Chapter Six

The EU and China in the WTO: What Contribution to the International Rule of Law? Reflections in Light of the *Raw Materials* and *Rare Earths* Disputes

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Introduction

The concept of the rule of law was originally developed in the context of domestic legal systems characterized by a high degree of centralization, institutionalization, and hierarchization.[1] During the last two decades, though, significant efforts have been undertaken to apply this concept to the international legal order. The growing consensus on the importance of the rule of law is best demonstrated in the field of international trade, which currently functions as one of the most regulated and institutionalized domains of global governance. It is now widely recognized that the rule of law strengthens international trade and that international trade can reinforce the rule of law accordingly.[2] On the one hand, domestic legal systems and international law can provide a stable legal environment that regulates imports and exports, constrains protectionism, and favors foreign investment. On the other hand, the use of international arbitration or dispute settlement at the national and international levels strengthens the rule of law. Even the general recognition in international trade regulations that "the best form of dispute settlement is dispute avoidance"[3] reinforces the rule of law as it pushes states to adopt transparent and publicly accessible trade regulations.

The aim of this chapter is to inquire into the European Union (EU)-China strategic partnership's contribution to the rule of law at the international level, in the particular context of the World Trade Organization

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(WTO). More specifically, we analyze the EU's relationship with China in the context of the WTO's dispute settlement mechanism (DSM), hypothesizing that the use the two strategic partners make of the DSM contributes to the enhancement of the international rule of law.

For that purpose, we first explain the importance of the rule of law in the context of the WTO. Subsequently, we consider the EU-China relationship in the WTO and more specifically the way in which both players make use of the WTO's DSM in their bilateral trade relations. Finally, we analyze two recent cases that were brought before the WTO's DSM by the EU, namely the *raw materials* and the *rare earths* disputes, in order to assess the actual contribution of EU-China dispute settlement to the enhancement of the rule of law at the international level. The main argument defended by this chapter is that the practical use the EU and China make of the DSM reinforces the international rule of law in international trade. Such use nevertheless also demonstrates that the heritage of China's accession protocol and its overall implementation in the DSM challenge some important aspects of the international rule of law, in particular the clarity and equality before WTO law.

The International Rule of Law and the WTO

Despite increasing difficulties in adapting to the needs of its members—as best exemplified by the current stalemate in the Doha Development Agenda (DDA)—the WTO still functions as the premier institution that regulates international trade in goods and services. The ultimate objective of the organization is raising standards of living, ensuring full employment, and expanding trade in and production of goods and services.[4]

The WTO arguably best testifies to the importance of the rule of law in international trade governance. According to James Bacchus, "the WTO is offering persuasive evidence to the world for the very first time that there truly can be something deserving of being called international law, and, thus, that there truly can be the international rule of law."[5] The WTO indeed offers a multilateral governance system that goes far beyond "power politics in disguise"[6] and provides for both a "legalization" and "judicialization" of international trade relations.[7]

First, it benefits from strong legal foundations that are grounded in various multilateral agreements, notably the core agreements that cover trade in goods (General Agreement on Tariffs and Trade 1994, GATT 1994)[8] and services (General Agreement on Trade in Services, GATS),[9] and the protection of intellectual property rights (Agreement on Trade Related Aspects of Intellectual Property Rights, TRIPS).[10] To these agreements must be added all the rules that are included in the specific accession protocols of newly acceded members to the WTO.[11]

Second, the WTO's Dispute Settlement Understanding (DSU), notably its Article 23, requires WTO members to seek redress of a violation of WTO obligations by using the rules and procedures of the Understanding.[12] The DSU constitutes therefore a unique instrument that provides for compulsory jurisdiction and empowers the Dispute Settlement Body (DSB) to judge the compliance of WTO members with the rules of the WTO. The decisions of the DSB, based on the reports of panels or the appellate body (AB), are binding for the member concerned and are, generally speaking, well implemented. The good compliance records are testimony of a "clear movement toward an international rule of law to act in anticipation of compliance with WTO obligations."[13] In addition, panel and AB reports, as well as DSB decisions have now developed into a large body of jurisprudence both in terms of procedural and substantive rules.[14]

Third, the WTO's Trade Policy Review Mechanism (TPRM) creates a framework for a peer-review process that imposes international scrutiny on WTO members' practice in international trade. In that process, the fear of seeing one's reputation tarnished can constitute a major "deterrent mechanism" against States' temptations to violate international trade rules.[15] The TPRM eventually leads to an enhancement of the transparency and understandability of the trade policies of WTO members.

The EU and China in the WTO: Different Histories, Similar Objectives

While the EU is one of the founding members of the WTO and has assumed the role of a genuine rule maker thanks to its active role in the various rounds of trade negotiations, China gained access to the WTO only in 2001 after more than 15 years of intense negotiations.[16] At that time, "trade policy makers understood that the international organization could not pretend to govern world trade with such an important trading nation outside of the World Trade Organization."[17] In fact, China's accession constitutes probably the "greatest WTO-era achievement."[18] Importantly, the EU supported, to a very large extent, the Chinese accession to the WTO. The Union took the view that this accession constituted the best incentive for China to respect international trade rules and to increase the trade flows between the EU and China. This calculation proved to be accurate: trade flows between the EU and China increased by more than 300 percent in the ten years following the accession of China to the WTO.[19]

From China's perspective, the accession to the WTO became a necessity to pursue and enhance its policies of reform and opening up.[20] Obtaining most favored nation (MFN) status was one of the main incentives in seeking access to the WTO. According to this principle, "each contracting party

shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate part of the appropriate schedule annexed to this agreement."[21] Nevertheless, China had to pay a very high price to obtain membership as the market access requirements for China's accession and other commitments were notably "far more reaching than those made by any member that has joined the World Trade Organization since 1995."[22] In addition to an average tariff rate below 10 percent for imports,[23] China is also bound by several so-called "WTO-Plus" and "WTO-Minus" obligations under the accession protocol.[24] These include commitments on transparency, transitional product-specific safeguard clauses, the annual review of Chinese trade laws during the first ten years after accession, the elimination of export duties, and "special price comparison in determining anti-dumping."[25]

More than ten years after its accession, China has arguably made great progress in transforming its legal and economic systems to comply with its WTO commitments.[26] In addition, it has also become increasingly acquainted with the WTO's functioning. China's actions in the WTO now incorporate all the elements of the four strategies in the country's multilateral diplomacy.[27] First, right after its accession, China took the stance of a patient *watcher* in the context of the DSM. It participated as a Third Party to most of the cases that were brought before the DSB. This low-profile strategy was mainly aimed at addressing its own lack of expertise in international trade law and was a way of becoming acquainted with WTO procedures. Second, China became more and more *engaged* in the DSM, acting first as a reluctant litigant in the position of a respondent, and later as a more active litigant in both the positions of respondent and complainant.[28] China has, until today, been involved in 45 cases since its accession: 12 times as a complainant and 33 times as a defendant. Interestingly, all the cases that have been brought by China were against its main trading partners, the EU and the United States. Third, and in addition to its growing involvement in the WTO, China is also engaged in the negotiations of a very diverse set of bi- or plurilateral trade agreements (RTAs) and therefore also *circumvents* the WTO architecture. China's propensity for developing a large and comprehensive network of free trade agreements (FTAs) is "motivated by a desire to develop alternative negotiation forums to advance China's economic interests."[29] While this holds particularly true for all WTO members, the quest for securing bilateral and regional FTA's is particularly important for China given its "backward position" in the current multilateral trade negotiations.[30] It is arguable that China has so far not tried to *shape* the organization: "there is scant evidence that China has played the disruptive, blocking role that has been ascribed to it."[31] An interesting development in this respect is China's objection to a recent Appellate

Body report. In *US-Tuna II*, the Appellate Body considered that a TBT Committee Decision constituted a "subsequent agreement" in the sense of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.[32] China has fiercely objected to this interpretation, which it considers to be inconsistent with the provisions of the DSU.[33] In the DDA negotiations so far, China has kept a low profile.[34] On the one hand, the position of China in the DDA is directly framed by the Chinese reluctance to abide with any additional commitment without reciprocity.[35] China already gave up a lot to obtain its membership and is not willing to go beyond these commitments. On the other hand, China is still not willing to undertake a leadership role in order not to damage its relationship with other developing countries within the WTO.[36]

EU-China Trade Disputes and the WTO

Looking more specifically into the EU-China relationship, it is arguable that economic links and expectations for mutual economic benefits have always been "the main driver of cooperation"[37] between the EU and the People's Republic of China (PRC). In the wake of its "opening and reforms policy," China has become the second-largest trading partner of the EU over the last years. The EU is now the main trading partner of China. Through growing exchanges, both markets have become highly intertwined and are, in fact, interdependent.[38]

In spite of the increasingly comprehensive partnership between the EU and China, growing interdependence has also brought many difficulties and disagreements between both blocks. In this process, differences in ideological background play a role, but do not offer a full explanation. It is the ever-growing trade deficit that questions, in fact, the existence of a well-balanced and mutually beneficial economic relationship.[39] While economic theories diverge on the question whether macroeconomic imbalances are a severe issue that should be solved, Europe and China each have their own explanations to justify the existence of a major trade deficit in their bilateral economic relationship. On the one hand, the EU regularly complains about market access issues in China, particularly in the field of services. The EU Chamber of Commerce in China, while recognizing the positive impact of the Shanghai Pilot Free Trade Zone, recently pointed to the necessity of lifting investment constraints as well as of addressing frequent indirect and hidden restrictions.[40] On the other hand, China is facing rising protectionism and a lack of trust in Europe. It remains, as of today, the primary target of European antidumping measures.[41] This extensive use of antidumping measures is perceived as a tool used by the EU to close its market. In this context, China is still very much affected by and opposed to

its nonrecognition as a market economy—a strong symbolic and economic challenge to its trade policy. It challenges, indeed, the lack of recognition of the great changes generated by its policy of opening up and reforms,[42] which makes it easier for the EU to apply antidumping measures against Chinese products. In practice, China's nonmarket economy status implies that the EU can determine the normal value of Chinese products for the purpose of an antidumping investigation on the basis of an analogous third country methodology according to the EU Anti-Dumping Regulation.[43]

All these difficulties have arguably been reinforced in the context of the recent financial and economic turmoil in Europe and in the United States. While China's export-driven economy suffered from the decreasing demand in Europe and in the United States, the crises also enabled China to raise its profile internationally and to voice its demands for structural changes in international economic and financial governance.[44] "China's increasing leverage"[45] has more particularly enabled it to "divide and conquer" in Europe by orienting its investments in strategic European sectors thanks to a lack of political cohesion and coordination in Europe.[46] These changes in the balance of economic power have led Europe to fear that China could have actually started "buying up Europe,"[47] and China to blame Europe for its difficulties in "putting its own house in order." The decreasing mutual trust, along with China's growing self-confidence, has led to the revival and development of a number of contentious issues. Recent concerns about export restrictions on raw materials and rare earths as well as complaints about illegal measures affecting the renewable energy sector are among the latest examples of a state of play that has become ever more confrontational.

In that context, both actors have increasingly made use of the WTO's DSM to resolve their bilateral trade disputes. Nevertheless, there are other explanations for this development as well.[48] First, as indicated above, China has strongly increased its capacity to participate in WTO dispute settlement since its accession in 2001.[49] In addition to considerable investments in WTO law teaching and research within Chinese universities,[50] China has successfully established public-private partnerships in order to facilitate the sharing of information between the government and businesses.[51] Second, even if there is a growing number of contentious issues that inevitably leads to an increase in the number of cases, it was already clear at the time of China's accession to the WTO that some of these issues would come up before the DSM as they were not adequately addressed or resolved during the negotiations of China's accession protocol.[52]

The DSM is arguably used when bilateral discussions fail to bring a solution.[53] Although very demanding, filing a case with the WTO can prove to have two major advantages. First, the DSM operates on the basis of a

strongly developed legal framework with which both actors have to abide, and which has the authority to ensure that decisions are effectively enforced. In this respect, both the EU and China highly value the DSM and have so far generally implemented DSB decisions satisfactorily in cases in which they stood against each other.[54] The only Article 21.5 DSU compliance panel in a dispute between the two countries was established upon the request of China. It aims at determining whether the measures taken by the EU in the dispute on steel fasteners[55] respected the recommendations and rulings of the DSB. Second, WTO dispute settlement also allows the complainants to act not only individually but also jointly with other members—a burden sharing that the EU has recently exercised together with the United States, Mexico, and Japan. This burden sharing also allows the EU to share the political and economic costs of a complaint with other WTO members.[56]

Also interesting is the nature of the cases that have been brought before the WTO. The table below indicates that disputes not only concern sensitive issues that rank high in the bilateral relationship but also mirror changes in the nature and priorities of the European and Chinese economies. This is particularly true for the two case studies of this chapter. *China-Raw Materials* and *China-Rare Earths* not only have not major legal implications but also concern issues that are central in terms of energy security and the fight against climate change—two challenges identified by China[57] and the EU[58] as strategic priorities. These two concerns are closely intertwined[59] and relate both to the difficulties of combining sustainable development and the need to secure access to natural resources (table 6.1).

China-Raw Materials *(DS395) and* China-Rare Earths *(DS432)*

China-Raw Materials (DS395) concerns restrictions on exports imposed on certain raw materials by China. These include the exports of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. There is a very limited world supply for these materials, and China is the main producer worldwide.[60] For the EU, a large number of industrial activities ranging from the steel industry to nanotechnologies depend on the availability of these raw materials. The raw materials sector furthermore employs as many as 30 million workers and is of central importance in the development of green technologies.[61] It was with this in mind that the EU brought *China-Raw Materials* before the WTO DSM, along with Mexico and the United States, who alleged that the export restrictions increased the price on international markets and favored Chinese industries that could get raw materials for a lower and more stable price. China defended its measures by arguing that its export restrictions were aimed at conserving exhaustible natural resources (Art. XX

Table 6.1 EU-China trade disputes at the WTO[a]

Dispute	*Date*	*Complainant*
China—Measures Affecting Imports of Automobile Parts	March 30, 2006	European Communities
China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers	March 3, 2008	European Communities
China—Measures Related to the Exportation of Various Raw Materials	June 23, 2009	European Communities
European Communities—Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China	July 31, 2009	China
European Union—Anti-dumping Measures on Certain Footwear from China	February 4, 2010	China
Provisional Anti-dumping Duties on Certain Iron and Steel Fasteners from the European Union	May 7, 2010	European Union
China—Definitive Anti-dumping Duties on X-Ray Security Inspection Equipment from the European Union	July 25, 2011	European Union
China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum	March 13, 2012	European Union
European Union and Certain Member States—Certain Measures affecting the Renewable Energy Generation Sector	November 5, 2012	China
China—Measures Imposing Anti-dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union	June 13, 2013	European Union

[a] See http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=none&subject=none&agreement=none&member1=EEC&member2=CHN&complainant1=true&complainant2=true&respondent1=true&respondent2=true&thirdparty1=false&thirdparty2=false#results. At the time of writing, China had notified the WTO Secretariat of a request for consultations with the EU on measures relating to tariff concessions on certain poultry meat products.

(g) GATT 1994) as well as protecting human, animal, or plant life or health (Art. XX (b) GATT 1994).

The key findings of the Panel were twofold and concerned both duties and quotas applied by China on raw materials.[62] First, export duties that include taxes and charges imposed on exports were found to violate Paragraph

11.3 of China's protocol of accession, which stipulates the conditions for applying export duties.[63] While export restrictions in the form of quotas are banned under the GATT 1994, export duties are authorized and constitute, generally speaking, an important lever for developing countries to protect their natural resources.[64] In the negotiations for its accession, China nevertheless agreed to stop imposing export duties on all but 84 products as part of its *WTO-Plus* obligations.[65] Most interestingly, the Panel ruled that China could not benefit from the general exceptions foreseen in Article XX (b) or (g) of the GATT 1994. These exceptions relate to the conservation of exhaustible natural resources (g) and the protection of human, animal, or plant life or health (b). The absence of any reference to Article XX GATT 1994 in Paragraph 11.3 of China's accession protocol made it impossible for China to justify the duties on that basis. Second, the Panel ruled that export quotas are forbidden by Article XI:1 of the GATT 1994 and that China did not successfully prove that these quotas were "temporarily applied" in order to "prevent or relieve a critical shortage." These two key findings were upheld by the Appellate Body.[66] This ruling has arguably a major impact on China's industrial policy, as it requires China to put an end to a practice that partly aimed at protecting rising domestic demand for raw materials while restricting the exports in order to protect the environment.[67]

On March 13, 2012, the EU requested consultations with China regarding China's restrictions on the export of rare earth elements in a dispute that became DS432: *China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum.* Rare earths are chemical elements necessary for the development of green technologies, such as electric cars and solar panels. China is by far the largest supplier of rare earths (around 97%), although it only holds around 36 percent to 48 percent of world reserves.[68] In the words of former EU commissioner for trade Karel De Gucht, "China's restrictions on rare earths and other products violate international trade rules and must be removed. These measures hurt our producers and consumers in the EU and across the world, including manufacturers of pioneering hi-tech and 'green' business applications."[69] Even if the EU "encourages all countries to promote an environmentally friendly and sustainable production of raw materials," it considers that export restrictions do not achieve this objective.[70]

As in *China-Raw Materials*, the EU raised the issue of compliance of China's export duties with Paragraph 11.3 of the accession protocol. The question of the applicability of Article XX of the GATT as a justification for a breach of the obligations under Paragraph 11.3 of the protocol was therefore relevant again. China put forward arguments of resource scarcity as well as environmental harm caused by the exploitation of rare earths in order to defend its industrial practice.[71] A Panel was established on July 10, 2012, and the Panel Report was circulated on March 26, 2014.[72] The

Report declared, as it did in *China-Raw Materials*, that "the majority of the Panel agreed with the complainants and found that the 'General Exceptions' contained in Article XX of the GATT 1994 are not available to justify a breach of the obligation to eliminate export duties contained in China's Accession Protocol. Accordingly, the majority held that China could not invoke the exception in Article XX(b) to seek to justify its export duties."[73] The findings were upheld by the Appellate Body.[74]

The overall debate on the DSB rulings relates to the status of China's accession protocol and *WTO-Plus* obligations in the WTO legal system. This systemic question has been pending for a very long time in the WTO, and the case law has hardly produced a unified and clear interpretation.[75] In a discussion directly linked to this legal uncertainty, the DSB questioned, in *China-Raw Materials* and *China-Rare Earth*, the availability of the general exceptions of Article XX of the GATT 1994 to justify breaches of obligations that fall beyond the scope of the GATT 1994 but are included in the accession protocol as part of China's *WTO-Plus* obligations. Both the Panel and Appellate Body reports on *China-Raw Materials* and *China-Rare Earth* chose a very restrictive approach and ruled that "Article XX defences are per se available only for violations of GATT 1994 provisions, whereas the legal basis to resort to such defences for violations of non-GATT obligations is the text of incorporation by cross-reference."[76] The absence of a direct reference to Article XX of the GATT in Paragraph 11.3 of the Accession Protocol denies China the right to justify its export duties on that basis.

Although there is no discussion regarding the DSB's capacity to enforce the provisions of the accession protocol,[77] the conclusions reached in these two cases are certainly highly debated.[78] China furthermore reacted very emotionally against the decisions in the two disputes. While the EU considers WTO cases strictly in economic and legal terms, China still has a tendency to see them in a much more political way.[79] Having gained expertise in international trade law, China now critically considers its accession protocol and tries to avoid as much as possible discriminatory practices that do not directly fall under the GATT 1994. In addition, the restrictive interpretation of China's accession protocol has raised many concerns and criticisms, especially from the side of other developing and emerging countries, which can point to these "very irrational and controversial" aspects of multilateral trade governance.[80] In this respect, Argentina, Brazil, and Russia endorsed an approach that sought to ascertain the common intention of the drafters. Russia even made a very strong and assertive statement that departed from the usual highly diplomatic language used by WTO members before the DSB. In this statement, Russia expressed its "serious concern" as the findings in *China-Rare Earths* clearly depart from the assurance that was given to Russia during the negotiations for its accession that

> [i]n accordance with well-established customary practices of the WTO and the understanding shared by the Members (…) all Members have equal availability of defences under the WTO Agreement in the context of the whole integrity of all parts of the WTO Agreement, in particular Multilateral Trade Agreements and Protocols of accession, with or without specific reference to such defences in the Protocol of accession.[81]

Whether an alternative approach was possible was confirmed in the dissenting opinion expressed in the Panel Report in *China-Rare Earths*. It reads as follows: "unless China explicitly gave up its right to invoke Article XX of GATT 1994, which it did not, the general exception provisions of the GATT 1994 are available to China to justify a violation of Paragraph 11.3 of its Accession Protocol. I see nothing in China's Accession Protocol that clearly indicates such a waiver."[82]

While China indeed did not explicitly give up its right to invoke Article XX of GATT 1994, the accession protocol does nevertheless not directly refer either to the availability of the general exceptions of the GATT for Paragraph 11.3 or for all the provisions included in the accession protocol. In contrast, other accession protocols such as those of Albania (2000) and Croatia (2000) make it clear that exceptions to the accession protocol can only be imposed in conformity with the WTO Agreement.[83] This distinction explains the diversity in the existing case law on the relationship between China's accession protocol and the WTO agreements. In *China-Publications and Audiovisual Products*, for example, the Appellate Body endorsed the Chinese argument that it could benefit from the exceptions foreseen in Article XX of the GATT because there was an explicit reference to the WTO Agreement in the next section of China's accession protocol.[84]

Reflections from an International Rule of Law Perspective

The question now is what these two cases tell us about the international rule of law. On the one hand, it is arguable that these two disputes demonstrate that issues central to the EU-China relationship as well as to global governance are being brought to the WTO's DSM. This reliance on multilateralism and the jurisdiction of the DSM in the field of trade supports, to a great extent the development of, and respect for, the international rule of law. The supremacy of the law and the effective implementation of rules shape bilateral relationships and help resolve bilateral disputes. This is a strong and positive signal and certainly a significant contribution to the enhancement of the strategic partnership between China and the EU. It adds, in fact, legal certainty, transparency, and jurisdictional control in the international trade practices of China and the EU in the field of international trade.

On the other hand, the conclusions reached in the cases *China-Raw Materials* and *China-Rare Earths* may, in the long run, constitute a challenge to the international rule of law as developed and protected in the context of the WTO. The conclusions in *China-Raw Materials* and *China-Rare Earths* reinforce, in fact, a dual regime that does not place original members of the WTO and acceding countries on an equal footing. This dual regime is a direct consequence of the strong leverage original members of the WTO have to push acceding members to agree upon conditions that go far beyond the obligations foreseen under the GATT (i.e., *WTO-Plus* and *WTO-Minus* obligations). A notable example of this dual regime is that original members do not have an obligation to banish export duties, while new members are in some cases required, under their terms of accession, to stop applying export duties.[85] The Panel decisions in *China-Raw Materials* and *China-Rare Earths* arguably recognized the ability of sovereign states—which committed to abide by certain *WTO-Plus* or *WTO-Minus* obligations—to "sign away their rights to pursue public policies, such as environmental protection."[86] This can be perceived, to a certain extent, as a "deplorable"[87] precedent that also reinforces the existing nonreciprocity between original members and those new members who have committed not to use export duties.

It is submitted that the dual regime engendered by the inclusion of a great number of *WTO-Plus* and *WTO-Minus* obligations within accession protocols challenges some fundamental aspects of the international rule of law.

First, the negotiation of accession protocols that go far beyond the general obligations included in the WTO Agreement challenge the principle of equality of all WTO members in the application of WTO law. The principle of equality is at the core of the WTO, as best emphasized by the Single Undertaking Rule that was introduced by the Uruguay Round. In accordance with the Single Undertaking, membership in the WTO is an "'all-or-nothing' proposition—members must sign on to all WTO treaty regimes, and as a general rule, no reservations or exceptions are permitted."[88] The package to which new WTO members have to subscribe is therefore "applied simultaneously and inseparably," which should provide for the equality of all WTO members in the realm of WTO law.[89] With this in mind, the conclusions reached in *China-Raw Materials* and *China-Rare Earths* challenge the Single Undertaking and the equality of all the WTO members before WTO laws in two ways. On the one hand, the reliance on nonreciprocal obligations foreseen by accession protocols "undermines the aspiration of the WTO to be a truly multilateral, rules-based organization."[90] On the other hand, the availability of general exceptions detailed in Article XX of the GATT 1994 appears to be contested or at least not crystal clear for nonoriginal members who wish to justify breaches of obligations

included in the accession protocol. In these two cases, China's "less-than-equal status" as produced by a very stringent accession protocol is reinforced to a point that it may challenge some of the main principles underpinning the WTO system, namely reciprocity and equal treatment.[91]

Second, *WTO-Plus* and *WTO-Minus* obligations negotiated in the accession process are very often "informally, or even haphazardly" created and therefore strongly complicate the role of the DSB.[92] They challenge, to a certain extent, the clarity of WTO law as they leave a great scope for interpretation. While the clarity of legal texts should not be achieved at all costs, it significantly provides for legal predictability, and in that sense helps assure justice.[93] While it is not questionable that WTO Panels have to rely on the texts of the accession protocols and Working Party Reports and not on the possible intentions of the drafters of these texts, the two disputes testimony that China's accession protocol can be questioned for its overall coherence and clarity of its provisions.

It is notable that the conclusions endorsed by the DSB followed, to large degree, the arguments developed by the EU in the two cases. In *China-Raw Materials*, the EU argued that the extended application of the exceptions included in Article XX of the GATT to obligations included in the accession protocol would constitute "an extremely slippery slope."[94] This point of view was repeated in the debate on *China-Rare Earths*, in which the EU put forward that the accession protocol "reflects rights and obligations that were 'tailor-made' for China" and should therefore not be submitted to the general exceptions of the GATT "unless specifically stated."[95] In these two cases, the EU was clearly driven by a strong political will to defend its trade interests, that is, in fine the main purpose of bringing a case before the WTO DSB. It therefore supported a restrictive understanding of China's accession protocol to make its case against breaches of some of China's WTO commitments.

While the EU approach is fully understandable from the perspective of the protection of the EU's trade interests, the critiques and controversies that followed these two disputes should lead the EU to question its overall perspective on *WTO-Plus* and *WTO-Minus* obligations. In line with Article 21 TEU, the EU puts indeed the promotion of the rule of law at the core of its external action.[96] The EU now advocates the benefits of strengthening the rule of law at both the national and international levels and has, in this respect, encouraged China to launch a new "legal affairs" dialogue as part of the political pillar of the EU-China strategic partnership. As an actor that strives for coherence across its external policies, the EU should reflect upon the relevance to push acceding members to agree on obligations that go far beyond those included in the WTO Agreement. Striving for more equality and clarity in international trade law would only reinforce the EU's strategic

objective of promoting the rule of law, more particularly vis-à-vis its strategic partners such as China.

Conclusion

In spite of their very different experiences in the WTO, China and the EU contribute to the enhancement of the international rule of law in trade multilateralism thanks to the use they make of the WTO's DSM. Nevertheless, the heritage of China's accession process still has a great influence, even in a context that has changed to a very large extent. In this respect, *China-Rare Earths* and *China-Raw Materials* shed light on the potential negative impacts that *WTO-Plus* and *WTO-Minus* obligations might have on some of the key fundamentals of the rule of law, namely the principle of equality and clarity of WTO law.

Since promoting the rule of law is an integral part of the EU's external action, the criticism of the Panel decisions should particularly inform the EU strategy when it participates in accession negotiations in the framework of the WTO. It indeed appears that the WTO's accession process challenges the enhancement of the rule of law in international trade governance and therefore questions the overall coherence of EU external action. It is only by achieving a greater coherence among its foreign policies that the EU can enhance the "effectiveness, legitimacy and credibility" of its external action.[97]

The political impact of these cases should not be underestimated. These disputes are "merely the tip of the iceberg": the WTO dual regime and the increasing gap between historical and new WTO members has indeed led a number of developing and emerging countries to start reconsidering their trade relationship with the developed world.[98] Bearing in mind the strong reactions of Russia and other WTO members, it is very likely that the issue of sovereignty over national resources will come back in future rounds of negotiations at the WTO. In order not to erode the DSM, a major cornerstone in the development of the international rule of law, it appears primordial that the EU along with the other WTO members learn from the experience of the China accession protocol and its actual implementation and work together for the maintenance of the unicity of WTO law.

Notes

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1. Jan Wouters and Matthieu Burnay, "Introduction: The International Rule of Law: European and Asian Perspectives," in Jan Wouters and Matthieu Burnay

(eds.), Special Issue on "The International Rule of Law: European and Asian Perspectives," *Belgian Review of International Law*, Vol. 16, October 2014, p. 299.

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3. Jonathan T. Fried, "Two Paradigms for the Rule of International Trade Law," *Canada-United States Law Journal*, Vol. 20, 1994, p. 44.
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5. James Bacchus, "Groping toward Grotius: The WTO and the International Rule of Law," *Harvard International Law Journal*, Vol. 44, 2003, p. 541.
6. Ernst-Ulrich Petersmann, "How to Promote the International Rule of Law: Contribution by the World Trade Organization Appellate Review System," *Journal of International Economic Law*, Vol. 1, 1998, p. 31.
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8. General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994.
9. General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, April 15, 1994.
10. Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade, April 15, 1994.
11. The WTO distinguishes between two types of membership: (i) original membership (Art. XI:1 WTO Agreement) was available for GATT 1947 Contracting Parties and the EC and was only open at the time of establishment of the WTO; and (ii) accession through Art. XII WTO Agreement. Members that joined the WTO through this procedure are also referred to as non-original Members or "newly-acceded" Members.
12. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, April 15, 1994, Art. 23.
13. Jennifer Hillman, "An Emerging International Rule of Law? The WTO Dispute Settlement System's Role in its Evolution," *Ottawa Law Review*, Vol. 42, 2011, p. 279.
14. Valerie Hugues, "Accomplishments of the WTO Dispute Settlement Mechanism," in Yasuhei Taniguchi, Alan Yanovich, and Jan Bohanes (eds.), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (New York: Cambridge University Press, 2007), p. 186.
15. Rachel Brewster, "Reputation in International Relations and International Law Theory," in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations*: *The State of the Art* (New York: Cambridge University Press, 2013), p. 527.
16. Interestingly, China was one of the original signatories of GATT 1947, but the Chinese Nationalist government in Chinese Taipei announced in 1949 that

China would leave GATT. However, the government of the PRC in Beijing never recognized this decision and so, in 1986, it notified GATT of its wish to resume its status as a GATT Contracting Party. The Contracting Parties considered that China would have to negotiate its re-accession. This in itself is remarkable from a rule of law perspective.

17. Susan Ariel Aaronson, "Is China Killing the WTO?," *The International Economy*, Winter 2010, p. 40.
18. Bryan Mercurio and Mitali Tyagi, "China's Evolving Role in WTO Dispute Settlement: Acceptance, Consolidation and Activation," *European Yearbook of International Economic Law*, Vol. 3, 2012, p. 89.
19. www.ec.europa.eu/eurostat.
20. For a very good description of the accession process and incentives for China to become part of the WTO, see Yang Guohua and Cheng Jin, "The Process of China's Accession to the WTO," *Journal of International Economic Law*, Vol. 4, June 2001, pp. 297–328.
21. The quoted excerpt is derived from Article II:1(a) GATT 1994 on Schedules of Concessions. The General Most-Favoured-Nation Treatment obligation is to be found in Article I:1 GATT 1994. Before acceding to the WTO, China had to negotiate every year its status of Permanent Normal Trade Relations with the United States.
22. Nicolas Lardy, *Integrating China in the Global Economy* (Washington, DC: Brookings Institution Press, 2002), p. 10.
23. While for other countries like Argentina, Brazil, India, and Indonesia, the average figure is 30 percent respectively.
24. Although the terms "WTO-Plus" and "WTO-Minus" have somewhat become "common place" these days, Yamaoka has refined Charnovitz' typology (who indeed distinguishes between WTO-Plus Incumbent, WTO-Plus Applicant, WTO-Minus Incumbent and WTO-Minus Applicant: Steve Charnovitz in Merit E. Janow, Victoria Donaldson, and Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement, and Developing Countries* (Huntington, NY: Juris Publishing, 2008), 855–920, 869, as follows: "(…) to avoid the confusing terms of WTO-plus and WTO-minus, the following terms are used in this article though slightly wordy: (i) more stringent obligations to an applicant compared with the WTO Agreement; (ii) less stringent obligations to an applicant compared with the WTO Agreement; (iii) more stringent obligations to incumbent Members compared with the WTO Agreement; and (iv) less stringent obligations to incumbent Members compared with the WTO Agreement": Tokio Yamaoka, "Analysis of China's Accession Commitments in the WTO: New Taxonomy of More and Less Stringent Commitments, and the Struggle for Mitigation by China," *Journal of World Trade*, Vol. 47, 2013, p. 118.
25. Yamaoka, "Analysis of China's Accession Commitments in the WTO," p. 109.
26. Ling-Ling He and Razeen Sappideen, "Reflections on China's WTO Accession Commitments and Their Observance," *Journal of World Trade*, Vol. 43, 2009, pp. 870–871.
27. See Joel Wuthnow, Xin Li, and Lingling Qi, "Diverse Multilateralism: Four Strategies in China's Multilateral Diplomacy," *Journal of Chinese Political Science*, Vol. 17, 2012, pp. 269–290.
28. For a detailed description of the Chinese involvement in the World Trade Organization DSM, see Wenhua Ji and Cui Huang, "China's Experience in

Dealing with WTO Dispute Settlement: A Chinese Perspective," *Journal of World Trade*, Vol. 45, pp. 1–37; Cui Huang and Wenhua Ji, "Understanding China's Recent Active Moves on WTO Litigation: Rising Legalism and/or Reluctant Responses?," *Journal of World Trade*, Vol. 46, 2012, pp. 1281–1308.

29. See generally: K. Zeng, "Multilateral versus Bilateral and Regional Trade Liberalization: Explaining China's Pursuit of Free Trade Agreements," *Journal of Contemporary China*, Vol. 19, 2010, p. 651.
30. Qingjiang Kong, "China's Unchartered FTA Strategy," *Journal of World Trade*, Vol. 46, 2012, p. 1200.
31. James Scott and Rorden Wilkinson, "China Threat? Evidence from the WTO," *Journal of World Trade*, Vol. 47, 2013, p. 781.
32. Appellate Body Report, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted June 13, 2012, para. 372.
33. WTO, Committee on Technical Barriers to Trade, Minutes of the Meeting of November 5–6, 2014, G/TBT/M/64/Rev. 1, March 6, 2015, para. 2.304 and 2.310.
34. See Warwick Commission's Report (2007), "The Multilateral Trade Regime: Which Way Forward?" The Report of the First Warwick Commission, University of Warwick, available at http://www2.warwick.ac.uk/research/warwickcommission/worldtrade/report/contents.pdf.
35. Chin Leng Lim and Jiang Yu Wang, "China and the Doha Development Agenda," *Journal of World Trade*, Vol.44, 2010, p. 1327.
36. Lim and Wang, "China and the Doha Development Agenda," p. 1327.
37. Gustaaf Geeraerts, "EU-China Relations," in Thomas Christiansen, Emil Kirchner, and Philomena Murray (eds.), *The Palgrave Handbook of EU-Asia Relations* (London: Palgrave Macmillan, 2013), p. 499.
38. We can probably even go further and argue that the relationship is one of complex interdependence as understood by the Neoliberalism school of International Relations. See Robert Owen Keohane and Joseph S. Nye, *Power and Interdependence* (Glenview, NY: Scott, Foresman, 1989).
39. The deficit reached €131 billion in 2013. See http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113366.pdf.
40. The European Union Chamber of Commerce in China, European Business in China Position Paper 2014–2015, available at http://www.europeanchamber.com.cn/en/publications-position-paper.
41. European Commission, DG Trade, "Statistics of Anti-Dumping, Anti-Subsidies and Safeguard," Statistics Covering the First Ten Months of 2014, November 14, 2014, p. 8, available at http://trade.ec.europa.eu/doclib/docs/2013/august/tradoc_151694.pdf.
42. The symbolic importance of the recognition of China as a market economy has been regularly reaffirmed by the Chinese leadership in the context of the European debt crisis. In this context, Wen Jiabao, the Chinese Premier argued that recognizing the status of market economy is "the way a friend treats another friend" during a press conference at the World Economic Forum in 2011. See http://www.weforum.org/news/premier-wen-china-will-do-what-it-can-global-economic-stability-and-recovery.

43. Council Regulation (EC) No. 1225/2009 of November 30, 2009 on Protection Against Dumped Imports from Countries Not Members of the European Community, OJ 2009, L 343/51, Art. 2 (7).
44. Nicola Casarini, "China's Approach to US Debt and the Eurozone Crisis," *Ideas Reports*, Vol. 12, June 2012, p. 43, available at http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR012/casarini.pdf.
45. François Godement, "A Global China Policy," *ECFR Policy Brief,* June 2010.
46. Sophie Meunier, "Divide and Conquer? China and the Cacophony of Foreign Investment Rules in the EU," *Journal of European Public Policy*, Vol. 21, 2014, p. 1010.
47. François Godement, "The Scramble for Europe," *European Council for Foreign Relations, Policy Brief*, No. 37, July 2011, p. 1. Against that perspective, Kerry Brown argues that the Chinese investments in Europe remain low and that it is not likely to change until China "develops into a middle income, more developed economy." See Kerry Brown, "China's Overseas Investment in the European Union," *The International Spectator: Italian Journal of International Affairs*, Vol. 47, 2012, p. 74.
48. These elements are mentioned in Jan Wouters and Matthieu Burnay, "China and the EU in the WTO: Living Apart Together?" in Jan Wouters, Tanguy de Wilde, Pierre Defraigne, and Jean Christophe Defraigne (eds.), *China, the European Union and Global Governance* (Cheltenham: Edward Elgar, 2013).
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50. See generally: Wang Zhenmin, "Legal Education in China," *The International Lawyer*, Vol. 36, 2002, pp. 1203–1212.
51. Pasha L. Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building," *Journal of International Economic Law*, Vol. 13, 2010, p. 1033.
52. Interview with EEAS official, Brussels office, June 19, 2013.
53. See Qingjiang Kong, "EU's Monitoring of China's Compliance with WTO Obligations," *European Business Law Review*, Vol. 22, 2011, pp. 337–348.
54. Interview with EU official, EU Permanent Mission to the WTO, June 20, 2013.
55. DS397: EU-Definitive anti-dumping measures on certain iron and steel fasteners from China. This case was the first ever issue brought by China against the EU before the WTO DSM.
56. Interview with EEAS officials, Brussels and Geneva, June 19–20, 2013.
57. See National People's Congress, twelfth five year plan, March 14, 2011.
58. See Council of the European Union, "European Security Strategy: A Secure Europe in a Better World," December 12, 2003.
59. David Belis and Simon Schunz, "Global Climate Governance and the Energy Challenge: European and Chinese Perspectives," in Jan Wouters, Tanguy de Wilde, Jean-Christophe Defraigne, and Pierre Defraigne (eds.), *China, the European Union and Global Governance* (Cheltenham: Edward Elgar, 2012), p. 202.

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66. China—Measures Related to the Exportation of Various Raw Materials—AB-2011–5—Reports of the Appellate Body, WT/DS395/AB/R, January 30, 2012.
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69. European Commission—Press Release, "EU Challenges China's Rare Earth Export Restrictions," March 13, 2012, available at http://europa.eu/rapid/press-release_IP-12-239_en.htm.
70. European Commission—Press Release, "EU Challenges China's Rare Earth Export Restrictions."
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