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REFORMING THE WTO THROUGH THE PRISM OF RULES – VERSUS POWER-BASED TRADE RELATIONS

This panel was convened at 10:15 a.m., Thursday, June 25, 2020, by its moderator Gabrielle Z. Marceau of the World Trade Organization, who introduced the panelists: Stephen de Boer, Ambassador of Canada to the WTO; Henry Gao of Singapore Management University; and Jennifer Hillman of the Council on Foreign Relations.

WTO Reform: A China Round?

*By Henry Gao**

Since its accession to the World Trade Organization (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 attribute 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 (Plan), which was prepared in 2014 by the Chinese Academy of Sciences and the Chinese Academy of Engineering under the leadership of the Chinese Ministry of Industry and Information Technology (MIIT), along with the National Development and Reform Commission (NDRC) and twenty agencies. Officially adopted by the State Council in 2015,[1] 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

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[1] State Council, Guowuyuan Guanyu Yinfa <Zhonguo Zhizao 2025> de Tongzhi [State Council Notice on Issuing <Made in China 2025>], Guofa [2015] #28 (May 8, 2015), *at* http://www.gov.cn/zhengce/content/2015-05/19/content_9784.htm.

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China, alleging China's various technology transfer measures in violation of various WTO rules including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the General Agreement on Tariffs and Trade (GATT) 1994, and China's Accession Protocol.[2] 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." article by Harvard law professor Mark Wu,[3] the U.S.-led coalition has been arguing that the existing WTO rules are insufficient in dealing with the problems created by China's state capitalism. In this Article, I will discuss if the existing WTO rules provide adequate tools in dealing with China, what new rules might be needed, and how to get China to accept such new rules and implement them.

I. Are the Existing WTO Rules Adequate in Dealing with China?

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

The idea of China's uniqueness is not entirely new. When China sought entry into the GATT thirty years ago, Douglas Newkirk—a senior U.S. trade official—famously stated that "the GATT was not written with a socialist market economy in mind." When the Doha Round stalled ten years ago, Aaditya Mattoo and Arvind Subramanian suggested that one way to break the deadlock would be launching a "China round of multilateral trade negotiations."[4]

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

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

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

[2] China - Certain Measures on the Transfer of Technology - Request for Consultations by the European Union, WT/DS549/1, G/L/1244, IP/D/39 (June 6, 2018).

[3] Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 Harv. Int'l L.J. 261 (2016).

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

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

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

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

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

Whatever may be the fault of the "public body" jurisprudence of the AB, this is less significant now that China has started to assign key governmental functions to many SOEs. Along with the push by the Communist Party of China to install Party Committees in SOEs and to make them the key decision makers, it becomes much easier to find the exercise of government authority by these SOEs and government control of these firms.

Moreover, the jurisprudence is also changing. In its report on the *US – Countervailing Measures (China) (Article 21.5 – China)* case in 2019, the AB rejected China's argument that connections with the government needs to be established every time when the alleged "public body" engages in any specific conduct under investigation.[8] Instead, the AB ruled that the focus should be "on the entity, as opposed to the conduct alleged to give rise to a financial contribution," and "once it has been established that an entity is a public body, then "all conduct' of that entity shall be attributable

[5] Weihuan Zhou, Henry Gao & Xue Bai, *Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China*, 68 INT'L & COMP. L.Q. 977 (2019).

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

[7] *See* Michel Cartland, Gérard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. WORLD TRADE 979, 1001–14 (2012); Wu, *supra* note 3, at 301–05 (2016).

[8] Appellate Body Report, United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China, para. 5.99, WT/DS437/AB/RW and Add.1 (adopted 15 August 2019).

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to the Member concerned."[9] Moreover, the AB also rejected China's proposition that "the circumstances potentially justifying recourse to out-of-country prices are limited to those in which the government effectively determines the price at which the good is sold, including more specifically, where the government sets prices administratively, is the sole supplier of the good, or possesses and exercises market power as a provider of the good so as to cause the prices of private suppliers to align with a government-determined price."[10] Instead, the AB recognized that there would be many other "different types of government interventions" that "may result in price distortion," and in turn warrant "recourse to out-of-country prices."[11]

The third misconception is that subsidy-countervailing actions are ineffective in practice. But studies have shown countervailing measures tend to provide much higher margins of protection compared to anti-dumping measures. Moreover, with the expiration of the non-market economy methodology at the end of 2016, the current set of inflated anti-dumping rates can no longer be sustained. This leaves countervailing measures as the only meaningful option.

In short, the real problem is not the lack of rules to tackle China's state capitalism, but the lack of utilization of existing rules. WTO members—especially the major players—should start conducting well-coordinated countervailing investigations domestically and initiate "big, bold" cases[12] at the WTO to challenge China's subsidies and state intervention in the market through SOEs. Legal actions based on existing WTO rules will not only help to level the playing field for non-Chinese firms, but also help China to steer its SOE reform back on the right course, as originally charted by reform pioneers like Deng Xiaoping and Jiang Zemin more than thirty years ago.

II. What New Rules Do We Need?

At the 11th WTO Ministerial Conference in Buenos Aires, the United States, the European Union, and Japan issued a joint statement[13] condemning "severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises, forced technology transfer, and local content requirements and preferences" as "serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy." To "address this critical concern," they vowed to "enhance trilateral cooperation in the WTO and in other forums."

At the same Conference, the United States also set the agenda on the substance of the negotiation and strived to control how the negotiations should be conducted. At the conclusion of the conference, United States Trade Representative (USTR) Robert Lighthizer stated that "MC11 will be remembered as the moment when the impasse at the WTO was broken. Many members recognized that the WTO must pursue a fresh start in key areas so that like-minded WTO Members and their constituents are not held back by the few Members that are not ready to act."[14] In other words,

[9] *Id.*, para. 5.100.

[10] *Id.*, para. 5.147.

[11] *Id.*, para. 5.144.

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

[13] Office of the United States Trade Representative (USTR) Press Release, Joint Statement by the United States, European Union and Japan at MC11 (Dec. 12, 2017), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states.

[14] USTR Press Release, USTR Robert Lighthizer Statement on the Conclusion of the WTO Ministerial Conference (Dec. 14, 2017), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/ustr-robert-lighthizer-statement.

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

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

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

The first concerns the need to update the substantive rules of the WTO, such as clarifying the application of "public body" rules to SOEs, expanding the rules on forced technology transfer and addressing barriers to digital trade.[20] All of these are long-standing issues that have been litigated in the WTO.[21] They each reflect a major concern over China's trade and economic systems, which employ measures that are perceived as unfair trade practices. The first relates to China's unique state-led development model, which emphasizes the role of state-owned firms in the Chinese economy, often without a clear boundary between the state and the firm. The second refers to China's

[15] European Commission, WTO Modernisation: Introduction to Future EU Proposals (Sept. 18, 2018, *available at* https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

[16] WTO, General Council, Strengthening and Modernizing the WTO: Discussion Paper – Communication from Canada, JOB/GC/201 (Sept. 24, 2018).

[17] *See, e.g.*, 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 (Dec. 10, 2018) [hereinafter EU Proposal]; Proposal by Canada Titled Strengthening the Deliberative Function of the WTO, JOB/GC/211 (Dec. 14, 2018) [hereinafter Canada Proposal].

[18] *See, e.g.*, Proposal by the United States Titled, An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, WT/GC/W/757/REV.1 (Jan. 15, 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 (Nov. 1, 2018).

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

[20] *See* EU Proposal, *supra* note 17, at 4–6; Canada Proposal, *supra* note 17, at 5.

[21] On public body, see: United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, at 2869, WT/DS379/AB/R, DSR 2011:V (2011) (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, WT/DS542/1, IP/D/38 (2018); China—Certain Measures on the Transfer of Technology—Request for Consultations by the European Union, WT/DS549/1, G/L/1244, IP/D/39 (2018); on digital trade barrier, see: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, at 3, WT/DS363/AB/R, DSR 2010:I (2010) (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 & Int'l Health L. & Pol'y 347 (2011).

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overzealous drive to obtain and absorb foreign intellectual property rights, where foreign firms are met with explicit or implicit demands to trade their technologies for markets. The third touches on the core of the authoritarian regime in China, where the government maintains tight control over information and the Internet.[22]

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

The last significant issue is development, another longstanding issue stemming from the call of the United States and the European Union for greater "differentiation" among WTO members. The underlying rationale is that, while developed countries were willing to extend special and differential treatment to smaller developing countries, they are rather reluctant to extend the same treatment to large developing countries such as China which have already become economic powerhouses in their own right. Thus, in their proposals, the European Union and Canada called for the rejection of "blanket flexibilities"[29] for all WTO members, which are to be replaced by "a needs-driven and evidence-based approach"[30] that "recognizes the need for flexibility for development purposes while acknowledging that not all countries need or should benefit from the same level of flexibility."[31] The U.S. proposal is more radical by proposing the automatic termination of special and differential treatment for members that fall into one of the following four categories:

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

[23] *See* EU Proposal, *supra* note 17, at 9–11; Canada Proposal, *supra* note 17, at 2.

[24] USTR, 2002 Report to Congress on China's WTO Compliance, 22–23 (Dec. 1, 2002), *available at* https://china.usc.edu/sites/default/files/article/attachments/2002-report-chinas-wto-compliance.pdf.

[25] USTR, 2018 Report to Congress on China's WTO Compliance, 75 (Feb. 2019), *available at* https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf.

[26] *Id.*

[27] *Id.* at 76.

[28] General Council & Council for Trade in Goods, Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements – Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Israel, Japan, New Zealand, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States – Revision, at 3–4. 3, JOB/GC/204/Rev.3, JOB/CTG/14/Rev.3 (Mar. 5, 2020).

[29] EU Proposal, *supra* note 17, at 6.

[30] *Id.* at 7.

[31] Canada Proposal, *supra* note 17, at 5.

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Organisation of Economic Co-operation and Development members; G20 members; classification as "high income" by the World Bank; or a share of at least 0.5 percent of global goods trade.[32] Such a classification system would strip many WTO members of their developing countries status, including China, as it meets two criteria, i.e., G20 membership and a large trade share.

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

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."[36] This is duly reiterated in the reform proposal, which is listed under the heading of "Adhering to the Principle of Fair Competition in Trade and Investment."[37] While some Western commentators might be puzzled by such an adamant position on the SOE issue, this is not surprising at all as SOEs relate to two of the three "core interests" of China as famously defined by State Councillor Dai Binguo in 2009.[38] Due to its unhappy experience with the discriminatory provisions in its accession package, China resents being singled out in WTO negotiations. Because these proposals clearly target China, it is no surprise that China would react so strongly. 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 in goods enabled by the Internet, as well as on such related services as payment and logistics services."[39] As I discussed in another article, this is very different from the position taken by the United States, which emphasizes digital transmissions and the associated issue of free flow of data.[40]

[32] United States, Draft General Council Decision - Procedures to Strengthen the Negotiating Function of the WTO - Decision of X Date, at 1–2, WT/GC/W/764 (Feb. 15, 2019).

[33] MOFCOM Press Release, China's Position Paper on WTO Reform (Dec. 20, 2018), *at* http://english.mofcom.gov.cn/article/newsrelease/counselorsoffice/westernasiaandafricareport/201812/20181202818679.shtml.

[34] WTO, General Council, China's Proposal on WTO Reform: Communication from China, WT/GC/W/773 (May 13, 2019).

[35] *Id.*, paras. 2.1–2.10.

[36] MOFCOM, *supra* note 33.

[37] WTO, *supra* note 34, Sec. 2.4.2.

[38] The three core interests are: preserving China's basic state system and national security; national sovereignty and territorial integrity; and the continued stable development of China's economy and society. *See* Michael D Swaine, *Part One: On "Core Interests," in* Michael D Swaine, 34 China Leadership Monitor, *available at* https://carnegieendowment.org/files/CLM34MS_FINAL.pdf. State-owned economy is the basic economic system according to Articles 6 and 7 of the Chinese Constitution, which also state that public ownership and state-owned economy shall be the leading force in the economy.

[39] WTO, *supra* note 34, para. 2.22.

[40] Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 J. Int'l Econ. L. 297, 308–10 (2018).

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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-endeavor basis, and should receive more technical assistance for that purpose.[41] 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."[42]

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."[43] At the same time, it also indicated its willingness to "take up commitments commensurate with its level of development and economic capability."[44] 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 modernizing their customs processes.[45] 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 percent of the measures immediately upon ratification.[46] All of its Category B measures have been fully implemented as of January 2020.[47]

III. Should China Get Developing Country Status?

In the WTO, developing countries are entitled to "special and differential treatment" set out in 155 rules.[48] However, none of those rules define what a "developing country" is. Instead, each member is able to "self-designate," subject to challenges from other members.

In the case of China, its developing country status has been a controversial issue since the days of its accession negotiation. On the one hand, citing its low levels of development, China made recognition as a developing country a key principle of its WTO bid. On the other hand, many members were reluctant to grant China developing country status due to "the significant size, rapid growth and transitional nature of the Chinese economy." As a result, a "pragmatic approach" was taken, and China hardly received any special and differential treatment in its accession package. For example, under the normal tariff reduction modality for the Uruguay Round, China only needed to reduce its average industrial tariff from the base point of 42.7 percent to 31.4 percent. Instead, China agreed to reduce it to 9.5 percent. Similarly, China agreed to reduce its agricultural tariff from the base point of 54 percent to 15.1 percent, instead of 37.9 percent as per normal

[41] WTO, *supra* note 34, para. 2.28.

[42] *Id.*

[43] MOFCOM, *supra* note 33.

[44] *Id.*

[45] Third World Network, *Many Developing Countries Against Trade Facilitation Rules in WTO* (June 28, 2003), *at* https://www.twn.my/title/twninfo35.htm.

[46] WTO Trade Facilitation Agreement Database, *at* https://www.tfadatabase.org/members/china/measure-breakdown?date=2020.

[47] *Id.*

[48] WTO, Committee on Trade and Development, Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W/239 (Oct. 12, 2018).

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modality. These put China's commitments on par with those of developed countries rather than developing countries.

On some issues, China's commitments even exceeded those of developed countries. For example, it has agreed to eliminate all export subsidies on agricultural products upon accession, an obligation that developed countries themselves were only able to commit to fourteen years later. In fact, many of China's commitments were tailor-made for China and modifies the WTO Agreements to the detriment of China. These include WTO plus obligations provisions which go beyond normal WTO requirements, such as the transitional trade policy review (TPR) mechanism, and WTO minus rights provisions, such as the special safeguard mechanisms and non-market economy methodology in anti-dumping investigations.

In summary, contrary to popular belief, China did not really get developing country treatment in its accession, even though it was able to keep the title. After its accession, however, China joined the developing country camp, and sponsored many proposals for special and differential treatment for developing countries. For example, at the WTO Ministerial Conference held in Cancun, Mexico in 2003, China joined India and Brazil in establishing the G20, which calls for developed countries to reform their agricultural trade policy while reserving flexibilities for developed countries. To be frank, it would be relatively uncontroversial to grant special treatment to other developing countries. Given the sheer size of China, however, any accommodation granted could easily tip off the balance and make the whole deal fall apart. But it would be wrong to accuse China of sabotaging the trade talks, as it has been trying to contribute by foregoing special treatment on many issues, such as not designating any Category C measures under the Trade Facilitation Agreement. However, when China insisted on developing country treatment, things could become difficult. This is the case, for example, with regard to the negotiation on fisheries subsides, which would not be able to move without substantial commitments from China, which provides one of the largest subsidies in the world.

Nonetheless, given the collapse of the Doha Round negotiations and the rise of plurilateral initiatives such as the various joint statement initiatives, the title of developing country no longer matter much as commitments will be largely negotiated on a case-by-case basis. Recognizing that China might need the developing country title as a political statement, the best way to proceed is to give China developing country status in name, but to structure the negotiations in such a way that the obligations are not based on developed or developing country label, but tailored according to the trade share of each participant, so that China can also make "commitments commensurate with its level of development and economic capability."

IV. Final Thoughts

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

First, the proposed rules should be neutral on their face so that they would not be deemed as China-specific or discriminatory against China. With the painful memories of unequal treaties during the "century of humiliation," China is very sensitive to such gestures. One lesson can be

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drawn from the 2008 July Package negotiations, where the United States wanted China to make concessions on sectorals. The request was rejected by China because the same demands were not made to the other emerging economies. Instead, China insisted that such concessions must be made on a voluntary basis by everyone.

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

There is a theory that the WTO agreements are like incomplete contracts. As such, the implementation often relies on the goodwill of the implementer. This provides yet another reason why China should be constructively engaged in any negotiation on WTO reform. If a reform deal were to be negotiated without China's participation in the hopes that it could be forced down China's throat, it practically guarantees that China would try to dodge the implementation at every opportunity. This was already proven by China's experience with the transitional trade policy review mechanism, which is above and beyond the normal WTO TPR cycle. China regarded this as discriminatory and, at the very first meeting, refused to provide written answers to the questions, which as they rightly pointed out is only required under the normal TPR.[49] Since the transitional review is entirely different from the normal TPR, China argued that no written replies should be required. While the other WTO members were not happy, in the end they had no choice but to accept China's practice, which is supported by a strict textualist and minimalist interpretation of its obligations under the Accession Protocol. If anything, this episode should teach WTO embers the importance of engaging rather than sidestepping China in any negotiation on WTO reform.

[49] Henry Gao, *The WTO Transparency Obligations and China*, 12 J. COMP. L. 329, 350–53 (2018).

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