

CONFLATING TRADE WITH POLICY: THE ROLE OF INTERNATIONAL TRADE FRAMEWORKS IN AUSTRALIA–CHINA TRADE RELATIONS

DANIEL RÜHMANN*

Significant anti-dumping duties and mounting restrictions on the importation of Australian goods into China have characterised bilateral trade relations between Australia and China in recent years. Trade tensions have spilled over from a significant deterioration in bilateral relations over political disagreements. This article examines the potential and the limitations of international trade frameworks to resolve the politically charged trade disputes. The World Trade Organization's ability to address a conflation of trade with political relations is limited. The Australia–China trade disputes exemplify these limitations both systemically and in the resolution of individual disputes. While political disagreements are likely to persist, Australia and China's strong bilateral trade, their people-to-people connections and their roles as key players within the Indo-Pacific provide bilateral relations with ample incentives for a cooperative way forward. Preferential trade agreements may build on the gaps of the WTO framework. The countries' bilateral free trade agreement, the China–Australia Free Trade Agreement, provides a strong foundation for bilateral trade relations, but its potential to resolve trade issues has largely been left unused. However, the Regional Comprehensive Economic Partnership Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership may be able to foster the return and commitment to rules-based trade relations on a level playing field. Both their substantive additions to existing trade frameworks and the creation of regional forums for communication and cooperation have the potential to address current tensions and increase predictability for traders. Resumptions of diplomatic communication indicate that Canberra and Beijing are aware of this potential.

CONTENTS

I	Introduction.....	2
II	The Dimensions of Australia–China Relations.....	4
	A The Figures of a Strong Relationship	4
	B Known Frictions, New Symptoms.....	7
III	WTO Disputes: Trade Restrictions and Political Objectives.....	10
	A Disputed Trade Restrictions	11
	1 Disputes on Anti-Dumping Duties.....	11
	2 Disputes on Import Restrictions.....	15
	B The Systemic Risks for Rules-Based Trade	21
	C The Practical Challenges in WTO Dispute Settlement.....	25
IV	ChAFTA: A Quiet Agreement in Loud Times	29
V	The Way Forward for Rules-Based Trade	32
	A Reality Check on Australia–China Trade Relations.....	33
	B RCEP: A Weak Commitment to Rules?.....	38
	C CPTPP: The Agreement of High Expectations	41
VI	Conclusion	46

* PhD Candidate, Institute for International Law and European Law, Department of International Economic and Environmental Law, University of Göttingen. The PhD research is supported by a fellowship of the Konrad-Adenauer-Stiftung. The author would like to thank Professor Tania Voon for her insightful comments on an earlier draft of this article, as well as the two anonymous referees. This article was finalised in July 2023 and last updated in October 2023.

I INTRODUCTION

The panel proceeding on the very first dispute between Australia and China before the World Trade Organization was concluded in August 2023 through a mutually agreed solution.¹ At the time of writing, two further proceedings are pending before WTO panels but have been suspended with the intent of both countries to find a diplomatic solution.² The WTO proceedings arose as an outlet of significant tensions in both the political and the trade dimension of bilateral relations. The constant growth of exchanges in trade, culture and society indicates a strong partnership between the countries. The 21st of December 2022 marked the 50th anniversary of the establishment of official diplomatic relations between Australia and the People's Republic of China.³ The 1972 Joint Communiqué emphasised 'respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence' as the principles guiding bilateral relations.⁴ However, over the past six years, political frictions and their confrontational articulation have highlighted differences in values and national interests. The political tensions quickly spilled over into trade relations. Coinciding with increasingly emerging political conflicts, China has imposed anti-dumping duties and import restrictions on Australian goods, causing significant trade disruptions.

This article examines the potential and the limitations of international trade frameworks to resolve the politically charged trade tensions between Australia and China. Today's world trade system under the WTO is designed to level the playing field for its members, so that trade disputes are resolved based on rules rather than economic power. For this level playing field to provide predictability and security to traders and prevent the coercive use of trade restrictions, it requires a certain degree of separation from its members' political relations. Accordingly, WTO trade rules allow for trade restrictions only where they are based on issues and objectives related to the restricted goods and services.⁵ The legal assessment can take into account other political motivations only to a limited extent. This article argues that the politically charged trade tensions between Australia and China

¹ Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598/R (24 August 2023) [4.1]–[4.4] ('*China — AD/CVD on Barley (Australia)*').

² On this intention, see Anthony Albanese, Prime Minister of Australia, 'Visit to the People's Republic of China' (Media Release, Department of Prime Minister and Cabinet, 22 October 2023) <<https://www.pm.gov.au/media/visit-peoples-republic-china>>, archived at <<https://perma.cc/2YQM-F6UQ>>. On the status of the outstanding WTO proceedings at the time of writing, see *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Doc WT/DS602/6 (6 October 2022) (Communication from the Panel) ('*China — AD/CVD on Wine (Australia)*'); *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Doc WT/DS603/5 (1 March 2023) (Communication from the Panel) ('*Australia — AD/CVD on Certain Products (China)*').

³ Department of the Prime Minister and Cabinet (Cth), 'Joint Communiqué of the Australian Government and the Government of the People's Republic of China concerning the Establishment of Diplomatic Relations between Australia and China' (Joint Communiqué, 21 December 1972) <<https://pmtranscripts.pmc.gov.au/sites/default/files/original/00003119.pdf>>, archived at <<https://perma.cc/4E8T-GBB3>>.

⁴ *Ibid.*

⁵ For an analysis of the key WTO provisions relevant to Australia–China trade disputes, see below Part III.

exemplify the limitations of international trade frameworks in adequately resolving conflicts that conflate trade with political relations and objectives.

Notwithstanding these limitations, the growing architecture of world trade has significant potential to foster both countries' commitment to mutually beneficial rules-based trade. Conflicting interests between Australia and China are likely to persist regarding both trade and policy. Nevertheless, bilateral connections through economic and cultural links, the Indo-Pacific as a region of increasing international importance and a similarly expressed vision for the development of international trade law provide ample common ground for continued cooperation. The preferential trade agreements ('PTAs') that Australia and China are or may become mutual members of can build on the gaps of the WTO framework. In doing so, they can contribute to a way forward in which rules-based resolutions of recent and potential future trade disputes increase predictability for traders and level the playing field in bilateral trade relations.⁶

Following this introduction, Part II of the article contrasts the strong economic connections between Australia and China with the eruptions of political frictions in recent years. Part III analyses the key legal provisions and issues in the anti-dumping proceedings and regarding the Chinese import restrictions that coincided with political frictions, particularly in light of the relevant provisions of the *General Agreement on Tariffs and Trade 1994* ('GATT 1994')⁷ and the *Anti-Dumping Agreement* ('ADA').⁸ The initiation of the first three WTO proceedings between the two countries in 2020 and 2021 created the opportunity for legal clarification on reciprocal anti-dumping duties. At the time of writing, a diplomatic solution of outstanding disputes is arguably imminent, following successive signs of diplomatic rapprochement throughout 2023. Albeit a welcome improvement in bilateral relations, the duties were able to disrupt bilateral trade for multiple years and will likely remain without legal clarification. Meanwhile, no WTO proceedings have even been initiated regarding the restrictions on the importation of Australian goods over the past years. Both types of trade restrictions arguably exemplify the WTO's limited tools and mechanisms to address the conflation of trade restrictions with political disputes.

Therefore, the article analyses how preferential additions to the WTO complement its multilateral framework both in reacting to trade disputes in times of political conflict and as avenues for returning to and maintaining rules-based trade. Part IV starts to investigate how the 2015 *China–Australia Free Trade*

⁶ The GDP of China in 2021 was more than elevenfold that of Australia: 'GDP (Current US\$) — Australia, China', *World Bank* (Web Page) <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=AU-CN>>. The merchandise export volume of China in 2021 was nearly tenfold compared to Australia: 'Exports of Goods and Services (BoP, Current US\$) — China, Australia', *World Bank* (Web Page) <<https://data.worldbank.org/indicator/BX.GSR.GNFS.CD?locations=CN-AU>>.

⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('GATT 1994').

⁸ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*') ('*Anti-Dumping Agreement*').

Agreement ('*ChAFTA*')⁹ contributes to bilateral trade relations. *ChAFTA* builds an important framework for bilateral cooperation and economic integration. However, the agreement has contributed little to the resolution of recent trade disputes as neither party has used *ChAFTA*'s legal tools or its communication forums to this end. Part V evaluates the consequences of the trade disruptions for both countries and the potential contributions of newer PTAs to the way forward in Australia–China trade relations. It assesses the substantive tools and the incentives for a mutually beneficial rules-based relationship provided by the new *Regional Comprehensive Economic Partnership Agreement* ('*RCEP*')¹⁰ and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('*CPTPP*').¹¹ While China is already a member of *RCEP*, it has applied to join *CPTPP*.¹² Both agreements commit to rules-based trade and create important forums to address trade barriers. *CPTPP* in particular may become a stepping stone for a balanced way forward in bilateral relations and could foster an environment in which the conflation of trade with policy becomes a less effective and thus less attractive tool. The final Part concludes that the trade frameworks have the potential to foster predictable and rules-based trade relations. However, the extent to which this potential can be realised continues to hinge on the parties' willingness to let their relationship be guided by common interests.

II THE DIMENSIONS OF AUSTRALIA–CHINA RELATIONS

The relationship between Australia and China has developed two opposing dimensions over recent years. The figures of bilateral trade, the cultural exchanges and the people-to-people linkages indicate a continuously strong partnership based on mutual benefits. However, several diplomatic incidents highlighted considerable differences in national and strategic interests and led to an unprecedented deterioration in Australia–China relations.

A *The Figures of a Strong Relationship*

Bilateral trade between Australia and China has never been as strong as it is today. While China accounted for no more than 1% of Australia's merchandise trade 50 years ago,¹³ it is now Australia's top trading partner. Two-way trade totalled AUD299 billion in 2022, with Japan (AUD147 billion) and the United

⁹ *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) ('*ChAFTA*').

¹⁰ *Regional Comprehensive Economic Partnership Agreement*, signed 15 November 2020, [2022] ATS 1 (entered into force 1 January 2022) ('*RCEP*').

¹¹ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) ('*CPTPP*').

¹² 'China Applies to Join Pacific Trade Pact to Boost Economic Clout', *Reuters* (online, 18 September 2021) <<https://www.reuters.com/world/china/china-officially-applies-join-cptpp-trade-pact-2021-09-16/>>, archived at <<https://perma.cc/TX7X-CZ7J>>.

¹³ Wilson Au-Yeung, Alison Keys and Paul Fischer, 'Australia–China: Not Just 40 Years' [2012] (4) *Economic Roundup* 7, 13.

States (AUD87 billion) ranked next.¹⁴ The rapid development of China's economy was accompanied by an increasing demand for resources such as iron ore and coal.¹⁵ These goods are a primary reason why Australia is one of the few developed countries to maintain a trade surplus with China.¹⁶ Overall Australian exports to China peaked in 2021 at AUD189 billion (36.4% of total Australian exports) while imports totalled AUD93 billion (23.4% of total Australian imports).¹⁷ The main imports from China are high-tech products, household equipment and child-related or sporting goods.¹⁸ In turn, Australia was China's fifth most important import source (5.2% of total Chinese imports) and in 13th place for exports (2.2% of total Chinese exports) in 2022.¹⁹ The smaller shares result from China's significantly larger overall trade volume and show the Australian economy's greater dependence on China than vice versa.²⁰ Bilateral trade proved resilient even during COVID-19, declining by only 2%, while Australian trade with all other countries declined by nearly 17%.²¹

Trade relations are underpinned by a long history of cultural exchanges.²² As of 2021, 1.39 million (5.5%) of the Australian population are of Chinese descent, half a million more than ten years ago.²³ Accordingly, Mandarin is the second most spoken language (2.7%) in Australia, with Cantonese in fifth place (1.2%).²⁴ Bilateral trade in services builds on these linkages through tourism and

¹⁴ Department of Foreign Affairs and Trade (Cth), *Australia's Direction of Goods and Services Trade: Calendar Years from 1989 to Present* (Dataset, September 2023) <<https://www.dfat.gov.au/trade/resources/trade-statistics/trade-time-series-data>>, archived at <<https://perma.cc/5DVY-WXKY>> ('*Australia's Direction of Goods and Services Trade Dataset*').

¹⁵ Au-Yeung, Keys and Fischer (n 13) 20. For the development of China's GDP, see generally 'GDP (Current US\$): China', *World Bank* (Web Page) <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2020&locations=CN&start=1960&%20view=chart>>.

¹⁶ See Department of Foreign Affairs and Trade (Cth), *China* (Fact Sheet) <<https://www.dfat.gov.au/sites/default/files/chin-cef.pdf>>, archived at <<https://perma.cc/5JWA-95F6>> ('*China Fact Sheet 2022*').

¹⁷ *Australia's Direction of Goods and Services Trade Dataset* (n 14). In 2022, exports to China fell by 2.1% to AUD 185 billion (27.6%) and imports increased by 22.4% to AUD 114 billion (21.5%).

¹⁸ *China Fact Sheet 2022* (n 16).

¹⁹ *Ibid.*

²⁰ 'Net Trade in Goods (BoP, Current US\$) - China, Australia', *World Bank* (Web Page) <<https://data.worldbank.org/indicator/BN.GSR.MRCH.CD?locations=CN-AU>>.

²¹ *Australia's Direction of Goods and Services Trade Dataset* (n 14).

²² See generally Au-Yeung, Keys and Fischer (n 13).

²³ Australian Bureau of Statistics, *Data Table for Cultural Diversity Summary* (Dataset, 28 June 2022) table 4, item 196 <<https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/latest-release>>, archived at <<https://perma.cc/SR2C-Q2DN>> ('*2021 Cultural Diversity Summary Data Set*'); Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census* (Catalogue No 2071.0, 21 June 2012) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>>, archived at <<https://perma.cc/DVV9-U6J4>>.

²⁴ *2021 Cultural Diversity Summary Data Set* (n 23) table 5, items 191, 198.

education.²⁵ China is Australia's biggest source of international students.²⁶ The decrease of Australian services exports to China by 53.6% due to the COVID-19 pandemic reflects the economic significance of international Chinese students and tourists for Australia.²⁷ Moreover, increasing research cooperation adds further depth to the scientific and educational links.²⁸ China surpasses even the US as one of Australia's most important partners in scientific knowledge creation, with technology and science as the main fields of research collaboration.²⁹

Investment figures do not entirely mirror the strong trade and societal links. Although China's total stock of foreign investment in Australia increased by 30.9% in the five years between 2017 and 2022, it still only accounts for a marginal percentage (1.9%) of the total foreign investment in Australia.³⁰ The position of the US as the largest source of foreign investment in Australia (24.1%)³¹ reflects one way in which the nature of Australia's economic relationship with the two superpowers differs. The asymmetry between the trade and investment relations between Australia and China can be partly attributed to stricter controls on outbound investments in China.³² Another reason is the increased regulatory screenings under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) resulting from the loss of trust due to foreign interference concerns in Australia.³³ This loss of trust is the result of deeper frictions in recent relations between Australia and China.

²⁵ China is the top destination for Australian service exports, particularly travel and education-related services: Australian Bureau of Statistics, *International Trade: Supplementary Information, Calendar Year* (Release, 14 June 2023) <<https://www.abs.gov.au/statistics/economy/international-trade/international-trade-supplementary-information-calendar-year/2022>>, archived at <<https://perma.cc/FS4Q-FFZG>>.

²⁶ 'China Country Brief', *Department of Foreign Affairs and Trade* (Web Page, July 2022) <<https://web.archive.org/web/20230828040656/https://www.dfat.gov.au/geo/china/china-country-brief>>.

²⁷ Comparing services exports from 2019 and 2021, see *Australia's Direction of Goods and Services Trade Dataset* (n 14).

²⁸ James Laurenceson and Michael Zhou, Australia–China Relations Institute, *The Australia–China Science Boom* (Report, 22 July 2020) 4.

²⁹ *Ibid* 4, 8.

³⁰ Australian Bureau of Statistics, *International Investment Position, Australia: Supplementary Statistics* (Catalogue No 5352.0, 3 May 2023) <<https://www.abs.gov.au/statistics/economy/international-trade/international-investment-position-australia-supplementary-statistics/2022>>, archived at <<https://perma.cc/D7UE-6CDR>> ('*International Investment Position Statistics*').

³¹ *Ibid*.

³² Doug Ferguson et al, KPMG and The University of Sydney, *Demystifying Chinese Investment in Australia* (Report, April 2019) 30.

³³ Doug Ferguson et al, KPMG and The University of Sydney, *Demystifying Chinese Investment in Australia* (Report, July 2021) 8. Australian foreign investment screening provisions were recently subject to amendments: *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) sch 1 pt 1. See also Explanatory Memorandum, *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (Cth) 8–9; Josh Frydenberg, Treasurer (Cth), 'Major Reforms to Australia's Foreign Investment Framework' (Media Release, 5 June 2020) <<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/major-reforms-australias-foreign-investment-framework>>, archived at <<https://perma.cc/N97P-WNRB>>.

B Known Frictions, New Symptoms

Mutually beneficial trade and significant people-to-people ties provide Australia and China with strong incentives for continued cooperation. Nevertheless, divergent national and strategic interests and values became apparent as relations deteriorated drastically. According to a former official of the Australian Department of Foreign Affairs and Trade ('DFAT'), the developments show the 'immense clash of interests and values that today's China creates and the limits this inevitably puts on the relationship'.³⁴

What the Chinese ambassador recently referred to as the 'first shot' in the countries' deteriorating relations arose out of foreign interference concerns in Australia.³⁵ Media reports alleged Chinese interference in Australian politics, academia and media as well as cybersecurity risks to critical infrastructure.³⁶ The 2017–18 annual report of the Australian Security Intelligence Organisation found that foreign actors seek to 'influence the opinions of members of the Australian public and media, Australian government officials, and members of Australia-based diaspora communities'.³⁷ The Director-General at that time later warned of Chinese interference in particular.³⁸ Canberra reacted by enacting several legislative measures.³⁹ The reforms attributed national security a greater role in addressing foreign investment and international arrangements.⁴⁰ Arguably, the most prominent outlet of this development is the exclusion of the Chinese companies Huawei and ZTE from Australia's 5G infrastructure in 2018 based on cybersecurity concerns.⁴¹ Media reported that Australian officials actively

³⁴ Richard Maude, 'Looking Ahead: Australia and China after the Pandemic', *Asia Society* (online, 13 May 2020) <<https://asiasociety.org/australia/looking-ahead-australia-and-china-after-pandemic>>, archived at <<https://perma.cc/ZQ5S-4QD5>>.

³⁵ The quote refers to the ban of Chinese companies from the Australian 5G infrastructure: Rod McGuirk, 'China Envoy Says Australia Fired First Shot with Huawei Ban', *AP News* (online, 24 June 2022) <<https://apnews.com/article/technology-china-sydney-australia-037521cd9d6e09854c98b4acf1acbf20>>, archived at <<https://perma.cc/Z8P9-UF93>>.

³⁶ Discussing several allegations, see Michael Clarke, Jennifer S Hunt and Matthew Sussex, 'Shaping the Post-Liberal Order from Within: China's Influence and Interference Operations in Australia and the United States' (2020) 64(2) *Orbis* 207, 214–19.

³⁷ Australian Security Intelligence Organisation, *ASIO Annual Report 2017–18* (Report, 2018) 3.

³⁸ Peter Hartcher, "'Insidious": Former ASIO Boss Warns on Chinese Interference in Australia', *The Sydney Morning Herald* (online, 22 November 2019) <<https://www.smh.com.au/politics/federal/insidious-former-asio-boss-warns-on-chinese-interference-in-australia-20191121-p53cv2.html>>, archived at <<https://perma.cc/35PU-WL6U>>.

³⁹ On the measures' connection to media reports on Chinese interference, see Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145 (Malcolm Turnbull, Prime Minister). On the protection of critical infrastructure, see *Telecommunications and Other Legislation Amendment Act 2017* (Cth). On infrastructure critical to national security, see *Security of Critical Infrastructure Act 2018* (Cth). On transparency in foreign political interference, see *Foreign Influence Transparency Scheme Act 2018* (Cth). On foreign donations, see *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).

⁴⁰ Clarke, Hunt and Sussex (n 36) 219–21.

⁴¹ Michael Slezak and Ariel Bogle, 'Huawei Banned from 5G Mobile Infrastructure Rollout in Australia', *ABC News* (online, 23 August 2018) <<https://www.abc.net.au/news/2018-08-23/huawei-banned-from-providing-5g-mobile-technology-australia/10155438>>, archived at <<https://perma.cc/9HJS-NGR6>>.

advocated for other Western countries to implement similar measures.⁴² Although the exclusion's compatibility with WTO rules is questionable, China did not initiate a formal dispute proceeding.⁴³ Nevertheless, the ban, other cases of prevented Chinese investment that occurred in this context and the loss of trust on both sides commenced a downward spiral for political relations.⁴⁴

Tensions were exacerbated by several incidents in which Australia took a common position with the US that publicly conflicted with China's political or strategic interests. Australia's position in these disagreements appears to have been elevated to a fundamental choice for either one of the superpowers, demonstrating Australia's difficulty in balancing the two relationships.⁴⁵ Australia is connected to the US through political values and the liberal understanding of the state's role in the economy.⁴⁶ Furthermore, economic relations with the US build on reciprocal foreign investment, which is significantly higher compared to China and creates long-term commitments.⁴⁷ Back in 1996, former Australian Prime Minister John Howard wrote that 'the alliance between Australia and the United States was ... not in any way directed at China'.⁴⁸ However, China has arguably come to question this intention following several incidents.⁴⁹

The advocacy of former Prime Minister Scott Morrison for an independent investigation into the COVID-19 pandemic and for corresponding reforms in the World Health Organization is one prominent incident in the timeline of deteriorating relations.⁵⁰ Morrison's demands were voiced in unison with the US, whose former President Donald Trump labelled COVID-19 the 'Chinese virus'.⁵¹ While Canberra insists the investigation 'is not targeted', China accused Australia's leading role in the inquiry of being politically motivated and strongly

⁴² Cassell Bryan-Low and Colin Packham, 'How Australia Led the US in Its Global War against Huawei', *The Sydney Morning Herald* (online, 22 May 2019) <<https://www.smh.com.au/world/asia/how-australia-led-the-us-in-its-global-war-against-huawei-20190522-p51pv8.html>> archived at <<https://perma.cc/KU2P-JHD7>>.

⁴³ See generally Tania Voon and Andrew Mitchell, 'Australia's Huawei Ban Raises Difficult Questions for the WTO', *East Asia Forum* (online, 22 April 2019) <<https://www.eastasiaforum.org/2019/04/22/australias-huawei-ban-raises-difficult-questions-for-the-wto/>>, archived at <<https://perma.cc/RT44-3AGQ>>.

⁴⁴ On other affected investments, see Weihuan Zhou and James Laureceson, 'Demystifying Australia–China Trade Tensions' (2022) 56(1) *Journal of World Trade* 51, 59–60.

⁴⁵ See generally Kerry Brown and Hannah Bretherton, 'Australian Relations with China and the USA: The Challenge of Grand Strategies' (2016) 70(1) *Australian Journal of International Affairs* 1.

⁴⁶ On the difference between Australia's relations with China and the US, see generally *ibid.*

⁴⁷ On Australian foreign investment in the US, see generally *International Investment Position Statistics* (n 30).

⁴⁸ Zhou and Laureceson, 'Demystifying Australia–China Trade Tensions' (n 44) 59.

⁴⁹ See also James Laureceson, 'No Wonder China Is Confused by Us', *Australian Financial Review* (online, 25 November 2020) <<https://www.afr.com/world/asia/no-wonder-china-is-confused-by-us-20201124-p56hlq>>, archived at <<https://perma.cc/L4VE-3DXR>>.

⁵⁰ Colin Packham, 'Australia Says All WHO Members Should Back Coronavirus Inquiry', *Reuters* (online, 23 April 2020) <<https://www.reuters.com/article/us-health-coronavirus-australia-idUSKCN225041>>, archived at <<https://perma.cc/8MFR-97VN>>. See, eg, Paul Fraioli (ed), 'The Deterioration of Australia–China Relations' (2020) 26(3) *Strategic Comments* v, v.

⁵¹ Jérôme Viala-Gaudefroy and Dana Lindaman, 'Donald Trump's "Chinese Virus": The Politics of Naming', *The Conversation* (online, 13 April 2021) <<http://theconversation.com/donald-trumps-chinese-virus-the-politics-of-naming-136796>>, archived at <<https://perma.cc/KH8N-5B4R>>.

rejects any criticism on the way it handled the pandemic.⁵² Another issue between Australia and China is Canberra's repeated allegations of human rights violations vis-a-vis minorities in the regions of Xinjiang and Tibet.⁵³ The tension intensified when Australia introduced the Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2021 (Cth) intended to specifically address imports of goods produced by forced labour in these regions.⁵⁴ China rejects the allegations, which Australia again raises in a similar manner to the US,⁵⁵ as 'untrue reports' and as part of an 'anti-China campaign'.⁵⁶ A third aspect of concern to China is the strategic partnership between Australia and the US. Australia, the United Kingdom and the US recently entered into a security pact ('AUKUS').⁵⁷ Moreover, Australia entered the Quadrilateral Security Dialogue ('Quad'), which includes Japan and India in the UK's place.⁵⁸ The agreements react to the strategic competition in the Indo-Pacific and disagreement over Chinese territorial claims within the South China Sea.⁵⁹

The political tensions reached a climax as China published a list of '14 grievances' in 2020, in which it attributed to Canberra sole responsibility for the frictions and called for a change in behaviour.⁶⁰ These publicly addressed and broadly debated disagreements between Australia and China led to an unprecedented low in political relations.⁶¹ Concerns that the repercussions could affect bilateral trade emerged early on, when the Chinese ambassador indicated shortly after the COVID-19 inquiry that Chinese 'consumers' might decide to

⁵² Paul Karp and Helen Davidson, 'China Bristles at Australia's Call for Investigation into Coronavirus Origin', *The Guardian* (online, 29 April 2020) <<https://www.theguardian.com/world/2020/apr/29/australia-defends-plan-to-investigate-china-over-covid-19-outbreak-as-row-deepens>>, archived at <<https://perma.cc/T4MG-PNLP>>.

⁵³ Penny Wong, Minister for Foreign Affairs (Cth), 'Human Rights Concerns in Xinjiang' (Ministerial Statement, Department of Foreign Affairs and Trade, 1 September 2022) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/human-rights-concerns-xinjiang>>, archived at <<https://perma.cc/2GCS-3VMJ>>; 'China Country Brief' (n 26).

⁵⁴ Explanatory Memorandum, Customs Amendment (Banning Goods Produced by Uyghur Forced Labour) Bill 2021 (Cth) 1.

⁵⁵ Annabelle Liang, 'US Ban on Imports from China's Xinjiang Region Takes Effect', *BBC News* (online, 21 June 2022) <<https://www.bbc.com/news/business-61754796>>, archived at <<https://perma.cc/VM9T-L2X5>>.

⁵⁶ Jonathan Kearsley, Eryk Bagshaw and Anthony Galloway, "'If You Make China the Enemy, China Will Be the Enemy": Beijing's Fresh Threat to Australia', *The Sydney Morning Herald* (online, 18 November 2020) <<https://www.smh.com.au/world/asia/if-you-make-china-the-enemy-china-will-be-the-enemy-beijing-s-fresh-threat-to-australia-20201118-p56fqs.html>>, archived at <<https://perma.cc/6N3X-B6SW>>.

⁵⁷ *Agreement between the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for the Exchange of Naval Nuclear Propulsion Information*, signed 22 November 2021, [2022] ATS 4 (entered into force 8 February 2022).

⁵⁸ 'The Quad', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/international-relations/regional-architecture/quad>>, archived at <<https://perma.cc/2E59-GJB2>>.

⁵⁹ Bertil Lintner, 'Quad and AUKUS Building a Bulwark against China', *Asia Times* (online, 25 September 2021) <<https://asiatimes.com/2021/09/quad-and-aucus-building-a-bulwark-against-china/>>, archived at <<https://perma.cc/6HBR-RPYQ>>.

⁶⁰ Kearsley, Bagshaw and Galloway (n 56).

⁶¹ See Rory Medcalf, 'Australia and China: Understanding the Reality Check' (2019) 73(2) *Australian Journal of International Affairs* 109, 112–15.

boycott Australian products.⁶² Indeed, the trade dimension and the strained political dimension of Australia–China relations quickly aligned as conflicts began to spill over.

III WTO DISPUTES: TRADE RESTRICTIONS AND POLITICAL OBJECTIVES

In parallel with political tensions, the number of disputes over disruptions to bilateral trade increased. Both Australia and China initiated WTO dispute settlement proceedings over reciprocal tariffs on goods that each country accused the other of ‘dumping’ into its domestic markets.⁶³ Moreover, several Australian goods have been subject to import restrictions upon entry into China. To date, however, Australia has not initiated WTO proceedings over these latter restrictions.

The WTO dispute settlement mechanism faces several obstacles in adequately resolving politically charged trade disputes. The initiation of the WTO anti-dumping proceedings was a first step towards rules-based resolutions for the heated bilateral trade relations and created the opportunity for helpful clarification for the future application of ADA exceptions. The imminent completion of the panel proceedings has arguably contributed to both countries’ willingness for diplomatic resolutions of the disputes.⁶⁴ However, a comprehensive legal assessment of the tariffs by WTO panels may never be published.

An analysis of the relevant WTO provisions shows that they are unable to adequately redress the harm inflicted on affected industries. Additionally, the legal assessment of Chinese import restrictions is complicated by non-transparent implementation based on very technical justifications and allegedly informal instructions. In the objective assessment under WTO law, political motivations can only be taken into account to a limited extent.

In times of heightened political tensions, trade disruptions that affect several Australian industries create significant pressure on Canberra to find a solution with the economically dominant China.⁶⁵ The ability to apply political pressure through trade restrictions poses fundamental challenges to the rules-based WTO system, the purpose of which is to create a level playing field governed by trade rules rather than economic power. These challenges remain even with recent disputes

⁶² Georgia Hitch and Jordan Hayne, ‘Federal Government Calls Chinese Ambassador about Comments on Trade Boycott over Coronavirus Inquiry’, *ABC News* (online, 28 April 2020) <<https://www.abc.net.au/news/2020-04-28/government-calls-chinese-ambassador-boycott-coronavirus-inquiry/12191984>>, archived at <<https://perma.cc/S8HZ-HCR6>>.

⁶³ *China — Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Docs WT/DS598/1, G/L/1382, G/ADP/D135/1 and G/SCM/D130/1 (21 December 2020) (Request for Consultations by Australia) (‘*China — AD/CVD on Barley (Australia)*’); *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Docs WT/DS602/1, G/L/1390 G/ADP/D137/1 and G/SCM/D132/1 (28 June 2021) (Request for Consultations by Australia) (‘*China — AD/CVD on Wine (Australia)*’); *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Docs WT/DS603/1, G/L/1391, G/ADP/D138/1 and G/SCM/D133/1 (29 June 2021) (Request for Consultations by China) (‘*Australia — AD/CVD on Certain Products (China)*’).

⁶⁴ See Albanese (n 2).

⁶⁵ See generally Darren Lim and Victor Ferguson, ‘In Beef over Barley, Chinese Economic Coercion Cuts against the Grain’, *The Interpreter* (online, 13 May 2020) <<https://www.lowyinstitute.org/the-interpreter/beef-over-barley-chinese-economic-coercion-cuts-against-grain>>, archived at <<https://perma.cc/GL6Y-CMAC>> (‘In Beef over Barley’).

resolved, particularly where the resolution makes little use of the WTO's rules-based system.

A Disputed Trade Restrictions

An analysis of the key legal provisions and issues highlights the potential and limitations of the WTO provisions and dispute settlement mechanism in reacting to and adequately resolving politically charged trade disputes.

1 Disputes on Anti-Dumping Duties

Australian anti-dumping duties on Chinese goods are not new to bilateral relations. Australia has been increasingly imposing tariffs on Chinese goods for 15 years to address alleged unfair trade practices.⁶⁶ These tariffs on Chinese goods have arguably contributed to trade tensions.⁶⁷ Currently, the majority of Australian investigations⁶⁸ and two-thirds of active anti-dumping measures⁶⁹ concern Chinese exports. However, China has not initiated WTO proceedings against any Australian tariffs until 2021.⁷⁰

Under the *ADA*, which is based on art VI of the *GATT 1994*, dumping occurs when a product's export price is less than the comparable price for 'like products'⁷¹ when destined for consumption in the domestic market of the exporting country, ie the normal value.⁷² The *ADA* provides substantive and procedural provisions under which anti-dumping duties up to the margin between export price and normal value can be imposed to counter dumping that causes 'injury'⁷³ to a domestic industry.⁷⁴

⁶⁶ On tariffs imposed between 2005 and 2015, see Productivity Commission, 'Developments in Anti-Dumping Arrangements' (Research Paper, February 2016) 8, 40; Weihuan Zhou, 'Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China' (2015) 49(6) *Journal of World Trade* 975, 976 ('Australia's Anti-Dumping and Countervailing Law and Practice').

⁶⁷ Weihuan Zhou, 'Barley Is Not a Random Choice: Here's the Real Reason China Is Taking on Australia over Dumping', *The Conversation* (online, 23 November 2018) <<http://theconversation.com/barley-is-not-a-random-choice-heres-the-real-reason-china-is-taking-on-australia-over-dumping-107271>>, archived at <<https://perma.cc/WB3T-LXSV>>.

⁶⁸ 'Current Cases and the Electronic Public Record (EPR)', *Department of Industry, Science and Resources, Anti-Dumping Commission* (Web Page) <<https://www.industry.gov.au/anti-dumping-commission/current-cases-and-electronic-public-record-epr>>.

⁶⁹ 'Current Measures in the Dumping Commodity Register (DCR)', *Department of Industry, Science and Resources, Anti-Dumping Commission* (Web Page) <<https://www.industry.gov.au/anti-dumping-commission/current-measures-dumping-commodity-register-dcr>>.

⁷⁰ See especially *Australia — AD/CVD on Certain Products (China)*, WTO Docs WT/DS603/1, G/L/1391, G/ADP/D138/1 and G/SCM/D133/1 (n 63). On potential reasons for the lack of prior WTO proceedings, see Zhou and Laurenceson, 'Demystifying Australia-China Trade Tensions' (n 44) 67.

⁷¹ A 'like product' is defined as 'a product which is identical, ie alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration': *Anti-Dumping Agreement* (n 8) art 2.6.

⁷² *GATT 1994* (n 7) art VI:1(a); *Anti-Dumping Agreement* (n 8) art 2.1.

⁷³ The term 'injury' is defined as 'material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry': *Anti-Dumping Agreement* (n 8) art 3.1 n 9.

⁷⁴ *GATT 1994* (n 7) art VI:2; *Anti-Dumping Agreement* (n 8) arts 3.1, 9.1.

WTO rules provide for several exceptions to the determination of normal value based on prices in the exporting country's domestic market. For instance, s 15(a)(ii) of the *Protocol on the Accession of the People's Republic of China* ('*Accession Protocol*')⁷⁵ allows WTO members to treat China as a non-market economy so that prices or production costs in a third country can be used as normal value.⁷⁶ While academics and member states debate whether and to what extent the provision expired in 2016,⁷⁷ Australia has already agreed, as a precondition for the 2005 *ChAFTA* negotiations, to grant China 'market economy status' and therefore not to use the *Accession Protocol* provision.⁷⁸

Nevertheless, Australia does not use China's domestic prices for its anti-dumping measures but treats various sectors of China as 'particular market situations', for which an investigation authority is allowed to deviate from the normal value pursuant to art 2.2 of the *ADA*.⁷⁹ In practice, very similar results can be achieved as under the *Accession Protocol* provision, ie the use of external comparison benchmarks to calculate dumping margins larger than the normal value based on domestic prices in China.⁸⁰ This practice could bypass the bilateral understanding during *ChAFTA* negotiations and raises several issues regarding conformity with WTO law.⁸¹

While the practice has arguably contributed to bilateral tensions,⁸² it is neither new vis-a-vis China nor is Australia holding back on similar measures against other trading partners.⁸³ Australia is defending its anti-dumping system as 'independent, transparent, non-discriminatory and rules-based'.⁸⁴ However, a recent proceeding initiated by Indonesia against Australian anti-dumping duties

⁷⁵ *Accession of the People's Republic of China*, WTO Doc WT/L/432 (23 November 2001) (Decision of 10 November 2001) s 15(a)(ii) ('*Accession Protocol*').

⁷⁶ On the issue of whether the nature of s 15 of the *Accession Protocol* is better described as an exception or an 'autonomous legal right', see generally Weihuan Zhou and Delei Peng, 'EU — Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol' (2018) 52(3) *Journal of World Trade* 505, 510–11.

⁷⁷ See generally Zhou and Peng (n 76). See also Andrei Suse, 'Old Wine in a New Bottle: The EU's Response to the Expiry of Section 15(a)(ii) of China's WTO Protocol of Accession' (2017) 20(4) *Journal of International Economic Law* 951, 951–3, 956–63.

⁷⁸ See John Howard, Prime Minister of Australia, 'Announcement of Free Trade Agreement Negotiations between Australia and China' (Media Release, Department of Prime Minister and Cabinet, 18 April 2005) <<https://pmtranscripts.pmc.gov.au/release/transcript-21698>>, archived at <<https://perma.cc/F49V-W59F>>.

⁷⁹ Zhou, 'Australia's Anti-Dumping and Countervailing Law and Practice' (n 66) 980–7.

⁸⁰ Zhou and Laureceson, 'Demystifying Australia–China Trade Tensions' (n 44) 66–7.

⁸¹ For an elaborate discussion, see generally Zhou, 'Australia's Anti-Dumping and Countervailing Law and Practice' (n 66).

⁸² Zhou, 'Barley Is Not a Random Choice: Here's the Real Reason China Is Taking on Australia over Dumping' (n 67).

⁸³ 'Current Measures in the Dumping Commodity Register (DCR)' (n 69).

⁸⁴ Dan Tehan, Minister for Trade, Tourism and Investment (Cth), 'Establishment of WTO Panel in China's Challenge to Australia's Trade Remedies on Certain Products' (Media Release, 1 March 2022) <<https://www.trademinister.gov.au/minister/dan-tehan/media-release/establishment-wto-panel-chinas-challenge-australias-trade-remedies-certain-products>>, archived at <<https://perma.cc/7V3K-XAAA>>. The Australian legislation on anti-dumping measures can be found at 'Anti-Dumping and Countervailing System Key Legislation, Directions and Policy', *Department of Industry, Science and Resources: Anti-Dumping Commission* (Web Page) <<https://www.industry.gov.au/anti-dumping-commission/about-anti-dumping-commission/anti-dumping-and-countervailing-system-key-legislation-directions-and-policy>>.

on A4 copy paper based on a ‘particular market situation’ resulted in an adverse decision on Australia’s application of art 2.2 of the *ADA*, which Australia did not appeal.⁸⁵ As Australia and China are conducting diplomatic consultations on mutually agreeable solutions to outstanding WTO proceedings,⁸⁶ the panel may not be able to further clarify open questions regarding the Australian anti-dumping system in a rules-based framework for now.⁸⁷

In contrast to the Australian practice, China’s use of anti-dumping and countervailing measures against Australia is a new bilateral phenomenon that emerged during the peak of bilateral tensions. China imposed anti-dumping duties on Australian barley on 19 May 2020 (73.6%)⁸⁸ and on Australian wine on 28 March 2021 (from 116.2% to 218.4%).⁸⁹ Barley was also subjected to minor countervailing duties based on allegedly unlawful subsidisation under the *Agreement on Subsidies and Countervailing Measures* (‘*SCM Agreement*’).⁹⁰

On 16 December 2020, Australia initiated formal WTO proceedings against the tariffs, alleging that they violate substantive and procedural *ADA* requirements.⁹¹

⁸⁵ Panel Report, *Australia — Anti-Dumping Measures on A4 Copy Paper*, WTO Doc WT/DS529/R (4 December 2019) [7.6]–[7.126].

⁸⁶ See Albanese (n 2).

⁸⁷ *Australia — AD/CVD on Certain Products (China)*, WTO Docs WT/DS603/1, G/L/1391, G/ADP/D138/1 and G/SCM/D133/1 (n 63).

⁸⁸ «关于对原产于澳大利亚的进口大麦进行反倾销立案调查的公告» [Announcement on the Launch of an Anti-Dumping Investigation into Barley Imports Originating from Australia] (People’s Republic of China) Ministry of Commerce, Announcement No 89 of 2018, 19 November 2018 <<http://www.mofcom.gov.cn/article/b/e/201811/20181102807700.shtml>>, archived at <<https://perma.cc/4SGX-QZQ2>>; «关于原产于澳大利亚的进口大麦反倾销调查最终裁定的公告» [Announcement on the Final Ruling of the Anti-Dumping Investigation into Barley Imports Originating in Australia] (People’s Republic of China) Ministry of Commerce, Announcement No 14 of 2020, 18 May 2020 <<http://www.mofcom.gov.cn/article/b/e/202005/20200502965862.shtml?ref=chinatrademonitor.com>>, archived at <<https://perma.cc/8U9Z-EMN7>>.

⁸⁹ «关于对原产于澳大利亚的进口相关葡萄酒进行反倾销立案调查的公告» [Announcement on the Launch of an Anti-Dumping Investigation into Wine Imports Originating from Australia] (People’s Republic of China) Ministry of Commerce, Announcement No 34 of 2020, 18 August 2020 <<http://www.mofcom.gov.cn/article/b/e/202008/20200802993244.shtml>>, archived at <<https://perma.cc/J4A5-WKQZ>>; «中华人民共和国商务部公告2021年第6号» [Announcement No 6 of 2021 of the Ministry of Commerce of the People’s Republic of China] (People’s Republic of China) Ministry of Commerce, Announcement No 6 of 2021, 26 March 2021 <<http://www.mofcom.gov.cn/article/b/g/202104/20210403056446.shtml>>, archived at <<https://perma.cc/98RV-Y4VQ>>.

⁹⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*Agreement on Subsidies and Countervailing Measures*’) (‘*SCM Agreement*’); «关于对原产于澳大利亚的进口大麦进行反补贴立案调查的公告» [Announcement on the Launch of a Countervailing Investigation into Barley Imports Originating from Australia] (People’s Republic of China) Ministry of Commerce, Announcement No 99 of 2018, 21 December 2018 <<http://www.mofcom.gov.cn/article/b/e/201812/20181202818864.shtml>>, archived at <<https://perma.cc/CW29-7JA3>>; «关于原产于澳大利亚的进口大麦反补贴调查最终裁定的公告» [Announcement on the Final Ruling of the Countervailing Investigation into Barley Imports Originating from Australia] (People’s Republic of China) Ministry of Commerce, Announcement No 15 of 2020, 18 May 2020 <<http://www.mofcom.gov.cn/article/b/c/202005/20200502965863.shtml>>, archived at <<https://perma.cc/3NZT-4BUH>>.

⁹¹ *China — AD/CVD on Barley (Australia)*, WTO Docs WT/DS598/1, G/L/1382, G/ADP/D135/1 and G/SCM/D130/1 (n 63); *China — AD/CVD on Wine (Australia)*, WTO Docs WT/DS602/1, G/L/1390 G/ADP/D137/1 and G/SCM/D132/1 (n 63).

Article 6.8 of the *ADA* constitutes another exception to the determination of normal value. It allows national authorities to determine anti-dumping duties based ‘on the facts available’ if (i) a party does not provide necessary information within a reasonable period or significantly impedes the investigation, and (ii) the comprehensive requirements of annex II are satisfied with respect to, inter alia, the quality, source and extent of the evidence considered. A key point of contention is whether these steps were taken by China and whether other requirements of art 6 of the *ADA* were met.⁹² Media reports indicate inconsistencies in China’s investigations, as they were allegedly based on inaccurate export price comparisons between Egypt and China, and on an inadequate representation of China’s domestic barley industry.⁹³ Australia’s submissions in the cases reject the claim that it did not provide sufficient information to Chinese authorities.⁹⁴

The determination of dumping and corresponding remedies by national authorities, based on national legislation and with a focus on the impact of product prices on import-competing domestic industries, bears a high risk of biased findings. Anti-dumping duties can often amount to disguised trade barriers nurturing protectionism instead of free trade.⁹⁵ This is particularly true where exceptions regarding the determination of normal value can be used to justify protectionist or politically motivated duties to apply economic pressure. Both the undefined ‘particular market situation’ in art 2.2 of the *ADA* and the ability to claim a lack of cooperation under art 6.8 of the *ADA* provide the risk of such utilisation. Panels have to conduct a fact-intensive and objective analysis of the information used to determine the tariffs against the legal requirements of the *ADA*.⁹⁶ Communications from the panels in the proceedings between Australia and China have indicated that the use of external benchmarks and complex calculations complicates the legal analysis of anti-dumping duties and thereby prolongs the trade disruptions they cause.⁹⁷

⁹² *China — AD/CVD on Barley (Australia)*, WTO Docs WT/DS598/1, G/L/1382, G/ADP/D135/1 and G/SCM/D130/1 (n 63) [2].

⁹³ Scott Waldron, ‘China’s Tariffs on Australian Barley: Coercion, Protectionism, or Both?’, *The Diplomat* (online, 19 June 2020) <<https://thediplomat.com/2020/06/chinas-tariffs-on-australian-barley-coercion-protectionism-or-both/>>, archived at <<https://perma.cc/4DY8-GC7F>>.

⁹⁴ *China — Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598 (10 May 2022) (Australia’s Second Written Submission) [107]–[166] <<https://www.dfat.gov.au/sites/default/files/ds598-australias-second-written-submission.pdf>>, archived at <<https://perma.cc/7VV6-G89L>>; *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Doc WT/DS602 (29 April 2022) (Australia’s First Written Submission) [139]–[239], [319]–[406], [424]–[477] <<https://www.dfat.gov.au/sites/default/files/ds602-australias-first-written-submission-bci-redacted.pdf>>, archived at <<https://perma.cc/E8WE-X4H5>>.

⁹⁵ M Rafiqul Islam and Khorsed Zaman, ‘Australia–China Dispute over Barley Trade at the WTO: Challenges Ahead and Possible Outcomes for Australia’ (2022) 17(1) *Global Trade and Customs Journal* 25, 33.

⁹⁶ Zhou and Laurenceson, ‘Demystifying Australia–China Trade Tensions’ (n 44) 70.

⁹⁷ See, eg, *China — Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598/8 (5 December 2022) (Communication from the Panel) (‘*China — AD/CVD on Barley (Australia)*’); *China — AD/CVD on Wine (Australia)*, WTO Doc WT/DS602/6 (n 2).

The WTO disputes on Chinese anti-dumping duties were expected to result in panel reports by 2023.⁹⁸ However, shortly before the panel report on the barley tariffs was expected, both parties suspended the proceedings in April for three months.⁹⁹ China had agreed to ‘undertake an expedited review of the duties [on barley]’, which led to their complete repeal in August 2023.¹⁰⁰ Both parties to the WTO dispute were in possession of the panel’s final report at that time,¹⁰¹ which might have influenced the outcome of this mutually agreed solution. The initial panel report on the barley tariffs has not been made public. A diplomatic solution is arguably also imminent for the tariffs on Australian wine.¹⁰² China insists that a resolution of these tariffs will be made in conjunction with the dispute over Australian anti-dumping duties on Chinese products.¹⁰³

While the repeal of the tariffs ends their harm to bilateral trade and affected industries after three years, the anti-dumping duties consequently remain without a legal clarification providing guidance and predictability for future cases. The inflicted economic harm thus stays unremedied and the technicalities and ambiguities of the *ADA*’s exceptions remain as a potential tool to apply economic pressure during political conflicts.

2 Disputes on Import Restrictions

Another outlet of Australia–China trade disruptions is import restrictions on Australian goods. While some restrictions have been lifted throughout 2023, others continue to affect trade.¹⁰⁴ As of now, all these restrictions will arguably remain without a final legal assessment by WTO panels. Several factors complicate the assessment as to the WTO-conformity of the restrictions. The identification of the disruptions as trade-restrictive state measures is a prerequisite for the application of WTO trade rules. Most import restrictions were imposed based on very technical labelling, packaging, health, environmental and other

⁹⁸ *China — AD/CVD on Barley (Australia)*, WTO Doc WT/DS598/8 (n 97); *China — AD/CVD on Wine (Australia)*, WTO Doc WT/DS602/6 (n 2). On Australia’s WTO disputes, see generally ‘Australia and the WTO’, *World Trade Organisation* (Web Page) <https://www.wto.org/english/thewto_e/countries_e/australia_e.htm#disputesHeading>.

⁹⁹ *China — Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598/9 (13 April 2023) (Communication from the Panel).

¹⁰⁰ Penny Wong, Don Farrell and Murray Watt, Minister for Foreign Affairs (Cth), ‘Step Forward to Resolve Barley Dispute with China’ (Joint Media Release, 11 April 2023) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/step-forward-resolve-barley-dispute-china>>, archived at <<https://perma.cc/3L4D-KNPB>>; Kristy Needham, ‘Australia Hopes for China Wine Breakthrough as Deadline Nears’, *Reuters* (online, 18 October 2023) <<https://www.reuters.com/world/asia-pacific/australia-hopeful-china-wine-breakthrough-deadline-nears-2023-10-17/#:~:text=Australia%20lodged%20a%20complaint%20over,12%20months%20to%20January%202020>>, archived at <<https://perma.cc/6L99-KEQJ>>.

¹⁰¹ Panel Report, *China — AD/CVD on Barley (Australia)*, WTO Doc WT/DS598/R (n 1) [3.5].

¹⁰² See Albanese (n 2).

¹⁰³ Paul Karp, ‘Australian Government Says “Yeah, No” to Deal with China to Drop Wine Tariffs’, *The Guardian* (online, 24 September 2023) <<https://www.theguardian.com/australia-news/2023/sep/24/australian-government-says-yeah-no-to-deal-with-china-to-drop-wine-tariffs>>, archived at <<https://perma.cc/9LFP-EDU7>>.

¹⁰⁴ See, eg, ‘China Drops Barriers to Australian Hay as Trade Relations Improve’, *Reuters* (online, 28 September 2023) <<https://www.reuters.com/business/australia-says-exports-hay-china-will-resume-2023-09-28/>>, archived at <<https://perma.cc/Q3E2-SNYY>>.

inconsistencies found during the inspections of individual shipments.¹⁰⁵ For instance, beef imports were suspended based on ‘repeated violations of inspection and quarantine requirements’¹⁰⁶ and due to COVID-19 concerns.¹⁰⁷ The suspension of timber log imports¹⁰⁸ and barley imports from Australia’s largest grain exporter¹⁰⁹ was attributed to pest infestations found during inspections. The list of restrictions based on similarly technical grounds goes on and ranges from additional inspections, to non-renewal of licences, to alleged informal orders not to buy Australian goods.¹¹⁰ The restrictions noticeably concern a broad range of commodities relevant to bilateral trade, which increases the economic pressure on Australia to resolve bilateral issues.¹¹¹

The identification of state trade measures is particularly difficult where import restrictions may not have been imposed through formal and public means. According to media reports, for instance, coal imports were suspended following informal instructions to importing state-owned enterprises (‘SOEs’).¹¹² The competent Chinese import authority later confirmed the testing of coal imports, albeit for environmental reasons.¹¹³ Australian cotton exporters raised a similar claim of informal instructions to domestic importers to refrain from buying

¹⁰⁵ See, eg, Kath Sullivan and Jodie Gunders, ‘Red-Meat Processors Have Beef Sales to China Suspended as Trade Barriers Escalate’, *ABC News* (online, 12 May 2020) <<https://www.abc.net.au/news/rural/2020-05-12/china-trade-escalation-as-beef-farmers-are-targeted/12237468>>, archived at <<https://perma.cc/Q9TK-27NP>>. For an overview of products subject to import restrictions and official reasons, see Zhou and Laurenceson, ‘Demystifying Australia–China Trade Tensions’ (n 44) 70–1.

¹⁰⁶ Stephen Dziedzic, ‘China’s Meat Import Suspension a Reminder of Beijing’s Ability to Inflict Economic Pain’, *ABC News* (online, 13 May 2020) <<https://www.abc.net.au/news/2020-05-13/china-import-suspension-reminder-bejing-inflict-economic-pain/12243560>>, archived at <<https://perma.cc/XH55-WSW3>>.

¹⁰⁷ Kath Sullivan, ‘China’s Ban on Australian Beef Costing the Meat Industry Hundreds of Millions of Dollars’, *ABC News* (online, 9 December 2020) <<https://www.abc.net.au/news/2020-12-09/china-bans-cost-meat-industry-hundreds-of-millions/12961538>>, archived at <<https://perma.cc/33QK-MU9T>>.

¹⁰⁸ ‘China Suspends Australian Timber Imports from New South Wales and Western Australia’, *ABC News* (online, 24 December 2020) <<https://www.abc.net.au/news/2020-12-24/china-suspends-australian-timber-imports-from-nsw-wa/13013752>>, archived at <<https://perma.cc/94MJ-26TQ>>.

¹⁰⁹ Hallie Gu and Colin Packham, ‘China Suspends Barley Imports from Australia’s Largest Grain Exporter’, *Reuters* (online, 2 September 2020) <<https://www.reuters.com/article/china-australia-barley-idINKBN25T0RK>>, archived at <<https://perma.cc/AX8N-D3WZ>>.

¹¹⁰ Yong-Shik Lee, ‘Weaponizing International Trade in Political Disputes: Issues Under International Economic Law and Systemic Risks’ (2022) 56(3) *Journal of World Trade* 405, 420–1.

¹¹¹ Saheli Roy Choudhury, ‘Here’s a List of the Australian Exports Hit by Restrictions in China’, *CNBC* (online, 17 December 2020) <<https://www.cnbc.com/2020/12/18/australia-china-trade-disputes-in-2020.html>>, archived at <<https://perma.cc/BS2D-Q8M8>>. On the commodities most relevant for bilateral trade, see *China Fact Sheet 2022* (n 16).

¹¹² Michael McGowan and Lisa Martin, ‘China Coal Imports: “No Basis” to Claims There Is a Ban, Minister Says’, *The Guardian* (online, 22 February 2019) <<https://www.theguardian.com/business/2019/feb/22/china-coal-import-ban-may-not-be-tied-to-australia-diplomatic-tensions-frydenberg-says>>, archived at <<https://perma.cc/7VJF-R7KJ>>; Zhou and Laurenceson, ‘Demystifying Australia–China Trade Tensions’ (n 44) 73.

¹¹³ ‘Chinese Port Bans Imports of Australian Coal, Sending Dollar Tumbling’, *The Guardian* (online, 21 February 2019) <<https://www.theguardian.com/business/2019/feb/21/chinese-port-bans-imports-of-australian-coal-sending-dollar-tumbling>>, archived at <<https://perma.cc/J6AP-WTCX>> (‘Chinese Port Bans Imports of Australian Coal’).

Australian cotton.¹¹⁴ Moreover, the lack of a comprehensive legal obligation for the competent Chinese authorities to publish import restrictions adds to concerns about non-transparent trade restrictions.¹¹⁵ The absence of formal decisions complicates not only the identification of state measures but also their substantive legal assessment. The WTO framework cannot maintain a level playing field if the applicability of its trade rules remains uncertain.

Once a restrictive state measure can be identified, it has to be tested against the WTO's key trade principles. For instance, the restrictions on coal could have been imposed in breach of art I:1 of the *GATT 1994*, which constitutes the principle of most-favoured nations ('MFN'). It requires trade measures of WTO members that confer 'any advantage' to be granted 'immediately and unconditionally' to all 'like products', regardless of their origin.¹¹⁶ '[A]ny advantage' under art I:1 of the *GATT 1994* is broadly understood to already arise where state measures have less trade-restrictive effects on like products of other origins or when like products of only certain origins are spared from import restrictions.¹¹⁷ The restrictions would thus have to be tested in detail against China's trade behaviour vis-a-vis other imports from other WTO members.

The MFN obligation covers both de jure and de facto effects of regulation as well as its individual application.¹¹⁸ Therefore, a violation does not require import restricting regulation that expressly, ie de jure, discriminates like products from specific member states. It would suffice for a breach if Australia could show that the quarantine, health and other requirements de facto disadvantage its goods more than like products from another WTO member state.¹¹⁹ Moreover, even domestic regulations that are generally WTO-consistent may violate the MFN obligation if they are applied in a discriminatory manner. However, such discriminatory application would be subject to the burden of proof on a case-by-case basis.¹²⁰ While individual media reports have described inconsistent consequences of non-compliance regarding, for instance, beef from Australia and New Zealand,¹²¹ the finding of MFN breaches must be founded in a comprehensive assessment of the individual facts.

¹¹⁴ Colin Packham and Dominique Patton, 'China Tells Cotton Mills to Stop Buying Australian Supplies', *Reuters* (online, 16 October 2020) <<https://www.reuters.com/article/australia-china-cotton-int/china-tells-%20cotton-mills-to-stop-buying-australian-supplies-sources-idUSKBN2710JW>>, archived at <<https://perma.cc/XE4J-QHKN>>.

¹¹⁵ See Zhou and Laurenceson, 'Demystifying Australia–China Trade Tensions' (n 44) 72 for a further discussion of the compliance practice of the Chinese General Administration of Customs.

¹¹⁶ *GATT 1994* (n 7) art I:1.

¹¹⁷ See Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, WTO Docs WT/DS139/AB/R and WT/DS142/AB/R (31 May 2000) [79].

¹¹⁸ On 'as such' and 'as applied' challenges in the WTO, see Alan O Sykes, 'An Economic Perspective on As Such/Facial versus As Applied Challenges in the WTO and US Constitutional Systems' (2014) 6(1) *Journal of Legal Analysis* 1, 3–10.

¹¹⁹ On de facto discrimination, see generally Lothar Ehring, 'De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment — or Equal Treatment?' (2002) 36(5) *Journal of World Trade* 921.

¹²⁰ On the burden of proof, see Appellate Body Report, *United States — Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/AB/R (25 April 1997) 14.

¹²¹ Su-Lin Tan, 'Banned Australian Beef Exporters Are Repeat Offenders, Chinese Data Shows', *South China Morning Post* (online, 19 May 2020) <<https://www.scmp.com/economy/china-economy/article/3084911/australian-beef-exporters-banned-china-are-repeat-offenders>>.

Establishing a violation of the MFN clause becomes even more difficult with respect to the restrictions on coal and cotton, which were allegedly implemented through informal orders to private importers or Chinese SOEs. Article XVII:1 of the *GATT 1994* extends the non-discrimination obligation to state trading enterprises ('STEs') and, at least in conjunction with the obligations incorporated into the *Accession Protocol*, requires Chinese SOEs to conduct purchases solely in accordance with 'commercial considerations' and free of governmental influence.¹²² Government-subsidised SOEs and complementary industrial policies are dominant in China's economy.¹²³ The reported absence of similar restrictions on coal imports from Russia and Indonesia suggests possible MFN violations.¹²⁴ However, de facto discrimination in importation decisions of SOEs and governmental influence on commercial activities add another layer to potentially trade-restrictive state measures that would have to be based on evidence.

Easier to show than MFN violations in the application of technical and health import regulation might be import bans or restrictions which are prohibited under art XI:1 of the *GATT 1994*. As a discriminatory effect is not required, Australia would likely be able to show a limitation of Australian imports in accordance with the broadly understood provision.¹²⁵ However, in the case of at least de facto restrictions implemented through informal governmental influence on SOEs, the finding is again not as evident.¹²⁶ Also, the finding of a breach based on trade-restrictive state measures would not conclude the assessment.

If a breach of either WTO obligation can be shown, possible justifications under art XX of the *GATT 1994* must be considered. A WTO panel cannot impute political motivations but is limited to those put forward by the parties or otherwise based on objective evidence. The coal import restrictions could, for instance, be justified by China as 'relating to the conservation of exhaustible natural resources' under art XX(g) of the *GATT 1994*.¹²⁷ China would have to show a 'close and genuine relationship of ends and means'¹²⁸ and that the measures were 'primarily aimed at' that objective.¹²⁹ Moreover, restrictions based on pest concerns could have been 'necessary to protect human, animal or plant life or health' pursuant to art XX(b) of the *GATT 1994*. Other restrictions could be argued to have been 'necessary to secure compliance with [generally WTO-consistent] laws or

¹²² Julia Ya Qin, "'WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol' (2003) 37(3) *Journal of World Trade* 483, 505–6.

¹²³ Haiwei Jiang and Miaojie Yu, 'Understanding RCEP and CPTPP: From the Perspective China's Dual Circulation Economic Strategy' (2021) 14(2) *China Economic Journal* 144, 156.

¹²⁴ 'Chinese Port Bans Imports of Australian Coal' (n 113).

¹²⁵ The provision applies to all 'prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported': Appellate Body Report, *China — Measures Relating to the Exportation of Various Raw Materials*, WTO Docs WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R (30 January 2012) [320].

¹²⁶ For a brief discussion on potential de facto restrictions violating *GATT 1994* (n 7) art XI:1, see Zhou and Laurenceson, 'Demystifying Australia–China Trade Tensions' (n 44) 74.

¹²⁷ On clean air as an exhaustible natural resource, see Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996) 4–22 ('*US — Gasoline*').

¹²⁸ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [136].

¹²⁹ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R (n 127) 14–19.

regulations' on, for instance, quarantine or labelling pursuant to art XX(d) of the *GATT 1994*. Establishing necessity requires a weighing and balancing of the measures' contribution to the objectives, their importance and their trade restrictiveness.¹³⁰ Additionally, the material contribution to the objective has to be without a less restrictive, WTO-consistent and reasonably available alternative that would make an equivalent contribution.¹³¹ While there may be inconsistencies in individual cases, such as the question of scientific evidence for the COVID-19 concerns cited for beef restrictions,¹³² China has provided reasons for its formal measures and may also be able to present justifications for informal measures, which at least prima facie reflect the purposes of art XX of the *GATT 1994*. A WTO panel would have to delve into the technical Chinese regulations and consider their individual application against the requirements of art XX of the *GATT 1994*.

However, for a full justification of found breaches, the chapeau of art XX of the *GATT 1994* must be considered as well. Therefore, if Australia was unable to challenge China's necessity argument or present appropriate alternatives to the applied trade restrictions, it could argue that the measures pursued the objectives listed in art XX of the *GATT 1994* contrary to its chapeau, by constituting 'arbitrary or unjustifiable discrimination' or a 'disguised restriction on international trade'. The lack of similar restrictions for other trading partners¹³³ and a coal supply contract with Indonesia concluded shortly after Australian imports were restricted¹³⁴ indicate arbitrary discrimination behind the environmental reasons for suspended coal imports. Reported difficulty of the Australian beef industry in communications with Chinese authorities about the grounds for the import ban and ways to secure compliance suggest similar outcomes.¹³⁵ However, both parts of art XX of the *GATT 1994* would have to be tested on a case-by-case basis.

GATT 1994 principles find further elaboration in the more detailed *Agreement on Technical Barriers to Trade* ('*TBT Agreement*')¹³⁶ and the *Agreement on the Application of Sanitary and Phytosanitary Measures* ('*SPS Agreement*'),¹³⁷ which both most likely apply to the restrictions based on, for instance, health grounds or technical importation requirements.¹³⁸ The *SPS Agreement* applies to all trade-restrictive laws, decrees, regulations, requirements and procedures relevant

¹³⁰ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [178].

¹³¹ Ibid.

¹³² Lee (n 110) 419.

¹³³ 'Chinese Port Bans Imports of Australian Coal' (n 113).

¹³⁴ Aaron Clark and David Stringer, 'China's \$1.5 Billion Indonesia Coal Deal May Hit Australia', *Bloomberg* (online, 27 November 2020) <<https://www.bloomberg.com/news/articles/2020-11-27/china-s-1-5-billion-coal-deal-with-indonesia-may-hit-australia>>.

¹³⁵ Sullivan (n 107).

¹³⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*').

¹³⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary and Phytosanitary Measures*') ('*SPS Agreement*').

¹³⁸ The *TBT Agreement* does not apply to sanitary and phytosanitary measures already captured by the *SPS Agreement*: *TBT Agreement* (n 136) art 1.5.

to the protection of human or animal life or health.¹³⁹ It thus covers trade restrictions based on pest and COVID-19 concerns, such as those expressed for timber, barley and beef imports. The *TBT Agreement*'s provisions cover trade measures that lay down mandatory 'product characteristics or their related processes and production methods' and hence apply to restrictions based on, inter alia, packaging or labelling requirements.¹⁴⁰

Both agreements include non-discrimination obligations. Article 2.3 of the *SPS Agreement* prohibits measures that arbitrarily or unjustifiably discriminate between members' products or constitute a disguised restriction on international trade.¹⁴¹ Article 2.1 of the *TBT Agreement* prohibits 'both de jure and de facto discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions'.¹⁴² Additionally, both agreements generally prohibit measures that are more trade-restrictive than necessary to fulfil their legitimate objectives.¹⁴³ Ultimately, the issues discussed above regarding the identification of trade-restrictive state measures and their necessity for the fulfilment of legitimate objectives apply here mutatis mutandis. The legal analysis of a WTO panel would have to acknowledge the different formulation and structure of the obligations and additional provisions on, for instance, conformity presumptions and scientifically supported evidence.¹⁴⁴

The import restrictions and the Australian industries affected by them will most likely remain without the clarity of a final legal conclusion. The above analysis illustrated that WTO provisions governing import restrictions provide opportunities to disguise political motives through non-transparent measures or ambiguous justifications, and hence to disrupt trade in order to apply economic pressure. Beijing actively denies any breach of international obligations with respect to the trade restrictions.¹⁴⁵ In a comment on the import restrictions of 2020, former Minister for Trade, Tourism and Investment Simon Birmingham raised the possibility of resorting to dispute proceedings under international law over

¹³⁹ *SPS Agreement* (n 137) annex A (definition of 'sanitary or phytosanitary measure').

¹⁴⁰ *TBT Agreement* (n 136) annex I (definition of 'technical regulation'). On top of the obligations on technical regulations, the *TBT Agreement* also sets out rules on standards and corresponding conformity assessment procedures.

¹⁴¹ The language mirrors the chapeau of *GATT 1994* (n 7) art XX.

¹⁴² Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (4 April 2012) [175]. Recital 6 of the *TBT Agreement* (n 136) refers to similar objectives as art XX of the *GATT 1994* (n 7) and incorporates 'the requirement that [the measures] are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination'. However, legitimate regulatory objectives in the sense of art 2.1 of the *TBT Agreement* are not limited to the objectives of art XX of the *GATT 1994*.

¹⁴³ *SPS Agreement* (n 137) art 2.2 prohibits measures that exceed the extent necessary to protect human, animal or plant life or health, are not based on scientific principles or are maintained without sufficient scientific evidence. *TBT Agreement* (n 136) art 2.2 refers to the fulfilment of a non-exhaustively defined 'legitimate objective'.

¹⁴⁴ On additional issues under these agreements, see Zhou and Laurenceson, 'Demystifying Australia–China Trade Tensions' (n 44) 75–6.

¹⁴⁵ Daniel McCulloch, 'China Responds after Australian Trade Minister Simon Birmingham Accuses It of Undermining Free Trade Deal', *7NEWS* (online, 10 December 2020) <<https://7news.com.au/business/finance/minister-accuses-china-of-undermining-deal-c-1733420>>, archived at <<https://perma.cc/XCB3-4GRU>>.

Australian goods ‘targeted’ by China.¹⁴⁶ However, Canberra has apparently decided to rely on diplomatic efforts, as no formal proceedings have yet been initiated.¹⁴⁷ Indeed, after some three years, import restrictions on, for instance, coal and copper have been lifted in early 2023.¹⁴⁸ Nevertheless, the imposed restrictions were able to harm trade and remain without final assessment under WTO rules.

Both types of trade restrictions arguably exemplify the limitations of the WTO system in reacting to potential political motivations in its objective rules-based assessment. Politically motivated trade measures both pose systemic risks to the world trade system and raise significant practical challenges under the WTO dispute settlement mechanism.

B *The Systemic Risks for Rules-Based Trade*

Rules-based trade might not translate into symmetrical relationships, but it positions all actors on an equal footing, a level playing field.¹⁴⁹ In promoting free trade, the WTO is neither capable of levelling nor intended to level the economic power of its member states.¹⁵⁰ The WTO ‘provides a level playing field with [the dispute settlement mechanism as] a credible referee dealing even-handedly with the players. It is a playing field on which only governments participate in the game’.¹⁵¹ In creating this playing field, WTO provisions intentionally focus on key principles of liberalised trade such as tariff bindings, non-discrimination and the prohibition of quantitative trade restrictions.¹⁵² These principles set the boundaries for the trade policies of WTO members to create a level playing field for traders and prevent the coercive use of trade restrictions.¹⁵³ However, for this playing field to provide predictability and security to the economic decisions of traders,¹⁵⁴ it requires a certain degree of separation to geopolitical, strategic or diplomatic

¹⁴⁶ ‘Australia Accuses China of Undermining Trade Agreement’, *BBC News* (online, 9 December 2020) <<https://www.bbc.com/news/world-australia-55240898>>, archived at <<https://perma.cc/8UXC-ULVH>>.

¹⁴⁷ See, eg, Stephen Dziedzic, ‘Federal Government Pressures China to Drop Trade Sanctions on Australian Goods Ahead of Key Anniversary’, *ABC News* (online, 2 December 2022) <<https://www.abc.net.au/news/2022-12-02/tim-watts-china-trade-sanctions/101727172>>, archived at <<https://perma.cc/9ARD-9QRU>>.

¹⁴⁸ Lewis Jackson, Siyi Liu and Melanie Burton, ‘Australia Exports First Copper to China since 2020, Industry Hopes End to Ban Near’, *Reuters* (online, 10 May 2023) <<https://www.reuters.com/markets/commodities/chinese-buyers-anticipate-end-soft-ban-australian-copper-2023-05-10/>>, archived at <<https://perma.cc/24TZ-DBVF>>; Muyu Xu, ‘Exclusive: China Energy Places Order to Import Australian Coal’, *Reuters* (online, 6 January 2023) <<https://www.reuters.com/business/energy/china-energy-places-order-import-australian-coal-sources-say-2023-01-06/>>, archived at <<https://perma.cc/6WR5-5RVZ>>.

¹⁴⁹ John Fitzgerald, ‘Introduction’ in John Fitzgerald (ed), *Taking the Low Road: China’s Influence in Australian States and Territories* (Australian Strategic Policy Institute, 2022) 3.

¹⁵⁰ On the rationale of the regulation of international trade, see Surya P Subedi, ‘The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level Is the “Level Playing Field”?’ (2006) 53(2) *Netherlands International Law Review* 273, 286–7.

¹⁵¹ Peter Sutherland et al, Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Report, 2004) 15–16.

¹⁵² See *GATT 1994* (n 7) arts I, II, III, XI.

¹⁵³ Subedi (n 150) 281–2.

¹⁵⁴ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*Understanding on Rules and Procedures Governing the Settlement of Disputes*’) art 3.2 (‘*DSU*’).

relations.¹⁵⁵ This separation is reflected in the requirements of the WTO provisions discussed above that trade restrictions must pursue either enumerated¹⁵⁶ or other legitimate purposes¹⁵⁷ directly related to the affected good or service. The objective legal assessment can take further political motivations into account only to a limited extent. The level playing field is therefore called into question when trade policy is employed as part of foreign policy to advance political objectives.

The WTO dispute settlement mechanism binds WTO members to its rules-based resolution of trade disputes,¹⁵⁸ and thereby reduces the risk of spillovers into the political dimension of international relations and vice versa.¹⁵⁹ Article 3.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU')¹⁶⁰ provides that WTO proceedings are non-contentious, but a process in which members pursue a 'fair, prompt and effective resolution of trade disputes' in good faith.¹⁶¹ While the term 'good faith' is vague and the threshold for a violation of art 3.10 of the DSU is rightly set high,¹⁶² the provision reflects the understanding that the WTO can only create a level playing field if its members ensure that trade-restrictive measures can be assessed against its rules-based requirements. The conflation of trade restrictions with political disputes challenges this assessment.

The Chinese trade restrictions on Australian goods create considerable economic pressure.¹⁶³ Scholars have indicated that the circumstances of the Chinese trade measures and previous experience suggest a conflation of trade measures with the aim of retaliating for political behaviour.¹⁶⁴ Australian Prime Minister Anthony Albanese, elected in 2022, declared that Australia has been subject to 'economic coercion'.¹⁶⁵ Former Australian Prime Minister Tony Abbott argues that China's trade is 'turned on and off, like a tap' to achieve strategic

¹⁵⁵ Lee (n 110) 406. See also Markus Wagner, 'Weaponised Trade: A New Concept for an Increasingly Complex World' (Periscope: Occasional Analysis Brief Series No 14, Konrad Adenauer Stiftung, Regional Programme Australia and the Pacific, December 2022) 2.

¹⁵⁶ See, eg, *GATT 1994* (n 7) arts XX, XXI. For trade in services, see *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') arts XIV, XIV bis ('*GATS*').

¹⁵⁷ See, eg, *TBT Agreement* (n 136) art 2.2.

¹⁵⁸ *DSU* (n 154) arts 23.1, 23.2(a).

¹⁵⁹ Subedi (n 150) 282.

¹⁶⁰ *DSU* (n 154) art 3.10.

¹⁶¹ Appellate Body Report, *United States — Tax Treatment for 'Foreign Sales Corporations'*, WTO Doc WT/DS108/AB/R (24 February 2000) [166].

¹⁶² See Panel Report, *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc WT/DS141/R (30 October 2000) [6.216].

¹⁶³ See, eg, Liangyue Cao and Jared Greenville, Australian Bureau of Agricultural and Resource Economics and Sciences, *Understanding How China's Tariff on Australian Barley Exports Will Affect the Agricultural Sector* (ABARES Research Report No 20.14, June 2020). See also Trish Gleeson, Donkor Addai and Liangyue Cao, Australian Bureau of Agricultural and Resource Economics and Sciences, *Australian Wine in China: Impact of China's Anti-Dumping Duties* (ABARES Research Report No 21.10, July 2021).

¹⁶⁴ See Lee (n 110) 414–23. See also Lim and Ferguson, 'In Beef over Barley' (n 65).

¹⁶⁵ Tess Ikonomou, 'NATO Says China Is a Threat to Security', *The Canberra Times* (online, 30 June 2022) <<https://www.canberratimes.com.au/story/7801133/nato-says-china-is-a-threat-to-security/>>.

goals.¹⁶⁶ The timing of the measures may support this thesis. For instance, the investigations on barley started a few months after the ban of Huawei and ZTE from the Australian 5G network, while the final decision was reached shortly after the inquiry into the origins of COVID-19. Moreover, shortly before China imposed the tariffs on barley and started investigations into wine, the Chinese ambassador indicated that Chinese ‘consumers’ might also boycott Australian products such as beef and wine.¹⁶⁷ However, it is notably not ‘consumers’ who implement anti-dumping duties and restrictions on imports when such imports are found not to meet technical requirements.

China insists its trade restrictions are unrelated to political tensions.¹⁶⁸ It opposes corresponding accusations as unfounded and harmful to mutual trust.¹⁶⁹ Furthermore, China strongly objects to concerns about the WTO-conformity of its trade measures and responsively points to considerable doubts about the compatibility with international law of Australia’s longstanding anti-dumping and anti-subsidy practice as well as decisions to exclude Chinese investors from projects in Australia.¹⁷⁰ China maintains its general opposition to economic coercion and alleges that it is mainly used by other countries.¹⁷¹ Indeed, several studies analyse how large economies are ‘playing to [their] strengths’ by exerting economic pressure to impose political demands.¹⁷² Comprehensive research shows that, for instance, US foreign policy increasingly uses such tools to achieve political goals.¹⁷³ However, similarly comprehensive studies examine China’s use of trade measures to apply economic pressure during disputes with, inter alia, Norway, South Korea, Vietnam, the Philippines and Lithuania to retaliate against previous behaviour or to change a political position.¹⁷⁴

Two circumstances arguably facilitate the use of trade measures for political purposes by China. First, China is an important trading partner, surpassing even

¹⁶⁶ Graham Lanktree, ‘Tony Abbott: China Using Trade as a “Weapon”’, *Politico* (online, 27 July 2021) <<https://www.politico.eu/article/china-using-trade-as-a-weapon-says-australias-tony-abbott-in-call-for-stop-on-tech-sale/>>, archived at <<https://perma.cc/Y998-LD44>>.

¹⁶⁷ Dominique Patton and Colin Packham, ‘China Hits Australia with Barley Tariff in Latest Blow to Relations’, *Reuters* (online, 18 May 2020) <<https://www.reuters.com/article/us-china-australia-barley-idUSKBN22U1J6>>, archived at <<https://perma.cc/UPB2-DDT5>>.

¹⁶⁸ Zhou and Laurenceson, ‘Demystifying Australia–China Trade Tensions’ (n 44) 55. On China’s rhetoric in other cases of coercive trade measures, see Christina Lai, ‘Acting One Way and Talking Another: China’s Coercive Economic Diplomacy in East Asia and Beyond’ (2018) 31(2) *Pacific Review* 169, 175–82.

¹⁶⁹ McCulloch (n 145).

¹⁷⁰ *Ibid.* On the sectors to which Australia restricted Chinese investment, see Zhou and Laurenceson, ‘Demystifying Australia–China Trade Tensions’ (n 44) 59–60.

¹⁷¹ Fergus Hanson, Emilia Currey and Tracy Beattie, International Cyber Policy Centre, *The Chinese Communist Party’s Coercive Diplomacy* (Policy Brief Report No 36/2020, August 2020) 5, 16.

¹⁷² *Ibid.* 4. See also Lai (n 168) 170–2.

¹⁷³ See generally Peter E Harrell and Elizabeth Rosenberg, Center for a New American Security, *Economic Dominance, Financial Technology, and the Future of US Economic Coercion* (Report, April 2019).

¹⁷⁴ For a case study, see Peter Harrell, Elizabeth Rosenberg and Edoardo Saravalle, Center for a New American Security, *China’s Use of Coercive Economic Measures* (Report, June 2018) 42–9. For an analysis of common characteristics of these cases and of the way China addressed them, see Matthew Reynolds and Matthew P Goodman, Center for Strategic and International Studies, *Deny, Deflect, Deter: Countering China’s Economic Coercion* (Report, March 2023) 12–22.

the US for nearly two-thirds of global economies.¹⁷⁵ This leverage allows it to apply economic pressure by influencing trade. Target countries may decide to avoid legal proceedings to prevent further disruptions to beneficial trade. Second, China's political and administrative system lacks transparent regulation of governmental influence on trade.¹⁷⁶ This system can enable an accelerated and informal implementation of trade measures and complicates legal scrutiny. In contrast, US executive orders, for instance, explicitly state underlying foreign policy considerations.¹⁷⁷ Clearly expressed objectives of trade measures allow for a predictable legal assessment against the requirements under which, for instance, art XX of the *GATT 1994* allows the implementation of trade-restrictive state measures.

Informal measures or economic pressure disguised under technical justifications may provide strategic benefits to its user. Politically, the user obtains 'plausible deniability', which may allow it to avoid diplomatic scrutiny and the associated reputational costs.¹⁷⁸ Furthermore, the lack of formally published restrictions provides flexibility to de-escalate conflicts without having to publicly concede.¹⁷⁹ Similarly, the targeted country is offered the opportunity to give in to the pressure without declaring defeat in a public diplomatic conflict.¹⁸⁰ Legally, the non-transparent use of trade restrictions hampers the process of identifying and challenging state trade measures.¹⁸¹ In order to obtain legal clarification, the targeted country would hence have to invest considerable resources in fact-intensive investigations and WTO proceedings of an uncertain outcome. This uncertainty combined with the economic pressure may cause the targeted country to refrain from initiating WTO proceedings.

International trade relations are not devoid of political interaction. On the contrary, the WTO's forums for dialogue and cooperation inherently require political communication and offer the opportunity to address issues that go beyond mere trade.¹⁸² Moreover, the expansion of the WTO's mandate after the Uruguay Round may foster further politicisation, as the regulated areas were extended to domestic regulation on environmental protection¹⁸³ and intellectual property,¹⁸⁴ among other areas.¹⁸⁵ As a result, individual economic and political power affects international economic relations and trade disputes arising between WTO

¹⁷⁵ See Roland Rajah and Alyssa Leng, 'The US-China Trade War: Who Dominates Global Trade?', *Lowy Institute* (Web Page) <<https://interactives.lowyinstitute.org/charts/china-us-trade-dominance/us-china-competition/>>.

¹⁷⁶ Harrell, Rosenberg and Saravalla (n 173) 19–20.

¹⁷⁷ Reynolds and Goodman (n 174) 25–6.

¹⁷⁸ Hanson, Currey and Beattie (n 171) 16.

¹⁷⁹ Lim and Ferguson, 'In Beef over Barley' (n 65).

¹⁸⁰ Charles Miller, 'Explaining China's Strategy of Implicit Economic Coercion: Best Left Unsaid?' (2022) 76(5) *Australian Journal of International Affairs* 507, 513.

¹⁸¹ Zhou and Laurenceson, 'Demystifying Australia–China Trade Tensions' (n 44) 55.

¹⁸² Arie Reich, 'Threat of Politicization of the WTO' (2005) 26(4) *University of Pennsylvania Journal of International Law* 779, 781.

¹⁸³ See generally 'Negotiations on Trade and the Environment', *World Trade Organisation* (Web Page) <https://www.wto.org/english/tratop_e/envir_e/envir_negotiations_e.htm>.

¹⁸⁴ See generally *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') ('*TRIPS*').

¹⁸⁵ Reich (n 182) 810.

members.¹⁸⁶ In fact, not every trade-related dispute is or must be subject to WTO proceedings. Although the *DSU* prohibits proceedings on the violation of WTO provisions outside of its multilateral rules and procedures,¹⁸⁷ individual consultations between traders and authorities are more likely to represent the day-to-day resolution of disagreements.¹⁸⁸ The mutually agreed solution between Australia and China regarding the barley proceeding provides an example.

However, where economic strength is employed in ways that substitute agreed rules-based trade frameworks to punish countries or force them to change their behaviour, the rules-based world trade system is called into question. Consequently, a level playing field in international trade depends on the extent to which its sovereign members actively commit to rules-based trade. Where members choose to exploit the loopholes in this system to exert economic pressure through trade restrictions, the dispute settlement mechanism provides only limited remedy.

C The Practical Challenges in WTO Dispute Settlement

The WTO's dispute settlement mechanism has a unique role in stabilising the world trade order by exclusively managing the disputes of the biggest multilateral legal framework on trade. WTO procedures are designed to ensure compliance with WTO rules without regard to the economic strength of the disputing member states.¹⁸⁹ Unlike the rules under the *General Agreement on Tariffs and Trade 1947* ('*GATT 1947*'),¹⁹⁰ which did not provide for an appellate system and required consensus of both disputing parties to adopt panel reports,¹⁹¹ the *DSU* improves the implementation of final decisions through a reverse consensus requirement and the Appellate Body ('AB').¹⁹² However, trade measures that apply economic pressure to pursue political objectives particularly highlight its limitations.

The inoperability of the AB is an urgent problem that has the capacity to cast doubt on the effectiveness of today's world trade system.¹⁹³ Although the blocking of new appointments of AB members by the US raises legitimate shortcomings of

¹⁸⁶ See generally Gregory Shaffer, 'The Challenges of International Trade Law' in *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (Cambridge University Press, 2021) 58, 69–72.

¹⁸⁷ *DSU* (n 154) arts 23.1–23.2(a).

¹⁸⁸ *Ibid* art 1.1 requires members to initiate a dispute under the *DSU*. The *DSU* further reflects a preference that members attempt to reach a satisfactory resolution of the matter through consultation: at art 4.5. On the strategic aspect of initiating a WTO proceeding, see Christina L Davis, 'Do WTO Rules Create a Level Playing Field?: Lessons from the Experience of Peru and Vietnam' in John S Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge University Press, 2006) 219, 221–8.

¹⁸⁹ See generally Davis (n 188) 221–8.

¹⁹⁰ *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) ('*GATT 1947*').

¹⁹¹ See William J Davey, 'Dispute Settlement in Gatt' (1987) 11(1) *Fordham International Law Journal* 51, 60, 97.

¹⁹² *DSU* (n 154) arts 16.4, 17.3, 17.14. On the effectiveness of the WTO's dispute settlement system vis-a-vis China, see generally Weihuan Zhou, *China's Implementation of the Rulings of the World Trade Organization* (Hart Publishing, 2019).

¹⁹³ See generally Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22(3) *Journal of International Economic Law* 297.

the WTO,¹⁹⁴ it carries the risk that disputes over trade measures will remain without a rules-based solution, as a losing party may ‘appeal into the void’ and thereby block adverse rulings similar to conditions under the *GATT 1947*.¹⁹⁵ Therefore, members may resort to means outside the application of rules-based frameworks to achieve their objectives. At the 12th Ministerial Conference held in Geneva in June 2022, WTO members agreed on talks to secure a fully functioning dispute settlement system by 2024.¹⁹⁶ However, the trajectory of these talks is difficult to predict considering the partly fundamental issues the US raised regarding the AB’s rights under the *DSU* and its legal analyses.¹⁹⁷

Disputes between Australia and China are less affected, as both countries are part of the Multi-Party Interim Appeal Arbitration Arrangement (‘MPIA’) proposed by the European Union and joined by 24 other WTO members under art 25 of the *DSU*.¹⁹⁸ The MPIA aims to ‘replicate the substantive and procedural aspects of the WTO appeal arbitration procedure’ as a temporary solution until the AB is operational again.¹⁹⁹ It has so far finalised two disputes while several disputes of MPIA members are currently pending before WTO panels.²⁰⁰ Australia and China have formally informed the panels in their disputes about the MPIA as a framework for the potential appeal of any final panel report.²⁰¹ The MPIA averts the risk of an ‘appeal into the void’ between Australia and China.

A fundamental condition for the enforcement of trade law is transparency of state conduct, which the alleged informal restrictions arguably lack. The concern that China’s domestic structure may be prone to allowing informal means to influence trade is not new and has been the reason for additional transparency obligations upon its WTO accession.²⁰² Section 2(C) para 1 of the *Accession Protocol* requires that ‘laws, regulations and other measures pertaining to or affecting trade ... are published and readily available ... before such measures are implemented’.²⁰³ Compared to the obligations under art X of the *GATT 1994*, the

¹⁹⁴ See the comprehensive discussion of the raised shortcomings in United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (Report, February 2020).

¹⁹⁵ William J Davey, ‘WTO Dispute Settlement: Crown Jewel or Costume Jewelry?’ (2022) 21(3) *World Trade Review* 291, 293. On the impact of the AB’s inoperability on trade disputes between the US and China, see Lee (n 110) 412.

¹⁹⁶ *MC12 Outcome Document*, WTO Docs WT/MIN(22)/24 and WT/L/1135 (22 June 2022, adopted 17 June 2022) [4].

¹⁹⁷ United States Trade Representative (n 194).

¹⁹⁸ *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12 (30 April 2020) (Multi-Party Interim Appeal Arbitration Pursuant to Article 25 of the *DSU*).

¹⁹⁹ ‘Multi-Party Interim Appeal Arbitration Arrangement (MPIA)’, *WTO Plurilaterals* (Web Page) <https://wtoplurilaterals.info/plural_initiative/the-mpia/>, archived at <<https://perma.cc/5L9Y-TKGS>>.

²⁰⁰ *Ibid.*

²⁰¹ *China — Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598/5 (20 August 2021) (Agreed Procedures for Arbitration under Article 25 of the *DSU*); *China — Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Doc WT/DS602/3 (20 December 2021) (Agreed Procedures for Arbitration under Article 25 of the *DSU*); *Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Doc WT/DS603/4 (20 September 2022) (Agreed Procedures for Arbitration under Article 25 of the *DSU*).

²⁰² *Report of the Working Party on the Accession of China*, WTO Doc WT/ACC/CHN/49 (1 October 2001) [324] (‘*Working Party Report*’).

²⁰³ *Accession Protocol* (n 75) s 2(C) para 1.

provision supports timeliness, availability and coverage of the publications.²⁰⁴ However, it is difficult to challenge violations if technical justifications are used or trade restrictions are imposed through informal instructions to SOEs.

The obligation that import purchasing procedures of STEs be fully transparent provides only limited remedy.²⁰⁵ STEs do not necessarily cover all enterprises which the government owns or controls, but are defined by the exercise of ‘exclusive or special rights or privileges’.²⁰⁶ Moreover, the obligation of ‘full transparency’ is ambiguous at best and further diminished by the reference to ‘compliance with the WTO Agreement’.²⁰⁷ In general, WTO transparency and notification requirements are under-utilised and under-enforced.²⁰⁸ Therefore, the applicable provisions are of limited effectiveness in addressing the practical problem of economic and political pressure through trade measures.

The *DSU* is designed to resolve trade disputes of parties in good faith.²⁰⁹ However, its reliance on goodwill renders the mechanism susceptible to misuse. Even if China’s trade restrictions were held to violate WTO provisions, they would still have inflicted harm on affected industries. The process of WTO dispute resolution is lengthy. It is true that its initiation is an important step towards communication. The mandatory consultation requirement under art 4 of the *DSU* provides the opportunity for a resolution through diplomatic channels. However, a forum for discussion requires the willingness to discuss. Usually, members will have already considered direct bilateral channels. It is thus not surprising that the formal consultations in the three anti-dumping dispute proceedings between Australia and China were unsuccessful.²¹⁰ Subsequently, the panel proceedings and their reports take time. Two and a half and three years have passed since Australia requested consultations on the anti-dumping duties on wine and barley respectively. Furthermore, were the panel proceeding not entirely suspended and a panel report circulated, it may still be appealed by either party, which would further delay a final decision.

Once a final decision is reached, the implementation of an adverse decision within an individually defined ‘reasonable period of time’ may further prolong the process.²¹¹ If the WTO proceedings resulted in a panel report that found China to

²⁰⁴ See Henry Gao, ‘The WTO’s Transparency Obligations and China’ (2017) 12(2) *Journal of Comparative Law* 329, 334–5.

²⁰⁵ *Accession Protocol* (n 75) s 6 para 1.

²⁰⁶ See the ‘working definition’ pursuant to art 1 of the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994*’), which forms part of the *GATT 1994* (n 7) pursuant to para 1(c)(ii) in the Introductory Note. See also Panel Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc WT/DS276/R (6 April 2004) [6.108]; Panel Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Docs WT/DS161/R and WT/DS169/R (31 July 2000) [763]–[769].

²⁰⁷ *Accession Protocol* (n 75) s 6 para 1.

²⁰⁸ William Alan Reinsch, Sanvid Tuljapurkar and Jack Caporal, ‘Transparency at the WTO: Why Does Transparency Matter, and Are Members Meeting Their Obligations?’, *Center for Strategic and International Studies* (Blog Post, 22 April 2020) <<https://www.csis.org/analysis/transparency-wto-why-does-transparency-matter-and-are-members-meeting-their-obligations>>, archived at <<https://perma.cc/7NZZ-ZPHP>>.

²⁰⁹ *DSU* (n 154) art 3.10.

²¹⁰ Islam and Zaman (n 95) 27.

²¹¹ See especially *DSU* (n 154) arts 21.1–21.2, 21.4. See also Islam and Zaman (n 95) 31–3.

have violated *ADA* rules, the accumulated duration of such proceedings may render an implementation unnecessary.²¹² Article 11.3 of the *ADA* requires anti-dumping measures to be reviewed after five years before renewal is possible. In such a case, it could suffice to simply not renew the tariffs after the ‘sunset review’. Consequently, the measures could fully exert their economic pressure on affected industries, which are left to cope with the increased costs for up to five years.

WTO proceedings are unlikely to offset these costs, as the *DSU* does not provide retrospective remedies. Instead, the *DSU*’s objective is to restore conformity of a member’s behaviour with its obligations.²¹³ Article 21.1 of the *DSU* allows temporary ‘[c]ompensation and the suspension of concessions ... [only] in the event that the recommendations and rulings are not implemented within a reasonable period of time’.²¹⁴ While compensation is voluntary and thus unlikely,²¹⁵ a proportionate suspension of concessions only allows for equally trade-restrictive measures.²¹⁶ Such restrictions would harm mutually beneficial trade even further, as well as affected Australian traders and consumers.²¹⁷

Finally, adverse rulings may not prevent similar future measures. Where trade restrictions are based on merely informal instructions or on generally WTO-consistent law prescribing, for instance, labelling, quarantine and health requirements, the implementation of an adverse WTO ruling is difficult to monitor and could be circumvented.²¹⁸ WTO proceedings can only provide legal clarity to the extent that they assess compatibility of the argued justifications with WTO exceptions for the individual case. No conclusion, or at least no direct conclusion, is made on underlying political motivations. New trade restrictions could thus be implemented using the same mechanisms, while arguing that the individual circumstances differ from those in previous WTO proceedings.

Overall, the WTO dispute settlement mechanism provides only limited means to counter the politically motivated use of trade measures to apply economic pressure in general and to sustainably resolve the frictions between Australia and China. WTO proceedings, which were initiated between Australia and China at least in regard to the anti-dumping duties, are an important first step to address the issues in a rules-based environment. Moreover, they raise international awareness of both countries’ anti-dumping practices and may increase the reputational cost of their unlawful use.²¹⁹ However, the proceedings’ long duration and limited remedy for past and future restrictions weaken their effectiveness in deterring members from disrupting trade in times of political conflict. Furthermore, legal clarification is not provided in cases where WTO proceedings are ended without the publication of the final panel reports.

The WTO system relies on its members’ commitment to communicate and justify trade restrictions openly, transparently and unconflicted with political

²¹² This has been the result in multiple WTO disputes: Zhou, *China’s Implementation of the Rulings of the World Trade Organization* (n 192) 152–82.

²¹³ *DSU* (n 154) art 19.1; Mark Wu, ‘China’s Export Restrictions and the Limits of WTO Law’ (2017) 16(4) *World Trade Review* 673, 683.

²¹⁴ See especially *DSU* (n 154) arts 22.1–22.2, 22.6.

²¹⁵ *Ibid* arts 21.1–21.2.

²¹⁶ *Ibid* arts 21.2, 21.4, 21.6.

²¹⁷ Miller (n 180) 519–20.

²¹⁸ Zhou and Laurenceson, ‘Demystifying Australia–China Trade Tensions’ (n 44) 81.

²¹⁹ On the relevance of reputation to Chinese foreign policy, see Lai (n 168) 173–5.

intentions. This commitment is even more important where, like between Australia and China, trade disruptions are only partially subjected to formal WTO proceedings. Further rules on trade and additional avenues of communication on trade barriers through PTAs can foster this commitment.

IV CHAFTA: A QUIET AGREEMENT IN LOUD TIMES

In 2015, Australia became the first ‘major’ developed country to enter a PTA with China.²²⁰ However, as a preferential addition to the WTO,²²¹ *ChAFTA*’s provisions include little new substance relevant to the trade disputes. Also, the forums offered by the agreement for dialogue and cooperation have remained notably quiet, as neither party used them to address trade tensions. The reluctance to use these forums further illustrates the spilled over political tensions. *ChAFTA* provides a valuable foundation for both current and future Australia–China relations. However, its potential remains under-utilised so far.

Neither Australia nor China have chosen to initiate dispute proceedings under *ChAFTA* to date.²²² One reason may be that the obligations and remedies relevant to the disagreements over anti-dumping measures and import restrictions do not go beyond WTO provisions. The *ADA* is fully incorporated.²²³ So are the relevant provisions of the *GATT 1994*,²²⁴ the *TBT Agreement*²²⁵ and the *SPS Agreement*.²²⁶ The dispute settlement chapter largely resembles the *DSU*, albeit with minor adjustments in language and structure and without an appeal procedure.²²⁷ Thus, the multilateral forum of potentially two stages offered by the WTO dispute settlement mechanism may have been considered more appropriate.

ChAFTA’s transparency and cooperation provisions provide tools to address tensions. Regarding anti-dumping, for instance, Australia and China agreed on enhanced dialogue, transparent treatment and adequate opportunity for consultations.²²⁸ However, since China’s tariffs were based on an alleged lack of sufficient information from Australia, these provisions appear to have had limited effect to date. Consequently, Australia has deliberately chosen not to use *ChAFTA*’s High Level Dialogue on Trade Remedies because it considered the WTO ‘the most effective avenue for resolving these issues’.²²⁹

²²⁰ Heng Wang, ‘An Analytical Introduction to ChAFTA: Features and Challenges’ in Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The China-Australia Free Trade Agreement: A 21st Century Model* (Hart Publishing, 2018) 19, 19.

²²¹ On *ChAFTA*’s relationship to WTO law, see *ChAFTA* (n 9) art 1.1; *GATT 1994* (n 7) art XXIV; *GATS* (n 156) art V.

²²² On the choice of forum in dispute settlement, see *ChAFTA* (n 9) art 15.4 para 2.

²²³ *Ibid* art 7.9 para 1.

²²⁴ *Ibid* art 1.2 para 2, arts 2.7 (Non-Tariff Measures), 16.2 (General Exceptions).

²²⁵ *Ibid* ch 6 (Technical Barriers to Trade).

²²⁶ *Ibid* ch 5 (Sanitary and Phytosanitary Measures).

²²⁷ *Ibid* ch 15 (Dispute Settlement).

²²⁸ *Ibid* art 7.9 para 2.

²²⁹ Department of Industry Science, Energy and Resources (Cth), ‘International Trade Remedies Forum’ (Meeting Minutes, 5 July 2021) 3 <https://www.industry.gov.au/sites/default/files/2021-08/international_trade_remedies_forum_-_minutes_5_july_2021.docx>, archived at <<https://perma.cc/3F9U-EDTY>>.

Another forum within *ChAFTA* is its committees.²³⁰ The Committee on Trade in Goods is established to review, at either party's nomination, non-tariff measures that could constitute unnecessary obstacles to trade.²³¹ Licensing or labelling requirements, as cited by China upon import suspensions, are expressly included.²³² However, the last *ChAFTA* committee meeting was in 2017.²³³ The silence in *ChAFTA*'s dialogue forums mirrors the freeze in diplomatic communication and thus illustrates the disputes' conflation of trade-related with political aspects.

Nevertheless, *ChAFTA* rules continue to support the bilateral economic relationship amid tensions. The core achievement is tariff eliminations for 100% of Chinese exports and 98% of Australian exports upon full implementation.²³⁴ Despite bilateral tensions, scheduled tariff cuts under *ChAFTA* were continuously implemented.²³⁵ The preferential tariffs provide Australia with a competitive advantage over traders without a China PTA, particularly in agricultural products, which are important to bilateral trade and for which China is a growing market.²³⁶ Trade in services was liberalised by China's then most extensive 'positive list' of sectors covered by MFN commitments²³⁷ and Australia's 'negative list' of non-conforming measures.²³⁸

Regarding investment, *ChAFTA* provisions add little to the existing bilateral investment treaty.²³⁹ For instance, the albeit broader MFN obligation is not subject to investor state dispute settlement ('ISDS')²⁴⁰ and the added national treatment

²³⁰ See, eg, *ChAFTA* (n 9) arts 2.15 (Committee on Trade in Goods), 5.11 (Committee on Sanitary and Phytosanitary Measures), 6.13 (Committee on Technical Barriers to Trade), 8.20 (Committee on Trade in Services), 9.7 (Committee on Investment), 14.1 (Joint Commission).

²³¹ *Ibid* art 2.7 para 4, art 2.12.

²³² Department of Foreign Affairs and Trade (Cth), *ChAFTA Fact Sheet: Trade in Goods* (Fact Sheet, August 2018) <<https://www.dfat.gov.au/sites/default/files/chafta-fact-sheet-trade-in-goods-trade-rules-and-facilitation.pdf>>, archived at <<https://perma.cc/CY5T-S44F>>.

²³³ 'ChAFTA Joint Committee Meetings', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/trade/agreements/in-force/chafta/news/implementation/Pages/chafta-joint-committee-meetings>>, archived at <<https://perma.cc/AZS2-XBZS>>.

²³⁴ *ChAFTA* (n 9) art 2.4, annex I. See Department of Foreign Affairs and Trade (Cth), *Using ChAFTA to Export and Import Goods* (Guide, 19 August 2020) 2.

²³⁵ 'ChAFTA Implementation Process and Timeline', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/trade/agreements/in-force/chafta/fact-sheets/Pages/chafta-implementation-timeline>>, archived at <<https://perma.cc/6L93-BCAZ>>.

²³⁶ Department of Foreign Affairs and Trade (Cth), *ChAFTA Fact Sheet: Agriculture and Processed Food* (Fact Sheet, August 2018) <<https://www.dfat.gov.au/sites/default/files/chafta-fact-sheet-agriculture-and-processed-food.pdf>>, archived at <<https://perma.cc/NM8C-DUYG>>.

²³⁷ *ChAFTA* (n 9) art 8.3, annex III; 'Summary of ChAFTA Chapters and Annexes', *Department of Foreign Affairs and Trade* (Web Page, 26 August 2015) <<https://www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/chafta-summary-of-chapters-and-annexes>>, archived at <<https://perma.cc/26C2-TLEQ>>.

²³⁸ *ChAFTA* (n 9) art 8.3, annex III.

²³⁹ *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, signed 11 July 1988, [1988] ATS 14 (entered into force 11 July 1988) ('Australia–China BIT'). On their cumulative relationship, see Tania Voon and Elizabeth Sheargold, 'Australia, China and the Coexistence of the Successive International Investment Agreement' in Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The China-Australia Free Trade Agreement: A 21st Century Model* (Hart Publishing, 2018) 215.

²⁴⁰ *ChAFTA* (n 9) arts 9.4, 9.12 para 2.

obligation includes substantial carve-outs.²⁴¹ Provisions common in international investment law on fair and equitable treatment and expropriation are missing entirely.²⁴² Main points of progress include modern safeguards to ensure regulatory autonomy,²⁴³ facilitated temporary entry²⁴⁴ and the quadrupled threshold of Australian screenings of Chinese non-SOE investments in non-sensitive industries.²⁴⁵ However, increased investment screenings by the Australian Foreign Investment Review Board and the exclusion of Chinese investors based on national security arguments are likely to be left unaddressed under *ChAFTA* due to the limited scope of its ISDS provisions.²⁴⁶

Generally, *ChAFTA* reflects a pragmatic approach. Its original provisions cover the ‘low hanging fruits’ of areas significant to bilateral relations and without much friction.²⁴⁷ *ChAFTA*’s selective areas of liberalisation and particularly its tariff reductions add to the stability of bilateral trade flows despite tensions.²⁴⁸ The agreement provides the bilateral economic relationship with a foundation that would arguably be difficult to achieve under today’s conditions. Further liberalisation, including a comprehensive investment chapter, is the subject of future negotiations.²⁴⁹ Such negotiations may also address the asymmetries in the parties’ obligations regarding trade in services,²⁵⁰ the tariff schedules and investment obligations, which provide more liberalisation to China than vice versa.²⁵¹ However, negotiations did not progress beyond a declaration of intent and initial review meetings of *ChAFTA* committees in 2017.²⁵² While this stagnation reflects bilateral tensions, separating the potential benefits of further negotiations from political tensions would be more in line with the agreement’s pragmatic approach.

As concluded in DFAT’s post-implementation review in 2020, *ChAFTA* has succeeded in expanding economic opportunities but it falls short of its potential if not used as a forum for dialogue.²⁵³ By fostering the economic partnership between China and Australia, it connects two economically and diplomatically important players in a region of steadily growing significance. In doing so, *ChAFTA* symbolically represents a relationship of a ‘major’ developed nation with

²⁴¹ Ibid art 9.3 para 2 n 1, para 4, art 9.5 para 2.

²⁴² However, containing provisions on expropriation, see *Australia–China BIT* (n 239) art VIII:1.

²⁴³ For an overview, see Voon and Sheargold (n 239) 224–5.

²⁴⁴ *ChAFTA* (n 9) ch 10 (Movement of Natural Persons).

²⁴⁵ Department of Foreign Affairs and Trade (Cth), *Investment and Investor–State Dispute Settlement (ISDS)* (Fact Sheet, August 2018) <<https://www.dfat.gov.au/sites/default/files/chafta-fact-sheet-investor-state-dispute-settlement.pdf>>, archived at <<https://perma.cc/ZZ28-VDRP>>.

²⁴⁶ Tania Voon and Dean Merriman, ‘Is Australia’s Foreign Investment Screening Policy Consistent with International Investment Law?’ (2022) 23(1) *Melbourne Journal of International Law* 62, 87–9.

²⁴⁷ Wang (n 220) 21.

²⁴⁸ On the tariff reduction during the trade disruptions, see Zhou and Laureceson, ‘Demystifying Australia–China Trade Tensions’ (n 44) 78–9.

²⁴⁹ *ChAFTA* (n 9) art 9.9.

²⁵⁰ Ibid art 8.24 para 3.

²⁵¹ On the asymmetries in the investment obligations, see Voon and Sheargold (n 239) 218–24.

²⁵² ‘ChAFTA Implementation Process and Timeline’ (n 235).

²⁵³ Department of Foreign Affairs and Trade (Cth), *China–Australia Free Trade Agreement Post-Implementation Review* (Report, December 2020) [164]–[173].

China.²⁵⁴ However, the focus of *ChAFTA* is on economic interests and traditional trade rules between Australia and China. The challenges arising from the conflation of trade with political relations within the WTO framework similarly apply to *ChAFTA* and arguably result in its current under-utilisation. As long as persistent political disagreements prevent the promotion of mutually beneficial trade, the bilateral agreement is unable to reach its full potential as a rules-based, ‘predictable, transparent and consistent commercial framework’.²⁵⁵

V THE WAY FORWARD FOR RULES-BASED TRADE

Despite the imminent conclusion of recent WTO proceedings and a relative thaw in diplomatic relations, disagreements and differences persist between Australia and China. The economic pressure resulting from Chinese trade measures did not align Australia’s political positions with China’s.²⁵⁶ Rather, the trade disruptions highlighted bilateral interdependencies and the significance of trade diversification and resilience-building.

The political climate between the countries has shifted since Australia’s change of government in May 2022.²⁵⁷ In the year marking the 50th anniversary of bilateral diplomatic relations, the two countries’ ministers and heads of government resumed a ‘structured dialogue’ on trade, security, human rights and other issues after several years of stalemate.²⁵⁸ However, the resumption of diplomatic consultations and the progress regarding recent trade disputes do not prevent the conflation of both dimensions of bilateral relations in the future.

Strengthening the role of rules-based trade frameworks can promote and contribute to a way forward in which a level playing field and predictability in bilateral trade can be maintained, even if disagreements on policy and values persist. The two regional trade agreements, *RCEP* and *CPTPP*, can complement the trade framework under the WTO and *ChAFTA*. This is both in their ability to reactively respond to trade disputes in times of political conflict through substantive rules and as forums for cooperation, and by proactively promoting commitment to rules-based trade.

²⁵⁴ Chang-Fa Lo, ‘ChAFTA’s External Impact on Related Mega-FTAs’ in Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The China-Australia Free Trade Agreement: A 21st Century Model* (Hart Publishing, 2018) 63, 72.

²⁵⁵ *ChAFTA* (n 9) Preamble.

²⁵⁶ On Australia’s constant position, see Elena Collinson, ‘Despite the Apparent Thaw, Australia’s Core China Policy Remains Hardline’, *UTS Australia-China Relations Institute* (Blog Post, 10 October 2022) <<https://www.uts.edu.au/acri/research-and-opinion/opinion/despite-apparent-thaw-australias-core-china-policy-remains-hardline>>, archived at <<https://perma.cc/JJ4D-CJLC>>.

²⁵⁷ Bill Birtles, ‘China’s Foreign Minister Blames Morrison Government for Poor Relations, Tells Penny Wong to “Treat Us as a Partner, Not a Threat”’, *ABC News* (online, 10 July 2022) <<https://www.abc.net.au/news/2022-07-10/treat-us-as-a-partner-not-a-threat-wang-yi-told-penny-wong/101225434>>, archived at <<https://perma.cc/2XV5-E3ZX>>.

²⁵⁸ See ‘Foreign Minister Penny Wong Raises Human Rights and Trade in Beijing, while Seeking “Structured Dialogue” with China’, *ABC News* (online, 21 December 2022) <<https://www.abc.net.au/news/2022-12-21/penny-wong-china-australia-relationship-future-xi-jinping/101798076>>, archived at <<https://perma.cc/729E-7UYB>>.

A Reality Check on Australia–China Trade Relations

Trade flows and economic reality paint a twofold picture of the consequences of China's trade restrictions. The affected industries of both economies were forced to find new markets or new sources of supply respectively. Australian wine exports, for which China had accounted for 40%, experienced a significant plunge and difficulties in adjusting.²⁵⁹ Beef exports suffered a similar fate.²⁶⁰ The tariffs on barley hit not only Australian but also Chinese markets, which had to find potentially more expensive new suppliers.²⁶¹ Up to 80% of China's barley imports originated in Australia before the duties were imposed.²⁶² Moreover, according to media reports, the suspended coal imports contributed to an energy shortage in parts of China.²⁶³ As trade is by definition mutually beneficial, the unilateral restrictions had adverse effects on both economies, albeit difficult to quantify. Media reports suggest that Australian exports to China have suffered damages of up to AUD20 billion annually.²⁶⁴

The figures of bilateral trade paint another picture. Excluding global trade disruptions due to COVID-19, bilateral trade grew 12% in 2021 compared to prior heights in 2019, and another 6% in 2022.²⁶⁵ Since China has remained Australia's most important trading partner, Beijing could undoubtedly have exerted stronger economic pressure.²⁶⁶ For instance, Australian iron ore and wool exports to China have remained untouched by trade measures. However, the restriction of trade requires the impact on both economies to be taken into consideration.²⁶⁷ Restrictions may be carefully considered to minimise the impact on their own consumers and businesses.²⁶⁸ Notably, iron ores and concentrates are by far the most exported Australian goods to China. The export of these goods accounted for 67.1% of Australian exports to China in 2021 and, after the trade tensions, still

²⁵⁹ See Cassandra Hough and Stephanie Nitschke, 'Australian Export Wine Markets Emerge in Wake of China Tariff Increase', *ABC News* (online, 27 July 2022) <<https://www.abc.net.au/news/rural/2022-07-27/australian-wine-export-markets-emerge-china-tariff-increase/101268436>>, archived at <<https://perma.cc/6XMT-7W4P>>.

²⁶⁰ Department of Foreign Affairs and Trade (Cth), *Australia's Top 25 Exports, Goods and Services* (Fact Sheet, September 2023) <<https://www.dfat.gov.au/sites/default/files/australias-goods-and-services-by-top-25-exports-2022.pdf>>, archived at <<https://perma.cc/66RE-T43X>>.

²⁶¹ Matt Brann and Joanna Prendergast, 'China's 80 per Cent Barley Tariff a "Lose–Lose Situation" for Australian Grain Growers, Chinese Consumers', *ABC News* (online, 23 October 2021) <<https://www.abc.net.au/news/2021-10-23/barley-tariff-the-true-cost-of-losing-china/100558454>>, archived at <<https://perma.cc/L6ZD-LH5D>>.

²⁶² Waldron (n 93).

²⁶³ See Tarric Brooker, 'China's Aussie Coal Ban Backfire Shows It Doesn't Know What It's Doing', *News.com.au* (online, 10 January 2021) <<https://www.news.com.au/finance/business/mining/chinas-aussie-coal-ban-backfire-shows-it-doesnt-know-what-its-doing/news-story/5e2c0ed39e25f4458b3119a7b508c085>>, archived at <<https://perma.cc/S5BN-M2RM>>.

²⁶⁴ Needham (n 100).

²⁶⁵ *Australia's Direction of Goods and Services Trade Dataset* (n 14).

²⁶⁶ See James Laurenceson, Thomas Pantle and Michael Zhou, 'PRC Economic Coercion: The Recent Australian Experience' (Brief, Australia–China Relations Institute, 14 September 2020) 6.

²⁶⁷ James Laurenceson, 'Australia–China Relations Through the Frame of Trade' in Greg McCarthy, Youzhong Sun and Xianlin Song (eds), *Transcultural Connections: Australia and China* (Springer, 2021) 21, 30–1.

²⁶⁸ Rory Medcalf, 'China's Economic Leverage: Perception and Reality' (Policy Options Paper No 2, National Security College, March 2017) 2.

56% in 2022.²⁶⁹ The mutually dependent nature of the bilateral economic relationship may naturally limit the willingness for further trade disruptions. This raises the question of how effective the economic pressure resulting from the trade restrictions has been.

The trade restrictions have not led Australian officials to change their political positions.²⁷⁰ Instead, Australian politicians were quick to publicly condemn the measures as ‘economic coercion’.²⁷¹ Australia substantiated its claim of being the subject of unlawful trade measures by initiating WTO proceedings on the anti-dumping duties. As a result, the trade restrictions’ economic pressure did not prove very effective in enforcing China’s political demands. On the contrary, Australia’s defiance demonstrated a critical weakness of employing economic pressure through trade restrictions during times of political tension. When informal pressure is transferred into a rules-based environment, the reputational costs of its use can significantly increase. Australia’s diplomatic messaging cast doubt on the reliability of China as a trading partner that abides by the rules.²⁷²

Australia did not respond with further unilateral trade restrictions of the kind arguably employed in China–US trade tensions.²⁷³ One reason for Australia’s restraint might be its position as an economic middle power. The EU, economically in a different weight class than Australia, has developed legislation to deter economic coercion, which also includes, as a means of last resort, mechanisms for economic countermeasures.²⁷⁴ The development of the *Anti-Coercion Instrument* has been fast-tracked as a reaction to Chinese trade restrictions on Lithuania following political tensions.²⁷⁵ The question of whether the retaliatory restrictions intended by the EU instrument are lawful under international trade law and to what extent they may constitute an adequate policy response is beyond the scope of this article. It should, however, be reiterated that the *DSU* requires that the determination of a violation of WTO law and the consequences thereof be exclusively determined under the WTO dispute settlement mechanism and not unilaterally by either one WTO member.²⁷⁶ Australia’s response has focused on diplomatic communication, recourse to

²⁶⁹ ‘China Fact Sheet 2020’, *Department of Foreign Affairs and Trade* (Fact Sheet, July 2021); ‘China Fact Sheet 2020’, *Department of Foreign Affairs and Trade* (Fact Sheet, July 2021); *China Fact Sheet 2022* (n 16).

²⁷⁰ See Collinson (n 256).

²⁷¹ Miller (n 180) 517.

²⁷² See Laurenceson, Pantle and Zhou (n 266) n 46 and accompanying text.

²⁷³ See Wagner (n 155) 9.

²⁷⁴ See generally Marcin Szczepanski, ‘Proposed EU Anti-Coercion Instrument’ (Briefing Paper PE 729.299, European Parliamentary Research Service, 24 November 2022) <[https://web.archive.org/web/20230131000516/https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729299/EPRS_BRI\(2022\)729299_EN.pdf](https://web.archive.org/web/20230131000516/https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729299/EPRS_BRI(2022)729299_EN.pdf)>.

²⁷⁵ On the background of the tensions, see *ibid* 3. The European Parliament voted in favour of the *Anti-Coercion Instrument* on 3 October 2023 and it is set to enter into force by the end of 2023: Council of the European Union, ‘Trade: Council Adopts a Regulation to Protect the EU from Third-Country Economic Coercion’ (Press Release, 23 October 2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/10/23/trade-council-adopts-a-regulation-to-protect-the-eu-from-third-country-economic-coercion/>>, archived at <<https://perma.cc/52P4-PCS4>>.

²⁷⁶ *DSU* (n 154) arts 23.1–23.2(a).

rules-based trade proceedings and efforts to mitigate the trade disruptions' harmful effects on its economy.²⁷⁷

The disruptions over the past years have arguably even strengthened the resilience of the Australian economy. The frictions and the growing trade exposure to China increased awareness of the necessity of trade diversification.²⁷⁸ The benefits of trade diversification for the strategic resilience of international value chains is not a new insight.²⁷⁹ Trade rules establish and protect opportunities for states to exploit their comparative advantages but do not balance trade or the policies influencing it.²⁸⁰ Preferential trade liberalisation with a diverse set of jurisdictions can create an environment that enables businesses to mitigate risks associated with dependence on potentially unreliable partners. Australia has taken significant steps in this regard in recent years through its involvement in *RCEP* and *CPTPP*, an economic cooperation and trade agreement with India,²⁸¹ a comprehensive economic partnership agreement with Indonesia,²⁸² the *Pacific Agreement on Closer Economic Relations Plus* with several pacific states,²⁸³ and bilateral PTAs with Hong Kong,²⁸⁴ Peru²⁸⁵ and the UK.²⁸⁶ More agreements are under negotiation, including with the EU.²⁸⁷ These efforts help to increase the resilience of Australian businesses against future trade disruptions.

Whereas the government creates this environment, Australian businesses ultimately conduct trade and are affected by disruptions. In the long run, informal and legally ambiguous trade restrictions increase uncertainty, and risk management compels businesses to seek other trading partners.²⁸⁸ In fact, Australian exporters for timber, seafood and coal managed to find alternative markets with trade revenues compensating most losses from China.²⁸⁹ Coal

²⁷⁷ This approach arguably reflects the 'deny, deflect, deter' strategy recently suggested for US foreign policy: Reynolds and Goodman (n 174) 30–48.

²⁷⁸ Rory Medcalf, 'Coronavirus Shock Will Cascade through the Indo-Pacific Region', *The Strategist* (online, 3 March 2020) <<https://www.aspistrategist.org.au/coronavirus-shock-will-cascade-through-the-indo-pacific-region/>>, archived at <<https://perma.cc/RUM4-8CDY>>.

²⁷⁹ See Joint Standing Committee on Trade and Investment Growth, Parliament of Australia, *Pivot: Diversifying Australia's Trade and Investment Profile* (Report, February 2021) 43–74.

²⁸⁰ Petros C Mavroidis and André Sapir, 'The WTO at the Crossroads: How to Avoid the China Syndrome?' (2022) 21(3) *World Trade Review* 359, 361 ('The WTO at the Crossroads').

²⁸¹ *Australia–India Economic Cooperation and Trade Agreement*, signed 2 April 2022, [2022] ATS 8 (entered into force 29 December 2022).

²⁸² *Indonesia–Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019, [2020] ATS 9 (entered into force 5 July 2020).

²⁸³ *Pacific Agreement on Closer Economic Relations Plus*, signed 14 June 2017, [2020] ATS 12 (entered into force 13 December 2020).

²⁸⁴ *Free Trade Agreement between Australia and Hong Kong, China*, signed 26 March 2019, [2020] ATS 4 (entered into force 17 January 2020).

²⁸⁵ *Free Trade Agreement between Australia and the Republic of Peru*, signed 12 February 2018, [2020] ATS 6 (entered into force 11 February 2020).

²⁸⁶ *Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland*, signed 17 December 2021, [2023] ATS 3 (entered into force 31 May 2023).

²⁸⁷ For an overview, see 'Australia's Free Trade Agreements (FTAs)', *Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/trade/agreements/trade-agreements>>.

²⁸⁸ Lee (n 110) 428.

²⁸⁹ Weizhen Tan, 'China Restricted Imports from Australia. Now Australia Is Selling Elsewhere', *CNBC* (online, 2 June 2021) <<https://www.cnbc.com/2021/06/03/australia-finds-new-markets-for-coal-barley-amid-china-trade-fight.html>>, archived at <<https://perma.cc/JE5F-LCDC>>.

exports even exceeded pre-COVID levels in 2022 despite the reductions vis-a-vis China.²⁹⁰ Although Australian trade with China grew by 6% in 2022, it also grew on average 30.7% with its other trading partners.²⁹¹ The increase in bilateral trade with Australia's next biggest trading partners Japan (68.8%), the US (28.2%) and South Korea (60.4%) went significantly beyond that.²⁹² Thus, the trade restrictions proved the abilities of affected Australian industries to use diverse international trade routes to compensate for the harm caused by Chinese restrictions at least to some extent.

Nevertheless, these observations should not lead to the erroneous assumption that decoupling from China would best serve Australia's economic interests.²⁹³ Active distancing, with no alternatives in sight, would harm Australian firms and households.²⁹⁴ Without corresponding frameworks that provide economic incentives for businesses to diversify trade away from China, active distancing may force businesses to refrain from economic decisions that would benefit traders of both countries. Rather, without discounting the advantages of gradual trade diversification, Australia can benefit from further encouraging China's commitment to rules-based international trade and ensuring its own commitment. Bilateral economic and societal ties, as well as the importance of both countries in the Indo-Pacific region, require a way forward without permanent hostility between economic middle power Australia and superpower China.²⁹⁵

The resumption of high-level discussions between Australia and China is a first step in this direction. China has reduced its list of Australian 'grievances' to four general demands, which call for a cooperative 'path of seeking common ground while reserving differences', reciprocal treatment 'as a partner', independence from third parties, and building of a 'positive and pragmatic foundation of public opinion' to improve bilateral relations.²⁹⁶ On the 50th anniversary of bilateral diplomatic relations, Australian Foreign Minister Penny Wong travelled to Beijing to conduct the sixth Australia–China Foreign and Strategic Dialogue.²⁹⁷ Australian Prime Minister Anthony Albanese called discussions with Chinese President Xi Jinping in December 2022 'very positive and constructive'.²⁹⁸ The travel of

²⁹⁰ *Australia's Top 25 Exports, Goods and Services* (n 260); Department of Industry, Science and Resources (Cth), *Resources and Energy Quarterly* (Report, September 2023) 51, 61 <<https://www.industry.gov.au/sites/default/files/2023-10/resources-and-energy-quarterly-september-2023.pdf>>, archived at <<https://perma.cc/S2CN-76B6>>.

²⁹¹ *Australia's Direction of Goods and Services Trade Dataset* (n 15).

²⁹² *Ibid.*

²⁹³ See generally James Laurenceson and Michael Zhou, Australia–China Relations Institute, *COVID-19 and the Australia-China Relationship's Zombie Economic Idea* (Report, 7 May 2020) 1–3.

²⁹⁴ *Ibid.* 10.

²⁹⁵ Maude (n 34).

²⁹⁶ Birtles (n 257).

²⁹⁷ Penny Wong, Minister for Foreign Affairs (Cth), 'Australia–China Foreign and Strategic Dialogue Joint Outcomes Statement' (Joint Statement, 21 December 2022) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/australia-china-foreign-and-strategic-dialogue-joint-outcomes-statement>>, archived at <<https://perma.cc/X92A-6Z4U>>.

²⁹⁸ Matthew Doran, 'Anthony Albanese's Breakthrough Meeting with Xi Jinping Will Count for Nothing if It Doesn't Produce Result', *ABC News* (online, 20 November 2022) <<https://www.abc.net.au/news/2022-11-20/anthony-albanese-apec-summit-xi-jinping/101675298>>, archived at <<https://perma.cc/KXL8-3MBK>>.

Albanese to Beijing in November 2023 is the first personal visit to China by an Australian head of government since 2016.²⁹⁹

The WTO dispute regarding anti-dumping duties on Australian barley has been concluded and the tariffs repealed in August 2023 after they affected trade for about three years. A media release by the Australian Prime Minister suggests that a similar resolution might be found for the outstanding disputes at his November visit to Beijing.³⁰⁰ Such an outcome provides benefits for both countries. While the WTO panel reports were expected within 2023, even a ruling in Australia's favour would have been unlikely to lift the tariffs within a year because China could appeal the decision and would subsequently still have to implement it. For China, the agreement provides an opportunity to avoid an adverse WTO ruling and end the disruption of mutually beneficial trade without necessarily admitting wrongdoing. In addition to the agreement on the tariffs, trade flows in sectors affected by import restrictions are beginning to show signs of normalisation. For example, after three years, Australian coal exports to China return to levels reached before the restrictions started.³⁰¹

These recent improvements should not be misinterpreted to expect harmony in diplomatic and trade relations between Australia and China. Both sides have expressed their awareness of past 'difficulties and setbacks' regarding trade 'blockages', human rights protection and other subjects, and agreed to 'maintain high-level engagement' and 'further dialogue'.³⁰² Striking a balance between asserting increasingly conflicting national interests and values and cooperatively pursuing economic interests is not a straightforward task and will depend on the political willingness of both countries. Political disagreements will stay part of the 'new normal'.³⁰³ Within this new normal, political tensions will remain at risk of spilling over into trade relations.

The limited scope of the WTO trade framework and the merely bilateral forum of *ChAFTA* have shown limited effectiveness in reactively resolving politically charged trade disputes. Their rules-based approach to trade restrictions can only take limited account of political motivations. While the initiation of dispute proceedings and the barley panel report made available to the parties may have contributed to both countries' willingness to reach diplomatic consensus, legal clarification remains elusive and the rules-based structure of the WTO dispute settlement mechanism has taken only limited effect. Hence, the effectiveness of rules-based tools and mechanisms suffers where the objective assessment is impaired by informal, non-transparent or deliberately very technically justified trade restrictions. To that extent, international trade frameworks rely on their sovereign members' commitment to rules-based trade.

Nevertheless, the development and expansion of trade frameworks can contribute to a relationship between Australia and China in which a level playing field and predictability in bilateral trade can be maintained despite persistent

²⁹⁹ 'Australia PM to Visit China, with Progress on Wine, Wind Tower Disputes', *Reuters* (online, 22 October 2023) <<https://www.reuters.com/world/australia-pm-says-deal-reached-with-china-resolve-wto-wine-dispute-2023-10-21/>>, archived at <<https://perma.cc/7E3Z-YN2Q>>.

³⁰⁰ See Albanese (n 2).

³⁰¹ *Resources and Energy Quarterly* (n 290) 7.

³⁰² 'Foreign Minister Penny Wong Raises Human Rights and Trade in Beijing, while Seeking "Structured Dialogue" with China' (n 258).

³⁰³ Maude (n 34).

disagreements. They can add to the substantive scope of international trade rules and create forums for cooperation in cases of conflicts.³⁰⁴ Additional commitments, clarity and consistent enforcement can improve the ability of trade rules to respond to politically motivated trade disruptions and facilitate diplomatic insistence on compliance with rules-based solutions. On top of that, the role of international trade frameworks goes a step further as they can proactively foster an environment in which politically motivated trade restrictions become less effective and thus less attractive.³⁰⁵ By increasing the economic and reputational costs of unilateral trade restrictions, improving the resilience of members affected by restrictions, and promoting domestic reforms that address structural susceptibility to the conflation of trade with policy, trade frameworks can strengthen the level playing field in rules-based trade. Two regional trade frameworks with the potential to contribute to rules-based trade relations between Australia and China are *RCEP* and *CPTPP*.

B *RCEP: A Weak Commitment to Rules?*

RCEP adds little to the substantive rules governing Australia–China trade disputes. However, it contributes to the region’s economic integration, provides an important forum for communication, and reflects the benefits of rules-based cooperation in leveling the playing field. Despite its substantive limitations, the agreement has the potential to subject the region’s trade and barriers to trade to a fruitful forum beyond mere bilateral diplomacy.

Flexibility and pragmatism are the key components that enabled the ‘largest trading bloc of the world’³⁰⁶ to enter into force on 1 January 2022.³⁰⁷ The heterogeneity in the economic development of its 15 members, ten of which are the member states of the Association of Southeast Asian Nations (‘ASEAN’), has limited *RCEP*’s liberalisation ambitions from the outset.³⁰⁸ Several chapters are excluded from dispute settlement, including those building on the *ADA*, the *TBT Agreement* and the *SPS Agreement*.³⁰⁹ However, the agreement is forward-looking. For instance, all members agreed to implement ‘negative list’ services commitments within six years.³¹⁰ Moreover, a comprehensive review framework foresees future negotiations on the dispute settlement exceptions, the lack of ISDS provisions and the agreement in general.³¹¹ Nevertheless, the different levels of

³⁰⁴ On the risk of marginalisation these preferential forums raise for the multilateral forum of the WTO, see Mark Wu, ‘The “China, Inc” Challenge to Global Trade Governance’ (2016) 57(2) *Harvard International Law Journal* 261, 320–2.

³⁰⁵ On policy considerations that utilise such an environment in the trade conflict between the US and China, see Reynolds and Goodman (n 174) 36–42.

³⁰⁶ Alessandro Nicita et al, ‘A New Centre of Gravity: The Regional Comprehensive Economic Partnership and Its Trade Effects’ (Conference Paper, United Nations Conference on Trade and Development, 2021) 7.

³⁰⁷ Deborah K Elms, ‘Getting RCEP across the Line’ (2021) 20(3) *World Trade Review* 373, 378.

³⁰⁸ Lo (n 254) 76. *RCEP*’s membership includes Australia, China, Japan, New Zealand, South Korea and the ASEAN member states Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam.

³⁰⁹ *RCEP* (n 10) arts 5.17, 6.14, 7.16.

³¹⁰ *Ibid* art 8.12. Note that art 8.12(7) exempts Cambodia, Laos and Myanmar from the six-year rule.

³¹¹ On ISDS, see *ibid* art 10.18. *RCEP* also foresees a general review of the agreement with a view to update and enhance it: at art 20.8.

economic development among *RCEP* members and the agreement's purpose as a counter-model to the 'deep' commitments under *CPTPP* render far-reaching liberalisation unlikely.

Notwithstanding its substantive limitations, *RCEP* contributes to the stability of the Indo-Pacific's trade architecture with harmonisation as its main objective.³¹² Despite the last-minute exit of India,³¹³ the ASEAN-centric PTA represents 29% of the global GDP and 30% of the global population.³¹⁴ In 2019, intra-*RCEP* trade accounted for about 50% of the members' total trade.³¹⁵ China and ASEAN are respectively their most important trading partners.³¹⁶ *RCEP* members are the destination for 67% of Australian exports.³¹⁷ The agreement's harmonisation significantly disentangles the region's 'noodle bowl' of PTAs,³¹⁸ particularly with ASEAN.³¹⁹ However, the disentanglement is limited in so far as existing agreements with potentially further commitments have not been terminated.³²⁰

Its most important tool for harmonisation is uniform rules of origin ('ROO') governing the input threshold for intra-*RCEP* goods to access tariff preferences. The liberal rules include, for instance, a broad definition of 'originating goods'³²¹ and require a regional value content of 40%.³²² While tariff reductions do not go beyond *ChAFTA*, are flexible over 20 years and exclude sensitive sectors like agriculture,³²³ the simplified ROO facilitate the integration of regional value chains in production and distribution.³²⁴ *RCEP*'s comprehensive rules on trade and investment facilitation and cooperation further add to security and predictability

³¹² Jeffrey Wilson, 'Who's Afraid of the RCEP?', *9DASHLINE* (online, 4 October 2021) <<https://www.9dashline.com/article/whos-afraid-of-the-rcep>>, archived at <<https://perma.cc/NW5N-FK2E>>.

³¹³ On the background of and potential reasons for the last-minute exit of India, see Elms (n 307) 378–9.

³¹⁴ 'Overview: The Regional Comprehensive Economic Partnership (RCEP)', *Department of Foreign Affairs and Trade* (Fact Sheet, 15 November 2020) <<https://www.dfat.gov.au/sites/default/files/rcep-overview.pdf>>, archived at <<https://perma.cc/F9H8-52HB>>.

³¹⁵ Nicita et al (n 306) 7.

³¹⁶ Jiang and Yu (n 123) 152.

³¹⁷ 'Overview: The Regional Comprehensive Economic Partnership (RCEP)' (n 314).

³¹⁸ Richard E Baldwin, 'Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade' (2006) 29(11) *World Economy* 1451, 1491.

³¹⁹ On the pre-existing agreements, see generally Elms (n 307) 373–4. On the costs of this 'noodle bowl', see Ann Capling and John Ravenhill, 'Multilateralising Regionalism: What Role for the Trans-Pacific Partnership Agreement?' (2011) 24(5) *Pacific Review* 553, 556–7.

³²⁰ On concerns of fragmentation, see Pasha L Hsieh, 'Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law' (2018) 51(3) *Cornell International Law Journal* 683, 719–23.

³²¹ See especially *RCEP* (n 10) arts 3.2(b)–(c).

³²² *Ibid* art 3.5, annex 3A headnote 7(a).

³²³ *Ibid* annex I; Joint Standing Committee on Treaties, Parliament of Australia, *Report 196: Regional Comprehensive Economic Partnership Agreement* (August 2021) [3.5]–[3.6] ('*Report 196: RCEP*'); Nicita et al (n 306) 10.

³²⁴ *Report 196: RCEP* (n 323) [3.9]–[3.11]; 'RCEP Outcomes at a Glance', *Department of Foreign Affairs and Trade* (Fact Sheet, 1 January 2022) <<https://www.dfat.gov.au/sites/default/files/rcep-outcomes-at-a-glance.pdf>>, archived at <<https://perma.cc/364Z-YW4X>>.

for traders and investors.³²⁵ Strategically, open markets within a rules-based framework contribute to trade diversification and thereby reduce adverse effects of unilateral restrictions.³²⁶

RCEP's affirmation of WTO obligations and its new rules commit to a rules-based level playing field while the global trading system is experiencing difficult times. The agreement provides a forum for dialogue, particularly on non-tariff barriers relevant to Australia–China trade tensions.³²⁷ One avenue is the annual ministerial meeting.³²⁸ Another is the *RCEP* committees.³²⁹ Their decisive advantage over *ChAFTA* committees is that they include other members with strong economic ties to Australia and the economic superpower China and thus a vested interest in supporting rules-based dispute resolutions. South Korea and the Philippines, for instance, have already experienced trade disruptions amid political tensions with China.³³⁰ This increased forum could therefore address the conflation of trade with policy more effectively compared to *ChAFTA*.

However, a new and bigger platform does not guarantee its use.³³¹ Several aspects could weaken *RCEP*'s ability to address politically charged bilateral trade tensions. The consensus requirement for committee decisions can be used to block decisions on trade barriers.³³² Moreover, China has considerable leverage within the agreement, as it accounts for more than half of the combined GDPs and is the top trading partner for most members.³³³ It can use this leverage to, for example, press for a referral of conflicts to the agreement's bilateral technical consultations.³³⁴ Consequently, the extent to which *RCEP* can reach its full

³²⁵ In particular, see *RCEP* (n 10) chs 4 (Customs Procedures and Trade Facilitation), 15 (Economic and Technical Cooperation), arts 10.16 (Promotion of Investment), 10.17 (Facilitation of Investments). For multilateral provisions on trade facilitation, see *Marrakech Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Trade Facilitation*'). Negotiations on a WTO agreement on investment facilitation for development have been ongoing since 2017: 'Investment Facilitation for Development', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm>.

³²⁶ James Laurenceson, 'RCEP Shows that Open Regionalism Still Calls the Shots', *East Asia Forum* (online, 30 June 2022) <<https://www.eastasiaforum.org/2022/06/30/rcep-shows-that-open-regionalism-still-calls-the-shots/>>, archived at <<https://perma.cc/53Z2-6Q4U>>.

³²⁷ 'Overview: The Regional Comprehensive Economic Partnership (RCEP)' (n 314).

³²⁸ *RCEP* (n 10) art 18.1.

³²⁹ *Ibid* arts 18.2–18.7; 'The First Regional Comprehensive Economic Partnership Agreement (RCEP) Joint Committee Virtual Meeting, 26–27 April 2022', *Department of Foreign Affairs and Trade* (Media Release, 28 April 2022) <<https://www.dfat.gov.au/news/news/first-regional-comprehensive-economic-partnership-agreement-rcep-joint-committee-virtual-meeting-26-27-april-2022>>, archived at <<https://perma.cc/9DJU-GW4X>>.

³³⁰ For an elaborate discussion of South Korea's case, see Darren J Lim and Victor A Ferguson, 'Informal Economic Sanctions: The Political Economy of Chinese Coercion during the THAAD Dispute' (2022) 29(5) *Review of International Political Economy* 1525. On the Philippines, see Harrell, Rosenberg and Saravalle (n 174) 43–4.

³³¹ Elms (n 307) 380.

³³² *RCEP* (n 10) art 18.7(c).

³³³ Wilson (n 312); Jiang and Yu (n 123) 152.

³³⁴ *RCEP* (n 10) arts 2.18, 5.14.

potential in maintaining a level playing field hinges on the functioning of its cooperation mechanisms.³³⁵

From a bilateral perspective, *RCEP* provides Australia and China with further common interests and proves that these can nurture cooperation. *RCEP* reflects common objectives despite the crisis of multilateral trade and the increasingly bilateral approach to trade by the US, one of the main architects of the WTO.³³⁶ China in particular has celebrated its leadership in promoting openness and cooperation through *RCEP*.³³⁷ Moreover, China and Australia both publicly pursue strong multilateral trade rules by, for instance, stressing ‘the urgency and importance’ to overcome the impasse of the WTO’s appeal system.³³⁸ Through their regional and international engagement, both countries increasingly emerge as strong forces in the development of the rules-based global trade framework.

Overall, *RCEP*’s contribution to Australia–China relations goes further than *ChAFTA* in that it integrates both economies within the region. *RCEP* considerably adds to the stability and resilience of regional value chains. It reflects the Indo-Pacific’s commitment to rules-based trade and thereby raises the reputational costs of a violation of its rules and spirit. Unfortunately, however, *RCEP*’s forum to address barriers to trade has contributed little to resolve the politically charged trade disputes between Australia and China since its entry into force in January 2022. The agreement cannot, as of now, directly remedy the gaps in the WTO and *ChAFTA*. Nevertheless, along with the region’s significance, the agreement’s tools and forum may increase in influence. While the effectiveness of the framework’s mechanisms still hinges on the political willingness of its members, *RCEP* illustrates the incentives for bilateral cooperation and creates a foundation for further regional integration. Therefore, it fosters the region’s commitment to rules-based trade. In addition to *RCEP*, *CPTPP* may even go a step further in contributing to this commitment.

C *CPTPP: The Agreement of High Expectations*

Australia is one of *CPTPP*’s twelve members.³³⁹ China is not. Nevertheless, *CPTPP* has a strong impact on the trade and political environment in which Australia and China interact. This impact is likely to further increase as China has applied to join the agreement.³⁴⁰ The effectiveness of *CPTPP* in preventing and resolving trade disputes in times of political conflict is subject to several potential caveats. However, both the scope and depth of *CPTPP*’s substantive provisions

³³⁵ On the economic dimension of this finding, see Cyn-Young Park, Peter A Petri and Michael G Plummer, ‘The Economics of Conflict and Cooperation in the Asia-Pacific: RCEP, CPTPP and the US–China Trade War’ (2021) 25(3) *East Asian Economic Review* 233, 236.

³³⁶ On this development, see Austin Chad Cohen, ‘Trading Places: With the United States in Retreat, Who Writes the International Rules for Trade?’ (2019) 47(2) *Georgia Journal of International and Comparative Law* 539, 541–6.

³³⁷ Jiang and Yu (n 123) 152.

³³⁸ *MC12 Outcome Document*, WTO Docs WT/MIN(22)/24 and WT/L/1135 (n 196) [4].

³³⁹ *CPTPP*’s original membership includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam. The UK is the first jurisdiction to accede to the PTA, having reached an agreement in March 2023: Dominic Webb, ‘The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)’ (Briefing Paper No 9121, House of Commons Library, UK Parliament, 25 April 2023) <<https://commonslibrary.Parliament.uk/research-briefings/cbp-9121/>>.

³⁴⁰ ‘China Applies to Join Pacific Trade Pact to Boost Economic Clout’ (n 12).

and the negotiations required as part of an accession process bear significant potential to promote a rules-based level playing field for trade not only between Australia and China.

CPTPP is considerably more ambitious in liberalising regional trade and value chains than *RCEP*. Australia's engagement in *CPTPP* reinforces Australia's credible position as a reliable trading partner committed to rules-based trade. Moreover, Australia's participation contributes to the middle power's trade diversification and can thereby help to reduce the economic impact of unilateral trade restrictions imposed on it.³⁴¹ The agreement's trans-regional nature brings the American continent closer to the Indo-Pacific and further untangles the 'noodle bowl' of pre-existing PTAs. The accession agreement with the UK in July 2023,³⁴² the fact that several jurisdictions have applied for membership and the expressed interest of South Korea and Thailand in joining *CPTPP* indicate the growing influence of the agreement.³⁴³

This influence creates a strong incentive for China to enter *CPTPP*. Economically, China has been one of the greatest beneficiaries of the modern rules-based trade system. An accession to *CPTPP* would allow China to further strengthen its trading position, particularly through trade liberalisation vis-a-vis Canada and Mexico, both of whom have no PTA with China so far.³⁴⁴ Strategically, China's ambition to take part in shaping international rules incentivises it to engage in *CPTPP*. The agreement's comprehensive scope and its far-reaching commitments provide an indication of the direction in which international economic law is evolving.³⁴⁵ High expectations have been expressed for *CPTPP* to provide a potential 'blueprint' for future trade frameworks, while numerous issues in the WTO are without an agreed solution and the trajectory of current negotiations remains unclear.³⁴⁶ China's accession would allow the superpower to participate in this evolution.

Simultaneously, China's accession to *CPTPP* would subject it to this evolution. Current members could significantly expand the rules governing their economic relations with China. *CPTPP*'s substantive provisions could complement Australia–China relations well beyond *RCEP* and *ChAFTA*. In terms of traditional trade rules, *CPTPP* eliminates more than 98% of tariffs.³⁴⁷ However, these are subject to ROO with a higher threshold compared to *RCEP*.³⁴⁸ *CPTPP*'s increased focus on dialogue and transparency may help to reduce the unilateral restriction of

³⁴¹ See Collins C Ajibo et al, 'RCEP, CPTPP and the Changing Dynamics in International Trade Standard-Setting' (2019) 16(3) *Manchester Journal of International Economic Law* 425, 428.

³⁴² Webb (n 339).

³⁴³ Jeffrey J Schott, 'Which Countries Are in the CPTPP and RCEP Trade Agreements and Which Want In?', *Peterson Institute for International Economics (PIIE)* (Web Page, 27 July 2023) <<https://www.piie.com/research/piie-charts/which-countries-are-cptpp-and-rcep-trade-agreements-and-which-want>>, archived at <<https://perma.cc/E6PD-4JYQ>>.

³⁴⁴ 'China FTA Network', *Ministry of Commerce, People's Republic of China* (Web Page) <<http://fta.mofcom.gov.cn/english/index.shtml>>.

³⁴⁵ On this potential, see Capling and Ravenhill (n 319).

³⁴⁶ On the agreed next steps in WTO reforms, see *MC12 Outcome Document*, WTO Doc WT/MIN(22)/24 and WT/L/1135 (n 196). On the systemic challenges of the multilateralisation of regionalism for the WTO, see Wu (n 304) 320–2.

³⁴⁷ Department of Foreign Affairs and Trade (Cth), *CPTPP Outcomes at a Glance* (Fact Sheet, September 2021) <<https://www.dfat.gov.au/sites/default/files/cptpp-outcomes-at-a-glance.pdf>>, archived at <<https://perma.cc/2CDE-Z6RT>>.

³⁴⁸ *CPTPP* (n 11) art 3.11, annex 3-C.

trade during political tensions. The anti-dumping rules build on the *ADA* with particular emphasis on practices that support transparency, cooperation and therefore predictability before a trade remedy is imposed.³⁴⁹ The chapters on technical barriers to trade and sanitary and phytosanitary measures complement the respective WTO agreements regarding their implementation,³⁵⁰ transparency,³⁵¹ cooperation³⁵² and information exchange.³⁵³ Service liberalisations could complement *ChAFTA* commitments through, for instance, *CPTPP*'s prohibition on restrictive joint venture requirements usual for China.³⁵⁴ Moreover, an accession could lead to China's first 'negative list' approach to commitments regarding trade in services.³⁵⁵ The investment chapter of *CPTPP* includes, inter alia, stronger non-discrimination obligations that are generally subject to ISDS, which *ChAFTA* lacks.³⁵⁶ If China adopted *CPTPP*'s rules in their entirety, they could considerably add to bilateral economic relations.

In addition to traditional trade rules, *CPTPP* includes comprehensive provisions, some of which have arguably been developed specifically with China's potential accession in mind.³⁵⁷ These provisions include, inter alia, chapters on intellectual property,³⁵⁸ labour,³⁵⁹ competition³⁶⁰ and the environment.³⁶¹ Chinese labour rights, for example, have previously been an issue in Australia–China relations due to Australian allegations of Chinese human rights abuses and attempted Australian legislative action against forced labour.³⁶² Discussions on the *CPTPP* labour provisions may help to address this subject of bilateral tension. However, the chapter on SOEs and designated monopolies is arguably most significant *vis-à-vis* China.³⁶³ The first ever distinct chapter in this regard reflects broader international concerns about the influence of SOEs on trade.³⁶⁴ If China

³⁴⁹ *Ibid* annex 6-A.

³⁵⁰ On technical barriers to trade, see *ibid* arts 8.5–8.6, 8.8. On sanitary and phytosanitary measures, see at arts 7.6–7.12.

³⁵¹ On technical barriers to trade, see *ibid* art 8.7. On sanitary and phytosanitary measures, see at 7.13.

³⁵² On technical barriers to trade, see *ibid* arts 8.9, 8.11–8.12. On sanitary and phytosanitary measures, see at arts 7.5, 7.15, 7.17.

³⁵³ On technical barriers to trade, see *ibid* art 8.10. On sanitary and phytosanitary measures, see at art 7.16.

³⁵⁴ *Ibid* art 10.5(b).

³⁵⁵ Under *CPTPP*, every member committed to such a 'negative list' approach: *ibid* art 10.7.

³⁵⁶ *Ibid* arts 9.4–9.5, ch 9 s B.

³⁵⁷ Zeng Jia et al, 'China Has Good Reasons to Join Pacific Trade Pact, but Obstacles Remain', *The Straits Times* (online, 10 April 2019) <<https://www.straitstimes.com/asia/east-asia/china-has-good-reasons-to-join-pacific-trade-pact-but-obstacles-remain>>, archived at <<https://perma.cc/88Q8-CTDR>>.

³⁵⁸ *CPTPP* (n 11) ch 18. On suspended provisions, see at Preamble art 2. Discussing the suspensions, see Ajibo et al (n 341) 437–8.

³⁵⁹ *CPTPP* (n 11) ch 19.

³⁶⁰ *Ibid* ch 16.

³⁶¹ *Ibid* ch 20.

³⁶² See Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2021 (Cth).

³⁶³ *CPTPP* (n 11) ch 17.

³⁶⁴ Office of the United States Trade Representative, 'Joint Statement by the United States, European Union and Japan at MC11' (Press Release, 12 December 2017) <<http://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>>, archived at <<https://perma.cc/M7GK-6ST7>>.

commits to the provisions, they may contribute to reforms and transparency with regard to the governmental influence on SOEs. In doing so, the risk of informal trade-restrictive instructions could be reduced.

The *CPTPP* chapter on SOEs adds some substantive coverage to existing rules. For instance, art XVII of the *GATT 1994* on STEs covers enterprises exercising ‘exclusive or special rights or privileges’³⁶⁵ and requires their sales and purchases affecting trade to be conducted in a non-discriminatory manner and solely in accordance with commercial considerations.³⁶⁶ China’s *WTO Accession Protocol* broadens the scope of the non-discrimination and commercial considerations obligations to all Chinese SOEs.³⁶⁷ The *CPTPP* chapter adds substance by providing a definition of SOEs, which describes the required government ownership or control, and by applying its rules to all commercial activities of SOEs from *CPTPP* members.³⁶⁸ Another set of rules builds on provisions of the *SCM Agreement* and specifically addresses non-commercial assistance that advantages SOEs.³⁶⁹ Unlike the *SCM Agreement*, the *CPTPP* rules are not limited to trade in goods but also cover certain modes of trade in services.³⁷⁰ Moreover, *CPTPP*’s refined rules on transparency and its enforcement may further increase legal scrutiny on the substantive obligations on SOEs and address their structural susceptibility to the conflation of trade with policy.³⁷¹

While the *CPTPP* chapter would reinforce and add to China’s obligations under the *Accession Protocol*, its equal application to China and *CPTPP* members would also reduce the asymmetry of China’s obligations in the WTO framework to some extent. As the obligations would not be limited to China anymore, their enforcement may increase as compared to, for instance, *GATT 1994* art XVII on STEs and the *Accession Protocol*, which are arguably both under-utilised to address SOEs in WTO proceedings.³⁷²

China’s accession to *CPTPP* will not be a straightforward undertaking. The high standard of *CPTPP* regarding SOEs, labour and other areas of deep

³⁶⁵ See the ‘working definition’ in *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994* (n 206) art 1, which forms part of the *GATT 1994* pursuant to para 1(c)(ii) of the Introductory Note.

³⁶⁶ On the subordination of the commercial consideration obligation in art XVII:1(b) of the *GATT 1994* to the non-discrimination obligation in art XVII:1(a) to the extent that violations of the former are limited to cases of discriminatory conduct, see Appellate Body Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc WT/DS276/AB/R (30 August 2024) [89]–[91], [94], [98]–[100].

³⁶⁷ *Working Party Report*, WTO Doc WT/ACC/CHN/49 (n 202) [46].

³⁶⁸ *CPTPP* (n 11) art 17.1 (definitions of ‘state-owned enterprise’, ‘commercial considerations’ and ‘commercial activities’).

³⁶⁹ *Ibid* arts 17.1 (definition of ‘non-commercial assistance’), 17.6. On the unaddressed issue of SOEs as the recipients of non-commercial assistance under *CPTPP*, see Weihuan Zhou, ‘Rethinking the (CP)TPP as a Model for Regulation of Chinese State-Owned Enterprises’ (2021) 24(3) *Journal of International Economic Law* 572, 583–4.

³⁷⁰ *CPTPP* (n 11) arts 17.6.1(b)–(c), 17.6.2(b)–(c). However, see the exclusion at art 17.6.4.

³⁷¹ *Ibid* art 17.10, annex 17-B. See Mikyung Yun, ‘An Analysis of the New Trade Regime for State-Owned Enterprises under the Trans-Pacific Partnership Agreement’ (2016) 20(1) *Journal of East Asian Economic Integration* 3, 15–17, 21–7.

³⁷² On art XVII of the *GATT 1994*, see Robert Howse, ‘Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor’ (2022) 43(4) *University of Pennsylvania Journal of International Law* 821, 827. On the extended rules under the *Accession Protocol*, see Zhou, ‘Rethinking the (CP)TPP as a Model for Regulation of Chinese State-Owned Enterprises’ (n 369) 577.

commitments that have not been subject to previous PTAs will arguably require significant reform of Chinese policies. China is unlikely to simply agree to the agreement's rules, which were previously negotiated without the superpower at the table.³⁷³ China could use its economic leverage to avoid 'deep' commitments through, for instance, less preferential tariff schedules,³⁷⁴ non-conforming measures regarding trade and investment,³⁷⁵ extensive transition periods for implementing necessary reforms to comply with *CPTPP*'s high standards,³⁷⁶ and arguably already extensive individual exceptions regarding *CPTPP*'s SOE provisions.³⁷⁷ *CPTPP* would considerably gain in importance through China's domestic market.³⁷⁸ Australia's competitors for agricultural exports, Canada and Mexico, would gain their first PTA with China.³⁷⁹ Therefore, *CPTPP* members may be willing to make concessions to China to facilitate its accession, particularly where unbridgeable gaps between China's policies and some of *CPTPP*'s standards seem to arise during negotiations.

From a bilateral perspective, China's interest in joining the agreement creates a new opportunity for dialogue and cooperation in Australia–China relations. Although China's accession to *CPTPP* is likely to be a lengthy process, it could go a long way towards restoring predictability and reliability in trade relations with Australia.³⁸⁰ As any accession requires a consensus decision by incumbent *CPTPP* members,³⁸¹ ongoing trade disputes would have to be addressed before or during negotiations.³⁸² In fact, the Australian Parliament recommended that support for an accession process should be conditional on an end to 'coercive trade measures'.³⁸³ China's responsiveness to Australia's diplomatic efforts in addressing bilateral tensions may hence also be motivated by China's desire to accede to *CPTPP*.³⁸⁴

Two circumstances give reason for optimism that the significant potential of *CPTPP* to promote a level playing field in Australia's trade relations with China can be realised. First, *CPTPP* is unique in several respects. The agreement redefines which trade-related areas of law are governed under international trade frameworks. A Chinese commitment to further reforms, for instance, on the transparency of governmental influence on trade through SOEs can facilitate the identification and response to politically motivated trade measures. In addition,

³⁷³ For an elaboration on the impact of US–China relations on *CPTPP*, see Ajibo et al (n 341) 425–8.

³⁷⁴ *CPTPP* (n 11) art 2.4.2, annex 2-D.

³⁷⁵ Ibid arts 9.12, 10.7.

³⁷⁶ See, eg, ibid ch 17 n 35.

³⁷⁷ Ibid art 17.9, annexes IV, 17-D, 17-E, 17-F.

³⁷⁸ Jia et al (n 357).

³⁷⁹ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Expanding the Membership of the Comprehensive and Progressive Trans-Pacific Partnership* (Report, February 2022) 73 [4.101] ('*Expanding the Membership of the CPTPP*').

³⁸⁰ Jia et al (n 357).

³⁸¹ *CPTPP* (n 11) art 5.

³⁸² *Expanding the Membership of the CPTPP* (n 379) 67 [4.79], 69 [4.84], [4.86].

³⁸³ Ibid 76 [4.113].

³⁸⁴ See also James Laurenceson and Weihuan Zhou, 'Australia's Barley Solution with China Shows Diplomacy Does Work', *The Conversation* (online, 17 April 2023) <<http://theconversation.com/australias-barley-solution-with-china-shows-diplomacy-does-work-203898>>, archived at <<https://perma.cc/8WWX-HUK9>>.

CPTPP can address many other contemporary issues, such as those related to labour, competition, climate change and cross-border data flow, that go well beyond the scope of the WTO.³⁸⁵

Second, China's possible accession to *CPTPP* could benefit from the experience of China's accession to the WTO in 2001. The WTO accession was widely expected to be the first step in transforming the Chinese economy into a market economy modelled on liberal Western values.³⁸⁶ However, neither the WTO rules nor the additional rules of the *Accession Protocol* have arguably brought about such a development.³⁸⁷ Expectations that *CPTPP* would completely transform China's economic model seem unrealistic. Nevertheless, incumbent members can learn from the lack of binding language in the *WTO Accession Protocol* and use *CPTPP* negotiations to ensure that China adheres to the rules and spirit of the agreement by implementing its standards for transparent and rules-based trade into its domestic regulations.³⁸⁸ Under *CPTPP*, additional commitments may be achieved even without the need for asymmetrical obligations like under the *WTO Accession Protocol*. These commitments can increase the reputational costs of measures that substitute the reliance on economic power for rules-based solutions and foster an environment in which politically motivated trade restrictions become less effective and thereby less attractive.

Opposing a Chinese accession would lock Australia out from the advantages of cooperative dialogue, further Chinese commitments in international trade and a new pillar strong bilateral trade relations can build on. The surely lengthy Chinese accession process to *CPTPP* would bear the potential of being very constructive in strengthening rules-based both bilaterally and multilaterally. China's dependence on Australia's consent could allow Australia to extract additional concessions which further embed bilateral trade relations in a rules-based level playing field. To what extent this potential can be realised, remains to be seen.

VI CONCLUSION

The relations of Australia and China illustrate that strong trade figures do not necessarily translate to stability. The global trade system under the WTO requires a certain degree of separation between political and trade relations.³⁸⁹ Otherwise, its level playing field may be destabilised by the conflation of trade interests with political disagreements, exemplified in Australia–China relations. Despite mutual interdependencies, China's vastly larger economy allows it to apply economic pressure as a response to perceived political transgressions. The politicisation of trade relations diminishes the WTO system's ability to resolve bilateral trade disputes adequately, because its objective legal assessment of trade restrictions can only take limited account of political motivations. The transfer of the disputes into the framework of formal WTO proceedings was a first step, but ultimately took only limited effect towards a rules-based dispute resolution and an untangling of trade and policy.

³⁸⁵ Jiang and Yu (n 123) 155–9. See also Wu (n 304) 315–20.

³⁸⁶ Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press, 2021) 25–9.

³⁸⁷ See Wu (n 304) 288–94.

³⁸⁸ See Mavroidis and Sapir, 'The WTO at the Crossroads' (n 280) 363–5.

³⁸⁹ Lee (n 110) 406.

China's trade restrictions had little impact on Australia's political positions. Political disagreements will inevitably be part of future bilateral relations. However, the complementary economies and remarkable people-to-people links between Australia and China provide fertile ground for a cooperative way forward. Both countries are connected by the Indo-Pacific's geography and supply chains and are key players in the region's strategic balance. Moreover, both Australia and China promote and engage in the development of modern trade frameworks. The adherence to the MPIA exemplifies their general support for rules-based dispute resolution.

Preferential additions to the WTO framework can build on its gaps to foster the cooperative pursuit of these common interests and promote the return to rules-based trade relations on a level playing field. Deeper substantive rules and the creation of communication and cooperation forums under PTAs may help to reduce tensions and increase predictability for the traders of both countries. *ChAFTA* illustrates the uniqueness of Australia–China relations. However, while it creates a valuable foundation for a continuously strong economic relationship, it falls behind its potential as a forum for cooperation in resolving bilateral conflicts. The new *RCEP* reflects the common buy-in within the Indo-Pacific and has the potential to provide a platform for further cooperation.³⁹⁰ However, its mechanisms to react to trade disputes in times of political conflict may be weakened by its dependence on developing and least developed members.

CPTPP has significant potential to promote rules-based trade between Australia and China. China's interest in joining *CPTPP* suggests its willingness for further commitment to rules-based trade. Although an accession process would unlikely be quick, it could encourage necessary dialogue on trade disruptions and foster predictability in future trade relations. Moreover, modern trade rules on, inter alia, SOEs and labour can encourage progress on other issues important to bilateral relations. Provided incumbent *CPTPP* members utilise this potential, China's accession can improve their ability to find rules-based resolutions to trade disputes and proactively foster an environment in which trade restrictions become a less attractive tool to address political disagreements.

In conclusion, Australia and China will likely continue to differ in their national interests, political systems and understanding of the government's role in the economy. Nevertheless, their economic and social linkages offer considerable incentives for a way forward that avoids the conflation of shared economic interests with political disagreements. International trade frameworks can significantly support this way forward. However, their effectiveness depends on both countries' commitment to rules-based trade relations. Reassessing the possibilities and mutual expectations for future relations on the occasion of the 51st anniversary of bilateral diplomatic relations could provide a fruitful basis for this commitment.

³⁹⁰ Laurenceson, 'RCEP Shows that Open Regionalism Still Calls the Shots' (n 326).