

# Explaining the Limits of the WTO in Shaping the Rule of Law in China

Ming Du\* & Qingjiang Kong\*\*

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## Abstract

When China acceded to the World Trade Organization (“WTO”) in 2001, pundits were enthusiastic about the prospect that China’s WTO membership would boost international trade, encourage China’s restructuring towards a market economy, discipline the domestic legal system and strengthen the rule of law in China. More recently, however, serious concerns have been raised regarding China’s record on the rule of law. The first National Security Strategy report issued by the Trump Administration in December 2017 claimed that China’s increased participation in the liberal international economic system had not effectuated China’s deeper engagement with, or respect for, the rule of law.

The purpose of this article is to take a critical look at the two contrasting narratives on the impact of the WTO on China’s rule of law construction over the past two decades. It concludes that, although the WTO has played a positive role in advancing the rule of law in China, such a role has long been exaggerated. Accordingly, we provide an account of why the WTO has failed to play a catalyst role in instituting the rule of law in China widely expected in the western world.

## I. Introduction

China’s accession to the WTO in 2001 ended a 15-year campaign frequently described as the most difficult and exacting of all WTO accession.<sup>1</sup> Back then, China’s accession was widely expected to boost international trade, encourage China’s restructuring towards a market economy, discipline China’s domestic legal system and strengthen the rule of law in China. In a letter addressed to President Clinton on 14 November 1999, Martin Lee, the founding chairman of the United Democrats of Hong Kong, highlighted the importance of China’s entry into the WTO for China to become a rule of law country:

The participation of China in the WTO would not only have economic and political benefits, but would serve to bolster those in China who understand that the country must embrace rule of law, which of course is a key principle underlying active membership in global trade organizations.<sup>2</sup>

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\* Professor, Durham University Law School, UK. Email: [ming.du@durham.ac.uk](mailto:ming.du@durham.ac.uk).

\*\* Professor & Dean of School of International Law, China University of Political Science and Law, Beijing, China. We thank the editors-in-chief, Vincent Beyer, two anonymous reviewers and colleagues at Durham Law School for their helpful comments on earlier drafts of the paper.

<sup>1</sup> Raj Bhala, ‘Enter the Dragon: An Essay on China’s WTO Accession Saga’, 15 *American University International Law Review* (2000), at 1471.

<sup>2</sup> The White House Office of the Press Secretary, ‘The U.S. – China WTO Agreement will Help Promote Reform, Accountability, and Openness in China’ (8 March 2000).

No doubt the Clinton Administration was persuaded by the proposition that requiring China to adhere to strict global trade rules would instil in China a sense of the rule of law that is the basis of democratic reform.<sup>3</sup> President Clinton proclaimed the vote of the House of Representatives in May 2000 in favour of normal trade relations ‘a step toward a China that is more open to our products and more respectful of the rule of law at home and abroad’.<sup>4</sup> Such optimism was shared enthusiastically among senior European Union officials as well as senior Chinese Communist Party (CCP) officials.<sup>5</sup>

Since its accession to the WTO, China has recorded one of the most astounding miracles of economic development in world history. China is currently the second largest economy, the second-largest source of outward foreign direct investment flows and the largest exporter of merchandise trade in the world.<sup>6</sup> It is also generally acknowledged that China’s WTO membership has played a positive role in advancing the rule of law in China.<sup>7</sup> In an effort to fulfil its WTO obligations, China launched the largest-ever legislative revamp in history with more than 3,000 laws and regulations being scrutinised and revised to bring them into conformity with WTO rules.<sup>8</sup> The positive impact of China’s WTO membership on China’s progress with respect to the rule of law and good governance has been referred to as a prominent example of how the WTO may promote good governance norms in the domestic context.<sup>9</sup>

However, serious concerns have emerged in recent years concerning the progress and even the future prospect of the rule of law in China. The first National Security Strategy issued by the Trump Administration in December 2017 painted a pessimistic picture of the impact of the liberal international economic system on China’s market-oriented reforms and the rule of law:

For decades, U.S. policy was rooted in the belief that support for China’s rise and for its integration into the post-war international order would liberalize China. Contrary to our hopes, China expanded its power at the expense of the sovereignty of others. China gathers and exploits data on an unrivaled scale and spreads features of its authoritarian system ... China is determined to make economies less free and less fair, to grow their militaries, and to control information and data to repress their societies and expand their influence...<sup>10</sup>

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<sup>3</sup> Charlene Barshefsky, ‘Trade Policy and the Rule of Law’, 9 *Minnesota Journal of Global Trade* 361 (2000), at 367.

<sup>4</sup> William J. Clinton: ‘Remarks on House of Representatives Action on Permanent Normal Trade Relations with China’ (May 24, 2000).

<sup>5</sup> Pascal Lamy, ‘Remarks at the China – Britain Business Council Conference’, London (October 2, 2000); Cao Jianming, ‘WTO and the Rule of Law in China’, 16 *Temple International and Comparative Law Journal* 379 (2002), at 379.

<sup>6</sup> Hong Kong Trade Development Council, ‘Economic and Trade Information on China’ (5 May 2020).

<sup>7</sup> Li Liao and Minyou Yu, ‘Impact of the WTO on China’s Rule of Law in Trade: Twentieth Anniversary of the WTO’, 49 (5) *Journal of World Trade* (2015), 837-872.

<sup>8</sup> Donald Clarke, ‘China’s Legal System and the WTO: Prospects for Compliance’, 2 *Washington University Global Studies Law Review* 97 (2003), at 104.

<sup>9</sup> Richard B. Stewart and Michelle Ratton Sanchez Badin, ‘The World Trade Organization: Multiple Dimensions of Global Administrative Law’, 9 *International Journal of Constitutional Law* 556 (2011), at 573.

<sup>10</sup> The White House, ‘National Security Strategy of the United States of American’ (December 2017), at 25.

This narrative argues that China undertakes minimum commitments to the international legal regime while extracting the benefits of global institutions and that China only selectively incorporates international norms most conducive to its economic growth and preferable to its elites.<sup>11</sup> In particular, it is claimed that China's increased participation in international organizations has not effectuated deeper engagement with, or respect for, the rule of law. Though rhetoric about law has been prominent in official statements, reality has fallen short of official promises.<sup>12</sup> The World Justice Project's Rule of Law Index ranked China 88<sup>th</sup> among the 128 jurisdictions in its 2020 report.<sup>13</sup> Reflecting on the limited impact of the WTO on China's economic and political reforms, the Trump Administration called the US support for China's accession to the WTO eighteen years ago 'a mistake'.<sup>14</sup>

The purpose of this article is to take a critical look at the two contrasting narratives on the impact of the WTO on China's rule of law construction over the past decade. It is submitted that, although the WTO has played a positive role in advancing the rule of law in China, such a role has long been exaggerated. Accordingly, we provide an account of why the WTO has failed to play the catalyst role in instituting the rule of law in China widely expected in the western world. The article is structured as follows. Part II clarifies the concept of rule of law and reviews major theoretical propositions on the relationship between the rule of law and the WTO. Part III discusses how the WTO has promoted the rule of law in China as well as its limits. Part IV reflects on why the WTO fails to perform the expected role in transforming China to a rule of law country as defined in the western liberal democracies. Part V concludes the article.

## **II. WTO and the Rule of Law in China: Representations of a Relationship**

### **1. Defining the Rule of Law**

Rule of law is an 'essentially contested concept', meaning many different things to different people.<sup>15</sup> Consequently, the precise meaning and content of the rule of law remain deeply ambiguous and progress in rule of law performance is difficult to measure. Theoretical formulations of rule of law can be roughly divided into two general types, formal (thin) and substantive (thick).<sup>16</sup> The formal conception of the rule of law tends to focus on the proper sources and form of legality. It is concerned with the instrumental aspects of the rule of law that a state must possess in order to effectively function as a system of law.<sup>17</sup> There are different formulations of the formal conception of the rule of law and the most influential articulation is probably the list

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<sup>11</sup> Samuel S. Kim, 'China's International Organization Behavior', in Thomas W. Robinson & David Shambaugh (eds), *Chinese Foreign Policy: Theory and Practice* 401, 419 (1994); Pitman B. Porter, 'China and the International Legal System: Challenges of participation', 191 *China Quarterly* 699 (2007), at 701.

<sup>12</sup> Jacques DeLisle, 'Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping', 26 *Journal of Cotemporary China* 68 (2017), at 70.

<sup>13</sup> World Justice Project Rule of Law Index 2020, at 58.

<sup>14</sup> Shawn Donnan, 'US Says China WTO Membership was a Mistake', *Financial Times* (19 January 2018).

<sup>15</sup> Richard H. Fallon, 'The Rule of Law as a Concept in Constitutional Discourse', 97 *Columbia Law Review* 1 (1997), at 7.

<sup>16</sup> Brian Tamanaha, *On the Rule of Law: History, Politics. Theory* (Cambridge University Press), at 91; Randall Peerenboom, *The Long March towards Rule of Law* (Cambridge University Press, 2002), at 3.

<sup>17</sup> Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law* 467 (1997), at 467.

drawn up by Lon Fuller which also constitutes what he called the ‘internal morality’ of law. These characteristics include publicity, prospectivity, generality, clarity, consistency, performability, stability over time, and congruity between the rules that are announced and the enforcement of them in actual practice.<sup>18</sup> Fuller’s aspirational list of characteristics for the rule of law is not exhaustive. In addition to purely formal qualities, institutional elements such as the existence of an independent judicial system, open and effective law-enforcement agencies applying the rules with due process are also seen as emblematic of a commitment to effectuate the rule of law in practice.<sup>19</sup>

The fundamental feature of the formal conceptions of the rule of law is that it does not seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or bad law, provided that the formal precepts of the rule of law were themselves met.<sup>20</sup> In other words, all the basic characteristics of a formal rule of law are consistent with an instrumental view of law—that is, the use of legal rules by a government to achieve whatever substantive ends chosen by the government. Thus, the rule of law in its formal conception is a version of judging that values the systemic virtues of regularity, predictability, and certainty over the concern with substantive justice in particular instances.<sup>21</sup> It is possible for a legal system to comply with the formal conception of the rule of law and still be undemocratic, unjust and in gross violation of human rights.<sup>22</sup>

Critics of the formal conception of the rule of law theories often argued that it is devoid of political and economic morality. In the absence of substantive moral content, a formal conception of the rule of law could be used instrumentally by an authoritarian government to strengthen the regime and deprive individuals of their rights.<sup>23</sup> But this would run counter to the long tradition of the rule of law, which has essentially been protecting the rights of citizens from arbitrary infringement from state actors.<sup>24</sup> Therefore, a formal conception of rule of law has a lot in common with the idea of ‘rule by law’. There is no guarantee that the formal conception of the rule of law will change the life of society members for the better. As one theorist argues, ‘a state which savagely represents or persecutes sections of its people does not genuinely follow the rule of law simply because it undertakes those acts according to detailed laws duly enacted and scrupulously observed’.<sup>25</sup>

In view of the criticisms levelled at formal legality as ‘an impoverished account of the rule of law’,<sup>26</sup> some scholars espouse a thick, substantive approach to defining rule of law that attempts to provide additional normative elements of political morality or

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<sup>18</sup> Lon L. Fuller, *The Morality of Law* (Yale University Press, 1977), at 46-73.

<sup>19</sup> Nicolas Hachez and Jan Wouters, ‘Promoting the Rule of Law: A Benchmark Approach’, Leuven Centre for Global Governance Studies Working Paper No. 105 (April 2013), at 7.

<sup>20</sup> Craig, above n 17, at 467.

<sup>21</sup> Allan C. Hutchinson, ‘The Rule of Law Revisited: Democracy and Courts’ in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* 196 (Hart Publishing, 1999), at 199.

<sup>22</sup> Joseph Raz, *The Authority of Law- Essays on Law and Morality* (Oxford Clarendon Press, 1979), at 214.

<sup>23</sup> Peerenboom, above n 16, at 69.

<sup>24</sup> Nicolas Fegen, ‘Thick or Thin? Defining Rule of Law: Why the “Arab Spring” Calls for a Thin Rule of Law Theory’, 80 *UMKC Law Review* 1187 (2012), at 1197.

<sup>25</sup> Daniel Shuker, ‘Review of “Rule of Law” by Tom Bingham’, 36 *Yale Journal of International Law* 219 (2010), 220-222.

<sup>26</sup> Jeremy Waldron, ‘The Concept and the Rule of Law’, 43 *Georgia Law Review* 1 (2008), at 61.

justice to the formal aspects of the rule of law. They argue that certain substantial rights are based on, or derive from, the rule of law. The concept of rule of law is used as the foundation for those rights, which are then used to distinguish between ‘good’ laws which comply with these rights and ‘bad’ laws which do not.<sup>27</sup> For example, the United Nations defines the rule of law as follows:

A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and *which are consistent with international human rights norms and standards*. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>28</sup>

Like formal conceptions of the rule of law, there are competing forms of substantive conceptions of the rule of law. Regardless of what form of substantive theory one prefers, what is in common is that, in addition to the formal attributes identified by the formal conception, they seek to impose very specific normative and political theories of the relationship between the state and a legal system. For example, within Western liberal democracies, the most common substantive version includes democracy and individual rights within the rule of law.<sup>29</sup> Other versions include freedom, equality, dignity, fairness, free market capitalism and even various social welfare rights to establish necessary social, economic, educational and cultural conditions.<sup>30</sup> Precisely because substantive theories of the rule of law require ‘a complete moral and political philosophy’ as Raz argued, they present particular challenges to cross-cultural dialogues because of cultural differences between nations and across regions and to persons with different political persuasions.<sup>31</sup> This challenge explains why the World Bank and other development agencies are more likely to employ a formal conception of the rule of law in their development aid activities.<sup>32</sup>

In summary, it would be simplistic to suggest that there is an overarching coherence to the rule of law concept. At its core, the rule of law requires not only formal legality, but also the notion that the state and its officials must operate within a limiting framework of the law. In this respect, ‘rule of law’ is distinct from ‘rule by law’ or ‘rule by man’. Under the rule of law, the law constrains all members of society, including government actions. Rule by law, by contrast, means the state uses law to control its citizens but never allows law to be used by the people to control the state.<sup>33</sup> Moreover, there are legal limits on the government’s law-making power so that the state cannot mould the positive law to its will. Whilst in the past, divine law or some type of ‘natural law’

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<sup>27</sup> Craig, above n 17, at 467.

<sup>28</sup> United Nations Security Council, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (23 August 2004).

<sup>29</sup> Tamanaha, above n 16, at 110-112; Tom Bingham, *The Rule of Law* (Penguin, 2011), at 67.

<sup>30</sup> Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986), at 407-410.

<sup>31</sup> Ruti Teitel, ‘Global Rule of Law: Universal and Particular’, in Andras Sajó (ed), *Human Rights with Modesty – The Problem of Universalism* (Martinus Nijhoff Publishers, 2004), at 231.

<sup>32</sup> Lawrence Tshuma, ‘The Political Economy of the World Bank’s Legal Framework for Economic Development’, 8 *Social and Legal Studies* 75 (1999), at 83.

<sup>33</sup> Jeremy Waldron, ‘Rule by Law: A Much Maligned Proposition’, NYU School of Law Public Law & Legal Theory Research Paper Series Working Paper No.19-19 (June 2019), at 3-4.

provided the limits, human rights declarations are said to be the common phraseology in western liberal societies today.<sup>34</sup>

## 2. The Relationship between the WTO and the Rule of Law in China

It is well known that the rule of law has been weak in traditional Chinese legal culture. The two dominant intellectual traditions of Confucianism and legalism are more accommodating to the notion of ‘rule of man’ and ‘rule by law’ respectively, as opposed to ‘rule of law’.<sup>35</sup> In particular, law was traditionally viewed as an instrument of governance for the rulers to impose their will on the people and not something that protects the weak individual from the state. This is fundamentally different from the Western notion of the rule of law.<sup>36</sup> In contemporary China, law has been playing a significant role in supporting economic development and preserving social order. Nevertheless, the Chinese government’s conception of law remains highly instrumentalist as reflected in the venerable slogan of ‘ruling the country according to law’.<sup>37</sup> Despite the fact that the Chinese government has made impressive accomplishments in legal reforms before and after its accession to the WTO, the rule of law in China remains a ‘bird in a cage’ due to various institutional, cultural and ideological limitations.<sup>38</sup>

According to the conventional account, the WTO can contribute to the rule of law in China both directly and indirectly. To begin with, over the past sixty years, the WTO has evolved from a system based on reciprocal bargaining and mutual concessions among WTO Members to a system that promotes rules of good governance norms in both the transnational and domestic context.<sup>39</sup> The extensive WTO requirements of transparency, participation, reason giving and review on decision making by WTO Members’ domestic administrative bodies constitute what is probably the most highly developed and profoundly transformative administrative law program of any global regime.<sup>40</sup> The most salient example is Article X of the General Agreement on Tariffs and Trade of 1994 (GATT 1994), which states:

(1) Laws, regulations, judicial decisions and administrative rulings of *general application* . . . shall be published promptly...

...

(3) (a) Each [Member] shall administer in a uniform, impartial and reasonable manner

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<sup>34</sup> Tamanaha, above n 16, at 118.

<sup>35</sup> Qiang Fang & Roger Des Forges, ‘Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949 CE’, 44 *Stanford Journal of International Law* 101 (2008), at 103.

<sup>36</sup> Benedict Sheehy, ‘Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes’, 26 (2) *Northwestern Journal of International Law & Business* 225 (2006), at 238-245.

<sup>37</sup> DeLisle, above n 12, at 79.

<sup>38</sup> Stanley Lubman, ‘Bird in a Cage: Chinese Law Reform After Twenty Years’, 20 (3) *Northwestern Journal of International Law & Business* 383 (2000), at 389- 410.

<sup>39</sup> Padideh Ala’i, ‘From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance’, 11 (4) *Journal of International Economic Law* 779 (2008), at 780.

<sup>40</sup> Stewart and Badin, above n 9, at 570.

all its laws, regulations, decisions and rulings...

(b) Each [Member] shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose . . . of the prompt review and correction of administrative action . . . Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement...

Article X is significant because it goes to the heart of a country's legal infrastructure and more precisely to the nature and enforcement of its administrative law regime.<sup>41</sup> It requires that trade related measures be promptly published, administered in a uniform, impartial and reasonable manner and provide for independent review of administrative measures that impact international trade. Before the creation of the WTO in 1995, Article X was only considered as a 'subsidiary' obligation. In a series of disputes, the GATT panels simply declined to rule on the Article X claims but focused on the inconsistency of the disputed measure with substantive provisions such as Article XI:1 of the GATT 1947.<sup>42</sup> However, in the recent two decades, Article X has developed into a provision of fundamental importance as the embodiment of the principles of transparency and due process, which impose limitations on the exercise of executive discretion.<sup>43</sup> It was also replicated in other WTO Agreements. Notably, the requirements provided in Article X embody some of the same principles required by the formal theory of the rule of law as discussed in section II:1 above.<sup>44</sup> Thanks to the clarity and strength of these rule of law requirements, the WTO's near universal membership, and its compulsory dispute settlement mechanism, the WTO was expected to play a direct role in promoting at least a formal conception of the rule of law in China.

More significant is the expected indirect social, legal and political implications of China's WTO membership. The WTO promotes a neoliberal economic paradigm—low tariffs, minimal regulation, limited government subsidies, strong protection of intellectual and private property that reflects conventional wisdom about the role of government.<sup>45</sup> The WTO membership is thus a channel through which neoliberal commitments and key norms of good governance are spread. For a state like China, with a long history of official intervention in all aspects of life, the neoliberal paradigm challenges core ideas about the proper role of the Chinese government in society.<sup>46</sup> Therefore, the induction of China to the WTO is part of a larger strategy of massive and fundamental economic and socio-legal reform in China. Moreover, WTO disciplines represent the rule of law in trade. The rule of law however is not easily compartmentalized to a single sector. It will have spillover effects on China's legal system in general. In the end, it will strengthen the accountability of institutions and

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<sup>41</sup> Sylvia Ostry, "China and the WTO: The Transparency Issue", 3 *UCLA Journal of International Law and Foreign Affairs* 1 (1998), at 2.

<sup>42</sup> GATT Panel Report, *Japan – Japanese Measures on Imports of Leather*, L/5623, adopted on 15 May 1984, para 57; GATT Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, L/6253, adopted on 2 March 1988, para 6.2.

<sup>43</sup> WTO Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fiber Underwear*, WT/DS24/R, adopted on 25 February 1997, at 20.

<sup>44</sup> Jiangyu Wang, 'The Rule of Law in China', *Singapore Journal of Legal Studies* 347 (2004), at 377.

<sup>45</sup> Elaine Hartwick & Richard Peet, 'Neoliberalism and Nature: The Case of the WTO', 590 *Annals American Academy Political and Social Science* 188 (2003), 190-192.

<sup>46</sup> Joseph Fewsmith, 'The Political and Social Implications of China's Accession to the WTO', 167 *China Quarterly* 574 (2001), 584-586.

generally improve the protection of rights of individuals.<sup>47</sup> As President Clinton asserted:

By joining the WTO, China is not simply agreeing to import more of our products; it is agreeing to import one of democracy's most cherished values: economic freedom. The more China liberalises its economy, the more fully it will liberate the potential of its people... And when individuals have the power... they will demand a greater say.<sup>48</sup>

The idea that norms of the international society such as the WTO rules profoundly affect or even transform state behaviour has a distinguished intellectual tradition in social sciences. For example, international constructivist theory contends that state identity and state interests are defined by forces unleashed by the norms of behaviour embedded in international society. Therefore, international norms promoted by international organizations such as the WTO can teach states what their interests should be, decisively influence national policies by pushing states to adopt these norms, and help them learn good behaviour in international society.<sup>49</sup> From this perspective, China's accession to the WTO could help socialise China to conform to global legal norms, including the rule of law. Similarly, new institutional economics school has long argued China's WTO membership would orient China towards its official policy of the development of a market economy. However, a flourishing market economy requires not only physical facilities but also the rule of law.<sup>50</sup> The Chinese government's desire for fast economic growth would require China to create the framework of rules and institutions and to develop a judicial branch capable of enforcing binding legal rules. Otherwise it would risk the loss of international capital and significant foreign trade.<sup>51</sup> In the same vein, political scientists have long termed the process of using WTO membership as a lever to improve domestic good governance 'policy anchoring'.<sup>52</sup> Once China becomes a formal member of the WTO, it will be difficult for China to renege on its commitments without incurring considerable political and economic costs. The reform-minded Chinese leaders could then wield the WTO accession as an external force to lock in and further domestic economic and political reforms.<sup>53</sup>

### **III. Evaluating the Impact of the WTO on the Rule of Law in China: From Theory to Practice**

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<sup>47</sup> Statement of Christian Murck, 'Testimony to the Congressional-Executive Commission on China hearing on WTO: Will China Keep its Promises? Can it?' (6 June 2002).

<sup>48</sup> Clinton's Speech on China Trade Bill at the Paul H. Nitze School of Advanced International Studies of the John Hopkins University (8 March 2000).

<sup>49</sup> Alistair Iain Johnson, *Social States: China in International Institutions, 1980-2000* (Princeton University Press, 2008), at 27; Martha Finnemore, *National Interests in International Society* (Cornell University Press, 1996), at 2.

<sup>50</sup> Ronald H. Coase, *The Firm, The Market, and the Law* (University of Chicago Press, 1988), at 10.

<sup>51</sup> Liu Wujun, 'Deep Understanding of Market Economy as Rule of Law Economy', *People's Daily* (2 July 2012).

<sup>52</sup> Michael J. Ferrantino, 'Policy Anchors: Do Free Trade Agreements and WTO Accessions Serve as Vehicles for Developing Country Reform?', Office of Economics Working paper, U.S. International Trade Commission (April 2006), at 3.

<sup>53</sup> Sarath Rajapatirana, 'Developing Countries' Trade Policies in the 1990s: Back to the Future' in D Lai & R. H. Snape (eds), *Trade, Development and Political Economy: Essays in Honour of Anne O. Krueger* 78 (Palgrave Publisher, 2001), at 78-95.



What impact has China's eighteen years of WTO membership brought on the rule of law in China? On the one hand, the Chinese government's proclamation that it has successfully completed the construction of a socialist legal system and that it is committed unwaveringly to pushing forward the project of 'ruling the country according to law' has triggered much enthusiasm.<sup>54</sup> On the other hand, some commentators advocate a more realistic view and argue against overstating the role of the WTO accession and compliance in China's construction of the rule of law.<sup>55</sup> The Trump Administration's vehement criticism of the slow progress of the rule of law in China seems to vindicate a more cautious position in this debate.

To evaluate the role of the WTO in shaping the rule of law in China, one needs to appreciate broad legal reforms China has undertaken to implement and comply with its commitments under the WTO. These commitments go beyond WTO requirements and are designed to deal with the unique legal, economic, political and ideological conflicts between the Chinese trade regime and the principles embodied in the WTO legal framework.<sup>56</sup> In this part, we will first evaluate the WTO's requirements of transparency, uniform administration of law and independent judicial review as they had a direct impact on a formal/thin conception of the rule of law in China. Then we will proceed to assess to what extent the WTO has also shaped the rule of law in China in its substantive conception.

## 1. Transparency

After World War II, transparency has gained an almost 'quasi-religious' nature as a key component of good governance. It is said to be an effective tool for anticorruption as well as democracy-building efforts, particularly in developing and transition countries.<sup>57</sup> Transparency is also one of the vital elements of trade liberalism, underpinning all substantive areas of the WTO.<sup>58</sup> For the purpose of our article, we note that transparency is also one of the most crucial aspects of the formal conception of the rule of law, encompassing mainly its key principle of promulgation but also relevant to the principles of clarity, stability, and prospectivity.<sup>59</sup>

The issue of transparency was among the top concerns of China's major trading partners in negotiations leading up to China's accession to the WTO as China's administrative legal system was not designed for transparency. One typical example was a body of regulatory documents grouped together under the heading "normative documents", which are extensively used by Chinese government ministries and at the local level. Normative documents are not part of the formal system of laws, regulations and rules and they are usually for internal use, not available in the public domain and

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<sup>54</sup> Wang Yuhua, *Tying the Autocrat's Hands: The Rise of the Rule of Law in China* (Cambridge University Press, 2015), at 3-4.

<sup>55</sup> Wang, above n 44, at 377.

<sup>56</sup> Kong Qingjiang, *China and the World Trade Organization: A Legal Perspective* (World Scientific Publishing, 2002), at 27-61.

<sup>57</sup> Sudip Ranjan Basu, 'Does WTO Accession Affect Domestic Economic Policies and Institutions?', (HEI Working Paper No 03/2008) 1, at 26.

<sup>58</sup> WTO, Doha Ministerial Declaration, WTO Doc. WT/MIN (01)/DEC/1(2001), 20 November 2001.

<sup>59</sup> Wang, above n 44, at 380.

changing frequently.<sup>60</sup> However, as scraps of the old regime from the pre-reform period when China was governed by administrative decrees and not legislation, they affect the rights and duties of business actors to the extent that they define the ways in which state agencies carry out their work and implement the law.

China's transparency commitments are based on, but also go beyond, the general transparency requirements specified in GATT Article X. The transparency provisions in the Accession Protocol have six facets. First, China shall make public all relevant laws, regulations and other measures in respect of trade in goods, services, TRIPS and the control of foreign currency. Second, China shall only enforce those laws that are published and made readily available to other WTO Members, individuals and enterprises. Third, China shall establish or designate an official journal dedicated to the publication of all relevant laws which should be made readily available to the public. Fourth, after publication of laws in such a journal, China shall provide a reasonable period for comments to be made to the appropriate authorities before such measures are implemented. The comment requirement is modelled on the US administrative procedural law and is believed to be the most problematic area in China's transparency commitments.<sup>61</sup> Fifth, China shall establish or designate one or more enquiry points where the published laws can be obtained and requests from the public can be replied in an authoritative way within thirty-five days of receiving them. Finally, China should translate all laws, regulations and other measures pertaining to trade into at least one official language of the WTO and to make such translations available to WTO Members.

After 18 years of full WTO Membership, one can fairly say that China has largely complied with its transparency obligations. This is particularly the case for the Chinese central government and those central government ministries with a primary or significant responsibility for international trade-related issues.<sup>62</sup> Moreover, the WTO principle of transparency has played a major role in the reform of Chinese administrative law, in particular the Chinese open government information (OGI) rules at both national and local levels.<sup>63</sup> Statistics indicate that the Chinese government has proactively published nearly 72 million records and received 3.8 million disclosure requests by the end of 2018.<sup>64</sup>

Nevertheless, there remains much room for China to improve. For example, to implement the commitment to establish or designate an official journal dedicated to the publication of all trade-related measures, the State Council issued a notice in March 2006 directing all central, provincial and local government entities to send copies of all of their trade-related measures to Ministry of Commerce (MOFCOM) for immediate publication in the MOFCOM Gazette. However, it appeared that adherence to the State

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<sup>60</sup> Paolo D. Farah, 'Five Years of China's WTO Membership: EU and US Perspectives on China's Compliance with Transparency Commitments and the Transitional Review Mechanism', 33(3) *Legal Issues of Economic Integration* 263 (2006), at 278-280.

<sup>61</sup> Ostry, above n 41, at 2.

<sup>62</sup> Henry Gao, 'The WTO Transparency Obligations and China', 12(2) *The Journal of Comparative Law* 329 (2018), at 353.

<sup>63</sup> Liu Wenjing, 'Approaching Democracy through Transparency: A Comparative Law Study on Chinese Open Government Information', 26 *American University International Law Review* 101 (2011), at 107-109.

<sup>64</sup> Jamie Horsley, 'Open Government Developments in China: Implications for US Businesses', *China Business Review* (1 July 2019).

Council's notice was far from complete. To date, some but not all central government entities publish trade-related measures in this journal. At the same time, these government entities tend to take a narrow view of the types of trade-related measures that need to be published. As a result, while trade-related regulations and departmental rules are often published in the journal, it is still less common for other central government measures such as opinions, circulars, orders, directives and notices to be published, even though they are all binding legal measures with implications for international trade.<sup>65</sup> Moreover, China rarely publishes certain types of trade-related measures and sub-central government measures in the official journal. A typical example are China's complex and extensive subsidy programs. The U.S. has frequently accused China of severely under-reporting important programs and significantly over-reporting irrelevant or minor programs.<sup>66</sup>

Another example is the requirement of a reasonable period for public comment on new or modified trade-related laws and regulations. China has introduced detailed rules in complying with the notice-and-comment commitment regarding draft laws and regulations. However, no noticeable improvement in the publishing of departmental rules or normative documents for public comments appears to have taken place.<sup>67</sup> In April 2018, MOFCOM issued a measure requiring that there should be a 30-day comment period for draft normative documents. In May 2018, a notice issued by State Council calling for more public consultation in the drafting process of normative documents and requiring drafts of normative documents involving 'vital interests of the people' or "having significant impact on rights and obligations" to be published for public comment. Despite these recent efforts, to date most normative documents in China are still not published for public comment.<sup>68</sup> It remains to be seen how these measures will be implemented in practice.

## 2. Uniform Administration

In its WTO accession agreement, China committed to apply, implement and administer its laws, regulations and other measures relating to trade in goods and services in a *uniform, impartial and reasonable manner* at all levels of government throughout China. In support of this commitment, China further committed to establish an internal review mechanism to investigate and address cases of non-uniform application of laws based on information provided by companies or individuals. This uniform administration commitment is significant because if successful, it could reduce a major obstacle - local and departmental protectionism - to strengthen at least a formal conception of the rule of law in China, ensuring generality and non-contradictory enforcement of rules.<sup>69</sup>

Take local protectionism as an example. Local protectionism is a systemic defect in China's governance. Contrary to the conventional image of China as a unitary state and 'a ruthlessly effective authoritarian regime whose writ runs from the Standing

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<sup>65</sup> United States Trade Representative, *2019 Report to Congress on China's WTO Compliance* (March 2020), at 114.

<sup>66</sup> Committee on Subsidies and Countervailing Measures, 'Questions from the United States Regarding the New and Full Notification of China', G/SCM/Q2/CHN/75 (30 January 2019), at 1.

<sup>67</sup> USTR, above n 65, at 116.

<sup>68</sup> *Ibid.*

<sup>69</sup> Stanley Lubman, 'A key Move to Protect Courts in China', *The Wall Street Journal* (30 July 2014).

Committee of the Party Poliburo in Beijing to the most remote hamlet’,<sup>70</sup> extensive administrative reforms featured by devolution of regulatory power from the central government in Beijing to local authorities over the past several decades have rendered China one of the most decentralized countries in the world. This *de facto* federalism has been identified as an important factor in accounting for China’s economic success as it incentivizes local party elites to answer for their own prosperity, experiment with best policies meeting their local conditions and promote entrepreneurialism and growth.<sup>71</sup> Whilst local empowerment has delivered impressive economic outcomes, it has also decreased the capacity of the central government to control local behavior through its traditional mechanisms of political patronage and financial allocation. It has in turn intensified a hardwired tension between local interests and the central party-state.<sup>72</sup> For example, local party officials have taken protectionist measures favoring local enterprises as sources of revenue or set up regulatory barriers blocking or separating regional markets, significantly increasing the costs of market expansion for firms. Against this backdrop, the obligation of uniform administration of WTO-consistent laws and regulations helps fight against trade barriers applied by local authorities and strengthens China’s capacity to ensure that its political subdivisions comply with WTO requirements.

The adoption of the Legislation Law in 2000 prior to China’s accession to the WTO represented an attempt to address the myriad conflicts that jeopardized the coherence of China’s entire legal system. However, it only succeeded to some extent in reining in the discretion of the localities while it made little progress in establishing mechanisms to control the departmental protectionism rampant within the State Council.<sup>73</sup> To implement the obligation of uniform administration, the Chinese central government launched an extensive campaign to inform and educate both central and local government officials and state-owned enterprise (SOE) managers about WTO rules. In 2002, China also established an internal review mechanism at MOFCOM to handle cases of non-uniform application of laws. Nevertheless, foreign investors continue to voice concerns about inconsistent enforcement of laws and regulations in different areas including customs trade administration, taxation, investment and intellectual property rights.<sup>74</sup>

One example is China’s alleged selective enforcement of the Anti-Monopoly Law (AML) against foreign companies in merger reviews to advance China’s industrial policy goals and boost national champions, whilst the law has rarely been applied to powerful Chinese SOEs. In fact, a review of China’s AML enforcement activities since the law took effect in 2008 shows that all transactions blocked or conditionally

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<sup>70</sup> Statement of Jerome Cohen to US-China Economic and Security Review Commission hearing on China Trade and WTO Issues, 14 June 2001.

<sup>71</sup> Arthur R. Kroeber, *China’s Economy: What Everyone Needs to Know* (Oxford University Press, 2016), at 113.

<sup>72</sup> Eric C. Ip & Kelvin Hiu Fai Kwok, ‘Judicial Control of Local Protectionism in China: Antitrust Enforcement against Administrative Monopoly on the Supreme People’s Court’, 13 (3) *Journal of Competition Law & Economics* 549 (2017), at 554.

<sup>73</sup> Laura Paler, ‘China’s Legislation Law and the Making of a More Orderly and Representative Legislative System’, 182 *The China Quarterly* 301 (2005), at 318.

<sup>74</sup> USTR, above n 65, at 168.

approved to date have involved foreign companies.<sup>75</sup> Moreover, China applies the AML in ways that are openly discriminatory against foreign firms, forcing them to sell assets to Chinese SOEs or to provide access to technology (intellectual property) to Chinese domestic firms at below market rates. For instance, in the Glencore/Xstrata case, both the acquirer company Glencore and the target company Xstrata are incorporated in Switzerland. As both companies have some minor assets in China, the companies needed approval of the merger in China. The Chinese authorities approved the deal on condition that Glencore sell a mine in Peru to a Chinese SOE to further China's goal of securing more natural resources from South America, despite the fact that the mine in Peru was not related to Glencore and Xstrata's activities in China. Similarly, in the Microsoft/Nokia case, the Chinese government approved the deal on the condition that Microsoft cap licensing fees of technology at below market rates to Chinese domestic companies.<sup>76</sup>

### 3. Independent Judicial review of administrative actions

Independent courts are widely seen as an institution emblematic of a commitment to the rule of law.<sup>77</sup> Under Article 2(D) of its Accession Protocol, China is committed to give foreign investors in all cases an opportunity for an impartial and independent judicial body to review specified administrative actions.<sup>78</sup> Accordingly, the Supreme People's Court of China promulgated three judicial interpretations to guide judicial review of WTO-related administrative actions and made it clear that the judicial review of WTO-related administrative actions should be consistent with China's WTO commitments. Compared with the generic judicial review provisions embodied in Article X:3 of the GATT 1994, China's independent and impartial judicial review obligation is much more onerous. It has also been frequently referred to as an example that WTO law embodies various substantive constitutional law principles.<sup>79</sup>

Chinese courts have come a long way in their reforms.<sup>80</sup> Recent significant reforms in the Xi Jinping era include centralization of control over court finances and personnel, professionalisation of the judiciary, creation of circuit courts of appeal delinked from provinces and localities, stepped-up efforts against corruption in the courts, and closer monitoring of party-state interference in individual cases.<sup>81</sup> There is no doubt that the Chinese government is committed to improve judicial professionalism, to make the rule of law in the Chinese context more transparent, to take meddling by local officials out of the judicial process, to improve the fairness of judicial decisions, and to ensure better implementation of laws.

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<sup>75</sup> United States Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy* (9 September 2014), at 2.

<sup>76</sup> Daniel CK Chow, 'China's Enforcement of Its Anti-Monopoly Law and Risks to Multinational Companies', 14(1) *Santa Clara Journal of International Law* 99 (2016), at 104-105.

<sup>77</sup> Ratna Rueban Balasubramaniam, 'Judicial Politics in Authoritarian Regimes', 59 *University of Toronto Law Journal* 405 (2009), at 405.

<sup>78</sup> Veron Mei-Ying Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on legal and Political Reform', 52 (1) *American Journal of Comparative Law* 77 (2004), at 79.

<sup>79</sup> Ernst U Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and E U Petersmann (ed), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, 2006), 32-33.

<sup>80</sup> Information Office of the State Council, 'Judicial Reform in China' (October 2012, Beijing).

<sup>81</sup> Carl Minzner, 'Legal Reform in the Xi Jinping Era', *Asia Policy* No.20 (July 2015), at 6-7.

However, based on the standards and jurisprudence laid down by the WTO and other international legal instruments, it remains doubtful whether China's judicial system can pass the scrutiny of the WTO requirements.<sup>82</sup> Chinese judges continue to be influenced by political, government or business pressures, particularly outside of China's big cities.<sup>83</sup> In particular, there are serious concerns about the independence of China's judiciary from the CCP. Ample evidence shows that despite all the reforms, the party retains systematic and structural control over the courts. More specifically, the party has the power to command courts to develop judicial policies consistent with its political objectives and priorities and to instruct courts regarding specific decisions in individual cases or categories of cases that the party deems important.<sup>84</sup> The Chief Justice Zhou Qiang, China's top judicial official, publicly denounced the idea of an independent judiciary and warned judges not to fall into 'the trap of western ideology' in 2017.<sup>85</sup> Consequently, though judicial power in China is separate from other state powers, it is always a pliant agent to the supreme power of the CCP. Indeed, As President Xi Jinping stated unequivocally, the cornerstone of socialist rule of law with Chinese characteristics is the leadership of the CCP. Discussion of judicial independence from the CCP at the central level is currently a forbidden subject in China.

#### 4. Substantial Conception of the Rule of Law in China

It is fair to say that contemporary China has gradually moved away from a purely instrumental conception of law toward a substantial conception of rule of law where law is meant to protect human rights, binding not only citizens but also government officials and the CCP.<sup>86</sup> However, it remains true that, although legal reforms in service of China's economic development are taken seriously, similar formal commitments to more democratic governance, protection of individual civil and political rights and effective control of the state and its actors are widely dismissed as largely empty words. Numerous accounts have emphasized the supremacy of the CCP's rule and suggested that even if China is making progress in extending some form of governance by law, the system cannot be regarded as following the rule of law because the rule of law has so far failed to reach politically sensitive domains where interests important to the CCP are at stake.<sup>87</sup> Rule of law indices from the World Bank and World Justice Project both score China significantly higher on many economic-related aspects of law than on political ones. Some even claim that China is currently experiencing the most sustained domestic political crackdown since Tiananmen square and we are witnessing a renewal of China's authoritarian state.<sup>88</sup> Consequently, even the most optimistic observers of China's rule of law project would agree that, to the extent one expects to see a profound

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<sup>82</sup> Chien-Huei Wu, *WTO and the Greater China: Economic Integration and Dispute Resolution* (Brill, 2012), at 119-126.

<sup>83</sup> USTR, above n 65, at 168.

<sup>84</sup> Ling Li, 'The Chinese Communist Party and People's Courts: Judicial Independence in China', 64 *American Journal of Comparative Law* 37 (2016), at 72.

<sup>85</sup> Michael Forsythe, 'China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince', *New York Times* (18 January 2017).

<sup>86</sup> Jianfu Chen, 'The Transformation of Chinese Law: From Formal to Substantial', 37 *Hong Kong Law Journal* 689 (2007), at 735-736.

<sup>87</sup> See generally Eva Pils, *China's Human Rights Lawyers: Advocacy and Resistance* (Routledge 2015).

<sup>88</sup> Carl Minzner, 'The Great China Crackdown is Here (and Why You Should Worry)', *The National Interest* (April 25, 2016).

indirect impact of WTO membership in terms of moving China towards a western style liberal democratic version of the rule of law, that hope was completely dashed.<sup>89</sup> Given China's current authoritarian party-state regime, the possibility of adopting a liberal democratic version of the rule of law in China in the near future is dim. Any legal reforms that are designed to challenge the CCP's grip on power are set up to fail.

From the analysis above, it can be concluded that China's accession to the WTO has had a positive impact on the formal rule of law in China. However, such impact is limited, even less so in the sense of a substantial conception of the rule of law. The primary motivation for undertaking legal reform in China was economic, and it was not a question to bring the rule of law to China at least in the western sense of separation of powers, human rights and democracy.

#### **IV. Explaining the Limits of the WTO in Shaping the Rule of Law in China**

##### **1. The Limited Mandate of the WTO**

To offer a multidimensional explanation of why the WTO has failed to socialise China into a rule of law country as defined in western liberal democracies is obviously beyond the scope of this paper.<sup>90</sup> Nevertheless, a preliminary reflection of several plausible causes is in order. To begin with, despite all the enthusiasm about the direct and potential role of the WTO in improving the rule of law in China, both the WTO Agreements and China's WTO Accession Protocol have actually very little to say about the rule of law in China except some sporadic provisions and specific sectors and most of these obligations, if they exist after all, are procedural in nature. They do not address substantive justice or any structural issues that have hindered China from being a rule of law country.

Around the time when China was about to join the WTO, some prominent legal scholars argued that China's WTO entry was at root a fundamental challenge to China's politics and governance, and that consequently China was required to revamp virtually all aspects of its legal and regulatory systems in order to comply with its WTO obligations. When assessing legal institutional reform that the WTO requires, one commentator wrote:

In order to meet the transparency and rule of law requirements of the GATT... constitutional provisions permitting control by the Chinese Communist Party in the operation of the legal system may have to be revised. ... This may also require deletion or amendment of the term "socialism" in the constitutional references to the rule of law... This is a basic rule of law concept contained in GATT Article X(3)(b), on independent adjudication and review of trade regulation matters.<sup>91</sup>

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<sup>89</sup> Albert H.Y. Chen, 'China's Long March towards Rule of Law or China's Turn against Law?' 4 (1) *The Chinese Journal of Comparative Law* 1 (2016), at 10-11.

<sup>90</sup> See Generally Ge Chen, 'Piercing the Veil of State Sovereignty: How China's Censorship Regime into Fragmented International Law can Lead to a Butterfly Effect', 3 (1) *Global Constitutionalism: Human Rights, Democracy and the Rule of Law* 31 (2014), 31-70.

<sup>91</sup> Pitman B. Potter, 'The Legal Implications of China's Accession to the WTO', 167 *The China Quarterly* 592 (2001), at 603.

As Wang pointed out, this argument is seriously flawed as it erroneously paints the GATT/WTO legal system as an anti-socialism, anti-authoritarianism, and liberal democracy-oriented machine.<sup>92</sup> In fact, there is no requirement under the WTO Agreement to have a fair and well-functioning legal system outside a few specific areas, let alone a liberal democratic rule of law.<sup>93</sup> This realistic observation takes us back to the fundamental nature of WTO law: it is a multilateral regime designed to facilitate reciprocal market access for goods and services by reducing tariff and non-tariff barriers.<sup>94</sup> It does not envision the rule of law with constitutional and political values. Though it may have a bearing on the rule of law and good governance, that relationship is indirect and flimsy at best.

Furthermore, there is a growing perception that the current GATT/WTO rules are incapable of constraining China's unique economic model.<sup>95</sup> While some problematic policies and practices being pursued by the Chinese government have been found to be inconsistent with China's WTO obligations after an expensive and long litigation process, many other interventions fall into a grey area: they violate the spirit, if not always the letter, of WTO rules.<sup>96</sup> Consequently, they are not directly and effectively disciplined by WTO rules. The allegation that China uses administrative review and licensing processes and foreign ownership restrictions to coerce US firms to disclose sensitive information and transfer technology to Chinese entities, a trigger of the ongoing China-US trade war, is one of such examples.<sup>97</sup> The office of the United States Trade Representative (USTR) claims that such practices are 'harmful to the development and use of innovative technologies' and 'a major trade irritant'.<sup>98</sup> Nevertheless, WTO rules seem to be ineffective in tackling these practices.

To begin with, if a foreign firm were required by the Chinese government officials to disclose sensitive technical information during administrative processes and such information were then passed to domestic entities, such practice would violate Article 39 of the TRIPS Agreement, which protects undisclosed information submitted to the government agencies against unfair competition and unfair commercial use. It would also be inconsistent with China's specific commitment not to condition the approval of foreign investment on the transfer of technology in its WTO Accession Protocol.<sup>99</sup> However, the alleged coercion often took place through informal, indirect and implicit ways, such as oral instructions behind closed doors, and hence impossible to prosecute. The fear of Chinese government retaliation has further prompted foreign firms to refrain

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<sup>92</sup> Wang, above n 44, at 375.

<sup>93</sup> Clarke, above n 8, at 111.

<sup>94</sup> Kyle Bagwell, Petros C. Mavroidis and Robert W. Staiger, 'It is a Question of Market Access', 96 *American Journal of International Law* 56 (2002), at 59.

<sup>95</sup> The European Commission Concept Paper, 'WTO Modernisation: Future EU Proposals on Rulemaking' (June 2018); Andrew Lang, 'Heterodox Markets and 'Market Distortion' in the Global Trading System', 22 (4) *Journal of International Economic Law* 677, at 701-719.

<sup>96</sup> Dani Rodrik, 'The WTO has Become Dysfunctional', *Financial Times* (August 5, 2018); Stephen J Ezell and Robert D. Atkinson, 'False Promises: The Yawning Gap Between China's WTO Commitments and Practices' (The Information Technology & Innovation Foundation, 2015), at 2.

<sup>97</sup> USTR, *Findings of the Investigation into China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (March 22, 2018), at 23-43.

<sup>98</sup> Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union, Annexed Statement 2 on Technology Transfer and Practices (31 May 2018).

<sup>99</sup> WTO, *Protocol on the Accession of the People's Republic of China*, WT/L/432 (10 November 2001), section 7(3).



from public testimony despite them reporting otherwise in confidential industry surveys.<sup>100</sup> Consequently, it is difficult to challenge China's practice at the WTO. Moreover, unless a WTO Member has made specific commitments under GATS mode 3, ownership restrictions on foreign investment are not regulated by WTO disciplines, nor are they generally prohibited by international investment treaties or the most recent free trade agreements. Some developing countries even argue that the market for technology policy such as a joint venture requirement is a perfectly legitimate tool for economic development.<sup>101</sup> The reality is that the WTO rules were not formulated with a state-led economy in mind. It is not effective in addressing a trade regime that broadly conflicts with the fundamental underpinnings of the WTO system.<sup>102</sup>

Finally, to the extent that we see improvements in certain aspects of the rule of law in either a formal or substantive conception in China, it is not entirely clear whether the key driver of change in the Chinese legal system is China's WTO Membership, the internal developments within China or simply a convergence of interests between the Chinese government and other foreign stakeholders. For more than two decades before its WTO accession, China had pushed for proactive and unilateral economic liberalization and legal construction. It seems plausible that the Chinese government's decision to pursue WTO Membership was because it was consistent with China's domestic reform agenda, and that the WTO accession was only part of China's grand development strategy. It not only opened more markets for Chinese products and services, but also gave the Chinese leadership extra leverage to overcome domestic obstacles in the domestic economic and legal system.<sup>103</sup> To be sure, this claim is not to downplay the positive influence of the WTO, but more of a plea to supporters of the claim that the WTO promotes the rule of law to pin down the causal mechanisms and to provide sufficient evidence demonstrating that WTO member states have indeed internalised the international norms and that these norms are primary drivers underlying the progress in Chinese rule of law.

## **2. The Limits of the WTO Dispute Settlement Processes**

The WTO dispute settlement system is widely considered as the 'jewel in the crown' of the global trade architecture. Thanks to the consensus decision-making practice, the WTO Appellate Body is protected as an independent judiciary. Nevertheless, the Appellate Body appears to be very conscious of its legitimacy when it passes judgement over domestic policies in sensitive areas.<sup>104</sup> Through various issue-avoidance techniques and a number of crucial jurisprudence moves, the Appellate Body has been largely successful in avoiding the charges of judicial activism and the appearance that it is the agent of the neo-liberal project.<sup>105</sup> However, the WTO judiciary's conservatism renders itself a reluctant guardian for values of the rule of law that are not explicitly embodied in WTO Agreements.

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<sup>100</sup> USTR, above n 97, at 19-23.

<sup>101</sup> Julia Ya Qin, 'Forced Technology Transfer and the US-China Trade War: Implications for International Economic Law', 22 *Journal of International Economic Law* 743 (2020), at 753-758.

<sup>102</sup> Jennifer Hillman, Testimony before the U.S. Senate Foreign Relations Committee hearing on Multilateral Economic Institutions and U.S. Foreign Policy (November 27, 2018).

<sup>103</sup> Clarke, above n 8, at 97-98..

<sup>104</sup> Sol Picciotto, 'The WTO Appellate Body: Legal Formalism as a Legitimation of Global Governance', 18(3) *Governance* (2005), 477-503.

<sup>105</sup> Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', 27 (1) *European Journal of International Law* 9 (2016), at 13.

Take Article X of the GATT 1994 as an example. In contrast to the GATT 1947 era, WTO panels and the Appellate Body have on several occasions found measures to be inconsistent with the provisions of Article X. However, a careful review of the relevant case law has revealed a sharp contrast between the WTO Appellate Body's expansive interpretation of Article X requirements and its reluctance to apply these stringent requirements in specific disputes to avoid controversial decisions.<sup>106</sup> For example, despite the great potential of Article X:3(a) to rein in non-discriminatory but unreasonable and cumbersome regulations, the Appellate Body has been in most cases reluctant to find a measure inconsistent with Article X:3(a) to date.<sup>107</sup> Similarly, in *China - Publications and Audiovisual Products*, the Appellate Body accepted the panel's assumption, with no further investigation, that the content of imported cultural products censored by the Chinese government may be harmful to public morals in China. Ironically, in the same case, the Appellate Body criticized the panel for relying on 'an assumption arguendo' when the panel had simply 'assumed' without making a proper legal finding.<sup>108</sup> As a consequence of such a hasty assumption, the fact that China's content review mechanism may be violating basic principles of freedom of speech, arguably an essential element of the rule of law in liberal societies, was not even mentioned.<sup>109</sup>

Moreover, China's WTO obligations are not part of its domestic law, binding on courts and government bodies, until the enactment of appropriate domestic legislation and regulations incorporating those obligations. Accordingly, China undertook to meet its WTO commitments through revising its existing laws and/or enacting new ones. But having rules on paper does not mean that they are fairly enforced in practice. It is only meaningful to talk about the WTO's impact on the rule of law if China has faithfully and promptly implemented its WTO commitments, including adverse WTO rulings against it. Over 18 years of WTO membership, China has grown to become an active player in the WTO dispute settlement system. It is widely acknowledged that China has an overall good record in complying with the WTO rulings in a timely and qualitatively sound manner.<sup>110</sup> Nevertheless, after the early exemplary compliance record, several instances of non-compliance with key WTO principles of market access, non-discrimination and transparency, or the carefully negotiated conditions for China's WTO accession, have been identified.<sup>111</sup> The most striking examples include *China - Publications and Audiovisual Products*, *China - Export Restrictions* and several trade remedy cases. The WTO Trade Policy Review in 2018 has also enumerated some gaps between WTO Agreements and China's domestic legal and regulatory systems, in areas such as transparency, SOEs and foreign investment regime.<sup>112</sup>

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<sup>106</sup> Ala'i, above n 39, at 799-801.

<sup>107</sup> Ibid, at 800.

<sup>108</sup> WTO Appellate Body Report, *China-Measures Affecting Trading Rights and Distributions Services for Certain Publications and Audiovisual Products (China-Publications and Audiovisual Products)*, WT/DS363/AB/R (21 December 2014), para 213.

<sup>109</sup> Joost Pauwelyn, 'Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on *China- Audiovisuals*', 11 Melbourne Journal of International Law 119 (2010), at 133.

<sup>110</sup> Timothy Webster, 'Paper Compliance: How China Implements WTO Decisions', 35 (3) Michigan Journal of International Law 525 (2014), at 572; Weihuan Zhou, 'Fifteen Years on: Has China Implemented WTO Rulings: A perspective on Trade in Goods Dispute', 11 Asian Journal of WTO and International Health Law & Policy 155 (2016), at 199.

<sup>111</sup> USTR, above n 65, at 8-25.

<sup>112</sup> WTO Trade Policy Review: China, Concluding Remarks by the Chairperson (13 July 2018).

China's implementation record suggests that China has done what is necessary to achieve compliance with the WTO norms, but it may drag its feet in particularly sensitive areas and matters that it considers vital to its national interest. It must be stressed that this observation does not apply only to China. Compared with other liberal economies such as the US and EU's records of implementing WTO rulings, China actually exhibits a higher degree of compliance.<sup>113</sup> The point is simply that it is unrealistic to believe that WTO enforcement actions alone can have a significant impact on an economy as large as China's economy, unless the Chinese government is truly committed to market-based competition and the rule of law.

### **3. The Flawed Trade Liberalization - Rule of Law Nexus Argument**

In hindsight, much of the original optimism about the profound impact of the WTO membership on China's rule of law construction, both in formal and substantial conceptions, was founded on flawed assumptions. There may well be a powerful spillover effect on the rule of law from accession to the WTO.<sup>114</sup> However, contrary to what many people hoped for, the trade liberalization – rule of law process is not at all automatic, but heavily dependent on the existence of many other pre-conditions such as political will, expertise, funds, and an independent judiciary benefitting from the existence of embedded judicial authority and an established tradition of broad interpretation of judicial rules and doctrines.<sup>115</sup> Moreover, increased economic and cultural exchange deriving from WTO membership will not necessarily lead to political pressure for democratic reform and a western liberal conception of the rule of law. Policymakers may at times be unwilling or unable to effectively change behaviour, institutions and culture. Instead, the cultural disruption ensuing from economic globalization and trade liberalisation may encourage a greater exertion of central government authority to maintain societal stability and national identity.<sup>116</sup> This is arguably the case in China. After 40 years of reform and opening policy, China's remarkable economic liberalisation stands in marked contrast to political conservativeness, featuring the monopoly of political power by the CCP and the blurring line between Chinese national interests and the security of the CCP regime.<sup>117</sup> When the CCP perceives potential threats to its grip of power, it is very easy for it to slow or even block any spillover effects that the WTO may have on the rule of law effectively, efficiently and constitutionally, at no discernible cost to its economic standing in the world community.<sup>118</sup>

It is further submitted that the root problem with regard to trade liberalisation and rule of law nexus is that it implicitly assumes WTO Members as docile, readily receptive to all direct and indirect influences of economic globalisation, and their national policies and identities could be easily moulded along liberal democratic lines. The reality is, as Ian Hurd puts it, 'states are both socialised to norms and strategic calculators that

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<sup>113</sup> Webster, above n 110, at 535.

<sup>114</sup> Editorial, 'Vote for China's Freedom', *The Economist* (20 May 2000).

<sup>115</sup> Gordon Silverstein, 'Globalization and the Rule of Law: A Machine that Runs of Itself?', 1 (3) *International Journal of Constitutional Law* 427 (2003), at 430.

<sup>116</sup> Eric W. Orts, 'The Rule of Law in China', 34 *Vanderbilt Journal of Transnational Law* 43 (2001), at 109.

<sup>117</sup> Xiangfeng Yang, 'The Anachronism of a China Socialized: Why Engagement is Not All Its's Cracked Up to be', 10 (1) *The Chinese Journal of International Politics* 67 (2017), at 88-90.

<sup>118</sup> Silverstein, above n 115, at 442.

manipulate them'.<sup>119</sup> State power co-exists with global governance institutions. It may retreat under exogenous normative forces, but it is equally possible that the pendulum may swing towards the opposite direction. In short, it is not surprising that the WTO membership does not automatically bring the rule of law to China. Although there is a solid theoretical foundation for the claim that trade liberalisation may ultimately lead to the rule of law, it is not a guaranteed outcome.

## V. Conclusion

The WTO Agreement is claimed to be one of the most revolutionary transformative agreements in the history of international law.<sup>120</sup> China's accession to the WTO constituted an unprecedented opportunity to put its economic, legal and political system under strict scrutiny and to reform its legal system towards the rule of law. Whilst it is undisputed that China has made great strides in rule of law construction, it is less clear that the locomotion which gives impetus to China's positive behavioural evolution was primarily supplied by the WTO. Our contention is by no means a rejection of the positive role that the WTO has played in promoting the rule of law in China. There is indeed some evidence showing that the Chinese regions in which the rule of law is better realised are those in which foreign investors play a considerable role in their economic development.<sup>121</sup> Rather, the purpose of this article is to interrogate the degree, depth and scope of such effects. Indeed, it is precisely due to the U.S. policymakers' growing disillusionment with the extent of the impact of the WTO on China's economic and political reform that the U.S. has started a trade war with China since March 2018. The two parties signed a 'Phase One' trade agreement in January 2020 with commitments by China to purchase more U.S. products, to offer new market access opportunities and not to engage in certain market-disrupting practices including refraining from forcing foreign companies to transfer technology. However, it fell short on addressing fundamental structural problems in the U.S.-China relationship.<sup>122</sup> To be sure, WTO Membership is not a magic formula for converting a member government into a rule of law country.

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<sup>119</sup> Ian Hurd, 'Breaking and Making Norms: American Revisionism and Crises of Legitimacy', 44 (2) *International Politics* 194 (2007), at 209.

<sup>120</sup> Ernst-Ulrich Petersmann, 'Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement', 21 (1) *Journal of International Economic Law* 103 (2018), at 104.

<sup>121</sup> Wang, above n 44, at 3-4.

<sup>122</sup> U.S.- China Economic and Security Review Commission, 'The U.S.- China "Phase One" Deal: A Backgrounder', Issue Brief (February 4, 2020), at 1.