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ARTICLE

Chinese Perspectives on the Rule of Law in International Economic Law

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Abstract

In the currently volatile global economic environment, China's perspectives on the rule of law in international economic law are of significance. In principle, China shares developing countries' attitudes towards international economic law. China also seeks to play a constructive role in the development of international economic law, endorsing a flexible and pragmatic approach. China has concluded international trade and investment treaties designed to constrain its policy space and is an active supporter of the World Trade Organization's dispute settlement and investor-state dispute settlement mechanisms, with a good record of compliance. Recent trade tensions demonstrate challenges for the international rule of law but also emphasise the role of law in overcoming political challenges.

Keywords: China's perspective; international economic law; rule of law

I. Introduction

The rule of law has been recognised as "an ideal as well as a key common value underpinning the operation of modern human society".[1] For instance, in September 2012, heads of state and government gathered at the United Nations (UN) headquarters to confirm their commitment to the rule of law.[2] Accordingly, China seeks to be "a staunch defender and builder of the international rule of law".[3] Yet, although few raise an objection about the rule of law as an abstract ideal, many still disagree on its specific content.[4] In other words, its firm adherents are locked in great disagreement about what the rule of law really is.[5] Nevertheless, there are certain core constituent elements of the rule of law, as identified by the Council of Europe: legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination and access to justice.[6]

[1] H Zhao, "International Law at a Crossroad – The International Rule of Law: An Ideal and the Reality" (2020) 19 Journal of WTO and China 3, 4.

[2] UN GA Res adopted on 24 September 2012, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN DOC A/RES/67/1.

[3] Y Wang, "China: A Staunch Defender and Builder of the International Rule of Law" (2014) 13 Chinese Journal of International Law 635.

[4] See M Kanetake, "The Interfaces between the National and International Rule of Law: A Framework Paper" in M Kanetake and A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Oxford, Hart Publishing 2016) p 19.

[5] R Dworkin, "The Rule of Law" (2013) 2013 Law of Ukraine: Legal Journal 7.

[6] For the emergence of the constituent elements of the rule of law in Europe, see the contribution by de Sadeleer and Damjanovic in this issue.

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The rule of law is not an all-or-nothing affair; it is a matter of degree.[7] Accordingly, compliance with the rule of law is difficult to assess. For the discussion of the evolving nature of the rule of law in international economic law, China's perspective is of key importance. This is not only because China, as the world's second largest economy and an active player in international economic relations, plays an important role in fostering the rule of law in international economic law. More critically, the rule of law in international economic law is facing challenges in a time of "unprecedented global trade tensions",[8] and the US–China feud has been deemed as the basic reason for the current untenable situation in the World Trade Organization (WTO) system.[9]

For the purpose of this article, two caveats should be put forward. First, the international rule of law is different from the rule of law at the national level,[10] as there is no overarching world government, and international law in the first instance affects states rather than individuals.[11] Nevertheless, by way of analogy, certain core requirements of the international rule of law can be summarised as follows: respect for international law, the existence of international courts or dispute settlement mechanisms for the enforcement of international obligations, impartiality and independence of adjudicators, legal certainty and the equal treatment of states.[12]

Second, although the content of "international economic law" remains controversial, there is consensus on its core subjects (ie world trade law, international investment law and international monetary law).[13] It has often been contended that international monetary law as supervised by the International Monetary Fund (IMF) is not truly "law", because the IMF does not impose legally binding obligations on its Members that create enforceable legal rights.[14] Hence, this article focuses on international trade and investment law for two reasons: first, rule-making and dispute settlement – the two most inherent aspects of the rule of law – are most strongly demonstrated in these areas of international economic law. Second, WTO law primarily regulates horizontal state-to-state relations, whereas international investment law regulates the authority exercised by the government against individuals who are entitled to enforce their rights directly against states through the investor-state dispute settlement (ISDS) mechanism. While the WTO dispute settlement mechanism resolves disputes between states, the ISDS mechanism provides individuals with access to justice at the international level.[15] Thus, different aspects of China's practice in these two subfields give a comprehensive picture of Chinese perspectives on the rule of law in international economic law.

II. China's official statements on the international rule of law

Understanding China's position on the international rule of law more generally provides an important context for an analysis of the Chinese perspective on the rule of law in international economic law. Hence, a summary of China's official statements with respect to the international rule of law should be a helpful starting point.

[7] Dworkin, supra, note 5, 8; see also J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press 1979) p 222.

[8] Panel Report, US – Tariff Measures on Certain Goods from China, WT/DS543/R, para 9.2.

[9] See PC Mavroidis and A Sapir, "State Capitalism in the GATT/WTO Legal Order" (2023) 26 Journal of International Economic Law 154, 163.

[10] On those differences, see the contribution by de Sadeleer in this issue.

[11] J Woldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" (2011) 22 European Journal of International Law 315.

[12] See the contribution by de Sadeleer and Damjanovic in this issue.

[13] M Herdegen, *Principles of International Economic Law* (2nd edition, Oxford, Oxford University Press 2016) p 3.

[14] See, eg, D Collins, *Foundations of International Economic Law* (Cheltenham, Edward Elgar 2019) p 215.

[15] See the contribution by Alexovicova in this issue.

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Since 2006, the UN General Assembly (GA) has adopted resolutions entitled "The Rule of Law at the National and International Levels".[16] There were many discussions on this topic at the Sixth Committee of the GA.[17] China's statements provided in these discussions should represent its official understanding of the rule of law.

According to China's Statement (hereafter the Statement) at the 68th Session of the GA in October 2013,[18] China's position on the rule of law has been explained as follows: (1) the rule of law is the common goal pursued by states; (2) the UN Charter is the starting point and touchstone of building the rule of law at the international level; (3) peaceful settlement of international disputes is inherent to the principle of the rule of law; and (4) the freedom of states concerned with choosing means of peaceful settlement of international disputes must be respected according to law.

Taking into account the core requirements of the international rule of law mentioned above, two points can be summarised from this Statement: first, all states should "strictly observe the rules of international law, adhere to its universal application, progressively improve the international legislation and advance the democratization of international relations". With regard to "the rules of international law", the Statement at the 76th Session of the GA in October 2021 is helpful for understanding China's position. It criticised "the concept of a so-called rules-based international order", as it is not clarified "what the exact rules were, who wrote them or how they were related to the international order". It is explained that countries advancing that concept might supplant the universally accepted rule of international law with their own rules, and this runs counter to the spirit of the rule of law and embodies unilateralism and power politics.[19]

Second, all states should endorse the basic principles of international law, such as the sovereign equality of states, fulfilling international responsibilities in good faith and pursuing the peaceful settlement of disputes in order to strengthen the rule of law at the international level. The peaceful settlement of international disputes is a basic principle of international law and is inseparable from the international rule of law. The rule of law and the peaceful settlement of international disputes are thus interconnected and mutually reinforcing.

Accordingly, on the basis of the above statements, China's position on the rule of law in international economic law will be analysed from two angles: (1) China's understanding of the rules of international law that should be adhered by – or, in the words of the Statement, "what the rules were"; and (2) China's attitude towards the dispute settlement mechanism. While the first perspective concerns international rule-making, the second one deals with the enforcement of rules at the international level.

III. China's position on international economic law rule-making

China has been considered a developing country since the beginning of its participation in international economic law in the early 1980s. In the last four decades, the policy of reform and opening up, including WTO membership, has fostered China's strong economic growth. Accordingly, China's position regarding international economic law rule-making is twofold:

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[16] See, eg, UN DOC A/RES/61/39, A/RES/77/110.

[17] Key documents of the UN on this topic, including GA resolutions, annual reports of the Secretary-General and other reports of the Secretary-General and of the Security Council, are available at <https://www.un.org/ruleoflaw/key-documents/> (last accessed 2 July 2023).

[18] Statement by H.E. Ambassador Wang Min on the Rule of Law at the National and International Levels at the 68th Session of the UN General Assembly <https://www.un.china-mission.gov.cn/eng/chinaandun/legalaffairs/sixthcommittee1/201310/t20131011_8412182.htm> (last accessed 2 July 2023).

[19] Summary record of the 6th meeting: 6th Committee, held at Headquarters, New York, on Tuesday, 12 October 2021, General Assembly, 76th session, A/C.6/76/SR.6, para 3.

(1) China shares developing countries' attitudes towards international law in principle; and (2) while Chinese perspectives are still influenced by those attitudes, China supports the development of international economic law, along with the economic growth.

1. Sharing developing countries' understanding of international law

In international economic law, a prominent example of developing countries' attitudes towards international law is the fair and equitable treatment (FET) standard in international investment agreements (IIAs). FET has been deemed as an expression of the rule of law by scholars.[20] Yet, considerable debate has surrounded the question of whether FET merely reflects the minimum standard of treatment (MST), as contained in customary international law (CIL), or offers an autonomous standard.[21]

This debate has historical roots, which ultimately led to the evolution of the FET standard. In the 1960s and 1970s, under the banner of the "new international economic order", the newly independent states (ie developing countries) opposed the MST. Their concern with this settled CIL rule was that it would bind new states that did not and could not have participated in their development, since they did not exist at that time. The result of the developing countries' concerted attack on foreign investment protection rules, including the MST, was the conclusion of bilateral investment treaties (BITs), which could provide contracting states with the opportunity to set out the definite norms between them. FET had been included in BITs, to a certain degree as a compromise between developing and developed countries.

FET is the most common substantive standard in more than 120 Chinese BITs since 1982. However, the FET clauses therein do not refer to the MST or CIL. In most Chinese BITs, the FET clause does not make express reference to a particular body of law or other standards. Only a few BITs refer to generally recognised principles of international law accepted by both parties (1984 China–BLEU BIT) or to universally/commonly recognised principles of international law (2007 China–Costa Rica BIT). As explained by scholars:

> [I]n applying general/customary international law, special attention might have to be paid to the fact that most principles of general/customary international law had emerged and been developed in the context of Europe and among developed States, and China has not participated in this process. As a result, there has been limited familiarity with and consequently a certain degree of resistance to such principles in China. Indeed, some earlier writings by eminent Chinese scholars have flatly denied the existence and the applicability of international law/minimum standard.[22]

Hence, when the FET standards in Chinese BITs refer to general international law, they normally reiterate that those principles are "recognised" or "accepted" by contracting parties. In recent years, the reference to CIL/MST has been used in some IIAs to constrain the interpretation of FET by arbitral tribunals. Recent Chinese IIAs[23] have followed this approach, with a view to ensuring that the intentions of the contracting parties about the scope of the FET standard are correctly applied by the arbitrators. For example, Annex 10A of the Regional Comprehensive Economic Partnership Agreement (RCEP) confirms the

[20] See, eg, A Reinisch and C Schreuer, *International Protection of Investment: The Substantive Standards* (Cambridge, Cambridge University Press 2020) pp 342–44.

[21] R Dolzer, U Kriebaum and C Schreuer, *Principles of International Investment Law* (3rd edition, Oxford, Oxford University Press 2022) p 198.

[22] N Gallagher and W Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford, Oxford University Press 2009) p 128.

[23] In recent decades, China prefers to incorporate investment chapters into its free trade agreements.

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Parties' shared understanding that "customary international law" results from a general and consistent practice of states.

Accordingly, the FET standards in Chinese IIAs demonstrate China's position on law-making in international economic law. International law should reflect evolved and "generally/commonly recognised" rules, as developed by all states – both developed and developing – rather than insisting on rules that were formulated before developing states had been established.

2. Treaty-making in international economic law: China's pragmatic and flexible approach

With regard to international trade and investment treaties based on contracting states' consent, China's approach is flexible and pragmatic. As explained previously, significant differences exist not only between Chinese BITs during different periods, which have been deemed as distinct generations, but also among Chinese IIAs concluded during those same periods. This indicates that China pursues a pragmatic and flexible approach that is able to accommodate the model preferred by the negotiation partner.[24] The same approach can be identified in China's free trade agreement (FTA) negotiations.[25]

This flexible approach is in accordance with the economic development based on the opening-up policy and the integration into the world economy, including China's accession to the WTO as a rule-based trade regime. The acceptance of rules of international economic treaties has stimulated economic development. Economic development, in turn, has facilitated China's more active participation in international economic treaty-making.

There are several examples of China's flexible approach to international economic treaty rules, in particular concerning rules on labour rights and state-owned enterprises (SOEs). The "Investment and Sustainable Development" chapter of the China–European Union (EU) Comprehensive Agreement on Investment (CAI)[26] follows the EU's FTA model and for the first time provides binding labour clauses in China's IIAs. There are no similar rules directly addressing labour rights in other Chinese international trade and investment treaties, including RCEP signed at the end of 2020. Only a few Chinese FTAs incorporate provisions on cooperation on labour issues.[27] China's treaty practice before the CAI is in accordance with developing countries' resistance to the trade–labour linkage, which is evidenced in the 1996 Singapore Ministerial Declaration remitting the international labour standards to the International Labour Organization (ILO).[28]

Against this background, the labour clauses in the CAI are "a new chapter" for China's treaty-making in international economic law.[29] According to Article 3.4.1 of the CAI, the contracting parties shall respect, promote and realise the principles concerning the fundamental rights that are the subject of the fundamental ILO Conventions. That clause might be interpreted as a commitment to enforce core labour standards elaborated by a fundamental ILO Convention that China has not ratified. Furthermore, although the

[24] J Xiao, "How can a prospective China–EU BIT contribute to sustainable development: in light of the UNCTAD Investment Policy Framework for Sustainable Development" (2015) 8 Journal of World Energy Law & Business 527.

[25] J Xiao, "ASEAN–China FTA: a pragmatic approach to regulating services and investment" in P Gugler and J Chaisse (eds), *Competitiveness of the ASEAN Countries: Corporate and Regulatory Drivers* (Cheltenham, Edward Elgar 2010) p 256.

[26] Although concluded at the end of 2022, the CAI has not been ratified yet.

[27] China–Chile FTA Art 108, China–Iceland FTA Art 96, China–New Zealand FTA Art 177 and China–Switzerland FTA Art 13.5.

[28] WTO, Singapore Ministerial Declaration, adopted on 13 December 1996 <https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> (last accessed 2 July 2023).

[29] See Y Yan, "A New Chapter on China's Stance in Labour Protection? An Assessment of the China–EU CAI" (2022) 25 Journal of International Economic Law 466.

ratification of the CAI has been stalled, China ratified ILO Conventions No. 29 and 105,[30] as expressly required by Article 3.4.2 of the CAI. This should be regarded as a sign of willingness to implement the commitments in good faith.

A further example of China's flexible approach are the rules on SOEs. Recent development, particularly in regional trade and investment agreements, have been intended to constrain so-called "state capitalism".[31] The Trans-Pacific Partnership Agreement (TPP) and, later, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) played leading roles in this respect. According to commentators, the TPP was initiated by the Obama administration with a view to contain China's rise, although this has been openly denounced by China.[32] Nevertheless, China's attitude towards the TPP/CPTPP has shifted over recent years, from initial suspicion to a more neutral attitude and, ultimately, application for accession.[33] The rules on "covered entities" in the CAI are similar to those in Chapter 17 – "State-Owned Enterprises and Designated Monopolies" of the CPTPP, in essence integrating the rules on SOEs. Although the rationale for China's shift was the furtherance of domestic economic reforms (eg of SOEs),[34] this example demonstrates China's willingness to abide by treaty rules, even when they are specifically designed to constrain its policy space.

IV. China's position on the WTO dispute settlement and ISDS mechanisms

When a treaty enters into force, whether the obligations provided by it have been complied with is the next focal point of the analysis of a state's approach to the international rule of law. Indeed, *pacta sunt servanda* is one of the core principles of the international rule of law, as understood by China. Yet, it is worth noting that treaty rules might be interpreted differently by contracting parties: one state may claim the breach of the treaty's obligations by another state because of their different understandings of the relevant rules, or sometimes simply to pursue its own politics. Thus, whether or not a state has breached its treaty obligations should be adjudicated by an independent dispute settlement mechanism. This concerns the enforcement of treaty rules at the international level. Therefore, for the purpose of this article, in determining China's perspectives on the rule of law in international economic law, the focus should be placed on China's attitudes towards the WTO dispute settlement and the ISDS mechanisms in general. This begs the question as to whether China supports those dispute mechanisms, as well as its compliance with adverse awards in particular.

It is evident that China is an active supporter of the WTO dispute settlement and ISDS mechanisms. China's support of a well-functioning WTO dispute settlement mechanism can be proved by the fact that it is a founding Member of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA)[35] as an interim response to the demise of the Appellate Body caused by the US blockade on appointments of Appellate Body members. With regard to the ISDS mechanism, as a capital-importing and developing country, China

[30] ILO, "ILO welcomes China's move towards the ratification of two forced labour conventions" (20 April 2022) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_842739/lang–en/index.htm> (last accessed 2 July 2023).

[31] See Mavroidis and Sapir, supra, note 9, 154–55. They pointed out that there is no single definition of the term "state capitalism", but China is the typical example of state capitalism and by far the biggest economy with this type of system.

[32] See, eg, M Du, "Explaining China's Tripartite Strategy toward the Trans-Pacific Partnership Agreement" (2015) 18 Journal of International Economic Law 407, 414.

[33] In September 2021, China applied to join the CPTPP.

[34] See Du, supra, note 32, 429–31.

[35] For information on MPIA participants and cases, see <https://wtoplurilaterals.info/plural_initiative/the-mpia/> (last accessed 2 July 2023).

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accepted the investor-state arbitration (ISA) in BITs before 1998, with the limitation that only disputes "involving the amount of compensation" could be submitted to ISA.[36] Since the China–Barbados BIT signed in 1998, Chinese IIAs usually contain a far-reaching consent to ISA for "any dispute concerning investment".[37]

In current debates on the reforms of the ISDS mechanism, China's stance is clearly explained in its submission to UNCITRAL Working Group III: the present ISDS mechanism enhances the rule of law in international investment governance. China believes that the ISDS mechanism is one that is generally worth maintaining and supports the study of a permanent appeal mechanism as a reform proposal.[38] Indeed, China's strong interest as a capital exporter today is crucial, but its belief in the rule of law should not be underestimated. For instance, the support of a permanent appeal mechanism aims at the enhancement of legal certainty as a core element of the rule of law.[39] Although there are debates on the degree of and reasons for the inconsistency of ISA awards,[40] the UNCITRAL Working Group III has identified some unjustified inconsistencies in the awards,[41] which raise concerns for predictability stemming from the principle of legal certainty. As a standing appeal tribunal with a small and stable membership of adjudicators and their collegial work can greatly improve the consistency of decision-making, China's submission explicitly points out that such a mechanism "would be an important factor in promoting the application of the rule of law to the settlement of dispute between investors and States".

China's record in the ISDS mechanism as a respondent state is relatively simple. There are eight known cases involving China as the respondent state on the basis of Chinese IIAs,[42] and only two of them had been decided by an arbitral tribunal, and both of these were in favour of China.[43] Hence, China's compliance with adverse awards has to be assessed on the basis of WTO cases.

There are many publications on this topic. For example, Zhou has conducted excellent research into disputes in which China has been a respondent until December 2018 and China's implementation of adverse WTO rulings. According to his research, China has been invoking the limitations and flexibilities of WTO rulings to ensure that its implementation of the rulings not only delivers adequate compliance but also maintains its own interests. Although there have been issues relating to the quality of China's compliance, they concern the loopholes in the dispute settlement mechanism itself that may be utilised by all WTO Members. His opinion is that China's record of compliance with adverse rulings provides one of the strongest pieces of evidence of China's full commitment to and respect for the rules-based multilateral trading system.[44] An analysis

[36] For example, Art 13(3) of the China–Singapore BIT signed in 1985.

[37] Art 9(1) of the China–Barbados BIT.

[38] United Nations, Possible reform of investor-state dispute settlement (ISDS), Submission from the Government of China, Note by the Secretariat, A/CN.9/WG.III/WP 177, 19 July 2019 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/073/86/PDF/V1907386.pdf?OpenElement> (last accessed 2 July 2023) 2, 4.

[39] See the contribution by Damjanovic in this issue.

[40] See, eg, E Sardinha, "The Impetus for the Creation of an Appellate Mechanism" (2017) 32 ICSID Review 503–14; J Kurtz, "Building Legitimacy through Interpretation in Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law" in Z Douglas et al (eds), *The Foundation of International Investment Law: Bringing Theories into Practice* (Oxford, Oxford University Press 2014) p 270.

[41] See United Nations, Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, Note by the Secretariat, A/CN.9/WG.III/WP.150, 28 August 2018, 2–11.

[42] Those cases are Ekran Berhad, ICSID Case No. ARB/11/15; Ansung Housing, ICSID Case No. ARB/14/25; Hela Schwarz GmbH, ICSID Case No. ARB/17/19; Jason Yu Song, PCA Case No. 2019-39; Macro Trading Co., Ltd, ICSID Case No. ARB/20/22; Goh Chin Soon, PCA Case No. 2021-30 (formerly ICSID Case No. ARB/20/34); AsiaPhos Limited and Norwest Chemicals Pte Ltd, ICSID Case No. ADM/21/1; Eugenio Montenero, ad hoc arbitration under UNCITRAL Rules.

[43] In the Ansung and AsiaPhos cases, the tribunals declined the jurisdiction.

[44] W Zhou, *China's Implementation of the Rulings of the World Trade Organization* (Oxford, Hart Publishing 2019) p i.

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by Bacchus et al shows that China does a reasonably good job of complying with the WTO complaints brought against it. It concludes that the WTO dispute settlement mechanism offers, over the long term, a far more effective means of responding to protectionist Chinese trade policies than a policy of applying illegal unilateral tariffs.[45]

Because the publications mentioned above have demonstrated China's good record of compliance with adverse WTO rulings, only a few comments on China's practice since 2019 need to be added. Due to the paralysis of the Appellate Body, a WTO Member facing adverse panel decisions can appeal "into the void" and thus block the panel report's adoption and the binding effect of the WTO rulings.[46] Since January 2019, more than ten Members have notified such appeals. China is one of them, but only in two cases against the USA, inter alia DS562 concerning an American safeguard measure on imports of crystalline silicon photovoltaic products. This is in contrast to multiple notifications by some Members, particularly the USA. Moreover, in light of China's support of the MPIA, the appeal "into the void" should be deemed as an exceptional case because (1) the DS562 panel rejected all of China's claims for the first time in the history of the WTO dispute settlement mechanism concerning safeguard measures and (2) it could be retaliatory due to the fact that the USA appealed several times.[47] Therefore, the evaluation that China has shown a good record of compliance with adverse awards would not be impaired by the use of this practice since 2019 – or rather, this practice represents the status quo of the rule of law in international economic law.

V. Recent challenges facing the rule of law

The rule of law is, and can be satisfied as, a matter of degree. At the international level, the limitation of power, which is at the heart of the concept of the rule of law, would be more limited, as sovereign states have to limit their own power (ie sovereignty) when they create international rules. Accordingly, legal certainty and the clarity of international rules are also more limited. States may use these ambiguities to proclaim that they are not violating their obligations, at least in letter.

With regard to those limitations of the rule of law in international economic law, the most impressive lesson for China could relate to the controversies over Article 15 of China's Accession Protocol.[48] Before the China–US trade war, the debate around China being granted Market Economy Status was the most acrimonious WTO-based disagreement in the first two decades of China's WTO membership.[49] From the viewpoint of China, Article 15 is an agreement – in other words, a compromise – made with other Members requiring that the normal WTO rules on price comparability should be applied in anti-dumping proceedings involving Chinese imports after the expiration of fifteen years of China's accession.[50] However, the USA and EU sought to use the

[45] J Bacchus, S Lester and H Zhu, "Disciplining China's Trade Practices at the WTO" (2018) CATO Institute Policy Analysis No. 856, 1–2 <https://www.ssrn.com/abstract=324657> (last accessed 2 July 2023).

[46] See J Pauwelyn, "WTO Dispute Settlement Post 2019: What to Expect?" (2019) 22 Journal of International Economic Law 303.

[47] For instance, in cases involving China as a complainant: United States – Tariff Measures on Certain Goods from China (DS543) and United States – Certain Measures on Steel and Aluminium Products (DS544).

[48] According to para (a)(ii) of Art 15, importing WTO Members were, subject to certain conditions, exceptionally permitted to use a methodology not based on a strict comparison with domestic prices or costs in China. Para (d) provides that "[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession" – in other words, on 11 December 2016.

[49] See J Scott and R Wilkinson, "China and the WTO, Redux: Making Sense of Two Decades of Membership" (2022) Journal of World Trade 98.

[50] See Europe Union – Measures Related to Price Comparison Methodologies, Request for the Establishment of a Panel by China, WT/DS516/9, para 6.

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ambiguities in that Article to prevent the normal price comparison methodologies from being applied to Chinese products. Although China submitted the disputes to the dispute settlement mechanism at first, in the shadow of the China–US trade war, China did not request the establishment of a panel in case DS515 against the USA; in the case between China and the EU (DS516), the panel proceeding was suspended in May 2019 upon China's request and terminated one year later. Hence, the normal WTO rules are still not applied to Chinese products.

Recently, China's trade restrictions on certain products from Lithuania or Australia have been the subjects of dispute settlement mechanism disputes[51] and of harsh criticism.[52] Indeed, those trade measures might be used to pursue foreign policies. However, China is "not particularly unique in this regard"[53] because "it was national security advisors who were holding the pen at the latter stages of the negotiation" of the General Agreement on Tariffs and Trade (GATT), and "trade policy has always been foreign policy, after all, at least for big, powerful countries".[54] Therefore, it is unconvincing to proclaim that China's practice is "qualitative different"[55] in light of the multiple cases involving measures pursuing foreign policies, such as United States – The Cuban Liberty and Democratic Solidarity Act (DS38).

Recent trade tensions demonstrate various challenges that states' trade policies can present for international economic law, thus highlighting the importance of strong international institutions applying international law in order to overcome political disagreements.

VI. Conclusion

In China's view, the baseline is that international economic rules must be accepted by the state – mutually on a bilateral level or universally on the multilateral level – or, in fact, be based on states' consent. When consent exists, in particular with regard to treaty-making in international trade and investment law, China has followed a flexible and pragmatic approach and has demonstrated that it is open to accepting treaty rules that are designed to constrain its domestic policy space. With respect to the enforcement of international rules, China supports the maintenance and improvement of the WTO dispute settlement and ISDS mechanisms in general. China has a reasonably good record of compliance with adverse WTO rulings. A few cases since 2019 could be seen as evidence of China's insistence on the baseline mentioned above.

The rule of law is a matter of degree. At the international level, superpowers' compliance with the treaty rules to which they have acceded puts into question the existence of the international rule of law.[56] However, recent trade tensions also demonstrate that the value of the international rule of law should be emphasised at this moment in particular. China's perspectives should contribute to the enhancement of the rule of law in international economic law.

[51] China – Anti-dumping and countervailing duty measures on barley from Australia, WT/DS598; China – Anti-dumping and countervailing duty measures on wine from Australia, WT/DS602; and China – Measures concerning Trade in Goods (EU), WT/DS610.

[52] See B Czapnik and B Mercurio, "The Use of Trade Coercion and China's Model of 'Passive-Aggressive Legalism'" (2023) 26 Journal of International Economic Law 322.

[53] W Zhou and J Laurenceson, "Demystifying Australia–China Trade Tensions" (2022) 56 Journal of World Trade 84.

[54] Mavroidis and Sapir, supra, note 9, 156.

[55] Czapnik and Mercurio, supra, note 52, 324.

[56] Zhao, supra, note 1, 7.

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