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China's Changing Perspective on the WTO

From Aspiration, Assimilation to Alienation

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Twenty years after it became a member of the WTO, China's image in popular perception has shifted from the biggest success story of the world trading system to its biggest challenge.[1] In the past few years, tons of research have been conducted on what other WTO members should or could do to deal with the China challenge,[2] but not much attempt has been made to understand the Chinese perspective on its WTO membership. Focusing only on the China challenge without understanding the Chinese perspective is rather problematic as it treats China as a passive object rather than an active subject, despite its significant economic and political clouts in the world trading system today. This chapter fills the research gap by providing the first systemic review of this important yet ignored question, which in my view, would be the key to addressing the China challenge. The chapter argues that the Chinese perspective on the WTO has changed from viewing it as the symbol for its aspiration to integrate into the world economy, to trying to assimilate the Chinese

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[1] See, e.g., Petros C. Mavroidis and André Sapir, 'The WTO at the Crossroads: How to Avoid the China Syndrome', *World Trade Review,* 21(3), 359–366. https://doi.org/10.1017/S147474562200009X.

[2] See, e.g., M. Wu (2016), 'The "China, Inc" Challenge to Global Trade Governance', *Harvard International Law Journal* 57(2); J. Hillman (2018) Hearing on US Tools to Address Chinese Market Distortion; P. C. Mavroidis and A. Sapir (2021) *China and WTO: Why Multilateralism Still Matters*; R. L. Howse, 'Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor', 43 *University of Pennsylvania Journal of International Law* 821 (2022); W. Zhou, H. Gao, and X. Bai (2019) 'Building a Market Economy Through WTO-Inspired Reform of State-owned Enterprises in China', *International and Comparative Law Quarterly* 68, 977.

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economic system with that of the market-based multilateral trading system, to increasing alienations with the core values of WTO in response to the attacks on its economic system. The paper concludes with lessons drawing from China's changing perspective, especially on how to manage the China challenge in the multilateral trading system.

I The Aspiration: Pre-2001

While China was a founding contracting party to the GATT, it did not participate in the activities of the GATT due to the withdrawal from the GATT by the government of the Republic of China in 1950 and the subsequent Cold War.[3] This did not change even when China resumed its seat in the United Nations in 1971 when the Chinese Ministry of Foreign Trade and Ministry of Foreign Affairs submitted a joint report advising against China's participation in the GATT by calling it "a tool for the imperialists, especially American imperialists to expand foreign trade and grab world markets."[4]

However, China's perspective started to change when it started its economic reform in the late 1970s. In particular, learning from the success stories of other export-oriented economies in East Asia, China tried to boost its trade and investment, and started to realize the key role played by the GATT in the facilitation of international trade. In a joint report submitted to the State Council in 1982,[5] the Ministry of Foreign Economic Relations and Trade (MOFERT), Ministry of Foreign Affairs, State Economic Commission, Ministry of Finance, and General Customs Administration noted that China's foreign trade is rapidly developing with the adoption of the reform and opening up policy, and trade with members of the GATT already constitute 80% of its overall trade.[6] Thus, they suggested China to participate in the GATT and enjoy the MFN tariffs.[7] After learning more about the GATT in the next few years, China

[3] For a detailed discussion of China's history with the GATT and WTO, see H. Gao (2007) 'China's Participation in the WTO: A Lawyer's Perspective', *Singapore Year Book of International Law* 11, 41–74.

[4] Chinese Ministry of Foreign Trade and Ministry of Foreign Affairs, 'Report on the "GATT" Issue [Guanyu "Guanshui ji Maoyi Zongxieding" Wenti de Qingshi]', 30 November 1971, as quoted in G. Shi (2011) *Reader on China's Accession to the World Trade Organization (Four): Negotiation History of China's Accession to the World Trade Organization [Zhongguo Jiaru Shijie Maoyi Zuzhi Zhishi Duben (Si): Zhongguo Jiaru Shijie Maoyi Zuzhi Tanpan Licheng]*, People's Publishing House [Renmin Chubanshe], at 19–21.

[5] *Id.*, at 24–26.

[6] *Id.*, at 24.

[7] *Id.*

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formally submitted the application to resume its status as a GATT contracting party on July 10, 1986.[8]

In its Memorandum on China's Foreign Trade Regime submitted in February 1987, China stated that the "objective of the reform is to establish a new system of planned commodity economy of Chinese style."[9] The strange term "planned commodity economy" is essentially just a euphemism for "market economy," disguised in such a way so as to overcome the ideological opposition from Party hardliners. This was officially confirmed in 1992 when the Fourteenth National Congress of the Communist Party adopted a Resolution to make "socialist market economy" the goal of the reform,[10] which was subsequently incorporated into the PRC Constitution in 1993.[11]

As China's reform goal was to establish market economy and the GATT was the pinnacle international institution based on market economy principles, it is no wonder that China looked up to its accession to the GATT/WTO with great enthusiasm. For example, Li Zhongzhou, the first division chief for GATT Affairs at MOFERT who was responsible for China's GATT bid for a long time in the 1980s, summarized nine benefits of China's participation in the GATT, which includes boosting its trade and investment, getting MFN tariffs, enjoying special and differential treatment for developing countries, and participating in various GATT activities such as negotiations and dispute settlement.[12]

China's eagerness as an aspiring convert of the multilateral trading system is also demonstrated by its willingness to move past four major

[8] GATT, *China's Status as A Contracting Party: Communication from the People's Republic of China*, GATT Doc. L/6017 (Oct. 26, 1986).

[9] GATT, *China's Status as a Contracting Party, Memorandum on China's Foreign Trade Regime*, L/6125, 18 February 1987, at 4.

[10] Z. Jian, *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*, Oct. 12, 1992, www.gov.cn/test/2007-08/29/content_730511.htm.

[11] 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." *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 Mar. 29, 1993), www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4585.htm.

[12] Z. Li (1993) 'The Issue of China's Participation in the Multilateral Trading System', www.uvic.ca/research/centres/capi/assets/docs/Zhongzhou_China_Multilateral_Trading.pdf, at 11–12.

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political crises during its accession process: the boycott against China in the aftermath of the "June Fourth incident" in 1989; the unilateral release of China's concessions on market access and protocol (including some still under negotiation) by the US in April 1999; the NATO bombing of China's embassy in Yugoslavia in May 1999; and the collision of a US Navy spy plane with a Chinese fighter jet in April 2001. Any of the four crises, if they were to happen today, could easily derail or even terminate the whole negotiation. Yet, China was willing to set them aside and press forward with its accession talk. Indeed, in each case, a deliberate decision was made by China's then top leader to de-escalate the situation and move on, such as Deng Xiaoping's speech affirming the goal of "market economy" in his southern tour in 1992, Jiang Zemin's decision to resume negotiation with the US in August 1999,[13] and his call to President Bush at 2 AM Beijing Time on 12 September 2001, just 5 hours after the first of the 9/11 terrorist attacks, to condemn the attacks and send condolences to American people.[14]

II The Assimilation: 2001–2008

With the same joy as Monk Tang entering the Western Heaven,[15] China finally acceded to the WTO at the Doha Ministerial Conference in November 2001. The accession was celebrated universally across China, with CCTV hosting a "Who Wants to be a Millionaire"-style show testing people's knowledge on WTO issues, various local campaigns to teach WTO to people from all trades including taxi drivers, and a high-level seminar on WTO issues for Provincial Governors and Ministers in February 2002 with an opening speech by President Jiang Zemin. In the speech, Jiang repeatedly emphasized how the accession could help China to act in accordance with internationally accepted rules, build a foreign trade legal system compatible with common international

[13] B. Suo et al. (eds.) (2013) 'Basic Instruments and Selected Documents on the Negotiations for China's Accession to the World Trade Organization [Zhongguo Jiaru Shijie Maoyi Zuzhi Tanpan Wenjian Ziliao Xuanbian]', Beijing: China Commerce and Trade Press [Zhongguo Shangwu Chubanshe]', Bilaterals 3, 1002.

[14] J. Wu (2008), China's Fast Reactions to 911 [Zhongguo dui '911' Shijian de Kuaisu Fanying], Digest of Chinese and Foreign Books [Zhongwai Shuzhai], 6, www.xiaoshuo.online/zhongwaiwz/zwsz2008/zwsz20080614-1.html.

[15] This is the story in Journey to the West, a classic Chinese novel with a romantic account of the story of Xuanzang, a monk from the Tang Dynasty, going to India to study Buddhism at the famed Nalanda monastery.

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practices, and use WTO rules to "constrain China's policy and govern the government."[16]

Of course, China's decision to embrace WTO rules was in no way made out of altruism or naiveté. Indeed, Jiang made it quite clear that the US' willingness to let China in was not "a sudden act of kindness."[17] Instead, Jiang highlighted the strategic considerations of the US, that is, "pushing for political liberalization through economic liberalization" and thus "Westernize and divide the Socialist countries."[18] Referring to Clinton's speech on China's PNTR status, which hailed the role of WTO accession in "removing government from vast areas of people's lives"[19] and promoting social and political reform in China, Jiang stressed the need for China to keep a clear mind and strive to achieve its own "strategic intentions."[20]

So what are China's "strategic intentions"? The first is the promotion of China's economic development. Jiang mentioned that he thought "long and hard" about China's accession to the WTO and decided that China must "swim in the sea of international markets" given the increasing competition at the international level.[21] According to him, WTO accession will help China to attract foreign investment, enhance the competitiveness of its industries, participate in international rule-making, and promote the development of the socialist market economy, which are all aligned with China's long-term development goals.[22] The second is to improve China's approach to running its economy. In his speech, Jiang called for a major overhaul of the Chinese government's way to manage the economy upon WTO accession. In particular, he stated that the primary task of the government in managing the economy shall be regulating the market economy order using WTO rules, guiding the proper development of a socialist market economy, and nurturing and strengthening the international competitiveness of the Chinese economy.[23] In other words, China essentially takes the WTO rules as a manual for economic reform, which is why Jiang repeatedly mentioned the need for government officials and

[16] Z. Jiang (2006) 'Seize the Initiative amidst Intense International Competition [Zai Jilie de Guoji Jingzheng zhong Zhangwo Zhudong]', in *Selected Works of Jiang Zemin: Volume III [Jiang Zemin Wenxuan: Disan Juan]*. Beijing: People's Press, at 453–454.
[17] *Id*., at 450.
[18] *Id*.
[19] "Full Text of Clinton's Speech on China Trade Bill", www.iatp.org/sites/default/files/Full_Text_of_Clintons_Speech_on_China_Trade_Bi.htm (accessed 22 January 2022).
[20] Jiang, *supra* note 16, at 450.
[21] *Id*., at 450–451.
[22] *Id*., at 451.
[23] *Id*., at 451–453.

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Party members to "study WTO rules … in this new exam," and ended his speech by calling all government leaders to "pass the exam, and strive to get good results."[24]

How did China fare on the exam? The main question on the exam is the implementation of its accession commitments, which China passed with flying colors. For example, in China's first transitional review conducted in 2002, Sergio Marchi, then chairman of the WTO General Council, gave China an A+.[25] Similarly, Pascal Lamy also gave China an A+ in 2011.[26]

In addition, China also performed well on the bonus question on learning the rules of the WTO and fully participated in all areas of WTO's work.[27] In WTO negotiations, China has emerged from a Member that struggled to fully understand the content of discussion[28] to a key player.[29] In WTO dispute settlement, China has also risen from a reluctant participant that tried very hard to avoid disputes to one of the most active litigants.

It is worth noting that China's assimilation efforts in the WTO are largely because China deemed it to be in its own benefits. As explained by Shi Guangsheng, China's trade minister at the time of the accession, WTO membership is beneficial to China in three ways:[30] First, it promoted China's own economic development, as shown by China's accelerating GDP growth rate from 2001 to 2007, reversing the trend of declining GDP growth pre-2001; Second, it promoted China's reform and opening up, as shown by China's exponential growth in both exports and FDI; Third, it promoted the development of the socialist market economy in China, as shown by China's improving score in the World Bank's Ease of Doing Business Index.[31]

[24] *Id*., at 458.

[25] Z. Sun (2011), *Busy years in Geneva [Rineiwa Kongzong Suiyue]*. Beijing: People's Publishing House, at 121.

[26] 'WTO Chief: China Got A+ Performance since Entry', www.chinadaily.com.cn/china/2011-10/19/content_13928704. htm (accessed 22 January 2022).

[27] See H. Gao (2011) 'China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?', in Carolyn Deere-Birkbech (ed.) *Making Global Trade Governance Work for Development*. Cambridge: Cambridge University Press, at 156–167.

[28] Sun, *supra* note 25, at 97.

[29] Gao, *supra* note 27, at 175.

[30] G. Shi (2020) 'Working Together for a Better Future Based on Mutual Benefit', in H. Gao and Don Lewis (eds.), *China's Participation in the WTO*. London: Cameron May, at 17–18.

[31] M. Piatkowski, S. Solf, and W. Wei (2020) *China's Doing Business Success*. Washington, DC: World Bank.

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III The Awakening: 2008–2012

Right before China's first WTO Ambassador Sun Zhenyu went to Geneva to assume his position in early 2002, he met with former USTR Charlene Barshefsky in Beijing.[32] Barshefsky told Sun that China's accession will change the balance of power in the WTO, but it would be better for China to observe how things were done in the WTO first before joining any group. Taking her advice, China adopted a cautious approach in its first few years in the WTO: while it claimed its position as a developing country for political reasons, its positions on various issues do not always follow the developing country's "party-line." For example, China participated actively in the trade facilitation negotiation even though many developing countries opposed the negotiation. China was also the first developing country to express support for the chairman's texts in agriculture and NAMA negotiations.[33] In the words of Zhang Xiangchen, then Director-General of the Division on WTO Affairs of MOFCOM and later China's WTO Ambassador, China should play "a balancing, bridging and constructive role" between developed and developing countries.[34] This is confirmed by Chinese Premier Wen Jiabao, who stated at the Forum on the 10th Anniversary of China's Accession to the WTO that China was "a responsible country that has actively shouldered international responsibilities commensurate with the level of its development."[35]

While it recognizes that it has special responsibilities as a large developing country, China resents being singled out in the negotiations due to the painful memory of its "century of humiliation" starting from the Opium War. Therefore, when the July 2008 meeting ran into an impasse due to India's refusal to give in on special products and special safeguard mechanisms, China rejected the US request for it to provide additional concessions on special products in agriculture and sectoral negotiations on industrial goods as the same demands were not made to India or Brazil. When the US tried to accuse China of walking back the text despite getting "a seat at the big kids' table"

[32] Sun, *supra* note 25, at 45.
[33] Sun, *supra* note 25, at 187.
[34] '21st Century Business Herald, China's Doha Strategy [Zhongguo de Duoha Celue]', http://finance.sina.com.cn/chanjing/b/20051130/09052159265.shtml (accessed 30 November 2005).
[35] 'China Will Keep Its Door Open Forever', www.mfa.gov.cn/ce/ceus//eng/zgyw/t867816.htm (accessed 22 January 2022).

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as it requested,[36] Ambassador Sun gave a diatribe outlining China's contributions to the round in various areas as a retort to the US "finger pointing."[37]

As the July min-ministerial was underway in Geneva, an editorial titled "Elephant in the Room"[38] was published by the *China WTO Tribune* – a journal published by MOFCOM and edited by Zhang Xiangchen, who assumed his new position as the Deputy Permanent Representative of China's WTO mission the month before. In the editorial, Zhang argued that China's low-profile approach did not prevent it from playing a major role in the WTO. Moreover, as the world plunged into the financial crisis in 2008, China's visibility would become even more prominent. In 2009, despite the contraction of world trade by 13%, China became the biggest exporter for the first time in modern history, which led to two major developments:

First, the fact that China emerged not only unscathed but also triumphant from the financial crisis bolstered China's confidence in the so-called Beijing Model, a model of economic growth that relies heavily on government intervention.[39] Moreover, as China was able to avoid the contagious effects of the global crisis by maintaining its restrictions on foreign exchange and capital flows, its incomplete market reform was hailed as a feature rather than a defect of the Chinese system and Chinese leaders started to question the wisdom of more market-oriented reforms. On the other hand, concerned with the continued rise of China, the US announced its "pivot to Asia" and launched negotiations to join the TPP to reinforce both economic ties and strategic relationships in the Asia Pacific.[40]

[36] P. Blustein (2009) *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambitions, and the Great Shambles of the World Trade System*. New York: PublicAffairs, at p. 274. See also H. Gao (2015), 'From the Doha Round to the China Round: China's Growing Role in WTO Negotiations', in L. Toohey, and J. Greenacre (eds.), *China in the International Economic Order: New Directions and Changing Paradigms*. Cambridge: Cambridge University Press, pp. 79–97.

[37] Z. Sun, H.E. Ambassador, Permanent Mission P.R.C. to the WTO, Statement at the Informal Trade Negotiations Committee Meeting (11 August 2008), http://wtoandchina.blogspot.com/2008/08/chinas-contributions-in-dda-from.html (last visited 16 October 2021).

[38] X. Zhang (2008) 'Elephant in the Room [Wuzi li de Daxiang]', *China WTO Tribune* 7, 3.

[39] For more on the Beijing Model, see G. Shaffer and H. Gao (2020) 'A New Chinese Economic Order?', *Journal of International Economic Law* 23(3), 607–635, https://doi.org/10.1093/jiel/jgaa013.

[40] I. Fergusson and B. Vaughn (2009) 'The Trans-Pacific Strategic Economic Partnership Agreement', Report for Congress, Congressional Research Service.

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Second, China's emergence as the largest exporter, combined with the growth contractions in many countries, resulted in new waves of export restrictions against China even though the textile safeguard mechanism and the product-specific safeguard mechanism in China's Accession Protocol started to expire. With its surge of exports, China tried to ensure the supply of raw materials for its domestic producers by enacting export restrictions on raw materials. Based on its understanding of WTO rules, China regarded such measures to be justified by the general exceptions clause under GATT Art. XX.[41] However, the US and EU sued China in the WTO, and managed to win the case by arguing that China could not invoke the general exceptions clause due to the lack of explicit reference to such provision in China's Accession Protocol. At the DSB meeting adopting the AB report, China criticized the report for creating "a two tier membership, which was neither legally sustainable, nor systemically desirable."[42] Li Zhongzhou was even more explicit in his op-ed in the *China WTO Tribune*, where he blasted the decision as downgrading China to a "second-class citizen."[43] In view of such double standards, China started to question the value of WTO rules, which led to its efforts seeking alternatives.

IV The Alternative: 2013–2015

With the US reaching across the Pacific to assemble its allies in the TPP to contain China and "make sure the United States – and not countries like China – is the one writing this century's rules for the world's economy,"[44] China also started to make its own move. The first piece of the strategy is to form an RTA in response to the TPP, which led to the launch of negotiations on the Regional Comprehensive Economic Partnership (RCEP)

[41] X. Wang (2011) 'Analysis of the Case on Raw Materials Export Restrictions by the US, EU and Mexico [Meiguo, Oumeng, Moxige Suwo Yuancailiao Chukou Xianzhi an Pingxi]', in C. Li (ed.), *Gaming with WTO Rules: China's Ten Years' Experience in WTO Dispute Settlement Practices [Shimao Zuzhi Guize Boyi: Zhongguo Canyu WTO Zhengduan Jiejue de Shinian Falu Shijian]*. Beijing: Commercial Press, at 397–399.

[42] WTO Dispute Settlement Body, Minutes of Meeting, Held in the Centre William Rappard on 22 February 2012, WT/ DSB/M/312, 22 May 2012.

[43] Z. Li (2011) 'Appeal to WTO to Refrain from Treating China as Second Class Citizen [Jihu WTO Moba Zhongguo ru Lingce]', *China WTO Tribune* 9, at 94.

[44] "President Obama: 'Writing the Rules for 21st Century Trade'," February 2015, https://obamawhitehouse.archives.gov/blog/2015/02/18/president-obama-writing-rules-21st-century-trade (accessed 3 November 2021).

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in November 2012.[45] China had long advocated for regional economic integration between East and Southeast Asia, but its preferred set-up was ASEAN plus three, that is, China, Japan, and Korea. Japan, on the other hand, prefers to add three more countries, that is, India, Australia, and New Zealand, as counterbalances to China. China's willingness to go with the ASEAN plus six model reveals its urgency following the US accession to the TPP, which could severely disrupt China's supply chains in the region with provisions such as the yarn-forwarding rule that makes it difficult for TPP members to use inputs from non-members in the production process.

Second, in 2013, China announced two major initiatives: the Silk Road Economic Belt, which connects China with Europe through the Eurasian Continent,[46] and the 21st Century Maritime Silk Road, which links China with Southeast Asian countries, Africa, and Europe across the Pacific and Indian oceans.[47] Later combined together as the Belt and Road Initiative, this has since become the centerpiece of President Xi's foreign policy. Spanning sixty-five countries on three continents with a total population of 4.4 billion,[48] the BRI reportedly accounts for 29% of global GDP and 23.4% of global merchandise and services exports.[49] By "linking up the interests of China with those of developing countries in Asia, Africa, and Latin America,"[50] the BRI helps China to build its own supply chain without direct confrontation with the US in the Pacific.

[45] Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership, https://asean.org/wp-content/uploads/2016/10/SEOM-AFPs-Bali-Annex-4-Joint-Declaration-on-the-Launch-of-Negotiations-for-the-RCEP.pdf.

[46] 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, www.mfa.gov. cn/ce/cegy//eng/zgyw/t1076334.htm (last visited 1 June 2020).

[47] First proposed by President Xi in his speech to the People's Representative Council of Indonesia on 2 October 2013. See W. Jiao (2013) 'President Xi Gives Speech to Indonesia's Parliament', *China Daily*, 2 October 2013, www.chinadaily.com.cn/china/2013xiapec/2013-10/02/content_17007915_2.htm (last visited 1 June 2020).

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

[49] *Id*. For a detailed review of the Belt and Road Initiative, see G. Shaffer and H. Gao (2020), *supra* note 39, 614–620.

[50] J. Xi, 'Coordinate Two Grand Schemes and Lay a Solid Foundation for the Path of Peaceful Development [Tongchou Liangge Daju, Hangshi zou Heping Fazhan Daolu de Jichu]', speech at the third joint study session of the 18th Politburo of the China Communist Party, 28 January 2013, www.gov.cn/ldhd/2013-01/29/content_2321822.htm (accessed 22 January 2022).

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V The Attack: 2016–2020

China's efforts to build the alternatives turned out to be rather prescient, as attacks started to pour in from all fronts in the next few years.

(i) Unilateral Attack

On the unilateral front, the US launched a trade war against China when Trump came into office. In August 2017, President Trump 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.'[51] 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 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.'[52] On the same day, President Trump directed 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.[53] On 3 April 2018, the USTR published a proposed list of Chinese products subject to an additional tariff of 25%.[54] In total, the list covers about 1,300 separate tariff lines with an estimated worth of roughly $50 billion. In the next one and a half years, the list was expanded several times to cover $550 billion worth of Chinese products.

These tariff measures are clearly in violation of WTO rules such as MFN and tariff bindings. In addition, despite its ultimate finding of

[51] United States Trade Representative (USTR) (2018) '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 (last visited 23 January 2022).

[52] *Id*.

[53] 'Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation – the White House', https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-actions-united-states-relatedsection-301-investigation/ (accessed 23 January 2022).

[54] USTR (2018) '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 (last visited 23 January 2022).

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consistency on the Section 301 legislation in the *US – Sections 301* case, the WTO Panel also explicitly warned that making a unilateral determination of WTO-inconsistency against another country's trade measures "*before* the adoption of DSB findings" could constitute "a *prima facie* violation of Article 23.2(a) [of the DSU]" (emphases original).[55] Commenting on the US Section 301 investigations in the General Council, China's WTO Ambassador Zhang Xiangchen criticized the US measures for "violat[ing] the most fundamental values and principles of this organization." China filed a dispute against the US the day after the first rounds of tariffs were announced,[56] and brought two successive WTO cases against subsequent rounds of US tariffs.[57]

(ii) Plurilateral Attack

In addition to unilateral actions, the US also started to take a coordinated approach against China with its allies. This started with a joint statement the US issued along with the EU and Japan at the 11th WTO Ministerial Conference in December 2017,[58] where they agreed to "enhance trilateral cooperation in the WTO and in other forums" to address the "critical concerns" on "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." Since then, the trilateral group has intensified its work with several more joint statements, all targeting China's trade practices without explicitly naming it.

In China's view, the other major attack on the plurilateral front is the refusal to recognize China's market economy status. According to Section 15(a)(ii) of China's WTO Accession Protocol, China agreed to be treated as a non-market economy (NME) in antidumping investigations, with the proviso that such provision "shall expire 15 years after the date of accession." China understood this to mean that "China will be recognized as

[55] 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. 7.95–7.97.

[56] United States – Tariff Measures on Certain Goods from China, DS543.

[57] US – Tariff Measures on Certain Goods from China II, DS565; US – Tariff Measures on Certain Goods from China III, DS587.

[58] USTR (2017) 'Joint Statement by the United States, European Union and Japan at MCII', 12 December 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states (last visited 23 January 2022).

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a full market economy" on 11 December 2016, as stated by then-Chinese Premier Wen Jiabao to world leaders in 2011.[59] Since its accession, China has been working hard to persuade other WTO members to recognize China's market economy status, both by inserting the provision in its free trade agreements, as well as making direct demands to the governments of other members. As of 2016, more than 80 countries have recognized China's market economy status. In addition to the practical benefit of avoiding discriminatory treatments in the antidumping investigation, the recognition of market economy status is also regarded by China to be of great symbolic value as it marks China's coming of age in the WTO. However, starting from 2011, some foreign lawyers started to argue that the expiration of the clause does not automatically grant China market economy status.[60] In 2016, the EU[61] and the US[62] respectively announced that they would not recognize China's market economy status.[63] In response, China dropped its earlier position which mixed the two issues together and started to separate them by treating market economy status as a political issue and NME methodology as a legal/technical issue. On 11 December 2016, China took the unprecedented move by suing both the EU and the US in the WTO.[64]

At the first panel hearing of the case against the EU in December 2017, Chinese WTO Ambassador Zhang Xiangchen made a rare appearance before the panel.[65] Quoting the Latin maxim "*pacta sunt servanda*"

[59] 'Premier Wen Jiabao Attends the Opening Plenary Session and Business Dialogue of the World Economic Forum Annual Meeting of New Champions 2011 and Answers Questions', 2011, www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t859433.shtml (accessed 4 November 2021).

[60] B. O'Connor (2011) 'Is China a market economy?', https://voxeu.org/article/china-market-economy (accessed 3 November 2021).

[61] 'Texts Adopted – China's Market Economy Status – Thursday, 12 May 2016', www.europarl.europa.eu/doceo/document/TA-8-2016-0223_EN.html (accessed 22 January 2022).

[62] US Department of Commerce (2017) 'Memorandum on China's Status as a Non-Market Economy Country', 1, 9, A-570-053, 26 October 2017.

[63] 'China's Market Economy Status' – European Parliament Resolution of 12 May 2016 on China's market economy status, 2016/2677/RSP, European Parliament, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML±TA±P8-TA2016-0223±0±DOC±PDF±V0//EN.

[64] 'China Files WTO Complaint against US, EU over Price Comparison Methodologies' (2016), www.wto.org/english/news_e/news16_e/ds515_516rfc_12dec16_e.htm (visited 15 January 2022). The two cases are United States – Measures Related to Price Comparison Methodologies, DS515 and European Union – Measures Related to Price Comparison Methodologies, DS516.

[65] H. Gao (2018) 'Broken Promises Set a Bad Example for China in the WTO', *East Asia Forum*, 9 March 2018, www.eastasiaforum.org/2018/03/09/broken-promises-set-a-bad-example-for-china-in-the-wto/ (accessed 17 March 2022).

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("agreements must be kept"), Zhang made clear at the outset that "China brought this matter to dispute settlement with the objective to establish that promises made must be respected, and treaty terms struck must be honoured."[66] In China's 14-page statement, Zhang referred to the word "promise" six times and lambasted the US and EU for breaking their promises on ending China's NME status after 15 years. Zhang also highlighted the high stakes at play, including "the credibility of the dispute settlement mechanism, the integrity of the World Trade Organization, and the membership's faith in the multilateral trading system."[67]

In the end, however, the panel did not side with China. According to a leaked interim report, the panel supported the EU's argument that the expiration of the clause merely shifted the burden of proof and did not terminate the substantive right to apply the NME methodology.[68] In June 2019, China decided to suspend the case[69] and then abandoned the case by letting the authority for the panel lapse in June 2020.[70] While MOFCOM later clarified by stating that the termination of the proceedings in the case does not affect China's rights under the WTO,[71] it did indirectly reflect China's disappointment and despair toward the decision of the panel.

(iii) Multilateral Attack

At the multilateral level, the trilateral initiative spurred a new wave of WTO reform proposals, with key players, led by the US, EU, and Canada, all submitting major proposals. While there are considerable variations

[66] 'Opening Statement by Ambassador Zhang Xiangchen as a Part of the Oral Statement of China at the First Substantive Meeting of the Panel in the Dispute: European Union – Measures Related to Price Comparison Methodologies (DS516)', at para 2, http://wto.mofcom.gov.cn/article/newsupdates/201712/20171202684583.shtml (accessed 22 January 2022).

[67] *Id*., at para. 16.

[68] H. Gao and W. Zhou, 'The End of the WTO and the Last Case?', *East Asia Forum*, 10 July 2019, www.eastasiaforum.org/2019/07/10/the-end-of-the-wto-and-the-last-case/ (accessed 22 January 2022). See also the comment by Geraldo R on 3 July 2019, Jesse Kreier, 'China NME Case Suspended', International Economic Law and Policy Blog, https://ielp.worldtradelaw. net/2019/06/china-nme-case-suspended.html (accessed 17 March 2022).

[69] Communication from the Panel, European Union – Measures Related to Price Comparison Methodologies, WT/DS516/3, 17/06/2019.

[70] European Union – Measures Related to Price Comparison Methodologies – Lapse of authority for the establishment of the Panel – Note by the Secretariat, WT/DS516/14.

[71] 'MOFCOM Responds to the Termination of the Litigation Process on the Case against the EU's "Surrogate Country" Approach in Anti-dumping [Shangwubu Huiying Zhongzhi su Oumeng Fanqingxiao "Tidaiguo" Shimao Zhengduanan Susong Chengxu]', 11 July 2020, www.thepaper.cn/newsDetail_forward_8230020 (accessed 7 November 2021).

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among these proposals, they mainly focus on three groups of issues, all of which are regarded by China as China-specific:

The first group addresses the need to update the substantive rules of the WTO, such as clarifying the application of the "public body" rule to SOEs, expanding the rules on forced technology transfer, and reducing barriers to digital trade.[72] All of these reflect long-standing concerns over China's trade and economic systems, which have been litigated in the WTO. For example, concerns over China's unique state-led development model that emphasizes the role of state-owned firms in the Chinese economy were litigated in the *US – Anti-Dumping and Countervailing Duties (China)*.[73] Similarly, cases were also brought over China's over-zealous drive to obtain and absorb foreign intellectual property rights, where foreign firms are allegedly asked to trade their technologies for markets.[74] China's censorship regime and its tight control over information and the Internet were also the subjects of both actual and potential WTO litigation.[75] Unhappy with the results of these cases, the West tries to make new rules and tighten the discipline through their reform proposals.

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, such as those under the WTO Agreement on Subsidies and Countervailing Measures.[76] While no WTO Member may claim a perfect record in subsidy notifications, China's compliance seems to be particularly problematic and has been a constant subject of complaint by the USTR ever

[72] See European Commission, 'WTO Modernisation: Introduction to Future EU Proposals', 18 September 2018), at pp. 4–6; 'Communication from Canada, Strengthening and Modernizing the WTO: Discussion Paper', WTO Doc. JOB/GC/201 at 1, 24 September 2018, at p. 5.

[73] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, adopted 25 March 2011, paras. 276–359.

[74] See *China – Intellectual Property Rights II*, Request for consultations by the United States, WT/DS542/1, IP/D/38 (26 March 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 (6 June 2018).

[75] Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted 19 January 2010, paras. 338–413; see also the potential WTO case when Google pulled out of China, which was discussed in H. Gao (2011), 'Google's China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS', *Asian Journal of WTO & International Health Law and Policy (AJWH),* 6, 347. For an overview of China's data regulation framework, see H. Gao (2021), 'Data Regulation with Chinese Characteristics', in M. Burri (ed.), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021) 245–267.

[76] See EU proposal, *supra* note 72, at 9–11; Canada proposal, *supra* note 72, at 2.

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since China's accession to the WTO.[77] After much prodding from the US, China finally submitted its first subsidies notification in April 2006, nearly five years behind schedule.[78] However, even that remained incomplete as China did not notify subsidies by subcentral governments, which would eventually take China another ten years to report, with the subsequent notification took another four years.[79] In frustration, the US filed a "counter notification" in October 2011 pursuant to Article 25.10 of the SCM Agreement, and identified more than 200 unreported subsidy measures.[80] To address the problem, the joint proposal by the United States, the European Union, Japan and Canada on strengthening the notification requirements suggested some rather drastic measures, such as naming and shaming the non-compliant Member by designating it as "a Member with notification delay," curtailing its right to intervene in WTO meetings and nominate chairs to WTO bodies, and even levying a 5% fine based on its annual WTO contribution.[81]

The last significant issue is development, another long-standing issue stemming from the call of the US and the EU for greater "differentiation" among WTO members. While they are willing to extend special and differential treatment (S&DT) to smaller developing countries, it is politically difficult for them to extend the same treatment to large developing countries, such as China, a growing economic powerhouse. Among the major economies, the US never granted China preferences under the Generalized System of Preferences (GSP), while Canada and the EU terminated GSP benefits for China in 2014 and 2015 respectively. At the time of writing, only Australia, New Zealand, and Norway continue to provide GSP preferences to China. The EU and Canada, in their proposals, called for the rejection of "blanket flexibilities"[82] for all WTO members, which

[77] USTR (2002) '2002 Report to Congress on China's WTO Compliance' (1 December 2002), https://china.usc.edu/sites/default/files/article/attachments/2002-report-chinas-wto-compliance.pdf (last visited 1 June 2020), at 22–23.

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

[79] *Id*.

[80] *Id*., at 76.

[81] General Council and 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.

[82] EU Proposal, *supra* note 72, at 6.

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are to be replaced by "a needs-driven and evidence-based approach"[83] 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."[84] The US proposal went even further by proposing the automatic termination of S&DT for members who meet one of the following criteria: OECD membership, G20 membership, classification as "high income" by the World Bank, or a share of global goods trade at 0.5% or above.[85] With such a classification system, many WTO members, including China, will be stripped of their developing countries' status.

Commenting on these reform proposals at the Luncheon in Paris Workshop in November 2018, Ambassador Zhang criticized these efforts as trying to "put China in a tailor-made straightjacket of trade rules to constrain China's development…in the name of reform."[86] Drawing an analogy from the attempts by some countries to change the rules of the International Table Tennis Federation to reduce China's "advantages," Zhang pointed out that "[w]inning a game should be done through strengthen and hard work, not by altering the rules."

Another multilateral attack is the persistent blockage of the launch of the selection process for AB members by the US, which effectively shuts down the institution in December 2020. While such an attack ostensibly had nothing to do with China, a close examination of the US criticisms against the AB reveals that many of the complaints relate to the China cases. For example, among the six substantive "interpretive errors" enumerated by the USTR in its Report on the AB,[87] three are directed against the AB's decisions in cases concerning China.[88] These include, for example, the "public body" jurisprudence developed in US – Anti-Dumping and Countervailing Duties (China),[89] the requirement to consider

[83] *Id*., at 7.
[84] Canada Proposal, *supra* note 72, at 5.
[85] 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.
[86] 'On the Reform of the WTO Intervention by H.E. Ambassador Zhang Xiangchen at the Luncheon in Paris Workshop', 2018, http://wto.mofcom.gov.cn/article/meetingsandstatements/201811/20181102808197.shtml (accessed 22 January 2022).
[87] USTR (2020) 'Introduction', Report on the Appellate Body of the World Trade Organization, February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.
[88] For a discussion on the merits of the US complaints, see H. Gao (2019), 'Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis', in Chang-fa Lo, Junji Nakagawa, and Tsai-yu Lin (eds.), *The Appellate Body of the WTO and Its Reform*., Singapore: Springer, at 215–238.
[89] USTR, *supra* note 87, at pp. 85–89.

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government prices before using out-of-country benchmarks in US – Countervailing Measures (China) (21.5),[90] and the ban on "double remedies" through the concurrent application of countervailing duties and antidumping duties in US – Anti-Dumping and Countervailing Duties (China).[91] Thus, it is no wonder that China also regarded the attack on the AB as an indirect attack on China.

VI The Aftermath: Affirmation and Alienation

In response to these attacks, China took a bifurcated approach: First, while many of these measures against China posed challenges to China's foreign trade, the fact that the US abandoning its long-standing position as the champion of the rules-based multilateral trading system left a power vacuum that China was eager to fill by affirming the principles of WTO. Second, by disregarding WTO rules for political conveniences, the US and the EU also set "bad examples"[92] which China quickly picked up. This section explores both themes.

(i) Affirmation

At the World Economic Forum in Davos in January 2017, Chinese President Xi Jinping gave a widely reported speech,[93] in which he called on countries around the world to embrace rather than blame globalization for the world's problems. Using China's WTO accession as an example, he said that China made "a right strategic choice" by "bracing the storm and exploring the new world." Despite "having had [its] fair share of choking in the water and encountered whirlpools and choppy waves," China has "learned how to swim in this process." Moreover, in a veiled reference to the protectionist tendencies of Trump, he called on everyone to "adhere to multilateralism to uphold the authority and efficacy of multilateral institutions," "honor promises and abide by rules," rather than "select or bend rules as he sees fit"

China's pledge as "a steadfast defender of free trade, globalization, and economic openness"[94] did not stop just at words. Instead, China

[90] USTR, *supra* note 87, at pp. 105–109.
[91] USTR, *supra* note 87, at pp. 116–119.
[92] H. Gao *supra* note 65.
[93] 'Xi's Davos Speech: Is China the New Champion for the Liberal International Order?', 24 January 2017, https://thediplomat.com/2017/01/xis-davos-speech-is-china-the-new-champion-for-the-liberal-international-order/ (accessed 22 January 2022).
[94] *Id.*

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introduced a variety of measures to further bring down trade and investment barriers in the next few years. For example, in the midst of the trade war with the US, China reduced the tariffs on 1,449 tariff lines, which includes reducing tariffs on cars from 25% to 15%.[95] This is the largest round of tariff reduction in Chinese history, where the tariff lines covered are seven times those of the earlier rounds and covers 70% of consumer products.[96] Similarly, in the area of investment, China converted the market access catalog into a negative listing system in 2017 and has kept reducing the restrictions on foreign investment since.[97] In April 2018, Xi further announced that the whole island of Hainan will be converted into a free trade pilot zone.[98] With an area similar to Taiwan and a population a bit larger than Hong Kong, the Hainan Free Trade Zone (FTZ), if successful, will be the largest FTZ in the whole world and essentially re-create another Hong Kong for China.

At the international level, China also sped up its efforts to promote free trade, with the negotiations on the RCEP with its neighbors and the Comprehensive Agreement on Investment with the EU concluded in November and December 2020 respectively. Both agreements reflect China's view that it needs to seize the "important period of strategic opportunity for development" despite "profound and complex changes" both domestically and internationally,[99] as announced by Xi in his Report at the 19th Party Congress in 2017.[100]

In the WTO, China has also been playing a constructive role by leading the negotiation on certain issues.[101] These include launching offensive negotiations on issues such as investment facilitation, which China has

[95] L. Li (2018) 'Voluntarily Expand Imports to Enrich Consumer's Choices [Zhudong Kuoda Jinkou, Fengfu Xiaofei Xuanze]', *People's Daily*, 2 June 2018, 2.

[96] *Id*.

[97] H. Qiu (2021) '2021 Version of the Negative List on Foreign Investment Further Reduced [2021 Nian Ban Waizi Zhunru Fumian Qingdan zai Suojian]', *People's Daily*, 28 December 2021, http://finance.people.com.cn/n1/2021/1228/c100432318379.html (accessed 23 January 2022).

[98] 'SCIO Briefing on the Progress of Hainan Free Trade Port Policies and Institution', 2021, http://english.scio.gov.cn/pressroom/node_8023584.htm (accessed 23 January 2022).

[99] For discussion on the CAI, see H.S. Gao (2022) 'The EU–China Comprehensive Agreement on Investment: Strategic Opportunity Meets Strategic Autonomy', in M. Chi et al. (eds.), *Asian Yearbook of International Economic Law* (2022), 47–70.

[100] 'Full Text of Xi Jinping's Report at 19th CPC National Congress', 2017, www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-11/04/content_34115212.htm (accessed 23 January 2022).

[101] X. Yi (2021) 'China and WTO Reform [Zhongguo He WTO Gaige]', 28 October 2021, www.ccg.org.cn/archives/66333 (accessed 23 January 2022).

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been promoting at the WTO since 2014 as the coordinator of the group "friends of investment facilitation for development."[102] Designed to complement its Belt and Road Initiative, China successfully persuaded seventy WTO members to co-sponsor a Joint Statement on the issue at the 11th Ministerial Conference.[103] On the other hand, China initially took a defensive approach to issues such as e-commerce, due to its unpleasant experience with e-commerce issues in the WTO such as the China-Publications Case,[104] which China lost even though it did not wish to open up the online delivery of audiovisual services; as well as its restrictive data regulation framework domestically.[105] To counter the US initiative for negotiations on e-commerce, China pushed the WTO and World Economic Forum to endorse the "Enabling e-commerce" initiative – the brainchild of the Alibaba-backed eWTP. While this mission was also accomplished,[106] it was eclipsed by the Joint Statement Initiative on E-commerce, which was backed by the US. While it was initially wary of the US initiative, China changed its position and jumped on board when the negotiations on the e-commerce Joint Statement Initiative were officially launched in Davos on January 25, 2019.[107] As explained by Ambassador Zhang,[108] this decision also reflects China's wish to shape the rules in the negotiations, rather than being left out as in the Trade in Services Agreement negotiations. Since then, China has emerged as one of the most active participants with four submissions out of a total of fifty-two substantive submissions so far. In its submissions, China pushed for negotiations on its preferred issues relating to "trade in goods facilitated by the Internet" issues, especially the trade facilitation issues.[109]

[102] "Investment Facilitation for Development", https://perma.cc/8LKD-LPCV.

[103] *Joint Ministerial Statement on Investment, Facilitation for Development*, WT/MIN(17)/59, 13 December 2017.

[104] H. Gao (2021) 'Across the Great Wall: E-Commerce Joint Statement Initiative Negotiation and China', in Shin-yi Peng, Ching-Fu Lin, and T. Streinz (eds.), *Artificial Intelligence and International Economic Law: Disruption, Regulation, and Reconfiguration*. Cambridge: Cambridge University Press.

[105] H. Gao (2021) *supra* note 75.

[106] 'WTO, World Economic Forum and eWTP Launch Joint Public–Private Dialogue to Open up E-commerce for Small Business', WTO, 11 December 2017, https://perma.cc/W97H-SQ5F.

[107] B. Baschuk and S. Donnan, 'China to Join Talks on $25 Trillion E-Commerce Market at Last Minute', *Bloomberg*, 25 January 2019, https://perma.cc/273Y-EEHK.

[108] X. Ling, 'WTO Members Sign Joint Statement on E-Commerce at Davos [Shimao Zuzhi Chengyuan zai Dawosi Qianshu Dianzi Shangwu Lianhe Shengming]', www.gov.cn/xinwen/2019-01/25/content_5361275.htm (accessed 23 January 2022).

[109] H. Gao (2018) 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade', *Journal of International Economic Law* 21(2), 297–321, https://doi.org/10.1093/jiel/jgy015.

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More broadly, China has cleverly used existing rules in the WTO framework to pre-empt attempts by some countries to make China-specific rules. For example, in its November 2018 position paper on WTO reform,[110] China set out three principles, that is, "preserve the core values of the multilateral trading system" such as non-discrimination, "safeguard the development interests of developing members," and "follow the practice of decision-making by consensus." Together, these rules serve to prevent the US and other countries from introducing China-specific rules. More specifically, in its formal proposal on WTO reform issued in May 2019,[111] China also listed several specific issues to be addressed,[112] such as resolving the AB crisis, tightening rules to "curb the abuse of national security exception" as well as "unilateral measures inconsistent with WTO rules," rectifying "the inequity in rules on agriculture," and improving trade remedies rules.

On WTO dispute settlement, China also teamed up with the EU and other members to establish the multi-party interim appeal arrangement (MPIA). In its announcement on the MPIA, MOFCOM emphasized that the MPIA would help to maintain the operation of the WTO dispute settlement mechanism, safeguard the rule-based multilateral trading system, and affirms the confidence and support of the international society in the multilateral trading system.[113] In response to the US criticisms on the MPIA, China further stressed that the arrangement is consistent with WTO rules and made pursuant to Article 25 of the DSU,[114] even though the claim is debatable.[115]

[110] MOFCOM (2018) 'China's Position Paper on WTO Reform', 20 December 2018, www.mofcom.gov.cn/article/jiguanzx/ 201812/20181202817611.shtml (accessed 23 January 2022).

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

[112] *Id*., at 3–5.

[113] MOFCOM (2020) 'China, EU and Other WTO Members Decide to Establish Multi-Party Interim Appeal Arbitration Arrangement [Zhongguo Yu Oumeng Deng Shimao Zuzhi Chengyuan Jueding Jianli Duofang Linshi Shangsu Zhongcai Anpai]', 27 March 2020, www.mofcom.gov.cn/article/ae/ai/202003/20200302949253.shtml (accessed 23 January 2022).

[114] X. Xia (2020) 'US Obstructing Establishment of Interim Appeal Arbitration Mechanism at the WTO, China's Ministry of Commerce Refutes: US Actions Lacking Basis under WTO Rules [Meiguo Zunao WTO Chengli Linshi Shangsu Zhongcai Jizhi, Shangwubu Bochi: Meifang Xingwei Quefa Shimao Guize Yiju]', *21st Century Business Herald*, 18 June 2020, https://m. 21jingji.com/article/20200618/herald/015b28132bad9647b86d74b19e28a604_zaker.html (accessed 23 January 2022).

[115] For a criticism of the MPIA, see H. Gao (2021) 'Finding a Rule-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration

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(ii) Alienation

The day after the US announced 25% additional tariffs on $50 billion worth of Chinese products, MOFCOM retaliated with the same additional tariff on US products of equivalent value.[116] The next one and half years witnessed several more rounds of tit-for-tat retaliations, with the stakes quickly escalating to cover $550 billion worth of Chinese products and $185 billion worth of US goods.[117] Altogether, these additional tariffs cover almost the entire bilateral trade between the two, with only limited exceptions.[118]

By firing its own rounds of additional tariffs, China has also lost its innocence in the trade war. In its announcements, 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 justified by 'the relevant laws and regulations such as the Foreign Trade Law of the People's Republic of China and basic principles of international law."[119] No further details were provided by MOFCOM, but the most relevant would appear to be Article 7 of Foreign Trade Law, which states that China may take corresponding measures against any country imposing discriminatory trade measures against China. However, this provision suffers from the same problem as the US Section 301 legislation discussed earlier. With regard to international law principles, Dr. Yang Guohua, a formal senior MOFCOM official, has mentioned the following possibilities[120]: the right of self-defense under

Arrangement', *Journal of International Economic Law* 24(3), 534–550, https://doi.org/10.1093/jiel/jgab031.

[116] MOFCOM (2018) 'Notice on the Collection of Additional Tariff on Some Imported Products from the United States [Guanyu dui Yuanchanyu Meiguo de Bufen Jinkou Shangpin Jiazheng Guanshui de Gonggao]', ShangwubuGonggao No. 34, 4 April 2018, www.mofcom.gov.cn/article/b/e/201804/20180402728516.shtml (accessed 23 January 2022).

[117] D. Wong and A. Chipman Koty (2020) 'The US–China Trade War: A Timeline', *China Briefing News*, 25 August 2020, www.china-briefing.com/news/the-us-china-trade-war-a-timeline/ (accessed 23 January 2022). For a detailed analysis of the different phases of trade war, see C.P. Bown, 'US–China Trade War: The Guns of August', www.piie.com/blogs/trade-andinvestment-policy-watch/us-china-trade-war-guns-august (accessed 23 January 2022).

[118] According to the US government, US import from China in 2018 was only $540 billion with its export to China $120 billion. See United Sates Census Bureau Foreign Trade Division, 'Foreign Trade Data: Trade in Goods with China', www.census.gov/foreign-trade/balance/c5700.html (accessed 23 January 2022).

[119] MOFCOM, *supra* note 116.

[120] G. Yang (2018) 'International Law behind the Trade War between US and China [Zhongmei Maoyizhan Zhong de Guojifa]', *International Law Review of Wuhan*

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Article 51 of the UN Charter, the termination or suspension of a treaty's operation as a consequence of its breach by another party under Article 60 of the VCLT, and necessary measures to safeguard an essential interest against a grave and imminent peril under Article 25 of the Draft Articles on State Responsibility. Most WTO lawyers would not agree, however, that such general principles could be used to justify blatant violations of explicit WTO obligations.

Not only are the additional tariffs inconsistent with WTO rules, but the bilateral Phase One trade deal[121] signed by the US and China on 15 January 2020 is also of dubious legality under WTO law. This is especially the case for Chapter 6 on "Expanding Trade," which essentially set out managed trading regimes under which China agrees to import given quantities of US products, which is also supposed to expand on an annual basis.[122] Such practices have been outlawed by the Agreement on Safeguards, which contains explicit prohibitions on "orderly marketing arrangements or any other similar measures on the export or the import side,"[123] including both "actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members." It is true that such commitments were forced upon China by the US, but China's willingness to go along with such WTO-inconsistent arrangement also made it an accomplice in the crime.

At a broader level, with its blatant violation of WTO rules, such as the attack on the AB, and the imposition of additional tariffs against China and other countries, the US has effectively taught China that WTO rules could be just ignored, especially as it gets in the way. Soon, China started to apply what it learned to other countries, by enacting various trade restrictions on Australia, Canada, and other countries that stepped on its toes.

At the WTO, China also followed in the footsteps of the US in using its power to block consensus liberally, including blocking the appointment of a Taiwan trade official as the next Chair of the Committee on

University [Wuda Guojifa Pinglun], 120, at 135–138, http://ilr.whu.edu.cn/d/file/zxqk/dqml/2018-11-12/75156e95c2e263ec08cb89708dca031c.pdf (last visited 23 January 2022).

[121] USTR, 'Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China', 15 January 2020, https://ustr.gov/countries-regions/china-mongolia-taiwan/peoplesrepublicchina/phase-one-trade-agreement/text (last visited 1 June 2020). For a detailed analysis of the phase 1 deal, see W. Zhou and H. Gao, 'US–China Phase One Deal: A Brief Account – Regulating for Globalization', January 2020, http://regulatingforglobalization.com/2020/01/22/us-china-phase-one-deal-a-brief-account/ (accessed 7 November 2021). 122 Ibid., Art. 6.2.

[122] *Id.*, Art. 6.2.

[123] *Id.*, Art. 11.1(b).

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Government Procurement through Hong Kong in October 2021.[124] When the US won a case against China on safeguard measures on solar panels, China nullified the victory of the US by "appealing into the void."[125] In the discussions on WTO reform, China also took an aggressive position by stating explicitly in its position paper that "the reform should respect members' development models" and it would "opposes special and discriminatory disciplines against state-owned-enterprises in the name of WTO reform,"[126] a point further reiterated in its reform proposal.[127] For China, discussions on its economic model will be regarded as a "trap" that it will stay away from,[128] but it would not shy away from defending the model when it came under attack in the WTO, as shown by Ambassador Zhang's speeches in the WTO on several occasions.[129]

VII Conclusion

As we look back upon China's two decades in the WTO, we can see the shift of China from an eager, serious A+ student to one that grows increasingly alienated from the core values of the multilateral trading system. China is not alone. The US is essentially taking the same approach despite the professed affinity for multilateralism and international law by the new Biden Administration. New US Trade Representative Katherine Tai, for example, has repeatedly stated that she would not lift the WTO-inconsistent Trump-tariffs, but prefer to "retain" them as "leverage" against China.[130]

[124] S. Lester (2021), 'At WTO General Council Meeting, US and Other WTO Members Push for Taiwanese Chair of GPA Committee', October 2021, www.chinatrademonitor.com/wto-general-council-us-others-push-taiwanese-chair/ (accessed 7 November 2021).

[125] J. Pauwelyn (2019) 'WTO Dispute Settlement Post 2019: What to Expect?', *Journal of International Economic Law* 22(3), 297–321, https://doi.org/10.1093/jiel/jgz024.

[126] MOFCOM, *supra* note 110.

[127] WTO, *supra* note 111, Section 2.4.2.

[128] 'On the Reform of the WTO Intervention by H.E. Ambassador Zhang Xiangchen at the Luncheon in Paris Workshop', 20 November 2018, http://wto.mofcom.gov.cn/article/meetingsandstatements/201811/20181102808197.shtml (accessed 23 January 2022).

[129] 'Statement by H.E. Ambassador Dr ZHANG Xiangchen at the WTO General Council Meeting', 2018, http://wto.mofcom.gov.cn/article/meetingsandstatements/201807/20180702770676.shtml (accessed 7 November 2021); 'Statement by H.E. Ambassador Zhang Xiangchen of China at the General Council Meeting (Item 6 and 7) 13 October 2020', http://wto.mofcom.gov.cn/article/meetingsandstatements/202010/20201003007644.shtml (accessed 7 November 2021).

[130] B. Davis and Y. Hayashi, 'New Trade Representative Says US Isn't Ready to Lift China Tariffs –WSJ' www.wsj. com/articles/new-trade-representative-says-u-s-isnt-ready-to-lift-china-tariffs-11616929200 (accessed 23 January 2022).

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As the largest trader in the world and the second largest economy, it would be naïve for other countries to assume that they can change China's perspective on the multilateral trading system, let alone its behavior. Instead, to help steer China back toward a more receptive position on WTO, more will need to be done, with the following as starters:

First, the West need to abandon their own double standards. They should stop applying the NME methodology in antidumping investigations against China, despite explicit provisions supported by negotiating history[131] affirming its expiration in 15 years. They should stop applying WTO-inconsistent tariffs while accusing China of violating WTO rules. They should allow China to invoke the exceptions clause to justify its export restrictions on raw materials and rare earth while applying restrictions against Chinese imports on environmental grounds.

Second, in terms of detailed negotiating tactics, I have outlined the following in a policy brief published earlier this year,[132] which are summarized here: making the proposed rules neutral on their face so that they would not be deemed as China-specific or discriminatory against China so as to avoid evoking China's painful memory of the "century of humiliation," which would put China in a defensive mode; instead of holding the negotiations in a one-sided manner with a long list of demands on China, try to make it more balanced by giving China something in return, even if just as a token, so as to give "face" to China; try to understand China's own reform goals and policy movements, so as to gain insights on what China may agree to.

At its latest Trade Policy Review held in October 2021, China announced that it has "fully implemented all of its WTO commitments."[133] While people may debate the validity of such a claim of "full compliance," as I wrote three years ago, "the more important fact is that China acknowledges the legitimacy of the WTO rules and is willing to subject itself to the authority of the WTO. But as the WTO increasingly comes under attack

[131] W. Zhou and D. Peng (2018) 'EU – Price Comparison Methodologies (DS516): Challenging the Non- Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol', UNSW Law Research Paper No. 18-3, *Journal of World Trade* 52(3), https://ssrn.com/abstract=3115861 or http://dx.doi.org/10.2139/ssrn.3115861.

[132] H. Gao, 'Rethinking China Trade Policy: Lessons Learned and Options Ahead', National Foundation for American Policy 2021, https://nfap.com/wp-content/uploads/2021/01/Rethinking-China-Trade-Policy.NFAP-Policy-Brief.January2021-2.pdf.

[133] 'China Has Entirely Fulfilled Its WTO Commitments: Ministry', www.news.cn/english/2021-10/28/c_1310275388.htm (accessed 23 January 2022).

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in the West, China will start to doubt the WTO as well. When China escalates its emulation of the West from words to actions, the United States and the European Union might finally remember the warnings from Ambassador Zhang, but it will be too late."[134] Unfortunately, the developments over the past three years have largely confirmed my prediction, with China increasingly following the bad examples set by the West. If there is anything positive coming out of these unfortunate developments, it is the hope that people can finally heed my warning repeated today, before it becomes really too late.

[134] H. Gao *supra* note 65.

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