Introduction

As a multilateral institution with currently 161 members, the WTO is somewhat the centre of the universe of major legal systems around the world. Apart from its developed members, there has been increased participation in the activities of the organisation, especially in its dispute settlement mechanism, by many of its emerging economies such as Brazil, China, India, and so on. For instance, since joining the WTO in December 2001, China has been party either as complainant or respondent to some 46 disputes. These numbers are obviously staggering if we compare them with cases involving other emerging BRICS economies or even some developed country members. Because of the size of its economy and the fact that China acceded to the WTO under relatively less than favourable terms, this high number of cases was somehow not unpredicted. Moreover, while many major economies in the last few years

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1 As of 26 April 2015, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited 18 May 2015).

2 As of May 2015, China has been complainant in 13 cases, respondent in 33 cases and third party in 119 cases. See https://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited 18 May 2015).

3 BRICS is an acronym for an association of five major emerging economies: Brazil, Russia, India, China and South Africa. Their sixth summit was held in Brazil in July 2014. See http://www.brics6.itamaraty.gov.br/ (last visited 19 May 2015).

4 For instance, between 1995 and May 2015, India has been a party to a total of 43 cases while Brazil has been a party to 42 cases as complainant or respondent respectively. See https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited 18 May 2015).

have witnessed reduction in their shares of world trade due to the 2008 financial crisis, China has become a holder of the world’s largest foreign exchange reserves and has tremendously increased its share of world trade. Membership of the WTO has undoubtedly been key to China’s economic success in the last 14 years. While the process of internal economic liberalisation started long before China finally acceded to the WTO in 2001, the accession to the WTO was a catalyst for several regulatory and institutional reforms in China.

Although China may be thought of as generally sceptical with regard to international law and tribunals, its integration into the rule-based global trading system requires a rethink of how it views the rule of law and compliance with those rules. In other words, as a rule-based multilateral trade organisation with members from varied legal traditions, the 161 WTO members are undoubtedly confronted with some interesting questions on the approach of each of the members to compliance and disputes resolution in the world trading system. Consequently, a monograph that explores the operation of the WTO implementation regime in the context of international law theory of compliance while at the same time providing significant insights into China’s view on the notion of ‘compliance with public international law of trade’ in its Confucian context is an absolute must-read. This is precisely what this monograph intends to do.

However, the concept of ‘rule of law’ has only recently begun to resonate in China, mainly through the country’s agreement to settle disputes using the WTO dispute settlement mechanism. Confucian values, identified as the foundation of China’s great cultural tradition, have controlled the social order and regulated people in all activities of Chinese daily lives, including the people’s legal consciousness, expectations of justice and trust in law. Persuasion and negotiations are central tenets of Confucian

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7 As was somehow expected, China’s accession to the WTO meant that future economic reforms in China will be rooted within the core WTO disciplines. On this, see Julia Ya Qin, ‘The Impact of WTO Accession on China’s Legal System: Trade, Investment and Beyond’, Wayne State University Law School Research Paper No. 07-15 (2007).

8 It is important to point out that with regard to complying with a particular panel or AB report, Article 21.6 of the DSU states that ‘[t]he issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption’. In the EC – Bananas case, the AB pointed out that WTO members have broad discretion in deciding whether to bring a case against another member under the DSU. WT/DS27/AB/R, paragraphs 88–9.
The notion of law in Confucian tradition has over many centuries largely been seen in the context of ‘penal and administrative law’. Yet, the idea of rooting normativity in a formal structure condoning sanctions or retaliation as forms of remedies is alien to Confucian tradition. This legal tradition is distinct from the common and civil law of the Western society rooted in normativity. This therefore means that with the changing fundamentals of global economic order, the notion of law in a Confucian tradition requires adaptation. This monograph aims partly at examining the conflicting and conciliating processes between the Chinese approach to litigation and the Western approach of legal orientation in the field of the WTO dispute settlement mechanism. This objective is achieved first by examining the normative framework of WTO rule implementation in a globalised international economic order and secondly by examining the notion of the rule of law in a Confucian system such as China and how it has interacted with a rule-based world trading system.

More precisely, in the first part of this volume, we provide fundamental insights into the law and policy of the WTO dispute settlement system. In order to contextualise the analysis, Part I also discusses the sources of law that may be applicable in a dispute brought before a WTO panel or appellate body (Chapter 3). We further employ two significant international relations theories, namely constructivism and reputation costs, to explain why and how WTO members behave vis-à-vis their international trade law obligations. Beyond the work of few academics that have largely explored China’s participation in the world trading system in terms of its contributions to the development of international economic law, very little has

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10 In this regard, Confucianism is in direct contrast to legal positivism. Anything appearing as a formal structure highly favoured by legal positivism is incongruous with Confucian values. The power of persuasion and reasons rather than strict obligations therefore becomes the modus operandi in Confucian society. On this see H. Patrick Glenn (2014), pp. 320–21.
been written on Confucianism and the rule of law and how the Chinese government has conducted the whole WTO implementation process. As a consequence, Part II of this volume focuses on the concept of law in Chinese culture and how this fits into China’s reading of its international law commitments since its accession to the WTO in 2001. In this regard, it discusses the approach of China in the litigation of trade disputes in the WTO. The section discusses China’s relations with the multilateral trading system from the days of the General Agreement on Tariffs and Trade (GATT) to the WTO. Further, it discusses briefly law and Confucianism and the challenges faced by China with regard to compliance with WTO rules. We argue here that in an interconnected world, reputation costs have played an important role in the way China – as well as some WTO members – goes about implementing WTO rules.