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ARTICLE

The Concept of the Rule of Law and Global Economic Governance: Theoretical Remarks

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Abstract

This article offers some general thoughts on the rule of law in international economic law. It begins by briefly defining the rule of law and indicating the legal sources on which it is based. It then shows that the TFEU, confirmed by the case law of the Court of Justice, requires the rule of law to be respected in the conduct of the Union's commercial policy. However, although the rule of law may be favourable to international trade and investment, it is not indispensable to them. The rule of law is conducive, but not essential, to trade and investment. For businesses, the risks associated with a weak respect for the rule of law represent a cost, which they take into account when setting the price of their products. Finally, it should be remembered that the principles of the rule of law do not apply in the same way in the domestic sphere as in international law. This article is intended as a panoramic introduction to the relationship between the rule of law and international economic law. More specialised studies are published later in this issue, including analyses focusing on trade or investment or national perspectives, such as that of China.

Keywords: EU commercial policy; free trade agreements; rule of law; World Trade Organization

I. Introduction

While the rule of law is a relatively well-known and well-applied concept in Western countries, its application in the field of international economic relations is less obvious. These few pages will not suffice to clarify all the questions that arise on this subject. Very modestly, we will briefly explain the meaning of the rule of law (section II) and present some of the legal sources on which it is based (section III). This article will then show how the rule of law forms part of the EU's trade policy (section IV), while putting this assertion and the importance of the rule of law in international economic relations into perspective (section V). We will end with a few words on the difference between the internal and external dimensions of the rule of law (section VI).

II. What is the rule of law?

There can be no question of setting out here a complete theory of the rule of law. A detailed account would far exceed the limits of this modest contribution. Moreover, it would imply going beyond the law to explore other disciplines such as philosophy and political science. Conceptions of the rule of law vary across countries, legal and political systems, and in time, as is shown by the difficulty of translating the concept (*rule of law* in English, *État de droit* in French, *Rechtsstaat* in German), which immediately reveals nuances

that go beyond terminology. In their introduction to the present issue, N. DE SADELEER and I. DAMJANOVIC explain in more detail the origins and characteristics of the different models.[1]

The rule of law can be conceived more formally or more substantively,[2] although the two aspects cannot be completely separated. Scholars sometimes draw a distinction between an Anglo-American conception of the rule of law, based more on the limits to state powers and guaranteed by a vigorous judiciary, and a Franco-German conception which places greater emphasis on the primacy of positive law (especially of the written constitution) and respect for human rights.[3] This distinction can obviously be nuanced and refined, for instance by examining more closely the differences between the United Kingdom and the United States: the latter have a written constitution, a different conception of the "checks and balances," and do not assign exactly the same function to the judicial system.

Without delving deeper into these debates which are ultimately based on the writings of legal philosophers and political theorists, we will limit ourselves to a few intuitive elements, serving as much as possible as a working definition. The rule of law is a set of legal, political and even philosophical principles that are associated with good public governance and the satisfactory functioning of a legal system. The rule of law is respected when these principles are sufficiently followed in a given community; on the other hand, it is not respected, or it is in danger, when there are too many or too fundamental deviations from these principles.

The rule of law is a concept made up of several sub-principes, being understood that it cannot be reduced to a precise list of characteristics. The following elements[4] are generally considered to constitute the rule of law, on the understanding that they partly overlap and mutually reinforce each other.

- The principle of legality and legal certainty, which requires in particular that laws and regulations be adopted democratically, that they be drafted in a clear, transparent and precise manner, that they be easily known and consulted by those to whom they are addressed, in particular through official publication, and that the legislation present a sufficient degree of stability.
- The principle of the authority of the law, according to which all legal subjects, including the State itself and all public authorities, are bound by the legal norms and are obliged to respect them, but also generally comply with them effectively. If breaches of the law inevitably occur, they must remain the exception and cause some form of disapproval or sanction.
- The prohibition of arbitrariness in the acts of public authorities, which must treat all citizens equally, particularly in the application of the law, and avoid unjustified, discriminatory or disproportionate acts and behaviour. The action of the public authorities must be subject to effective control, in particular by giving the right to an effective remedy and access to an independent authority, endowed with the powers required to put an end to arbitrariness.

[1] Nicolas de Sadeleer and Ivana Damjanovic, "Introduction," this issue.

[2] Ming Du and Qingjiang Kong, "Explaining the Limits of the WTO in Shaping the Rule of Law in China" (2020) JIEL 885, 888; Simon Chesterman, "Rule of Law," *Max Planck Encyclopaedia of Public International Law* (2007) 13. See also Simon Chesterman, 'An International Rule of Law?' (2008) American Journal of Comparative Law 331.

[3] Chesterman, "Rule of Law" (n 2) 3–9. Elements of comparison can also be found in Nadia E Nedzel, "The International Rule of Law and Economic Development" (2018) Washington University Global Studies Law Review 447.

[4] See also Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" (2011) JIEL 315, 316.

- The separation of powers and, in particular, the independence of the courts. The latter must take their decisions in application of the law, without being obliged to submit to the decisions of other authorities, especially political ones. Judicial decisions must be generally respected and enforced, including when public authorities are condemned, and effective access to justice must be guaranteed to all citizens, which means in particular that disproportionate obstacles to access to justice, particularly in terms of cost, must not be created or allowed to persist. The judiciary must ensure respect for other principles, in particular the prohibition of arbitrariness and the submission of public authorities to the authority of the law.
- The principle of equality and non-discrimination, prohibiting rules based on arbitrary, unreasonable or disproportionate distinctions. This principle requires similar situations to be treated in a similar way, and for fundamentally different situations not to be treated in the same way, while being able to justify the configuration of the rules objectively and demonstrate their proportionality.

In a 2020 report, the European Commission summed up the concept of the rule of law as follows: "The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the common values for all Member States. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law."[5]

These principles are linked to fundamental rights, of which they are applications, in some respects, even if fundamental rights cannot be reduced to the rule of law. They are also part of the democratic organisation of the State. General respect for these principles is theoretically very difficult in a dictatorial regime, and certainly non-existent in practice.

The links between these principles and democracy and fundamental rights explain why the rule of law is a cornerstone of Western legal systems with a liberal tradition[6], although there are obviously nuances from one system to another. Undoubtedly, elements of the rule of law are also present in other legal and political systems. China and the Islamic world, for example, also have doctrines that are not unrelated to the rule of law.[7]

In the economic sphere, the rule of law, later renamed "good governance," is sometimes presented as one of the conditions for economic development.[8] In this context, a link is established between the rule of law and economic freedoms, the free market and, more generally, the liberal economic system.[9]

[5] EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "2020 Rule of Law Report – The rule of law situation in the European Union," COM (2020) 580 final, 30 September 2020, p 1. A founding document for the definition of the rule of law is the "Rule of law checklist" drawn up by the European Commission for Democracy through Law (Venice Commission) in March 2016 and endorsed by the Parliamentary Assembly of the Council of Europe in October 2017 (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e). See also UN Security Council, The rule of law and transitional justice in conflict and post-conflict societies – Report of the Secretary-General, S/2004/616, 23 August 2004.

[6] Nicolas de Sadeleer, *Manuel de droit institutionnel et de contentieux européen* (Bruylant 2021) 104, 115.

[7] Chesterman, "Rule of Law" (n 2) 10–11.

[8] See Nedzel (n 3) 447–502.

[9] See Chesterman, "An International Rule of Law?" (n 2) 346–347.

The rule of law is a principle (in the sense set out by Dworkin[10]) rather than a legal rule.[11] It is not a binary rule that can either be fully respected or violated. In a way, it is never perfectly realised, nor is there, in reality, a system in which none of its elements can be observed at all. It is therefore not a question of the absence or existence of a rule of law, but rather a question of degree, with different systems approaching the ideal of the rule of law to a greater or lesser degree, with an intensity that may also vary according to the principle or dimension envisaged. The rule of law is not a legally binding norm in all legal orders, especially if we consider the international legal order. However, even when it is not legally binding, it serves as a standard against which the quality of a legal order can be assessed.

III. Legal sources of the rule of law

Numerous provisions refer to the rule of law. One of these is Article 2 of the TEU, which elevates the rule of law to the status of a founding value of the EU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." These values must be promoted (Article 3(1) TEU) and form the basis of the relations between the Union and neighbouring countries (Article 8(1) TEU). They also apply to the Union's external relations (Article 21 TEU), as detailed below.[12]

Older references to the rule of law can be found in the Statute of the Council of Europe of 1949[13] and in the Charter of Paris of 1990 creating the OSCE.[14] However, these provisions do not give an abstract definition of the rule of law, but seem to consider the concept as self-explanatory.

On the other hand, many provisions in all legal systems give concrete form to the rule of law and make it a reality.

They appear in international treaties relating to human rights (for example, Article 6 of the European Convention on Human Rights[15]) or in treaties relating to the protection of foreign investments. The TEU also contains rules that contribute to the rule of law as well as to the effective application of Union law, such as Article 19, which states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[16]

On a broader scale, the rule of law involves a myriad of seemingly innocuous provisions in national constitutions and in simple laws and regulations which, on a wide range of subjects, guide the action of the public authorities, ensure that the law is respected and effective, and organise the exercise and enjoyment of various rights in an equal, proportionate and non-discriminatory manner.

[10] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).

[11] See Art. 21(1) TEU.

[12] On the place and role of values in the TEU, see de Sadeleer (n 6) 98 et seq.

[13] Statute of the Council of Europe, signed in London on 5 May 1949, Art 3: "Every member of the Council of Europe must accept the principles of the rule of law [. . .] ."

[14] The Charter of Paris for a New Europe, signed in Paris on 21 November 1990 contains many references to the rule of law, and makes an explicit link with democracy. Among others: "The free will of the individual, exercised in democracy and protected by the rule of law, forms the necessary basis for successful economic and social development"; "we will cooperate to strengthen democratic institutions and to promote the application of the rule of law."

[15] See also Art 47 of the (European) Charter of Fundamental Rights.

[16] See the contribution on international environmental law by Nicolas de Sadeleer in this issue.

National and international case law is also a significant source. While each specific decision helps to give concrete form to the rule of law in a particular situation, the body of decisions as a whole complements the legislative provisions, clarifying and interpreting them.

IV. The rule of law is part of the EU's common commercial policy

The European treaties stipulate that the Union's action in the field of the common commercial policy must, in particular, promote the rule of law. This statement, surprising at first sight given how far apart these two concerns are, is the unambiguous result of both the text of the Treaties and the judgments of the Court of Justice.

Article 205 of the TFEU states in general terms that "[t]he Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union." More specifically with regard to commercial policy – which is a part of the external policy – Article 207(1) of the TFEU states that "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." Paragraph 3 of the same article goes on to state that it is not enough to be part of the context of these principles, but that they must also be respected: "[t]he Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title [. . .] ."

The principles referred to are in particular those set out in Article 21(1) of the TEU: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." Paragraph 2 of the same article specifies and reinforces this idea: "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [. . .] (b) consolidate and support democracy, the rule of law, human rights and the principles of international law." Note that, in Article 21 of the TEU and 207 of the TFUE, the rule of law is downgraded to a "principle," whereas Article 2 of the TUE describes it as a "value." Beyond the symbol, the practical meaning of this use of two different concepts is unclear.

The rule of law, along with other related principles such as democracy, human rights and respect for international law, is an integral part of the common commercial policy and is binding on the EU institutions in the conduct of that policy.

This was confirmed by the Court of Justice, in particular in Opinion No. 2/15[17] on the EU-Singapore free trade agreement (FTA). To be sure, the rule of law is not even mentioned in the EU-Singapore FTA, and the debate before the Court was centred on the inclusion of sustainable development in the common commercial policy. However, the reasoning of the Court can perfectly be applied by analogy to the question of the rule of law.

The question put to the Court was essentially whether the Union had exclusive competence to conclude the FTA chapter devoted to sustainable development, or whether that competence was shared with the Member States. Under Article 207 TFEU, the EU has exclusive competence for the common commercial policy. Therefore, if sustainable development (at least insofar as it is considered in connection with and in the context of

[17] Opinion 2/15 (2017) ECLI:EU:C:2017:376.

trade relations, which was undoubtedly the case) forms part of the common commercial policy, then the Union's exclusive competence could be confirmed.

The Court's reasoning on this point is clear. It first points out that the TFEU incorporates new aspects into trade policy: "the FEU Treaty differs appreciably from the EC Treaty previously in force, in that it includes new aspects of contemporary international trade in that policy" (para 141), and in particular the principles of Article 21(1) and (2) TEU. It is indeed an obligation to take these principles into account in the implementation of the policy: "The obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU." (para 143). The conclusion is inescapable: "[i]t follows that the objective of sustainable development henceforth forms an integral part of the common commercial policy." (para 147).

The only difference between the rule of law and sustainable development in this respect is that the rule of law is referred to in Article 21, para 2, (b), whereas sustainable development is referred to in Article 21, para 2, (f). But as Articles 205 and 207 TFEU refer to the whole of Article 21, para 2 TEU, both are concerned in exactly the same way.

The impact of this inclusion of the rule of law in trade policy has perhaps been underestimated, at least in principle. The Court's reasoning is convincing concerning the EU's competence but, as regards substantive law, it does not make it possible to assess the degree of constraint that the rule of law concretely places on the Union in the conduct of its commercial policy. For as we shall see below, the application of the rule of law in the commercial sphere is less obvious than it might seem.

This case-law, together with the belief that there is a link between the rule of law and economic development, perhaps explains the importance that the rule of law takes on in certain trade agreements signed by the EU.

The Samoa agreement devotes several provisions to the rule of law, in connection with the promotion of human rights, democracy and good governance. On this occasion, the parties flesh out the concept of the rule of law with some substantive content, stressing in particular the importance of the judicial function: "The Parties shall actively support the consolidation of the rule of law at national, regional and international levels, acknowledging its crucial importance for the protection of human rights and for the effective functioning of democratic institutions. That includes ensuring the existence of an independent, impartial and well-functioning judicial system, equality before the law, the right to a fair trial and due process and access to effective mechanisms of legal redress".[18] The concept of the rule of law can also be found in the preamble of CETA (2016) and in Article 2 of the EU–Japan Strategic Partnership Agreement (2018), where it is included among the common values alongside democracy, human rights and fundamental freedoms. As can be seen from the above extract, the provisions relating to the rule of law generally do not impose precise, detailed and easily enforceable legal obligations. This does not mean, however, that they are without legal effect.

The rule of law is not systematically included in EU trade agreements, however. For example, besides the EU-Singapore FTA (2018), the rule of law is not mentioned in the EU–South Korea FTA (2010) and in the EU-Vietnam FTA (2019).

V. The relative importance of the rule of law for international trade and investment

Insofar as the rule of law is a principle contributing, among others, to a legal system's quality, it is worth recalling – once again in a very schematic way – the functions of law,

[18] Art 9.5 of the Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part, 8372/1/23 REV 1.

and in particular of economic law, with regard to economic relations and the functioning of the market. There is no doubt that other branches of law also pursue other objectives, that the functions of economic law could be set out in a different way and, above all, that the weighting that is or should be given to the various functions varies according to extra-legal opinions, in particular diverging conceptions of a just society.

The first function of law is to allocate rights and make it possible to exchange them. It is a matter of determining what control people have over things and how that control can be transferred from one person to another. This function of law is performed, in essence, by property law and contract law.[19]

The second function is to promote the efficient operation of the market. It includes a series of mechanisms designed to improve the information available to economic players, to increase the transparency of trade and prices, to maintain competition by avoiding cartels and monopolies, to reduce transaction costs by proposing clear and effective supplementary rules, to facilitate the process of concluding contracts and the means of evidence, to compensate for negative externalities, etc. All of this must be accompanied by enforcement and sanction mechanisms to ensure that the rules are effective, without which they would not fulfil the function assigned to them.

The third function of law is redistribution.[20] The gains from economic activity should not *necessarily* remain entirely in the hands of those who receive them through the application of the rules enacted to implement the first and second functions. On the contrary, economic activity is fundamentally based on a division of labour, and on collective infrastructures (tangible and intangible) from which a large part of the value-added results. It is therefore justified to share the gains. This is the role of tax law, principally, but also of social security law and of various rules protecting particular categories of actors. The aim of these rules is not to increase economic efficiency (or, to put it another way, to contribute to economic growth), but to distribute wealth in a way that seems more appropriate or fairer, within the general framework of the socio-economic system that produced it. It is also a question of increasing the legitimacy of the rules and of the legal and economic system.

Where does the rule of law stand in this landscape? The first observation is that certain elements of the rule of law have only a negligible impact on economic activity and actors. Their *raison d'être* lies elsewhere and concerns other (no less important) aspects of social functioning.

Other elements of the rule of law relate primarily to the second function of economic law. In terms of economic relations (because this is not their only function), they aim to limit the risks associated with international trade and investment, which is a way of reducing the transaction costs borne by actors of the international economy, and thus improving its efficiency. For example, the rules of non-discrimination, compliance with the law (particularly tax laws) by the authorities, the prohibition of corruption and its effective absence, legal certainty, etc are all elements of the rule of law which are not specifically intended to promote international trade and which, in a way, benefit all citizens, but which also benefit the actors of the international economy by reducing the risks and costs of their activity. The rules of the WTO or, more generally, of international economic agreements, can be understood as ways of strengthening the rule of law, or some of its components, in the specific field of international economic relations, with the aim of reducing the risks associated with the international nature of economic activity. This perspective is sometimes summed up in the idea of the "rule-oriented" system of J. Jackson[21]

[19] See Philippe Coppens, "La fonction du droit dans une économie globalisée" (2012) Revue internationale de droit économique 269, 276, 285.

[20] Ibid 285.

[21] John H Jackson, "The case of the World Trade Organization" (2008) International Affairs 437.

or that of "constitutionalisation" defended by E.-U. Petersmann,[22] who also associates it with a higher level of legalisation, with the existence of a powerful jurisdictional function and collaboration between national and international judges and with international economic relations that are less centred on inter-state relations.[23]

However, it is also clear that the rule of law does not exist to the same degree of perfection in all countries of the world, and that this does not prevent countries lagging behind in this respect, and businesses established there, from taking an active part in international trade and investment.[24] The recent surge in trade between Russia, China and Iran, particularly in the wake of Western sanctions linked to the war in Ukraine,[25] is a further, but far from unprecedented, demonstration of this. Studies have shown that treaties are not necessarily internalised (i.e. known, taken into account and respected) by all the organs of the signatory States. So the idea that a treaty ratified by a State more or less automatically means that that State complies with the treaty, barring minor exceptions, needs to be put into perspective.[26] However, this does not seem to prevent international trade or investment. Thus, a high level of respect for the rule of law is clearly not a *sine qua non* condition for being open to trade and investment. To put it another way, economic players regard a low level of respect for the rule of law as just one of many risks and, in all likelihood, factor it into their costs or prices. It is even possible that poor compliance with the rule of law could constitute a competitive advantage for certain economic activities, for instance those which, having attracted the favour of the authorities, can in practice dispense to comply with certain standards (fiscal, social, environmental, etc.) which, from their point of view, involve costs[27] – the export of illegally harvested tropical wood, of waste[28] or of endangered animal species can be cited as examples.

In terms of the international trading system, the rule of law is not self-evident either: there was initially a certain reluctance to regard the GATT as imposing "truly" legal obligations, and it was only as a result of a long evolution that the concept of a set of rules, with a jurisdiction to sanction non-compliance, took hold.[29] The WTO, with its elaborate rules and highly developed dispute settlement system, gave rise to high hopes of the advent of rules-based world trade,[30] or even "constitutionalisation." The current situation, with the complete paralysis of the Appellate Body, shows that the evolution is not linear and that a setback is possible.[31] It highlights the interdependence between the rule of law and the legitimacy of rules.[32]

[22] Ernst-Ulrich Petersmann, "How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System" (1998) JIEL 25.

[23] Petersmann, "How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System" (n 22) 33–40; Ernst-Ulrich Petersmann, "Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice" (2007) JIEL 529.

[24] China is a good example: despite protests from businesses and WTO member states (particularly the United States) related to rule of law issues, China has become and remains one of the main players in international trade (see Du and Kong (n 2) 885–905).

[25] See "How China, Russia and Iran are forging closer ties" The Economist 18 March 2024.

[26] Lauge N Skovgaard Poulsen, "From pledges to neglect: treaties and the rule of law promise" (2024) JIEL 192.

[27] This is a conception based on economic rationality rather than on a relational, reasonable, approach, as is more common among lawyers (Coppens (n 19) 282).

[28] Giulia Giardi, "Tricks under Trade: How International Trade Both Facilitates and is Facilitated by Corporate Environmental Crime in the Waste and Hydrocarbon Sectors," this issue.

[29] See Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO. The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015); William J Davey, "John Jackson and the Rule of Law" (2016) JIEL 333.

[30] Petersmann, "How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System" (n 22); Thomas Cottier, 'The Rule of Law in International Economic Relations' (2022) Zeitschrift für Europarechtliche Studien 3.

[31] Isabelle Van Damme, "25 Years of Law and Practice at the WTO: Did the Appellate Body Dig its Own Grave?" (2023) JIEL 124.

[32] Cottier (n 30) 9–10.

Confirmation of the idea that non-compliance with the rule of law is a risk that companies must bear may even come from where it was not expected, namely the case law of the Court of Justice of the European Union.[33] In a nutshell, the facts of the FIAMM case were the following. The European Union had established rules on banana imports that did not comply with the EU's obligations under WTO rules. After conducting and winning the proceedings before the panel and the Appellate Body, the United States was authorised to suspend concessions or other obligations as countermeasures. On the basis of this authorisation, the United States decided to levy a 100% customs duty on a series of goods, including certain types of batteries. FIAMM was an Italian manufacturer of such batteries, which it exported to the United States. It was therefore directly affected by the US sanctions, without having any connection with the trade that justified the sanctions, namely that of bananas. FIAMM sought damages from the EU, arguing that the EU had committed a negligence (the violation of WTO agreements, duly established by the jurisdictional bodies of this organisation) which was the cause of its damage.

One of the arguments opposed to FIAMM was based on the normal risk that exporters must undergo when engaging in international trade. Thus, "the Council contends that [. . .] the alleged damage falls within the normal risks which an exporter must assume given the current arrangements for world trade" (para. 139). The Commission concurs: "The Commission too submits that [. . .] involvement in international trade is, whatever the product market concerned, accompanied by the risk that an importing country will adopt decisions affecting trade for the most diverse reasons." (para 145). Surprisingly, the Court itself endorses these arguments: "An economic operator whose business consists in particular in exporting goods to the markets of non-member States must therefore be aware that the commercial position which he has at a given time may be affected and altered by various circumstances and that those circumstances include the possibility [. . .] that one of the non-member States will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO." (para 186).

The words are chosen to avoid expressing reality too crudely, but do not fool the informed reader. Admittedly, the position of an economic player can be influenced by "various circumstances," but the circumstance of the case was the violation of the WTO treaty by the party where that player was established. And "the stance taken by its trading partners" is only a hypocritical expression to refer, in reality, to this violation of the WTO agreements by the EU, followed by its non-compliance with the decision of the Dispute Settlement Body based on the panel and Appellate Body reports. In short, if the rule of law is violated, exporters just have to live with it. This case law is part of a more general trend in which the Court of Justice has consistently refused to give businesses and individuals the right to invoke WTO law before national and European courts.[34]

In conclusion, non-compliance with the rule of law constitutes a risk or a cost for economic players, but even in countries known to be the least respectful of these principles, the risk or cost is not observed to be so high as to prevent international economic relations.

Another way of looking at the relationship between international trade and the rule of law is to ask whether greater openness to international trade leads to better respect for the rule of law. Economists have attempted to establish correlations, but this raises

[33] Joined Cases C-120/06P and C-121/06P *FIAMM, Fedon v Council of the European Union and Commission of the European Communities* (2008) ECLI:EU:C:2008:476.

[34] Without comprehensively citing the abundant doctrine and case law on this subject, see for example Eric Pickett and Michael Lux, "The Status and Effect of WTO Law Before EU Courts" (2016) Global Trade and Customs Law 408; Kristiyan Stoyanov, "Three Decades of the Nakajima Doctrine in EU Law: Where Are We Now?" (2021) JIEL 724.

methodological questions, particularly as regards establishing causality and how to "quantify" respect for the rule of law. In any case, the results do not show a clear correlation.[35]

VI. Internal and international dimensions of the rule of law

We will conclude by pointing out that the rule of law practiced at the domestic level cannot be quite identical in the international sphere.

At the outset, the rule of law is a concept which implies that States must respect a set of obligations and adopt good behaviour at a domestic level.

It is only by extension that the same concept is applied to inter-state relations. There is no logical incompatibility here. Also in international society, one may wish or promote respect for the law rather than the use of force, submission to dispute settlement mechanisms with independent and impartial judges, legal certainty, equal treatment, and so on. Many provisions and mechanisms exist to this end in various treaties to bring about, as far as possible, this international rule of law.

There are, however, specific features of international relations and international law which make this more difficult or which, at the very least, temper expectations of the international rule of law. Somes authors argue that we need a definition of the rule of law that is specifically designed for the field of inter-state relations.[36] States, as subjects of international law, do not behave in the same way as the individual subjects of domestic law; nor do they necessarily have the same need for protection.[37] Generally speaking, the balance between power, politics and law is different in the international sphere: the law is certainly not absent but, more than in the domestic sphere, it is regarded as one element among others to be taken into account in determining conduct, rather than as the ultimate criterion for the behaviour to be adopted. Whereas national society is built on a vertical structure dominated by a sovereign (the State), international society is conceptually structured on a horizontal mode of relations between equals (the States),[38] with (at best) a decentralised enforcement of rules.[39] The international sphere is not governed by a sovereign,[40] and justice is not dispensed there with the same power, in particular because jurisdiction must be accepted by those it will be judging, and the enforcement of decisions is hardly conceivable in practice. Fragmentation of the international legal order is another factor explaining the relative weaknesses of the international rule of law, compared to its domestic application.[41] International law can of course be applied by domestic courts, which have greater power both in relation to individuals and (where the rule of law prevails) against their own State, but only if the relevant rules have direct effect, which is far from being universal. As a result, domestic courts are often not in a position to decide whether international law or its application is consistent with the rule of law. Therefore, the idea of an analogy between the rule of law protecting individuals in domestic law and a rule of law protecting states in the international sphere is open to question.[42]

That said, there are links between the provisions of domestic law and those of international law as regards the rule of law.

[35] Junsok Yang, "The Effect of International Trade on Rule of Law" (2013) Journal of East Asian Economic Integration 27.

[36] For such an endeavour, see Robert McCorquodale, "Defining the International Rule of Law: Defying Gravity?" (2016) ICLQ 277.

[37] Waldron (n 4) 323.

[38] See Chesterman, "Rule of Law" (n 2) 27.

[39] Denise Wohlwend, *The International Rule of Law. Scope, Subjects, Requirements* (Edward Elgar 2021) 2.

[40] For a discussion of the consequences of the absence of sovereigns in international law, see Waldron (n 4) 317 et seq.

[41] See Ivana Damjanovic, "The Reform of International Investment Law: Whose Rule of Law?," this issue.

[42] See Waldron (n 4) 327–342.

Firstly, treaties sometimes aim to improve certain aspects of international law that can be linked to the concept of the rule of law. This is the purpose, for example, of Article 3.2 of the WTO Dispute Settlement Understanding, which aims to promote legal certainty and clarity of the treaty provisions: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members [. . .], and to clarify the existing provisions of those agreements [. . .]". The links with domestic law are tenuous here, since this is a provision of international law that promotes the clarity and predictability of international law itself. However, it is all the easier to bring domestic law into line with the State's international obligations if these are sufficiently clear and precise.

Secondly, some provisions of international law aim at promoting or strengthening the rule of law at the domestic level. This is linked to various objectives under international law, including respect for human rights, economic development and the maintenance of international peace and security.[43] More specifically as regards the international economy, we have already mentioned the provisions of investment treaties which impose fair and equitable treatment of foreign investors. There are also examples in WTO law. Article X of the GATT requires that laws and regulations "shall be published promptly in such a manner as to enable governments and traders to become acquainted with them," that each party "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings" and that it establish "judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters." Article 41 of the TRIPS Agreement is in the same spirit, concerning the characteristics of procedures for enforcing intellectual property rights, by imposing the main components of a fair trial: "2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. 3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard. 4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions [. . .] ."[44] It was the presence of this type of rule that made it possible to assert (somewhat naively in retrospect) that China's accession to the WTO would promote the rule of law in China; in practice, the result has been unsatisfactory, even if it not inexistent.[45] Important though they are, these provisions of the WTO agreements are relatively imprecise and limited in scope; they cannot impose the establishment of the rule of law in general.[46]

Thirdly, and in the opposite direction, it also happens that provisions of domestic law of higher rank, i.e. constitutional provisions in the functional, if not formal, sense of the term, require certain aspects of the rule of law to be respected by economic treaties. An example can be found in Opinion 1/17 of the Court of Justice, in which it points out that the CETA (EU–Canada free trade agreement)[47] must comply with the provisions of the Charter of

[43] Chesterman, "Rule of Law" (n 2) 16–26. For a more general view of how and why treaties promote the rule of law, see Chesterman, "An International Rule of Law?" (n 2) 343–350.

[44] For other examples, see Petersmann, "How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System" (n 22) 34–35.

[45] Du and Kong (n 2) 885–905. For a much more enthusiastic presentation, Liao Li and Yu Minyou, "Impact of the WTO on China's Rule of Law in Trade: Twentieth Anniversary of the WTO" (2015) Journal of World Trade 837.

[46] Du and Kong (n 2) 900–901.

[47] Contrary to most other FTAs concluded by the EU, the preamble of CETA explicitly recognises "the importance" of the rule of law.

Fundamental Rights: "In its request for an opinion, the Kingdom of Belgium makes reference to the right, laid down in the second paragraph of Article 47 of the Charter, to a remedy before an 'independent and impartial tribunal previously established by law', and to 'effective access to justice' laid down in the third paragraph of Article 47. In that regard, it is a consequence of Article 47, which is binding on the Union in accordance with the case-law cited in paragraphs 165 and 167 of the present Opinion, that, when the Union enters into an international agreement that encompasses the establishment of bodies that are primarily judicial in nature and that are called on to resolve disputes between, in particular, private investors and States, such as the CETA Tribunal and Appellate Tribunal, the Union is subject, as regards the rules governing access to those bodies and their independence, to the provisions of the second and third paragraphs of Article 47 of the Charter."[48]

VII. Conclusion

It is not easy to draw a clear conclusion from this brief examination of the place of the rule of law in international economic law. Lawyers consider it to be a principle or a value, but from an economic point of view it appears to be one of several ways of limiting the risks to which economic actors are exposed when faced with the decisions of (foreign) States.

The rule of law is essential for the respect of fundamental rights and for the democratic functioning of the State, but international trade and investment can exist even where compliance with the rule of law is low. European law requires the promotion of the rule of law in the implementation of the common trade policy, but this obligation can come into conflict with geopolitical imperatives and its practical implications remain by and large uncertain.

[48] Opinion 1/17 (2019) ECLI:EU:C:2019:341, paras 189–190.

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