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Rethinking China trade policy: Lessons learned and options ahead

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RETHINKING CHINA TRADE POLICY: LESSONS
LEARNED AND OPTIONS AHEAD

BY HENRY GAO

EXECUTIVE SUMMARY

Looking back at the China trade policy of the Trump administration, the biggest lesson is that unilateralism simply doesn't work, at least not against a major power like China. Despite the tumultuous two-and-half-year trade war and the Phase 1 deal hailed as an "unprecedented" deal promising "a more balanced trade relationship and a more level playing field for American workers and companies,"¹ there has been little progress on the issues U.S. businesses and the Trump administration objected to in China's trade and economic policies. It is not only the U.S. government that needs a more viable approach. Many companies would like to see an alternative policy that addresses what they consider unfair or even sometimes predatory practices by the Chinese government but without resorting to protectionist trade and investment policies in the United States. Imposing tariffs on Chinese imports has been ineffective and has harmed U.S. consumers and companies.

As unilateralism doesn't work, the only options left are regionalism and multilateralism. The leading example for regionalism is the Trans-Pacific Partnership Agreement, which was regarded by President Obama² as a key instrument to ensure that the U.S. rather than China write the trade rules. The problem, however, is that the U.S. itself has withdrawn from the TPP, and is unlikely to return anytime soon. This leaves us with only the multilateral route, which includes the enforcement of existing rules through WTO litigation, and the negotiation of new rules through WTO reform. This analysis provides a critical evaluation of these two options.

There are a number of China-specific rules that have long been overlooked. Properly interpreted, these rules could be used to not only prevent the Chinese government from intervening in the market, but also ensure that such interventions would not be implemented through state-owned enterprises (SOEs). This can help address the market distortions caused by state intervention. The special rule on subsidies in Section 15(b) of China's WTO Accession Protocol, coupled with existing WTO rules on subsidies, provide a good defense against the problems created by China's unique economic model.

The real problem is not the lack of rules to tackle China's state capitalism, but the lack of utilisation of existing rules. WTO members — especially the major players — should start conducting well-coordinated countervailing investigations domestically and initiate "big, bold" cases³ at the WTO to challenge China's subsidies and state

¹ United States Trade Representative, United States and China Reach Phase One Trade Agreement, 13 December 2019, at <https://ustr.gov/index.php/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach>.

² Barack Obama, President Obama: The TPP would let America, not China, lead the way on global trade, 2 May 2016, *Washington Post*.

³ Testimony of Jennifer Hillman before the U.S.-China Economic and Security Review Commission Hearing on US. Tools to Address Chinese Market Distortions (8 June 2018) <www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf>.

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intervention in the market through state-owned enterprises. In view of the systemic importance of these issues, the cases are best brought by the United States together with its allies.

It would be unrealistic to assume that meaningful reform efforts at the WTO can be achieved without the participation of China. This is mainly due to the size of China's economy and its significant trade share, which makes it hard for any deal to reach the necessary critical mass without its participation. It is entirely understandable that other WTO Members would want to bring China into the negotiations. At the same time, however, certain guidelines also need to be followed in order to engage China constructively.

First, the proposed rules should be neutral on its face so that it would not be deemed as China-specific or discriminatory against China.

Second, the negotiation shall not be one-sided with a long list of demands on China. Instead, it is very important that China also gets something in return, even if just as a token. The Chinese take the concept of face very seriously and they will react nicely to gestures of goodwill.

Third, it is also very important to have a good understanding of China's own reform goals and policy movements, as they often provide important insights on what China may agree to.

The time has come to move forward and rethink China trade policy.

WTO LITIGATION

There seems to be an emerging consensus, especially among the big players, that the existing WTO rules are inadequate for dealing with China. This is prompting calls for new rules to cope with the challenges brought by China's unique economic system, with its heavy reliance on state-owned enterprises (SOEs) and government subsidies.

The idea of China's uniqueness is not entirely new. When China sought entry to the General Agreement on Tariffs and Trade (GATT) 30 years ago, Douglas Newkirk — a senior U.S. trade official — famously stated that “the GATT was not written with a socialist market economy in mind.” When the Doha Round stalled 10 years ago, Aaditya Mattoo and Arvind Subramanian suggested that one way to break the deadlock would be launching a “China round of multilateral trade negotiations.”⁴

This approach is highly problematic. To start with, you cannot just change the rules of the game every time you start to lose. This is not only far from fair play, but it is also very risky — especially when dealing with an emerging power like China. Since joining the WTO, China has been learning very fast from the other major players. If, as some WTO members have hoped, the WTO changed its rules just to deal with China, this would set a dangerous precedent that China would almost certainly use itself one day.

Moreover, even if some WTO Members manage to create new China-specific rules, how could they persuade China to accept them? Unlike 20 years ago, China is not seeking accession and the other WTO members have no leverage available. Instead, in accordance with the decision-making rule of the WTO, China now has the power to block any new rule by simply refusing to join the consensus.

Rather than seeking to rewrite the rules completely, WTO members should first review existing rule-books, including both the general WTO rules and China's accession commitments. There are a number of China-specific rules that have long been overlooked, such as China's commitments to ensure SOEs “make purchases and sales based solely on commercial considerations” and that prices for traded goods and services in every sector “be determined by market forces.” Properly interpreted, these rules could be used to not only prevent the Chinese government from intervening in the market, but also ensure that such interventions would not be implemented through SOEs. This can help address the market distortions caused by state intervention.

⁴ Aaditya Mattoo & Arvind Subramanian, A China Round of Multilateral Trade Negotiations, Working Paper Series WP12-4, Peterson Institute for International Economics, available at <http://www.iie.com/publications/wp/wp11-22.pdf>.

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Most specifically, the special rule on subsidies in Section 15(b) of China's WTO Accession Protocol allows WTO Members to "use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks" in cases of "special difficulties." As I elaborated in another paper, this provision, coupled with existing WTO rules on subsidies, provide a good defense against the problems created by China's unique economic model.⁵

So why have these rules seen little usage in the 18 years since China's accession? This is due to three misconceptions.

The first is that countervailing actions are impossible without sufficient information on the subsidy programs in China. This can be remedied by the open-ended language of "special difficulties" in Section 15(b). This allows investigating authorities of the importing countries to use alternative methodologies for identifying and measuring subsidy benefits, especially when information on subsidies is lacking, insufficient, or otherwise difficult to obtain.

The second misconception is that the WTO Appellate Body's narrow interpretation of what constitutes a 'public body' under the WTO's Agreement on Subsidies and Countervailing Measures has made it very difficult to regulate SOEs as public bodies. The problem started with U.S.–Anti-Dumping and Countervailing Duties (China) dispute,⁶ in which the Appellate Body ruled that a public body "must be an entity that possesses, exercises or is vested with governmental authority" and "the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity." This ruling downplays the value of State ownership or interest in an entity as a criterion in a "public body" determination and emphasises the question of whether the entity has the authority to function as an extension of the government. Compared with the "ownership-based" approach, the "authority-based" approach appears to impose a higher evidentiary burden on IAs to establish a "public body." Critics of the AB's ruling were concerned that the "authority-based" approach erected a substantial barrier to the determination of a "public body," thereby creating loopholes for subsidies granted through SOEs to circumvent the WTO disciplines.⁷

Whatever may be the fault of the "public body" jurisprudence of the AB, this is less significant now that China has started to assign key governmental functions to many SOEs. Along with the push by the Communist Party of China

⁵ Zhou, Weihuan, Henry Gao, and Xue Bai. "Building a market economy through WTO-inspired reform of state-owned enterprises in China." *International and Comparative Law Quarterly* 68, no. 4 (2019): 977–1022. doi:10.1017/S002058931900037X.

⁶ Appellate Body Report, *United States–Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (adopted 25 March 2011) WTO Doc WT/DS379/AB/R, paras 317–18.

⁷ See M Cartland et al., 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46 *JWT* 1001–14, 1008, 1010–12; M Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 *HarvInt'l LJ* 301–5., 303–5.

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to install Party Committees in SOEs and to make them the key decision-makers, it becomes much easier to find the exercise of government authority by these SOEs and government control of these firms.

Moreover, the jurisprudence is also changing. In its report on the *U.S. – Countervailing Measures (China) (Article 21.5 – China)* case in 2019, the Appellate Body rejected China’s argument that connections with the government needs to be established every time when the alleged “public body” engages in any specific conduct under investigation.⁸ Instead, the Appellate Body ruled that the focus should be “on the entity, as opposed to the conduct alleged to give rise to a financial contribution,” and “once it has been established that an entity is a public body, then ‘all conduct’ of that entity shall be attributable to the Member concerned.”⁹ Moreover, the Appellate Body also rejected China’s proposition that “the circumstances potentially justifying recourse to out-of-country prices are limited to those in which the government effectively determines the price at which the good is sold, including more specifically, where the government sets prices administratively, is the sole supplier of the good, or possesses and exercises market power as a provider of the good so as to cause the prices of private suppliers to align with a government-determined price.”¹⁰ Instead, the Appellate Body recognized that there would be many other “different types of government interventions” that “may result in price distortion,” and in turn warrant “recourse to out-of-country prices.”¹¹

The third misconception is that subsidy-countervailing actions are ineffective in practice. But studies have shown countervailing measures tend to provide much higher margins of protection compared to anti-dumping measures. Moreover, with the expiration of the non-market economy methodology at the end of 2016, the current set of inflated anti-dumping rates can no longer be sustained. This leaves countervailing measures as the only meaningful option. In short, the real problem is not the lack of rules to tackle China’s state capitalism, but the lack of utilisation of existing rules. WTO members — especially the major players — should, as former Appellate Body Member Jennifer Hillman argued, start conducting well-coordinated countervailing investigations domestically and initiate “big, bold” cases¹² at the WTO to challenge China’s subsidies and state intervention in the market through SOEs.

In view of the systemic importance of these issues, the cases are best brought by the U.S. together with its allies. Nobody is better suited for the job than USTR nominee Katherine Tai, given her successful experience coordinating the joint complaint in the *China – Rare Earth* case with the EU and Japan.

⁸ 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 and Add.1, adopted 15 August 2019, para. 5.99.

⁹ *Ibid*, para. 5.100.

¹⁰ *Ibid*, para. 5.147.

¹¹ *Ibid*, para. 5.144.

¹² Testimony of Jennifer Hillman before the U.S.-China Economic and Security Review Commission Hearing on US. Tools to Address Chinese Market Distortions (8 June 2018) <www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf>.

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At the same time, we also need to recognize the limits of litigation. While the WTO dispute settlement system is much faster compared to other international tribunals, it could still take 2-3 years for a case to fully go through all stages in the process. Moreover, with the Appellate Body now effectively dead due to U.S. blockage of appointment of Appellate Body members, China could block the adoption of any unfavourable judgment by simply “appealing into the void.” The biggest problem, though, is that WTO decisions, even those by the AB, lacks precedential value and are only supposed to apply to the specific measures in the case between the Parties to the dispute. Thus, for systemic issues, new multilateral rules might still be necessary.

WHAT NEW RULES DO WE NEED?

At the 11th WTO Ministerial Conference in Buenos Aires, the United States, the European Union and Japan issued a joint statement¹³ condemning “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” as “serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy.” To “address this critical concern,” they vowed to “enhance trilateral cooperation in the WTO and in other forums.”

At the same Conference, the United States also set the agenda on the substance of the negotiation and strived to control how the negotiations should be conducted. At the conclusion of the conference, the United States Trade Representative Robert Lighthizer stated that “MC11 will be remembered as the moment when the impasse at the WTO was broken. Many members recognized that the WTO must pursue a fresh start in key areas so that like-minded WTO Members and their constituents are not held back by the few Members that are not ready to act.”¹⁴ In other words, instead of trying to seek a consensus among all WTO Members like it did in the past, the United States would now work with the “coalition of the willing” and move at its own speed.

Since then, the trilateral group has intensified its work with several more joint statements. In turn, these statements have morphed into WTO reform proposals, with the key players all chipping in.

¹³ Office of the United States Trade Representative (‘USTR’), ‘Joint Statement by the United States, European Union and Japan at MC11’, 12 December 2017, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states> (visited 1 June 2020).

¹⁴ USTR, USTR Robert Lighthizer Statement on the Conclusion of the WTO Ministerial Conference’, 14 December 2017, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/ustr-robert-lighthizer-statement> (visited 1 June 2020).

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Among the major players, the European Union was the first to issue a comprehensive concept paper. Released on 18 September 2018, it is entitled “WTO Modernisation: Introduction to future EU proposals”¹⁵ and covers three aspects: rule-making and development, regular work and transparency, and dispute settlement. Three days later, Canada followed with its own discussion paper on ‘Strengthening and Modernizing the WTO’, which also includes three aspects: “(1) improve the efficiency and effectiveness of the monitoring function; (2) safeguard and strengthen the dispute settlement system; and, (3) lay the foundation for modernizing the substantive trade rules when the time is right.”¹⁶ In addition to the two comprehensive papers, both the European Union and Canada have also tabled various more specific proposals.¹⁷

The United States has not issued any comprehensive proposal, but prefers to address the specific issues directly through stand-alone proposals.¹⁸ In addition, Canada also convened a series of meetings with a group of like-minded countries. Informally referred to as the Ottawa Group, the group includes most of the key players in the WTO except the United States, China and India.¹⁹

The proposals by the European Union, United States, Canada, and the Ottawa Group share a lot of commonalities, especially on the following groups of issues, which are of particular relevance to China.

The first concerns the need to update the substantive rules of the WTO, such as clarifying the application of ‘public body’ rules to SOEs, expanding the rules on forced technology transfer and addressing barriers to digital trade.²⁰

All of these are long-standing issues which have been litigated in the WTO.²¹ They each reflect a major concern over China’s trade and economic systems, which employ measures that are perceived as unfair trade practices.

¹⁵ European Commission, ‘WTO modernisation: Introduction to future EU proposals’, 18 September 2018, https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (visited 1 June 2020).

¹⁶ WTO, General Council, ‘Strengthening and Modernizing the WTO: Discussion Paper — Communication from Canada’, JOB/GC/201, 24 September 2018.

¹⁷ Such as: Proposal by The European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro, on AB Reform, WT/GC/W/752/Rev.2, 10 December 2018.; Proposal by Canada titled Strengthening the Deliberative Function of the WTO, JOB/GC/211, 14 December 2018.

¹⁸ These include, for example, Proposal by the United States titled, An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, WT/GC/W/757/REV.1, 15 January 2019; Proposal by Argentina, Costa Rica, The European Union, Japan, and the United States titled Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements, JOB/GC/204, 1 November 2018.

¹⁹ The members include Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland.

²⁰ See pp. 4–6 of EU proposal, p. 5 of Canada proposal.

²¹ On public body, see *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (2011), WTO Doc WT/DS379/AB/R, DSR 2011:V at 2869 (Appellate Body Report); on forced technology transfer, see *China—Certain Measures Concerning the Protection of Intellectual Property Rights—Request for consultations by the United States* (2018), WTO Doc WT/DS542/1, IP/D/38; *China—Certain Measures on the Transfer of Technology—Request for consultations by the European Union* (2018), WTO Doc WT/DS549/1, G/L/1244, IP/D/39; on digital trade barrier, see *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2010), WTO Doc WT/DS363/AB/R, DSR 2010:I at 3 (Appellate Body Report); see also the potential WTO case when Google pulled

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The first relates to China's unique state-led development model, which emphasizes the role of state-owned firms in the Chinese economy, often without a clear boundary between the State and the firm. The second refers to China's over-zealous drive to obtain and absorb foreign intellectual property rights, where foreign firms are met with explicit or implicit demands to trade their technologies for markets. The third touches on the core of the authoritarian regime in China, where the government maintains tight control over information and the Internet.²²

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, with subsidies as the leading example.²³ While no WTO Member may claim a perfect record in subsidy notifications, China's failure in fulfilling that obligation seems to be particularly egregious. This seems to be a perennial problem, which the USTR has been complaining about ever since China's accession to the WTO.²⁴ After much nudging from the United States, China finally submitted its first subsidies notification in April 2006, nearly five years behind schedule.²⁵ However, even that remained incomplete as China did not notify subsidies by sub-central governments, which would take China another 10 years to report.²⁶ Moreover, the next notification took China four more years to submit. Frustrated over the slow progress, the United States invoked Article 25.10 of the SCM Agreement to file a 'counter notification' in October 2011, which identified more than 200 unreported subsidy measures.²⁷ To address the problem, the joint draft by the United States, the European Union, Japan and Canada on strengthening the notification requirements proposed some rather drastic measures, such as naming and shaming the delinquent Member by designating it as 'a Member with notification delay'; curtailing its right to make interventions in WTO meetings and nominations to chair WTO bodies, and even levying a fine at the rate of 5% of its annual contribution.²⁸

The last significant issue is development, another longstanding issue stemming from the call of the United States and the European Union for greater 'differentiation' among WTO Members. The underlying rationale is that, while developed countries were willing to extend special and differential treatment to smaller developing countries, they are rather reluctant to extend the same treatment to large developing countries such as China which have already

out of China, which was discussed in Henry S Gao, "Google's China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS" 6 *Asian J WTO & Intl Health L & Policy* (2011) 347.

²² For an overview of China's data regulation framework, see Henry Gao, *Data Regulation with Chinese Characteristics*, SMU Centre for AI & Data Governance Research Paper No. 2019/04; Singapore Management University School of Law Research Paper No. 28/2019. Available at SSRN: <https://ssrn.com/abstract=3430284> or <http://dx.doi.org/10.2139/ssrn.3430284>

²³ See pp. 9-11 of EU proposal, p. 2 of Canada proposal.

²⁴ USTR, '2002 Report to Congress on China's WTO Compliance', 1 Decemer 2002, at 22-23, <https://china.usc.edu/sites/default/files/article/attachments/2002-report-chinas-wto-compliance.pdf> (visited 1 June 2020).

²⁵ USTR, '2018 Report to Congress on China's WTO Compliance', February 2019, at 75, <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf> (visited 1 June 2020).

²⁶ *Ibid.*

²⁷ *Ibid.*, at 76.

²⁸ General Council & Council for Trade in Goods, 'Procedures to enhance transparency and strengthen notification requirements under WTO Agreements – Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Israel, Japan, New Zealand, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States – Revision', JOB/GC/204/Rev.3, JOB/CTG/14/Rev.3, 5 March 2020, at 3-4. 3.>

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become economic powerhouses in their own right. Thus, in their proposals, the European Union and Canada called for the rejection of ‘blanket flexibilities’²⁹ for all WTO Members, which are to be replaced by ‘a needs-driven and evidence-based approach’³⁰ 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’.³¹ The U.S. proposal is more radical by proposing the automatic termination of special and differential treatment for Members which fall into one of the following four categories: OECD members; G20 members; classification as ‘high income’ by the World Bank; or a share of at least 0.5 per cent of global goods trade.³² Such a classification system would strip many WTO Members of their developing countries status, including China, as it meets two criteria, *i.e.*, G20 membership and a large trade share.

CHINA’S REACTIONS

Realizing that it has become the unspoken target of WTO reform, China quickly responded with two documents. The first is a November 2018 position paper setting out China’s three principles and five suggestions on WTO reform.³³ In May 2019, China submitted a formal proposal on WTO reform, which further elaborated the main issues of concern to China, as well as the specific actions that need to be taken.³⁴ While many of the suggestions directly respond to the China-related reform proposals mentioned earlier, China also tries to turn the table by launching its own offensives. For example, China suggests that the first priority should be solving the existential issues facing the WTO, such as the impasse over the Appellate Body Member appointment process, the abuse of the national security exception and the resort to unilateral measures.³⁵ Of course, given the mounting pressure, most of the Chinese proposals directly address the aforementioned points. Depending on China’s attitudes, these issues can be grouped into three categories.

The first are issues regarded as non-negotiable by China. For example, in its position paper, China stressed the need to “respect members’ development models,” which means that China “opposes special and discriminatory disciplines against state-owned-enterprises in the name of WTO reform.”³⁶ This is duly reiterated in the reform proposal, which is listed under the heading of “Adhering to the Principle of Fair Competition in Trade and Investment.”³⁷ While some Western commentators might be puzzled by such an adamant position on the SOE

²⁹ EU proposal, at 6.

³⁰ *Ibid*, at 7.

³¹ Canada Proposal, at 5.

³² United States, ‘Draft General Council Decision - Procedures to strengthen the negotiating function of the WTO - Decision of X Date’, WT/GC/W/764, , 15 February 2019, at 1-2.

³³ MOFCOM, ‘China’s Position Paper on WTO Reform’, 20 December 2018,

<http://english.mofcom.gov.cn/article/newsrelease/counseloroffice/westernasiaandaficareport/201812/20181202818679.shtml> (visited 1 June 2020).

³⁴ WTO, General Council, ‘China’s Proposal on WTO Reform: Communication from China’, WT/GC/W/773, 13 May 2019.

³⁵ *Ibid*, at Para. 2.1-2.10.

³⁶ MOFCOM, above n. 33.

³⁷ WTO, above n. 34, at Section 2.4.2.

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issue, this is not surprising at all as SOEs relate to two of the three “core interests” of China as famously defined by State Councillor Dai Binguo in 2009.³⁸ Due to its unhappy experience with the discriminatory provisions in its accession package, China resents being singled out in WTO negotiations. Because these proposals clearly target China, it is no surprise that China would react so strongly.

The second are issues which China are willing to engage in. These include issues such as electronic commerce and investment facilitation, where China has been participating as part of the WTO’s Joint Statement Initiatives, another by-product of the 11th Ministerial Conference. Of course, this does not necessarily mean that China is in full agreement with the U.S. on these issues. Instead, the Chinese position often comes with a twist. Electronic commerce is one such example, with the Chinese proposal focusing on “cross-border trade in goods enabled by the Internet, as well as on such related services as payment and logistics services.”³⁹ As I discussed in another paper, this is very different from the position taken by the United States, which emphasizes digital transmissions and the associated issue of free flow of data.⁴⁰

On a third type of issues, China takes a more nuanced approach. The best example here is the development issue, where China made clear that, as a matter of principle, special and differential treatment is an “entitlement” that China “will never agree to be deprived of.”⁴¹ At the same time, China also indicated its willingness to “take up commitments commensurate with its level of development and economic capability.”⁴² Such an approach is not new but is actually consistent with what China has been doing for some time. For example, when trade facilitation was first brought within the scope of WTO negotiations as one of the four “Singapore Issues,” most developing country Members were unwilling to participate as they believed that the benefits would mostly accrue to developed countries with large trade volumes while developing countries would need to foot the bill for modernising their customs processes.⁴³ China, however, took a different position because it realized that it, as one of the largest and most diversified traders in the world, stood to benefit greatly from such an initiative. Thus, China actively participated in the negotiations and became one of the first developing countries to ratify the agreement upon conclusion.

³⁸ The three core interests are: preserving China’s basic state system and national security, national sovereignty and territorial integrity, and the continued stable development of China’s economy and society. See Michael D Swaine, “Part One: On ‘Core Interests’” in Michael D Swaine, ‘China Leadership Monitor no. 34’, https://carnegieendowment.org/files/CLM34MS_FINAL.pdf (visited 1 June 2020). State-owned economy is the basic economic system according to Articles 6 and 7 of the Chinese Constitution, which also state that public ownership and state-owned economy shall be the leading force in the economy.

³⁹ WTO, above n. 34, at para. 2.22.

⁴⁰ Henry Gao, ‘Digital or Trade? The Contrasting Approaches of China and US to Digital Trade’, 21 *Journal of International Economic Law* (2018) 297, at 308-10.

⁴¹ MOFCOM, above n. 33.

⁴² *Ibid.*

⁴³ Third World Network, ‘Many Developing Countries Against Trade Facilitation Rules in WTO’, 28 June 2003, <https://www.twn.my/title/twninfo35.htm> (visited 1 June 2020).

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Moreover, China did not designate any Category C measures and agreed to implement 94.5% of the measures immediately upon ratification.⁴⁴ All of its Category B measures have been fully implemented by January 2020.⁴⁵

TERMS OF ENGAGEMENT

To sum up, it would be unrealistic to assume that meaningful reform efforts at the WTO can be achieved without the participation of China. This is mainly due to the size of China's economy and its significant trade share, which makes it hard for any deal to reach the necessary critical mass without its participation. This is what happened at the 2008 July package negotiation on sectorals such as chemicals, electronics, machineries, where the target coverage of 90% of world trade would be impossible to meet without China, which alone accounts for 10% of world trade. Thus, it is entirely understandable that other WTO Members would want to bring China into the negotiations. At the same time, however, certain guidelines also need to be followed in order to engage China constructively:

First, the proposed rules should be neutral on its face so that it would not be deemed as China-specific or discriminatory against China. With the painful memories of unequal treaties during the “century of humiliation,” China is very sensitive with such gestures. One lesson can be drawn from the 2008 July Package negotiations, where the U.S. wanted China to make concessions on sectorals. The request was rejected by China because same demands were not made to the other emerging economies. Instead, China insisted that such concessions must be made on a voluntary basis by everyone.

Second, the negotiation shall not be one-sided with a long list of demands on China. Instead, it is very important that China also gets something in return, even if just as a token. The Chinese take the concept of face very seriously and they will react nicely to gestures of goodwill. A good example here is abandoning the non-market economy methodology in anti-dumping investigations, as the same result can be achieved through other means such as the “market disruption” methodology in Australia. But by removing the non-market economy methodology, the other WTO Members can demonstrate their goodwill to China by fulfilling the promises they made in China's accession deal to only use the methodology for 15 years.

Third, it is also very important to have a good understanding of China's own reform goals and policy movements, as they often provide important insights on what China may agree to. For example, key documents from the Chinese Communist Party have made the goal of the reform to have the market play a decisive role in resource allocation,

⁴⁴ WTO Trade Facilitation Agreement Database, <https://www.tfadatabase.org/members/china/measure-breakdown?date=2020> (visited 1 June 2020).

⁴⁵ *Ibid.*

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which means that even China itself is concerned with the market distorting effects of SOEs and subsidies.⁴⁶ At the same time, with the ongoing drive to promote mixed ownership reform in China, WTO reform proposals that use ownership as the sole criteria are likely to meet strong resistance from China. China's own international agreements also provide another good way to understand China's policy directions. For example, China's inclusion of commitments on free flow of data across the border and prohibition of data localization requirements in the newly-concluded RCEP has confirmed that it is possible for the U.S. and China to reach a deal on such issues, as I have predicted earlier.⁴⁷

There is a theory that the WTO agreements are like incomplete contracts. As such the implementation often relies on the goodwill of the implementer. This provides yet another reason as to why China should be constructively engaged in any negotiation on WTO reform. If a reform deal were to be negotiated without China's participation in the hopes that it could be forced down the throat of China, it practically guarantees that China would try to dodge the implementation at every opportunity. This was already proven by China's experience with the transitional trade policy review mechanism, which is above and beyond the normal WTO TPR cycle. China regarded this as discriminatory and, at the very first meeting, refused to provide written answers to the questions, which as they rightly pointed out is only required under the normal TPR.⁴⁸ Since the transitional review is entirely different from the normal TPR, China argued that no written replies should be required. While the other WTO Members were not happy, in the end they had no choice but to accept China's practice, which is supported by a strict textualist and minimalist interpretation of its obligations under the Accession Protocol. If anything, this episode should teach WTO Members the importance of engaging rather than side-stepping China in any negotiation on WTO reform.

⁴⁶ 中共中央 国务院关于新时代加快完善社会主义市场经济体制的意见 CCP Central Committee and State Council, Opinions on Accelerating the Improvement to the Socialist Market Economy System in the New Era, 18 May 2020, at http://www.xinhuanet.com/politics/zywj/2020-05/18/c_1126001431.htm.

⁴⁷ Henry Gao, Across the Great Wall: E-commerce Joint Statement Initiative Negotiation and China (June 19, 2020). Available at SSRN: <https://ssrn.com/abstract=3695382> or <http://dx.doi.org/10.2139/ssrn.3695382>.

⁴⁸ Henry Gao, 'The WTO Transparency Obligations and China', 12 *Journal of Comparative Law* (2018) 329, at 350-353.

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