

COMPLIANCE PROBLEMS UNDER WTO DISPUTES SETTLED BY MUTUALLY AGREED SOLUTION

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ABSTRACT

Mutually Agreed Solution (MAS) is a common tool used by World Trade Organization (WTO) members to settle disputes. Regulations of MAS in Articles 3.5 and 3.6 of the Dispute Settlement Understanding (DSU), though implying a rule-oriented evolution from the General Agreement on Tariffs and Trade era, are still ambiguous because parties to a dispute may contract out of their WTO obligations in the MAS. The ambiguity of the regulations gives WTO members excessive “scope for maneuver.”¹ Dispute parties, when terminating disputes, sometimes improperly use their powers and autonomy to achieve MASs inconsistent with their WTO obligations. Moreover, interim settlements are increasingly used by member states to avoid MAS notification, which is required under WTO rules. Substituting interim settlements for MAS resulted in disputes pending indefinitely. To solve such compliance problems under the disputes settled by MAS, as well as to make sure that the parties to the dispute are not entitled to contract out of their obligations, this paper argues that the ambiguity in Article 3.5 of the DSU should be clarified by analyzing the nature of WTO obligations. The notification obligation in Article 3.6 should be elaborated on and given further specificity. Finally, a “special panel” functioning under the authority of the WTO Secretariat should also be established by the WTO Secretariat to assist in the monitoring and managing the enforcement of WTO rules in disputes resolved by MAS.

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1. The term “scope for maneuver” was first used by Antonello Tancredi. See Antonello Tancredi, *EC Practice in the WTO: How Wide is the “Scope for Manoeuvre?”*, 15 EUR. J. INT’L L. 933, 938 (2004).

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I. INTRODUCTION

As of February 2018, 538 disputes have been brought to the World Trade Organization Dispute Settlement Mechanism (“DSM”), 119 of which were settled by a Mutually Agreed Solution (“MAS”).² Disputes settled by MAS account for 22.12 percent of all complaints brought to the WTO DSM.³ According to the Understanding on Rules and

2. See *Chronological List of Dispute Cases*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Feb. 17, 2018).

3. *Id.*

Procedures Governing the Settlement of Disputes (“DSU”) Article 3.7, “a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”⁴ MAS, being the preferred solution and playing a prominent role in dispute settlement, has accordingly gained some attention, but the research is incomplete. There is already an existing body of research concentrating on MAS, such as Wolfgang Alschner’s article that explicitly describes the definition of MAS based on panel and Appellate Body (“AB”) reports and relevant provisions in the DSU and also examines the substantive and procedural law of MAS.⁵ Alberto Alvarez-Jimenez analyzed in one of his articles whether MAS is legally binding and if a WTO panel or the AB has jurisdiction over the disputes related to MAS.⁶ Antonello Tancredi classified different kinds of MAS in terms of their consistency with WTO covered agreements.⁷ There is not sufficient research, however, examining the compliance problems caused when a MAS is used to avoid actually complying with the obligations contained in the WTO agreements. Although a MAS can terminate a dispute, in practice, the effect of compliance with WTO rules triggered by MASs can be quite different from the strict implementation of panel or AB reports, thereby creating a “grey area” in the multilateral trading system.⁸

The General Agreement on Tariffs and Trade (“GATT”) dispute settlement mechanism had clearly diplomatic features and contained no regulations on MAS. Member states were given more “scope for

4. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

5. See Wolfgang Alschner, *Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System*, 13 *WORLD TRADE REV.* 65 (2014).

6. See Alberto Alvarez-Jimenez, *Mutually Agreed Solutions under the WTO Dispute Settlement Understanding: An Analytical Framework after the Softwood Lumber Arbitration*, 10 *WORLD TRADE REV.* 343 (2011).

7. Antonello Tancredi classified MAS into several categories: 1) agreements *infra ordinem*, meaning agreements permitted by the DSU, 2) agreements *praeter legem*, i.e., agreements aimed to fill the lacunae in the DSU, and 3) Agreements *extra ordinem*, i.e., agreements which are not provided for in the DSU. For different kinds of MAS, see Tancredi, *supra* note 1, at 949-59.

8. “Grey area” measures represented by Voluntary Export Restraints will be explained later. Grey area measures are the measures which are difficult to regulate but have serious distorting effects on trade. The participants of the Uruguay Round decided to prohibit “grey area” measures in the Agreement on Safeguards, which is considered a major achievement of the Uruguay Round. See Yong-Shik Lee, *Revival of Grey-Area Measures? The US-Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards*, 36 *J. WORLD TRADE* 155, 156 (2002).

maneuver.⁹ The trading system has evolved, however, such that the WTO now includes more judicial elements, which supplement the diplomatic features inherited from GATT to regulate MAS in Articles 3.5 and 3.6 of the DSU.¹⁰ These Articles in the DSU provide, however, only a basic framework for MAS. Some standards regarding the relationship between MAS and WTO-covered agreements, as well as how dispute parties should notify their MAS, are ambiguous. Because a panel or the AB may rarely acquire opportunities to interpret articles related to MAS, some parties may choose to make use of the loophole and contract out of some WTO obligations by reaching a MAS, which seemingly terminates the dispute.¹¹

Solving the compliance issue triggered by MAS requires reform of the enforcement mechanism of the WTO. If the enforcement mechanism were more effective, it would be hard for a powerful dispute party to buy out of its obligation or use threats and coercion during the process of negotiating a MAS. A paradox exists between the WTO's membership-driven enforcement and intent to establish a rule-oriented multilateral trading system. Economic interdependence between nations, especially in the globalization era, makes non-compliance not only an issue between dispute parties, but also a problem shared by all WTO members. Although the existing enforcement mechanism under the surveillance of the Dispute Settlement Body ("DSB") may be seen as multilateral, the only deterrent enforcement measure, retaliation, is taken bilaterally between the dispute parties.¹² For the purpose of solving the compliance problem where WTO members rely on MAS to evade WTO obligations, a sensible method would be to intensify collaboration in enforcing WTO rules and introduce a more effective multilateral enforcement mechanism.

9. Tancredi, *supra* note 1, at 938.

10. See Robert Alilovic, *Consultations under the WTO's Dispute Settlement System*, 9 DALHOUSIE J. LEGAL STUD. 279, 287 (2000).

11. As will be explained in the following text, the panel and Appellate Body in the WTO have no explicit jurisdiction over the provisions in a MAS because strictly speaking, a MAS is not part of the WTO-covered agreements. Without jurisdiction over MASs, the panel and AB have no opportunity to exert their judicial lawmaking function or interpret the ambiguous DSU provisions related to MASs. As will be explained *infra* Part III(A), the United States and Brazil terminated a dispute by reaching a MAS without withdrawing the measures inconsistent with the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

12. See DSU, *supra* note 4, art. 22.2 ("... [A]ny party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions...").

This paper, by using the case-study method, focuses on the compliance problems of WTO members using MAS to bypass their WTO obligations. One of the reasons for the compliance problems under MAS is the ambiguity present in Articles 3.5, 3.6, and 21.6 of the DSU.¹³ These requirements related to MAS fail to clarify what “consistent with covered agreements” means, how the MAS shall be notified to the DSB, and how specific the responding party should be in its report evaluating the member’s progress in the implementation of the MAS.¹⁴ The ambiguity of the requirements in the DSU gives dispute parties excessive authority to reach settlements which may undermine the foundation of the WTO. This Note argues that WTO members cannot waive their WTO obligations amongst themselves by reaching a MAS unless permitted by WTO-covered agreements. Most of the WTO entitlements are protected by property rules, and most WTO obligations share collective features.¹⁵ Bilateral agreements that effectively waive compliance, as MASs have the capacity to do, undermine the multilateral nature of the trading system.

Section II of this paper will introduce the basic background of the WTO dispute settlement system, define MAS, explain its evolution, and also illustrate how MAS fits into the dispute settlement procedure. Section III will summarize the existing compliance problems in disputes settled by MAS by analyzing disputes brought to the DSB and the MASs reached between the parties. In Section IV, the institutional reasons and domestic concerns of the dispute parties that have caused MAS problems will be examined. Afterward, Section V will re-examine the theoretical controversies on WTO obligations and then try to clarify what a legal and effective MAS would look like. The final section will suggest improving horizontal trans-governmental networks within the WTO by establishing a “special panel” that will provide assistance to the DSB in promoting compliance by intensifying the multilateral enforcement mechanism.¹⁶

13. As will be explained *infra* Part II(B)(3), Article 3.5 of the DSU, *supra* note 4, made three substantive requirements with regard to MAS; article 3.6 is about the procedural regulation on MAS; and article 21.6 empowers the DSB to supervise the implementation of the adopted rulings or recommendations.

14. See DSU, *supra* note 4, arts. 3.5, 3.6, 21.6. This argument will be explained *infra* Part III(C) and Part IV(A).

15. Controversies over property rules and liability rules and different opinions over nature of the WTO obligations will be discussed in the following text. See *infra* Part V(A)(1).

16. With respect to the structure of this article, it is noteworthy that Section V and Section VI are all strategies the author suggests to solve the compliance problems in disputes resolved by MAS. Section V tries to illustrate the relationship between MAS and WTO-covered agreements

II. WTO DISPUTE SETTLEMENT SYSTEM AND MUTUALLY AGREED SOLUTIONS

A. *Basic Introduction to WTO Dispute Settlement*

Before the WTO, dispute settlement matters were regulated in Articles XXII and XXIII of GATT 1947, which gave priority to making a satisfactory adjustment for the nullification or impairment of the benefits of a contracting party.¹⁷ Only when no satisfactory adjustment was realized could the matter be referred to the Contracting Parties.¹⁸ Although the GATT also facilitated panels to hear disputes, there was no formal mechanism for dispute settlement in the GATT system. Additionally, due to the principle of consensus, any party could block the dispute settlement process, refuse to adopt or implement the panel's report, and block authorization to suspend concessions.¹⁹ For these reasons, dispute settlement under GATT exhibited distinct diplomatic and power-oriented features that garnered considerable criticism and eventually resulted in several proposals for reform.²⁰

At the end of the Uruguay Round Negotiation, the parties signed the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"). The WTO incorporated an effective dispute settlement system, which is stipulated in Annex 2 of the Marrakesh Agreement, *i.e.*, the Understanding on Rules and Procedures Governing the Settlement of Disputes or DSU. The DSU applies to all of the WTO-covered agreements and is administered by the DSB, which consists of representatives from all WTO members.²¹ Consultation is compulsory

and tries to make clear that WTO members cannot contract out of their WTO obligations. Section VI intends to alleviate the problems by strengthening the multilateral enforcement mechanism.

17. The nullification or impairment of one contracting party's benefits can result from another contracting party's failure to fulfill WTO obligations or its application of any measure. General Agreement on Tariffs and Trade art. 23.2, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

18. *Id.* art. 23.2.

19. *Id.* ("If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances."). The requirement in the GATT era was in stark contrast with the "negative consensus" principle in WTO dispute settlement.

20. See Julia Christine Bliss, *Reform in the Uruguay Round: Problems and Prospects*, 23 STAN. J. INT'L L. 31, 50 (1987); see also J. G. Castel, *The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures*, 38 INT'L & COMP. L. Q. 834, 841 (1989).

21. The General Council has representatives from all member governments and convenes as the Dispute Settlement Body. See *Dispute Settlement Body*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (last visited Feb. 17, 2018); see also *The WTO General Council*,

before a party may request the establishment of a panel.²² Unless there is consensus to the contrary, the DSB is obligated to establish a panel at the request of any of the parties to the dispute.²³ Additionally, if any of the parties is unsatisfied with the panel reports, it has the right to appeal to the Appellate Body, which is a permanent body under the WTO and consists of seven judges.²⁴

In contrast to the GATT's principle of positive consensus, the WTO Dispute Settlement Body follows a rule of negative consensus, which signifies that, theoretically speaking, all panel and AB reports will be adopted because, at the very least, the winning party will be in favor of the report.²⁵ The DSB is charged with the implementation of the rulings, but the enforcement powers are mainly held by the dispute parties themselves. In case of non-compliance, the dispute parties may initiate Article 21.5, which requires the original panel to determine if the losing party has fulfilled its obligation of implementation.²⁶ As remedies for non-compliance, the dispute parties may seek compensation or take retaliatory measures.²⁷ Thus, when compared with the GATT system, the WTO dispute settlement mechanism is more like a judicial system and more powerful, as its rulings usually obtain compulsory enforcement. Symbolizing vast progress in international rule of law, the WTO dispute settlement mechanism is a key element in maintaining the stability and predictability of the multilateral trading system.²⁸

B. *Mutually Agreed Solution and its Evolution from the Era of GATT to WTO*

The term Mutually Agreed Solution ("MAS") is described in Article 3.7 of the DSU, which states that "a solution mutually acceptable to the parties in a dispute and consistent with the covered agreements is clearly to be preferred."²⁹ Although MAS has played an important role in dispute settlements, especially in complicated cases, some basic

WTO, https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm (last visited Feb. 17, 2018).

22. DSU, *supra* note 4, art. 4.2 and art. 4.3.

23. *Id.* art. 21.6.

24. *Id.* art. 17.

25. *Id.* arts. 6.1, 16.4, 17.14.

26. *Id.* art. 21.5.

27. *Id.* art. 22.

28. For example, John H. Jackson considered the WTO Dispute Settlement Mechanism as unique in its judicial and legalistic system. The binding application of the reports to its members had a tremendous impact on the world trade system. See John H. Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, BROOKINGS TRADE F. 179, 179-80 (2000).

29. DSU, *supra* note 4, art. 3.7.

elements contained in its definition are not self-evident in the DSU. Therefore, it is necessary to look at the basic overview of the MAS under the DSU before examining compliance problems existing in settlements through MAS.

1. The Definition of MAS

Although there is no definition of MAS in the DSU, from the context of the relevant provisions, a narrow definition of MAS may be inferred.³⁰ First, MAS refers only to solutions to disputes that are formally filed before the WTO.³¹ In other words, if a dispute was introduced to both the WTO and Regional Trade Agreement (“RTA”) dispute settlement system, and the dispute parties reached a solution under the system of the RTA, the solution reached by the parties is not the MAS referred to in the DSU.

Second, a MAS under the WTO must include a final solution and truly terminate the dispute.³² Because MAS is not the only amicable negotiation element included in the WTO dispute settlement,³³ evaluating if there is a MAS should not depend on the negotiation character of the agreement reached by the parties but should instead focus on whether the agreement can resolve the dispute. In the *EC—Bananas* case, the panel speculated that a series of future steps for resolving the dispute could not be considered a solution.³⁴ The Appellate Body

30. In Article 3.5 and Article 3.6 of the DSU, *supra* note 4, MAS was referred to as “solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.”

31. DSU, *supra* note 4, arts. 3.5, 3.6.

32. *Id.* art. 3.7. The term “solution” in Article 3.7 refers to “the act of solving a problem.” See SHORTER OXFORD ENGLISH DICTIONARY 2917 (W.R Trumble & A. Stevenson eds., 5th ed. 2002); see also Panel Report, *India—Measures Affecting the Automotive Sector*, ¶ 7.113, WTO Doc. WT/DS146/R (adopted Dec. 21, 2001) [hereinafter Panel Report, *India—Measures Affecting the Automotive Sector*].

33. For example, according to Article 21.3(b) of the DSU, dispute parties can determine the reasonable period of time by agreement. Also, because the DSU does not illustrate whether the winning party must first initiate a 21.5 proceeding, or can directly apply for the authorization of retaliation, the dispute parties sometimes coordinate the order of the 21.5 proceeding and the arbitration in Article 22.6 by making bilateral agreements. Understanding between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/14 (Jan. 5, 2001); Understanding between the European Communities and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States—Tax Treatment for “Foreign Sales Corporations”*, WTO Doc. WT/DS108/12 (Oct. 5, 2000).

34. See Panel Report, *EC—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse to Article 21.5 of the DSU by Ecuador*, ¶¶ 7.81-7.82, WTO Doc. WT/DS27/RW2/ECU (adopted May 6, 1999) [hereinafter Panel Report, *EC—Bananas III (Article 21.5-Ecuador)*].

supported the opinion of this panel, stating that simply putting forward steps to a final solution will not eventually resolve the dispute, so the panel should examine whether the dispute parties intend to terminate disputes on a case-by-case basis.³⁵

Third, MAS under the DSU should be differentiated from interim settlements achieved by the dispute parties during the negotiation period.³⁶ In recent years, an increasing number of WTO members favored interim settlements to resolve disputes. These interim settlements usually emerge in the form of a Memorandum of Understanding (“MoU”) or a Frameworks Agreement, including steps toward final compliance with WTO obligations and plans to terminate disputes.³⁷ As the number of interim settlements reached by dispute parties has increased, the quantity of MAS terminating disputes has declined.³⁸

2. The Classification of MAS

The classification of MAS may be considered from the perspectives of time and text. Because MAS can be achieved at any time during the process of dispute settlement,³⁹ from the aspect of time, this article classifies the two periods in which a MAS might be implemented as either a pre-ruling MAS or a post-ruling MAS. The reason for this classification is because panel and AB reports have an important role in the negotiation and achievement of MAS. A pre-ruling MAS may be attained both during the consultation stage and after the establishment of the panel. As posited by Pauwelyn, parties are most eager to make concessions during dispute settlements, not because of enforcement, but rather because of the anticipation of a panel/AB report.⁴⁰ Therefore, after the panel and AB reports have been adopted by the DSB, the remaining gap for the dispute parties to interpret WTO rules becomes smaller as

35. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse to Article 21.5 of the DSU by Ecuador*, ¶ 220, WTO Doc. WT/DS27/AB/RW2/ECU (adopted Dec. 11, 2008) [hereinafter Appellate Body Report, *EC—Bananas III (Article 21.5-Ecuador II)*].

36. DSU, *supra* note 4, art. 3.7; *see also* Appellate Body Report, *EC—Bananas III (Article 21.5-Ecuador II)*, *supra* note 35, ¶ 219.

37. Examples of interim settlements will be given in the next Section. *See infra* Part II(D).

38. For the rise of interim settlements in recent settlement trends, *see* Alschner, *supra* note 5, at 72.

39. Major provisions directly related to MAS are Articles 3.5, 3.6, and 3.7, which are under “general provisions” of the DSU. “General provisions,” literally speaking, applies to the whole stage of the dispute settlement.

40. *See* Joost Pauwelyn, *The Limits of Litigation: ‘Americanization’ and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. DISP. RESOL. 121, 126-27 (2003) (discussing the expectation that panel and AB reports can influence the negotiation process of a MAS).

the panel and AB have already provided authoritative interpretation regarding the disputed WTO rules.

From the aspect of text, MASs can be classified as “WTO+” or “WTO-.”⁴¹ A “WTO+” MAS may be broader and incorporate stricter or more specific obligations than what is contained in WTO-covered agreements. For example, in the *India-Autos* case, India and the EC reached a MAS by exchange of letters on November 12, 1997.⁴² In that agreement, India promises to “eliminate all quantitative restrictions on imports maintained by reference to GATT Article XVIII and notified to the WTO” in accordance with the time schedules contained in Annex III of document WT/BOP/N/24.⁴³ A “WTO+” MAS is usually allowed by WTO practice⁴⁴ due to the principle of *pacta sunt servanda* in international law, so long as the benefits conferred in the MAS do not violate most-favored nation (“MFN”) treatment.⁴⁵ On the other hand, “WTO-” refers to when dispute parties use a MAS to contract out of their WTO obligations between themselves. Because a “WTO-” MAS involves waiving obligations between certain members, the legitimacy of this kind of MAS is unclear and ambiguous.⁴⁶

41. Regarding the classification of “WTO+” and “WTO-”, see Gabrielle Marceau, *News from Geneva on RTAs and WTO-plus, WTO-more, and WTO-minus*, 103 PROC. ANN. MEETING AM. SOC’Y INT’L L. 124,124-28 (2009). In that article, the author divided RTAs into WTO+, WTO-, and WTO-more. WTO+ means the content of the RTAs is deeper than the WTO rules. *Id.* at 126-27. WTO-more means the content of the RTAs is broader than the WTO rules. *Id.* at 127. WTO- means the RTA denied the WTO rights. *Id.* at 127-28. Julia Ya Qin uses WTO-plus to describe the more stringent obligations undertaken by China in China Accession Protocol and WTO-minus the provisions allowing other Members to deviate from standard WTO disciplines. See Julia Ya Qin, *The Challenge of Interpreting ‘WTO-plus’ Provisions*, 44 J. WORLD TRADE 127, 127-29 (2010). Based on this classification above, this paper, however, considered “WTO-more” as a broader type of “WTO+” and “WTO-” as the MAS in which the dispute parties contracted out of their WTO obligations.

42. See Panel Report, *India—Measures Affecting the Automotive Sector*, *supra* note 32, ¶ 2.1.

43. See *id.* ¶ 7.120.

44. The Appellate Body in *EC—Bananas III* also admitted that MAS could create rights and obligations by saying “the parties’ obligations must first and foremost be determined on the basis of the text of the Understandings.” See Appellate Body Report, *EC—Bananas III (Article 21.5-Ecuador II)*, *supra* note 35, ¶ 216.

45. It is noteworthy that although “WTO+” commitments in MAS are not prohibited by the DSU, they cannot be protected or enforced under the dispute settlement mechanism. There is no doubt that “WTO+” commitments in MAS cannot be considered as WTO-covered agreements.

46. Pauwelyn argues that even though the DSU requires that a solution mutually agreed by the parties should be consistent with the covered agreements, it is unclear whether the requirement also applies to the dispute parties. See Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT’L L. 907, 948 (2003).

3. The Evolution of MAS from GATT to WTO

In the context of GATT, the objective of dispute settlement was to achieve satisfactory adjustment of the dispute.⁴⁷ Negotiation and appropriate compromise were the necessary elements in achieving this aim. Article XXII of the GATT 1947 emphasizes the importance of consultation.⁴⁸ Under Article XXIII, if no satisfactory adjustment is realized between the contracting parties involving in certain dispute, the matter may be referred to the CONTRACTING PARTIES.⁴⁹ Therefore, the dispute settlement mechanism under the GATT system had clear diplomatic features, which aimed to settle disputes and provide members with more freedom and autonomy. There is no particular provision to regulate the content of and procedural matters regarding a MAS.⁵⁰

The GATT system paid more attention to an amicable settlement, rather than utilizing a formal dispute settlement mechanism. This characteristic, to some extent, was inherited by its successor. After the establishment of the WTO, the priority given to amicable settlements had not changed but was supplemented with judicial elements, giving the WTO's dispute settlement process mixed features of diplomacy and judiciary. Articles 3.5 and 3.6 of the DSU are the main provisions regulating MAS. Article 3.5 stipulated three standards for a MAS to be effective: 1) it shall be consistent with the covered agreements; 2) it "shall not nullify or impair benefits accruing to any other Member under those agreements"; and 3) it shall not "impede the attainment of any objective" in the covered agreements.⁵¹ Although there are controversies regarding its standards, especially pertaining to the definition of "consistent with covered agreements," progress is clearly evident concerning the rule-oriented regulations of MAS when compared to the GATT era.⁵²

Moreover, Article 3.6 of the DSU incorporated procedural matters in regard to MAS.⁵³ A MAS, once being reached, shall be notified to the DSB where other WTO members can raise an objection.⁵⁴ The procedural safeguard contained in Article 3.6 is a diplomatic system, which

47. See GATT 1947, *supra* note 17, art. 23.1; see also William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L. J.* 51, 79 (1987) (stating that the dispute settlement mechanism in GATT "was more akin to the consensus/negotiation model" during 1959-1978).

48. See GATT 1947, *supra* note 17, art. 22.

49. See *id.* art. 23.

50. See Alilovic, *supra* note 10, at 282.

51. DSU, *supra* note 4, art. 3.5.

52. The controversy as to the standards will be explained *infra* Part IV(2)(B).

53. DSU, *supra* note 4, art. 3.6.

54. *Id.*

aims to ensure conformity to the obligations set in Article 3.5. In addition to the relief, when raising objections before the DSB, other WTO members whose interests are damaged by the MAS are also entitled to initiate a new suit.⁵⁵

4. Legal Status and Implementation of MAS

There is no article in the DSU clarifying the legal status of MASs and whether a MAS reached between the dispute parties is binding.⁵⁶ Whether a MAS is binding between the dispute parties is contingent on what kind of agreement the dispute parties made in settling the dispute.⁵⁷ Dispute parties may consider a non-binding agreement, such as a political promise, as necessary to a solution. Or they may reach a binding international treaty to settle the dispute. The binding effect of a MAS should therefore be determined on a case-by-case basis by the nature of the agreement achieved as well as the intention of the dispute parties.⁵⁸

The DSU is also silent about whether a MAS may forestall subsequent proceedings based on the same issue involved in the MAS. In the *India-Autos* case, the Panel recognizes that it is difficult to draw general conclusions as to the relevance of a MAS to subsequent proceedings other than on a case-by-case basis.⁵⁹ In the *EC—Bananas III* case, the Appellate Body emphasized the flexibility possessed by the contracting parties and denied that MASs automatically deter further proceedings.⁶⁰ However, the dispute parties can incorporate a provision into their MAS claiming a waiver to exercise the right to file further lawsuits.⁶¹

55. "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded . . . the contracting party may . . . make written representations or proposals to the other contracting party or parties . . ." See GATT 1947, *supra* note 17, art. 23.1.

56. See generally DSU, *supra* note 4.

57. For the legally-binding effect of the MAS, see Alvarez-Jimenez, *supra* note 6, at 348.

58. See, e.g., Panel Report, *EC—Bananas III (Article 21.5-Ecuador)*, *supra* note 34, ¶¶ 7.59-7.60 (stating that the legal status and effect of a MAS should be determined based on its content case by case).

59. See Panel Report, *India—Measures Affecting the Automotive Sector*, *supra* note 32, at ¶ 7.115.

60. See Appellate Body Report, *EC—Bananas III (Article 21.5-Ecuador II)*, *supra* note 35, ¶ 212.

61. *Id.*

C. *The Function of MAS in WTO Dispute Settlement*

The use of MAS in settling disputes is advocated by the WTO system because this method grants certain policy space to the members and lets them flexibly avoid the WTO system's rigidity. For instance, through the signing of a MAS, the losing party can negotiate with the winning party to set a mutually agreed timetable to make its measures consistent with the covered agreements.⁶² Enough flexibility and autonomy can earn domestic political support from members for a more rule-oriented trading system. This is important because political support will help ensure that these "losing" WTO members are willing to participate in future rounds of free trade negotiations.⁶³ In addition, reaching a MAS to settle disputes may avoid the disadvantageous and inefficient effects of continuous retaliation, which would negatively affect the consumers as well as the whole economy of the dispute parties. If a sustained "tit-for-tat" battle occurred between two trade powers, not only would the dispute between themselves likely result in a deadlock, but also the WTO's reputation as an efficient and fair defender of the multilateral trade system would be damaged.⁶⁴

III. COMPLIANCE ISSUES IN DISPUTES SETTLED BY MAS

A. *Mutually Agreed Solutions Reached by Dispute Parties Potentially Unfavorable to Less Powerful States*

When a less powerful state is confronted by a powerful member, power politics may be at play in negotiations on compensation or final solutions to the disputes, such that more powerful states may avoid their WTO obligations through MAS. In the *US—Upland Cotton* case,

62. The timetable made by the dispute parties in the MAS may not be constrained by the "reasonable period of time" determined by Article 21.3 of the DSU, *supra* note 4.

63. See the Two-Level Games Theory put forward by Robert D. Putnam. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433-439 (1998). He created a concept of "win-sets," which is the overlap between Level I and Level II. *Id.* at 437. Level I is the tentative agreements made after the bargaining of the negotiators and Level II is the extent to which the domestic constituents may ratify the agreements. *Id.* at 436. In his view, larger "win-sets" can make the Level I agreements more likely to be ratified. *Id.* at 437-38. The flexibility provided for the parties by MAS can broaden the "win-sets."

64. For example, Kym Anderson argues that retaliation can lead to an undesirable economic effect. The complainant's economy will not be helped but be harmed by retaliation. Additionally, compared to import-competing industries, retaliation has no benefit to the export industries in complainants. For the respondent, the industries being harmed by retaliatory measures are usually not the industries benefited from non-compliance. See Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement*, 1 WORLD TRADE REV. 123, 129-130 (2002).

Brazil brought a lawsuit to the WTO Dispute Settlement Mechanism against the U.S. Farm Bill of 2002 and the U.S. commodity programs, which damaged the Brazilian cotton industry.⁶⁵ The panel and AB both decided that the domestic support measures of the United States violated the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”).⁶⁶ Although the AB report required the United States to withdraw its support measures that were inconsistent with the WTO-covered Agreement, the U.S. Congress did not comply due to the domestic politics of agriculture subsidies.⁶⁷ Because of the lack of full cooperation on the part of the United States, Brazil initiated the proceedings under Article 21.5 of the DSU.⁶⁸ The second Panel and AB also ruled that the United States failed to make its measures consistent with the WTO-covered Agreement.⁶⁹ After the implementation proceeding, Brazil requested authorization for retaliation under Article 7.9 of the SCM Agreement and Article 22.2 of the DSU.⁷⁰ The DSB granted Brazil the authority to take retaliatory action.⁷¹

Brazil’s suspension of concessions was postponed, however, because Brazil agreed to work on reaching a MAS with the United States.⁷² On June 17, 2010, Brazil accepted a framework proposed by the United States in which the United States promised to offer financial support and technical assistance to Brazil’s cotton farmers but required Brazil to hold off on taking retaliatory action during the validity of the framework.⁷³ On October 16, 2014, Brazil and the United States notified the DSB that they had reached a Memorandum of Understanding and agreed to terminate the dispute.⁷⁴ In their MAS submitted to the DSB,

65. See Panel Report, *United States—Subsidies on Upland Cotton*, ¶¶ 7.200-7.203, WTO Doc. WT/DS267/R (adopted Sep. 8, 2004) (describing the measure at issue).

66. Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 763, WTO Doc. WT/DS267/AB/R, 3 (adopted Mar. 3, 2005).

67. Appellate Body Report, *United States—Subsidies on Upland Cotton Recourse to Article 21.5 of the DSU by Brazil*, ¶¶ 8-9, WTO Doc. WT/DS267/AB/RW (adopted June 2, 2008).

68. *Id.*

69. *Id.* ¶ 448.

70. Recourse to Arbitration by the United States under Article 2.6 of the DSU and Article 7.10 of the SCM Agreement, *United States—Subsidies on Upland Cotton*, ¶ 1.13, WTO Doc. WT/DS267/ARB/2 (Aug. 31, 2009).

71. *Id.* ¶ 6.5.

72. Communication from Brazil, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/44 (May 5, 2010).

73. See Joint Communication from Brazil and the United States, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/45 (Aug. 31, 2010).

74. Notification of a Mutually Agreed Solution, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/46 (Oct. 23, 2014).

the United States agreed to continuously transfer funds to the Brazilian Cotton Institution without effectively changing its GSM 102 agricultural support programs, which constitute an export subsidy.⁷⁵ The two parties even agreed in the MAS that the Memorandum “does not imply recognition of the consistency with the covered agreements of the measures” taken by the United States in this dispute.⁷⁶

The fact that the United States kept carrying out the GSM 102 program and required Brazil to waive its rights of action under Articles XXII or XXIII of GATT 1994 illustrates how a powerful state can use its power to persuade its less powerful counterpart to settle the dispute and practically “buy out” the obligation of making its measures consistent with the covered agreements.⁷⁷ Furthermore, less powerful states usually lack the ability to enforce effective and potent retaliation.⁷⁸ Sometimes their actions towards powerful players even bring about anti-retaliation in non-trade areas.⁷⁹ This power-oriented phenomenon is even more obvious during the negotiation phase, especially because Article 3.5 of the DSU does not clearly define the legal boundary of a MAS.⁸⁰ Thus, an enforcement mechanism that does not clearly require adherence to WTO obligations during negotiation and does not afford full and prompt remedies for non-compliance is usually in favor of the powerful members.⁸¹

B. MASs Reached by Dispute Parties Threaten the Interests of Other Members

Circumstances in which the interests of other WTO members are influenced by a MAS between dispute parties often lie within the scope of the MFN treatment principle.⁸² Because WTO members are not forbidden to make a “WTO+” MAS, sometimes the losing party will make compensation in their MAS. The compensation should also be covered by MFN treatment.⁸³ In other words, any benefits given to a dispute

75. *Id.* § 1.

76. *Id.* § X.

77. *See id.* § VI.

78. *See* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM J. INT’L L. 335, 338 (2000).

79. *See id.*

80. DSU, *supra* note 4, art. 3.5.

81. *See* Brian Manning & Srividhya Ragavan, *The Dispute Settlement Process of the WTO: A Normative Structure to Achieve Utilitarian Objectives*, 79 UMKC L. REV 1, 28 (2010).

82. *See* the *EC—Hormones* case *infra* note 86.

83. *See, e.g.*, GATT 1947, *supra* note 17, art. 1. Any advantage, favor, privilege, or immunity given in the MAS is within the scope of the MFN treatment and should be provided to all the WTO members.

party in the MAS must be unconditionally and promptly given to all WTO members.⁸⁴

When making compensation in a MAS, the losing party may narrowly and precisely define the product being compensated so that only the contracting party can accept the benefit.⁸⁵ This strategy, if not properly used, is likely to damage other WTO members' interests. For instance, in the *EC—Hormones* case, the panel and AB decided that the EC's measures concerning meat and meat products violated the WTO covered agreement.⁸⁶ On September 25, 2009, the EC and the United States notified the DSB regarding a Memorandum of Understanding concerning the measures to be undertaken.⁸⁷ On April 14, 2014, they notified the DSB with a revised Memorandum of Understanding.⁸⁸ In the Memorandum, the EU agreed to open an autonomous tariff rate quota for "High Quality Beef," where the in-quota tariff rate is zero.⁸⁹ "High Quality Beef" was precisely defined as beef fed by grain co-products.⁹⁰ This definition limits products entering the EU market to beef that is mainly imported from the United States and Canada, which leaves Brazilian and Argentine beef fed via forage that may be regarded as "like products" now receiving a lesser benefit. Therefore, narrowly defining a product by a party to avoid MFN obligation may damage the interests of other, non-party, WTO members.

C. *Problems of Performing the Duty of Notification After Reaching the MAS*

In Article 3.6 of the DSU, there are no specific and feasible requirements as to how the dispute parties are supposed to perform notification duties.⁹¹ Moreover, Article 21.6 of the DSU requires that the issue

84. *Id.* art. 1.1 (requiring that the MFN treatment should cover "any advantage, favor, privilege or immunity granted by any contracting party," which includes compensation granted in MAS).

85. See *New Issues Arise in EU-US Beef Trade Dispute*, ICTSD (Jun. 24, 2009), <https://www.ictsd.org/bridges-news/bridges/news/new-issues-arise-in-eu-us-beef-trade-dispute>.

86. See Panel Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 9.1, WTO Doc. WT/DS26/R/USA (Aug. 18, 1997); Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 253(d), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

87. Joint Communication from the European Union and the United States, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/28 (Sep. 30, 2009).

88. Joint Communication from the European Union and the United States, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/29 (Apr. 14, 2014).

89. *Id.* art. 2.1.

90. *Id.* art. 6.

91. See DSU, *supra* note 4, art. 3.6.

regarding implementation shall be placed on the agenda of the DSB meeting until its resolution and mandates that the member concerned submit a status report of the implementation progress.⁹² It says nothing, however, about how specific the report should be in terms of the obligations undertaken. As just one example of this problem, a party might ask whether the report should include all specific steps the party had taken in implementing a panel or AB report, or would a general description of the implementation status suffice? Furthermore, the party might ask whether the losing party should insert a planned timetable in the report to demonstrate the implementation progress.

In addition, Article 21.6 does not contain rules or standards governing how the DSB should examine the report provided by the dispute parties.⁹³ As a result, it is hard for the DSB, containing the representatives of all the WTO members, to take surveillance responsibility. It is also hard for the DSB to make a reasonable assessment concerning the implementation status of the losing party.⁹⁴ Due to the incomplete and ambiguous regulations about notifications, some WTO members provide the DSB with reports containing very little information about the implementation status.⁹⁵ Admittedly, Article 4.6 of the DSU requires consultation to be confidential.⁹⁶ The confidentiality, however, probably applies only to the process of negotiating the MAS, but not to the final result, i.e., the MAS itself, because keeping information confidential during the process of consultation does not conflict with any obligation of notification in Article 3.6.⁹⁷ One reason for making the process confidential is to protect the dispute parties, whereas publicizing the consultation results or the contents of a MAS protects both the interests of the dispute parties and the whole world trade system.⁹⁸

For example, in the *EC—Duties on Imports of Grains* case, after the request for consultation, the United States informed the WTO Secretariat that it was withdrawing its request for the establishment of a panel because it reached a MAS with the EC and the EC had adopted regulations implementing the MAS.⁹⁹ However, the contents of the

92. *Id.* art. 21.6.

93. *See id.*

94. Claus D. Zimmermann, *Tolerance of Temporary Non-Compliance: The Systemic Safety Valve of WTO Dispute Settlement Revisited*, 3 TRADE, L. & DEV. 382, 403 (2011).

95. *Id.*

96. DSU, *supra* note 4, art. 4.6.

97. *Id.* arts. 3.6, 4.6.

98. *See* Alschner, *supra* note 5, at 75-76.

99. Communication from the United States, *European Communities—Duties on Imports of Grains*, WTO Doc. WT/DS13/8 (May 2, 1997).

MAS had never been notified to the DSB.¹⁰⁰ Also, in the *Japan—Measures Affecting the Purchase of Telecommunications Equipment* case, Japan and the EC had reached an agreement and bilaterally settled their disputes, but no information regarding the MAS was notified.¹⁰¹ A similar occurrence happened in the *Korea—Telecommunications Procurement Sector* case, where Korea and the EC did not notify the DSB concerning their MAS.¹⁰²

D. *Interim Settlements Substituting MAS to Terminate the Dispute*

MASs, as final settlements able to terminate a dispute, are essentially different from an interim settlement.¹⁰³ Interim settlements, which are usually signed in the form of a MoU or Framework Agreement, are only steps toward the final settlement. In recent years, there is a tendency to substitute interim settlements for MAS, which is evident as an increase of MoUs or Framework Agreements but a decrease in the quantity of MAS reached by the dispute parties.¹⁰⁴ Because interim settlements are not able to terminate a dispute, substituting MAS with interim settlements will leave the case pending indefinitely.¹⁰⁵ For example, some members reached compensation agreements to settle disputes, but did not determine how the losing party should enforce the WTO obligations after the compensation; they actually waived the WTO obligations between the dispute parties.¹⁰⁶ This kind of compensation agreement is also contrary to Article 22 of the DSU, which clearly indicates that compensation and the suspension of concessions are temporary measures.¹⁰⁷

100. There is no WTO document showing the notification of a MAS available at WTO website. See *Results List*, WTO, [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%40Symbol%3d+wt%2fd513%2f*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2fd513%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true) (last visited Apr. 5, 2018).

101. Acceptance by Japan of the Request to Join Consultations by the United States, *Japan—Measures Affecting the Purchase of Telecommunications Equipment*, WTO Doc. WT/DS15/3 (Sept. 13, 1995).

102. See Notification of a Mutually-Agreed Solution, *Korea—Laws, Regulations, and Practices in the Telecommunications Procurement Sector*, WTO Doc. WT/DS40/2 (Oct. 29, 1997).

103. See Alschner, *supra* note 5, at 84-86.

104. *Id.* at 72.

105. As explained in the definition of MAS, it is the final solution to the disputes; interim settlements are only plans or frameworks of the final solution and do not have the effect of terminating disputes. See *id.* at 84-86.

106. See John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109, 115 (2004) (saying that the option of “buying out” obligations by providing compensation is not supported by the DSU).

107. See DSU, *supra* note 4, art. 22. Because compensation is a temporary remedy, a compensation agreement without a final solution to the dispute cannot be treated as MAS.

In the *Turkey—Restrictions on Imports of Textile and Clothing Products* case, Turkey and India notified the DSB that they had reached a mutually accepted solution.¹⁰⁸ In that case, Turkey applied quantitative restrictions on nineteen categories of textile and clothing products from India, but they only agreed to remove the quantitative restrictions on textile categories 24 and 27 in the MAS.¹⁰⁹ The MAS also specified that the compensation provided by Turkey must remain effective until Turkey removed all quantitative restrictions, thereby allowing the two parties to strive toward early compliance with the DSB rulings.¹¹⁰ This agreement, strictly speaking, is not a MAS under the DSU. Instead, it is only an interim settlement which includes compensation provisions and a resolution to further settle the dispute. By substituting a MAS with the actual interim settlement, Turkey's compliance regarding the recommendations and rulings of the DSB may be left indefinitely pending.¹¹¹

IV. REASONS FOR COMPLIANCE PROBLEMS IN DISPUTES SETTLED BY MAS

Compliance issues that arise under the settlements are essentially caused by conflicts between the flexibility pursued by WTO members, on the one hand, and the predictability and stability of the WTO system, on the other. As a member-driven organization, the WTO offers member states sufficient autonomy to settle their disputes and make their measures consistent with the WTO system.¹¹² The autonomy present in dispute settlements, if overly used, may result in compliance problems under a MAS.¹¹³ The reasons causing the aforementioned compliance problems can be roughly classified as institutional reasons and domestic concerns of the dispute parties.

A. Institutional Reasons

From a legislative and institutional perspective, there are multiple causes of MAS problems. First, the DSU does not make clear what an

108. Notification of Mutually Acceptable Solution, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/14 (July 19, 2001).

109. *Id.* ¶ 1 (i).

110. *Id.* ¶ 2.

111. There has been no update as to this dispute after the MAS on July 19, 2001.

112. Negotiation is an important way for WTO members to settle disputes. See DSU, *supra* note 4, art. 3.7. It is also negotiation that usually determines when and how the parties will secure compliance. See Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. DISP. RES. 141, 146 (2003).

113. See Alschner, *supra* note 5, at 76.

effective MAS should entail, and it makes the relationship between MAS and WTO obligations ambiguous.¹¹⁴ Article 3.5 of the DSU only minimally describes the three standards dispute parties should observe and does not specifically clarify their explicit meaning.¹¹⁵ As to the requirement of “consistent with the covered agreements,” there are different opinions as to how to interpret it. Some scholars object to a strict interpretation of this standard. For example, Antonello Tancredi made reference to the French text when interpreting “consistent with”; he argues that the corresponding French text uses the word meaning “compatible,” which provides member states with “scope for maneuver.”¹¹⁶ Instead, if the DSU intended to limit the parties’ flexibility, it should have used the language “cannot add to or diminish the rights and obligations provided in covered agreements,” as stipulated in Articles 3.2 and 19.2 of the DSU.¹¹⁷ On the other hand, Wolfgang Alschner argues that if WTO members reach an agreement that violates WTO obligations and cannot survive under the flexibility granted by the WTO-covered agreements themselves, the agreement may be considered inconsistent with the requirement set in Article 3.5.¹¹⁸ Even though the DSU does not allow WTO members to contract out of WTO obligations by making “WTO-” agreements, he maintains that the dispute parties are entitled to give up their rights in the MAS.¹¹⁹ Giving up rights, however, sometimes confers the same consequence as contracting out of WTO obligations.¹²⁰

Second, Article 3.6 of the DSU does not specifically clarify the notification duty of dispute parties after reaching a MAS. The DSU does not specify which disputing party should perform the duty of notification, when the duty should be observed, how specific the notification should be, and what the consequence would be if the dispute parties do not notify the DSB of the MAS.¹²¹ In regard to interim settlements, it is not clear if dispute parties should perform the same notification duty as in

114. *See generally* DSU, *supra* note 4.

115. *Id.* art. 3.5.

116. *See* Tancredi *supra* note 1, at 947.

117. DSU, *supra* note 4, arts. 3.2, 19.2.

118. *See* Alschner, *supra* note 5, at 94.

119. *See id.*

120. *Id.* at 95. This article does not hold the same opinion at this point. As will be explained later, the author considered that WTO members cannot bilaterally contract out of their obligations. So, if giving up rights will lead to the waiver of other parties’ obligations, the rights also should not be given up. *See infra* Part V(2)(B).

121. *See* DSU, *supra* note 4, art. 3.6.

reaching the MAS, and if the DSB should be informed of the compliance status after the interim settlements.¹²²

Sometimes, confidentiality in the negotiation of MAS can interfere with the performing of transparency obligations regarding the notification of MAS. According to Article 4.6 of the DSU, consultation should be confidential.¹²³ The purpose of upholding confidentiality during the process of consultation or negotiation is to create a comfortable environment to promote the achievement of solutions without prematurely releasing the positions held by the parties.¹²⁴ However, if the dispute parties overly pursue the confidentiality allowed in Article 4.6, they are likely to violate the transparency obligations in Article 3.6 of the DSU, which exist to protect the interests of other members and the entire multilateral trading system.¹²⁵ The insufficient notification system of the MAS and interim settlements interfere with the ability of other WTO members and domestic stakeholders to claim their interests. Although, theoretically speaking, other WTO members have the right to bring a lawsuit regarding how the content of a MAS damages their interests, the probability of winning such a case depends on the dispute parties' notification. It is difficult for a plaintiff to collect enough evidence to satisfy the burden of proof if the dispute parties insufficiently notified the DSB of the bilaterally reached MAS.

Third, the WTO does not have an effective multilateral enforcement mechanism. An effective and powerful enforcement mechanism would have a profound influence on the dispute parties, encouraging them to reach legitimate MASs consistent with WTO duties and to carry out WTO and MAS obligations.¹²⁶ But a paradox in the existing WTO enforcement mechanism makes it ineffective at multilateral enforcement. On one

122. If there is a requirement as to the notification of interim settlements, it will be difficult for the dispute parties to substitute interim settlements for MAS and actually make the dispute pending.

123. DSU, *supra* note 4, art. 4.6.

124. See David Collins, *Institutionalized Fact-Finding at the WTO*, 27 U. PA. J. INT'L ECON. L. 367, 381 (2006) (suggesting that the success of consultations can be partly attributed to "open atmosphere and confidentiality"); see also Gabrielle Marceau, *NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison*, 31 J. WORLD TRADE 25, 54 (1997) (stating that it is reasonable to limit the participation in the WTO confidential consultations to the members "having a substantial trade interest").

125. See DSU, *supra* note 4, art. 3.6. Alschner indicates that the requirement of confidentiality by the disputants may conflict with the interests of other stakeholders in transparency of bilateral settlements. See Alschner, *supra* note 5, at 75.

126. Pauwelyn indicates that the enforcement problems occur partly due to the transition from a power-based system toward a rule-based system while leaving the remedies area untouched. See Pauwelyn, *supra* note 78, at 338.

hand, the mechanism was supposed to overcome the drawbacks resulting from power-oriented diplomacy; on the other hand, the mechanism depends on the power of member states to implement DSB rulings and guarantee compliance with WTO-covered agreements. The tools the DSU provided for WTO members to enforce WTO rules are mainly compensation and retaliation.¹²⁷ Because compensation is voluntary and retaliation, to a large degree, depends on the power of the member states, the WTO enforcement mechanism obviously continues to demonstrate diplomatic features inherited from the GATT era.¹²⁸

B. *Domestic Concerns of the Dispute Parties*

In addition to institutional reasons, compliance problems occurring under MASs are also caused by domestic concerns of the dispute parties, including pressure from domestic interest groups and domestic incapability to comply with WTO obligations. Understanding these reasons is essential to designing effective solutions to compliance problems.

Firstly, domestic interest groups may object to compliance with WTO-covered agreements or panel and AB reports. From the perspective of political economy, compliance or implementation will bring about uneven payoffs for different interest groups because of the distributional effects of trade liberalization.¹²⁹ Free trade usually creates “winners” and “losers.”¹³⁰ Even though the total gains of one particular country increased through free trade, not every person in that country was necessarily made better off.¹³¹ For example, the process of trade liberalization of agricultural products in the United States and the EU is tough, as it would grant benefits to consumers but trigger losses to agricultural producers, which is an interest group that has traditionally been favored.¹³² Although the “winners” of trade globalization can theoretically compensate the loss of the losers, such redistribution within a country, as demonstrated in the United Kingdom, does not always work

127. DSU, *supra* note 4, art. 22.

128. *Id.* art. 22.1; *see also* Pauwelyn, *supra* note 78, at 338.

129. For the distributional effects of trade liberalization, *see* Dollar David & Aart Kraay, *Trade Growth and Poverty*, 114 *ECON. J.* 4 (2001).

130. *See* Richard N. Farmer, *Tariffs, Quotas, and Class Structure, Winners and Losers in Free Trade*, 13 *BUS. HORIZONS* 29, 30-32 (1970).

131. *See* Gene E. Mummy, *Silences in Ricardo: Comparative Advantage and the Class Distribution of Free Trade Benefits*, 44 *REV. SOC. ECON.* 294, 294-295 (1986); Dani Rodrik, *Has Globalization Gone Too Far?*, 39 *CAL. MGMT. REV.* 29, 31-33 (1997); PAULWELYN ET AL., *INTERNATIONAL TRADE LAW* 25 (3d ed. 2016).

132. *See* PAULWELYN ET AL., *supra* note 131, at 25.

well.¹³³ Evidence shows that the growth rate of economic inequality in the United Kingdom by 2015 has doubled compared to the 1980s.¹³⁴

Secondly, a WTO member may refuse to fully comply with its WTO obligations due to political considerations, such as in *China—Publications and Audiovisual Products*.¹³⁵ In that case, China made WTO+ commitments in its Accession Protocol to liberalize trading rights within three years after accession.¹³⁶ The United States claimed that China did not permit foreign entities and private Chinese enterprises to import cultural products, but maintained trading rights in the hands of state-owned enterprises (“SOEs”).¹³⁷ The products involved in this case were publications and audiovisual products, which the Chinese government maintained are politically and culturally sensitive in nature.¹³⁸ Also, the vested interest groups affected by the rulings were state-owned enterprises, which have possessed monopolies for long terms.¹³⁹ These reasons demonstrate the difficulty of fully complying with the reports.¹⁴⁰ In the end, China and the United States informed the DSB of a MoU, in which China made significant progress in implementing the ruling without making a final resolution.¹⁴¹ In China’s view, mutual cooperation of the two parties, like designing an MoU, was the most suitable way of solving this complex and sensitive dispute.

133. See Ethan B. Kapstein, *Winners and Losers in the Global Economy*, 54 INT’L ORG. 359, 376-80. For the inequality of income distribution in the U.K. and its relationship with globalization, see Shaun Docherty, *Globalization, Inequality, and the Concentration of Wealth in the UK*, INQUIRIES J. (2015), <http://www.inquiriesjournal.com/articles/1315/globalization-inequality-and-the-concentration-of-wealth-in-the-uk>.

134. See *UK Inequality Rising More Quickly Than Under Thatcher*, RT NEWS (Jul. 21, 2013), <https://www.rt.com/news/uk-inequality-growth-thatcher-382/>.

135. See Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual*, WTO Doc. WT/DS363/R (Aug. 12, 2009) [hereinafter *China—Publications and Audiovisual*].

136. World Trade Organization, Ministerial Decision of 10 November 2001, arts. 5.1, 5.2, WTO Doc. WT/L/432. For WTO-plus obligations in China’s Accession Protocol, see Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System, 37 J. WORLD TRADE 483, 501 (2003).

137. See *China—Publications and Audiovisual*, *supra* note 135, ¶ 2.3.

138. See Xiaowen Zhang & Xiaoling Li, *The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China*, 23 J. CONTEMP. CHINA 143, 154 (2014).

139. See *id.*

140. By limiting the right to importing foreign cultural products to SOEs, the Chinese government is able to implement censorship policies, which are motivated mainly by political considerations.

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

Thirdly, from the perspective of managerialism, a lack of domestic capacity is an important reason for noncompliance.¹⁴² This is especially true for developing countries, where the relative enforcement costs of obligations can be fairly high due to a lack of technological or economic capacity.¹⁴³ The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) reached during the Uruguay Round Negotiations, which had garnered strong opposition from developing countries, is a good example.¹⁴⁴ Developed countries and developing countries have obvious disagreements as to the appropriate extent of intellectual property protections.¹⁴⁵ For example, India asked for provisions permitting it to provide access for poor populations to pharmaceuticals without intellectual property protection.¹⁴⁶ The completed TRIPS Agreement incorporated a transitional period for developing countries on the condition that they observe the obligations in Articles 70.8 and 70.9.¹⁴⁷ Article 70.8 required member states to set up a “mailbox” mechanism for countries in transition to accept patent applications and assign priorities.¹⁴⁸ Article 70.9 required countries in transition to give exclusive marketing rights to the product that was the subject of a patent application.¹⁴⁹

Due to fear that compliance with Articles 70.8 and 70.9 of TRIPS would diminish the government’s ability to keep medical supplies accessible to the poor at affordable prices,¹⁵⁰ the Indian Patents (Amendment) Bill 1995, which was made to establish the mailbox mechanism required by Article 70.8, lapsed.¹⁵¹ The executive branch in India then

142. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 13, 197 (1995).

143. See Carlos M. Correa, *Intellectual Property Rights under the UNFCCC: Without Response to Developing Countries’ Concerns*, in *RESEARCH HANDBOOK INTELLECTUAL PROPERTY AND CLIMATE CHANGE* 74, 74-75 (Joshua D. Sarnoff ed., 2016).

144. See Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW* 285, 286 (Daniel M. Kennedy & James D. Southwick eds., 2002).

145. See Manning & Ragavan, *supra* note 81, at 6.

146. See *id.* at 6-8.

147. Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 70.8, 70.9, Apr. 15, 1994 (amended 2017), 1869 U.N.T.S. 299.

148. *Id.* art. 70.8.

149. *Id.* art. 70.9.

150. David K. Tomar, *A Look into the WTO Pharmaceutical Patent Dispute Between the United States and India*, 17 *WIS. INT’L L. J.* 579, 581 (1999).

151. See Manning & Ragavan, *supra* note 81, at 8.

relied on administrative orders to fulfill its TRIPS obligations.¹⁵² The United States brought a suit to the WTO, claiming that the orders failed to set up a mailbox mechanism statutorily.¹⁵³ The Appellate Body strictly interpreted the text of Article 70.8 and decided that India breached its obligations by failing to legally establish a mailbox mechanism.¹⁵⁴ Although India eventually implemented the AB reports in this case,¹⁵⁵ with regard to issues like improving intellectual property protection to incentivize innovation for pharmaceuticals and environmentally sound technologies, developing countries are not as capable as developed countries of providing strong protection due to their domestic economic and technological limitations.¹⁵⁶

V. CLARIFYING THE LEGITIMATE BOUNDARIES OF AN EFFECTIVE MAS

Because the requirements in Article 3.5 of the DSU have not been clearly interpreted and because it is difficult for a panel or the AB to acquire opportunities to interpret the provisions regarding MAS, clarifying the boundaries of a legitimate MAS is necessary. The nature of WTO obligations must be discussed when determining the relationship between an effective MAS and WTO rules. There have been long-term theoretical controversies as to whether WTO obligations should be strictly adhered to.¹⁵⁷ In this era of increasing globalization, however, where economic interdependence between nations is intensified, strictly adhering to WTO obligations could help support legal deference to international institutions, and “harder” agreements could help make commitments credible and reduce transactions costs.¹⁵⁸

152. *See id.* at 9.

153. *See* Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶¶ 4.3-4.4, WTO Doc. WT/DS50/R (adopted Sep. 5, 1997).

154. Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶¶ 69-71, WTO Doc. WT/DS50/AB/R (adopted Dec. 19, 1997).

155. Status Report by India, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS79/6 (Apr. 16, 1999).

156. *See* Correa, *supra* note 143, at 74-75.

157. *See generally* Jackson, *supra* note 106; Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002); Joel P. Trachtman, “*The WTO Cathedral*”, 43 STAN. J. INT’L L. 127 (2007).

158. *See* Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385, 386, 397 (2000).

A. *Theoretical Controversies on the Status of WTO Rules*

To clarify the legitimate boundaries of an effective MAS, the relationship between MAS and WTO rules must be ascertained. That relationship, to some extent, depends on the status and nature of WTO rules.

1. Property Rules or Liability Rules

Entitlements protected by property rules can be transferred only through a consensus of the contracting parties.¹⁵⁹ However, for entitlements protected by liability rules, consideration for the entitlements may be objectively determined.¹⁶⁰ A party can unilaterally infringe the entitlements by paying proportionate compensation after the fact.¹⁶¹ Generally speaking, when transaction costs are high, it is more efficient to protect entitlements by liability rules.¹⁶² Therefore, under the efficient breach theory,¹⁶³ WTO entitlements are probably protected by liability rules when compliance is inefficient.¹⁶⁴ Per the efficient breach theory, a party should be allowed to deviate from its obligations when the cost of compliance is greater than the benefits, and the party should be encouraged to perform its obligations in circumstances of efficiency.¹⁶⁵ According to Schwartz and Sykes, WTO covered agreements are like incomplete contracts because it is hard for contracting parties to make their agreements in advance, indicating how they should behave when dealing with every contingency.¹⁶⁶ Thus, the theory of efficient breach should apply to WTO obligations, and WTO members may unilaterally breach WTO rules if it is more economically efficient

159. See James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 443 (1995).

160. The liability is measured by the value of the damages, and the owner of the entitlement protected by a liability rule must accept the payment of damages. See Trachtman, *supra* note 157, at 147.

161. See Krier & Schwab, *supra* note 159, at 443.

162. See R. H. Coase, *The Problem of Social Cost*, 56 J. L. & ECON. 837, 850 (2013) (explaining that if the parties are allowed to make ex post negotiation and the renegotiation costs are very low, the content of the law will be irrelevant and the parties can always negotiate a different rule which is more efficient; liability rules can lower the transaction cost to give the parties incentives to breach).

163. The efficient breach theory was first stated by Robert L. Birmingham. See Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970).

164. See Trachtman, *supra* note 157, at 148-49.

165. See Birmingham, *supra* note 163.

166. See Schwartz & Sykes, *supra* note 157, at 179-81.

to do so.¹⁶⁷ Scholars in favor of efficient breach also believe that the purpose of the WTO is to promote the rebalancing of rights and obligations rather than strict compliance.¹⁶⁸ Judith Hippler Bello is the first person who put forward a rebalancing perspective, which provides more leeway than the standard efficient breach theory in contract law.¹⁶⁹ She argues that WTO members can renege on their commitment, as long as they can restore balance by offering compensation or enduring retaliation.¹⁷⁰ Therefore, under the efficient breach theory and rebalancing perspective, WTO entitlements are protected by liability rules because WTO members can unilaterally renege on their commitments.

This view has been intensely opposed by Jackson, Pauwelyn, and Trachtman, who insist that WTO rules are legally binding.¹⁷¹ Reinforced by the text, object and purpose, context, and practice of the GATT and WTO, Jackson concludes that WTO rules and the panel/AB reports should be strictly complied with.¹⁷² Strict compliance will promote the security and predictability goals of the Dispute Settlement system and also redress asymmetries of power by restraining “unilateralism.”¹⁷³ Buying out WTO obligations through compensation or tolerating retaliation will diminish the fairness and credibility of the trading system and undercut the goal of protecting powerless entities.¹⁷⁴ Moreover, compensation or retaliation measures are clearly labelled as temporary solutions by the DSU.¹⁷⁵ Only under the circumstances of renegotiation under GATT Article XXVIII and modifying scheduled services commitments under GATS Article XXI may member states unilaterally withdraw

167. *See id.*

168. *See* ISABEL FEICHTNER, *THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW* 35 (2012).

169. The rebalancing theory does not require the breach to be efficient as long as the parties can restore the balance of the negotiated concessions. *See* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT’L L. 416, 417 (1996) (stating that compliance with the WTO remains elective with three choices available, none of which, however, requires an efficient breach). Efficient breach theory, however, does not allow unconditionally contracting out of all the WTO rights and obligations.

170. *See id.* at 416-18.

171. *See* Jackson, *supra* note 106; Trachtman, *supra* note 157, at 129-30; *see also* Pauwelyn, *supra* note 78, at 341.

172. *See* Jackson, *supra* note 106, at 123.

173. *See id.* at 118.

174. *See id.* at 118-20.

175. *See* DSU, *supra* note 4, art. 22.1.

concessions.¹⁷⁶ That unilateral withdrawal must be made on the condition of failing to negotiate compensation with the member who has a substantial interest.¹⁷⁷

Accepting the interpretation of Jackson that WTO law is mandatory law, Trachtman agrees that states are not permitted to violate WTO obligations.¹⁷⁸ A realist perspective, however, makes his view less strict than Jackson's. In practice, due to the tolerance of the WTO enforcement mechanism, members who are capable of offering compensation and enduring retaliation may unilaterally deviate from their obligations.¹⁷⁹ Without an effective remedy, the right to specific performance in the WTO legal system is to some extent undermined.¹⁸⁰ In summary, in his view, the WTO legal system is best interpreted as employing a property rule as a matter of legal doctrine, but a liability rule as a matter of fact and practice.¹⁸¹ In view of the fact that the remedies available to developing countries are inadequate and inconsistent to the welfare of performance, however, efficient breach of WTO law is impossible.¹⁸²

Pauwelyn attempts to reconcile the views from the two extremes.¹⁸³ One is the interpretation made by Jackson, regarding WTO rules as firmly binding and which cannot be modified or negotiated.¹⁸⁴ The other is the view represented by efficient breach theory, which posits that WTO entitlements are protected by liability rules.¹⁸⁵ Pauwelyn claims, however, that "entitlements under international law ought to be protected by a property rule," which means that the entitlements can be transferred under the consensus of both parties.¹⁸⁶ In conclusion, regardless of the matter of practice, most scholars identify with the view that WTO obligations are legally and doctrinally binding. This paper considers whether the idea that WTO obligations should be strictly complied with is still contestable, to the extent that trade law is different

176. These Articles belong to the "intra-contractual flexibility" of the WTO, which will be discussed in the following text. *See infra* Part V(2) (B).

177. GATT 1947, *supra* note 17, art. 28; General Agreement on Trade in Services, art. 21, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS].

178. *See* Trachtman, *supra* note 157, at 146.

179. *See id.*

180. *See id.* at 130.

181. *See id.* at 146.

182. *See id.* at 129.

183. *See* JOOST PAUWELYN, OPTIMAL PROTECTION OF INTERNATIONAL LAW: NAVIGATING BETWEEN EUROPEAN ABSOLUTISM AND AMERICAN VOLUNTARISM 18 (2d ed. 2008).

184. *See id.* at 16.

185. *See id.* at 17.

186. *Id.* at 102

from the law of human rights or law proscribing genocide.¹⁸⁷

2. Bilateral Obligations or Collective Obligations

Even if one presumes that entitlements in the WTO are protected by property rules, member states may not always be able to negotiate deviations from their WTO commitments.¹⁸⁸ The issue as to whether WTO members can make “WTO-” agreements between themselves to contract out of their obligations is related to the controversy over whether WTO obligations are bilateral or collective in nature. Pauwelyn insists that the nature of WTO obligations should be determined by considering relevant provisions of the Vienna Convention on the Law of Treaties (“VCLT”).¹⁸⁹ According to Article 41.1(b)(i) and 58.1(b)(i) of the VCLT, two or more parties are allowed to modify or suspend operations of the multilateral agreements between themselves when certain conditions are satisfied.¹⁹⁰ Also, the aim of WTO obligations pertains to trade, which, unlike agreements in protecting human rights and the environment, cannot influence the benefits of other WTO members when being violated between certain parties.¹⁹¹ Because most of the WTO obligations are bilaterally negotiated before being multilateralized by the MFN principle, WTO obligations should, in this view, be considered as an assembly of bilateral obligations.¹⁹²

Opposing the views held by Pauwelyn, Chios Carmody believes that WTO obligations are collective in nature.¹⁹³ He suggests giving WTO law priority over the VCLT when determining this issue.¹⁹⁴ WTO law protects not only trade, but also members’ expectations in regard to certain governmental behaviors.¹⁹⁵ Because WTO obligations, as demonstrated by the centrality of MFN treatment in the WTO system, are universal and general, the breach of obligations among certain parties

187. See Trachtman, *supra* note 157, at 130; see also Pauwelyn, *supra* note 46, at 933.

188. Entitlements protected by property rules can be transferred through a consensus of the contracting parties, but if the entitlements are collective, WTO members cannot deviate from their commitments bilaterally.

189. See Pauwelyn, *supra* note 46, at 928-41.

190. The conditions include: (a) the modification is not prohibited by the treaty; (b) the modification does not affect the rights of other parties; and (c) the modification is compatible with the object and purpose of the treaty. Vienna Convention on the Law of Treaties, arts. 41.1(b)(i), 58.1(b), *opened for signature* May 23, 1969, 1115 U.N.T.S. 331.

191. See Pauwelyn, *supra* note 46, at 930-31.

192. See *id.* at 931-32.

193. See Chios Carmody, *WTO Obligations as Collective*, 17 EUR. J. INT’L L. 419, 423-25 (2006).

194. *Id.* at 437.

195. See *id.* at 421.

will break the universality of the WTO rules and damage other members' expectations and interests.¹⁹⁶

B. *Relationships Between MAS and WTO Rules*

Analyzing whether WTO obligations are bilateral or collective is quite important when determining the relationship between a MAS and WTO rules. "WTO+" commitments in a MAS are allowed under the WTO, but only if they introduce obligations extended to all WTO members under the MFN principle to avoid nullifying or impairing "benefits accruing to any Member."¹⁹⁷ A "WTO-" MAS, however, is illegal under Article 3.5 of the DSU when strictly interpreting the requirement "consistent with the covered agreements."¹⁹⁸ This paper argues that Article 3.5 of the DSU should be given a stricter interpretation so as to deny nations the freedom to contract out of their obligations as to the other dispute parties.

First, the purpose of the MFN obligation in WTO law is to prevent dispute parties from making agreements among themselves to waive obligations. The Marrakesh Agreement articulates that the aim of the WTO is to develop an integrated, viable, and durable multilateral trading system.¹⁹⁹ In early-stage rounds of GATT negotiations, though the tariff concession negotiation proceeded among the principal suppliers based on reciprocity, MFN treatment requires that concessions, once granted, be immediately and unconditionally extended to all contracting parties.²⁰⁰ Because unconditional MFN treatment, regarded as the foundation of the multilateral trading system, does not make each bilateral trading concession reciprocal, it is inappropriate to consider WTO obligations as an assembly of bilateral obligations.²⁰¹ Instead, any agreements waiving obligations between the dispute parties, even if it does not directly affect the benefits of other members, will undermine the essence of MFN treatment.

196. *See id.*

197. DSU, *supra* note 4, art. 3.5.

198. *Id.*

199. Marrakesh Agreement Establishing the World Trade Organization pmbll., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

200. The "principal supplier rule" is a practical consequence of the adoption of reciprocity and MFN clause. For the "principal supplier rule," see Factual Note by the Secretariat, *Rules and Procedures for the Dillon and Kennedy Rounds*, ¶ 13, WTO Doc. MTN/W/8 (Feb. 25, 1975).

201. The unconditional MFN treatment should be differentiated from the conditional MFN treatment, which requires a third party to provide a reciprocal offer to obtain the benefits under the MFN status. For conditional MFN treatment, see Jacob Viner, *The Most-Favored-Nation Clause in American Commercial Treaties*, 32 J. POL. ECON. 101 (1924).

MFN, as the cornerstone of the WTO system, created expectations for all WTO members—any WTO member, powerful or not, will immediately and unconditionally accord the benefits granted to any other country to all other contracting parties.²⁰² All members will be treated in a non-discriminatory manner, irrespective of market size, economic scale, or bargaining power.²⁰³ A breach of MFN treatment between any two parties, though without direct influence on the trade benefits of other members, will break the expectations of other contracting parties regarding how a WTO member will carry out its WTO obligations.²⁰⁴ Therefore, insisting on MFN treatment at any time for any member will create a single standard that is applied to all parties. Breaking such a single standard will introduce the risk of coercion and the excessive privilege of buying out obligations in the WTO system, similar to putting a bilateral patch on a multilateral trading system.

In addition, MFN treatment was designed to promote fair competition from the early stages of its evolution.²⁰⁵ Bilaterally contracting out of WTO obligations, often for protectionist purposes of a party, however, would allow governments to interfere with free competition. MFN treatment, free trade, and competition established economic relations among consumers and producers in different countries.²⁰⁶ When governments bilaterally waive WTO obligations in their MAS due to the pressure of domestic special interest groups, they may arbitrarily interfere with private property rights by distorting the competition among traders and producers.²⁰⁷

Second, having in mind the principle of fairness, WTO rule obligations should be applied uniformly to all WTO members.²⁰⁸ The concept of fairness is not easily defined, but from the political philosophy perspective, impartiality, determinacy, and coherence are the core of the fairness principle.²⁰⁹ In the context of the WTO system, fairness

202. Carmody, *supra* note 193, at 425.

203. GATT 1947, *supra* note 17, art. 1.1; see also Richard H. Snape, *Is Non-Discrimination Really Dead?* 11 *WORLD ECON.* 1, 1 (1988).

204. Carmody, *supra* note 193, at 422.

205. See Georg Schwarzenberger, *The Most Favored Nation Standard in British State Practice*, 22 *BRIT. Y.B. INT'L L.* 96, 106 (1945).

206. Carmody, *supra* note 193, at 425.

207. See ERNST-ULRICH PETERSMANN, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW* 131-33 (1991).

208. WTO Rule Obligations should be differentiated from the Market Access Obligations, which are contained in members' schedules annexed to GATT 1994 and GATS. For the classification, see Qin, *supra* note 136, at 484-85 (2003).

209. For the meaning of fairness, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Rawls argues that under the original position and behind the "veil of ignorance," fairness implies the need to

signifies that the gain and loss of the WTO trading system should be distributed to all WTO members in terms of the principle of equality without prejudice.²¹⁰ Contracting out of WTO obligations between dispute parties in the MAS, however, may be seen as discriminatory and contradicts the elements of impartiality and coherence stated in the fairness principle.

Third, per the principle of effectiveness in interpreting treaties, which is often relied on as a benchmark in reviewing certain interpretations, the requirements in Article 3.5 of the DSU should be strictly interpreted.²¹¹ If, as some scholars claimed, dispute parties can contract out of their WTO obligations in MAS to terminate disputes,²¹² the requirement of “shall be consistent with covered agreements” would make no sense. The Appellate Body in the *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* case stated that, in order to be “WTO-consistent,” WTO members’ regulatory requirements may not contravene any WTO obligations, unless they are justified under an applicable exception.²¹³ Also, Article 3.7 and Article 22.1 of the DSU describe compensation as a temporary action pending the withdrawal of the measure that is inconsistent with a covered agreement.²¹⁴ If the dispute parties can contract out of their obligations through MAS, they may actually attain permanent compensation agreements, which will make the temporality requirement meaningless. In addition, Article 10 of the Marrakesh Agreement specifies the requirements for amendment; Article 9.3 sets rules for requesting for a waiver; and Article 13 lays down the circumstances of non-application of multilateral trade agreements between particular

avoid being influenced by our own interests, priorities, or prejudices. *See id.* at 136-42; *see also* THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 34-38 (1995).

210. Different treatment principles should be considered for vulnerable economies. *See* Derk Bienen & Mamo E. Mihretu, *The Principle of Fairness and WTO Accession = An Appraisal and Assessment of Consequences*, 4-8 (Second Biennial Glob. Conference, Working Paper No. 2010/29, 2010).

211. For the principle of effectiveness in interpreting treaties, *see* Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 *EUR. J. INT’L L.* 605, 635 (2010).

212. For instance, Pauwelyn contends that even the MAS made between dispute parties has an effect distinct from withdrawing their measures inconsistent with the covered agreements, as long as the benefits of other members are not damaged, the dispute parties can legally terminate the dispute in that way. Pauwelyn, *supra* note 46, at 947.

213. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 223, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009).

214. DSU, *supra* note 4, arts. 3.7, 22.1.

members.²¹⁵ If the dispute parties are allowed to freely amend and waive obligations between themselves, they may, in effect, derogate from the above articles.

Fourth, weighing the value of flexibility for WTO members against the value of predictability in a multilateral trading system, “WTO-” MAS should not be allowed. To establish a balance between flexibility and predictability of the WTO, the WTO incorporates appropriate flexibility as part of the covered agreements, termed intra-contractual flexibility.²¹⁶ Intra-contractual flexibility represents the formal (de jure) trade policy flexibility tools provided by the WTO, which may include restrictions to safeguard the balance of payments, infant industry protection, safeguards, general exceptions, security exceptions, tariff renegotiation, etc.²¹⁷ Extra-contractual breach is the behavior of defection or violation by WTO members, which are not formally allowed by WTO rules.²¹⁸ “WTO-” MAS, without formal permission from the WTO, falls outside the domain of WTO intra-contractual flexibility. Although both intra-contractual breaches and extra-contractual breaches are *ex post* non-compliance, an intra-contractual breach is legal under the WTO and usually only requires offering compensation as a remedy.²¹⁹ An extra-contractual breach, on the other hand, is illegal and usually should be alleviated through the dispute settlement mechanism of the WTO.²²⁰

Apart from intra-contractual flexibility, the DSU also provides members with enough space to implement the recommendations.²²¹ For example, Article 21.3(b) of the DSU allows dispute parties to establish a mutually agreed “reasonable period of time.”²²² The dispute parties also have the freedom to decide how they will implement the

215. Marrakesh Agreement, *supra* note 199, arts. 9.3, 10, 13.

216. For the classification of intra-contractual flexibility and extra-contractual flexibility, see Simon A.B. Schropp, Trade Policy Flexibility and Enforcement in the WTO Reform Agenda Towards an Efficient “Breach” Contract 6 (Jan. 2008) (unpublished Ph.D. dissertation, University of St. Gallen).

217. See SIMON A.B. SCHROPP, TRADE POLICY FLEXIBILITY AND ENFORCEMENT IN THE WORLD TRADE ORGANIZATION: A LAW AND ECONOMIC ANALYSIS 4 (2009); see also GATT 1947, *supra* note 17, arts. 12, 18, 19, 20, 21, 28.

218. See SCHROPP, *supra* note 217, at 8.

219. See *id.* at 6-7.

220. See *id.* at 8-9.

221. See Porges, *supra* note 112, at 146.

222. DSU, *supra* note 4, art. 21.3.

recommendations of the panel and AB.²²³ In addition, in spite of the regulations regarding a reasonable period of time, the dispute parties can, in practice, devise their own timetables to make their measures consistent with the covered agreements through a MAS.²²⁴ This freedom implies that the WTO has accommodated temporary noncompliance, as long as the dispute parties have actively sought solutions and strived to change inconsistent measures.²²⁵ However, if the dispute parties are granted rights to contract out of their obligations, the deliberately established balance in the WTO system will be disturbed. Moreover, the extra-contractual breach will be automatically transferred into intra-contractual breach in a manner contrary to the objectives and purposes of the WTO system.²²⁶

Fifth, MASs belonging to the category of “WTO-” agreements would constitute “grey area measures.”²²⁷ Grey area measures, such as the Voluntary Export Restraints (“VERs”) prohibited by the Agreement on Safeguards, exhibit a tendency of bilateralism, which would undermine the value of a multilateral trading system.²²⁸ VERs are voluntary reductions of exports by exporting countries who control and administer limitations on trade, usually through export licensing systems.²²⁹ In practice, however, VERs are not voluntary in the common sense of the word, but administered by export countries to avoid trade barriers likely be imposed by importing countries.²³⁰

From an economic perspective, VERs often caused significant protection costs as they diverted the “quota rent”²³¹ from importing countries

223. Although Article 19 of the DSU authorizes the panel or Appellate Body to suggest ways in which WTO members can implement the recommendations, the suggestions are non-binding. The members can determine the most suitable way of implementing the rulings.

224. “The suspension of concessions or other obligations . . . shall only be applied until such time as . . . a mutually satisfactory solution is reached.” DSU, *supra* note 4, art. 22.8. That means when a MAS is reached, whether the reasonable period of time has passed becomes not so important. The three requirements in Article 3.5 of the DSU, *supra*, also do not demand the implementation timetable reached by the parties in MAS to be consistent with the agreed reasonable time period.

225. Zimmermann, *supra* note 94, at 382.

226. Simon A.B. Schropp, *Revisiting the “Compliance-vs.-Rebalancing” Debate in WTO Scholarship: Towards a Unified Research Agenda* 15-16 (HEI, Working Paper No. 29/2007, 2007).

227. *See* Lee, *supra* note 8, at 156.

228. *Id.*

229. SABINA NÜESCH, *VOLUNTARY EXPORT RESTRAINTS IN WTO AND EU LAW: CONSUMERS, TRADE REGULATION AND COMPETITION POLICY* 2 (2010).

230. *See* Carl Hamilton, *Voluntary Export Restraints and Trade Diversion*, 23 J. COMMON MKT. STUD. 345, 345 (1985).

231. Quota rent is the price difference of the products which have imposed restrictive measures between domestic market and global market. *See* PAUWELYN ET AL., *supra* note 131, at 225.

to enterprises in exporting countries.²³² As a result, VERs, as a protectionist trade measure, redistributed interest among different domestic groups at a high protection cost.²³³ Although competing import industries benefited from these grey area measures, the interests of consumers and the integrated social economy were impaired.²³⁴ From a political perspective, most VERs and their protection costs were not published and lacked transparency.²³⁵ In addition, virtually no formal procedures were required for importing countries to resort to VERs, making VERs preferred by governments of importing countries.²³⁶ More importantly, VERs undermined the tariff-based trade policy in GATT, which is indiscriminate and transparent, and should be determined via legislation through rounds of trade negotiation.²³⁷ Therefore, Article 11.1(b) of the Agreement on Safeguards prohibits WTO members to “seek, take or maintain any VERs” or other similar measures.²³⁸ Similar to VERs, contracting out of obligations through MAS cannot provide general protection to the domestic economy, but can only set up redistribution among different stakeholders, which is economically inefficient. Also, due to the lack of transparency, it is impossible for domestic stakeholders to express their concerns in a democratic way. Considering the attitude of the WTO towards VERs, dispute parties similarly should not be allowed to contract out of their obligations in a MAS to avoid harming the multilateral trading system through bilateral agreements.

VI. SUGGESTIONS ON IMPROVING THE WTO MULTILATERAL ENFORCEMENT SYSTEM

A. *Reasons for Persevering in Multilateralism*

When there is tension between bilateral dispute settlement and the rule-oriented multilateral trading system, insisting on multilateralism is a better solution because bilateral reciprocity is better off not being separated from the unconditional MFN principle.²³⁹ Though there are

232. *Id.*

233. See PETERSMANN, *supra* note 207, at 106-10.

234. See Lee, *supra* note 8, at 159.

235. See PAUWELYN ET AL., *supra* note 131, at 226.

236. See *id.*

237. See PETERSMANN, *supra* note 207, at 106-10.

238. Agreement on Safeguards art. 11.1 (b), Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 33 I.L.M. 1125.

239. Keohane stated that specific reciprocity and unconditional MFN clauses have achieved a rough balance within GATT/WTO. Overly depending on specific reciprocity may lead to costly

many troubles and challenges regarding multilateral governance, which, according to some scholars, has passed its prime,²⁴⁰ multilateralism and a rule-oriented international regime can better promote cooperation and restrain power politics.²⁴¹ The lessons of the Great Depression and the beggar-thy-neighbor trade policies of the 1930s should never be forgotten, as they illustrate that, without the constraint of international institutions, the pursuit of power and self-interest may be emphasized over cooperation.²⁴² Institutionalized rules of reciprocity and MFN, which are monitored and enforced multilaterally, can better guard member states against defection and undertaking beggar-thy-neighbor policies; this is especially true for developing countries, where a rule-based regime can help mitigate their fear of power abuse from stronger states.²⁴³ Even though the emerging economies today hope to contribute to global governance, they have never expressed a will to break the existing system established by the United States and Western Europe after World War II and later reinforced after the fall of the Soviet Union. Instead, the emerging economies wish to defend the rules present in multilateral institutions to protect their global interests.²⁴⁴ These interests are shared by both the emerging economies and developed countries and can be the basis of cooperation.²⁴⁵ The requirement of cooperation, especially in an era of interdependent economies and security, demonstrates more interest in maintaining multilateral governance.

negotiations and administrative tangles. Also, it is difficult for states to establish strict equivalence bilaterally. See Robert O. Keohane, *Reciprocity in International Relations*, 40 INTL. ORG. 1, 17-18 (1986).

240. The circumstances today are quite different from the special conditions that generated postwar multilateralism. The United States, who has been playing a vital leadership role in the postwar institutions, has changed its mind to multilateralism, and the rising of some developing countries and the increasing number of participants make cooperation under multilateralism harder than before. See G. John Ikenberry, *The Future of Multilateralism: Governing the World in a Post-Hegemonic Era*, 16 JAPANESE J. POL. SCI. 399, 408-10 (2015).

241. See Goldstein et al., *supra* note 158, at 387-89; see also ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 68-69 (2005).

242. The term "beggar-thy-neighbor" was first seen in E. A. GOWER, BEGGAR MY NEIGHBOUR!: THE REPLY TO THE RATE ECONOMY RAMP (1932).

243. See AMRITA NARLIKAR, THE WORLD TRADE ORGANIZATION, A VERY SHORT INTRODUCTION 5-7 (2005).

244. See Ikenberry, *supra* note 240, at 410-13.

245. See *id.*

B. Establishing a “Special Panel”

Although the DSB is the body in charge of implementation in WTO dispute settlements, it is not well-organized and lacks expertise in this respect.²⁴⁶ One way to improve this multilateral enforcement mechanism would be to establish a “special panel” consisting of experts to assist the DSB in monitoring and supervising compliance. Because the status of the special panel is just an informal group, it can be established directly by the WTO Secretariat to assist in the work of the DSB without authorization from WTO members.²⁴⁷ The WTO Secretariat plays an important role in overseeing the implementation of commitments made by WTO members.²⁴⁸ It also provides information to the public and the media and gives legal assistance.²⁴⁹ The work of the special panel should fall within the function of the WTO Secretariat.

1. Rationale for Establishing a Special Panel

Establishing a special panel would promote cooperation among WTO members in supervising implementation, as well as monitor compliance status from inside governments. Anne-Marie Slaughter believes that the world order is based on the combination of horizontal and vertical trans-governmental networks.²⁵⁰ The existing modes of cooperation in the WTO have included horizontal networks when dealing with enforcement issues, such as the surveillance of implementation under the DSB. The establishment of a special panel, operating under authority delegated by the WTO Secretariat, may make horizontal networks

246. “The DSB has authority to establish dispute settlement panels, refer matters to arbitration, adopt panel, Appellate Body and arbitration reports, maintain surveillance over the implementation of recommendations and rulings, and authorize suspension of concessions.” *Dispute Settlement Body*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (last visited Feb. 17, 2018).

247. The WTO Secretariat, with offices in Geneva, has 634 regular staff and is headed by a Director-General. It has the responsibility of providing support to WTO member governments. *Overview of the WTO Secretariat*, WTO, https://www.wto.org/english/thewto_e/secre_e/intro_e.htm (last visited Feb. 17, 2018).

248. Gregory Shaffer, *The Role of the Director-General and Secretariat: Chapter IX of the Sutherland Report*, 4 WORLD TRADE REV. 429, 429 (2005).

249. *Overview of the WTO Secretariat*, WTO, https://www.wto.org/english/thewto_e/secre_e/intro_e.htm (last visited Mar. 9, 2018).

250. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 19-23 (2004). A horizontal network is a mode of cooperation among government officials in dealing with issues in their respective areas. See *id.* at 19. Horizontal networks can be both spontaneous and institutionalized within international organizations. *Id.* Vertical networks emerge when governments delegate their authority to a “supranational” organization, which can be both inside and outside an international organization. *Id.* at 20.

among governments work more effectively. Specifically, the special panel could be made up of experts nominated by the WTO Secretariat who are more adept in supervising compliance. The special panel could also help overcome the adversarial nature of the DSB in exercising the surveillance function.

The special panel could not only promote cooperation in the trans-governmental horizontal network under the DSB, but also establish a “quasi-vertical” network, connecting itself with WTO members’ enforcement departments by collecting domestic compliance information, monitoring compliance status, and providing technical assistance programs. This connection may also promote enforcement within the member states by influencing the checks and balances between different interest groups.²⁵¹ For example, by collecting compliance information and increasing transparency, the special panel may reduce the information costs to the public and encourage consumers to resist the noncompliance of a protectionist interest group.²⁵² The practice of establishing an independent body to form a vertical trans-governmental network is not rare in international society. For example, when dealing with securities fraud, the International Organization of Securities Commissions (“IOSCO”) established a monitoring group to identify problems in compliance under the Multilateral Memorandum of Understanding (“MMOU”) and practiced the method of “name and shame” for members who violated the MMOU.²⁵³ To prevent illicit funds from being circulated in the financial system, the G-7 ministers established the Financial Action Task Force (“FATF”), an independent international body.²⁵⁴ FATF created a blacklist of the jurisdictions that did not effectively implement its recommendations and called on other members to refrain from making transactions with jurisdictions on the blacklist.²⁵⁵

Similarly, in the context of international trade, the WTO could strive to establish a vertical inter-governmental network like in the international financial system to check and balance the autonomy of WTO members in implementing WTO rulings and making MASs. An

251. *See id.* at 30.

252. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 547-548 (2000).

253. *See* Stavros Gadinis, *Three pathways to global standards: private, regulator, and ministry networks*, 109 AM. J. INT’L L. 1, 25-28 (2015).

254. Mark Pieth, *International Standards against Money Laundering*, in A COMPARATIVE GUIDE TO ANTI-MONEY LAUNDERING: A CRITICAL ANALYSIS OF SYSTEMS IN SINGAPORE, SWITZERLAND, THE UK AND THE USA, 3, 8 (Mark Pieth & Gemma Aiolfi eds., 2004).

255. *See id.* at 28-32.

informal special panel established by the WTO Secretariat could also help avoid the opposition of the powerful states because it may need no formal authorization from the ministerial conferences or the General Council to be established. Although the special panel is not a supranational institution, to some extent, it can play a similar role as an independent body, especially when it assists in exercising management functions.

2. Functions of the Special Panel

First, the special panel would help examine the contents of MASs. Article 3.6 and Article 21.6 of the DSU demand notification by the dispute parties but do not explain how the information provided by the dispute parties should be verified.²⁵⁶ If a special panel were established to assist the DSB in examining the content of MASs, it would be able to give its opinion on whether the MAS in question has met the requirements of Articles 3.5 and 3.6, whether the MAS notified by the dispute parties is a final solution to the dispute, whether the MAS is specific enough to demonstrate the enforcement steps, whether the dispute parties have contracted out of WTO obligations, and whether the MAS has affected other members' benefits. After the special panel makes its opinion, it could invite other WTO members under the DSB to offer their comments.

Second, the special panel could not only examine the content of the MAS, but also actively collect compliance information from member states and spread the information to all WTO members. This action might call attention to all members regarding the compliance process of the respondent in an international society. It could also work with the trade policy review mechanism ("TPRM") to increase transparency in the WTO. The TPRM works as an administrative mechanism, contributes to the collective appreciation and evaluation of individual member's trade policies and practices, and analyzes their influence on the multilateral trading system.²⁵⁷ By collecting and spreading compliance information in specific disputes, the special panel would supplement the functions of the TPRM and increase the reputational cost of noncompliance.²⁵⁸ The special panel could also learn from the FATF by creating a blacklist including the members with bad implementation

256. See Alschner, *supra* note 5, at 91; Zimmermann, *supra* note 94, at 403.

257. *Trade Policy Review Mechanism (TPRM)*, WTO, https://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm (last visited Apr. 8, 2017).

258. Supplemented with the functions of the TPRM, the special panel would play a different role in supervising the enforcement of WTO obligations. The special panel would concentrate

records.²⁵⁹ This method of increasing transparency could effectively push member states to make their measures consistent with the covered agreements.

When collecting and spreading information, the special panel could also cooperate with non-governmental organizations (“NGOs”), enabling them to play an assisting role in information collection and assessment.²⁶⁰ The participation of international NGOs, furthermore, could balance the influence of special interest groups within member states.

Third, the special panel could help promote capacity building in developing countries. Capacity limitations of member states have been considered a major reason for noncompliance by proponents of managerialism.²⁶¹ After the establishment of the WTO, various developing countries incurred significant costs to comply with their obligations under the new agreements, such as TRIPS.²⁶² Sometimes, they must create new legislative and regulatory regimes and systems to comply with their obligations.²⁶³ Taking climate change as an example, due to the capacity limitation in some developing countries in adapting to climate change and promoting research and development on technologies, one of the most urgent issues to be resolved is how environmentally sound technologies can be transferred from developed countries to developing countries.²⁶⁴ Without the capability of acquiring proper technology, complying with TRIPS will probably incur high compliance cost.²⁶⁵ The special panel could establish a direct relationship with compliance departments within countries that require capability building. For example, the special panel under the DSB could draw lessons from the IOSCO, which established the knowledge-sharing mechanism, to

solely on the enforcement issues arising in specific cases brought by WTO members to the Dispute Settlement Mechanism.

259. For example, the FATF perceived the Democratic People’s Republic of Korea (DPRK) and Iran as Non-Cooperative Countries or Territories (NCCTs) in its 2018 Public Statement. See Fin. Action Task Force, *Public Statement* (Feb. 23, 2018), <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-february-2018.html>.

260. See CHAYES & CHAYES, *supra* note 142, at 28.

261. See *id.* at 271.

262. See NARLIKAR, *supra* note 243, at 71-73.

263. See Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, 23 WIS. INT’L L. J. 643, 654-655 (2005).

264. Meir Perez Pugatch, *Global Challenges Rep.: Intellectual Property & the Transfer of Environmentally Sound Technologies*, at 21-23 (June 2011), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_gc_4.pdf.

265. See Khorsed Zaman, *The TRIPS Patent Protection Provisions and Their Effects on Transferring Climate Change Technologies to LDCs and Poor Developing Countries: A Critical Appraisal*, 3 ASIAN J. INT’L L. 137, 148-49 (2013).

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provide authoritative instructions to member states.²⁶⁶ It may also offer practical training through technical assistance programs.²⁶⁷

VII. CONCLUSION

Mutually Agreed Solutions play an important role in WTO dispute resolution by granting dispute parties sufficient autonomy and flexibility. Due to the ambiguity of relevant regulations and lack of effective surveillance, however, the MAS system has been used in some cases to waive obligations. Although strict compliance is impractical in international society, it is still necessary to clarify that the WTO rules have collective features, meaning that dispute parties cannot contract out of their obligations. Legally speaking, zero-tolerance for extra-contractual breach can help ensure that parties will incur reputational costs when defecting from legally binding rules. Introducing a stronger multilateral enforcement mechanism with the assistance of a special panel authorized by the WTO Secretariat could also be an appropriate method of maintaining multilateral governance and protecting the predictability of the WTO system. A special panel performing management tasks will not function as a powerful supranational body to impose sanctions²⁶⁸ and may be a feasible choice to maintain the efficacy of the WTO dispute settlement system and bolster the multilateral trading systems against future attacks.

266. Emerging Markets Comm. of the Int'l Org. of Sec. Comm'ns, *Obstacles to Joining the IOSCO MOU*, at 7-12 (Apr. 2007), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD246.pdf>.

267. See Gadinis, *supra* note 253, at 28.

268. Some rationalists conceive states as rational actors that may purposely choose not to comply with their commitments. They contend that, without effective sanctions, cooperation will be "in danger of collapsing." See Robert Axelrod & Robert O. Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, 38 *WORLD POL.* 226, 236 (1985). Enforcement theorists see management approach as inefficient to punish defectors and lower their defection incentives. See Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 *INT'L. ORG.* 609, 611-12 (2002).