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### China and trade and investment liberalization

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#### Citation

GAO, Henry S.. China and trade and investment liberalization. (2022). *The Oxford Handbook of International Trade Law*. 341-373.

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## China and Trade and Investment Liberalization

by Henry Gao

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(Daniel Bethlehem, Isabelle Van Damme, Donald McRae, and Rodney Neufeld (eds), *The Oxford Handbook of International Trade Law*, Oxford University Press, 2<sup>nd</sup> ed, 2020)

### 1. Introduction

China's rise in the international trade and investment system is one of the most important events of the 21st century. Many non-Chinese observers regard China's rapid ascent with surprise or even suspicion, but most Chinese believe that China was simply restoring its rightful place in the world, a position it held for thousands of years until the glory was lost in the mid-nineteenth Century.

Regardless of one's view, no one can deny the importance of China in the international trade and investment system today. At the same time, one should also take note of the fact that China's relationship with the multilateral trading system is not always straightforward, but full of twists and turns. Thus, this chapter will trace the relationship from the very beginning of the post-war multilateral trading system, followed by its withdrawal and absence from the GATT, then its re-entry into the system, its rapid ascent and the ensuing implications. The chapter does not purport to provide a complete analysis, but it will try to cover all the salient features of China's approach to the main issues, which is essential for anyone wishing to understand the multilateral trading system and the challenges presented by China.

### 2. Long March: GATT, China and WTO Accession

#### 2.1. China and the GATT

As one of the victorious Allied Powers, the Republic of China ("ROC") participated in the work of the Preparatory Committee for the UN Conference on Trade and Employment in 1946 to 1947, which tried to establish the ITO.<sup>1</sup> When the ITO failed to come into being due to the unfavourable political environment in the United States, China joined 22 other countries in signing the Protocol of Provisional Application of the General Agreement on Tariffs and Trade ('GATT 1947') and became one of its founding contracting parties on 21 April 1948.<sup>2</sup>

A year later, however, the Republican government lost the Civil War against the

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<sup>1</sup> For an overview of China's participation in the early dates of the GATT, see Liu Xiangping, 'Jin Wensi yu Guanmao Zongxieding [Wunz King and the GATT]', 5 *Ershiyi Shiji (Wangluo Ban)* [Twenty-First Century (web edition)] (2002), at 2-6, <http://www.cuhk.edu.hk/ics/21c/media/online/0204056.pdf>. See also Henry Gao, 'China's Participation in the WTO: A Lawyer's Perspective', 11 *Singapore Year Book of International Law* (2007) 41; Shi Guangsheng (ed), *Zhongguo Jiaru Shijie Maoyi Zuzhi Zhishi Duben (Si): Zhongguo Jiaru Shijie Maoyi Zuzhi Tanpan Licheng [Reader on China's Accession to the World Trade Organization (Four): Negotiation History of China's Accession to the World Trade Organization]*, (Beijing: Renmin Chubanshe [People's Publishing House], (2011) 12-14.

<sup>2</sup> *Ibid*, at 7. This is also reflected in the recitals in the preamble of the GATT 1947, which listed "the Republic of China" as one of the founding contracting parties.

Communists and was forced to retreat to the outlying island of Taiwan. The Communist Party of China ('CPC') took control of the bulk of Chinese mainland and established a rival government – the People's Republic of China ('PRC') – on 1 October 1949. The new government never officially announced whether they wanted to remain in the GATT,<sup>3</sup> but with the establishment of the Council for Mutual Economic Assistance in 1949 as the trade organization of socialist countries,<sup>4</sup> it seemed unlikely that the PRC was keen to participate in the GATT, a 'capitalist club' boycotted by the USSR since the very beginning.

This resulted in a rather bizarre scenario, as the exiled Republican government could not honour its tariff reduction obligations for the goods shipped to the mainland while the Communists could enjoy the preferential tariffs for all goods originating from the mainland.<sup>5</sup> Upon discovering this, the United States threatened the ROC government with termination of MFN treatment,<sup>6</sup> and the latter responded by formally withdrawing from the GATT, which took effect on 5 May 1950.<sup>7</sup>

The murky state of the law on succession makes the validity of Taiwan's withdrawal an interesting case study as one could well argue that, because Taiwan no longer represented China since 1949, it also did not have the right to withdraw in 1950. However, China did not protest at that time. It had more pressing concerns, including being embroiled in the Korean War. Even when it restored its seat in the United Nations in 1971,<sup>8</sup> China still did not raise the issue.<sup>9</sup> It was only after the launch of the economic reform and

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<sup>3</sup> According to Article 55 of the Common Program of the Chinese People's Political Consultative Conference of 1949, which served as China's interim constitution until 1954, 'with respect to the treaties and agreements made by the Kuomintang government and foreign governments, the Central People's Government of the Peoples' Republic of China shall conduct examination and may either recognize, repeal, revise or renegotiate them according to their respective contents'. Several treaties were recognised or repealed according to this provision, but the Chinese government never explicated stated how it would deal with the GATT. See Gao, above n. 1, at 42.

<sup>4</sup> While China never joined the CMEA for ideological and historical reasons, it has maintained economic exchange with CMEA countries. See Jude Howell, 'Foreign Trade Reform and Relations with International Economic Institutions', in Christopher Hudson (ed), *The China Handbook* (New York: Routledge, 2013), 173-87 at 175; Raphael Shen, *China's Economic Reform: An Experiment in Pragmatic Socialism* (Westport, CT: Praeger, 2000) 97.

<sup>5</sup> Liu, above n. 1, at 7.

<sup>6</sup> Ibid. See also Shi, above n. 1, at 14; Gao, above n. 1, at 42-43.

<sup>7</sup> General Agreement on Tariffs and Trade, Contracting Parties, Communication from Secretary-General of United Nations Regarding China, GATT/CP/54, 8 March 1950.

<sup>8</sup> See United Nations General Resolution 2758, adopted by the UN General Assembly on 5 October 1971, which decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it".

<sup>9</sup> While the GATT 1947 was not a specialized agency of the United Nations, it generally follows the decisions of the United Nations on political issues. See WTO, *GATT Analytical Index: Guide to GATT Law and Practice*, 6th ed. (Geneva: WTO and Bernan Press, 1995) 877. Thus, even though China did not raise

opening up in the late 1970s that China started to realize the importance of the MFN tariff regime under the GATT.<sup>10</sup> Thus, China joined the GATT as an observer in 1984,<sup>11</sup> and made a formal request to resume its GATT contracting party status in 1986.

## 2.2. Resumption of GATT Contracting Party Status

On 10 July 1986, China formally submitted the application to resume its status as a GATT contracting party.<sup>12</sup> On 4 March 1987, the GATT established a Working Party to handle China's application.<sup>13</sup> Things moved quickly initially, as the main players such as the United States wanted to use China as the example to encourage change in the Communist bloc.<sup>14</sup> By the beginning of 1989, the Working Party was ready to start the drafting of the Accession Protocol.<sup>15</sup> However, when China cracked down on student protesters on 4 June 1989, the West imposed sanctions on China and all work in the Working Party stalled.<sup>16</sup>

For the next two-and-a-half years, the working party went into hibernation.<sup>17</sup> Not until 1992, when the Fourteenth National Congress of the Communist Party adopted a

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the issue of GATT membership itself at the time, the GATT Contracting Parties still decided to revoke the Taiwan government's observer status, which it has acquired since 1965. See General Agreement on Tariffs and Trade, Contracting Parties, Twenty-Seventh Session, Summary Record of the First Meeting, Held at the Palais des Nations, Geneva, on Tuesday, 16 November 1971, at 3 p.m., SR-.27/1, 19 November 1971, at 1-4. See also Gao, above n. 1, at 43-44.

<sup>10</sup> See Shi, above note 1, at 24-26.

<sup>11</sup> China first requested to observe the meetings of individual GATT sessions in 1982. See People's Republic of China: Attendance at Thirty-Eighth Session, GATT Document L/5344. In 1984, China submitted a formal request to have observer status in meetings of the Council of Representatives and its subordinate bodies. See China – Request for Observer Status, GATT Doc. L/5712, 26 October 1984. Since then, China has been attending GATT meetings regularly as an observer. See Julia Ya Qin, GATT Membership for Taiwan: An Analysis in International Law, 24 New York University Journal of International Law and Politics (1992) 1059, at 1072.

<sup>12</sup> China's Status as A Contracting Party: Communication from the People's Republic of China, GATT Document L/6017.

<sup>13</sup> Minutes of Meeting: Held in the Centre William Rappard on 4 March 1987, GATT Document C/M/160, at 9-12.

<sup>14</sup> Yang Yongzheng, 'China's WTO Accession: The Economics and Politics', 34 Journal of World Trade 77 (2000), at 88-89.

<sup>15</sup> Shi, above note 1, at 73-76.

<sup>16</sup> The Working Party meeting original scheduled in June 1989 was cancelled due to concerns by the participants over 'political and economic upheaval in China', see Charan Devereaux, Robert Z. Lawrence, and Michael Watkins, *Case Studies in US Trade Negotiation Volume 1: Making the Rules* (Washington, DC: Institute for International Economics, 2006) 252.

<sup>17</sup> Jeffrey Gertler, 'China's WTO Accession—The Final Countdown', in Deborah Z. Cass, Brett Williams and George Barker (eds), *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge University Press, 2003) 56. See also 'China's Entry Into GATT Is Stalled by Thorny "Socialist Market Economy"', Wall Street Journal, 3 March 1993.

Resolution to make the ‘Socialist Market Economy’ the goal of the reform,<sup>18</sup> did the accession negotiations resume. Nonetheless, this did not solve all the problems as many observers were sceptical about the willingness of China to embrace true capitalism. For example, Douglas Newkirk, the then Assistant US Trade Representative, stated bluntly that ‘[t]he GATT was not written with a Socialist Market Economy in mind’.<sup>19</sup> Drawing on their own experience, many foreign countries did not appreciate that a Party Resolution carries much more weight than the laws passed by Parliament. It was not until the goal was incorporated into the PRC Constitution in 1993<sup>20</sup> that others began to appreciate that China was indeed taking the commitment to market reform seriously.

During the first half of the 1990s, China participated in the Uruguay Round negotiations in the hope that discussions on its status could be concluded in time for it to become a founding member of the WTO.<sup>21</sup> Unfortunately, the world had changed significantly. The Cold War was over, and China had lost its symbolic value as a reformer within the communist bloc. With the former Soviet countries also eager to join the GATT, the terms of accession for China were increasingly regarded as a template for other transition economies.<sup>22</sup> Thus, Western governments imposed more rigorous terms.<sup>23</sup> At the same time, the Uruguay Round negotiations turned out to be much more difficult than originally imagined, and most countries concentrated their resources on the Uruguay Round rather than on talks with China. Also, for the first time in history, the Uruguay Round included negotiations in trade in services and trade-related intellectual property rights. Disciplines on rules on non-tariff measures were also strengthened. As China lacked experience in these new areas, they posed new challenges for China.

On the other hand, China itself had also changed since the 1980s. First, the 1990s saw China’s rise as a major trader in the world, with goods ‘Made in China’ flooding many parts of the world. Many countries, both developed and developing, felt the threat of China to their traders not only in the world market but in their domestic markets too. For them, letting China accede to the GATT to enjoy expanded market access opportunities without

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<sup>18</sup> Jiang Zemin, ‘Jiakuai Gaige Kaifang he Xiandaihua Jianshe Bufa, Duoqu Youzhongguo Tese Shehui Zhuyi Shiye de Weida Shengli [Accelerate Steps of Reform and Opening Up and the Development of Modernization, Seize Greater Success in the Endeavor on Socialism with Chinese Characteristics]’, Report at the Fourteenth National Congress of the China Communist Party, 12 October 1992, [http://www.gov.cn/test/2007-08/29/content\\_730511.htm](http://www.gov.cn/test/2007-08/29/content_730511.htm) (visited 11 June 2020).

<sup>19</sup> Raj Bhala, ‘Enter the Dragon: An Essay on China’s WTO Accession Saga’, 15 *American University International Law Review* 1469 (2000), at 1480.

<sup>20</sup> Article 15 of the Constitution used to state ‘[t]he state practices planned economy on the basis of Socialist public ownership’. It was amended to ‘[t]he state practices Socialist market’. See *Zhonghua Renmin Gongheguo Xianfa Xiuzhengan (1993 Nian) [Amendment to the Constitution of the People’s Republic of China (2013)]*, adopted by the First Session of the Eighth National People’s Congress on 29 March 1993, [http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content\\_4585.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4585.htm) (visited 11 June 2020).

<sup>21</sup> See Bhala, above n 19, at 1480.

<sup>22</sup> Nicholas Lardy, *Integrating China into the Global Economy* (Washington: The Brookings Institution, 2002), at 63.

<sup>23</sup> *Ibid.*

demanding a pound of flesh would be unthinkable. At the same time, with the income level of the Chinese on the rise, more and more Western companies started to recognize the potential of China as the largest untapped market in the world. They demanded better market access opportunities in China which went beyond tariff concessions, and this too required extensive negotiation.

Even though China declared its intention in early 1994 to complete substantive negotiations by the end of that year,<sup>24</sup> when the WTO was established on 1 January 1995, the end of the accession negotiations was still nowhere in sight.<sup>25</sup>

### 2.3. WTO Accession

Frustrated that China did not become a founding Member of the WTO as it has wished, the head of Chinese delegation Gu Yongjiang stated at the meeting of the China Working Party on 20 December 1994 that “while China does not wish to close the door for negotiation, China will not take the initiative to request bilateral negotiations or meetings of the Working Party”.<sup>26</sup> All work of the Working Party stopped for the better part of 1995<sup>27</sup> and it was not until November 1995 that China submitted a new request for accession to the WTO.<sup>28</sup> Subsequently, the GATT Working Party was converted into a WTO Accession Working Party in December 1995.<sup>29</sup> The Chinese Government set out three principles on WTO accession.<sup>30</sup> First, as an international organization, the WTO would not be complete without the participation of China. Second, China should join as a developing country. Third, China’s accession should be based on a balance of rights and obligations. As we will soon see from the detailed analysis of the terms of the Chinese accession deal below, however, China has failed to achieve most of these principles.

In 1999 and 2000, China signed bilateral agreements with the United States and the (then) European Communities respectively. The one with the United States is the most comprehensive and covers both market access on goods and services, as well as rules issues, especially those on trade remedies.<sup>31</sup> In contrast, the one with the European Communities focuses on sectors of specific interests to the European Communities, such

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<sup>24</sup> In his letter to the Director General and contracting parties to the GATT on 25 January 1994, then Chinese premier Li Peng stated China’s wish to “conclude the negotiation to resume its GATT membership quickly and become a founding Member of the WTO”. See Shi, above n 1, at 118.

<sup>25</sup> Shi, above n 1, at 134-39.

<sup>26</sup> Shi, above n 1, at 135-39.

<sup>27</sup> *Ibid.*, at 436-42.

<sup>28</sup> WTO, Communication from China, WT/ACC/CHN/1, 7 December 1995.

<sup>29</sup> *Ibid.*

<sup>30</sup> MOFCOM, Zhongguo Jiaru Shimao Zuzhi de Lishi Beijing [Historical Background of China’s WTO Accession], 28 January 2010, <http://cwto.mofcom.gov.cn/article/sjzl/201001/20100106765404.shtml> (visited 11 June 2020).

<sup>31</sup> See Shi, above n 1, at 280-87.

as automobiles, telecommunications,, insurance and distribution.<sup>32</sup> On 10 November 2001, at the Fourth Session of the Ministerial Conference in Doha, Qatar, WTO Members adopted the Chinese Accession Protocol, which was approved by the National People's Congress Standing Committee the next day. One month later, the protocol took effect and China finally became a Member of the WTO.

With an accession negotiation spanning 15 years, China's WTO accession process was, until then, the longest in GATT/WTO history. This record was broken by Russia ten years later, but China's accession package remains the most complicated in the history of the WTO. This is not only due to its large trade volume, which ranked sixth largest at the time of accession, but also because of the unique nature of the Chinese economic system, which was in the process of transition from a traditional planned economy to a "Socialist market economy", a process that has yet to complete 19 years after China's WTO accession and subsequently led to many problems .

What benefits did China get as a newly-minted WTO Member? Many commentators point to lower tariffs at the MFN rate and the removal of non-tariff measures. In my view, however, both of them have been greatly exaggerated. First, even before its accession, China had signed bilateral trade agreements with most of its trade partners, which typically included MFN clauses granting China the same MFN rates as under other agreements, including the WTO. Studies confirm that larger gains were reaped by China's import industries while its exporting industries only saw modest gains.<sup>33</sup> Second, non-tariff barriers were a big problem before China's accession, but rather than being eliminated, they have largely been retained and even entrenched by China's accession deal.<sup>34</sup> Instead, I would argue that the biggest benefits resulting from China's WTO accession are its ability to use the WTO dispute settlement system and participate in the rule-making efforts of the multilateral trading system. But again, both benefits are also double-edged swords that could be used by and against China at the same time.<sup>35</sup>

While the direct benefits to China seem uncertain, the indirect benefits appear to be quite substantial, especially considering the phenomenal growth of China's trade and economy since its accession. This is because China's WTO accession has helped to further integrate China into the world economy. Furthermore, China was able to ride on the wave of globalization by becoming a key node in the global supply chain.

On the other hand, the price that China had to pay to get into the club seems rather hefty. First of all, China made substantive market access commitments on both goods and services. For goods, China agreed to reduce its overall tariff level to 10% by 2008, making it one of the lowest levels in the world.<sup>36</sup> For services, China also made

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<sup>32</sup> Ibid, at 387-88.

<sup>33</sup> Ting-Wei Lai, Raymond Riezman and Ping Wang, 'China's Gains from WTO Accession: Imports vs Exports', 24 *Review of International Economics* (2016) 837, at 849-50. ,

<sup>34</sup> See paragraphs below.

<sup>35</sup> See Section 3 below.

<sup>36</sup> Shi Guangsheng, 'Working Together for a Brighter Future Based on Mutual Benefit', in Henry Gao and Donald Lewis (eds), *China's Participation in the WTO* (London: Cameron May, 2005) 15-22, at 15-16.

extensive commitments, covering more than 100 out of the total of 160 services sectors enumerated in the Services Sectoral Classification List. Such level of commitments is on par with those of major developed countries and was regarded as ‘the most radical services reform program negotiated in the WTO’.<sup>37</sup>

In addition to the market access commitments, concerns over China’s unique economic system also led to a wide range of rules commitments. Tailor-made for China, these commitments fall under two categories: obligations that are beyond those normally required of WTO Members, often called ‘WTO-plus obligations’; and rights that are below those generally enjoyed by WTO Members, referred to as ‘WTO-minus rights’.<sup>38</sup>

Many of the WTO-plus obligations were designed to enhance the transparency of China’s trade regime.<sup>39</sup> For example, China committed to translate all laws and regulations affecting trade in goods and services into one of the WTO official languages.<sup>40</sup> Also, in order to monitor China’s implementation of its accession commitments in the first ten years of its Membership, a special annual transitional review mechanism was established.<sup>41</sup> The other obligations aim to prevent the erosion of accession commitments. One example is the extension of national treatment to foreign individuals, enterprises and foreign-funded enterprises, above and beyond the normal national treatment rule which only cover measures applicable to products.<sup>42</sup> Another example is an explicit commitment to eliminate all taxes and charges on exports for most products.<sup>43</sup>

While onerous, these WTO-plus obligations can still be justified as necessary to bridge the gaps in China’s economic and legal systems so that the accession commitments would not be easily evaded.

However, the WTO-minus rights provisions, are of a more defensive (or some might say protective) nature. They mainly cover the realm of trade remedies measures, where the normal WTO rules are weakened to make it easier for other WTO Members to invoke these protections against Chinese imports. For example, the normal WTO safeguard rules are watered down so that other Members may apply safeguard measures against Chinese imports whenever there are ‘market disruptions’, rather than ‘serious injury’ as mandated by the Agreement on Safeguards.<sup>44</sup> Such measures do not need to be

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<sup>37</sup> Aaditya Mattoo, ‘China’s Accession to the WTO: The Services Dimension’, 6 *Journal of International Economic Law* (2003) 299, at 333.

<sup>38</sup> Julia Ya Qin, ‘WTO-Plus’ Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol’, 37 *Journal of World Trade* (2003) 483. See Gao, above n. 1, at 54-57.

<sup>39</sup> For a detailed discussion of these provisions, see Henry Gao, ‘The WTO Transparency Obligations and China’, 12 *Journal of Comparative Law* (2018) 329.

<sup>40</sup> Report of the Working Party on the Accession of China, WT/MIN(01)/3, adopted on 10 November 2001, at para 334.

<sup>41</sup> Protocol on the Accession of China, adopted on 10 November 2001, Section 18.

<sup>42</sup> *Ibid*, Section 3.

<sup>43</sup> *Ibid*, Section 11.3

<sup>44</sup> *Ibid*, Section 16.



applied on an MFN basis, and instead can be applied against China only.<sup>45</sup> Moreover, once one Member applies safeguard measure against China, any other WTO Member can piggyback with its own safeguard measure to prevent diversion of Chinese exports into its own market as the result of the first safeguard measure.<sup>46</sup> Concerns over the reliability of the price data in China also led to the inclusion of the ‘non-market economy status’ provision in Section 15(a) of China’s Accession Protocol, which essentially allows other WTO Member to disregard the domestic prices in China and use inflated third-country prices instead in anti-dumping investigations against Chinese products. The provision is supposed to expire 15 years after China’s accession, but the United States nor the European Union still continued to use similar methodologies in their antidumping investigations when the time came. In response, China brought two separate WTO disputes against them.<sup>47</sup> Among the two, only the case against the EU has led to the formation of a panel, but the US also worked with the EU on the case, which the US Trade Representative Robert Lighthizer regarded as the ‘most serious litigation matter that we have at the WTO right now’.<sup>48</sup> The panel was supposed to issue its final report by mid-2019, but it suspended its work in June 2019 at the request of China.<sup>49</sup> No formal reason was announced, but it has been speculated that this could be due to the unfavourable panel ruling in the interim report<sup>50</sup> or the US’ suspension of its case against China on intellectual property rights.<sup>51</sup> Section 15(b) includes a similar provision to water down the requirements for subsidy investigations against Chinese products, but it doesn’t have an expiration date like its sister provision.

China’s bid for developing country treatment was also not very successful.<sup>52</sup> In the

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<sup>45</sup> Ibid, Section 16.3.

<sup>46</sup> Ibid, Section 16.8.

<sup>47</sup> These two disputes are: DS515: United States — Measures Related to Price Comparison Methodologies; DS516: European Union — Measures Related to Price Comparison Methodologies.

<sup>48</sup> The President's Trade Policy Agenda and Fiscal Year 2018 Budget, Hearing before the Committee on Finance, United States Senate One Hundred Fifteenth Congress First Session, S. HRG. 115–247, JUNE 21, 2017, at 12.

<sup>49</sup> Communication from the Panel, EU—Measures Related to Price Comparison Methodologies, WT/DS516/13, 17 June 2019.

<sup>50</sup> Henry Gao & Weihuan Zhou, ‘The end of the WTO and the last case?’, East Asia Forum, 10 July 2019, <https://www.eastasiaforum.org/2019/07/10/the-end-of-the-wto-and-the-last-case> (visited 11 June 2020). Joost Pauwelyn, ‘WTO Dispute Settlement Post 2019: What to Expect?’, 22 *Journal of International Economic Law* (2019) 297, at 316. The news was first reported in Bryce Baschuk, China Loses Market-Economy Trade Case in Win for EU and U.S., Sources Say, Bloomberg, 18 April 2019, <https://www.bloomberg.com/news/articles/2019-04-18/china-is-said-to-lose-market-economy-trade-case-in-eu-u-s-win> (visited 11 June 2020).

<sup>51</sup> See Jesse Kreier, ‘China NME case suspended’, *International Economic Law and Policy Blog*, 20 June 2019, <https://ielp.worldtradelaw.net/2019/06/china-nme-case-suspended.html> (visited 11 June 2020). The case was DS542: China — Certain Measures Concerning the Protection of Intellectual Property Rights.

<sup>52</sup> Henry Gao & Weihuan Zhou, ‘Myth busted: China’s status as a developing country gives it few benefits in the World Trade Organisation’, *The Conversation*, 7 October 2019,

WTO, a Member's developing country status is largely determined by self-designation, subject to challenge from other Members.<sup>53</sup> This is what happened in China's accession process, as concerns over China's size and unique economic system led to the denial of many special and differential treatments reserved for developing countries.<sup>54</sup> For example, China agreed to forgo the special treatment under Articles 27.8, 27.9 and 27.13 of the Agreement on Subsidies and Countervailing Measures.<sup>55</sup> Similarly, on agricultural subsidies, China agreed to cap its de minimus level at 8.5%, which is lower than the 10% allowed for developing countries.<sup>56</sup>

### 3. China and the Doha Round

As its accession coincided with the launch of the Doha Round, China was able to participate in the new Round from the very beginning. It has been thought that, as the biggest developing country in the WTO, China would become the leader of the developing country camp. In the first few years, however, China deliberately kept a low profile.<sup>57</sup> China's official explanation was that it has already made heavy commitments as a Recently-Acceded Member ('RAM'), exceeding the commitments made by most WTO Members in the Uruguay Round.<sup>58</sup> Thus, China should not be expected to make new concessions, but should instead focus on implementing its accession commitments. Another implicit reason is that China lacked experience in trade negotiations and wanted to learn before participating in the new Round. The major players were initially sympathetic to China's RAM argument and did not demand much from China.

While its ambitious agenda covered many issues, the Doha Round negotiations focused mainly on agriculture in the first few years, with developing countries demanding that developed countries eliminate export subsidies and reduce domestic support on agriculture. This is understandable given the importance of agricultural exports for most developing country Members. China, however, has a different export structure which is centred mostly on industrial products and very little agricultural

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<https://theconversation.com/myth-busted-chinas-status-as-a-developing-country-gives-it-few-benefits-in-the-world-trade-organisation-124602> (visited 11 June 2020).

<sup>53</sup> Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization', World Bank Policy Research Working Paper No. 2388 (2000), at 2. Available at SSRN: <https://ssrn.com/abstract=630760>.

<sup>54</sup> Report of the Working Party on the Accession of China, above n 40, para. 9.

<sup>55</sup> Ibid, para. 171.

<sup>56</sup> Ibid, para. 235.

<sup>57</sup> For an overview of China's participation in WTO negotiations until 2006, see Henry Gao, 'China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?', in Carolyn Deere-Birkbeck (ed), *Making Global Trade Governance Work for Development* (Cambridge: Cambridge University Press, 2011) 153–80. See also Gregory Shaffer and Henry Gao, 'China's Rise: How It Took on the U.S. at the WTO', 2018 *University of Illinois Law Review* 115, at 132-34.

<sup>58</sup> Huang Rengang, 'Multilateralism v. Regionalism: China's Participation in WTO Agriculture Negotiations', in Henry Gao and Donald Lewis (eds), *China's Participation in the WTO* (London: Cameron May, 2005), 35-45 at 39.

exports. Moreover, China is also one of the largest importers of many agricultural commodities, such as wheat, cotton and soybeans. Thus, the reduction of subsidies would raise world commodity prices and be inimical to its trade interests. On the other hand, openly opposing the developing country position would have been politically insensitive. That partly explains why China chose to keep quiet in the first few years, and the other Members were also content to leave it alone.

After a deal on agricultural issue was reached in 2006, the focus of the Round shifted to Non-Agricultural Market Access (NAMA), or industrial products. As a manufacturing powerhouse and the world's largest exporter, China emerged as the elephant in the room. It was simply too big to be ignored. Moreover, having agreed to reduce their agricultural subsidies, the United States and the European Union wanted to obtain significant concessions on industrial products from major developing countries to justify their agricultural concessions. Thus, in the same year, China was invited to join the United States, European Union, Japan, Canada, India and Brazil in the inner group of key players.<sup>59</sup> Citing the phenomenal growth of China's exports since its accession to the WTO, the United States and European Union called China 'the biggest beneficiary' of the multilateral trading system and urged China to be "more responsible" in negotiations.<sup>60</sup> In particular, they wanted China to make greater concessions in key sectors such as industrial machinery, chemicals and electronics. While China recognized that it has special responsibilities as a large developing country, it resented being singled out in the negotiations, in a similar way that it has resented the discriminatory clauses in its accession package. Thus, when India created an impasse at the July 2008 Ministerial Conference by refusing to cave in on special products and a special safeguard mechanism, China rejected the US request to provide additional concessions on special products in agriculture and sectoral negotiations on industrial goods.<sup>61</sup> China's decision was partly based on its domestic political difficulties, but an equally important reason was China's desire to be treated no differently than India.<sup>62</sup>

China's evolving role in the Doha Round can also be gauged by the number of

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<sup>59</sup> For an overview of China's participation in WTO negotiations since 2006, see Henry Gao, 'From the Doha Round to the China Round', in Lisa Toohey, Colin B. Picker, and Jonathan Greenacre (eds), *China in the International Economic Order: New Directions and Changing Paradigms* (Cambridge: Cambridge University Press, 2015) 79–97.

<sup>60</sup> See Robert B. Zoellick, 'Whither China: From Membership to Responsibility?', Remarks to National Committee on U.S.-China Relations', New York City, September 21, 2005, <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm> (visited 11 June 2020). See also Susan Schwab, 'Remarks at the 40th Anniversary Gala Dinner of the National Committee on US-China Relations', New York, USA, 12 October 2006. [www.ncuscr.org/files/2006Gala\\_SusanSchwab.pdf](http://www.ncuscr.org/files/2006Gala_SusanSchwab.pdf) (visited 11 June 2020).

<sup>61</sup> Paul Blustein, *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambitions, and the Great Shambles of the World Trade System* (New York: Public Affairs, 2009) 274.

<sup>62</sup> This is partly reflected in the passionate speech made by China's WTO Ambassador Sun Zhenyu Sun Zhenyu when the talks collapsed in mid 2008. See H.E. Ambassador Sun Zhenyu, Permanent Mission P.R.C. to the WTO, Statement at the Informal Trade Negotiations Committee Meeting, 11 August 2008, <http://wto2.mof.com.cn/aarticle/inbrief/200808/20080805717988.html> (visited 11 June 2020).

submissions it has made. Its first proposal was submitted in June 2002, addressing the issue of fisheries subsidies.<sup>63</sup> The number of Chinese proposals slowly rose to a dozen over the next three years, reflecting the cautious approach that China has taken.<sup>64</sup> As China was offered ‘a seat at the big kids’ table’,<sup>65</sup> its participation also intensified, with the number of Chinese proposals jumping to over one hundred just before the July 2008 meeting.<sup>66</sup>

#### 4. China’s Free Trade Agreement

As a latecomer, China did not sign any FTA before its accession to the WTO. This made perfect sense because concluding, or even just negotiating, FTAs pre-WTO accession would have encouraged existing WTO Members to request the same preferences. This would have defeated the purpose of the FTA and made it more difficult for China to complete its accession negotiation.

After its accession, however, China went on a shopping spree of FTAs. Starting with an FTA with the Association of Southeast Asian Nations (ASEAN) in 2002, China has concluded agreements with Chile (November 2005), Pakistan (November 2006), New Zealand (April 2008), Singapore (October 2008), Peru (April 2009), Costa Rica (April 2010), Iceland (April 2013), Switzerland (July 2013), South Korea (June 2015), Australia (June 2015), Georgia (May 2017), Maldives (December 2017), and Mauritius (October 2019). In addition, China has also signed two Closer Economic Partnership Arrangements (“CEPA”) with Hong Kong and Macau respectively, as well as an Economic Cooperation Framework Agreement (“ECFA”) with Taiwan. In addition, China has launched negotiations on a bilateral basis with the Gulf Cooperation Council (April 2005), Norway (September 2008), Sri Lanka (September 2014), Israel (March 2016), Moldova (March 2018), Panama (July 2018) and Cambodia (January 2020). In November 2012, China also launched negotiations on a regional basis with Korea and Japan (November 2012) and the other 15 countries in the Regional Comprehensive Economic Partnership (“RCEP”) Agreement.

Compared with the ones entered into by major Western powers such as the United States, European Union and Japan, the Chinese FTAs tend to be rather old-fashioned, with most of the commitments concentrating on trade in goods with only limited coverage of services and investment concessions.<sup>67</sup> This is not only a continuation of China’s cautious approach to trade liberalization in general, but also reflects its overwhelming interests in goods trade. Moreover, China is reluctant to include in its FTAs behind-the-border regulatory issues such as environmental protection, labour rights and

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<sup>63</sup> Negotiating Group on Rules, Proposal from the People’s Republic of China on Fisheries Subsidies, WTO Doc. TN/RL/W/9, 20 June 2002.

<sup>64</sup> See Gao, above n 57, at 161.

<sup>65</sup> Blustein, above n 61, at 274.

<sup>66</sup> *Ibid.*

<sup>67</sup> Henry Gao, ‘China’s Strategy for Free Trade Agreements: Political Battle in the Name of Trade’, in Ross Buckley, Richard Hu and Douglas Arner (eds.), *East Asian Economic Integration: Law, Trade and Finance* (Cheltenham, UK: Edward Elgar, 2011) 104-120, at 110-11.

competition issues.<sup>68</sup> Instead, these issues tend to be covered by standalone side agreements or Memorandums of Understanding, or, even if they are mentioned in isolated provisions in the main text, are couched only in soft, non-binding mutual cooperation type of languages.<sup>69</sup>

This does not mean that China's FTA model will always remain static. Instead, China has been willing to consider and incorporate new issues and approaches by learning from other 'high-standard' FTAs. This includes the broadening of coverage of issues, such as the addition of electronic commerce in the 2015 FTAs with Korea and Australia.<sup>70</sup> In other recent FTAs, commitments were deepened. A good example is the FTA with Mauritius, which covers more than 100 services sub-sectors by both sides, with Mauritius committing to open more than 130 sub-sectors.<sup>71</sup> The FTA with Australia also includes a 'built-in agenda' for the parties to 'initiate next round of the negotiation on trade in services in the form of negative listing approach'.<sup>72</sup> This is interesting given the popularity of the negative listing approach common to US-led FTAs.<sup>73</sup> China has also been periodically upgrading its FTAs, with new issues such as competition, environment and e-commerce included in the upgraded FTAs with Singapore and Chile, both over a decade old.

One of the pet clauses of Chinese FTAs is a provision recognizing China's market economy status, which has become the *sine qua non* for any aspiring member of China's coveted FTA club. This is not only China's way of expressing its dissatisfaction with the no-market economy clause in its Accession Protocol, but also helps to establish precedents among WTO Members regarding the recognition of China's market economy status. Unfortunately, as China's FTA partners are mostly smaller countries, such precedents are unlikely to sway the major players. Moreover, as the Australian practice of 'market disruption' has shown, even the recognition of China's market economy status might not prevent the other party from adopting essentially a non-market economy methodology in its anti-dumping investigations.<sup>74</sup>

The most ambitious FTA involving China is the RCEP, which aims to link up the

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<sup>68</sup> Henry Gao, 'China's Evolving Approach to Environmental and Labour Provisions in Regional Trade Agreements,' ICTSD Blog, 25 August 2017, <http://www.ictsd.org/opinion/china-3> (visited 9 May 2020).

<sup>69</sup> Ibid.

<sup>70</sup> <For a discussion of the e-commerce chapter in the Australia FTA, see Henry Gao, 'E-Commerce in ChAFTA: New Wine in Old Wineskins?', in Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The China-Australia Free Trade Agreement A 21st-Century Model* (Oxford: Hart Publishing, 2018) 283-303.

<sup>71</sup> MOFCOM, Zhongguo yu Maoliqiusi Qianshu Ziyou Maoyi Xieding [China Signed Free Trade Agreement with Mauritius], [http://fta.mofcom.gov.cn/article/chinamauritius/chinamauritiusnews/201910/41643\\_1.html](http://fta.mofcom.gov.cn/article/chinamauritius/chinamauritiusnews/201910/41643_1.html) (visited 1 June 2020).

<sup>72</sup> China–Australia Free Trade Agreement, Art. 8.24.

<sup>73</sup> See the chapters on trade in services and North America.

<sup>74</sup> See Weihuan Zhou, Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China', 49 *Journal of World Trade* (2015) 975-1010.

ten countries of ASEAN with its six trade partners, *i.e.*, China, Japan, Korea, India, Australia and New Zealand. Together, these 16 countries account for almost half of the world's population, almost 30% of global GDP, and about 40% of global trade, and the RCEP is widely regarded as one of the most important free trade agreements in the world.

The RCEP is often regarded as a China-led FTA, but this is far from the truth. The idea for Asia Pacific regional integration can be traced back to the formation of the Asia Pacific Economic Cooperation (“APEC”) in 1989. Over the years, there have been many competing visions. In 1990, Malaysian Prime Minister Dr. Mahathir bin Mohamad first proposed the idea of East Asia Economic Caucus (“EAEC”) or East Asia Economic Group (‘EAEG’),<sup>75</sup> which encompasses ASEAN and its three East Asian neighbours, *i.e.*, China, Korea and Japan. Also known as ‘ASEAN plus three’ or ‘10 + 3’, this was also China’s preferred model. At the time, the idea did not lead to substantive discussions due to the launch of the Doha Round. When the Doha Round started to falter, however, various ideas started to resurface again. The EAEC idea morphed into a proposal for an East Asia community (‘EAC’), which was noted in the Chairman’s Press Statement for the Seventh ASEAN Plus Three Foreign Ministers’ Meeting in Kuala Lumpur in July 2006 as a ‘long-term goal’.<sup>76</sup> Fearing the strong influence of China, Japan modified the EAC proposal and turned it into a ‘10 + 6’ initiative by adding, as counterbalances to China, three more members, *i.e.*, India, Australia and New Zealand.<sup>77</sup> In June 2008, Australian Prime Minister Kevin Rudd proposed an even more bold proposal for an Asia Pacific Community, which would also include the US in addition to the other 16 countries.<sup>78</sup>

As there was no unifying vision, the negotiations on an East Asia trade deal did not take off for several years. When the United States assembled a group of like-minded countries like Australia and Singapore to launch the negotiations for a Transpacific Partnership (‘TPP’) in 2010,<sup>79</sup> however, China realized that it needed to build its own mega trade deal in the region to counter the efforts of the United States to ‘pivot to Asia’.

<sup>75</sup> Dan Biers, Malaysia's Prime Minister Ponders Asian Caucus Plan, Wall Street Journal, 11 July 1996, at <https://www.wsj.com/articles/SB837028079332804000> (visited 1 June 2020). For a detailed analysis of the proposal, see Michio Kimura, ‘Asian Expectations toward Japan’s Role in the Consensual Process of Regional Integration: The Case of the East Asian Economic Caucus’, in Verena Blechinger & Jochen Legewie (ed), *Facing Asia - Japan's Role in the Political and Economic Dynamism of Regional Cooperation* (Munich: Iudicium, 2000) 21-56.

<sup>76</sup> Chairman’s Press Statement for the Seventh ASEAN Plus Three Foreign Ministers’ Meeting Kuala Lumpur, Ministry of Foreign Affairs, Malaysia, Putrajaya, 26 July 2006, <https://asean.org/chairman-s-press-statement-for-the-seventh-asean-plus-three-foreign-ministers-meeting-kuala-lumpur> (visited 1 June 2020).

<sup>77</sup> Yoko Nishikawa, ‘Q+A-What is Japan's East Asia Community idea all about?’, 22 October 2009, Reuters, <https://www.reuters.com/article/japan-asia/qa-what-is-japans-east-asia-community-idea-all-about-idUST25699920091022?pageNumber=1&virtualBrandChannel=0> (visited 1 June 2020).

<sup>78</sup> Frank Frost, ‘Australia’s proposal for an „Asia Pacific Community“: issues and prospects’, Parliament of Australia Department of Parliamentary Services Research Paper, no. 13, 2009–10, 1 December 2009, <https://www.aph.gov.au/binaries/library/pubs/rp/2009-10/10rp13.pdf> (visited 1 June 2020).

<sup>79</sup> See the chapter on TPP.

This was achieved by agreeing to the Japanese initiative of ‘10 + 6’, which by then had evolved into the proposal for the Comprehensive Economic Partnership for East Asia (CEPEA).<sup>80</sup> In 2012, the ASEAN plus six countries finally agreed to launch negotiations for the new agreement, which, as a further twist to the alphabet soup, was finally renamed as RCEP.

According to the RCEP’s Guiding Principles and Objectives,<sup>81</sup> ‘[n]egotiations for the RCEP will recognize ASEAN Centrality in the emerging regional economic architecture’, which means that ASEAN is in the driving seat for the RCEP. Indeed, all the other six non-ASEAN States already have an existing FTA with ASEAN, confirming the role of ASEAN as the hub of the RCEP. This appeared to be a compromise between China and Japan, the two biggest powers in the region, as neither was willing to concede the leadership role to the other.<sup>82</sup> However, as a weak regional institution with no uniform agenda, ASEAN does not have much power to move the negotiations forward, and the 2015 deadline to conclude negotiations was missed. After missing several additional deadlines, the RCEP countries finally announced in November 2019 that they have reached agreement among all countries except India, and were aiming to sign the agreement in 2020.<sup>83</sup> However, on 29 November 2019, Japan’s RCEP chief negotiator announced that it would not sign the deal unless India is also on board,<sup>84</sup> which appears to be a reaffirmation of its fear over the dominance of China without a counterweight.

Compared to the other mega regional agreement or negotiations such as the TPP, TTIP or the CETA, the RCEP is rather shallow.<sup>85</sup> It mainly covers the traditional goods trade, and services commitments are only scheduled pursuant to a GATS-type positive listing approach, which implies that concessions will not be very ambitious. It does not include popular new issues that are often found in other mega agreements such as labour,

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<sup>80</sup> Chairman’s Statement of the 4th East Asia Summit Cha-am Hua Hin, Thailand, 25 October 2009 , [https://asean.org/?static\\_post=chairman-s-statement-of-the-4th-east-asia-summit-cha-am-hua-hin-thailand-25-october-2009-2](https://asean.org/?static_post=chairman-s-statement-of-the-4th-east-asia-summit-cha-am-hua-hin-thailand-25-october-2009-2) (visited 1 June 2020).

<sup>81</sup> Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership, 20 November 2012, <https://asean.org/wp-content/uploads/2012/05/RCEP-Guiding-Principles-public-copy.pdf> (visited 1 June 2020).

<sup>82</sup> For the leadership competition and historical issues between China and Japan, see Richard Stubbs, ‘ASEAN Plus Three: Emerging East Asian Regionalism?’, 42 *Asian Survey* (2002) 440, at 443, 452.

<sup>83</sup> Joint Leaders’ Statement on The Regional Comprehensive Economic Partnership (RCEP) , 4 November 2019, <https://asean.org/storage/2019/11/FINAL-RCEP-Joint-Leaders-Statement-for-3rd-RCEP-Summit.pdf> (visited 1 June 2020).

<sup>84</sup> ‘Top Japan Negotiator Says It is Not Considering Signing RCEP Trade Pact Without India’, *Straits Times*, 29 November 2019, <https://www.straitstimes.com/asia/east-asia/japan-wont-sign-regional-comprehensive-economic-partnership-pact-if-india-doesnt-join> (visited 1 June 2020).

<sup>85</sup> See William Alan Reinsch, Jack Caporal and Lydia Murray, ‘At Last, An RCEP Deal’, 3 December 2019, Centre for Strategic and International Studies, <https://www.csis.org/analysis/last-rcep-deal> (visited 1 June 2020).

environment and state-owned enterprises. And even for those issues that are included, such as competition and government procurement, the commitments are couched in soft, best-endeavour language lacking substance. However, even such low level of ambition is hard to swallow for certain participants, such as India. For a long time, India insisted that it would only agree to a coverage of up to 80%, due to concerns that cheaper industrial products from China will flood the market and destroy its small and uncompetitive domestic industries.<sup>86</sup> To be fair, India's concerns are not unfounded, as ASEAN also saw its trade balance with China turning from a surplus of \$8 billion before the ASEAN-China FTA to a deficit of \$44.6 billion in 2013 before ballooning further to \$63.8 billion the next year.<sup>87</sup>

Notwithstanding its modest content, the very fact that the ASEAN plus five countries were able to conclude an agreement will still be a major boost to the region. This is because the East and Southeast Asia region already has one of the largest shares of intra-industry trade among major regions in the world,<sup>88</sup> especially in sectors such as electronics and computer products. Thus, the RCEP, once concluded, will only further boost the economic integration in the region, which should lead to more trade and economic growth for all parties involved.

## 5. Belt and Road Initiative

In contrast to RCEP, the child that China reluctantly adopted, BRI is entirely China's own creation. It is a combination of two initiatives which President Xi Jinping announced in 2013, *i.e.*, the Silk Road Economic Belt, which connects China with Europe through the Eurasian Continent,<sup>89</sup> and the 21st Century Maritime Silk Road, which links China with Southeast Asian countries, Africa and Europe across the Pacific and Indian oceans.<sup>90</sup> As the centrepiece of President Xi's foreign policy, the BRI covers sixty-five countries in three continents, with a total population of 4.4 billion.<sup>91</sup> Altogether, they account for 29%

<sup>86</sup> Ibid.

<sup>87</sup> Henry Gao, 'The Potential Collapse of the TPP: Implications for ASEAN', Brink, 15 December 2016, <https://www.brinknews.com/the-potential-collapse-of-the-tpp-implications-for-asean/> (visited 1 June 2020).

<sup>88</sup> Indermit Gil and Homi Kharas, 'An East Asian Renaissance: Ideas for Economic Growth', (Washington, DC: World Bank, 2007), at 20-22, <https://openknowledge.worldbank.org/handle/10986> (visited 1 June 2020).

<sup>89</sup> First suggested by President Xi Jinping in a speech titled "Promote People-to-People Friendship and Create a Better Future" at Kazakhstan's Nazarbayev University on 7 September 2013. See President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries, 7 September 2013, [http://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/xjpfwzysiesgjtfhshzzfh\\_665686/t1076334.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjtfhshzzfh_665686/t1076334.shtml) (visited 1 June 2020).

<sup>90</sup> First proposed by President Xi in his speech to the People's Representative Council of Indonesia on 2 October 2013. See Wu Jiao, 'President Xi gives speech to Indonesia's parliament', China Daily, 2 October 2013, [http://www.chinadaily.com.cn/china/2013xiapec/2013-10/02/content\\_17007915\\_2.htm](http://www.chinadaily.com.cn/china/2013xiapec/2013-10/02/content_17007915_2.htm) (visited 1 June 2020).

<sup>91</sup> MOFCOM, 'Yidai Yilu Zhanlue de Tichu he Xingcheng [One Belt One Road Initiative: The Proposal and Development]', <http://history.mofcom.gov.cn/?special=2ydylyzldtc> (visited 1 June 2020).



of global GDP and 23.4% of global merchandise and services exports.<sup>92</sup>

Through the TPP, the United States tried to build an Island Chain across the Pacific to contain China and disrupt China's supply chains. For example, the "yarn forwarding rule" in the TPP requires that, in order to be eligible for TPP preferences, the textile products manufactured in a TPP member country also need to have its yarn made within the TPP region.<sup>93</sup> This effectively blocks the access to the TPP market by Chinese yarn producers. In response, China has been trying to build its own supply chain by linking up with developing countries in Asia, Africa and Latin America.

The strategy is twofold: first, China can sell its products in these countries, which also helps to diversify China's export markets and solve the problem of surplus capacity; second, China can obtain natural resources and raw materials either directly from these countries, or through transportation hubs strategically located there, such as the Gwadar Port in Pakistan and the Kra Canal in Thailand. Many countries along the BRI corridor, however, suffer from poor infrastructure. That is why the BRI made improving infrastructure connectivity one of its main objectives, in addition to enhancing 'policy coordination', reinforcing 'unimpeded trade', accelerating 'financial integration' and boosting 'people-to people bonds'.<sup>94</sup>

To finance these infrastructure projects, China also proposed the establishment of a new development bank - the Asian Infrastructure Investment Bank (AIIB) – in 2013, the same year that the BRI initiative was announced. The AIIB was formally launched a year later and started operations in 2016.<sup>95</sup> By 2019 it had quickly grown, despite the boycott by the United States, to 100 members, which includes all major developed countries except the United States and Japan.<sup>96</sup> While headquartered in Beijing and counting China as the largest shareholder, China has tried to reduce the impression of the AIIB as a Chinese institution. The AIIB also emphasizes its 'openness, transparency, independence and accountability' and its mode of operation as a 'Lean, Clean and Green' Organization.<sup>97</sup> In addition to the AIIB, China has further spearheaded the establishment of the New Development Bank (formerly called the BRICS Development Bank), which is based in Shanghai. With a capital of \$100 billion, the New Development Bank has its shares equally divided between the five BRICS countries (Brazil, Russia, India, China and

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<sup>92</sup> Ibid. For a detailed review of the Belt and Road Initiative, see Gregory Shaffer and Henry Gao, 'Anew Chinese Economic Order?', 22 *Journal of International Economic Law* (2020, forthcoming).

<sup>93</sup> USTR, 'TPP Chapter Summary: Textiles and Apparel', <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Textiles-and-Apparel.pdf> (visited 1 June 2020).

<sup>94</sup> National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of the People's Republic of China with State Council authorization, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road', 28 March 2015, <http://www.chinaembassy.org.sg/eng//jrzg/t1250480.htm> (visited 1 June 2020).

<sup>95</sup> AIIB, 'Our Story So Far', <https://www.aiib.org/en/about-aiib/who-we-are/timeline/index.html> (visited 1 June 2020).

<sup>96</sup> AIIB, 'Members and Prospective Members of the Bank', <https://www.aiib.org/en/about-aiib/governance/members-of-bank/index.html> (visited 1 June 2020).

<sup>97</sup> AIIB, 'Our Founding Principles,' <https://www.aiib.org/en/about-aiib/index.html> (visited 1 June 2020).

South Africa) with equal voting rights in selecting its projects.<sup>98</sup> In 2014, China also created the Silk Road Fund, with a pledged funding of \$40 billion.<sup>99</sup> Various Chinese firms, especially financial institutions, both public and private, were also urged by the Chinese Government to help finance and invest in BRI projects. In 2019, it was estimated that total direct investment in the BRI countries amounted to more than \$90 billion.<sup>100</sup>

Building infrastructure projects along the BRI can help China export not only its products, but also its technical standards. This is most evident in the telecommunication sectors, where Chinese telecom giants such as Huawei and ZTE are the leading players in the construction of telecommunication networks in developing countries, especially those within the BRI.<sup>101</sup> In addition to the hardware infrastructure, the software infrastructure in BRI countries is also increasingly dominated by Chinese standards.<sup>102</sup> One good example is the electronic world trade platform, or the eWTP, an ambitious initiative by Alibaba that aims to build online marketplaces around the world in its own image.<sup>103</sup> The project has led to enthusiastic responses from countries around the world as well as international organizations, with the WTO announcing official partnership with Alibaba in 2017.<sup>104</sup>

While the BRI, in its current form, is but a loose assembly of countries, China has long been planning to harness its full potential by building up a pan-BRI FTA framework. In December 2015, the State Council issued Several Opinions on Accelerating the Implementation of the Free Trade Area Strategy, which state that, in the medium to long term, China is to build a global FTA network that covers countries along the BRI and links up all key countries in the five major continents.<sup>105</sup> Indeed, if we look at the recent

<sup>98</sup> New Development Bank, 'About Us', <https://www.ndb.int/about-us/essence/history/> (visited 1 June 2020).

<sup>99</sup> Silk Road Fund, 'About Us', <http://www.silkroadfund.com.cn/enweb/23775/23767/index.html> (visited 1 June 2020).

<sup>100</sup> Zhongguo Yidai Yilu Wang [China One Belt One Road Network], 'Tujie: "Yidai Yilu" Changyi Liunian Chengjidan [Pictograph: "One Belt One Road" Initiative's Achievements in First Six Years]', 9 September 2019, <https://www.yidaiyilu.gov.cn/xwzx/gnxw/102792.htm> (visited 1 June 2020).

<sup>101</sup> Scott Bicheno, 'Chinese Vendors Continue to Gain Share in the Global Telecoms Equipment Market', *telecoms.com*, 2 March 2020, <https://telecoms.com/502843/chinese-vendors-continue-to-gain-share-in-the-global-telecoms-equipment-market> (visited 1 June 2020).

<sup>102</sup> Andrew Polk, 'China Is Quietly Setting Global Standards', *Bloomberg*, 7 May 2018, <https://www.bloomberg.com/opinion/articles/2018-05-06/china-is-quietly-setting-global-standards> (visited 1 June 2020).

<sup>103</sup> See 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.

<sup>104</sup> WTO, 'WTO, World Economic Forum and eWTP launch joint public-private dialogue to open up e-commerce for small business', 11 December 2017, [https://www.wto.org/english/news\\_e/news17\\_e/ecom\\_11dec17\\_e.htm](https://www.wto.org/english/news_e/news17_e/ecom_11dec17_e.htm) (visited 1 June 2020).

<sup>105</sup> State Council, 'Guowuyuan Guanyu Jiakuai Shishi Ziyou Maoyiqu Zhanlue de Ruogan Yijian [Several Opinions of the State Council on Accelerating the Development of FTA Strategy]', *Guofa* [2015] #69, 17

additions to China's FTA club and those in the pipeline, almost all of them seem to fall within the coverage of the BRI. Such a heavily skewed hub-and-spoke system with China at the centre would definitely boost China's power *vis-a-vis* the other countries and make it easier for China to protect its own trade interests.

## 6. Free Trade Zones

In addition to the BRI and the AIIB, 2013 also saw China embarking on another major initiative: free trade zones ("FTZs"). In Chinese, they share exactly the same name – 'Zimao Qu' - as FTAs, which leads to a lot of confusion. In practice, however, they are quite different from each other, since FTAs aim to reduce trade barriers in foreign markets, while FTZs are mainly designed as tools for autonomous trade and investment liberalization within China. For example, the Overall Plan for the first pilot FTZ in Pudong, Shanghai makes it clear that FTZs are to pilot with further opening up in goods trade, services, and investment.<sup>106</sup>

As of 24 May 2020, there are a total of 18 FTZs, which cover all the coastal provinces of China, as well as key inland provinces. Broadly speaking, they are all tasked with promoting trade and investment, but there are still variations among them. Most importantly, the earlier batches of FTZs, especially the one in Shanghai, are supposed to be 'test beds for domestic economic reforms' by cutting government red tape and experiment with trade and investment liberalization measures.<sup>107</sup> One good example is the 'negative list' approach to foreign investment market access, which was pioneered by the Shanghai FTZ in 2013. In contrast to the 'positive list' approach for services in Chinese FTAs, the Shanghai FTZ scheduled commitments on foreign investment as a 'negative list'.<sup>108</sup> It included a total of 190 special administrative measures (restrictions) on foreign investment. While relatively long, it was still an improvement of the main instrument on foreign investment – the Foreign Investment Guiding Catalogue – by both reducing the number of sectors subject to investment restrictions and simplifying the procedure for investment approval. Since then, the list has been revised on an annual basis and keeps

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December 2015, [http://www.gov.cn/zhengce/content/2015-12/17/content\\_10424.htm](http://www.gov.cn/zhengce/content/2015-12/17/content_10424.htm)> (visited 1 June 2020).

<sup>106</sup> State Council, 'Guowuyuan Guanyu Yinfu Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Zongti Fangan de Tongzhi [Notice of the State Council on Issuing the Overall Plan for the China (Shanghai) Free Trade Pilot Area]', Guofa [2013] #38, 27 September 2013, [http://www.gov.cn/zwqk/2013-09/27/content\\_2496147.htm](http://www.gov.cn/zwqk/2013-09/27/content_2496147.htm) (visited 1 June 2020).

<sup>107</sup> Ibid.

<sup>108</sup> The People's Government of Shanghai Municipality, 'Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Waishang Touzi Zhunru Tebie Guanli Cuoshi (Fumian Qingdan) [China (Shanghai) Free Trade Pilot Area Special Administrative Measures on Market Access for Foreign Investment (Negative List)] (2013)', Hufufa [2013] 75, 30 September 2013, <http://www.shanghai.gov.cn/nw2/nw2314/nw32419/nw32510/nw32512/u26aw40135.html> (visited 1 June 2020). For detailed comparison of the positive and negative list approaches, see the chapter on trade in services.

getting shorter, with the latest list containing only 37 measures.<sup>109</sup> Moreover, the negative list approach was also gradually adopted at the national level. The initial list issued in June 2014 included 328 restrictions, which in the latest version issued in 2019 have been reduced by more than 60% to 131.<sup>110</sup>

In contrast, the later batches of FTZs, especially those located in the hinterlands, seem to be designed with a different objective. Examples are the new FTZs established in 2017 in Chongqing, Henan, Hubei, Shaanxi and Sichuan. Strategically located, these FTZs are tasked with the development of the poorer interior provinces, as well as linking up China's Western regions with BRI countries. For example, the ones in Chongqing and Sichuan serve as key nodes in the China-Europe Railway Express, which reaches all the way into Europe; while the one in Shaanxi is crucial in linking China with central Asian States. Within BRI countries, China worked with its state-owned companies to finance and build huge Chinese-built commercial facilities and industrial parks in new 'economic and trade cooperation zones'. By February 2020, China had built eighty-two such zones within BRI countries with total investment of \$34 billion.<sup>111</sup> Working in tandem, the internal FTZs and external economic and trade cooperation zones help to boost the trade between China and the BRI countries, furthering China's goal of turning the BRI into a giant hub and spoke system.

## 7. WTO Reform: A China Round?

Since its accession to the WTO, China's exports have been growing exponentially. In 2009, China became the world's top goods exporter. Four years later, China unseated the United States as the top trading nation in the world. In contrast to the burgeoning Chinese economy, the United States and Europe have been suffering from economic decline since the global financial crisis in 2008. China regards its rise as a long overdue restoration of its rightful position, as it has been the largest economy in the world for most of its history, except the brief aberration over the past 150 years. The Western powers, however, view China's rapid development with suspicion, as they attributed China's success mostly to its state-led development model, with state-owned enterprises, massive subsidies and heavy government intervention playing a major role.

The most notorious example of the Chinese development model is the Made in China 2025 Plan, which was prepared in 2014 by the Chinese Academy of Sciences and the Chinese Academy of Engineering under the leadership of the MIIT, along with the

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<sup>109</sup> MOFCOM, 'Zhongguo jiang Jixu Yajian Quanguo he Zimao Shiyangu de Waizi Zhunru Fumian Qingdan [China to Continue to Shorten the Negative List for Foreign Investment both Nationally and in FTZs]', 3 March 2020, <http://sg.mofcom.gov.cn/article/sxtz/202003/20200302941161.shtml> (visited 1 June 2020).

<sup>110</sup> Xinhua, 'Shichang Zhunru Fumian Qingdan (2019 Nian Ban) Fabu [Market Access Negative List (2019 Edition) Released]', 22 November 2019, [http://www.xinhuanet.com/fortune/2019-11/22/c\\_1125261249.htm](http://www.xinhuanet.com/fortune/2019-11/22/c_1125261249.htm) (visited 1 June 2020).

<sup>111</sup> Gong Xin, 'Nuli Shixian Duofang Gongying, Chixu Tuidong Jingwai Jingmao Hezuoqu Gaozhiliang Fazhan [Strive to Achieve Multilateral Win-win, Continue Pushing for High Quality Development in Economic and Trade Cooperative Zones Abroad]', *Zhongguo Jingji Daobao* [China Economic Herald], 6 March 2020, [http://www.ceh.com.cn/ep\\_m/ceh/html/2020/03/06/06\\_45.htm](http://www.ceh.com.cn/ep_m/ceh/html/2020/03/06/06_45.htm) (visited 1 June 2020).

NDRC and 20 agencies. Officially adopted by the State Council in 2015,<sup>112</sup> the Plan sought to move China up in the value chain of industrial activities and turn China into a manufacturing power which controls core technologies in key sectors by 2025. In particular, it aimed to achieve 70 percent self-sufficiency in high-tech industries by 2025, and a dominant position in global markets by 2049 – the hundredth anniversary of the People’s Republic of China. To achieve these goals, the Plan employed problematic tactics such as direct government intervention, massive subsidies, investments and acquisitions in foreign markets by State Owned Enterprises (‘SOEs’), and forced technology transfers. These practices led to widespread criticisms against the Plan, with many governments regarding it not only as economic aggression but also a potential national security threat. In June 2018, the European Union even brought a WTO case against China, alleging China’s various technology transfer measures in violation of various WTO rules including TRIPS, GATT 1994 and China’s Accession Protocol.<sup>113</sup> In view of the backlashes, China has toned down the propaganda on the Plan, but observers suspected that it has always remained on the agenda of the Chinese government.

To counter the Chinese threat, the United States led a concerted effort of like-minded countries to ‘level the playing field’. In particular, building on the influential “China Inc” paper by Harvard law professor Mark Wu,<sup>114</sup> the US-led coalition has been arguing that the existing WTO rules are insufficient in dealing with the problems created by China’s state capitalism. At the 11th WTO Ministerial Conference in Buenos Aires, the United States, the European Union and Japan issued a joint statement<sup>115</sup> 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 11th Ministerial Conference, the United States 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

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<sup>112</sup> State Council, ‘Guowuyuan Guanyu Yinfa <Zhongguo Zhizao 2025> de Tongzhi [State Council Notice on Issuing <Made in China 2025>]’, Guofa [2015] #28, 8 May 2015, [http://www.gov.cn/zhengce/content/2015-05/19/content\\_9784.htm](http://www.gov.cn/zhengce/content/2015-05/19/content_9784.htm) (visited 1 June 2020).

<sup>113</sup> China - Certain Measures on the Transfer of Technology - Request for consultations by the European Union, WT/DS549/1, G/L/1244, IP/D/39, 6 June 2018.

<sup>114</sup> Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’, 57 Harvard International Law Journal (2016) 261.

<sup>115</sup> 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).

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.’<sup>116</sup> 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.

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’<sup>117</sup> 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’.<sup>118</sup> In addition to the two comprehensive papers, both the European Union and Canada have also tabled various more specific proposals.<sup>119</sup>

The United States has not issued any comprehensive proposal, but prefers to address the specific issues directly through stand-alone proposals.<sup>120</sup> 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.<sup>121</sup>

The proposals by the European Union, United States, Canada, and the Ottawa

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<sup>116</sup> 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).

<sup>117</sup> European Commission, ‘WTO modernisation: Introduction to future EU proposals’, 18 September 2018, [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf) (visited 1 June 2020)..

<sup>118</sup> WTO, General Council, ‘Strengthening and Modernizing the WTO: Discussion Paper — Communication from Canada’, JOB/GC/201, 24 September 2018.

<sup>119</sup> 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..

<sup>120</sup> 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.

<sup>121</sup> The members include Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland.

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.<sup>122</sup> All of these are long-standing issues which have been litigated in the WTO.<sup>123</sup> They each reflect a major concern over China’s trade and economic systems, which employ measures that are perceived as unfair trade practices. 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.<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup> 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.<sup>127</sup> After much nudging from the United States, China finally

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<sup>122</sup> See pp. 4-6 of EU proposal, p. 5 of Canada proposal.

<sup>123</sup> 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 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.

<sup>124</sup> See the chapter on SOE.

<sup>125</sup> 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>

<sup>126</sup> See pp. 9-11 of EU proposal, p. 2 of Canada proposal.

<sup>127</sup> 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).

submitted its first subsidies notification in April 2006, nearly five years behind schedule.<sup>128</sup> However, even that remained incomplete as China did not notify subsidies by sub-central governments, which would take China another 10 years to report.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup>

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 become economic powerhouses in their own right.<sup>132</sup> Thus, in their proposals, the European Union and Canada called for the rejection of ‘blanket flexibilities’<sup>133</sup> for all WTO Members, which are to be replaced by ‘a needs-driven and evidence-based approach’<sup>134</sup> 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’.<sup>135</sup> The US 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.<sup>136</sup> Such a

<sup>128</sup> 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).

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*, at 76.

<sup>131</sup> 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.>

<sup>132</sup> See the chapter on trade and development.

<sup>133</sup> EU proposal, at 6.

<sup>134</sup> *Ibid.*, at 7.

<sup>135</sup> Canada Proposal, at 5.

<sup>136</sup> 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.



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.

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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> Of course, given the mounting pressure, most of the Chinese proposals directly address the aforementioned points.

First, with regard to the new substantive issues being proposed, while China expresses willingness to consider some of the issues, such as electronic commerce and investment facilitation, it objects to many proposals. For example, one of the five suggestions in China's position paper is 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'<sup>140</sup> 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'.<sup>141</sup> While some Western commentators might be puzzled by such an adamant position on the SOE 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.<sup>142</sup> As mentioned earlier, China resents being singled out in WTO negotiations. Because these proposals clearly target China, it is no surprise that China would react so strongly. Moreover, even in respect of issues on which China seems to agree with other WTO Members, the Chinese position sometimes comes with a twist. Electronic commerce is one such example, with the Chinese proposal focusing on 'cross-border trade

<sup>137</sup> 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).

<sup>138</sup> WTO, General Council, 'China's Proposal on WTO Reform: Communication from China', WT/GC/W/773, 13 May 2019.

<sup>139</sup> *Ibid.*, at Para. 2.1-2.10.

<sup>140</sup> MOFCOM, above n. 140.

<sup>141</sup> WTO, above n. 141, at Section 2.4.2.

<sup>142</sup> 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](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.

in goods enabled by the Internet, as well as on such related services as payment and logistics services'.<sup>143</sup> 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.<sup>144</sup>

Second, on the procedural issue of subsidy notifications, China adopts a dual-track approach. On the defensive side, China proposes that developing countries only comply with the notification obligations on a best-endeavour basis, and should receive more technical assistance for that purpose.<sup>145</sup> On the offensive side, China throws the ball into the court of developed countries by calling them to 'lead by example in submitting comprehensive, timely and accurate notifications' and 'improve the quality of their counter-notifications'.<sup>146</sup>

Third, with regard to development, China is taking a flexible approach. As a matter of principle, it made clear that, special and differential treatment is an 'entitlement' that China 'will never agree to be deprived of'.<sup>147</sup> At the same time, it also indicated its willingness to 'take up commitments commensurate with its level of development and economic capability'.<sup>148</sup> 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.<sup>149</sup> 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. Moreover, China did not designate any Category C measures and agreed to implement 94.5% of the measures immediately upon ratification.<sup>150</sup> All of its Category B measures have been fully implemented by January 2020.<sup>151</sup>

## 8. US-China Trade War

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<sup>143</sup> WTO, above n. 141, at para. 2.22.

<sup>144</sup> Gao, above n 104.

<sup>145</sup> WTO, above n. 141, at para. 2.28.

<sup>146</sup> Ibid.

<sup>147</sup> MOFCOM, above n. 140.

<sup>148</sup> Ibid.

<sup>149</sup> Third World Network, 'Many Developing Countries Against Trade Facilitation Rules in WTO', 28 June 2003, <https://www.twonetwork.org/twninfo35.htm> (visited 1 June 2020).

<sup>150</sup> WTO Trade Facilitation Agreement Database, <https://www.tfadatabase.org/members/china/measure-breakdown?date=2020> (visited 1 June 2020).

<sup>151</sup> Ibid.

When China joined the WTO, globalization was in its heyday and optimism abounded. The sentiment was nicely summed up by US President Bill Clinton in his speech<sup>152</sup> in 2000 promoting the bill that granted China permanent normal trading status:

*‘By joining the W.T.O., China is not simply agreeing to import more of our products; it is agreeing to import one of democracy’s most cherished values: economic freedom. The more China liberalizes its economy, the more fully it will liberate the potential of its people — their initiative, their imagination, their remarkable spirit of enterprise. And when individuals have the power, not just to dream but to realize their dreams, they will demand a greater say.’*

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*‘The Chinese government no longer will be everyone’s employer, landlord, shopkeeper and nanny all rolled into one. It will have fewer instruments, therefore, with which to control people’s lives. And that may lead to very profound change.’*

In other words, it was widely believed that the WTO would help to transform China from Communism to Capitalism, with more freedom to the people, in both economic and political spheres. This was to be achieved through the policy of ‘engagement’, which was adopted by successive US administrations from Clinton to Obama.<sup>153</sup>

However, as time went by, the United States realized that Communism not only did not retreat, but also further advanced in China, with the state-owned economy growing stronger and the rule of the Party further entrenched in the process.<sup>154</sup> It was this disillusion over the transformative power of the multilateral trading system that led to the exploration of other means to help effect change in China. Initially, President Obama tried to build a ‘coalition of the willing’ with the launch of the TPP negotiations in 2010, which included rules on SOEs, competitions, labour, government procurement and digital trade, all designed to address the challenges of China’s state capitalism. When President Trump came into office, however, the TPP deal was scrapped as he believed it was a “disaster” that is bad for American business and workers.<sup>155</sup> Instead, President Trump

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<sup>152</sup> Full Text of Clinton’s Speech on China Trade Bill, 9 March 2000, [https://www.iatp.org/sites/default/files/Full\\_Text\\_of\\_Clinton’s\\_Speech\\_on\\_China\\_Trade\\_Bi.htm](https://www.iatp.org/sites/default/files/Full_Text_of_Clinton’s_Speech_on_China_Trade_Bi.htm) (visited 1 June 2020).

<sup>153</sup> There have been some debates on whether the engagement policy started with Clinton, but most agree that it was the Clinton Administration which made engagement the main theme of America’s China policy. Compre Neil Thomas, ‘Matters of Record: Relitigating Engagement with China’, Marco Polo, 3 September 2019, <https://macropolo.org/analysis/china-us-engagement-policy/> (visited 1 June 2020); Orville Schell, ‘The Death of Engagement’, The Wire China, 7 June 2019, <https://www.thewirechina.com/2020/06/07/the-birth-life-and-death-of-engagement> (visited 1 June 2020).

<sup>154</sup> For a discussion about the evolution of different stages of SOE reform in China, see Weihuan Zhou, Henry S Gao and Xue Bai, ‘China’s SOE Reform: Using WTO Rules to Build a Market Economy’, 68 *International and Comparative Law Quarterly* (2019) 977.

<sup>155</sup> Douglas A. Irwin, ‘Mr. Trump’s Trade War’, *Wall Street Journal*, 15 December 2017, <https://www.wsj.com/articles/donald-trumps-trade-war-1513356667> (visited 1 June 2020).

resorted to another tool which he deemed more direct and effective: trade war.

As a prelude, in August 2017, President Trump, through a Presidential Memorandum, requested the USTR, to “determine, consistent with section 302(b) of the Trade Act of 1974 (19 U.S.C. 2412(b)), whether to investigate any of China’s laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.”<sup>156</sup> On 22 March 2018, the USTR released its Section 301 Report into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, which made positive findings on these issues, and suggested ‘[a] range of tools may be appropriate to address these serious matters including more intensive bilateral engagement, WTO dispute settlement, and/or additional Section 301 investigations.’<sup>157</sup> On the same day, President Trump issued another Presidential Memorandum directing the USTR to raise tariffs against Chinese products, bring WTO cases against China’s discriminatory licensing practices, and the Treasury Department to impose investment restrictions on Chinese firms.<sup>158</sup>

On 3 April 2018, the USTR published a proposed list of Chinese products that would be subject to an additional tariff of 25%.<sup>159</sup> In total, the list covers about 1,300 separate tariff lines with an estimated worth of roughly \$50 billion. China responded quickly, with the MOFCOM announcing 25% additional tariff on 106 US products with the same value.<sup>160</sup> In several rounds of tit-for-tat retaliations over the next one and half years, the stakes quickly escalated to cover \$550 billion worth of Chinese products and \$185 billion worth of US goods.<sup>161</sup> In other words, the additional tariffs cover almost the

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<sup>156</sup> Presidential Memorandum for the United States Trade Representative, 14 August 2017, <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-united-states-trade-representative> (visited 1 June 2020).

<sup>157</sup> USTR, ‘Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974’, 22 March 2018, <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> (visited 1 June 2020).

<sup>158</sup> Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation, 22 March 2018, <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation/> (visited 1 June 2020).

<sup>159</sup> USTR, ‘Under Section 301 Action, USTR Releases Proposed Tariff List on Chinese Products’, 3 April 2018, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/under-section-301-action-ustr> (visited 1 June 2020).

<sup>160</sup> MOFCOM, ‘Guanyu dui Yuanchanyu Meiguo de Bufen Jinkou Shangpin Jiazheng Guanshui de Gonggao [Notice on the Collection of Additional Tariff on Some Imported Products from the United States]’, ShangwubuGonggao [2018] #34, 4 April 2018, <http://www.mofcom.gov.cn/article/b/e/201804/20180402728516.shtml> (visited 1 June 2020).

<sup>161</sup> Dorcas Wong and Alexander Chipman Koty, ‘The US-China Trade War: A Timeline’, China Briefing, 13 May 2020, <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline> (visited 1 June 2020). For a detailed analysis of the different phases of trade war, see Chad P. Bown, ‘US-China Trade War: The Guns of August’, 20 September 2019,

entire bilateral trade between the two with only limited exceptions.<sup>162</sup>

The illegality of the additional tariffs by the United States is beyond doubt. Years before the current case, the Panel in *United States – Sections 301–310 of the Trade Act 1974*, ruled unequivocally that Section 301, to the extent that it requires the United States to make a unilateral determination of compliance, violates Article 23.2(a) of the DSU, which requires that a Member shall ‘not make a determination to the effect that a violation has occurred [...] except through recourse to dispute settlement’. However, relying on both the US Statement of Administrative Action (“SAA”) accompanying the US legislation implementing the results of the Uruguay Round<sup>163</sup> and the US statements in that case,<sup>164</sup> the Panel was satisfied that the US government had undertaken ‘never to adopt a determination of inconsistency prior to the adoption of DSB’<sup>165</sup> and thus concluded that the provisions at issue were not inconsistent with US obligations under the WTO. With keen awareness of the volatility of politics, the Panel ended its report with the following prescient admonition:<sup>166</sup>

*‘Significantly, all these conclusions are based in full or in part on the US Administration’s undertakings mentioned above. It thus follows that should they be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted.’*

By taking unilateral measures against China without DSB authorization, the United States has violated its WTO obligation. Not surprisingly, this is also China’s view, as articulated in its three successive WTO cases against the different rounds of US tariffs.<sup>167</sup> In addition, the specific weapons that the US chose in the trade war - additional tariffs on top of its WTO bound tariffs against Chinese products - also violate the MFN and tariff binding obligations under Articles I:1 and II:1 of the GATT 1994 respectively. In response, the United States claims that the additional tariffs were necessary steps to address, as outlined in the USTR Section 301 report, China’s distortive policies on technology transfer, which are ‘harmful, trade distorting policies not directly covered by

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<https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-war-guns-august> (visited 1 June 2020).

<sup>162</sup> According to the US government, US import from China in 2018 was only \$540 billion with its export to China \$120 billion. See United States Census Bureau, ‘Trade in Goods with China’, <https://www.census.gov/foreign-trade/balance/c5700.html> (visited 1 June 2020).

<sup>163</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815, para. 7.110-112.

<sup>164</sup> *Ibid.*, para. 7.116

<sup>165</sup> *Ibid.*, para. 7.112

<sup>166</sup> *Ibid.*, para. 8.1.

<sup>167</sup> The three cases are: DS543: *United States — Tariff Measures on Certain Goods from China*; DS565: *United States — Tariff Measures on Certain Goods from China II*; DS587: *United States — Tariff measures on certain goods from China III*.

WTO rules'.<sup>168</sup> While such argument is unlikely to be accepted by a panel or the Appellate Body, the United States has been able to convince many WTO Members of the necessity of WTO reform to address what it perceives as the underlying problem.

By firing its own rounds of additional tariffs, however, China has also lost its innocence in the trade war. In its announcement on the additional tariffs, China stated that its retaliatory tariffs were necessary to 'respond to the emergency caused by the violation of international obligations by the US, defend China's lawful self-interests', and were taken pursuant to 'relevant laws and regulations such as The Foreign Trade Law of the People's Republic of China and basic principles of international law'.<sup>169</sup> MOFCOM did not spell out the exact provisions, but the most relevant would appear to be Article 7 of Foreign Trade Law, which states that if any country imposes discriminatory trade measures against China, China may take corresponding measures against such countries. However, this provision cannot provide sound legal justification as it is essentially a simplified version of Section 301 and thus suffers from the same problem. With regard to international law principles, Dr. Yang Guohua, a formal senior MOFCOM official, has mentioned<sup>170</sup> the following possibilities: the right of self-defence under Article 51 of the Charter of the United Nations, the termination or suspension of the operation of a treaty as a consequence of its breach by another party under Article 60 of the Vienna Convention on the Law of Treaties,<sup>171</sup> and necessary measures to safeguard an essential interest against a grave and imminent peril under Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.<sup>172</sup> The biggest problem with these general principles, however, is whether they could be used to justify blatant violations of explicit WTO obligations, notwithstanding the famous statement by the Appellate Body in *US – Gasoline* that WTO agreements are not to 'be read in clinical isolation from public international law'.

After a roller-coaster ride spanning the better part of two years, the two sides finally signed a bilateral Phase One trade deal<sup>173</sup> on 15 January 2020. At 96 pages, the

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<sup>168</sup> United States Mission to International Organizations in Geneva, 'Ambassador Dennis Shea's Statement at the WTO General Council', 8 May 2018, <https://geneva.usmission.gov/2018/05/08/ambassador-dennis-sheas-statement-at-the-wto-general-council/> (visited 1 June 2020).

<sup>169</sup> MOFCOM, above n 163.

<sup>170</sup> Yang Guohua, 'Zhongmei Maoyizhan Zhong de Guojifa [International Law behind the Trade War between US and China]', Wuda Guojifa Pinglun [International Law Review of Wuhan University] (2018) 120, at 135-38, <http://ilr.whu.edu.cn/d/file/zxqk/dqml/2018-11-12/75156e95c2e263ec08cb89708dca031c.pdf>.

<sup>171</sup> United Nations, 'Vienna Convention on the Law of Treaties', 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, <https://www.refworld.org/docid/3ae6b3a10.html> [visited 2 June 2020].

<sup>172</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) (visited 1 June 2020).

<sup>173</sup> Office of the United States Trade Representative, 'Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of

agreement includes seven chapters on the following issues: (1) intellectual property, (2) technology transfer, (3) trade in food and agricultural products, (4) financial services, (5) macroeconomic policies and exchange rate matters and transparency, (6) trade expansion, and (7) dispute resolution. Most of the chapters covers rules or regulatory issues, with Chapter 6 sets out the detailed market access commitments by spelling out in dollar values China's additional import targets for the next two years. The purchase commitments are supposed to solve the trade imbalance problem, which is what prompted President Trump to launch the trade war in the first place. Technically speaking, however, all the additional tariffs imposed by the US over the past two years were triggered by the rules issues, as explained earlier. While the Agreement helped to avoid further escalation of the trade war, it has left most existing retaliatory tariffs intact<sup>174</sup> and institutionalized the unilateral and confrontational approach to resolving disputes, which could reignite the bilateral trade tensions.<sup>175</sup> Moreover, the deal fails to address the more significant and systemic issues, such as China's SOEs and industrial policies and subsidies. Instead, these issues are expected to be addressed by the two parties in their Phase Two negotiations.<sup>176</sup>

## 9. Conclusion

Started as a pariah state that rarely traded with the rest of the world, China has not only re-integrated itself into the world economy, but also grown to be the largest trader in the world. At the time of China's accession to the WTO, pundits hailed the event as a historic triumph of Capitalism that marked the end of history. Nineteen years after China's accession, however, most observers are left with a mixed feeling, as the success of China's economic and trade development has led to unexpected consequences both within and beyond China. In particular, these problems are most vividly reflected in the US-China trade war, which is still ongoing at the time of this writing.

At the ideological level, the two countries hold quite different views on the roles of the government. One believes, as eloquently put by Thomas Paine, that 'government, even in its best state, is but a necessary evil'<sup>177</sup> and therefore should be subject to constant

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China', 15 January 2020, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republicchina/phase-one-trade-agreement/text> (visited 1 June 2020).

<sup>174</sup> Chad Bown, 'US-China Trade War Tariffs: An Up-to-Date Chart', PIIE, 14 Feb. 2020, available at: [www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart](http://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart) (visited 1 June 2020).

<sup>175</sup> Weihuan Zhou, 'WTO Dispute Settlement Mechanism Without the Appellate Body: Some Observations on the US-China Trade Deal', 9 *Journal of International Trade and Arbitration Law* (2020) 443, 451-53.

<sup>176</sup> USTR, '2019 Report to Congress on China's WTO Compliance', Mar. 2020, at 30, [https://ustr.gov/sites/default/files/2019\\_Report\\_on\\_China%E2%80%99s\\_WTO\\_Compliance.pdf](https://ustr.gov/sites/default/files/2019_Report_on_China%E2%80%99s_WTO_Compliance.pdf) (visited 1 June 2020).

<sup>177</sup> Thomas Paine, *Common Sense: Addressed to the Inhabitants of America* (New York, Cosimo Inc, 2006), at 1. President Trump, in particular, seems to be a strong believer in this with his mandate, upon assuming office, that "for every 1 new regulation, 2 old regulations must be eliminated". See CNBC.com staff, Read President Trump's full prepared remarks for his first address to Congress,

checks and balances to make sure that it does not encroach upon the rights of private citizens and businesses. The other, however, regards the government as ‘the key safeguard in achieving the China Dream of great rejuvenation of the Chinese nation’<sup>178</sup> and calls for further strengthening of the national governance capacity in all areas, including the economy. At the technical level, the two also employ different tools to regulate the economy, with one supporting a laissez faire economy unfettered by government intervention, while the other advocates that the State has a responsibility in promoting economic development through various means such as the key role played by state-owned enterprises in strategic sectors, periodic economic planning which prioritizes the development of certain industries, and tools of ‘macroeconomic control’ that regulate issues ranging from exchange rate policy, money supply, to housing development and birth control.

Unless these deeper systemic issues are resolved, any deal the two sign will be merely a temporary ceasefire, rather than a deal for a ‘perpetual peace’, as Kant would put it. Many suggestions have been put forward lately, with the most well-known among them being the recent Joint Statement on ‘US China Trade Relations-A Way Forward’,<sup>179</sup> drafted by the US-China Trade Policy Working Group, a group of prominent economics and legal scholars from both countries, led by renowned Harvard economist Dani Rodrick. The Joint Statement calls for wide latitude for both countries in formulating their own ‘industrial policies, technological systems, and social standards’, the achievement of which could be realized through ‘well-calibrated’ trade policies, so long as the adverse effects on foreign actors are minimized.

Unfortunately, as it premised on dubious political economy analysis, the Joint Statement does not provide practical solutions to the real issues in the bilateral negotiations.<sup>180</sup> Instead, by granting excessive policy space to the two largest trading nations, it would create a dangerous precedent for bypassing existing rules in favour of more ‘policy spaces’ for national governments. This would, in turn, undermine the

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<https://www.cnn.com/2017/02/28/read-president-trumps-full-prepared-remarks-for-his-first-address-to-congress.html> (visited 1 June 2020). See also Executive Order 13771 of January 30, 2017

Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339.

<sup>178</sup> Central Committee of the Communist Party of China, ‘Zhonggong Zhongyang Guanyu Jianchi he Wanshan Zhongguo Tese Shehui Zhuyi Zhidu, Tuijin Guojia Zhili Tixi he Zhili Nengli Xiandaihua Ruogan Zhongda Wenti de Jueding [CPC Central Committee Decision on Several Important Questions on Insisting and Improving Socialism with Chinese Characteristic and Accelerating the Modernization of State Governance System and Governance Capacity]’, adopted by the Fourth Session of the Nineteenth Central Committee of the Communist Party of China on 31 October 2019, [http://www.gov.cn/zhengce/2019-11/05/content\\_5449023.htm](http://www.gov.cn/zhengce/2019-11/05/content_5449023.htm) (visited 1 June 2020).

<sup>179</sup> The US-China Trade Policy Working Group, ‘US - China Trade Relations — A Way Forward Joint Statement’, 18 October 2019, <https://shanghai.nyu.edu/news/us-and-chinese-economists-propose-way-forward-trade> (visited 1 June 2020).

<sup>180</sup> For a detailed analysis of the Joint Statement, see Weihuan Zhou and Henry Gao, ‘US – China Trade War: A Way Out?’, 19 World Trade Review (2020, forthcoming).



rule-based multilateral institutions, and run contrary to the aim of ‘perpetual peace’, because the ‘state of peace must be formally instituted, for a suspension of hostilities is not in itself a guarantee of peace’.<sup>181</sup>

To sum up, unilateralism does not provide a good solution for the challenges resulting from China’s rise. Instead, such challenges must be addressed by the rule of law, either through multilateral rules and institutions to be negotiated in the ongoing discussions on WTO reform, or, in the meantime, by creatively utilizing some of the existing rules, especially those on subsidies in both the WTO agreements and China’s accession package.<sup>182</sup> It is exactly at times like this that we have to be reminded that, only the rule of law would provide the true foundations for a ‘perpetual peace’.

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<sup>181</sup> Immanuel Kant, ‘Perpetual Peace’, in Immanuel Kant and Hans Siegbert Reiss, *Kant: Political Writings*. (Cambridge: Cambridge University Press, 1991), at 98.

<sup>182</sup> See Zhou, Gao and Bai, above n 154.

List of key publications:

Raj Bhala, 'Enter the Dragon: An Essay on China's WTO Accession Saga', 15 *American University International Law Review* 1469 (2000).

Paul Blustein, *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambitions, and the Great Shambles of the World Trade System* (New York: Public Affairs, 2009).

Henry Gao, 'China's Participation in the WTO: A Lawyer's Perspective', 11 *Singapore Year Book of International Law* (2007) 41.

Henry Gao, 'China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?', in Carolyn Deere-Birkbeck (ed), *Making Global Trade Governance Work for Development* (Cambridge: Cambridge University Press, 2011) 153–80.

Henry Gao, 'China's Strategy for Free Trade Agreements: Political Battle in the Name of Trade', in Ross Buckley, Richard Hu and Douglas Arner (eds.), *East Asian Economic Integration: Law, Trade and Finance* (Cheltenham, UK: Edward Elgar, 2011) 104-120.

Henry Gao, 'From the Doha Round to the China Round', in Lisa Toohey, Colin B. Picker, and Jonathan Greenacre (eds), *China in the International Economic Order: New Directions and Changing Paradigms* (Cambridge: Cambridge University Press, 2015) 79–97.

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

Henry Gao and Donald Lewis (eds), *China's Participation in the WTO* (London: Cameron May, 2005).

Aaditya Mattoo, 'China's Accession to the WTO: The Services Dimension', 6 *Journal of International Economic Law* (2003) 299.

Julia Ya Qin, 'WTO-Plus' Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol', 37 *Journal of World Trade* (2003) 483.

Gregory Shaffer and Henry Gao, 'China's Rise: How It Took on the U.S. at the WTO', 2018 *University of Illinois Law Review* 115.

Gregory Shaffer and Henry Gao, 'Anew Chinese Economic Order?', 22 *Journal of International Economic Law* (2020, forthcoming).

Weihuan Zhou, Henry S Gao and Xue Bai, 'China's SOE Reform: Using WTO Rules to Build a Market Economy', 68 *International and Comparative Law Quarterly* (2019) 977.

Weihuan Zhou and Henry Gao, 'US – China Trade War: A Way Out?', 19 *World Trade Review* (2020, forthcoming).

Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance', 57 *Harvard International Law Journal* (2016) 261.