

## SYMPOSIUM ON GREGORY SHAFFER, “GOVERNING THE INTERFACE OF U.S.-CHINA TRADE RELATIONS”

### MANAGING THE U.S.-CHINA RELATIONSHIP IN THREE (AND THREE ALTERNATIVE) DIMENSIONS

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Gregory Shaffer’s article discussing the legal aspects of the multifaceted U.S.-China relationship is comprehensive, pragmatic, and timely at the twentieth anniversary of China’s World Trade Organization (WTO) accession. Shaffer provides a surgical analysis of the “three central dimensions of this relationship: (i) the economic dimension; (ii) the geopolitical/national security dimension; and (iii) the normative/social policy dimension.”<sup>1</sup> He also offers a targeted roadmap to reconceptualize a world where policies are increasingly securitized and to revitalize domestic safety valves embedded in the post-war economic system.<sup>2</sup> Under Shaffer’s proposed “Rebalancing Within a Multilateral Framework,”<sup>3</sup> states enjoy more policy space and accommodation, subject to the proportionality principle and protection of third parties. Supplementing Shaffer’s analysis, I offer three alternative dimensions, namely, the perceptions of businesses, states, and international organizations and how they complicate the successful delivery of Shaffer’s proposal. I echo Shaffer’s call for empathy between the United States and China regarding their respective domestic challenges and approaches to each other. Yet I contend that adequate trust and understanding of each other and the agreement over Shaffer’s identification of interfaces/dimensions by decision-makers of the two nations are susceptible to disruptions caused by the three alternatives I offer. Furthermore, I argue that a thorough and inclusive policy and legal analysis—designed in a coordinated way (“统筹” in Chinese)—should reduce negative externalities from the management of the U.S.-China relationship and minimize impacts for developing and least developed countries.

#### *Three Alternative Dimensions*

The U.S.-China relationship is a dynamic equilibrium shaped by the logic of markets and the logic of states.<sup>4</sup> Here, I supplement Shaffer’s three dimensions—economic, geopolitical, and normative—with the interplay of the respective pursuits of businesses, states, and international organizations.

While businesses’ and states’ interests do not always align, the relationship is becoming more contentious due to domestic challenges and international pressure. In the United States, corporations are blamed for overextended

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<sup>1</sup> Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AJIL 622 (2021).

<sup>2</sup> John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982).

<sup>3</sup> Shaffer, *supra* note 1, at 623.

<sup>4</sup> See Harlan Grant Cohen, *Nations and Markets*, 23 J. INT’L ECON. L. 793 (2020).

global supply chains that have shifted manufacturing jobs to China (and developing countries mainly in the Asia-Pacific region), causing economic harms to U.S. workers and endangering national security. Already hurt by the U.S.-China trade war and the resulting tariffs, the COVID-19 pandemic has further pitted workers against corporations receiving large sums of governmental funds. Under the “worker-centered trade policy,” the United States is expected to prioritize workers’ interests and promote certain worker-friendly economic sectors such as manufacturing, green infrastructure, and technology by calling on corporations to reshore<sup>5</sup> and by increasing government investments, potentially funded by higher corporate and wealth taxes. Unbridled corporate practices have likewise been subject to discipline in China.<sup>6</sup> Determined to redress perceived unfair practices, unorderly expansion, and inequality, and to achieve “common prosperity,”<sup>7</sup> the Chinese government initiated administrative and legislative actions against corporations, seeking to protect ordinary citizens’ interests and re-exert control.<sup>8</sup> Meanwhile, selected Chinese business sectors with strategic importance such as semiconductors and artificial intelligence have been promoted. Accordingly, corporations in both countries have started to feel tightened regulatory environments.

Dynamics between established powers such as the United States, European Union, and United Kingdom can also influence how the United States and China manage their relationship. In September 2021, the United States and European Union concluded the inaugural Trade and Technology Council meeting to “coordinate approaches in key global technology, economic, and trade issues”<sup>9</sup> and, in October 2021, reached an agreement on steel and aluminum tariffs that seeks to close markets to “dirty steel.”<sup>10</sup> However, the European Union’s insistence not to treat the Trade and Technology Council as a venue against China,<sup>11</sup> despite its shared concerns with the United States over China’s trade practices, exhibits the different approaches that the European Union and United States are willing to take. Meanwhile, the United Kingdom’s unwillingness to sever economic ties with China<sup>12</sup> and desire to build a “Global Britain” may cause U.S. businesses to worry about losing the Chinese market to their UK counterparts. As the United States, European Union, and United Kingdom promote the Build Back Better Initiative as an alternative to China’s Belt and Road Initiative,<sup>13</sup> the dynamics between established powers will inevitably require more efforts in coordination and reconciliation, thus influencing U.S. policy design and execution, and impacting Shaffer’s proposal that emphasizes using bilateral and plurilateral dealings to manage the U.S.-China relationship (category 2).

<sup>5</sup> U.S. Trade Rep. Press Release, [U.S. Trade Representative Katherine Tai Outlines Biden-Harris Administration’s Historic “Worker-Centered Trade Policy”](#) (June 10, 2021). Compare with [AmCham Shanghai Releases 2021 China Business Report](#), AMCHAM SHANGHAI (Sept. 23, 2021) (finding that a third of the chamber’s members thought China’s policies would help their revenue and none would relocate production from China to the United States).

<sup>6</sup> See, e.g., Didi, Alibaba, and Meituan.

<sup>7</sup> Xi Jinping, [Zhishi Tuidong Gongtong Fuyin](#), QIUSHI (Oct. 15, 2021) (original in Chinese) (calling for enhanced anti-trust supervision and stating that common prosperity is neither egalitarianism nor welfare state but is against unbridled capital expansion).

<sup>8</sup> *Id.* (stating that common prosperity is to broaden the middle class); see also [China Deliberates Draft Amendment to Anti-monopoly Law](#), NAT’L PEOPLE’S CONGRESS (Oct. 21, 2021).

<sup>9</sup> Eur. Comm’n Press Release, [EU-US Trade and Technology Council Inaugural Joint Statement](#) (Sept. 29, 2021).

<sup>10</sup> White House Press Release, [On-the-Record Press Call by National Security Advisor Jake Sullivan, Commerce Secretary Gina Raimondo, and U.S. Trade Representative Katherine Tai on a U.S.-EU Agreement on Steel and Aluminum Tariffs](#) (Oct. 30, 2021).

<sup>11</sup> [EU Official: Trade and Tech Council Should Not Turn into an “Anti-China Exercise.”](#) WORLD TRADE ONLINE (Sept. 17, 2021).

<sup>12</sup> Kitty Donaldson, [Boris Johnson Says U.K. Doesn’t Want to Turn Away Chinese Investment](#), BLOOMBERG (Oct. 19, 2021).

<sup>13</sup> White House Press Release, [Fact Sheet: President Biden and G7 Leaders Launch Build Back Better World \(B3W\) Partnership](#) (June 12, 2021).

India, an emerging and regional power with an uneasy economic relationship with both the United States and China, can add more complications. India's protectionist stance on, inter alia, climate change, tariffs, intellectual property rights protection, data localization, and industrial policies and subsidies<sup>14</sup> has caused the United States to withdraw benefits under the Generalized System of Preferences, after which India announced retaliation.<sup>15</sup> Fearing negative impacts from China's exports, India refused to join the Belt and Road Initiative and withdrew from the Regional Comprehensive Economic Partnership at the last minute.<sup>16</sup> India is a member of the Quadrilateral Security Dialogue, an informal grouping comprised of the United States, Australia, and Japan, that was revitalized as tensions with China have risen. Nevertheless, as a developing country, India finds common ground with China against the United States at WTO on issues such as special and differential treatment, subsidies, and data regulations.<sup>17</sup> The effectiveness of Shaffer's proposal thus is impacted by the changing dynamics of the U.S.-India and India-China relationships.<sup>18</sup>

Crucially, the key element required by Shaffer's proposal—a mutual understanding of the economic, geopolitical, and normative interfaces—appears to be missing. The United States maintains that it speaks from “a position of strength” in this relationship, which is “competitive when it should be, collaborative when it can be, and adversarial when it must be,”<sup>19</sup> indicating its willingness to continue using domestic and international legal tools—inter alia, trade remedies and export control laws—to address China's actions it perceives as detrimental.<sup>20</sup> China rejects such a “competition, collaboration, and confrontation” narrative and objects to the “position of strength” statement as condescending and lacking respect.<sup>21</sup> Even understandings of China's WTO commitments differ. China characterizes questions it received during the WTO Trade Policy Review into ones that fall within China's explicit WTO commitments and those that exceed WTO requirements, such as investment and digital trade—areas that spurred tensions between the United States and China.<sup>22</sup> China considers requests that it fulfill obligations beyond its WTO requirements and commitments—involving, inter alia, investment and data regulation—to be unfair, unreasonable, and inappropriate, but has indicated a willingness to negotiate.<sup>23</sup>

Nevertheless, the WTO Trade Policy Review could solicit information needed to pacify the bilateral tension and facilitate smooth management of the U.S.-China relationship by acting as a pressure valve and a catalyst of domestic changes. For instance, the eighth Trade Policy Review on China allowed members to submit 2,562 questions,

<sup>14</sup> Shaffer, *supra* note 1.

<sup>15</sup> Nidhi Verma & Neha Dasgupta, *India to Impose Retaliatory Tariffs on 28 U.S. Goods from Sunday*, REUTERS (June 16, 2019).

<sup>16</sup> David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 64 (2016); see also Deborah K. Elms, *Getting RCEP Across the Line*, 20 WORLD TRADE REV. 373 (2021). The RCEP, effective on January 1, 2022, comprises of ten Southeast Asian countries, South Korea, China, Japan, Australia, and New Zealand, and is arguably the largest free trade agreement. *Regional Comprehensive Economic Partnership (RCEP) Agreement to Enter into Force on 1 January 2022*, RCEP (Nov. 3, 2021); *RCEP: A New Trade Agreement That Will Shape Global Economics and Politics*, RCEP.

<sup>17</sup> Jayshree Sengupta, *India & China: On the Same Side at the WTO*, OBSERVER RES. FOUND. (Aug. 1, 2017).

<sup>18</sup> Kirtika Suneja, *India Voices Concern Over US' Forced Labour Proposal Amid Subsidy Talks*, ECON. TIMES (Oct. 28, 2021).

<sup>19</sup> U.S. Dep't of State Press Release, *A Foreign Policy for the American People* (Mar. 3, 2021).

<sup>20</sup> USTR Press Release, *Remarks as Prepared for Delivery of Ambassador Katherine Tai Outlining the Biden-Harris Administration's "New Approach to the U.S.-China Trade Relationship"* (Oct. 4, 2021).

<sup>21</sup> *Vice Foreign Minister Xie Feng Meets US Deputy Secretary of State Wendy Sherman*, XINHUA NET (July 27, 2021) (original in Chinese).

<sup>22</sup> State Council Information Office of the People's Republic of China Press Release, *State Council Information Office Holds Press Briefing on the Eighth WTO TPR on China* (Oct. 27, 2021) (original in Chinese).

<sup>23</sup> *Id.*

inquiring about the Cybersecurity Law, intellectual property rights, the Dual Circulation, etc.,<sup>24</sup> which reportedly prompted over sixty Chinese departments and units, led by the Commerce Department, to respond.<sup>25</sup>

Doubts, however, exist over how seriously China currently takes the WTO,<sup>26</sup> whether the United States would accept a restored Appellate Body, and how relevant the WTO remains as members turn to other platforms such as the G20 and the Asia-Pacific Economic Cooperation for economic and trade discussions. Still, the very fact that both countries resort to the WTO for legitimacy—perhaps because no trade and investment agreement exists between them other than WTO agreements (excluding the Phase One Agreement)—indicates the significance of the WTO as an institution.

### *Recognizing Regulatory Autonomy with the WTO at the Core: Case Studies*

Shaffer offers four categories of solutions: category 1 lists redlines; category 2 encourages bilateral and plurilateral arrangements; category 3 broadens policy space in existing trade remedy rules; and category 4 subjects measures to WTO disciplines.<sup>27</sup> Defensively,<sup>28</sup> governments could justify the legitimacy of initiatives (i.e., industrial policies)<sup>29</sup> such as “Made in America” and “Dual Circulation” under WTO rules (category 1). Offensively, governments could coalesce to set new disciplines through sectoral agreements (categories 2, 3, and 4).

The WTO case of *United States—Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products* timely illustrates the potential effectiveness and shortcomings of Shaffer’s proposal to broaden safeguards to address China’s industrial policies (category 3, China’s defense and United States’ offense) and resuscitate the Appellate Body (category 4).<sup>30</sup> It also suggests challenges that partners under category 2 may pose. In that decision, the WTO panel upheld the United States’ determination of materials and critical moments in determining “unforeseen developments.”<sup>31</sup> It concurred with the United States’ conclusion that the increase in imports was the result of unforeseen developments, despite lacking direct evidence connecting China’s industrial policies to increased imports from third countries.<sup>32</sup> It accorded discretion (policy space) to the United States, upheld the United States’ causation determination,<sup>33</sup> and ultimately upheld challenged safeguard measures.<sup>34</sup> This is the first case in WTO history where a panel upheld safeguards targeting a member’s industrial policies.<sup>35</sup> The United States received a sweeping victory—the phrases “reject China’s claim” and “not persuaded by” China appeared twenty times and twenty-six times respectively in the panel report.

<sup>24</sup> Zhou Lanxu & Cheng Yu, *Dual Circulation at Heart of Economic Strategy*, STATE COUNCIL (Mar. 5, 2021) (explaining the “dual circulation” policy as “the domestic market is the mainstay of the economy, while domestic and international markets support each other”).

<sup>25</sup> State Council Information Office of the People’s Republic of China Press Release, *supra* note 22.

<sup>26</sup> Henry Gao, *China’s Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation* (Nov. 8, 2021).

<sup>27</sup> Shaffer, *supra* note 1.

<sup>28</sup> “Defensive” means justifying one’s own measures under the WTO rules. “Offensive” means extending domestic rules and practices at WTO or other rule-making fora or seeking compliance under existing rules.

<sup>29</sup> Chad P. Bown & Douglas Irwin, *Why Does Everyone Suddenly Care About Supply Chains?*, N.Y. TIMES (Oct. 14, 2021).

<sup>30</sup> Gregory Shaffer & Henry Gao, *It’s Essential to Bring Back Binding WTO Dispute Settlement*, HILL (Oct. 27, 2021).

<sup>31</sup> DS562: United States—Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, WT/DS562/R, [Report of the Panel](#), paras. 7.25–7.28 (Feb. 9, 2021).

<sup>32</sup> *Id.*, paras. 7.35–7.45.

<sup>33</sup> *Id.*, paras. 7.74–7.78.

<sup>34</sup> *Id.*

<sup>35</sup> China appealed. Ministry of Commerce of the People’s Republic of China Press Release, [Statements by China at the DSB Meeting on 27 September 2021](#) (Sept. 30, 2021).

But safeguards are controversial.<sup>36</sup> South Korea was first to challenge the same safeguards in 2018,<sup>37</sup> but the case stalled when South Korea and the United States signed the renegotiated United States–Republic of Korea Free Trade Agreement. Furthermore, for category 2 agreements on safeguards to be achieved, the United States would need to convince the European Union to abandon its disagreement with the panel report’s reasoning and the United States’ positions regarding the legality of the challenged safeguards.<sup>38</sup> The United States also needs to dissuade the European Union from treating U.S. measures imposed under national security concerns as safeguards at the WTO.<sup>39</sup> While the European Union temporarily suspended its WTO proceeding on steel,<sup>40</sup> the truce faces criticisms for violating the WTO’s most-favored-nation principle and for continuing the managed trade practice.<sup>41</sup>

The United States’ safeguards victory at and beyond the WTO, including the conclusion of the United States–Korea Free Trade Agreement and the EU-US joint statement on steel and aluminum, reflects the interplay of businesses (e.g., solar panel and steel industries), states (e.g., national security interests in energy and steel), and international organizations (WTO as the primary forum). Domestically, tariffs sought by the U.S. steel industry hurt the solar panel industry that uses steel as inputs; also, the United States’ protection of national security in energy via higher tariffs undercuts employment/workers,<sup>42</sup> undermining the very purpose of safeguards. Globally, broad safeguards targeting industrial policies by either the United States or China risk undermining cooperation required by the ambitious joint plan between the United States and China<sup>43</sup> and chilling climate change efforts as heightened tariffs constitute barriers to trade.<sup>44</sup>

Thus, I contend that the United States and China can be better off providing each other empathetic consideration as their respective trade policies (including industrial policies) are increasingly spurred by and reflect domestic policies and priorities.<sup>45</sup> For instance, China’s Dual Circulation policy can be seen as a response to Western states’ longstanding critique of China’s low domestic consumption<sup>46</sup> and the institutionalization of business decisions to turn inward when the external environment deteriorated. Similarly, the United States’ infrastructure bills, U.S.-EU steel and aluminum deal, and legislation channeling investments in cutting-edge technology reflect domestic pressure to spur economic growth, maintain the lead in high tech, protect labor rights, and fight climate change. The convergence of views of the United States and China on their governments’ role in the economy emerges: given “better play . . . to ensure better alignment between an efficient market and a well-functioning

<sup>36</sup> WTO Press Release, [Members Review Safeguard Actions, Address Increased Use of Measures](#) (Oct. 25, 2021).

<sup>37</sup> [DS545: United States—Safeguard Measures on Imports of Crystalline Silicone Photovoltaic Products](#).

<sup>38</sup> DS562: United States—Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, WT/DS562/R/Add.1, [Report of the Panel Addendum](#), Annex C-3, Integrated Executive Summary of the Arguments of the European Union (Sept. 2, 2021). Eur. Comm’n Press Release, [EU Statements at Regular Dispute Settlement Body \(DSB\) Meeting, 27 September 2021](#) (Sept. 27, 2021).

<sup>39</sup> DS548: United States—Certain Measures on Steel and Aluminium Products, WT/DS548/17, [Communication from the Panel](#) (Feb. 8, 2021).

<sup>40</sup> Eur. Comm’n Press Release, [EU and US Agree to Start Discussions on a Global Arrangement on Sustainable Steel and Aluminium and Suspend Steel and Aluminium Trade Disputes](#) (Oct. 31, 2021).

<sup>41</sup> Inu Manak & Scott Lincicome, [In Biden’s Steel Tariff Deal with Europe, Trump’s Trade Policy Lives on](#), CATO INST. (Nov. 2, 2021).

<sup>42</sup> Miranda Green, [Analysis: Trump Solar Tariffs Cost 62K US Jobs](#), HILL (Dec. 3, 2019).

<sup>43</sup> U.S. Dep’t of State Press Release, [U.S.-China Joint Glasgow Declaration on Enhancing Climate Action in the 2020s](#) (Nov. 10, 2021).

<sup>44</sup> Int’l Renewable Energy Agency, [Renewable Power Generation Costs in 2020](#) (June 2021).

<sup>45</sup> Mark Wu, [Managing the China Trade Challenge: Confronting the Limits of the WTO](#) (Penn Project on the Future of U.S.-China Relations Working Paper, Oct. 2020).

<sup>46</sup> Lingling Wei & Andrew Browne, [Pressure Grows on China to Spur Domestic Consumption](#), WALL ST. J. (Aug. 8, 2011).

government”<sup>47</sup> (China) and “a bigger role for the U.S. government in shaping what gets made where”<sup>48</sup> (United States).

To reconcile the impacts of governmental involvement, instead of securitizing economic issues (categories 1 and 3), it is better to resort to negotiations (category 2), especially through the WTO (category 4). I emphasize the WTO’s negotiation function because the WTO appears to be the platform that has the potential of engaging both the United States and China in producing binding trade instruments on a non-discriminatory basis, and the strategic use of the WTO dispute settlement mechanism adds uncertainty before a solution is finally reached. As WTO negotiations take place, China can use sectoral and regional agreements (some reflecting the United States’ interests; outcome of category 2)<sup>49</sup> to initiate domestic economic reform as China’s laws contemplate compliance with international treaties when conflicts occur.<sup>50</sup> Self-restraint and empathy that limit impulsive reactions by U.S. domestic businesses and interests could help smoothen the process.

### *Conclusion*

Both the United States and China are cognizant of the significance of their bilateral relationship, vowing not to let competition “veer into conflict.”<sup>51</sup> Whichever path they take, they will need to make tough decisions that balance domestic priorities and international realities, which would set an example for how to manage future challenges. It is in this vein that Shaffer’s article provides an invaluable framework not only for addressing the current U.S.-China relationship, but also its future.

<sup>47</sup> [Trade Policy Review Body, Report by China](#), WT/TPR/G/415, para. 5.1 (Sept. 15, 2021).

<sup>48</sup> [Bown & Irwin](#), *supra* note 29.

<sup>49</sup> See [EU-China Comprehensive Agreement on Investment](#); see also Ministry of Commerce of the People’s Republic of China Press Release, [China Officially Applies to Join CPTPP](#) (Sept. 20, 2021); Ministry of Commerce of the People’s Republic of China Press Release, [China Officially Applies to Join DEPA](#) (Nov. 1, 2021).

<sup>50</sup> See [Personal Information Protection Law](#), Art. 38 (effective Nov. 1, 2021) (stating that where international treaties provide for cross-border data transfer, international treaty requirements apply).

<sup>51</sup> Ministry of Foreign Affairs of the People’s Republic of China Press Release, [President Xi Jinping Had a Virtual Meeting with US President Joe Biden](#) (Nov. 16, 2021).