China’s Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation

Henry Gao
Singapore Management University, Singapore
E-mail: gaohenry@gmail.com

(Received 1 February 2022; accepted 1 February 2022; first published online 12 April 2022)

Abstract
Since its accession to the WTO twenty years ago, China’s image has shifted from a good student aspiring to assimilate itself into the multilateral trading system to one that is increasingly alienated from key WTO principles. How has China’s perspective on WTO been evolving? What are the reasons behind China’s changing perspective? This paper answers these questions from the Chinese perspective with a comprehensive analysis of the key moments in China’s first two decades in the WTO, followed by practical suggestions on how to engage China more constructively in the WTO and beyond.

Keywords: China; WTO; state capitalism; market economy; unilateralism; multilateralism; regionalism; accession; Belt and Road Initiative

1. Introduction
Twenty years after it became a Member of the WTO, China’s image in popular perception has shifted from the biggest success story of the world trading system to its biggest challenge. In the past few years, tons of research have been conducted on what other WTO Members should or could do to deal with the China challenge, but not much attempt has been made to understand the Chinese perspective on its WTO Membership. Focusing only on the China challenge without understanding the Chinese perspective is rather problematic as it treats China as a passive object rather than an active subject, one with significant economic and political clout in the world trading system today. This paper fills the research gap by providing the first systemic review of this important yet ignored problem, which in my view, is key to addressing the China challenge. The paper argues that the Chinese perspective on the WTO has changed from viewing it as the symbol for its aspiration to integrate into the world economy, to trying to assimilate the Chinese economic system with that of the market-based multilateral trading system, to increasing alienations with the core values of WTO in response to the attacks on its economic
system. The paper concludes with lessons drawing from China’s changing perspective, especially on how to manage the China challenge in the multilateral trading system.

2. The Aspiration: Pre-2001

While China was a founding contracting party to the GATT, it did not participate in the activities of the GATT due to the withdrawal from the GATT by the government of the Republic of China in 1950 and the subsequent Cold War. This did not change even when China resumed its seat in the United Nations in 1971, as the Chinese Ministry of Foreign Trade and Ministry of Foreign Affairs submitted a joint report advising against China’s participation in the GATT by calling it ‘a tool for the imperialists, especially American imperialists to expand foreign trade and grab world markets’.

However, China’s perspective started to change when it started its economic reform in the late 1970s. In particular, learning from the success stories of other export-oriented economies in East Asia, China tried to boost its trade and investment, and started to realize the key role played by the GATT in the facilitation of international trade. In a joint report submitted to the State Council in 1982, the Ministry of Foreign Economic Relations and Trade (MOFERT), Ministry of Foreign Affairs, State Economic Commission, Ministry of Finance, and General Customs Administration noted that China’s foreign trade was rapidly developing with the adoption of the reform and opening up policy, and trade with members of the GATT already constituted 80% of its overall trade. Thus, they suggested China participate in the GATT and enjoy the most favored nation (MFN) tariffs. After learning more about the GATT over the next few years, China formally submitted an application to resume its status as a GATT contracting party on 10 July 1986.

In its Memorandum on China’s Foreign Trade Regime submitted in February 1987, China stated that the ‘objective of the reform is to establish a new system of a planned commodity economy of Chinese style.’ The strange term ‘planned commodity economy’ is essentially just a euphemism for ‘market economy’, disguised in such a way so as to overcome the ideological oppositions from Party hardliners. The shift to market economy was only officially confirmed in 1992, when the Fourteenth National Congress of the Communist Party adopted a Resolution to make ‘Socialist Market Economy’ the goal of the reform, which was subsequently incorporated into the People’s Republic of China (PRC) Constitution in 1993.

---

3 For a detailed discussion of China’s history with the GATT and WTO, see H. Gao (2007) ‘China’s Participation in the WTO: A Lawyer’s Perspective’, Singapore Year Book of International Law 11, 41–74.


5 Ibid., at 24–26.

6 Ibid., at 24.

7 Ibid.


9 GATT, ‘China’s Status as a Contracting Party, Memorandum on China’s Foreign Trade Regime’, L/6125, 18 February 1987, at 4.


11 Article 15 of the Constitution used to state, ‘[t]he state practices planned economy on the basis of Socialist public ownership’. It was amended to ‘[t]he state practices Socialist market’. ‘Amendment to the Constitution of the People’s Republic of
As China’s reform goal was to establish a market economy and as the GATT was the pinnacle international institution based on market economy principles, it is no wonder that China looked to its accession to the GATT/WTO with great enthusiasm. For example, Li Zhongzhou, the first division chief for GATT Affairs at MOFERT who was responsible for China’s GATT bid in the 1980s, summarized nine benefits for China’s participation in the GATT, which include boosting its trade and investment, getting MFN tariffs, enjoying special and differential treatment for developing countries, and participating in various GATT activities such as negotiations and dispute settlement.\textsuperscript{12}

China’s eagerness as an aspiring convert of the multilateral trading system is also demonstrated by its willingness to set aside four major political crises during its accession process: the boycott against China in the aftermath of the ‘June Fourth incident’ in 1989; the unilateral release of China’s concessions on market access and protocol (including some still under negotiation) by the US in April 1999; the NATO bombing of China’s embassy in Yugoslavia in May 1999; and the collision of a US Navy spy plane with a Chinese fighter jet in April 2001. Any of the four crises, if they were to happen today, could easily derail or even terminate the whole negotiation. Yet, China was willing to set them aside and press forward with its accession talk. Indeed, in each case, a deliberate decision was made by China’s then top leader to de-escalate the situation and move on, such as Deng Xiaoping’s speech affirming the goal of ‘market economy’ in his southern tour in 1992, Jiang Zemin’s decision to resume negotiation with the US in August 1999,\textsuperscript{13} and his call to President Bush at 2 am Beijing Time on 12 September 2001, just 5 hours after the first of the 9/11 terrorist attacks, to condemn the attacks and send condolences to the American people.\textsuperscript{14}


With the same joy as Monk Tang entering the Western Heaven,\textsuperscript{15} China finally acceded to the WTO at the Doha Ministerial Conference in November 2001. The accession was celebrated universally across China, with CCTV hosting a ‘Who Wants to be a Millionaire’-style show testing people’s knowledge on WTO issues, various local campaigns to inform people about the WTO from all trades, including taxi drivers, and a high-level seminar on WTO issues for Provincial Governors and Ministers in February 2002 with an opening speech by President Jiang Zemin. In the speech, Jiang repeatedly emphasized how the accession could help China to act in accordance with internationally accepted rules, build a foreign trade legal system compatible with common international practices, and using WTO rules to ‘constrain China’s policy and govern the government’.\textsuperscript{16}

Of course, China’s decision to embrace WTO rules was in no way made out of altruism or naiveté. Indeed, Jiang made it quite clear that US willingness to let China in was not ‘a sudden act of kindness’.\textsuperscript{17} Instead, Jiang highlighted the strategic considerations of the US, i.e., ‘pushing


\textsuperscript{15}This is the story in Journey to the West, a classic Chinese novel with a romantic account of the story of Xuanzang, a monk from the Tang Dynasty, going to India to study Buddhism at the famed Nalanda monastery.


\textsuperscript{17}Ibid., at 450.
for political liberalization through economic liberalization’ and thus ‘Westernize and divide the Socialist countries’. Referring to Clinton’s speech on China’s permanent normal trade relations status, which hailed the role of WTO accession in ‘removing government from vast areas of people’s lives’ and promoted social and political reform in China, Jiang stressed the need for China to keep a clear mind and strive to achieve its own ‘strategic intentions’.

So what are China’s ‘strategic intentions’? The first is the promotion of China’s economic development. Jiang mentioned that he thought ‘long and hard’ on China’s accession to the WTO and decided that China must ‘swim in the sea of international markets’ given the increasing competition at the international level. According to him, WTO accession would help China to attract foreign investment, enhance the competitiveness of its industries, participate in international rule-making, and promote the development of the Socialist market economy, which are all aligned with China’s long-term development goals. The second is to improve China’s approach to running its economy. In his speech, Jiang called for a major overhaul of the way the Chinese government managed its economy upon WTO accession. In particular, he stated that the primary task for the government in managing the economy would be to regulate the market economy according to WTO rules, guide the proper development of socialist market economy, and nurture and strengthen the international competitiveness of the Chinese economy.

In other words, China essentially took the WTO rules as a manual for economic reform, which is why Jiang repeatedly mentioned the need for government officials and Party members to ‘study WTO rules ... in this new exam’, and ended his speech by calling all government leaders to ‘pass the exam, and strive to get good results’.

How did China fare on the exam? The main question on the exam is the implementation of its accession commitments, which China passed with flying colours. For example, in China’s first transitional review conducted in 2002, Sergio Marchi, then chairman of WTO General Council, gave China an A+. Similarly, Pascal Lamy also gave China an A+ in 2011.

In addition, China also performed well on the bonus question on learning the rules of the WTO and fully participated in all areas of WTO’s work. In WTO negotiations, China has emerged from a Member that struggled to fully understand the content of discussions to a key player. In WTO dispute settlement, China has also risen from a reluctant participant that tried very hard to avoid disputes to one of the most active litigants.

It is worth noting that China’s assimilation efforts in the WTO is largely because China deemed it to be to its own benefit. As explained by Shi Guangsheng, China’s trade minister at the time of the accession, WTO membership is beneficial to China in three ways: First, it promoted China’s own economic development, as shown by China’s accelerating GDP growth rate.

---

18Ibid.
20Jiang, supra note 16, at 450.
21Ibid., at 450–451.
22Ibid., at 451.
23Ibid., at 451–453.
24Ibid., at 458.
28Sun, supra, note 25, at 97.
29Gao, supra note 27, at 175.
from 2001 to 2007, reversing the trend of declining GDP growth pre-2001. Second, it promoted China’s reform and opening up, as shown by China’s exponential growth in both exports and foreign direct investment. Third, it promoted the development of the socialist market economy in China, as shown by China’s improving score in the World Bank’s Ease of Doing Business Index.31


Just before China’s first WTO Ambassador Sun Zhenyu went to Geneva to assume his position in early 2002, he met with former USTR Charlene Barshefsky in Beijing.32 Barshefsky told Sun that China’s accession would change the balance of power in the WTO, but it would be better for China to observe how things were done in the WTO first before joining any group. Taking her advice, China adopted a cautious approach in its first few years in the WTO; while it claimed its position as a developing country for political reasons, its position on various issues do not always follow the developing country ‘party-line’. For example, China participated actively in the trade facilitation negotiation even though many developing countries opposed the negotiation. China was also the first developing country to express support for the chairman’s texts in agriculture and non-agricultural market access (NAMA) negotiations.33 In the words of Zhang Xiangcheng, then Director-General of the Division on WTO Affairs of MOFCOM and later China’s WTO Ambassador, China should play ‘a balancing, bridging and constructive role’ between developed and developing countries.34 This is confirmed by Chinese Premier Wen Jiabao, who stated at the Forum on the 10th Anniversary of China’s Accession to the WTO that China was ‘a responsible country that has actively shouldered international responsibilities commensurate with the level of its development’.35 While it recognizes that it has special responsibilities as a large developing country, China resents being singled out in the negotiations due to the painful memory of its ‘century of humiliation’ starting from the Opium War. Therefore, when the July 2008 meeting ran into impasse due to India’s refusal to give in on special products and special safeguard mechanism, China rejected the US request for it to provide additional concessions on special products in agriculture and sectoral negotiations on industrial goods as the same demands were not made to India or Brazil.35 When the US tried to accuse China of walking back the text despite getting ‘a seat at the big kids’ table’ as it requested,36 Ambassador Sun gave a diatribe outlining China’s contributions to the Round in various areas as a retort to the US ‘finger pointing’.37

As the July min-ministerial was underway in Geneva, an editorial titled ‘Elephant in the Room’38 was published by the China WTO Tribune – a journal published by MOFCOM and edited by Zhang Xiangchen, who had assumed his new position as the Deputy Permanent Representative of China’s WTO Mission the month before. In the editorial, Zhang argued that China’s low-profile approach did not prevent it from playing a major role in the WTO.

---

32 Sun, supra note 25, at 45.
33 Sun, supra note 25, at 187.
Moreover, as the world plunged into the financial crisis in 2008, China’s visibility became even more prominent. In 2009, despite the contraction of world trade by 13%, China became the biggest exporter for the first time in modern history, which led to two major developments.

First, the fact that China emerged not only unscathed but also triumphant from the financial crisis bolstered China’s confidence in the so-called Beijing Model, a model of economic growth that relies heavily on government intervention. Moreover, as China was able to avoid the contagious effects of the global crisis by maintaining its restrictions on foreign exchange and capital flows, its incomplete market reform was hailed as a feature rather than a defect of the Chinese system and Chinese leaders started to question the wisdom of more market-oriented reforms. On the other hand, concerned with the continued rise of China, the US announced its ‘pivot to Asia’ and launched negotiations to join the Trans-Pacific Partnership (TPP) to reinforce both economic ties and strategic relationships in Asia Pacific.

Second, China’s emergence as the largest exporter, combined with the growth contractions in many countries, resulted in new waves of export restrictions against China even though the textile safeguard mechanism and the product-specific safeguard mechanism in China’s Accession Protocol started to expire. With its surge of exports, China tried to ensure the supply of raw materials for its domestic producers by enacting export restrictions on raw materials. Based on its understanding of WTO rules, China regarded such measures to be justified by the general exceptions clause under GATT Art. XX. However, the US and EU sued China in the WTO, and managed to win the case by arguing that China could not invoke the general exceptions clause due to the lack of explicit reference to such provision in China’s Accession Protocol. At the Dispute Settlement Body meeting adopting the Appellate Body report, China criticized the report for creating ‘a two tier membership, which was neither legally sustainable, nor systemically desirable’. Li Zhongzhou was even more explicit in his op-ed in the China WTO Tribune, where he blasted the decision as downgrading China to a ‘second-class citizen’. In view of such double standards, China started to question the value of WTO rules, which led to its efforts to find alternatives.


With the US reaching across the Pacific to assemble its allies in the TPP to contain China and ‘make sure the United States – and not countries like China – is the one writing this century’s rules for the world’s economy’, China also started to make its own move. The first piece of the strategy was to form a Regional Trade Agreement in response to the TPP, which led to the launch of negotiations on the Regional Comprehensive Economic Partnership (RCEP) in November 2012. China had long advocated for regional economic integration between East and Southeast Asia, but its preferred set-up was ASEAN plus three, i.e., China, Japan, and

---

42 WTO Dispute Settlement Body, Minutes of Meeting, Held in the Centre William Rappard on 22 February 2012, WT/DSB/M/312, 22 May 2012.
43 Z. Li (2011) ‘Appeal to WTO to Refrain from Treating China as Second Class Citizen [Jihu WTO Moba Zhongguo ru Lingce]’, China WTO Tribune 9, at 94.
Korea. Japan, on the other hand, preferred to add three more countries, i.e., India, Australia, and New Zealand, as counterbalances to China. China’s willingness to go with the ASEAN plus six model revealed its sense of urgency following the US accession to the TPP, which could severely disrupt China’s supply chains in the region with provisions such as the yarn-forwarding rule, which requires textile products manufactured in the TPP member countries to source the yarn from within the TPP and thus makes it difficult to use inputs from non-members in the production process.

Second, in 2013, China announced two major initiatives: the Silk Road Economic Belt, which connects China with Europe through the Eurasian Continent, and the 21st Century Maritime Silk Road, which links China with Southeast Asian countries, Africa, and Europe across the Pacific and Indian oceans. Later combined as the Belt and Road Initiative, this has since become the centrepiece of President Xi’s foreign policy. Spanning 65 countries in three continents with a total population of 4.4 billion, the BRI reportedly accounts for 29% of global GDP and 23.4% of global merchandise and services exports. By ‘linking up the interests of China with those of developing countries in Asia, Africa, and Latin America’, the BRI helps China to build its own supply chain without direct confrontation with the US in the Pacific.


China’s efforts to build alternatives turned out to be rather prescient, as attacks started to pour in from all fronts over the next few years.

6.1 Unilateral Attack

On the unilateral front, the US launched a trade war against China when Trump came into office. In August 2017, President Trump requested the USTR to ‘determine, consistent with section 302(b) of the Trade Act of 1974 (19 U.S.C. 2412(b)), whether to investigate any of China’s laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development’. On 22 March 2018, the USTR released its Section 301 Report on China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, which suggested ‘[a] range of tools [that] may be appropriate to address these serious matters including more intensive bilateral engagement, WTO dispute settlement, and/or additional Section 301 investigations’. On the same day, President Trump directed the USTR to raise tariffs against

---

46 First suggested by President Xi Jinping in a speech titled ‘Promote People-to-People Friendship and Create a Better Future’ at Kazakhstan’s Nazarbayev University on 7 September 2013. See ‘President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries’, 7 September 2013, https://www.mfa.gov.cn/ce/cegy//eng/t1076334.htm (last visited 1 June 2020).


Chinese products and bring WTO cases against China’s discriminatory licensing practices, and the Treasury Department to impose investment restrictions on Chinese firms. In total, the list covers about 1,300 separate tariff lines with an estimated worth of roughly $50 billion. Over the next one and half years, the list was expanded several times to cover $550 billion worth of Chinese products.

These tariff measures are clearly in violation of WTO rules, such as MFN and tariff-bindings. In addition, despite its ultimate finding of consistency on the Section 301 legislation in the US–Sections 301 case, the WTO Panel also explicitly warned that making a unilateral determination of WTO-inconsistency against another country’s trade measures ‘before the adoption of DSB findings’ could constitute ‘a prima facie violation of Article 23.2(a) [of the DSU]’ (emphasizes in original). Commenting on the US Section 301 investigations in the General Council, China’s WTO Ambassador Zhang Xiangchen criticized the US measures for ‘violat[ing] the most fundamental values and principles of this organization’. China filed a dispute against the US the day after the first rounds of tariffs were announced, and brought two successive WTO cases against subsequent rounds of US tariffs.

6.2 Plurilateral Attack

In addition to unilateral actions, the US also started to take a coordinated approach against China with its allies. This started with a joint statement the US issued along with the EU and Japan at the 11th WTO Ministerial Conference in December 2017, where they agreed to ‘enhance trilateral cooperation in the WTO and in other forums’ to address the ‘critical concerns’ on ‘severe excess capacity in key sectors exacerbated by government–financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises, forced technology transfer, and local content requirements and preferences’. Since then, the trilateral group has intensified its work with several more joint statements, all targeting China’s trade practices without explicitly naming it.

In China’s view, the other major attack on the plurilateral front is the refusal to recognize China’s market economy status. According to Section 15(a)(ii) of China’s WTO Accession Protocol, China agreed to be treated as a non-market economy (NME) in antidumping investigations, with the proviso that such provision ‘shall expire 15 years after the date of accession’. China understood this to mean that ‘China will be recognized as a full market economy’ on 11 December 2016, as stated by then Chinese Premier, Wen Jiabao, to world leaders in 2011. Since its accession, China has been working hard to persuade other WTO members to recognize China’s market economy status, both by inserting the provision in its free trade agreements, as

---


56 United States – Tariff Measures on Certain Goods from China, DS543.


well as making direct demands to the governments of other Members. As of 2016, more than 80 countries have recognized China’s market economy status. In addition to the practical benefit of avoiding discriminatory treatments in antidumping investigation, the recognition of market economy status is also regarded by China to be of great symbolic value as it marks China’s coming of age in the WTO. However, starting from 2011, some Western lawyers started to argue that the expiration of the clause does not automatically grant China market economy status. In 2016, the EU and US respectively announced that they would not recognize China’s market economy status. In response, China dropped its earlier position which mixed the two issues together, and started to separate them by treating market economy status as a political issue and NME methodology as a legal/technical issue. On 11 December 2016, China took the unprecedented move by suing both the EU and US in the WTO.

At the first panel hearing of the case against the EU in December 2017, Chinese WTO Ambassador Zhang Xiangchen made a rare appearance before the panel. Quoting the Latin maxim ‘pacta sunt servanda’ (‘agreements must be kept’), Zhang made clear at the outset that ‘China brought this matter to dispute settlement with the objective to establish that promises made must be respected, and treaty terms struck must be honoured’. In China’s 14-page statement, Zhang referred to the word ‘promise’ six times and lambasted the US and EU for breaking their promises on ending China’s non-market economy status after 15 years. Zhang also highlighted the high stakes at play, including ‘the credibility of the dispute settlement mechanism, the integrity of the World Trade Organization, and the membership’s faith in the multilateral trading system.’

In the end, however, the Panel did not side with China. According to a leaked interim report, the Panel supported the EU’s argument that the expiration of the clause merely shifted the burden of proof and did not terminate the substantive right to apply the NME methodology. In June 2019, China decided to suspend the case, and then abandoned the case by letting the authority for the panel lapse in June 2020. While MOFCOM later clarified by stating that the termination

---

75Ibid., at para. 16.
78European Union – Measures Related to Price Comparison Methodologies – Lapse of authority for the establishment of the Panel – Note by the Secretariat, WT/DS516/14..
of the proceedings in the case does not affect China’s rights under the WTO, 71 it did indirectly reflect China’s disappointment and despair towards the decision of the panel.

6.3 Multilateral Attack

At the multilateral level, the trilateral initiative spurred a new wave of WTO reform proposals, with key players, led by the US, EU, and Canada, all submitting major proposals. While there are considerable variations among these proposals, they mainly focus on three groups of issues, all of which are regarded by China as China-specific.

The first group addresses the need to update the substantive rules of the WTO, such as clarifying the application of the ‘public body’ rule to SOEs, expanding the rules on forced technology transfer, and reducing barriers to digital trade. 72 All of these reflect long-standing concerns over China’s trade and economic systems, which have been litigated in the WTO. For example, concerns over China’s unique state-led development model that emphasizes the role of state-owned firms in the Chinese economy was litigated in the US– Anti-Dumping and Countervailing Duties (China). 73 Similarly, cases were also brought to challenge China’s over-zealous drive to obtain and absorb foreign intellectual property rights, where foreign firms are allegedly asked to trade their technologies for markets. 74 China’s censorship regime and its tight control over information and the Internet were also the subject of both actual and potential WTO litigation. 75 Unhappy with the results of these cases, the West tries to make new rules and tighten the discipline through their reform proposals.

The second group addresses the procedural issue of boosting the efficiency and effectiveness of the WTO’s monitoring function, especially the rules relating to compliance with the WTO’s notification requirements, such as those under the WTO Agreement on Subsidies and Countervailing Measures. 76 While no WTO Member may claim a perfect record in subsidy notifications, China’s compliance seems to be particularly problematic, and has been a constant subject of complaint by the USTR ever since China’s accession to the WTO. 77 After much prodding from the US, China finally submitted its first subsidies notification in April 2006, nearly five years behind schedule. 78 However, even that remained incomplete as China did not notify subsidies by sub-central governments, which would eventually take China another ten years to report, and the subsequent notification took another four years. 79 In frustration, the US filed a ‘counter notification’ in October

76 See EU proposal, supra note 72, at 9–11; Canada proposal, supra note 72, at 2.
79 Ibid.
2011 pursuant to Article 25.10 of the SCM Agreement, and identified more than 200 unreported subsidy measures.80 To address the problem, the joint proposal by the United States, the European Union, Japan, and Canada on strengthening the notification requirements suggested some rather drastic measures, such as naming and shaming the non-compliant Member by designating it as ‘a Member with notification delay’, curtailing its right to intervene in WTO meetings and nominate chairs to WTO bodies, and even levying a 5% fine based on its annual WTO contribution.81

The last significant issue is development, another longstanding issue stemming from the call of the US and the EU for greater ‘differentiation’ among WTO Members. While they are willing to extend special and differential treatment (S&DT) to smaller developing countries, it is politically difficult for them to extend the same treatment to large developing countries, such as China, a growing economic powerhouse. Among the major economies, the US never granted China preferences under the Generalized System of Preferences (GSP), while Canada and the EU terminated GSP benefits for China in 2014 and 2015, respectively. At the time of writing, only Australia, New Zealand and Norway continue to provide GSP preferences to China. The EU and Canada, in their proposals, called for the rejection of ‘blanket flexibilities’82 for all WTO Members, which are to be replaced by ‘a needs-driven and evidence-based approach’83 that ‘recognizes the need for flexibility for development purposes while acknowledging that not all countries need or should benefit from the same level of flexibility’.84 The US proposal went even further by proposing the automatic termination of S&DT for Members which met one of the following criteria: OECD membership, G20 membership, classification as ‘high income’ by the World Bank, or a share of global goods trade at 0.5% or above.85 With such a classification system, many WTO Members, including China, will be stripped of their developing countries’ status.

Commenting on these reform proposals at the luncheon in the Paris Workshop in November 2018, Ambassador Zhang criticized these efforts as trying to ‘put China in a tailor-made straight-jacket of trade rules to constrain China’s development … in the name of reform’.86 Drawing analogy from the attempts by some countries to change the rules of the International Table Tennis Federation to reduce China’s ‘advantages’, Zhang pointed out that ‘[w]inning a game should be done through strengthen (sic) and hard work, not by altering the rules’.

Another multilateral attack is the persistent blockage of the launch of the selection process for AB members by the US, which effectively shut down the institution in December 2020. While such attacks ostensibly had nothing to do with China, a close examination of the US criticisms against the AB reveals that many of the complaints relate to the China cases. For example, among the six substantive ‘interpretive errors’ enumerated by the USTR in its Report on the AB,87 three are directed against the AB’s decisions in cases concerning China.88 These include,

---

80Ibid. at 76.
82EU Proposal, supra note 72, at 6.
83Ibid. at 7.
84Canada Proposal, supra note 72, at 5.
for example, the ‘public body’ jurisprudence developed in US – Anti-Dumping and Countervailing Duties (China),89 the requirement to consider government prices before using out-of-country benchmarks in US – Countervailing Measures (China) (21.5),90 and the ban on ‘double remedies’ through the concurrent application of countervailing duties and antidumping duties in US – Anti-Dumping and Countervailing Duties (China).91 Thus, it is no wonder that China also regarded the attack on the AB as an indirect attack on China.

7. The Aftermath: Affirmation and Alienation

In response to these attacks, China took a bifurcated approach: First, while many of these measures against China posed challenges to China’s foreign trade, the fact that the US was abandoning its long-standing position as the champion of the rules-based multilateral trading system left a power vacuum that China was eager to fill by affirming the principles of WTO. Second, by disregarding WTO rules for political conveniences, the US and the EU also set ‘bad examples’92 which China quickly picked up. This section explores both themes.

7.1 Affirmation

At the World Economic Forum in Davos in January 2017, Chinese President Xi Jinping gave a widely reported speech,93 in which he called on countries around the world to embrace rather than blame globalization for the world’s problems. Using China’s WTO accession as the example, he said that China made ‘a right strategic choice’ by ‘bracing the storm and exploring the new world’. Despite ‘having had [its] fair share of choking in the water and encountering whirlpools and choppy waves’, China has ‘learned how to swim in this process’. Moreover, in veiled reference to the protectionist tendencies of Trump, he called on everyone to ‘adhere to multilateralism to uphold the authority and efficacy of multilateral institutions’, ‘honor promises and abide by rules’, rather than ‘select or bend rules as he sees fit’.

China’s pledge as ‘a steadfast defender of free trade, globalization, and economic openness’94 did not stop just at words. Instead, China introduced a variety of measures to further bring down trade and investment barriers in the next few years. For example, in the midst of the trade war with the US, China reduced the tariffs on 1449 tariff lines, which included reducing tariffs on cars from 25% to 15%.95 This is the largest round of tariff reduction in Chinese history, where the tariff lines covered are seven times those of the earlier rounds and covered 70% of consumer products.96 Similarly, in the area of investment, China converted the market access catalogue into a negative list system in 2017 and has kept reducing the restrictions on foreign investment since.97 In April 2018, Xi further announced that the whole island of Hainan would be converted

89USTR, supra note 87, at pp. 85–89.
91USTR, supra note 87, at pp. 116–119.
96Ibid.
into a free trade pilot zone. With an area similar to Taiwan and a population a bit larger than Hong Kong, the Hainan Free Trade Zone (FTZ), if successful, will be the largest FTZ in the whole world and essentially re-create another Hong Kong for China.

At the international level, China also sped up its efforts to promote free trade, with the negotiations on the RCEP with its neighbors and the Comprehensive Agreement on Investment with the EU concluded in November and December 2020 respectively. Both agreements reflect China’s view that it needs to seize the ‘important period of strategic opportunity for development’ despite ‘profound and complex changes’ both domestically and internationally, as announced by Xi in his Report at the 19th Party Congress in 2017.

In the WTO, China has also been playing a constructive role by leading the negotiation on certain issues. These include launching offensive negotiations on issues such as investment facilitation, which China has been promoting at the WTO since 2014 as the coordinator of the group on friends of investment facilitation for development. Designed to complement its Belt and Road Initiative, China successfully persuaded 70 WTO members to co-sponsor a Joint Statement on the issue at the 11th Ministerial Conference. On the other hand, China initially took a defensive approach to issues such as e-commerce, due to its unpleasant experience on e-commerce issues in the China–Publications Case, which China lost even though it did not wish to open up the online delivery of audio visual services; as well as its restrictive data regulation framework domestically. To counter the US initiative for negotiations on e-commerce, China pushed the WTO and World Economic Forum to endorse the Enabling e-commerce initiative – the brainchild of the Alibaba-backed eWTP. While this mission was also accomplished, it was eclipsed by the Joint Statement Initiative on E-commerce, which was backed by the US. While it was initially wary of the US initiative, China changed its position and jumped onboard when the negotiations on the e-commerce Joint Statement Initiative was officially launched in Davos on 25 January 2019. As explained by Ambassador Zhang, this decision also reflects China’s wish to shape the rules in the negotiations, rather than being left out as in the Trade in Services Agreement (TiSA) negotiations. Since then, China has emerged as one of the most active participants with four submissions out of 52 substantive submissions so far. In its submissions, China pushed for negotiations on its preferred topics relating to ‘trade in goods facilitated by the internet’ issues, especially the trade facilitation issues.

---

105H. Gao (2021) supra note 75.
More broadly, China has cleverly used existing rules in the WTO framework to pre-empt attempts by some countries to make China-specific rules. For example, in its November 2018 position paper on WTO reform, China set out three principles, i.e. to, ‘preserve the core values of the multilateral trading system’ such as non-discrimination, ‘safeguard the development interests of developing members’, and ‘follow the practice of decision-making by consensus’. Together, these rules serve to prevent the US and other countries from introducing China-specific rules. More specifically, in its formal proposal on WTO reform issued in May 2019, China also listed several specific issues to be addressed, such as resolving the AB crisis, tightening rules to ‘curb the abuse of national security exception’ as well as ‘unilateral measures inconsistent with WTO rules’, rectifying ‘the inequity in rules on agriculture’, and improving trade remedies rules.

On WTO Dispute Settlement, China also teamed up with the EU and other members to establish the multi-party interim appeal arrangement (MPIA). In its announcement on the MPIA, MOFCOM emphasized that the MPIA would help to maintain the operation of the WTO dispute settlement mechanism, safeguard the rule-based multilateral trading system, and affirm the confidence and support of the international society on the multilateral trading system. In response to the US criticisms on the MPIA, China further stressed that the arrangement is consistent with WTO rules made pursuant to Article 25 of the DSU, even though the claim is debatable.

7.2 Alienation

The day after the US announced 25% additional tariffs on $50 billion worth of Chinese products, MOFCOM retaliated with the same additional tariff on US products of equivalent value. The next one and half years witnessed several more rounds of tit-for-tat retaliations, with the stakes quickly escalating to cover $550 billion worth of Chinese products and $185 billion worth of US goods. Altogether, these additional tariffs cover almost the entire bilateral trade between the two, with only limited exceptions.

By firing its own rounds of additional tariffs, China has also lost its innocence in the trade war. In its announcements, China stated that its retaliatory tariffs were a necessary response ‘to the emergency caused by the violation of international obligations by the US, defend China’s lawful self-interests’, and were justified by ‘the relevant laws and regulations such as the Foreign Trade

---

112 Ibid., at 3–5.
118 According to the US government, US import from China in 2018 was only $540 billion with its export to China $120 billion. See United Sates Census Bureau Foreign Trade Division, ‘Foreign Trade Data: Trade in Goods with China’, www.census.gov/foreign-trade/balance/c5700.html (accessed 23 January 2022).
Law of the People’s Republic of China and basic principles of international law. No further details were provided by MOFCOM, but the most relevant would appear to be Article 7 of Foreign Trade Law, which states that China may take corresponding measures against any country imposing discriminatory trade measures against China. However, this provision suffers from the same problem as the US Section 301 legislation discussed earlier. With regard to international law principles, Dr Yang Guohua, a formal senior MOFCOM official, has mentioned the following possibilities: the right of self-defence under Article 51 of the UN Charter, the termination or suspension of a treaty’s operation as a consequence of its breach by another party under Article 60 of the Vienna Convention on the Law of Treaties, and necessary measures to safeguard an essential interest against a grave and imminent peril under Article 25 of the Draft Articles on State Responsibility. Most WTO lawyers would not agree, however, that such general principles could be used to justify blatant violations of explicit WTO obligations.

Not only are the additional tariffs inconsistent with WTO rules, the bilateral Phase One trade deal signed by the US and China on 15 January 2020 is also of dubious legality under WTO law. This is especially the case for Chapter 6 on ‘Expanding Trade’, which essentially sets out managed trading regimes under which China agrees to import given quantities of US products, which are also supposed to expand on an annual basis. Such practices have been outlawed by the Agreement on Safeguards, which contains explicit prohibitions on ‘orderly marketing arrangements or any other similar measures on the export or the import side’, including both ‘actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members’. It is true that such commitments were forced upon China by the US, but China’s willingness to go along with such WTO-inconsistent arrangement also made it an accomplice in the crime.

At a broader level, with its blatant violation of WTO rules, such as the attack on the AB, the imposition of additional tariffs against China and other countries, the US has effectively taught China that WTO rules could be just ignored, especially if they get in the way. Soon, China started to apply what it had learnt to other countries, by enacting various trade restrictions on Australia, Canada, and other countries that stepped on its toes.

At the WTO, China also followed in the footsteps of the US in using its power to block consensus liberally, including blocking the appointment of a Taiwan trade official as the next Chair of the Committee on Government Procurement through Hong Kong in October 2021. When the US won a case against China on safeguard measures on solar panels, China nullified the victory of the US by ‘appealing into the void’. In the discussions on WTO reform, China also took an aggressive position by stating explicitly in its position paper that ‘the reform should respect members’ development models’ and it would oppose ‘special and discriminatory disciplines against

---

119 MOFCOM, supra note 116.
122 Ibid., Art. 6.2.
123 Ibid., Art. 11.1(b).
state-owned-enterprises in the name of WTO reform,\textsuperscript{126} a point further reiterated in its reform proposal.\textsuperscript{127} For China, discussions on its economic model will be regarded as a ‘trap’ that it will stay away from,\textsuperscript{128} but it would not shy away from defending the model when it came under attack in the WTO, as has shown by Ambassador Zhang’s speeches in the WTO on several occasions.\textsuperscript{129}

8. Conclusion

As we look back upon China’s two decades in the WTO, we can see the shift of China as an eager, serious A+ student to one that grows increasingly alienated from the core values of the multilateral trading system. China is not alone. The US is essentially taking the same approach, despite the professed affinity for multilateralism and international law by the new Biden Administration. New US Trade Representative Katherine Tai, for example, has repeatedly stated that she would not lift the WTO-inconsistent Trump tariffs, but prefers to ‘retain’ them as ‘leverage’ against China.\textsuperscript{130}

As the largest trader in the world and the second largest economy, it would be naïve for other countries to assume that they could change China’s perspective on the multilateral trading system, let alone its behavior. Instead, to help steer China back towards a more receptive position on WTO, more will need to be done, with the following as starters:

First, the West needs to abandon their own double standards. They should stop applying the non-market economy methodology in antidumping investigations against China, despite explicit provisions supported by negotiating history\textsuperscript{131} affirming its expiration in 15 years. They should stop applying WTO-inconsistent tariffs themselves, while accusing China of violating WTO rules. They should stop disallowing China to invoke the exceptions clause to justify its export restrictions on raw materials and rare earth, while imposing their own restrictions against Chinese imports on environment grounds.

Second, in terms of detailed negotiating tactics, I have outlined the following in a policy brief published earlier this year,\textsuperscript{132} which are summarized here: make the proposed rules neutral on face value so that they would not be deemed as China-specific or discriminatory against China and avoid evoking China’s painful memory of the ‘century of humiliation’, which would put China in a defensive mode; instead of holding the negotiations in a one-sided manner with a long list of demands on China, try to make them more balanced by giving China something in return, even if just as a token, so as to give ‘face’ to China; try to understand China’s own reform goals and policy movements, so as to gain insights into what China may agree to.

\textsuperscript{126}MOFCOM, supra note 110.
\textsuperscript{127}WTO, supra note 111, Section 2.4.2.
At its latest Trade Policy Review held in October 2021, China announced that it has ‘fully implemented all of its WTO commitments’.\(^{133}\) While people may debate the validity of such a claim of ‘full compliance’, as I wrote three years ago, ‘the more important fact is that China acknowledges the legitimacy of the WTO rules and is willing to subject itself to the authority of the WTO. But as the WTO increasingly comes under attack in the West, China will start to doubt the WTO as well. When China escalates its emulation of the West from words to actions, the United States and the European Union might finally remember the warnings from Ambassador Zhang, but it will be too late.’\(^{134}\) Unfortunately, the developments over the past three years have largely confirmed my prediction, with China increasingly following the bad examples set by the West. If there is anything positive coming out of these unfortunate developments, it is the hope that people can finally heed my warning repeated today, before it becomes really too late.


\(^{134}\)H. Gao supra note 65.