German Law Journal (2023), **24**, pp. 227–242
doi:10.1017/glj.2023.1

ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor–International Trade Law and State Intervention in the Economy in the Covid Era

China in the WTO Twenty Years On: How to Mend a Broken Relationship?

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(Received 16 January 2023; accepted 16 January 2023)

Abstract

China's participation in the World Trade Organization (WTO) has been a rollercoaster of milestones and frictions. China has emerged as a leading trading nation, which has contributed to the expansion of world trade. Some of its trading partners, however, and most vocally the United States, complain that China has reached its new status by eluding its WTO commitments. Under President Trump, the United States reacted strongly against China, almost bringing the WTO (but not China!) to its knees. These actions have been criticized in different ways: Some underline their unilateral character (and the ensuing legal issues they raise), whereas others focus on the regime-neutrality of the WTO, which should, in principle, be able to accommodate Western liberal democracies, developing countries, and socialist countries like China equally. In this short Article, we argue that staying idle is no solution to the China issue and that addressing it through unilateral actions is no solution either. Both approaches would only deepen the current WTO crisis. In our view, the only viable solution for the WTO system requires adding new disciplines to the existing multilateral rules.

Keywords: China; WTO; state capitalism

A. Something Happened on the Way to Heaven

In his classic account of U.S. trade history, Irwin explains how a group of like-minded players negotiated the GATT and the key role played initially by Cordell Hull, a Southern politician who served for more than ten years as Secretary of State in the administration of President Franklin D. Roosevelt.[1] China was one of the original contracting parties to the General Agreement on Tariffs and Trade (GATT)[2] in 1947, but its status was deactivated in 1950 after the formation of the People's Republic. Thereafter, neither China nor Chinese Taipei had practically any contact with the GATT.[3]

While the Chinese Taipei might have wanted to join the GATT, the compromise among its members was that no negotiation would ever be initiated until China was ready to join. The situation in China changed in the late 1970s and early 1980s, following Deng Xiaoping's economic

[1]*See generally* Douglas A. Irwin, Clashing Over Commerce: A History of US Trade Policy (2017).
[2]General Agreement on Tariffs and Trade (1947), 55 U.N.T.S. 194.
[3]*See generally* Douglas A. Irwin, Petros C. Mavroidis, & Alan O. Sykes, The Genesis of the GATT (2008).

reforms.[4] China formally sought the resumption of its status as a contracting party to the GATT in 1986, with accession negotiations starting the following year. Despite twenty rounds of negotiations, the two parties (China and the incumbent GATT members) failed to reach an agreement by 1995, when the WTO succeeded GATT. It then took another eighteen rounds of negotiations for the two parties (China and the incumbent WTO members) to agree on China's Protocol of Accession to the WTO. The exceptionally long accession negotiation reflected an exceptional situation of having a country, a behemoth indeed with a socialist economic system and the largest population in the world, join an organization conceived and operated on essentially liberal economic principles.[5] Back in 2001, China's accession to the WTO was hailed as a magnificent achievement that would stay in history as the indelible etching on the wall commemorating the definitive victory of the liberal paradigm.[6] Twenty years later, the mood has changed radically.

Increasingly, there is a feeling, in the Western world certainly, that perhaps China and the WTO are mutually incompatible. What has changed during the past twenty years? China or the WTO? How can a seemingly happy marriage turn so sour so quickly? The answer is multi-faceted, but what is clear in any event is that China did not change as expected and hoped. The WTO incumbents even set a date in the Protocol of Accession, 2015, when China would have become a market economy (as understood in the Western world). The problem is largely one of false expectations. It is further a case of sub-optimal contracting.

Inspired by our recent book,[7] in this paper we discuss China in the WTO, not China in the world economy, nor China in the realm of international relations. We do not deny that there is an osmosis between the general and the specific. Allison offered a perspective in this context, when claiming that we are probably traversing yet another Thucydides' trap.[8] Nevertheless, while we take on board all these analytics, in what follows, we concentrate on China and the WTO. We start from the nature of the original GATT contract to try and better assess the present crisis.

I. Did the GATT Intend to Regulate Trade Irrespective of the Choice of Economic Regime?

The GATT is important for what it states, but equally important for what it does not. As is the case with all international contracts, the balance of rights and obligations agreed was between players with specific backgrounds. Legal scholars and social scientists have described the GATT-think, both its explicit and its implicit dimensions. In Baldwin's classic account, the GATT is a tariff bargain, the value of which is insured through legal disciplines like national treatment and non-violation complaints.[9] Jackson,[10] Dam,[11] and Hudec[12] offered detailed accounts of the legal disciplines aimed to serve the overarching aims.

A different perspective is offered by Tumlir[13] and Zeiler,[14] who focus on the pre-requisite for the agreed GATT-think to function: a liberal economy. This should not come as a surprise at all: Irwin, Mavroidis, and Sykes have shown that a conscious decision was taken to restrict originally the number of seats around the GATT negotiating table to a homogenous nucleus of liberal

[4]*See* Henry Gao, *China's Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation*, 21 World Trade Rev. 342–58 (2022).

[5]*See also* Yang Guohua & Cheng Jin, *The Process of China's Accession to the WTO*, 4 J. Int'l Econ. L. 297–328 (2001).

[6]*See* Mark Wu, *The 'China Inc.' Challenge to World Trade Governance*, 57 Harv. J. Int'l L. 261–324 (2016).

[7]Petros C. Mavroidis & André Sapir, China and the WTO: Why Multilateralism Matters (2021).

[8]*See generally* Allison Graham, Destined for War: Can America and China Escape Thucydides's Trap? (2017).

[9]Robert E. Baldwin, Non-Tariff Distortions of International Trade (1970).

[10]*See generally* John H. Jackson, World Trade and the Law of the GATT (1969).

[11]*See generally* Kenneth Dam, The GATT, Law and International Economic Organization (1970).

[12]*See generally* Robert E. Hudec, The GATT Legal System and the World Trade Diplomacy (1975).

[13]*See* Jan Tumlir, *International Economic Order and Democratic Constitutionalism*, 34 Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 71–83 (1984).

[14]*See generally* Thomas W. Zeiler, Free Trade, Free World (Univ. N.C. Press 1999).

https://doi.org/10.1017/glj.2023.1 Published online by Cambridge University Press

market economies.[15] This choice was consistent with the idea that the GATT, besides being a trade agreement, was part of the arsenal of the West during the Cold War. Trade policy, after all, broadly defined, is national security policy, as Schelling (1971) has observed, since it allows trading nations to have access to goods that could be critical in advancing national security concerns.[16]

We should not be oblivious to the fact that the GATT entered the world of international relations as an interim organization that was meant to be eventually incorporated into the International Trade Organization (ITO), but that the latter never saw the light of day.[17] In part hoping to persuade them to change course, in part in order to place a dent on the coherence of the Soviet bloc, the GATT gradually opened its doors to socialist countries: First, Poland and Yugoslavia in the 1960s, and then, Hungary and Romania in the 1970s. The incumbents did not find it necessary to translate the liberal understanding implicit in the GATT, into explicit legal disciplines, because all four countries were very small in terms of international trade.

In a similar vein, the GATT had not been amended when Japan joined it in the 1950s, although the state played an important role in the Japanese economy, and many GATT incumbents were reluctant to accept this country in their midst for this reason. "Japan Inc." was the epithet by which Japan was known at the time and the years that followed as well. Japan was, of course, a large economy, and its export-led growth model was viewed as a threat.[18]

As a matter of fact, some of the reactions to China's attempt to access the GATT and then the WTO were, and are still today, very reminiscent of the reactions to Japan's own efforts to enter the GATT-world and the reactions it provoked afterwards and during several decades. Yet, there were also striking differences between the West's reaction to Japan Inc. and China Inc., which had to do with economics but also, primarily, with geopolitics.[19] Japan was a member on probation (unheard of at that time, and never repeated since the accession process), while China entered like everyone else. Geopolitics weighed in different ways on the two processes, as well. Given the military occupation of Japan by the United States at the time it joined the GATT, there was never any doubt that it would eventually espouse the Western economic model. Its membership of the OECD, with its various "codes of conduct"—in line with the principles of economic liberalism—a decade after joining the GATT, was the clearest sign that Japan had joined the Western club.[20]

[15]*See* IRWIN, MAVROIDIS, & SYKES, *supra* note 3.

[16]Thomas Schelling, *National Security Considerations Affecting Trade Policy,* United States International Economic Policy in an Interdependent World 723–37 (Comment on Int'l Trade & Inv. Pol'y 1971).

[17]Brown provided an excellent account of the ITO-saga, both its negotiation as well as its submission for approval before the U.S. Senate. *See* WILLIAM ADAMS BROWN, THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1950). Relying on this account, Johnson updated the record. See DONALD C. JOHNSON, THE WEALTH OF A NATION, A HISTORY OF TRADE POLITICS IN AMERICA (2018).

[18]*See* MAVROIDIS & SAPIR, *supra* note 7, at 134–35. Japan presented the world trading regime with challenges as a result of its monumental growth rates in the 1960s and 1970s. Complaints against Japan were raised not only at the moment it acceded to the GATT but also a few years after it had joined. Already at the moment of its accession, it managed to provoke a record number of invocations of the non-application clause. Eventually, however, Japan became "one of us," and its ascension to Quad status is the best proof of this effect.

[19]*See* Vinod K. Aggarwal & Andrew W. Reddie, *Economic Statecraft in 21st Century: Implications for the Future of the Global Trade Regime*, 20(2) WORLD TRADE REV. 137 (2021). See also the considerations advanced by Ming Du, *Unpacking the Black Box of China's State Capitalism*; Leonardo Borlini, *Economic Interventionism and International Trade Law in the Covid Era*, in this Issue.

[20]Japan gained OECD membership in 1964. Its entry into the organization is significant from two main perspectives. The first is historical: Japan's joining the OECD, which followed the signing of the San Francisco Peace Treaty in 1954, and, entering the GATT in 1955, signaled its successful transformation into a fully industrialized economy. Second, membership has helped Japan promote various domestic reforms facilitated by OECD recommendations, analysis, and data, such as the liberalization of capital movements. Japan has continued to take an active role in international rulemaking in areas ranging from macroeconomic policies and economic development to trade and investment, as well as tax.

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II. What Changed with China's Accession?

When China knocked on the WTO door, and, eventually, when it joined in 2001, the GATT/WTO liberal understanding was still implicit. [21] WTO incumbents assumed that, with Deng's reforms, China had entered a one-way street, with market economy being the end destination. Probably influenced by Fukuyama's pronouncement of the end of history,[22] they seemed to espouse the view that the definitive victory of liberalism had arrived, and the fall of the Berlin wall was only the beginning.

In fact, some U.S. statesmen went so far as to publicly declare that China would become not only a liberal market economy, but also a liberal democracy. Of course, there were skeptics as well, especially in the United States. But even they bought into a simplistic narrative: The United States would keep its tariffs at the same level after China's accession; China would greatly reduce and cap its tariffs (from 25 to 9% for industrial products and from 31 to 14% for farm products); therefore, the United States was bound to gain more than China and obtain bilateral trade surpluses with China. Even those who did not buy into the "China changes" story, could see the huge potential economic benefits of accessing the world's fastest growing market with the biggest population, which would also soon become the world's biggest market.[23] China was the biggest prize of the twenty-first century.

The aspiration of these circles to see China in the WTO materialized. Their economic dream has become reality, but so have the frictions with China. We can only speculate that, even if China had, like Japan, become a Western-style economy by becoming an OECD member a decade after its accession to the GATT/WTO, frictions most likely would have occurred, as they did occur with Japan. Incorporating a very large and rapidly growing economy into the trading system cannot happen without frictions. What is different with China, of course, is that it has retained substantial state involvement in the working of its economy,[24] which is in direct contradiction to the WTO's implicit liberal understanding. China describes its economic system as a "socialist market economy."[25] It is a mix of private initiative and state planning where, unlike in Western economies, the state's—or the Communist Party's—role is paramount.[26] Dominated by SOEs (state-owned enterprises) and omni-present industrial policies, the Chinese economy leaves room for the private sector, but, according to official Chinese statistics,[27] the public sector made up 63% of total employment in 2019.

We cannot neglect, of course, that some opening of the economy has occurred over the years and it is now possible to have "Wofers" (wholly owned foreign enterprises), but privatization has been slow, or at least slower than expected by China's trade partners. No doubt, lots of assets have been corporatized, but corporatization does not mean privatization, as China's trade partners have come to realize after the country's accession to the WTO.

III. In a Nutshell

China did not become a Western-style market economy, and it continued growing at unprecedented rates.[28] The question is, of course, whether China achieved as much while observing—as it claims to

[21] Economists and historians alike have described the GATT-think, both its explicit and its implicit dimension. In Baldwin's classic account, *supra* note 9, the GATT is a tariff bargain, the value of which is guaranteed through legal disciplines such as national treatment and non-violation complaints.

[22] *See generally* Francis Fukuyama, The End of History and the Last Man (1992).

[23] *See* Petros C. Mavroidis & André Sapir, *The WTO at the Crossroads: How to Avoid the China Syndrome?* 21 World Trade Rev. 359, 360–61 (2022).

[24] For an insightful analysis of this system, see Du, *supra* note 19.

[25] https://www.reuters.com/world/china/unleashing-reforms-xi-returns-chinas-socialist-roots-2021-09-09/.

[26] *See generally* Wu, *supra* note 6.

[27] Nat'l Bureau of Stat. of China, http://www.stats.gov.cn/english/.

[28] China's achievements since the date of accession to the WTO—December 11, 2011—have been truly remarkable. In 2001, China was the sixth largest exporter of goods in the world (fourth, if the EU is counted as one unit). Since 2009, it has been the world's largest goods exporter, even surpassing the EU bloc from 2014 onwards. Fast export, and import, growth has boosted GDP growth and income levels. According to the IMF's April 2021 WEO database, China's GDP amounted to barely 13% of

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have been the case—its commitments to its WTO partners or whether it deviated from the agreed rules. We turn to this question in what comes next.

B. China Collides with its WTO Partners

China's membership in the WTO is undeniably a success story as far as China's growth is concerned. Nevertheless, China's integration in the world economy has created frictions, especially with the United States, which has long had massive trade deficits with China. In 2019, U.S. goods and services trade with China totaled an estimated $635 billion. Exports were $163 billion; imports were $472 billion. The U.S. goods and services trade deficit with China was $309 billion,[29] a far cry from the forecast at the time when China joined the WTO.

Of course, economists rightly argue that bilateral trade balances reflect many factors other than trade policies and that the WTO is about establishing competitive opportunities for nations to exploit their comparative advantage, not about having bilaterally balanced trade. But the politics of trade are different. Critics of China's trade policy, not only in the United States but also in the European Union and elsewhere, often argue that China has done well by not respecting its WTO obligations.[30] Has this been the case? To respond to this question, we first need to set the record straight regarding the obligations that China assumed when joining the WTO.

I. The Three Layers of Obligations in the WTO-System

Like for all other new WTO members, China's accession implied taking on three distinct layers of obligations. First, the multilateral framework that applies to all WTO members and consists of the General Agreement on Tariffs and Trade 1994,[31] the General Agreement on Trade in Services,[32] the Agreement on Trade-Related Aspects of Intellectual Property Rights,[33] and the Dispute Settlement Understanding.[34] Second, a plurilateral framework that applies to only a subset of WTO members wishing to join the two existing plurilateral agreements: The Government Procurement Agreement (GPA)[35] and/or the Agreement on Trade in Civil Aircraft.[36] Finally, China's Protocol of Accession.[37]

U.S. GDP in 2001. Twenty years later, this ratio is likely to reach 73%. During the same period, China's per capita income, measured at purchasing power parities, rose from the level of Sudan in 2001 to nearly the level of Mexico. *See* THE WORLD BANK DATA, *GDP (current US$) – China*, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CN-U.

[29]*See* THE WORLD BANK DATA, *The People's Republic of China*, https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china.

[30]Ming Du, *China's State Capitalism and World Trade Law*, 63(2) I.C.L.Q. 409, 427 (2014).

[31]General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

[32]General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[33]Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

[34]Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[35]Agreement on Government Procurement (as amended on Mar. 20, 2012), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm [hereinafter GPA]. At present, the Agreement has twenty-one parties, comprising forty-eight WTO members. Thirty-five WTO members/observers participate in the Committee on Government Procurement as observers.

[36]The Agreement on Trade in Civil Aircraft ("Civil Aircraft Agreement") was concluded on April 12, 1979, at the end of the Tokyo Round. It entered into force on January 1, 1980, https://www.wto.org/english/res_e/publications_e/ai17_e/aircraft_general_oth.pdf.

[37]Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001).

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II. China's WTO Commitments

The plurilateral leg is of no interest because China promised to join the GPA but has not done so up to now. Nor does China belong to Civil Aircraft agreement. Consequently, what matters is the multilateral disciplines and the obligations assumed under the Protocol of Accession. The multilateral framework was negotiated during the Uruguay Round without China in mind. The most glaring evidence to this effect is the fact that the term "SOE," a key feature of China's economic system, though also present in many other countries, including EU member states, is totally missing in the WTO Agreements.[38] Notice though, that, a few years later, President Obama adopted the opposite strategy, as he negotiated the Trans-Pacific Partnership (TPP) with China in mind, without implicating China in negotiation. If China ever wished to accede to the TPP, it would have to adjust to a very demanding discipline regarding SOEs, as Vietnam, a country where SOEs are also an important feature, had to do to join the Comprehensive and Progressive TPP (CPTPP),[39] the trade agreement reached among the remaining TPP signatories after President Trump decided to bow out of the TPP.[40] It is the latter approach that gets our vote. All the more so because the Protocol of Accession, to which we now turn, did not address these gaps.

III. Filling the Gaps Through the Protocol of Accession

China's Protocol of Accession reflects the zeitgeist at the time when China was negotiating its accession, which could be summarized as exuberance and probably even irrational exuberance. As we have already noted, incumbents even set 2015 as the year by which they expected China to have become a market economy. The Protocol contains many best-endeavors clauses that reflect the spirit of the negotiated contract but do not translate into legally enforceable obligations. Alas, only the latter matter. So, while we observe various best-endeavors clauses on privatization or pricing policies, there is precious little in the Protocol in terms of binding commitments in these areas. Fatefully, the issue of SOEs was foreseen but not exhaustively handled in the 2001 Protocol of Accession.[41] Trade with China continues to be highly contentious,[42] and the role of the Chinese state in the economy is at the core of these concerns. As Levy shows, the treatment in the text was very concise and essentially provided particular China-specific adjustments to existing WTO agreements, such as the SCM agreement. The tweaks have, however, proved inadequate to handle the specific problems arising with China's

[38]*See* Leonardo Borlini, *When the Leviathan Goes to the Market: A Critical Evaluation of the Rules Governing State-Owned Enterprises in Trade Agreements*, 35 LEIDEN J. INT'L L. 313, 315 (2020) (noting, "There is no textual reference to the term 'SOEs' in the WTO agreements. Until very recently, trade scholars barely even mentioned SOEs because they were not seen as a WTO problem. That many provisions of the WTO are applicable to SOEs is not in doubt, but these rules do not apply explicitly to such entities.").

[39]Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed in Santiago, Chile, Mar. 8, 2018. The TPP-11 is a separate treaty that incorporates, by reference, the provisions of the original Trans-Pacific Partnership (TPP), defunct after the United States withdrew its signature, *see* www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng. The chapter on SOEs remained identical after the United States withdrew.

[40]For a critical account of the novelties and potentials of the CTPP's approach to trade regulation of SOEs, see also Mitsuo Matsushita, *Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises,* in this issue; Borlini, *supra* note 38, at 323–32.

[41]J.Y. Qin, *WTO Regulation of Subsidies to State-owned Enterprises (SOEs)—A Critical Appraisal of China Accession Protocol*, 7(4) J.I.E.L. 863 (2004); Philip I. Levy, *The Treatment of Chinese SOEs in China's WTO Protocol of Accession*, 16(4) WORLD TRADE REV. 635 (2017).

[42]Since its accession to the WTO, China has been a defendant in forty-four cases, of which six have been settled or terminated and twelve are still in consultation. Some of the cases have remained at the consultation stage for a long time, without the complainant submitting a request for the establishment of a panel. Twenty-seven of the forty-four disputes against China have included at least one claim that China has violated its Protocol of Accession. In the overwhelming majority of such cases, complainants invoked the Protocol of Accession as an additional basis for complaints falling under the multilateral agreements.

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accession.[43] In some cases, foreseeable problems were simply not addressed at all. Most notably, the Protocol did not quell anxieties about the Chinese state sector and did not provide any specific provision for the long-standing issue of SOEs as pass-through vehicles for subsidies. The Protocol of Accession could never have been a perfect substitute for deficient legislative foresight. Both the statutory language as well as practice, discussed in an exemplary manner by Williams, confirm this point. To begin with, the extensive margin of obligations included in the multilateral agreements and the plurilateral agreements, assuming the acceding country agrees to adhere to one or more of them, circumscribes the sum of obligations that a Protocol of Accession can include. Furthermore, the intensive margin (e.g., level of tariffs) is, of course, a matter of negotiation and very much an item for inclusion in any similar protocol.[44]

To conclude this section, recall that China joined the WTO at the end of 2001, at the same time as the Doha Round was launched. Its negotiating mandate included renegotiation of various WTO Agreements, including the Agreement on Subsidies and Countervailing Measures (SCM),[45] which could have been used to "complete" the deficient SCM Agreement. One could have imagined, for example, adding important details to explicitly acknowledge that SOEs are "public bodies" in the SCM sense of the term. This did not happen.[46]

Furthermore, abandoning the "Trade and Competition"[47] and "Trade and Investment"[48] initiatives that were part of the Doha Round mandate at the 2003 WTO Ministerial Meeting in Cancun did not help either. Complaints regarding competition enforcement in China abound. Enforcement of competition law by the Chinese authorities is considered wanting in various respects.[49] Now, because the Doha Round is all but gone, and the group on Trade and Competition has been dissolved, we are back to square one on this score. Note that, even those sympathizing with China's record, like Ju and Ping,[50] still call for a change in direction, adding credence to critical arguments regarding the manner in which the Chinese Competition Office has dealt with high-profile cases so far. [51]

On the other hand, various investment-related practices have continued to plague market access for foreigners in China. The EU recently tried to remedy this situation, but only for EU investors, with the bilateral EU–China Comprehensive Agreement on Investment (CAI). Dadush and Sapir provide a comprehensive account of the content of CAI.[52] Their conclusions are quite telling: There is not much there in terms of substantive commitments, although it may be

[43]Levy, *supra* note 42.

[44]*See generally* Peter John Williams, A Handbook on Accession to the WTO (2008).

[45]Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. [Not reproduced in I.L.M.].

[46]*See also* Bernard M. Hoekman & Douglas Nelson, *Subsidies, Spillovers and Multilateral Cooperation,* RSCAS 2020/12 EUI Working Papers (2020) (regretting the fact that the current SCM Agreement does not sufficiently take into account SOEs).

[47]For an informed analysis of such an approach, see Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J.I.E.L. 665 (1999), for one view of a world competition agenda. The article identifies market access and open markets as the key point of intersection of trade and competition and proposes that a WTO instrument should take advantage of the synergy. *See also* Eduardo Pérez Motta, Competition Policy and Trade in the Global Economy: Towards an Integrated Approach 11 (2016).

[48]*See also* Bijit Bora & Edward M. Graham, *Investment and the Doha Development Agenda*, *in* Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance 335 (Ernst-Ulrich Petersmann ed., 2005).

[49]Economy provides a comprehensive account. *See generally* Elizabeth C. Economy, The Third Revolution, Xi Jinping and the New Chinese States (2019).

[50]*See* Heng Ju & Lin Ping, *China's Anti-Monopoly Law and the Role of Economics in its Enforcement*, 6 Russ. J. Econ. 219–38 (2020).

[51]The Comprehensive Agreement on Investment (CAI) is a proposed investment deal between the People's Republic of China and the European Union. *See* European Commission, EU–China agreement: Milestones and documents, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/milestones-and-documents_en.

[52]Uri Dadush & André Sapir, *Is the European Union's investment agreement with China underrated?*, Bruegel Policy Contribution No 09/21, https://www.bruegel.org/2021/04/is-the-european-unions-investment-agreement-with-china-underrated/.

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an important platform for further multilateral negotiations.[53] On top of that, the CAI has now been in a limbo for quite a long time: Proposed in 2013, the deal had not been signed as of the time of publication of this article.

All this considered, one may safely conclude that China did not have to do anything more than other WTO members with respect to its SOEs. Contrary to, say the EU, where SOEs are scrutinized under strict EU law,[54] China's SOEs are scrutinized under much laxer Chinese competition law. In addition, China maintains various restrictions on inward foreign direct investment, and the full picture starts looking rather gloomy.

C. Is Adjudication the Better Way?

The United States has led the chorus of critique against China's practices, and others have joined in, albeit not with the same intensity. The "cahiers des doléances" that various WTO members have put together are not identical.[55] It is probably fair to state, though, that dissatisfaction with China on the part of the United States, the EU, and other Western countries have centered mainly around two issues. First, the manner in which Chinese SOEs have been operating, which is allegedly not in compliance with the obligations assumed. Second, the lack of enforcement of intellectual property rights, typified by the de jure or de facto obligation for foreign investors in China to enter into joint venture agreements with Chinese companies and transfer their technology as a precondition for market access.

I. Complaints Against China

Maybe we should kick-off this discussion by stating that a general claim has been formulated to the effect that there has been under-enforcement against China by its trading partners, and there is probably some merit to this claim. If we use a country's share of global trade as a predictor for the number of disputes it faces at the WTO as respondent, then China is definitely under-represented. Probably, various foreign investors prefer to "bite the bullet" and stay in the Chinese market rather than provoke the wrath of the Chinese authorities by litigating their rights. There is some evidence to this effect, as we discuss elsewhere.[56]

So far, two WTO complaints have been raised implicating Chinese SOEs, but both have been raised by . . . China.[57] This observation is telling, in and of itself. If the membership complains about the SOEs' involvement in the Chinese economy, why not litigate more? When litigation occurred, the outcome has not been exhilarating for complainants. The WTO Appellate Body had already, before complaints involving China had been lodged, eviscerated the legal discipline imposed by GATT Article XVII on state-trading enterprises (STEs), a sub-set of SOEs, by narrowing the obligation imposed to non-discriminatory behavior, making the obligation to act in accordance with commercial considerations de facto redundant.[58] When China-specific

[53]*Id.*

[54]On the "exportation" by the EU of its internal rules on public undertaking into EU free trade agreements of a new generation, see Nerina Boschiero & Stefano Silingardi, *The EU Trade Agenda Confronts a Global Pandemic—Rules on State Intervention in the Market*, in this Issue; Borlini, *supra* note 38, at 326–33.

[55]Henry Gao, *China's Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation* 21(3), World Trade Rev. 342 (2022), calls this phase of China–WTO relations one of "alienation," following the original "aspiration" and high hopes that the world community harbored about trade expansion when China joined the WTO, and the ensuing phase, "assimilation," during which, for right or, as we believe, wrong reasons, the WTO membership believed that China would change and become an integral part of the liberal trade order.

[56]*See Id.* at 48–61.

[57]*See* Appellate Body Report, *United States–Definitive Antidumping and Countervailing Duties (China)*, WT/DS379/AB/R (Mar. 25, 2011); Appellate Body Report, *United States–Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (December 18, 2014).

[58]WTO case law has been significantly weakened by the finding that it suffices for STEs to act in a non-discriminatory manner to comply with the provision. The case law is discussed in detail in Petros C. Mavroidis, The Regulation of

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complaints were lodged, the Appellate Body has held that SOEs 100% owned by the Chinese state are not even presumptively "public bodies."[59] Its eventual finding, in a subsequent case, that even private companies could be considered "public bodies,"[60] a complete U-turn over the prior case law, was too little too late. By that time, the Trump administration had pulled the rug out from under the Appellate Body, condemning it, at least provisionally, into abeyance. Yes, legislators could have provided clearer legislative guidance, but WTO adjudicators failed miserably in this context as well.

And what about the vexed issue of forced technology transfer that foreign companies wanting to invest in China routinely complain about? There has only been one litigation against China, by the European Union, in a WTO case that is still pending.[61] Why nothing more? For one simple reason: The WTO does not punish the behavior of private agents. Unless the obligation to transfer technology to a Chinese partner in a joint venture can be attributed to the Chinese state, which is rarely or never the case, foreign investors will not prevail in a WTO litigation.

II. What if a Different Legal Strategy Had Been Adopted?

But wait a moment, one might argue: Are we convinced that complainants have been pursuing the right legal strategy? Certainly, Charlene Barshefsky, a former U.S. Trade Representative, thinks that this has not been the case. In a recent 2019 speech at the United States–China Business Council in Shanghai, she deplored the under-use of commitments made by China in its

INTERNATIONAL TRADE, Volume I, 397–405 (2016). A particularly debatable decision is Appellate Body Report *Canada–Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R ¶¶ 93–106 (Aug. 30, 2004), where the AB rejected the argument that Art. XVII:1(b) establishes a separate, general competition-law-type obligation on STEs to follow "commercial considerations" in all of their purchases and sales.

[59]In *United States–Definitive Antidumping and Countervailing Duties (China)*, *supra* note 59, the notion of "public body" was understood as an entity that, although not institutionally part of a government, still functions like one. This reading had an important corollary: The recognition that SOEs can be run as genuine commercial enterprises and operate on a level playing field with private enterprises. The reasoning underlying this reading thus implies that SOEs should not be treated differently simply because of majority-ownership by a government. This Appellate Body decision drew criticism not just from academics, but also from those who joined the Uruguay Round negotiation to draft the SCM Agreement. For example, three key drafters of the SCM Agreement wrote that "[a] remarkable illustration of the troublesome activities of the [AB] (which may, in the long run, destroy the credibility of the WTO dispute settlement system) is its report in the United States–Definitive Anti-Dumping and Countervailing Duties on Certain Products from China." Michel Cartland, Gérard Depayre, & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46(5) J. WORLD TRADE 979–1015, 991 (2012). For a fuller discussion of this case law, see Leonardo Borlini, *The Covid 19 Exogenous Shock and the Crafting of New Multilateral Trade Rules on Subsidies and State Enterprises in the Post-Pandemic World*, in this issue, and the comprehensive literature referred to therein.

[60]The more recent case law adopted a rather expansive understanding of the term, allowing even private entities, under certain conditions, to be considered public bodies. Following a few defeats, the United States managed to score a clear victory regarding the understanding of the term "public body," whereby even private firms, assuming they are intermingled with the state, could be characterized as such. Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China—Recourse to article 21.5 of the DSU by China*, WT/DS437/AB/RW ¶¶ 291, 317-9 (July 16, 2019). Even before this case, the Appellate Body made it clear that "SOEs-as-subsidy-providers" can be captured by Article 1.1(a)(1)(iv) of the SCM agreement that provides for private bodies that have been entrusted or directed to carry out the functions that constitute potential subsidies, such as transfer of funds. Appellate Body Report, *United States Countervailing Duty Investigation on DRAMS from Korea*, WT/DS296/AB/R ¶ 113 (June 27, 2005). Yet, not all governmental measures vis-à-vis a private intermediary would necessarily amount to "entrustment" or "direction" because both terms demand a significant degree of command-and-control authority on the side of the government. Moreover, the use of private vehicles poses more of an evidentiary challenge for panels, as they have to examine how the ostensibly private conduct can be ascribed to a government entity, which will not necessarily be eager to disclose that relationship to the rest of the world. *See also* MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM, PETROS C. MAVROIDIS, & MICHAEL HAHN, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 314–15 (3rd ed. 2015).

[61]On February 22, 2022, the European Union requested WTO dispute consultations with China concerning alleged Chinese measures adversely affecting the protection and enforcement of intellectual property rights. *See China—Enforcement of intellectual property rights—Request for consultations by the European Union*, WT/DS611/1 IP/D/43 G/L/1427 (Feb. 22, 2022).

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Protocol of Accession to litigate at the WTO.[62] However, apart from the anti-surge clause, which protects against "excessive" Chinese exports, she did not point to any provision that would have obliged China to open its closed market, which is the main problem faced by China's trading partners, and certainly a far bigger one than slowing down the alarming pace of Chinese exports to their markets. What can be done to further open up the Chinese market under the existing WTO regime? Not much is the simple answer. There is a lot in terms of "spirit" but no binding language in the Protocol of Accession.

In fact, a former member of the Appellate Body, Jennifer Hillman, has claimed that non-violation complaints could provide an adequate means to channel disputes against China.[63] We disagree. For starters, this instrument can be of almost no help when it comes to litigating Chinese measures—and there are many—preceding time-wise China's negotiation of tariff bindings. This is so because of the allocation of the burden of proof under WTO law.[64] But more to the point, prevailing in this context, a non-violation complaint does not entail an obligation for China to amend its regime.[65] It will simply have to part with a very small, infinitesimal indeed, portion of its huge surplus.

Consequently, our conclusion is that WTO adjudication is no remedy for deficient WTO legislation. Those who negotiated China's terms of accession seem to have spent more time thinking about, "how can we block Chinese exports?" than asking, "how do we guarantee that China will open up?" One might argue that, so far, we have painted a rather bleak picture; complaints against China have been mounting, and it seems that they cannot be effectively addressed through the current multilateral legislative framework. Is there no light at the end of the tunnel? Maybe, yes, but to get to this point, members of the world trading

[62]*See* Jordan Papolos, *Extraordinary Accession: China's WTO Agreement from Every Angle*, 28 (2019) https://www.merckgroup.com/content/dam/web/corporate/images/country-specifics/china/research/AmChamChina.pdf.

[63]Jennifer Hillmann, *Testimony before the U.S.–China Economic and Review Security Commission*, U.S. Senate, Wash., D.C. (2018), https://www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf. Briefly, an NVC allows WTO members to request compensation even for legal measures, which nevertheless nullify or impair the benefits accruing to them. What matters is that benefits have been impaired, irrespective of whether the action described in the complaint is legal or not. To this effect, the WTO member has to show that its benefits have been impaired as a result of a measure by another WTO member that they could not have reasonably anticipated. For a detailed discussion of this instrument, see Kyle Bagwell & Robert Staiger, *Domestic Policies, National Sovereignty, and International Economic Institutions* 116(2) Q. J. ECON. 519–652 (2001).

[64]NVCs are associated with a high burden of proof. Following the ruling in the Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper—Action by the Dispute Settlement Body*, WT/DS44/5 (Apr. 23, 1998), the leading case on this score, the burden of persuasion varies depending on when the challenged measure occurred. As NVCs are linked to tariff concessions, what we care about is the point in time when the challenged measure occurred, as compared to when a concession was negotiated.

[65]Hillmann, *supra* note 63, does not discuss exhaustively the complaints that an aspiring complainant could bring under an NVC. In MAVROIDIS & SAPIR, *supra* note 7, at 156–58, nevertheless, we examine the potential of an NVC complainant to be successful when challenging the legality of Chinese SOEs and/or forced TT before the WTO. In the case of China, the first and last tariff concessions were agreed to in 2001. In line with the allocation of the burden of proof as per the Panel Report on *Japan—Film,* if the challenged measure (any challenged measure) occurred before 2001, when tariff concessions between China and its trading partners were exchanged, then the complainant must demonstrate that although it was aware of it, it could not have anticipated its impact. For Chinese measures adopted after 2001, the presumption works in the opposite way. It will be incumbent on China to show that although unknown to the complainant at the moment when tariff concessions were being exchanged, the complainant should still have anticipated that the challenged measure would eventually occur. Therefore, one can easily understand that with respect to the first category of measures, complainants will have an Everest to climb. They will have to demonstrate this although they were fully aware of the measures challenged and could not have anticipated their eventual impact. Keep in mind that this allocation of the burden of proof is not conditional on transparency-related concerns. It is a legal presumption. Incumbents must do their homework and find out what kind of measures exist in the Chinese market that might affect the outcome of their tariff negotiation with China. In order to prevail, they have to show why the impact of these measures, the eventual impact, that is, could not have been reasonably anticipated. The limits of reasonableness are quite elastic, which is why no WTO member has been successful so far in adjudicating similar measures.

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community, China included, will have to behave like "responsible stakeholders," as Zoellick, another ex-USTR, has recently asked them to do.[66]

This is not the time, we suggest, to point fingers. Maybe there was a lack of foresight on the part of WTO incumbents when China was negotiating its accession, and, for sure, there were unforeseen developments as well. The question is what to do now? To a large extent, in our view, solving the China problem can only have beneficial effects for the future of the WTO as a whole.

D. Multilateralism Matters

In our view, the China story in the WTO is a case of cognitive dissonance: China never committed to become a "market economy" when it joined the WTO. To put it schematically and for all practical purposes, it only promised to become a "socialist market economy." The Western countries and the WTO membership in general only paid attention to the words "market economy," but, for the Chinese, the word "socialist" was equally important. China's constitution is very clear about this. Its Article 6 states that:

> The foundation of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, that is, ownership by the whole people and collective ownership by the working people . . . . In the primary stage of socialism, the state shall uphold a fundamental economic system under which public ownership is the mainstay and diverse forms of ownership develop together.[67]

This, it seems, meant more to the Chinese negotiators in charge of China's accession to the WTO than it did to the WTO incumbents on the other side of the table. And the world soon found out that this had indeed been the case all along.

I. The Deng Legacy, and President Xi's China of Today

In our latest book, we provide strong evidence to the effect that Chairman Deng, market-opening initiatives notwithstanding, was not in tune with Gorbachev's dismantlement of the Soviet Communist Party.[68] To Chairman Deng and his successors, preserving the Chinese Communist Party structure was of quintessential importance. In fact, Chairman Deng excoriated Gorbachev's decision to dissolve the Party because he always thought that its role was crucial in directing state affairs.

It was not really a surprise, therefore, that President Xi has moved towards re-invigorating the role of the state, rather than retracting it from the workings of the economy. And he had, and still has, little incentive to do otherwise. As it is, China has been outperforming other big advanced and emerging economies for some time now. And not only that. China weathered the Great Financial Crisis much better than others. The same holds for the Covid-19 crisis. According to the IMF's April 2021 WEO database, China's GDP will reach 117% of its 2019 level in 2022, while the United States will only reach 106%, and the EU 102%, of their 2019 levels.[69] Why change then?

For both ideological- and performance-related reasons, a serious regime change was never in the cards. The reduction of the role of the state in China has always been more a question of corporatization than privatization of state assets. The former should not be confused with the latter, as corporatized assets can continue to be under state control in one form or another. As a result, the world trading community is now stuck with a Chinese legal framework that is

[66] *See generally* Robert B. Zoellick, America in the World, A History of US Diplomacy and Foreign Policy (2020).

[67] Constitution of the People's Republic of China, art. VI.

[68] *See* Mavroidis & Sapir, *supra* note 7, at 14–19.

[69] Int'l Monetary Fund, *World Economic Outlook: Managing Divergent Recoveries* (2021), https://www.imf.org/en/Publications/WEO/Issues/2021/03/23/world-economic-outlook-april-2021.

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at odds with the situation in most other countries. Yet, this does not necessarily mean that no progress is possible in trying to bridge the gap between the Chinese and the WTO systems. The world trading community should be under no illusions as to what can be achieved. China will not change its economic regime and overall approach by legislative fiat, through an edict decided in Geneva.

II. Aggressive Unilateralism, Tolerance, and . . . Problems

The United States has been critical of China's evolution over the years on various fronts, from its human rights record to its implementation of WTO obligations. The Trump administration upped the ante by adopting a series of unilateral measures of dubious WTO-consistency, and most importantly of doubtful efficiency, which the Biden administration has, so far, not rescinded.[70] We submit that the other courses of actions advanced to deal with the "China problem" are also inappropriate, or at best only partly efficient.

Bilateral solutions, like the United States–China Phase One deal or the EU–China CAI may help a bit but will not solve the problem because of the nature of what is at stake: Subsidies involving SOEs require multilateral discipline. Bilateral solutions only advance short-term, narrow interests aiming to redress trade imbalances as opposed to systemic interests that address the cause of concern or effect change in the medium term. In examining the United States–China Phase One deal in particular, Hufbauer labelled it "managed trade,"[71] and this is exactly what it is. Irreconcilable with the most favored nation (MFN) rule, the cornerstone of the world trading regime, it has not expanded U.S. exports to China as expected, either.

The deal did not solve the "China problem," nor even reduce the U.S. trade deficit with China, and risks being outlawed by a WTO panel. And as hinted at above, before it reached this deal with China, the Trump administration was busy imposing unilateral tariffs against Chinese imports. We now know, thanks to the work of Amiti, Redding, and Weinstein and Bown, that not only did China not flinch under U.S. pressure, but that it is the U.S. economy that suffered the bulk of the cost of the unilateral increase in tariffs.[72] The world trading community would be well-advised to avoid repeating unilateral reactions à la the Trump administration.[73]

Rodrik recommended a "do-nothing" approach, claiming that the WTO should tolerate different economic regimes, and should accommodate the idiosyncratic features of the Chinese system.[74] There are two problems with this view: First, problems persist, and second, for the reasons discussed above, the multilateral trading regime was predicated on a liberal understanding that should cut

[70]For an informed analysis of this course of action by the current U.S. administration, see Thomas J. Schoenbaum, *The Biden Administration's Trade Policy: Promise and Reality*, in this issue.

[71]Gary Clyde Hufbauer, *Managed Trade: Centerpiece of US–China Phase One Deal*, PETERSON INST. OF INT'L ECON.: WASH., D.C. (2020), https://www.piie.com/blogs/trade-and-investment-policy-watch/managed-trade-centerpiece-us-china-phase-one-deal.

[72]*See generally* Mary Amiti, Stephen J. Redding, & David Weinstein, *The Impact of the 2018 Trade War on US Prices and Welfare* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26672, 2019); *see also* Chad Bown, *Anatomy of a Flop: Why Trump's US-China Phase One Trade Deal Fell Short*, PETERSON INST. OF INT'L ECON. (2021), https://www.piie.com/blogs/trade-and-investment-policy-watch/anatomy-flop-why-trumps-us-china-phase-one-trade-deal-fell.

[73]The EU executive has recently adopted measures to counteract "Belt and Road" subsidies, but there are doubts as to the legality of this approach, and even bigger doubts as to their effectiveness if they remain a tool in EU hands only. *See Commission Implementing Regulation* (EU) 2020/870 of June 24, 2020, imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fiber products originating in Egypt and levying the definitive countervailing duty on the registered imports of continuous filament glass fiber products originating in Egypt; C/2020/4060, O.J. L. 201, 25.6.2020, 10–6.

[74]*See generally* Dani Rodrik, *The Double Standard of America's China Trade Policy*, PROJECT SYNDICATE (May 10, 2018), https://www.project-syndicate.org/commentary/american-trade-policy-double-standard-by-dani-rodrik-2018-05, (arguing, "Any sensible international trade regime must start from the recognition that it is neither feasible nor desirable to restrict the policy space countries have to design their own economic and social models. Levels of development, values, and historical trajectories differ too much for countries to be shoehorned into a specific model of capitalism.").

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across the various GATT constituents. The GATT/WTO was not designed to accommodate each and every state on earth irrespective of its regime choice. The liberal understanding permeated the agreed text. Indeed, its key institutions cannot function properly absent acknowledgement of the liberal understanding. At the same time, it is true that neither the GATT nor the WTO agreements ever made explicit their implicit liberal understanding.[75] Contrary to the European Union, which added accession criteria, the Copenhagen criteria, to prepare for the accession of the former socialist countries of central and eastern Europe, the GATT/WTO agreements contain no such criteria.

III. What is Needed in New Multilateral Rules?

What the multilateral trading regime can potentially achieve in China, in addition to what it has already done during the past twenty years, is to tweak a few key institutions, which would facilitate access to China's market and increase the relevance of the WTO framework in Beijing. To be clear, the world trading community's interests would be better served by amending the current trade law regime and bringing it into line with the original "liberal understanding" of the General GATT. In our view, only a legislative amendment will allow the WTO membership to solve the specific problems posed by SOEs and forced technology transfer.

But the international trading community should not repeat mistakes of the past. *Non bis peccatur*, or the cat should not sit on the hot stove twice, as the saying goes. There is no reason to believe, if there ever was one, that a relational contract, full of gaps, will function as expected. The heterogeneity among WTO members argues against such expectations. Now is the time for explicit contracting. Wu correctly underscores the capacity of China to evade WTO discipline.[76] It is equally true, though, that the biggest victories against China in WTO disputes were scored in areas where contractual expression had been quite clear. And now is the time for action. Contrary to Rodrik's suggestion, the world trading community cannot stay idle. The "do-nothing" approach implies that problems perpetuate. The world trading community needs to come together and "complete" the WTO contract in some key areas.

There is no need for the multilateral trading community to re-invent the wheel. Assuming the two key complaints against China continue to be the behavior of SOEs and the request for transfer of technology as a pre-condition for market access by foreign investors, the world trading community would be sensible to mimic existing successful examples dealing with these two issues.

Both the CPTPP, the successor to the TPP signed under Obama but rejected by Trump, as well as the United States–Mexico-Canada Agreement (USMCA), the successor to the North American Free Trade Agreement (NAFTA),[77] contain detailed chapters regarding the disciplining of SOEs and forced technology transfers,[78] the two biggest irritants to trade and investment relations with China.

We submit that, for *realpolitik* reasons as well, this is a commendable approach: Why attempt to re-invent the wheel when solutions that meet the approval of a substantial percentage of the WTO membership already exist? And the good news is that China has already agreed on some of this discipline in its bilateral investment agreement (the CAI) with the EU, as Dadush and Sapir explain.[79] With this in mind, we would like to advance two proposals for WTO reforms.

The first concerns SOEs, of which only a small subset of STEs are covered by the existing WTO Agreement under GATT Article XVI.[80] The new text should make it clear that all SOEs—including,

[75] *See* Mavroidis & Sapir, *supra* note 7, at 68–71, 104–05.

[76] *See generally* Wu, *supra* note 6.

[77] The United States–Mexico–Canada Agreement [hereinafter USMCA] entered into force on July 1, 2020. The USMCA, which replaced the North America Free Trade Agreement (NAFTA), is a mutually beneficial win for North American workers, farmers, ranchers, and businesses. The text of the agreement is available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

[78] For an analytical account of the CPTPP and USMCA chapters on SOEs, see Borlini, *supra* note 38, at 326–33.

[79] *See generally* Dadush & Sapir, *supra* note 52.

[80] *See* Ernst-Ulrich Petersmann, *GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform*, *in* State Trading in the 21st Century 71 (Thomas Cottier & Petros C. Mavroidis eds., 1998); Andrea Mastromatteo, *WTO and SOEs: Article XVII of the GATT 1994*, 16(4) WTR 601 (2017).

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but not exclusively, STEs—are presumptively "public bodies," thus reversing the burden of proof in subsidies disputes, and must, in any case, act in accordance with "commercial considerations." In our view, emulating Chapter 17 of the CPTPP is the appropriate way for the WTO to address this issue.

This chapter accomplishes precisely what a series of GATT/WTO panels should have addressed earlier. Article XVII of the GATT was designed to cover activities by entities engaging in state trading. This provision requires WTO members to ensure that their STEs behave in accordance with commercial considerations, afford interested parties adequate opportunities to compete, and avoid discriminatory behavior. As mentioned above, a series of GATT/WTO panels turned this test on its head when understanding the first two obligations (act in accordance with commercial considerations and afford adequate opportunities to compete) as a subset of the obligation to not discriminate.[81] As we argue elsewhere, "we can return to orthodoxy, to the intended meaning of this provision, by simply reversing the current case law (which is, in fact, what the text of Chapter 17 of the CPTPP does)."[82] However, the return to orthodoxy will be permanent only "by preempting judicial discretion through, say, the adoption of an understanding of Article XVII of the GATT that will dissociate the two obligations (the obligation to act in accordance with commercial considerations; and the obligation to afford adequate opportunities to compete) from the obligation to not discriminate."[83] And, *ca va sans dire*, the obligation to act in accordance with commercial considerations should not be confined to STEs only, but should be extended to cover SOEs, state-invested enterprises, state-owned commercial banks, and so forth. The WTO could thus introduce an agreement inspired by Chapter 17 of the CPTPP and/or Chapter 22 of the USMCA. This would address a great deal of the concerns expressed by China's trading partners. Ultimately, it will be a matter for courts to decide, because they will be called upon to enforce this provision.[84]

Second, for foreign direct investment involving joint ventures, WTO signatories, including China, should be constrained not to enforce contracts between domestic and foreign firms that oblige the foreign investor to transfer technology to its domestic partner against its wishes. If agreed at the multilateral level, a substantial part of today's complaints against China would subside.

> There is a necessary condition for all this to happen of course: all the main WTO players, China included, must agree to participate in fresh WTO negotiations. The key question for the (important) stakeholders, is how to bring this about politically. The January 2020 Joint Statement of the Trilateral (Japan, United States, and EU) showed that trade distorting policies and practices by China pose challenges to many nations, and that cooperation is possible. As argued by Baldwin et al., call for a structured dialogue with China will be required down the road.[85]

[81] *See supra* note 60.

[82] MAVROIDIS & SAPIR, *supra* note 7, at 185.

[83] *Id.* at 185. Note that Chapter 22 of the USMCA goes even further than Chapter 17 of the CPTPP. Its main features are as follows: To start with, Article 22.1 includes a definition of SOEs, which covers not just cases of ownership but also cases of the control of voting rights, or of the enterprise itself by the state. It makes clear, though, that regulatory or supervisory activities of, say, a financial regulatory body are not covered. Additionally, as in the CPTPP context, the agreement makes it clear in Article 22.4 that SOEs, when engaging in commercial activities, must act in accordance with commercial considerations. Third, Article 22.1 defines "commercial considerations" to cover price, quality, marketability, and so forth of purchase or same that "would normally be taken into account in the commercial decisions of a privately-owned enterprise in the relevant business or industry." Finally, the same provision also defines "non-commercial assistance," a term aiming to capture equity infusions, loans, guarantees, and so forth, "on terms more favorable than those commercially available."

[84] As we argued in MAVROIDIS & SAPIR, *supra* note 7, at 186: "This is quite a realistic prospect, in fact. . . . We are encouraged to think this way by the language in Chapter 11 of the EU–Vietnam FTA. Vietnam is a self-described socialist market economy, just like China. The language in this chapter recognizes the right of both parties to decide upon their own system of owner ship but requires that SOEs act in accordance with commercial considerations with respect to their commercial activities."

[85] *See generally* Richard E. Baldwin, Chad Bown, Jonathan Fried, Anabel Gonzalez, André Sapir, & Tetsuya Watanabe, *Getting America Back in the Game: A Multilateral Perspective*, Geneva Trade Forum (2020), https://www.graduateinstitute.ch/sites/internet/files/2020-12/Getting%20America%20back%20in%20the%20game_A%20Multilateral%20perspective.pdf.

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Is the United States then prepared to commit to the WTO again? And is China willing to do the same? The current attitude of the Biden administration is hard to discern. While it has not committed to reinvigorating the WTO dispute adjudication function, nor to resuscitating its moribund legislative function, at least it has not pressed the "abort" button that the Trump administration pressed to kill the WTO Appellate Body. The world trading system is in large part the brainchild of the United States. Originally conceived as part and parcel of the Cold War machinery,[86] the GATT managed to emerge as the genuine multilateral forum for trade integration. In today's world, with the return of geopolitics, and even more so with the global climate challenge and its trade repercussions, the rationale for multilateral solutions is even stronger. And, to be fair, China so far has not been a consistently disruptive player. The Biden White House recognized as much recently:

> Russia and the PRC pose different challenges. Russia poses an immediate threat to the free and open international system, recklessly flouting the basic laws of the international order today, as its brutal war of aggression against Ukraine has shown. The PRC, by contrast, is the only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to advance that objective.

In the trade area, will the United States continue to challenge China on its own, as President Trump started to do but with little result,[87] or will it change its position and instead challenge China within the confines of the WTO together with friends and allies? This is the ultimate policy choice facing the Biden administration. Rational decision-making should tilt the balance decidedly in favor of the latter option. There is tangible proof now that the United States is moving in this direction. Senator Portman recently submitted a bi-partisan bill, the Trading System Preservation Act, aiming to provide the U.S. President with authority to enter into plurilateral agreements.[88]

And what about China? Why would its government agree to discuss WTO reforms that would oblige it to change some of its behavior when the existing regime works in its favor?

No one can deny that China has benefitted enormously from its participation in the WTO. The cost of non-WTO, as may happen if the "China problem" continues to poison the atmosphere at the WTO, would be felt in Beijing probably even more than elsewhere. China should have an incentive,[89] therefore, to act as a "responsible stakeholder,"[90] as already argued in 2005 by then-U.S. Deputy Secretary of State, Robert Zoellick.[91]

[86]*See generally* Benn Steil, The Battle of Bretton Woods (Princeton Univ. Press 2013).

[87]*See generally* Hufbauer, *supra* note 71.

[88]Trading System Preservation Act of 2022, S. 3708, 117th Cong. (2nd Sess. 2022).

[89]We are fully aware that the survival of the current regime does not depend solely on feelings of altruism and mutual cooperation. China's participation in new talks could be greatly aided by a few carrots and some sticks. Reopening the Trade in Services Agreement (TiSA) with China occupying a seat at the table could provide a boost in this direction. Inviting China to the CPTPP could further act as a quid pro quo for negotiating forced transfer of technology, an investment agreement that is in the WTO context, and disciplining of SOEs. *See also* Joel P. Trachtman, *US–Chinese Trade: Interface and Lawfare*, EUI Working Paper RSCAS 2017/11, at 13–14, suggesting that the spirit of free trade, which benefits both China and the United States, may stimulate the two powers to lead the world in formulating and using WTO law and China in accepting special arrangements for its SOEs.

[90]Mark Wu, *Is China Keeping Its Promises on Trade*?, *in* The China Questions: Critical Insights into a Rising Power 140–47 (Jennifer Rudolph & Michael Szonyi, eds., 2018), for one, doubts that China would be willing to join the CPTPP or that TTIP and similar free-trade agreements from which it is excluded would induce China to accept making changes to global trading rules. One of his arguments in support of this thesis is that the loss of competitiveness from being excluded from those FTAs is likely to be small and that China would be able to compensate for this loss through FTAs of its own. At the same time, China is unlikely to want to see the collapse of the multilateral system because it would mean the end of the rules-based trading system and the return to an earlier power-based system that would set it on a collision course with the other big power, the United States.

[91]Robert B. Zoellick, *Whither China? From Membership to Responsibility, Remarks to the National Committee on U.S.–China Relations*, N.Y.C., Sept. 21, 2005, https://www.ncuscr.org/sites/default/files/migration/Zoellick_remarks_notes06_winter_spring.pdf.

https://doi.org/10.1017/glj.2023.1 Published online by Cambridge University Press

China's export-led growth model has paid handsome dividends to the Chinese political class. What matters to the Chinese society, it seems, is "output legitimacy"; as long as the state delivers on its economic promise, its legitimacy will not be questioned.[92] China needs an open trading system and seems to be willing to accept changes to maintain the system. It should not pass unnoticed that it knocked on the door of the CPTPP, an agreement that was designed to tame China's SOEs.[93]

E. Conclusion

Crises usually go in tandem with opportunities. And the current crisis is no exception. The attitude of the key WTO players will matter a lot. The Biden administration, although it has adopted a strong approach on China, like the Trump administration, departs from the previous administration in its willingness to reassert a strong U.S. presence in multilateral institutions like the WTO.[94] Its leadership, and the manner in which it will be exercised, will define to a considerable extent the success of the endeavor we put forward in this short contribution. The WTO, and more broadly the international community, can only benefit from a multilateral solution to the China problem.

Acknowledgements. For helpful discussions, we are indebted to Claus-Dieter Ehlermann, Gary Hufbauer, Kirtikumar Mehta, and Doug Nelson.

Competing interests. None

Funding statement. None

[92] *See* Jinghao Zou, *Legitimacy Without Democracy: Way of Transition Toward Superpower?*, AM. J. CHINESE STUD., 19, 127–42 (2019); Nicholas R. Lardy, *The State Strikes Back, the End of Economic Reform in China?*, PETERSON INST. OF INT'L ECON. (2019).

[93] REUTERS, *China Applies to Join Pacific Trade Pact to Boost Economic Clout* (2021) https://www.reuters.com/world/china/china-officially-applies-join-cptpp-trade-pact-2021-09-16/.

[94] *See* Schoenbaum, *supra* note 70, and, with different tones, José E. Alvarez, *Biden's International Law Restoration*, 53 N.Y.U. J. INT.'L L. & POL., 524–86 (2021).

Cite this article: Mavroidis PC, Sapir A (2023). China in the WTO Twenty Years On: How to Mend a Broken Relationship?. *German Law Journal* **24**, 227–242. https://doi.org/10.1017/glj.2023.1