

China in the WTO

Remarks of

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- **China in the WTO – some general points.**
 - All WTO Members benefit from WTO Membership. But during these 25 years of WTO history, China has been perhaps the greatest beneficiary of any Member if measured by its gains in trade, particularly in manufactured goods.
 - It went from accounting for under 3% of total world trade to over 13% and is now the world's largest exporting country.
 - The certainty of foreign market access offered by the WTO paved the way for this expansion, despite special remedies (safeguards and antidumping) being available to its trading partners with respect to China's trade for 12 and 15 years, respectively.
 - The special trade review mechanism for IP enforcement in China expired after 11 years.¹

¹ . . . beside the ordinary WTO Trade Policy Review Mechanism (TPRM), a special "precautionary" instrument, the Transitional Review Mechanism (TRM), was included in Section 18 of the Protocol of China's accession to the WTO, as requested by the US and supported by the EU. . . . The TRM is more comprehensive than the TPRM. The TRM has the objective of monitoring and enforcement of implementation of WTO commitments (which TPRM does not), promoting transparency and exchange of information in trade relations with China. On the other side, the TPRM

- Without WTO Membership and without China's increased earnings from trade, one can speculate as to whether it could have afforded the scale of its Belt and Road initiative or its series of ambitious series of five-year plans targeting aerospace, artificial intelligence, biotechnology, information technology, semiconductors, quantum computing, robotics, advanced machinery and rail, deep sea technologies, and new materials.
- **What did China have to do in order to join the WTO?**
 - To accede to the WTO, China had to change perhaps 10,000 laws and regulations.
 - China agreed to join the Information Technology Agreement as part of the price paid to get into the WTO.
 - Its participation was crucial to ITA expansion in 2015.
 - China agreed that its state-owned enterprises would buy and sell on the basis of commercial considerations.
 - As part of its integration into the world economy, for the first decade of China's WTO Membership, China's economy did become more market oriented, the role of the state appeared to lessen, and the role of market forces grew.
 - Once it did join, China, like Japan in the GATT during its rising-world-economic-power period, generally kept a low profile in the WTO, not seeking to expand the rules of the WTO that would have imposed on it additional costs.
 - In fairness, no other major trading power invested very much energy in driving the WTO agenda forward during recent years, so in this respect China's reticence has not stood out as much as it might have otherwise.

final report by the WTO secretariat does not need consensus approval of the WTO members. The review under TRM started to take place after accession and would continue each year for eight years with a final review in the tenth year or at an earlier date decided by the General Council. This mechanism requires China to provide WTO members with specific information, such as economic data, economic policies, policies affecting trade in goods, policies affecting trade in services, the trade-related intellectual property regime and specific questions in the context of the TRM. The Implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in China, Paolo Davide Farah and Elena Cima | Article | 2 TSINGHUA CHINA L. REV. 317 (2010).

- As far as IP is concerned, China strongly backs indigenous patenting, and its companies actively register patents abroad. In deliberations within the TRIPS Council, China does not take a vocal stand on the most divisive issue – it neither sides with the most vocal advocates of IP protection as a promoter of innovation, nor does it choose to side with the most vocal developing country critics of IP.
- **The foreign reaction:**
 - Foreign companies investing in China and exporters to the Chinese market were pleased with China’s joining the WTO.
 - Competing industries and workers were not, in both developing countries and in the manufacturing sectors of developed economies. A factor in the long pause in Members, particularly developing country Members, considering further trade liberalization may well be fear of the competitive strength of China in manufactured goods.
 - MIT economist David Autor has cited high costs to U.S. manufacturing employment as a result of China’s work force being added to the global supply of labor. The measurement is not without controversy in the economics profession, and automation and other technological change dwarfs China’s trade effects on other countries’ employment. The political impact in the United States of China’s emergence into the global economy is, however, beyond question.
- **China in the WTO today**
 - For the first fifteen years of its membership in the WTO, China appeared to be living by the Deng Xiaoping maxim “Hide Our Capabilities and Bide Our Time”.
 - **During the last four years, it has become more active particularly in the Joint Statement Initiatives (JSIs). It was a primary moving force behind the creation JSI for Investment Facilitation for Development, launched at Buenos Aires in December 2017.**
 - At the Buenos Aires WTO Ministerial, 70 Members, including China, *called for beginning structured discussions with the aim of developing a multilateral framework on investment facilitation. ... to identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and*

requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention; ... to clarify the framework's relationship and interaction with existing WTO provisions, with current investment commitments among Members, and with the investment facilitation work of other international organizations. These discussions shall not address market access, investment protection, and Investor-State Dispute Settlement. [Emphasis supplied].

- **In a rare break with the position of India and South Africa China favors the JSIs. China has also sided with developed countries favoring preserving the Moratorium of Customs Duties on Electronic Transmissions:**

- *Members should continue to maintain the practice of not imposing customs duties on electronic transmissions until the next session of the Ministerial Conference²*

- **China was not an original signatory of the declaration launching the E-commerce JSI but has, within bounds, become very active, tabling papers, supporting aspects of e-commerce that boost trade in goods.**

- *The Buenos Aires declaration creating the initiative states that the signatories share the goal of advancing electronic commerce work in the WTO in order to better harness these opportunities. ... We recognize the particular opportunities and challenges faced by developing countries, especially LDCs, as well as by micro, small and medium-sized enterprises, in relation to electronic commerce. We also recognize the important role of the WTO in promoting open, transparent, non-discriminatory and predictable regulatory environments in facilitating electronic commerce. We, as a group, will initiate exploratory work together toward future WTO negotiations on trade-related aspects of electronic commerce.*

- **In joining the e-commerce JSI, China expressed concern for developing countries and stated its defensive interests:**

Members sponsoring the Davos Joint Statement include not only developed Members, but also developing Members and LDCs. They differ in national conditions and development stages, have different challenges and concerns on electronic commerce-related

² INF/ECOM/19, 24 April 2019

issues. When it comes to the entire WTO membership, the interests are even more diversified. Therefore, to advance the negotiation, differences in Members' respective industry development conditions, historical and cultural traditions as well as legal systems need to be fully understood. Bearing in mind the aforementioned differences, Members should respect each other's design of the electronic commerce development paths, and the legitimate right to adopt regulatory measures in order to achieve reasonable public policy objectives. [Emphasis supplied].

- **There is a stark difference between China's economic goals for these talks on e-commerce and its political concerns. It sees data as an important part of government tools for controlling unwanted domestic political activities, while its economic objectives do not differ all that much from those of Western participants.**
- **China is interested in facilitating trade in goods through E-commerce, proposing that**
 - *Electronic payment: Members should, to the extent practicable, adopt or build procedures allowing the option of payment by electronic means; Members should also make use of free zones and customs warehouses to facilitate cross-border electronic commerce.*
 - *Paperless Trading: Members should endeavor to accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents, and endeavor to make trade administration documents available to the public in electronic form.*
 - *Electronic Signatures and Electronic Authentication: Members should provide interested parties with the option to use electronic signatures and data messages in accordance with Members' laws and regulations, and should not deny electronic signatures and data messages legal validity solely because they are in electronic form; Members should promote the mutual recognition of digital certificates and electronic signature.*
 - *Electronic Contracts: Members should provide interested parties with the option to adopt electronic contracts, and should not deny electronic contracts legal validity solely because electronic means are adopted; Members' Contract Law and other related laws and regulations should apply to electronic contracts.*

actual trade negotiations take place, it will accept obligations in line with its capacity.

- Is China a developing country for purposes of obtaining special and differential treatment?
 - Not when it comes high technology items, whether vaccines, software applications, AI, and it is investing vast amounts in semiconductors.
 - In its Final Report⁴, issued last month, the National Security Commission on Artificial Intelligence, concluded that China “is an AI peer in many areas [to the United States] and an AI leader in some applications.
 - Former Deputy Secretary of Defense Robert Work has said that China is perhaps two generations behind leading producers of semiconductors but is investing to close the gap.
 - At the same time, some segments of China’s economy lag. Hundreds of millions of Chinese small holders in its agriculture sector are indeed very poor, although China states that with government measures these families are no longer below China’s defined poverty line.
 - On a list ranking countries by per capita GDP, China clocks in as 56th with an estimated per capita GDP in 2021 of \$11,819 (nominal, 2021 est.). Brazil (which has formally renounced special and differential treatment) is 82nd and India is 138th. Its neighbors on the list are developed countries.

Compliance issues

- China’s record of compliance with its WTO obligations.
 - China is a major target of WTO dispute settlement cases (45 of them and counting, as compared with India, 32 cases, and the U.S. with 173) with respect to claims that it has acted in various ways inconsistently with its WTO obligations.
 - With respect to IP, a noteworthy case is DS 542, which was settled bilaterally.
 - *DS 542 – WTO summary*

⁴ <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf>.

In March 2018, the United States initiated a WTO case challenging Chinese measures that deny foreign patent holders the ability to enforce their patent rights against a Chinese joint-venture partner after a technology transfer contract ends and that impose mandatory adverse contract terms that discriminate against and are less favorable for imported foreign technology as compared to Chinese technology. Consultations took place in August 2018, and a panel was established to hear the case at the United States' request in November 2018.

On March 18, 2019, China's State Council issued a Decision Revising Some Administrative Regulations, revising certain of the technology licensing requirements cited in the U.S. complaint.

After China's announcement, the WTO panel suspended its work in light of ongoing consultations between the United States and China to resolve their dispute.

The United States made its latest request for suspension on June 8, 2020, and the panel granted the request.

- Article 41.1 of TRIPS, requires WTO Members to have remedies available under domestic law.
 - There is no explicit prohibition in TRIPS of Members themselves engaging in IP theft – an allegation repeatedly made against China, most extensively by the United States and the EU, and denied by China.⁵

Industrial subsidies

- China has been widely regarded by the West as standing out as a major provider of subsidies to industry. Western countries have been particularly critical of the lack of transparency with respect to subsidies in China.
 - The U.S. view of transparency in China with respect to subsidies is contained in a report issued in January 2021:

⁵ See Congressional Research Service. <https://fas.org/sgp/crs/row/R46532.pdf>.
<https://www.scmp.com/news/china/diplomacy-defence/article/2149173/china-regrets-eus-allegation-intellectual-property>.

- *A further persistent problem is China's inadequate transparency. China disregards many of its WTO transparency obligations, which places its trading partners at a disadvantage and often serves as a cloak for China to conceal unfair trade policies and practices from scrutiny. For example, for the first 15 years of its WTO membership, China failed to notify any sub-central government subsidies to the WTO, despite the fact that most subsidies in China emanate from provincial and local governments. The magnitude and significance of this problem is illustrated by the five WTO cases that the United States has brought challenging prohibited subsidies maintained by China. While those cases involved hundreds of subsidies, most of the subsidies were provided by sub-central governments. The United States was able to bring those cases only because of its own extensive investigatory efforts to uncover China's opaque subsidization practices.*

Trilateral and U.S. Proposals

- During the last U.S. administration, US proposals, often a result of collaboration with Japan and the European Union (and thus trilateral) were seen as aimed at China:
 - Transparency obligations would be backed up with a monetary penalty for noncompliance.
 - Disciplines on industrial subsidies (with EU and Japan).
- The US has also tabled proposals –
 - Establishing categories of developing countries. (China would not qualify for special and differential treatment as a developing country).
 - Stating that Market oriented principles were fundamental to the WTO.⁶
 - Opposing environmental dumping. (WT/GC/W/814)

⁶ https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263985,262610,262031,261632,261432,261434,259951,259601,259540,259308&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

Bilateral and not multilateral attempts at solutions

- The WTO has not been the central venue for dealing with the systemic clashes with the West.
 - Europe has its CAI with China
 - The United States has its Phase I agreement with China negotiated during the Trump Administration, following and coinciding with unilateral measures.

- **What then is the relevance of the WTO?**
 - If China and its trading partners reach agreements which have broader relevance to the trading system, that would be of interest to other Members, the solutions can be brought back to the WTO and proposed for adoption.
 - There may be areas where it is easier to negotiate a multi-party agreement in the WTO than a bilateral agreement. This may prove to be the case, for example, with creating disciplines related to industrial subsidies.

- **What has been and will be the effect of the geopolitical “Great Fracture”, a term used by UN Secretary General Antonio Guterres?**
 - The WTO’s functional difficulties are affected by but not by any means solely caused by the rise of China as a major trading nation.
 - It was a factor in complaints about the Appellate Body (the AB not finding subsidies in the Chinese economic system due to its reading of the requirement that a government or “public body” provide the funding, and has been a factor in what the U.S. views as shortcomings in the AB’s dealing with other trade remedy issues, principally antidumping).
 - China’s competitive strength is an unstated factor in the reluctance of WTO Members to engage in negotiations for further trade liberalization. Its participation in the Environmental Goods Agreement (EGA) negotiations was a complication contributing to the deadlock and abandonment of the effort.

- **China's bilateral relationships with the largest trading entities – EU, US, Japan and India, are still in the process of being shaped. The impact on the WTO remains uncertain, but could become critical.**
 - *The U.S. 2021 Trade Policy Agenda And 2020 Annual Report OF THE PRESIDENT OF THE UNITED STATES, March 2021* presents the prior administration's findings (under section 301) with respect to China without distancing itself from them.

 - **The bottom line: It would not have been desirable to isolate China by denying its entry into the WTO, but with 20/20 hindsight, the negotiated terms of entry would no doubt have differed. Seeking to isolate China, had that been an option, would have been worse for global stability, and would not have been in the best interests of the WTO's Members.**

 - **I do not think that those of us who supported China's entry into the WTO were mistaken. What we failed to take into account was the importance of the Chinese Community Party to China. It cannot afford to relinquish a high degree of control over the Chinese economy. Some of us thought that economic liberalization would bring along political liberalization. The two are inextricably linked but the influence runs in the opposite direction. Political needs define the extent of market liberalization.**

 - **The challenge for China's major trading partners is to deal with what is (divergence) rather than what might have been (convergence). It is more productive to focus on how to bridge differences rather than trying to change China.**

 - **It serves the interest of the WTO and the global trading system to keep China engaged and enmeshed in the multilateral trading system. This is true for all countries.**

 - **The central challenge for China at the WTO is to make sure that the multilateral trading stays healthy. China is certainly not seeking to kill the goose that laid golden eggs for it, but China has not paid much attention to offering it nourishment either.**
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