

# China's Evolving Approach to International Dispute Settlement

## Summary

- International dispute settlement provides a means for states to settle disputes in a peaceful manner. China approaches international dispute settlement on a case-by-case basis. It is increasingly prepared to accept adjudicative methods of dispute settlement (as opposed to diplomatic means) when it considers the benefits of doing so to outweigh the economic and political costs.
- Where issues of sovereignty are concerned, such as in the *South China Sea* case, China is generally hostile to international adjudication. Its strong preference is for political or diplomatic approaches.
- But in areas where multilateral action is required in order to protect its interests – including trade and investment – China is more likely to participate in international adjudication. China is an active player in the World Trade Organization's dispute settlement mechanism. In the field of international investment law, China is increasingly prepared to subject disputes to international arbitration.
- In newer areas of international law, such as the regime governing deep-sea mining, we are likely to see China engaging proactively with international dispute settlement mechanisms.
- At a time when multilateralism is being challenged and nationalism is on the rise, the need for states to support international dispute resolution, and comply with the decisions of relevant bodies, is vital. In areas in which China is engaging, other states should encourage the continuation of this behaviour by engaging and complying themselves with relevant rules.



### Introduction

The peaceful settlement of disputes has been crucial to the post-Second World War international order, a key purpose of which has been to maintain peace and to prevent another world war. International dispute settlement is also a fundamental requisite of international trade and investment activity, since businesses need a stable and predictable environment in which to operate. States have an obligation, under the UN Charter, to settle their disputes peacefully.<sup>1</sup>

Article 33 of the UN Charter states that dispute resolution can take many forms: 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their [the parties'] own choice'. This briefing focuses on China's attitude to the settlement of disputes by adjudicative means, i.e. deferral to independent third-party arbitrators or judges. Resolution of disputes through international courts and tribunals is predicated on the fair and impartial application of international rules, designed to protect the weak as well as the strong. On some issues, courts and tribunals can also provide solutions that are otherwise unavailable because of political stalemate.

Until 15 years ago, China was a relatively quiet player on the international law scene, playing only a small role in international rule-making. This historical position stems at least partly from perceptions within the Communist Party of China (CPC) of international law as a Western construct, used in the past as a tool of Western imperialism, including in the imposition on China of unequal treaties in the 19th century. In 1954, China and India agreed the Five Principles of Peaceful Co-Existence, consisting of (i) mutual respect for territorial integrity and sovereignty; (ii) mutual non-aggression; (iii) mutual non-interference; (iv) equality and mutual benefit; and (v) peaceful co-existence. The Five Principles continue to form the cornerstone of China's foreign policy, including its approach to international law. China also places great emphasis on the authority of the UN Charter, particularly the principle of non-interference in the domestic affairs of other states.<sup>2</sup>

The Chinese government has tended to perceive international dispute settlement mechanisms involving independent adjudication by judges and arbitrators

as Western-dominated, which has led to an instinctive distrust of them. Submitting to such processes involves a sacrifice of control, and thus sovereignty, which China is reluctant to cede. China has not accepted the compulsory jurisdiction of the International Court of Justice (ICJ)<sup>3</sup> – although it is not alone in this (of the permanent members of the UN Security Council, or P5, only the UK currently accepts the compulsory jurisdiction of the court).<sup>4</sup> Nor has China consented to the individual or interstate communication procedures of any of the UN human rights treaty bodies (of the other P5 members, France, Russia and the UK have accepted some; the US none). While China was actively involved in the negotiation of the Rome Statute establishing the International Criminal Court (ICC) in 1998, it was one of only seven states (including the US) that voted against the establishment of the court.

But in the last 10 years, there has been a discernible shift in China's language about international law generally. In October 2014, the Fourth Plenum of the CPC placed the 'rule of law' (法治) at the top of its agenda, accompanied by a call for China to take a greater role in shaping the norms that underpin the international legal order. Since this time, China has been investing heavily in building up its expertise in pursuit of this new agenda.<sup>5</sup> This has included creating new government decision-making machinery designed to promote compliance with international law, training large numbers of international lawyers, and setting up an international law advisory committee for the Ministry of Foreign Affairs (MFA).<sup>6</sup>

Despite a ban since 2015 on textbooks promoting Western values, many Chinese international lawyers (including some from the MFA) spend time studying international law at Western universities, their courses often funded by the Chinese government. The numbers of Chinese students doing master's degrees or doctorates in international law, both in China and overseas, are swelling. There is growing interest among members of the Chinese international law community in engagement with their counterparts outside China, including through sharing platforms and running joint projects. As will be seen, 'upskilling' has an important role to play in determining the extent to which China participates in international dispute settlement.

<sup>1</sup> Article 2(3) of the UN Charter.

<sup>2</sup> Article 2(7) of the UN Charter.

<sup>3</sup> This does not prevent China from agreeing to ICJ jurisdiction in specific cases.

<sup>4</sup> France withdrew its consent to the compulsory jurisdiction of the ICJ following the *Nuclear Tests* cases of 1974. The US withdrew its consent to the compulsory jurisdiction of the court while the *Nicaragua v US* case was before the court in 1984.

<sup>5</sup> Royal Institute of International Affairs (2016), 'Exploring Public International Law and the Rights of Individuals with Chinese Scholars – Part 3', International Law Programme Roundtable Meeting Summary, p.1. The summary covers an event held in Geneva on 5–6 March 2016. See <https://www.chathamhouse.org/event/chinese-approaches-public-international-law-and-rights-individuals-part-three> (accessed 27 Feb. 2017).

<sup>6</sup> *Ibid.*

This briefing paper provides an overview of China's approach to international dispute settlement. It draws on discussions held under the Chatham House Rule at a roundtable involving Chinese and non-Chinese international law experts in Beijing in November 2016 (the 'Beijing Roundtable');<sup>7</sup> discussions with experts within and outside China; and a literature review.<sup>8</sup> The paper identifies a general and gradual shift in recent years from outright rejection of legal methods of international dispute settlement towards greater acceptance of it in certain contexts. The paper considers in particular China's approach to international dispute settlement in the context of (a) maritime affairs and (b) trade and investment, two areas in which China has adopted quite different approaches in practice. It then seeks to account for these differences, and to explore the implications for policymakers, businesses and civil society.

It should be noted that the main focus of this paper is the settlement of disputes between states, rather than disputes between states and private parties, although the analysis will touch upon the latter. The paper does not purport to be a comprehensive survey of China's approach to international dispute settlement, and focuses principally on issues discussed at the roundtable in November 2016.

## China's general attitude to international dispute settlement

As a general rule, China considers that states should be able to choose the means of settling a dispute, rather than disputes being subject to compulsory adjudication by an international court. China considers negotiation and conciliation to be the appropriate means for settling disputes involving its 'core interests' (核心利益), which include issues of sovereignty and territorial integrity.<sup>9</sup>

In most cases, when China enters into a treaty, it will opt out of any provisions referring disputes under the treaty to international courts or tribunals. For example, in ratifying the International Convention on the Elimination of All Forms of Racial Discrimination 1965 and the Convention on the Elimination of Discrimination against Women

1979, China submitted reservations that precluded the application both of the interstate dispute resolution provisions involving arbitration and of referrals to the ICJ.

At the Beijing Roundtable, it was observed by some Chinese participants that China's wariness of international dispute resolution is partly informed by Chinese culture and tradition, which is more inclined towards discussion (and thus negotiation) than towards the confrontation involved in litigation. But China's attitude is also informed by its lack of experience and expertise in interstate litigation. China's legal profession has only developed relatively recently, and there are linguistic and technical barriers to engagement in international litigation for domestic Chinese lawyers. The fact that many Western states have long engaged with international tribunals, whereas China has not, has led to a sense in China that international dispute settlement is 'foreign made', and as such does not always offer a level playing field.

## Resolution of maritime boundary disputes in the South China Sea

China's approach to the recent arbitration proceedings on China's claims in the South China Sea offers one litmus test for its approach to international dispute settlement. The South China Sea is abutted by eight states and is of huge strategic and commercial importance – handling roughly half of the world's daily merchant shipping, a third of global oil shipping, and 12 per cent of the world's total fish catch.

In January 2013, the Philippines challenged China's assertion of rights in the South China Sea, in a claim brought under the UN Convention on the Law of the Sea (UNCLOS).<sup>10</sup> On 7 December 2014, the Chinese government published a position paper maintaining that the arbitration tribunal constituted under Annex VII of UNCLOS had no jurisdiction to hear the case.<sup>11</sup> The government pointed to an official declaration of 2006, which stated that China accepted no compulsory settlement procedures provided by UNCLOS in relation to territorial sovereignty and maritime delimitation.<sup>12</sup> The declaration also emphasized the government's belief that 'negotiations is [sic] always

<sup>7</sup> Roundtable co-hosted by the International Law Programme and Asia Programme of Chatham House and the Chinese University of Political Science and Law (CUPL), held at CUPL on 26–27 November 2016. This meeting followed on from earlier roundtables co-hosted by Chatham House and CUPL, as part of Chatham House's work on China and international law.

<sup>8</sup> For details, see <https://www.chathamhouse.org/about/structure/international-law-programme/china-future-of-international-legal-order-project>.

<sup>9</sup> See Zeng, J., Xiao, Y. and Breslin, S. (2015), 'Securing China's core interests: the state of the debate in China', in *International Affairs*, 91(2), pp. 245–66.

<sup>10</sup> *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*.

<sup>11</sup> Ministry of Foreign Affairs of the People's Republic of China (2014), 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' ('Position Paper'), 7 December 2014, [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) (accessed 27 Feb. 2017).

<sup>12</sup> Declaration of 25 August 2006 under article of 298 UNCLOS, [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Chinaafter ratification](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Chinaafter ratification) (accessed 27 Feb. 2017).

the most direct, effective and universally used means for peaceful settlement of international disputes'.<sup>13</sup> Under UNCLOS, compulsory dispute settlement before an international court or arbitral tribunal can only be sought after other procedures, including bilateral negotiations, have been exhausted. China maintains that this has not yet occurred.<sup>14</sup>

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China's refusal to appear before the tribunal was consistent with the traditional Chinese approach to boundary disputes. The Qing-dynasty government rejected Portugal's request to refer Macau-related boundary disputes to the Permanent Court of Arbitration in 1909; the Republic of China refused to appear before the Permanent Court of International Justice in 1926 in relation to a dispute arising from China's denunciation of the Treaty of Amity with Belgium; and in the 1960s, the People's Republic of China rejected an Indian proposal to resolve Sino-Indian boundary disputes through an international tribunal.<sup>15</sup>

In October 2015, the tribunal held that it did have jurisdiction to rule on some of the claims brought by the Philippines, on the basis that they were not covered by China's exclusion of sovereignty and delimitation disputes. In July 2016, the tribunal unanimously found that China's claims of historical rights to the region were ill-founded and contrary to international law. The tribunal's decisions were vehemently rejected by the Chinese government.<sup>16</sup> The case seemed to confirm suspicions expressed by some of China's most senior international lawyers that too often international courts adopt an overly expansive approach to jurisdiction, and that they have a tendency to stray beyond their remit in seeking to make the law, rather than simply interpret it.

The tribunal's decision also gave China a common grievance with Russia, which had itself rejected the decision of an arbitral tribunal appointed under Annex VII of UNCLOS in the *Arctic Sunrise (Netherlands v. Russia)* case of 2014.<sup>17</sup> That case concerned Russia's arrest of 28 activists for protesting aboard Gazprom's drilling platform, and Russia's seizure of the ship itself, the *Arctic Sunrise*. The Netherlands instituted arbitration proceedings before a tribunal established under Annex VII of UNCLOS. Russia refused to accept that the tribunal had jurisdiction. Russia also rejected the tribunal's decision on the substantive arguments in the case, after the tribunal ruled that Russia had breached UNCLOS (although ultimately Russia did comply with the court's decision, releasing the activists and the ship some time after the award). In June 2016, shortly before the decision in the *South China Sea* case, the Russian and Chinese governments issued a common Declaration on the Promotion of International Law.<sup>18</sup> This set out their joint interpretation of the overarching framework of international law. The Declaration emphasizes the principles of sovereign equality, non-intervention, and that 'all dispute settlement means and mechanisms [should be] based on consent'.

China's hostile reaction to the *South China Sea* proceedings and refusal to participate in the arbitration have led to concerns that the Chinese government is seeking to undermine the rules-based international order. The reality is somewhat more nuanced. Some within China's growing international law community argued that China should participate in the arbitration,<sup>19</sup> not least to enable China to do full justice to its legal arguments, rather than shouting from the sidelines. This argument was lost, but it is nonetheless significant that China's concerns have been articulated from within the UNCLOS system rather than from outside it (contrary to the US, which is not a party to UNCLOS). In issuing a position paper, China attempted to engage in the debate, albeit outside the formal proceedings; the tribunal treated the position paper as effectively an unofficial pleading. This novel form of 'non-participatory participation'<sup>20</sup> has been described within the Chinese government as an 'experiment', and should be seen in

<sup>13</sup> Position Paper above, para 87.

<sup>14</sup> *Ibid.*, paras 45–48.

<sup>15</sup> Hsieh, P. (2010), 'China's Development of International Economic Law and WTO Legal Capacity Building', *Journal of International Economic Law*, 13(4), p. 997, p. 1001.

<sup>16</sup> Ministry of Foreign Affairs of the People's Republic of China (2016), 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines', 12 July 2016, [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1379492.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml) (accessed 27 Feb. 2017).

<sup>17</sup> *Netherlands v. Russia*, Case 2014-02, Permanent Court of Arbitration.

<sup>18</sup> The Ministry of Foreign Affairs of the Russian Federation (2016), 'The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law', 25 June 2016, [http://www.mid.ru/en/foreign\\_policy/position\\_word\\_order/-/asset\\_publisher/6S4RuXfeYlKr/content/id/2331698](http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698) (accessed 27 Feb. 2017).

<sup>19</sup> See further, Sceats, S. (2016), 'China's Fury Over South China Sea Belies Its Legal Insecurities', Chatham House Expert Comment, 4 July 2016, <https://www.chathamhouse.org/expert/comment/chinas-fury-over-south-china-sea-belies-its-legal-insecurities> (accessed 27 Feb. 2017).

<sup>20</sup> Muller, W. (2015), 'A Return to the Rule of Law in the South China Sea?', Chatham House Expert Comment, 11 November 2015, <https://www.chathamhouse.org/expert/comment/return-rule-law-south-china-sea> (accessed 27 Feb. 2017).

the context of a strategic ambition on the part of China to develop a greater mastery of international law.<sup>21</sup>

In its recent white paper on 'China's Policies on Asia-Pacific Security Cooperation', China reaffirmed its commitment to UNCLOS, while reiterating that 'for disputes over territories and maritime rights and interests, the sovereign states directly involved should ... seek a peaceful solution through negotiation and consultation'.<sup>22</sup> Although China vociferously objected to the tribunal's award in the *South China Sea* case, it is perhaps significant that references to the 'nine-dash line' (the basis of China's territorial claims in the South China Sea) have been omitted in recent documents, including the white paper mentioned above. The decision may yet prove relevant to negotiations on this issue between China and the Philippines under President Rodrigo Duterte, and to the interests of other states bordering the South China Sea, such as Indonesia, Malaysia and Vietnam, lending them a bargaining chip in an otherwise asymmetric power dynamic.

**Despite China's strong rebuff of the award in the *South China Sea* case, discussions with Chinese experts suggest that the case is likely to have further galvanized the Chinese government's investment in international law, to enable it to use the law for its own strategic advantage in the future.**

In any event, China's approach to the settlement of international maritime disputes needs to be evaluated from a broader perspective than simply the South China Sea issue. We know from Chinese experts that in the *South China Sea* case, one background issue that played into China's refusal to engage in litigation with the Philippines (which was represented by leading Western international lawyers) was a lack of experience before international courts and tribunals. China has been rapidly building up its capacity and expertise in relation to maritime disputes over the past decade. It has developed large centres of excellence in leading universities (such as the Center for Oceans Law and Policy at Shanghai Jiao Tong University, and the Institute of the Law of the Sea at the Ocean University of China in Qingdao) and state-affiliated think-tanks (such as the China Institute for Marine Affairs and the National

Institute for South China Sea Studies). China's confidence in the law governing international maritime disputes is growing in proportion to this increase in analytical capacity. While China did not participate in the *South China Sea* litigation, it did engage in subtle outreach by encouraging academics to write on the topic, as part of a 'soft power' drive to influence the development of the law in this area.<sup>23</sup> Despite China's strong rebuff of the award in the *South China Sea* case, discussions with Chinese experts suggest that the case is likely to have further galvanized the Chinese government's investment in international law, to enable it to use the law for its own strategic advantage in the future.

China has also started to play a more active role before maritime tribunals in other contexts. In 2010, China made both written and oral representations in the first advisory proceedings of the ITLOS Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS), which concerned the extent of state liability when state-sponsored contractors cause damage to the sea floor.<sup>24</sup> In 2014, China submitted a substantial written statement to ITLOS on whether ITLOS had the competence to issue an advisory opinion requested by a fisheries body in relation to fishing compliance by third-state vessels within a coastal exclusive economic zone.<sup>25</sup> In these cases, China was not itself being taken to court, so it was able to give its views without risking a contrary decision against itself. Furthermore, the intervention in 2010 related to the dispute settlement regime for deep-sea mining, an area in which China has a strong economic interest. Discussions with Chinese experts suggest that the fact that this is a relatively new area of international law for all states (compared to areas such as maritime delimitation, in which some states have historically had greater experience of litigating than China) may also be relevant to China's confidence in asserting itself in this context.

## Resolution of China's trade and investment disputes

China's approach to interstate disputes over trade is significantly different to the approach described above in relation to the South China Sea. When China joined the World Trade Organization (WTO) in 2001, it was resistant to the idea of accepting the WTO's compulsory

<sup>21</sup> See further, Sceats (2016), 'China's Fury Over South China Sea Belies Its Legal Insecurities'.

<sup>22</sup> State Council of the People's Republic of China (2017), 'Full Text: China's Policies on Asia-Pacific Security Cooperation', white paper, Part I, 11 January 2017, [http://english.gov.cn/archive/white\\_paper/2017/01/11/content\\_281475539078636.htm](http://english.gov.cn/archive/white_paper/2017/01/11/content_281475539078636.htm) (accessed 27 Feb. 2017).

<sup>23</sup> See Tiezzi, S. (2014), 'China's Academic Battle for the South China Sea', *The Diplomat*, 25 February 2014, <http://thediplomat.com/2014/02/chinas-academic-battle-for-the-south-china-sea> (accessed 1 Mar. 2017).

<sup>24</sup> ITLOS Case no. 17, Written Statement of the PRC, 'Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)', 18 August 2010, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/Statement\\_China.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_China.pdf) (accessed 17 Mar. 2017).

<sup>25</sup> ITLOS Case no. 21, Written Statement of the PRC, 'Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)', 26 November 2013, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/written\\_statements\\_round1/C21\\_8\\_China\\_orig\\_Eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_8_China_orig_Eng.pdf) (accessed 17 Mar. 2017).

dispute settlement system, but was required to do so as a condition of membership. Over time, China has developed trust in the WTO system, perceiving it as a genuinely level playing field in which it can succeed, and strongly asserting itself in disputes threatening its core economic and ideological interests. In fact, the WTO dispute resolution system makes stronger compulsory provision than the UNCLOS system, which, as noted above, is subject to the ability of states parties to opt out of defined categories of dispute settlement<sup>26</sup> and allows avoidance by agreement.<sup>27</sup>

Since China became a WTO member, it has been a respondent in 39 disputes (the third-highest number of all 164 members), and has initiated 15 cases itself (putting China in the top 10 initiators of cases before the WTO). China has also been active as a third party, intervening in 136 cases.<sup>28</sup> China is one of only two states, with the US, to have a de facto permanent member on the Appellate Body, which functions as an international court. Chinese judge Zhang Yuejiao, who retired in November 2016 after serving an eight-year term, was also the chair of the WTO Appellate Body. Where China has lost cases before the WTO, it has cooperated at each stage of the proceedings and generally has a good record of compliance.<sup>29</sup>

China's very different approaches to international dispute settlement can be explained by a number of factors. In the realm of trade, governments that wish to sustain and promote open markets and free flows of investment have self-interested incentives to act responsibly. They are therefore prepared to sacrifice some autonomy for improved collective returns. WTO membership has been a major factor in both China's economic growth and its domestic reform. China has revised over 3,000 laws at central government level, and many more at local level, in order to bring its legal system into compliance with WTO standards.

Further, the resolution of interstate trade disputes does not directly involve 'core interests' of sovereignty as politically charged as those implicated in the South China Sea dispute. As a Chinese participant observed at a roundtable in Geneva in March 2016 when seeking to explain the different attitudes in China towards

the WTO and UNCLOS dispute settlement processes, '... trade issues are not that sensitive; you may gain or lose it's a balance. If you lose on territory, you do not gain something'.<sup>30</sup> Defeat at the WTO does not result in the same loss of face, political legitimacy or even territory that is at stake in disputes over territorial sovereignty. One reason for this is that the WTO mechanism offers a particularly flexible form of international dispute settlement, comprising a hybrid of litigation and arbitration. There is also a sense that, to a greater extent than with other forms of international adjudication, states are not compelled to comply with WTO decisions: decisions can be negotiated and a state can, in the last resort, accept retaliatory measures. As Geraldo Vidigal has argued, 'the perception that in the WTO non-compliance is part of the rules, rather than a violation of the rules, creates an atmosphere in which states, even great powers, are happy to accept to lose some battles and to continue to play the game'.<sup>31</sup>

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Whereas China lacks confidence in relation to interstate litigation before international tribunals generally, and has tended to perceive an uneven playing field as a result, discussions at the Beijing Roundtable suggested that the picture before the WTO dispute settlement mechanism is very different. Since joining the WTO in 2001, China has invested heavily in improving its skills in all aspects of WTO law, including organizing government-sponsored legal training from American and Japanese practitioners with expertise in WTO disputes. In its first dispute as a complainant, the Chinese government relied predominantly on foreign law firms, but it has increasingly brought domestic lawyers on board. Now China itself is training other developing states, such as Vietnam, in WTO participation.

<sup>26</sup> Article 298 of UNCLOS.

<sup>27</sup> Articles 282 ff. of UNCLOS.

<sup>28</sup> WTO (undated), 'China and the WTO', Member Information, [https://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/china_e.htm) (accessed 6 Mar. 2017).

<sup>29</sup> Ji, W. and Huang, C. (2011), 'China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective', *Journal of World Trade*, 1, p. 31; Nathan, A. (2016), 'China's Rise and International Regimes: Does China Seek to Overthrow Global Norms?', in Ross, R. and Bekkevold, J. (eds) (2016), *China in the Era of Xi Jinping: Domestic and Foreign Policy Challenges*, Washington, DC: Georgetown University Press, p. 165, p. 178.

<sup>30</sup> Royal Institute of International Affairs (2016), 'Exploring Public International Law and the Rights of Individuals with Chinese Scholars – Part 3', p. 5.

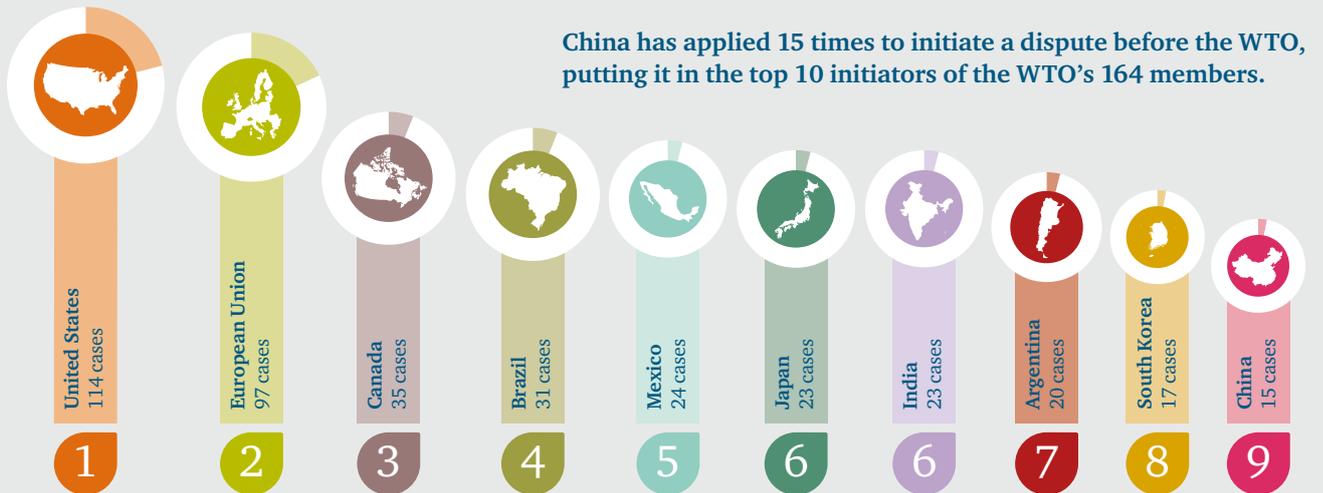
<sup>31</sup> Comments from Geraldo Vidigal in response to Akande, D. (2015), 'China's View of International Litigation: Is the WTO Special?', EJIL Talk! blogpost, 13 November 2015, <http://www.ejiltalk.org/chinas-view-of-international-litigation-is-the-wto-special> (accessed 27 Feb. 2017).

# China and WTO dispute settlement

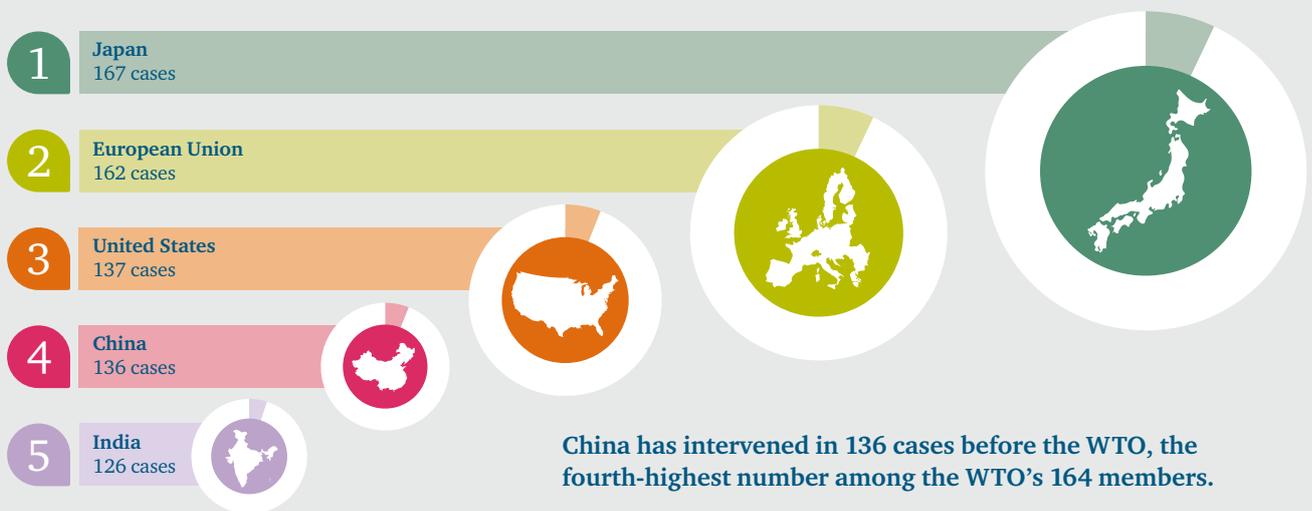
## Top 5 respondents



## Top 10 initiators



## Top 5 third-party interveners



Source: World Trade Organization.

Figures correct as of 16 March 2017.

### *Foreign investment law*

There has also been a gradual shift in China's attitude to international dispute settlement in the context of international investment law. International investment agreements promote and protect investments made by the individuals and private companies of one state in another state. The main mechanism for the settlement of disputes between investors and states under such agreements is referral of the dispute to international arbitration (known as investor–state dispute settlement). Arbitration typically consists of a three-person panel operating under rules that are often modelled on the arbitration rules of the UN Commission on International Trade Law (UNCITRAL).

Bilateral investment treaties (BITs) are one of the main types of international investment agreement. China has one of the most extensive networks of BITs, totalling around 130 and second only to Germany in number.<sup>32</sup> The majority of China's 'first-generation' BITs and free-trade agreements (FTAs) did not permit disputes to be brought before an international arbitral tribunal. But since China's BIT with Barbados in 1998, China has concluded a new generation of BITs, which provide investors with recourse to international arbitration for a wide range of disputes with states.<sup>33</sup> China is now on the receiving end of its first arbitration claim by an investor to come before a tribunal, in a case filed against the People's Republic of China (PRC).<sup>34</sup> With investors becoming increasingly aware of the protection potentially available under investment treaties, investment claims against China are likely to become more frequent.<sup>35</sup>

This shift towards acceptance of investor–state dispute settlement coincides with China's general strategy of opening up to free trade, and some have argued that it was designed to instil confidence in investors.<sup>36</sup> Others have posited that the Chinese government's inclusion of investor–state dispute settlement provisions in the BITs that it concludes with small developing countries is an experiment, to test whether to agree to investor–state arbitration in BIT negotiations with developed states such as the US and Canada, which insist upon recourse to arbitration in the event of a dispute.<sup>37</sup>

China has also agreed to the referral of state-to-state disputes to international arbitration, both in its BITs

(where the dispute concerns the interpretation or application of the treaty)<sup>38</sup> and in certain circumstances in its most recent bilateral FTAs. For example, the dispute settlement chapter of the China–Switzerland FTA (2013) provides that interstate disputes whose subject matter falls within the scope of both the agreement and the parties' WTO obligations can be settled either before the WTO or by arbitration.<sup>39</sup> To date, states parties to FTAs with such provisions have tended to use the WTO dispute mechanism. But where the subject matter of the dispute falls outside the scope of WTO obligations, as is increasingly the case, the main mechanism will be arbitration.

China is also a major player in the ongoing negotiations on the Regional Comprehensive Economic Partnership (RCEP), a 'mega-regional' trade deal between 16 states (ASEAN member states plus the six states that have existing trade agreements with ASEAN). The scope of the RCEP goes beyond trade in goods and services, covering also investment, competition, intellectual property rights, and other areas of economic and technical cooperation. The text of the RCEP is still being negotiated, but there have been suggestions that disputes between investors and states will be subject to resolution through investor–state dispute settlement, including arbitration via the International Centre for Settlement of Investment Disputes (ICSID) or UNCITRAL.

China has also agreed to arbitration clauses in the agreement between Russia, China, South Africa, India and Brazil that established the New Development Bank,<sup>40</sup> and in the agreement founding the Asian Investment and Infrastructure Bank (AIIB).<sup>41</sup> We know from discussions at the Beijing Roundtable that China is carefully considering options for international dispute settlement mechanisms – whether bilateral or multilateral – in the context of its 'Belt and Road Initiative'.

### How far does China's shift in attitude extend?

There is some evidence that China's increased acceptance of, and assertiveness before, international courts and tribunals extends beyond trade and investment, to other areas in which its core interests are engaged. China has

<sup>32</sup> See <http://investmentpolicyhub.unctad.org> for a full list.

<sup>33</sup> See, for example, Article 9 of the China–Barbados BIT, signed 20 July 1998, which entered into force on 1 October 1999.

<sup>34</sup> *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25.

<sup>35</sup> See Fei, J., Furlong, T. and Horrigan, B. (2014), 'China sued by South Korean property developer at ICSID', Herbert Smith Freehills Arbitration Notes, 10 November 2014, <http://hsfnotes.com/arbitration/2014/11/10/china-sued-by-south-korean-property-developer-at-icsid> (accessed 9 Mar. 2017).

<sup>36</sup> See Irwin, A. (2014), 'Crossing the Ocean by Feeling for the BITs: Investor-State Arbitration in China's Bilateral Investment Treaties', GEGI Working Paper 3, p. 5.

<sup>37</sup> *Ibid.*, pp. 19–20.

<sup>38</sup> See, for example, Article 8 of the China–Colombia BIT, signed on 22 November 2008, entered into force 2 July 2013.

<sup>39</sup> Free Trade Agreement between the People's Republic of China and the Swiss Confederation, signed on 6 July 2013, entered into force on 1 July 2014.

<sup>40</sup> Article 46 of the Agreement for a New Development Bank, signed on 15 July 2014, entered into force in July 2015.

<sup>41</sup> Article 55 of the Agreement on the AIIB, signed on 29 June 2015, entered into force on 25 December 2015.

never been a party to a case before the ICJ. But in 2009, and for the first time, it made both written and oral submissions in the proceedings regarding the *Kosovo Advisory Opinion*.<sup>42</sup> The case concerned the competing interests of the territorial integrity of a state and a minority group's wish for independence under the principle of self-determination. These are, of course, issues that China faces in relation to Tibet and Xinjiang, which each have secessionist movements. The case allowed China to support its own interests before the court without having the risk of an adverse decision being made against it.

Beyond dispute resolution, China has also been prepared to support international criminal courts and tribunals where these are part of multilateral efforts to combat international crime. Despite voting against the establishment of the ICC, China has not explicitly ruled out becoming a party to the ICC Statute,<sup>43</sup> and in 2011 it acquiesced in the UN Security Council's referral of the situation in Libya to the ICC. China also voted in favour of the creation by the UN Security Council of the International Criminal Tribunal for the former Yugoslavia (ICTY), and Chinese nationals have served as judges and prosecutors at the ICTY. In a UN Security Council debate in 2012, China voted in favour of an international court to prosecute piracy. Again, China has a significant vested interest here, as Chinese vessels continue to be harassed by piracy. As piracy constitutes a global threat, an orchestrated international effort is required to tackle it. Conversations with the Chinese government suggest that it is precisely in relation to such global challenges, and newer areas of international law – such as the regimes governing climate change, cybersecurity and transnational crime – that Beijing will increasingly look to assert itself.

It is clear from discussions at the Beijing Roundtable that the Chinese government is actively pondering the forms that its participation in international courts and tribunals might take, a subject on which it held an internal conference in October 2016. China is also increasing its legal outreach and engagement with other states as part of its efforts to consolidate its understanding of international rules and their application in practice. While there have been connections between the UK and Chinese legal academic communities for some time (Chinese lawyers have studied in the UK, and several leading UK-based public international lawyers have taught at China's Xiamen Academy), this

cooperation is on the increase. In addition, the Great Britain-China Centre and the China Law Society recently agreed a comprehensive programme of cooperation on legal and judicial issues in the context of discussions on the Belt and Road Initiative.<sup>44</sup> The UK Supreme Court and Supreme People's Court of China host annual judicial roundtable meetings. This international dialogue and cooperation is likely to reinforce the trend of greater Chinese participation in international dispute settlement bodies, where such participation falls within China's strategic objectives.

### **It is clear that China's attitude towards international dispute settlement – like that of many Asian states generally – is evolving towards greater acceptance and engagement.**

It is important to keep this shift in China's attitude to international dispute settlement in perspective: the WTO remains the only international dispute settlement mechanism with compulsory jurisdiction in which China has participated, and it is the only dispute settlement mechanism under which China has actually brought a case. While China has had to agree in principle to the dispute settlement framework of UNCLOS as a party to that treaty, it has availed itself of all possible opt-outs. China's increasing acceptance of ad hoc arbitration is not quite the same as accepting the jurisdiction of a permanent international court. As matters currently stand, the number of disputes involving China as a party before international courts, and China's use of strategic litigation to further its own interests, will necessarily be limited. But in certain important contexts at least, it is clear that China's attitude towards international dispute settlement – like that of many Asian states generally<sup>45</sup> – is evolving towards greater acceptance and engagement.

### **What accounts for the change in attitude?**

There are a number of catalysts for this gradual shift in attitude. China needs to attract foreign direct investment, and to trade globally, in order to achieve sustainable economic growth. Growth is necessary to sustain China's huge population, and to support government plans to boost the country's less developed rural and inland regions.

<sup>42</sup> 'Accordance with International Law Of The Unilateral Declaration Of Independence In Respect Of Kosovo', Advisory Opinion, ICJ Reports 2010, p. 403. China's written statement of 16 April 2009 is available at <http://www.icj-cij.org/docket/files/141/15611.pdf> (accessed 27 Feb. 2017).

<sup>43</sup> See Royal Institute of International Affairs (2014), 'Exploring Public International Law and the Rights of Individuals with Chinese Scholars, Part II', International Law Programme Roundtable Meeting Summary, p. 8, [https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/23711%20Meeting%20summary%20Roundtable%2020-%20proof.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/23711%20Meeting%20summary%20Roundtable%2020-%20proof.pdf) (accessed 17 Mar. 2017). The summary covers a roundtable held in Beijing on 14–15 November 2014.

<sup>44</sup> See speech of Lord Keen of Elie QC at UK-China Rule of Law Roundtable on 24 November 2016, <https://www.gov.uk/government/speeches/uk-china-legal-cooperation-along-the-belt-and-road> (accessed 27 Feb. 2017).

<sup>45</sup> See Chesterton, S. (2016), 'Asia's Ambivalence about International Law & Institutions: Past, Present and Futures', *European Journal of International Law*, 24(4), pp. 945–78.

To attract investment in Chinese projects – whether located in China or abroad – China needs to be able to offer businesses a stable operating environment. This requires certainty as to what the law is; access to justice to enforce the law; and a fair hearing before an independent judiciary. The need for governance by rule of law applies equally to China's relations with other states as it does to the Chinese domestic system. In the context of the Belt and Road Initiative, for example, if China is to leverage networks with other states, it needs to create a predictable legal regime that gives states, businesses and individuals the confidence to work together. In the longer term, the interests of business may even play into the Chinese government's assessment of how to resolve the politically charged territorial disputes in the South China Sea, since businesses need regional stability and clarity of maritime boundaries and shipping routes for their own investment purposes.<sup>46</sup>

Another driver of China's evolving attitude to international adjudication is its sense of identity amidst fundamental changes in international relations. Globalization and successful economic development have made China more confident about itself on the international stage. The election of President Donald Trump in the US, with his nationalist and protectionist agenda, opens up more space for China on that stage.<sup>47</sup> There is also a sense that China is settling into its role as a 'great power',<sup>48</sup> and becoming a more active global citizen. It is prepared to uphold and even promote international norms, where the interests of the global order coincide with its own.

China is more actively involved in UN institutions than ever before. Faced with environmental difficulties on its own doorstep, China's attitude to climate change has shifted. It has signed up to the Paris Agreement under the UN Framework Convention on Climate Change (UNFCCC), with President Xi Jinping hailing the deal as a hard-won agreement to which all signatories should adhere.<sup>49</sup> As well as defending the status quo, China is attempting to shape global governance. For example, China's creation of the AIIB, a multilateral financial institution with 57 states as members, was born of a frustration with aspects of the IMF and World Bank's governance of the international economic system. China's increased engagement in international adjudication in certain contexts thus fits into a pattern of greater assertiveness in global governance generally.

### Is there room to influence China in its new behaviour?

Some disputes will be more amenable to resolution through international courts and tribunals than others. Some may be more suited to flexible arrangements akin to the WTO system, rather than binding court decisions. Whatever the mechanism, in both the maritime and trade examples cited in this paper, much is at stake. While territorial rivalry in the South China Sea may seem the bigger threat to peace and security, a full-scale trade war would also generate dangerous geopolitical ripples.

It is far better that sensitive disputes, such as the recent controversy over China's non-market economy status at the WTO, are thrashed out before independent WTO panels (China brought a complaint in December 2016) than through inflammatory rhetoric and reprisals from outside the system.<sup>50</sup> The shifts identified in this paper suggest an increasing acceptance by China that its push for economic cooperation and globalization should take place within the international rule of law. China's membership of international institutions such as the WTO has also strengthened its own government institutions and legal system, as well as bolstering the wider international legal order.<sup>51</sup> It is in the international community's strong interests that this continue, especially at a time when multilateralism looks vulnerable and nationalism is on the rise.

To encourage China and other states to submit to international courts and tribunals, those courts and tribunals must be perceived as legitimate and capable of offering states a level playing field. South Africa and two other African states have recently attempted to withdraw from the ICC, following criticism of South Africa for ignoring the court's order to arrest Sudanese President Omar al-Bashir during a visit to the country, and amid allegations of institutional bias against Africa and its leaders. While the ICC is of course an international criminal tribunal rather than an international dispute mechanism, the attempted withdrawals show how damaging perceptions of illegitimacy and bias can be for any international court, even if there are valid arguments against those allegations. International dispute mechanisms also need to be

<sup>46</sup> For analysis on the benefits of UNCLOS for Beijing, see Hayton, B. (2015), 'Is China Moving Towards Compromise in the South China Sea?', Chatham House Expert Comment, 31 October 2015, <https://www.chathamhouse.org/expert/comment/china-moving-towards-compromise-south-china-sea> (accessed 27 Feb. 2017).

<sup>47</sup> Sceats, S. (2017), 'Trump Isolationism could help China become a Leader in International Law', Chatham House Expert Comment, 19 January 2017, <https://www.chathamhouse.org/expert/comment/trumpian-isolationism-could-help-china-become-leader-international-law> (accessed 27 Feb. 2017).

<sup>48</sup> See Zeng, J. and Breslin, S. (2016), 'China's "new type of Great Power relations": a G2 with Chinese characteristics?', *International Affairs*, 92(4), p. 793.

<sup>49</sup> Speech at the World Economic Forum in Davos, 17 January 2017, <https://www.weforum.org/agenda/2017/01/full-text-of-xi-jinping-keynote-at-the-world-economic-forum> (accessed 27 Feb. 2017).

<sup>50</sup> Muller, W. (2017), 'China and the WTO: How US Unpredictability Jeopardizes a Decade and a Half of Success', Chatham House Expert Comment, 7 March 2017, <https://www.chathamhouse.org/expert/comment/china-and-wto-how-us-unpredictability-jeopardizes-decade-and-half-success> (accessed 14 Mar. 2017).

<sup>51</sup> Ibid.

adequately funded and resourced in order to function properly (not least the WTO Secretariat, which has seen the number of disputes that it handles double since 2012).<sup>52</sup>

China's perceptions of how others approach international law, including the means and mechanisms of international dispute settlement, will inevitably influence how it conducts itself. Reluctance by other WTO member states to implement adverse rulings may have an effect on future

compliance by China. It is vital that the major players abide by international law, including WTO rules; otherwise a system that has provided global stability in the context of both trade and geopolitics risks being destroyed. With President Trump hinting that he will be prepared to ignore WTO rules in his trade plans, there is an important role for Europe, including the UK, to play in pushing these arguments home through leadership by example.

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<sup>52</sup> WTO (2014), 'Azevêdo says success of WTO dispute settlement brings urgent challenges', speech by WTO Director-General Roberto Azevêdo, 26 September 2014, [https://www.wto.org/english/news\\_e/spra\\_e/spra32\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra32_e.htm) (accessed 9 Mar. 2017).

### About the author

**Harriet Moynihan** is an associate fellow in the International Law Programme at Chatham House, with particular expertise in international human rights law and international humanitarian law. Before joining Chatham House, Harriet was a legal adviser at the Foreign & Commonwealth Office (FCO), where she advised on a wide range of international law issues. Prior to that, Harriet trained and worked as an associate solicitor for Clifford Chance LLP in the firm's London and Singapore offices. During her time at the FCO, Harriet represented the UK in the Council of Europe, in cases before the European Court of Human Rights, and at bilateral and multilateral treaty negotiations.

### Acknowledgments

I am grateful to Tim Summers, Rod Wye, Wim Muller, Alice Lacourt, Elizabeth Wilmshurst and Ruma Mandal, as well as two external (peer) reviewers, for their comments on earlier drafts. I am also indebted to those experts who participated in the Beijing Roundtable in November 2016 for their valuable comments, and to CUPL as co-hosts of the roundtable.

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Cover image: A Chinese coast guard ship and a Filipino fisherman in close proximity around Scarborough Shoal in the South China Sea.  
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ISBN 978 1 78413 213 2

Typeset by Soapbox, [www.soapbox.co.uk](http://www.soapbox.co.uk)

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