



DATE DOWNLOADED: Thu Mar 30 03:54:47 2023

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Sa Qianyi, China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM), 12 J. WTO & CHINA 61 (2022).

ALWD 7th ed.

Sa Qianyi, China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM), 12 J. WTO & China 61 (2022).

APA 7th ed.

Qianyi, S. (2022). China's role in promoting the rule of law through its engagement with the wto dispute settlement mechanism (dsm). Journal of WTO and China, 12(1), 61-80.

Chicago 17th ed.

Sa Qianyi, "China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM)," Journal of WTO and China 12, no. 1 (March 2022): 61-80

McGill Guide 9th ed.

Sa Qianyi, "China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM)" (2022) 12:1 J WTO & China 61.

AGLC 4th ed.

Sa Qianyi, 'China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM)' (2022) 12(1) Journal of WTO and China 61

MLA 9th ed.

Qianyi, Sa. "China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM)." Journal of WTO and China, vol. 12, no. 1, March 2022, pp. 61-80. HeinOnline.

OSCOLA 4th ed.

Sa Qianyi, 'China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM)' (2022) 12 J WTO & China 61

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

China's Role in Promoting the Rule of Law through Its Engagement with the WTO Dispute Settlement Mechanism (DSM)

Sa Qianyi*

Abstract: The WTO is the only international system focusing on global rules of trade. As a rule-based system, it is not only dedicated to creating, governing, and implementing these rules but is also a unique system of solving trade disputes through the DSM. The WTO's procedure underscores the rule of law and also ensures the predictability and stability of the international trade system. Twenty years have passed since China's accession to the WTO, and it is widely recognized that the WTO has boosted China's economic growth. More importantly, China's participation in the DSM has demonstrated China's role in promoting the rule of law within the multilateral trade system, which is a major contribution to the WTO. This article examines China's practical experience during several WTO disputes, and argues that China implements and promotes the rule of law in the DSM.

Keywords: WTO Dispute Settlement Mechanism, Rule of Law, China's Participation in the DSM

I. INTRODUCTION

The World Trade Organization (WTO) has played a positive and important role in providing a predictable, open, and rule-based multilateral trade system. More importantly, it has contributed significantly to the rule of law and has achieved major progress towards developing the international rule of law.¹

* Sa Qianyi, Lecturer, Tianjin Normal University; PhD. of SOAS University of London. Email: saqianqian@163.com.

¹ Jennifer Hillman, *Moving towards an International Rule of Law? The Role of the GATT and the WTO in Its Development*, In Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Cambridge University Press, 2015, p. 66; Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, 4th Edition, Routledge, 2013, p. 225; Zhao Hong, *China's Accession to the WTO and Its Rule of Law*, *Journal of WTO and China*, Vol. 6, No. 1, 2016, p. 41.

The WTO's procedure undoubtedly underscores the rule of law that ensures the international trade system's predictability and stability.² As a former WTO Appellate Body Member pointed out, one main reason why the WTO-based multilateral trading system is a successful example of implementing the international rule of law is its ability to peacefully settle disputes.³ Indeed, the Dispute Settlement Mechanism (DSM) is regarded as the "jewel in the WTO's crown", enabling it to uniquely contribute to the multilateral trade system by effectively solving trade disputes and supervising the implementation of legally binding WTO rules.⁴

Generally speaking, the precise concept of rule of law is controversial and has many definitions. In this context, some researchers divide its definitions into two types: "thin" (formal) and "thick" (substantive) versions.⁵ The "thin" theory focuses on the systematic virtues of the rule of law that a state must implement as an effective law system.⁶ Fuller provided an outline of eight principles required by the rule of law that comprise the essence of the "thin" rule of law: Generality, promulgation, prospectivity, clarity, consistency, no impossible obligation, constancy, and congruence.⁷ The WTO's fundamental principles including transparency, uniform and fair application of laws and judicial review are the same requirements for the "thin" version of the rule of law.⁸ In addition, Wang found that the "thin" theory of the rule of law can be applied in

2 WTO, Understanding the WTO: Setting Disputes – A Unique Contribution, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (Last Visited on November 30, 2021).

3 *Supra* n. 1, Zhao Hong (2016), p. 43.

4 *Ibid.*

5 Jorgen Moller, The Advantages of a Thin View in Christopher May and Adam Winchester (eds.), *Handbook on the Rule of Law*, Edward Elgar, 2018, p. 21; Jorgen Moller and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns, and Courses*, Palgrave Macmillan, 2014, p. 16; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004, p. 91.

6 Du Ming and Kong Qingjiang, Explaining the Limits of the WTO in Shaping the Rule of Law in China, *Journal of International Economic Law*, Vol. 23, No. 4, 2020, p. 888; Paul Graig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, In Richard Bellamy (ed.), *The Rule of Law and the Separation of Powers*, Routledge, 2016, p. 467.

7 Kristen Rundle, The Morality of the Rule of Law: Lon L. Fuller, In Jens Merierhenrich and Martin Loughlin (eds.), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, 2021, p. 189. Fuller described his eight *desiderata* comprising rule of law as eight demands of laws in inner morality. See Lon L. Fuller, *The Morality of Law*, Revised Edition, Yale University Press, 1969, p. 39.

8 Wang Jiangyu, The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development, *Singapore Journal of Legal Studies*, 2004, p. 377.

China, and its construction of the “thin” rule of law has been enhanced due to China’s accession to the WTO.⁹ Therefore, this article aims to illustrate China’s significant role in promoting the rule of law in the multilateral trade system. To demonstrate this viewpoint, this article attempts to illustrate several major WTO disputes where China was actively involved in the DSM to exemplify the extent to which China’s participation in the DSM satisfied the key features required by the rule of law.

This article is structured as follows: Section I presents the introduction. Section II analyzes China’s role in conforming to the clarity principle required by the “thin” rule of law by reviewing seven fully fledged WTO cases related to the Protocol on the Accession of the People’s Republic of China (China’s Accession Protocol). Section III attempts to explain the consistency principle of a “thin” rule of law, taking *China — Demonstration Bases* as an example. Section IV views China’s compliance in the DSM to show that China has obeyed the compliance principle covered by the rule of law. Section V is the conclusion.

II. CLARITY¹⁰

The common ground of Fuller’s “thin” rule of law includes eight requisite elements. Given the subject matter, this article mainly concentrates on two essential elements of a “thin” version of the rule of law by viewing major WTO disputes in which China was involved and played a pivotal role. Therefore, this section first examines the extent to which China is playing an important role in promoting the rule of law in WTO dispute settlement.

In Fuller’s “thin” version of the rule of law, clarity means that the rules must be clear.¹¹ In this regard, the DSM clearly reflects the clarity dimension. Specifically, the DSM is based on clearly-defined rules to address WTO

⁹ *Supra* n. 9, p. 388.

¹⁰ Sa Qianyi, *China and the World Trade Organization Dispute Settlement Mechanism: 2001-2018*, PhD. Thesis of SOAS University of London, 2019.

¹¹ *Supra* n. 8, Lon L. Fuller (1969), p. 63; Colleen Murphy, Lon Fuller and the Moral Value of the Rule of Law, *Law and Philosophy*, No. 24, 2005, p. 204.

disputes.¹² Article 3.2 of the Understanding on Rules and Procedures for the Settlement of Disputes (DSU) states that it serves to “clarify the existing provisions of those agreements”, which has clearly demonstrated the mandate to clarify WTO provisions.¹³ According to Article 3.2 of the DSU, the DSM plays a pivotal role in providing security and predictability to the multilateral trading system.¹⁴ To improve predictability and stability, the DSM aims to make Members’ trade rules as clear and transparent as possible, which is the demand for a “thin” version of the rule of law, namely clarity. As a major participant in the DSM, China has used the WTO adjudicatory body to clarify certain provisions under WTO Protocols. This article will explore this viewpoint in a detailed analysis of seven fully-fledged WTO cases involving China’s Accession Protocol.

A. *China — Auto Parts*¹⁵

China — Auto Parts was the first time that China attempted to clarify certain provisions related to its Accession Protocol. This was also the first case China was involved in as a sole respondent to procedures through negotiation, panels, and the Appellate Body proceedings. During this dispute, China’s participation in the DSM promoted the WTO adjudicatory body’s effort to clarify several issues concerning Protocol-related disputes, which improved the clarity of the WTO rules. The findings of the Panel and Appellate Body illustrated important guidelines for the following Protocol-related cases.

In *China — Auto Parts*, the US, the EU, and Canada brought an action against China’s importation measures, which affected exports of automobile parts from these three complainants.¹⁶ The instruments in this question regulated

¹² *Supra* n. 2.

¹³ Peter Van de Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge, University Press, 2017, p. 190. See Article 3.2 of the DSU.

¹⁴ *Ibid.*

¹⁵ *China — Measures Affecting Imports of Automobile Parts*, DS339, DS340 and DS342 (hereinafter *China — Auto Parts*).

¹⁶ The measures at issue consisted of three instruments enacted by Chinese governments affecting auto parts imported in China: Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles (Decree of the People’s Republic of China, No. 125), entered into force on April 1, 2005 (hereinafter Decree 125); Policy on Development of Automobile Industry (Order of the National Development and Reform Commission, No. 8), entered into force on May 21, 2004; Rules on Verification of Imported Automobile Parts Characterized as Complete Vehicles (Public Announcement of the Customs General Administration of the People’s Republic of China, No.4 of 2005), entered into force on April 1, 2005.

that if imported automobile parts had the “essential character” that made it a complete vehicle, they would be charged at the tariff rate applicable to a whole vehicle. Based on the conditions, it was a 25% charge imposed on imported automobile parts.¹⁷ In accordance with Article 21 of Decree 125, imported Completely Knocked Down (CKD) and Semi-Knocked Down (SKD) kits used to assemble vehicles were characterized as complete vehicles. The complainants (the US and Canada) requested the Panel to find whether the 25% charge imposed by China’s measures on imported CKD and SKD kits were inconsistent with paragraph 93 of the Report of the Working Party on the Accession of China (hereinafter Working Party Report).¹⁸

The first two legal issues discussed at the Panel were focused on the relation between the commitments, especially “WTO-plus” ones under China’s Accession Protocol and the Working Party Report. Specifically, China’s Accession Protocol is a unique document since its length and scope are the most extensive among all the accession protocols signed by other WTO Members. The consensus is that the WTO commitments China has committed to vastly exceed those undertaken by other WTO Members.¹⁹ “WTO-plus” commitments are Protocol commitments undertaken by newly acceding Members incorporating more stringent obligations than generally applicable WTO rules such as uniform administration, transparency, and national treatment, as undertaken by

¹⁷ Article 21 of Decree No.125 stipulates the condition of “essential character”.

¹⁸ Report of the Working Party on the Accession of China, WT/ACC/CHN/49, adopted October 1, 2001, para. 93.

¹⁹ Since the establishment of the WTO, accession protocols for the majority of acceded Members have only been three or four pages long; for instance, Georgia (three pages), Viet Nam (four pages) and Armenia (four pages). See Accession of Georgia, WT/ACC/GEO/33, adopted October 28, 1999; Accession of the Socialist Republic of Viet Nam, WT/L/662, adopted November 15, 2006 and Accession of the Republic of Armenia, WT/L/506, adopted December 17, 2002. China’s obligations under China’s Accession Protocol are larger than those undertaken by other WTO members. This point of view has been supported by many scholars: Gao mentioned that China’s concessions regarding goods and services were far beyond those assumed by other WTO members. He noted that China’s obligations regarding trade in goods and services far exceeded those of other WTO members. See Gao Henry, *From the Doha Round to the China Round: China’s Growing Role in WTO Negotiations*, In Lisa Toohey and Colin B. Picker and Jonathan Greenacre (eds.), *China in the International Economic Order: New Directions and Changing Paradigms*, Cambridge University Press, 2015, p. 84. Lardy stated that China’s commitments greatly exceeded those undertaken by founding WTO members since the establishment of the WTO. See Nicholas R. Lardy, *Integrating China into the Global Economy*, Washington, D.C.: Brookings Institution Press, 2002, p. 104. See also Karen Halverson, *China’s WTO Accession: Economic, Legal, and Political Implications*, *Boston College International & Comparative Law Review*, Vol. 27, No. 2, 2004, p. 326.

China.²⁰ Therefore, China's WTO commitments, especially its "WTO-plus" provisions incorporated in its Accession Protocol and Working Party Report have raised unique interpretative issues.²¹ China intends to further clarify these issues as well as provide clear and important guidance in WTO adjudicatory proceedings. This case concerned paragraph 93 of the Working Party Report, which states: "In response to questions about the tariff treatment for kits for motor vehicles, the representative of China confirmed that China has no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles. If China created such tariff lines, the tariff rates would be no more than 10 percent". This obligation is subject to the "WTO-plus" commitments, as WTO Members are not allowed to create binding tariffs exceeding concessions in goods schedules.²² The Panel concluded that China's Accession Protocol is an integral part of the WTO Agreement, according to Part I, Article 2.1 of China's Accession Protocol.²³ On this basis, paragraph 342 of the Working Party Report contains China's commitments, which are incorporated into Article 1.2 of its Accession Protocol.²⁴ Accordingly, China's commitment in paragraph 93 of the Working Party Report is an integral part of the WTO Agreement.²⁵ Therefore, another issue the Panel clarified is that China's commitments under the Working Party Report are enforceable at the DSM.²⁶

Moreover, the WTO adjudicatory body analyzed the main issue on the interpretation of WTO obligations. The Panel and the Appellate Body both confirmed that interpretation of China's commitments in paragraph 93 shall refer

20 WTO, Handbook on Accession to the WTO Chapter 5: Substance of Accession Negotiation, https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s1p1_e.htm (Last Visited on December 17, 2021); Steven Charnovitz, Mapping the Law of the WTO Accession, In Merit E. Janow, Victoria Donaldson and Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement & Developing Countries*, Juris Publishing, 2008, p. 865. For more details on China's WTO-plus commitments, see Qin Julia Ya, "WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, *Journal of World Trade*, Vol. 37, No. 3, 2003, p. 490.

21 Qin Julia Ya, The Challenge of Interpreting "WTO-Plus" Provisions, *Journal of World Trade*, Vol. 44, No. 1, 2010, p. 127.

22 *Ibid.*, p. 143.

23 Reports of the Panel, *China — Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R and WT/DS342/R, adopted July 18, 2008 (hereinafter Panel Reports, *China — Auto Parts*), para. 7.740.

24 The Working Party Report, para. 342.

25 Panel Reports, *China — Auto Parts*, para. 7.740.

26 *Ibid.*

to the customary rules of interpretation of public international law in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).²⁷ As can be seen from this dispute, the Panel's approach to interpretation is unclear. After merely reviewing the ordinary meanings of Article 2(2) and Article 21(1) of Decree No. 125, the Panel moved to examine another element, which was whether China had in effect created a "tariff line". The Panel then reviewed the HS Classification Handbook, China's Customs Import and Export Tariff for 2005 submitted by Canada, and an import declaration form provided by an automobile manufacturer in China, concluding that China's measures at issue were inconsistent with paragraph 93 of the Working Party Report.²⁸ However, the Appellate Body reversed the Panel's findings, as those on threshold issues were irreconcilable. Specifically, the Panel found that the charge imposed based on the measure at issue was characterized as an internal charge in light of Article III:2 of the GATT 1994, while the Panel also observed that the 25% charge imposed on the importation of CKD and SKD kits under Article 2(2) of Decree No. 125 is an ordinary custom according to Article II:1(b) of the GATT 1994.²⁹

Regarding the approach on the interpretation of China's Protocol-related disputes in the WTO dispute mechanism, the Appellate Body seems to have followed a textualist approach. In the *China — Auto Parts* Appellate Body Reports, it noted that "[T]hus, we do not see a textual basis for reading Article 2 (2) as establishing a new or special customs procedure for those importers that avail themselves of that provision.³⁰ As the panel and the Appellate Body in this litigation have not definitively provided a solid basis for the interpretation of China's obligations, China must face more WTO litigation in this regard. Regrettably, more legal issues have been raised due to China's engagement with more disputes related to its obligations under its Accession Protocol and Working Party Report.

27 Vienna Convention on the Law of Treaties, 155 UNTS 331, 8ILM 679, adopted in Vienna on May 23, 1969, entered into force on January 27, 1980.

28 *Supra* n. 25, paras. 7.749-7.752.

29 Reports of the Appellate Body, *China — Measure Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R and WT/DS342/AB/R, adopted December 15, 2008 (hereinafter Appellate Body Reports, *China — Auto Parts*), para. 220.

30 *Ibid.*, para. 232.

B. *China — Publications and Audiovisual Products*³¹

The US challenged China again in *China — Publications and Audiovisual Products*. This case was the first time China sought to avail itself of the Article XX defence to justify the violation of its Accession Protocol. Since then, Article XX of the GATT has been the main provision that China has invoked to justify its inconsistencies with certain provisions embedded in its Accession Protocol and Working Party Report. In this dispute, one question was asked: Whether China is able to resort to GATT Article XX when accused of violating its WTO obligations. To answer this question, two main legal issues must be clarified: How does the WTO adjudicatory body read China's Accession Protocol and Working Party Report, and what is the relationship between Article 5.1 of China's Accession Protocol and provisions under the WTO Agreement. This case clarified the conditions determining whether WTO Members' regulatory requirements are WTO-consistent measures. As the complainant, the US claimed, "the relationship between Article XX(a) of the GATT 1994 and China's Accession Protocol is a question of broad systematic import".³²

This time, the US target was China's measures related to trading rights and distribution services for certain publications and audiovisual entertainment products. The US claimed that China's measures at issue were inconsistent with trading rights commitments incorporated in its Accession Protocol and Working Party Report because the measures limited the right of enterprises in China, foreign enterprises, and foreign individuals, to import certain products into China.³³ The heated debate over China's Accession Protocol in this dispute was whether Article XX could be directly invoked as a defence to its breach. Paragraph 5.1 of China's Accession Protocol and associated paragraphs 83(d)

31 *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, DS363 (hereinafter *China — Publications and Audiovisual Products*).

32 Report of the Panel, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted August 12, 2009 (hereinafter Panel Report, *China — Publications and Audiovisual Products*), para. 7.739.

33 Report of the Appellate Body, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted December 21, 2009 (hereinafter Appellate Body Report, *China — Publications and Audiovisual Products*), para. 2; Panel Report, *China — Publications and Audiovisual Products*, para. 2.3(a).

and 84(a) of the Working Party Report were discussed in this case. Paragraph 5.1 of China's Accession Protocol expressly states that after a three-year transitional period, all Chinese enterprises shall have trading rights for all goods except for certain goods set forth in its Annex 2A. This is also defined in paragraph 83(d) and paragraph 84(a), as China has committed to extending its trading rights to "all goods" except for eighty-four categories of goods listed in its Annex 2A. In other words, China grants both foreign individuals and enterprises trading rights to join every aspect of its business regarding distribution, retail, transport, repair, and services.³⁴ In relation to paragraph 84(b) of the Working Party Report, China has confirmed that these trading rights should be granted in a non-discriminatory way.³⁵

Initially, the Panel found that the key point needing clarification was whether Article XX(a) can justify China's WTO-inconsistent trading rights obligations under its Accession Protocol. The Panel pointed out that the requirements to invoke Article XX(a) exceptions are: the measures fall short of subparagraph (a) of Article XX and such measures should satisfy the requirements of the chapeau for Article XX.³⁶ However, at this stage, the Panel did not prioritize the interpretative rules set forth in the Vienna Convention. Instead, it examined the merits of China's defence subject to Article XX (a) on an assumption *arguendo* basis.³⁷ Then, the Panel concluded that the measures that China undertook were inconsistent with its Accession Protocol because it did not meet the requirement of "necessary" required by Article XX(a).³⁸

However, as for the approach to interpretation, the Appellate Body has opinions differing from those of the Panel. First, the Appellate Body more closely followed the interpretative rules regulated by the Vienna Convention, reversing the Panel's findings. Specifically, it pointed out that the assumption *arguendo* carried out by the Panel was unlikely to assist with solving this issue and it potentially created uncertainty regarding the implementation of China's

34 The Working Party Report, paras. 83(d) and 84(d).

35 *Ibid.*, para. 84(b).

36 Panel Report, *China — Publications and Audiovisual Products*, para. 7.748.

37 *Ibid.*, paras. 7.744-7.745; Appellate Body Report, *China — Publications and Audiovisual Products*, para. 209.

38 Appellate Body Report, *China — Publications and Audiovisual Products*, para. 210.

obligations under its Accession Protocol.³⁹ This occurred because the determination to apply the GATT Article XX exceptions to China's WTO obligations should be a legal interpretation issue in accordance with Article 17.6 of the DSU.⁴⁰ Second, the Appellate Body seems to support the textual interpretation of China's Accession Protocol and has preferred a sequential approach to interpreting it. For example, the Appellate Body subsequently focused on the ordinary meaning of words and phrases in paragraph 5.1 of this document such as "without prejudice to" and "right".⁴¹ After examining the language in the text of the provision at issue, the Appellate Body then analyzed the context of associated provisions in the Working Party Report such as paragraph 84(b).⁴² Third, the Appellate Body concluded that the conditions upon which China could invoke an Article XX defence were: The availability of Article XX exceptions requires China to conform to the requirements under Article XX of the GATT and "constitute the exercise of its right to regulate trade in a manner consistent with the WTO Agreement".⁴³ The most important issue is whether a measure regulating those who may engage in the import and export of goods falls short of China's right to regulate trade relies on whether the measure has a clear, discernible, and objective link to the regulation of trade in goods in question.⁴⁴ The Appellate Body also stressed that the examination of an objective link was required. Pursuant to Articles 31-32 of the Vienna Convention, a treaty should be interpreted in good faith and abide by the following aspects: ordinary meaning, context, objective, and purpose, sequential practice, and supplementary means of interpretation.⁴⁵ In addition, several other factors related to the measure at issue shall be carefully examined such as the nature, design, structure, and function of the measure with a scrutiny of the regulatory context in this regard.⁴⁶ China is definitely allowed to apply for GATT Article XX, but other legal issues in this aspect must be clarified. These include the approach

39 *Ibid.*, para. 215.

40 *Ibid.*, para. 216.

41 *Ibid.*, para. 221.

42 *Ibid.*, para. 225.

43 *Ibid.*, para. 233.

44 *Ibid.*, para. 230.

45 The Vienna Convention, Articles 31 and 32.

46 *Ibid.*

to the interpretation of China's WTO obligations and whether a GATT Article XX defence is only applicable to Paragraph 5.1 of China's Accession Protocol. All of these questions must be addressed and clarified as they apply to additional WTO disputes.

C. *China — Raw Materials*⁴⁷

In *China — Raw Materials*, the same question of whether China has recourse to GATT Article XX exceptions to defend its violation of the Accession Protocol was raised again. However, this time, the heated debate was changed to an interpretative approach to paragraph 11.3 of the Accession Protocol in connection with Article XX exceptions under Article 31 of the Vienna Convention. In two precedent cases, legal issues related to China's Accession Protocol have been clarified. The most important one has been gradually clarified: The Appellate Body seems to prefer a strict textual approach to Protocol-related cases.

This case addressed claims against China's limitations on exports of eight types of raw materials, and the heated debate was whether China's measures that violated its obligations under paragraph 11.3 of the Accession Protocol were justified pursuant to Article XX of the GATT 1994. Unlike paragraph 5.1, paragraph 11.3 of the Accession Protocol mainly focuses on taxes and charges levied on imports and exports. It is likely that the drafters of the WTO Agreement did not regulate issues on export taxes and underestimated future concerns in this regard.⁴⁸ Article II of the GATT related to the Schedules of Concessions only regulates import duties and charges on importation without creating rules on export duties.⁴⁹ Even though the GATT prohibits WTO Members from conducting quotas, imports, or export licenses or other measures imposed on the importation of goods pursuant to GATT Article XI:1, Members are free to levy

47 *China — Measures Related to the Exportation of Various Raw Materials*, DS394, DS395 and DS398 (hereinafter *China — Raw Materials*).

48 Daniel Crosby, WTO Legal Status and Evolving Practice of Export Taxes, *Bridges*, Vol. 12, No. 5, November 6, 2018, <https://www.ictsd.org/bridges-news/bridges/news/wto-legal-status-and-evolving-practice-of-export-taxes> (Last Visited on February 3, 2019). Karapinar stated that export restrictions were an arguably "under-regulated" area in the WTO. See Baris Karapinar, Export Restrictions and the WTO Law: "Regulatory Deficiency" or "Unintended Policy Space", *WTO Trade Report*, 2010, https://www.wto.org/english/res_e/publications_e/wtr10_21may10_e.htm (Last Visited on January 18, 2022).

49 *Ibid.*, Daniel Crosby (2018), p. 49.

export duties, export taxes, and other charges.⁵⁰ The majority of WTO Members are allowed to levy export duties while Members such as Ukraine, Montenegro, Tajikistan, Kazakhstan, the Russian Federation, and China are banned from using export duties under their accession protocols.⁵¹ All of these Members have committed to WTO-plus obligations regarding export duties in their accession protocols. China has committed to eliminating all taxes and charges applied to exports except for products inscribed on its list (Annex 6 of the Protocol). It is worth noting that these obligations far surpass those of the founding WTO Members.⁵²

In *China — Raw Materials*, the Panel first analyzed the ordinary meaning of paragraph 11.3, and a comparison with paragraph 5.1 of China's Accession Protocol found that there was no express reference to GATT Article XX.⁵³ Moreover, the Panel examined two exceptions provided in paragraph 11.3 (Annex 6 and GATT Article VIII) and concluded that "no general exception in the language of Paragraph 11.3" provided China with the applicability to invoke GATT Article XX as defences for its violations of paragraph 11.3.⁵⁴ After viewing the context of provisions embodied in the Working Party Report, the Panel failed to find "any explicit or implicit provision in the Working Party Report" to allow China to invoke Article XX exceptions.⁵⁵ Furthermore, the Panel reviewed the note to Annex 6 to China's Accession Protocol and concluded that China did not comply with its obligations under Annex 6 because it failed to consult with affected WTO Members before imposing export duties on the raw materials at issue.⁵⁶

In the present case, the Appellate Body confirmed that it holistically applied

50 These opinions are expressed in Mark Wu, China's Export Restrictions and the Limits of WTO Law, *World Trade Review*, Vol. 16, No. 4, 2017, p. 675.

51 Several Members have made commitments to limit their export duties in the WTO, for instance, Ukraine, Montenegro, Tajikistan and Kazakhstan. See *supra* n. 13, Peter Van de Bossche and Werner Zdouc (2017), p. 270.

52 Paragraph 11.3 of China's Accession Protocol states: "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994".

53 Reports of the Panel, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R and WT/DS398/R, adopted July 5, 2011 (hereinafter Panel Reports, *China — Raw Materials*), para. 7.124.

54 *Ibid.*, para. 7.129.

55 *Ibid.*, para. 7.148.

56 *Ibid.*, para. 7.104.

the customary rules of interpretation of public international law in the Vienna Convention when considering whether GATT Article XX defences are available to justify violations of paragraph 11.3 of China's Accession Protocol.⁵⁷ Nevertheless, compared with the Panel, the Appellate Body strictly obeys the textual approach and prioritizes the interpretation of "ordinary meaning" over other elements required by the Vienna Convention. It examined the ordinary meaning first and then the context. For instance, the Appellate Body reversed the Panel's findings on whether China failed to consult with affected Members relying on the Note to Annex 6 to China's Accession Protocol. In a comprehensive analysis of the ordinary meaning of Paragraph 11.3 and each sentence of the Note to Annex 6, the Appellate Body noticed that the word "furthermore" in its second sentence means that China's commitment in this sentence is "in addition" to that described in its first sentence.⁵⁸ In other words, the Appellate Body considered that the WTO adjudicatory body should analyze whether China's obligations are not beyond the maximum tariff level embodied in Annex 6 and then examine whether the consultation held was required by this Note. Although a reference to Article VIII of the GATT 1994 indicates another exception regarding paragraph 11.3 of China's Accession Protocol, it includes all fees and charges regarding importation or exportation except for export duties. After viewing the context of Paragraph 11.3 (Paragraphs 11.1-11.2 and relevant paragraphs described in the Working Party Report), the Appellate Body confirmed that China could not invoke the defences provided for in GATT Article XX for violations of Paragraph 11.3 of its Accession Protocol.

China's experience in WTO Protocol-related disputes have revealed and clarified substantive legal issues raised by obligations under WTO Members' Protocols and working party reports. In these cases, China has gradually clarified several questions such as the legal status of Protocols, their enforcement during the WTO dispute proceedings, the WTO adjudicatory body's approach to interpretation of relevant provisions of accession protocols, the relationship between certain provisions under Protocols, and the extent to which exceptions

57 Reports of the Appellate Body, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, adopted January 30, 2012 (hereinafter Appellate Body Reports, *China — Raw Materials*), para. 307.

58 *Ibid.*, para. 286.

provided for in the WTO Agreement are applicable. China has utilized the WTO adjudicatory body to clarify the ambiguous interpretive approach to Members' WTO obligations. Furthermore, China's participation in these WTO disputes has helped to solve more legal issues related to Members' commitments. All of these have shown China's active role in promoting the rule of law in the DSM.

III. CONSISTENCY

Another requirement on Fuller's "thin" rule of law is consistency or non-contradictory.⁵⁹ In other words, "one law cannot prohibit what another law permits."⁶⁰ China's participation in the DSM has illustrated that China obeyed this instrumental principle required by the rule of law. Specifically, prior to China's accession to the WTO, it had substantially overhauled its laws, regulations, and rules. China issued two fundamental legal instruments to ensure that its sub-central government rules and regulations complied with WTO rules: Opinions on Revising Sub-central-level Regulations, Rules and Other Policy Measures so as to Adapt to the Process of China's Accession to the WTO, and Notification on Revising Sub-central-level Regulations and Rules on Foreign Trade and Economic Cooperation. Consequently, at the local government level, thirty-one provinces and autonomous regions as well as forty-nine major cities modified and repealed approximately 190,000 local regulations, rules, and policy measures.⁶¹ Even after acceding to the WTO, China has gradually reviewed and continuously reviews its WTO-inconsistent provisions. For instance, it has drafted, revised, and abrogated more than 2,300 laws, regulations, and rules at the central level, while it has revamped another 190,000 regulations, rules, and

59 *Supra* n. 7, Lon L. Fuller (1969), p. 65.

60 *Supra* n. 11, Colleen Murphy (2005), p. 240.

61 *Supra* n. 1, Zhao Hong (2016), p. 45; Sun Zhenyu, China's Experience of 10 Years in the WTO, In Ricardo Meléndez-Ortiz, Christophe Bellmann and Shuaihua Cheng (eds.), *A Decade in the WTO: Implications for China and Global Trade Governance*, ICTSD Programme on Global Economic Policy and Institutions, December 2011, <https://www.files.ethz.ch/isn/139098/a-decade-in-the-wto-implications-for-china-and-global-trade-governance.pdf> (Last Visited on January 22, 2022), p. 12.

other policy measures at the local level.⁶²

China's Accession Protocol confirmed that its laws, regulations, and other national and sub-national measures affecting trade in goods, services, and trade-related aspects of intellectual property rights shall be applied and administered in a uniform, impartial and reasonable manner.⁶³ China's commitments on uniform administration are WTO-plus commitments: Other WTO Members do not require these Members to remove a WTO-inconsistent measure, but they do need to seek its removal.⁶⁴ However, China has strived to ensure consistency between its central and sub-central legislation and the WTO rules. Taking the *China — Demonstration Bases* as an example.⁶⁵ during this dispute, the US alleged that on February 15, 2015, China provided subsidies to an industrial cluster of enterprises located at demonstration bases in China that were contingent on these enterprises' export performance. On April 14, 2016, without taking the dispute to the DSM, China and the US concluded a memorandum of understanding in which China committed to repeal and modify the measures at issue.⁶⁶ Then China adopted concrete actions to revise and abolish relevant measures. For example, the Notice on Effectively Administering the 2013 Foreign Trade Common Service Platform Construction Fund (Notice No. 101) was abrogated and invalid during the next fiscal year.⁶⁷ Moreover, China confirmed that it published an administrative notice directing sub-central governments to terminate any existing financial support to Common Service Platforms. This case exemplifies that China has strived to ensure it complies with WTO rules and principles and has also strengthened its path towards the rule of law by actively engaging with WTO disputes.

62 Yuan Yuan, Looking back 14 Years after Accession: Cases of China – Intervention at Session 2 of Day 1: Transition from Accession to Membership — Maximizing the Benefits of WTO Membership and Global Economic Integration Third China Round Table on WTO Accessions, June 2, 2015, https://www.wto.org/english/thewto_e/acc_e/session2yuanpostaccessionlookingback14yearafter.pdf (Last Visited on January 18, 2022).

63 China's Accession Protocol, Article 2(A).

64 Ravi P. Kewalram, WTO Dispute Settlement and Sub-national Entities in China, In Deborah Z. Cass, Brett G. Williams and George Barker (eds.), *China and the World Trading System: Entering the New Millennium and Good Governance in the World Trading System*, Cambridge University Press, 2007, p. 416.

65 *China — Measures Related to Demonstration Bases and Common Service Platforms Programme*, DS489 (hereinafter *China — Demonstration Bases*).

66 *Memorandum of Understanding between the People's Republic of China and the United States of America Related to the Dispute China — Measures Related to Demonstration Bases and Common Service Platforms Programs*, WT/DS489/7, adopted April 19, 2016. (hereinafter *China — Demonstration Bases Memorandum*).

67 *China — Demonstration Bases Memorandum*, Article 1.a.

IV. COMPLIANCE

Compliance is another principle explaining the rule of law. According to Aristotle, the rule of law means to at least obey laws. Therefore, in a WTO context, it means to abide by WTO law.⁶⁸ As Wang mentioned, “China’s WTO compliance will directly contribute to its construction of ‘thin’ rule of law”.⁶⁹ China clearly has attained a major achievement by promoting this aspect of the rule of law.⁷⁰ For instance, it issued the General Office of the State Council’s Notice on Strengthening Trade Policy Compliance (Notice No. 29). This Notice required that regulations, rules, normative documents, and any other policy measures related to trade in goods, services, and trade-related intellectual property regulated by departments under the State Council as well as local governments and bureaus subject to local governments shall comply with the WTO Agreement, China’s Accession Protocol, and the Working Party Report.⁷¹ Furthermore, China has revised, annulled, and continuously modified many of its domestic laws, regulations, rules, and other measures to comply with WTO rules and principles. For instance, it has revised the Foreign Trade Law and Legislation Law of the People’s Republic of China.⁷²

Many scholars have acknowledged that China has reliably complied with WTO law. Bacchus et al. stated that China has not ignored the rulings brought against it in the DSM, while other WTO Members such as the United States have ignored these rulings.⁷³ When analyzing WTO disputes during 1995-2016,

68 Yang Guohua, WTO and Rule of Law in China: A View Based on Personal Experience, *Global Trade and Customs Journal*, Vol. 11, No. 6, p. 253.

69 *Supra* n. 8, Wang Jianyu (2004), p. 377.

70 Scholars have discussed China’s improvement of its rule of law since its accession to the WTO and the impact of the WTO on China’s rule of law. See *Supra* n. 68, p. 252.

71 Notice on Strengthening Trade Policy Compliance, Article I.

72 Many scholars have analyzed China’s legal achievements in ensuring China’s legal instruments comply with the WTO Agreement. See Liao Li and Yu Minyou, Impact of the WTO on China’s Rule of Law in Trade: Twentieth Anniversary of the WTO, *Journal of World Trade*, Vol. 49, No. 5, 2015, pp. 843-850.

73 The US did not comply with the WTO adverse rulings in *United States — Subsidies on Upland Cotton* and the European Union still prohibits hormone-treated beef to be sold in its market without complying with the WTO adverse rulings. See Notification of a Mutually Agreed Solution, *United States — Subsidies on Upland Cotton*, WT/DS267/46, adopted October 23, 2014.

Reich concluded that China has been involved in 2.8% of compliance panels, and it has had zero suspension requests against it.⁷⁴ Zhou confirmed that based on a detailed analysis of four completed WTO “trade in goods” disputes involving China, it has promptly and satisfactorily amended almost all of its WTO-inconsistent measures and has a positive implementation record in WTO disputes.⁷⁵ Given the subject matter, this article will not examine the extent of China’s compliance with WTO jurisdiction. Instead, this article attempts to explore China’s experience with relying on compliance disputes to encourage other WTO Members to abide by the rule of law.

China has challenged the unjustified non-market economy (NME) methodology that the US and EU have used during several WTO disputes to determine the dumping margin. If China is regarded as a NME, the US and the EU are allowed to use prices in surrogate markets during anti-dumping investigations to determine dumping margins. As a result, other WTO Members will calculate higher dumping margins during anti-dumping investigations.

In *EC — Fasteners*, Article 9(5) of the EU’s Basic Anti-dumping Regulation (the EU’s Basic AD Regulation) stated that anti-dumping duties were exclusively imposed on certain suppliers from NME Members but not on all suppliers.⁷⁶ On January 26, 2009, the EU applied Council Regulation (EC) No. 91/2009 to impose definitive anti-dumping duties on imports of certain iron or steel fasteners originating in China. In other words, the EU cannot grant an individual rate of duty to NME Members unless they satisfied the criteria listed in the EU’s Basic AD Regulation.⁷⁷ This Regulation did not clearly define “NME Members”, but the list of these Members’ names annexed to Council Regulation No. 519/94 included China as one of them.⁷⁸ For decades, the EU

74 Arie Reich, The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis, In Toshiyuki Kono, Mary Hiscock and Arie Reich (eds.), *Transitional Commercial and Consumer Law: Current Trends in International Business Law*, Springer, 2018, p. 25.

75 Zhou Weihuan, Fifteen Years on: Has China Implemented WTO Rulings? A Perspective on Trade in Goods, *Asian International Health Law and Policy*, Vol. 11, No. 1, 2016, p. 199.

76 WTO, DS397: *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds397_e.htm (Last Visited on January 18, 2022).

77 WTO, *EC — Fasteners (China)* (DS397), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds397sum_e.pdf (Last Visited on January 18, 2022).

78 Yang Guohua, *An Analysis of WTO Cases Involving China*, Intellectual Property Publishing House, 2015, p. 110. See also Council Regulation (EC) No.519/94, adopted March 7, 1994.

had not automatically granted individual treatment to Chinese exporters. Therefore, China wanted to prove that it satisfied the criteria listed in the EU's Basic AD Regulation to avoid the imposition of anti-dumping duties.⁷⁹ This is why China brought this dispute before the WTO tribunal. The Panel found that the EU's measures at issue were inconsistent with the Anti-dumping Agreement (hereinafter ADA). The Appellate Body cited Article 6.10 and Article 9.2 of the ADA to uphold the Panel's conclusion that the covered agreements lacked a provision allowing investigating authorities to impose countrywide anti-dumping duties on exports originating from NME Members.⁸⁰ Article 9(5) of the EU's Basic AD Regulation was a discriminatory provision against NME Members when determining and imposing anti-dumping duties, which is inconsistent with WTO rules. Both the Panel and the Appellate Body recommended that the EU should bring its WTO-inconsistent measures into compliance with the WTO Agreement.

Initially, when subject to implementation supervision, the EU preferred partial compliance with the WTO's adjudication. However, as Chinese enterprises presented extensive and detailed proof, the EU had to accept that its measures on determining China's export prices were inconsistent with WTO rules. Nevertheless, the EU simply revised several of its errors and reduced its average anti-dumping tariff from 77.5% to 54.1%.⁸¹ China had to launch compliance proceedings because the EU did not withdraw or modify its measures to fully comply with the adopted recommendations and rulings before the reasonable period of time expired. China proposed eight claims during the Article 21.5 compliance panel, and the Panel supported five of them, which was a significant achievement for China. As the EU did not agree with the compliance Panel's jurisdiction, the EU and China each appealed to the Appellate Body regarding certain issues of law and legal interpretations developed in the compliance Panel Report. China ultimately achieved an overwhelming victory, as the EU had to revise its measures in question as well as its annual anti-dumping

79 *Ibid.*, Yang Guohua (2015), p. 113.

80 *Supra* n. 76.

81 Fu Donghui, Li Hua and Feng Xuewei, Preparation for Compliance Proceeding in *EU — Fasteners* Recourse to Article 21.5 of the DSU, In Fu Donghui, Feng Xuewei and Li Ye (eds.), *China's Engagement in WTO Dispute Settlement*, China Legal Publishing House, 2020, p. 381.

duties on imports of certain iron or steel fasteners originating in China.

EC — Fasteners was a long-lasting case for China (2009-2016), during which it successfully prohibited other WTO Members from using unjustified NME methodology on it to impose anti-dumping duties on its exports. More importantly, as an active WTO participant, China has relied on compliance proceedings to become responsible for monitoring other WTO Members' compliance with WTO rules.

V. CONCLUSION

It has been over twenty years since China's accession to the WTO, and an opportune moment to review its twenty years of experience with the WTO dispute settlement system. The WTO's important principle of the rule of law has significantly impacted China's path towards pursuing compliance. To comply with WTO rules and principles, China has substantially overhauled its legal instruments. It has gradually transformed from a silent participant reluctant to initiate disputes to a proactive actor who is experienced with launching compliance proceedings. China has become one of the top three WTO Members in the WTO adjudicatory body.

In return, China has played a positive and important role in promoting the WTO DSM's pursuit of compliance with the rule of law. China has used the DSM during several WTO protocol-related cases to clarify a number of legal issues regarding WTO Members' protocol, including the legal status of China's Accession Protocol, the relationship with the WTO Agreement and other issues. All of these have demonstrated that China abides by the clarification principle regulated by the "thin" rule of law. Moreover, China has quickly revised and annulled its WTO-inconsistent measures in *China — Demonstration Bases*, showing that it has strived to satisfy its WTO consistency obligation as required by the rule of law. Furthermore, in *EC — Fasteners*, China not only challenged unfair NME methodologies but also actively launched compliance proceedings to monitor other WTO Members so they would comply with WTO rulings. All of these have explicitly illustrated that China has played an increasingly active and pivotal role in promoting the WTO's rule of law.

The spread of trade protectionism among major WTO Members, the Sino-US trade conflict, and the uncertainty resulting from the COVID-19 pandemic have all negatively influenced the WTO multilateral trade system. As a powerful and emerging WTO Member, China's role in the WTO is not only to enhance global economic growth but also to maintain this system and prevent trade protectionism by relying on the rule of law.