

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

### PROMISING TRAIL OR PERILOUS TRAP? ENGAGING CHINA IN THE WTO AND BEYOND

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How to deal with China? This is the biggest question confronting U.S. trade policy—or even the United States’ entire foreign policy—today. Over the past few years, the debate on this important issue has benefited from the contributions of many trade law scholars, including those by Mark Wu,<sup>1</sup> Jennifer Hillman,<sup>2</sup> Petros Mavroidis, André Sapir,<sup>3</sup> Rob Howse,<sup>4</sup> Weihuan Zhou, and the present author.<sup>5</sup> In “Governing the Interface of U.S.-China Trade Relations,”<sup>6</sup> Gregory Shaffer offers refreshing insights. Building on the framework developed by the U.S.-China Trade Policy Working Group,<sup>7</sup> of which he is a member, Shaffer further adjusts the group’s “four-buckets” model<sup>8</sup> and provides an updated framework. Calling his approach “Rebalancing Within a Multilateral Framework,” Shaffer argues that his framework avoids the pitfalls of both “Power-Based Bargaining” and “Rule-Based Neoliberalism” and is the most promising “middle path.” As a trade lawyer, I am naturally more inclined toward Shaffer’s approach and its firmer grounding in trade law, in contrast to the heavily econ-centric approach in the Joint Statement by the Working Group, which does not reference law. Coming from the other side of the Pacific, however, I would approach the issue a bit differently by asking the questions that rarely gets asked: What are China’s reactions to these proposals? Will China be willing to trail

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<sup>1</sup> Mark Wu, *The “China, Inc” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261 (2016).

<sup>2</sup> Hearing on U.S. Tools to Address Chinese Market Distortion, *Testimony of Jennifer Hillman* (June 8, 2018).

<sup>3</sup> PETROS C. MAVROIDIS & ANDRÉ SAPIR, *CHINA AND WTO: WHY MULTILATERALISM STILL MATTERS* (2021).

<sup>4</sup> Robert L. Howse, *Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor*, U. PA. J. INT’L L. (forthcoming).

<sup>5</sup> 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).

<sup>6</sup> Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 15 AJIL 622 (2021).

<sup>7</sup> The US-China Trade Policy Working Group, *Joint Statement: US-China Trade Relations: A Way Forward* (Oct. 27, 2019).

<sup>8</sup> The four buckets are “Prohibited”; “Bilateral Discussions and Adjustments”; “Domestic Adjustments”; and “Multilateral Governance.”

along, or, perhaps more likely, will it view them suspiciously as “traps,” as China’s former World Trade Organization (WTO) Ambassador Zhang Xiangchen once put it?<sup>9</sup>

### *Will China Agree to Change?*

China’s opposition to the “power-based system” is well known, especially against unilateral actions by the United States. For example, when the United States announced additional tariffs on Chinese products as the result of the 2018 Section 301 investigations, China responded that it “strongly condemns and firmly opposes such unilateral and protectionist behaviour,” which it regarded as “an intentional and gross violation of the WTO’s fundamental principles of non-discrimination and bound tariffs.”<sup>10</sup> Following words with action, China also brought three successive WTO cases against the different tranches of additional U.S. tariffs in the trade war.<sup>11</sup>

Yet China’s opposition to unilateral measures does not necessarily mean that China agrees with “those seeking to reinforce the WTO system with new rules that limit the state’s role in the economy.”<sup>12</sup> When the United States and other countries first started to push for WTO reform discussions after the eleventh ministerial conference, China was rather reluctant. In the view of Zhang, “the WTO agreement is a set of contracts achieved through negotiations. Within the scope of those contracts, Members abide by the conditions set forth in the contracts. Beyond the scope of those contracts, Members have their own policy space.”<sup>13</sup> In other words, China only accepted the rules in existing WTO agreements and its Accession Protocol and regarded the other issues as matters within each member’s own policy space.

In particular, when China’s Ministry of Commerce issued its official position paper on WTO reform in 2018, it made clear that “the reform should respect members’ development models” and that “China opposes special and discriminatory disciplines against state-owned-enterprises in the name of WTO reform.”<sup>14</sup> As put bluntly by Zhang, “if someone wishes, in the name of reform, [to] put China in a tailor-made straightjacket of trade rules to constrain China’s development, I think they will be very much disappointed at the end of the day.”<sup>15</sup>

Such adamant resistance to WTO reform might appear surprising to some observers, especially considering China’s near-religious fervor in promoting the study of and compliance with WTO rules when it acceded to the WTO twenty years ago, as Shaffer and I have previously documented.<sup>16</sup> Yet, as I argued in two recent papers, such strong reactions are not really surprising for two reasons: First, China has always regarded such reform proposals as touching on its non-negotiable “core interests,”<sup>17</sup> which includes preserving China’s basic state system and national security, national sovereignty, territorial integrity, and the continued stable development of China’s

<sup>9</sup> Ministry of Commerce of the People’s Republic of China Press Release, [On the Reform of the WTO Intervention by H.E. Ambassador Zhang Xiangchen at the Luncheon in Paris Workshop](#) (Nov. 20, 2018).

<sup>10</sup> Ministry of Commerce of the People’s Republic of China Press Release, [Statement by Ambassador ZHANG Xiangchen on Announcement of Proposed Tariff Actions Under Section 301 by the US](#) (Apr. 4, 2018).

<sup>11</sup> [DS543: United States–Tariff Measures on Certain Goods from China](#); [DS565: United States–Tariff Measures on Certain Goods from China II](#); [DS587: United States–Tariff Measures on Certain Goods from China III](#).

<sup>12</sup> [Shaffer](#), *supra* note 6, at 623.

<sup>13</sup> Ministry of Commerce of the People’s Republic of China Press Release, [Statement by H.E. Ambassador Dr. ZHANG Xiangchen at the WTO General Council Meeting](#) (July 28, 2018).

<sup>14</sup> [China’s Position Paper on WTO Reform](#) (Dec. 17, 2018).

<sup>15</sup> [Statement by Ambassador ZHANG Xiangchen on Announcement of Proposed Tariff Actions Under Section 301 by the US](#), *supra* note 10.

<sup>16</sup> Gregory Shaffer & Henry Gao, [China’s Rise: How It Took on the U.S. at the WTO](#), 2018 U. ILL. L. REV. 115 (2018).

<sup>17</sup> Henry Gao, [WTO Reform and China: Defining or Defiling the Multilateral Trading System?](#), 62 HARV. INT’L L.J. (Special Issue) 1 (2021).

economy and society. Second, China has arguably grown disillusioned with and even “alienated” from WTO rules, especially in response to perceived attacks by the United States and other WTO members.<sup>18</sup>

The second reason above—China’s disillusionment from WTO rules given the behavior of other parties—provides the key to understanding the recent statement by China’s Deputy Permanent Representative to the United Nations, Geng Shuang, that the “rule-based international order” is a violation of the spirit of the rule of law, a statement which led to a great deal of controversy and confusion.<sup>19</sup> In a way, the statement elucidates the implicit message in President Xi’s statement at the General Debate of the Seventy-Sixth Session of the UN General Assembly in September 2021, where he pointed out:

In the world, there is only one international system, i.e. the international system with the United Nations at its core. There is only one international order, i.e. the international order underpinned by international law. And there is only one set of rules, i.e. the basic norms governing international relations underpinned by the purposes and principles of the UN Charter.<sup>20</sup>

In other words, China is emphasizing the central roles of the existing international institutions and rules of international law to counter the accusations by the United States and others that China has violated the “rule-based international order.” The status quo institutions and instruments already have well-established texts and meanings, while the “so-called ‘rule-based international order’” “advocated by a small number of countries” could be as amorphous as its proponents want.<sup>21</sup> As pointed out by China’s top diplomat Yang Jiechi at the first U.S.-China dialogue in Anchorage in early 2021, China “would not recognize that the rules made by a small number of people would serve as the basis for the international order.”<sup>22</sup>

The same battle of words is also fought on the trade front, with China sticking to the awkwardly phrased expression, “the multilateral trading system with the WTO at its core,” which first appeared in its 2018 white paper on “China and the World Trade Organization”<sup>23</sup> and was most recently affirmed by Xi’s speech at the opening ceremony of the Fourth China International Import Expo in November 2021.<sup>24</sup> Again here, the intention is to make sure that no rules beyond those already present in the WTO agreements are snuck in without China’s consent.

We can thus understand why it would be hard to get China to agree to WTO reform discussions aiming to change the salient features of its economic model, be it through the “Rule-Based Neoliberalism” approach that aims to introduce new rules to discipline China’s trade practices, or through the “Rebalancing Within a Multilateral Framework” approach Shaffer outlined in his article. Instead, for a long time, China has been refusing any attempt to make new rules on sensitive issues such as state-owned enterprises and subsidies, which is why I have argued that the best way forward is to better utilize existing WTO rules, especially those contained in China’s Accession commitments.<sup>25</sup>

<sup>18</sup> Henry Gao, *China’s Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation* (2021).

<sup>19</sup> *Geng Shuang: “Rule-Based International Order” Is a Violation of the Spirit of the Rule of Law*, CGTN (Oct. 13, 2021).

<sup>20</sup> *Full Text of Xi’s Statement at the General Debate of the 76th Session of the United Nations General Assembly*, CHINA DAILY (Sept. 21, 2021).

<sup>21</sup> *Geng Shuang: “Rule-Based International Order” Is a Violation of the Spirit of the Rule of Law*, *supra* note 19.

<sup>22</sup> *How It Happened: Transcript of the US-China Opening Remarks in Alaska*, NIKKEI ASIA (Mar. 19, 2021).

<sup>23</sup> State Council Information Office of the People’s Republic of China, *White Paper: China and the World Trade Organization* (June 28, 2018).

<sup>24</sup> Ministry of Foreign Affairs of the People’s Republic of China Press Release, *Xi Jinping Delivers a Keynote Speech at the Opening Ceremony of the Fourth China International Import Expo* (Nov. 4, 2021).

<sup>25</sup> *Zhou, Gao & Bai*, *supra* note 5.

### *A New Approach?*

Interestingly, over the past few months, China has seemed to be changing its position. The policy shift was first announced in Xi's speech at the Import Expo in November 2021, where, after duly reiterating that "[t]he multilateral trading regime with the WTO at its core is the cornerstone of international trade," he went on to state that "China will take an active and open attitude in negotiations on issues such as the digital economy, trade and the environment, industrial subsidies and state-owned enterprises (SOEs)."<sup>26</sup> This seems to contradict China's earlier position, which explicitly stated that "during discussions on subsidy disciplines, no special or discriminatory disciplines should be instituted on SOEs in the name of WTO reform."<sup>27</sup> So, does this mean that China is now more receptive to the two reformist approaches mentioned in Shaffer's article?

For two reasons, I do not think this is the case: First, Xi's latest statement is still premised on the primacy of multilateral rules, as the sentence is followed by the affirmation that China would "uphold the position of the multilateral trading regime as the main channel for international rules-setting."<sup>28</sup> This is quite different from the two approaches discussed in Shaffer's article, which mainly rely on bilateral "rebalancing," presumably without the sanction of the WTO.

Second, it is probably no coincidence that Xi's remarks were made shortly before President Biden gave explicit assurance that the United States would not seek to change the Chinese system,<sup>29</sup> after the same message was hinted by U.S. Trade Representative Katherine Tai<sup>30</sup> and National Security Advisor Jake Sullivan.<sup>31</sup> The interesting question, though, is how much substance there is in Xi's statement, which, depending on how it is carried out in actual negotiation, could either be simply a perfunctory overture or prelude to more meaningful changes. This leads us to another important issue: how to engage China.

### *Principles of Engagement*

While it is encouraging to see that China is now more receptive to reform discussions in the multilateral context, such willingness to negotiate does not necessarily mean that China will regard all issues as negotiable, let alone accept the results of such negotiations. Notwithstanding this cautious note, negotiations with China could still be fruitful if the following principles of engagement are observed.

The first principle is non-discrimination. China regarded the period between the Opium War and the founding of the People's Republic as the "century of humiliation," when "unequal treaties" were forced upon China by the imperialist powers.<sup>32</sup> Such experience made China very sensitive to discriminatory gestures. For example, when a key negotiation held in July 2008 on the Doha Round ran into an impasse due to India's refusal to make concessions on special agricultural safeguards, the United States pressured China to make additional concessions in certain sectors to make the results commercially meaningful for American businesses. China rejected the request because no such demands were made to the other emerging economies. In response to the U.S. complaint that

<sup>26</sup> [Xi Jinping Delivers a Keynote Speech at the Opening Ceremony of the Fourth China International Import Expo](#), *supra* note 24.

<sup>27</sup> General Council, [China's Proposal on WTO Reform: Communication from China](#), WTO Doc. WT/GC/W/773 (May 13, 2019).

<sup>28</sup> [Xi Jinping Delivers a Keynote Speech at the Opening Ceremony of the Fourth China International Import Expo](#), *supra* note 24.

<sup>29</sup> [Talks Between Xi Jinping and Joe Biden Do Not Herald a Thaw](#), *ECONOMIST* (Nov. 20, 2021).

<sup>30</sup> Greg Ip, [U.S. Trade Policy Adapts to a China That Will Never Change](#), *WALL ST. J.* (Oct. 6, 2021).

<sup>31</sup> Amber Wang, [US Wants Coexistence Not Cold War with China, Jake Sullivan Says](#), *S. CHINA MORNING POST* (Nov. 8, 2021).

<sup>32</sup> Michael Zhou, [For China, the History That Matters Is Still the "Century of Humiliation,"](#) *S. CHINA MORNING POST* (Sept. 28, 2021).

China had failed to contribute to the round even though it was given “a seat at the big kids’ table” as requested,<sup>33</sup> China’s Ambassador to the WTO Sun Zhenyu gave a diatribe at the informal Trade Negotiations Committee meeting held afterward.<sup>34</sup> Sun outlined China’s contributions across all areas of agricultural and non-agricultural market access and services and blasted the United States and other developed countries for pressuring China while protecting their own sensitive areas. To have a productive negotiation, such mistakes must not be repeated. Instead, any proposed rules, be it on state-owned enterprises, subsidies, or competition, should be neutral, at least on their face, so that they would not be deemed as China-specific or discriminatory against China. Otherwise, proposed reforms could well be perceived by China as a “tailor-made straightjacket” and rejected.<sup>35</sup>

The second principle is reciprocity. It is too tempting to just fill the negotiation document with a long list of demands on China. The primary example for such an approach is the Phase One Agreement, which contains ninety-seven references to “China shall” (or ninety-nine references if “China and the United States shall” are also included), while only three references to “the United States shall.”<sup>36</sup> Given the one-sided nature of the deal, it is no surprise that China has no incentive to implement it.<sup>37</sup> Anyone with any level of familiarity with the Chinese culture would understand the importance of “saving face” to the Chinese. Thus, it is hard to imagine that China would be willing to engage unless it is offered something in return, even if just as a token. This point is also proven by China’s warm reactions to President Biden’s announcement that the United States will not try to change China’s economic system. But this is just the starting point, and more substantive gestures of good will would be needed before more concrete results could be achieved. Such gestures could include discontinuing practices such as the non-market economy methodology in antidumping investigations against China; the WTO-inconsistent trade war tariffs; and the deprivation of China’s right to invoke the general exceptions clause to justify its export restrictions on raw materials and rare earth.<sup>38</sup>

The third principle is understanding China’s own priorities. In particular, a good understanding of China’s own reform goals and policy movements is crucial as it provides important insights on what China may agree to. Xi’s recent announcement on state-owned enterprises and subsidies is a good example, as it signals that China is now willing to discuss these issues. But a seasoned China observer could feel the wind of change long before this formal announcement just by reading other moves made by China, such as its agreement to commitments<sup>39</sup> on state-owned enterprises and subsidies in the Comprehensive Agreement on Investment with the European Union last December and its recent application to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.<sup>40</sup>

Lest anyone thinks that the three principles are too abstract to be useful in practice, let us apply them to the issues discussed in Shaffer’s article. First, the principle of reciprocity could be applied to pure economic policies. In particular, by raising the issues of industrial subsidies and safeguard measures, the United States should also be prepared to address the issues of agricultural subsidies and antidumping measures, which are China’s main concerns. If the United States is willing to concede on these two issues, there could be some room for agreement.

<sup>33</sup> PAUL BLUSTEIN, *MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM* 272, 274 (2009).

<sup>34</sup> [Statement by H. E. Ambassador Sun Zhenyu at the Informal Trade Negotiations Committee Meeting](#) (Aug. 11, 2008).

<sup>35</sup> [On the Reform of the WTO Intervention by H.E. Ambassador Zhang Xiangchen at the Luncheon in Paris Workshop](#), *supra* note 9.

<sup>36</sup> [Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China, Phase One Agreement](#) (Jan. 15, 2020).

<sup>37</sup> [US-China Phase One Deal: A Brief Account](#), WOLTERS KLUWER (Jan. 22, 2020).

<sup>38</sup> Gao, *supra* note 18.

<sup>39</sup> Henry S. Gao, [The EU-China Comprehensive Agreement on Investment: Strategic Opportunity Meets Strategic Autonomy](#) (May 1, 2021).

<sup>40</sup> Henry Gao & Weihuan Zhou, [China’s Entry to CPTPP Trade Pact Is Closer Than You Think](#), NIKKEI ASIA (Sept. 20, 2021).

Second, a key to addressing national security policies could be following the principle of non-discrimination. In particular, the United States will need to explain to China that its restrictions on Huawei and TikTok are not unfairly picking on China alone, but are justified by universal public policy considerations.

Third, a deep understanding of China's own policies and priorities would be especially important for negotiation on social policy issues, given that China has a very different approach to such issues than the United States. In particular, while China has traditionally shunned social issues in general in its trade agreements, it has become more willing to discuss certain issues such as environmental protection in recent years.<sup>41</sup> Yet, on other issues such as labor and human rights, it has always insisted on a more rigid approach, despite including labor provisions in its recent investment agreement with the European Union, which uses mainly best-endeavor language and does not have a binding dispute settlement mechanism.<sup>42</sup>

### *Conclusion*

At the end of his article, Shaffer argues: "It is naïve to think that China will change its economic model through coercion. Coercive policies tend to rally populist, nationalist responses in support of authoritarian leaders. Thus, it is best to see the U.S.-China trade relationship in terms of a long game in which transnational forces are also at play."<sup>43</sup> I cannot agree more with this statement, and I greatly admire Shaffer's efforts, through this article and others, to "advance[] a middle ground between those seeking to reinforce the World Trade Organization (WTO) system with new rules that limit the state's role in the economy, and those who reject WTO constraints in favour of a power-based system."<sup>44</sup> Where I differ with Shaffer, though, is whether only these three alternatives exist. Instead, as I illustrated in this essay, there is a fourth approach which is the favorite of China, i.e., making fuller use of the existing rules of the WTO, as well as new WTO rules which China is willing to negotiate and accept. This process will not be easy, but I do not think we should give up on this approach due to its difficulty. Rather, if anything, we should be thankful that China still believes in the value of the multilateral trading system. Because when China starts to emulate the bad examples of the United States and European Union and begins to apply unilateral trade sanctions without regard to WTO rules, it will be too late.<sup>45</sup>

Or maybe it has already become too late?<sup>46</sup>

<sup>41</sup> Henry Gao, *China's Evolving Approach to Environmental and Labour Provisions in Regional Trade Agreements*, INT'L CENTRE TRADE & SUSTAINABLE DEV. (Aug. 25, 2017).

<sup>42</sup> Gao, *supra* note 39.

<sup>43</sup> Shaffer, *supra* note 6, at 669.

<sup>44</sup> *Id.* at 622.

<sup>45</sup> Henry Gao, *Broken Promises Set a Bad Example for China in the WTO*, E. ASIA F. (Mar. 9, 2018).

<sup>46</sup> Gao, *supra* note 18.