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

THE LIMITS OF THE WTO

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In "Governing the Interface of U.S.-China Trade Relations,"[1] Gregory Shaffer argues that legal rules and dispute processes can play a major role in managing conflict and competition between the United States and China. While trade is the central focus of Shaffer's article, he realizes that it cannot be severed from other dimensions of the great power rivalry, including human rights and security issues. Shaffer rejects the idea promoted by some scholars (e.g., Petros Mavroidis and André Sapir[2]) that the World Trade Organization (WTO) should double down on neoliberalism in response to the impact on trade of China's industrial policies by crafting rules that would constrain distinctive features of China's political economy. Such an approach fails to explain why China, a rising power with a strong sense of its own sovereignty and entitlement to its own political and economic system, would ever agree to these constraints. Shaffer and I agree on the basic vision of a pluralist WTO that respects deep differences among states and that is deferential to domestic policies to further legitimate objectives, whether protecting the environment or promoting the observance of basic labor rights around the world. Yet I differ with Shaffer on where the WTO fits into an *overall* strategy for addressing the global economic governance issues raised by the U.S.-China conflict. While I see the WTO as a useful and necessary part of the picture, I have a lesser estimate than Shaffer of its amenability and centrality to addressing many of the governance challenges that are at play. The post-war General Agreement on Tariffs and Trade from which the WTO system originates still plays a crucial role in providing a structure for voluntary reduction in tariffs through negotiations based on reciprocity and a set of rules for the legal security of tariff concessions. This is reinforced by non-discrimination norms that apply to domestic policies that affect trade. But where non-discriminatory domestic policies are claimed to be trade restrictions, it is much less clear that they should be disciplined multilaterally through a trade-focused institution like the WTO that is not particularly sensitive to the demands of public policy in complex areas of regulation.

Embracing Pluralism

Shaffer rightly argues that it is an important *strength* of the WTO, and perhaps an essential characteristic, that it can accommodate very diverse domestic political and economic arrangements. This is a view of trade multilateralism that has been elaborated in economic terms most notably by Dani Rodrik[3] and articulated in legal and

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[1] Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AJIL 622 (2021).

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

[3] Dani Rodrik, Straight Talk on Trade: Ideas for a Sane World Economy (2017).

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institutional terms as "pluralism" in work that I have co-authored with Joanna Langille.[4] According to this perspective, the WTO ought to focus on relatively shallow kinds of economic integration that are possible among states with clashing values and political and economic systems, rather than pushing for new, more integrating rules that are less deferential to the political and economic choices of different states. Where differences between political and economic systems lead to dissensus about what is "unfair" trade as opposed to legitimate public policy, as Shaffer points out,[5] WTO law facilitates a sort of "agreeing to disagree" approach. It is permissive of unilateral actions to rebalance trade in response to the external impacts of other countries' domestic policies, but without seeking to delegitimize or even ban those policies. This is a reasonable approach: if anything, WTO rules need to be more permissive of different forms of domestic economic intervention and industrial policy.

As Shaffer indicates, the China challenge might require some rethinking of the form and conditions of these unilateral responses (typically anti-dumping duties, countervailing duties, and safeguards measures), especially at the level of WTO jurisprudence. But the direction of change should generally be greater permissiveness, although within a multilateral framework with controls on abuses and with independent and impartial dispute settlement. Shaffer deftly shows how, for example, the United States can respond to human rights and labor rights abuses within the existing multilateral framework, pointing to provisions such as the "public morals" exception in Article XX of the General Agreement on Tariffs and Trade.[6] Shaffer also explains how the security exception in this agreement and related agreements (the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and the General Agreement on Trade in Services) has been interpreted in WTO dispute settlement;[7] the exception offers considerable latitude to restrict trade where genuine security interests are at stake but is still tied to a dispute settlement process that is able to control for fundamentally pretextual or bad faith invocations of security.

Shaffer's logic and sobriety, including his sensible appeal to existing institutions and rules—showing they still matter here—are an excellent antidote to the many cataclysmic and sensationalist presentations of the U.S.-China conflict and its fallout for the WTO. One piece of evidence in support of his perspective is that the United States and China continue to file cases against one another in the WTO dispute system (even after the demise of the Appellate Body and the related system of "enforcement" through retaliatory countermeasures where the losing party does not bow to a final dispute ruling). The countries also engage each other, often in disagreement, in the WTO diplomatic arena. But that is fine—debate in a multilateral deliberative forum is itself a way of containing tensions, where each of the rivals must not only account for its views to the other but also to the larger community of nations.

The Challenge of Trust

At the same time, one should be clear, and perhaps somewhat clearer than Shaffer is in this article, in understanding the limits of law-based multilateralism as well as of a WTO-centered approach. First, a commitment to contain or resolve disputes within such an institutional framework requires a certain level of trust. Perhaps this exists in the case of some disputes that do not engage fundamental economic or political interests, and, as just mentioned, the United States and China continue to engage each other at the WTO. But one must acknowledge

[4] Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. (2012).

[5] Shaffer, *supra* note 2, at 670.

[6] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

[7] Shaffer, *supra* note 2, at 655.

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that, generally, trust is at a low. Investing in a range of more modest, political initiatives to rebuild or build trust through limited cooperation on shared concerns might be a more realistic short term-strategy than putting significant capital into reforming WTO dispute settlement as an avenue to managing U.S.-China trade tensions.

Shaffer himself mentions, for example, how the United States has refrained from bringing dispute complaints for fear that China will retaliate against American business.[8] The concern is not unfounded; China's response to Canada following normal extradition laws and procedures in the case of a Huawei executive facing charges in New York was to take two Canadians in China as hostages, detaining them until a deal was worked out with the U.S. prosecutor that set the executive free.[9] In addition, China simply chose not to respect the South China Sea arbitration ruling against it because the award clashed with China's own concept of its national sovereignty.[10] When China has lost WTO rulings, it has implemented the decisions through formal changes to the impugned measures while also finding other ways of maintaining or reinstating barriers to market access, or more generally the underlying policies.[11]

On this last point, while China is often operating within the letter of the law here, this behavior nonetheless arguably contributes to the trust problem. At the same time, the United States' commitment to good faith participation in a rules-based international community has itself been shaky. As Ruti Teitel and I have argued, the Biden administration has embraced global legalism only half-heartedly.[12] As we observe, the current administration has, for instance, sought to frustrate the International Criminal Court's entirely proper exercise of its jurisdiction in the context of the Israel/Palestine conflict and has not lifted a finger to reinstate the WTO Appellate Body—the latter example obviously highly relevant to Shaffer's theme.

Still, Shaffer is right to insist that it is essential that the United States and China find a path to cooperation on a range of issues, including trade, even if (as I suggest) that might mean having to build trust up from the bottom. While having strong words for each other on a number of issues, Xi and Biden have also displayed some delicacy and restraint, especially in their more recent expressions of the nature of the rivalry between the two powers. This is a hopeful sign. The United States has brought China (along with Russia and some Gulf states) into its efforts to restore the Iran Deal.[13] China is showing that, despite the tensions between the two countries, it is not interested in sabotaging or undermining every important U.S. diplomatic or geostrategic initiative around the world. While China's initial handling of the outbreak of the coronavirus in Wuhan was an understandable contributor to mistrust, China and the United States agree on the need for a waiver on intellectual property rights under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights to facilitate dissemination of vaccines to poor countries.[14] Recently, in the context of the COP26 UN Climate Change Conference, the United States and China have made a joint declaration on enhancing climate action—while the declaration is aspirational, it nevertheless extends to many areas of climate policy.[15]

[8] *Id.*, at 648.

[9] *Canada's Two Michaels Back Home After More than 1000 Days Imprisoned in China as Huawei's Meng Cuts Deal with U.S.*, Wash. Post (Sept. 25, 2021).

[10] Hao Duy Phan & Lan Ngoc Nguyen, *The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions*, 8 Asian J. Int'l L. 36 (2018).

[11] Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 Mich. J. Int'l L. 525 (2014).

[12] Robert Howse & Ruti Teitel, *America's Ambivalent Commitment to International Justice*, Project Syndicate (Aug. 2, 2021).

[13] *U.S. Seeks Russian and Chinese Support to Salvage Iran Nuclear Deal*, Guardian (Dec. 5, 2021).

[14] *Tai Talks TRIPS Waiver With Allies as China Gets Behind It—GOP Balks*, Inside U.S. Trade (May 19, 2021).

[15] U.S. Dep't of State Press Release, U.S.-China Joint Glasgow Declaration on Enhancing Climate Action in the 2020s (Nov. 10, 2021).

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The WTO's Limits in Addressing Contemporary Global Economic Governance

While Shaffer is persuasive that the WTO can still play a constructive part in managing U.S.-economic tensions, many axes of economic rivalry between the United States and China are not really covered by the WTO. Although in some cases, aspects of foreign investment and financial services are addressed in the General Agreement on Trade in Services, issues such as investment screening and approval of mergers, acquisitions, and listings on stock exchanges are not well-suited to dispute settlement in the WTO. The monetary and financial relationship between the United States and China relates to a wide range of matters—the role of the Chinese yuan renminbi as a global currency, exchange rates, the fate of cryptocurrency, and sanctions on third countries (e.g., Iran). To be sure, there are some rules of relevance that go back to the General Agreement on Tariffs and Trade, but these are linked to outdated Bretton Woods arrangements that assumed fixed exchange rates (tied to the gold standard) and International Monetary Fund-managed macroeconomic policy adjustment.

I do not see any avenues within the current institutional structure of the WTO for moving to a twenty-first century state-of-the-art legal framework on these economic matters—much of the expertise is in central banks and treasury departments domestically and in the International Monetary Fund internationally. Efforts to propose legal rules on currency manipulation by some scholars and policy analysts are fraught with conceptual and methodological difficulties, raising the question as to whether general rules enforced in dispute settlement are an appropriate avenue at all for some of these aspects of global economic governance.[16] At the same time, innovation in financial markets and related technological transformations[17] are occurring at a pace that really does make the consensus-based rule-making process of the WTO seem "medieval," as former WTO Director General Pascal Lamy once put it.[18] While there are currently plurilateral negotiations at the WTO on e-commerce, these talks reveal a divergence of approaches that is largely irreconcilable. Some propose shifting decision making in the WTO to versions of majority or super-majority voting; but there is a wisdom in the existing system as it does protect the pluralism discussed above. But this means the system is simply not adaptable to real-time global economic governance on certain issues.

While the WTO's Technical Barriers to Trade Agreement requires that international standards be used as a basis for technical regulations, the WTO lacks the expertise and institutional heft to develop international standards or impede China (or for that matter, the European Union) from attempting to impose its own standards globally, whether through the Belt and Road Initiative or otherwise. China views technical standards as a strategic tool to advance China's military industrial complex. Its Belt and Road Initiative engages the framework for sovereign debt and debt restructuring, another aspect of global economic governance that is outside of the WTO regime. As well, the conduct of Chinese enterprises or agencies (whether state or "private") in participant countries engages issues of corporate social and environmental responsibility.[19] Because of his commitment to the WTO frame, Shaffer sees climate and labor issues in terms of the interaction of policies such as carbon border adjustment and labor rights-based import restrictions with the WTO legal framework.[20] But as the Belt and Road Initiative illustrates, to the extent the United States wishes to shape China's global economic footprint, or its climate and social consequences, it may need to focus on fora and processes outside the WTO.

[16] *See* Robert Howse, *Towards an Equitable Integration of Monetary and Financial Matters, Trade and Sustainable Development*, *in* THE RULE OF LAW IN MONETARY AFFAIRS: WORLD TRADE FORUM 285 (Thomas Cottier, Rosa M. Lastra & Christian Tietje eds., 2014).

[17] *See* WINSTON MA, THE DIGITAL WAR: HOW CHINA'S TECH POWER SHAPES THE FUTURE OF AI, BLOCKCHAIN AND CYBERSPACE (2021).

[18] *Quoted in* Robert Wolfe, *Decision-Making and Transparency in the "Medieval" WTO: Does the Sutherland Report have the Right Prescription?*, 8 J. INT'L ECON. L. 631 (2005).

[19] Johanna Aleria P Lorenzo, *A Path Toward Sustainable Development Along the Belt and Road*, 24 J. INT'L ECON. L. 591 (2021).

[20] Shaffer, *supra* note 2, at 632.

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Moreover, there is no mandate in the WTO for the negotiated reduction or elimination of fossil fuel subsidies, even though the Organisation for Economic Co-operation and Development and the G20 have done constructive work to prepare such a move. Instead, the United States and the European Union have agreed to develop a "climate club" for steel and aluminum,[21] which would ultimately allow trade restrictions against countries that refuse to participate in the arrangement, curbing the carbon intensity of steel and aluminum production as well as adopting other appropriate green policies. Shortly after this development, in the context of COP26, the United States and China agreed, as mentioned above, to a joint declaration committing to cooperation on a wide range of climate-related matters, including adequate carbon regulations. The WTO is not mentioned at all in the joint declaration. However, one can imagine the joint declaration as paving the way, eventually, for China to join the EU-U.S. steel and aluminum climate club (which might eventually be extended to other-carbon intensive industries). The WTO law and policy community obsesses as to whether and what kind of carbon border adjustment might be consistent with WTO rules and worries constantly about protectionist abuses of climate policies. Yet there is complete inaction at the WTO on environmental goods or fossil fuel subsidies. At the same time, we see nascent forms of cooperation or coordination emerging that may ultimately bring the United States and China closer together, but completely sideline the WTO.

Conclusion

While I agree with Shaffer's theme of not giving up on multilateralism and institutions in managing the U.S.-China conflict, I question the wisdom of focusing so much on the WTO. That multilateralism is still a vibrant possibility for addressing global problems was illustrated recently by the agreement on a global minimum corporate income tax.[22] While the challenge addressed by the agreement was fundamentally one of taxation of transboundary economic activity and actors, something in principle within the WTO's legal and institutional remit, it was handled entirely outside the WTO framework. At the same time, even where China and the United States *agree* (along with essentially all of the developing world) on as urgent and crucial an issue as access to COVID-19 vaccines, at issue is a proposal for a waiver from the patent rights provisions of the WTO Trade and Intellectual Property Rights agreement, which would allow poorer countries the possibility of access to COVID vaccines and treatments at low cost by breaking the patents. Yet even acting together, China, the United States, and Russia cannot make basic global justice prevail on this issue at the WTO. The European Union, Switzerland, and a few other countries are blocking the waiver at the behest of their pharmaceutical industries. In these circumstances, if China and the United States are seeking sites for global economic governance, which can manage the tensions of their relationship while opening up opportunities for enlightened cooperation, they may want to diversify their investment of political capital and negotiating resources away from the WTO.

[21] Steel and Aluminium: EU-US Joint Statement (Oct. 31, 2021).

[22] Daniel Bunn, *What's in the New Global Tax Agreement?*, TAX FOUND. (Oct. 8, 2021).

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