO LAW UNDER THE EUROPEAN COMMUNITY LEGAL ORDER (208)

I. European Community (EC) Law and the Internal Legal Effect of International Trade Agreements under the European Community (EC) Legal Order (208)
II. The Internal Legal Effect of WTO Agreements as Specified by the EC Treaty-making Institutions (217)
III. Legal Treatment of WTO Law before the European Courts (221)
   1. Role of the European Courts in the Context of WTO Law (221)
   2. EC Case Law on Internal Effect of WTO Agreements (224)
   3. EC Case Law on Internal Effect of WTO Decisions (230)
PART IV  DOMESTIC IMPLEMENTATION OF WTO LAW: THE CASE OF THE PEOPLE'S REPUBLIC OF CHINA (249)

CHAPTER 1  CHINA'S ACCESSION TO THE WTO: HISTORICAL OVERVIEW, SIGNIFICANCE AND IMPLICATIONS FOR DOMESTIC WTO IMPLEMENTATION (250)

I. From the GATT to the WTO: China's "Long March" towards the Multilateral Trading System (251)
   1. Pre-GATT Involvement in International Trade (252)
   2. Original Connection and Later Disassociation with the GATT (253)
   3. Campaigns for Resuming the Status as a Contracting Party of the GATT (254)
   4. Endeavors to Join the WTO (258)

II. Process of China's WTO Accession: Significance and Implications for Domestic WTO Implementation (261)
      A. Technical Dimension (262)
      B. Practical Dimension (264)
         (1) Unique Situation of China (264)
         (2) Concerns and Skepticism of Other WTO Members (269)
   2. Implications of the Accession Process for China's Implementation of WTO Obligations (276)

III. Outcome of China's WTO Accession: Significance and Implications for Domestic WTO Implementation (281)
      A. Formation of the "Accession Package" for China (283)
      B. Substances of the "Accession Package" for China (285)
      C. China's Motive Behind the "Accession Package" (287)
   2. Implications of the "Accession Package" for China's Implementation of WTO obligations (291)
CHAPTER 2 STATUS OF WTO LAW IN CHINESE DOMESTIC LAW (294)

I. Status of Treaties in Chinese Domestic Law (294)
   1. Relationship between Treaties and Chinese Domestic Law under International Law (294)
   2. Status of Treaties in Chinese Constitutional Arrangements (296)
      A. Common Guideline of the Chinese People's Political Consultative Conference (Tentative Constitution of the PRC) (296)
      B. The Constitution of the People's Republic of China (Constitution of the PRC) (297)
      A. Granting "Trumping effect" to Treaties: China's Past Practice in Treaty Implementation (302)
      B. Direct Application or Transformation: Trends of China's Practice in Treaty Implementation (305)

II. The Law of the WTO in the Chinese Context (308)
    2. Nature and Enforceability of "China-specific" WTO Obligations (313)

III. Status of WTO Law in Chinese Domestic Law (315)
     1. Within the Scope of the WTO Agreement (316)
     2. Within the Scope of Chinese Domestic law (320)

CHAPTER 3 THE ROLE OF THE CHINESE LEGISLATURE AND THE JUDICIARY IN THE DOMESTIC IMPLEMENTATION OF WTO LAW: AN EMPIRICAL STUDY (324)

Introduction (324)
I. The Role of Chinese Legislative Bodies in the "Transformation" of WTO Law (326)
    1. China's Position towards the "Transformation" of WTO law (326)
    2. China's Actual Practice in the "Transformation" of WTO law (331)
       A. Achievements and Progresses (332)
       B. Problems and Challenges (337)

II. The Role of Chinese Courts in the "Application" of WTO Law (345)
    1. The Role of National Courts in the Enforcement of WTO Law (345)
    2. The Role of the Chinese Courts under the WTO Legal Regime (348)
    3. Judicial Interpretation of the Supreme People's Court of China (350)
       A. Judicial Interpretation for WTO-compatible Judicial Review (352)
(1) Scope of reviewability (353)
(2) Standing (353)
(3) Original Jurisdiction (355)
(4) Standard of review (355)
(5) Applicable law (356)

B. Judicial Interpretation for TRIPs-friendly Trial Services (360)

4. Judicial Practice of the People’s Court (365)
A. Development of the WTO-related Cases in China (366)
B. Definition of the WTO-related Cases: Implications for the "Application" of WTO Law by the People’s Court (369)
C. Hearings of WTO-related Cases: Case-study of the Application of WTO Law by the People’s Court (371)

(1) IPR-related Criminal and Civil cases (371)
(2) WTO-related International Trade Administrative Cases (392)

(a) Local court system of Beijing Municipality (373)
(b) Local court system of Shanghai Municipality (379)
(c) Local court system of Guangdong Province (381)

Conclusion (382-385)
PART I

EMERGENCE AND DEVELOPMENT OF THE LAW OF THE WORLD TRADE ORGANIZATION UNDER PUBLIC INTERNATIONAL LAW
INTRODUCTION

On January 1, 1995, a new international economic organization came into being. The creation of the World Trade Organization (WTO), of which the tenth anniversary recently passed, marks "a watershed moment for the institutions of world economic relations reflected in the Bretton Wood system." Through a decade of existence, the WTO has grown into a "common institutional framework for the conduct of trade relations," serving to "develop an integrated, more viable and durable multilateral trading system."

Like many international economic organizations that emerged after World War II, the WTO is a treaty-established inter-governmental institution. "Treaties are often an awkward albeit necessary method of designing institutions needed in today's interdependent world." The WTO was founded by the Marrakesh Agreement Establishing the World Trade Organization (hereinafter as the "WTO Agreement"), treaty adopted by 124 nation states plus the European Community (EC) at Marrakesh, Morocco on 15 April 1994. With a length of 25,000 pages and enormous impacts, the WTO Agreement has been the heaviest and most important treaty system ever since the adoption of the United Nations Charter of 1945. Although its formal text takes no more than 10 pages to address merely institutional issues, the WTO Agreement has actually developed a legal complexity, first through its inclusion in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (hereinafter as the "Final Act"), the latter includes 28 more Ministerial Decisions, Declarations and one Understanding related to the WTO Agreement, and

3 Id. Preamble.
also through its four elaborate annexes that contain additional 29 Agreements and Understanding to regulate a variety of trade and trade-related areas.\(^6\) This comprehensive treaty package – usually called the “WTO agreements” (different from the above “WTO Agreement”) or “Uruguay Round agreements,” or simply, the “WTO treaty” or “1994 Uruguay Round treaty” – is at the core of an emerging body of multilateral rules for trade, the latter nowadays is widely recognized as “the law of the WTO” or “WTO law.”

The law of the WTO has its roots in the *General Agreement on Tariffs and Trade of 1947* (hereinafter as the “GATT 1947” or “GATT”). Signed by 12 developed and 11 developing economies on October 30\(^{th}\), 1947, the GATT 1947 played a dual role for over four decades as both a primer multilateral trade agreement and a *de facto* principal institution for international trade.\(^7\) Having been applied on a provisional basis,\(^8\) the GATT treaty set forth a “liberal trade philosophy” that had imposed four primary legal obligations on the “contracting parties.” These four “pillars” of the GATT included:

1. Unconditional most-favored-nation (MFN) obligation;
2. National treatment (NT) obligation;
3. Binding tariffs obligation; and
4. Elimination of import quotas obligation.\(^9\)

Meantime, above primary obligations were subject to certain exceptions prescribed in the GATT provisions, such as the balance-of-payment relief, safeguard measures, as well as the measures concerning public health, safety or national security (Article XX

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\(^6\) *Id.*


\(^9\) *Bhalal, Supra note 7, at 4.*
and XXI). In early 1995, the birth of the WTO brought an end to the GATT institution, while the GATT treaty obligations continued by incorporating the text of the GATT 1947 into the “GATT 1994,” as part of “Annex 1A” of the WTO Agreement. Thus, the GATT treaty became an integral part of the law of the WTO, and the latter is therefore often referred to as the “GATT/WTO law.”

The creation of the GATT as a de facto multilateral trade organization in late 1940s somehow established the institutional framework for the law of the GATT/WTO. Having filled the vacuum left by a still-born International Trade Organization (ITO), the GATT operated as a principal multilateral trade institution by its CONTRACTING PARTIES, which referred to the contracting parties of the GATT using their power to “act jointly.” More significantly, the GATT developed a “reasonably sophisticated” (if not perfect) dispute-settlement process through its five decades of institutional practice. Along with this achievement were eight multilateral trade negotiation “rounds” accomplished under the GATT auspices, and the latest one, so-called “Uruguay Round,” gave birth to the WTO. The then newly-born multilateral trading organization bears an institutional continuity of the GATT for it is required to “be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and bodies established in the framework of GATT 1947.” Despite the uncertainty with the binding nature of the wording “be guided by,” it has been clear that the GATT practice imposed enormous implications for the WTO institution as well as for the multilateral trading rules evolving thereafter.

Still, however, the birth of the World Trade Organization (WTO) marked a watershed for the substantive expansion and institutional evolution of WTO law. On the one hand, under comprehensive WTO agreements, a large part of treaty obligations serve

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10 *Id.* at 5.
11 *Jackson, Supra* note 4, at 48-49.
12 *Porges, Supra* note 8, at 67.
13 *Jackson, Supra* note 4, at 3.
to address the new areas like trade in services, protection of intellectual property rights and investment, which significantly expands the substance of WTO law. On the other hand, with the advent of the WTO, a "genuine" international institution had first come out merely for trade issues, aiming to "facilitate the implementation, administration and operation, and further objectives" of its comprehensive treaty system. To this end, the WTO particularly affords "a stronger, more rule-oriented dispute settlement process" based upon a single WTO legal instrument, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter as the "DSU"). Over a decade of practice in enforcing and interpreting the "covered agreements," the WTO's DSU-based dispute settlement mechanism has significantly enhanced the institutional dimension of WTO law as a "real law," making WTO legal regime a dynamic legal system towards its maturity and integrity.

Completion of the Uruguay Round and the creation of the WTO did not end the evolution of WTO law. Since 1995, the WTO has held six Ministerial Conferences, with the forth in Doha, Qatar on November 2001 set the agenda for a new round of trade negotiations ("Doha Round") on a range of subjects and other work concerning agriculture, cotton, services, TRIPs, investment, etc. Since then, the original mandate of the Doha Conference for trade negotiations has been refined by work at Cancún in 2003, Geneva in 2004, and Hong Kong in 2005. The ongoing Doha Round is now taking the WTO system further in its directions, where negotiators continue to pursue agreements in various other subjects, e.g., environmental protection, telecommunications. This suggests an even increasing expansion of treaty norms under the WTO auspices, as well as the accelerating advancement of the WTO

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15 JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 3 (2d ed. 1980). According to Professor Raz, the law is observed to have three features as being "normative, institutional and coercive."


17 *Id.* at http://www.wto.org/English/tratop_e/dda_e/negotiations_summary_e.htm.
dispute settlement mechanism, both contributing significantly to the evolution of WTO law.

The above review highlights the substantive and institutional dimension of the law of the WTO in a historical context. To conceive of this emerging body of rules for international trade, one should further explore its definition, sources and nature, as elaborated in the remainder of this part (Part I). The succeeding discussions begin with the definition of the law of the WTO. According to Professor Hart, “definition is primarily a matter of drawing lines or distinguishing between one kind of thing and another, which language marks off by a separate word.” The appropriate definition entails the availability of “a form of words which can always be substitute for the word defined.” To make it clear, “there should be a wider family of things or genus, about the character of which we are clear, and within which the definition locates what it defines.” As for the definition of the law of the WTO, the best applicable genus will be “public international law.”

Accordingly, the first chapter (Chapter 1) of the present part examines the relationship between the law of the WTO and public international law, and concludes that the law of the WTO is part and parcel of public international law, or, more precisely, a specialized area of public international law concerned with international trade. For this reason, the sources and nature of WTO law must be examined within a greater corpus of public international law, based on the general rules of the latter. Also, as part and parcel of public international law, WTO law is never a self-contained, but always an open, dynamic legal system evolving under public international law. Only with these in mind will one be able to grasp a sound structure of the law of the WTO.

20 Id. at 15.
The second chapter (Chapter 2) elaborates the sources of the law of the WTO by referring to a commonly used “inventory” of the sources of international law that covers treaties, customary law, general principles of law, as well as judicial decision and teachings of the most highly qualified publicists. The sources of WTO law generally fit this inventory, with their hierarchical status distinguished accordingly. The final chapter (Chapter 3) explores the nature of the law of the WTO, particularly in the context of Hart’s concept of a legal system. It then draws the distinction between the “treaty obligations” and “secondary legal obligations” under the WTO auspices.
CHAPTER 1 RELATIONSHIP BETWEEN WTO LAW AND PUBLIC INTERNATIONAL LAW

Public international law (sometimes known as the “law of nations”) is a system of law primarily concerned with the relations between states, though nowadays the subject also extends to rights and duties pertaining to individuals, companies and international organizations depending on the situation. Notably, there is another distinct subject related to that of public international law, called “private international law” (or the “conflict of laws” in the Anglo-American legal tradition), which is concerned with rights arising in private law and enforceable by individuals against each other. According to many international law scholars, in this chapter and other related ones through the present study, the term “public international law” is interchangeable with its abbreviated title “international law.”

Much has been said and written about the interrelations between international law and WTO law, especially the extent to which WTO law should be receptive to other rules of international law. This chapter turns to examine the relationship between the two systems particularly in terms of treaty norms and dispute settlement mechanism.

I. The law of the GATT/WTO is Part and Parcel of Public International Law

It has now been widely recognized that the law of the GATT/WTO is part and parcel of public international law. From a historical perspective, institutional evolution from the GATT (as a de facto multilateral trade organization) to the WTO appears indispensable to the emergence of GATT/WTO legal regime, and this process in-deed reflects one significant feature of modern public international law in the post-World

22 Id. at 2.
War II era, highlighting the predominant role of international organizations in
"forming world law." 23

Back to 1940s when the World War II came to an end, 24 international organizations
began to play a significant role in extending the horizon of international law and
considerably modifying its nature. 25 These were certain variations of international
law, which largely expanded its landscape. Among them was the "Bretton Woods
System," originally consisting of three principal governmental economic institutions,
namely, the GATT, the International Monetary Fund (IMF), as well as the
International Bank for Reconstruction & Development (IBRD) or World Bank, and
serving to accomplish international cooperation for free trade, economic
reconstruction and financial security. In early 1995, when the WTO came into being
to replace the GATT, it was seen to fill up the "missing leg" of the "Bretton Wood
stool." 26

Being a comprehensive multilateral institutional framework, the "Bretton Woods
System" has operated to establish and enhance an "international economic law" which,
according to Professor John Jackson, "would embrace trade, investment, and services
when they are involved in transactions that cross national borders, and those subjects
that involve the establishment on national territory of economic activity of persons or
firms originating from outside the territory." 27 International economic law appears to
be largely overlapped with (if not subject to) a broad concept of public international
law. Equally, within the "Bretton Woods System," the three constituent institutions
are seen closely linked to three respective specialized areas of international law. 28

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23 Id. at 736. Cite, G. Clark and LB Sohn.
24 Id. at 39.
25 Id. at 39-42.
26 JACKSON, supra note 4, at 32.
27 Id. at 25.
28 O'BRIEN, supra note 21, at 614. "As for other two institutions ... as the IMF was designed to secure
the stability of exchange rate, the work of IMF is usually described as comprising the topic of
International Monetary Law. As the IBRD (or World Bank) was designed to promote reconstruction
terms of the GATT/WTO institution, given its objectives to promote free trade, the
work under the WTO/GATT auspices is normally deemed part of “international trade
law.”

Like international economic law, international trade law contains both public law and
private law dimensions, representing a much broader category of international norms
“concerned with the flow of goods and services across the border,” regardless of its
relation with public or private rights. Although it is not uncommon to treat
contemporary international trade law as being embodied in the GATT/WTO legal
regime, the latter merely represents the public law dimension of international trade
law. The reasons are simple: subjects of public international law are primarily the
nation-states, despite some special occasions where individuals, companies or
international organizations may be involved therein. The GATT/WTO system
simplifies this issue in the sense that the GATT/WTO legal rules only apply to the
governments of their Member States.

During the GATT era, the range of application of GATT treaty was limited to the
governments of the “contracting parties.” The WTO treaty adopts this practice by
imposing legal obligations upon Member States. So long as the nation states
contract with each other, which has been the case with GATT/WTO Memberships,
“they do so automatically and necessarily within the system of public international
law.” Thus, the law evolving from the WTO/GATT system is “no more than a
specialized branch of public international law” concerned with trade and trade-related

by facilitating capital investment, the activities of the World Bank Group are usually described as
falling within International Development Law.”

29 Id.
30 Id. at 619. This is also true for international economic law and its other two divisions, namely,
International Monetary Law and International Development Law.
32 JACKSON, supra note 4, at 53-54.
(July 2001).
affairs.” For the same reason, it might be inappropriate to treat the WTO/GATT legal regime as the equivalent of international trade law, given the latter’s “mixed” legal nature in both private and public international law sense. Otherwise this may somehow obscure the “pure” nature of the law of the WTO as a new variation of public international law, although it is indisputable that the law of the WTO is at the core of international trade law.

The above historical perspective indicates that the GATT/WTO law emerged from the landscape of modern public international law, and has ever since grown into an indispensable part of this landscape. Besides, there is an institutional perspective, given that WTO law must be scrutinized in the context of international law. The WTO is an international governmental organization, with a range of organs and responsibilities plus an “international legal personality.” Viewed as little different from other international law institutions, the WTO falls into the ambit of “international institutional law,” a major field of public international law. It is therefore unaffordable to isolate the law evolving through the GATT/WTO system from public international law.

Also, the “constitution” of the WTO (WTO Agreement) is a treaty, under which legal obligations applicable to each Member State are treaty obligations. On some occasions, the term “WTO” does not directly refer to the institution itself, but to its comprehensive treaty system. As contended by the WTO’s Appellate Body in the Japan Alcohol case, “[t]he WTO is a treaty – the international equivalent of a ... contract. ... The Members of the WTO have made a bargain. In exchange for the

35 In reality, however, some scholarly texts imply that international trade law primarily refers to a set of legal regimes developed under the GATT/WTO system, called as the “rules” or “law” of the GATT or the WTO. Others even see international trade law as exchangeable with “WTO law” or the “GATT law.”
36 McRae, supra note 34, at 28.
benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they made in the WTO Agreement.\footnote{Appellate Body Report, Japan – Taxes on Alcoholic Beverage, WT/DS8/AB/R 15 (Oct. 4, 1996).} Treaties are automatically born into the system of public international law, much the same way as private contracts are automatically born into a system of domestic law,\footnote{Pauwelyn, supra note 33, at 2.} not to mention that treaties constitute the major primary source of public international law. To the WTO treaty system, which is at the core of the WTO law, this is no exception.

More importantly, WTO agreements themselves draw from public international law, despite the fact that many negotiators of those treaties did not bear it in mind in their drafting process.\footnote{Id.} Under Article 3.2 of the DSU, the “covered agreements” of the WTO are to be interpreted and applied “in accordance with the customary rules of interpretation of public international law,” which indeed indicates the drafters’ intent to view the WTO within the mainstream of public international law.\footnote{Id.} Also, it is worth noting the WTO dispute settlement process, given its essential role as that of many other international adjudicating bodies, the latter range from the traditional one like the International Court of Justice (ICJ) to new ones like the International Tribunal for the Law of the Sea (ITLOS).\footnote{Id. at 31.} Despite some procedural differences in the jurisdiction and operation of above adjudicating bodies, judicial nature of the task of a WTO panel or the Appellate Body is basically the same as that of other international tribunals.\footnote{Id. at 31-32.} This similarity makes the WTO dispute settlement mechanism a worthy study in the field of international dispute settlement, another major subject of public international law, not to mention the essential role of this mechanism in paving the “institutional dimension” of WTO law.
In sum, in a historical, institutional, textual and substantive context, GATT/WTO law has been incorporated into the corpus of international law, ever since it emerged from the landscape of modern public international law. In this particular connection, the law of the WTO can be treated as nothing more than the integral part of international law. Further more, it is appropriate to take international law as the genus of WTO law, viewing the latter from an international law perspective. According to some scholars, “[p]rinciples of international law, we are reminded by panels and the Appellate Body, are valid for the WTO and form the basis of the relations between and among WTO members.” This observation suggests an approach of applying general concepts, rules and principles of international law to WTO law, especially concerning its fundamental dimensions, e.g., sources of law, legal nature, legal interpretation, as well as its relationship with the internal legal system of each WTO Member.

The remainder of the present part (Part I) is devoted to an exercise as such, proving that the GATT/WTO law is neither a “close” nor a “self-contained” legal regime. On the contrary, it has been and will continue to be open to the broader landscape of public international law. Particularly, under certain prescribed conditions, international law rules will serve to fill up the “gaps” left by the existing WTO treaty system. In this sense, international law has enriched the law of the WTO, and will continue to achieve more in this regard.

II. The Law of the WTO Represents Certain “New Frontiers” of Public International Law

It is one thing to see the GATT/WTO law as part and parcel of public international law, and quite another to assert that there is nothing special about this emerging body of legal norms in the realm of public international law. The law of the GATT/WTO

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43 Thomas Cottier & Krista N. Schefer, Good faith and the protection of legitimate expectations in the WTO, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 48 (Marco Bronkers, eds., 2000).
44 Pauwelyn, supra note 33.
is more than a “continued tradition” of public international law.\(^{45}\) It has created some “new frontiers” for that classic subject in both a theoretical and practical context.\(^{46}\)

Theoretically, public international law is essentially based upon the concept of sovereignty of states, while the GATT/WTO law is based on an economic theory (principle of comparative advantage) underlying a liberal trade order. Under a sovereignty-based regime, states will, due to citizenship and nationality, protect the interests of the “insiders” even at the expense of the “outsiders”. Under the GATT/WTO legal regime, pursuit of “national interests” can be seen as “protectionism” and at variance with the notion of the liberal trader order on which the WTO is founded.\(^{47}\) Since WTO law still exists within the framework of a sovereignty-based system of international law, a tension between the claims to state sovereignty and those to international disciplines of trade undertaken by the GATT/WTO law, will become the sources of numerous problems occurring in the field of international trading system.\(^{48}\)

Despite the above inherent theoretical conflicts, by “thickening” the “rule of law” nature, the GATT/WTO law has gradually overcome the “sovereignty obstacles” to its underlying liberal trade philosophy. Rapid expansion of world trade as the result of trade liberalization is regarded as a big contribution to the growing independence of the world economy. Thus, private interests are increasingly affected by the forces from abroad, inevitably calling for more citizen participations and political democracy in the processes of international economic policy.\(^{49}\) For international trading system, there has been an evolution from a “power-oriented” approach to a “rule-oriented approach,”\(^{50}\) where the role of the sovereignty or “economic sovereignty” (analogue

\(^{45}\) McRae, supra note 34, at 27-28.
\(^{46}\) Id. at 29-30.
\(^{47}\) Id. at 29.
\(^{48}\) Id. at 41.
\(^{49}\) JACKSON, supra note 4, at 111.
\(^{50}\) Id. at 110-111.
to the sovereignty in economic sphere) as the foundation of international law has gradually decreased and faded.51

Meanwhile, upon the creation of the WTO, the GATT/WTO trading system has developed towards the “rule of law,” especially in the aspects of “rule implementation” and dispute settlement.52 Over the past decades, enhancement of “international rule of law” in the WTO context has led to certain breakthroughs to the “sovereign nature” of public international law. As a result, GATT/WTO law has turned into some “new frontiers” of public international law.

In a practical context, evolution of the WTO dispute settlement has extended the horizon of the “new frontiers” of public international law. Generally, “an active process of dispute settlement, in which international law is argued, applied, and refined, can make contributions to both procedural and substantive aspects of international law.” This is particularly true for the WTO dispute settlement process, which first serves to resolve individual disputes in the application of the “covered agreements” within the scope of the DSU, but also goes further. The WTO dispute settlement process is “unique” for its judicial nature. Being obligatory to all WTO Members, the process makes its results both final and binding upon the latter. In this judicial decision-making process, applying WTO agreements is rather an active, law-creating process, where the concepts and doctrines of international law may be refined through authoritative interpretations of the WTO panels or the Appellate Body.53

While the WTO is a treaty-established institution and a treaty-based legal regime, the meanings of WTO treaty norms can only be clarified and articulated by the adjudicating organ available to the WTO system. Through the efficient WTO dispute settlement process, treaty law and judicial decision-making merge well. Rulings of

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51 McRae, supra note 34, at 29-30.
52 JACKSON, supra note 4, at 109-111.
53 McRae, supra note 34, at 30-31.
the WTO’s Dispute Settlement Body (DSB) play a more significant role than their relegation traditionally prescribed as a “subsidiary source of international law” under Article 38(1)(d) of the Statute of the ICJ. Thus, development of public international law within the WTO dispute settlement process maintains a much faster pace than has occurred under other existing international legal institutions.\footnote{Id. at 40.}

Accordingly, the law of the GATT/WTO does, and will continue to represent certain “new frontiers” of public international law. With its “rule of law” feature increased, WTO law significantly enhances the “international rule of law,” the latter is deemed as a “new frontier” of modern public international law for its achievement in resuming a “natural law” tradition. Apparently, efficient operation of the WTO dispute settlement process accelerates the development of international dispute settlement process in both procedural and substantive dimensions, and thus has refined the concepts and doctrines of public international law as a whole.\footnote{Id. at 30.} This functioning is deemed to have expanded the “new frontiers” of public international law. As the GATT/WTO law evolves towards its maturity and integrity, public international law will remain a dynamic rather than static legal system.

In a word, the relationship between the law of the WTO and public international law is “two-folded,” while the interaction between the two systems can be seen as a continuing process of “cross-fertilization.”\footnote{Pauwelyn, supra note 33, at 26.} WTO law is part and parcel of public international law on the one hand, and represents certain “new frontiers” of the latter on the other. Without a position as such, one may feel difficult – if not impossible – to obtain a sound perception of WTO law.
CHAPTER 2 SOURCES OF THE LAW OF THE WTO

A simple question "what is the law of the WTO?" will invite numerous complex issues. With its "genus" (public international law) available in previous discussions, definition of WTO law still calls for some further explorations. While there is no doubt that WTO law is part and parcel of international law, issues may go further as: What does the WTO law look like? How to establish it and by what criteria? What would be the outcome? All these issues are concerned with the "sources of law."

"Sources of law" are involved in "some accepted criteria by which 'laws' are established" in a legal system. They either supply the substance of the rules of law (as "material sources"), or give them the force and nature of law (as "formal sources").57 Within a national legal system, sources of law can be easily identified when they are prescribed in a written constitution, or based on a distinct allocation of power among legislative, judicial and executive branches of the government.58 This reflects the functioning of the "rules of recognition" within a legal system.

In terms of international law, identifying its sources appears uneasy, for international law is regarded as a "primitive legal system" in the absence of a "permanent supreme legislative body."59 Thus, "rules of recognition" are formulated on the basis of a widely recognized practice of the ICJ (a primer international dispute settlement body).60 This practice is codified in Article 38(1) of the Statute of the ICJ, providing that:

(1) The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing

57 O'BIEN, supra note 21, at 66.
58 Id. at 65.
59 Id. at 28.
60 Id. at 33.
rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law recognized by civilized nations;

d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law."\(^{61}\)

The above provision has long been regarded as the “most convenient summary of the sources of international law."\(^{62}\) The rationale behind this approach is that “whatever deemed as the law by the competent adjudicating body through its application would be law,” where the perspectives of the adjudicating body is at the center, just like those of the ICJ in this case. The results are an “inventory” of the sources of international law, covering four categories as follows:

1. Treaties;
2. Customary law;
3. General principles of law; and
4. Judicial decisions and teachings of the most highly qualified publicists.

Among these four categories, the first two are “primary sources” of international law without hierarchical difference, although “in the event of a direct conflict a treaty provision (unless it violated a rule of *jus cogens*) would prevail over a customary rule.” The third category serves to “fill gaps in treaty and customary law” and can be treated as the “subordinate source” of international law.”\(^{63}\) Nevertheless, it is arguable that these three categories are “parallel” sources in that they all belong to the “formal sources” from which international law derives its force and validity.\(^{64}\) Namely, all these categories include the rules of international law that are “likely”

\(^{61}\) Article 59 of the Statute of the ICJ reads that: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

\(^{62}\) O'BRIEN, *supra* note 21, at 65-66.

\(^{63}\) Id. at 68.

\(^{64}\) Id. at 66.
binding in nature and contain the force of general application.

As for the fourth category, it does not contain such binding force. Particularly, Article 38 (1)(d) expressly denies the binding nature of "judicial decisions" by referring to Article 59 of the same Statute. Also, Article 38(1)(d) regards both "judicial decisions" and "teaching of the most qualified publicists" as "subsidiary means for the determination of rules of law." Thus, these two sources of law are qualified as evidentiary of the existing rules of international law and as such also constitute the "material sources" from which only the matter (substance) of international law derives, and appear to be the "subordinate source" of international law.

As part and parcel of international law, the law of the WTO may adopt the above "inventory" for identifying its own sources of law. However, the WTO has in itself been a "mini" but integrated legal system, as viewed from the perspective of Professor Hart's doctrine of a legal system, and will in all respects be comparable to the legal system represented by international law. Especially, the WTO legal system features a highly efficient DSU-based dispute settlement process, where a single Dispute Settlement Body (DSB) is designed to "establish panels, make rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreements." In this context, the DSB turns out to be analogous to the ICJ within the WTO legal system, while the DSU can be seem as an analogy of the Status of the ICJ. Thus, the sources of WTO law deserve a better articulation than by simply adopting the "inventory" designed for international law.

Following the rationale behind the approach proposed by Article 38(1) of the Statute of the ICJ, an exercise to locate the sources of WTO law should start with the DSU, WTO equivalent of the Statute of the ICJ that spells out the "rules of recognition." It is observed that the DSU contains no explicit enumeration analogous to Article 38 (1)

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65 Id.
of the statute of the ICJ. Alternatively, Article 3.2 and Article 7 of the DSU establish some criteria for identifying the sources of WTO law. Under Article 3.2, part of the purposes of the WTO's dispute settlement process is to "clarify" the provisions of the WTO Agreement "in accordance with customary rules of international law." Under Article 7, the "terms of reference" for panels serve to "examine, in the light of the relevant provisions in the covered agreement(s) cited by the parties to the dispute, the matter referred to the DSB" and to "address the relevant provisions in any covered agreement or agreements cited by the parties to the disputes."66

Were Article 3.2 and Article 7 of the DSU viewed as the "WTO substitute" for Article 38(1) of the Statute of the ICJ, the sources of WTO law would be limited to the "covered agreements" and "other agreements" invoked by the parties in the WTO's dispute settlement process.67 As these "agreements" fall within the category of "treaties," primary source of international law, from the outset, WTO law refers to the comprehensive treaty system under the WTO auspices, with the above "covered agreements" taking a lead.

Nevertheless, the sources of WTO law are not limited to international treaties. As part and parcel of public international law, WTO law shares the four categories of the sources of international law as defined in Article 38(1) of the Statute of the ICJ. There are also increasing needs to extend jurisprudential basis of the WTO beyond the limits of the WTO treaty texts.68 Therefore, the other three categories of international law, namely, custom, general principles of international law, as well as judicial decisions and the teachings of the most highly qualified publicists, are "potential sources" of WTO law.69 All these four categories will be elaborated in the WTO context in the ensuing sections.

67 Id.
68 Cottier & Schefer, supra note 43.
69 Palme the & Mavroidis, supra note 66.
I. Treaties

Under Article 38(1)(a) of the Statute of the ICJ, the first category of the sources of international law is “international conventions,” also categorically known as “treaties.” Under Article 2(1)(a) of the Vienna Convention on the Law of the Treaties, a “treaty” is an “international agreement” concluded between states in written form and governed by international law, whether embodied in one or more instruments or whatever its particular designation. Here the term “instruments” may have other names, such as, “protocols.”

Treaties impose legal obligations upon the parties (nation states) to these treaties. Depending on the nature of these legal obligations, treaties can be categorized as the “law-making treaties” and “treaty contracts.” Law-making treaties “will purport to lay down general rules, will be multilateral in character, and the observance of rules will not dissolve other treaty obligations.” In the absence of a legislative body under international law, multilateral law-making treaties are usually employed to stipulate common rules for future and continuing observance. In contrast, “treaty contracts” are those treaties that resemble contracts, with their performance leading to dissolution of legal obligations concerned.

Both law-making treaties and treaty contracts are “international conventions” within the scope of Article 38(1)(a), where law-making treaties are “general” in nature and treaty contracts are “particular.” They both come within the category of “formal sources of international law,” imposing legal obligations upon the parties involved. However, it is important to distinguish one from the other, for legal obligations and rights deriving respectively from these two legal sources appear different in character,

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70 O'Brien, supra note 21, at 80.
71 Id. at 82.
72 Id.
and therefore bear different legal implications.

1. 1994 Uruguay Round Agreements

As a treaty-established international organization, the WTO is equipped with a comprehensive treaty system, which is deemed to be the "fundamental source of law of the WTO." Major body of this treaty system refers to "1994 Uruguay Round agreements," the results of 1986-1994 Uruguay Round negotiations that were signed at the Marrakesh Ministerial Conference in April 1994. As a terminological matter, the "1994 Uruguay Round agreements" are often called "WTO agreements." They comprise some 60 agreements and decisions totaling 550 pages. Since then, trade negotiations under the WTO auspices have also produced some "post-1994 agreements," e.g., Information Technology Agreement, Services Protocols and Accession Protocols.

The Uruguay Round agreements constitute a comprehensive treaty package, beginning with a "single copy" of treaty document called the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act). Attached to the Final Act is the Marrakesh Agreement Establishing the World Trade Organization (or, the "WTO Agreement"), together with 28 Ministerial Decisions, Declarations, and an Understanding related to this agreement. The WTO Agreement — usually called as the "WTO Charter" — is by itself a ten-page treaty text and confined to institutional issues regarding the establishment of the WTO, including its scope (Article II), functions (Article III), governing structure (Article IV), status (Article VIII), decision-making (Article IX), amendment (Article X), accession

73 Palmeter & Mavroidis, supra note 66, at 398.
74 World Trade Organization, WTO Legal Text, at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#ita.
75 JACKSON, supra note 4, at 47.
More significantly, the WTO Agreement explicitly outlines four important annexes which consist of a number of “agreements and associated legal instruments” on trade and trade-related issues. Article XII of the WTO Agreement expressly clarifies the legal nature of these annexed agreements and legal instruments. According to Article XII:2, Annex 1, 2, and 3 — as collectively referred to as the “Multilateral Trade Agreements” (MTA) — are “integral part” of the WTO Agreement and “binding on all WTO members.” Article XII:3 of the WTO refers to “Plurilateral Trade Agreements” which is also the integral part of the WTO, but binding only on the members that accept it. This unique arrangement allows certain “flexibility” for the treaty texts to be added or subtracted upon the changing environment of international trade over time, and “for the evolution of institutions necessary for implementation of the rules.” The structure of the four annexes is also significant in the sense that they serve different purposes respectively and entail different legal consequences.

Annex 1 of the WTO Agreement contains three multilateral agreements, namely, Annex 1A, 1B and 1C. They address respectively three substantial areas of trade: trade in goods, trade in services and trade-related aspects of intellectual property rights. “Annex 1A” contains General Agreement on Tariffs and Trade 1994 (GATT 1994) and vast “schedule of tariff concessions.” Tariff schedules for each of the major trading country (the United States, Japan, and the European Union) constitute a volume of printed tariff listings. The GATT 1994 comprises the revised GATT 1947, some new understandings, and side agreements on 12 topics ranging from agriculture to pre-shipment inspection.

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77 Id.
78 The “side agreements,” with some of them originated from the Tokyo Round and revised in the Uruguay Round, addressed respectively twelve topics as diverse as: agriculture, application of sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade (standards), trade-related
According to Article II:4 of the WTO, GATT 1994 is "legally distinct from" GATT 1947. When GATT 1994 came into force upon the establishment of the WTO, GATT 1947 as a separate legal instrument lost its force of law. By incorporating GATT 1947 into its text, GATT 1994 absorbs the treaty obligations of the former as a whole. GATT 1994 contains numerous substantive rules to constrain the governments of members from imposing or continuing a variety of measures that restrain or distort international trade, so as to achieve the "liberal trade" goal and secure free market. Among them three major substantive rules are worth noting: the MFN clause (Article I), the National Treatment clause (Article III) and the "binding tariff concessions" clause (Article II). Other substantive rules concern the "exceptions" to the above three sets of legal obligations, such as the rules for national security, health and morals, and safeguard.

Annex 1B contains *Uruguay Round General Agreement on Trade in Services* (GATS) and a series of "schedules of concessions." The GATS resulted from the negotiations in the Uruguay Round on "services" – emerging area of trade that embraces more than a hundred different service sectors, e.g., banking, insurance, tourism, communications, legal, transport, etc). It is observed that trade in services takes a larger portion of international and national markets. The GATS contains a body of multilateral rules to "inhabit a growing tendency of the governments to limit competition in services with restrictions and protectionist measures." Many of these rules are comparable to those of the GATT, including the analogies of the National Treatment clause, transparency clause and the exceptions on safeguard, health, morals and national security. Other substantive rules address the issues on subjects like competition and monopoly policy, investment measures, implementation of Article VI of the GATT 1994 (dumping), implementation of Article VII of the GATT 1994 (valuation), preshipment inspection, rules of origin, import licensing procedures, subsidies and countervailing measures, and safeguards.

79 World Trade Organization, at www.wto.org. According to the information available therein, the *GATT 1994* must be read with the *GATT 1947*.

80 JACKSON, DAVEY & SYKES, *supra* note 76, at 209.
Annex 1C contains *Uruguay Round Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPS), designed to ensure the governments of members to provide for certain "minimum level of protection" of a variety of intellectual property rights, such as patents, copyrights, industrial designs, trademarks, and the like. The TRIPS equally contains the analogies to the substantive rules of the GATT on MFN treatment, National Treatment, transparency and various exceptions. Also, the TRIPS comprises the obligations imposed on the governments of members to provide civil and administrative procedures and remedies for the right-holders to pursue. More remarkably, by incorporating the provisions of some major intellectual property treaties (such as the Berne Convention on copyrights, Paris Convention on patents, etc.), the substantive rules of the TRIPS are largely enriched, making this agreement an open and dynamic legal regime within the WTO.\(^{82}\)

Annex 2 of the WTO Agreement contains *Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), which comprises most WTO rules for dispute settlement. The DSU establishes a unitary dispute settlement mechanism for all the agreements listed in Annex 1, Annex 2 and Annex 4 of the WTO Agreement (collectively as the "covered agreements"). Although the "covered agreements" do not exhaust the treaty source of WTO law, they constitute the essential part of the WTO treaty system available to the WTO dispute settlement process.

Annex 3 of the WTO Agreement establishes a Trade Policy Review Mechanism (TPRM) for reviewing and reporting the overall trade policies of each WTO member on a periodic and regular basis. The TPRM is rather "administrative" than "legalistic" in nature, for it does not focus on the WTO consistency, but on the general impact of

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\(^{81}\) *Id.* at 210.

\(^{82}\) *Id.*
the trade policies on the examined Members and their trading partners within the WTO.83

According to Article II:2 of the WTO Agreement, the above three annexes are integral part of the WTO Agreement, collectively termed “Multilateral Trade Agreements” (MTA). Both the WTO Agreement and its annexed MTA are “binding on all WTO members,” and therefore create substantive and procedural legal obligations, which are multilateral in nature. As “formal sources” of WTO law, WTO Agreement and the annexed MTA agreements are multilateral law-making treaties, creating common rules for future and continuing observance in various substantive areas of trade. In this regard, the WTO has reinforced the “single package idea” of the negotiators of the Uruguay Round, and overcome the “fragmented feature” of the GATT 1947 (“GATT as à la carte”).84 Particularly, the overall application range of the DSU (Annex 2) towards all Members enables the WTO to establish and maintain a unitary dispute settlement mechanism, so as to ensure the consistent application and integrity of the “covered agreements,” especially in terms of the above noted treaties.

Notably, the MTA is also a mixture of law-making treaties and treaty contracts, the latter mainly refer to vast “schedule of tariff concession” attached to GATT 1994 in Annex 1A, as well as comprehensive “schedules of concession” attached to the GATS in Annex 1B. These schedules represent specific arrangements between a specific WTO Member vis-à-vis others as a whole, creating time-framed, specific legal obligations to be dissolved upon their performance. They appear to fall within the category of treaty contracts, and constitute another more formal source of WTO law.

Annex 4 of the WTO Agreement originally contained four “Plurilateral agreements” that address four respective subjects: trade in government procurement, trade in civil aircraft, bovine meat and dairy products. Subsequently, the agreement on bovine

83 Id. at 220.
84 Id. at 219.
meat and that on dairy products were terminated in 1997. Since then, Annex 4 has remained Agreement on Trade in Civil Aircraft and Agreement on Government Procurement (GPA). According to Article II:3 of the WTO Agreement, these two treaties form an integral part of the WTO Agreement specifically “for those members that have accepted them” and only “binding on those members.” Although this “optional” nature is at odd with the “single package” philosophy of the MTA, “Plurilateral agreements” are still the law-making treaties in that they contain rules of general application towards the parties concerned, which impose various legal obligations upon these parties, either in a substantive or a procedural sense. With their mandatory nature limited to a “plurilateral” status, Annex 4 leaves some important flexibility for the WTO to evolve and address new subjects emerging in the future.

2. Post-1994 Agreements, Protocols and Schedules of Commitments

Upon the completion of the Uruguay Round and since the birth of the WTO, the WTO treaty system has continued to expand through six rounds of trade negotiations held successively in Singapore, Geneva, Seattle, Doha, Cancun and Hong Kong. These rounds have resulted in the conclusion of certain “post-1994” treaties in the form of “agreements,” “protocols” and “schedules of commitments.”

In the area of trade in goods, noteworthy is the Ministerial Declaration on Trade in Information Technology Products (hereinafter as “Information Technology Agreement” or the “ITA”). Concluded at the Singapore Ministerial Conference by

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85 World Trade Organization, supra note 74.
86 JACKSON, DAVEY & SYKES, supra note 76, at 220.
88 World Trade Organization, supra note 74.
89 Interestingly, a “ministerial decision” of the WTO may be termed an “agreement,” and thus bring this legal source into the category of “treaties.” This may give rise to a question with regard to the legal status of the “Doha Declaration,” which remains a controversial at present.
29 (including 15 EC Member States) WTO Members in December 1996, the ITA did not enter into force until July 1st, 1997, when a stipulated "90 percent trade coverage criteria" were met based on total shares of the participants of this agreement in world trade in information technology products.\(^90\) Serving as "solely a tariff cutting mechanism," the ITA features vast schedule of tariff cutting for various IT products with various fixed implementation periods. Therefore, based on its legal nature, the ITA is a treaty contract rather than a law-making treaty. As for its binding force, the ITA creates specific and time-frame obligations upon each participating Member. On the MFN basis, the benefits of these obligations will accrue to all other WTO Members.\(^91\) Adding the ITA to the WTO treaty system has increased the formal sources of WTO law.

Similar development has taken place in the area of trade in services. After the Uruguay Round, four protocols were concluded and attached to the GATS, with two covering financial services and the other two addressing movement of natural persons and basic telecommunications. They are referred to as the "Post-1994 GATS Protocols."\(^92\) Attached by vast "schedule of commitments," these protocols are a mixture of law-making treaty and treaty contract. They are incorporated into the WTO's treaty system and serve as formal sources of WTO law.

More significantly, there have been a large number of "accession protocols" for the Members acceding to the WTO (so-called "acceding Members) after January 1\(^{st}\), 1995. Titled as "Post-1994 Accession Protocols," these agreements form an integral part of the WTO Agreement for the acceding Member concerned. They contain various terms of accession which break down binding legal obligations upon the acceding ember concerned, and these benefits accrue to all other existing Members on the MFN


\(^{91}\) Id.

\(^{92}\) World Trade Organization, supra note 74.
basis. Depending on the particular case, the accession protocol may attach the “schedule of commitments” for an acceding Member.\(^93\) Thus, from an overall perspective, “Post-1994 Accession Protocols” have become a mixture of law-making treaty as well as treaty contract. Among these accession protocols is the Accession Protocol on China, a most comprehensive package of this kind.

In addition, since the establishment of the WTO, “schedule of commitments” has been on the increase as envisaged by existing WTO Members. These schedules contain the commitments of individual Members concerned, which allow specific foreign products or service-providers access to their domestic market.\(^94\) Appearing as “pure” treaty contracts, they are an integral part of the WTO Agreement for the Members concerned, and therefore also constitute the formal source of WTO law.

3. Other International Agreements

Besides the treaty system under the WTO auspices (at the core of which are the “covered agreements”), other international agreements that exist outside the WTO auspice may also be incorporated into the WTO treaty system, and become another source of WTO law.\(^95\) Treaties of this kind should fall in either of the following categories:

1. These international agreements are explicitly referred to in the “covered agreements” of the WTO. Typical cases include several major intellectual property conventions referred to by the TRIPS, and the “customary rules of interpretation of public international law” as noted in Article 3.2 of the DSU, which actually codifies Article 31 and 32 of Vienna Convention on Law of Treaties.

2. Parties to the said international agreements are also those to a dispute in the

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\(^93\) World Trade Organization, *supra* note 74.

\(^94\) *Id.*

\(^95\) Palmeter & Mavroidis, *supra* note 66, at 409.
WTO dispute settlement process, where these agreements are bound to largely affect the rights and obligations of the WTO members under the “covered agreements” of the WTO.96

Therefore, “other international agreements” in themselves may not amount to WTO law without condition, and will only be deemed as the treaty source of WTO law on the limited occasions mentioned above. Even in these two categories, it will be the “covered agreements” of the WTO that play the major role, while relevant international agreements will serve only as a supplement. This indicates that among the treaties sources of the WTO law, the “covered agreements” will always take the central position.

II. International Custom

“Custom” basically refers to the evolving and observed rules of conduct by which “the practice has become general.”97 International custom, often interchangeable with “customary international law,” is defined as the “rules of national behavior that can be ascertained from the practice of nations when such practice reveals that nations are acting under a sense of legal obligation (opinio juris).”98 This definition is affirmed in Article 38(1)(b) of the ICJ Status, where international custom is regarded “as evidence of a general practice accepted as law.”

Although international custom counts as one of the two “primary” sources of international law, it is considered to have played a minor role in regulating current international economic relations.99 This is particularly true for the treaty-based legal regime like the GATT/WTO law, evident in the most-favored-nation clause (MFN) of

96 Id. at 412 (July 1998).
97 O'BRIEN, supra note 21, at 68.
98 Id. at 26.
99 JACKSON, supra note 4, at 26.
the GATT/WTO treaty, which denies either a custom or any codification of it. The only portion of custom, which is expressly incorporated into the WTO legal regime, lies in Article 3.2 of the DSU specifying that the purpose of the dispute settlement is to clarify the provisions of the WTO agreements "in accordance with customary rules of interpretation of public international law." Even this portion has been integrated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and thus applied in practice more as treaty norms. Other likely examples may be found in certain WTO dispute settlement proceedings, such as the "precautionary principle" noted in the Beef Hormone case. But the nature of this principle as international custom seems "plausible" in the eyes of the Appellate Body of the WTO, since the latter felt "less than clear" whether it has been widely accepted as such.¹⁰⁰

In addition, recalling the wording of Article XVI:1 of the WTO Agreement, the provision refers to "customary practices" of the GATT 1947 by which the WTO is obligated to be guided. A question has been raised whether the phrase "customary practices" falls within the category of customary international law. Few parties to the GATT 1947 offered a positive answer in this regard. Nor has any WTO member done so ever since.¹⁰¹

III. General Principles of Law

Under public international law, general principles of law serve to "fill gaps in treaty and customary law" and become some "subordinate source" of international law.¹⁰² Given their function, however, general principles of law would have the same general binding force as that of treaties and customary law, and should be capable of being incorporated into any concrete source of law.

¹⁰⁰ Palmeter & Mavroidis, supra note 66, at 406-407.
¹⁰¹ Id. at 407.
¹⁰² O'BRIEN, supra note 21, at 68.
This proposition equally applies to WTO law, where general principles of law should be treated as effective supplements to the source of WTO law, and incorporated into the latter in both textual and practical sense. Textually speaking, some general principles of law have been incorporated into the text of WTO agreements. A typical example concerns Article 22.4 and 22.6 of the DSU. According to these two provisions, the level of suspension of concessions should be proportional to the level of the nullifications and impairment, which actually reflects the principle of proportionality. 103

For practical purpose, especially in the context of WTO dispute settlement process, WTO panels and the Appellate Body have relied on some general principles of law to support their “legal reasoning,” on occasion and even in controversial cases. Examples in this context include:

1. the principle that an exception to a general rule should be interpreted narrowly, which has been applied by the GATT panels in several instances before the Appellate Body finally rejected it;
2. the equitable principle of estoppel, invoked by the WTO panel in a proceeding involving the U.S. subsidies and countervailing measures affecting imports of softwood lumber from Canada;
3. the interpretative principle concerned with the avoidance of the readings that would result in reducing the whole clauses or paragraphs of a text to “redundancy or inutility,” which has been recognized several times by the WTO’s Appellate Body. 104

Still, there are now a few WTO treaty provisions that have recourse to general principles of law, although they are only occasionally or even controversially quoted or invoked in the WTO dispute settlement process. Thus, general principles of law have been an essential component but merely a supplemental source of WTO law.

103 Palmeter & Mavroidis, supra note 66, at 408.
104 Id.
With a rapid expansion of Members’ practice in the WTO dispute settlement process, it is expected that the chances for these principles to be adopted and applied within the WTO system will increase steadily.

IV. Reports of “Prior” Panels and the Appellate Body as Judicial Decisions

Within the primitive legal system represented by contemporary international law, decisions of an adjudicating body like the ICJ are treated as “subsidiary means for determination of rules of law” under Article 38(1)(d) of the Statute of the ICJ. These judicial decisions fall within the category of the “subordinate sources” of international law, since under Article 59 of the Statute of the ICJ, their binding force are confined to the parties of the particular disputes at issue. In no event will they obtain a “stare decisis” status. Neither will they amount to any binding “precedent” as they are in a full-fledged national legal system. None the less, being binding as between the parties to the dispute, and with respect to the subject matter in dispute, the principle of “res judicata” clearly applies.

Thus, within international law system, judicial decisions contain not a controlling but a “persuasive” force upon subsequent disputes and tribunals. They are “material sources” that merely generate the substantive matter of international law. Absent the binding nature and the force of general application (which derive from a “formal source” like treaties, international custom or general principles of law, etc.), these judicial decisions may not serve as a rule of international law for general application. However, as res judicata, they constitute a source of law as between the parties in respect of the decided case.

This is also the case with the GATT/WTO law, the latter is part and parcel of international law. Ever since the GATT era, the GATT/WTO legal system has

105 The doctrine of “stare decisis” is even inapplicable under many mature (domestic) legal systems.
106 Palmeter & Mavroidis, supra note 66, at 401.
developed a dispute settlement mechanism that, back to its origin in the GATT, was already seen to be “sophisticated enough” and “work better than the World Court.” The GATT dispute settlement process was established under Article XXIII of GATT 1947, where the CONTRACTING PARTIES explained their position before a “panel of experts” with authority to take up each particular dispute after the mid-1950s and functioning as an adjudicating organ to investigate, recommend action, give a ruling on the matter, and authorize suspension of concessions. Until the end of 1994, over 500 disputes had been processed by the GATT panels, with 196 panel reports issued.

With the advent of the WTO, an integrated, more rule-based dispute settlement mechanism came into being under the DSU. It is designed for all parts of the GATT/WTO system, including the post-GATT subjects like services and intellectual property, as well as the post-WTO subjects like information technology, environment, etc. It furnishes “a right to appellate review” as unique to any other international tribunals. It has been deemed as “the most developed dispute settlement system in any existing treaty regime.”

Within the WTO dispute settlement process, the single Dispute Settlement Body (DSB) serves as the adjudicating body to make rulings and recommendations, maintain surveillance of their implementation and authorize suspension of concessions and other obligations under the covered agreements. To make rulings and recommendations, the DSB has the authority to establish panels, and adopt the reports of panels and those of the Appellate Body (a standing organ to take up the appellate review of panel reports). Unless it is adopted by the DSB, a WTO panel or Appellate

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107 Jackson, supra note 4, at 115.
108 Id. at 120.
109 Palmeter, supra note 31, at 468.
Body report will not have any binding force upon the parties to the dispute. However, under the DSU formulation, the adoption of these reports is almost, if not absolutely, automatic and unconditional.  

It is then clear that in the context of GATT/WTO law, "judicial decisions" refer exclusively to adopted reports of the GATT and the WTO panels, as well as those of the WTO’s Appellate body. To identify the sources of WTO law, one should pay attention to the "prior" reports, as contrasted with the "current" ones, with the necessity to draw a distinction between the two. A report is deemed to be "prior" in the sense of its being a decided case law in the previous dispute, which may be of relevance to subsequent cases and panels. In this regard, the status of that report is relevant to the parties of all subsequent disputes, with regard to its so-called "force of general application." A report is deemed to be "current" on the other hand, in the sense of its limited binding force merely upon the parties to the particular dispute concerned, without creating a binding precedent. In this connection, every report imposes specific, "instant" legal obligations upon the parties to the disputes.

The "stare decisis" status of prior GATT panel reports remained vague in terms of any express reference in the GATT/WTO treaties. The only likely relevant provision is Article XVI:1 of the WTO Agreement, mandating the WTO to "be guided by the decisions, procedures and customary practices followed by the CONTRACTING

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111 RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 38-39 (1999). "In a remarkable volte-face from the GATT practice that permitted a losing party to block the adoption of a panel report, a WTO panel or Appellate Body report is adopted automatically unless the DSB disapproves the report by consensus. The DSU guarantees the winning Member the fruits of its victory, even if all other WTO Members object to the report. If a panel report is not appeared, the report will be adopted at a DSB meeting within 60 days after circulation of the panel report to the members. If a DSB meeting is not scheduled within this 60-day period, a special DSB meeting will be held for this purpose. An appellate Body report must be adopted by the DSB and unconditionally accepted by the dispute Members unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days after its circulation to WTO members."
PARTIES to GATT 1947 and bodies established in the framework of GATT 1947.”  

However, the wording “be guided by” implies the existence of guidance as distinct from the mandatory nature of the said “decisions, procedures and customary practices” (to serve as binding precedents). The provision also fails to further specify whether the adopted GATT panel reports fall within the category of such “decisions.”

In the absence of any indication in the GATT/WTO treaty law, one may have recourse to the results of the WTO dispute settlement process. This approach is proposed in Japan—Taxes on Alcoholic Beverage case, where the Appellate Body asserted that “[adopted reports] are often considered by subsequent panels. They create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.”

The Appellate Body then viewed the adopted GATT panel reports within the meaning of Article 59 of the Statute of the ICJ, and concluded that the both led “to the same effect.” Accordingly, it is clear that the “prior” adopted GATT panel reports share the status of “judicial decisions” within the meaning of Article 38(1)(d) of the Statute of the ICJ, and thus amount to “subordinate source” of the law of the WTO.

As for “prior” adopted reports of the WTO panels and Appellate Body, their “stare decisis” status is expressly denied in Article 3.2 of the DSU, the latter provides that: “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” In this context, “recommendations and rulings” actually refer to adopted reports of the WTO panels and Appellate Body under the formulation of the DSU. They do not create binding precedents to

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112 Palmeter & Mavroidis, supra note 66, at 401.
113 Appellate Body Report, supra note 37.
114 Palmeter & Mavroidis, supra note 112.
115 Notably, reports of WTO panels and the Appellate Bodies do not in themselves have legal binding force. Nor are they capable of creating legal obligations and rights until and unless being adopted by the DSB to become the “recommendations and rulings of the DSB.”
control the decisions of panels in subsequent cases. Nor do they have the same force of general application as that of the WTO treaty. Obviously, these reports equally fall within the category of the "judicial decisions" specified in Article 38(1)(d) of the Statute of the ICJ, and serve as "subordinate source" of the WTO law.

Although previously adopted reports of the GATT/WTO panels and the Appellate Body are nothing more than "non-binding precedents," their "persuasive power" is apparent. In practice, these reports are often taken into account (or, "followed") by panels and the Appellate Body in subsequent dispute settlement proceedings, unless the latter may distinguish them from the instant cases, or may find them in error. The "persuasive value" of prior reports obviously rests on the reasoning they contain. However, behind this approach is a legal tradition of "treating like cases alike," which has been accounted as "an important source of legitimacy for any adjudicator." This tradition reflects valuable attributes – continuity, consistency and efficiency – in any legal system. The WTO legal system is no exception, as it is part of public international law. Commentaries in the practice enhance the value of the "jurisprudence" or case law of any international adjudicating body.

It is worth drawing a distinction between the adopted reports of the WTO panels and those of the Appellate Report in terms of their persuasive power. The "persuasive value" of prior adopted WTO penal reports lies not only in their reasoning, but also in their factual findings, though the latter is rare. As for the "authoritativeness" of the adopted Appellate Body reports, subsequent WTO panels generally follow them in much the same way that a lower court follows the decisions of a high court. The Appellate Body in subsequent proceedings, comparatively, is often "more prone than panels to follow its own prior decisions." In contrast with the ad hoc operation of the WTO panels, the Appellate Body is a standing tribunal. Members of the Appellate Body are more likely to be confronting their own collective decisions or those of their

116 Palmeter & Mavroidis, supra note 66, at 403.
colleagues when they confront prior decisions especially on points of law. “This relationship seems likely to lead to a stronger attachment to the reasoning and results of those decisions.”

Even the Appellate Body is more likely to follow its prior decisions than to depart from them, the opposite may happen. Where the members of the WTO disagree with the adopted Appellate Body reports, the only way left for them to “fix the problem” would be to change the text of the covered agreement in question. However, there is no practical way to achieve such a “law-amending” process, making the adopted Appellate Body reports “final” rulings on the subject. This may inspire greater willingness on the part of the Appellate Body — being substantially a court of last resort — to “reexamine” its prior decisions rather than to simply ignore them.

The next question to consider is whether an un-adopted panel reports constitutes a “judicial decision” in the sense of Article 38 (1) (d). In fact, an answer to this question may be less than meaningful. Given the adopted reports of prior panels and the Appellate Body contain only “persuasive power,” the difference between the un-adopted reports and adopted ones lies in the level of such power. True, the un-adopted reports, as observed by the Appellate Body in Japan–Taxes on Alcoholic Beverage case, “have no legal status in either the GATT or the WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or the WTO members.” However, the Appellate Body meanwhile agreed that they could somehow provide for certain “useful guidance” to the panels of subsequent dispute settlement proceedings. In this particular connection, it seems difficult to measure the gap between a level to which a report may “persuade” the subsequent WTO tribunals and that to which a report may “guide” them. Thus, un-adopted panel reports might also serve to a much lesser degree as a “sources” of the WTO law. The

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117 Id. at 404-406.
118 Id. at 406.
119 Id. at 402-403.
WTO Tribunal and the Appellate Body should not lose sight of their previous or prior un-adopted reports, since the reasons for their non-adoption or rejection may reveal the parts that deserve the attention of the WTO Tribunal or the Appellate Body which summarily dismissed them.

Regardless of their limited role in directly forming part of any source of the WTO law, prior reports of the panels and the Appellate Body have made great contributions to this emerging legal regime. A commentary is correct in observing that “[o]ther than the texts of the WTO Agreements themselves, no source of law is as important in WTO dispute settlement as the reported decisions of prior dispute settlement panels. These include ... reports of the Appellate Body.”120 This recalls the common awareness pointed out by Professor John Jackson, that the WTO treaty “has many gaps and ambiguities,” and “a key question facing the DS system is whether it is appropriate and feasible to pass to it the responsibilities of correcting these gaps and ambiguities.”

As Professor Jackson further articulated, “[I]n many of these cases it would demand that the panels and appellate body undertake tasks that would appear to be law making rather than law applying, arguably more appropriate for a legislature that does not exist, or negotiations that substitute for legislation. Yet the WTO rules ... impose a number of constraints on the exercise of power. In such cases the temptation will be stronger to overburden the DS process, despite treaty clauses also aimed at constraining the authority of that process.” Thus, it is highly expected that the reports of panels and the Appellate Body will play an increasingly vital role in enriching the sources of the law of the WTO.

V. Teachings of the Most Highly Qualified Publicists

120 Id. at 400.
Other than judicial decisions, the "teachings of the most highly qualified publicists" are specified in Article 38(1)(d) of the Statute of the ICJ as the other "subsidiary means for the determination of rules of law." They therefore equally fall within the category of "subordinate sources" of international law. Being "subsidiary" in nature, the teachings of the most highly qualified publicists constitute part of "material source" which provides only the substantive matter of international law, without touching its force or validity. The way in which this category may work on the sources of international law involves increasing occasions where it may be taken as reference by international adjudicating bodies in particular dispute settlement proceedings. This is also the case with the law of the WTO.

During the GATT era, the teachings and writings of highly qualified publicists were rarely referred to by the panels. The reluctance of the panels was attributed to the GATT's diplomatic heritage. Writings of legal scholars were less appealing to the diplomats than to lawyers, while the GATT dispute settlement process was more a diplomatic system of "conciliation" than a legal proceeding. In addition, the relative absence of legal scholars among the panelists inevitably accounts for the relative insignificance of the level of scholarship in their rulings.

Within the WTO dispute settlement process, panels and the Appellate Body are more willing to refer to the teachings of highly qualified publicists to justify their positions. This is evident in some adopted reports of panels and the Appellate Body in which certain most distinguished legal scholars have been cited. Take two remarkable examples. In the panel report on Argentina - Measures Affecting Foodware, Textiles, Apparels and Other Items, the teachings of John H. Jackson, Keith Hightet and Mojtaba Kazazi were cited. In the Appellate Body report on India

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121 O'Brien, supra note 21, at 68.  
122 Id. at 66-67.  
123 Palmeter & Mavroidis, supra note 66, at 407-408.  
124 Id. at 408.
Patent Protection for Pharmaceutical and Agricultural Chemical Products, the teachings of E.-U Petersmann, I. Brownile, and F. Roessler were mentioned.¹²⁵

This development is largely attributed to the “thickening legality” of the WTO system, by which not only do panels – advised by lawyers – increasingly deal with complex issues of law (such as standing, adequacy of notice and admissibility of evidence), the Appellate Body also brings a legal perspective to the process, given its standard of review confined to the issues of law and legal interpretation of panel reports.¹²⁶ As a result, the WTO dispute settlement process becomes more “legal and adjudicative” in nature, and the law plays an increasingly important part in this connection. With this trend, it is likely that there will be more occasions for panels and the Appellate Body to refer to the teachings of the most highly qualified publicists in future WTO dispute settlement proceedings.

¹²⁵ Id. at 413. FT 62.
¹²⁶ Id. at 408.
CHAPTER 3  NATURE OF THE LAW OF THE WTO

The law of the WTO has emerged from the landscape of modern international law since World War II, and has ever since grown into an integral part as a “new frontier” of public international law. The nature of WTO law, which is inextricably linked with the nature of international law, has also been moulded in the same historical context.

The nature of international law is one of the most discussed questions by international legal scholars. After World War II, two schools of theories contributed significantly to the transformation of the nature of modern international law. On the one hand, the revival of “natural law” traditions, with emphasis on human rights, peaceful resolution of disputes and avoidance of armed conflicts, the rule of law, etc., imposed “minimum standards of state conducts” not only in contemporary treaties following the United Nations Charter (1945), but also on international adjudication such as the trial of war criminals by the Nuremberg tribunal. Consequently, the nature of modern international law, especially in its substance, has extensively demonstrated the traces of natural law thinking.

The law of the WTO is no exception. Natural law theories are identifiable in the WTO treaty system. The first preamble of the WTO Agreement itself specifies the objectives of the agreement as “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, ... allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking ... to protect and preserve the environment ... at different levels of economic development.” The second preamble then addresses the needs “for positive efforts designed to ensure developing countries, and especially the least developed among them ...” All these provisions are based upon or deriving from

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127 O’BRIEN, supra note 21, at 28.
128 Id. at 46.
“natural rights” or human rights developed under natural law theory. Equally remarkable, through the establishment and maintenance of a highly effective WTO dispute settlement process, the law of the WTO has achieved the “thickening” of its legality and advanced “international rule of law.”\textsuperscript{129} Not only has the DSU provided for a set of “due process-oriented” procedures, the quasi-judicial practice of the WTO’s DSB also bares fruits.

On the other hand, positivism remains a significant role in identifying (if not “defining”) the nature of modern international law, although “extreme positivism” (which places no restriction on state sovereignty) is generally responsible for the outbreak of World War II. Positivist theories can be traced back to the 18\textsuperscript{th} century when positivism “dominated the subject” by according “with the rationalist and optimistic spirits of the enlightenment.” In the 19\textsuperscript{th} century, positivism “was congenial to the practitioners of Realpolitik such as Cavour and Bismarck who sought to avoid any restraints on state conduct.” Obviously, the positivist theory in its very substance is conflicted with natural law thinking, as the latter emphasizes “minimum international standards” towards the sovereign states. However, positivist theories are still significant in the sense that their emphasis on “pure” rules lays a “theoretical” foundation for the nature of law (and also international law) to be analyzed and elucidated through a concrete conceptual frame.\textsuperscript{130}

In general, the term “positivism” represents two parallel concepts: “(1) the Austinese theory that laws are commands; (2) the view that a clear distinction should be drawn between law as it “is” and law as it “ought” to be.”\textsuperscript{131} Criteria have been developed upon both these concepts to clarify the nature of “law” and that of “international law,” first by Austin,\textsuperscript{132} then Kelsen,\textsuperscript{133} and later by Hart, whose theory on a “legal system”

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{130} O’Brien, \textit{supra} note 21, at 46-48 (2001).
\item \textsuperscript{131} \textit{Id.} at 29.
\item \textsuperscript{132} \textit{Id.} at 29-31.
\end{enumerate}
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has been subject to considerable debates and comments. This chapter conducts a similar exercise in the context of WTO law, namely, an examination of the nature of the law of the WTO from the positivist perspective.

I. The WTO as A Legal System

A positivist position – as proposed by Kelsen – holds that “it is impossible to grasp the nature of law if we limited our attention to the single isolated rule.” This position was enhanced by Hart in his book *The Concept of Law*, stressing the significance of a “legal system” in defining the precise nature of a law existing therein. Later, Joseph Raz further asserted that “a theory of legal system is a perquisite of any adequate definition of a ‘law’...” 134 All these indicate that the precise nature of law can only be reached through a study of the legal system to which this law belongs to.

This proposition applies to the law of the WTO. As a result, two issues are essential to an examination of the nature of WTO law. First, what are the criteria for identifying a legal system? Second, does the WTO (especially, its treaty system) amount to a legal system? What if the answer is positive? Both issues are discussed below.

1. Hart’s Theory of A Legal System

In the view of Profess Hart, an integrated concept of a “law” can be described as a “union” of two different types of rules: primary rules and secondary rules. They both are essential to the existence of a “modern legal system.” As Hart pointed out, “most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rules and the interplay between them are understood.” The “explanatory power” of

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133 *Id.* at 47.
such union "in elucidating the concepts that constitute the framework of legal thought" makes a study of these two types of rules a desirable start of assessing the nature of law.135

All legal systems, regardless of their primitive or sophisticated nature, contain primary rules that are simply "a collection of separate standards resembling rules of etiquette" and subject to abidance.136 In other words, primary rules function to "regulate behavior"137 and the purpose is to "impose duties."138 Although some of them may be in the form of order backed by the force, primary rules do not alone amount to a "legal system," without the procedure available for their interpretation, enforcement and modification.139

Secondary rules are those supplemented to the primary rules, serving to "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." According to Hart, to add these secondary rules to primary rules is "enough to convert the latter into what is indisputably a legal system."140 The maturity and advancement of a legal system largely depends on the development of its secondary rules. Municipal legal systems are often deemed as "mature" and "advanced" for its highly developed secondary rules. International legal system is often deemed as "primitive" "because its institutional limitations have prevented the development of a system of secondary rules."141

Under Professor Hart’s speculations, secondary rules are categorized into three groups:

135 HART, supra note 19, at 79-81.
137 O'BRIEN, supra note 21, at 48.
138 Id. at 33.
139 HART, supra note 19, at 91-93.
140 Id. at 94.
141 Palmeter, supra note 31, at 445.
rules of recognition, rules of adjudication and rules of change. Rules of recognition represent a secondary rule that is “accepted and used for the identification of primary rules of obligations.”142 In this context, Hart introduced an “insider vs. outsider” viewpoint. From the view of those who accept a particular legal system (“insiders”), the validity of the rules of recognition is “presupposed” as a matter of fact, when these rules serve to determine the validity of other rules within that legal system.143 From the view of a non-member of a legal system (“outsider”), it may observe the rules followed by the members and ascertain the rule of recognition by such observation.144

In a modern municipal legal system like the United States, the constitution may serve as the rule of recognition therein. In a primitive legal system where the constitution is not available, the rule of recognition may be established by referring to the widely recognized practice of an available dispute settlement organ (court) in identifying “what is to count as law.”145 This is particularly true for international law regime, where Article 38(1) of the Statute of the International Court of Justice (its premier adjudicating body) has served as the rule of recognition to specify the sources of international law.

Rules of adjudication represent a secondary rule that empowers authoritative determination of possible breach or violation of primary rules, and addresses remedy and sanctions.146 A lack of rules of adjudication would constitute a serious “defect” in any legal system. Accordingly, they are usually the first secondary rule to be supplemented to a system of primitive rules.147

Rules of change represent a secondary rule that empowers “deliberate” changes of

142 HART, supra note 19, at 100.
143 Id. at 102.
144 Palmeter, supra note 31, at 448.
145 HART, supra note 19, at 108.
146 Id. at 97.
147 Id. at 94.
primary rules. An alternative process would be a prolonged evolution of custom.\textsuperscript{148} In a modern municipal legal system, the legislatures, the executive or even individuals may be entitled to the alteration of the obligations comprised in the primary rules.\textsuperscript{149} In a primitive legal system like public international law, alteration appears to be problematic.

With regard to the relations among these three groups of secondary rules, where the rules of adjudication exist, there must be the rules of recognition available, for those who are empowered to determine the breach or violation of a primary rule “cannot avoid employing a rule of recognition” to determine the validity of that primary rule.\textsuperscript{150} Similarly, the rules of recognition are inextricably linked with the rules of change. After all, a law after its alteration “entitled by the rules of the system” would need recognition within that system in any event.\textsuperscript{151}

It is worth noting that Hart’s theory of legal system pays a particular attention to international law. As mentioned above, Hart views international law as a “primitive legal system” in terms of its lack of the supreme legislature, or compulsory jurisdiction of the adjudicating body, as well as “a centrally organized system of sanction.” All these actually imply a deficiency of advanced, developed secondary rules. Despite these identified shortcomings of international law, Hart still deemed international law as a “law,” which just resembles a primitive law more than a law in a municipal legal system. Conversely, Hart also observes that international law resembles municipal law more in its “function and content” (concerned with primary rules), than its “form” (concerned with secondary rules). In this sense, “no other social rules are so close to municipal law than those of international law.”\textsuperscript{152}

\textsuperscript{148} Id. at 92-93.
\textsuperscript{149} Id. at 95-96. “Two ways by which change can be effected in a modern municipal legal system are constitutional and legislative. Constitutional amendment … is much more difficult to accomplish.”
\textsuperscript{150} Id. at 97.
\textsuperscript{151} Id. at 96.
\textsuperscript{152} Id. at 237.
2. The WTO as A Legal System

A positivist approach based upon Hart’s theory of a legal system, has a great significance in examining the nature of the law of the WTO. First, although his position regarding international law as a “primitive legal system has been subject to criticism, Hart has correctly predicted that international law, given its “evolving and different nature,” may “evolve in a manner analogous to a developed system of municipal law.”153 The law of the WTO is part and parcel of international law, but also represents the “new frontier” of international law in many respects that seem to have achieved certain “features” of a municipal legal system (as elucidated below). Hart’s positivist approach in its fundamentals appears to keep pace with this trend.

Secondly, given that positivism stresses “free will” of sovereign states, through the history of international law after 1945, positivist approach has been adopted especially by “newly independent states” to “stress the role of treaties and diminish the position of customary international law.”154 Treaty norms are obviously the “rules” within the prevailing scope of a positivist approach. It is expected that a special treaty regime may be more easily conceived if a positivist approach is adopted in this regard. The WTO is a treaty-established institution, while the law of the WTO at first sight refers to a comprehensive treaty system (WTO agreements). It is appropriate to adopt a positive approach in examining the nature of WTO law, with particular focus on the WTO’s treaty system.

As elucidated in previous section, treaty system under the WTO auspices constitutes the most primary source of the WTO law. It is plain to see all legal analysis begin there.155 The examination of the nature of WTO law is no exception. The WTO’s

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153 O’BRIEN, supra note 21, at 48.
154 Id.
155 Palmeter & Mavroidis, supra note 66, at 398.
treaty package consists of a series of “agreements” and the associated legal instruments, among which the “covered agreements” as specified by the DSU – including the WTO Agreement and its Annex 1, 2 and 4 – takes a led. Along with them is an increasing body of “post-1994 agreements, protocols and schedules of commitments” that emerged and has been incorporated into the treaty package since the inception of the WTO in early 1995. By now, most discussions and comments concerning the law of the WTO have focused on the “covered agreements” of the DSU, with little mentioning about the “post-1994” treaty outcome. The current exercise holds the same position as the above. A closer look is thus taken at the covered agreements from the perspective of Hart’s positivist criteria for a legal system.

A. The WTO’s Primary Rules

In the context of Hart’s view of a legal system as “a fusion” of primary and secondary rules, a treaty may meet his criteria in many respects. In general, “treaty regimes are essentially regimes of primary rules.” This is particularly true for the “law-making treaties” that serve to produce “common rules for future and continuing observance.” On most occasions, a treaty itself serves as the “ultimate rules of recognition” from an “internal perspective” of the parties to this treaty. Treaties are also commonly seen to comprise rules of adjudication and rules of change. All these features are shared by the WTO treaty regime, and especially duplicated in the covered agreements of the DSU.

Like many treaty regimes, the WTO is never dearth of primary rules. Most of the

156 The reason for this is “two-fold.” From the one hand, most of the post-1994 WTO treaties are too recent to get the attention of the seekers of the virtue of WTO law. From the other hand, the 1994 Uruguay Round Agreements (as “covered agreements”) play a predominant role within the WTO treaty system, and, by virtue of their quantities and substance, usually represents the WTO treaty system as a whole.

157 Palmeter, supra note 31, at 446.

158 Id. at 453.

159 Id. at 467.
WTO's primary rules lie in Annex 1 and Annex 4 of the WTO Agreement. As discussed in the previous section, Annex 1 refers to three multilateral agreements, namely, GATT, GATS and TRIPS. They set out numerous substantive rules for a variety of areas concerning trade in goods, trade in services and trade-related intellectual property rights. Being multilateral in nature, these three agreements are binding upon all WTO members. Annex 4 consists of two plurilateral trade agreements, both containing a large number of substantive rules. Being "plurilateral" in nature, both agreements are binding only upon the parties to them. Thus, both Annex 1 and Annex 4 are mandatory in nature, with the "scope of mandate" differing from each other. Given their concrete substance and obligatory nature, substantive rules arising from Annex 1 and Annex 4 come within the definition of Hart's primary rules as noted earlier. As a matter of fact, it has been recognized that the WTO represents one of the most comprehensive collections of primary obligations under public international law.\textsuperscript{160}

B. The WTO's Secondary Rules

Meanwhile, the WTO features a significant proliferation of secondary rules, which, as first mentioned by Celso Lafer, largely contributed to the "thickening of legality" of the WTO.\textsuperscript{161}

(a) Rules of recognition

From the perspective of a Member (insider) of the WTO, the WTO Agreement - usually regarded as the "Charter" or "Constitution" of the WTO - serves as the body of the basic rules of recognition. This is also the case with many treaties that are constituent instruments. The members of the WTO "presuppose" - as a matter of fact - that this constituent agreement of the WTO is applicable to them, "providing a

\textsuperscript{160} Id. at 466.

\textsuperscript{161} Id. at 467. Also, Celso Lafer, The WTO Organization Dispute Settlement System, 18-19 (1996).
reason for their own behavior” and “providing justification for their expectations concerning the behavior of other members.”162

One more reason for the WTO Agreement to be viewed as the WTO’s rules of recognition is linked to the role of the WTO – as an institution – to undertake the “implementation, administration and operation” of the primary rules in the MTA and Plurilateral Agreements (Article III:1 of the WTO Agreement). Since the WTO is expressly defined as an institution to support the operation of the primary rules therein, provisions of the WTO Agreement concerning institutional issues, including, inter alia, the establishment of the WTO, its scope, functions, structure, as well as accession, acceptance, and entry into force, fall within the category of the “ultimate” rules of recognition within the WTO.163 Especially, Article II (2) of the WTO Agreement provides that the agreements and associated legal instruments included in Annex 1, 2 and 3 (collectively as the “Multilateral Trade Agreements,” or “MTAs”) are “integral parts of the WTO Agreement” and “binding on all members.” By recognizing the scope and binding force of the MTAs, Article II (2) actually functions as a rule of recognition to “identify” primary rules. For these reasons, the WTO members and adjudicators may “determine authoritatively which of the primary rules contained in the MTA are relevant to their purposes.”164

(b) Rules of adjudication

Most of WTO’s rules of adjudication are contained in the DSU, which is seen as a continuity of the pattern beginning from the GATT era to supply the same kind of rules to the trading system’s sets of primary rules. Provisions of the DSU include some that codify and expand upon the “diplomatic tradition of the GATT” by requiring pre-panel consultation, and providing for good offices, mediation and

162 Id. “Their view differs radically from the external view of a non-member.”
163 Id.
164 Id.
conciliation.\textsuperscript{165} They also include others that set out comprehensive procedures for the establishment and operation of panels (as the tribunal of the first instance) and the Appellate Body (as the tribunal at the appellate level).\textsuperscript{166} More remarkably, provisions of the DSU make a unified dispute settlement mechanism possible as featured by a single Dispute Settlement Body (DSB) to process any dispute brought under any of the WTO agreements (covered agreements). If, as observed by others, the DSU does establish the “most developed dispute settlement system in any existing treaty regime,” it would not be difficult to find – within the WTO – the most advanced rules of adjudication in the same context.\textsuperscript{167}

Nevertheless, however, certain provisions of the DSU, such as those concerning the “sanctions” or “remedies” for WTO violation or inconsistency, illustrate the “defects” of the WTO regime in comparison to a modern municipal legal system. As the major sanction available in the WTO, the prevailing party may “suspend the application to the Member concerned of concessions or other obligations under the covered agreements,” which is equivalent to the trade damage suffered by the prevailing party.\textsuperscript{168} By contrast, “compensations” are only available in the case where the suspension of concessions or other obligations is not feasible.\textsuperscript{169}

Notably, within the WTO treaty system, the DSU is not the only source of rules of adjudication. Some other covered agreements – such as six “side agreements” on trade in goods, GATS and TRPS – also provide for a few rules of adjudication on procedural matters, which in effect substitute for their counterparts in the DSU in a limited way. Typical examples of those provisions are Article 4 of the SCM, Article

\textsuperscript{165} Id. at 469.

\textsuperscript{166} Particularly, as a standing tribunal, of which the members are not affiliated with any government, and which has no other WTO responsibilities, the Appellate Body of the WTO has achieved the separation of “judicial power” from “policy-making power” within the WTO institutional structure. This enhances the feature of the “rule of law” of the WTO.

\textsuperscript{167} Palmeter, \textit{supra} note 31, at 469.

\textsuperscript{168} Id. at 469.

\textsuperscript{169} Id. at 472.
14 of the TBT, and Article 17 of the Antidumping Agreement.\footnote{Id. at 469-470.}

(c) Rules of change

Article IX and X of the WTO Agreement – dealing with the subject of “decision-making” and “amendment” respectively, comprise most of the WTO’s rules of change. It has been observed that within the WTO, decision-making, amendment or other changes in primary rules mainly depend on the procedures of “consensus” or “vote by members.” According to Article IX (1) of the WTO Agreement, “consensus” in the WTO context refers to a situation under which “… no member, present at the meeting when the decision is taken, formally objects to the proposed decision.” In the absence of consensus, the decision shall be decided by vote “with each member having a single vote.” Specific “pass rate” of the votes varies upon different situations.\footnote{Id. at 474-476.}

However, Article X (2) provides that for certain primary rules, their amendment may only take effect upon consensus. These include Article IX and X of the WTO Agreement (Decision-making and Amendment, respectively), Article II of GATT 1994 (tariff binding), as well as three articles provides the MFN obligation respectively in GATT 1994 (Article I), GATS (Article II(1)) and TRIPS (Article 4).\footnote{Id. at 477.}

With regard to other cases where the change of primary rules may occur on the ground of Article IX and X of the WTO Agreement, they are listed as follows: For Article IX, Paragraph 2 on the “interpretation” of the WTO Agreement and the MTAs to be adopted by a three-fourths majority, and Paragraph 3 on the “waiver” of WTO obligations to be decided by three-fourths majority as well. For Article X, Paragraph 1 concerns the submission of a proposed amendment to be decided either by consensus or by two-thirds majority of the Members; Paragraph 3 relates to the
effectiveness of an amendment decided by three-fourths majority; and Paragraph 4
sets out the “general amending authority,” requiring any amendment “of a nature that
would not alter the rights and obligations of the Members” to “take effect for all
members upon acceptance by two-thirds of the Members.”173 In addition, Paragraph 5
applies to the amendment to the GATS, Paragraph 8 to the DSU and the Trade Policy
Review Mechanism (TPRM), and Paragraph 9 and 10 cover exclusively the
Plurilateral Agreements.174

Besides Article IX and X of the WTO Agreement, there are other provisions or those
of other covered agreements serving as rules of change as well, such like Article XII
(2) to govern the accession of new members, Article 71.2 of the TRIPS, and Article
XXIV (9) of the Agreement on Government Procurement.175

II. The Law of the WTO as A Real “Law”

The nature of WTO law is examined in the context of Profess Hart’s theory of the
interplay of primary rules and secondary rules within a legal system, and the results
indicate that the WTO law represents a legal system less “primitive” than
international law, but equally less “sophisticated” than municipal law. To take a more
“blunt” look at the nature of WTO law, one may go further with a question whether,
and to what extent, the law of the WTO is really law. Such perspective reflects
Joseph Raz’s observation of law, where the law is viewed as having three “most
general and important features” of being “normative, institutionalized and
coercive.”176 All these features are somehow shared by the law of the WTO.

According to Professor Raz, the law is normative “in that it serves, and is meant to

173 Id. at 475-477.
174 Id. at 478.
175 Id. at 475-477.
176 RAZ, supra note 15.
serve a guide for human behavior.”\textsuperscript{177} The WTO law fits this criterion in terms of abundant primary rules contained in its comprehensive treaty system. Those primary rules – of their very functioning described in previous section – are in any respect the “norms” to guide the behaviors of the WTO Members in trade and trade-related areas.

Professor Raz also proposes that the law is institutionalized “in that its application and modification are to a large extent performed and regulated by institutions.”\textsuperscript{178} The institutional feature of the WTO law depends on the availability of an institution (WTO) established by it. According to Article III: 1 of the WTO Agreement, the functioning of the WTO covers “implementation, administration and operation” of the WTO treaties, the latter is the primary source of WTO law. Accordingly, thanks to the WTO, the institutional feature of WTO law has been significantly enhanced.

Raz further observes that the law is coercive “in that obedience to it, and its application, is internally guaranteed, ultimately, by the use of force.”\textsuperscript{179} The WTO law is somehow deemed as “coercive” for its highly effective dispute settlement mechanism comparable to any of its kind in other treaty regimes. In the WTO dispute settlement process, rulings of the single Dispute Settlement Body (the DSB, which is the WTO’s adjudicating body) are actually binding upon the parties to the specific disputes, and their implementation is backed by certain “sanctions.” However, such sanctions are relatively “weak,” as they are limited between the “suspensions” of concessions or obligations, and the “compensation” equivalent to trade damage. With these sanctions, it is doubtful that specific rights and obligations of the WTO can be “internally guaranteed” to live up with Professor Raz’s criteria of coerciveness. In this context, the nature of WTO law as real law is more or less imperfect.

The above generalization of the “lawness” of WTO law shows the extent to which the

\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
WTO law may amount to “real” law remains as “shallow” as that of international law. As elucidated previously, being part and parcel of international law, WTO law inevitably shares some “deficiencies” of the latter. However, representing some “new frontiers” of international law, WTO law has achieved much as noted above. This places WTO law somewhere between a primitive system of law as international law (as it is) and a modern legal system as much as any municipal law. In other words, WTO law is more advanced than international law, but still has been on the way towards a modern system of state law. If, according to Professor Hart, none of the “shortcomings” of international law may prevent it from properly claiming to be “law,” there is no reason why the law of the WTO may not amount to real law, much less to say that it lacks the various “virtues” of contemporary international law.

III. Nature of Legal Obligations under the Law of the WTO

The nature of the law of the WTO is examined above in the light of its “lawness,” of being normative, institutional and coercive. Specifically, the normative and coercive features of WTO law are embodied in various legal obligations, just in the same way as “real” law.

Professor Hart’s idea of an “obligation” has two dimensions: (1) the existence of certain rules; (2) the application of such “general” rules to a particular person by calling attention to the fact that his case falls under these rules. Obviously, the first dimension implies the “normative feature” of law, while the second dimension merely indicates the “coerciveness” of law in terms of its “application” process. The binding nature of an obligation is reinforced by Raz’s further summarization of three “characteristics” of an obligation as follows: (1) insistence on a general demand for conformity and importance or seriousness of social standards; (2) necessity for the

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180 HART, supra note 19, at 85.
181 RAZ, supra note 15. “The law is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force.”
maintenance of social life or some highly prized feature of it; (3) involvement of sacrifice or renunciation.¹⁸²

Accordingly, an “obligation” in its plain meaning can be seen as both normative and coercive. And legal obligations, in terms of legal rules (not other social rules), will contain the nature of those rules (law) in anyway. Consequently, a sound conception of the nature of law entails proper and in-depth appreciation of the nature of its legal obligations in light of its substance and binding force. This is certainly the case with the law of the WTO.

Legal obligations generally refer to “legal norms” that are “obligatory” or “binding” in nature (or, directly as “norms of obligation.”). Such norms (obligations) derive from formal sources of law, given that the latter serves to determine the validity and force (binding nature) of law.¹⁸³ As long as these sources can be identified, legal obligations deriving from them – in the form of legal norms or prescriptions – will be “presupposed.”¹⁸⁴ Where legal obligations themselves can be identified in one or more of formal sources, their binding nature will be presumed. Accordingly, in examining the nature of a legal obligation, a two-prong approach may be adopted as follows: (1) Identifying the formal sources concerned; (2) Presupposing the existence of related legal obligations and clarifying the substance and binding nature of these obligations. This approach is therein adopted in an examination of the nature of WTO treaty obligations.

In public international law, treaties, custom or general principles of law are formal sources to set out “international obligations” incumbent upon nation states.¹⁸⁵ Since WTO law is part and parcel of public international law, legal obligations deriving

¹⁸² HART, supra note 19, at 86-87.
¹⁸³ JACKSON, DAVEY & SYKES, supra note 76, at 177. The sources of law can be categorized into “formal sources” and “material sources.”
¹⁸⁴ Id. at 173.
¹⁸⁵ Id.
therefore automatically fall within the above category. However, the WTO legal obligations have their unique features. Given that treaties serve as the most primary formal source of WTO law, most legal obligations under the WTO are “treaty obligations.” In contrast, another primary formal source, custom, plays a minor role in formulating norms of WTO law, thus there are few “customary obligations” identifiable within the WTO. Besides, the WTO regime introduces a category of “secondary legal obligations” based on the rulings of the WTO dispute settlement mechanism.

1. Treaty Obligations under the WTO

Owing to the fact that the WTO treaty system dominates primary formal sources of WTO law, most WTO legal obligations are “treaty obligations.” As discussed previously, the WTO maintains a comprehensive treaty system ranging from multilateral trade agreements (MTAs) to bilateral schedules of concessions. Given various substances and binding force of these treaties, legal obligations deriving therefore vary in their nature. The rest of this chapter will elaborate this point.

In general, the binding force of a WTO-administrated treaty is governed by rules of the law of treaties, which are generalized by O’Brien as: “[a] state that consents to abide by a treaty is bound by the terms of the treaty in its relation with other parties to the treaty. As is sometime said, the treaty governs the relations of the parties inter se. As a general principle, the state party to a treaty will not be affected in its relation with a non-party. However, this principle has to be qualified because a treaty may be held to have codified or consolidated rules of customary international law.”186 It is contended that WTO treaties can hardly become “customary international law.”187

186 O’BRIEN, supra note 21, at 80.
Thus, the binding force of a WTO treaty may only extend to its parties (WTO Members), and legal obligations under this treaty will find its binding force within the same legal circles. In this context, the binding character of treaty obligations is a specific outcome of the applicability and validity of that treaty.

As for the substance of the WTO treaty obligations, it depends on the contents of the specific WTO treaty norms in question. Usually, legal obligations take the form of obligatory legal norms. This goes back to earlier discussions on a “WTO legal system” as represented by a fusion of primary and secondary rules contained in the WTO treaty. They both are treaty-based rules, and capable of creating legal obligations, the nature of the treaty obligations varies with the different substance of those respective rules. Accordingly, the substance of WTO treaty obligations is related to a specific norm rather than a specific treaty.

As noted earlier, most primary rules of the WTO contained in the Annex 1 and Annex 4 of the WTO Agreement, cover a comprehensive issues on trade and trade-related areas like trade in goods, trade in services, trade-related intellectual property rights and investment, etc. More primary rules are being formulated upon the extension of WTO legal regime to some new areas, such as the information technology. Major secondary rules of the WTO can be found in the WTO Agreement and the DSU. All these comprehensive rules, with their very substance, entail numerous legal obligations upon WTO Members. The remainder of this section focuses on the binding nature of WTO treaty obligations, with necessary reference to their particular substance.

Since the binding nature of these obligations is treaty-based, they need to be examined in the context of the binding force of the specific WTO treaty. The WTO treaty system – in its varying binding nature – can be divided into three types of instruments:

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Jackson, Davey & Sykes, supra note 76, at 173.
multilateral agreements, plurilateral agreements and bilateral agreements/arrangements. Accordingly, legal obligations arising from these three types of instruments are correspondingly termed “multilateral treaty obligations,” “plurilateral treaty obligations” and “bilateral treaty obligations.” The nature of the WTO treaty obligations will be examined below according to these types of instruments.

A. Multilateral Treaty Obligations

The first type of the WTO’s treaty package refers to a set of multilateral agreements consisting of the WTO Agreement and its first three annexes (collectively as “Multilateral Trade Agreements” or MTAS). Their binding force is expressly defined in Article II:2 of the WTO Agreement as towards “all members” of the WTO. Besides, Article XII:2 of the WTO Agreement requires the WTO Members to anchor their accession on the acceptation of the above agreements as a whole, rather than picking and choosing one or more among them. All these actually reinforce a “single package” idea envisioned at Punta Pel Este during the Uruguay Round, and consequently led to the “multilateral nature” of these agreements.189 Accordingly, legal obligations deriving from these multilateral agreements are categorized as “multilateral treaty obligations,” legally binding upon all WTO Members.

The substance of these multilateral treaty obligations varies upon the respective multilateral agreements with which they are associated. Annex 1 of the WTO Agreement has been viewed as containing most of the WTO’s primary rules governing various substantive areas of trade. Thus, most legal obligations deriving therefore are substantive in nature and serve to guide the conduct of Member States in

189 The “single package” idea means that in order to become a WTO Member, the governments have to accede or accept both the WTO Agreement and all the “MTA” as a whole, rather than acceding to or accepting one or more of these agreements. This idea is embodied in Article XII:1 and Article XVI:4 of the WTO Agreement.
trade and trade-related areas. The WTO Agreement and its basic contents serve as major “rules of recognition” (secondary rules) within the WTO legal system, of which most legal obligations are institutional and procedural in nature, supporting the functioning of the WTO’s primary rules.

Interestingly enough, the agreement still contains three primary rules to generate substantive obligations “on a member,” as provided respectively in Article VII:4 (to promptly pay dues), Article VIII (to accord functional privileges and immunities to the WTO, its officials and the representatives of the Members), and Article XVI:4 (to ensure conformity of national legislation with the WTO agreements). 190 It is notable that Article XVI:4 is regarded as the “conformity clause,” 191 which paves the way for the WTO Members to implement the WTO law in their internal legal system. This topic comes within the scope of this study and is elaborated in the ensuing sections.

B. Plurilateral Treaty Obligations

The second type of the WTO’s treaty package refers to two existing “plurilateral trade agreements” contained in Annex 4 of the WTO Agreement: Agreement on Trade in Civil Aircraft and Agreement on Government Procurement. According to Article II:3 of the WTO Agreement, both these agreements are binding only upon those WTO Members “who accept them,” and “do not create either rights or obligations for the Members that have not accepted them.” Given that the accession to both agreements is “optional,” 192 legal obligations arising from these agreements – categorized as “plurilateral treaty obligations” – do not affect the WTO Members as a whole, but only those who accept them. For the parties to both these agreements, the plurilateral

190 Porges, supra note 8, at 85-86.
191 Id. at 87-88.
192 Plurilateral Trade Agreements are merely binding upon the WTO Members that have accepted these agreements. This “optional” nature is at odds with the “single package” approach applicable to the “MTA.”
treaty obligations are legally binding, but just incumbent upon one vis-à-vis another among themselves.

Discussions so far have touched two categories of WTO treaty obligations. They both share some features in fact. Mostly, multilateral agreements and plurilateral agreements under the WTO are both “law-making” treaties. Legal obligations deriving therefore will then fall within the category of “rule obligations” (rules of conduct), binding upon WTO Members as a whole or upon the identifiable “insiders.” These obligations are more “regulatory” in nature for general application, imposing “minimum standards” for WTO Members, irrespective of their actual or potential trade impact in (bilateral) relations with the latter. In this context, they are regarded more as “statutes” with general application, than bundles of bilateral “contracts.”

C. Bilateral Treaty Obligations

The third type of the WTO’s treaty package refers to the “treaty contracts” addressed in the previous section on the sources of WTO law, referring to numerous bilateral schedules of commitments and various country-specific “agreements” or protocols concluded between and after the Uruguay Rounds in late 1994. Specifically, they include the schedules annexed to the GATT 1994 and the GATS, as well as those post-1994 tariff-cutting schedules on new areas like information technology products. They also include protocols on the accession of new members and those on finance services, telecommunications, etc. Given that these treaty contracts reflect bilateral, state-to-state relations, legal obligations arising therefore are categorized as “bilateral treaty obligations.” In terms of the substance, these obligations are also termed “market access obligations” incumbent upon each “specific” member of the WTO. This means the WTO market access obligations are “country-specific.” Each WTO member has its own market access obligations vis-à-vis all other WTO members respectively on the basis of the MFN treatment, aimed at liberalizing its trade in
specific goods and services to benefit all Members respectively.\textsuperscript{193}

\section*{D. Comparison and Analysis}

Despite the difference among the above three categories, WTO treaty obligations are "bilateral" in nature from an overall perspective. This is largely attributable to the object (trade), origin (reciprocal arrangements) and objective (trade liberalization) of the WTO treaty system, and also reflects any eventual breach and enforcement of the treaty obligations. It is readily visible that "many trade treaties and agreements on investment (even if multilateral)" fall into the category of "multilateral treaty obligations of a bilateral nature." This is exactly the case with the WTO treaty system, for it has been observed "both GATT and the WTO treaty remain treaties establishing bilateral jural relationships between WTO Members."\textsuperscript{194}

There is hardly any doubt that "market access obligations" under the treaty contracts of the WTO are bilateral in nature. As for the "normative or rule obligations" deriving from the WTO multilateral and plurilateral agreements, their broad scope of application towards all or any identified group of the WTO Members does not obscure their bilateral nature. After all, most GATT/WTO treaty obligations were originally negotiated on a state-to-state, bilateral level, and ended up as bilateral and mutual reduction in trade restrictions. The latter was subsequently multilateralized and applied to all other WTO members, based on the MFN principle.\textsuperscript{195} Thus, by their very substance, the normative obligations of the WTO are capable of being "individualized" and "differentiated." Though they are "uniform" in the sense of putting forth the same set of "codes of conduct" binding on the WTO members as a whole or as a "plurilateral" group,\textsuperscript{196} they can be seen as compilation of bilateral

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\textsuperscript{194} Pauwelyn, supra note 187, 918-919.
\textsuperscript{195} Id. at 919-920.
\textsuperscript{196} Qin, supra note 193.
\end{flushleft}
obligations, or as the “duplication” of these bilateral obligations towards each single Member. Thus, despite the “heterogeneity” of the WTO treaty obligations,\(^{197}\) they are all in fact “binding” in nature.

For all these, it is worth noting that the WTO normative obligations and market access obligations “differ in their design.” This distinction has a great significance in the way in which each type of obligations may be modified or changed. In light of WTO rules of normative obligations, their modification or change seems very difficult, in the sense that the amendment of any provisions of the WTO agreements, as well as the waiver of any obligation “imposed on a Member” by the WTO Agreement or any of the Multilateral Trade Agreements, would be subject to “elaborate and stringent procedures” provided in Article IX and Article X of the WTO Agreement. As a result, WTO normative obligations “are intended to be stable and unsusceptible to constant revision.”\(^{198}\)

By way of contrast, the WTO market access obligations “may be modified, withdrawn or re-negotiated either periodically or under certain specified circumstances at any time, on the basis of reciprocity,” in accordance with the relevant provisions of its associated WTO agreements. Accordingly, market access obligations are “designed to allow flexibility for frequent change.”\(^{199}\)

2. Secondary Legal Obligations under the WTO

Although treaty obligations have dominated the category of “WTO legal obligations,” they do not exhaust this category. Given their complexity, WTO treaty obligations will inevitably encounter interpretative problems. Also, the binding nature of these

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\(^{197}\) Pauwelyn, supra note 187, at 918-919.
\(^{198}\) Qin, supra note 193.
\(^{199}\) Id.
treaty obligations calls for compliance or redresses of any violation.\textsuperscript{200} Both situations have led to the crucial role of the WTO dispute settlement process, since it serves to “preserve the rights and obligations of Members” under WTO agreements, and to “clarify the existing provisions of these agreements.”\textsuperscript{201} In this context, Professor Petersmann introduces the “secondary legal obligations” under the WTO legal system, which comes within the category of WTO legal obligations as well, although their binding force is arguably less extensive than WTO treaty obligations.

According to Professor Petersmann, “[u]nder both general international law and WTO law, violations of international legal obligations trigger ‘secondary legal obligations’ of bringing the illegal act into conformity with international law.”\textsuperscript{202} The observation implies that such WTO obligations may only occur in a “violation case” in the WTO settlement.\textsuperscript{203} Considering the role of the WTO dispute settlement process in the application (interpretation) and “enforcement” (implementation) of specific WTO treaty obligations, the above “secondary legal obligations” should emerge from the results of this process, namely, reports of WTO panels and the Appellate Body as adopted by the WTO’s Dispute Settlement Body (DSB). This recalls a commentary of the International Law Commission, to the effect that: “[i]t will be a matter for the interpretation and application of the primary rule [in casu, the WTO provision setting out the obligation] to determine into which of the categories an obligation comes.”\textsuperscript{204} In this context, the “secondary legal obligations” of WTO are subordinate to the pertinent WTO treaty obligations they propose to apply and enforce.

\textsuperscript{201} DSU, \textit{supra} note 110, Art. 3.2.
\textsuperscript{202} Petersmann, \textit{supra} note 129.
\textsuperscript{203} It is necessary to draw a distinction between “violation” and “non-violation” disputes in the WTO dispute settlement process. Under Article 26:1(b) of the DSU, in a non-violation dispute, the lost party will not be obligated to perform the results of the WTO Dispute Process. Accordingly, the “secondary legal obligations” generally arise from the “violation” disputes.
\textsuperscript{204} Pauwelyn, \textit{supra} note 187, at 915-917.
As noted above, legal obligations deriving from the “formal sources” are capable of giving the force and validity of law. As the source of WTO’s secondary legal obligations, the results of WTO dispute settlement process (WTO decisions or rulings) have to be binding in nature so as to “presuppose” such legal obligations. Basically, the legal nature of the WTO decisions is similar to that of the ICJ decisions, which, as emphasized in Article 59 of the Statute of the ICJ, have “no binding force except between the parties and in respect of that particular case.” However, neither the DSU nor any other WTO agreement contains such “ICJ-type” clause. Instead, as submitted by John Jackson, “a good number of clauses” of the DSU can be considered for this purpose, since the “overall gist of these clauses, in the light of the practice of the GATT, and perhaps supplemented by the preparatory work of the negotiators” would “strongly suggest” that the recommendations or rulings of the DSB are binding upon the parties to the particular cases, and therefore impose the secondary legal obligation of “bringing the illegal act into conformity” with the WTO treaty obligations which have been related.

The results of the WTO dispute settlement process refer to the reports of WTO panels and the Appellate Body (AB) as adopted by the WTO’s Dispute Settlement Body (DSB), namely, WTO decisions or rulings. The contents of these reports are specified in Article 19.1 of the DSU, which provides that “[w]here 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.” From a perspective of Petersmann’s definition of the “secondary legal obligations,” this clause not only specifies the substance of such obligations in the WTO context as “bringing illegal act into conformity with international law,” but also confirms WTO decisions or rulings as their legal source.

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205 Under Article 59 of the Statute of the ICJ, “The decision of the Court has no binding force except between the parties and in respect of that particular case.” Similarly, Article 94 of the UN Charter states: “Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”

206 Jackson, Misunderstandings, supra note 200, at 62.
As noted above, unless and until adopted by the DSB, the reports of WTO panels and the Appellate Bodies will never be transformed into binding decisions or rulings of the WTO. Under the DSU, the process of this “adoption” is “virtually automatic” with “no blocking.” Moreover, once a panel or Appellate Body report is adopted, it will be unlikely to be altered or modified, for neither the DSU nor any other WTO agreement provides for any procedure for an alteration or revocation as such. This leads to a “once binding, always binding” situation. In this sense, a WTO decision seemingly creates a more coercive legal obligation than WTO treaty obligations in general terms.

The binding force of WTO decisions or rulings is also strongly supported in Article 21.1 of the DSU, which provides that “[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” The provision explicitly addresses the implementation of WTO treaty obligations, implying that the secondary legal obligations of WTO are not only directed at WTO decisions or rulings, but also extend to their implementation within the WTO legal system. In this context, some other provisions of the DSU further establish “an implementing procedure,” which not only affirms the binding nature of WTO decisions, but also introduced a separate type of secondary legal obligation, so-called “obligation to perform.” Such obligations involve possible “compensation” or “retaliation” serving as “only a fallback” in the alternative.

In short, the “secondary legal obligations” of the WTO represent one particular

207 Under the DSU, to block the “adoption” of the reports of WTO panels and the Appellate Body reports requires the “consensus” of all WTO Members. Since this “consensus” is very difficult (if not impossible) to reach, such “adoption” is deemed to be automatic and inevitable.

208 Jackson, Misunderstandings, supra note 200, at 62. Article 3.7 of the DSU prescribes several “hierarchical” approaches. To serve the objective of the WTO’s DSU-based dispute settlement mechanism almost means to secure the withdrawal of the measures concerned.
category of international law obligations. Deriving from WTO decisions or rulings, they are incumbent upon the parties to the particular "violation cases" in the WTO dispute settlement process, aimed at bringing the challenged internal law or practice of WTO members into conformity with specific WTO treaty obligations. Compared with WTO treaty obligations, the secondary legal obligations of the WTO have a limited scope of application, binding only on the parties (WTO members) to the particular WTO disputes. However, such binding force should never be ignored. As noted above, a typical legal obligation should be both "normative" and "coercive" in nature. As for the secondary legal obligations of the WTO, they may not be so "normative," but undoubtedly are "coercive." Although they are "secondary" legal obligations to their "primary" counterparts under the WTO treaties, they still come within a broad category of WTO legal obligations.
PART II

THE RELATIONSHIP BETWEEN THE LAW OF THE WTO AND INTERNAL LAW OF ITS MEMBERS
INTRODUCTION

In the preceding part (Part I), the law of the WTO is examined in the context of its historical evolution, sources of law and legal nature. As concluded, WTO law is not only part and parcel of public international law, but also represents some magnificent "new frontiers" of this landscape. The present part (Part II) takes a look at the relationship between WTO law and the internal law of WTO Members, particularly focusing on the status of WTO Law under the domestic legal system or internal legal order of these Members. This subject is significant in the sense of an "increasing recognition" that "understanding an international legal system necessitates understanding the relationship of national legal and political systems to that international system." It is also essential to exploring the issue of "WTO implementation" which, as the key subject of the present study), cannot be fully displayed and perceived without referring to "enforcement mechanisms" at both international and internal levels.

As state practice indicates, implementation of international law is more often accomplished by domestic judiciaries, if empowered to do so under the national constitutional arrangements or within the "intent" of the national legislature, than by international tribunals. This seems not to be the case with regard to the law of the WTO. On the one hand, most WTO Members simply deny the "direct effect" of WTO law in domestic/internal law, leaving a free hand for national courts to be restrictive in this regard. On the other hand, national constitutional and legal systems of WTO Members are diverse, especially with regard to the relationship between WTO law and municipal law. When these internal legal settings remain unclear or silent on this issue, there will be room for "judicial policy-making," for national courts to play an active or even constructive role in this regard. Accordingly, most of

the present part will be devoted to an examination of the role of national courts in domestic/internal implementation of WTO law.

It is necessary at the onset to take a “preliminary” overview of the membership of the WTO. When the WTO formally came into being on January 1st, 1995, the organization had 129 Members, including 128 states and the European Communities (EC) as the signatories of the 1994 Uruguay Round Agreements. They are the “original WTO Members.” The past decades had witnessed a rapid increase in WTO Membership. According to the WTO Secretariat, until February 16th, 2005, when Cambodia obtained its “access ticket” as the latest comer, WTO Members reached 148, including the 19 post-1995 comers as the “acceding Members.” Since then, Saudi Arabia has been admitted as the latest Member, leaving 30 states (as the “observers” of the WTO) working on their accession to the WTO. Thus, one may still expect some “160 nations or independent customs territories” to be the members of the WTO, as some scholars forecast eight years earlier.

The WTO membership is open to both a sovereign state and a “customs territory having full autonomy in the conduct of its trade policies.” This flexibility is explicitly provided in Article XII of the WTO Agreement, and has explained why the WTO has comprised an increasing number of regional governments. The European Community (EC) is the only “original Member” joining as “a single customs union” with a single external trade policy and tariff. Several “acceding Members” take a similar status, e.g., Hong Kong, Macao and Taiwan. Unlike these three regional governments, whose accession has somewhat reflected the nuance of the WTO’s admission policy in avoiding political sensitivity, the EC is a model of regional integration by virtue of

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210 JACkSON, supra note 4, at 1.
212 JACkSON, supra note 4, at 1.
its highly developed political, economic and legal system.

The EC is the official title of the European Union (EU) in WTO vocabulary. It has been a member of the WTO in its own right since 1 January 1995. As “a single customs union with a single trade policy and tariff,” the EU now has 25 Member States that are equally WTO Members in their own rights. While Member States of the EU coordinate their position in Brussels and Geneva, the European Commission alone speaks for the EU at almost all WTO meetings. As a result, in most issues, WTO materials would refer to the EU, or “more legally-correct EC.” It is “for legal reasons” that the EU has been officially regarded as the EC in WTO parlance. Since this study is all about WTO-related legal issues, this author will follow the above standard usage, adopting the title of the “EC” wherever the EU is addressed in a legal context. Together with the United States (U.S.), the EC has played a predominant role within the WTO. 214

As WTO Members consist of both national and regional governments, the law of an individual WTO Member is either “national law” or “regional law.” For the purpose of present study, both categories are referred to as “internal law” or “domestic law.” In the context of dispute settlement and enforcement of WTO law, internal law of WTO Members should be deemed as comprising domestic constitution, legislation, judicial decision as well as other related legal acts of a particular legal system therein. Given the predominant position of the United States and the EU in the WTO, both the U.S. legal system and the EC legal order are most frequently cited for a study of the relationship between WTO law and internal law of WTO Members, as evident in the current part.

To a great degree, the relationship between WTO law and the internal law of WTO Members duplicates the one between international law and municipal law. As noted

214 Id.
earlier, WTO law is part and parcel of international law. Presumably, effects of the interactions between international law and municipal law will extend to WTO law, but merely in regard to its relation with the internal law of WTO Members, not with that of the non-Members (e.g., "observers" of the WTO). This can be explained in the context of Hart’s theory on a legal system, particularly his proposition concerning “insiders” and “outsiders” of a legal system.²¹⁵

According to Hart, the “insiders” of a legal system are those who accept this system, view it from “an internal perspective,” and take it as the one that applies to them. In contrast, the “outsiders” of this legal system would view it “externally,” taking it as “merely an explanation of why” the “insiders” would behave as such. Because Hart views international law as a “primitive” legal system, “insiders” of international law will be those who are subject to this system.²¹⁶ They are mainly sovereign states, and can exceptionally be private individuals and international organizations. Both groups are the “subjects” of international law. International law is the law of nation states, while municipal law is the internal law of an individual nation state. The relationship between international law and municipal law is mainly one between a “primitive” legal system, referring to international law, and a municipal legal system of its “insiders.” In terms of treaty law (a primary source of international law), such a relationship turns out to be the one between this treaty law and the domestic law of the parties to this treaty, and these “parties” are the “insiders” of it.

As discussed earlier, the law of the WTO represents an integral legal system as well. An acceding Member of the WTO is by all means an “insider” of the WTO legal system, with its accession conditioned on the “terms to be agreed” by it with other WTO Members. These terms not only incorporate the requirements of the existing WTO treaties (WTO agreements) accepted by this acceding Member, but also include a specific “final accession package” (consisting of the Working Party Report and

²¹⁵ Palmeter, supra note 31, at 446.
²¹⁶ Id. at 451-452.
schedules of market access commitments) reached by both sides.\textsuperscript{217} Through its accession to the WTO, the acceding Member views the law of the WTO — from an internal perspective — as binding upon itself. By contrast, non-Members of the WTO are the “outsiders” of WTO legal system, and “may observe the rules members follow.” Since WTO law is part and parcel of international law, the relationship between international law and the law of its “insiders” (municipal law) is presumably applicable to the law of the WTO and the internal law of its Members (“insiders”). Since WTO agreements are at the core of WTO law, the relationship between WTO law and the internal law of WTO members is mainly the one between this comprehensive treaty system and the internal law of the “signatories” of these treaties; the latter refer to WTO Members.

This part (Part II) examines the relationship between WTO law and the internal law of WTO Members. As stated above, the exercise begins with the relationship between international law and municipal law, as summarized in Chapter 1. Based on an observation of the “theoretical dichotomy” between monist and dualist, Chapter 1 will introduce a “pragmatic approach” by which the above subject is interpreted as a possible “conflict of obligations” between the system of international law and that of municipal law, with the two operating separately. This approach will then apply to the relationship between international treaties and municipal law, especially focusing on the status of treaties in the municipal sphere, where the roles of municipal constitutional arrangements, legislatures and courts are significant.

Chapter 2 explores the relationship between WTO law and the internal law of WTO Members, which is the major subject of the present part. From a “pragmatic” perspective, this chapter will be devoted to a two-way exercise, reviewing the status of the internal law of WTO members within the WTO legal system from an international perspective, and the vice versa from a municipal perspective. The first

\textsuperscript{217} World Trade Organization, Membership, supra note 211.
part of this exercise will elucidate WTO requirements for the domestic law of WTO Members, as well as the effect of domestic law in the WTO dispute settlement process. The second part of the exercise will assess the status of WTO law in the domestic law of WTO Members, which appears to be more comprehensive. It will first generalize the main issues, and then briefly cover most academic discussions on these issues. The remainder of the exercise will turn to the "domestic effect of WTO law," particularly concerning the WTO treaty obligations and the "secondary legal obligations" deriving from the rulings of the WTO tribunal (e.g., reports of WTO panels and the Appellate Body as adopted by the WTO’s Dispute Settlement Body).

The next part (Part III) will continue with the issue on the domestic effect of WTO law, but the focus of discussions will shift to the practical dimension, which involves the "domestic implementation" of WTO law by WTO Members. Specifically, Part III will present an empirical study of American and European experiences. These experiences are essential, for "domestic WTO implementation" cannot afford oversimplification, given diverse state practice in this regard. Considering the leading position of the U.S. and the EC within the WTO, as well as their active roles in domestic WTO implementation, the WTO practices of the U.S. and the EC not only represent the trends in this regard, but also provide their fellow Members with some useful reference and guidance therein. Thus, the U.S and the EC experiences – significant and comprehensive as they may be – deserve a separate part as presented later.
CHAPTER 1
THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

The relationship between international law and municipal law is one of the most important topics in public international law. "Municipal law" means the domestic law of an individual sovereign state that generally comprises both "primary and secondary legislation" as well as the principles "to be deduced from the judicial decisions of the superior appellate courts." As a matter of language, municipal law may also be referred to as "internal law," "national law," or "state law." All these terms are exchangeable in the present context.

Over the centuries, the relation of international law with municipal law has been extensively addressed through numerous writings. The importance of this subject is well recognized based upon a common viewpoint that one cannot conceive of an international legal system without understanding the relationship of national legal and political systems to that international system. John O’Brien, from a perspective of modern international law, views this relation as comprised of "three central issues" as follows:

(i) The status of rules of municipal law before international tribunals;
(ii) The circumstances where a rule of public international law will be applied by a municipal court;
(iii) The consequences upon a conflict of a rule of municipal law with that of public international law.

Among the above three issues, the first two underline a theoretical discussion on the relationship between international law and municipal law, either as "part of a single

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218 O’BRIEN, supra note 21, at 107-108.
219 Jackson, Status, supra note 209, FT 4.
220 O’BRIEN, supra note 21, at 107.
legal order” (monism) or as a combination of “two distinct systems of law” (dualism). Notably, these two issues have in themselves superseded the theoretical controversy and embarked on a pragmatic endeavor by bringing the question to both international and national processes of dispute settlement. The third issue assumes a conflict between international law and municipal law, which, existing in either of the circumstances referred to by the first two issues, addresses the “appropriateness” of the primacy of either of the above system of law over the other.

Accordingly, O’Brien has suggested a two-tier, pragmatic approach for scrutinizing the relationship between international law and municipal law. By this approach, the issue is brought into the landscape of the international and domestic enforcement of international law. For the purpose of such an exercise, the present chapter begins with a theoretical dichotomy of dualism and monism, given the “certain, though not decisive influence” of these two schools of thoughts “on writers dealing with substantive issues and also on courts.” The chapter then provides some pragmatic insights on the relationship between international law and municipal law, especially focusing on the relation of the obligations of states with municipal law based upon the theories of “co-ordination.”

I. A Theoretical Dichotomy of Dualism and Monism

Historically, there are two theoretical doctrines that have sought to illuminate the relationship between municipal law and international law, namely, monism and dualism. Both doctrines assume that international law and municipal law – each as a legal system – operate simultaneously within a common field, leading inevitably to a question as to which system will prevail.

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221 Id.
223 Id. at 31.
224 O’BRIEN, supra note 21, at 108.
Monism represents the older of the two doctrines. The monist doctrine holds that both legal systems are “part of a single legal structure,” and “concerned with the same subject matter.” In case of a conflict between the two, the rules of international law should prevail. The earlier monist jurists established their propositions upon natural law principles and deemed the law of nations as “higher” than municipal law. Later, Hersch Lauterpacht from the United Kingdom introduced the “supremacy of international law” even within the municipal sphere. Kelsen, on the contrary, did not support the supremacy of international law over municipal law, but proposed a “basic norm” as follows: “[t]he states ought to behave as they have customarily behaved.” He then asserts that “[i]t is the basic norm of the international legal order which is the ultimate reason of validity of the national legal orders.”

The dualist doctrine views international law and municipal law as “two separate systems” in the sense that they regulate different subject matter. Specifically, international law regulated the relations between states, while municipal law concerned the relationship between the state and its citizens. Thus, neither legal system had the power to create or alter the rules of the other. For the same reason, when municipal law provides that international law applies in whole or in part within the jurisdiction, it merely represents an exercise of the authority of municipal law to “adopt” or “transform” the rules of international law. In this context, where a conflict arises between international law and municipal law, a municipal court would apply municipal law.

The dualist doctrine is closely associated with the positivist approach to international law, with the latter traced back to the beginning of the 18th century. The doctrine

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225 *Id.*
226 BROWNLIE, *supra* note 222, at 33.
228 BROWNLIE, *supra* note 222, at 32.
increased its importance and attraction in the 19th century Europe when the will of the state was placed at the center of politics and diplomacy to deny any “higher authority” over it. By contrast, a British “pragmatic tradition” emphasized little in theoretical debate in this regard. Most celebrated dualist exponents, e.g., Triepel, Strupp, and Anzilotti, have a civil law background.\footnote{O’BRIEN, supra note 21, at 109.} Anzilotti developed a doctrine featured by the distinction between international law and municipal law, noting “each system was founded on a fundamental principle or norm.” According to Anzilotti, for municipal law, the principle was that state legislation was to be obeyed; for international law, the principle was that agreements between states were to be respected, namely, *pacta sunt servanda.* Later, Anzilotti confirmed his favor of dualism in the case of the Electronic Company of Sofia and Bulgaria, recognizing that “the systems deal with two different subject matters, that is, each has its own sphere of application.”\footnote{Id. at 110.}

In addition, there is a monist-naturalist theory “resembling Kelsen’s provision of a universal basic norm.” This theory submits a “third legal order” that international and municipal legal orders are subordinate to. Usually postulated in terms of natural law or of a general principle of law, this third legal order is superior to international and municipal legal orders, capable of determining both of the latter.\footnote{BROWNLIE, supra note 222, at 33.}

II. A Pragmatic Approach Based upon the Theories of “Co-ordination”

A dichotomy of monism and dualism has long been criticized as “unreal” – for “both theories conflict with the way in which international law and national organs and courts behavior.”\footnote{Id.} As also observed, entangling such a theoretical controversy may obscure the nature of the relationship between municipal law and international law.\footnote{Id. at 50.} Arguably, the monist approach is not practically workable alone, given the ambiguity
in and inapplicability of international law on many occasions. More significant arguments have been put forward against both theories, especially challenging their “common field of operation.” It then concludes with a pragmatic approach in this course, holding that international law and municipal law are operating “on a different sphere,” without any conflict arising between each other. 234

According to this pragmatic approach, although the two systems do not come into conflict “as systems” since they work in different spheres, there may be a conflict of obligations in the form of “an inability of the state on the domestic plane to act in a manner required by international law.” The conflict usually appears to be an incompatibility of national law with international law, but the legal consequences of this circumstance “will not be the invalidity of the internal law, but the responsibility of the state on the international plane.” 235 Accordingly, international law can be seen as “a system of co-ordination,” where no substantial conflict will arise, and the attention “should be directed to the actual practice of the courts.” 236 This pragmatic approach appears to concentrate on the operation of “enforcement mechanisms” for the given rules of international law on both international and domestic plane.

Developed by Sir Gerald Fitzmaurice, the approach was later advanced by Rousseau, who characterized international law as a “law of co-ordination” that “does not provide for automatic abrogation of internal rules in conflict with obligations on the international plane.” Since 1945, there has been an increasing “preference for practice over theory” advocated by Fitzmaurice, Rousseau, and their followers, which consistently stresses the practice of municipal courts. 237 This goes back to John O’Brien’s “three central issues” in the earlier discussion, which reflect a similar approach of focusing on judicial processes at both the international and municipal

234 O’BRIEN, supra note 21, at 110-111.
235 BROWNLIE, supra note 222, at 34.
236 O’BRIEN, supra note 21, at 111.
237 BROWNLIE, supra note 222, at 34.
Professor O'Brien's perspective falls within the scope of modern international law, the latter gives predominance to the actual practice rather than theoretic debates. Based upon the "co-ordination" theories, the above noted pragmatic approach falls within this landscape as well. Aiming to "create sensible working relationship" between international law and municipal law, insisting on "the maintenance of an accommodation between the two systems," rather than "the attainment of a formal 'harmony' or the 'supremacy' of international law," the approach comes closer to reality than any theoretical formula. In accordance with this approach, O'Brien's "three central issues" turn out to be more appropriate than the dichotomy of monism and dualism would be, especially in examining the relationship between international law and municipal law.

The remainder of this chapter will address Professor O'Brien's three central issues. Before addressing these, it is necessary to have a "preliminary review" of the inherent relations among these issues, so as to follow the logic and order of the pragmatic approach for the succeeding articulation. From the outset, either of the first two issues reflects one-way thinking towards, respectively, the status the rules of municipal law in the international sphere, or the status of international law in the municipal sphere. The third issue represents a single topic that can be incorporated into either of the first two. Since the pragmatic approach holds that either international law or municipal law is "supreme in its own field, and neither has a hegemony over the other," most study will be divided by these two issues, with each part turning on the international or municipal plane, but equally addressing the third issue.

III. The Relation between International Law Obligations and Domestic law

238 Id. at 50.
239 Id. at 55.
Discussions so far have submitted a pragmatic approach based upon the “coordination” theories, which propound a conflict of “obligations” – rather than any other form of confrontation – between international law and municipal law. In this regard, the relationship between the two systems can be interpreted as that “between the obligations of the states under international law and those under municipal law.” As a practical matter, the conflict of municipal law with international law is essentially a conflict with international law obligations.

Accordingly, how to specify these international legal obligations becomes crucial. As noted earlier, legal obligations of the states derive from formal sources of the law of nation states (international law). Basically, international law contains two primary forms: customary international law and treaty law. This distinction complicates the status of international legal obligations, especially in the municipal sphere. However, given the leading role of treaty law in shaping contemporary international law, and given the major subject of the present study concerning WTO agreements – the most comprehensive body of treaty law in international law landscape – the following discussions will concentrate on “treaty obligations.” Based on O’Brien’s three central issues, below is a two-tier examination of the relationship between international law and municipal law, from a perspective of either system of law.

1. In International Sphere

Viewing the relation of international law (obligations of states) with municipal law from an international law perspective, John O’Brien examines the “status of rules of municipal law before international tribunals” (see, his first central issue). Due to this pragmatic approach, the issue is brought to the international dispute settlement process, where the governments of states are the major subject of international law,

240 TIEYA WANG, GUO JI FA YIN LUN (INTRODUCTION TO INTERNATIONAL LAW) 197-198 (1998).
with little chance for private individuals being involved.241

In the international sphere, it has been clear that municipal law should adhere to international law obligations. First, the binding nature of international law obligations leads to a general duty for the states to bring their municipal law into conformity with these legal obligations under international law.242 More significantly, there is a well-established governing law in this regard,243 notably, the fundamental general principle of pacta sunt servanda that is codified in Article 26 of the Vienna Convention on the Law of Treaties.244 Article 27 further elaborates the governing law, providing that no state can plead provisions of its own law or deficiencies in that law in justifying their disobedience and disrespect for international obligations, and the otherwise triggers state responsibility vis-à-vis impaired parties (states).245 The two provisions address O’Brien’s third central issue of “primacy.” Consequently, on the international plane, in case of a clash between a national legal rule and an international legal norm, the latter will prevail, with the clash possibly generating the state responsibility.

In the international dispute settlement process, tribunals have consistently adhered to the above governing law, notably the long-standing jurisprudence of the ICJ and its predecessor (PICJ). In Greco-Bulgarian Communities, the tribunal held that “it is a general principle of international law that in the relations between the Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of treaties.”246 Generally, international tribunals examine the conformity of municipal law with international law obligations on each specific occasion. They

241 O’BRIEN, supra note 21, at 1.
242 BROWNLE, supra note 222, at 35.
243 Id. at 34.
244 This article, titled “Pacta sunt servanda,” provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”
245 This article, titled “Internal law and observance of treaties,” provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”
246 BROWNLE, supra note 222, at 34-35.
basically treat these occasions as "facts" and "evidence of conduct attributed to the state concerned which creates international responsibility."247 They pay attention to the "acts of the legislature and other sources of internal rules and decision-making" that "are not to be regarded as acts of some third party for which the state is not responsible," since otherwise "would facilitate evasion of obligations." In this regard, a "specific occasion" is not limited to a "municipal law" narrowly defined as national legislation, but extends to the constitution, judicial decisions and other related legal acts of this municipal legal system. This proposition has been affirmed by numerous decisions of international tribunals.248

Therefore, in a general sense, the failure to bring municipal law into conformity with international law obligations does not in itself constitute "a direct breach of international law," so long as this failure does not constitute a "fact." Such a breach will arise only "where the state concerned fails to observe its obligations on a specific occasion."249 This does not apply to a circumstance in which some national legislation (e.g., "mandatory legislation") may in itself constitute a breach of a treaty obligation and then "a tribunal might be required to make a declaration to that effect."250 Interestingly, the opposite situation may have a similar consequence. Where a treaty norm inconsistent with municipal constitutional rules becomes invalid in the municipal sphere, such domestic invalidity does not in itself preclude the validity of this treaty norm under international law.251 This in turn recalls the premise of John O'Brien's perspective, that international law and municipal law are separate systems, operating in different spheres.

247 Id. at 39.
248 Id. at 34-35. Regarding the constitution of a state, the PCIJ asserted in the Polish Nationals in Danzig that: "It should ... be observed that ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."
250 Id.
251 Jackson, Status, supra note 209, at 317.
2. In the Municipal Sphere

A. General Issues and Their Significance

Viewing the relation of international law obligations with municipal law from a municipal law perspective, John O’Brien suggests taking into account the “circumstances where a rule of public international law will be applied by a municipal court,” as covered by his second central issue. Due to this pragmatic approach, the issue is brought into domestic judicial proceedings for the enforcement of international law. Questions may arise as to the role of municipal courts in enforcing international legal obligations, as well as to the extent to which private individuals may rely on these international obligations to challenge municipal law and practice before these courts. These questions, along with other relevant ones, are all about the “domestic legal effect” of international law obligations. The issue, especially in terms of treaty law and treaty obligations, has been well articulated by Professor John Jackson. According to Professor Jackson, “domestic legal effect” of treaty law involves “at least three sub-questions” as follows:

1. The availability of the “direct effect” or “direct applicability” of a given treaty (or any part of it), which entitles “at least some” domestic litigants to “rely on” its provisions, and bind domestic courts to accept these provisions as applicable law;
2. The availability of the “standing” of “a particular party” on domestic plane, based on any provision of the given treaty;
3. The “hierarchy of norms” with regard to a conflict between the given treaty and a “prior or subsequent” domestic statute or constitutional provision.

252 O’BRIEN, supra note 21, at 1.
253 JACKSON, DAVEY & SYKES, supra note 76.
The above articulation appears to be an annotation to John O’Brien’s second and third central issues. Sub-questions (1) and (2) particularly elaborate O’Brien’s second central issue, presenting some scenarios and specific terms for succeeding discussions. From the perspectives of O’Brien and Jackson, in the municipal sphere, the relationship between international law and municipal law is largely a matter of the treatment of international law obligations before municipal courts.

This, however, does not suggest that only municipal courts are involved in the issue. To enforce (or, specifically, to “apply”) international law obligations, the municipal court has to “ascertain” the existence and “internal effect” of these international obligations in the municipal sphere, and make sure the court by itself has the competence to do so. International law provides little guidance for these purposes. Instead, clues often lie in the domestic legal system, particularly the municipal constitutional arrangements, or, the “intent” of national legislature. Accordingly, the domestic legal effect of international obligations is in the instance a constitutional and/or legislative issue. This recalls Jackson’s sub-question (1) and (3), mainly referring to the sources and hierarchy of domestic law, separation of power, etc.

In terms of international treaties, other factors matter as well, although not explicitly or implicitly covered by Jackson and O’Brien’s concept of “domestic legal effect.” These factors belong to the broader landscape of legal/constitutional issues inventoried by Jackson. Among these issues, some are prerequisites for obtaining

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254 BROWNLIE, supra note 222, at 43.
255 Id. at 51.
256 Id. at 43.
257 Jackson, Status, supra note 209, at 328.
258 Id. at 316. Jackson’s “inventory” of legal/constitutional issues related to the treaties in domestic law covers eight items as below: (1) the power to negotiate; (2) the power to “sign” (usually ad referendum, only to certify the text); (3) the power to “accept” the treaties as a binding international law obligation; (4) the “validity” of the treaty under national constitutional law; (5) the power to implement the treaty obligations; (6) direct applicability of the treaty in domestic law; (7)
the "domestic legal effect" of treaties, such as the validity of treaties in domestic sphere, usually addressed by the national constitution;\textsuperscript{259} or the power to implement the treaties in domestic sphere, concerning the role of municipal courts and other domestic institutions (e.g., legislature). Some others, although parallel to the issue of "domestic legal effect," still reflect certain bearings of the latter, such as the treaty making process, which, from the outset, concerns the national "constitutional procedure" (especially, "democratic participation" and separation of power), and also involves the enactment of national legislation.\textsuperscript{260}

Due to the above observation, the status of international law obligations (treaties) in domestic law is collectively shaped by various entities of a municipal legal system, e.g., constitutional system, legislature, courts, and even administrative bodies. Questions then may arise as to who has the authority to determine the relations among these entities, especially in regard to the domestic effect of international law obligations; and, to what extent a competent entity may determine such matters. These are all about the role of above municipal entities in the enforcement/implementation of international obligations. In the municipal sphere, the health of the relations of municipal law with international law depends largely on the maintenance of a "proper" relationship among the above actors.\textsuperscript{261} This will be discussed later.

The treaties in themselves matter as well. As observed by Jackson, whether a treaty is entitled to direct application or subject to an act of transformation depends greatly on

\begin{itemize}
  \item invocability in municipal law (contrasted with direct applicability); (8) a hierarchy of norms in domestic law when treaty norms conflict with norms of that law; and (9) the power to administer the treaty, which includes a series of issues, such as the procedure for formal "ratification;" the power to interpret the treaty for domestic application and as a matter of international law; the power to represent the country in institutional procedures relating to the treaty; the power to "vote" in such procedures; the power to amend the treaty; and the power to terminate the treaty.\textsuperscript{258}
\end{itemize}

\textsuperscript{259} \textit{Id.} See, Category (4) of the above Inventory.

\textsuperscript{260} \textit{Id.} at 315.

\textsuperscript{261} BROWNLIE, supra note 222, at 51.
“the relative degree to which constitutional drafters trust international institutions and treaty-making processes compared with national institutions and legislative process."\textsuperscript{262} The quality of treaties entails enormous implications for their status in domestic law. Treaties can be imperfect, given their possible vagueness, ambiguities, and rigidity. A nation state is more likely to grant direct application to a treaty that is precise, specific in nature, and/or adaptable to the changing situation than otherwise.\textsuperscript{263} The matter of "justiciability" is for succeeding discussions.

The above issues and questions display the complexity of the relationship between international law and municipal law in the municipal sphere. In the international sphere, international law obligations simply bind the states, and the latter are obliged to give effect to their international legal obligations. Nevertheless, how a state makes and applies international law obligations is mainly a matter of domestic discretions. Notwithstanding its general international duty, the state is responsible for assuring its constitution and laws enable its government can carry out its international obligations; how the state may achieve such results is not of concern to international law as a whole. Nor does international law contain any general rule to govern this particular issue.

In effect, a state may carry out its international obligations "by particular means," e.g., national legislation, executive measures, or judicial decisions. Given the absence of a well-settled rule of international law vis-à-vis the diverse state practices, the relationship between international legal obligations and municipal law remains controversial and unresolved as a matter of domestic law, with the issue largely complicated by the internal structure and arrangements of particular state systems. Consequently, for the questions addressed by O’Brien’s and Jackson, answers to them will vary from country to country.

\textsuperscript{262} Jackson, \textit{Status}, supra note 209, at 313.
\textsuperscript{263} \textit{Id.} at 339.
Meanwhile, the issue has more practical significance. International law, especially in terms of its enforcement and implementation, cannot replace the municipal law of states, but indeed depends on the actions of governments of states and their legal systems. As survey of state practice indicates, disputes remain limited when raised and settled on the international plane, while municipal courts have played an increasingly significant role in the enforcement of international law. In some areas of public international law, “nearly all the relevant case law derives from the municipal courts.”

Take, for instance, the treaties involving private law (especially private commercial transactions), e.g., Warsaw Convention on the contracts by international air carriers, or, IMF’s Article of Agreement on the enforceability of contracts involving an exchange of currencies. Traditionally, a treaty of this kind calls for enforcement by domestic courts. Even though this treaty is not “self-enforcing” in nature, or remains ambiguous in its nature, the municipal court may still be granted the competence to apply or interpret it. Hence, the effectiveness of international law obligations has considerable practical impacts on their implementation in the municipal sphere, especially with regard to the practice of the municipal court.

B. Some Basic Concepts

Discussions so far have called for attention to the enforcement mechanism for international law obligations, especially concerning the role of the national judiciary. Equal attention should also be paid to the process of giving domestic legal effect to international obligations, where national constitutional systems, legislatures, and even administrative bodies may play significant roles as well. As a matter of terminology, this process can be variously described as “adoption,” “incorporation,” “reception,” “transformation” and “implementation,” depending on different scholarly

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264 O'BRIEN, supra note 21, at 107.
preferences. There are also some other concepts for describing the effects of this process, e.g., "direct application" (direct applicability) or "direct effect" of international law obligations, or, specific treaty obligations that are "self-executing" in nature. For the succeeding discussions, these terms and concepts are defined and clarified as follows.

According to John O’Brien, the doctrine of incorporation holds that the rules of international law will "automatically" become part of municipal law "without any express act of adoption." It presumes that "adoption will operate unless there is some clear statute or precedent to indicate otherwise." In this context, a treaty signed and ratified by a state would become binding upon the citizens of this state "without any legislation being passed." As for the doctrine of transformation, O’Brien submits an opposite case, where the rules of international law do not become part of municipal law "unless and until there has been an express act of adoption." This means the given rule of international law must be "transformed" into domestic law. In this regard, a treaty concluded by a state would not be given domestic effect in municipal courts of this state "unless domestic legislation had been enacted to ‘transform’ it into municipal law."  

Professor O’Brien’s proposition is consistent with that of his compatriot Ian Brownlie; the latter acknowledged a trend of British judicial practice to "displace the doctrine of incorporation by that of transformation." Although these two doctrines are distinguishable in giving domestic effect to international law, their significance and application under different jurisdictions may still cause confusion. In analyzing the status of treaties in domestic legal systems, American scholar John Jackson asserts there is no uniform definition of an "act of transformation," nor is there any definition for terms such as "incorporation," "adoption," "reception," since they seemingly

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265 BROWNLIE, supra note 222, at 42.
266 O’BRIEN, supra note 21, at 113.
267 BROWNLIE, supra note 222, at 42-47.
"compete with" or "may ... be subsumed within" each other. This echoes the position of the late Chinese scholar, Wang Tieya. According to Professor Wang, terms like "incorporation" and "transformation" are only distinguishable in terms of their plain meanings. This distinction is not legally significant and may not lead to any legal effect. Professor Wang particularly referred to the phrase "incorporation," regarding it as a common description of any case where the rule of international law is integrated into municipal law, regardless of the necessity to take an "express act" of such integration.

This author holds a variant perspective. First, absent a uniform definition, the term "transformation" generally implies an "express act of adoption" or, an "act of transformation" in its plain meaning. Such an act, as O'Brien suggests, mainly refers to the enactment of domestic legislation for implementation of international law. Even Jackson regards an act of transformation as a "government action" of a particular state to "incorporate" treaty norms into its domestic law, which may take various forms like a statute, a regulation of an administrative body, or even a decision of a court or tribunal in the municipal sphere, depending on the actual practice of the given state. As evident in state practice, in most cases, an act of transformation falls with the province of municipal legislature, ending up in the enactment of domestic legislation. Thus, it is not unreasonable to regard the term "transformation" as what it ordinarily means. The succeeding discussions will adhere to this definition.

Secondly, Although Professor O'Brien's doctrine of "incorporation" explicitly refers to a situation where international law obligations automatically become part of domestic law without the aid to an act of transformation, the term "incorporation," in effect, has multiple usage and meanings in a general sense. In its plain meaning,

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268 Jackson, Status, supra note 209, at 315.
269 WANG, supra note 240.
270 Jackson, Status, supra note 209, at 315.
271 BROWNLIE, supra note 222, at 42.
the word “incorporation” describes nothing more than a general process of giving domestic legal effect to international law, including the process of “transformation” as well. Apparently, O’Brien’s doctrine of “incorporation” can be misleading and confusing.

To understand what amounts to O’Brien’s “incorporation” doctrine, one may consider the concept of “direct application” (or “direct applicability”) introduced by Jackson in terms of treaties. According to Jackson, “direct application” generally means the courts or other competent government bodies in a municipal system will deem the treaty language as a source of law subject to this system, much the same way as they treat the constitutions, statutes, or certain other legal instruments of domestic law. This treaty language will then become “a required source for the court to examine so as to determine the legal rules applicable to particular cases.”

Hence, the concept of “direct application” (“direct applicability”) allows for a treaty provision automatically to become part of the sources of domestic law, without resorting to an act of transformation, and turns out to be comparable to O’Brien’s doctrine of “incorporation.” The succeeding discussions will adhere to this position. Wherever the term “incorporation” is noted, it refers to a general process of incorporating international law obligations into domestic law. As for O’Brien’s “incorporation,” this author adopts the concept of “direct application,” “direct applicability” or, alternatively, “direct effect” as noted below.

The concept of “direct effect” is more commonly used in the European context. Developed by the European Court of Justice (ECJ), the concept represents a principle of the internal EC legal order to grant individuals rights deriving from internal EC legal acts. Since originally applied to the “constituent EC treaties,” the doctrine of direct effect has “extended to cover certain types of international agreements.”

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272 Jackson, Status, supra note 209, at 321.

the predominant European viewpoint, “direct effect” concerns “the ability of international treaty obligations to generate legal rights, within the internal legal system of the Community, which individuals can enforce against their government.” Unlike Jackson’s definition of “direct application” (directing at the applicability of international law rules by the courts as domestic source of law), the leading European perspective emphasizes the capability of international legal rules to “confer rights on individuals,” implying the availability of judicial review. For purposes of the succeeding discussions, the term “direct application,” “direct applicability” and “direct effect” are exchangeable.

Finally, although Jackson might go to extremes in mixing the phrase “transformation” with “incorporation” and the like, he has properly introduced the term “implementation” for the purpose of international treaties. From Jackson’s perspective, the process of “implementation” covers both “transformation” and “direct application.” An act of transformation may achieve “partial or full implementation,” while the direct application of a treaty might be one form of “implementation” of certain types of treaties. In this sense, “implementation” can be regarded as the alternative of the “incorporation” in the latter’s plain meaning. The present study embraces Jackson’s idea of “implementation” as a matter of domestic law. In the succeeding discussions, wherever this term appears, it will mean “domestic implementation” as Jackson proposed herein.

C. Notes for the Subject of This Study

274 THE WTO AND INTERNATIONAL TRADE REGULATION 133 (Philip Rutley, Iain MacVay & Carol George eds., 1998). See, Case 26/62, Nv Algemene Transporten Expeditie van Gend en Loos et al. v. Nederkandse Administratie der Belastingen (van Gend en Loos), 1963 E.C.R. 1219, at 13, “Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage [by means of direct effect].”

275 Jackson, Status, supra note 209, at 317.
Discussions so far have clarified a couple of terminological issues concerning the relation of international law with municipal law in municipal sphere, especially addressing the domestic legal effect of international law obligations. At this stage, it seems appropriate to take a look at the subject of the whole study: “domestic implementation” of WTO law. This subject, based on the above theoretical and conceptual articulation, suggests the necessity of narrowing the scope of the present study, limiting it to international treaties and their legal status on the municipal plane. This merits some explanation below.

First, as discussed and confirmed in Part I, the law of the WTO is mainly treaty law. Thus, the remainder of the present study will concentrate on international treaties, especially in terms of the existing WTO treaty system (WTO agreements). The issues on customary international law will be omitted.

Second, based on Jackson’s concept of “treaty implementation,” the present study will focus on a process of giving domestic legal effect to WTO law (especially, WTO treaty law), as well as various to the results of this process. Addressing the role of several municipal authorities (e.g., constitutional system, legislature, courts) in this process, the study will examine the treatment of WTO law by these respective domestic authorities, and analyze the policy and legal rationale behind their operation in this particular context.

Finally, since the subject of the present study remains “controversial and unresolved as a matter of domestic law,” the study will explore the diverse practice of WTO Members. Particularly, a case study will be conducted of U.S and European experiences, so as to reach some policy recommendations for the People’s Republic of China, a new Member of the WTO.

For all these considerations, although the remainder of this chapter will not go beyond the general question on the relationship between international law obligations and
municipal law in the municipal sphere, its focus will shift to pragmatic aspects of that issue, which concerns the roles of respective municipal authorities in the implementation of treaties.

IV. Role of Municipal Authorities in Domestic Implementation of Treaties

As discussed earlier, the status of treaties in domestic law is shaped collectively by various entities of a municipal legal system, including the national constitutional system, legislature, courts, as well as administrative bodies. The health of the relationship between treaty obligations and domestic law depends greatly upon the maintenance of the “proper” relations among these domestic actors. 276

1. Status of Treaties in Municipal Constitutional Arrangements

Generally, constitutional arrangements of a particular state serve to “determine whether a particular rule constitutes a rule of municipal law of this state.” 277 The domestic effect of international law, or, its status of “being part of municipal law” is equally determined by these national constitutional arrangements. 278 Thus, municipal constitutional systems may serve as the starting point of any discussion on the domestic status of international law, 279 as followed in the succeeding discussions.

A survey of state practice indicates, most states make some reference to the status of international law within the term of their written constitution. 280 Notwithstanding the diversity of such references, O’Brien generalizes three aspects of their contents: (i) the executive branch shall respect certain fundamental rights “internally”; (ii) the executive branch shall conduct itself “externally” in accordance with international law;

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276 BROWNLIE, supra note 222, at 51.
277 O’BRIEN, supra note 21, at 108.
278 BROWNLIE, supra note 222, at 50.
279 O’BRIEN, supra note 21, at 113.
280 Id. at 131.
(iii) the constitution may make separate provision in respect to treaty provisions and rules of customary international law.\footnote{281} Issues (i) and (ii) suggest a general preference of the states to assert the primacy of municipal law over international law on the municipal plane, and therefore confirms the predominant role of municipal administrative bodies in foreign affairs. Issue (iii), on the other hand, distinguishes treaties from customary international law by virtue of their status under the national constitutional system.

According to L. Hankin, "the status of treaties in the domestic law of any country is a constitutional, not an international, question."\footnote{282} Thus, municipal constitutional arrangements may cover a number of issues with respect to the domestic status of treaty law. They may expressly specify the "domestic legal effect" of treaties, either granting the "direct effect" or instead, requiring an act of "transformation." They may clarify the "hierarchical status" of treaties in domestic law, in case of a conflict between the two. Moreover, they may address the prerequisite or pertinent issues essential to the status of treaties in domestic law, which, as noted earlier, include the validity of treaties under domestic law, the power to implement treaties in domestic sphere, and the treaty-making process, etc. All these issues are covered by an "inventory" submitted by Professor Jackson. Below these issues are summarized in the context of their inherent linkage to municipal constitutional arrangements.

A. Validity of Treaties in Domestic Law

This issue is crucial, for a treaty will never be considered domestically effective unless and until its domestic validity is established. The issue often falls within the province of the national constitutional system, but not always. Exceptions include the practice of the U.S. As state practice indicates, it is not uncommon that a treaty provision will be invalidated by a national constitutional rule for its inconsistency

\footnote{281 Id. at 127.}
\footnote{282 L. HANKIN, CONSTITUTIONALISM 62.}
with the latter. This situation suggests that the national constitution may serve as the “basis” for domestic validity of treaties. It may raise a broader issue on the “hierarchical status” of treaties. Notably, domestic invalidity of a treaty generally does not exclude its validity under international law.\textsuperscript{283}

\textbf{B. Power to Implement Treaties in Domestic Sphere}

Only domestically valid treaty obligations are capable of being implemented domestically. Where such domestic validity is established, the issue will concern the allocation of the power to implement these treaty obligations among various national government bodies, as well as the “capability” of these constitutional institutions to do so through the “direct application” or an act of “transformation.” These apparently reach the traditional province of the municipal constitution (especially, separation of powers), and are often covered by municipal constitutional arrangements.\textsuperscript{284}

\textbf{C. Choice between Direct Application of Treaties and An Act of Transformation under the Domestic Legal System}

This is the key issue on the status of treaties in domestic law, for such status basically appears to be a matter of “direct application” or “transformation” of treaty law. Municipal constitutional systems often make this choice, so as to determine the domestic legal effect of treaties.\textsuperscript{285} As some scholarly observations suggest, wherever a national constitution is silent on the necessity to defer to an act of “transformation,” the “direct application” will be presumed.\textsuperscript{286} In terms of treaties, however, many states present an opposite case, where municipal constitutional arrangements

\textsuperscript{283} Jackson, \textit{Status, supra} note 209, at 317.
\textsuperscript{284} \textit{Id.}
\textsuperscript{285} O’\textsc{brien}, \textit{supra} note 21, at 127-131.
\textsuperscript{286} \textit{Id.} at 113.
explicitly call for a process of transformation, with very few exceptions available (e.g., “self-executing treaties” of the U.S.).

In contrast, constitutional recognition of the “direct application” appears rare. Even if the “direct application” is constitutionally permissible, it is usually conditioned on a requirement for the consistency of treaties with the national constitution itself. This is merely part of the “significant qualifications and conditions” attached therein. Others include the requirement for the application of *lex posterior* (the “later-in-time” prevails) to a “statute-like” treaty law,287 or, the “publication” prerequisite for domestic recognition of a treaty law with direct application.288

Finally, the role of municipal constitutional arrangements is not unlimited in determining the status of treaties in domestic law. Where constitutional drafters are explicit about their deference to an act of transformation, they will likely decline to further instruct the operation of this process, and rather leave it to the municipal legislature. Besides, not all national constitutions explicitly address the domestic legal effect of treaties. The status of many treaties in domestic law is either unintended or unclear within municipal constitutional arrangements, leaving room for other municipal authorities (e.g., legislature or judiciary) to play a role.

**D. “Hierarchical Status” of Treaties in Domestic Law**

This issue concerns whether a treaty provision will prevail over a rule of domestic law in case of a conflict between the two. As a survey of state practice indicates, the issue is “more often deemed to turn on a constitutional rule”289 and to be governed by national constitutional system. A predominant “constitutional principle” embraced by the majority of states is: “international law must give way to national legislation,”

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287 Brownlie, supra note 222, at 50.
288 Jackson, Status, supra note 209, at 310-311.
289 Id. at 333.
which is particularly true for treaties. This principle reflects a “dualist-like” position in general, but does not suggest a simple and absolute conclusion.

In the domestic sphere, clashes between the rules of treaties and domestic law turn into “a fairly elaborate matrix” due to their equal complexity. The present study does not intend to scrutinize each of these clashes, but two of them are worth noting for their frequent appearance in municipal constitutional arrangements: one is the clash between a treaty norm and a national constitutional provision, the other is that between a treaty norm and a national legislative enactment. In terms of the first clash, it is observed “with one or two exceptions, constitutions generally are deemed superior to treaties.” As for the second one, the situation has been complicated not only by the complexity of national legislation, the latter is either “prior” or “subsequent” to the treaty norm concerned, but also by the diverse state practice that enhances such complexity. Certain municipal constitutions assert that “the later in time prevails,” as in the U.S. Others, on the contrary, insist on the primacy of international treaties over domestic statutes (even including later-enacted ones). As a survey of state practice indicates, where a treaty law is in conflict with domestic law, the national constitutional system has more often given weight to domestic law than otherwise.

290 BROWNLIE, supra note 222, at 50.
291 Jackson, Status, supra note 209, at 318. According to Robertson, given their differing relevance with domestic law, treaties can be categorized as follows: (1) Treaties with purpose and substance outside the sphere of national law, such as alliances, peaceful settlement of international disputes; (2) Treaties affecting the administrative sphere of rights and obligations of various public authorities, and not relating to individuals; (3) Treaties relevant to relations between public authorities and individuals; and (4) Treaties concerned with relations between individuals or other subjects of private law. The domestic law shares the above normative complexity, since it may consist of constitution, prior national-level statutes, subsequent national-level statutes, as well as various regulatory acts and laws of subordinate governmental units (at the state-level or provincial level) that “may be either prior or subsequent to the treaty.” It is not the purpose of this study to examine every possible clash between the norms from each of above two categories. Nor will it be possible to do so, given the differing approaches adopted by different legal systems to cope with these clashes.
292 Jackson, Status, supra note 209, at 318.
As the above observations suggest, a question on the "hierarchical status" of a treaty may arise only when there is a clash between this treaty and domestic law in domestic sphere, while some scholars even regard such a clash as rare. Professor Jackson is the biggest proponent of this position, submitting that the questions of the "hierarchy of norms" arise only when "a directly applicable and invocable treaty norm is unavoidably inconsistent with other norms in the national legal system."293 This submission has two important bearings: first, international treaties may enter into a conflict with domestic law only when they are valid, directly applicable, and "invocable" on the domestic plane; second, this conflict serves as the prerequisite for reaching the issue of the "hierarchy of norms."

To this author, Jackson’s proposition risks a problem of oversimplification. First, the domestic validity of treaties may depend on their "hierarchical status" in domestic law. This is particularly the case with many national constitution rules capable of trumping any inconsistent treaty obligations. In such a situation, it will be crucial to clarify the "hierarchical status" of the treaty norms concerned, as to their domestic validity, leading to a possible "conflict" between domestically invalid treaty provision and the pertinent rules of domestic law.

Second, based on the "co-ordination" theories, the earlier discussed "pragmatic approach" proposes "a conflict of obligations" that is always possible between municipal law and international law, regardless of the domestic legal effect of the latter.294 In practice, such a conflict turns out to be common and substantial, leading to great potential for an action being brought before a domestic court against domestic legislation, on the ground of treaty obligations (even they have no "direct effect" under the domestic constitutional or legislative system). In this instance, the presiding court does not have to address the "hierarchical status" of the treaty obligations

293 Id.
294 BROWNLIE, supra note 222, at 34.
concerned, for the latter’s lack of direct effect has presumed the primacy of domestic law over them. Thus, the issue of the “hierarchy of norms” does not imply an exclusive case of directly applicable treaty norms. This issue should be elaborated in a general sense.\textsuperscript{295} Notably, where the direct effect of a treaty law is excluded, the primacy of domestic law will be presumed over this treaty provision, making it unnecessary to reach the issue of “hierarchy of norms.”

\textbf{E. Domestic Treaty-making Process}

This issue concerns the allocation of the “treaty-making powers” among national government institutions, including the power to negotiate or sign a treaty, and to accept this treaty as binding international legal obligations. In this context, the issue is a procedural matter, and, from the outset, involves domestic constitutional procedures. In the domestic sphere, “treaty making” is distinguishable from “treaty implementation.” Nevertheless, the making of a treaty may entail enormous implications for its domestic legal effect. As Jackson observes, where the domestic constitutional treaty-making process does not require any “democratic participation” (e.g., parliamentary approval), the case will be rare that the adopted treaty is granted domestic effect without the subsequent act of the Parliament. This parliamentary act will then serve to fill the blank left by the prior treaty-making process in “democratic participation,”\textsuperscript{296} obviously amounting to an act of “transformation.” In addition, the domestic constitutional treaty-making process may provide an aid to identifying the “hierarchical status” of a treaty in domestic law, if domestic legislation has been silent on the issue. Here, one may refer to a competent government institution (usually, a national legislature) in making this treaty, deeming the effect of this treaty comparable to that of domestic legislation enacted by that institution.

Since municipal constitutional arrangements cover these complex issues, they play an
\textsuperscript{295} Jackson, \textit{Status}, supra note 209, at 333.
\textsuperscript{296} \textit{Id.} at 315-316.
essential role in determining the domestic status of treaties. Nevertheless, such a role
is not unlimited. As noted earlier, even though a national constitutional system
explicitly defers to an act of transformation, it may decline to further put forward a
formula for the operation of this process, and would rather leave the matter to
competent government institutions (e.g., legislature, courts and administrative bodies).
Besides, while "the practice of state reflects the characteristics of the individual
constitution," national constitutions vary from state to state in treating the status of
treaties in the domestic sphere. Not all national constitutions address the domestic
effect of all treaties. In many treaties, the issue is unmentioned or unclear in the
national constitution, leaving room for national government institutions to play a role.
This is true even for a highly developed national legal system, such as Switzerland
and the Netherlands. The situation calls for an active role of national authorities "in
different directions" for the above purpose.298

2. Transformation of Treaties by Municipal Legislature

In previous discussions, the domestic status of treaties is mainly manifested by the
formalities of their domestic implementation, namely, the "direct application" or
"transformation" of these treaties. A choice between these two formalities is often
covered by municipal constitutional arrangements, which, however does not imply
this is "always" the case. More often, especially in absence of explicit constitutional
references, such a choice is made by the national legislature on a case-by-case basis.
Constitutional or legislative deference to an act of transformation will lead to the
primacy of domestic law over treaties, and thus clarify the "hierarchical status" of the
latter within Jackson's interpretation of this concept.

According to some scholars, "to rule against direct application would enable national
officials to implement the treaty by means of an act of transformation," the latter is

297 BROWNLIE, supra note 222, at 50-51.
298 Jackson, Status, supra note 209, at 310.
"much more likely to be found and utilized by the domestic legal institutions."\textsuperscript{299} This is particularly true for national constitutional practice, which contains an overwhelming deference to the "transformation" of treaties. Nevertheless, as Jackson submits, an act of transformation may have various forms, such as a domestic statute, administrative regulation, or even a judicial decision, so long as they are capable of incorporating treaty obligations into domestic law.\textsuperscript{300} In practice, an act of transformation mainly refers to the enactment of domestic legislation for treaty implementation, giving predominance to the role of municipal legislatures. This has been the case with the "enabling Act of Parliament" of the U.K. and the "implementing legislation" of the U.S., both spelling out the roles of the British Parliament and the U.S. Congress.\textsuperscript{301} As Jackson concluded, the doctrine of transformation "recognizes the responsibility of the executive branch to negotiate treaties and the monopoly power of the legislature to change the law."\textsuperscript{302}

Basically, a municipal legislature conducts an act of transformation in two dimensions: policy and technical dimensions. The policy dimension bears the legislature's motives and political considerations for such a choice, which can be interpreted from both international and domestic perspectives.

From an international perspective, the national legislature may desire to assert their interpretation of a treaty, especially when the treaty concerned appears to be ambiguous or, under its terms, "the policy choices are left open (explicitly or implicitly)." This "legislative interpretation" of treaties may further be adopted by an authoritative entity (which can be the legislature itself, or more often, national courts of law) to impose an interpretation for domestic law. All these legal interpretations will constitute the "state practice" to "influence the later international interpretation of

\textsuperscript{299} \textit{Id.} at 322.
\textsuperscript{300} \textit{Id.} at 315.
\textsuperscript{301} BROWN\textsc{lie}, supra note 222, at 46.
\textsuperscript{302} O'BRIEN, supra note 21, at 128.
this treaty norm.” Besides, the legislature may favor an act of transformation with the intent to delay the application of a treaty obligation or “preserve the option” to “breach” that obligation.303 This becomes an issue of “treaty compliance,” relating to that of “treaty implementation” as discussed later.

From a domestic perspective, the national legislature may intend to use an act of transformation to enhance its political power “vis-à-vis other governmental entities.” Within the province of the legislature, an act of transformation will be the implementing legislation for the treaty law concerned, triggering the “allocation” of national authority to make certain decisions, or to take certain actions for the treaty implementation purpose. At this stage, the treaty-implementing power is allocated among several municipal government institutions, including not only the legislature itself, but also the courts of law and the administrative agencies, while the act of transformation turns out to be “part of a purely internal power struggle” within the state.304 Given its predominant (if not exclusive) law-making authority, the national legislature will always have the final say on this power allocation. As national courts and administrative agencies must adhere to its intent, the role of the national legislature in treaty implementation becomes insurmountably significant.

In the technical dimension, the national legislature may tailor the act of transformation in various ways. It may reword the treaty to “match domestic circumstances,” as in the case of many multilateral treaties, given that their official language may be incompatible with the (legal) language of the implementing nation state, or, same as in the latter but with differences in “certain nuances of usage.” The legislature may directly enact a treaty provision by setting it out as a schedule to the enacted domestic legislation, or, by enacting a domestic legislation that uses all or part of the language of this treaty. It may also enact a separate act or statute that employs its own substantive provisions to give effect to a treaty, but the text of the treaty will

303 Id. at 326.
304 Jackson, Status, supra note 209, at 324-325.
not be directly enacted. In this regard, the treaty concerned can be referred to in the long or short titles of the enacting legislation, or in its preamble or annexed schedule.

Another approach may be adopted by the legislature where the treaty language is deemed as ambiguous, and the direct application of it would lead to a violation of "constitutional standard of due process." In this circumstance, the legislature may wish to elaborate on the treaty provisions to "clarify some ambiguities (for use by domestic courts and other applications)." In the aggregate, the legislature may "paraphrase," "clarify," "refer to," "confirm" or "elaborate" the treaty language. These comprehensive tasks may impose a great challenge for the legislature to develop compatible legislative techniques. After all, even though the above eventualities may occur in the context of "a good faith effort fully to apply the treaty norms," they may also arouse the legislature's temptation to "depart from the precise wording of the treaty" and therefore "to 'transform' a norm that does not accord with the treaty norm itself."

Where the domestic status of treaties entails an act of transformation, the municipal legislature will play a determinant, insurmountably significant role compared to those of other national government authorities. As state practice indicates an overwhelming deference to an act of "transformation," it is expected that the role of the municipal legislature in treaty implementation will remain highly significant, as a practical matter.

3. Application of Treaties by Municipal Courts

From the outset, the domestic status of a treaty regime is a matter of constitutional or legislative choice between the "direct application" and "transformation" of this treaty regime in the domestic sphere. Where the role of a national constitutional system or

305 Id. at 325.
306 Id. at 322.
legislature has been satisfied in this context, the treaty concerned is capable of being applied domestically. This, however, merely reaches the halfway point of the whole process of treaty implementation. From a pragmatic perspective, treaty implement is more about the task of applying a treaty (or part of it), mainly by domestic courts of law.

Friedl Weiss views the “application of law” as comprised of three steps in the context of dispute adjudication:

1. Determining the applicable law and ascertaining the rules of the legal system which are to be applied on the basis of given materials;
2. Interpreting the rules so chosen or ascertained, which is determining their meaning as they were framed and with respect to their intended scope;
3. Applying to the case in hand the rules so found and interpreted.307

As noted earlier, several municipal government authorities may undertake to interpret or apply treaties within their constitutional authority. Typically, by an act of transformation, a national legislature may incorporate its interpretations of treaties into domestic legislation. These “legislative interpretations” appear to be general rules or policies for the treaty norms concerned, without being directed at any particular case (dispute). Therefore, they do not fall within Professor Weiss’s meaning of “legal application.” As for national administrative bodies, they may argue towards the “allocation of power, or policies to apply in relation to the treaty.” They may also decide within their discretion to act “as if the treaty were, or were not, directly applied” for purposes of a particular case (dispute).308 However, subject to a judicial review by national courts, administrative decisions in this regard will not contain any decisive, authoritative interpretations of the treaty.

308 Jackson, Status, supra note 209, at 328.
Today, judicial review has been one of the fundamentals of a modern legal system that is based upon the rule of law, with the courts of law playing an exclusive role in performing this legal function. Under such a system, administrative bodies’ interpretations of treaties are always subject to those of the courts, and therefore do not govern the outcome of any typical legal interpretation. On the contrary, where the issue of the domestic legal effect of treaties arises in judicial review, the reviewing court will have the final say on it.  

For the purpose of treaty application/interpretation, national courts generally follow Professor Weiss’s three-prong approach. For the first prong, the court will first “make a choice of law depending on the nature of the subject matter.” Where the treaty norms are appropriate for use, the courts will “ascertain” their existence and “their effect within the municipal sphere.” To this end, the courts will adhere to any available constitutional arrangements or legislative policies or laws concerning the issue. This task can be easy or tough, depending on the extent to which these rules or policies may address the issue, explicitly or implicitly. Where they are ambiguous or silent on the issue, the court may find itself in a difficult position seeking the guidance to maintain “proper relations” with the legislative and the executive branches. This may become a constitutional problem, regarding the “separation of powers” in the context of foreign relations, to which the resolutions developed by the courts vary from state to state, ranging from “judicial activism” to “judicial restraint.” In any event, the court will have to undertake a “judicial policy-making” process often criticized and doubted. The first prong usually leads to the “direct application” of a treaty (or part of it), or, otherwise, the application of domestic legislation for the purpose of those treaty norms. With this completed, the court will continue with the

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309 Id.
310 BROWNLIE, supra note 222, at 46.
second and third prongs.

Accordingly, municipal courts serve as both the “applying authority” of treaties and the “destination” for this applying process. Although from the outset, the domestic status of treaties falls within the province of the national constitutional system and the legislature; as a practical matter, the issue is more related to domestic enforcement mechanisms, which, in a general sense, refer to domestic judicial proceeding featuring the exclusive role of national courts.

A. Municipal Courts’ Position towards Domestic Legal Effect of Treaties

Application of treaties by municipal courts calls for the latter’s appropriate position towards the domestic legal effect of treaties. In this regard, some municipal constitutional systems and legislatures have developed certain rules and policies. Wherever they are available, the courts must adhere to them, and thus become the “operator” of these constitutional and/or legislative rules and policies.

A question then arises as to how to locate these rules or policies. As a survey of state practice indicates, the national constitution system and the legislature address the domestic effect of treaties variously. There will never be a “simple and firm” rule or policy for the “direct application” of all treaties; even the most monist countries like the Netherlands would not do so. On the contrary, some national constitutions do simply deny the direct application of all treaties. More often, the domestic constitution limits this effect to “certain category of treaties” (e.g., “self-executing treaties” of the U.S.), granting the direct application to some treaties, while explicitly requiring an act of transformation for others. The domestic legislature, on the other hand, may take the same position by adhering to an act of transformation. In

312 Jackson, Status, supra note 209, at 327.
313 Id.
these situations, it would be easy to find constitutional or legislative rules or policies for domestic status or effect of treaties.

On other occasions, states will take an “intermediate” position, granting direct application to certain part of a treaty, or, otherwise, imposing certain criteria or conditions upon the treaty provisions concerned, so as to restrict such direct effect to a certain degree. Where this provision-specific approach is adopted to define the domestic status of treaties, it will be difficult, if not impossible, for the national constitution or legislation to incorporate any simple and firm rule or policy for the issue. Consequently, the courts will likely face the ambiguous, fragmental intent of the constitution or the legislature, not to mention the latter’s possible silence on the issue.

In the above situation, the courts will have to shoulder the burden of clarifying this issue by “articulating interpretive strategies and conducting default rules.” Absent explicit constitutional or legislative guidance, the courts often have to resort to other legal sources for alternative criteria. According to U.S. practice, such alternative criteria can be the intent of the treaty makers. Or, the treaty concerned may in itself serve as a convenient source for this purpose, since “direct and precise [treaty] language enters into the evaluation of this intent.” In this regard, the pertinent treaty language needs to be suitable enough for the expression of the “unilateral intent” of the treaty-making officials or institutions of the applying state.

Treaties differ in expressing the “intent” concerning their domestic legal effect. Some treaties “expressly disavow direct enforcement.” In this context, a treaty clause indicating the necessity to take domestic implementing action may “presumably”

314 Id. at 312.
316 Jackson, Status, supra note 209, at 328.
317 Scott & Stephen, supra note 315, at 610.
secure the “unilateral intent” of the applying state to deny the direct application, and therefore qualify a matter of domestic law binding upon the applying state.\textsuperscript{318} This presumption assumes that the denial of the “direct application” is always in the interest of the applying party to the treaty, so that international exclusion of such direct effect will be deemed to reflect the unilateral intent of the applying state, and thereby control its domestic sphere.

Other treaties “expressly call for domestic judicial enforcement.” They mostly involve “private commercial transactions where the parties typically are strangers to each other not likely to engage in repeat play.”\textsuperscript{319} These treaties may express such intent “by their own terms, or through implementing domestic laws.”\textsuperscript{320} However, whether such intent lives up to the above “unilateral intent” criteria remain unsettled. A treaty incorporating an international obligation of direct applicability does not in itself make this obligation a matter of domestic law to the applying state, for this treaty cannot exclude the possibility of the adverse “domestic intent” of the applying state.\textsuperscript{321} This recalls an earlier-discussed circumstance, where the “inability” of a state to give direct effect to a treaty (especially under municipal national constitutional arrangements) does not prevent this state from expressly obligating itself to apply this treaty in the international sphere.\textsuperscript{322} Notwithstanding this settled international commitment, the applying state will still be prevented from granting direct application to this treaty, since the national constitution or legislative law and policies have so provided.

Thus, the “unilateral intent” criteria are not entirely reliable. They merely apply to the intent to deny direct application, and merely result in a “presumption” for such an effect on the domestic plane. Reasonable these criteria may be, they are also

\textsuperscript{318} Jackson, Status, supra note 209, at 328.
\textsuperscript{319} Scott & Stephen, supra note 315.
\textsuperscript{320} Id.
\textsuperscript{321} Jackson, Status, supra note 209, at 328.
\textsuperscript{322} Id. at 322. “[S]ome states would obviously avoid making such impossible commitments.”
restrictive. As noted above, this approach has widely been adopted by the U.S. courts. Even so, it remains arguable in the U.S., that "where the matter is not predetermined," the issue "is the one of domestic constitutional, or legislative policy, and law, and need not involve (as a matter of domestic law) the intent of other parties to the treaty." In this context, although the commentary does not refer to the unilateral intent of the applying state, based upon the above discussion, such intent is not necessarily relevant, either.

As for the "international intent" to grant direct application, national courts may face the question of honoring the principle of pacta sunt servanda, so as to avoid state responsibilities. The courts may adhere to such intent only within their competence relative to other national governmental institutions, under national constitutional/legal settings. This will still be a matter of domestic law, particularly concerning the "separation of powers" and the propriety of the relations among the courts and other domestic governmental institutions. In this sense, the courts' position towards the domestic status of treaties is, at any rate, a matter of domestic law, subject to the explicit or implicit intent of the national constitution or legislature in the same regard.

In sum, municipal courts' position regarding the domestic legal effect of treaties varies. The courts may adhere to direct application, or defer to an act of transformation. They may also develop other judicial policies or techniques to handle the matter, leading to complex arguments in this regard. On the one hand, even though a treaty is directly applicable, the courts may still find a way to avoid this effect, e.g., adopting the concept of "invocability" and "justiciability." On many occasions, the courts will tend to do so to avoid the embarrassment of determining its government's breach of treaty obligations. On the other hand, where an act of

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323 Id. at 328-329.
324 Id. at 327-328.
325 Id. at 326.
transformation is required, the courts must apply domestic implementing legislation for the treaty concerned, other than that treaty itself. The issue then turns to a domestic matter of legal interpretation. Even so, since treaties maintain an important bearing on the interpretation of domestic law, the courts will inevitably interpret the treaty itself. These circumstances will be discussed below.

B. The Concept of Invocability and Justiciability

In terms of the application of treaties by municipal courts, the term “invocability” is regarded as the equivalent of “standing.” As Jackson submits, “even though the treaty is directly applicable in the domestic legal system, in a specific case a determination may need to be made as to who is entitled to invoke or rely on the treaty norm.” Such a “special case” refers to either the “vertical application” of the treaty, or the “horizontal application” of it. In the former circumstance, the treaty is directly applied in the disputes between different units or levels of government, or between the government and private individuals. In the latter circumstance, the treaty is directly applied between the private citizens or enterprises. “Invocability” refers to standings of the above particular parties in either circumstance, based on a “direct applicable” treaty at issue.

The terms “justiciability” refers to the “quality” of a rule (e.g., a treaty norm) to be “understood and applied by courts within their competence.” The concept is deemed to “center, explicitly or implicitly, around the precision (Bestimmtheit) of the rule concerned” for clarifying the obligations and rights deriving therein. “Justiciability” of a treaty is mainly determined by its intent, context, and purpose, and may also be measured in the context of certain broad principles, such as the human rights guarantee. In the latter case, those principles are deemed to come within the

326 Id. at 319.
327 Id. at 317-318.
As a technical matter, "justiciability" may serve as the criterion for both "direct applicability" and "invocability" of treaties. According to the judicial practice of the states, treaty obligations with insufficient precision (e.g., negotiating programmes) – which are deemed to lack justiciability – will be excluded from direct application by municipal courts.\textsuperscript{329} It is also observed that "invocability" of a treaty depends on its justiciability as well. As the concept of "justiciability" appears so essential to the both, national courts and governments are often confused with the question of "direct applicability" (direct application) and that of "invocability."\textsuperscript{330}

In fact, the above two legal concepts are distinguishable from each other. "Direct application" is primarily a matter of the intent of one or more parties (states) to the treaty concerned, especially in terms of the unilateral intent of treaty makers of the applying state. "Invocability" is a matter to be determined by municipal courts on a case-by-case basis. For that purpose, beside the "justiciability" of the treaty concerned, the courts will take into account other factors as well, such as the categories of persons entitled to standing (e.g., "citizen," "adult male") or, "political question."\textsuperscript{331} In this sense, "invocability" is mostly a matter of domestic procedural law (for standing). Consequently, these two concepts arise from separate dimensions of a national legal system: "direct applicability" concerns the national treaty-making process, while invocability concerns national judicial proceedings. As they remain in different dimensions, the direct application of a treaty does not necessarily lead to its invocability.

Such a difference may also result in a "vacuum" between the two dimensions for

\textsuperscript{329} Id.
\textsuperscript{330} Id., \textit{supra} note 209, at 317-318.
\textsuperscript{331} Id.
municipal courts to fill in the process of treaty application. In this context, the courts may decide within their competence whether the treaty law concerned can "transit" from a "directly applicable" status to an invocable matter. In some nation states, the court often adopts a two-prong approach, excluding the application of directly applicable treaty provisions based upon the criteria of "invocability" or "justiciability." Specifically, the court will first recognize that the treaty concluded as directly applicable is part of the domestic jurisprudence. Then, based upon the concept of invocability, the court will determine which party is entitled to invoke or rely on the treaty concerned; or, based upon the precision and other attributes of the language of this treaty (justiciability), the court will determine only portions of this treaty should be entitled to direct application and the remainder of it should not. By this approach, municipal courts may successfully exclude the domestic effect of treaties without irritating their "legitimate" status of direct application.

Behind the above approach is a nuanced judicial policy, based upon the courts' concern that the "direct application" will likely result in an embarrassing court decision that their municipal government is "acting in violation of the treaty." Such a consequence may "undercut the effectiveness" of that government, "if it should participate in an international proceeding where it is charged with breach of the treaty obligation." Accordingly, many national courts have tended to avoid touching the above decisions, and a convenient approach for this purpose will be to "avoid applying the treaty norm in particular cases," as evident in the adoption of the "invocability" and "justiciability" criteria.

C. Municipal Courts' Interpretations of Treaties

Application of law requires its interpretation. So does the application of international

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332 Id.

333 This concerns the "interplay" between international and domestic judicial proceedings.

334 Jackson, Status, supra note 209, at 325-326.
treaties. As noted above, municipal courts are the “applying institution” of treaties in the domestic sphere. However, their interpretations of treaties are conditioned by the treaty’s domestic legal effect. Where a treaty is directly applicable and becomes part of domestic jurisprudence, the domestic court may, subject to the criteria of invocability and justiciability, apply (interpret) this treaty in the same way it does with domestic law. Where an act of transformation is required, a domestic municipal legislature generally takes on this task, incorporating its own interpretations of the treaty into domestic implementing legislation.

As mentioned earlier, “legislative interpretations” do not amount to typical “legal interpretations,” since they take the form of domestic legislation.\(^{335}\) To the courts, they may not directly apply a treaty subject to the act of transformation. Neither can they develop the same interpretations of this treaty, as those of a directly applicable one. This, however, does not mean that the courts may not interpret this treaty at all. Even though a treaty may not be directly applicable, it still may have a significant “bearing on interpretation of municipal law.” Such “municipal law” can either be the particular implementing legislation for this treaty, or be any other domestic law relevant to this treaty. To interpret such domestic legislation, the courts may still have to interpret the pertinent treaty norms as well.\(^{336}\)

Thus, in terms of treaty interpretation, domestic courts either interpret the directly applicable treaty norms (e.g., “self-executing” model in the U.S.), or interpret any domestic rule of law, which is related to a treaty norm subject to an act of transformation (e.g., “non self-executing” model in the U.S). In the latter circumstance, there might be a necessity for the courts to interpret pertinent treaty norms. Both circumstances are discussed below.

\(^{335}\) In a country based on the rule of law, legal interpretation usually falls within the exclusive competence of the national courts; the latter possess the “inherent” authority to interpret law.

\(^{336}\) Jackson, Status, supra note 209, at 319.
According to the judicial practice of many states, where the national court has decided—"as a preliminary issue"—that a treaty norm is "applicable to a case before it," this treaty norm "is applicable as though it is a rule of the law of the forum," and, the court will use the same techniques of legal interpretation as it would for domestic rules of law.\(^{337}\) Obviously, such a process of "treaty interpretation" is conditioned by the direct applicability and invocability of the treaty norm concerned. In England, once the court ascertains that there are no bars within the domestic legal system to applying a treaty, the court will "take judicial notice" of this treaty, accepting it as the rule of domestic law without requiring a "formal proof" of its existence.\(^{338}\) In the U.S., the self-executing treaties obtain the "statute-like" status, and therefore is applied and interpreted by the court just as the court would apply and interpret domestic statute law.\(^{339}\)

One concern may arise in this context about the potential of "diverging interpretation of rules" by the courts of different states supporting the direct application of the same treaty provision.\(^{340}\) The courts of different states may have different interpretations of a directly applicable treaty norm. This inconsistency of interpretation may lead to chaos in domestic treaty implementation, and jeopardize the effectiveness of treaties in the domestic sphere. In addition, the inconsistency of interpretation may also occur between a national court and an international tribunal. While a national court may hold—within its competence—it's interpretation of a directly applicable treaty norm, it is arguable that the parallel interpretations by an existing international body should be definitive in domestic law as well.\(^{341}\) Here, a preliminary question arises: whether the direct effect of a treaty law necessarily extends to an international interpretation of

\(^{337}\) Brownlie, supra note 222, at 43.

\(^{338}\) Id. at 41. The requirement is actually imposed upon the matter of facts and foreign law.

\(^{339}\) Jackson, Status, supra note 209, at 310.

\(^{340}\) Cottier & Schefer, supra note 328, at 99.

\(^{341}\) Jackson, Status, supra note 209, at 326-327.
this treaty law. In other words, whether domestic law, which comprises directly applicable treaty norms, should incorporate the interpretations of these treaty norms by a competent international body, making them equally binding upon domestic institutions (like the courts)? This falls within a broad scope of the stare decisis status of international judicial decisions.

A blunter question may arise where an international interpretation of the treaty norm clashes with a domestic one. In practice, this may happen regardless of the domestic effect of the treaty norm concerned. As noted earlier, even where a treaty is not directly applicable, the national court may still have the competence to interpret it for the purpose of applying the pertinent domestic law. This may raise a question of the "hierarchical status" of the interpretations by an international tribunal compared to those by the national court. Here, the key to the issue is a matter of the res judicata force of such international interpretation in the domestic sphere, reflecting the attitude of national policy makers towards the relative merit of national judges, as compared to that of international judges. As a practical matter, there is "at least a suspicion or hint" that the domestic legal institutions will "strain" to apply their interpretation through one technique or another. As a technical matter, the methods of interpretation as employed by British, American, and Commonwealth courts are normally "similar to a great way to those of international tribunals and international law."

(2) Interpretation of Domestic Law in Light of Treaties

The fact that the interpretation of the rules of domestic law may entail the necessity to refer to a treaty obligation suggests a tight linkage between two types of legal obligations arising therefore. On many occasions, the applied domestic law is the

342 Id.
343 Id. at 327-328.
344 BROWNIE, supra note 222, at 49.
“implementing legislation” for this treaty, serving as the act of transformation of the latter. In applying this domestic implementing legislation, the national court will do so just like it “would interpret other legislation or domestic legal acts.” At the same time, the court will recognize any possible necessity to refer to the treaty itself. In this context, since this interpretation of the treaty serves the purpose of interpreting the pertinent domestic law, it may not bear the same legal consequence as those of directly applicable treaties.

In many states, municipal courts have developed certain common rules for the interpretation of domestic law in light of treaties and other international law obligations. In the United Kingdom, there has been a well-established rule of construction providing that “where domestic legislation is passed to give effect to an international convention, there is a ‘presumption’ that Parliament intended to fulfill its international obligations.” Here, the key for the courts to interpret this domestic legislation is to locate the above intent of Parliament. As English courts have consistently recognized, the text of a treaty may be used as “an aid to interpretation” for the purpose of interpreting the Enabling Act of Parliament. Originally, the courts imposed controversial conditions in various individual cases. Later, they reached a common policy, that the text of a treaty may be used as an aid to interpretation in any case where the interpreted domestic law “does not in terms incorporate the treaty nor refer to it,” or, where there is an “absence of ambiguity in the legislative text when taken in isolation.” With regard to a necessity to make a reference to the text of a treaty, it remains unsettled whether “the method chosen to give legislative effect of the treaty” should determine this issue.

The above British practice reveals in part a predominant judicial rule of construction for today, which is the doctrine of “consistent interpretation.” According to this doctrine, where a national rule of law “allows for different interpretations,” the rule

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345 Jackson, Status, supra note 209, at 327.
346 BROWNLIE, supra note 222, at 47-49.
"has to be construed in accordance with international obligations." In terms of treaties, the doctrine requires that the construed national law has to be "broadly framed" and have "no fundamental conflict" with the treaty obligations concerned.\textsuperscript{347} This seems not to be a problem with a domestic law intended to implement the given treaty obligations, for the intent of this implementing legislation is fundamentally consistent with that of the treaty obligations concerned, and the legislation itself would be deemed to be "broadly framed" and open to multiple interpretations. As a result, the treaty obligations concerned should qualify as "a proper aid to interpretation" and serve to reveal any latent ambiguity in the given national law.\textsuperscript{348}

In reviewing the state practice, the doctrine of consistent interpretation has been widely embraced by many countries, and turned into a long-standing judicial policy of their courts. In the United States, this practice can be traced back to the case of the \textit{Charming Besty} in the early history of the Supreme Court. In this landmark case, Chief Justice Marshall held that "an act of Congress ought never to be construed to violate the law of nations if any other construction is possible."\textsuperscript{349} In Switzerland, the Swiss Supreme Court established in its 1968 decision \textit{Frigero v. EVED} that national law has to be applied and construed in accordance with international obligations, whenever there are doubts as to the proper meaning of the domestic statutory language.\textsuperscript{350}

\section*{D. \textit{Res Judicata} and the "Interplay" between Municipal Judicial Proceeding and International Dispute Settlement Process}

As mentioned earlier, from a pragmatic perspective, the relationship between treaty

\begin{itemize}
\item \textsuperscript{347} Cottier & Schefer, \textit{supra} note 328, at 88-90.
\item \textsuperscript{348} BROWNLIE, \textit{supra} note 222, at 48.
\item \textsuperscript{349} 2 Cranch 64 (1804).
\item \textsuperscript{350} Cottier & Schefer, \textit{supra} note 328, at 89, FT 22.
\end{itemize}
law and domestic law should be examined in the context of international enforcement mechanisms. Since treaties are implemented at both domestic and international level, there is always a potential for a treaty being applied simultaneously by a national court and an existing international tribunal, leading to the interplay between domestic judicial proceeding and international dispute settlement process. This concerns the concept of \textit{res judicata}.

The term \textit{"res judicata"} refers to a general rule of law, providing that "a matter once judicially decided is finally decided."\textsuperscript{351} At international level, the \textit{res judicata} force of the result of international dispute settlement may extend, at least, to the parties of a particular dispute. In this context, the international decision will create some "secondary legal obligations" of international law.

In principle, "without the co-operation of the internal legal system," decisions of international tribunals (which contain the interpretations by these tribunals) are not binding upon national courts. Such "internal co-operation" can be the approaches for giving domestic effect to international legal obligations, specifically, by "direct application" or an act of "transformation." Thus, a question remains unsettled: whether the \textit{res judicata} force of an international decision may shift to the domestic sphere, so that the "secondary" international law obligations deriving therein will equally bind national courts. As a matter of fact, at the international level, even the establishment of the \textit{res judicata} force for an international decision can be questionable, not to mention its possible legal effect in the domestic sphere. Some highly developed international tribunals, such as the International Court of Justice (ICJ), may secure the \textit{res judicata} force of their determinations on a limited basis. Nevertheless, even an ICJ decision "does not of itself create a \textit{res judicata}" for its

\textsuperscript{351} BRYAN A. GARNER, BLACK'S LAW DICTIONARY 905 (8th ed. 2004). The term refers to a rule that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."
Of course, the above situation does not imply that a national court – within its competence – “could not, or should not, recognize the validity of the judgment of an international tribunal of manifest competence and authority, at least for certain purposes.” At least, decisions of international tribunals “may provide evidence of the legally permitted extent of jurisdiction and territorial sovereignty of the particular states involved.” Moreover, they may, as they often do, serve as a “persuasive source” for national courts to apply and interpret international law (including treaties).

As for the decisions of municipal courts, in general, their application of res judicata does not shift to an international jurisdiction. The reason is simple. Although the subject matter “may be substantially the same” within both jurisdictions, and the applied treaty obligations may be the same as well, the parties involved in each jurisdiction will not be, and issues “will have a very different aspect” accordingly. One exception to this general practice involves the principle of “exhausting local remedies.” Where it is established that “adequate remedies have been obtained” in the municipal sphere, the force of res judicata from this jurisdiction will extend to the other one (international jurisdiction).

Notably, this consequence may also lead to a violation of international law and “cause the international responsibility of the state of forum.” Moreover, the effect of res judicata of national judicial decisions may extend to international jurisdiction upon the agreement among the states concerned. In this context, an international tribunal may, in accordance with its constituent instrument (usually referring to an agreement between two or more states), “accept certain categories of national judicial decisions

\[^{352}\text{BROWNLIE, supra note 222, at 53.}\]

\[^{353}\text{Id.}\]

\[^{354}\text{BROWNLIE, supra note 222, at 53.}\]
as conclusive of particular issues."355

355 Id.
CHAPTER 2 THE RELATIONSHIP BETWEEN WTO LAW AND THE
INTERNAL LAW OF WTO MEMBERS

I. The Nature of the Relationship between WTO Law and Internal Law of
WTO Members

It is well established that the law of the WTO is part and parcel of international law. Thus, it is not surprising that the relationship between WTO law and the internal law of WTO members falls within the broad matrix of the relationship between international law and municipal law. This proposition is particularly supported by Professor Hart's concept of a legal system, which draws a distinction between the "insiders" and "outsiders" of a legal system.

According to the "pragmatic approach" noted earlier, the relationship between international law and municipal law turns out to be a "conflict of obligations" between these two separately operating systems, which refers especially to "an inability of the state on the domestic plane to act in the manner required by international law," and "the consequence of this will not be the invalidity of the internal law but the responsibility of the state on the international plane."356 In terms of treaties, such a conflict involves the issue of treaty compliance.357 From this pragmatic perspective, the relationship between WTO law and the internal law of WTO Members turns into a conflict between WTO legal obligations and the rules of the internal law of WTO members, which particularly involves the "WTO compliance" issue, concerning the compliance of domestic law of WTO members with WTO legal obligations.

From an international law perspective, there are generally two categories of

356 BROWNLIE, supra note 222, at 34.
357 Jackson, Status, supra note 209, at 311.
international legal obligations under the law of the WTO: one is the treaty obligations under the WTO agreements (as “WTO treaty obligations”), the other is the “secondary legal obligations” deriving from the rulings of the WTO’s Dispute Settlement Body (DSB) (as “DSB decisions”). “WTO compliance” concerns a possible conflict of internal law of WTO members with either of these categories. Differing in the source and legal nature, these two types of WTO legal obligations are distinguishable from each other, which are also reflected in their respective relations with the domestic law of WTO Members.

Acknowledging the different domestic effectiveness of these two types of WTO obligations, some scholars have proposed an intermediate position of granting “direct effect” to the DSB decisions, under which the WTO treaty norms would be “stated and clarified” with “no flexibility,” and “left to the discretion of the contracting parties.”\textsuperscript{358} However, the evidence of state practice supports an opposite position. In some very limited situations, domestic institutions (e.g., legislatures and courts) may grant direct effect to certain WTO treaty provisions. However, in no event have they granted such effect to the results of the WTO dispute settlement process. This will be elaborated in the succeeding discussions.

Certainly, the domestic legal effect of WTO law (in the context of above two categories of WTO obligations) reflects only part of the relationship between WTO law and the internal law of WTO members. To take an overall look at this core subject, one may turn to John O’Brien’s “three central issues” for describing the relationship between international law and municipal law,\textsuperscript{359} a “broad matrix” of the above core subject. Viewed from O’Brien’s perspective, the relationship between WTO law and internal law of WTO members may correspondingly contain three central issues as follows:

\textsuperscript{358} Cottier & Schefer, supra note 328, at 101.
\textsuperscript{359} O’BRIEN, supra note 21, at 107.
(i) Status of internal law of WTO members within the WTO legal system (especially, the treatment of such internal law in the WTO dispute settlement process);

(ii) Status of WTO legal obligations in the internal law of WTO members (especially, the circumstances in which WTO legal obligations are implemented by domestic institutions, such as domestic courts);

(iii) Consequences of a conflict of WTO legal obligations with internal law of WTO members.

The above observation equally suggests a two-tier, pragmatic approach for assessing the relationship between WTO law and the domestic law of WTO members, according to which the succeeding discussions are divided into two parts, addressing, respectively, issue (i) and (ii), with each equally specifying issue (iii).

II. Status of Internal Law of WTO Members within the WTO Legal System

1. Pacta sunt servanda in the Context of WTO Law

On the international plane, the relationship between international law and municipal law is settled by the fundamental principle of pacta sunt servanda. This customary rule is codified in Article 26 of the Vienna Convention on the Law of Treaties, providing that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 27 of the same Convention confirms the supremacy of a treaty over the internal law of its parties, providing that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,” otherwise it will trigger state responsibility vis-à-vis the impaired parties to this treaty. As a result, parties to a treaty have “a general duty” to bring their internal

360 See, supra note 244.
361 See, supra note 245.
As part and parcel of international law, WTO law takes the major form of treaty law, which basically refers to a comprehensive treaty package under the WTO auspice, titled “WTO agreements,” “Uruguay Round Agreements” or, simply “WTO treaties.” Thus, WTO law falls within the governing scope of the *Vienna Convention on the Law of Treaties*. As parties to the WTO treaties, WTO Members are subject to a similar “general duty” noted above, which is incorporated in Article XVI:4 of the WTO Agreement. Under this provision, “[E]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” Incorporating the principle of *pacta sunt servanda* into WTO legal regime, this provision reinforces the supremacy of WTO law over internal law of WTO members in international sphere. As a result, WTO legal obligations (especially, WTO treaty obligations) prevail over national or regional law of WTO Members in any event.

Unlike numerous WTO substantive legal rules that address various trade and trade-related subjects, Article XVI:4 of the WTO Agreement particularly targets the domestic legal systems of WTO Members. Because of this feature, it is among some other WTO treaty provisions that particularly impose the criteria for Members’ domestic implementation of WTO law. Under these “implementing provisions,” Members are supposed to afford a favorable internal legal system for their WTO implementation, which manifests the “rule of law” feature of the WTO, as originally advocated by its founders.

According to Article XVI:4 of the WTO Agreement, the “inconformity” of domestic law of a WTO Member with WTO legal obligations may constitute a breach of WTO

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362 Brownlie, *supra* note 222, at 35.
law, and trigger the state responsibility vis-à-vis the impaired WTO Members. However, the establishment of such a breach is not unconditional. As noted earlier, a failure to bring domestic law into conformity with international law “is not in itself a direct breach of international law,” for “domestic invalidity does not itself preclude the validity of a treaty under international law.”363 A breach will arise “only where the state concerned fails to observe its obligations on a specific occasion.”364 In terms of WTO law, such a “specific occasion” concerns the “internal law” of a particular WTO Member, in regard to its constitution (state practice indicates a rare case in this regard), legislation (it “could of itself constitute a breach of treaty provision” in limited situations),365 judicial decisions or other related legal acts.

Furthermore, this specific occasion usually entails a particular dispute, where enforcement/resumption of the breached WTO obligations calls for specific performance by the convicted WTO Member. The WTO dispute settlement process has made such specific performance possible by offering certain reparations for the WTO violations, which, however, contain certain disadvantages at the same time. Under Article 21:1 of the DSU, “WTO-inconsistent measures and practices under national law have to be brought into compliance with WTO obligations within a reasonable period of time.” In this regard, a major “specific performance” would be to remove these contested measures or practices. However, the DSU-based enforcement mechanism fails to fix a grace period for the above purpose, and also makes the available reparation limited to the withdrawal of concessions and temporary compensation.366 These disadvantages have constituted a significant obstacle to the enforcement of WTO law at international level.

Another limitation to the international enforcement of WTO legal obligations

363 Jackson, Status, supra note 209, at 317.
365 Id.
366 Cottier & Schefer, supra note 328, at 85.
concerns the constitutional structure of a WTO Member, which can be either a unitary or a federal nation-state. Under international law, the acts of a national legislature, or, other sources of internal rules and decision making “are not to be regarded as the acts of some third party for which the state is not responsible,” otherwise this “would facilitate evasion of obligations.” As an exception to this tradition, WTO law enables WTO Members “to enforce obligations internally only to the extent that they dispose of the necessary constitutional powers.” This suggests that a Member may exclude itself from the liabilities of its subordinate authorities’ violations of WTO legal obligations, so long as the domestic constitution of this Member provides for such a leeway. This leaves room for reexamining “if a proper balance of basic obligations to perform between unitary and federal state members of the WTO is to be maintained,” as this “balance” is so acknowledgeable for its significance to the international enforcement of WTO law. On the other hand, this WTO mandate does reinforce the general duty of WTO Members to implement WTO legal obligations “in matters falling within the jurisdiction of the central government.”

2. WTO Treaty Requirements for Internal Law of WTO Members

A. Issue of “Domestic Implementation” as Specified in WTO Agreements

The WTO treaty law has given particular attention to the domestic law of WTO Members. Within the WTO treaty system, quite a few provisions mandate WTO Members “to make available judicial, arbitral or administrative tribunals and independent review procedures at the domestic level.” They are part of the above-mentioned implementation provisions, including:

367 BROWNLIE, supra note 222, at 34.
368 Cottier & Schefer, supra note 328, at 85.
370 Cottier & Schefer, supra note 328, at 85.
- GATT 1994 (Article X of the GATT);
- WTO Antidumping Agreement (Article 13);
- WTO Agreement on Preshipment Inspection (Article 4);
- WTO Agreement on Subsidies and Countervailing Duties (Article 23);
- General Agreement on Trade in Services (Article VI), the TRIPS Agreement (e.g. Article 41-50, 59); and
- Agreement on Government Procurement (Article XX).\footnote{INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 72 (Ernst-Ulrich Petersmann eds. 1997).}

These provisions impose similar (if not identical) criteria for the internal dispute settlement and enforcement mechanisms of WTO Members. A few of them are even more “aggressive” by calling for the direct effect of WTO treaty norms. According to these provisions, the objective of domestic courts or other dispute settlement bodies should be to examine the “alleged breaches of the Agreement” (Article XX:2 of the Agreement on Government Procurement), and “whether the parties to the dispute have complied with the provision of this Agreement” (Article 4:f of the PSI Agreement). At odds with most of the other “modest” implementation provisions, the domestic legal effect of these “aggressive” provisions is unsettled in both academic and practical circles. Nevertheless, all implementation obligations of the WTO entail “a clear determination to increase the effectiveness of WTO law by linking it to domestic dispute settlement and enforcement mechanisms.”\footnote{Id. at 72-73.} This, according to some scholars, has reflected the significant “rule of law” feature of the WTO legal system, as proposed by the WTO founders.

The issue of domestic implementation can be traced back to the Uruguay Round negotiations. In January 1990, Switzerland proposed in the “Negotiation Group on Dispute Settlement” to “further strengthen the domestic implementation and judicial enforcement of international trade rules.” That proposal called for reaching this goal
“by implementing the Uruguay Round Agreements in domestic laws on the basis of individual rights and obligations, thereby improving private access to domestic courts and private rights in domestic policy-making process.” Specifically, “domestic foreign trade law should not be less precise than the corresponding international GATT/WTO rules,” regardless of the domestic effect of these international obligations. 373

Subsequently, when the Uruguay Round Agreements concluded in 1994, they followed that Swiss proposal in a very limited way. Only those provisions “requiring private access to domestic courts and prescribing precise substantive and procedural standards for domestic trade policy-making processes” have been incorporated into the WTO agreements, turning out to be the existing “implementation provisions” under the WTO. On the other hand, “much remains to be done so as to further strengthen the multi-level protection of individual rights, and the ‘grass-root enforcement’ of liberal trade rules, in domestic court proceedings.” 374 Moreover, notwithstanding their binding nature in an international legal sense, the “implementing provisions” still maintain much flexibility by giving WTO Members various options for the domestic mechanism for the WTO implementation. In fact, there has not yet been any WTO treaty provision that explicitly mandates WTO Members to implement WTO obligations in a particular way, 375 even though some of them have indicated such a tendency (e.g., the above-noted “aggressive” implementation provisions). In this sense, WTO law has restrained itself from over interfering with the internal law of WTO Members.

This position is in line with the general practice of international law, where how a state will make and apply international law is a matter to be determined upon its own,

373 Id. at 119.
374 Id.
375 Id. at 72.
as the issue remains "controversial and unresolved as a matter of domestic law." 376

Under international law, the WTO's "implementation provisions" are definitely binding upon its Members, and the "inconformity" of the internal law of a Member with any of these requirements may trigger the state responsibility of this Member vis-à-vis its impaired counterparts within the WTO. Take the provisions on "the obligations of publication, transparency and reasonably application" for example. They "are as instrumental in making the (factual) assessment of national or regional law [of WTO Members] as is the substantive rule at stake."

B. Role of Domestic Courts as Defined in WTO Agreements

WTO agreements set forth a series of requirements for internal dispute settlement and enforcement mechanisms of WTO members, as contained in certain "implementation provisions" noted above. Interestingly, none of these provisions provides for the exclusive role of domestic courts in this regard. Instead, they simply refer to "judicial, arbitral or administrative tribunals and independent review procedures at the domestic level," leaving to WTO Members a great deal of discretion for their choice. One scholar therefore asserts that none of these WTO requirements "address[es] the specific role of national courts and the functioning of judicial review with respect to the rights of the individual." 377

Nevertheless, the availability of a variety of means for option can never imply a denial of any of them, especially in regard to those deemed to be the best choices. First, these implementation provisions do explicitly note the "judicial ... tribunals" which, within their plain meanings, mean nothing more than the courts of law. The provisions just place the courts in a "candidate seat" with other available domestic adjudicating bodies, for the options of WTO Members within their own discretion.

376 Cottier & Schefer, supra note 328, at 91.
This flexibility reflects the capacity of the WTO legal regime to address the diverse political and legal development of individual WTO Members.

Second, these implementation provisions do not and should not prevent domestic courts from playing a significant role in the implementation of WTO law. It is particularly true from the perspective of the international rule of law, which emphasizes the essential role of national judiciary in the implementation of international law. As American scholar Mattias Kumm observes:

National courts in cooperation with litigants would assume the role of policing national political branches. In liberal constitutional democracies, government institutions and bureaucracies exhibit, at least as a general matter, the habit of conforming their behavior to legal requirements as interpreted by national courts. Therefore, the enforcement of international law by national courts is likely to increase the probability of state compliance with international law. ... Whatever the reasons for widespread state compliance with international law, however, problems of noncompliance sufficiently widespread for national judicial actors to have a potentially significant role in the enforcement of international law.378

Apparently, Professor Kumm based his observation on his belief in “liberal constitutional democracies” and the “rule of law” – both concepts open to various meanings in enforcing international law, depending on the particular political and legal systems involved. Today, as the “rule of law” has now been embraced by any state or region claiming to possess a “modern” legal system, states have developed certain common standards for this favorable regime, no matter how it is presented in various countries and regions, or at national and international levels.379


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“independent judiciary” has been one of these widely recognized common standards. WTO Members are no exception to this. As a result, it is not surprising to see the increasingly essential role of national or regional courts in domestic implementation of WTO law, especially with a sophisticated legal system like that of the U.S. or the EC. In this regard, there is no doubt that national courts should undertake to enforce WTO law “even when there is no specific authorization from the legislative or executive branches to do so.”

Finally, as noted above, a few of these “implementation provisions” indicate a trend to have WTO law directly applicable to domestic judicial proceedings. It is true that this has now been rare, given that an act of “transformation” is still the leading formality of domestic WTO implementation, featuring the prevailing role of the national legislature. As matter of evidence, however, the courts of WTO Members do construe national trade law to conform to WTO law “under certain circumstances.”\(^{380}\) The following discussions not only confirm this fact, but also see it as an increasing trend in the practice of WTO Members.

3. Status of Internal Law of WTO Members in WTO Dispute Settlement

Basically, in examining the conformity of municipal law with international law obligations, international tribunals will treat municipal law as “facts” and “evidence of conduct attributed to the state concerned which creates international responsibility.”\(^{381}\) In this regard, the municipal law should be understood in a broad context as comprised of the constitution, legislation, judicial decisions and other related legal acts of a specific state. It is also arguable that “when it is appropriate to apply rules of municipal law, an international tribunal will apply them as such,” suggesting the deference to domestic law as applied by domestic authorities.

\(^{380}\) Hilf, *supra* note 377.

\(^{381}\) BROWNLIE, *supra* note 222, at 39.
The WTO’s adjudicating body is the Dispute Settlement Body (DSB), consisting of *ad hoc* trial organ called “panels” as well as a standing appellate organ named the “Appellate Body.” Once adopted by the DSB, the report of a WTO panel or of the Appellate Body will become a binding ruling or decision of the WTO. 382 Thus, a WTO ruling is also referred to as a “DSB ruling” or, a “DSB decision.” So far, the WTO dispute settlement process has been regarded as one of the most developed international dispute settlement mechanisms, especially featured by its appellate-level trial under a standing organ (the Appellate Body). It is observed that in the international sphere, the legal status of WTO law would be manifested better at the “trial level” than at the “appellate level” of the WTO dispute settlement process.

At the trial level, WTO panels take on a primary task of construing WTO legal obligations and deciding whether “the results produced on the basis of national or regional law” are consistent with the relevant WTO obligations. They (or the Appellate Body, if an Appellate complaint is available) have the final say as to the interpretation of WTO rules, since “there is no one to whom deference could be given.” In examining the “compatibility” of the alleged internal law of WTO members with WTO obligations, the panel bases its jurisdiction on Article XXIII of the GATT and on the DSU, determining “whether the application and interpretation of a national or regional measure, as set out by a national or regional authority, adequately responds to legitimate expectations created by the international rule.” Particularly, the panel may focus on the extent to which such domestic legal acts have achieved “a result compatible with international obligations in a sufficiently clear, predictable and impartial manner.” 383 The question then arises as to what “standard of review” the panel should apply under such a situation.

This goes back to the beginning of this section, where international tribunals, in a similar situation, basically treat municipal law as the facts or evidence of state conduct in violation of international law rules, but the tribunals may also defer to municipal law as so construed and applied in the domestic sphere. Following this customary practice, WTO panels essentially recognize domestic law — as so applied by respective authorities of WTO Members — as matters of fact with certain deference, without performing a de novo review. However, since the panels are called upon to declare whether domestic law of WTO members and the way they are applied are compatible with the pertinent WTO treaty provisions, they are seemingly facing increasing chances to rigorously examine the internal law of WTO members, mainly based upon the “good faith” protection, “rather than standards of review which are limited to patent unreasonableness or arbitrary and capricious interpretation of national or regional law.”

Moreover, a potential for WTO panels to adopt the above “more nuanced approach” appears to be strengthened by the above-noted implementation provisions of the WTO. Regarding those on publication, transparency and reasonably application of internal law and related measures of WTO members (e.g. Article X of the GATT, Article 62 of the TRIPS, Article VI of the GATS, collectively as the “transparency issue”), they impose upon the panels the criteria for assessing the status of internal law in WTO law. As a practical matter, these provisions are “as instrumental in making the (factual) assessment of national or regional law as is the substantive rule at stake.”

III. Status of WTO Law in the Internal Law of WTO Members

1. General Issues

In the previous chapter (Chapter 1 of Part II), the status of treaties in domestic law is

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384 Id. at 86-87.
385 Id. at 87.
elaborated mainly based upon Professor Jackson's observations. As probably the most comprehensive treaty law in the world, the law of the WTO definitely deserves a case study in this regard. Before embarking on such an exercise, it will be helpful to review some major issues addressed in that chapter concerning domestic status of international treaties.

Basically, the question as to the status of a treaty in domestic law concerns the "domestic legal effect" and "hierarchical status" of this treaty under the domestic legal system. A treaty (or part of it) may obtain "domestic effect" through the "direct application" of it by domestic courts, or by "an act of transformation," mainly conducted by a domestic legislature. How to choose between the two formalities is generally a matter of domestic law, for which international law rules do not provide much guidance. That choice is often indicated in the domestic constitution, or in domestic legislation. In the latter case, the intent of treaty makers of the applying state will be expressed, while the domestic treaty-making process of this state may have significant implications for making such a choice. The "hierarchical status" of a treaty is closely linked to its domestic legal effect. Where treaty law is directly applicable, its "hierarchical status" in domestic law can be specified by the constitution, legislation, or even judicial decisions of a particular state. Where the direct effect is clearly rejected or excluded, it is presumed that domestic law prevails over the treaty law concerned.

From a pragmatic perspective, it is more appropriate to examine the domestic effect of a treaty (or part of it) in the context of domestic enforcement mechanisms, especially in regard to judicial proceedings and the role of the courts. Wherever the direct application is established, the courts will still have to secure the "invocability" (standing) and justiciability of the treaty concerned before they apply this treaty. Where an act of transformation is required, the courts generally take on a task of applying domestic implementing legislation for the treaty concerned, but may still refer to the treaty itself for the above purpose. Consequently, the status of treaties in
domestic law is collectively shaped by the national constitution, legislature and courts. Given the diversity of state practice in this regard, the status of treaties in domestic law has been complicated by the internal structure and arrangement of the particular state. However, national courts may play a pragmatic and essential role in this course.

On the other hand, the quality and characteristics of treaties entail significant implications for the domestic legal effect of these treaties. A state is more likely to grant direct application to a treaty that is precise, specific in nature, and/or adaptable to the changing situation than to the otherwise situations. Whether a treaty provision is entitled to direct application or subject to an act of transformation will depend greatly on “the relative degree to which constitutional drafters trust international institutions and treaty-making processes compared with national institutions and legislative process.”

The WTO treaties have inherited the above complexity of treaties. Taking Professor Jackson’s viewpoint, the status of WTO Agreements in the domestic law of WTO members can be seen as comprising two questions: (1) Whether WTO treaty provisions are directly applicable or subject to an act of transformation, for purposes of obtaining domestic legal effect, and (2) In case of a conflict between WTO treaty obligations and the internal law of WTO members “in a domestic context and with domestic law,” which will prevail? As noted earlier, question (1) appears to be more essential to clarifying the status of WTO law in domestic law, since the denial of direct effect will almost secure a clear answer to question (2). Most of the succeeding discussions will concentrate on question (1), with question (2) being addressed wherever necessary.

Answers to the above two questions can be hardly found in the WTO treaties, for none of these treaty provisions explicitly mandates WTO Members to “fully

386 Jackson, Status, supra note 209, at 339.
387 Id. at 313.
incorporate WTO law into their domestic laws and make precise and unconditional WTO rules directly applicable by domestic courts and citizens.\textsuperscript{388} As mentioned earlier, even those “implementing obligations” do not explicitly require this direct effect. The WTO treaties leave room for Members to choose between the formality of “incorporating WTO law directly into the domestic legal system” (direct application) and that of “adjusting its domestic law to the international WTO obligations” (act of transformation).\textsuperscript{389} Over the past decade, this position has not been modified in WTO negotiations and the rule-making process,\textsuperscript{390} and is, in effect, increasingly affirmed in the WTO dispute settlement process. Specifically, the \textit{US-Section 301-310} panel report explicitly refers to the “indirect effect” of WTO law, holding “it would be entirely wrong to consider the position of individuals is of no relevance to the GATT/WTO legal matrix.”\textsuperscript{391} According to this panel:

Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depends on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, in deed one of primary objectives of the GATT/WTO a whole, is to produce certain market conditions which would allow this individual activity to flourish.

... Providing security and predictability of the multilateral trading system is another central object and purpose of the system ...

... The security and predictability in question are of the “multilateral trading system.” The multilateral trading system is, per force, composed not only of State but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Member benefit from WTO

\textsuperscript{388} Petersmann eds., \textit{supra} note 371, at 120.
\textsuperscript{389} Id. at 72.
\textsuperscript{390} Eeckhout, \textit{supra} note 311, at 101.
Based on the above reasoning, the panel concludes that “[I]t may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.” Thus, as some European authors observe, “it is very hard to see any form of consensus emerging within the WTO membership with respect to the relationship between WTO law and municipal law.”

Meanwhile, answers to the above two questions vary from Member to Member within the WTO, given their diversity of economic development, political structure, as well as of constitutional and legal systems. Nevertheless, Members do share some similarities in their practice, not only in terms of their “policy considerations” for domestic effect of WTO law, but also of their approaches for WTO implementation. As the issue remains generally “controversial and unresolved” in the domestic sphere, enormous academic interest has been directed into this field, leading to an expanding jurisprudence for the subject. All these will be elaborated below.

2. Rethinking the Concept of “Direct Effect”

Discussions so far have revealed that the most essential concept for the status of treaties in domestic law is “direct application” or its alternatives, “direct applicability” and “direct effect.” The term “direct effect” appears to be more commonly used in the European context. Given the predominant role of the EC in the WTO, the concept of “direct effect” merits some further elaboration before a discussion on domestic legal effect of WTO law.

The doctrine of “direct effect” originated from the case law of the European Court of

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392 Id.
393 Eeckhout, supra note 311, at 101.
394 Cottier & Schefer, supra note 328, at 91.
Justice (ECJ), and thus is inherently linked to the role of internal courts and the operation of domestic judicial review. According to some European scholars, a treaty has “direct effect” in the sense that “a private person in a state may base a claim in, and be granted relief from, the domestic courts of that state against another private person or the state on the basis of the state’s obligations under this treaty.” Such claims can be made “without a transformation of the relevant treaty obligation by domestic rule-makers.” More significantly, the claims may equally be made “against implementing legislation on grounds that such legislation is incompatible with international law.” These submissions imply that the concept of direct effect contains an element of “invocability,” as elaborated in the following observations:

Direct effect brings about the empowerment of three actors: the administration, private sectors, and the courts. The administration is empowered to act without specific internal legislation, directly reply upon treaty provisions, provided that the legislator or the government decides to act this way. Private actors directly derive rights and assume obligations under a self-executing treaty. Importantly, they may use such rights and obligations to challenge domestic law. Bit foremost, the position of courts is reinforced vis-à-vis government and national or regional legislators to the extent that the courts may overrule national or regional rules inconsistent with treaty obligations based upon supremacy of international law. Direct effect, in other words, has a fundamental impact on constitutional power relations among domestic actors, private and public.

Apparently, the above observations not only reveal a complex constitutional and legal

396 Ruttley, MacVay & George eds., supra note 274. See, Case 26/62, Nv Algemene Transporten Expeditie van Gend en Loos et al. v. Nederkandse Administratie der Belastingen (van Gend en Loos), 1963 E.C.R. 1219, at 13. “Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage [by means of direct effect].”
397 Cottier & Schefer, supra note 328, at 91.
398 Id.
context behind the direct effect, but also spell out the necessity for a "judicial review." In this sense, the "invocability" of treaties basically entails the availability of a judicial review. Notably, Professor Jackson has sought to separate "direct application" from "invocability," since each concept involves different policy considerations.399 This position has been supported by EC judicial practice. As a European practitioner observes, "[t]he ECJ ... established a link between the possibility of invoking an international agreement for reviewing the legality of a Community act and the fact that this agreement may be relied upon by individuals before national courts. As a consequence of this link, the ECJ was not prepared to review the validity of such an act unless the agreement was capable of conferring rights on individuals." Obviously, the European courts treat the two concepts as separate regimes, although recognizing a close linkage between them.

This is particularly true for the EC case law concerning the status of WTO law in the EC legal order. As that European practitioner further observes, the well-established ECJ case law provides that "the direct effect of the WTO Agreements serves as a precondition for using these as a ground for judicial review in a direct action before of ECJ and CFI [Court of the First Instance]."400 Nevertheless, notwithstanding such divergent definitions, the concept of direct effect has been widely adopted to describe the domestic legal effect of WTO law, both for academic discussions and for actual practice.

To this author, neither "direct effect" nor "invocability" can be simplified and generalized, given the categorization of WTO legal obligations as well as diverse practice of WTO Members. The issue needs to be examined from both scholarly and practical perspectives, and elaborated on a case-by-case basis. For the purpose of the succeeding discussions, the meaning of "direct effect" will extend to "invocability,"

399 Jackson, Status, supra note 209, at 317-318.
unless the distinction is specifically noted between the two concepts.

3. Academic Discussions on Domestic Legal Effect of WTO Agreements

For simplicity, the present section focuses on domestic legal effect of WTO treaty obligations. Since the GATT era, an extensive literature has contributed to this subject, with a major focus on two contradictory schools of thought towards the “direct effect” of WTO agreements: against direct effect, Jan Tumlir and Ernst-Ulrich Petersmann, and for this doctrine, John Jackson. For issues raised in this context, there is usually a presumption of “an explicit conflict between the provisions of WTO Agreements and internal law of the WTO members.” Also, these academic discussions have significantly penetrated the practice of WTO Members, and in turn mirrored their practice. Although WTO Members may differ in choosing for or against direct effect of WTO treaties, behind their choice are some common considerations in political economy and legal dimensions. These considerations have the roots in the above-noted long-standing academic discussions; the latter appears to be crucial to assessing the diverse practice of WTO Members in this regard, and will be first elaborated as follows.

A. Advocates of the Direct Effect of WTO Agreements

In the political economy dimension, arguments for direct effect of trade treaties (including WTO Agreements) are mainly developed by two European scholars, Jan Turmil and Ernst-Ulrich Petersmann. Viewing the right to trade as a fundamental human right, they both set forth the idea of “constitutionalizing” international trade principles to fight against “inherently protectionist tendencies in domestic law system.” Considering the integrity of a state’s sovereignty, Turmil “suggests granting

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401 Cottier & Schefer, supra note 328, at 93.
402 Id. at 91.
individuals the right to invoke trade treaty provisions in front of their domestic courts," so as to allow for their standing to challenge national protectionist policies and practice on such grounds. This, as he believes, would "help to correct the asymmetries in the political process." Petersmann suggests similar "constitutional restraints" on domestic protectionist behaviors. Relying on the political theory of public choice, he submitted that the GATT/WTO rules must be available to individuals to ensure the governmental compliance with the GATT/WTO obligations, especially those concerning non-discrimination and market access.⁴⁰³

Among the U.S. scholars embracing the direct effect of trade treaty rules, Frederick Abbot bases his proposition on "regional integration mechanisms." From his viewpoint, direct effect would encourage not only the implementation of market regulations, but also more importantly, "a 'deeper', or social and political, integration in addition to economic integration." Although Abbot does not explicitly refer to WTO Agreements, his proposition would equally apply to WTO treaty rules, should the latter be deemed "as a large regional integration mechanism."⁴⁰⁴

Some other authors base their beliefs in direct effect of international trade law on "quasi-economic arguments," notably the idea of "compliance capital" concerning the "benefits deriving from reliability and protection of legitimate expectation." Interestingly, in smaller and medium-size trading nations heavily relying on the "rule of law" in international law relations, advocating direct effect of GATT treaty has long been a scholarly tradition, which has naturally extended to the WTO agreements since the advent of the WTO.⁴⁰⁵ Notably, some Swiss scholars submit that the "direct democracy" of Switzerland considerably enlarges the basis for direct effect, and "renders" the nation "a well-suited candidate to take the lead unilaterally in this

⁴⁰³ Id. at 93-94.
⁴⁰⁴ Id. at 96.
⁴⁰⁵ Id.
In legal dimension, arguments for the direct effect of WTO agreements particularly target the judicial practice of the EC and other WTO Members that have refused to directly apply GATT/WTO rules. In supporting the political economic arguments of Tumlir and Petersmann, Jacques Bourgois pleads for availability of judicial review to individuals on the grounds of GATT/WTO law. Meinhard Hilf contests the position of European courts that views WTO Agreements as "too flexible to apply," and insists that since the "justiciability" of GATT/WTO provisions is nothing different from those of the Treaty of Rome, GATT/WTO rules should apply as directly applicable as the latter under the EC legal order. With regard to the courts' concerns for the authoritative interpretation of WTO rules, Hilf insists the safeguard or procedures for this purpose "cannot rule out direct effect."  

B. Critics of Direct Effect of WTO Agreements

In the political economy dimension, American scholar John Jackson has developed probably the most comprehensive arguments against direct effect of treaties (including WTO Agreements). In analyzing the "policy reasons" for denying direct effect, Jackson particularly introduces some "functional arguments," among which is

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406 Id., at 97. These arguments cover the following key points: (1) direct effect is an important element of checks and balances in direct democracy which tends to be open to protectionist arguments; (2) the absence of global foreign policy responsibilities renders direct effect more feasible than elsewhere; (3) WTO rules which have passed the test of direct democracy enjoy the same democratic legitimacy as national statutes.

407 Id. at 95.

408 Id. at 98. Professor Jackson regards the concept of "direct effect" as comprising three dimensions: (1) self-execution narrowly defined; (2) standing of individuals before domestic courts; and, (3) hierarchy of norms. Deeming these dimensions to be equally important, Jackson neither vigorously nor universally supports or denies the "self-execution narrowly defined." However, he does view the idea of granting standing and allowing for an international treaty law to be superior to federal legislation (leaving the constitution alone) as dangerous to the idea of the democracy and democratic representation of individuals.
an observation that "some constitutions provide for very little democratic participation in the treaty-making process," so that granting direct effect to treaties subject to this process may risk a threat to domestic democracy and cause "constitutional structural problems." Given legitimate desires of national legislatures to adopt treaty language to domestic legislation, as well as those of governmental institutions to use an act of transformation for the "purely internal power struggle," granting direct effect will frustrate all these efforts, leading to a refusal to join the treaty in the end. As Jackson concludes, direct effect "may or may not be the optimal policy for implementing trade treaties," given the diverse practice of WTO members in this regard. However, he suggests that each member should take into account constitutional factors like the treaty-making process, national constitutional arrangements, characteristics of national legal system, as well as the policies a particular government intends to promote. 409

Some European scholars join Jackson by adding one more argument related to the "reciprocity" concern, acknowledging that "direct effect" is not available in most members of the WTO, especially the U.S. According to Jan Peter Kuijper, a WTO member not recognizing direct effect would "place itself in such favorable position that it becomes fundamentally unfair to its trading partners [that recognize such effect]." Thus, "when discussing interpretation and application of the treaty," it may "arrive with free hand at table, contrary to their counterparts from countries with direct effect, whose hands are tied by the interpretation of their courts." 410 Piet Eeckhout further points out in his commentary on the ECJ’s decision on Portugal v. Council, that "[r]eciprocity is indeed the cornerstone, but ultimately it is not reciprocity as such which leads the Court to deny WTO law direct effect. Rather, it is the impact of direct effect on the EU’s political institutions." As he concludes, the issue involves "the clear constitutional dimension" of Portugal case, and "goes

409 Id. at 98-99.
410 Id. at 99.
beyond the issue of reciprocity in international trade relations." Accordingly, the argument of reciprocity is regarded as the one of "Realpolitik." 

In the legal dimension, both American and European scholars have noticed the potentials lying in direct effect for diverging interpretation of WTO agreements by different adjudicators at national, regional, and international levels. John Jackson and S. P. Crowley observe this occurring in the context of the WTO Antidumping Agreement. Wolfgang Benedek expresses a particular concern about the errors in the interpretation of the Tokyo Round Agreement on Subsidies and Countervailing Duties by the Austrian Supreme Court. Piet Eeckhout expressed a similar concern when referring to "judicial policy" in the context of the EC and its member states, warning that "multiple national courts interpreting WTO agreements independently may reduce the effectiveness of the WTO rules and its dispute settlement procedures." However, the issue "is not unique to international law," to which a resolution usually lies in "appeal mechanisms." Thus, it is expected that a "WTO-inconsistency" in above sense will be overcome as a procedural matter, so as to secure the "uniform interpretation of WTO law." 

Besides, inspired by the judicial practice of certain WTO Members, scholars from the U.S. and Europe have developed other legal arguments against direct effect. As John Jackson observes, direct effect does not necessarily ensure domestic implementation of WTO obligations. Even a treaty norm automatically has direct effect, internal courts may still avoid applying it on certain grounds, such as factual findings, justiciability, etc. In this context, the courts' practice has called upon considerable scholarly attentions and debates. Notably, with regard to European courts' denial of direct effect of WTO rules for their "flexibility," some European scholars explicitly

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411 Eeckhout, supra note 311.
412 Cottier & Schefer, supra note 328.
413 Eeckhout, supra note 311, at 97-100.
414 Cottier & Schefer, supra note 328, at 98.
contest this position, asserting that “most of them are sufficiently precise to be construed by courts.”

C. Consistent Interpretation: Possible Coordination between WTO Legal Obligations and Internal law of WTO Members

The above scholarly pros and cons of the direct effect of WTO Agreements share a presumption that WTO treaty obligations are in fundamental conflict with the internal law of WTO Members. This provides for a simple choice of “black or white,” which appears to be convenient for domestic policy makers to make a decision. However, this fundamental conflict does not always exist in reality. Instead, the internal law of WTO Members often turns out to be ambiguous and flexible in interpretation, leaving the potential for their coordinating with WTO legal rules. This is particularly the case with domestic implementing legislation for WTO treaties (e.g., the URAA in the U.S.), where the intent of the domestic legislature is usually presumed to comply with WTO legal obligations. Given their justiciability as noted above, WTO treaty provisions often are more precise and detailed than their analogies in the internal law of WTO members. This also raises the possibility for the internal law of WTO members being applied and interpreted in accordance with WTO treaty obligations. All these situations are covered by the doctrine of “consistent interpretation.”

As the principle of “consistent interpretation” requires, where a domestic rule of law allows for different interpretations, it has to be construed in accordance with international obligations, so as to adhere to both international and municipal law as much as possible. The biggest proponent of this doctrine in the context of GATT/WTO law is Ernst-Ulrich Petersmann, who urges the courts of the EC and the member states to develop the “GATT-conform” legal interpretations. Some recent

415 Id. at 92.
416 Id.
European observations indicate the important assistance this doctrine may offer to WTO members, in honoring the principle of *pacta sunt servanda* "without treading on the more sensitive ground of direct effect." \(^{417}\)

Many WTO members have incorporated the principle of "consistent interpretation" into their judicial jurisprudence, especially the U.S. and the EC. The case law of the European Court of Justice (ECJ) recognizes the application of "consistent interpretation" to international agreements concluded by the Community, based upon their "primacy ... over provisions of secondary Community legislation." This position was early established in *Marleasing*, and subsequently affirmed in *Commission v. Germany*. In the latter case, the Court rules that Community legislation ought to be construed in a manner consistent with the specific GATT obligations under the International Dairy Arrangements. In *Werner* and *Leifer*, the Court particularly applied the doctrine in the context of Article XI of the GATT. \(^{418}\) In the U.S., the principle of consistent interpretation was originally introduced by a Supreme Court decision in *Charming Betsy*, where Chief Justice Marshall held, "an act of Congress ought never to be construed to violate the law of nations if any other construction is possible." \(^{419}\) Over the past decade, the *Charming Betsy* canon of statutory interpretation has played a significant role in the U.S. domestic implementation of WTO legal obligations.

Compared with their European counterparts, the U.S. courts more frequently encounter the issue related to this doctrine, by coping with the applicability of the *Charming Betsy* doctrine with regard to GATT/WTO law. Although European courts have been restrained from coping with the issue, European scholars are not without foresight and sagacity in this regard. On one hand, they acknowledged the virtues of this doctrine in enforcing WTO obligations without irritating the existing internal

\(^{417}\) Id. at 88-91.

\(^{418}\) Id. at 89.

\(^{419}\) 6 U.S. (2 Cranch) 64, 118; 2 L. Ed. 208 (1804).
legal order of WTO members. On the other hand, they notice the problems in the lack of public awareness among domestic legal circles (especially the courts) towards WTO law. As they point out, "the doctrine of consistent interpretation is bound to remain largely irrelevant, despite Charming Betsy, Commission v. Germany, ... until basic knowledge of and sensitization to WTO rules has taken place in the legal community at large."420

4. Status of WTO Agreements in Internal Law of WTO Members

The status of WTO agreements in domestic law concerns their domestic legal effect and hierarchical status under the domestic legal system of WTO members. As indicated in previous discussions, the issue is a matter of domestic law. Previous discussions have highlighted two competing positions towards the domestic effect of WTO treaties, as supported by a number of competing considerations on both policy (political economy) and legal dimension. In practice, many WTO members have taken a position of excluding the direct effect of WTO agreements, and therefore secured the primacy of their domestic law over WTO treaty obligations in any event. The U.S. and the EC are two notable examples, given their predominant position within the WTO. To support their consistent adherence to this position, the European courts repeatedly cite the fact that the EU's "major trading partners" (e.g., the U.S.) do not recognize direct effect of WTO agreements. Switzerland is one of a few Members friendly to the "direct effect" of WTO rules, but in a cautious manner by treating the issue on a provision-by-provision basis.421

It should be noted that the attitude of a WTO member state towards the direct effect of WTO law is not necessarily linked to its traditional practice in treating international treaties. No doubt, the minority of states that have a monist tradition (like Switzerland) will be more flexible in supporting the direct effect of WTO law than those without.

420 Cottier & Schefer, supra note 328, at 91.
421 Id. at 107-108.
For the majority of states, they cannot be simply categorized as “dualist states,” given their usually complicated, diverging or even contradictory practice in this regard. Among them quite a few states do have a tradition that recognizes the direct effect of treaties (e.g., self-executing mode in the U.S.), but they would rather avoid granting this privilege to the WTO, and depart from their long-standing practice. This is largely attributed to the enormous impact WTO law may impose upon domestic trade and economic relations.

From an overall perspective, the dominant position of WTO members has been to reject the direct effect of WTO agreements. This is mainly the outcome of policy considerations of political economy, rather than a legal consideration of the justicability of WTO treaties.\(^\text{422}\) It has been widely recognized – at least within the academic circle – that WTO treaties generally have no problem in their “justiciability.” Most WTO treaty provisions are “sufficiently precise to be construed by the courts” and “do not show structural differences to comparable norms in national or regional law.” Further, through the WTO dispute settlement process, “principles, rules and exceptions” deriving from WTO treaty system will be applied and legally construed by panels and the Appellate Body, and thus become “more precise” for domestic courts to apply and rely on in many occasions.\(^\text{423}\) According to some legal scholars, WTO treaty provisions have been “justiciable” enough to support the legality and the “rule of law” of the WTO legal system. In this sense, as a legal technical matter, WTO agreements should merit the direct effect.

However, as most WTO members are reluctant to grant direct effect to WTO treaty obligations, the reality suggests some other reasons beyond the above legal considerations. The major reason is related to the “fundamental impacts” of direct effect on “constitutional power relations among domestic actors, private and public.” As mentioned before, direct effect is deemed to empower the administrative bodies,

\(\text{422}\) *Id.* at 92-93.
\(\text{423}\) *Id.* at 93.
courts and private individuals of a domestic system, and therefore will likely affect the existing internal constitutional and legal settings. In terms of WTO treaties, such concerns will be more severe, given the complexity and comprehensiveness of this treaty system, as well as its enormous implications for external trade and economic relations of individual WTO members. In the U.S., these concerns were fully addressed in far-reaching, heated debate over the “sovereignty” issue during the enactment of the URRAA in 1994. In the EC, similar concerns are mostly expressed by European courts on the ground of “reciprocity.” According to Petersmann, in the U.S., the European Communities and elsewhere, WTO agreements would appear be “politically unacceptable” even if can be “legally acceptable.”

5. Status of WTO Rulings in Internal Law of WTO Members

In recent years, the status of WTO rulings in domestic law has called for increasing attention from academic and practical circles. Instead of arguing about the direct effect of WTO agreements (as a whole or in part), scholars and practitioners are increasingly focused on individual WTO treaty provisions as specified by the WTO’s DSB decisions. The question then arises as to whether these specified WTO obligations can be invoked before domestic courts to challenge domestic legislation. The issue should be separated from the one related to WTO Agreements (as elaborated above), for, at the international level, WTO rulings do not have the force of stare decisis to equate themselves to WTO agreements, and thus face a controversial status of being part of WTO law (see, Chapter 3 of Part I). However, they do have the force of res judicata towards the parties of the particular dispute, and therefore may impose some “secondary legal obligations” upon these parties. In practice, increasing actions have been brought before domestic courts on the grounds of WTO rulings, either based upon their force of stare decisis or their force of res judicata. All these

424 Eeckhout, supra note 311, at 91-110.
425 Petersmann eds., supra note 371, at 120.
issues are articulated below.

A. Res Judicata, Stare Decisis and the Interplay between WTO Dispute Settlement Process and Judicial Proceedings of WTO Members

One of a series of success stories of the WTO is about its “quicker and more efficient” dispute settlement system with compulsory jurisdiction, relatively strict timetable, binding decisions and high rate of compliance. The past decade has witnessed frequent use of this DSU-based system. The results have been an enormous volume of cases initiated by an increasing number of WTO members, as well as a comprehensive body of decisions rendered by the WTO’s Dispute Settlement Body (DSB).

The DSB decisions consist of the reports of WTO panels or of the Appellate body as adopted by the DSB. In the form of “recommendations” submitted to the DSB, the reports may contain “the findings of a panel,” or “the conclusions of the Appellate Body on issues of law and legal interpretations.” Unless and until being adopted, these reports will not become binding WTO decisions on the WTO Members involved. The “WTO decisions” constitute “a substantial body of jurisprudence” for an “emerging WTO legal system.”

According to the DSU, the WTO dispute settlement process is designed mainly “to preserve the rights and obligations of Members under the covered agreements.” As a result, a WTO decision would incorporate the interpretations of specific WTO treaty obligations by the panel or Appellate Body. Given the effect of res judicata of these WTO decisions within the WTO legal system, the constituent interpretations by the panel or Appellate Body would have the same binding force towards the particular

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426 McRae, Future supra note 382, at 4-6.
427 Id. at 8-10.
WTO member involved. The question then arises as to whether such *res judicata* force may shift to a domestic judicial proceeding of the given member. Or, more broadly, whether this WTO decision would have any effect of *stare decisis* on the internal courts of any WTO member addressing the similar or identical issue.

This in turn raises a preliminary issue regarding the linkage between WTO dispute settlement process and the domestic judicial proceedings of WTO members, both collectively regarded as the “two-level protection of individual rights within the WTO framework” 428 or, “two-level approach of judicial review” in the context of international trade relations. 429 Meinhard Hilf, after generalizing five types of links with regard to a two-level protection of individual rights or judicial review, concludes that none of them are presented within the WTO system. 430 Specifically, Professor Hilf observes that:

There is no recognized rule on the exhaustion of local remedies, national courts are unable to call for a preliminary ruling or interpretation from a higher body in cases of unclear rules under GATT [and the WTO agreements], and individuals have no access to the international dispute settlement procedure. This means there is no institutional linkage between the two levels of judicial protection, creating a danger that divergent interpretations of GATT [and WTO] law will occur at each level.

Accordingly, WTO dispute settlement process is not institutionally linked to internal courts of WTO members at all. As a result, the WTO court (DSB) cannot of itself create a *res judicata* for their domestic counterparts. Neither can it establish *stare decisis* in the same context, none less to say “prior” WTO decisions do not of themselves have such a status within the WTO legal system. 431 These two restrictions

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429 *Id.* at 329-330.
430 *Id.* at 335. These five types of links are: (1) No linkage at all; (2) Consecutively operating systems; (3) Parallel or alternative judicial review; (4) Systems of integrated judicial review; (5) Individual involvement on the international level.
431 Zonnekkeyn, *supra* note 400, at 607.
to the domestic effect of WTO decisions are implicitly specified in the DSU, and meanwhile reflect the long-standing practice of the World Court (ICJ). However, they do not imply that WTO decisions would have no domestic effect at all. As required by the DSU, in interpreting WTO treaty provisions, panels and Appellate Body would have to adopt an “orderly approach” based upon the customary principles of interpretation of international law. This practice has greatly contributed to the justiciability of these interpretations, and increased their referring or guiding value to domestic courts.\(^{432}\) In this context, the matter would appear to be that of the discretion of internal courts of WTO members.

B. “Intermediate Position” Doctrine and Some Further Reflections

During the GATT era, scholars and practitioners had already advocated the \textit{res judicata} force or even the \textit{stare decisis} status of GATT panel reports in domestic courts. With the advent of the WTO, their enthusiasm for such effect and status of WTO decisions and rulings reached the highest, notably in an extensive literature containing various arguments for the above position.\(^{433}\) One of these arguments is developed under a doctrine of “intermediate position,” according to which giving the \textit{res judicata} force of adopted WTO panel and Appellate Body reports in domestic courts is an “intermediate approach” between the contradictory pros and cons of the direct effect of WTO treaty obligations. The biggest proponent of this doctrine is Piet Eeckhout, asserting that where a case is specifically settled in the WTO dispute settlement process, “the binding character of the agreement and the principle of legality should … trump any lack of direct effect. … The reasons for not granting direct effect … cease to be valid where a violation is established.” This echoes the proposition of Meihard Hilf in the EC context, who views the doctrine as “a minimum

\(^{432}\) McRac, \textit{Future}, supra note 382, at 5-6.

\(^{433}\) Zonnekkeyn, \textit{supra} note 400, at 604. FT 32.
standard” for granting direct effect. As Professor Hilf submits, “[n]o flexibility seems to be left to the discretion of the contracting parties ... The relevant GATT law will then have been stated and satisfied. At least in such a situation the ECJ would have safe grounds to apply the relevant GATT law directly.”

Subsequently, this doctrine was endorsed by more scholars, such as Thomas Cottier and Krista Nadakavukaren Schefer. As they observe, this intermediate approach is appropriate in terms of the WTO dispute settlement process, which features an increasing judicial nature with its compulsory jurisdiction, strict time frame, and more important, binding decisions. They acknowledge the doctrine is legally “separated from direct effect in the traditional sense” since “it is not a matter of applying general rules, but of complying with a specific ruling arrived by quasi-judicial procedures respecting due process of law.” Nevertheless, they assert that the approach “goes beyond the critics of direct effect in the USA and Europe to balance the competing ideas of direct effect’s acceptability.” Accordingly, they call upon the necessity to examine “remedies available in WTO law” and develop “nuanced judicial policies” for “building and exploring the interaction between courts and governments” in this context.

However, from the viewpoint of this author, the doctrine of “intermediate position” is not so convincing. The present issue is about what legal effect a WTO decision or ruling should have in the internal law of WTO members, of which the key should still be the WTO dispute settlement process producing these decisions. This recalls John Jackson’s “secondary legal obligations” created by WTO decisions and rulings. As Jackson submits, “an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it

434 Cottier & Schefer, supra note 328, at 100-101.
435 Id. at 83. FT 2.
436 Id. at 100-101.
consistent with the rules of the WTO Agreement and its annexes.\footnote{Jackson, Misunderstandings, supra note 200, at 62.} Deriving from a WTO decision as such, this “secondary legal obligation” has the same effect of \textit{res judicata}\footnote{Deriving from a WTO decision as such, this “secondary legal obligation” has the same effect of \textit{res judicata} as that of the pertinent WTO decision within the WTO, binding upon the parties to a particular WTO dispute to the same extent that WTO treaty obligations bind WTO Members generally. In this particular connection, the binding force of this secondary “obligation of conformity” can be comparable to that of WTO treaty obligations, but would never be more coercive than the latter, given its limited scope of application.} as that of the pertinent WTO decision within the WTO, binding upon the parties to a particular WTO dispute to the same extent that WTO treaty obligations bind WTO Members generally. In this particular connection, the binding force of this secondary “obligation of conformity” can be comparable to that of WTO treaty obligations, but would never be more coercive than the latter, given its limited scope of application.

Based upon previous discussions, the legal effect of WTO treaty obligations appears to be different at international and domestic levels. At international level, they are binding upon WTO members under the WTO legal system. Any violation of these obligations would trigger state responsibility. At the domestic level, they are either directly applicable (on rare occasions) or subject to an act of transformation (on most occasions), depending on the actual practice of individual WTO members. If domestic effect WTO treaty obligations have remained an “unsettled and controversial issue,” especially, if, as noted herein, the direct effect of these treaty obligations remains a rare case, how can we expect domestic authorities to treat WTO decisions or rulings (of which the legal force turns out to be less coercive than WTO treaty obligations) more preferentially by adopting a simple approach (like the above “intermediate approach”) uniformly, or, even by giving them the equivalent to direct effect (e.g., effect of \textit{res judicata} in domestic sphere) with ease?

Being “secondary” in nature, the “obligation of conformity” as deriving from WTO decisions may somewhat – but not always – have the same domestic legal effect as that of its pertinent WTO treaty obligations, merely in a particular applying member state (region), but will very unlikely receive a more preferential treatment than those treaty obligations, in terms of a potential for granting it the effect of \textit{res judicata} in the
domestic sphere (equivalent to direct effect of WTO treaty obligations). Therefore, given a particular domestic legal system or internal legal order rejecting the direct effect of WTO agreements, it would be difficult – if not impossible – to find WTO decisions binding upon local courts.

As for *stare decisis* of WTO decisions, it is not even available to the WTO dispute settlement process. As a result, “secondary legal obligations” deriving from WTO decisions would not have the same “general application” as WTO treaty obligations do. It is interesting to see the proponents of the “intermediate position” doctrine take this inability as a major argument, asserting that through a WTO decision or ruling, the specific WTO obligations will be “stated,” “satisfied,” and “specifically settled” for direct application. As this author understands, what they observe as above is rather a confirmation of the contents of the pertinent WTO obligations, than a definition of their legal nature. Since the WTO tribunal (DSB) is not capable of establishing *stare decisis* for their decisions, it would be nonsense to require its domestic analogies to grant such status to its rulings. Absent the *stare decisis* status from its origin (the WTO dispute settlement process), WTO decisions or rulings would have nothing to shift to domestic judicial proceedings. In any event, WTO decisions do not have the *stare decisis status* in the internal courts of WTO members.

The above analysis may explain why to most WTO Members, the domestic effect of WTO decisions has not yet been an issue on agenda, since the same effect of WTO agreements remains controversial and unsettled. The analysis may also explain why the “intermediate position” – to the knowledge of this author – has not yet been embraced by any WTO Member. As a survey of state practice indicates, most WTO Members deny the direct effect of WTO agreements, not to mention their passive attitude towards the domestic effect of WTO decisions or rulings. Even though a Member may be flexible in granting the direct effect of WTO agreements (occasionally and partly), it may still, and usually does, deny the similar *res judicata* force of the WTO decision concerned. As the issue comes more frequently before

157
internal courts of WTO members, it would appear to be more controversial in academic and practical realms. This is evident in the next chapter: a case study of U.S. and EC experiences.
PART III

DOMESTIC IMPLEMENTATION OF WTO LAW: AN EMPirical STUDY OF THE U.S. AND THE EC EXPERIENCES
INTRODUCTION: WHY THE U.S. AND THE EC?

It is almost trite to refer to the importance the United States and the European Communities (EC) have within the WTO.\textsuperscript{438} As two leading WTO members in the "Quad,"\textsuperscript{439} the U.S. and the EC are among the world's most developed economic entities and together account for some 40 percent of both global GDP and trade. This may partly explain the predominant role they have played within the WTO, especially in the dispute settlement and implementation of WTO law at international and internal levels. During the Uruguay Round negotiations, the U.S. and the EC took the dominant seats of power in this course. The 1994 Uruguay Round Agreements are observed to reflect in many respects the position of both economic giants. Especially, the DSU has been deemed as the WTO analogy of the U.S. "Section 301" regime, while most "implementing obligations" under WTO treaties have been seen as the reflections of the "rule of law," as firmly advocated by the EC and its member states. In this sense, the WTO's dispute settlement mechanism and implementing requirements are almost designed by the U.S. and the EC.

The past decades have witnessed the overwhelming role the U.S. and the EC play in the WTO dispute settlement process. These two economic elites have remained the most frequent users of this multilateral dispute settlement mechanism, as either the complainant or the respondent.\textsuperscript{440} Despite a likely small percentage of global trade


\textsuperscript{439} World Trade Organization, Membership, supra note 211. The U.S. and the EC are two of the "four largest members" officially recognized by the WTO Secretariat as the "Quad" or the "Quadrilaterals." The other two Members of the "Quad" are Canada and Japan. The WTO Secretariat refers to the "Quad" in the context of the WTO's "accession" process, stating that "some of the most difficult negotiations have needed an initial breakthrough in talks among the Quad."

\textsuperscript{440} World Trade Organization, Dispute settlement – dispute by country, at www.wto.org/English/tratop_e/dispu_e/dispu_by_country_e.htm. By 2005, the U.S. has been the top litigator before the WTO, as the complaint in 80 cases, and the respondent in 89 cases. The EC has taken the second position, as a complaint in 70 cases and the respondent in 53 cases.
and investment affected by allegedly U.S. or EC WTO-inconsistent trade measures, economic disputes involving both economic giants by all means surpass those involving other nations, "by virtue of the sheer trade volume at stake or their political dimension." Similarly, the U.S. and the EC have equally been the Members most frequently addressing domestic effect of WTO law in their internal proceedings. In recent years, the U.S. and European courts have given increasing attention to WTO panel and Appellate Body reports. Given the accelerating expansion of the outcomes of WTO dispute settlement, it is expected that this trend will continue.

From the perspective of the global economic and trading system, the significance of the economic disputes brought by and against the U.S. and EC at two levels can hardly be overstated. From the perspective of the implementation and development of WTO law, the significance of these disputes can even be greater. Often, they reflect some of the thorniest issues arising from WTO implementation, expanding the horizon of such practice to create certain "new frontiers." This is equally true for the issues arising on international and domestic planes. Moreover, these disputes have led to "the clarification of significant aspects, in terms of substance and volume, of both procedural and substantive WTO law," as well as the enrichment of the experiences for WTO members to coordinate their domestic law and practice with WTO commitments.

Accordingly, U.S. and EC practice represents an area of study of great importance to WTO implementation at both international and domestic levels. This chapter takes a particular look at such practice at internal level. This may invite a question as to whether the U.S. and the EC experiences will match those of other WTO Members, especially the mass of developing countries vis-à-vis the "Quad." The question turns to be more sensitive to newcomers to the WTO, since they usually face numerous accusations of "WTO incompliance" by a "senior" member like the U.S. and the EC. A fundamental reflection on this far-reaching issue is beyond the scope of this study. However, a short commentary below may be helpful to the continuity of present
discussions.

First, a relatively rule-oriented multilateral institution like the WTO (as featured in the DSU-based quasi-judicial process), together with a highly developed legal system like that of the U.S. and the EC (recognized worldwide) suggest some more “fair play” for WTO members in the WTO than their peers in the GATT. Any member comfortable with the idea of the “rule of law” may feel less reluctant to rely on the WTO dispute settlement process, just the same way it may rely more on legal means than on political and diplomatic venues for WTO implementation in the domestic sphere. In this context, the member will have to adhere to certain general standards of the “rule of law,” of which some valuable reference can always be taken from the U.S. and the EC experiences.

Second, the WTO dispute settlement system is imperfect. Pleas for its reforms have significantly increased in recent years. It would always be appropriate for WTO members to take a cautious attitude towards WTO decisions, although the quality and “justiciability” of these international rulings have received respect. In this context, any tendency of a WTO member to restrict the internal effect of WTO law (especially WTO decisions) should have legitimacy. As for the U.S. and the EC, they have acted consistently in a conservative manner towards the domestic effect of WTO law: the direct effect of WTO treaties is generally excluded, even though the EC has had something of a “spark” of flexibility on its restrictions. *Res judiciata* of WTO decisions is internally impossible, not to mention their *stare decisis* status in domestic context. These may diminish many concerns about a “radical” or “aggressive” advocacy of the “full WTO implementation” by the two major players (which has not yet become the case with them at least). Scholars and practitioners may be enthusiastic about this, but this is definitely not true with their governments. A distinction has already been drawn in this regard. Thus, members may follow the same position as the U.S. and the EC, raising a “reciprocity” argument as the EC particularly develops. Or, if their position has been the same or similar position as the
two major players, the question becomes: what is to be learned from the U.S. and the EC?

As most WTO Members are sovereign states, they may turn first to their peer – the U.S., to see how this leading state copes with the enduring internal controversy over the sovereignty issue. Given its persistent hostility to the direct effect of WTO law, the U.S. government has set a good example for those who intend to take the same position as it does, not only in terms of the enactment of complex implementing legislation to WTO agreements (Uruguay Round Agreements Act, or, URAA) by the U.S. Congress, but also of the adoption of comprehensive approaches by the U.S. courts for avoiding direct impact of WTO law on national constitutional arrangements, e.g., the separation of powers. In contrast, the EC experience seems unique among WTO Member States, given its status as a highly integrated regional organization (“customs union”). At the outset, the unique constitutional structure of the EC leads to entirely different legislative outcomes for the transformation of WTO law into the internal EC Legal order. Fundamentally, however, because of this special constitutional arrangement, the European courts have developed – within their competence – more sophisticated techniques and more nuanced policies than the U.S. for rejecting the direct effect of WTO law. Assuming a persistent tendency of most WTO members to resist as much internal effect of WTO law as possible, the EC experience seemingly gives them great latitude to pursue such a purpose.

The above assessment of U.S. and EC experiences seems encouraging to an “anti-WTO law” task force among WTO members. This actually depends on how one views the direct effect of WTO law. To exclude this direct effect does not mean to deny any domestic effect of WTO law. On the contrary, the “indirect effect” of WTO law may still remain far-reaching and profound, especially through the efforts of domestic legislatures and judiciaries, as evident in U.S. and EC practice.
CHAPTER 1

IMPLEMENTATION OF WTO LAW UNDER THE U.S. LEGAL SYSTEM

I. Legal Effect of Trade Agreements in the U.S. Law

Under U.S. jurisprudence, whether an international agreement becomes part of U.S. domestic law depends on the doctrine of self-executing treaties. 441 In terms of their legal effect in U.S. domestic law, international agreements are either "self-executing" or "non-self-executing." A self-executing treaty (or part of it) has "direct domestic law effect" and "purports directly by its own terms to give rights to individual, citizens" before the courts. A non-self-executing international agreement (or part of it) does not have such direct effect. It can only be implemented domestically through "an act of transformation" (e.g., implementing legislation) passed by the U.S. Congress or promulgated by the Executive. 442 Regardless of terminological difference, the "self-execution" of an international agreement actually refers to its "direct effect" or "direct application." These terms are interchangeable in the present context.

Absent the uniformed criteria for the categorization, the distinction between self-executing and non-self-executing international agreements has long remained confusing in U.S. law. Under the U.S. Constitution, while Article VI makes treaties to the "supreme law of the land," other provisions also specify certain non-self-executing treaties. 443 Neither the Constitution nor any U.S. statute has ever provided

442 JACKSON, DAVEY & SYKES, supra note 76, at 99. For non-self-executing treaties, of which the implementation "requires some change in domestic law, ...some additional action by government bodies will be necessary." This raises the question as to who has the authority to implement such a treaty. It is observed that "Congress many enact a statute" or, "the President or other officials may have authority to implement the agreement by issuing or changing the regulations."
443 Id. at 100.

164
for an exhaustive inventory of either of the two categories, nor has any set forth a "once then forever" standard for this purpose. According to the *Comments to the Restatement (Third) of Foreign Relations Law of the United States*, a treaty signed by the U.S. will be "presumably" self-executing, in the absence of an "express request" by Congress or the Executive for implementing legislation.\footnote{444} Based upon a rather vulnerable presumption, this seemingly convenient approach begs more questions, e.g., how to make sure the same "request" is not covered by the "intent" of the treaty makers?

When ratifying an international agreement under congressional or constitutional authorization, the U.S. Congress or the Executive may expressly indicate the "intent" to grant or deny the self-execution of this agreement, but does not always do so. When the intent of these treaty makers remains vague or obscured, it will be left for the U.S. courts to play a significant role. To determine the "self-execution" of a treaty, the U.S. courts have developed some standards through well-established case law, such as in *People of Saipan v. U.S. Department of Interior*,\footnote{445} where the key is to "look at a series of factors, but primarily at the intent of the drafters,"\footnote{446} including intent implied or expressed in the treaty itself.\footnote{447}

This approach is particularly fit for U.S. trade agreements, where the Congress or the Executive usually is explicit about its intent to indicate self-execution or not. In this context, it is necessary to draw a distinction between "treaties" and "executive agreements" in U.S. law, although both categories are collectively regarded as "treaties" or "international agreements" in international law. Under the U.S.

\footnote{444} Cottier & Schefer, *supra* note 328, at 106-107.
\footnote{445} 502 F. 2d 90 (9th Cir. 1974). "The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined by reference to many contextual factors: the purpose of the treaty and the objectives of its creators, the implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self-execution and non-self-execution."
\footnote{446} *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES*, Ch.2, §111(4) (1987).
\footnote{447} John Jackson, *Status, supra* note 209, at 320.
Constitution, the ratification of “treaties” entails the advice of the Senate and its consent by a two-thirds vote. These “treaties” constitute the traditional category of international agreements in U.S. law. The above constitutional requirements do not apply to the “executive agreements.” The ratification of executive agreements is under the “inherent” or constitutional authority of the Executive (President), or under that as delegating to the Executive by Congress. This turns to be a “speedier and easier” treaty-making process, since it “avoids the minority Senate veto ... that could block a treaty.” However, for the same reason, executive agreements have been blamed for an absence of “democratic participation,” and thus regarded as “unconstitutional” or “risking direct domestic legal effects of the self-executing agreements.”

Although an executive agreement is not necessarily non-self-executing in a general legal sense, this occurs in many U.S. executive agreements, especially those in the field of trade regulation, given the above-noted concern about their “democratic defects.”

Back in the GATT era, the GATT treaty was an executive agreement in U.S. law, accepted by the President within his authority based upon the 1945 Reciprocal Trade Agreement Act. Despite “a long history of recognition by the U.S. government of the validity and binding nature of GATT,” the self-execution of this trade agreement has remained ambiguous until the WTO came into being in January 1995. The Congress never explicitly approved the GATT treaty. Neither did it explicitly exclude the self-execution of this treaty, as evident in successive Trade Agreement Acts during the period. In the context of case law, the U.S. courts never held the GATT “not to be a binding international agreement for the United States.” In fact,

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448 JACKSON, DAVEY & SYKES, supra note 76, at 92.
449 Id. at 95.
450 Id. at 240.
451 Id. at 238. The issue “became moot” when the WTO entered into force on January 1st, 1995, since the GATT text was incorporated into the WTO Agreement; the latter is expressly defined as non-self-executing treaties in the URAA.
452 Id. at 239-240.
“many cases have applied GATT rules,” especially in terms of “the extent to which GATT rules could be used to defend or attack an administrative agency’s interpretation of U.S. law.”

Regarding the self-execution of GATT provisions, the courts seldom directly address the issue, leaving little guidance in this regard. Some federal court decisions deny the “treaty status” of the GATT on the ground of U.S. treaty-making authority for entering into the GATT, and consequently avoid the issue of self-execution. Other court decisions refer to the application of individual GATT provisions, but offer no clear guidance on the question of self-execution. In these decisions, while the courts assume the binding force and self-executing of the given GATT provisions, they consistently reject the allegations that the contested U.S. legislation or administrative acts violate these GATT obligations, and thus make it unnecessary to provide a rationale for such an assumption. Some notable examples include a group of federal cases involving the now-abandoned “wine gallon” method of determining the application of U.S. excise taxes to distilled spirits. This challenged administrative act is ruled not in violation of the “national treatment” (NT) obligations under GATT Article III. In United States v. Star Industries, the court relies on the “most favored nation” (MFN) obligations under GATT Article I to defeat the plaintiff’s allegation of invalidating a U.S. federal law, simply upon the assumption of the self-executing nature of those GATT rules. In all above context, the U.S. courts have carefully avoided the issue “on other grounds.”

However, this does not imply that no federal case law “has actually analyzed the self-executing status of any GATT provision in regard to an alleged violation through federal legislation or administrative regulation.” In a landmark case, the U.S. Court

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453 Id. at 241.
455 Id. at 566.
of Appeals for the Federal Circuit (Federal Circuit or, CAFC), *Suramerica de Aleaciones Laminadas v. United States*, the Court not only explicitly denies the self-execution of the GATT treaty, but also rejects the self-executive effect of a GATT panel report. For GATT provisions, the Court rules that:

> [E]ven if we were convinced that Commerce’s interpretation [of the U.S. statutory requirements for filing an antidumping investigation] conflicts with the GATT, which we are not, GATT is not controlling. While we acknowledge Congress’s interest in complying with U.S responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for the Congress and not this court to decide and remedy.

Interestingly, as for the GATT panel report, the Court does not follow the above rationale, but rely on some factual grounds to rule out the issue. As the Court argues: “the GATT panel itself acknowledged and declared that its examination and decision were limited in scope to the case before it. The panel also acknowledged that it was not faced with the issue of whether, even in the case before it, Commerce has acted in conformity with the U.S. domestic legislation.” Obviously, the Court has taken the panel report as a fact or the “evidence,” holding it to be irrelevant to the present case.

The post-GATT U.S. trade agreements appear to be much clearer in their self-executing or non-self-executing nature. Beginning with the Trade Agreement Act of 1974, a “statutory” treaty-approval procedure named “fast track” has been extensively applied to “all major trade agreements,” including various resulting agreements of GATT rounds of trade negotiations (e.g., Tokyo Round Agreements, Uruguay Round Agreements, etc.), as well as Free Trade Agreements (e.g., North America Free Trade Agreement or NAFTA). Aiming to expedite the congressional approval of the “non-

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456 *Suramerica de Aleaciones Laminadas v. United States*, 966 F. 2d 660.

tariff barrier agreements and implementing statutes", 458 the “fast track” procedure allows a statute approved by the Congress authorizes the President to accept a proposed treaty. This statute, after being approved by both houses of the Congress and signed by the President, constitutes “the basis for further presidential action” on ratifying or accepting the proposed treaty. 459 Thus, with the “fast track” procedure, all post-GATT U.S. trade agreements have fallen within the category of “executive agreements” under U.S. law.

Moreover, under the “fast track” process, the Congress usually adds to the required statute (as noted above) “the measures that it wishes to enact into domestic law,” so as to implement the proposed international agreement.” 460 The statute concerned then turns into the “implementing legislation” of the given agreement. By this approach, the Congress has been increasingly explicit about its preference regarding the non-self-execution of the post-GATT trade agreements, notably in Trade Agreements Act of 1979, which provides that “[n]o provision of any trade agreement approved by the Congress ... nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.” 461 Since then, with only certain “possible minor exceptions,” trade agreements accepted by the U.S. have been treated as non-self-executing. 462 A particular case in this regard appears to be the Uruguay Round Agreements (WTO agreements) with its U.S. implementing legislation, Uruguay Round Agreements Act (URAA).

II. Uruguay Round Agreements Act (URAA) and the U.S. WTO Implementation

458 JACKSON, DAVEY & SYKES, supra note 76, at 82.
459 Jackson, Great 1994, supra note 441, at 168-169. This is regarding the application of the “fast track” procedure to the major trade agreements.
460 Id. at 168.
461 19 USCA § 2504(a).
462 Jackson, Great 1994, supra note 441, at 168.
In 1994, after the Uruguay Round results were signed by the U.S. government and other original WTO members on April 15, the U.S. Congress and Executive Branch proposed the fast track process to ratify these trade treaties. This statute, lately cited as “1994 Uruguay Round Agreements Act” (URAA, or directly, “the Act”), did not get approved by both houses of the Congress until December 1 of that year. Based on the enactment of the URAA, then U.S. President Clinton ratified the Uruguay Round Agreements (equally, “WTO agreements”) a week later. Since then, the WTO agreements have been the leading U.S. trade agreements within the category of its “executive agreements.”

1. Domestic Legal Effect of WTO Law under the URAA

Until the creation of the WTO in January 1995, the then existing U.S. trade agreements, GATT 1947, had remained ambiguous as to its self-executing nature, absent the express “intent” of U.S. Congress in this regard. This ambiguity no longer exits in the successor of the old GATT, namely, Uruguay Round Agreements (WTO agreements), for the sake of the enactment of the Uruguay Round Agreements Act (URAA).

Serving as the implementing congressional legislation for WTO agreements, the URAA explicitly excludes their self-execution, notably in Section 102, which governs the relationship of WTO agreements to U.S. domestic law. According to Section 102(a)(1), “no provisions of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States, shall have effect.” The provision is analogous to

463 Id. at 169.
465 19 USCA §102(a)(1) (US federal law prevails over conflicting WTO provisions).
Section 3(a) of the 1979 Trade Agreements Act,\(^466\) and therefore establishes the “continuing primacy” of U.S. federal law over any inconsistent WTO legal obligation deriving either from pertinent WTO provisions, or from the application of these provisions by WTO institutions. The latter situation particularly refers to two categories of decisions: decisions of the Ministerial Conference and General Council as the “authoritative interpretations by the WTO,” and, “decisions of WTO dispute settlement panels.”\(^467\)

Both categories are explicitly noted in “Subsection C” of the URRA governing “Uruguay Round Implementation and Dispute Settlement.” It should be noted that in terms of WTO decisions, this subsection only refers to “reports” of WTO panels and the Appellate Body, without noting the role of the DSB and its adoption process. This has somewhat obscured the legal nature of WTO decisions as the binding source of international law to create “secondary legal obligations.”\(^468\) Considering the purely internal perspective of the U.S. Congress, its “negligence” or “ignorance” as such might be understandable. After all, Congress is not dealing with this issue on international plane. From a different perspective, this might also reflect the “over-concern” of the U.S. government about the results of the WTO dispute settlement process, for it even brings WTO’s “preliminary rulings” into domestic implementation process. More important, the binding force of WTO decisions does not matter much in this context, since the focus of the Congress is on the substance of such decisions (as buried in the “reports”), other than their legal effect in international sphere. Accordingly, instead of “WTO decisions,” the following discussions of the U.S. experience will mainly address the reports of WTO panels and the Appellate Body. Also,

\(^{466}\) Jackson, Davey & Sykes, supra note 76, at 87.

\(^{467}\) Id. at 244. Also, David W. Leebron, Implementation of the Uruguay Round Results in the United States, p.212-214. Leebron regards “WTO agreements” as comprising “authoritative interpretation by the WTO or decisions of dispute settlement panels.” To this author, this perspective can be better presented by the concept of “WTO law” as articulated in this study.

\(^{468}\) According to preceding discussions, particularly, reports of WTO panels and the Appellate Body will not be consided as binding upon the parties to the disputes concerned, until and unless they are adopted by the WTO’s Dispute Settlement Body (DSB).
for purpose of these discussions only, the concept of “WTO law” is particularly redefined in the URAA context, as comprised of WTO agreements, authoritative interpretations by the WTO, as well as reports of WTO panels and the Appellate Body.

This goes back to Section 102(a)(1), whose scope does not limit it to WTO agreements, but rather extends to a broad concept of “WTO law” in the above sense. In the same context, this provision implies that any inconsistent “WTO law” would be invalidated by the pertinent U.S. domestic law, which consequently has excluded the possibility of relying on any WTO legal obligations – either under WTO treaty law or specified by WTO panels or the Appellate Body – to challenge U.S. domestic law in any event, not to mention the possibility of granting direct effect to WTO treaty obligations. This is also the case with U.S. State law, except for an occasional action brought by the U.S. government to invalidate such domestic law, for its alleged inconsistency with WTO agreements, which is specified in Section 102(b)(2).469 The following discussions will focus on U.S. federal law (or, simply, U.S. law), while the issues related to U.S. State law will be omitted.

The URAA continues to address the invocability of WTO agreements in Section 102(c), which governs the “[e]ffect of [WTO] agreements with respect to private remedies.” Section 102(c)(1) imposes two statutory restrictions on private rights of action,470 providing that WTO agreements “neither create privately enforceable rights, nor provide a basis for challenging an executive action.”471 In this regard, the “intent” of the Congress is, as clarified in Section 102(c)(2), “to occupy the field with respect

469 In addition, with regard to the relationship between WTO agreements and the State law, section 102(b)(2)(A) the URAA excludes the possibility of relying on any WTO treaty provision to invalidate any State law or “the application of such a State law,” “except in an action brought by the United States for the purpose of declaring such law or application invalid.”

470 Section 102(c)(1) (A) & (B) of the URAA mandates that no person other than the United States “shall have any cause of action or defense under any of the UR Agreements” or challenge “any action or inaction ... of the United States, any State, or any political subdivision of a state on the ground that such action or inaction is inconsistent” with one of these agreements.

471 JACKSON, DAVEY & SYKES, supra note 76, at 87.
to any cause or action or defense under or in connection with any of the Uruguay Round Agreements” particularly in U.S. judicial proceedings. As Section 102(c) serves to deny the “invocability” of WTO agreements entirely, it reinforces the non-self-executing nature of these trade agreements. This position was initially indicated by the Senate during the enactment of URAA, which asserted that WTO agreements “are not self-executing and thus their legal effect in the United States is governed by implementing legislation.”472 Here, of course, the “implementing legislation” refers to the URAA.

In Section 102(d), the URAA introduces a “statement of administrative action” (SAA), which serves “as an authoritative expression” by the U.S. concerning the application and interpretation of WTO agreements and the URAA itself “in any judicial proceeding.”473 While indicating the objective of the URAA is to “bring U.S. law fully into compliance with U.S. obligations under the [Uruguay Round] agreements,”474 the SAA makes it absolutely clear that WTO agreements are not self-executing in U.S. law, and cannot be applied by the U.S. courts so as to interpret U.S. laws in a manner contrary to the clearly expressed intent of the Congress.475 More significantly, the SAA provides that reports of WTO panels and the Appellate Body “have no binding effect under the law of the U.S. and do not represent an expression of the U.S. foreign or trade policy.”476 In this connection, the U.S. Congress particularly excludes the potential for WTO decisions having res judicata force and stare decisis status under U.S. legal system.

Undoubtedly, the above SAA sections have affirmed the non-self-execution of WTO agreements in any respect. Nevertheless, they implicitly acknowledge the application and interpretation of WTO treaty provisions by the U.S. courts. In reality, this

473 19 USCA §3512(d).
475 Id.
476 Id. at 1032.
situation represents not just a possibility, but also an inevitable trend. Regardless of their non-self-executing nature, WTO agreements are capable of being applied in domestic proceedings. This, according to John Jackson, are “indirect impacts and effects” of non-self-executing treaties.\(^{477}\) Even absent a direct “statute-like” effect on U.S. domestic law, WTO agreements “might still be applied either by a court to resolve ambiguities in the language of a statute, or by administrative agencies in promulgating rules and regulations,” although “such applications could not lead to an interpretive result that was contrary to any clearly expressed intent of the Congress.” In this sense, the key to the U.S. WTO implementation appears not a matter of pursuing the self-execution of WTO law (which would appear to unrealistic), but that of applying or interpreting WTO law for purpose of the particular domestic law. This “particular U.S. law” often refers to the URAA, given its status as the “implementing legislation for WTO agreements.”

When the issue turns to the legal application/interpretation of the WTO legal context, concerns are raised about the consequences of such legal constructions to other competing domestic legislation. Especially, where the rule of *lex specialis derogat lega generalis* applies, one may question how broadly a U.S. statute – e.g., the URAA – should be interpreted “when it arguably conflicts with previous legislation.” This has become a matter of considerable concern in the implementation of WTO agreements, “particularly regarding environmental protection and product standards.”\(^{478}\) The URAA has fully addressed this concern in Section 102(a)(2), which governs the “interaction” of the URAA and the “pre-existing law.”\(^{479}\) According to this provision, the Act itself “shall not be construed to amend or modify any law of the United States” relating to the protection of life or health, environment or worker safety, or, “to limit any authority conferred under any law of the United

\(^{477}\) Jackson, Davey & Sykes, *supra* note 76, at 101-102.

\(^{478}\) Id. at 244-245.

States...unless specifically provided for by this Act.\textsuperscript{480}

Consequently, Section 102(a)(2) has created some exceptions to the rule of lex specialis derogat lega generalis in the URAA context, which actually reflects the intent of U.S Congress to restrain the "potential effects" of the URAA being interpreted to alter U.S. laws (including administrative regulation). Notably, for other domestic statute not specified in the URAA, their amendment for the purpose of conforming to the WTO agreements (whether as a result of dispute settlement or a volunteer determination of the U.S.) will entail the normal U.S. legislative process.\textsuperscript{481} Accordingly, the WTO implementation appears to be quite restrictive under U.S. jurisdiction.

In the aggregate, the URAA not only explicitly excludes the self-execution of WTO agreements, but also clearly denies the res judicata force and stare decisis status of WTO decisions by excluding the "binding effect" of WTO panel and Appellate Body reports under the U.S. legal system. This then raises concerns about legal authority and procedure for the implementation of WTO law in U.S. domestic law.\textsuperscript{482} The question is closely linked to the role of the U.S. Congress and Executive branch, as specified in the URAA for the next discussion.

2. Statutory Role of the U.S. Congress and the Executive Branch in the WTO Implementation

Since WTO agreements are not self-executing treaties under U.S. law, the implementation of WTO law calls for additional actions of U.S. government bodies, which raises the issue of "authority" to implement, although a number of forms of

\textsuperscript{480} 19 USCA §3512(a)(2).
\textsuperscript{481} JACKSON, DAVEY & SYKES, supra note 76, at 245.
\textsuperscript{482} Id. at 90.
implementation are possible in this regard. As noted above, WTO agreements are "executive agreements" under U.S. law. From the perspective of treaty making, both U.S. Congress and Executive have played a significant role, especially in the context of the "fast track" process, under which the U.S. President had ratified these trade agreements, while the Congress had enacted the URAA.

As for the URAA, it grants the Congress and Executive Branch an essential role in the WTO implementation, notably in Subsection C, which governs "Uruguay Round implementation and dispute settlement." As noted before, for the implementation purpose, this subsection specifically refers to two categories of decisions by WTO institutions, involving WTO decision-making and dispute settlement respectively. A series of administrative reporting and congressional consultation requirements are therefore established to implement the two processes and their operation under the WTO auspices, where a predominant role is given the United States Trade Representative (USTR), the most significant agency on trade matters in U.S. Executive Branch. Thus, the URAA has provided for "much closer congressional oversight of U.S. WTO/GATT participation than in the past."

In the same context, the URAA has been very specific about how the U.S. would respond to reports of WTO panels and the Appellate Body. According to the SAA, WTO panels and the Appellate Body "will not have any power to change U.S. law or order such a change," while "only Congress and the Administration can decide whether to implement a WTO panel determination and, and, if so, how to implement it." With regard to the adverse WTO reports, the Congress authorizes the USTR, in consultation with various congressional and executive bodies and agencies, to

483 Id. at 99. 484 Subtitle C - Title I- Uruguay Round Implementation and Dispute Settlement. 485 JACKSON, DAVEY & SYKES, supra note 76, at 89. 486 Id. at 245. 487 H.R. Doc. No. 316, 103d Cong., 2d Sess. Pt. 1, at 656, 659.
determine whether to implement them and, the related extent of implementation.488

In case an adverse WTO report targets U.S. legislation, the SAA states that: "[i]f a [WTO] report recommends that the US change federal law to bring it into conformity with a Uruguay Round Agreement, it is for the Congress to decide whether any such change will be made." In recent years, significant targeted U.S. legislation includes the "Byrd Amendment," the Antidumping Act of 1916, as well as Section 301-310 of the U.S. Trade Act of 1973. In all three cases the WTO tribunal has ruled in favor of the complainants. So far, the USTR and Congress have been working to conform with on each of these WTO decisions.

For the cases where an adverse WTO report targets U.S. administrative regulation or practice, the URAA requires in Section 123(g) that the contested regulation or practice "may not be amended, rescinded, or otherwise modified" in the implementation of such ruling "unless and until" the Congress, the USTR and relevant administrative agency have consulted through stringent procedures specified therein.489 In terms of the particular WTO reports on antidumping and countervailing duty issues, Section 129 of the URAA provides for administrative action of the International Trade Commission (ITC), USTR and other "administrative authorities."490

Given the essential role of the Congress and Executive Branch (especially the USTR) in WTO implementation, it is interesting to witness the position of other U.S. government bodies and agencies coping with the WTO affairs in daily practice. One example is the U.S. Department of Commerce (DOC). In March 2003, during a trade law training conference held in Washington, DC, some DOC officials confessed publicly that they would always stick to the U.S domestic law and ignore the relevant

488 19 USCA §3533(f)(3).
489 19 USCA §3533(g).
490 19 USCA §3538.
WTO provisions of the WTO. This indifferent attitude towards WTO law was shared by a number of judges of the U.S Court of International trade (CIT) present at the event. This fact indicates a comparatively restrictive role of the U.S. court in the WTO implementation of WTO law, which is the subject of the following discussion.

III. Treatment of WTO Law before the U.S. Courts

1. Role of the U.S. Courts in International Trade Regulation

Trade regulation in the U.S. refers to national governmental regulation of the importation of goods (and services) and competition by imported goods in the domestic economy under domestic trade law. In this process, the role of the U.S. courts – as part of the U.S. government – is regarded as "corollary to the roles allocated to the Congress and to executive and administrative agencies." Under the U.S. Constitution, the Congress has the authority to impose duties on imported goods and regulate commerce with foreign nations, which leads to statute-specified "governmental regulatory actions" or "statutory programs" to be administered and implemented in practice. Given the "inability" of the Congress to administer its legislation (statutes) on a daily basis, it is necessary to delegate that responsibility to other government institutions (basically, the Executive Branch and judiciary).

Since early 1990s, it has been well recognized that statutory application and interpretation by the administrative agencies and the courts were capable of determining how the above "governmental actions" or "programs" of the Congress would "work in the real world." Moreover, applications and interpretations by administrative agencies are subject to those by the courts. This actually refers to

492 Id. at 15.
493 Id.
“judicial review” in the context of international trade relations, especially the review by the courts of the “lawfulness” of the administrative interpretations. 494 Under U.S. jurisprudence, the role of the U.S. courts in international trade regulation is usually considered in the context of judicial review of trade-related administrative decisions, 495 the latter being nothing more the operation of a general judicial review in the particular area of international trade. 496 Accordingly, for the purpose of present discussions, it is appropriate, and sometimes necessary to note some basic aspects of a standard U.S. judicial review, e.g., reviewability of review, scope of review, standard of review, etc.

Under the U.S. judicial system, judicial review involving international trade issues mainly falls within the competence of the Court of International Trade (CIT, at trial level) and the Court of Appeals for the Federal Circuit (CAFC, at appellate level). Today, most litigation involving international trade law occurs in the CIT, formerly known as the Customs Court (given its current name by the Customs Court Act of 1980). Possessing all the powers in law and equity of a U.S. district court, the CIT enjoys extensive jurisdiction, which allows access to this court “to cover most persons with a real interest in challenging or defending a trade-related action.” Particularly, the CIT has “exclusive jurisdiction” over appeals or actions towards administrative decisions of the U.S. Customs Service, Department of Commerce, International Trade Commission and other administrative authorities, on trade issues such as import classification, antidumping (AD) and countervailing duties (CVD), country of origin, tariffs, duties, fees and other taxes on imports, embargos or quantitative restrictions on imports, etc. 497

For various actions, the CIT has established a complex structure of review, featured

494 Id. at 16.
495 Id. at 14.
496 Id. at 17.
497 JACKSON, DAVEY & SYKES, supra note 76, at 113. See, 28 USCA §1581.
by the diverse "scopes of review" responding to either "factual" or "legal" issues in respective types of actions. The trial de novo standard applies only to a few "statute-specified actions" in both factual and legal context, and thus represents a rare case. For the majority of actions, especially those concerning antidumping (AD), countervailing duty (CVD) and trade adjustment assistance, the "substantial-evidence standard" and "arbitrary-capricious standard" – both provided in the Administrative Procedure Act – would apply to the review of factual issues by the Courts. In reviewing the lawfulness of administrative statutory interpretations, the Court generally applies the two-prong "Chevron test" evolving from a U.S. Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*. 499

Decisions of the CIT are appealable to the Court of Appeals for the Federal Circuit (CAFC, or, Federal Circuit) and ultimately to the U.S. Supreme Court. The CAFC was established under Article III of the U.S. Constitution on October 1, 1982, and formed by combining the U.S. Court of Customs and Patent Appeals and the appellate division of the U.S. Court of Claims. Unique among the thirteen Circuit Courts, CAFC has nationwide jurisdiction in a variety of subject matters, including international trade, government contracts and patent. Accordingly, appeals to this appellate court come not only from the CIT, but also from all federal district courts and the U.S. Court of Federal Claims. The Court also takes appeals of the decisions of certain administrative agencies, such like the ITC, the Board of Patent Appeals and Interferences, the Trademark Trial and Appeals Board, etc. 501

Like the practice of the CIT, the scope of review adopted by the CAFC also depends upon the types of actions brought, as well as on the distinction between factual issues and legal issues. However, in terms of individual actions, especially the appeals of

498 *Id.* 113-114.
500 JACKSON, DAVEY & SYKES, supra note 76, at 113.
the CIT decisions, the Court has applied diverging or even controversial appellate standards of review, in absence of explicit statutory guidance. In customs cases, the Court usually reviews the CIT's conclusion of law de novo, while accepting its factual findings unless they appear to be "clearly erroneous."\(^{502}\) In antidumping (AD) / countervailing duty (CVD) cases, the situation turns out to be more complicated and controversial as observed below.

Historically, the CAFC applied the same combination of "de novo/clearly erroneous" standard to the AD/CVD cases as it does to customs cases. In 1984, the CAFC repealed that traditional approach by introducing the "apply anew" standard in *Atlantic Sugar* case.\(^{503}\) Under the new standard, in reviewing the AD/CVD decisions of the CIT, the CAFC would apply the same "substantial evidence/in accordance with law" standard as the CIT does, although that standard is statutorily the privilege of the CIT only.\(^{504}\) In the following decades, the Court had consistently applied the "apply anew" standard until it changed this position in *Suramerica* case in 1994. In *Suramerica*, the Court called for more deference to the CIT and proposed a new standard of review outlined by the U.S Supreme Court in *Universal Camera Corp. v. NLRB*, which only considers whether the CIT "misapprehended or grossly misapplied the statutory standard."\(^{505}\) Since then, the CAFC has increasingly cited the *Surameica* rationale, although that practice does not necessarily imply a tendency for the Court to move away from its long-standing "apply anew" standard of review.\(^{506}\) From a practical perspective, for review of legal questions, the CAFC has been observed to


\(^{503}\) Id. at 183. See, *Atlantic Sugar*, Ltd. v. United States, 744 F. 2d 1556, 1559 (Fed. Cir. 1984) ("[w]e review the [CIT's] review of an ITC determination by applying anew the statute's express judicial review standard." In this regard, the "express judicial review standard" refers to that only applicable to the CIT in accordance with 19 U.S.C. §1516a.


\(^{506}\) Suramerica, *supra* note 456.

\(^{506}\) Carman, *supra* note 502, at 190-191.
consistently apply the *de novo* standard, which is equally adopted by the CIT in the same context.

Obviously, among the U.S. federal courts, the CIT and CAFC appear to encounter WTO legal issues more frequently than others, given their particular competence and jurisdiction noted above. Also, “[O]ther federal courts accord deference to Federal Circuit opinions on matters within its jurisdiction or expertise.” More important, “the Supreme Court rarely accepts cases from the Federal Circuit for review.” Considering all these “institutional factors,” the CAFC Case law of the CIT and CAFC has constituted the essential part of the U.S. judicial jurisprudence on WTO law. Accordingly, the large part of the succeeding discussions will contribute to an analysis of some recent, distinguishing decisions of the CIT and CAFC.

2. The Rise of WTO Issues in the U.S. Courts and the Application of the *Charming Betsy* Doctrine

Within the U.S., international trade is regulated under domestic trade law; the latter excludes WTO agreements for their non-self-execution, as well as WTO panel and Appellate Body reports for their lack of *res judicata* force and *stare decisis* status in domestic sphere. Section 201(c) of the URAA particularly bars private parties from bringing an action against U.S. domestic legislation, or U.S. administrative regulation or practice on the ground of WTO agreements. This restriction is equally imposed upon the WTO’s DSB decisions.

As the door is shut for the U.S. courts to directly rely on WTO law, a window opens wider and wider for the courts to address WTO issues. As noted in previous discussions, the non-self-execution of WTO agreements does not lead to their

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508 REED, *supra* note 491.
irrelevance to U.S. domestic law and practice. Given their "indirect impacts and effects" in the domestic sphere, WTO agreements and reports are often applied and interpreted by the U.S. administrative agencies and the U.S. courts for their internal administrative legislation and statutory interpretations. Particularly, in judicial review of trade-related administrative actions, the courts would inevitably encounter these issues on the domestic effect of WTO law, and therefore must determine these issues. In this context, the rise of WTO issues is largely attributed to the Charming Betsy doctrine, a "time-honored canon of statutory construction" under the jurisprudence of the U.S. courts. 509

A. The Charming Betsy Doctrine and the Availability of Standings

The Charming Betsy doctrine originated from an early decision of the U.S. Supreme Court in Murray v. Schooner Channing Betsy, requiring "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains ... further than is warranted by the law of nations as understood in this country." 510 Within its meanings, the doctrine would allow private parties the standing to bring an action against U.S. domestic legislation, or related administrative decisions based upon the non-self-executing WTO legal obligations, without irritating the express intent of the Congress. The past decade has witnessed a frequent citation of Charming Betsy doctrine – usually by petitioners to develop their arguments based on WTO law – before the U.S. courts, accelerating an increase of federal cases involving WTO issues. As a recent trend, more and more petitioners would focus on a particular report of the WTO panel or Appellate Body, rather than just look at the pertinent provisions of WTO agreements. They seem to assume that WTO reports are equal to WTO agreements, especially in terms of their status such as the "law of the nations" covered by the Charming Betsy doctrine. Interestingly, from the perspective

510 6 U.S. (2 Cranch) 64, 118; 2 L. Ed. 208 (1804).
of other practitioners, usually the respondents, even the status of WTO agreements as the "law of nations" would be doubtful,⁵¹¹ which may serve as part of the argument against the application of Charming Betsy for later discussion.

Although U.S. federal courts’ position towards the above assumption and the applicability of Charming Betsy vary from case to case (even from court to court), they have consistently recognized the standing of private parties in this regard. In the decision of the Federal Circuit in Timken, the Court observed that although “[s]ection 3512(c) bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the Uruguay Round Agreement Act ("URAA"),” “Koyo brought this action under U.S. law under the assumption that it would be interpreted so as to avoid a conflict with international obligations.”⁵¹² The Court reached the same conclusion in Koyo, holding that Section 3512(c) did not bar an “action under U.S. law” urging that a domestic statute should “be interpreted so as to avoid a conflict with international obligations.”⁵¹³ In this context, private individuals may always secure their standing under the Charming Betsy doctrine, so as to develop an argument on the basis of non-self-executing WTO law. The CIT and other federal courts have consistently taken the same position as that of the CAFC. Consequently, it is not surprising to observe that WTO issues are more and more frequently raised before the U.S. courts. Here, the question is no longer “whether courts would even be allowed to hear arguments based on WTO rules, under the Charming Betsy doctrine,” but how the courts will hear such arguments, and, alternatively, how the courts will treat WTO law.

B. About the “WTO Issues”

⁵¹³ Clement, supra note 478, at 7.
Before embarking on the jurisprudence of the U.S. courts on WTO issues, it is vital to conceive of the circumstances under which these WTO issues may arise before the courts, as well as their substance. For this purpose, thirteen decisions of the CIT and the CAFC are to be cited and analyzed, as they remain the most recent and updated status in this regard (to the best knowledge of this author). As elaborated in later discussions, all these federal cases carry out a judicial review of U.S. administrative decisions, of which the majority are AD/CVD determinations by the DOC or the ITC, and the minority include one concerning the customs appraisal by the U.S. Customs Services (Luigi case) and another concerning the import-related regulation by the U.S. State Department (Turtle Island Case). Responding to that situation, the most-cited WTO legal regime before the U.S. courts has been the WTO Antidumping Duty Agreement (ADA) and the WTO Countervailing Duty Agreement (CDA), together with the pertinent GATT primary obligations, e.g., GATT Article I (MFN) and Article III (National Treatment). Whatever WTO legal obligations are involved, the reviewing courts generally apply them for a review of the "reasonableness/permissibility" of the alleged administrative interpretation or implementation of the pertinent U.S. trade status. This becomes a pure "question of law" under the basic concept of the U.S. judicial review.

Notably, cases considering WTO issues only account for a tiny percentage of the caseload of the CIT and CAFC, of which the thirteen cases cited herein would never represent an exhaustive inventory, but have already covered most WTO issues (to the best understanding of this author). Therefore, by articulating and analyzing these thirteen cases, the study of U.S. court jurisprudence on WTO law is more likely accomplished than the otherwise.

C. "Chevron Test" v. Charming Betsy Doctrine

Since cases considering WTO issues involve judicial review of a trade-related administrative action, the reviewing court (mostly, CIT and CAFC) would have to
apply a specific standard of review depending on the type of the reviewed administrative act and the particular issues for review. In this context, the reviewing court generally deals with questions of law, while most contested administrative acts are AD/CVD administrations decisions. This has somewhat narrowed the choices of the courts for the standards of review, let alone the dominant application of the “Chevron test.”

The “Chevron test” evolves from the Supreme Court decision in *Chevron U.S.A. v. Natural Resources Defense Council.*514 According to this approach, the court first determines “whether Congress has directly spoken to the precise question at issue.” Then, “if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguous expressed intent of Congress.”515 This is “prong one” of the *Chevron* rule. Where “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” And, as the court further explained, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” This is “Prong two” of the *Chevron* deference rule.516 Obviously, the “Chevron test” is designed for the review of legal issues. In practice, the test mainly applies to judicial review of AD/CVD administrative decisions. For other types of administrative decisions, such as those involving customs appraisal decisions, the reviewing court will likely apply the trial de novo standard.

With the rise of WTO issues in the U.S. courts under the *Charming Betsy* doctrine, this two-century-old canon of statutory construction is inevitably in play with in the above standards of review, mostly under the “*Chevron* test.” Some scholars even

515 Id. at 842-843.
view *Charming Betsy* as “an extension of *Chevron* to the international trade arena.”\(^{517}\) However, U.S. courts do not share this simple proposition. As survey of the WTO-related case law of the CIT and the CAFC indicates, where the Chevron test is established, the applicability of *Charming Betsy* will depend on whether “prong one” or “prong two” of this test is in actual operation.

Where the “prong one” Chevron rule is applied, the *Charming Betsy* doctrine will be excluded. This principle was originally introduced by the Supreme Court in *McCulloch*, stating that the *Charming Betsy* “does not purport to establish an absolute rule that the “law of nations” trumps inconsistent domestic law or governmental acts,” and therefore in the fact of a “clear expression” of congressional intent, the *Charming Betsy* canon is inapplicable.\(^{518}\)

In reviewing the cases considering WTO issues, the CIT and the CAFC have fully adhered to this principle. In *Turtle Island*, the Federal Circuit found it unnecessary to take into account the WTO report governing the same administrative regulation at issue. As the Court found, “[t]he intent of Congress is clear and the government’s current implementation of section 609(b) carried out that intent.” The Court then concluded, “because the meaning of section 609 is clear, we need not reach the question of how much deference we ought to accord the State Department’s interpretation of section 609, or whether the State Department’s interpretation would minimize potential conflicts with international trade agreement.”\(^{519}\) The Court reached the same conclusion in *Delverde v. United States*,\(^{520}\) where, by applying “prong one” of the *Chevron*, the Court found “the meaning of the statute is clear,” and then decided it did not need to “give *Chevron* deference to Commerce’s interpretation,” but “to determine whether Commerce’s methodology is in accordance

\(^{517}\) *Id.* at 229.

\(^{518}\) *McCulloch*, 372 U.S. at 21-22.


\(^{520}\) *Delverde* V. United States, 202 F. 3d. 1360, 1369 (Fed. Cir. 2000).
with the statute.” The Court then concluded that it was not. Referring to a WTO panel report that particularly addresses the contested administrative action in the instant case, the Court determined “we do not consider the relevance of that decision except to note it is not inconsistent with our holding.”

More often, the CIT and CAFC apply “Prong two” of the Chevron deference rule to cases considering WTO issues, since most of them concern the AD/CVD decisions of the Commerce Department (DOC) and the International Trade Commission (ITC), which often contain administrative interpretations of ambiguous statutory or regulatory provisions. Such ambiguity actually suggests a potential for “any other possible constructions,” which may serve as the threshold for the application of the Charming Betsy doctrine. In this context, the two principles seemingly fit well with each other. Nevertheless, their substance is quite different. The Chevron deference calls for deference to “reasonable” agency statutory interpretations, while the Charming Betsy doctrine requires the conformity of a questioned agency interpretation with international obligations. This raises the question of: what if the reviewing court finds that the statutory interpretations of the DOC to be reasonable, but also not in harmony with a WTO obligation? In such a situation, does Charming Betsy trump the Chevron by relying on the pertinent WTO obligation to determine the “reasonableness” of the agency interpretation concerned? Or, does Charming Betsy survive the Chevron deference? The courts’ answers to these questions vary from case to case.

During the GATT era, the courts already intended to insulate the Charming Betsy doctrine from the Chevron deference, particularly in reviewing the AD/CVD

524 Id. at 235.
determinations. In *Suramerica*, the Federal Circuit held that Commerce's reasonable interpretations of the law merited deference under *Chevron*, irrespective of the text of any related international trade agreement. Since the WTO came into being in January 1995, the federal courts have reiterated this rationale in a couple of subsequent decisions. In a recent CIT decision in *SNR Roulements v. U.S.A.*, the Court excluded the applicability of the *Charming Betsy*, holding that Commerce had showed sufficient "reasonableness" of its statutory interpretation for purposes of *Chevron* deference. Although acknowledging its "reviewing obligations" under both principles, the Court found on factual grounds that *Chevron* deference was a "paramount principle" owing to Commerce's prior decisions consistently affirming the test. The Court held this practice was "entitled to considerable weight" and sufficient to establish the reasonableness of the challenged agency interpretation. As the Court concluded, such a consequence was more important than the application of the Charming Betsy doctrine.

Off the bench, there are generally two contradictory positions towards the application of the *Charming Betsy* in the WTO context, specifically regarding the effect of this practice on "traditional *Chevron* deference-based resolution of appeals in the CIT and CAFC."525 One position represents the advocacy of this doctrine, usually from the perspective of the "petitioners," asserting that the *Charming Betsy* governs the "permissibility" of administrative interpretations "for the purpose of *Chevron*" and serves as a "threshold review for congressional intent;" the latter is at core of the *Chevron* deference. For this reason, "agency determinations that transgress the WTO/GATT are not ‘permissible’ for purposes of *Chevron,*" and therefore "merits no judicial deference."526

The other position represents the restraint of the *Charming Betsy*, usually from the perspective of the respondents (e.g., U.S. administrative agencies). The position takes

525 *Id.* at 236-237.
a historical perspective, viewing the Charming Betsy generally as applying to customary international law; the latter is “already part of the U.S. law” and self-executing in nature. It then questions if WTO agreements – being so complex and non-self-executing in nature – will qualify under this doctrine. It also raises the same concern about WTO reports, particularly considering the “failure of standard of review” in WTO dispute settlement. Under this position, the Charming Betsy is rather “a plausible and useful adjunct” to the Chevron deference rule. This submission appears to be in line with the position of the above-noted case law of the CIT and CAFC.

So far, discussions have focused on the incompatibility and even the contradiction of the Charming Betsy with the two-prong Chevron test, which implies little prospect for the application of the Charming Betsy before the U.S. courts. However, this does not represent the whole picture. Federal courts (particularly, CIT and CAFC) do apply the Charming Betsy in the WTO context, not only with the Chevron deference, but also in the absence of this standard of review.

In Hyundai, the Federal Circuit fully recognized the Charming Betsy doctrine, ruling that “Chevron must be applied in concert with” it when this doctrine is implicated. To this end, the Court particularly noted the statutory ambiguity, Commerce’s action to “fill the void” in this regard and the pertinent WTO provisions. As the Court found, “under the Charming Betsy doctrine, the Court must consider whether Commerce formulated its regulation consistent with Article 11.2 of the [WTO] Antidumping Agreement.” After confirming such consistency, the Court again gave predominance to the Charming Betsy, emphasizing that “unless the conflict between an international obligation and Commerce’s interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce’s regulatory authority under the Charming Betsy doctrine.” This actually has imposed a significant restriction upon

527 Seastrum, supra note 511, at 235-238.
the application of the *Charming Betsy*. The Court finally concluded that Commerce’s ‘not like’ requirement is consistent with U.S. obligations under Article 11.2 of the Antidumping Agreement.\(^{528}\)

In *Federal-Mogul*, the Federal Circuit found on factual grounds that the *Chevron* deference was not applicable, and instead resorted to other deference criteria set forth in the Administrative Procedural Act (APA). Meanwhile, the Court applied the *Charming Betsy* doctrine to address defendants’ allegation of GATT violation, holding this doctrine “particularly apt in this case.” Acknowledging Commerce was entitled to broad statutory discretion of choosing between the non tax-neutral and tax-neutral methodologies for antidumping purposes, the Court held the latter, which Commerce had actually chosen, “clearly accord with” the pertinent GATT obligations. This case represents a good example of combining the application of the *Charming Betsy* with that of the non-*Chevron* standards of review, under an implicit condition that the administrative statutory interpretations at issue are not in conflict, but in harmony with the pertinent GATT/WTO legal obligations.\(^{529}\)

In reviewing the above two CAFC decisions, they both involve the AD determinations by the Commerce Department, and both entail the application of the *Charming Betsy* doctrine in conjunction with a deferring standard of review imposed particularly upon the AD/CVD administrative decisions. Accordingly, it will be safe to conclude in that type of case, the *Charming Betsy* may survive the *Chevron* deference and other deference criteria. What about the situation in other types of trade cases, which may adhere to other standards of review than the *Chevron* deference and its analogies? To answer this one must review the CAFC decision in *Luigi*, where the Court reviewed *de novo* the U.S. Customs’ appraisal rulings “TD 85-111,” as promulgated “in order to implement an April 26, 1984 decision on the treatment of interest charges made by the

\(^{528}\) Hyundai, *supra* note 509, at 1344-1345.

Committee on Customs Valuation of the GATT." 530

In *Luigi*, the Federal Circuit declared "we need not determine whether *Chevron*, *Skidmore*, or any deference is applicable to TD 85-111, because ... the meaning of TD 85-111 reflects a proper interpretation of 19 U.S.C.§1401a based upon our *de novo* consideration of the issue." 531 In conducting such a *de novo* review, the Court gave full credit to the *Charming Betsy* doctrine, holding that "[a]lthough all the detailed criteria of TD 85-111 cannot be found in the explicit language of the statute, ... the statute must be interpreted to be consistent with GATT obligations, absent contrary indications in the statutory language or its legislative history." In this context, the court found "no such contrary indications" because "[t]he GATT approach is quite consistent with the statute." Specifically, the Court observed that the GATT not only had defined the pertinent appraisal standard as broadly as the statute had, but also had been "consistent with the policy of the statute." Moreover, the "GATT parameters" had provided a "uniform method" of appraisal, which was absence in the statute, but deemed by the Court as necessary for preventing the manipulation of importers. On these grounds, the Court determined to "construe the statute to make it consistent with GATT," and concluded that the interpretative rulings of TD 85-111 were "consistent with the statute" since they "set forth the same criteria" as the 1984 GATT decisions. 532 As this customs case indicates, the *Charming Betsy* may survive *de novo* review as well, under similar conditions to those in *Federal-Mogul*, that the contested administrative statutory interpretation is not in conflict, but in harmony with the pertinent GATT/WTO obligations.

**D. The Role of the Charming Betsy Doctrine: Some Reflections**

As WTO issues are more frequently raised before U.S. courts, the *Charming Betsy*

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530 *Luigi* v. United States, 304 F. 3d 1362, 1368-1369.
531 *Id.* at 1365.
532 *Id.* at 1368-1369.
doctrine will be increasingly in play with various standards of review of "questions of law" regarding trade-related administrative acts. As a survey of the CIT and the CAFC practice indicates, the linkage between this traditional canon of statutory interpretation and the above standards of review is "a mess." The applicability of the Charming Betsy can be diminished by a standard of review - such as the Chevron test - in cases like Turtle Island, Corus and SNR Roulement. It can serve as a supplement or aid to a standard of review, as evident in cases like Hyundai, Federal-Mogul and Luigi. Obviously, in the context of WTO law, the reviewing courts decide the fate of the Charming Betsy on a case-by-case basis, regardless of the possible impact of the chosen standards of review on the application of this doctrine.

To make it clearer, the Charming Betsy doctrine and the standards of review are parallel legal issues. They do not necessarily work together. They arise when WTO legal obligations come up for judicial review of trade-related administrative actions. They interact when both share the same thresholds for application, e.g., the "statutory ambiguity" criteria for the application of Charming Betsy and of the Chevron deference. However, at a fundamental level, each regime has its own operation rules. To establish the applicability of the Charming Betsy in the context of WTO law, at least two conditions should be satisfied as below, neither of them necessarily linked to standards of review.

First, the pertinent GATT/WTO legal obligations should account as those deriving from the "law of nations" as suggested by the Charming Betsy doctrine. Without doubt, provisions of WTO agreement would always fall within this category (See, in Part I, Chapter 3, "Nature of the Law of the WTO"). Take the CAFC decision in Hyundai for example, where the Court held that since the URAA was "intended to bring U.S. law fully in compliance with U.S. obligations under the Uruguay Round agreements," the WTO Antidumping Agreement (ADA) was "properly construed as

533 William, supra note 507, at 702. "Charming Betsy and Chevron require courts to examine federal statutes for ambiguity."
an international obligation of the United States." Accordingly, whenever a WTO treaty obligation is involved, it is possible to consider the application of the *Charming Betsy*.

In contrast, the same case is less likely to appear in WTO panel or Appellate Body reports, for WTO reports are hardly categorized as the above "law of nations." Even a WTO report adopted by the DSB, and capable of creating some "secondary legal obligations" binding upon the parties (WTO members) to a particular dispute, does not have *stare decisis* status in the WTO dispute settlement, much less *stare decisis* effects in the U.S. courts. This may explain why, as discussed later, arguments based upon the WTO's *EC-Bed Linnen* ruling have consistently been rejected by CIT and the CAFC in *Corus*, *Timken*, and *Koyo*, although the reviewing courts have not been explicit about it. Also, even when such secondary legal obligations happen to bind the U.S. as a particular party to the WTO dispute concerned, it remains unsettled that in ruling on the same issue, U.S. courts would, as suggested by Professor Jackson, treat those specific obligations as the same international law obligations as WTO treaty obligations. In practice, U.S. courts usually turn away from this issue by simply jumping into the substantial stage of ruling out the domestic effect of WTO reports. The latter situation will be elaborated in the next discussion.

Second, the U.S. statute concerned (noted as the "act of Congress" in the *Charming Betsy* doctrine) should be broadly framed – or, bluntly, ambiguous enough – to allow at least one possible statutory construction consistent with the pertinent GATT/WTO legal obligations concerned. This condition usually (but not always) implies the absence of a fundamental conflict of this statute with the relevant WTO obligations. As evident in above-noted case law of the CIT and the CAFC, the reviewing court would apply the *Charming Betsy* when the statute concerned is either silent on the issue (*Hyundai*), capable of granting broad administrative discretion (*Federal-Mogul*),

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534 *Hyundai*, *supra* note 509, at 1343-1344.
or with “no contrary indications” for a consistency with GATT obligations (Luigi).

This condition has restricted the effectiveness of the Charming Betsy doctrine in facilitating the WTO implementation in U.S. law, since it leads to the unlikelihood of challenging U.S. domestic law and practice by WTO law. Where the application of the Charming Betsy works (as evident in the above three cases), the reviewing court will recognize, in advance, the consistency of the agency statutory interpretation at issue with the pertinent GATT/WTO obligations. After all, the Charming Betsy is nothing more than “judicially crafted interpretative guides,” and will hardly be applied by the court in such a manner that the overall purpose of the statute concerned would be frustrated. Therefore, as the Federal Circuit observed in Koyo, “Charming Betsy … does not purport to establish an absolute rule that the “law of nations” trumps inconsistent domestic law or governmental acts.” Instead, it serves as an aid for the courts to clarify the intent of Congress through the assessment of the “reasonableness of agency statutory interpretations.”

It should be noted that the clear intent of Congress, which does not necessarily result in its conflict with the pertinent GATT/WTO obligations, has been a sufficient ground in itself for excluding the application of the Charming Betsy. Given the non-self-executing nature of WTO agreements, and also the primacy of U.S. domestic law over these trade agreements, when the intent of the Congress is already expressed, there will be no need to resort to WTO law. This may explain why Prong one of the Chevron test may work to displace the Charming Betsy, notably in Turtle Island. In that regard, what matters is the consequence of such exercise, not the exercise itself. This has, in turn, indicated the necessity of satisfying the second condition for the application of the Charming Betsy.

Nevertheless, one should never underestimate the role of the Charming Betsy doctrine. It not only allows WTO issues to be argued by private individuals before U.S. courts, but also enables (or, obligates) the courts to address these issues. When application of
the *Charming Betsy* is recognized, the pertinent WTO legal obligations would end up having nearly the same effect as those of self-executing treaty norms, without touching the same sensitive issues brought about by the latter. When the application of this doctrine is not recognized, the court would still, and usually must, interpret the WTO law concerned, since the parties have successfully brought WTO issues before the courts based upon this doctrine, regardless of the merits of this application. As discussed below, such an inevitable process of law application will have great implications for the effectiveness of WTO law under the U.S. legal system.

3. **The Position of the U.S. Courts towards WTO Law**

The previous discussion indicates that the applicability of the *Charming Betsy* doctrine is conditioned by the harmonization between U.S. domestic law and WTO law, and the actual application of the doctrine would, in turn, enhance such harmonization. In reviewing above-noted decisions of the CIT and CAFC concerning WTO issues, only the minority of them have recognized the application of the *Charming Betsy*. In the majority of these case laws, the reviewing court would have to decide, and usually has already decided, whether WTO treaty obligations (including those specified by the particular WTO panel and Appellate Body reports) would have such domestic effect under the U.S. legal system, that they may trump the U.S. law and practice.

From the beginning, federal courts have taken a firm position of excluding the possibility of WTO law overriding U.S. domestic law or invalidating U.S. legal practice. The courts base such a position on the non-self-executing nature of WTO agreements as expressly intended by the Congress through the URAA. To this end, they customarily quote Section 102(a) of the URAA, which provides for the primacy of U.S. domestic law over any provision of WTO agreements, as well as over "the
application of any such provision to any person or circumstance." The latter usually refers to WTO panel and Appellate Body reports ("WTO reports"). In above-noted federal cases concerning WTO issues, the courts not only stress this position when rejecting the application of Charming Betsy (e.g., Curos and Turtle Island), but also insist on the same position when allowing the Charming Betsy to apply to the assessment of U.S. law and practice in light of WTO law (e.g., Hyundai and Federal-Mogul).

Regardless of the applicability of the Charming Betsy doctrine, a trend shows that more and more WTO-related federal cases have focused not on WTO treaty provisions, but on the adverse reports of WTO panels and the Appellate Body. In most of these cases, WTO issues arise before the federal court (usually, the CIT or the CAFC) because a WTO panel or the Appellate Body has ruled against the U.S. on the same or similar action of the U.S administrative agency as challenged before the court. Over the past decade, cases of this kind have been growing sharply. Only a few of them refer to an adverse WTO report covering the same underlying administrative decisions as the reviewing court does, such as Hyundai and Turtle Island. In more of these cases, the agency actions targeted by the WTO tribunals are just similar to those heard by the courts. Typical examples in this regard are the decisions of the CAFC in Corus, Timken, and Koyo, where the Commerce Department’s “zeroing” methodology in calculation of the antidumping duty were repeatedly alleged to be inconsistent with the interpretations of the WTO Appellate Body in its EC-Bed Linen decision.

Theoretically, the above two situations have raised two separate legal issues in the context of WTO law. Where the court reviews the same administrative action as the one covered by an adverse WTO report, it generally faces the issue of the res judicata force of that WTO report in U.S. law. Where the contested agency action before the reviewing court is similar to the one addressed by the WTO tribunal, the court

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536 Husisian, supra note 522, at 470.
generally faces the question of the *stare decisis* status of the WTO report concerned in
U.S. law. In practice, however, U.S. courts rarely distinguish these two issues from
each other, except for the CIT decision in *Corus* case, where the Court did point out
that "the common law concept of *state decisis* does not expressly apply to WTO
rulings." To rule on the domestic effect of WTO reports (and equally, WTO treaty
provisions), the courts usually rely on factual findings, U.S. statutory provisions, and
their own long-standing practice (U.S. case law). Since part or all of these grounds
have been sufficient to deny the binding force of adverse WTO reports on U.S law
and practice, there seems no need to elaborate the distinction between the above
issues. In most occasions, the courts do not raise these issues at all, for in any event
the courts have equally taken a firm position of denying the domestic effect of WTO
report, and excluding their role in "striking" the challenged agency interpretations.

Despite a firm position regarding WTO law, U.S. courts have carried out nuanced,
sophisticated policies and strategies for coping with WTO issues, especially the
domestic effect of WTO reports. To the reviewing court, the first step is always to
avoid these issues on factual grounds. This approach is particularly workable in cases
where the challenged administrative action is not identical, but similar to the one
covered by the pertinent WTO report. After all, it would always be easy to find a
difference from a similarity, so as to make the issue irrelevant to the instant case. This
recalls a group of decisions of the CAFC on the Commerce Department’s "zeroing
methodology," as challenged simultaneously by respective parties on the ground of
the WTO Appellate Body report in *EC-Bed Linen (EC-Bed Linen* decision). In
*Timken*, the Federal Circuit ruled that the *EC-Bed Linen* decision was "not ...
sufficiently persuasive to find Commerce's practice unreasonable" simply based upon
two factual distinctions between this WTO report and the present case, especially the
distinction that the WTO ruling "does not involve the U.S." The Court reiterated
this rationale in *Soyo*, holding that the *EC-Bed Linen* decision is not applicable, for

538 *Timken, USCAFC, supra* note 512, at 14.
the WTO report neither involved the United States's specific practice, nor dealt with an “administrative review” of a prior “antidumping investigation.” In *Corus*, the Court not only rejected the *EC-Bed Linen* decision for the same reasons cited in *Timken*, but also excluded another WTO Appellate Body report, *Corrosion-Resistant Steel* decision, for its absence of “a finding regarding the challenged zeroing methodology.”

This factual-finding strategy turns out to be less workable in a CIT or CAFC appeal parallel to a WTO proceeding, since both would deal with the same agency decision. In such situations, the courts usually base their resisting position on WTO law upon U.S. statutory provisions and their own prior practice (U.S. case law). The basic statutory grounds come from the URRAA, together with the SAA. In *Turtle Island*, as Federal Circuit Judge Newman particularly notes in his dissent, the SAA states that decisions of WTO panels and AB “have no binding effect under the law of the US and do not represent an expression of US foreign or trade policy.” Since this section of the SAA has explicitly indicated Congress’s intent to reject any controlling status of WTO reports on U.S. law and practice, it has become one of the courts’ most favorite statutory sources in support of their position, towards not only the *res judicata* force of WTO reports, but also their *stare decisis* status in U.S. law. *Corus* is a “zeroing” decision of the CIT. In *Corus*, after finding that the instant case was not identical, but “more similar to *Bed Linen*” than other zeroing cases, the Court, by citing this section and its analogies in the SAA, concluded that “panel reports do not provide legal authority for federal agencies to change their regulations or procedures.”

Another statutory ground the courts heavily rely upon concerns the “separation of powers” among U.S. constitutional institutions, notably in Section 129 of the

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539 Clement, *supra* note 479, at 8.
542 *Corus*, CIT, *supra* note 537.
As the courts observe, “Congress has enacted legislation ... [and] authorized the USTR ... to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation," so that “the response to an adverse WTO panel report is the province of the executive branch, and more particularly, the Office of the USTR.” In this regard, the courts also refer to the SAA, such as “[i]f a [WTO] report recommends that the U.S. change federal law to bring it into conformity with a Uruguay Round Agreement, it is for the Congress to decide whether any such change will be made.”

Due to Congress’s constitutional concerns as above, U.S. courts have consistently rejected granting WTO reports any controlling status over U.S. law and practice. Notably, in Corus, the Federal Circuit made it clear that “we will not attempt to perform duties that fall within the executive province of the political branches, and we therefore refuse to overturn Commerce’s zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.” Consequently, the Court regarded the WTO Appellate Body’s Softwood Lumber decision “as nonbonding because the finding therein was not adopted as per Congress’s statutory scheme.” In Turtle Island, as Judge Newman stressed in his dissent, the Court “is not authorized to evaluate a pragmatic political accommodation” and is, “like the executive branch, ... bound by the law as congress enacted it.” Accordingly, the “salutary developments” made by the pertinent WTO report “do not relieve the judicial obligation to implement the statutory text as Congress intended and enacted it.”

Interestingly, on the same statutory ground, the courts can endorse (even indirectly)

543 19 USC § 3533(f), 3538. – See Corus.
544 Corus, CAFC, supra note 540, at 9.
545 Hyundai, supra note 509, at 1343.
546 Turtle Island, CAFC, supra note 519, at 36. See, “Dissenting.”
547 Corus, CAFC, supra note , at 540.
548 Turtle Island, CAFC, supra note 519, at 37.
the adverse WTO report, although such cases are rare at this moment. In those situations, the adherence of the reviewing court to the WTO report concerned is conditioned by the intent of the Executive Branch — usually evident in its administrative actions — to comply with it. In George E. Warren Corp. v. U.S. Environmental Protection Agency, the D.C. Circuit recognized an agency's discretion to take an adverse WTO report into account for its statutory interpretations, noting that the Executive Branch already determined that compliance was appropriate. In Delverde, the reviewing court acknowledged the adverse WTO report for its consistency with the rulings of the court itself, as the latter required the revision of the challenged agency action in accordance with the Congress's "true" intent.

It should be noted that for above the constitutional concerns, the courts generally feel reluctant to determine what role should be accorded to WTO agreements and reports. This reluctance may explain why the courts always give priority to the avoidance of the issues on factual grounds. As mentioned before, the courts have adopted this strategy for their treatment of WTO reports. More significantly, the courts have treated WTO agreements in the same way. In a recent CIT decision, Usinor v. United States, the Court held the issue to be moot because U.S. law and the WTO Antidumping Agreement were not in conflict on the issue, and therefore "avoided the larger issue." In sum, concerns of the courts about the potentials for disturbing their constitutional relations with other government bodies have become the major policy consideration behind their firm position of rejecting the binding force of WTO agreements and reports on U.S. law and practice.

To support their position on WTO agreements and reports, the courts also rely on their long-standing practice dating back to the GATT area. These cases actually have been

549 Clement, supra note 479, at 13.
550 Delverde, CAFC, supra note 520, at 9.
codified by most of the above-noted URAA provisions. Among the most-cited are the
decisions of the CAFC in *Suramerica, Mississippi*, and *Footwear*, all three
considering GATT panel reports. In *Corus*, the Federal Circuit cited *Suramerica*,
affirming that “neither the GATT nor any enabling international agreement outlining
compliance therewith ... trumps domestic legislation; if U.S. statutory provisions are
inconsistent with the GATT or an enabling international agreement, it is strictly a
matter for Congress.”552 In *Hyundai*, the Court cited the principles “espoused in
*Footwear*,” holding that “[a]s an initial matter, the WTO report itself has no binding
effect on the court.” The Court observed particularly that Congress had clearly
codified these principles “as part of the URAA.”553 In *Turtle Island*, Judge Newman
cited *Suramerica* and *Mississippi* in his dissent, asserting that “although the
government appears to rely on the WTO ruling as requiring United States (and
judicial) support of the current Guidelines, neither we nor the State Department has
authority to rewrite the statute.”554

In recent years, the courts have increasingly relied on more recent cases coming up
after the creation of the WTO, especially those considering WTO reports. Notably, in
the CIT decision in *Corus*, the Court cited both *Footwear* and *Hyundai*, holding that
“[a]s this court frequently recognized, WTO decisions are not binding upon
Commerce or the court.” Therefore, from an overall perspective, by referring to their
prior practice since the GATT era, the courts have reinforced their URAA-based
statutory grounds for excluding the binding force of WTO agreements and reports on
U.S. law and practice.

Discussions so far have indicated that, to clarify the domestic effect of WTO law, U.S.
courts mainly rely on domestic legal sources, namely, statutory and precedential
authority, and thus adhere to the “intent” of the U.S. Congress as expressed in these

552 Suramerica, *supra* note 456, at 667.
553 Hyundai, *supra* note 509, at 1343.
554 Turtle Island, CAFC, *supra* note 519, at 37.
domestic sources. In addition, the courts also resort to the WTO reports at issue, considering if, within the WTO legal system, the contents and legal status of these reports, as well as the “intent” of WTO tribunals possibly expressed there, have provided for some indications regarding their domestic legal effect. In the CIT decision in Corus, the Court particularly addressed the stare decisis status of WTO rulings, holding that “it appears that WTO decisions are not binding upon the WTO itself. The common law concept of stare decisis does not expressly apply to WTO rulings. As a result, WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved. They are not binding upon other signatory countries or future panels.” Here, the Court implies that since the effect of WTO decisions is limited to the particular countries involved, neither such an effect will reach the U.S. if it is not a party to the WTO dispute concerned, nor will it directly confer any private rights and obligations towards under U.S. legal system. Thus, the Court has based its rejection of the pertinent WTO report on its legal status in international law (WTO law).

In another decision, the CIT has based the same position on the substance of the issues addressed by the WTO report concerned. In Koyo, the Court refused to determine whether the EC’s “zeroing” methodology as set forth in the WTO’s EC-Bed Linen decision, and the alleged U.S. agency decision were the same, for only the Ministerial body of the WTO – not the courts in the U.S. – could interpret an Appellate Body report. Here, the Court seemed to realize the parallel proceedings on both international and domestic planes, and tried to avoid the issue based upon its understanding of the “exclusive authority” of the WTO.

In contrast, the CAFC has based a similarly resisting position regarding the pertinent WTO report on the “limited authority” of the WTO tribunal, as specified by the WTO itself in that report. In Hyundai, the Federal Circuit noted that the WTO panel had

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555 Corus, CIT, supra note 537, at 18.
556 Clement, supra note 479, at 7.
acknowledged its own restrictive authority to intervene into domestic sphere.\footnote{Hyundai, \textit{supra} note 509, at 1334.} As the Court observed, although the WTO panel rejected Commerce’s statutory interpretation in question, it however “declined to suggest that the U.S. should act to revoke” the challenged agency decision. “Rather, the panel concluded that the U.S. has a range of possible options to implement its recommendation.” Here, the Court has based the position on the expressed judicial restraint of its WTO counterpart.

In the aggregate, U.S. courts, especially the CIT and the CAFC, have consistently taken a firm position of rejecting the binding force of WTO law on U.S. domestic law and practice. They base their position mainly upon domestic statutes and case law, but also resort to the WTO legal regime occasionally. Although such a resisting position is in accordance with the intent of the U.S Congress buried in the URAA, it does not suggest that WTO law – consisting of WTO agreements – is entirely irrelevant under the URAA. Notably, Section 102(b)(2) of the URAA grants the U.S. the standing to challenge state law on the ground of WTO law. Under this provision, the reviewing court may take judicial notice of a WTO decision, considering the views of the WTO tribunal as persuasive sources.\footnote{H.R. Doc. No. 316, at 659.} More clearly, as the Federal Circuit indicates in \textit{Hyundai}, denying the binding force of WTO panel reports “is not to imply that a panel report serves no purpose in litigation before the court. To the contrary, a panel’s reasoning, if sound, may be used to inform the court’s decision.”\footnote{Hyundai, \textit{supra} note 509, at 1343.} According to both these statutory and precedential sources, WTO reports are nothing more than the persuasive sources in U.S. law. This means, however persuasive these WTO decisions can be, it would be very difficult, if not impossible, for U.S. courts to change their consistently indifferent position towards them.

\section*{IV. \ Prospects and Conclusions}
The U.S. courts' passive position towards WTO law has raised more concerns from the academic and practical circles. Trade practitioners, particularly, call for the bench to cease its escaping strategies and take a more positive approach to this growing body of international trade rules. Particularly, as they observe, recent years have witnessed "a sharp growth of U.S. case law noting or citing WTO obligations or the decisions of WTO panels," and this trend will continue due to three circumstances as follows. 560

First, the "relative specificity" of the WTO – versus its predecessor GATT – in addressing the highly "technical topics" of trade, and the virtues of WTO panels – versus its GATT counterparts – in efficiently specifying and enforcing WTO obligations, have fostered the utilization of the WTO dispute settlement process and leading to a "much higher potential" – than the otherwise – "for there being an on-point WTO ruling" parallel to a U.S. court decision. 561 As the "free trade inclinations" of the WTO tribunal increasingly come up in conflict with the "more protectionist" agency determinations, more and more parties are pursuing simultaneous appeals (i.e., direct appeals to the CIT and lobbying governments to bring WTO challenges). Consequently, the overlap of two-level dispute settlements would occur more directly. As simultaneous appeals are often brought before the CIT and the WTO, there has been a growing potential "for differing outcomes in national and WTO appeals," which calls for U.S. courts to clarify the issues of those competing outcomes. 562

Second, given all its virtues and efficiency, WTO dispute settlement becomes more often the "end-point of trade disputes." 563 Therefore, for practical purposes, trade lawyers in domestic proceedings are anticipating from the beginning "the potential for

560 Husisian, supra note 522, at 470.
561 Id. at 465.
562 Id. at 470.
563 Id. at 466.
a WTO case,” and trying to make “the most favorable WTO-type arguments” before U.S. courts, in case the final results are challenged in the WTO forum. With these efforts, they have been bringing more WTO issues before the U.S. courts.

Finally, the application of the Charming Betsy doctrine by the U.S. courts – even on an occasional basis – offers great potential “for WTO decisions influencing the resolution of appeals in the CIT and CAFC;” the doctrine has itself secured the standing of private individuals to challenge U.S. domestic law and practice on the ground of WTO law, and thus increased their opportunities to raise WTO issues before U.S. courts. In the latter situation, even the courts rule out these issues. They have at least addressed them, often by applying specific WTO legal obligations. This process of “legal application” has itself had significant implications for domestic implementation of WTO law.

No doubt, neither the expansion of WTO disputes nor that of U.S. trade cases is likely to slow down. The trend suggests an even greater potential for both WTO tribunals and the U.S. trade courts hearing appeals of the same or similar agency determinations and being “increasingly on a collision cause with one another.” It also imposes the “potential for the WTO arguments being heard in every appeal” brought in U.S. forum. Accordingly, it is highly expected that the U.S. courts will more frequently encounter WTO issues, and have to take on the task of determining the domestic effect of WTO agreements and reports on U.S. law and practice.

So far, subject to the intent of the Congress buried in the URAA, U.S. courts have consistently resisted the domestic effect of WTO law. Even noting the URAA is presumed to comply with the WTO Agreements, the courts insist that they should follow what Congress has done, not what it thinks or assumes. In reality, the intent of

564 *Id.* at 470.
565 *Id.* at 469.
566 *Id.* at 470.
U.S Congress, which is driven by state interests (e.g., sovereignty concerns), rather than international commitments of the U.S. — may not guarantee U.S. law would always reflect the will of international community, even though the latter turns to be legitimate under WTO legal regime. The Charming Betsy doctrine may allow the courts to hear the WTO arguments and interpret WTO rules (on limited occasions), but will never enable the courts to make WTO law trump U.S. law or practice. The courts may acknowledge or endorse the adverse WTO decisions, but only within the intent of Congress or the Executive Branch as authorized. To U.S courts, WTO obligations can be very persuasive — but never binding upon them.

Given the courts’ rigid position toward the domestic effect of WTO law, in the foreseeable future, WTO law will still “be cast in a supporting rather than a starring role in domestic appeals of trade decisions.” Here is the reality: the courts are continuing to reject the effect of WTO law under the U.S. legal system, or are even trickily avoiding the issue, while trade practitioners and scholars are increasingly airing their repudiations and frustrations. Nevertheless, the courts’ current position has been both acceptable under the WTO regime, and in accordance with the intent of the U.S. Congress. One commentary has asserted that the courts’ “restrictive view of international law expressed in Suramerica and its progeny has little support in legal doctrine [Charming Betsy] or in constitutional history.” Given the analysis of the URAA and the Charming Betsy in the present Chapter, that perspective appears to be one-sided and flawed. As understandable as it should be, unless Congress changes the issue and indicates otherwise, it is unlikely that the courts will depart from their longstanding practice in how they treat WTO law. This has been the case with Suramerica, for Congress lately modified the agency action at issue to comply with the WTO requirements.

\[567\] Id.

\[568\] William, supra note 507, at 691-693.
CHAPTER 2 IMPLEMENTATION OF WTO LAW UNDER THE EUROPEAN COMMUNITY LEGAL ORDER

I. European Community (EC) Law and the Internal Legal Effect of International Trade Agreements under the European Community (EC) Legal Order

The European Community (EC) remains the central element in a growing European Union (EU). The emergence of the EC and subsequently the EU has been premised upon a series of founding treaties that constitute the primary sources of EC/EU law. Today, the Community (EC) is the common label for three existing European Communities, of which each has its own founding Treaty as follows: the Treaty of Paris 1952 that created the European Coal and Steel Community (ECSC); the two Treaties of Rome in 1958 that created, respectively, the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). In November 1993, the Treaty of Rome for the EEC was officially renamed the Treaty establishing the European Community (the “EC Treaty”), and replaced the EEC with the EC, while the ECSC and EURATOM remains in existence.569 At the same time, the Maastricht Treaty on European Union (TEU) entered into effect, officially creating the European Union.570

The TEU establishes a “three-pillar” structure of the Union, under which the three European Communities (now commonly labeled the “EC”) constitute the first pillar (“European Community pillar”), with the other two pillars relating to a Common Foreign and Security Policy (CFSP) and Cooperation in the Fields of Justice and

570 RALPH H. FOLSOM, EUROPEAN UNION LAW IN NUTSHELL 8 (2005).
Home Affairs (JHA), respectively. Being part of the EU, the EC pillar represents an "institutionally sophisticated and intricate model of cooperation" among the European states, deemed a "traditional, developed EC system" that is "not only intergovernmental but also quasi-federal" in nature.\(^{571}\)

This feature is also reflected in the legal structure of the EU, where there is a European Community (EC) law at the core of an evolving "European Union (EU) law" or simply, "European law."\(^{572}\) There is also "non-EC EU law," emerging from the other two pillars of the Union.\(^{573}\) Given the different nature of the three pillars at present, only the EC pillar amounts to a well-established legal order (EC legal order), with its origin in the EEC - "a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community."\(^{574}\)

As a result of the "institutional merges" between 1957 and 1967,\(^{575}\) legislative, administrative and judicial processes of three European Communities are now undertaken by a single set of European institutions, namely, the Council of the European Union, the Parliament, the Commission and the Court of Justice of the European Communities (attached by the Court of First Instance in 1989).\(^{576}\) This,

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\(^{571}\) WEATHERILL, supra note 569, at 6-9.

\(^{572}\) FOLSOM, supra note 570, at 34-35.

\(^{573}\) WEATHERILL, supra note 569, at 11.

\(^{574}\) Case 6/64, Costa v. ENEL, 1964 E.C.R. 585.


\(^{576}\) WEATHERILL, supra note 569, at 10. "There is a disjoint façade to the European Union. The nature of each of three pillars is different. The Council seems to be the only institution which is in any significant sense a institution of the whole Union. In November 1993, ... renamed itself the Council of
inter aliar, has contributed significantly to a Community law (EC law) having grown into “the most institutionally and constitutionally sophisticated species of law created within the European Union.” In contrast, the second and third pillar of the EU structure do not share the same “legal integrity” as the EC pillar has, especially in terms of their “institutional deficiency” in performing the same legal functions as the EC pillar does.

Accordingly, EC law is not co-terminous with EU law, since the latter represents a legal structure evolving towards “a unified EU legal order” that is not yet completed. On the contrary, the law stemming from the traditional EC architecture bears most of the constitutional and institutional characters of a quintessential legal system, and therefore has become a well-developed legal order comparable to any national legal system. Consequently, under this EC legal order, EC law is capable of being supreme and having direct effect, to the same extent as it is within the domestic legal system of Member States (the issue is discussed as below). It is, in a large sense, with such supremacy and the direct effect nature that EC law has distinguished itself from “non-EC EU law.”

Generally, EC law has four major sources of law:

(1) Founding treaties, especially the EC treaty subsequently amended by the Amsterdam Treaty 1999 and the Nice Treaty 2003;

(2) International agreements, especially those concluded by the Community or by it and the Member States with third countries or international

the European Union. The Commission, Parliament, and Court remain institutions whose principal role is within the European Community pillar.”

577 Id. at 33.
578 Only the Council of European Union amounts to the institution of the EU. The Commission, the Parliament and the Courts are all institutions of the EC system.
579 WEATHERILL, supra note 569, at 11-12.
580 Id. at 99.
organizations, e.g., association agreements, cooperation agreements, trade agreements, etc.;

(3) Secondary legislation, which includes, but is not limited to the binding legal instruments (regulations, directives and decisions) and the non-binding legal instruments (resolutions, opinions), both adopted by the EU council, the Parliament and/or the Commission pursuant to the pertinent provisions of the founding treaties.

(4) Case-law, mainly referring to decisions of the Court of Justice (ECJ) and the Court of First Instance (CFI) of the European Communities, since they both undertake to “ensure that Community law is respected in the interpretation and implementation of the founding treaties.”

Among the above sources the founding treaties are referred to as the primary law of the EC, and the other three categories are collectively regarded as the secondary law of the EC. In addition, EC law is also supplemented by national legislation of the Member States as enacted “under regional direction” of the EC institutions, as well as by national judicial decisions based upon advisory rulings from the ECJ.

With the emergence of EC law, the question inevitably arises regarding its supremacy over the national law of Member States (“hierarchical status” of EC law), and, subsequently, its direct effect under the domestic legal system of these Member States. Without an explicit reference in any founding treaty of the EC, the issue was merely left to European courts to resolve. Through its long-standing practice dating from the 1960s, notably in the case of Costa v ENEL (for the supremacy of Community

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581 Europa – Eur-lex – Process and players (this is rom the official website of the EU institutions, representing the official position of the EU, including their perspectives of the legal sources of EU/EC law), at: http://europa.eu.int/eur-lex/lex/en/droit_communautaire/droit_communautaire.thm.
582 FOLSOM, supra note 570, at 34-35.
583 Id. at 77.
and of Van Gend en Loos (for the direct effect of Community law), the European Court of Justice (Court of Justice or, ECJ) has well established the supremacy and direct effect of EC law. According to the Court, both these fundamental principles are implicitly contained in the EC Treaty, particularly in the object of this treaty, since “it would be impossible to create the structure envisaged by the [founding] Treaties unless the law is supreme and directly effective.”

The supremacy principle has imposed a significant duty – as reviewable by the ECJ – upon the Member States to repeal or amend any conflicting national law (even the national constitution). In practice, the ECJ has invalidated numerous national laws as in conflict with EC law. The principle of direct effect, on the other hand, is observed “in many ways” as “an application of the principle of the supremacy of Community law over conflicting national law,” under which relevant provisions or measures stemming from EC law “are capable of generating legal rights” for individuals “to enforce against their government” before their national courts and tribunals. Moreover, from the perspective of the internal EC legal order, the direct effect of these EC provisions or measures refers to their ability to generate legal rights for individuals to enforce against the activities of European institutions, mostly before the European courts. This is particularly the case with international agreements concluded by the Community with the third countries or international organizations. In both these connections, the principle of direct effect aims at the invocability of the EC provisions or measures at issue.

Originally, the Court of Justice applied the principle of direct effect only to provisions of the EC founding treaties. Now, the doctrine is extended to cover various secondary

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584 Costa v. ENEL, supra note 574.
586 WEATHERILL, supra note 569, at 99.
587 FOLSOM, supra note 570, at 78.
588 Ruttley, MacVay & George eds., supra note 274, at 132-134.
laws of the EC, including directives, regulations, decisions and certain types of international agreements, with certain conditions imposed that are developed by the European Courts.589 These criteria for direct effect concern the “legal perfect” of the EC provisions and measures at issue, requiring them to be “clear, unconditional, clearly intended to benefit individuals, and independent of further Member State implementing action.”

International agreements are the so-called “external relations agreements” within the Community legal order, falling within the category of the secondary laws of the EC. According to Article 300(7) of the EC Treaty, they “shall be binding on the institutions of the Community and on Member states.”590 This provision actually reflects the general principle of pacta sunt servanda, mandating both the Community and Member States to be bound internationally by their commitments under these agreements. However, the EC founding treaties keep silence on the “direct effect” of these agreements within the internal legal order of the Community, leaving the issue to be addressed either by the individual agreement itself or, by the proper European court.591

Under the jurisprudence of the Court of Justice, external relations agreements generally amount to acts of the EC institutions, and therefore form “an integral part of Community law.”592 This perspective indicates a strong tendency to grant the direct effect to any international agreement so far as it is “duly concluded” in accordance with the relevant founding treaty of the EC.593 In practice, however, the European Courts decide the issue (especially its invocable dimension) on a case-by-case basis,

589 Id. at 134-135.
590 Article 300(7) (ex 228) of the EC Treaty.
591 Ruttley, MacVay & George eds., supra note 274, at 132.
weighing the extent to which the agreement concerned may satisfy the Courts’ criteria for direct effect (as noted above). In this context, the Courts have developed a two-tier test. At the first tier, the Courts particularly assess the “nature, purpose and economy” of the given international agreement as a whole, looking at the “wording, objectives, the role of reciprocity” of the given agreement, and “the structure and flexibility of its system, including the dispute settlement.” Only when the given agreement meets the required standards will the Courts embark on the second tier, and similarly examine the “context, object and purpose” of the specific provisions at issue. This approach has been widely used by the Courts to determine the internal legal effect of international trade agreements under the EC legal order.

A particular type of the EC’s external relations agreements, “international trade agreements” are multilateral agreements “on customs and trade policies concluded with non-member countries, groups of non-member countries or within the framework of international trade agreements,” at the core of which are the GATT 1947 and subsequently, WTO agreements. Parallel to this category are two types of regional trade agreements, namely, “association agreements” and “cooperation agreements,” both of which involve regional economic cooperation of the Community “with the overseas countries and territories” in general and in specific. Within the

595 Griller, supra note 593, at 444-445.
596 Broek, supra note 594, at 412.
597 Ruttley, MacVay & George eds., supra note 76, at 132. For example, in an early case on the denial of direct effect of GATT provisions (International Fruits), the ECJ took into account the “purpose, spirit, general themes and terms” of the GATT provisions.
599 FOLSON, supra note 570, at 281-285. With regard to WTO agreements, distinction has been drawn between the GATT as concluded exclusively by the Community, and the “mixed agreements” (GATS and TRIPS), as concluded by both the Community and its Member States.
600 See, supra note 598.
Community legal order, the legal effect of regional and international trade agreements is mostly of the discretion of the European courts. The Courts, in a long line of their cases, have treated these two categories of trade treaties differently, especially in terms of the potential for granting them direct effect.

As noted before, ever since the case of *van Gend en Loos*, the Court of Justice has established the “direct effect” and “invocability” of “programmatic EC norms.” In a subsequent case, *Costa v ENEL*, the Court further established the predominance of EC law “over national law” based upon the doctrine of “primauté.” In further developments in this regard, the Court has consistently granted the direct effect (*effet utile*) to regional trade agreements (particularly, EFTA Agreement and Associated Agreements). This practice has, by allowing individuals to invoke these regional trade provisions before the European courts other than any existing international tribunal, greatly enhanced the market access rights of foreign exporters into the Community. 601

As for multilateral trade agreements, the European courts nevertheless present a “stark contrast” to the above practice towards the *effet utile* of regional trade agreements. 602 During the GATT era, the Court of Justice consistently denied the direct effect of GATT provisions within the EC legal order. The Court originally introduced this position in the case of *International Fruit Company* in early the 1970s. 603 Due to this landmark case, the GATT 1947 was “an integral part of the Community legal system” and binding on the EC, but was incapable of conferring rights on private parties before national courts. 604 This reasoning was reaffirmed by the Court in a number of

602 Id.
604 Philip Ruttley, Iain MacVay & Carol George eds., *supra* note 274, at 137.
subsequent cases, notably in *Germany v Council*, which developed two main arguments for denying the direct effect of GATT 1947: (i) the GATT treaty was considered to be "an instrument of negotiations rather than adjudication" that has "great flexibility"; and (ii) provisions of the GATT were "not sufficiently precise for the purpose of direct effect." As a result, the Court held that the GATT 1947 did not meet the criteria for assessing the legality of EC law.

Meanwhile, however, the Court of Justice also developed two major exceptions to its general position of denying the direct effect of GATT rules. In *Nakajima* case, the Court took recourse to the GATT rules on anti-dumping because the EC instrument at issue sought to implement these GATT rules. This "*Nakajima* exception" is also termed as the "principle of implementation" for the direct effect of GATT/WTO treaty law. In *Fediol*, since the contested EC legislation – the 1984 "New Instrument" (now the "Trade Barrier Regulation") for assessing the trade practice of the EC's trading partners – explicitly referred to the GATT rules for interpretation, the Court took recourse to those rules for interpretation purposes. This "*Fediol* exception" is also termed the "principle of interpretation" for the direct effect of GATT/WTO treaty law. In a subsequent case, *Commission v Germany*, the Court construed "in great detail" the GATT International Dairy Arrangement for assessing the legality of the contested national measure of a Member State, based upon the above exceptions.

With the advent of the WTO, the GATT 1947 is incorporated into WTO agreements. In considering WTO treaty provisions under the EC legal order, the European courts have continued their practice of the GATT era. This will be elaborated in succeeding discussions.

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606 Cottier & Schefer, *supra* note 328, at 102.
609 Eeckhout, *supra* note 311, at 91.
II. The Internal Legal Effect of WTO Agreements as Specified by the EC Treaty-making Institutions

On January 1st, 1995, both the European Communities (EC) and 15 Member States joined the WTO, and have adhered to WTO agreements ever since. As noted before, WTO agreements are at the core of “international trade agreements,” the latter of which fall into the EC’s broad category of external trade law governing the EC’s external commercial relations, and particularly concerning its “common commercial policies.” Since WTO agreements are essential parts of the EC’s international agreements, their internal legal effect under the EC legal order is mainly left to the discretion of the European Courts. From the outset, however, it is vital – if not mandatory – to take into account the intent of the EC treaty makers in this regard.

For most international trade agreements, their treaty-making procedures are generally set forth in Article 300 of the Treaty of Rome. According to this provision, it is the EC Commission that undertakes to propose and then receive authorization from the EC Council to open negotiations with third countries or international organizations; it is in turn the Council that, based upon the “tentative agreement” reached by the Commission, undertakes to conclude or ratify this agreement after consulting the Parliament. In this treaty-making process, the EC Council plays a determinant role through its voting system; the latter has been further consolidated by the Treaty on European Union (TEU) since November, 1993. Also, under the TEU, the EC Council is renamed the “Council of the European Union” (EU Council), and becomes

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611 Today, with the growth of the European Union, Member States of the EU have reached 25, all of which are WTO Members in their own rights. Given its “incomplete” legal order, the EU in itself has not yet qualified the membership of the WTO. Still, it is the EC, as an integral legal order, that plays the role within the WTO, especially in terms of its treaty-making authority. In this sense, when the WTO affairs are involved, it is not the EU but the EC that should be referred to.

612 FOLSOM, supra note 570, at 262-263.

613 Id. at 281-282.
“the only institution which is in any significant sense an institution of the whole Union.” Nevertheless, treaty-making is by no means the domain of the EU, since other EC institutions (especially the Commission and the Parliament) have retained their principal role within the Community legal order. This may be among the major “legal reasons” for the EU to be “officially regarded as the EC” in regards to WTO affairs, since this set of treaty-making procedures equally applied to WTO agreements.

During the negotiation and conclusion of the WTO agreements, the EC treaty-making institutions expressly indicated their intent to reject the direct effect of these comprehensive trade treaties, with far-reaching impacts. In the EC Council Decision 94/800 on the Conclusion of the WTO Agreement, the EC Council, “concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations,” asserted that “by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.” The rational behind the EC Council’s above position was revealed by the EC Commission in its Explanatory Memorandum to draft the above Council Decision as follows:

“[I]t is important for the WTO Agreements and its annexes not to have direct effect, that is on whereby private individuals who are natural or legal persons could invoke it under national law. It is always known that the US and many other of our trading partners will explicitly rule out any such direct effect. Without an express stipulation of such exclusion in the Community instrument of adoption, a major imbalance would arise in the actual management of the obligations of the Community and other countries.”

As noted before, “council decisions” are secondary legislation of EC law. In contrast,

614 WEATHERILL, supra note 569, at 10.
616 Philip Ruttley, Iain MacVay & Carol George eds., supra note 274, at 145.
WTO agreements are the “integral part of the Community legal system” due to Article 228:7 of the EC Treaty, and thus have “the higher legal ranking” than the former. As a result, it has been widely recognized that the 94/800 EC Council Decision, in terms of its intent to control the internal effect of WTO agreements, may not bind the EC court and national courts of Member States. According to the unanimous viewpoint of academic and practical circles, the Council Decision in itself can neither “limit the effect of an agreement, that the agreement’s text is its primary source of interpretation,” nor “limit the Court’s competence to apply Community agreements” given its legal status as “secondary legislation.” To some scholars, this Council Decision is even just “a unilateral ad ex post facto declaration” and “can not … alter the legal characters of its acts” which “only the ECJ is competent to decide.” In other words, it is “no more than an expression of [the Council’s] potential wishes, rather than having any legal force.”

In practice, the 94/800 EC Council Decision serves only as a persuasive source for the European courts (as well as national courts of Member States) to determine the internal/domestic legal effect of WTO agreements, although such persuasiveness can be decisive in the mind of these courts. In general, the European courts are more likely to take into account the Council’s position, together with all factors possibly covered, and finally make their own decisions on a case-by-case basis. This is particularly the case with the ECJ case law in Portugal v Council, where the Court only refers to the 94/800 Council Decision in the sense that this decision “correspond with” the conclusion having reached by the Court on denying Portugal “the possibility of relying on WTO agreements to control the legality of the Community acts.”

617 PETERSMANN, supra note 371, at 121.
619 Philip Ruttley, Iain MacVay & Carol George eds., supra note 274, at 146.
620 Id. at 145-146.
622 Sender & Leuen, supra note 618.
The position of the EC Council (and therefore, the EC Commission) of excluding the direct effect of WTO agreements appears more to be a matter of "political considerations" 623 than that of "legal concerns" (e.g., justiciability). From the perspective of the proponents of the direct effect of multilateral trade commitments, the position of the EC treaty-making institutions is not only at odds with some WTO treaty requirements in this regard (e.g. Article 42 of TRIPS), but also manifests the tendency of "periodically elected politicians and government bureaucracies" to maximize their own powers over the equal rights and welfare of domestic citizens, and thus confirms "the correctness of the assumption of public choice and constitutional theories in a regretted way." 624

However, from the viewpoint of this author, the above commentary goes to the extreme. First, it remains unclear that the WTO treaty regime has explicitly recognized the direct effect of WTO agreements as a whole or in part. Even some WTO provisions do recognize such effect (such like Article 42 of TRIPS as noted above), they should not bind the EC and its Member States internally (within the Community legal order), considering their legal nature as nothing more than international law obligations. Second, motives of the EC decision makers to reject direct enforcement of WTO agreements can be diverse and interactive towards each other, just the way in which a simple outcome may derive from a complex of factors. In this context, we may face more questions than answers. "If, as claimed above, the "evil" motives of politicians and government bureaucracies are not forgivable, what if the political concerns about "sovereignty" of Member States of the EC or, about "reciprocity" for the Community? The issue has been open to ongoing, heated debate, towards which this author will provide some further reflections in the succeeding discussions.

623 Cottier & Schefler, supra note 328, at 106.
624 PETERSMANN, supra note 371, at 121.
III. Legal Treatment of WTO Law before the European Courts

1. Role of the European Courts in the Context of WTO Law

The European Court of Justice (ECJ) and Court of First Instance (CFI) are judicial institutions of the European communities, collectively referred to as the “European courts.” It is observed that “the Community legal order grew and developed mainly at the hands of the Community judges.” The European courts play a significant role in the growth and development of EC law, as either the legislator or the adjudicator within the Community legal order.

In the “earliest years” of the EC, the Court of Justice was already “a powerful law maker” based upon “the open-ended constitutional language of the Treaty of Rome.” This law-making role is evident in the Court’s recognition of “general principles of law,” e.g., a right of legitimate expectation, a right to be heard, legal certainty, etc. More significantly, given the fact that Community law in its substance directly affects individuals, the Court has developed a substantial body of “general principles of community law” for protecting individual rights, which, including proportionality and fundamental rights, are independent of explicit supports from the EC founding treaties. It should be noted that all above recognized or articulated principles by the Court “are a higher source of law capable of overriding legal acts of the Community.”

As the adjudicator of the EC, the European courts are, according to Article 220 of the

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625 WEATHERILL, supra note 569, at 33.
626 FOLSOM, supra note 570, at 71.
627 WEATHERILL, supra note 569, at 71.
628 FOLSOM, supra note 570, at 73.
EC treaty, obligated to ensure that Community law is respected in the interpretation and implementation of the EC founding treaties. To this end, the Courts maintain wide jurisdiction to hear various actions. Specifically, the ECJ has competence, *inter alia*, to rule on:

(i) Applications for annulment;
(ii) Actions for failure to act brought by a Member State or an institution;
(iii) Action against Member States for failure to fulfill obligations;
(iv) Reference for a preliminary ruling; and
(v) Appeals against decisions of the CFI.

Created in 1989, the CFI is an independent court attached to the ECJ, instituting "a judicial system based on two levels of jurisdictions." This means all cases heard in the first instance by the CFI may be subject to a right of appeal to the ECJ "on points of law only." With some exceptions, the CFI’s jurisdiction mainly covers the following “direct actions” brought by individuals and the Member States:

(i) Actions for annulment (against acts of the Community institutions);
(ii) Actions for failure to act (against inaction by the Community institutions);
(iii) Actions for damages (for the reparation of damage caused by unlawful conduct on the part of a Community institution);
(iv) Action based on an arbitration clause.

In exercising their jurisdictions, the CFI and the ECJ generally have the task of reviewing the legality of the contested legal acts of the Community institutions or the Member States. This appears to be the question of law. In this context, the Courts

will perform their interpretative function, referring to various sources of EC law.\textsuperscript{632} As a result, the Courts will inevitably face the “hierarchical status” of international agreements, vis-à-vis the acts of the EC institutions or, national law of the Member States under the Community legal order. The issue is more likely to arise in direct actions before the CFI for annulment or damages against the EC institutions, or appeals of them and the reference for preliminary rulings before the ECJ, than other actions brought therein. As noted before, none of the founding treaties of the EC explicitly refers to this issue, leaving it to the discretion of the European courts.\textsuperscript{633} The Courts (especially the ECJ) in turn have developed the doctrines of “supremacy” and “direct effect,” both serving as the “twin pillars” of the Courts’ “integrationist jurisprudence” for the evolving EU System.\textsuperscript{634}

As the major part of the EC’s international trade agreements, WTO agreements inevitably encounter all of the above situations. According to some scholars, “[s]ince its early, originally controversial case law, the ECJ has consistently claimed the authority to interpret GATT law and now the WTO law.” And, “in theory, the ECJ has the last word in interpreting WTO law for the purpose of EC law.”\textsuperscript{635} In this context, the focus of the Courts is not limited to WTO treaty provisions, but extends to the decisions of the WTO tribunal, namely, “binding” reports of WTO panels and the Appellate Body as adopted by the WTO’s Dispute Settlement Body (DSB).\textsuperscript{636} Hence, the succeeding discussions will elaborate the Courts’ jurisprudence on internal legal effects of WTO law, including both WTO agreements and WTO decisions, under the EC legal order.

\textsuperscript{632} WEATHERILL, supra note 569, at 33. This concerns the regular role of the courts as a general jurisprudential issue.
\textsuperscript{633} FOLSOM, supra note 570, at 77.
\textsuperscript{634} Id. at 71.
\textsuperscript{635} Francis Snyder, The European Courts and WTO Law: with Special Reference to Antidumping, unpublished manuscript on file with the author, p.4.
\textsuperscript{636} This is different from the case of the U.S., in which the U.S. authorities focus on the reports of WTO panels and the Appellate Body, regardless of their adoption by the WTO’s DSB.
2. EC Case Law on Internal Effect of WTO Agreements

From the perspective of the Court of Justice, international agreements concluded by the Community - e.g., the GATT 1947 and WTO agreements - are “an integral part of the EC legal order,” and is presumably “compatible with EC law.”637 This, however, does not necessarily lead to the direct effect of GATT/WTO law, especially for the purpose of reviewing the legality of Community legal acts.638 In fact, the ECJ is probably the “most aware of the liberalizing and powerful results of direct effect” than any court of law of other jurisdictions, as is particularly evident in its treatment of GATT/WTO treaty rules.

As discussed before, during the GATT era, the Court of Justice maintained a longstanding practice of rejecting the direct effect of GATT provisions and panel reports. With the advent of the WTO in January 1995, the issue of the internal legal effect of WTO agreements has been repeatedly raised before the European courts.639 As widely acknowledged, these newly-established multilateral trade rules brought some “fundamental changes” to the old GATT regime which “could reasonably “invalidate” the major arguments in prior case law for denying the direct effect of GATT rules.640

637 See, Snyder, supra note 635.
640 Cottier & Schefer, supra note 328, at 104. These “fundamental changes” are presented as follows: “First, the traditional argument of vagueness loses creditability in light of (a) ... (b) an increasing number of panel reports elaborated under judicial proceedings and providing specific guidance for interpretation. Second, the major changes in dispute settlement, in particular the introduction of the Appellate Body, cannot remain without an impact. Third, the qualification of GATS and TRIPS as being mixed agreements, to be ratified both by the EU and the member states, raises the issue of independent interpretation of and qualification of these agreements by national courts in their own rights.”
For this reason, many expected the Courts to firmly reject this position towards GATT rules, and become more open to the flexibility of granting direct effect to WTO agreements.\footnote{See, Desmedt, supra note 639.}

So far, however, the responses of the European Courts have been a big disappointment to the above public expectations. Before the emergence of the landmark case, Portugal v Council,\footnote{Portugal v. Council, supra note 621.} the Court of Justice had on many occasions already avoided the crucial issues relating to the internal legal effect of WTO agreements in the European context.\footnote{See, Desmedt, supra note 639. FT 2.} Particularly in Hermes,\footnote{Case-53/96, Hermès International and FHT Marketing Choice BV, 1998 E.C.R. I-3603.} although the Court claimed that it had jurisdiction to interpret Article 50 of the TRIPS, it avoided ruling on the direct effect of this WTO rule. According to the Court, it was not required to rule on the issue, but to answer the question of interpretation submitted to it by the national courts, “so as to enable that court to interpret Netherlands procedural rules in light of that article.”\footnote{G. A. Desmedt, European Court Rules on TRIPS Agreement, 1 NO4 J. INT'L ECON. L. 679, 681 (Dec. 1998).}

In Portugal v Council, the Court of Justice for the first time expressly addressed the legal effect of WTO law in Community law. In denying Portugal the potential for WTO rules “controlling” the legality of Community legislation, the Court concluded that “WTO agreements are not in principle amongst the rules in the light of which the Court is to review the legality of the measures adopted by the Community institutions.” This turned out to be the continuity of the Court’s long-standing practice towards GATT law, although the Court did acknowledge prior case law on the “Nakajima exception” and “Fediol exception” to this general position.

Notably, the reasoning of the Portugal case was based upon (if not reiterating) the ECJ’s prior case law considering GATT law. Having recognized the significant
distinction between WTO treaty law and the GATT 1947, the Court held that WTO rules still "accord considerable weight to the negotiation between the parties." Specifically, the Court emphasized the significant role of negotiations in redressing WTO-inconsistent measures (e.g., withdrawal of inconsistent measures, compensation, etc.). As the Court observed, "to require the judicial organs to restrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated agreements even on a temporary basis." 646

Besides, the ECJ base its reasoning on the principle of "reciprocity," especially referring to the Kupferberg case, 647 where the absence of reciprocity in the implementation of a free trade agreement (FTA) between the EEC and Portugal did not by itself prevent the Court from granting direct effect to the provisions of this FTA. 648 The Court rejected applying the "Kupferberg doctrine" 649 to the present case due to "the distinctive feature of the WTO system" from directly applicable treaties within the EC legal order. 650 The Court observed its counterparts in most important WTO members have refused to recognize the WTO agreements as directly applicable and invocable, and argued that its adherence to the opposite practice may lead to a diverging application of WTO rules, and thus "deprive the legislative and executive organs of the Communities of the manoeuvrability enjoyed by the other WTO members during the negotiations." 651

Beginning with the Portugal case, the European courts have consistently affirmed

646 Eckhoute, supra note 638, at 519.
648 Eckhoute, supra note 638, at 514.
649 This means, "absence of reciprocity in the granting of direct effect or applicability is not in itself enough to result in the absence of reciprocity in the performance of the treaty obligations."
650 Sender & Leuen, supra note 618, at 414-415.
651 Eckhoute, supra note 638, at 519.
their position of rejecting the direct effect of WTO agreements while sustaining the "Nakajima/Fediol exceptions." On the one hand, the Courts have repeatedly adhered to the Portugal doctrine in subsequent cases. Particularly in the case of OGT,\textsuperscript{652} the Court of Justice addressed the question as to whether an individual may rely on the provisions of the GATT 1994 to challenge an EC regulation. As the Court ruled, "the answer to that question may be deduced from existing case-law, so that it is appropriate for the Court ... to give its decision by reasoned order." In this context, the "existing case-law" essentially referred to the Portugal case law.\textsuperscript{653}

From the other hand, the European courts continue to apply the "Nakajima/Fediol exceptions." In Netherlandsv Parlement and Council (or, "Biotechnological invention case"),\textsuperscript{654} the Court of Justice held WTO agreements (such like TRIPS and TBT) as being "in principle not invocable to review the legality of an EC act," but meanwhile recognized their invocability "for two considerations." First, the Dutch plea "should be understood as being directed at the perceived obligation imposed on Member States to breach their individual obligations under international law," and second, the contested Community measure (Biotechnological Invention Directive) "claims not to affect those obligations under international law."\textsuperscript{655} In this particular connection, although the Court did not explicitly refer to the "Nakajima/Fediol exceptions," many have taken this case as "an example" of above exceptions especially in sense of the "principle of implementation."\textsuperscript{656}

In addition to the Portugal doctrine, the European courts have developed their jurisprudence on the internal effect of WTO agreements in other respects. In Dior v

\textsuperscript{652} Case C-307/99, OGT Fruchhandelsgesellschaft v Hauptzollamt Hamburg-St. Annen (Fruchhandelsgesellschaft), 2001 E.C.R. I-3159.
\textsuperscript{653} Eeckhoutte, supra note 638, at 520.
\textsuperscript{655} Eeckhoutte, supra note 638, at 526.
\textsuperscript{656} Id. at 528.
The Court of Justice addressed the issue of "mixed agreements" in the context of TRIPS, which leads to the "division of competence between the EC and its member states," and therefore indicates a potential for individuals directly relying on Article 50 of TRIPS (procedural provision) before national courts of the Member States. Other than the GATT, both TRIPS and the GATS are "mixed agreements" – as ratified by the EC and its Member States in accordance with Advisory Opinion I/94 of the ECJ. This type of agreement falls "partly within the competence of the European courts and partly within that of the Member states," leading to a "division of competence" that opens the possibility for national courts to have "independent interpretation and qualification of these agreements in their own rights."

Regardless of above concern, the Court in Dior v Tuk still affirmed its Portugal doctrine, concluding that "the provisions of TRIPS, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law." As for the "opening for direct effect" of WTO agreements, some scholars assert it "will be gradually closed again, whenever the Community extends its legislative activities to the areas covered by the mixed agreements of the WTO, such like the TRIPS and GATS." However, until this is achieved, there will always be the potential European courts to be influenced by their counterparts in Member States of the EU.

On the contrary, it is not entirely clear to what extent the judicial policy of the European courts will bind the Member States of the EU. The practice of Member States appears to be diverse, but also remains "controversial and far from being uniformly settled." In a British case Lenzing AG, the judge gives considerable weight

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658 Broek, supra note 594, at 416.
659 For the definition and origin, see Sender & Leuven, supra note 618, at 416.
660 Cottier & Schefter, supra note 328, at 104.
661 Sender & Leuven, supra note 618, at 415-416.
to Community law (concerning the issue of "reciprocity") in denying the direct effect of TRIPS.\textsuperscript{662} In contrast, the German government has "partly acknowledged direct effect of substantive standards of the TRIPS Agreement." The result is a potential conflict between the consistently rejecting position of the European courts, with an increasing tendency of national judiciaries of Member States to allow direct enforceability of WTO treaty provisions. This has raised the concerns for a potential of "turmoil" under the EC legal order – by the "cons" of direct effect,\textsuperscript{663} and the concerns for the "WTO's consistency" – by the "pros" of direct effect.\textsuperscript{664}

From an overall perspective, it seems very unlikely that in the foreseeable future, the European courts will make a breakthrough to their long line of case law on internal effect of WTO agreements. As noted before, the Courts' negative position towards the direct effect of WTO agreements (and WTO law) is linked to that of the Council, the Commission. More significantly, dual membership of the EC and its Member States in the WTO has complicated the situation, which contributes to an increasing acknowledgement that "WTO law, as interpreted by the European courts, has so far tended to foster tighter relations between the EC and the Member States" and is beginning to "reshape the distribution of power" between them.\textsuperscript{665}

In discussions so far, the EC case law on internal legal effect of WTO agreements consists of two parts: the Courts' general position of denying direct effect (and therefore the "invocability") of WTO agreements and, the courts' limited flexibility of granting "other legal effects" to WTO treaty provisions,\textsuperscript{666} the latter mainly refer to the "Nakajima/Fediol exceptions" to the above general position, which "may be termed as the principle of implementation." In this context, it should be noted that

\textsuperscript{663} Cottier & Schefer, supra note 328, at 104-105.
\textsuperscript{664} Id. at 99-100.
\textsuperscript{665} Snyder, supra note 635, at 1.
\textsuperscript{666} Eeckhout, supra note 311, at 91-110.
the application of the “consistent interpretation” doctrine may also lead to “other legal effects” of WTO agreements under the Community legal order, although the situation is different from the Nakajima/Fediol exceptions in the sense that latter may live on in a conflict between an act of the Community institutions and a WTO treaty provision, while such a conflict would not be allowed for purposes of consistent interpretation.\textsuperscript{667} Considering the courts’ rejecting position in general, “other legal effects” become crucial to enhancing the effectiveness of WTO law, including WTO agreements.

3. EC Case Law on Internal Effect of WTO Decisions

In recent years, the internal legal effect of the results of WTO dispute settlement process under the EC legal order received increasing attention within and without the Community, which raised the particular issue of the force of \textit{res judicata} of these WTO decisions (panel and Appellate Body reports adopted by WTO Dispute Settlement Body) in Community law.\textsuperscript{668} The European courts’ response to this issue remains “a novelty” in EC case law, and represents the extension of the European courts’ jurisprudence on the internal legal effect of WTO agreements. As the Court of Justice observed in \textit{Potugal v Council}, the DSU-based WTO dispute settlement process does not in itself obligate the Community to implement WTO rulings by granting them direct effect. Neither does the WTO regime imply a possibility of doing so automatically.\textsuperscript{669} The issue is therefore left to the discretion of the proper Community institution, which, as discussed above, refers to the European courts.

In the early 1990s, the Court of Justice addressed the \textit{res judicata} effects of international judicial decisions in Community law, which decisions were rendered by the tribunal/court of an international agreement concluded by the Community. In

\textsuperscript{667} Id. at 104-105.
\textsuperscript{668} Zonnekkeyn, \textit{supra} note 400, at 604.
\textsuperscript{669} Griller, \textit{supra} note 593, at 441.
1991, the ECJ delivered an opinion (Opinion 1/91) before the conclusion of the draft agreement on the European Economic Area (EEA) between the Member States of the European Free Trade Association (EFTA), where it especially noted the compatibility of the EEA's "judicial supervisions" with the EC Treaty, and specifically, the compatibility of the role between the "EEA court" and the ECJ within the Community legal order. At the outset, the ECJ declared the "incompatibility" in this context in general terms, especially expressing the concern about a risk of inconsistent interpretations by the EEA Court of the EEA provisions, with those by the ECJ itself in their analogies with the EC Treaty.671

Meanwhile, however, the ECJ still admitted the binding force of the EEA judicial rulings "under certain conditions." Having recalled its case law on the binding effect of international agreements concluded by the EC, and on its own jurisdiction to interpret these agreements, the Court held:

[W]here, however, an international agreement provides for its own system of courts, ... the decision of that court will be binding on the Community institutions, including the Court of Justice. These decisions will also be binding in the event the Court of Justice is called upon to rule, by way of a preliminary ruling or in a direct action, on the interpretations of the international agreement, in so far as that agreement is an integral part of the Community legal order. An international agreement providing for such a system is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards interpretation and application of its provisions."672

671 Zonnekkeyn, supra note 400, at 605.
672 Id. at 605-606.
According to the above rulings, judicial decisions of the EEA court would be binding upon the ECJ, since the EEA appeared to be “an integral part of the Community legal order.” Moreover, the Court implied that the binding character of a judicial decision of the above kind “does not depend on the direct effect” of the EEA and the like, not to mention that the EEA did not have direct effect.\(^{673}\) Concerning its nature, Opinion 1/91 was nothing more than a judicial policy of the ECJ, towards a draft regional trade agreement of which the binding nature remained unsettled at the time. Even though the binding force of this agreement is secured, it would not change the “policy-oriented” nature of Opinion 1/91; the latter by no means amounts to EC case law so as to control the results of subsequent cases of the ECJ. Also, it remains unclear whether the ECJ’s position of granting direct effect to international judicial decisions – as articulated in Opinion 1/91 – was determined upon the quality of the international tribunal concerned. In this context, the ECJ focused its attention on the relationship between the given international agreement (e.g., the EEA) and the EC legal order, and further, the nature of the given international agreement (e.g., regional agreement in the case of the EEA).

Due to the above observations, the reasoning of Opinion 1/91 appears to be inapplicable to WTO decisions, given the legal nature of the Opinion as a non-binding, persuasive judicial policy of the EC, as well as WTO agreements being multilateral (other than regional) in nature. However, other observations – especially in the context of the “judicial nature” of the WTO tribunal and its predecessor (GATT panels) – support the application of the Opinion 1/91 to WTO decisions. From their perspectives, if, being not a “court-like” but a “conciliatory” international adjudicating body, the GATT panels could have rejected the applicability of the Opinion, and the WTO Dispute Settlement Body (DSB) should merit such application, since the DSB “is now far more judicial in nature” and, WTO agreements are an “an
integral part of the Community legal order." As mentioned above, the Opinion itself did not base its applicability upon the extent of the judicial nature of the international adjudicating body concerned. Even if it is the case, the European courts have consistently rejected granting WTO decisions the same effect as Opinion 1/91 proposed. This is evident in the EC case law as elaborated below.

EC case law on internal effect of WTO decisions is mainly concerned with the DSB rulings on the "EC banana regime" and the "EC beef hormone regime," and also with the implementation of these decisions within the WTO. The first case is the ECJ decision in Atlanta, where a private action was brought against Council Regulation 404/93 (the "old EC banana regime") on December 11, 1996, on the ground of the adopted report of WTO Appellate Body of 27 September 1997. The Court dismissed Atlanta’s claim for damages caused by the WTO-incompatibility of the EC banana regime “on procedural grounds.” According to the Court, the given Appellate Report, taken after the appeal had been brought, was “inescapably and directly linked to” the plea of infringement of the GATT rules.” Although that plea had been raised before the Court of First Instance (CFI), the applicant failed to repeat it on appeal. The Court therefore refused to examine the substance of that plea. Following Atlanta case, the CFI ruled on another case concerning the same cause of action. In Fruchhandelsgesellschaft mbH Chemnitz v Commission, the Court also rejected the petitioners’ arguments, but based on different reasoning that the EC “had already amended its regulation, bringing it into compliance with the DSB rulings.”

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674 *ibid.* at 606-607.
In 2001, the European courts successively ruled on four more “banana cases.” Three of them were handled by the CFI, respectively, *Cordis v Commission* (*Cordis*),680 *Bocchi Food Trade International v Commission* (“Bocchi”) 681 and *T. Port v Commission* (“T. Port”).682 They were collectively termed “quota damage cases.”683 The last one was handled by the ECJ, namely, *OGT Fruchthandelsgesellschaft mbH Chemnitz v Hauptzollamt Hamburg-St. Annen* (“OGT”).684 Unlike the two previous cases that targeted the EC’s “old banana regime” (Council Regulation 404/93) related to the adopted Appellate Body report of 27 September 1997, the three CFI cases targeted the EC’s subsequent legislative efforts to implement not only that Appellate Body report, but also the adopted WTO panel report of 22 May 1997, both directed at the “old banana regime.”685 These legislative efforts turned to be the “EC’s new banana regime,” 686 specifically as *Council Regulations No. 1637/98* and *No. 2362/98*.687

These three “quota damage cases” have the similar factual backgrounds to each other.

687 Zonnekeyn, *Dice Cast, supra* note 678, at 488-490.
The petitioners, dissatisfied with the annual quantities of banana allocated to them in accordance with Council Regulation 2362/98, claimed damages caused by the “inconformity” of that “new banana regime” with WTO rules and certain general principles of EC law. Particularly, the petitioners asserted that since the incompatibility of the “old banana regime” with WTO law had been specified by the WTO decisions, the res judicata force of these decisions led to the EC’s “obligation of conformity,” which would preclude the Community institutions from adopting a Regulation containing infringements of WTO law, even though that legislation was purposed to implement the above EC’s “obligation of conformity.” In addition, the petitioners also claimed damages caused by the misuse of power by the Commission on other grounds.688

The Court of First Instance denied these claims in all respects. In rejecting the allegation of “misuse of power,” the Court held that the petitioners failed to establish that the Commission’s adoption of Council Regulation 2362/98 was for any purpose other than the one it had stated, which was “to bring into effect the arrangement of importing bananas into the EC introduced by the old banana regime.” Regarding the invocability of the WTO provisions as specified by the two WTO decisions at issue, the Court first cited the Portugal case, concluding that since the WTO agreements are not in principle intended to confer rights on individuals, “the EC cannot incur non-contractual liability as a result of infringement of them.”689

The CFI then referred to the Nakajima/Fediol exceptions, according to which WTO rules will become directly applicable and invocable only when the Community intends to implement a particular obligation assumed in the context of WTO law, or the Community measures concerned expressly refer to the precise provisions of WTO treaties. In this regard, the court ruled that neither of the two WTO decisions involved had contained any specific obligation the Commission intended to implement in

688 Id. at 598-599 (2001).
689 Id.

235
accordance with the “new banana regime” (Council Regulation 2362/98), since the latter did not explicitly refer either to a specific obligation arising from the given WTO decisions, or to a specific provision of any WTO agreement.690

The fourth “banana case” was the ECJ’s OGT case. Its factual grounds were different from those of three “quota damage cases,” but its reasoning followed that of the latter. Originally, the petitioner (“OGT”) applied to German courts for the suspension of an import duty imposed upon it under the “old banana regime” (Council Regulation 404/93).691 During the court proceeding, a WTO panel report of the “EC-Banana-Article 21.5 Panel” was adopted by the DSB,692 ruling that the “EC new banana regime” continued to infringe the WTO Agreement. The German courts then referred the “OGT” to the Court of Justice, on a particular question as to whether the “OGT” may rely on Articles I and XIII of the GATT 1994, to challenge the validity of the import duty imposed upon the “old banana regime.”693

The Court of Justice denied the direct effect of the above WTO provisions by citing the Portugal, Dior/Tik and other of its cases. Besides, the Court denied the res judicata effect of the adopted panel report of the EC-Banana-Article 21.5 Panel. Following the reasoning of the CFI’s three quota damage cases with regard to Nakajima/Fediol exceptions, the ECJ concluded that the “new banana regime” was “not designed to ensure the implementation in the EC legal order of a particular obligation assumed in the context of GATT, nor does it refer expressly to a specific provision of GATT.”694

After their issuance in 2001, the four “banana judgments” of the European courts

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690 Zonnekkeyn, supra note 400, at 599.
691 Weisberg, supra note 683, at 167.
693 Weisberg, supra note 683, at 165-168.
694 Id. at 167-168.
were widely questioned and criticized, especially for the Courts’ ignorance of the Community’s expressed intent – as evident in the “EC banana regimes” – to implement its WTO obligations as specified by the WTO decisions concerned. Some scholars even characterized the Courts’ position as the “misjudgment” of the Nakajima doctrine. Until then, the Courts based their exclusion of the res judicata force of WTO decisions under the EC legal order on previous case law for rejecting the direct effect and the invocability of WTO agreements. Neither the ECJ nor the CFI would regard WTO decisions as having more binding force than WTO agreements. Also, in the four banana cases, each cause of action extended only to the adoption stage of the WTO rulings at issue, without reaching the implementation of these rulings by the WTO.

Obviously, for those who expected “further penetration of WTO law within the EC legal order,” the above banana line of case law did not give them much inspiration. The situation had lasted until the Court of Justice ruled on the “EC beef hormone regime” two years later, which seemingly brought some lights to the darkness. On 30 September 2003, the ECJ rendered two judgments on the Biret cases, where the Court dismissed the claims of the petitioners, “Biret” and its subsidiary, for damages suffered as the result of the EC’s ban on the import of hormone treated beef. The ban was embodied by Council Directive 96/22/EC (also, “old hormone directive”), which, long before the Biret actions, had been declared by the WTO’s DSB as breaching several provisions of the WTO’s SPS Agreement. In that WTO ruling (WTO’s “beef hormone” decision), the WTO tribunal had requested the Community to bring the SPS-inconsistent measures into conformity with the EC’s particular WTO

695 Zonnekeyn, supra note 400, at 602.
696 Zonnekeyn, Dice Cast, supra note 678, at 485-487.
obligations,\footnote{Appellate Body Report, \textit{EC -- Measures Concerning Meat and Meat Products (Hormones)}, WT/DS26/AB/R (16 January 1998).} and granted the Community a grace period of 15 months (until 13 May 1999) for such implementation. It was not until 22 September 2003 -- four years after the expiration of the above grace period -- that the Community came up with new legislation to amend the "old hormone directive," which was \textit{Directive 2003/74/EC} (also, "new hormone directive"). After the enactment of this EC legislation, its compatibility with the requirements of the WTO's \textit{beef hormone} decision was consistently questioned by other WTO members.\footnote{\textit{Zonnekeyn, Dice Cast}, supra note 678, at 485-487.} The \textit{Biret} cases were initiated before the Court of First Instance in June 2000. The CFI dismissed the petitioners' damage claims on grounds of well-established EC case law rejecting the direct effect of WTO agreements. The petitioners appealed to the Court of Justice on 16 March 2002.\footnote{Id. at 485-488.} In that proceeding, the Advocate General (AG) Albert proposed a "copernican annotation," suggesting the Community might be held liable under EC law, for non-implementation of WTO decisions "within the prescribed reasonable time" and for damages incurred accordingly. In such a circumstance, as AG Albert observed, the relevant provisions of WTO agreements may become directly applicable and invocable by private parties to "trigger the liability of the EC."\footnote{Id. at 761. \textit{See also}, Case C-93/02 P, Biret International v. Council, and, Case C-94/03 P, Etablissements Biret and Cie SA v. Council.} In this context, the AG Albert's analysis was consistent with the previously discussed "intermediate position," and therefore raised many hopes for the Courts' change in their position towards WTO law.

The ECJ refused to adopt AG Albert's proposal, but did so on clever grounds. In its judgments, the Court first pointed out the "insufficient motivation" of the CFI rulings, observing that the key issue of the two \textit{Biret} cases was whether the WTO's \textit{beef hormone} decision put into question the Court's firmly-established case law denying
the direct effect of WTO agreements, and, whether this WTO decision was capable of providing grounds for a review of the legality of the contested "EC new hormone directive." This clarification actually matched AG Albert’s understanding of the problem.

In its ruling, the Court determined that the WTO’s beef hormone decision could not lead to the Community’s liability for non-implementation of this decision. The Court based this holding on the factual ground that the alleged damages had occurred not only before that WTO decision was adopted on 13 February 1998, but also before the expiration date (13 May 1999) of the grace period granted to the Community to implement that decision. In looking beyond the findings, the Court implied that the claimed damages were based upon the effectiveness of the Community’s obligation to implement the WTO’s beef hormone decision. Therefore, the Court did not reject the proposal of AG Albert on any legal ground, but merely on specific factual grounds. As the Court concluded, absent any damage Biret might have suffered from the EC’s failure to implement the particular WTO decision, it was not necessary for the Court to consider what such damages would really be. The Court therefore upheld the judgments of the CFI.

Here, the Court in the Biret cases simply dismissed the petitioners’ claims on factual grounds, avoiding the need to rule on whether the Community should be liable for the alleged non-implementation of the WTO’s beef hormone decision. This raised many expectations that the Court may “leave the door half open” for granting direct effect to WTO law under the EC legal order. Particularly, the Court’s silence in the Biret cases on several crucial issues – heavily addressed in previous EC case law – inevitably led to a presumption of the possibilities of breaking its previous holdings, not to mention that the AG Albert had launched an official try in this regard in the present cases. As some scholars asserted, since the Court did not explicitly rule on the question

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703 Id. at 485-488.
704 Id. at 487-488.
“whether the EC could be liable for measures that have been found to be WTO incompatible, if the damages had arisen subsequent to the period within which the EC should have implemented the DSB decision,” the court should not exclude a possibility for itself doing so. They also observed that unlike its previous practice, the Court did not apply the reciprocity principle to the Biret cases.\textsuperscript{705} Considering the significant role of this reciprocity principle in shaping the previous EC case law on denying the direct effect of WTO agreements, its absence in the Biret case law could suggest that the Court may depart from its long-standing practice in the future.

Two recently rendered EC judicial decisions – adding to the Courts’ inventory of banana case law – have nevertheless squashed these over-optimistic hopes. In the case of Afrikanische,\textsuperscript{706} the CFI dismissed the claims of two banana importers for alleged damages resulting from the “new EC banana regime.” To this end, the Court cited previous banana cases, especially adhering to its reasoning in three “quota damages cases” and that of the ECJ in the case of OGT in the context of the Nakajima/Fediol exceptions. In this particular connection, the Court ruled that the petitioners failed to demonstrate that the “new banana regime” intended to implement any WTO obligation imposed upon the Community. Nor did they establish that this EC legislation had explicitly referred to any WTO obligation, either specified in a particular WTO panel report, or in a decision for the adoption of this panel report.\textsuperscript{707}

The other case, Van Parys,\textsuperscript{708} involved a similar factual background to that of the previous case of OGT. In Van Parys, the Court of Justice affirmed its consistent position of rejecting the res judicata force of WTO decisions within the EC legal

\textsuperscript{705} Id. at 484-486. “Without requiring whether any other of the EC’s major trading partners would allow such damage claims.”


\textsuperscript{707} Zonnekeyn, Dice Cast, supra note 678, at 488-489.

\textsuperscript{708} Case C-337/02, Van Parys v Belgische Interventie – en Restitutiebureau, Judgment of 1 March 2005.
order, and thus largely filled “loophole” left in the Briet cases.\textsuperscript{709} The case was initiated by “Van Parys,” a Belgian banana importer being denied an import license based upon the “EC new banana regime.” The petitioner challenged the lawfulness of this EC measure by claiming that it had been ruled by the WTO tribunal as a violation of WTO rules. In this sense, the petitioner implicitly called for the res judicata effect of WTO decision within the Community legal order.

In ruling in Van Parys, the Court of Justice strictly followed its well-established Portugal doctrine and Nakajima/Fediol exceptions. The Court first cited the Portugal doctrine, especially in terms of the significant role of negotiations in defining the nature of WTO law. It then further held: “requiring the Community courts to review the legality of Community measures in the light of the WTO rules, on the sole ground that the time-limit for implementation of the DSB decision has expired, could undermine the Community’s position in trying to reach a mutually acceptable and WTO conforming solution to the dispute.”\textsuperscript{710}

Besides, the ECJ explicitly referred to the reciprocity principle omitted in the Briet cases. As the Court noted, “it is known that some important commercial partners of the Community have not recognized the WTO rules as rules applicable before their courts when reviewing the legality of their rules of domestic law. The lack of reciprocity, which results from this different point of view entails the risk of introducing an ‘anomaly’ in the application of WTO rules.”\textsuperscript{711} Finally, in reviewing the circumstances in which the contested “EC banana regime” was amended and subject to further negotiations, the Court denied the application of the Nakajima/Fediol exceptions to these EC measures on similar grounds to those relied on by the Courts in the previous banana line of case law, especially the three “quota damage cases” and the case of OGT.

\textsuperscript{709} Delphine De Mey, supra note 686, at 1030.
\textsuperscript{710} Id. at 1027, FT12.
\textsuperscript{711} Id. at 1028, FT 16.
Interestingly, the Advocate General in the Van Parys case adopted a less restrictive stance than his colleague did in the Biret cases. As AG Tizzano asserted, "the Community regime in question, after the expiry of the period granted to the Community to bring its own legislation into conformity with the WTO rules, was invalid because of its inconsistence with WTO rules." To this end, AG Tizzano particularly acknowledged the applicability of the Nakajima exception to the WTO decision concerned by interpreting this case law broadly.\textsuperscript{712} Meanwhile, he rejected the arguments of reciprocity by citing the opinion of his colleague (AG Albert) in the Biret case.\textsuperscript{713} The Court also declined to follow his proposal in the end.

Discussions so far have revealed that the European courts take a firm position of denying the \textit{res judicata} force of WTO decisions, the same way they consistently refuse to grant direct effect to WTO agreements. From the perspective of this author, it is not surprising that the EC courts take such a conservative attitude towards the internal legal effect of WTO law. Like their counterparts in many other WTO members, the ECJ and CFI always intend to avoid disturbing the constitutional role of other Community institutions within the current community and the growing European Union. Despite their essential role in defining the internal effect of WTO law, the European courts have been cautious about their judicial activism and present more judicial restraint than their counterparts in other WTO members. Take, for instance, the Briet case law. The silence of the Court of Justice on crucial issues concerning the internal effect of WTO law may suggest the Court's intent to allow a certain possibility of granting direct effect to WTO law, but this silence may also suggest otherwise. The presumption can go either way, since the existing factual circumstances of that case had constituted a sufficient ground to dismiss the petitioners' claims, not to mention the Court's tendency to use its best efforts to avoid these sensitive issues, which turns to be a matter of judicial strategy as this author

\textsuperscript{712} \textit{Id.} at 1030-1031.

\textsuperscript{713} \textit{Id.} at 1028, FT18.
may understand it.

In contrast to the above comprehensive EC case law on the internal effect of WTO decisions, during the GATT era, there was only one case, *Durbeck*, where the Court of Justice had explicit referred to the GATT panel reports. In that case, the ECJ rejected the petitioner’s claim based, interestingly, upon the contents of that report as informed by the Commission. In the future, we will witness more and more EC cases coming out in this regard. In the long run, the attentions of the EC’s WTO counterparts will not stop at *bananas* and *hormone-treated beef*. Thus, it is foreseeable that the jurisprudence of the EC courts will not limit itself to the *banana* or *beef hormone* lines of case law. So far, the Courts have consistently refused to grant direct effect to WTO law. By contrast, European scholars and practitioners have consistently advocated an “intermediate position” of recognizing the *res judicata* force of WTO decisions. The current situation is as a scholar has claimed: “the dice has not yet been cast!”714

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714 Zonnekeyn, *Dice Cast*, supra note 678, at 483.
COMPARISON AND CONCLUSION

In the aggregate, both U.S. and the European Community authorities have always tended to limit the effect of WTO law to the level of international responsibility, so as to avoid threatening the predominance of their domestic (internal) law. Behind their similar (if not identical) position rejecting the direct enforcement of WTO law, there are several policy considerations in the context of political economy.  

First, the political economy of denying the direct effect of WTO obligations reflects to a large degree the predominant interests of producers in major trading powers like the U.S. and EC, making unilateral granting of procedural rights and domestic enforcement of WTO obligations the equivalent of a trade concession. From a purely economic or individual rights perspective, this situation indicates the protectionism position, in which the illegality is nevertheless justified somehow by the "constitutional structural issues" addressed below.

Second, the direct effect of WTO obligations may have profound implications for traditional allocations of the national (internal) constitutional powers of WTO members, and therefore may impose a number of "constitutional structural problems" upon them. This is particularly true for the U.S. as a sovereign nation state. As WTO law reaches more and more deeply into U.S legal systems and directly affects the life of individuals therein, self-execution of WTO law will inevitably alter the distribution of powers within the U.S. domestic governance. Specifically, making WTO obligations self-executing can be dangerous to U.S democracy, especially as this avoids "democratic participation" in the treaty-making process for these trade agreements. On the other hand, the direct effect of WTO obligations may enhance not only the power of private actors in foreign trade and economic relations, but also the

715. Cottier & Schefer, supra note 328, at 111.
716. Id.
power of domestic courts vis-à-vis rule-making authorities or the executive branch, and thus give the courts a role neither judges nor the domestic constitutional framework have well prepared for. Had it become true in the U.S., the Congress and its constitutional power to regulate foreign commerce – which is "arguably the most important foreign policy prerogative of the 21st century" – would inevitably be damaged.\footnote{Id. at 111-112.}

Third, the direct effect of WTO obligations may significantly impact on the external economic relations and foreign policies of WTO members. Today, foreign policy and economic policy of a country (and even a region) become increasingly indistinguishable. Being the multilateral legal framework for international trade, WTO law will inevitably affect the foreign policies of each WTO member, especially the U.S. in terms of its task of constitutional shifts as noted above. Under direct effect, national or regional courts may enhance their role in external economic relations, but may also risk hindering foreign policy goals that can no longer be pursued by other (e.g., military) means, or risk spurring a formal, or, most likely, informal retreat from WTO membership. Particularly, given the global responsibilities and potentially extensive retaliatory powers they have, the U.S. and the EC depend heavily on effective instruments of foreign (external) policy to negotiate and fulfill these responsibilities. Therefore, the considerations of "a fair-playing field" in external relations turn out to be paramount to both of these economic elites, as well as to other major trading powers (e.g., China) inside the WTO. This especially explains why the Community institutions always have the reciprocity concern in the context of WTO implementation/enforcement, to which direct effect would appear to be a big detriment.\footnote{Id.} The question merits some elaboration as follows.

Subject to the DSU-based WTO dispute settlement system, WTO members have a primary obligation to redress their violations of WTO obligations, as usually specified
in an adopted panel or Appellate body report by the WTO’s DSB. To this end, the member concerned may offer adequate compensation through diplomatic negotiations, until it is finally able to remove the violating measure. The impaired or nullified member, on the other hand, may simply withdraw their trade concessions as a means of cross-sanctions. This intermediate stage of granting temporary compensation and accepting sanctions represents a distinguishing feature of the WTO enforcement system — not available to any domestic enforcement mechanism of any WTO member.\footnote{Id. at 113.}

Should direct effect be established, domestic courts would have to immediately remedy the WTO inconsistency by invalidating the domestic law and practice concerned, while the domestic legislator would be “practically obligated to take the court’s ruling into account” or “to pass a new law overriding the WTO provision in the national context.” In this sense, for a WTO member to grant direct effect to WTO obligations almost means the unilateral waiver of rights to temporary compensation and options for sanctions available under the WTO. Although the availability of international redresses (such like those offered by the WTO) do not necessarily exclude direct effect, the latter will doubtlessly trigger a reciprocity problem by curtailing “the options for state conduct at international level” to “assure level playing fields in trade policy.” As discussed before, EC case law has fully addressed this concern, especially in terms of a potential for imbalanced powers among the major Members of the WTO. Considering a fair-playing field for EC external relations, none of the Community authorities is prepared to make WTO “have more bite at home than abroad.”\footnote{Id. at 112-113.} This is presumably the case with the U.S. and many other WTO members as well.

Discussions so far have focused on the political economy of denying the direct effect of WTO obligations, which may raise the question on how to find “appropriate rules
coordinating political actions and judicial avenues in the WTO and/or unilaterally within the members of the WTO.” On the other hand, considerations for such rejection may focus on the nature and characteristics of the WTO legal order – from a purely legal perspective. The jurisprudence of U.S. and the EC courts has contributed greatly to this curse, especially by developing the concept of “justiciability.”

For the above political economic and legal considerations, the U.S. and the EC have been cautious towards the domestic/internal effect of WTO law; part of these considerations has been strategic thinking to maximize the utmost effect of WTO law abroad for fostering market access rights, while leaving the traditional constitutional allocation of power at home as unimpaired as possible. Nevertheless, this consequence does not lead to the entire irrelevance of the WTO legal regime to the internal law of WTO members. The adoption of the “consistent interpretation” doctrine by the European courts, and, the expanding application of the U.S. analogy of this doctrine – the Charming Betsy canon of statutory interpretation – by the U.S. courts, has indicated the expansion of the effect of WTO law within the two jurisdictions. However, given the limitations imposed by the “consistent interpretation” doctrine or the Charming Betsy canon upon the implementation of WTO law, the effects of WTO law under the U.S. legal system or the EC legal order still remain primarily a matter of U.S. domestic law or EC internal law.

It should be noted that despite their predominant roles within the WTO, neither the U.S. nor the EC is in a position to impose its own practice on any other WTO members. The practice of WTO members in implementing WTO law should, to a large extent, be a matter of their internal affairs, which may differ from country to country and region to region depending upon the particular constitutional and legal system of each WTO member. However, since WTO law does not in itself provide any clue for its domestic implementation, it is necessary for WTO members to

721 Id. at 111.
develop certain unified, consistent standards or criteria for this purpose, so as to secure the effectiveness of WTO in the domestic sphere of individual WTO Members. In this context, the above political economic and legal considerations appear to be of tremendous practical importance, as they would help reach a consensus among WTO members on what to do about the direct effect of WTO legal obligations, regardless of their possibly diverging practice in this regard. This logic is explained in the next part (Part IV), which concerns a study of domestic implementation of WTO law in a new Member of this multilateral trading institution, the People’s Republic of China.
PART IV

DOMESTIC IMPLEMENTATION OF WTO LAW: THE CASE OF THE PEOPLE’S REPUBLIC OF CHINA
CHAPTER 1  CHINA’S ACCESSION TO THE WTO: HISTORICAL
OVERVIEW, SIGNIFICANCE AND IMPLICATIONS FOR DOMESTIC WTO
IMPLEMENTATION

China’s accession to the World Trade Organization (WTO) is recognized as a historical event in a broad context of world trade, multilateral trading system, as well as today’s international law and relations. Immediately after this accession became effective on 11 December 2001, some authoritative commentaries claimed it as “the most significant activity in the WTO’s seven-year life so far.” The significance of China’s WTO accession stemmed first from the accession process, longest and most arduous one on the WTO record. The significance also stemmed from the outcome of that process, which, labeled as the “accession package,” has so far been the most complex of its kind under the WTO legal regime. Moreover, the significance lies in the far-reaching impacts of China’s WTO accession on China (as a new member), on her trading partners (in terms of bilateral trade relations), as well as on the WTO itself (as a growing multilateral trading institution).

To assess the implications of China’s WTO accession, one can hardly go beyond the above coverage. A sound perception of these implications is conditioned by a commonly shared proposition, that “the WTO cannot be truly effective without embracing China as a member,” given the country’s largest population and “potential to be the largest economy” in the world. Equally, given its increasing importance in the world trade, China’s implementation of WTO obligations, mostly in domestic sphere, represents the major aspects of these implications. Upon the WTO accession,

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724 Id. at 24.
China has become an “insider” of the WTO and bound by various WTO disciplines. Although from the outset, the so-called “WTO implementation” or “WTO compliance” is a matter of “adjustment problem” for both China and her trading partners, challenges are mainly imposed upon the side of China, as indicated in her “Accession Package.”

As a result, it is China’s post-WTO performances (namely, WTO implementation) – rather than its WTO accession – that have generated various far-reaching impacts on every dimension of the Chinese society and international community, not to mention that China has just celebrated the 4th anniversary of its accession to the WTO. Of course, China’s WTO implementation is indispensable to its WTO accession. Until the accession process had been completed, China was not obligated to implement any of its WTO obligations, the latter were in turn the outcome of the accession process. More profoundly, factors having worked on the accession process have affected, and will continue to affect the implementation process.

In this chapter, all above issues will be addressed to assess the implications of China’s WTO accession for its domestic WTO implementation. The chapter begins with a historical overview of China’s endeavors to enter the GATT/WTO system. It then turns to China’s accession process, elucidating the significance of this process to China’s WTO implementation. Finally, the chapter shifts the focus on the outcomes of the accession process, analyzing the substance and legal nature of the “accession package” for China’s WTO implementation.

I. From the GATT to the WTO: China’s “Long March” towards the Multilateral Trading System

725 Id. at 26.
726 WANG Yong, China’s Stakes in WTO Accession: The Internal Decision-making Process, in CHINA’S ACCESSION TO THE WORLD TRADE ORGANIZATION: NATIONAL AND INTERNATIONAL PERSPECTIVES 20-21 (Heike Holbig & Robert Ash eds. 2002).
1. Pre-GATT Involvement in International Trade

Foreign trade in China can be traced as far back as to the Western Han Dynasty (206 B.C. – A.D. 9). Chinese exports began in the 2nd century A.D, when the Chinese traded silk goods with Rome for species and pearls. Until the Imperial China (Qing Dynasty) lost the Opium War with the British in 1839, and subsequently signed the 1842 Treaty of Nanjing, China’s traditional trading relations with the outside world had been based on a “tributary system,” serving the political objective to maintain a “Chinese world order.” Trade concessions were mostly given to the non-Chinese “barbarians” to reward their tribute and observance. Consequently, there was little need to trade with the Western countries in economic sense, as China had long remained a self-sufficient, self-sustaining sovereign state.

In 1840s, the Western powers started to break out China’s traditional trading pattern towards the outside. After the 1839 Opium War, British forced China to open its market to the West through the bilateral Treaty of Nanjing in 1842, of which trade had been a predominant subject. Under this so-called the “first unequal treaty,” British required the Manchu government to: abolish the monopolistic Cohong trading system; set forth a fixed tariff; open five ports for trade and residence by British consuls. Soon after, other Western countries forced the Imperial China to sign a series of treaties of the same kind. Implementation of these “unequal treaties,” especially from the Chinese viewpoint, had severely undermined the sovereign and economic interests of the Imperial China, although the outsiders might consider it as a price China paid for her entry to the West-dominated “civilized world.” As Dr. Gerrit Gong observes, “trade according to Western practices may have seemed the life-blood for the

727 HONG WANG, CHINA'S EXPORTS SINCE 1979, 14 (St. Martin’s Press, 1993).
European countries, but it sounded the death-knell for old China.729

In 1912, the Republic of China (ROC) was established through revolution to terminate the Qing Dynasty. Until then, China was on its way of integrating into the international society, even in absence of an equal footing. Nevertheless, continuous political turmoil and civil wars between the ruling Party Kuo-Ming-Tang (KMT) and the dissenting Chinese Communist Party (CCP) frustrated the country’s efforts to restructure its relations (including the trading relations) with the world. Not until the mid-1940s did China win itself a new, respectable figure among the international community, through its significant contributions to the ending of the World War II. From then on, despite its continuous struggles in a civil war, China had devoted efforts to pursuing a better position in the international society.730 The ROC’s involvement in the preparation for and creation of the GATT 1947 was part of these efforts.

2. Original Connection and Later Disassociation with the GATT

China was one of the twenty three original contracting parties of the GATT, predecessor of the WTO. Between 1946 and 1947, the ROC government participated in the 1st multilateral trade negotiation round and signed the Final Act of Geneva that created the GATT 1947. One year later, the ROC government signed the Protocol of Provisional Application (PPA) and became an original contracting party of the GATT 1947. Until then, China was still in the civil war, but it did not prevent the ROC government to attend the 2nd round of tariff reduction negotiations held in Annecy, France. In late 1949, the Chinese Communist Party (CCP) won the civil war and took over the Mainland China. As the People’s Republic of China (PRC) was established

729 Id. at 136-138.
730 Id. at 138.
on 1 October 1949, the KMT shifted its regime to Taiwan. Since then, the whole China has been split by the Taiwan Straits with two co-existing regimes.\(^{731}\)

These changes in China’s political situation imposed significant implications for the presence of China within the GATT. In 1950, the KMT regime in Taiwan notified the Secretary-General of the UN of its decision to withdraw from the *GATT 1947*, and, according to the then UN Secretary General, such withdrawal took effect on May 5\(^{th}\) of that year. During the following forties decades, the PRC government kept silent on that withdrawal, due mainly to its long-standing isolation from the Western world for ideological frictions and political conflicts between the two.\(^{732}\)

For the same reason, the PRC government missed serial subsequent rounds of multilateral trade negotiations under the GATT. In early 1950s, when GATT contracting parties worked on the 4\(^{th}\) Trade Negotiation Round, the PRC was in the Korean War and was imposed economic sanctions by Western countries. In late 1960s, when the Kennedy Round was in session to address the problems of developing countries, the PRC was suffering the infamous “Big Leap Forward” movement and falling into the early stage of the “cultural-revolution” disaster. Between 1973 and 1979, when the Tokyo Round was held significantly to develop the GATT system, the PRC underwent the peak of the “cultural revolution” disaster. All in all, within four decades after the ROC’s withdrawal from the GATT, the PRC did not have any association with this growing multilateral trading system.

### 3. Campaigns for Resuming the Status as a Contracting Party of the GATT


\(^{732}\) Id. at 298-300.
It was not until early 1980s did the PRC pay attentions to the GATT system. In 1980, two years after the Chinese government officially endorsed an open-door policy and launched massive economic reforms, China began to send officials to training courses conducted by the GATT. A year later, China became an observer at the meeting of the Multilateral Fabric Agreement (MFA) of the GATT. During another two years, China further became an observer at the GATT’s ministerial sessions.\textsuperscript{733} In 1984, China obtained a membership of the MAF and a permanent observer status to the GATT proceedings at large. Nevertheless, the observer-status experience was of little use for the country fully to participate in this predominant multilateral trading system, since the country still remained an “outsider” of the GATT, unaffected by the latter’s privileges and obligations. For this reason, when present at above respective GATT events, China repeatedly expressed a willingness to resume her status as a GATT contracting party, through re-negotiation of her rights and obligations under the GATT legal regime.\textsuperscript{734}

Subsequently, China submitted a formal application on 10 July 1986, requesting the “resumption” of her status as a contracting party of the GATT. It is worth noting that this resumption application applied the same procedures as those for the accession to the GATT, the latter, as laid down in Article XXXIII of the GATT 1947, provided that “[a] government ... may access to this Agreement [the GATT 1947] ... on terms to be agreed between such government and the Contracting Parties.” As a result, China’s resumption application was processed at both multilateral and bilateral levels. This two-level accession process was subsequently adopted by the WTO legal regime, as further provided in the “WT/ACC/13” of 15 March 1995, and revised in accordance with the “Technical Note on the Accession” of 19 November 1999.\textsuperscript{735}

\textsuperscript{733} Id. at 300-302.
\textsuperscript{734} Id. at 301, 304.
\textsuperscript{735} Id. at 302-310.
At multilateral level, four months after China submitted the “Memorandum on China’s Foreign Trade System” on 13 February 1987, the GATT appointed a working party on China’s resumption application, with the members reaching as many as 68 in the GATT history for the first meeting. At bilateral level, there were thirty seven GATT contracting parties (subsequently, WTO members) requesting bilateral negotiations with China, focusing mainly on tariff concessions and market access on trade in services.\textsuperscript{736} Until May 1989, when reaching the understanding with the U.S. at the 5\textsuperscript{th} round of bilateral negotiations, China had respectively yielded some similar fruits with other major GATT contracting parties. This “smooth advance” was largely due to a technical factor: bilateral negotiations by then had only been limited to trade in goods, without outreaching the complex issues put forward lately by Western countries in the WTO era. Moreover, China’s aggressive economic reforms and opening to the outside world convinced its Western trading partners that the country was on the way towards a “free market,” and also improve the diplomatic relations between the two sides. Meanwhile, the GATT Working Party on China held the 7\textsuperscript{th} meeting of its kind, almost wrapping up the review of China’s foreign trade system. As a protocol on China’s GATT resumption almost took shape, it was highly expected that the negotiations at both levels would be concluded by the end of 1989.\textsuperscript{737}

Nevertheless, the Chinese government’s crackdown of the Tiananmen pro-democracy movement on 4 June 1989 brought the ongoing negotiations nearly to a stand-still at both levels. It was not until early 1992, when the Chinese leader Deng Xiaoping delivered his famous speeches in South China and the 14\textsuperscript{th} session of the Central Committee of the CCP set forth the strategic goals of establishing Chinese market economy and modern enterprise system, did China reinforced her open policy and economic reforms. As the Western world’s faith got restored in this regard, negotiations for China’s GATT resumption were resumed as well. By late 1992, the

\textsuperscript{736} Id. at 311.
\textsuperscript{737} Id. at 312-313.
GATT Working Party on China has held eleven meetings in total, particularly addressing tremendous inquiries of the GATT contracting parties about the China’s Memorandum. At the 11th meeting on October 1992, the Working Party finalized the investigations on China by two documents: the Draft Report of the Working Party on China and the Draft Protocol on China.\(^{738}\)

In contrast, the progress in bilateral negotiations was far less desirable, making itself a “bottleneck” to China’s prolonged struggle for returning to the GATT and subsequently entering the WTO. Right after the “Tiananmen incident,” Western countries imposed economic sanctions upon China. The subsequent revocation of these sanctions did not wipe Western countries’ growing skepticism about China’s development towards a free market and democracy within their standards of civilization.\(^{739}\) During bilateral negotiations, their demands upon China expanded significantly, covering not only traditional field of trade in goods (particularly agricultural products and textile), but also new areas like intellectual property and trade in services, etc. Moreover, some demands touched China’s domestic trade regulation and judicial affairs, such as finance and tax policies and judicial review, which appear to fall within the scope of “domestic implementation.”\(^{740}\)

It should be noted that difficulties in above bilateral negotiations were concerned with the then ongoing Uruguay Round. The extensive coverage of these trade negotiations (e.g., intellectual property protection, trade in services, agriculture, etc.) expanded the scope of China’s commitments demanded as a price of its acceding to the GATT.\(^{741}\) The Uruguay Round kicked off just two months after China submitted her official resumption application to the GATT. China then actively engaged in this most

\(^{738}\) Id. at 311.

\(^{739}\) Id. at 311-313.

\(^{740}\) Id. at 315.

enduring event in the GATT history. On 15 April 1994, China joined the other 125 participants to sign the final documents of the Uruguay Round in *Marrakesh*.\(^{742}\)

Nevertheless, China’s participation in the Uruguay Round did not expedite her resumption of the GATT contracting party status. Neither did the birth of the WTO secure an original membership for China, although the Chinese government intended to set the end of 1994 as the “deadline for finishing substantial negotiations of China’s resumption in the GATT.”\(^{743}\) Due to “high prices” charged by some western countries, their bilateral negotiations with China came to a deadlock.\(^{744}\) The situation lasted until the WTO came into being on 1 January 1995. Consequently, China lost the opportunity to become a “founding (original) member” of the newly established multilateral trading institution, and had to continue her endeavors to pursue a membership of the WTO as an “acceding Member.”

4. Endeavors to Join the WTO

Upon the establishment of the WTO on 1 January 1995, China, having failed to resume the status as a GATT contracting party in time to become an original member of this newly born multilateral trading institution, had to renewed its application for the accession to the WTO. At this stage, the process of China’s WTO accession can be classified under three headings: (1) conclusion of bilateral market-access negotiations; (2) conclusion of multilateral negotiations in the Working Party, including the draft Protocol and its Annexes, as well as the Working Party Report, all of which setting out the terms of China’s accession; (3) approval and acceptance of

\(^{742}\) YANG & CHENG, *supra* note 731, at 304.

\(^{743}\) Id. at 315, FT39.

\(^{744}\) Id. at 317.
these terms of accession by WTO members and by China, respectively.745

In December 1995, the GATT Working Party on China was transformed into a WTO Working Party on the Accession of China, continuing with the multilateral negotiations in this context. At bilateral level, some forty four WTO members (including previous thirty seven GATT contracting parties) expressed interest in negotiating bilateral market-access terms with China, among them the U.S., the European Communities (EC), Japan and Canada were major players vis-à-vis China, given their predominant influence within the WTO. As noted below, it was not until China reached bilateral agreement with the U.S. in November 1999 and then with the EC in May 2000, was the country able to make rapid progress in concluding her bilateral negotiations with most other WTO members.746

Between 1995 and 1999, China made tremendous efforts to accelerate its accession process towards the WTO. At the end of 1995, China accepted full convertibility for currency account transactions. In 1997, despite the negative impacts of the South Eastern Asian financial crisis, China announced an overall restructuring of state-own enterprises, including the elements of privatization, and also agreed to phase out trading monopoly and extend the scope of candidates enjoying the full trading authority. Meanwhile, China continued to make significant progresses in bilateral negotiations with the U.S. and the EC. In April 1999, when the Chinese Prime Minister Zhu Rongji visited the U.S., Beijing presented Washington an extremely favorable offer in order to expedite the conclusion of the deal. When the Clinton Administration was yet hesitating to accept the Chinese offers, NATO bombed the Chinese embassy in Budapest in that May, arousing sever resentments in China.

745 Jeffrey L. Gertler, China’s WTO Accession – the Final Countdown, in CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 56 (Deborah Z. Cass, Brett G. Williams & George Barker eds. 2003).
746 Id.
towards the American. The Sino-US accession negotiation was then interrupted until November 1999, when China finally reached the deal with the U.S. This was followed shortly thereafter by a spate of other bilateral deals in the first half of 2000, including that with the EC in May of that year.

Another element contributing to China’s expenditure for her bilateral accords with WTO members was the U.S. administration’s agreement with China in September 2000 – as a *quid pro quo* for China’s market-access – that the U.S. would provide China with permanent MFN status, thus eliminating the annually renewed conditional MFN provided under the *Jackson-Vanik* amendment to the US Trade Act. During that period, the Working Party on China resumed its work on drafting the Accession Protocol and the Working Party report. It was then highly expected that China would join the WTO by the end of 2000.

Nevertheless, hindered by certain major controversies on market access to Chinese agriculture and insurance market, the accession process was dragged until late March 2001, when the Sino-US aircraft collision occurred over the South China Sea, worsening the whole situation. After three-month efforts to overcome these difficulties, China reached a new bilateral accession deals with the U.S. and the EC in June 2001. By then, China already ironed out all substantive issues raised out of its long-standing bilateral negotiations with WTO Members. On 13 September 2001, when signing the accession agreement with Mexico, China concluded the last bilateral negotiation for her accession.

748 Gertler, *supra* note 745.
749 *Id.* at 57-58.
750 *Id.* at 57.
Four days later, at its final (18th) meeting, the Working Party on China reached agreement with China on all “outstanding issues” and then finalized the full “accession package” for her, including the Accession Protocol and the Working Party Report. On 10 November 2001, the WTO Ministerial Conference in Doha, Qatar approved the Decision on Accession and the above “accession package.” On the next day, the Chinese government notified the Director-General of the WTO that the Standing Committee of the People’s Congress of China had ratified the terms of accession. Thus, due to accession procedures of the WTO, China officially became the 143rd Member of the WTO one month later on 11 December 2001.  

II. Process of China’s WTO Accession: Significance and Implications for Domestic WTO Implementation

1. Significance of the Accession Process: Why So Long?

From the above historical overview, China’s experience in pursuing a GATT/WTO membership has portrayed the “longest and most arduous” accession process for a single Member in the GATT/WTO history. With feature, China is distinguished from any other acceding WTO Member, even though “each accession to the WTO is a unique event.” Some observers take this feature for granted, deeming it as an “easily making” fact according to China’s status as an original GATT contracting party back to 1948, as well as its subsequent resumption application to the GATT as early as 1986. To this author, however, “timing” matters only in the sense that it may mark whatever is brought to the surface, but not the factors underneath. Others refer to “the many ups and downs China experienced along its accession trail,” especially those historical “incidents” occurring one after another.  These individual events, as any

751 Id. at 61.
752 Id. at 55-56.
acknowledgeable observer will agree, would hardly be counted as the key obstacle to the accession process. As this author believes, the significance of China’s accession process is determined by the factors in two dimensions at least: technical and practical.

A. Technical Dimension

In technical dimension, difficulties standing in the way of China’s “long and torturous fifteen-year accession path” come from the GATT/WTO accession procedures. For the GATT, accession procedures were mainly set out in Article XXXIII of the GATT 1947, entailing bilateral market-access negotiations by an “acceding member” with each interested GATT contracting party, before the outcomes of these negotiations became “mulilateralized” – on the MFN basis – through review of a Working Party appointed by the “Contracting Parties” as a whole. The WTO adheres to a similar practice, notably in Article XII:1 of the WTO Agreement, providing that “[a]ny state or separate customs territory ... may accede to this Agreement on terms to be agreed between it and the WTO.” Under this accession provision, an “acceding member” is particularly required to reach bilateral market-access accord with each interested WTO member, before its accession is finally endorsed by the WTO Working Party at the multilateral level.

Consequently, an acceding member of the WTO is bound not only by the well-established WTO agreements, but also by the specific “terms” it has reached with all other WTO members for the accession. In this particular connection, one may hardly find any limitation to such “terms.” Legally, the existing WTO members are free to

753 General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, Art: XXXIII. “... may access to this Agreement [the GATT 1947] ... on terms to be agreed between such government and the Contracting Parties.”
negotiate any term for the accession of an acceding country, including whatever imposing the more stringent, restrictive commitments than the WTO agreement would do in a general sense.\textsuperscript{754} This opens the door for the possible abuse of above accession procedures by the existing WTO members.

At this point, it seems necessary to post a "common-sense" notice that the GATT's accession procedures did not apply to its "original contracting parties," in just the same way that the WTO analogies do not apply to its "original members." For the founding members of the GATT/WTO system, their membership was secured right after the GATT 1947 entered into force (through the PPA) or the WTO was established. This appears to be a far simpler process than the accession process undertaken by an "acceding member." Unfortunately, for the historical reasons noted earlier, China, once an original contracting party of the GATT, failed to take advantage of either of these privileges. Instead, the country underwent the rather complex and complicated accession procedures of the GATT and then of the WTO, part of which were the bilateral market-access negotiations with GATT contracting parties, and subsequently, WTO members.

As mentioned above, The GATT/WTO accession procedures are at both bilateral and multilateral levels. In this context, the bilateral accession negotiations appear more complex and time-consuming, for the acceding Member would have to deal respectively with each individual GATT or WTO Member. In the case of China, thirty seven GATT contracting parties and later on forty four WTO members had been engaged in such bilateral accession negotiations with China before the accords were sealed. This remarkable number inevitably brought complexity to the accession process, making it potentially long process.

\textsuperscript{754} Qin, \textit{supra} note 193, at 487.
More fundamentally, the mandatory requirement for the bilateral accession negotiations opens the door for the engaged Members (especially led by the U.S. and EC) to request maximization of market access from China, while blocking any possible “leeway” for China to avoid their demands. In this particular connection, it would be hard to see engaged members bargaining for the so-called “commercially viable” terms, but rather for whatever in their best interests, since the settings of the GATT/WTO accession procedures may arouse their temptation to do so. This “one-sided” tendency increased the “imbalance” of positions between China and her trading partners in the accession negotiations, and thus increased the difficulties in processing a smooth accession. In addition, the extension of the substantive coverage of the Uruguay Round broadened the scope of the commitments demanded as a price of admission, placing additional burdens on the part of China.

B. Practical Dimension

The technical dimension merely presents the possibility, and may never turn into a reality without counting all practical factors. In the course of China’s long and arduous accession process towards the GATT/WTO system, difficulties in practical dimension matter more, which mainly originated from China’s “unique” situation, based on her historical, political, economic and legal status vis-à-vis the fundamentals essential to the GATT/WTO system. This contrast has invited enormous concerns and skeptics of the GATT/WTO Members, especially those from the West. The consequence was the increase of a “Sino-West confrontation,” especially evident in the bilateral accession negotiations between both sides.

(1) Unique Situation of China

755 WANG, supra note 726, at 20-21.
756 Halverson, supra note 741, at 326.
Within the international community, China has been unique in many respects. From the outset, the country's historical experience in integrating into the global community is definitely in a class of its own, and has profound implications for China's continuous adventure in this regard, including her accession to the GATT/WTO system and implementation of WTO obligations.

Over the past two hundred years, China's long-standing struggle with the Western world has portrayed a long and painful process of adjusting herself from the centre of a "Chinese world order" to the bearer and enforcer of a West-dominated "standard of civilization." From the beginning of this enduring course, trade and trade relations had played a pivotal role, originally evident in initial British attempts back to the eighteenth century to open trade for China. The subsequent "unequal treaties" and the "treaty port system" erected therein – as forcibly imposed by the Western powers upon China "under the threat of naval bombardment and overland siege" – allowed them to dictate the conditions of its relations with China for almost a century (1840s – 1930s). Concerning trade relations, such conditions include: opening of treaty ports, fixing of tariffs, limits on internal duties for imports, trading on Western terms, etc. Having resented the "unequal treaties" and "treaty port system" as a "national humiliation," the Chinese had consistently sought to remove them until the 1930s, when such efforts finally bore fruits with the gradual abrogation of the extraterritoriality in China.

Nevertheless, China’s endeavors to pursue independence and prosperity did not end

758 GONG, supra note 728, at 132-133.
759 Id. at 139.
760 Id. at 162-163.
there. Neither did she stop the process of integrating into the world community. With the two tasks being merged, a main issue is raised: how can the country accommodate itself to a modern world apparently dominated by the West (economically at any rate), without having China’s identity overshadowed by the latter? \(^{761}\) In search of answers to this question, the Chinese would inevitably turn to their past experience, with highly emotional outburst of Chinese humiliation and naturally emerging nationalism. This may entail significant implications for China’s interactions with the Western world, particularly at the negotiating table.

Therefore, it was not surprising to see China’s harsh responses to the expanding demands of the Western countries for her GATT/WTO commitments, particularly in the bilateral accession negotiations. As noted earlier, it is for technical reasons that Chinese had to face the challenges posed by each GATT/WTO Member in the already complex accession process, and China’s firm position (even if not always consistent) towards the increased pressures from the West which further prolonged the process. Without taking into account these historical perspectives, it would be difficult, if not impossible, to obtain a sound perception of the difficulties inherent in China’s accession process. Moreover, this historically sentimental factor did not detract from China’s determining accession to the WTO. As discussed below, it continues to affect China’s post-WTO performance, particularly in the implementation of WTO legal obligations in the domestic sphere. On many occasions, this factor of uniqueness even determines how far China can reach out to satisfy the requirements of the WTO.

History may display the roots, but can rarely reflect the living reality of the current situation. China is also unique in terms of her fascinating trade and economic developments vis-à-vis today’s fairly conservative political structure. According to the recently released WTO statistics, China now has been among the World’s top ten

\(^{761}\) Yahuda, *supra* note 757, at 304.
trading partners, and also the second largest recipient of foreign direct investment (FDI).\textsuperscript{762} The country has grown into a major player in the world economy. By the time China joined the WTO in December 2001, it already ranked as the seventh largest exporter and eighth-largest importer of trade in goods, and also the twelfth-leading exporter and tenth-leading importer of trade in services. Given its largest population in the world, China can be easily counted as the largest potential market of all WTO Member.\textsuperscript{763} Therefore, as a growing economic giant, China's accession to the WTO has inevitably invited numerous concerns of her trading partners, either about a threat to their interests in the GATT/WTO system, or about the impacts on the WTO institution itself.

However, China's remarkable performances in the world economy do not in themselves make the country unique, for the impact of the Chinese economy on the world economy as a whole still remains relatively small, and is unlikely to increase substantially as a consequence of its WTO accession.\textsuperscript{764} China's uniqueness lies in the fact that the preceding economic achievements have been made during its "transitional period," featured by China's consistent implementation of aggressive economic reforms and rigorous open-door policy, under a fairly conservative political structure still based upon a communist ideology.\textsuperscript{765} China adopted the open-door policy and launched economic reforms in early 1980s, aiming at transforming a centrally-planned economy into a "socialist market economy." The last two decades have witnessed considerable fruits bore by this process: not just the above-noted remarkable economic achievements, but also China's increasingly pivotal role in international community, as partly mirrored in the lengthy accession effort towards the GATT/WTO system.\textsuperscript{766} Specifically, China has gradually brought prices and

\begin{footnotesize}
\textsuperscript{762} Halverson, \textit{supra} note 741, at 320. \\
\textsuperscript{763} Gertler, \textit{supra} note 745, at 65. \\
\textsuperscript{764} Yahuda, \textit{supra} note 757, at 318. \\
\textsuperscript{765} \textit{Id.} at 307. \\
\textsuperscript{766} Halverson, \textit{supra} note 741, at 321.
\end{footnotesize}
market mechanism into play as the key determinants of her future trade relations with the rest of the world.\textsuperscript{767} Nevertheless, it remains controversial to what extent China can really be regarded as a "market economy," especially in terms of the GATT/WTO criteria. Despite its economic achievements, China's nationwide dominance of a communist apparatus, problematic restructure of numerous state-owned enterprises and other related circumstances still reflect the "planned nature" of the Chinese economy, which has affected WTO members' confidence in the pace and depth of China's reform and open process with regard to "sufficient market orientation" as a condition of the WTO membership.\textsuperscript{768}

Another dilemma posed by China's remarkable economic achievements concerns her position as a "developing country," as consistently claimed by the Chinese side. This claim has much merit in the context of the traditional definition of a developing country, given China's relatively low annual per capita income of less than $800, with up to 9 million peasant farmers engaged in traditional agriculture and with much of the country still experiencing the poor world-type economic conditions. However, China's "developing country" position has been complicated by her remarkable performances in the world economy, with a number of Chinese coastal provinces reaching the level of newly industrialized economies. In this regard, China can hardly be treated as a standard developing economy.\textsuperscript{769}

These controversial issues arise from China's unique situation, and they both entail

\textsuperscript{767} Gertler, \textit{supra} note 745, at 66.
\textsuperscript{768} Yahuda, \textit{supra} note 757, at 307.
\textsuperscript{769} Id. at 311.
significant implications for China's WTO accession. As noted above, the "market economy" status generally serves as a prerequisite for the GATT/WTO membership. The "developing country" position, on the other hand, suggests the acceding member concerned would be entitled to a series of "special and preferential treatments" under the GATT/WTO regime. Both issues were crucial to the setting-up of China's GATT/WTO commitments and obligations. As discussed below, they formed part of major focuses of GATT/WTO members' concerns and skepticism about China's accession, as consistently penetrating throughout China's bilateral and multilateral accession negotiations with her GATT/WTO rivals. Until they were ironed out, together with others, the accession process would have no steam to move forward.

(2) Concerns and Skepticism of Other WTO Members

It was China's unique situation that caused the concerns and skepticism for other WTO Members about its accession to the WTO. However, it would not be possible to understand these concerns and skepticism without referring back to the nature of this multilateral trading institution, as well as its underlining principles. Being a principal international organization for the promotion of multilateral global trade, the WTO is charged with laying down the rules governing international trade, which are based upon five fundamental principles: (1) Non-discrimination, including the Most Favored Nation (MFN) and national treatment; (2) Market opening; (3) Transparency and predictability; (4) Undistorted trade; and, (5) Preferential treatment for developing countries. As these principles are underlined by most substantive legal obligations of the GATT/WTO system, the WTO is seen to have embodied the so-called the "spirit of classical liberalism."
To be sure, the WTO has not always completely adhered to these principles, while its members have not only complained about their application to themselves, but some have even sought to side step them. Nevertheless, as supported by major OCED countries, the WTO has registered considerable successes in applying these principles across the board. At this point, it is worth noting that the OECD countries, particularly represented by four largest WTO members called “Quad” (Canada, European Union, Japan and United States), are leading founders of the WTO and major advocates of above fundamental principles. Generally, most difficult negotiations would need an initial break through among the “Quad.” As this case applied to China’s WTO accession, most concerns and skepticism about China’s WTO accession had been raised by these developed countries.

Reviewing China’s unique situation in the context of the above five fundamental principles, one may easily understand why other WTO Members, especially those Western countries, raised tremendous concerns and skepticism about China’s WTO accession, and also, why the coverage of these concerns and skepticism had been so extensive, far beyond the above-discussed controversies on China’s “market economy” status and “developing country” position. Particularly, under the principle of transparency and predictability, the WTO regime “necessarily intrudes into domestic affairs of its members,” especially concerning their national legal infrastructures and judicial systems for “WTO compliance” or “WTO implementation” purpose.

Having traveled the whole accession trail, concerns and skepticism of China’s WTO counterparts were fully addressed in the accession negotiations, bilaterally and multilaterally. Their complexity and sensitiveness contributed largely to a sluggish

773 Id.
774 Id. at 309.
acquisition process, as undesirable to either side.\textsuperscript{775} In addition, China's resisting position towards most of these concerns and skepticism also increased the length of this process.

In general, these concerns and skepticism bear four facets. The first facet concerns the market access, relating to the principles of "non-discrimination" and "market opening." As mentioned earlier, the WTO members intended to take advantage of bilateral accession negotiations with China, requesting the maximization of market access from her. It is thus hard to say their concerns and skepticism in this context are for their own sake or, in support of the above general principles of the WTO. Extensive and enormous as their demands could be, the motive behind appeared to be more "interest-driven" than "fair bargaining," and inevitably received numerous complaints and criticism from the Chinese side, although the accession negotiations in this regard ended up in China's massive concessions, notably, the commitments to eliminate dual-pricing practices, phase out (within three years) most of the restrictions on importing, exporting and trading faced then by foreign enterprises, progressively and substantially open up the service sectors to foreign competitors, etc.\textsuperscript{776}

The second facet concerns China's status as a "market economy," relating to the principle of "undistorted trade" that underlines the WTO disciplines on the imposition of trade remedies (antidumping, countervailing duties and safeguard measures) by respective WTO members.\textsuperscript{777} A "market economy" (ME) used to be the "prototype" model of a WTO member whose industries and sectors "operate under market conditions," with all the privileges and rights deriving from above disciplines.\textsuperscript{778} A

\textsuperscript{775} Gertler, supra note 745, at 66. "In the final few months, there was little doubt that WTO members and China were very eager to see the negotiation brought to a rapid and successful conclusion. This desire to achieve closure of China's accession was also shared by the WTO Secretariat."

\textsuperscript{776} Id. at 62.

\textsuperscript{777} Id. at 63.

\textsuperscript{778} Jackson, Impact of China's Accession, supra note 723, at 26.
“non-market economy” (NME) – on the other hand – would have to undergo certain particular adjustments before it may reach that position. These advance adjustments, which allow a WTO member to “walk away” from above regular disciplines on its imposition of trade remedies towards another member, and thus put the latter in a very unfavorable position, mainly cover the NME treatment for antidumping purpose, rigorous restriction on subsidies, and special product-specific safeguard mechanism. In this sense, the status of an ME or NME is crucial to the establishment of the rights/obligations of an acceding member, with regard to its capacity to challenge any trade remedy outside the WTO disciplines.

China has long argued that over the past two decades of the open-door policy and economic reforms, the country has transformed from a centrally-planned economy into a market economy, and should qualify for the regular treatments granted to a ME under the WTO with regard to trade remedies. This position, however, has not yet been fully shared by the Western countries, particularly during China’s WTO accession process. Among the West’s major concerns were China’s state trading and government-owned, or state-owned or operated enterprises, both inevitably resulting in their enormous skepticism about China’s rampant subsidies, irregular market and distorted pricing system. As a consequent, the controversy over China’s ME/NME status lasted over fifteen years, until China finally sealed the accession deal with the Western countries by accepting the NME treatment for antidumping purpose (for fifteen years), a special product-specific safeguard mechanism with a separate textile safeguard, as well as the abolition of all export subsidies on either industrial or

779 Gertler, supra note 745, at 63.
780 NICHOLAS LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 25 (2002). This argument has found its statistical supports from China, IMF and the WTO. Until 1999, the prices of 95% of retail commodities, 86% of producer goods, and 83% of agricultural commodities in China were determined by market forces (as opposed to state-guided or state-fixed prices).
The third facet relates to China's trade regime and legal system, notably the principle of "transparency and predictability" that are "key element of the multilateral trading system." According to the transparency principle (mainly contained in Article X of the GATT), the member governments should promptly publish all trade-related laws, regulations, judicial decisions and administrative rulings of generally application, administer all such measures in a uniform, impartial and reasonable manner, and meanwhile furnish efficient, independent procedures of judicial review for all trade-related administrative actions. The predictability principle calls for "a legal hierarchy giving preference to tariffs over less transparent and less secure non-tariff measures such as quotas and licenses, and therefore "encouraging members to 'bind' their market-opening commitments in goods and services." Evidently, this principle is more procedural than substantive in nature, and has intruded into domestic sphere of a WTO members, particularly focusing on its internal legal infrastructures in legislative and judicial context. This goes back to the subject of the present study, domestic implementation of WTO law, as mainly undertaken by national legislature and judiciary.

The West's concerns and skepticism about China's trade regime and legal development long preceded the country's WTO accession. Back to late 1980 when China just introduced the open-door policy and launched economic reforms, Western business circles held many expectations for enormous market potentials in that country. Their expectations were soon frustrated (partially, at least) by the fact that until early 1990s, there had not yet been any actual Chinese market to them. To make it worse, their "pioneers" doing business in China had experienced a broad range of market-disorder problems, e.g., arbitrary administrative interferences, unfair trade

782 Gertler, supra note 745, at 63.
783 Id. at 62-63.
practices, discriminatory regulatory process, lack of transparency, etc. All these problems appeared to be in conflict with the principles of transparency and predictability of the WTO, and in effect limited the participation of the Western traders in the Chinese market or "unfairly" affected their trade. When China began her efforts to join the GATT and then the WTO, Western countries had a chance to address these problems. They added extensive requirements for China's trade regimes and legal system, with many of them even more stringent than those imposed upon an existing WTO Member.

Interestingly, no records indicated that China had ever held a harsh position towards the above concerns and demands. A positive response in this regard constituted a big contrast to China's paradoxical attitude towards the West's demands for substantial trade concessions, e.g., market access and discriminatory imposition of trade remedies. Despite her immature legal system and problematic trade regulation, China has committed to adhere herself to the WTO's transparency obligations in greater depth and width than many WTO members (including some most developed countries) have been able to do (details in this regard are elaborated in China's Accession Protocols for later discussions). In compliance with the principle of predictability, China, after having all her import tariffs bound, has committed to the phased reduction and removal of tariff barriers, mostly by 2004, but in no case later than 2010. In this context, the West's concerns and skepticism consequently focused more on China's difficulties and the capacity in developing the WTO-compatible trade regime and legal system, than on her willingness and determination to fulfill the obligations in this regard. Even so, the complexity and comprehensiveness of these WTO obligations already contributed to slow accession process by China.

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784 KONG Qingjiang, China's WTO Accession: Commitments and Implications, 3 J. INT'L ECON. L. 655, 668 (2000).
785 Gertler, supra note 745, at 63.
The final facet concerns China's position as a "developing country," in relation to the principle of "preferential treatment for developing countries" that provides "transition periods" to developing countries and countries in transition to market economies, "to adjust their system to many of the new obligations resulting from the Uruguay Round."\textsuperscript{786} For over five decades since the establishment of the PRC, the Chinese government has claimed that the country is a developing country.\textsuperscript{787} During the fifteen years of WTO accession negotiations, China's negotiators had consistently claimed China's entitlement to join the status of a developing country, until at the very end they accepted implicitly the U.S. and EU argument that China could not be treated as a "typical" developing country "by virtue of size and the magnitude of its part in international trade." Taking such acceptance as part of the "concessions," China has agreed to a special cap on its ability to provide domestic production subsidies in agriculture, abolition of export subsidies, as well as immediate implementation of the TRIPs Agreement.\textsuperscript{788}

At this stage, it is interesting to recall the Western world's insistence on China's status as a "non-market economy" (NME) for the purpose of trade sanctions. Since China - from their perspectives - is neither a "market economy" (ME) nor a "developing country," a question may arise as to what category it should fall into. True, it is not uncommon that a ME may stay at its developing stage, and there is not necessarily a linkage between a NME and a developing country. However, it will be very rare, if not possible, to see a NME like China (still under a "transitional period" as recognized by the Western countries) being part of the developed world already. Otherwise, where can one find the advantages of the ME - as widely recognized in the Western world - over the NME?

This irony reveals the fact that the West is more apprehensive about the potentials of

\textsuperscript{786} Id. at 64.
\textsuperscript{787} Yahuda, supra note 757, at 311.
\textsuperscript{788} Gertler, supra note 745, at 64.
China’s increasing economic strength and competitive power if granted preferential treatment of a developing country. Notably, these concerns have also been widely shared by the developing WTO Members. During the accession negotiations, although the EU and U.S. took the lead in resisting China’s accession simply as a designated ‘developing country’, it was the developing world that had most to fear from it.\(^\text{789}\) Being a predominant receipt of foreign direct investment and an active role in world trade, China has emerged as “a damaging competitor” to many developing countries, with her WTO accession possibly putting them in a position at increasingly competitive disadvantages to existing developing WTO Member countries.\(^\text{790}\) Since the resistances to China’s claim for the status of a developing country also came from the developing countries of the WTO as well, the controversy turned out to be significant, contributing in part to the already slow accession process.

2. Implications of the Accession Process for China’s Implementation of WTO Obligations

China’s official entry into the WTO in December 2001 ended the slowest and most sluggish accession process she had experienced in the GATT/WTO history. Since then, China has embarked on the new stage of WTO implementation, devoting to honoring its comprehensive and complex WTO commitments. Despite China’s completion of her accession process, circumstances contributive to this protracted process have not yet disappeared. The unique situation of China can not change overnight. Neither will the concerns and skepticism of other WTO Members diminish, with their focus shifting to China’s post-WTO performance. In response, China will likely maintain her rather incredulous position towards these concerns and skepticism, regardless of the significant concessions made in the Accession Protocol. All these impressions will continue to affect China’s WTO implementation.

\(^\text{789}\) Yahuda, supra note 757, at 306.
\(^\text{790}\) Id. at 312.
Take, for instance, China’s obligations in regard to market access. Although WTO Members have successfully maximized their rights and privileges vis-à-vis China, they may also make themselves a “self-interests seeker” – rather than a “fair-play advocate” – to the Chinese people. Given China’s historical experience in the “unequal treaties” with the Western world, the country’s reluctance to fulfill these obligations will inevitably emerge wherever and whenever possible, in just the same way as its long-standing resistance persists, to the corresponding demands of other WTO Members during the accession negotiations.

This can equally be the case for China’s status as a None Market Economy (NME), the latter has been confirmed by the China Accession Protocol and therefore “internationally legalized.” The Chinese may continue to regard this term as a “concession” of much unfairness, while the Western perspectives have firmly taken it as “constructive” and “part of the trade off in trying to assimilate a society and a market structure that is really quite different from, and could abuse, an equal partnership, or a totally harmonized partnership role in the WTO.”791 With these two conflicting perspectives underneath, just as they were during China’s accession process, it would be hard to imagine a smooth process of WTO implementation for China, especially with regard to her NME-related substantive obligations.

On the surface, these two situations represent nothing more than a bargaining contest that is normal in any negotiation of an international agreement. In deed, however, they reflect a conflict of values between the Western world and China, particularly in terms of the role of the market. Unlike the WTO, which was built on the basis of free trade and has represented the “spirit of classical liberalism,” the Chinese regime viewed the role of market primarily in terms of a mechanism to increase efficiency

791 Jackson, Impact of China’s Accession, supra note 723, at 26.
and productivity, rather than as the governing principle of the national economy.\textsuperscript{792} Even though they realize the inevitability of the market opening, the Chinese would rather maximize the period of adjustment, so as to ease any tension brought about by the overture. Such considerations are not unique to China, since other acceding WTO Members will follow the same practice in effect. No doubt, they will invariably prolong China's WTO implementation process depending on each specific obligation involved.

In the same context, concerns may also arise – from both sides, from China and other WTO Members – about China's capacity to fulfill her WTO obligations. The only difference is that China took them into account earlier on during the accession process, while other WTO Members, especially those from the West, have __ to pay more attention to them in their assessment of China's performance after WTO accession. In either case, these concerns are always there, whether before or after China joined the WTO. Having served as a feet-dragging factor in China's accession process, these concerns continue to play a significant role in China's WTO implementation. Therefore, it will be sensible for China's counterparts within the WTO to be patient and prepared for a protracted process of China's WTO compliance. After all, many of China's WTO obligations appear to exceed its current implementing capacity, even though the country is not lacking in its good faith to fulfill them. This is particularly the case with China's TRIPs-related commitments, as well as those concerning the transparency and predictability of the Chinese domestic trade regime.

As noted above, during the accession process, China committed to bring her trade regime and legal system – in greater depth and width than most other WTO members have done – into compliance with the WTO's transparency and predictability principles. In this regard, China's attitude is more positive towards other demands of WTO members for substantive trade concessions (e.g., market access and the NME
status). Nevertheless, given China’s relatively recent legal system, problematic trade regulation and “novel” legal culture in the Western sense, it remains questionable whether the country has the capability to fulfill these obligations, and how to achieve that in practice. This concern was shared by China and her WTO counterparts during the accession process, and will continue unabated in the process of China’s WTO implementation. Notably, the transparency and predictability obligations are procedural in nature, and have intruded into China’s domestic sphere, especially her legal infrastructures in the legislative and judicial process. This goes back to the subject of the present part, which focuses on China’s domestic implementation of WTO law, as mainly undertaken by the Chinese legislature and judiciary for later discussions.

Finally, China’s bid for a “developing country” represents a more complicated task than any negotiation in the three preceding occasions. On the one hand, China failed to obtain an “across-the-board preferential treatment as a developing country” for her WTO accession, and had to accept a special cap on her ability to provide for agricultural subsidies, the abolition of export subsidies, as well as the immediate implementation of the TRIPs Agreement. Accepting these terms as “concessions,” however, the Chinese will be likely to return to the matter on a case-by-case basis. On the other hand, China was able to reach agreement on specific transitional arrangements in certain areas of Chinese internal trade regime, e.g., the phasing out of quotas and import licenses, the phased liberalization of the right for foreign entities to trade in China. This will give her some leverage as a developing country within the WTO.

Consequently, the status of China as a developing country, which already served as

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793 Gertler, supra note 745, at 64.
794 Yahuda, supra note 757, at 311.
795 Gertler, supra note 745, at 64.
one of the feet-dragging obstacles in the Chinese accession process, has not yet been finally settled “on a once and for all” upon the completion of the package deal,\textsuperscript{796} but will continue to affect China’s WTO implementation process. China will likely continue to claim the various exemptions and entitlements available to those classified as “developing countries,”\textsuperscript{797} or, assert the lack of sufficient recognition for China’s position as a developing country.\textsuperscript{798} Either of these circumstances may serve China’s purpose to have her WTO obligations legitimately waived. Besides, given the developing world’s worries and concerns about China’s potential of being a “damaging competitor” upon her WTO accession, China has made, and will continue to make special concessions to these developing countries, particularly through the regional trade arrangements (RTA). This may reshape her WTO obligations vis-à-vis the developing countries concerned. Thus far, the ongoing ASEAN-China Free Trade Area (ACFTA) has been the first case of this kind.\textsuperscript{799}

For all these, the process of China’s accession to the WTO was actually not sluggish in itself, but the reasons for this significant feature have imposed enormous hindrances for the country’s implementation of WTO obligations. These include the various concerns and skepticism of WTO members about China’s unique situation, focusing on China’s willingness and capacity to fulfill her WTO obligations. They also include various conflicts of the Chinese values (based upon their historical experience and ideological heritage) with Western values, especially in terms of the role of market and rule of law. It is the process of China’s WTO accession that has brought these concerns and conflicts to the surface. Given China’s growing significance as a world trader, it will be the process of China’s WTO implementation that may widen or deepen these concerns and conflicts, or otherwise address and abate

\textsuperscript{796} Yahuda,\textit{ supra} note 757, at 311.
\textsuperscript{797} \textit{Id.} at 306.
\textsuperscript{798} \textit{Id.} at 309.
\textsuperscript{799} For the information on ASEAN-China Free Trade Area, please visit the official website of the Secretariat of the Association of Southeast Asian Nations (ASEAN) at http://www.aseanaec.org/4979.htm.
III. Outcome of China’s WTO Accession: Significance and Implications for Domestic WTO Implementation

China’s accession to the GATT/WTO trading system has been the longest and most arduous process compared to those of other acceding WTO Members. By the time China acceded to WTO in December 2001, there were 16 other acceding Members, among which 11 were transitional economies (former centrally-planned economies). None of these acceding Members had ever experienced the same hardship as China. Subsequently, the outcomes of China’s accession process, so-called “accession package” for China, became the most comprehensive of its kind in the WTO history.

An “accession package” refers to the protocol of accession for an acceding Member, with any necessary reference to the particular paragraphs of the relevant Working Party Report. This “accession package” contains all “terms” reached by the acceding Member with the WTO at both bilateral and multilateral levels. The protocol of accession, together with the incorporated provisions of the Working Party Report, becomes “an integral part of the WTO Agreement” binding upon the acceding Member, in the same way as other WTO agreements upon an original Member. This suggests that an acceding Member will have to shoulder a “double burden” of implementing WTO law, not only with reference to the existing WTO agreements in general, but also the specific accession protocol for the acceding Member. How to assess such a “double burden” will depend on the relation of this protocol to the

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800 Qin, supra note 193, at 487.
801 Id. at 488.
existing WTO treaty system, especially in relation to the length and substance.

Take the above-noted 16 acceding Members. The main text of each of their protocols of accession consists of no more than two pages of “standardized provisions,” and addresses nothing more than necessary procedural and technical matters of the accession. In these circumstances, the protocol has little impact on the substance and structure of the existing WTO treaty, and then the acceding Member concerned are still bound mainly by the “pure” WTO agreements, exactly in the same measure as the original Members.\textsuperscript{802}

The accession of China has fundamentally changed this long-standing practice. As elaborated below, the Protocol on the Accession of the People’s Republic of China (“China Protocol”) is distinguishable from any of its kind to date, both textually and substantively. The China Protocol, together with its incorporation of a comprehensive part of the Working Party Report on China (“China Working Party Report”), is the outcome of her WTO accession process, namely, “accession package” that embodies China’s obligations and commitments vis-à-vis her WTO counterparts. China’s WTO implementation is a process of implementing these obligations and commitments. Thus, it is these outcomes of China’s accession process – so-called “accession package” for China – that determine what the country should implement. Given the complexity and comprehensiveness of this accession package, China’s WTO implementation will inevitably undergo many hardships, depending largely upon the substances and legal nature of each individual obligation set forth in the accession package. All these issues are elaborated below.

1. Significance of the “Accession Package” for China: Why So Comprehensive?

\textsuperscript{802} \textit{Id.} at 487-488.
The "accession package" for China refers to the Accession Protocol of China (China Protocol), with a number of paragraphs of the China Working Party Report incorporated therein. This outcome of China's accession process to the WTO are comprehensive and complex, and appear to be the most lengthy accession documents of their kind, among other WTO's acceding Members. This significance stems from the complexity of the accession formalities, reflecting extensive concerns and skepticism of WTO members about the unique situation of China, and also demonstrates China's remarkable resolutions and efforts to integrate herself into the international community for national economic development and prosperity.

A. Formation of the "Accession Package" for China

At the core of the "accession package" for China, the China Protocol is not a standardized document as in the case of many other WTO acceding members. As noted above, for each of the 16 acceding members prior to China, the main text of their accession protocol takes no more than 2 pages of "standardized provisions" on necessary procedural and technical matters of the accession. In contrast, the China Protocol consists of 11 pages of main text, 9 annexes (including China's Goods and Services Schedules), as well as 143 paragraphs incorporated by reference from the China Working Party Report. The main text of the China Protocol covers 17 sections of substantive provisions, which include 56 paragraphs and many additional subparagraphs. As for the incorporation of 143 paragraphs of the Working Party Report into the Protocol, it is expressly provided in Section 2.1 of the Protocol: "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." In turn, Paragraph 342 of the Working Party Report specifically refers to those 134 paragraphs

803 Id. at 487-489.
that have respectively prescribed China’s accession commitments.804

From a technical perspective, comprehensiveness of China’s “accession package” depends on the complexity of its WTO accession process, as featured by its bilateral market-access negotiations with each interested Member, as well as the multilateral negotiations in the Working Party.805 At the bilateral level, with the deals struck and notified to the WTO, China’s consolidated Schedule of Concessions and Commitments on Goods (“Goods Schedule”) and consolidated Schedule of Specific Commitments on Services (“Service Schedule”) were prepared with the assistance of the WTO Secretariat and thereafter reviewed by the Working Party. In that process, these schedules were “multilateralized” – namely, extended on a MFN basis to all WTO members – as they were annexed to the Protocol of Accession. In other words, these bilaterally agreed commitments became part of the multilateral treaty terms of China’s membership in the WTO.806

As the bilateral market-access negotiations neared completion, WTO members and China embarked on multilateral negotiations in the Working Party, “wrapping up the many outstanding multilateral elements of the accession package.” To finalize the negotiated package that consists of the Accession Protocol and the Working Party Report, both sides faced the challenges of “identifying the trouble spot and agreeing on the timing – including possible transition period – for China to bring any WTO-inconsistent policy measures into compliance with WTO obligations.” To meet this challenge, China provided the Working Party with the updated information

804 World Trade Organization, Report of the Working Party on the Accession of China, WT/MIN(01)/3 (10 Nov. 2001). According to paragraph 342, “[t]he Working Party took note of the explanations and statements of … took note of the commitments given by China in relation to … which are reproduced in paragraph 18-19 … 339 and 341 of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.” [Various paragraph numbers omitted.]
805 Gertler, supra note 745, at 56.
806 Id. at 57.
(notifications of laws, regulations and other policy measures) on all key aspects of China’s trade regime, which became indispensable to finalizing negotiations on various key provisions of the Protocol and the Report. Lately, at the final meeting of the Working Party in 2001, the technical ‘clean-up’ and verification of the Goods and Services Schedules was completed, followed by an overall review of the documents to ensure consistency among various elements of the whole accession package. With the agreement reached between China and Working Party members on all “outstanding issues,” China’s accession package finally came into being for the approval and acceptance by WTO members and by China, respectively.

B. Substances of the “Accession Package” for China

Given its lengthy text, the “accession package” for China covers a wide range of subjects and prescribes numerous specific rules binding upon both China and other WTO Members. As noted above, at the core of this accession package is China’s Accession Protocol, with numerous Goods and Services Schedules annexed and incorporating a large body of paragraphs drawn from the China Working Party Report. By virtue of its substances, the China Protocol addresses extensive concerns and skepticism of WTO members about China’s trade regime and practice, which significantly contributed to its comprehensiveness.

Under the China Accession Protocol, China and WTO members have agreed on: (1) preambular and general provisions; (2) commitments relating to the administration of the trade regime, including uniform administration, special economic areas, transparency and judicial review; (3) commitments on non-discrimination, special

807 Id. at 58.
808 Id. at 56.
809 Qin, supra note 193, at 489.
trade arrangements, state trading, non-tariff measures, tariff-rate quota administration, import and export licensing, price controls, taxes and charges levied on imports and exports, export subsidies and domestic support in agriculture, sanitary and phytosanitary measures; (4) trading rights; and, (5) standards and technical regulation.\textsuperscript{810}

Besides, the China Protocol has imposed some obligations upon China, which are widely regarded as her “massive concessions” for the WTO accession, including: a special transitional provision on price comparability for determining dumping and subsidies, lasting fifteen years; the establishment of both a separate transitional product-specific safeguard mechanism and a separate textile safeguard; immediate implementation of the TRIPs Agreement, a host of technical, sectoral issues in trade in services; a transitional review mechanism to oversee compliance with the terms of the Protocol, etc.\textsuperscript{811}

In addition, the China Protocol contains many “transitional Annexes of the Protocol” which, other than Goods and Services Schedules, include the Annexes on: Products subject to State-trading; Products subject to designed Trading; Non-tariff Measures subject to Phased Elimination; Products and Services subject to Price Controls; Notification and Phase-out of Subsidies; Export Taxes and Charges; Restrictions Maintained Against China, Issues to be Addressed in the Transitional Review.\textsuperscript{812}

In sum, in terms of its substances, the “accession package” for China contains mostly China’s obligations and commitments vis-à-vis other WTO Members. Of course, some “soft commitments” are still available from these WTO Members, e.g., non-

\textsuperscript{810} Gertler, \textit{supra} note 745, at 58.
\textsuperscript{811} \textit{id.} at 59.
\textsuperscript{812} \textit{id.} at 60.
abuse of domestic products in antidumping actions, restraint in the use of special safeguard, etc.\textsuperscript{813} Compared to the overwhelming obligations imposed upon China, these "soft commitments" appear too minor to attract any attention.

\section*{C. China's Motive Behind the "Accession Package"}

As a procedural matter, the accession package\textsuperscript{814} for China (China Protocol) would never have come into effect and become legally meaningful without the approval and acceptance of both China and WTO members.\textsuperscript{814} Given the "one-sided" nature of the accession package in regard to China's overwhelming obligations, it does not seem to present a problem for WTO members to endorse this package, for the latter comes fully within their expectations. As for China, the situation turns out to be interesting. One may wonder why the country, with a particular sensitivity towards foreign interference in domestic affairs and an emphasis on reciprocity and mutual benefit in trade relations with the West, which can be attributed to her historical experience in humiliating and discriminatory treatment, would agree to such comprehensive WTO terms.\textsuperscript{815} After all, "no country has endured as lengthy an accession process to the GATT/WTO as China, nor has any country acceding to the WTO been asked to take on as many concessions as the price for admission," the latter has led to the comprehensiveness of China's accession package.\textsuperscript{816}

The answer is simple: China sees the WTO membership as beneficial, or, more precisely, the Chinese believe "the costs of remaining outside the WTO may well exceed the costs of joining."\textsuperscript{817} According to some Chinese top trade officials, the WTO accession will help China expand foreign trade, deepen the ongoing economic

\textsuperscript{813} Id.
\textsuperscript{814} Id. at 60-61.
\textsuperscript{815} Halverson, supra note 741, at 331.
\textsuperscript{816} Id. at 323.
\textsuperscript{817} Id. at 332.
reforms in domestic sphere, and engage actively in international economic affairs (e.g., decision making) and resisting trade protectionism. In a word, the WTO membership may allow the country to accelerate the pace of integrating into the world economy, and signal her status as a global economic power.

Among these strategic considerations, to deepen China’s ongoing domestic economic reforms takes a lead. Although the Chinese leaders may differ about the pace and depth of economic reforms, they nevertheless agree there can never be a turning back towards the command economy. Particularly, the 1997 Asian financial crisis convinced the Chinese leadership of the need to complete their economic reforms. Considering the worsening impact of the state-owned sector as a drag on economic growth, together with the growing debt crisis in the state-own financial sector, they might have viewed WTO accession as “generating necessary momentum” to complete the most politically difficult stage of China’s move to a market economy. Over the past two decades, China has made incredible strides at reforms, and, as the Chinese leaders believe, committing China to abide by international treaty rules and the rule of law in the conduct of trade and in domestic policy reform is likely to take this process forward at an even more impressive pace.

The Chinese leaders would not recognize a reversal of the open-door policy within the international economy. In this regard, China’s lack of the GATT/WTO membership did not preclude it from becoming an active member of the international trading community. Since the introduction of an open-door policy in the late 1970s, and the appointment of Deng Xiaoping as paramount leader in 1986, China has pursued a vigorous trade policy. In the last twenty years it has undertaken economic reforms aimed at freeing up its imports and exports and encouraging foreign investment.

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818 YANG & CHENG, supra note 731, at 302-304.  
819 Halverson, supra note 741, at 332.  
820 Yahuda, supra note 757, at 307.  
821 Gertler, supra note 745, at 65.  
822 Yahuda, supra note 757, at 307.
Meanwhile, China has undergone extensive political changes, and conducted major reform of its legal system, both of which contributed to an increase of Chinese slice of the international trade pie. 823

Nevertheless, until it entered the WTO in 2001, China was excluded from the international trading system. Not only was the country limited in its ability to participate on the same terms as WTO Members in the negotiation of new standards relevant to trade, it was also precluded from the WTO's dispute settlement process. Moreover, unlike most other states, China was subject to the annual ritual of scrutiny by the US Congress in order to gain the MFN status in the U.S. 824 China's accession to the WTO is expected to overcome, to a greater or lesser degree, all of the above disadvantages. With the recognition and prestige of the WTO, China may gain much leverage to enable her to play an active role in the international trading community. Directly, the accession will provide the 1.3 billion Chinese people with secure, predictable and non-discriminatory access to the markets of 143 trading partners, as well as their various goods and services. 825 More significantly, with the WTO membership, China will be entitled to the privileges of the GATT/WTO system, including the MFN treatments, utilization of the WTO dispute settlement process, as well as the participation in decision making.

Of course, the cost of China's WTO accession can hardly be overstated, especially in terms of the difficulties facing many Chinese sectors upon the accession. The impact on loss-making state industries, less-developed agricultural communities and myriad government-financed projects across the country will be dramatic. Moreover, the so-called 'adjustment' to new, more competitive market conditions, will, for millions of individuals and families, mean unemployment and significant “displacement.” 826 No
doubt, it will take many years for large segments of China to establish a new equilibrium, during which time many citizens will be facing considerable hardship.\(^{827}\)

Nevertheless, such an “adjustment” has occurred long before China’s accession to the WTO, while the Chinese people are hardly strangers to this process. Back to the early 1990s, China already introduced a bankruptcy law and other legislation making state industries in principle responsible for their own profits and losses. Over at least a decade now, China has radically reduced state subsidies and encouraged development of private enterprises in many sectors.\(^{828}\) Since the mid-1990s in particular, and as a member of the IMF, China has rationalized and liberalized handling of its foreign-exchange market. Besides, China has progressively, yet dramatically, reduced its import tariffs and other non-tariff restrictions on foreign participation in the Chinese market.\(^{829}\) Whether or not China acceded to the WTO, she will continue with this process of self-adjustment, so as to build up a market economy and be further integrated into the international community for her own development and prosperity.

Accordingly, it is hard to say that the “cost” of China’s WTO accession is exclusively attributed to this historic event, although the latter may have rendered the cost more “tangible” than otherwise. If one views China’s economic reforms and her new opening to the outside world as an inevitable course, the WTO accession would be a significant link in this course, while the pursuit of this course, or specifically, the existence of this link, is just a matter of time. In this sense, in terms of China’s WTO accession, there is little to lose but much to win, even for the Chinese people. From this perspective, it will be easy to understand why China finally decided to accept the comprehensive WTO bid. In effect, it is mainly the collective political will of Chinese leaders that make China’s WTO accession possible, and make the accession package what it has been.

\(^{827}\) Id.
\(^{828}\) Id.
\(^{829}\) Id. at 66-67.
2. Implications of the "Accession Package" for China's Implementation of WTO obligations

Upon the WTO accession, China has taken on a major but somehow "imponderable" task of fulfilling its various WTO commitments. In this process, questions may arise as to "whether and how" China will be able to ensure "uniform and impartial implementation" of its WTO obligations. However, a prerequisite is to clarify "what" to implement, which in turn depends on the contents of China's accession process, namely, its "accession package" as mentioned above. The implications of this "accession package" for China's WTO implementation are "tangible." The "package" is the "objective" of such implementation. In another word, legal nature and functioning of this process depends on the formation, substances and enforceability of this "accession package."

First, the formation of China's "accession package" through the bilateral and finally, multilateral negotiations indicates a process of essentially "multilateralizing" China's obligations vis-à-vis other WTO members, allowing China to "replace the many risky and uncertain bilateral relationships" it used to rely on to conduct its trade relation with major trading partners, "by a single, multilateral trade relationship with the rest of the world." This represents a crucial change in the legal nature of China's external trade relations, and has inevitably increased the complexity of the implementation process. Meanwhile, upon the WTO accession, China could avail herself of the privileges and rights under the multilateral GATT/WTO regime, especially the access to the WTO dispute settlement process. This has created the interplay between international and domestic enforcement mechanism, leaving room for the results of the WTO dispute settlement process to be implemented in the domestic system. The process of WTO implementation will accordingly be complicated.

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830 Id. at 66.
Secondly, the contents of China’s “accession package” are essentially about “a one-way set of commitments (from China’s side only).” As noted earlier, the “package” consists of two major treaty texts, Accession Protocol and Working Party Report, with a number of annexes. It contains essentially China’s obligations and commitments vis-à-vis other WTO Members, the latter are indispensable to China’s WTO implementation. As a result, China’s WTO implementation will be nothing more than a process of fulfilling these comprehensive obligations. Therefore, from an international law perspective, China’s “accession package” deserves a thorough articulation for the purpose of its WTO implementation. This will be discussed in the next chapter.

Finally, the Chinese political will - which has already made the accession package legally meaningful – will be equally essential to China’s WTO implementation. Given China’s strategic considerations for the WTO accession, her willingness to fulfill the WTO commitments is not in doubt, although there has been little query that the country “will be a difficult member to integrate fully into the organization.” The issue is rather a matter of the “capacity” than that of the “willingness.” This is not unique to China. In practice, it has been “far from easy for the WTO to demand effective implementation,” and, much will depend on the standards imposed on the WTO member concerned, like China.

Since the WTO has tolerated a wide range of performance by its over one hundred and forty members, why not China? As some observations indicate, the OECD countries have varied greatly in their compliance with the ostensible rules of the WTO, “as may be seen from considering such different cases as Japan, the U.S., EU countries and say South Korea.” Therefore, it is not really surprising that China

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831 Id. at 60.
832 Yahuda, supra note 757, at 310.
833 Id.
may undertake the WTO implementation by her own approaches, even though it may
turn out to be at odd with others’ practice. As an old Chinese saying describes, this is
a process of “reaching the same goal from every path.” In this context, some
perspectives represented by a senior WTO official should be highly appreciated,
claiming that “at this stage, we can do little more than wish China and its people ‘bon
courage’ as they venture down the extremely challenging and tortuous path that
stretches before them.”834

834 Gertler, supra note 745, at 67.
CHAPTER 2 STATUS OF WTO LAW IN CHINESE DOMESTIC LAW

I. Status of Treaties in Chinese Domestic law

Theoretically, the status of treaties in domestic law may be conceived from five major perspectives: (1) validity of treaties in domestic law; (2) domestic legislation of treaty-making process; (3) power to implement treaties in domestic legal system; (4) choice between direct application of treaties and an act of transformation under the domestic legal system; and, (5) "hierarchical status" of treaties in domestic law. They are primarily governed by the national constitution, and may also be addressed by other internal legal authority.

Pragmatically, the status of treaties within a national legal system is shaped collectively by various national legal instruments, including constitutional arrangements, legislation, judiciary decisions, as well as administrative rulings (Perspective (3)). As noted above, the status of treaties in a national legal system represents one primary dimension of the relationship between treaty obligations and consistency with domestic law. The health of such relationship will then depend largely on the maintenance of a "proper" balance with all applicable national legal instruments, in a dynamic process of "domestic implementation," which in turn is conditioned upon the "legal effect" (Perspective (4)) and the "hierarchical status" (Perspective (5)) of these treaties. Accordingly, to obtain a sound perception of domestic legal status of treaties, one should take into account all above five perspectives, with a particular focus on "domestic implementation" of these treaties. As previously discussed, both the U.S. and the EC have adhered to this proposition in their practice. The present chapter is devoted to a similar exercise taken by the People's Republic of China.

1. Relationship between Treaties and Chinese Domestic Law under
In the eyes of international law, relations between treaties and domestic law are governed by a well-established set of principle, *Vienna Convention on the Law of Treaties* ("Vienna Convention"). Article 26 and 27 of this Convention codify and complement a fundamental general principle of *pacta sunt servanda*, requiring domestic law to adhere to international treaty obligations, especially in case of a clash between the two, the latter may incur "state responsibility" for the nation state concerned. The Vienna Convention entered into force on January 27, 1980, binding upon all parties to it in terms of treating all treaties they have entered into at international level. For the non-parties to this Convention, it is still binding upon them as customary international law.

China officially became a party to the Vienna Convention on October 3, 1997. Back to May 9 of that year, the 25th Session of the Standing Committee of the 8th National People’s Congress approved China’s accession to this Convention. Four months latter, the representatives of the Chinese government deposited the instrument of Accession with the Secretary-General of the United Nations, just a month before this Convention took effect for China. Since then, the Vienna Convention has – in particular regard to its codification of the principle of *pacta sunt servanda* – played a leading role in defining, at international level, the status of each treaty to which China is a party in Chinese domestic law. As a matter of fact, the Chinese government has consistently maintained its adherence to this Convention and the principle of *pacta sunt servanda*. Moreover, the Chinese government has codified this principle in a number of Chinese statutory provisions, which, as will be seen later, prescribe the direct effect of treaty provisions in certain circumstances.

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835 See *supra* note 244 and 245.
836 NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH 158 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds. 2005).
2. Status of Treaties in Chinese Constitutional Arrangements

A. Common Guideline of the Chinese People's Political Consultative Conference (Tentative Constitution of the PRC)

The constitutional history of the People's Republic of China can be traced back to the eve of the birth of the People's Republic of China (PRC). On September 29, 1949, the Common Guideline of the Chinese People's Political Consultative Conference (the "Common Guideline") was adopted by the 1st plenary session of this conference, which is the so-called "tentative Constitution" of the PRC. Under Article 55 of the Common Guideline, "[f]or the treaties and agreements concluded by the Kuomintang government with foreign governments, the Central People's Government of the People's Republic of China should examine them, according to their contents, to recognize, abolish, revise, or re-conclude them respectively." 838

This article was regarded as the PRC government's general guiding principle for handling treaties concluded by the past government, which especially addressed the validity of treaties in Chinese domestic law. Particularly, "recognition" represents a special concept in China's treaty practice, meaning the recognition of the validity of any legal action taken on a treaty that was previously signed, ratified or acceded to by the predecessor Chinese government. Upon such recognition, the treaty concerned would still be subject to ratification for its validity in Chinese internal law, as in the case of the four Geneva Conventions of 1949 in 1956. Furthermore, by stipulating that the power to conclude treaties belonged to the Central People's Government, the article addressed the issue of treaty-making process under Chinese internal law, although it did not provide any specific procedures in this context. 839

838 Hollis, Blakeslee & Ederington eds., supra note 836, at 155.
839 Id. at 155-156.
B. The Constitution of the People’s Republic of China

(Constitution of the PRC)

On September 20, 1954, the first Constitution of the PRC was adopted at the 1st meeting of the 1st National People’s Congress of the PRC, and was thus titled as the “1954 Constitution.” Under Article 31 of this Constitution, the Standing Committee of the National People’s Congress decided on the ratification and abrogation of treaties concluded with foreign states. Article 41 further provided that the President of the PRC shall, in accordance with decisions of the Standing Committee of the National People’s Congress, ratify and abrogate treaties with foreign states. One month later, to implement these constitutional provisions, the 1st National People’s Congress adopted a decision of its Standing Committee on the Procedure of Rectifying a Treaty Concluded with Foreign States at its 1st meeting. 840 Both the 1954 Constitution and the above related legislative decision merely focused on domestic treaty-making process, especially the allocation of treaty-making power, without referring to other issues crucial to the status of treaties in Chinese domestic law.

The current PRC Constitution, which is the forth Constitution adopted at the 5th meeting of the 5th PRC National People’s Congress on December 4, 1982 (thereinafter as the “1982 Constitution”), restates above provisions of the 1954 Constitution concerning the power of the Standing Committee of the National People’s Congress to decide “on the ratification and abrogation of treaties and important agreements” (Paragraph 14, Article 67), as well as that of the President of the PRC to ratify or abrogate them (Article 81). Moreover, Paragraph 9 of Article 89 provides that the state council has responsibility to “conduct foreign affairs and conclude treaties and agreements with foreign states.” 841 Equally, the current Constitution of the PRC merely addresses the allocation of the treaty-making process without touching other

840 Id. at 156. FT2.
841 Id. at 157.
issues crucial to the status of treaties in Chinese domestic law.

Notably, the current PRC Constitution does codify China's general principles of foreign policy, providing that "China consistently carries out an independent foreign policy and adheres to the five principles of mutual respect, for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries." It is based upon this constitutional stipulation that China has concluded a large number of treaties with foreign states. Being policy-oriented in nature, this stipulation does not explicitly address the status of treaties in Chinese legal system, but does lay a foundation for China to fulfill its international obligations in good faith, especially its treaty obligations.

3. Status of Treaties under China's Law of Treaties

On December 28, 1990, the Law of the People's Republic of China on the Procedures for the Conclusion of Treaties (hereinafter as the "Treaty Procedures Law") was adopted at the 17th Session of the Standing Committee of the 7th National People's Congress, marking a new era for Chinese treaty practice. With a higher "hierarchical status" than that of the decisions of the National People's Congress and regulations of the State Council, this law of treaties of the PRC for the first time laid down procedural rules for the conclusion of treaties, based on China's 45 years of treaty practice since 1949.

In stead of giving a definition of a treaty, the Treaty Procedures Law defines its governing scope in Article 2 as covering "bilateral or multilateral treaties and

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842 Id. at 156.
843 Id. at 163.
844 Id. at 157.
agreements and other instruments in the nature of a treaty or an agreement concluded between the People's Republic of China and foreign states.” Article 4 of this law categorizes these “treaties and agreements” by the respective names in which the PRC has concluded them, ranging from the PRC, the Government of the PRC to the governmental departments of the PRC. Article 5 then lays down detailed rules and procedures for negotiation and signature of these different types of treaties. Notably, the Treaty Procedures Law does not specify the title of a treaty. Although contracting forms or procedures for the entry into force of a treaty may depend on its title, the effect of it may not. For China, the commonly used treaty titles include: treaty, convention, protocol, agreement, exchange of notes, exchange of letters, minutes, memorandum of understanding, joint communique, joint statement, etc. 845

Article 3 of the Treaty Procedures Law incorporates the provisions of the 1982 Constitution on the allocation of treaty-making power, 846 specifying respectively the role of the State Council, the Standing Committee of the National People’s Congress and the President of the PRC in domestic treaty-making process. 847 Specifically, the power to conclude treaties belongs to the State Council, through the procedures on treaty drafting, approval of treaty proposal, negotiation, signature, entry into force, amendment, termination and the issuance of full powers to its representatives. The Ministry of Foreign Affairs, under the leadership of the State Council, administers the specific affairs concerning the conclusion of the treaties and agreements with foreign affairs. 848 In this regard, Article 5 sets out the procedure for initiating the conclusion of a treaty, and Article 6 does that for the appointment of representatives with full

845 Id. at 159.
846 See, Articles 67, 81 and 89 of the 1982 Constitution of the People’s Republic of China.
847 Hollis, Blakeslee & Ederington eds., supra note 836, at 157. Under Article 3, the State Council shall conclude treaties and agreements with foreign states. The Standing Committee of the National People’s Congress of the PRC shall decide on the ratification and abrogation of treaties and important agreements concluded with foreign states. The President of the PRC shall, in accordance with such decisions of the Standing Committee of the National People’s Congress of the PRC, ratify and abrogate treaties and important agreements concluded with foreign states.
848 Id.
powers. 849

With regard to the formalities to be processed upon the signature of a treaty, the Treaty Procedure Law sets out “internal legal procedure” for treaty ratification (Article 7), approval (Article 8) and recording and registration (Article 8). 850 Also, this Law particularly refers to the accession and acceptance of multilateral treaties. Under Article 11, accession to a multilateral treaty shall be decided by the Standing Committee of the National People’s Congress or by the State Council. Under Article 12, the State Council shall decide upon the acceptance of a multilateral treaty. Meanwhile, the Law provides for the publication, registration and amendment of a treaty in Article 16, 17, and 19, respectively. 851 In addition, the Treaty Procedure Law addresses the compilation of the collection of treaties in Article 16. 852

From all above, the Treaty Procedure Law has achieved the most elaborate and operational rules for the conclusion of treaties by China. More significantly, since the Law was adopted by the Standing Committee of the National People’s Congress and promulgated under the decree of the PRC President, it has the higher “hierarchical status” than any decision of the National People’s Congress or administrative regulation, - before or after its enactment – in the same context, and therefore makes itself a uniform, major treaty law of China. 853 However, the Treaty Procedures Law, as its title suggests, focuses on Chinese domestic treaty-making process, and thus reflects only part of the status of treaties in Chinese internal law. Silent on other crucial issues in this context, e.g., the legal effect and “hierarchical status” of treaties, the Law has not yet rendered a clearer legal status for treaties in the Chinese legal system.

849 Id. at 159-160.
850 Id. at 159-161.
851 Id. at 162-163.
852 Id. at 163.
853 Id. at 158.
Nevertheless, one should bear in mind that domestic treaty-making process still has significant implications for other respects of the status of treaties in domestic law. In general, domestic validity of treaties may derive from their acceptance into domestic law through domestic treaty-making process. This is equally true for China, where the validity of treaties under the Chinese law may derive immediately from their validity under international law. In the latter circumstances, the Treaty Procedures Law mandates that China and other contracting parties fulfill their domestic procedural requirements and notify each other through diplomatic channel. Thus, the issue of domestic validity of treaties is closely linked to that of their domestic treaty-making process.

Besides, parallel with that of domestic legislative power, the structure of domestic treaty-making power may provide for a sensible reference to the “hierarchical status” of a treaty in domestic law, assuming that treaty is both directly applicable and invocable. Under the Constitution and the Law on Legislation of the PRC, national legislative power is allocated among the National People’s Congress, its Standing Committee and the State Council, similar to the allocation of treaty-making power as noted above. More importantly, in terms of their law-making power these three legislative bodies rank hierarchically towards each other in the Chinese domestic legal order. This suggests that treaties and laws made by the same legislative body may stand equal to each other, and further, the legal status of treaties made by one legislative body, likely depends on the hierarchy of the national legal system where this body ranks.

Admittedly, these two submissions are rather practical and pragmatic in nature, without being explicitly addressed either by the current Constitution or by the major PRC law of treaties. Together with other crucial issues absent in the same context, they are more reflected or even confirmed in the practice of respective Chinese

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854 Li, supra note 837, at 74. FT 115.
855 Id. at 89-90.
4. Status of Treaties in China’s “Treaty Implementation” Practice

The proceeding discussions reveal the fact that neither the current PRC Constitution nor any major Chinese law of treaties has been explicit in all crucial respects of the status of treaties in Chinese domestic law. In particular, they are both silent on the issue of “treaty implementation,” the latter mainly involves the “domestic legal effect” of a treaty and its “hierarchical status” in Chinese legislation, as collectively determined by the Chinese legislature, judiciary and administrative bodies. Thus, in the absence of constitutional and legislative references, the domestic legal status of a particular treaty can only be identified through the practice of the above Chinese government authorities in treaty implementation. This will be the focus of the ensuing discussions.

A. Granting “Trumping effect” to Treaties: China’s Past Practice in Treaty Implementation

China’s treaty implementation practice has long been inconsistent and even self-contradictory. For a time, there was a frequently-followed principle: if a treaty to which China is a party contains provisions inconsistent with the Chinese law, treaty provisions should prevail, unless China has made reservations to them. This principle has been adopted in a number of Chinese statutes. An earliest example was Article 189 of the Civil Procedural Law of the PRC of 1982, which reads “if a provision of an international treaty which China has concluded or acceded to is different from that of the present law, the treaty provision shall apply, unless China has made reservations to the provision.” Since then, the principle has been consistently incorporated into the relevant provision of subsequent Chinese statutes, e.g., Article 142 of the General Principles of the Civil Law of the PRC of 1986, Article 72 of the Administrative Procedural Law of the PRC of 1989, Article 238 of the Civil Procedural Law of the

The application of this principle entails certain interesting bearings for China’s practice in treaty implementation. First, the principle is adopted for the purpose of a particular Chinese statute, without specifying any particular treaty or (its provisions), suggesting that any treaty (or its provision) relevant to that domestic statute (by virtue of subject matter) would be taken into account. Furthermore, for individual provisions of a treaty, rather than that treaty as a whole, the principle implies that it may only give the priority to the treaty concerned on a provision-by-provision basis. Nevertheless, this principle has established a broad scope of application towards the “hierarchical status” of treaties in Chinese domestic law, despite the lingering ambiguities as to how to identify these treaties.

Secondly, by granting the trumping effect to treaty provisions, this principle implies that a given treaty provision is not only valid in Chinese law, but also directly applicable and invocable within the Chinese legal order. After all the domestic validity of a treaty is an essential prerequisite for an inquiry into other respects of its status in domestic law, and therefore, clarification of those “other respects” – e.g., “hierarchical status” of the treaty – will in turn presupposes such validity. Also, the higher “hierarchical status” of a treaty (or part of it) usually comes up wherever its direct applicability and invocability have been secured, as evident in the case of this principle. In addition, by granting the trumping effects to treaty provisions, the hierarchy of Chinese domestic legal order may apply to the relationship between treaty provisions and domestic norms, especially at a “horizontal level,” where treaty

856 Hollis, Blakeslee & Ederington eds., supra note 836, at 163.
provisions may come in to a conflict with domestic norms.\textsuperscript{857}

Thirdly, in explicitly granting the trumping effect to treaty provisions over domestic norms, this principle is silent on whether the conflicting norms under reference are previously or subsequently enacted. Thus, it implicitly excludes, under the Chinese legal system, the application of \textit{lex posteriori derogate priori} to a conflict between a prior treaty and a subsequent domestic statute, while there is not necessarily a conflict between a prior treaty and a subsequent treaty of the same rank. Consequently, under this principle, treaty provisions will always prevail over domestic statutory norms, even though the latter is enacted subsequently to the former.\textsuperscript{858}

Finally, as mentioned above, this principle has been incorporated by a number of Chinese laws (statutes). Given a large number of those statutory provisions concerned, as well as their extensive subject matters, it is doubtless that the application of this principle constitutes a major part of China’s “treaty implementation” practice. Actually, the adherence of this principle used to be China’s leading practice in treaty implementation, manifesting “the firm resolution of the PRC to carry out in good faith the principle of \textit{pacta sunt servanda}.”\textsuperscript{859} Notably, none of these statutory provisions is constitutional in nature, even though some have fallen into the category of “basic laws” within the scope of Article 62 of the Constitution.\textsuperscript{860} Besides, given the substance of each individual domestic statute concerned, the principle provides not a general, but a case-by-case approach of treating treaties preferentially to Chinese domestic law, which is merely part of China’s practice in treaty implementation,\textsuperscript{861} or, more precisely, represents a special case of “direct application” and higher “hierarchical status” of treaties as defined by the Chinese legislature.

\textsuperscript{857} Li, \textit{supra} note 837, at 90.
\textsuperscript{858} \textit{Id.} at 91.
\textsuperscript{859} \textit{Id.} at 93.
\textsuperscript{860} \textit{Id.} at 92.
\textsuperscript{861} Hollis, Blakeslee & Ederington eds., \textit{supra} note 836, at 164.
B. Direct Application or Transformation: Trends of China’s Practice in Treaty Implementation

As a practical matter, the “hierarchical status” of treaties or treaty provisions seldom comes up as the primary concern with regard to their domestic implementation. Instead, the Chinese authorities pay more attention to the “formality” of treaty implementation, the latter refers to either the “direct application” or the “transformation” of treaties and their provisions. How to choose between these two formalities is crucial to the status of treaties in Chinese domestic law. As indicated before, this issue is explicitly addressed neither by the PRC Constitution nor by the major Chinese treaty law, while the answers to it are more likely to be formed in the practice of Chinese authorities, namely, the legislature, the administrative body and the judiciary.862

As noted above, statutory-based provisions which allow direct application of treaties are not a scarcity in China’s domestic legal system, as they used to be the leading part of China’s practice on domestic treaty implementation, featuring a primary role of the Chinese legislature, especially the National People’s Congress and its Standing Committee.863 However, given the wide scope of treaties as defined under Chinese legal system, as well as their rapid expansion in recent year involving extensive subjects in international economic and trade relations, more and more treaties to which China is a party require further domestic legislative or administrative actions for their enforcement, the so-called process of “transformation.”864 This has been the current trend in China’s domestic treaty implementation.

In China, “transformation” of treaties is mainly undertaken by the legislative and

862 Id.
863 LI, supra note 837, at 78.
864 Id. at 77.
administrative bodies through many administrative laws and regulations. Take, for instance, the subject of foreign and diplomatic relations. China acceded to the *Vienna Convention on Diplomatic Relations of 1961* in 1975 and the *Vienna Convention on Consular relations of 1963* in 1979. To implement these two Conventions, China enacted the *Regulations of the PRC Concerning Diplomatic Privileges and Immunities* and the *Regulations of the PRC Concerning Consular Privileges and Immunities* in 1986 and 1990 respectively. Consequently, it is these regulations rather than the two Conventions that will be directly applied under Chinese legal system. 865

With regard to international economic and trade relations, many treaties acceded to by China call for their transformation for domestic implementation purpose. For instance, on September 25, 1992, the State Council issued *Decree No.105 of the State Council of the PRC for the implementation of the International Copyright Treaty*. In order to implement the *Patent Cooperation Treaty*, China’s Patent Bureau enacted the *Regulation on the Implementation of the Patent Cooperation Treaty* in 1995. In 1997, the State Council published the *Notice on China’s Nuclear Export Policy*, which laid down specific rules and regulations in strict line with the provisions of the *Treaty on Non-Proliferation of Nuclear Weapons*. In a more indirect way, Article 12 of the *Regulation of Maritime Transportation of Containers* enacted by the State Council in 1990 stipulates that the transport of containers by sea should accord with international container standards, fixed technical standards, as well as regulations of relevant international container transport conventions. 866

Besides, judicial interpretations by the Supreme People’s Court of China (SPC) may also concern treaty implementation. Despite the unclear legal nature of such “judicial legislation,” the SPC judicial interpretations are by all means binding upon the lower People’s courts. In terms of their role in domestic treaty implementation, here are two earlier examples. The first is the enforcement of the *Convention on the Recognition...*

865 Hollis, Blakeslee & Ederington eds., *supra* note 836, at 164.
866 *Id.*
and Enforcement of Foreign Arbitral Awards (the “New York Convention”). Upon China’s accession to this convention, the SPC issued a notice to the lower courts concerning the application of the Convention. Another example is about service of legal documents to foreign nationals or permanent residents of foreign countries.\textsuperscript{867} On February 1, 1988, the SPC issued the notice on the implementation of Chinese-Foreign Judicial Assistance Agreement,\textsuperscript{868} mandating the lower courts to adopt the means of services in accordance with the terms of the treaties to which both China and the national state of the person concerned are parties.\textsuperscript{869}

As both these judicial notices mandate the PRC courts conscientiously to handle the matter strictly in conformity with the treaty provisions concerned, questions may arise as to whether they fall within the definition of “direct application” (as a substantive matter), or that of “transformation” (as a procedural matter). From the viewpoint of this author, they should be considered as “transformation” by implementation of the convention concerned within the Chinese jurisdiction. In these circumstances, even though the court may end up applying the provisions contained in the conventions, such treaty application is actually based upon the two judicial notices with legislative effect.

Discussions so far have focused on the legislative activities of Chinese authorities in domestic treaty implementation, which is half way to the whole implementation process. After the direct application or transformation of a treaty (or part of it) is recognized or processed by the Chinese legislation, it is incumbent upon Chinese courts to apply the treaty provisions concerned, or their transformation as embodied in the specific domestic legislation in a particular trial, a stage of enormous practical significance in China’s domestic treaty implementation where Chinese courts play a predominant role.

\textsuperscript{867} Id. at 165.
\textsuperscript{868} LI, supra note 837, at 82.
\textsuperscript{869} Hollis, Blakeslee & Ederington eds., supra note 836, at 165.
According to some earlier observations, there used to be “very few cases” coming up with the question of direct application of treaties in the PRC judicial practice, with one having been singled out regarding an international carriage dispute between a Belgium-based diamond company, and a Beijing-registered agency of a Chinese air carrier. The presiding court lately applied Article 22(2(d)) of the *Warsaw Convention of 1929*. In recent years, China’s judicial practice in this context has been rapidly expanded, despite the absence of public attention in this area. Particularly, after China acceded to the World Trade Organization (WTO) in December 2001, the Chinese courts have made remarkable progress in the implementation of WTO treaty norms (mostly with the provisions of the TRIPs Agreement), even in an indirect way. This will be elaborated as follows.

II. The Law of the WTO in the Chinese Context

From the outset, the law of the WTO refers to a comprehensive treaty system under the WTO auspices. At the core of this “fundamental source of WTO law” are the Uruguay Round Agreements of 1994, consisting mainly of the “Multilateral Trade Agreements” (MTAs) which cover the WTO Agreement and its first three annexes, as well as the Plurilateral Trade Agreements (PTAs) which refer to the fourth annex therein. Despite a difference in the scope of their binding force (as being either multilateral or plurilateral in nature), both the MTAs and PTAs bind their respective Members in a rather uniformed than “member-specific” manner. This “legal uniformity” has been seen as a significant achievement on the WTO rule of law.

Nevertheless, the accession procedures of the WTO create a “loophole” in the above treaty system. Under Article XII of the WTO Agreement, an acceding Member must negotiate its “ticket of entry” – in the form of “terms of accession” – with each

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870 I.I, supra note 837, at 82.
871 Id. at 82-83.
interested Members at bilateral and multilateral levels, with these terms of accession without limitation.\footnote{Qin, supra note 193, at 487.} This result is a series of "post-1994 protocols of accession" for the acceding Members of the WTO. These accession protocols appear to be "member-specific" in nature, with their substance varying abruptly due to the outcomes of the accession negotiations for each acceding Member.

Meanwhile, the post-1994 protocols of accession have invariably made by their own provisions formed "an integral part of the WTO Agreement" and thereby incorporated into the well-unified WTO treaty structure. Thus, in the context of an acceding Member, the "WTO law" includes not only the Uruguay Round Agreements of 1994 (as the "standard" WTO treaty regime), but also the particular protocol of accession for this Member (as the "member-specific" WTO treaty law), regardless of any possible inconsistency between the two. This seems to suggest that an acceding Member will have to shoulder a "double burden" of its WTO implementation by virtue of two convergent sources of WTO law. In fact, the issue depends on the relationship between the "standard" WTO treaty regulation and the Member-specific law-generating treaties, especially in terms of their length and substance. In any event, implementing WTO law for an individual acceding Member must be examined in the context of that particular Member, especially having regard to its accession protocol, which is exactly the case of China as will be discussed below.


On the surface, "member-specific" protocols of accession are at odd with the unified structure of the existing WTO treaty system, which mainly refers to the Uruguay Round Agreements of 1994. However, depending on their length and substance, these post-1994 accession protocols may have little or no impact on the overall uniformity...
of the existing WTO treaty structure. This has been the case with the 16 acceding Members prior to the accession of China. To them, the main text of each of their accession protocols consists of no more than 2 pages of "standardized provisions," which covers nothing more than the necessary procedural and technical matters relating to the accession process. In that regard, those accession protocols can hardly be "unique" to the well-established WTO treaty system.

By contrast, China's accession protocol is in every way a unique part of the existing WTO treaty system, both in length and in substance. With 11 pages of the main text, 9 annexes, as well as 143 paragraphs incorporated by referral from the China Working Party Report, the China Accession Protocol sets out numerous "special provisions" that have elaborated, expanded, modified or deviated from the existing WTO agreements. As observed, these special provisions can be categorized as including three groups that contain, respectively:

(1) Commitments within the scope of the Multilateral Trade Agreements (MTAs), which either affirm that China shall comply with existing WTO rules on specific subjects, or agree that China shall not have recourse to certain WTO provisions that provide transitional periods for the developing country Members under the MTAs. They account for a large part of the Protocol provisions (including many incorporated from the Working Party Report).

(2) Commitments on "WTO-plus" obligations, which usually impose more stringent disciplines on China than those required by the MTAs. These so-called "WTO-plus" provisions cover a variety of subjects ranging from transparency,
judicial review, sub-national government, to foreign investment, national
treatment for foreign investors, economic reform, government procurement, and
compliance review. They inevitably increase the difficulties in China’s WTO
implementation.

(3) Commitments that result in “WTO-minus” disciplines and rights, which,
focking on trade remedy regimes, immediately weaken the existing WTO
disciplines and reduce the rights of China as a WTO Member.876

Apparently, the provisions in the first category have little impact on the substance of
the existing WTO treaty norms, although some of them may have the effect of
elaborating and interpreting specific WTO rules.877 On the other hand, many of the
“WTO-plus” provisions in the second category, as well as all of the “WTO-minus”
provisions in the third category, turn out to be “unique” to the China Accession
Protocol. These so-called “ad hoc member-specific rules” in the China Accession
Protocol have created “a new set of rules of conduct” within the WTO treaty system,
“to govern a WTO trade with the 6th largest trading partner in the world.”878

In terms of quantities, “WTO-plus” and “WTO-minus” provisions are incomparable
to those in the first category. However, their impacts on the well-established WTO
treaty regimes can never be overestimated. There have been increasing concerns
about their potentials for impairing the uniformity of the WTO rules of conduct, as
well as the WTO rule of law, or for imposing “undesirable constraints on the WTO
dispute settlement system.”879 From a more thoughtful perspective, one may be
concerned more as to how these discrepancies between the Protocol and the existing

876 Id. at 488-489.
877 Id. at 489.
878 Id. at 489-490.
879 Id. at 519.
WTO agreements will affect China’s implementation of her WTO obligations. Particularly, the subjects covered by most “WTO-plus” provisions directly involve the key respects of China’s domestic implementation of WTO law.

This related back to the question of the relationship between the China Accession Protocol and the existing WTO agreements. After all, it is of the utmost importance to clarify each of the “WTO obligations” that China must discharge. The Accession Protocol has in part answered this question. Under Part I, paragraph 1.3 of the Accession Protocol, “[e]xcept as otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement ... should be implemented by China as if it had accepted that [WTO] Agreement on the date of its entry into force.” Although concentrating on the date of effectiveness of the WTO treaty obligations binding upon China, this provision in-deed suggests priority of the Accession Protocol to the MTAs. This understanding is in accordance with some Chinese perspectives which, by applying the rule of lex specialis derogat generalis to the above relationship, contend that the Accession Protocol should prevail over the existing WTO agreement concerned in case of a discrepancy between the two.880

Although this issue remains controversial, this author sees no practical difference between above the proposition and the one holding that both the Accession Protocol and the existing WTO agreements should be of equal legal status since they both form integral parts of the WTO treaty system. Giving priority to the Accession Protocol (which has been the current reality) can hardly affect China’s “alternative obligations” under the existing WTO agreements, for most China’s obligations under the Accession Protocol fall within the “first category” reflecting the obligations under the existing WTO agreements. As for the “WTO-plus” and “WTO-minus” obligations,

880 KONG XIANGJUN, WTO FALV DE GUONEI SHIYING (Domestic Implementation of WTO Law) (Beijing: People's Court Press, 2002).
which are more stringent than the standard WTO obligations, China’s implementation of them can only enhance the qualification of her WTO counterparts. In either case, other WTO Members will unlikely challenge the discrepancies between the China Accession Protocol and the existing WTO agreements in the WTO dispute settlement process. Hardly can China herself challenge such discrepancies, given the binding force of the Accession Protocol in international law. Accordingly, China’s WTO implementation is mainly a task of implementing the Accession Protocol, both in international and domestic settings. In other words, so far as China’s WTO implementation is concerned, the process is more a matter of the China Accession Protocol than that of the existing WTO agreements.


China Accession Protocol, which contains the commitments “referred to in paragraph 342 of the Working Party Report,” is “an integral part of the WTO Agreement.” Like the Uruguay Round Agreements of 1994, the Accession Protocol represents a common agreement among all WTO Members, under which most legal obligations are “one-way” or “one-sided” on the part of China.881 Being part of the WTO treaty system, the Accession Protocol (a complete treaty in itself) shares the same legal force with other existing WTO agreements under international law, regardless of any discrepancy between the two. This means, the Accession Protocol binds China and WTO members in regard to the modified terms of China’s WTO accession,882 to the same extent as other existing WTO agreements, even though the Protocol might in many respects appear to be inconsistent with the latter.

881 Qin, supra note 193, at 509.
As noted previously, the China Accession Protocol has established three categories of "China-specific" legal obligations. They either confirm or expand the commitments that China should undertake under the existing WTO treaties, or else they could operate to decrease the privileges and rights China would have been accorded in the same context. The last two categories refer to "WTO-Plus" obligations and "WTO-minus" obligations, inherently containing significant discrepancies with the standard WTO obligations.\textsuperscript{883} Since the Accession Protocol is an integral part of the WTO treaty system, these three categories belong to a broad category of "WTO treaty obligations" emanating from the standard WTO treaty system, and sharing the same legal nature with it.

This goes back to the previous discussions (see, Part I) on the nature of WTO treaty obligations. Depending on the multilateral, plurilateral or bilateral nature of each respective WTO agreement, legal obligations flowing therefrom vary accordingly. Those emanating from the MTAs and the PTAs are multilateral and plurilateral in nature, and are technically termed "regulatory obligations." Those arising from the "Goods and Services Schedules" are purely bilateral in nature, usually termed "market access obligations." Since the China Accession Protocol contains both the MTAs and the Schedules portions, the China-specific obligations flowing therefrom are equally categorized as either "regulatory obligations" (multilateral in nature) or "specific market access obligations" (bilateral in nature).

The preceding discussions also introduce some "secondary legal obligations," as the result of the WTO dispute settlement process to enforce the pertinent WTO treaty obligations.\textsuperscript{884} In this context, the pertinent WTO treaty obligations are deemed to be "enforceable." China-specific obligations share the same enforceability as a general WTO treaty obligation to generate the above "secondary legal obligations." Being an

\textsuperscript{883} Qin, supra note 193, at 488-489.

\textsuperscript{884} Jackson, Misunderstandings, supra note 200, at 62.
integral part of the WTO Agreement, the Accession Protocol is part of the “covered agreements” for the purpose of the DSU, with its provisions being fully enforceable through the WTO dispute settlement procedure.885

Under the DSU, the failure on the part of a Member to carry out its obligations under a “cover agreement” is considered a prima facie case of nullification and impairment, meaning the establishment of a presumption that a breach of the rules has an adverse impact on other Members, and that it is up to the Member accused of the breach to refute the charge. Equally, should China fail to carry out any specific obligations under the Accession Protocol, other WTO Members may seek redress by resorting to the WTO dispute settlement process. It will then be incumbent upon China to prove that such failure did not have an adverse impact on that Member. Therefore, the consequence of a failure to comply with a China-specific obligation would be no different from that of a failure to comply with a standard WTO obligation.886 Likewise, such consequences turn out to be “secondary obligations” as noted above.

For all these, China-specific obligations share the same features and the same legal status with standard WTO obligations, of which a significant consequence to China’s WTO implementation is that, China should equally honor the Accession Protocol and the existing WTO agreements, and also equally fulfill the specific WTO obligations and standard WTO obligations, at both international and domestic levels.

III. Status of WTO law in Chinese Domestic Law

The law of the WTO generally refers to a treaty system which, based upon the “WTO Agreement” and its comprehensive annexes, will also include the Protocol of

885 Qin, supra note 193, at 508-509.
886 Id. at 509.
Accession for China, so far as that country is concerned. Thus, to examine the status of WTO law in Chinese domestic law turns essentially on a matter of all those WTO treaties, especially the Accession Protocol.

The status of treaties in Chinese domestic law is a complex issue from various perspectives, e.g., domestic validity and treaty-making process of treaties, their legal effect in the Chinese legal system (depending on a choice between direct application and an act of transformation), as well as the power to implement them in domestic forum. Under the Chinese legal system, neither the Constitution nor the general law of treaties has uniformly and thoroughly clarified this issue. The practice of various Chinese authorities in this regard appears inconsistent and at times even contradictory, as different treaties are treated somewhat differently. Occasionally, a treaty in question may in itself clarify the issue, especially through particular provisions mandating China to honor the treaty as a whole. In terms of WTO law, its status in Chinese domestic law has been addressed at both international and domestic levels.

1. **Within the Scope of the WTO Agreement**

Unlike the case of many other treaties to which China has acceded, the status of WTO treaty-based law in Chinese domestic law is, first of all, well established within the scope of WTO treaties, particularly in paragraph 66, 67 and 68 of the China Working Party Report.887

Paragraph 67 begins with the “validity” and “treaty-making process” of the WTO Agreement in Chinese legal order, stating that the WTO Agreement “fell within the category of ‘important international agreements’ subject to the ratification by the Standing Committee of the National People’s Congress.” In fact, such ratification was notified by the Chinese government to the Direct-General of the WTO Secretariat

on 11 December 2001, a month before China officially became a member of the WTO. Through this domestic law-making process, the WTO Agreement has obtained its validity within Chinese domestic legal order.

Paragraph 67 addresses the “formalities” to be followed by China for domestic implementation of the WTO Agreement, stating that “the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic law and enacting new ones fully in compliance with the WTO Agreement.” This actually refers to the acts of “transformation,” which may tend to suggest that China denies the “direct application” of WTO law under domestic legal order. At this point, the “legal effect” of WTO law under Chinese domestic legal system is absolutely clear: in the absence of any “direct effect” in Chinese domestic law, the WTO Agreement is not a part of the Chinese domestic law; nor is it comparable to any source of Chinese law for the purpose of its “hierarchical status” within China.

To the extent that domestic implementation of WTO law is primarily a matter of transformation, the “power to implement WTO law” belongs to the legislative body, as classified in paragraph 66 of the Working Party Report. From the reports of various Chinese legislative bodies and their corresponding legislative enactments, paragraph 66 cited China’s position that “[t]hese features of the Chinese legal system would ensure an effective and uniform implementation of the obligations after China’s accession [to the WTO].”

Notably, paragraph 66 and 67 reiterate the “statements” of China in the Working Party. Without being incorporated into the China Accession Protocol, they do not constitute the “commitments” by China vis-à-vis her WTO counterparts, but merely serve as an essential indication of those commitments, unlike other paragraphs of the Working
Party Report that are incorporated into the Accession Protocol. However, without
the binding force of international law, the two paragraphs are not unuseful for
defining the issue at this point. After all, the status of the WTO Agreement in Chinese
domestic law is basically a matter of domestic law that does not necessarily fall within
the scope of the WTO regimes. So long as the two paragraphs accurately reflect the
intent and practice of China in this regard, they should be taken as a reliable source
for the clarification of the present issue.

However, the above submission does not imply that the commitments by China vis-à-
vis other WTO members, as embodied in the WTO Agreement, are irrelevant to the
status of WTO law in Chinese domestic law. On the contrary, where the WTO
provisions have expressly addressed one or more aspects of this issue, they actually
"confirm" – to a varying degree – the legal status of WTO law. This is evident in
paragraph 68 of the Working Party Report, which imposes a single obligation upon
China to take an "act of transformation" for domestic WTO implementation.
According to this paragraph, "administrative regulations, departmental rules and other
government measures would be promulgated in a timely manner so that China's
commitments would be fully implemented within the relevant timeframes." Moreover,
"the central government would undertake in a timely manner to revise or annual
administrative regulations or department rules if they were inconsistent with China's
obligations under the WTO Agreement and the Draft Protocol."

Since paragraph 68 has been related by the "Draft Protocol" to constitute an integral
part of the WTO Agreement, it has the force of international law both for China and
her WTO counterparts. But this paragraph actually contains a patent ambiguity. On
the one hand, the requirement for an act of transformation represents a single
"commitment" of China to fulfill WTO legal obligations in such matter as are
specified therein. On the other, the adoption of an act of "transformation" means that

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888 Lennard, supra note 882, at 404.
China is given a “privilege” to exclude the “direct application” of the WTO Agreement, a less desirable formality of WTO implementation for most WTO Members (including China). Whether or not paragraph 68 is treated as China’s “legal obligation” or, instead, her “legal right,” by explicitly referring to an act of “transformation,” this paragraph has confirmed the “legal effect” of the WTO Agreement under the Chinese legal system, one crucial aspect of its status in Chinese domestic law.

The foregoing discussions appear to suggest that, paragraph 66, 67 and 68 of the Working Party Report have been explicit in regard to the status of the WTO Agreement in Chinese domestic law. Nevertheless, one should keep in mind that such textual and contextual parts of the WTO Agreement related to this issue are intended to achieve the purpose of incorporating the general principle of *pacta sunt servanda* into the WTO legal regime. As paragraph 67 states, “China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations.” This appears to be an echo of the principle of *pacta sunt servanda* under international law. Paragraph 68 confirms where “administrative regulations, departmental rules or other measures were not in place” timely, “authorities would still honor China’s obligations under the WTO Agreement and Draft Protocol.” In this context, although the principle of *pacta sunt servanda* is confirmed, it remains ambiguous how the Chinese authorities will, in the absence of an act of “transformation,” “honor” WTO legal obligations, which appears to be a matter of Chinese domestic law.

In sum, within the scope of the WTO Agreement, the status of WTO law in Chinese domestic law is well “stated” and “confirmed,” especially in some textual and contextual parts of the China Accession Protocol, namely, paragraphs 66, 67 and 68 of the China Working Party Report. As international instruments creating legal obligations in international law, these WTO agreements are not supposed to mandate
China’s choice of methodology for giving effect to her international obligations under Chinese internal law. In reality, however, they have been widely and frequently relied up by various Chinese authorities, wherever there is an issue within the Chinese domestic legal system. This is attributable largely to a shortcoming inherent in Chinese domestic legal system and the difficulty involved in clarifying the entire issue, which is the focus of the ensuing discussions.

2. Within the Scope of Chinese Domestic law

Under the Chinese legal system, the status of treaties in Chinese domestic law has been unclear and controversial. The PRC Constitution and the Chinese law of treaties are silent on the issue. China’s practice in this regard has been inconsistent or even contradictory, since different treaties have been treated differently. In the context of the WTO Agreement (WTO law), this situation is not much improved, given the absence of any Chinese legislation capable of clarifying the issue in a systematic and consistent manner.

Specifically, upon the WTO accession, China has not enacted any statutory law comparable to the “Uruguay Round Agreement Act” (URAA) of the U.S., which may systematically and comprehensively clarify the status of WTO law in Chinese domestic law. Nor has the competent Chinese treaty-making authority, e.g., Standing Committee of the NPC, adopted any decision or resolution comparable to the “Council Decision 94/800 on the Conclusion of the WTO Agreement, the EC Council” of the EC, which may explicitly and thoroughly clarify this issue. This significant legislative deficiency, as observed by some Chinese jurists, is attributable largely to China’s inexperience in treaty-making practice. Little attention has been paid to the status of treaties in domestic law, in regard to their domestic implementation. 889

889 KONG XIANGJUN, supra note 880, at 145-146.
Notably, the Supreme People’s Court of China (SPC) has practically filled the above legislative “gap.” As mentioned above, judicial interpretation by the SPC may concern specifically the question of treaty implementation. In terms of domestic implementation of WTO law, the SPC has gone further during its efforts to develop a WTO-compatible system of judicial review. On 27 August 2002, the SPC issued the *Provisions of the SPC on Certain Issues Related to Hearings of International Trade Administrative Cases* (hereinafter as the “2002 Trade Ji”), where it endeavors to clarify the domestic legal effect of WTO law in a general sense.

In Article 3, 7 and 8 of the 2002 Trade Ji, the SPC implicitly limits the legal grounds for the People’s Court to hear international trade administrative cases to Chinese laws, regulations and rules at national and local levels. For its silence on the applicability of WTO law, the SPC made a particular explanation in the press conference for the enactment of the 2002 Trade Ji. As Hon. LI Guoguang, the-then Vice President of the SPC, pointed out in this press conference:

> The hearings of international trade administrative cases directly concern the application of international treaties and domestic law, especially domestic implementation of WTO rules. Given the comprehensiveness and enormous impacts of WTO rules, how to make rules for their domestic implementation has invited widespread concerns and become one of the major issues addressed in the present Provisions. According to Article 67 of the Working Party Report on the Accession of China, ... This indicates that WTO rules cannot be directly applied within the jurisdiction of our country, but instead should be implemented by means of revising and promulgating domestic law. ... Articles 7 and 8 of the Provisions incorporate the spirit of such a principle, by explicitly providing that in the hearings of administrative cases, the People’s Court shall rely on domestic law (... omitted).”

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890 LI Guoguang, *Zai Zuigao Renmin Fayuan Gongbu ‘Guanyu Shenli Guoji Maoyi Xingzheng Anjian Ruogan Wenti de Guiding’ Xinwen Fabuhui Shane De Jianghua* (Speech at the Press Conference of the
Due to the practice of the SPC, the above speech delivered in the press conference for the issuance of the 2002 Trade JI is actually the official "annotation" of this set of judicial interpretations, expressing the position of the SPC towards the status of WTO law in Chinese domestic law. So far, there has never been any Chinese legal authority that elaborates the issue to such an extent. Interestingly, to support its position towards the issue, the SPC particularly referred to the pertinent context of the WTO Agreement. This is actually the approach commonly adopted by other Chinese authorities (legislative or administrative in nature) as well, wherever they face the same task of clarifying the issue.

In other words, although well-specified by the WTO legal regime, the domestic status of WTO law remains unclear within the scope of Chinese domestic law. In this regard, given the huge "loophole" in Chinese legislation, Chinese authorities will basically resort directly to the well-settled WTO legal text and context, especially, paragraph 67 and 68 of the Working Party Report. It remains interesting to see that if this "adoption" of WTO legal sources should be considered as "direct application," contrary to China's firm and consistent position, embracing the doctrine of "transformation." By this pragmatic approach, the above issue can always be clarified in domestic legal system. At this stage, for instance, it has been settled by the Chinese authorities along the line espoused by the WTO legal regime.

As noted above, "treaty implementation" reflects an essential aspect of their domestic status. It would be impossible to obtain an accurate perception of the status of WTO law in Chinese domestic law, without looking into its actual implementation in Chinese domestic legal order. To this end, the next chapter will focus on the domestic implementation of WTO law in China, based particularly on an empirical study of the

role of the Chinese legislature and the Chinese judiciary in this regard.
CHAPTER 3 THE ROLE OF THE CHINESE LEGISLATURE AND THE JUDICIARY IN THE DOMESTIC IMPLEMENTATION OF WTO LAW:
AN EMPIRICAL STUDY

Introduction

It has now been more than four years since China officially joined the WTO on December 11, 2001. Over this period, international trading community – led by major WTO Members like the U.S. and the EC – has cast numerous concerns about China’s capacity and ability to honor her WTO commitments. In this connection, much attention has been given to the performance of various Chinese administrative agencies, as evident in some WTO Members’ assessment of China’s WTO compliance.891 No doubt, like their counterparts in other WTO Member States, Chinese administrative bodies play a predominant role in fulfilling China’s WTO obligations, especially those concerning market access and other substantive trade-related commitments. Nevertheless, the task of “WTO implementation” does not fall within the exclusive province of any domestic executive body, in particular.

Conceptually, “treaty implementation” covers both “direct application” and “transformation,” suggesting a crucial role of the national legislature and the judiciary in the implementing process of WTO law. More importantly, WTO legal regime is explicit in the role of domestic legislative bodies and courts, imposing upon the Members a series of obligations that particularly fall within the jurisdiction of the legislature and the courts. In the case of China, the role of the Chinese legislature and the judiciary in China’s WTO implementation has become even more significant, not only as specified by the mandate of the China Accession Protocol, but also as

confirmed by the currently escalating confrontation between China and a few of its
tWTO counterparts (e.g., U.S. and Japan) over China’s enforcement of intellectual
property rights. With China’s problematic IPR enforcement in the spotlight of the
world, the Chinese legislature and the judiciary are being pushed into the frontier of
China’s WTO implementation, and will likely constitute an interesting case study on
their role in the WTO implementation.

Nevertheless, an empirical study in the same context will have to go beyond the above
instances. This is the purpose of this chapter. China’s WTO accession has long been
a popular topic for scholarly debates, as well as a focus of political and diplomatic
attention. Unfortunately, little has been mentioned about the role of the Chinese
legislature and the judiciary in this historically remarkable process, especially as it
related to China’s WTO compliance. Take, for instance, the annual report of the
United States Trade Representatives (USTR) on China’s WTO compliance, which by
now has been released for the fourth time. In total four reports of this kind, the USTR
repeatedly addressed the situation on China’s WTO-compatible judicial review, which
is supposed to be afforded by the Chinese courts that “have handled cases involving
administrative agency decisions relating to international trade in goods or services or
intellectual property rights.” As the USTR consistently echoed in these reports, “so
far, however, there continues to be very little known statistics, as few foreign
companies have had that experience with these courts.”

This chapter reflects the efforts of this author to fill up such a “gap.” The chapter
begins with the role of the Chinese legislature in the “transformation” of WTO law.
After an elaboration of China’s position towards this “transformation” process, the
chapter will analyze China’s legislative practice in this regard, and will also add some

892 United States Trade Representatives, The U.S.-China Joint Commission on Commerce and Trade
(JCCT) Outcomes on U.S. Requests, at
11, 2006).
893 USTR 2005 Report, supra note 891, at 92.
reflections and policy recommendations. The following section will discuss the role of the Chinese judiciary in the “application of WTO law.” It first elucidates the role of Chinese courts in the context of WTO legal regime, and then shifts the focus to the judicial practice of China’s court system in this regard, addressing, respectively, the role of the Supreme People’s Court of China (SPC) and the lower People’s Court. A conclusion will then be drawn accordingly.

I. The Role of Chinese Legislative Bodies in the “Transformation” of WTO Law

1. China’s Position towards the “Transformation” of WTO law

It has been well-recognized that China embraces the doctrine of “transformation” in her domestic implementation of WTO law. This position is best illustrated in paragraph 67 of the China Working Party Report, where the Chinese government stated that “the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic law and enacting new legislation in fully compliance with the WTO Agreement.” This appears to be the process of “transformation,” with the task mainly taken on by the Chinese legislature, ending up with the new enactment or amendment of the existing Chinese legislation on the matter at issue.

This goes back to paragraph 66 of the Working Party Report, which particularly specifies the allocation of the legislative power and the hierarchy of domestic legislation under the Chinese constitutional and legal system, and therefore “classifies” the role of respective Chinese legislative bodies to carry out the “transformation” process of WTO law. Under this paragraph, by virtue of the PRC Constitution and the Law on Legislation, the National People’s Congress (NPC, highest organ of state power) and its Standing Committee (as its permanent body) “exercise the legislative power of the State.” They “had the power to formulate the
Constitution and laws.” The State Council (Central People’s Government of China, executive body of the highest organ of state power) “was entrusted with the power to formulate administrative regulations.” The ministries, commissions and other competent departments (collectively “departments”) of the State Council may “issue departmental rules within the jurisdiction of their respective departments and in accordance with the laws and administrative regulations.” Furthermore, the “provincial people’s congress and their standing committees could adopt local regulations,” and the “provincial governments had the power to make government rules.”

As such, China’s legislative power is rather “de-centralized” both “horizontally” and “vertically.” Horizontally, the legislative power is divided into the “state legislative power,” exercised by the NPC (highest organ of the state power) and its Standing Committee, as well as the “administrative legislative power,” exercised by the State Council (executive body of the highest organ of state power) and its various departments. Thus, the NPC and its Standing Committee are doubtless the legislative bodies of the state. The State Council and its various departments, which are actually the administrative bodies at all levels, also serve as the legislative bodies with their administrative character. At this stage, the legislative power is allocated at the national level.894

In a vertical manner, the legislative power is also shared by the local people’s congress and its standing committee, as well as the local government, mostly at the provincial level. They therefore serve as a “local legislative body.” The diversity of legislative bodies has long been a significant feature of China’s legislative system, leading to the equally diverse sources of Chinese law, ranging from the Constitution, laws, administrative regulations and local regulations to the departmental rules and

local government rules. These features are crucial to the enactment of a new law in China, one primary formality of "transformation" of WTO law into Chinese domestic law.

To administer the above diverse legislative bodies and their legislative enactments in an effective and uniform manner, the PRC constitution and the Law on Legislation explicitly specify their "hierarchy." As Paragraph 66 of the Working Party Report further stated, the NPC and its Standing Committee has the power "to annul the administrative regulations that contradict the Constitution and laws," "as well as the local regulations that contradict the Constitution, laws and administrative regulations." And, the State Council has the power "to annul departmental rules and local government rules inconsistent with the Constitution, laws and administrative regulations." This establishes the mechanisms and criteria for the revision and amendment of the current Chinese law, another primary formality of "transformation" of WTO law into Chinese domestic law.

By contrast, the WTO legal regime in itself remains unclear as to the hierarchical status of a source of Chinese law involved in the process of "transformation" of WTO law. According to paragraph 68 of the Working Party Report, which is integrated into the China Accession Protocol and becomes part of China's WTO commitments, "administrative regulations, departmental rules and other central government measures would be promulgated in a timely manner so that China's regulations, departmental rules and other central government measures would be fully implemented within the relevant time frames." Furthermore, "the central government would undertake in a timely manner to revise or annul administrative regulations or departmental rules if they were inconsistent with China's obligations under the WTO Agreement and Draft Protocol." Within the meaning of this provision, China's "transformation" of WTO law into domestic law involves only administrative

895 Id.
legislation (in a lower hierarchical status than that of the “laws”), as well as the role of administrative bodies at various levels (lower-ranking legislative bodies than the NPC and its Standing Committee).

It is true that some WTO provisions do refer to other sources of Chinese law which, as promulgated by a higher-ranking legislature than the administrative bodies, are recognized as having a higher hierarchical status than administrative legislation. Nevertheless, they are silent on the issue of domestic WTO implementation. Under Section 2(A)(2) of the China Accession Protocol, “China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as “laws, regulations and other measures”) pertaining to or affecting trade in goods, services, trade-related aspects if intellectual property rights (TRIPs) or the control of foreign exchange.” This provision, although focusing on those sources of Chinese law that share the subject matters of the WTO legal regime, does not even refer to the WTO. Of course, to the extent that it has imposed certain requirements for the management of such sources of law, the provision will likely affect the process of “transformation” of WTO law into Chinese domestic law, but do not necessarily lead to the involvement of any such sources of law, at a higher hierarchical status, and as promulgated by a higher-ranking legislature, in that process.

In another example, Section 2(A)(3) of the China Accession Protocol particularly mandates that “China’s local regulations, rules and other measures of local governments at the sub-national level” “conform to the obligations undertaken in the WTO Agreement and this Protocol.” Focusing merely on China’s local legislation, this provision does impose a liberal obligation upon China to comply with WTO legal regime, but never specify any specific formality of doing so, such as the process of “transformation.” Accordingly, under the current WTO legal regime, China seems only committed to transform WTO law into domestic law by means of administrative
legislation, with the administrative bodies playing a leading role of the legislative enactment. It then remains unclear whether those in the higher hierarchical status, e.g., the Constitution and laws, shall be involved to serve this process of transformation.

In addition, the above WTO provisions repeatedly refer to the "measures" of the governments at the central and local level, which in fact do not count as a source of Chinese law, but are "administrative acts" performed by the administrative bodies at various levels. Rule-making in nature, these measures are generally termed "normative documents," falling within the categories of the "abstractive administrative acts" under the Chinese administrative law regime.

Actually, it is also questionable whether the "departmental rules and local government rules" should be viewed as a source of Chinese law. In this connection, the key can be found in the criteria for defining a source of law. As many have maintained, such criteria lie in Article 72 and 73 of the Chinese Administrative Procedural Law, according to which the People's Court shall, for the purpose of hearing an administrative case, "rely on" laws, administrative regulations and local regulations but will "take as reference" departmental rules and local government rules. Since the last two legal authorities are not capable of providing legal grounds for the courts, they will not have the force of general application, and therefore should not qualify as a source of law. With such criteria, there would be little difference in the legal force between departmental/local governmental rules and normative documents, although the latter is deemed to be in a lower hierarchical status for this purpose.

Unlike the case of departmental rules and local government rules, however, the issue as to which governmental authority has the power to annul normative documents is still unsettled. Under the Chinese administrative law regime, these abstractive administrative acts are excluded from judicial review, although the court may "indirectly" annul any normative document by applying its analogy in a higher
hierarchical status. As is a customary practice in China, a normative document can either be annulled by the administrative agency that makes it, or by another administrative body ranking higher than that norm-issuing administrative agency. This actually has little inconsistency with the constitutional and statutory allocation of the power to annual administrative legislation. Therefore, within the WTO legal regime, it should be the administrative bodies and administrative legislation (or the alike) at various levels, that play a leading role in China’s “transformation” of WTO law into domestic law, although what China has achieved is far beyond such “legitimate expectation.” This will be examined immediately below.

2. China’s Actual Practice in the “Transformation” of WTO law

China’s efforts to bring its trade-related laws, regulations and other measures into compliance with the WTO legal regime can be traced back to 1999, long before the country acceded to the WTO in December 2001. By the eve of China’s WTO accession, 40 laws and administrative regulations had been enacted or amended, with another set of 12 administrative regulations annulled; over 2000 departmental rules had been reviewed, followed by their respective annulment or amendment, as well as the issuance of the new ones. The Legal Affairs Office and other various departments of the State Council played a leading role in this “initial transformation” of WTO law.

During the first year of WTO membership, China attached a principal focus on its framework of laws and regulations governing trade in goods, trade in services, and Intellectual Property Rights. With an initial review of 2500 of these trade-related

896 KONG XIANGJUN, supra note 880.
897 It appears to be interesting whether this practice, in which a “rule maker” plays at the same time as the “rule corrector” would be in conflict with the spiritual of the “rule of law.”
legal authorities for their WTO consistency, 30 departments of the State Council reportedly repealed 830 regulations and rules, and issued almost 450 new or revised rules. At local level, nearly 190,000 local regulations and rules were reportedly amended, annulled or terminated. This work continued in 2003, when the central government issuing more than 100 new or revised laws and regulations in an effort to meet China’s WTO commitments, and 31 provinces and autonomous regions and 49 major cities reportedly repealed over 500 trade-related measures and amended almost 200 more. By these massive transforming activities, China has established a basic WTO-consistent legal framework for each major trade or trade-related area. The country continued these efforts in 2004 and 2005, with a pace slowing down to focus not on the “quantity” but on the “quality” of the desirable legislative products. Below is a review of some progress achieved in the past four years.

A. Achievements and Progresses

In the area of trade in goods, China has particularly developed a comprehensive legal framework for trade remedies. Shortly before China's WTO accession, the State Council revised its regulations on antidumping (AD) and countervailing duties (CVD) and issued a new one on safeguards, in order to make them consistent with the WTO's AD Agreement, CVD Agreement and Safeguards Agreement. These three administrative regulations became effective on January 1, 2002, followed by a series of ministerial rules issued respectively by the MOFCOM and the SETC, on the initiation of investigations, questionnaires, hearings or other procedural matters related to these trade remedy proceedings. In 2003, upon a general reorganization of the State Council ministries and commissions, the functions of the MOFCOM and the SETC concerning trade remedies are consolidated into the MOFCOM. The above

899 Xinhua Press, Woguo Chubu Jianqi Fuhe Shi Mao Zuzhi Guize De Shewai Jingji Falv Fagui Tixi (A legal framework for foreign-related laws and regulations has been initially established to comply with the WTP rules in our country), at www.china.org.cn/chinese/zhuanti/244649.htm (Dec. 10, 2002).
900 USTR 2005 Report, supra note 891, at 89.
regulations and rules were then updated and revised to reflect such changes. In July 2004, China promulgated the long-awaited revised Foreign Trade Law, which particularly provides for the full liberalization of trading rights as required by the China Accession Protocol. To implement this statutory amendment, the MOFCOM issued the “implementing rules” setting out the procedures for a new registration process in this regard.

In the area of trade-related investment, by the time China became a WTO member, it had finished the review of its laws and administrative regulations governing the foreign-related enterprises for their compliance with the WTO requirements. As a result, the Standing Committee of the National People’s Congress amended the Law on Chinese-foreign Contractual Joint Ventures and the Law on Foreign-capital Enterprises in 2002, and the Law on Chinese-foreign Equity Joint Ventures in 2003; the State Council, in the meantime, had amended the regulations for the implementation of these laws. This part of the “transformation” process is mainly concerned with export performance, local content, foreign exchange balancing, and technology transfer. They represent a “fundamental restructure” of China’s legal framework for foreign investment, a significant progress in the area.

It is to be observed that China’s most remarkable achievement on her “transformation” of WTO law is in the area of trade-related intellectual property rights (IPR). By the time of her WTO accession, China had completed the amendments to Chinese patent law, trademark law and copyright law for a WTO

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901 Id. at 28-31.
902 Id. at 12.
903 Id. at 13.
904 Id. at 47.
consistency. Within several months after accession, China issued “regulations” for the trademark law and the copyright law. It also promulgated various sets of “implementing regulations and rules” covering specific subject matters addressed by the WTO’s TRIPs Agreement, e.g., integrated circuits, computer software and pharmaceuticals. In 2003, China adopted several new “measures” in the patent, trademark and copyright areas for the same purpose. These transformation measures moved China generally in line with the WTO law on most key substantive areas of the IPR.\footnote{USTR 2005 Report, supra note 891, at 66.}

Further progress was made in 2004 and 2005, particularly in the IPR enforcement regime. In March 2004, the Regulations on Customs Protection of Intellectual Property Customs Administration took effect.\footnote{Id. at 68.} Subsequently, the Customs Administration enacted the implementing rules for these regulations, effective July 2004.\footnote{Id. at 67.} In June 2005, the Trademark Administration circulated draft amendments to its Regulations on the Timely Transfer of Suspected Criminal Cases in the Enforcement of Administrative Law, designed to strengthen Chinese regional industrial and commercial administrations with the view to ensuring effective trademark enforcement and protection. Earlier, in April 2005, the Copyright Administration of China and the Ministry of Information Industry (MII) adopted the Measures for administrative Protection of Copyright on the Internet. Five months later, in search for a more important Internet-related measure for public comments, China circulated the draft Regulations on the Protection of Copyright over Information Networks.\footnote{Id. at 68.} Currently, China is preparing for the “Third Amendment” to its patent law and to the implementing regulation for this law, and also preparing a
draft of an "anti-monopoly law." 910

However, China's legal framework to fulfill her WTO commitments in the area of trade in services turns to be more fragmental and less consistent. Most of these commitments involve the market access to various service sectors covered in China's Service Schedules, at the core of which are "acquired rights" and "licensing process." For the latter, the Administrative Licensing Law took effect in July 2004. For a specific service sector, financial service is a good example. The Chinese financial regulators have issued a series of rules and measures to respond to China's WTO's requirements. In the banking sector, to keep pace with China's WTO obligations, shortly after China's accession to the WTO, People's Bank of China (PBOC) adopted "regulations" governing foreign-funded banks, with "implementing rules" effective February 1, 2002. The PBOC also undertook several other related measures. To open the banking sector further, the Chinese Banking Regulatory Commission (CBRC) enacted the Implementing Rules for the Administrative Regulations on Foreign-invested Financial Institutions in July 2004, which removed the restriction that limited foreign-funded banks to open only one new branch every 12 months.911

In the insurance sector, the China Insurance Regulatory Commission (CIRC) promulgated several new "insurance regulations" shortly after China's accession to the WTO, including one directed at the regulation of foreign insurance companies. Although implementing many of China's commitments, these regulations created problems in three capital areas: capitalization requirements, transparency and branching. To address these problems, CIRC issued the Detailed Rules on the Regulations for the Administration of Foreign-invested Insurance Companies in May, 2004.912 Besides, to fulfill its commitment to open up the motor vehicle financing

911 USTR 2005 Report, supra note 891, at 74-76.
912 Id. at 78.
sector to foreign non-bank financial institutions, the CBRC adopted the long-awaited “regulations” permitting foreign financial institutions to offer auto loans in October 2003. One month later, CBRC enacted implementing rules setting forth the procedures for foreign financial institutions to apply for licenses to begin operation. In August 2004, the PBOC and CBRC jointly issued the Administrative Rules on Auto Financing which became effective in October 2004.913 By setting forth administrative requirements and risk management rules for extending auto loans in China, these rules enable the licensed companies to actually begin operations.914 In addition, in October 27, 2005, the 18th session of the Standing Committee of the 10th NPC adopted the amended Security Law, effective on January 1, 2006.915

The preceding survey tends to show that China has made remarkable achievements in her endeavor to transform WTO law into the domestic legal system. Substantially, this process has covered almost every area of trade or trade-related matter addressed by the WTO legal regime, so as to fully respond to China’s comprehensive WTO commitments. Hierarchically, the process has involved a variety of legislative bodies with their legislative activities at all levels. In this connection, the administrative bodies apparently play a key role, with regard to administrative regulations, departmental rules and measures in the form of Chinese internal law. All is actually within the “legitimate expectation” of the WTO.

However, China has gone further in the sense that the higher-ranking state legislature (Standing Committee of the NPC) has also played a major role in this process, followed by the amendments to or promulgation of the “laws” at a higher hierarchical level. Typical cases include the amendments to the Foreign Trade Law, Patent Law, Trademark Law, Copyright Law and Security law, as well as the drafting of an anti-

913 Id. at 80.
914 Id. at 80-81.
monopoly law. This reflects China's good faith to honor the WTO law: despite its higher hierarchical status, the "laws" are subject to the WTO disciplines to the same extent as administrative regulations and rules, and will be deemed to be revised or annulled for its WTO inconsistency, even though the WTO legal regime does not can not explicitly so require.

B. Problems and Challenges

While China has made significant and steady progress in bringing its laws, regulations and measures into compliance with its WTO commitments, questions and problems emerge at the same pace. First, not all China's WTO commitments have been transformed into the Chinese domestic law, with numerous "blank areas" left behind. For example, China has not yet implemented its trading rights commitments insofar as they relate to the importation of books, newspapers and magazines. Under the terms of China's Accession Protocol, trading rights for these publications should have been automatically available to foreign-related enterprises and foreign individuals as of December 11, 2004. Nevertheless, China continues to reserve the right to import these publications exclusively for state trading enterprises, based on the general exception for the public morals in Article XX of GATT 1994. The same situation arises in regard to the trading rights commitments concerning the importation of pharmaceuticals. Although under China's Accession Protocol, these rights should have been automatically available to foreign pharmaceutical companies as of December 11, 2004, China still requires foreign pharmaceutical companies to hire Chinese importers to bring their finished products into the country, and also requires them to sell their finished products through Chinese wholesalers.916

Secondly, for those commitments that have been translated into Chinese domestic law, the extent to which they are fully addressed by domestic enactments (e.g., laws, 916 USTR 2005 Report, supra note 891, at 13.
regulations, rules or measures) can be problematic in a substantive or technical sense. Take the sector of legal services. In December 2001, the State Council issued the *Regulations on the Administration of Foreign Law Firm Representative Offices*. Ten months later, the Ministry of Justice issued implementing rules. While these measures removed some market access barriers, their ambiguities in many substantive areas also led to new obstacles (contrary to China’s GATS commitments) to China’s legal service market, such as the “economic needs test” and the “restrictions on the types of legal services.” To date, these obstacles have continued to prevent foreign law firms from participating more fully in China’s legal market.917

Particular techniques adopted in the transformation of China’s WTO commitments may also significantly affect the extent to which these commitments are addressed by domestic legislative measures. For example, China’s countervailing duty (CVD) regime is still a mystery. To conform to the requirements of the WTO Subsidies Agreement and China’s WTO commitments, China has its CVD regulations and rules to “track” those found in the Subsidies Agreement. However, there are still certain areas where key provisions are omitted or vaguely worded, leaving much to be desired for greater transparency and clarification.918 This “technical defect” has increased the difficulties for China to enforce its CVD regime for the WTO consistency purpose.

Thirdly, in many instances, China still maintains some regulations, rules or measures that are inconsistent with its WTO commitments. A typical case relates to the consumption tax regulations, which first went into effect in 1993 and was applicable to a range of consumer products, including spirits and alcoholic beverages, tobacco, cosmetics, jewelry, etc. The regulations provide different tax bases to compute consumption taxes for domestic and imported products, resulting in a substantially higher effective consumption tax rate for imported products than for domestic

917 Id. at 82.
918 Id. at 31.
products. This appears to be in conflict with the "national treatment" principle, a cornerstone of the GATT legal regime. Despite the concerns consistently raised by the U.S. and other WTO members, China has not yet revised these regulations.919

To make the matter worse, China even creates inconsistencies with her WTO commitments by issuing new rules and measures for WTO implementation purpose. For instance, to implement its post-WTO automobile policy that in itself has not yet fully adhered to China's WTO commitments, the National Development and Reform Commission (NDRC) issued the Measures on the importation of Parts for Entire Automobile in February 2005. Since they became effective two months later, these rules have been strongly criticized by WTO members like the US, EC and Japan, for they not only result in the imposition of a tariff on auto parts in excess of China's bound rate, but also improperly condition tariff treatment on local content, contrary to Article III of the GATT 1994 and the commitment in China's Accession Protocol to eliminate all local content requirements relating to importation. By now, even though China has been slow to implement these rules, the uncertainty that they create distorts the auto parts trade.920 In short, to maintain those WTO-incompatible regulations, rules and measures and issue the new ones, China places herself in more difficult position in performing her task of transforming WTO law into Chinese domestic law.

3. Some Reflections and Policy Recommendations

Notwithstanding the remarkable achievements made in the transformation of WTO law into Chinese domestic law, China is still facing enormous problems and challenges ahead. Comparing these two sides, achievements or challenges, one may lead to an unrealistic view or an unfounded forgone conclusion. An objective assessment calls for a better understanding of the reasons behind all these "ups and downs," which should blend China's economic capacity, legislative techniques and
collective political will with her WTO counterparts' perception of the situation and their reactions accordingly.

Here is a typical case reflecting all the above factors, starting with the observations of an American trade association on China's transformation of its services commitments into domestic law: "[i]n many instances, PRC regulators are using a two-pronged approach to implement China's services commitments. ... China often enacts basic laws that 'allow' or 'permit' new investment in previously restricted sectors as required by WTO commitments, but sets the bar for entry prohibitively high. American investors in China's service sectors say these restrictions and the lack of transparency in the regulatory system prevent complete market openings."\(^{921}\) From the U.S. perspectives, because of the above "two-pronged" approach, China has not succeeded in putting in place the transformation of its WTO commitments into domestic law, even though such process had been undertaken at a higher hierarchical level by taking the form of legislative enactment.

From a Chinese perspective, however, the "two-pronged" approach represents its customary practice: in legislating a new subject, a source of law in a higher hierarchical level (e.g., basic law and law) will be taken to address the primary issues and prescribe general principles, while those in a lower hierarchical status (e.g., regulations, rules and measures) will be taken to set forth the procedures and rules for their implementation. This approach particularly applies to a case where the legislative process is still in progress, and the legislative techniques for this purpose remain unperfected. Being flexible and tentative in nature, a lower hierarchical source of law is more suitable to address the changing or developing conditions. Once the situation is ripe and fully ready, it will be appropriate to expect a more stable and consolidated source of law at a higher hierarchical level, to govern the matter based upon the experience and techniques accumulated by the lower hierarchical

\(^{921}\) Id. at 74.
China is a new member of the WTO, with little experience in the implementation of her WTO commitments, both internationally and domestically. Due to her “uniqueness” in various respects, China has subjected herself to the most comprehensive and far-reaching WTO obligations among the WTO Members. In turn, by the time China acceded to the WTO, many of these obligations had far exceeded China’s implementing capacity. Fulfilling these obligations has become a challenge not only in respect to China’s economic capacity, but also for her legislative techniques. To face this “dual” challenge, especially in the Chinese internal system, it is necessary to develop some strategies that could accommodate the tentative and effective measures to the long-term fundamental goal of the WTO. The “two-pronged” approach represents part of China’s efforts in this regard, particularly in the context of Chinese domestic legislative activities.

In the circumstances, the U.S. business community complained that China, while enacting “basic law” to allow foreign investors to operate in the previously restricted sectors, also “sets the bar for entry prohibitively high.” It should be noted that such a bar is generally in the form of a lower hierarchical source of law, being tentative and adjustable in nature. The revised Sectoral Guidelines Catalogue for Foreign Investment, enacted by the State Council in January 2005 (2005 Catalogue), is a clear illustration of this point. Like its previous version adopted in March 2002, the 2005 Catalogue continued to reflect China’s decision to adhere to her WTO commitments to open up certain sectors to foreign investment, including travel agencies, human resources companies, cinemas, etc. Nevertheless, it still excludes books, magazines and newspapers from the above category, even though they have been equally covered by China’s WTO commitments. Thus, the 2005 Catalogue implemented China’s WTO commitments on a selective basis. However, it is subject to further review in

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922 Id. at 52.
the near future, since a normative document as such is always adjustable in the Chinese legal order. Sooner or later, the inconsistency of the 2005 Catalogue with the WTO legal regime will be corrected by its successive version, in accordance with the spirit and requirements set forth in the established "basic law." It is a matter of the time. Thus, for present purpose, it is premature to determine that China has failed to fulfill her WTO commitments in any particular area.

Certainly, time is of essence not only for China's WTO counterparts, as they are anxiously coaxing China to complete her WTO compliance, but also for China, since the "transformation" process constitutes the essential part of her domestic WTO implementation. It is understandable that China's trading partners would always like to see the completed transformation of China's WTO obligations in a timely fashion. However, it is also clear that both sides have acknowledged that it may not always be the case in practice. Under paragraph 68 of the China Working Party Report, "[i]f administrative regulations, departmental rules or measures were not in place within such time frames, [Chinese] authorities would still honor China's obligations under the WTO Agreement and Draft Protocol." In this connection, to "honor" China's WTO obligations is truly a matter of international law that involves international responsibility, rather than a matter of domestic law that involves domestic legal remedies.923 As noted above, paragraph 68 constitutes part of China's accession terms binding upon both sides. Thus, this provision does indicate the recognition by China's WTO counterparts of any possible "untimely" situation with regard to China's "transformation" process.

Since China's "transformation" of WTO law into domestic law is mainly a matter of domestic administration, falling within the discretion of Chinese legislative bodies, the task has become a test of China's political will, economic capacity and legislative techniques in this regard. Generally, the Chinese government has consistently acted

923 Interestingly, the issue of the "time frames" is more outstanding in China's services commitments, since they are mainly involved in China's Service Schedules for market opening.
in a good faith in honoring its WTO commitments, as evident in its steady progresses and continuous efforts in the transformation process. Problems and challenges mainly stemmed from China's insufficient economic capacity to carry out certain WTO commitments, as well as Chinese untested legislative techniques to treat the complexity and comprehensiveness of the more burdensome WTO commitments. In these situations, a delay in transformation is inevitable.

To resolve this problem, China should first establish the “legitimacy” of such a delay, by resorting to a particular WTO legal source that may justify the above insufficiency and inexperience. Then, China should make sure that any WTO inconsistency caused by this delay (particularly, the existing domestic legislation and the like) remain at a lower hierarchical level, flexible and legally adjustable enough for future correction. In this context, the above-noted “two-pronged” approach appears to be a good choice. To incorporate the WTO commitments into a “basic law,” or to take advantage of the experience of the lower hierarchical legal sources for this purpose, China should develop its legislative techniques on a larger scale. Technically, the Chinese legislature may “reword” the WTO provisions to match domestic circumstances, incorporate part of the language of the WTO treaty into a new domestic legislation, or, indirectly, give effect to the WTO treaty obligations by enacting a separate act or statute, without reenacting the text itself. Each of these tasks calls for a good understanding of WTO law, which constitutes a real challenge to a new WTO member like China. But China will learn from her experience in this connection.

China’s task of transforming WTO law into domestic law has also become a test of patience of its trading partners within the WTO, depending on their perception of the whole situation. For this purpose, it is essential to enhancing the transparency of China’s “transformation” process, as promised by the Chinese government in her accession negotiations with other WTO members. The first commitment is to provide an opportunity for “pubic comment” before new or modified laws and regulations could be implemented. So far, China’s compliance with this commitment has been
uneven, since only a small portion of new and revised laws and regulations have gone through this “notice-and-comment” procedure. The second commitment is to make new and revised laws and regulations available to the public, on which China always maintains a better record. Via official journals or the internet, almost all new or revised laws and regulations (in Chinese) have been available soon after issuance and prior to their effective date. None the less, China continues to lag behind in another commitment to translate them into one or more of the WTO languages (English, French and Spanish).924

The above “transparency” obligations are designed to facilitate the efficient communication between China and other WTO members. Apparently, much is still left to be desired in this context. Communication is the beginning of understanding. Without a sound perception of the situation in China, China’s trading partners within the WTO are not likely to reach any objective assessment of the country’s performance on the WTO compliance. For China, the country should continue to improve the “transparency” of its transformation process. To other members of the WTO, they need to be more patient than ever. After all, China does not lack in political will and good faith in honoring her WTO commitments, especially in regard to the transformation process. At this point, assistance is more productive than criticism. Particularly, Western countries should continue to assist China in this regard, since a timely and proper “transformation” of WTO law into Chinese domestic law is in the best interest of both sides.

In sum, China’s transformation of WTO law into domestic law has never been an easy task. With enormous challenges and problems ahead, both China and her WTO counterparts should maintain an optimistic and cooperative position, working diligently towards the same goal of getting China on the right track to achieve her goal of WTO compliance.

924 USTR 2005 Report, supra note 891, at 88-89.
II. The Role of Chinese Courts in the "Application" of WTO Law

1. The Role of National Courts in the Enforcement of WTO Law

Under public international law, how to implement a treaty under the domestic legal system of its party members is generally a matter for the latter’s discretion, while the treaty in itself does not elaborate the issue. In this regard, the WTO treaty regime has gone further by producing enormous legal effect on the internal legal order of its Member States. Particularly, the WTO Agreement imposes an obligation upon the Member States to ensure a legal conformity of their domestic laws with the WTO obligations, a task to be taken up by the domestic legislature in the first place, but also significantly affects the domestic “judicial structure.”

A number of WTO-administered agreements contain express provisions to obligate Member States to provide for “an effective system of legal remedies” against any violation of WTO obligations by Member States. This actually refers to a domestic enforcement mechanism, generally linked to the judicial process undertaken by the domestic courts. Although the courts may grant various legal remedies, the WTO legal regime directs mainly at the “judicial review,” incorporating this requirement into a number of WTO agreements, e.g., GATT 1994 (Article X of the GATT), WTO Antidumping Agreement (Article 13), WTO Agreement on Customs Valuation (Article 11), Agreement on Pre-shipment Inspection (Article 4), WTO Agreement on Subsidies and Countervailing Measures (Article 23), GATS (Article VI), TRIPs Agreement (Article 41-50 and 59) and, Agreement on Government Procurement

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925 Ruttley, MacVay & George eds., supra note 274, at 130.
927 Ruttley, MacVay & George eds., supra note 274, at 140-141.
928 Id. at 41.
Notably, the above provisions do not impose a uniformed standard upon Member States for the availability of judicial review, especially in terms of the role of national courts. Some provisions are explicit in this regard, such as Article 11 of the WTO Agreement on Customs Valuation, requiring Member States to make available a "distinct" judicial review to be undertaken by national courts. Others are more implicit, such as Article 41:4 of the TRIPS Agreement, providing that "[p]arties to a proceeding shall have an opportunity for review by a judicial review authority of final administrative decisions and ... of at least the legal aspect of initial judicial decisions on the merits of a case."\(^{930}\)

However, more provisions adopt a rather flexible standard, allowing Member States to choose between "judicial, arbitral or administrative tribunals or procedures" for the purpose of "prompt review" of the relevant administrative actions. These include Article 6(2) of the GATS, Article X:3(2) of the GATT, Article 23 of the WTO Agreement on Subsidies and Countervailing Measures, as well as Article 13 of the WTO Antidumping Agreement. Although under the heading "judicial review," the possibility is open for an alternative review by the less stringent arbitral or administrative procedures. Specifically, Article X:3(2) of the GATT and Article 6(2) of the GATS are deemed to have put forward the minimum standard for such review. Thus, under these very provisions, it would be difficult (if not impossible) to single out the role of national courts.

Accordingly, within the WTO treaty system, regarding the requirement for domestic judicial review, the significance of the role of national courts varies from one agreement to another. However, this does not suggest the denial of their role in this

\(^{929}\) Petersmann, *supra* note 371, at 72.

\(^{930}\) Ruttley, MacVay & George eds., *supra* note 274, at 131.
process at all. On the contrary, the trend of today’s rule of law calls for the enhancement of the courts’ role as such, so as to secure a “distinct” judicial review for protecting private interests and rights against abuses of administrative power. Within a modern concept of the rule of law, judicial review falls within the exclusive province of the judicial authority, namely, courts of law. Obviously, the existing WTO treaty system does not adhere to this trend in a uniformed manner, given the imbalance in the level of legal development among different Member States. Nevertheless, to single out the role of national courts in act effort to satisfy the WTO requirement for judicial review will definitely count as a move to “keep pace with the time,” as evident in the case of China now under discussion.

Besides the major requirements for judicial review, the WTO treaty system, particularly the TRIPs Agreement, has also specified the role of domestic courts in providing for other legal remedies for the enforcement of WTO law. Under the TRIPs Agreement, Article 42-50 (Part III: Section 2) specifically address the civil procedures and remedies for the enforcement of intellectual property rights, while Article 61 (Part III: Section 5) specifies the criminal procedures for the purpose. So far as these civil and criminal proceedings are concerned, the exclusive role of national courts in granting a civil remedy or criminal sanction for the WTO implementation is taken for granted.

For all these, the role of national courts has been explicitly or implicitly addressed by the WTO treaty regime, so as to establish the “legitimacy” of their involvement in the implementation of WTO law. As a result, the courts will face the task of hearing the cases related to the particular WTO legal rules (so-called “WTO-related cases”). More specifically, the courts will inevitably encounter the issue of interpreting a rule of WTO law, and, on many occasions, will have to “apply” this rule.

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931 See, Hilf, supra note 377, at 321.
932 KONG XIANGJUN, supra note 880.
2. The Role of the Chinese Courts under the WTO Legal Regime

China is not only subject to the WTO's general requirements for the role of national courts in domestic implementation of WTO law, but also to any special requirement set forth in the Accession Protocol on her WTO accession.

With regard to the requirement for judicial review, Article 2(D) of the Accession Protocol provides that:

1. China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interests in the outcome of the matter.

2. Review procedures shall include the opportunity for appeal, without penalty, by individuals or enterprises affected by any administrative action subject to review. If the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any right to further appeal.

Besides, this provision is supplemented by paragraphs 76-79 of the China Working Party Report, as they have been incorporated into the Accession Protocol, and, as such, are legally binding upon China and her WTO counterparts. Section 1 of Article 2(D) stipulates certain institutional standards for the “review” of trade-related administrative actions, emphasizing the independence of the “tribunals” to undertake this review (as confirmed by paragraph 78 of the Working Party Report). This section also defines the coverage of the “reviewable” administrative actions to the extent
provided by the GATT, GATS and TRIPs Agreement, which has been further confirmed by paragraph 79 of the Working Party Report. Section 2 of Article 2(D) stipulates a series of procedural requirements for a “review” covered by the previous section, focusing on “due process” – fundamental element of modern rule of law. Also, this section confirms the “judicial nature” of the required review procedures by exclusively assigning the task of “appeal” to a “judicial body,” leading to a “distinct” judicial review operated by the Chinese courts. These stipulations have been confirmed by paragraph 79 of the Working Party Report.

Therefore, compared with the general requirements of the WTO for judicial review, those specifically set forth in Article 2(D) of the Accession Protocol have become more uniform and rigorous, resembling the essential elements of a modern rule of law. They give the Chinese courts an exclusive role in the WTO-compatible judicial review process, so as to fulfill China’s obligations in this regard. This mandate is in fact consistent with China’s existing system of judicial review featuring the exclusive role of the People’s Court. To meet with these China-specific institutional and procedural requirements, the People’s Court will be able to guarantee a minimum level of justice.

As noted above, so far as a single treaty instrument of the WTO is concerned, the TRIPs Agreement has been most relevant to the role of the judiciary. Besides the judicial review requirements, the Accession Protocol mandates China to make available civil and criminal procedures and remedies for the enforcement of intellectual property rights to a greater extent than that required by the TRIPs Agreement. These China-specific TRIPs obligations are stipulated in several paragraphs of the Working Part Report, as they have been integrated into the Accession Protocol.

Regarding “civil judicial procedures and remedies,” China is committed in paragraph 291 to effectively implement Article 42 and 43 of the TRIPs Agreement “under the
judicial rules of civil procedure.” In paragraph 292, China is further committed to amend the relevant implementing rules “to ensure full compliance with Article 45 and 46 of TRIPs Agreement, to the effect that damages paid by the infringer to the right-holder would be adequate to compensate for the injury knowingly, or, with reasonable grounds to know, engaging in the infringing activity.” Regarding “criminal procedures,” China particularly addressed in paragraph 303 the concerns of some WTO Members about the “monetary thresholds for bringing a criminal action,” to have its administrative authority recommend that “judicial authority make necessary adjustments to lower the thresholds.” In paragraph 305, China is committed to “fully apply the provisions of the TRIPs Agreement” upon its accession to the WTO, given “the advanced state of protection for intellectual property rights in China.”

As a matter of civil and criminal judicial process, all these TRIPs-based commitments are within the province and function of the Chinese courts. In other words, China’s implementation of these obligations falls within the exclusive authority of the People’s Court.

3. Judicial Interpretation of the Supreme People’ Court of China

Generally speaking, the role of the Chinese courts in treaty implementation is primarily concerned with the role of the Supreme People’s Court (SPC), especially in terms of its “judicial interpretation.” Under the Chinese constitutional and legal system, the power to interpret law is vested first and foremost in the legislative bodies, namely, the National People’s Congress (NPC) and its Standing Committee. Their legal interpretation forms part of the legislation, should the appropriate procedures be followed. Besides, the NPC delegates the power of “statutory interpretation” to the Supreme People’s Court and the Supreme People’s Procuratorate (SPP), making the latter competent in interpreting any particular issue arising from the daily adjudication of the People’s Court and public prosecution of the People’s Procuratorate on the
application of law. 933

Varying in forms, judicial interpretations of the SPC and SPP only bind the lower courts and the procuracy. Given such limited scope of application, they do not count as a source of Chinese law, with their hierarchical status not comparable to that of the legislature. However, the People’s Court does rely on the SPC judicial interpretation in the routine adjudicative work. Particularly, wherever judicial interpretation is applicable, the People’s Court is mandated to rely on it in the judgment. In this sense, the SPC judicial interpretation serves as a de facto source of law, with a “quasi-legislative” function. Despite its uncertain status in the hierarchy of Chinese law, the SPC judicial interpretation is credited with a strong authority of law, since most issues of legal interpretation will come before the People’s Court.

Given this “quasi-legislative” character, judicial interpretation by the SPC serves the purpose of “treaty implementation” in the same way as any other source of Chinese law. This refers particularly to the “transformation” process, where, as discussed before, the role of the SPC has been active with regard to a number of treaties. In terms of the WTO agreements, the role of the SPC in implementing these treaty norms in the domestic setting has special significance. Since China joined the WTO in December 2001, the SPC has reviewed all of its approximately 2,600 instances of judicial interpretation and related documents, so as to ensure that they comply with WTO legal regime. 934 More remarkably, the SPC has issued a series of new decrees of judicial interpretation to consolidate China’s WTO obligations on judicial review, as well as on civil and criminal judicial proceedings for the enforcement of intellectual property rights. Most of these judicial decrees of interpretation will be discussed below.

933 The issue as to “which governmental body has the authority to interpret law” is not only prescribed in the current PRC Constitution, but also, more specifically, clarified in the Resolution of the NPC Standing Committee on Strengthening the Legal Interpretation of Laws of 1954 (“1954 Resolution”).

A. Judicial Interpretation for WTO-compatible Judicial Review

On 28 August 2002, just before the one-year anniversary of China’s accession to the WTO, the SPC published its first set of decree of judicial interpretation aimed at honoring China’s commitments to bring its judicial system in line with the requirements of the WTO. This set of decree of judicial interpretation, known as the “Rules on Certain Issues Related to Hearings of International Trade Administrative Cases” (“ITAC Rules”), became effective on October 1, 2002. They represented the first attempt by the Chinese judiciary to strengthen its role in creating a favorable legal environment for China’s post-WTO performance within this global trading club.

Under the Chinese judicial system, judicial review of administrative acts constitutes a major part of the administrative trial services afforded by the People’s Court.935 The Administrative Procedural Law (ALL)936 allows access to the courts for the purpose of challenging administrative interference with legitimate interests of individuals and organizations. For administrative acts involving international trade, as China recently entered into the WTO, judicial review in this regard would play an increasingly crucial role in ensuring the compliance of China’s trade regulation with the WTO regime, as provided in Article 2(D) of the China Accession Protocol. Apparently, the ITAC Rules were promulgated in good time to provide the People’s Court with some guidance in this connection. This set of judicial interpretative pronouncements consist of 12 Articles, addressing a series of issues on the scope of reviewability, standing, original jurisdiction, standard of review, application of law, etc. These issues will be further examined below.

935 LI Guoguang, supra note 890.
(1) Scope of reviewability

*Article 1* of the *ITAC* rules establishes a category of “international trade administrative cases” to be tried by the People’s Court, which actually defines the scope of reviewability for a WTO-compatible judicial review. Parallel to the structure of the WTO treaties, *Article 1* defines the governing scope of the *ITAC Rules* as covering “administrative cases in relation to international trade in goods, international trade in services, international trade-related intellectual property rights and other areas of international trade.” Evidently, these *Rules* are mainly but not exclusively applicable to international administrative cases involving the WTO legal regime. Other similar cases, which involve the bilateral and multilateral treaties China has signed or ratified in the area of trade, investment and intellectual property rights, also fall into the governing scope of the *Rules.* However, *Article 11* of the *ITAC Rules* provides for an exception in this regard. According to this Article, “[f]or the purpose of hearing an international trade administrative case where one or more parties are from Special Administrative Region of Hong Kong, Macao, or the Taiwan Area, People’s Court shall take as reference these rules.”

By introducing a new category of “international trade administrative case” to China’s existing administrative trial services, *Article 1* has significantly expanded the scope of reviewability under China’s system of judicial review, and therefore will facilitate the development of China’s WTO-compatible judicial review.

(2) Standing

To make judicial review as available as possible to the individuals and enterprises intending to challenge the adverse administrative actions in relation to international trade, *Articles 3* and *Article 10* of the *ITAC Rules* serve as the applicable standing

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clauses. As Article 3 provides, "[w]here a natural person, legal person or any other organization believes that a particular international trade-related administrative act – conducted by the agencies or institutions under their statutory authority – infringes his legitimate rights and interests, he may commence an action in People's court." The provision reflects the legacy of **ALL** concerning its broad and vague criteria for obtaining standing, since the meaning of "legitimate rights and interests" can be divergent.

As for **Article 10**, on the appearance, it fits the requirements of the WTO for the "widespread" protection of the rights and interests of private parties. In effect, it does make a breakthrough to **ALL** by specifying the standing of foreign parties by incorporating the principles of "national treatment" and "reciprocity." According to this article:

> Foreigners, natural persons with no nationality, or foreign organizations shall be entitled to the same standing as that of the citizens and organizations of the People's Republic of China in an international trade administrative case. Under the circumstances listed in Article 71(2) of the Administrative Procedural Law, the principle of reciprocity shall be applied instead.938

It is worth noting that **Article 4** of the **ITAC Rules** prescribes a particular legal ground on which the standing of the parties may be established. As this article provides, "'[a]should a new law enter into force before a particular administrative determination is made, parties involved may commence an action in People's Court against that determination based on the new law, regardless of the fact that the acts of the parties attributed to that determination occur before the new law enters into force.'" Accordingly, these three provisions may efficiently safeguard the right of individuals and enterprises to take actions against adverse administrative actions in relation to international trade, the exercise of which would offer them a better chance to seek

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938 *Id.* at 16-17.
suitable judicial remedies.

(3) **Original Jurisdiction**

Within the hierarchy of the Chinese Court System, the Administrative Chamber of People’s Court is charged with the administrative cases which, based on Article 2 of the Rules, unquestionably include international trade administrative cases. However, given that international trade administrative cases contain highly technical and strongly policy-oriented features, it is expected that the judges handling this type of case would be expert in administrative law and international economic law generally, as well as knowledgeable about the WTO rules. Only thus, it is important to note, can the appropriately high quality of hearings of this type of case be guaranteed, and the consistent operation of the legal system be maintained. For this purpose, Article 5 of the Rules properly raises the rank of the original jurisdiction of People’s Court over such cases. As Article 2 provides, “A competent Interim People’s Court or one at the level above shall have jurisdiction as the court of first instance over an international trade administrative case.”

(4) **Standard of review**

*Article 6* of the *ITAC Rules* sets forth the standard of review to be adopted by People’s Court for international trade administrative cases. According to this rule, People’s Court shall, on a case-by-case basis and in accordance with the Administrative Procedural Law, review the legality of a particular administrative act in dispute from the angles of a seven-prong test:

1. Substantiality and sufficiency of major evidence;
2. Accuracy of the application of law and regulations;
3. Violation of legal procedures;

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*Id.*
(4) Absence of authority;
(5) Abuse of executive power;
(6) Obvious prejudice in administrative sanctions; and
(7) Failure to carry out statutory duties or delay therein.

From all of the above, it is understood that at the hearing of this type of cases, the People's Court is to review factual findings (the question of fact) and legal conclusions (the question of law) as well, with regard to the contested international trade administrative act.\textsuperscript{940}

At this stage, it is interesting to look at the standard of review from a comparative law perspective. The People's Court standard of review resembles that of the WTO panels in that it calls for examination and consideration of the factual evidence presented as well as applicable legal rules. This approach contrasts with the standard of review employed by the WTO Appellate Body, which, according to article 17.6 of the DSU, reviews only "issues of law covered in the panel report and the legal interpretation developed by the panel." The seven-step balancing act in the People's Court sets forth more specific legal criteria, and may occasion more penetrating evidentiary review than the WTO panels' "objective assessment" test. The legal view envisioned in the People's Court standard likewise appears much closer to a \textit{de novo} review than to the "substantial evidence" and "arbitrary, capricious" tests followed by the U.S. courts, which are highly deferential to administrative agency decision-making in international trade cases.

\section*{(5) Applicable law}

As mentioned earlier, the issuance of \textit{the ITAC Rules} aims at providing effective judicial remedies, assuring compliance of Chinese trade regulation with the WTO

\textsuperscript{940} \textit{Id.}
regime. However, the WTO treaties have no direct effect in China, and may only be implemented in China through the amendment or promulgation of Chinese domestic laws.\textsuperscript{941} In the circumstances, Articles 7, 8 and 9 of the Rules specifically address the issue of applicable law in the context of hearings of international trade administrative cases; this lays down the legal basis on which People's Court may conduct judicial review in the international trade administration area.

As Article 7 provides, \textquoteleft[According to Article 52(1) of the Administrative Procedural Law and Article 63 of the Legislation Law, People's court shall base the hearings of international trade administrative cases on the law, administrative rules and regulations and local regulations pertaining to or affecting international trade. Local regulations in this regard shall be promulgated by the corresponding local legislatures under their statutory authority.\textQuoteRight

Furthermore, Article 8 provides, \textquoteleft[According to Article 53(1) of the Administrative Procedural Law and Article 71, 72 and 73 of the Legislation Law, for the purpose of hearing an international trade administrative case, People's court shall take as reference the regulations pertaining to or affecting international trade, which are issued by the administering authorities under the State Council within their discretion, with the formulation of these regulations based on the law and administrative rules and regulations, decisions or orders of the State Council. People's Court shall also take as reference local regulations pertaining to or affecting international trade, which are issued by the People's government of provinces, autonomic regions and municipalities subject to the Central Government, by that of the cities where the People's governments of provinces, autonomic regions and municipalities are located, of the cities where the Special Economic Zones are located, and of the larger cities.

\textsuperscript{941} World Trade Organization, \textit{Working Party Report on the Accession of China}, WT/MIN(01)/3 (Nov 11, 2001), para. 67. \textquoteleftThe WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic law and enacting new ones fully compliance with the WTO Agreement.\textQuoteRight
approved as such by the State Council. Formulation of these local regulations shall be based on the law, administrative rules and regulations and local regulations."

Both Articles indicate that in the hearing of an international trade administrative case, People’s Court would mostly rely on the law and administrative regulations while merely taking as reference the regulations and rules issued by the State Council. This approach is very different from the one adopted by People’s Court in the hearing of an ordinary administrative case. The reason is clear: It is the law and administrative rules and regulations pertaining to or affecting international trade, that constitute the primary grounds on which People’s Court may conduct judicial review in international trade administration cases. Also, “sub-national governments had no autonomous authority over issues of trade policy to the extent that they were related to the WTO Agreement and the Draft Protocol."^{942} As for local regulations pertaining to or affecting international trade, the competent People’s Court is to take them as legal grounds in the hearing of any international trade administrative case falling into its territorial jurisdiction, so long as these local regulations are promulgated by local legislatures under their statutory authority, and have no conflict with the law and administrative rules and regulations of the nation.^{943}

A comparative law note may be of interest here. The mandate that sub-national legislation should conform to WTO norms consistent with the laws of China is parallel to U.S. practice requiring state law to be in conformance with U.S. treaty obligations consistent with federal law, a precept inherent in the supremacy clause of the U.S. constitution.^{944}

^{942} Under Article 8 and 9 of the Law on Legislation of the PRC, legislation for "the fundamental economic systems and those concerning fiscal policies, taxation, customs, finance and foreign trade" shall solely be in the form of law. With such laws unavailable, the State Council may be delegated effectively to legislate for those systems in the form of administrative regulation.

^{943} LI Guoguang, supra note 890, at 15-16.

^{944} US Constitution, Art. IV, Sec. 2. "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of
Considering the international feature of an international trade administrative case, Article 9 of the Rules incorporates China's principle of "complying with international treaties" and that of "interpreting in consistency with international treaties." As this article provides, "[w]here there are two or more reasonable interpretations of a particular provision of the applicable law and administrative regulations available to People's Court to hear an international trade administrative case, the Court shall choose the one consistent with the corresponding provision of the relevant international treaty, except for those provisions that the People's Republic of China have claimed for reservation."

This Article is interesting. On the one hand, the ITAC Rules as a whole aim to fulfill China's obligation on a WTO-compatible judicial review, the Article in itself does not refer to the WTO legal regime at all. What may be relevant instead is the modest phrase of "international treaty." Such prescription is actually consistent with China's position towards the domestic status of WTO law, which embraces the "transformation" of WTO law, and accordingly excludes its direct effect. From the other, Article 9 has apparently incorporated the doctrine of "consistent interpretation," reflecting the efforts of the Chinese judiciary to learn from the experience of its counterparts in other WTO Members. As a result, the Article opens the room for the People's court to apply WTO law in a more direct way. After all, to transform WTO law into Chinese domestic law is rather a complex process, while the outcome of such process (domestic legislation) may not always be in place in a timely manner. Thus,

the United States, shall be the supreme Law of the land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

945 In international judicial practice, it is customary for a domestic court to embrace the principle of "consistent interpretation" and render its interpretation of a domestic law as consistent as possible with the relevant international treaty. A comparative law review shows that this principle is recognized around the world. The United States Supreme Court, for example, has put it in this way: "There is, first, a firm and obviously sound cannon of construction against finding implicit repeal of a treaty in ambiguous congressional action." Trans World Airlines, Inc v Franklin Mint Corp, 466 US 243 at 252 (1984).
the role of the Chinese courts in filling up any “gap” left over by the legislative bodies is essential, as it is strongly supported by the doctrine of “consistent interpretation.”

In summary, the ITAC Rules have significantly extended the subject-matter jurisdiction of the People’s Court in the field of administrative law, and strengthened the function of judicial review in the context of international trade administration. Moreover, the Rules for the first time have clarified a positive and cautious position of the People’s Court to carry out its duty to assure feasible and substantial fulfillment of China’s WTO commitments. Undoubtedly, the issuance of the Rules symbolizes a huge turning point in China’s judicial practice in administrative law.\textsuperscript{946}

Notably, the ITAC Rules merely address certain primary issues concerning the hearings of international trade administrative cases. For the purpose of hearing a specific case of this type (e.g., antidumping administrative cases, anti-subsidies administrative cases, intellectual property administrative cases), the Supreme People’s Court has also issued other decrees of judicial interpretation to provide for more detailed procedural guidance. These include the Rules on Certain issues Related to the Application of Law in Hearings of Antidumping Administrative Cases (\textquotedblleft Antidumping JI\textquotedblright), and also, the Rules on Certain Issues Related to the Application of Law in Hearings of Anti-subsidies Administrative Cases (Anti-subsidies JI), both effective on January 1, 2002. On July 25, 2003, the SPC issued the Rules of Evidence for the Administrative Litigation (\textquotedblleft Administrative Evidence JI\textquotedblright). All these judicial interpretations have paved the way for the Chinese courts to conduct a WTO-compatible judicial review in practice.

B. Judicial Interpretation for TRIPs-friendly Trial Services

Within the WTO treaty system, the TRIPs Agreement is most relevant to the role of

\textsuperscript{946} Li Guoguang, \textit{supra} note 890, at 17.
the national judiciary, with its extensive coverage reaching not only judicial review, but also civil and criminal proceedings. Upon WTO accession, it is not surprising that the most active role of the People's Court in China's WTO compliance has been evident in the intellectual property-concerned trail services, regardless of their legal nature concerning the field of civil law, administrative law or, criminal law. To secure TRIPs-friendly trial services, the Supreme People's Court (SPC) has made enormous efforts to review the existing related judicial decrees of interpretation and issue new ones. In fact, a campaign for this purpose had been kicked off long before China acceded to the WTO, and the achievements so far have been remarkable.

Many of these achievements are first dedicated to China’s particular commitments under the *Accession Protocol* to afford sound civil and criminal procedures and remedies. For instance, to fulfill China’s obligations to effectively implement Article 43 of the TRIPs Agreement (regarding “evidence”), the SPC issued *Several Provisions on Evidence for Civil Litigations* on January 5, 2002 (as the *2002 JIs on Civil Evidence*), a month after China acceded to the WTO. To fully address the concerns of other WTO members about China’s criminal law enforcement of IP rights, and honor China’s commitments to adjust the “money thresholds for bringing a criminal action” in this regard, the SPC issued the *Interpretation of Several Issues Concerning the Particular Application of Law in the Hearings of Criminal Cases on Intellectual Property Infringements* on November 2, 2004 (as the *2004 JIs on IP Criminal Cases*, effective November 22, 2004).

Apparently, judicial interpretation of the above kind is based upon, but not limited to the particular mandate in China’s WTO accord, since it serves to provide concrete judicial guidelines and operational rules for the overall IP-concerned trial services. It is formulated in a broader context, covering comprehensive related issues in a more thorough manner. The *2004 JIs on IP Criminal Cases* can be cited for this purpose. Although mainly aimed at lowering the thresholds for bringing a criminal action against the IP-related crime, this set of judicial interpretative pronouncements does
not stop there. Instead, it systematically clarifies a number of other fundamental issues concerning the criminal trial services for the IP enforcement, including: coverage of criminalization on “online piracy,” definition of the “identical trademark” and the “usage” concerned, identification of the status of being “internationally acknowledging,” calculation of “illegal business volume,” definition of accomplice, as well as the principles of penalization for simultaneously crimes. Given this extensive coverage, the purpose of the 2004 JIs on IP Criminal Cases has gone beyond the “transformation” of China’s “criminal thresholds” obligations into domestic law. They are more purposed to optimize China’s IP-concerned criminal trial services as a whole.

In issuing the formulation of judicial interpretation concerning the IP-related civil trial services, the SPC adopts a strategic approach similar to the above. Under the Accession Protocol, China is committed to effectively implement or fully comply with Article 42, 42, 45 and 46 of the TRIPs Agreement, as they set forth respectively the standards for the “fair and equitable” civil procedures and related legal remedies. Being procedural in nature, these obligations have been elaborated by the SPC in many of its newly issued or revised judicial interpretation, but in an interestingly indirect way. For most of such judicial interpretation, it does not serve to “transform” the above procedural obligations directly, but to implement particular provisions of a Chinese law that have served to transform China’s substantive TRIPs obligations on particular intellectual property rights.

The 2nd Amendment to the Patent Law of the PRC, effective July 1, 2001, which constituted part of China’s efforts to get ready for her WTO accession may now be examined. Aimed to develop a TRIPs-compatible patent regime, the Amendment has incorporated a number of TRIPs provisions into the existing Patent Law. In particular,

Article 61 of the amended Patent Law provides that, any patentee or any party whose interests are affected may bring a motion to the People’s Court for the patent infringement prevention and property preservation, should he or she prove the existence of such patent infringement, or the potential for such infringement, as well as the irreparable damages that would incur accordingly to his or her legitimate rights and interests otherwise. To implement this provision and make such “provisional measures” available, the SPC issued *Several Provisions on the Application of Law in the Pre-trial Prevention of Patent Infringements* on June 24, 2001. To address other amended provisions of the Patent Law, the SPC issued a more comprehensive set of judicial interpretation, namely, *Several Provisions on the Application of Law in the Hearings of Cases Concerning Patent Disputes*, effective July 2, 2001. According to the SPC, the issuance of these decrees of judicial interpretation has marked a mile in the establishment of China’s TRIPs-friendly judicial mechanism for patent trials.948

This is also the case with the Amended to the Trademark Law of the PRC, effective December 1, 2001 when China officially became a WTO member. The Amendment has incorporated a number of TRIPs obligations into the existing Trademark Law, of which some specifically address the trial services provided by the People’s Court. The SPC has since then actively responded to these statutory changes. For instance, Article 57 and 58 of the amended Trademark Law has incorporated the standards set forth in Article 50 of the TRIPs Agreement, providing certain “provisional measures” for pre-trial trademark infringement prevention and evidence preservation. To implement these two provisions, the SPC issued the *Interpretations of the Issues on the Application of Law in Pre-trial Prevention of the Infringements of Exclusive Rights of Registered Trademarks and Preservation of Evidence* on January 22, 2002. On the same day, the SPC also issued the *Interpretations of Issues on the Jurisdiction*

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948 Renzhen Guanche Shishi Xin Zhuanli Fa, Gongzheng Shenli Zhuanli Jijfen Anjian (Strictly implementing and enforcing new patent law, justly hearing cases on patent disputes), at http://www.chinaiprlaw.cn/file/20010702699.html. This was the SPC statement at the News Conference for the enactment of that judicial decree of interpretation.
and Leal Application with Regard to the Hearings of Trademark Cases, so as to implement Article 32, 33, 43 and 49 of the amended Trademark Law. These four statutory provisions serve to meet the TRIPs requirements for domestic judicial review, and therefore have brought four more types of trademark administrative acts into the scope of reviewability. Apparently, this set of judicial interpretation is of both civil and administrative law in nature. On October 16, 2002, the SPC issued a more thorough, comprehensive set of judicial interpretative rulings, *Interpretations of Several Issues on the Application of Law in the Hearings of Trademark-related Civil Case*, which further improved the judicial mechanism for China’s trademark trial services.

Besides, the SPC also issued some TRIPs-compatible judicial interpretations concerning other particular intellectual property rights. For copyrights, the SPC issued the *Interpretations of Several Issues on the Application of Law in the Hearings of Civil Cases concerning Copyright Disputes*, effective October 15, 2002. On January 8, 2004, the SPC issued the revised *Interpretations of Several Issues on the Application of Law in the Hearings of Copyright Cases Concerning Computer Network*. With these consistent, enormous efforts, the SPC has paved the way of developing China’s TRIPs-friendly trail services for all kinds of intellectual property disputes, with their various legal nature engaged in civil law, administrative law or, criminal law.

Discussions so far have revealed that by reviewing its existing judicial interpretations and issuing the new ones in accordance with China’s WTO commitments, the SPC has made remarkable progress in developing a WTO-consistent judicial mechanism, to pave the way for the people’s Court to implement WTO law in daily judicial practice. Of course, all these available judicial interpretative rulings are not yet exhaustive. They are either silent on certain crucial issues with regard to particular trial services, or fail to respond to the new ones emerging from judicial developments. Where the issues as such are already covered by the SPC, it may still remain
questionable to what extent the judicial interpretation concerned has fully addressed the pertinent WTO obligations. This undesirable situation can attribute to the incapacity of the SPC to accommodate its judicial policies to WTO requirements in a timely manner. On many occasions, however, the problem inherent in the particular domestic legislation designed to "transform" those WTO obligations requires the judicial interpretation concerned merely to serve the consistent application of this internal legislation.

China's criminal law enforcement against copyright infringements is currently the most concern of major WTO Members about China's WTO compliance. Although the 2004 Jls on Criminal Cases significantly lower the "monetary thresholds" and "copy thresholds" for criminalizing copyright infringements, from the perspective of some WTO Members (especially the U.S.), they are still too high or even should be eliminated entirely, according to the mandate of Article 61 of the TRIPs Agreement. Since the requirement for such thresholds are set forth in the Criminal Law of the PRC, the SPC can do little or nothing to remove unless and until the Criminal Law itself is amended accordingly by the Chinese legislature (by the Standing Committee of the NPC).

Therefore, in most cases, the role of the SPC in implementing WTO law is restrained by the Chinese legislature. After all, in this particular connection, the SPC serves as a "quasi-legislative" body (not comparable to a domestic legislature), attempting to transform WTO rules from its judicial interpretation into domestic law. Thus, the role of the Chinese courts in the WTO implementation must be assessed not only by the performance of the SPC, but more importantly, through the normal practice of the People's Court.

4. Judicial Practice of the People's Court

949 USTR 2005 Report, supra note 891, at 68.
It is well established that in the context of WTO law, the role of national judiciary is mainly confined to judicial review and judicial enforcement of intellectual property rights. In the case of China, such judicial practice refers to administrative trial services involving China’s WTO obligations, as well as civil and criminal trial services relating to China’s TRIPs obligations. As a result, there is a new category of caseload for the People’s Court, known as “WTO-related cases,” which include both WTO-related international trade administrative cases and TRIPs-related civil and criminal cases.

A. Development of the WTO-related Cases in China

Ever since China acceded to the WTO, there has not yet been a significant increase of international trade administrative cases. According to the official statistics of the SPC, compared to the year 2002, the first-instance administrative cases in 2003 decreased significantly. However, the situation varies with regard to cases involving foreign trade regime. On the one hand, customs administrative cases and import-export inspection administrative cases dropped from 202 to 63; cases involving foreign exchange control dropped from 9 to 3. On the other hand, patent administrative cases increased from 138 to 243, and taxation administrative cases increased from 1150 to 1495. Subsequently, the issuance of the ITAC Rules did not bring about any dramatic change. As the U.S. Trade Representative recently observed, until the end of 2005, “there continues to be little data” on the cases handled by the Chinese courts “involving administrative agency decisions relating to international trade in goods or services or intellectual property rights,” for “few foreign companies have experienced with these courts.”

950 2 REFERENCE TO ADMINISTRATIVE REGULATION AND JUDICIAL REVIEW 64-67 (Beijing: Law Press, 2003). Of cause, various factors contributed to this decrease, as pointed out by the SPC accordingly.
951 Id. at 64-65.
952 USTR 2005 Report, supra note 891, at 92.
Admittedly, the USTR has exaggerated the case, since the sources relied upon were so limited. In 2001, as the official statistics of the SPC indicated, compared to the situation in 1997, customs administrative cases increased by 3.57 times; patent administrative cases by 3.06 times; other cases involving administrative areas like trademark, foreign exchange control, industrial & commercial administration, financial administration, etc., all increased by more than double. During the one-year gap between China's WTO accession and the issuance of the *ITAC Rules*, administrative actions were continuously brought before the local courts in Beijing, Shanghai, Guangdong and other jurisdictions in China, to challenge international administrative acts covered by the WTO legal regime. This means in effort that, even before the issuance of the *ITAC Rules*, China's WTO-related administrative trial services had been more or less settled in practice. The past four years have witnessed a continuous increase in international trade administrative cases. Invariably, most of them have occurred in China's developed regions, especially Beijing, Shanghai and Guangdong Province. Among these cases, the IPR-related administrative cases have continuously taken a lead.

The IPR-related administrative cases are categorized as patent administrative cases, trademark administrative cases and copyright administrative cases. In practice, the first two categories are more commonly seen than the third one. Prior to the 2nd Amendment of the Patent Law, patent administrative cases only involved the decisions of the Patent Re-examination Board on patents. After this Amendment took effect on July 1, 2001, this category extends to such decisions on utility models and design applications. Also, the 2001 Amendment to the Trademark Law has brought

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953 1 REFERENCE TO ADMINISTRATIVE REGULATION AND JUDICIAL REVIEW 2 (Beijing: Law Press, 2003).

954 LI Guoguang, supra note 890, at 12.

955 The Amendment to the Patent Law of the PRC took effect on July 1st, 2001. According to Article 41 and 46 of this amended Patent Law, “for utility models and design applications or patents, the final decisions on re-examination and invalidation would be made by the People’s court other than
four more types of decisions of the Trademark Review and Adjudication Board under judicial review, and thus significantly expanded the category of trademark administrative cases.

Since the Patent Re-examination Board will always be the defendant in a patent administrative case, while the Trademark Review and Adjudication Board will always be the defendant of a trademark administrative case, given the location of both these central government agencies in Beijing, the No.1 Beijing Interim People’s Court has been granted the exclusive jurisdiction over these two categories of cases, which means, patent and trademark administrative cases will be exclusively tried by the local courts in Beijing. The development on these cases will be detailed in later discussion regarding the WTO-related judicial practice of the local court system of Beijing Municipality.

As for the IPR-related civil and criminal cases, the past years have witnessed an even greater leap in their growth. Between 1998 and 2004, the Chinese courts decided 38,228 IPR-related civil cases of first instance nationwide. Also, the courts decided 2,057 criminal cases involving IPR infringement under Section7, Chapter III of the “Specific Provisions” of the Criminal Law of the PRC, with 2,375 adjudged offenders sentenced. Among these cases, 8,332 IPR-related civil cases and 385 criminal cases for inventions that were patented prior to the amendment.” Consequently, the following patent administrative actions may be challenged before the People’s Court:

(1) A final decision of the Patent Re-examination Board on the request for re-examination of a utility model or design applications, as the latter has been raised by the applicant(s), patentee(s), or those who request to revoke the patent at issue;

(2) A final decision of the Patent Re-examination Board on the request for a declaration of the invalidity of a utility model or design application at issue.

This specifically refers to Article 32, 33, 43 and 49 of the amended Trademark Law. To implement these statutory provisions, the SPC issued the Interpretations of Issues on the Jurisdiction and Legal Application with Regard to the Hearings of Trademark Cases on January 22, 2002.

WANG Zhengqin, Vice-President of Beijing High People’s Court, Status of Judicial Protection of Intellectual Property Rights with the Beijing Court System, Speech at the News Conference for the 3rd “World IPR Day” (April 17, 2003) at 1 (on file with the author).
were decided in 2004, with 528 adjudged offenders sentenced.\textsuperscript{958} In 2005, the number for civil cases continuously rose to 13,393, and criminal cases to 505, with 741 offenders sentenced.\textsuperscript{959} Sharing the same geographic feature as that of international administrative cases, these IPR-related civil and criminal cases mainly occurred in Beijing, Shanghai, Guangdong and other developed regions of China.

B. Definition of the WTO-related Cases: Implications for the “Application” of WTO Law by the People’s Court

Emergency and growth of the “WTO-related cases” in China have enabled Chinese courts to address WTO law in their regular practice. Whether or not this process can be counted as the “application” of WTO law will depend on how a “WTO-related case” is defined. According to its plain wording, the “WTO-related” qualification suggests a connection between the case concerned and a particular WTO legal rule, and the extent to which they may connect each other depends on the status of WTO law under the Chinese domestic legal system.

As noted above, China is among most WTO members that reject the “direct application” of WTO law in their domestic legal system. The Chinese government has held a firm position of embracing the doctrine of “transformation,” which in effect excludes the possibility for the People’s court directly applying WTO law. It is unlikely that the aggrieved parties may be allowed to bring an action on the basis of WTO law or, the People’s Court may decide a case on the basis of WTO law. Often, what makes a WTO legal rule relevant to a case is a specific source of Chinese law recognized as such by the People’s Court, which serves to transform the related WTO rule into Chinese law. The more Chinese law transformed the WTO rule concerned,


\textsuperscript{959} Supreme People’s Court of the People’s Republic of China, \textit{People’s Court is to enhance judicial protection of IPR, and severely penalize the IPR crimes}, News Press (March 10, 2006), at www.chinaiprlaw.cn/file/200603147337.html.
the more the case will be determined by reference to the WTO legal order. Nevertheless, given the availability of the domestic implementing legislation, the People’s court should always rely on it, not directly on the WTO legal regime eonomine for even a single time.

There is another situation. If a case brought before the People’s Court involves the issues that are also covered by the WTO legal regime, there will likely be an overlap of the governing scope between a possibly applicable Chinese law to this case, and the pertinent WTO legal rule. This will equally lead to a connection between the case and the WTO rule. Typical examples in this regard include antidumping and anti-subsidy administrative cases, of which the subject matters (antidumping and countervailing duties) are governed by the WTO AD Agreement and CVD Agreement. Intellectual property administrative cases are also included, since they apparently fall within the coverage of the TRIPs Agreement. For these WTO-related cases, the applicable Chinese law may not be available or yet in place, which may leave room for the People’s Court to “take as reference” (not even “rely on”) the pertinent WTO rule, with the same legal effect as if it is in actual fact applying these WTO rules. The doctrine of “consistent interpretation” represents a specific case in this regard, where the applicable domestic law is available, but too vague to provide for any meaningful, practical guidance.

Since the term “WTO-related” bears different meanings, the WTO-related cases can be differently defined. If it refers to a case where the People’s Court expressly relies on WTO law, there has not yet been one, and there will unlikely be one in the future. It may also refer to a case where the People’s Court could address the WTO legal regime, or interpret WTO law using its own reasoning, or even take WTO law as reference in the absence of a comparable domestic legal basis. The preceding study of international trade administrative cases and IPR-related civil and criminal cases will fall within this category, with an increasing number. At this stage, it is necessary to clarify the meaning of the “application” of WTO law by the People’s Court. For the
purpose of the present chapter, to "apply" WTO law means the People’s Court will "interpret" the particular WTO legal rule for various purposes, e.g., for clarifying any issue raised by parties with reference to a particular WTO legal rule, for interpreting the applicable domestic legal rule to implement this WTO rule, or, for developing the Court's reasoning in the absence of any available domestic legal basis. None of these instances falls within the category of "direct application" of WTO law, while each of them calls for the ordinary function of the courts to apply law. No doubt, the expansion of such "application" will enhance China’s domestic implementation of WTO law.

C. Hearings of WTO-related Cases: Case-study of the Application of WTO Law by the People’s Court

Discussions so far have indicated that only in the hearing of a WTO-related case will the People’s Court be likely to encounter the issue of applying WTO law. In fact, the availability of such an occasion depends on the subject matter of the case involved, the compatibility of the applicable domestic law (if is any) with the pertinent WTO rule, or, the substance ("judicialibility") of any WTO rule that may be relevant to the case.

(1) IPR-related Criminal and Civil cases

Applying the above criteria, the IPR-related criminal cases will be the most unlikely occasion where the People’s Court could even address China's TRIPs obligations (specifically, Article 61 of the TRIPs Agreement). The subject matter of this type of WTO-related cases involves criminal law, most sensitive legal field to any nation state, which exclusively falls within national competence of the state. There is no reason for the People’s Court to disregard the current Chinese Criminal legislation, even though the latter is allegedly inconsistent with the requirements of the Article 61 of the TRIPs Agreement. Besides, the procedural nature of those TRIPs obligations
makes it unfeasible for the People’s Court to apply them to any particular case.

Nor will the IPR-related civil cases leave much room for the People’s Court to apply the TRIPs legal regime, even though it is in substance judicatable under Chinese law. As noted above, in terms of transforming WTO law into Chinese domestic law, China’s legislative framework for civil law enforcement of IPR has been the most convincing example, given its great compatibility with the TRIPs Agreement. Consequently, in the hearing of an IPR-related civil case, the People’s Court has no need to address the TRIPs obligations at all, since the domestic IPR legal regime has full coverage of the situation. What is left for the Court to figure out is how to apply the relevant Chinese IPR law properly. Should this task be achieved, the People’s Court will fully satisfy its role in implementing WTO law, specifically, the TRIPs Agreement.

At this point, it is necessary to recall China’s specific commitments towards the TRIPs Agreement. Especially, according to paragraph 305 of the Working Party Report, China is committed to “fully apply the provisions of the TRIPs Agreement” upon its accession to the WTO, given “the advanced state of protection for intellectual property rights in China.” Frankly speaking, whether the IPR protection in China has reached an “advanced” status remains controversial. However, that is no dispute that the Chinese IPR legislation has been well-established, and highly-compatible with the TRIPs Agreement. Thus, to “fully apply the provisions of the TRIPs Agreement” is clearly a task of the responsible and competent Chinese administrative and judicial bodies. This inevitably puts a heavy burden upon the People’s Court to provide TRIPs-consistent civil and criminal trial services, an issue that can never be resolved simply by applying the TRIPs Agreement.

(2) WTO-related International Trade Administrative Case
International trade administrative cases, as categorized by Article 1 of the ITAC Rules of the SPC, include, but are not limited to, those involving the WTO legal regime. In a “WTO-related” international trade administrative case, the challenged administrative act is covered by the particular WTO rule, regardless of the availability of a comparable domestic legislation. If such domestic legislation is not available, the People’s Court may resort to the pertinent WTO rule for its decision. If that legislation is not available, given the overlap between its governing scope and that of the WTO rule concerned, the People’s Court may still interpret WTO rules in aid of domestic legislation. Accordingly, compared with IPR-related civil and criminal cases (which merely involve a single WTO legal regime, TRIPs Agreement), WTO-related international administrative cases have left more room for the People’s Court to apply WTO law. Thus, for a case-study of the application of WTO law by the People Court, it would be much more plausible to take the Court’s judicial practice on WTO-related international trade administrative cases, than IPR-related civil and criminal cases.

As noted above, ever since China joined the WTO in December 2001, the growth of WTO-related international trade administrative cases has been modest, with intellectual property administrative cases consistently taking a lead. Most of these cases occurred in Beijing, Shanghai and Guangdong Province, given their political essence or economic significance throughout the whole country. The following section will focus on the judicial practice of the local court system in each of these three regions. In this context, it should be noted that for the cases released to the public, it is difficult to discuss whether the related WTO legal rules were applied by the presiding courts, since the available information on them seldom mentioned such details. As an alternative approach, this author will resort to both the position of the above local court systems towards the domestic status of WTO law, as well as the particular cases determined by them.

(a) Local court system of Beijing Municipality
Beijing Municipality High People’s Court (as “Beijing High Court”) oversees two interim courts and district courts all over the administrative territory of Beijing Municipality. According to Beijing High Court, as the Capital of China, Beijing Municipality accommodates all central government agencies, including those playing a leading role in the implementation of China’s comprehensive WTO obligations, e.g., Ministry of Commerce, General Customs Administration, State Council Tariff Commission, State Intellectual Property Office, etc. Under the Administrative Litigation Law (ALL), a competent court may assert jurisdiction over an administrative case, so long as the location of the defendant(s) fall within its jurisdiction. As the ITAC Rules of the SPC further provide, for the purpose of an “international trade administrative cases,” the competent interim courts, or those at the above level must serve as the court of the first instance. Consequently, any action against an administrative act of the above administrative agencies may only be brought before either of the two interim courts in Beijing, or brought directly to the Beijing Municipality High People’s Court as directed. These specially refer to such WTO-related administrative cases as antidumping and anti-subsidies administrative cases, patent and trademark administrative cases, and other administrative cases concerning import-export inspection, quarantine procedures and non-tariff barrier measures.

As the Beijing High Court forecast in 2003, upon China’s WTO accession, WTO-related international trade administrative cases would continue to increase, with more and more new issues and environments. According to the survey of the High Court, a few antidumping and anti-subsidy cases, custom valuation cases, or those cases involving import-export inspection, quarantine procedures and non-tariff barrier measures might emerge in its lower courts, with their number remaining modest.

961 Id. at 22.
Given the recent amendments to the Patent Law and Trademark Law, cases involving administrative review of legal status of patent and trademark would increase significantly for a short run. As the High Court fully acknowledged, upon the WTO accession, the Beijing Court System was likely to shoulder most of the caseload for WTO-related international administrative cases.962

Considering these challenges, the Beijing High Court contended that China’s WTO accession already put an enormous pressure on the Beijing Court System in the context of a WTO-compatible judicial review. This suggested a great opportunity for the local courts to optimize their administrative trial services, but also posed tremendous challenges to these courts. To meet these challenges, the Beijing High Court proposed two principles to guide the hearings of WTO-related administrative cases. One was to maintain the consistency of judicial practice, especially in terms of the “WTO-related” administrative trial services. The other is to safeguard the national economy by properly balancing the government policy goals and the mandates of law.963

In 2002, a Shenzhen-based trading company brought an action before the No.2 Beijing Interim People’s Court against the Ministry of Foreign Trade and Economic Cooperation (MOFTEC, which is now replaced by the Ministry of Commerce, MOFCOM). In this case, the plaintiff, Haohe Automobile trading company of Shenzhen City, requested the Court to grant a motion for the defendant to issue a license for import of electronic machinery products. Subsequently, the plaintiff withdrew the case upon its own initiative.964 The case was quite unique, for the defendant was a leading central government agency responsible for the implementation of China’s WTO commitments. Also, as the High Court contended, a case as such involved both China’s state policies and the WTO legal rules for a

962 Id. at 21-22.
963 Id.
964 The judgment of this case is on file with the author.
specific importation, which in deed complicated the whole situation, by making it very difficult for the court to identify the issue in question.\footnote{965 WANG Zhenqing, supra note 960, at 22.}

Another similar case occurred in the same year. The plaintiff was a Shanghai-based metal manufacturer limited company, suing the State General Administration for Quality Supervision and Inspection and Quarantine (AQSIQ) for administrative compensation. The case was remarkable in that the defendant was the central government agency in charge of the state policies and procedures for the compliance with the WTO’s TBT Agreement. Moreover, the plaintiff raised issues concerning certain WTO legal rules, e.g., transparency, market access and fair competition, which mandated the law enforcement authorities like the AQSIQ to maintain uniformity of their administrative acts.\footnote{966 Id.} Unfortunately, the court decisions on both these cases are not available to this author.

It is said that in 2003, a Taiwanese importer filed an antidumping administrative action before the No.2 Beijing Intermediate Court, which was supposed to be China’s first antidumping administrative case. Due to some political sensitivity, the case was dismissed quickly. The presiding court failed to give any reasoning for this dismissal. This is a big frustration, not only to the Chinese trade law practitioners, but also to the Chinese judges devoting themselves to the administrative trial services.\footnote{967 The author leaned this information from some judge friends in Beijing.}

However, the development in the IPR-related administrative cases may bring in some hopes in the future. As noted above, due to the geographic features of the challenged administrative agencies, patent and trademark administrative cases fall within the exclusive jurisdiction of the No.1 Beijing Intermediate People’s Court. During the first eight months after the Amendment to the Patent Law took effect, 60 patent administrative cases were filed before this Court, three times the number in the
previous year. Among these 60 cases, 17 involved utility models, and 1 involved design applications, both subject matters are brought under judicial review in accordance with the new Patent Law.\footnote{Beijing has ruled a series of patent administrative cases concerning utility models, Beijing Court Net, March 22, 2002. From http://www.chinacourt.org/public/detail.php?id=688.} By the end of 2002, the Beijing Court System had commenced 194 patent administrative cases, accounting for 20% of its caseload as a whole. By April 2003, this number jumped to more than 200, with most cases involving utility models and design applications.\footnote{WANG Zhenqing, supra note 957, at 2-3.} As the Beijing High Court predicted, this category will continue to expand significantly in the near future.

Notably, to the knowledge of this author, there have been few patent administrative cases involving foreign elements. One “high-profile” exception was initiated by a Japanese company Honda Motor in 2002. In this case, Honda Motor challenged the adverse final decision of the Patent Re-examination Board to invalidate its design application (KCW) for the motorcycle products. After the No.1 Beijing Intermediate People’s Court ruled the case, the plaintiff appealed to the Beijing High Court.\footnote{Honda File A Lawsuit against the State Intellectual Property Office of the PRC, at http://business.sohu.com/19/83/article202608319.shtml.} Regardless of the final court decision (which has not yet been available to this author), the case itself has been significant enough, since its came out immediately after China’s WTO membership had been officially endorsed. Subsequently, both the judgment of the trial court and that of the appellate court were translated into Japanese, and distributed among the intellectual property industries in Japan.\footnote{WANG Zhenqing, supra note 957, at 3.}

Ever since the Amendment of the Trademark Law, the No.1 Beijing Intermediate People’s Court has tried a number of trademark administrative cases. Right after the promulgation of the amended Trademark Law, that Court commenced the first case of this kind, where the plaintiff, Beijing Hengsheng Far-eastern Computer Group challenged the decision of the Trademark Review and Adjudication Board to reject its
request for a review of a registered trademark “Hengsheng” owned by the third party, *Beijing Hengsheng Technology & Development Company*. The defendant based its decision on the fact that the plaintiff had failed to file its request within the statutory time limit. After the trial court rendered the verdict, the plaintiff appealed to the Beijing High Court. In December 2002, the appellate court ruled to uphold the challenged administrative measure of the defendant.972

Beginning from the “Hengsheng” case, there have been more and more trademark administrative cases before the Beijing Court System. Quite a few of them involved significant foreign elements. In December 2003, the No.1 Interim People’s Court of Beijing decided two high-profile cases of this kind. The plaintiffs in both cases were famous transnational companies: one was the US-based “Johnson & Johnson,” the other was the Japan-based “Shiseido.”973

In the “Johnson & Johnson” case, the plaintiff challenged the decision of the Trademark Review and Adjudication Board to support a registered trademark “CAREFUL,” which was owned by a Chinese company, Zhejiang Kang Fu Ya Company. As the plaintiff alleged, “CAREFUL” had been in conflict with its trademark “CAREFREE.” The Court upheld the decision of defendant, ruling that the two registered trademarks were not similar enough to confuse the consumers.974

In the “Shiseido” case, the plaintiff challenged the decision of the Trademark Review and Adjudication Board to reject its request for a review of a decision of the local trademark office, the latter had denied its original application for the registration of its trademark “BÉNÉFIQUE.” The Court supported the position of the plaintiff, vacated

973 Sources available at [www.chinacourt.org](http://www.chinacourt.org).
the challenged decision of the defendant. The appellate and final court decisions for both cases are not available to this author.

It is highly expected that for a time being, patent and trademark administrative cases will continue to take a prominence among various categories of "WTO-related" administrative cases, in terms of both quantities and qualities. This trend will enhance the predominant role of the Beijing Court System in the implementation of WTO law. Also, it may more or less wipe off much skepticism about the functioning of China’s WTO-compatible judicial review, especially by those who claimed China’s absence and dearth of "WTO-related" administrative cases.

(b) Local court system of Shanghai Municipality

Like its Beijing counterpart, the Shanghai Court System equally holds an optimistic and enthusiastic attitude towards the application of WTO law. Although acknowledging that the Beijing Court System is in the "forefront" of the "WTO-related" administrative trial services, the Shanghai Municipality High People’s Court (as "Shanghai High Court") still stresses its "territorial advantages" that may significantly contribute to the development of China’s WTO-compatible judicial review.976

According to the Shanghai High Court, Shanghai Municipality – serving as the "frontier" of China’s "open-door" movements and economic reforms – has become the centre of the Chinese economy, especially in the field of finance and international trade. The municipality possesses some "absolute advantages," especially in terms of its abundant resources for settling administrative law disputes involving import &

976 Shanghai Municipality High People’s Court, Properly Handle Four relations with Regard to the Post-WTO Administrative Trial Services, 3 PEOPLE’S JUDICATURE 24 (2003).
management of capital, market adjustment & monitor, and other measures for the protection of legitimate rights of private parties. As the High Court forecast, upon China’s WTO accession, local administrative authorities in Shanghai would be expected to re-adjust their trade-related measures significantly. Inevitably, the WTO-concerned administrative law disputes would increase, and therefore constituted a new landscape of administrative trial services provided by the Shanghai Court System. 977

As the Shanghai High Court acknowledged, for the “WTO-related” administrative cases handled by the Shanghai Court System, most of them were rather “indirectly” connected to the WTO legal regime, in contrast to those handled by the Beijing Court System. Nevertheless, the High Court asserted that, given the far-reaching and profound impact of the WTO accession on China’s overall system of judicial review, local administrative trial services furnished by the Shanghai Court System would still be “directly” linked to WTO law. The High Court particularly referred to China’s market access commitments concerning finance, insurance, telecommunication, transportation, tourism and other sectors of trade in services, predicting that many “WTO-related” administrative cases brought before the Shanghai Court System would involve the above substantive areas, although the absolute number of these cases might not be so remarkable in a short run. 978

In practice, the Shanghai Court System has ruled on several “high-profile” WTO-related administrative cases. As early as in 2001, a local court in Shanghai commenced an administrative case that would possibly involve China’s market access obligations under the WTO. In this case, the plaintiff was a foreign financial enterprise, who challenged the decision of local administration to reject its application for a permit to open local banking business. Although the court decision for this case is not available to the public, the case itself has been significant enough, since it was

977 Id. at 25.
978 Id.
possibly related to China’s market access commitments on banking services.\textsuperscript{979}

Another WTO-related administrative case was concerned with customs valuation, heard by the No.2 Shanghai Interim People’s Court in September 2001. In this case, the plaintiff, \textit{Jiangxi Ke Jia Li Technology \& Development Limited Company}, challenged an adverse decision of Shanghai Customs Services on the customs evaluation of its imported electronic products. According to the defendant’s decision, the plaintiff’s importation had been valued at USD$200 per unit, leading to a tariff at 15\% tariff rate and a value-added taxation (VAT) at 17\% VAT rate levied on the plaintiff. The Court upheld the position of the defendant, ruling that the challenged customs determination was based upon substantial evidences and in accordance with the relevant law and regulations.\textsuperscript{980}

(c) Local court system of Guangdong Province

Compared with their counterparts in Beijing and Shanghai, the Guangdong Court System takes a more modest and pragmatic position towards the application of WTO law, also the released official statistics shows that its role in operating the WTO-compatible judicial review has been much significant and active.

As the Guangdong Provincial High People’s Court (as “Guangdong High Court”) reported in 2003, that long before China’s accession to the WTO, some of its lower courts had decided a number of WTO-related administrative cases. After China acceded to the WTO, local courts within the province already ruled eight such cases, six in Shenzhen and two in Guangzhou. All of them were customs valuation cases, where the plaintiffs (importers) challenged the determinations of the local customs services on the value of their imported goods. From the perspective of the Guangdong High Court, these were typical “WTO-related” administrative cases. The

\textsuperscript{979} Id.
\textsuperscript{980} 2 REFERENCE TO ADMINISTRATIVE REGULATION AND JUDICIAL REVIEW (Beijing: Law Press, 2003).
High Court then expected a continuous increase of such cases within its jurisdiction. 981

Besides, the Guangdong High Court also reported some other WTO-related administrative cases handled by its lower courts, which mainly involved foreign investment activities. Although these cases were decided differently on their merits, the responses of the affected foreign investors to those court decisions were quite positive. Some even increased their investment in Guangdong afterwards. On this basis, the High Court concluded that in the field of foreign investment, the WTO-compatible administrative trial services would significantly contribute to a favorable legal environment, and therefore attract more foreign investors for local economy. 982

Conclusion

Due to above empirical study, both Chinese legislature and the judiciary have played an important role in China’s implementation of WTO obligations. The more crucial their role in this regard, the closer China will move towards the “commercial rule of law” that is essential to a favorable legal environment for trading and investing activities within and from without China. Nevertheless, the significance and enhancement of such a role largely depend on the extent to which the Chinese government (mainly represented by the executive body) may engage in the operation of the WTO institution, especially in regard to the WTO’s dispute settlement mechanism, which will lead to the interplay between international and domestic enforcement mechanisms. After all, both Chinese legislature and the judiciary serve to “smooth out” China’s “WTO inconsistency” as originally alleged by foreign traders and investors, and later developed into a confrontation between China and other WTO Members. When more and more trade disputes are brought to the surface, or even before the Dispute Settlement Body of the WTO, the issue of domestic

981 Id.
982 Id.
implementation will emerge, and sooner or later, the role of the Chinese legislature and the Chinese judiciary will stand out.

By now, China has not yet been advanced very far. The past four years witnessed a rather "peaceful" transition of China from a new comer into a fully-engaged Membership, where, as acknowledged by other WTO Members, China's "commitments that were easiest fulfilled have largely been fulfilled."983 For many commitments that are still outstanding, they have been "tenderly" treated by China and its counterparts in the WTO through bilateral or multilateral negotiations, without being referred to the WTO's DSB. Consequently, "transformation" of WTO obligations was basically on China's own accord, with enormous technical difficulties and inefficient practice ahead. "Application" of WTO rules was a rare case, given a comparatively light caseload involving WTO legal regime, an inexperienced judicial practice in this regard, as well as a developing court system subject to numerous criticisms.

Nevertheless, China cannot stay in the stage of "peaceful transition" for good. Today, other WTO Members are pushing this transition to a close. Their position was fully addressed by Ambassador Karan K. Bhatia, Deputy USTR in his recent testimony before the Commission of Finance of the U.S. Senate, where he proclaimed that "China's transition period as a new participant in the international trading system – and, in particular, the WTO – must now come to a close, and China must act and be treated as a fully accountable participant in and beneficiary of the international trading system." As he continued, "[I]ike any stakeholder, China must find a way to pursue its own self-interest while also adhering to, and helping to shape, the policies and institutions that undergird its own growing prosperity and the prosperity of its trading

partners."\(^{984}\)

This may explain a recent WTO case against China’s regulations on imported auto parts, which was jointly filed by the U.S. and the EC on March 30, 2006, “sweeping aside diplomatic niceties weeks before a visit of the Chinese president to Washington.”\(^{985}\) It may also explain the consistently tough position of the U.S. and Japan towards China’s IPR enforcement, which may lead to another WTO case against China soon, despite the latter’s successive, substantive concessions already made. Over the past four years, China’s role in the WTO dispute settlement process has been inactive. Until the latest “auto parts” dispute, China played the part of the complainant (third party) before the WTO’s DSB for only once, as well as a respondent for only twice. Since early this year, however, China has encountered two WTO challenges, which will likely be followed by future complaints. Obviously, as China embarks on its fifth year of the WTO accession, other WTO Members become more aggressive in using the WTO enforcement mechanism to open China’s market. This inevitably imposes enormous challenges to China’s capacity to implement its WTO obligations.

These challenges will affect the Chinese legislature and judiciary significantly. At least, directed at China’s legislative and judicial system, the dispute over China’s IPR enforcement has placed the Chinese legislative bodies and courts in the spotlight of the international trading community. With their IPR practice tested by the WTO, Chinese legislative bodies and courts will play a leading role in China’s WTO implementation, particularly in terms of the TRIPs Agreement. For other WTO


actions against China, their merits can be administrative in nature, with little relevance to Chinese legislative activities or judicial practice. However, implementation of a WTO decision on any of these disputes may still depend on the domestic transformation process, or, domestic judicial proceedings. As noted above, the U.S. and the EC has developed certain legislative and judicial practice in this regard. To China, this moment has yet to come, which, nevertheless, does not suggest that the Chinese legislative bodies and courts can do nothing but wait with hands folded. Particular, the Chinese courts may start with each single “WTO-related” case. This reminds us a famous saying of Mao Zedong, founder of the People’s Republic of China, that “a spark may burn the whole grass.”
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