

# All the Tea in China: Solving the 'China Problem' at the WTO

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## Abstract

The history of China's accession to the WTO has been a rollercoaster of alacrity and acrimony. Hailed as another milestone in the WTO-era, it soon proved to be a thorn in the side of the multilateral edifice. Various complaints have arisen, and all have to do with the role of state involvement in the workings of the economy. The cause of concern is not state involvement per se – it is state involvement in an economy of unprecedented size. State-owned enterprises and transfer of technology are the expressions of state involvement that have caught most of the attention. In this paper we argue in favor of multilateral solutions to address both matters. Staying idle is not an option as the trading community otherwise will continue to be confronted with unilateral responses that are largely ineffective while generating significant negative external effects.

Undeniably, China's ascent to world power status, has been almost monopolizing the headlines in recent months: it was a major theme in the recent US elections, it is responsible for an important recent legislative initiative in the European Union, and it is consistently present in the thinking of policy makers worldwide. Behaving more and more like the world power that it undeniably is, China has taken bold international initiatives, like the Belt and Road Initiative (BRI) and joining the Regional Comprehensive Economic Partnership (RCEP), which was finalized on 15 November 2020. RCEP constitutes the world's largest trading bloc, assembling 15 trading nations representing 30 per cent of the world GDP (gross domestic product).

In this paper,<sup>1</sup> we concentrate on China's trade policy. China's accession to the World Trade Organization (WTO) has presented the global economic system with a conundrum. Are the contributions of China's high-growth, export-oriented economy a win-win – an unalloyed benefit for both the People's Republic and its trading partners? Or, as seems increasingly to be the prevailing opinion, has China's markedly different economic system made it a problem that needs solving?

China's participation in the WTO has provided it with almost uninhibited access to 163 markets, the United States among them, from which it has profited immensely. Recording unprecedented growth rates, it has transformed itself from a low-income developing country to a global power in one generation. This is not, of course, due solely to its trade performance. China has long been a central player in global geopolitics and its economic potential has loomed large throughout East Asia and, indeed, the rest of the world. In

recent years, that potential has been realized as China has profited from globalization to become a trade powerhouse. Its export-led growth model has perfectly positioned it to take advantage of the elimination of trade barriers for its products worldwide. The rest of the world has profited from China's growth as well – at least in part. China's unprecedented export growth has benefited foreign consumers and stimulated capital gains for foreign investors. And yet, the silver lining of cheap Chinese consumer goods and corporate capital gains is tinged with gray.

Accusations have proliferated that China's success is due not only to its industry but also to other factors, and most notably, the suggestion that it simply does not play by the rules, for instance by engaging in illegal subsidization or by counterfeiting. Such views are probably expressed most vociferously in Washington, DC, but not only there. With varying degrees of vehemence, many of China's trading partners, especially the big players like the United States, the European Union, Canada, and Japan, have voiced their views of China's trading practices that range from general concern to pointed critique. Typically, these voices have criticized the extent of state involvement in the Chinese economy and argued for stricter enforcement of the current multilateral rules regulating international trade.

But wait a second. What has gone wrong? Was not China supposed to profit from its accession to the WTO, just like the other members were supposed to profit from China's accession? Was not China supposed to do well, in other words, by doing good? The claim of China's partners is that it did well by not doing good. And what we purport to do in what follows is examine the validity of this claim. In

Section 1, we discuss the terms of China's accession to the WTO. We explain why China's was different from any other previous accession, how differences were contracted about what was expected from China and insist on what China did not commit to. In Section 2, we move to discuss the main claims against China, that is its attitude towards transfer of technology, and the way its SOEs (state-owned enterprises) have been functioning, so the claim goes, to undermine the commitments entered by China. We explain why, under the current WTO regime, nothing much can be done against either of these claims. Then in Section 3, we will critically discuss the suggested approaches to address the China problem. We explain why staying idle is not an option and discuss the shortcomings of unilateral responses. In our view, viable solutions can only be multilateral. The final section provides conclusions.

### China and the WTO

In Mavroidis and Sapir (2021), we provide extensive discussion regarding the development of the Chinese economy in recent years. It is not the absolute numbers that are breathtaking, as China has moved to become the biggest trader. It is the speed at which China moved from being a country that hardly managed to feed its own people, to a global superpower. The world has never experienced anything like this.

In our recent book, highlight the worldwide euphoria when, or shortly before, China joined the WTO in 2001. It is no exaggeration to state that there was consensus that China's market-opening measures were a one-way street. The WTO incumbents even agreed that by 2016, China would no longer automatically qualify as an NME (non-market economy). And then there were voices going so far as to defend the thesis that, because of the irreversible transformation of China into a market economy, the next step was its metamorphosis into a liberal democracy. A giant market economy and a liberal democracy as well. And membership of the WTO would nudge China into this transformation. Well, then, how could anyone oppose China's accession? And if some details had not been negotiated to the satisfaction of all, should we miss the forest for a few trees?

Euphoria in the late 1990s was, of course, not exclusively linked to China's transformation. This was the period referred to as the 'end of history' by Fukuyama (1992), with the end of the Cold War and the supposedly definitive victory of liberalism. Less than a generation later we are back to dysphoria, the return of history and the ensuing end of dreams, as suggested by Kagan (2008). Did WTO incumbents misread China, the times, or both? China was different, and China influenced the times as well.

#### Why was China different?

China was not the first, and it may not be the last, country to join the GATT/WTO with an economic system different from the liberal system that the main incumbent members had adopted. The GATT had to face a somewhat similar situation when socialist, non-market countries from Central and

Eastern Europe (like Hungary and Poland) joined the club. But these countries were small, and it was relatively easy to negotiate their accession through existing protocols, which imposed specific obligations on the acceding countries. Furthermore, their subsequent transformation into market economies linked to their accession to the European Union removed whatever problems might have existed during their initial years of participation in the world trading system.

Even when Japan wanted to join – a much bigger economy in which the state played a crucial role, even though it was not centrally planned – the GATT system was not questioned. Japan was an outlier; it was far from sharing the liberal understanding when it joined the GATT under the protective aegis of the United States. This changed relatively soon afterwards, when Japan acceded to the Organization for Economic Cooperation and Development (OECD). Through (or because of) its OECD membership, Japan endorsed the liberal understanding and aligned its regulatory regime to that of the Western countries that dominated the GATT at the time.

India and Brazil, two large and important original GATT signatories that might have been a thorn in the system's side, always accepted the system's basic tenets, each gradually welcoming the liberal understanding and thus avoiding clashes with other GATT/WTO members as their economies grew over time. India first, in 1991, with the economic reform operated by Prime Ministers Rao and Singh, and then Brazil, with the adoption of Plano Real in 1994, steered by Presidents Franco and Cardoso, abandoned the heavily interventionist policies of the past and espoused the principles and practices of market economics.

In short, until the accession of China, the multilateral trading system was able to cope with increasing variety in economic systems among its members with little difficulty. This was either because new members were fairly small or, if they were larger economies, because they shared (or subsequently accepted) the liberal understanding that was implicit in the original GATT text and that reflected the fact that its main architects were from the United States or the United Kingdom.<sup>2</sup>

This time, it was different. China was neither small nor willing to reform its one-party political system and everything it entails in terms of state participation in the working of the economy, as many of its partners had hoped it would have done within a relatively short period of time after joining the WTO. The reaction to China's participation in the WTO is reminiscent of the hostility toward the accession of Japan to the GATT in the 1950s and the subsequent attempts to resolve the 'Japan problem'. Recent complaints against China are very similar to earlier complaints against Japan. Almost identical arguments were raised against the destructive nature of the Japanese 'mercantilist trade and investment regime'. Furthermore, reliable historical accounts<sup>3</sup> support the argument that Japan's organization of its economy was one of the paradigms that Chairman Deng, the man credited with the transformation of the Chinese economy, aspired to emulate. Japan has, of course,

fully integrated into the ranks of the Western world. This does not, however, mean that, as in the case of Japan, one should expect changes in China soon. There are crucial differences between the two countries, including the fact that Japan relies on the US for its defense, while China does not.

### What did China Commit to?

China did commit to various market-opening measures. It agreed to meaningful tariff concessions, and for the first time bound its customs duties and applied them on non-discriminatory basis. But tariffs are only a part of the game, which consists in three distinct sets of obligations:

1. multilateral obligations (tariff bindings belong here);
2. plurilateral agreements; and
3. ad hoc clauses.

China adhered to the Agreement establishing the WTO, and thus, agreed to implement all the multilateral WTO agreements. It further promised to adhere to the GPA (Government Procurement Agreement), even though, at the moment of writing, it has yet to fulfil its promise, as the relevant discussion in Georgopoulos et al. (2017) shows.

The ad hoc clauses are embedded in China's Protocol of Accession. In Mavroidis and Sapir (2021), we devote a detailed discussion to this issue, the main takeaways from which are:

- the Protocol of Accession does make references to the key concern of the world trading community (state involvement in the economy), but does not go beyond the WTO *acquis*, that is the rights and obligations already included in the WTO contract prior to China's accession;
- China did accept WTO+ obligations, by which we mean obligations in areas covered by the WTO but going further than those accepted by incumbent members. For example, China accepted to abolish export duties, except for a list of products explicitly mentioned in its protocol. No other WTO member had accepted to abandon such a long list of export duties. and
- China did not accept any WTO+ obligations, by which we mean obligations in areas outside the current scope of the WTO.

And this is where in our view the problem lies. China was and still is different. So, unless it accepted certain WTO+ obligations, none of the current concerns of the world trading community could be addressed through the WTO channel. Here is why.

### What did China Not Commit to?

The GATT/WTO is, of course, the (legal) benchmark to judge the adequacy of the existing trade regime to address the concerns of China's trading partners. The GATT/WTO is an incomplete contract regulating trade transactions based on a 'liberal understanding' of the law and economy.<sup>4</sup> The original GATT was part of the wider International Trade Organization (ITO) project, which contained disciplines on both state and private restraints to trade. It was a chapter of the

ITO (Chapter IV) and regulated only state barriers to trade. The original GATT entered into force on 1 January 1948, while awaiting the advent of the ITO. Even though the formal negotiation of all issues involved had been finalized, the treaty repeatedly failed to get through the US Congress, and no other nation was prepared to ratify it without US approval. Politics got in the way, and the ITO never saw the light of day. It never will, as the WTO has by now taken its place. The GATT disciplines, nevertheless, were part and parcel of a wider understanding on how to liberalize trade, which is predicated on respect for private rights and limited and controlled state intervention in the economy. This was explicitly contracted in the ITO.

But the obligations that were explicitly contracted in the ITO were almost never explicitly incorporated in the GATT text. Article XXIX is an exception, even though it only requests a best endeavor to observe the treatment of restrictive business practices. The implicit, rather than explicit, adherence to the ITO obligations on private rights and limited state intervention constitutes the 'liberal understanding' of the GATT. There is an implicit assumption that laws, contracts, and property rights will be enforced; private agents will be conducting international trade operations; the state will not undo contractual promises regarding trade liberalization through favoritism (pecuniary or otherwise) toward domestic agents; and investment will be liberalized. None of this was ever translated into legal language in the GATT/WTO agreements, but it formed the essential background against which the multilateral trading system has been operating since its inception in 1948. All the big players shared (or at least accepted) the liberal understanding of the law and economy. In both Hudec's (1975) and Jackson's (1969) account, it was precisely because they all shared this view of the world, that there was no need to translate what was being practiced anyway at home into treaty language. After all, the GATT was only supposed to solve international issues. And as Irwin et al. (2008) have highlighted, there was a conscious decision to have the GATT negotiated by a nucleus group of like-minded countries, Western, liberal democracies.

In Ruggie's (1982) account, this was the era of 'embedded liberalism', the post-Second World War era, when states were putting together an international system supporting free trade and market economies, while acknowledging the right to regulate in order to combat unemployment and support welfare policies at home. One might add that this was the quintessential reason why the multilateral rules operated so smoothly, despite the increasing number and heterogeneity of GATT/WTO members.

Why, then, did the Protocol of Accession of China not include terms inspired from this 'liberal understanding', which could have been tailor-made for China? In part, we argue, there was exuberance – the widespread expectation that China would quickly transform into a market economy. In part, it was because there is only so much one can achieve through a Protocol of Accession. The GATT/WTO regime was simply not designed with countries like China in mind. Notwithstanding claims regarding under-enforcement

of China's Protocol of Accession, transforming China into a market economy through its Protocol of Accession was legally and policy-wise not a real option.

### Bull(s) in the China store

If China played by the book, as the book is understood by its trading partners, then there should be no problem – its trade practices, alien as they might appear to some since they are not consonant with trade practices followed by most market economies, should be accommodated like any other country's. But considered from another angle, China must be doing something wrong, otherwise there would be nothing to complain about. We understand the 'China problem' as the sum of claims that various trading nations (and most comprehensively and loudly the United States) have mapped out. A major difficulty in assessing the situation is that this problem is a moving target – claims continually appear, disappear, and reappear again. Let us take the accusation that China is a currency manipulator as just one example. The Trump administration branded China a manipulator, the president withdrew the accusation a few months later, he reintroduced it once again sometime later, and then the administration succeeded in reaching a deal with China. The same applies to other claims.

Two complaints, however, surface with some regularity and have withstood the test of time: that Chinese state-owned enterprises (SOEs) benefit from unfair trade advantages, and that Chinese companies (both private and state owned) impose forced technology transfer (TT) deals on foreign businesses as a condition for accessing the Chinese market. In this paper, we will thus, focus on these two claims, which are central both to the way the Chinese economic system operates and to the difficulty that foreign economic operators encounter in their dealings with Chinese firms inside and outside China. By focusing on these two claims, we are targeting the key concern of China's trading partners: state involvement in the working of the Chinese economy. The state does so directly, by establishing SOEs, which pursue (to some extent at least) state policy while operating in the market; and it does so indirectly, by influencing the behavior of its private sector, requesting from it that it acts as bottleneck to ensure that foreign technology will reach Chinese hands, without China having to pay the required royalties.

SOEs and TT, lie at the core of complaints against China's trade and investment regime. They represent the high-priority items for the Trilateral group,<sup>5</sup> comprising the EU, Japan, and the US, but also for a few others and are therefore salient concerns of all of China's major trading partners. By addressing these two concerns, we will be in a position to understand whether the current legal regime applicable to China (that is, the multilateral trade law as reflected in the WTO agreements that bind all WTO members including China, and China's Protocol of Accession, which contains China-specific obligations) suffices to address the concerns raised. If the answer to this question is yes, then we need to explore the reasons for the under-enforcement of WTO law

vis-à-vis China. If the answer is no, then we need to ask why the current regime is inadequate and what can be done about it. To determine the answer, we propose to analyze SOEs and TT in terms of the legal regime applicable to China – the multilateral rules as well as China's Protocol of Accession. The combination of these rules provides a benchmark for assessing the ability of China's current regime to deal effectively with the concerns voiced by the international community.

### SOEs

The term 'SOEs' does not even appear in the Agreement on Subsidies and Countervailing Measures (SCM). This is an oddity for various reasons:

- SOEs exist in some WTO incumbents. Indeed, STEs (state-trading enterprises), currently regulated in Article XVII of GATT, are a form of SOEs.
- The SCM was negotiated during 1986–1993. As of 1991, it was clear that China was requesting its accession to the WTO. Why then, did the framers of the SCM not think of negotiating disciplines for SOEs without China, which would later be applied to China, just like any other WTO member?

This is not to say that SOEs are not disciplined by the SCM. They are not disciplined head on, but they could be considered to be 'public bodies' in the SCM sense of the term, and thus be subjected to the various disciplines embedded in this agreement. The term has been interpreted in rather wayward manner, as Ahn and Spearot (2016) have shown in their excellent contribution on this score.

In a nutshell, the current WTO rules on SOEs could, in principle, resolve at least some of the concerns raised by the United States and China's other trading partners, but such a resolution requires a more imaginative interpretation of the existing rules than the WTO has thus far been willing to concede. This entails a reorientation of the current case law, a demanding exercise by any account. Therefore, in our view, a clarification of the rules on SOEs, inspired by existing regulatory solutions at the regional and plurilateral levels, would go a long way toward addressing the current concerns. A legislative amendment would, by spelling out the details, preempt discretion by WTO judges and avoid the risk of unsatisfactory outcomes due to unclear rules. In other words, clearing up some of the haziness that has plagued rulings related to SOEs will go a long way toward bringing China into alignment with the goals and policies of the WTO.

### Transfer of technology

With respect to TT, the situation is different: the current rules are not adequate to address the friction over forced TTs at all, if those requesting TT are private agents. This is largely because requests for TT by private agents are not covered in the current WTO agreements, since these



agreements do not deal with private deals but exclusively with state rules or actions. Since similar requests could occur elsewhere as well (and not only in China), an expansion of current agreements to include private TT deals is necessary. But such an expansion raises an important issue: if the concern about TT is new – that is, if it postdates the WTO members' negotiation with China that led to the conclusion of the Protocol of Accession – then it needs to be addressed now for the first time. If, conversely, the concern predated the negotiation, why was it not addressed before? Is the concern about TT a new issue, specific to China? If it caused problems before, why was it not addressed? Where did the system go wrong? Whatever the answers to these questions, we believe that only a negotiation leading to new rules can help solve the problem of private impediments to trade.

That private impediments could hinder trade liberalization was, of course, common knowledge when the original GATT was being negotiated. This is precisely why the ITO, under the aegis of which the GATT was originally supposed to come, contained a chapter dealing with multilateral responses to restrictive business practices (RBPs) by private agents. The degree of state involvement in the workings of the economy varied across trading nations. In principle, however, the original members shared a commitment to the market economy, and thus private impediments were meant to be addressed by domestic competition laws.

The introduction of competition discipline in China is quite recent, and even today, China remains a country with substantial state involvement in the workings of the national economy. Countries with similar substantial involvement, ranging from Japan of the 1950s to socialist countries like Hungary and Poland, joined the GATT before China did. The parallels with their accession processes are not only relevant but warranted indeed. As a result, unless behavior is somehow attributed to China, there is not much that can be done within the four corners of the current regime. To attribute behavior to a WTO member, according to the prevailing legal standard, there is no need for a government to compel private agents to act in a particular way. It suffices that it incentivizes them ('nudges') to do so.

To apply this test on a case-by-case basis would require elaborate legal/economic arguments as to what extent a particular 'nudge' has changed the incentives or not. And of course, the success of the endeavor will be predicated on meeting a jurisprudential test, which could change, and not a clear, statutory language. This is why we still believe that a legislative solution banning TT outright is warranted. We explain, in what now follows, how this can be done.

### What can be done about it, and how should it be done?

Reactions to China's ascent have been asymmetric even among critics. The Trump administration preferred to take justice into its own hands. President Trump's decision to 'take on' China was accompanied by a roller coaster of announcements of tariffs on specific products, followed by the imposition of some of them, retaliation by China,

subsequent announcements veering toward peaceful resolution of the dispute, then renewed belligerence, and finally a deal. These were not dull times, as far as international trade news was concerned. Of course, we are not here to judge the usefulness of similar tactics (antics?) when it comes to possible political exploitation. Our interests instead are the repercussions that Trump's actions against have on the multilateral edifice of international trade. To us, what matters most is whether this is the most appropriate way to resolve the China issues. And, of course, it is at best unclear at this stage, whether the Biden administration will follow this approach, or not.

For starters, the world is not unanimous in criticizing China's trading practices. For one, there is a silent majority of trading nations, the smaller players, who have other fish to fry. And then, even among critics, there is no unanimous attitude towards China. The Trump Administration was at one end of the spectrum. But neither the EU nor Japan picked up the hatchet of trade war against China. Japan has not done much, but the EU is in the process of enacting legislation to take measures against WTO members with heavy state involvement in the workings of their economy. And of course, as Wu (2016) never ceases to remind us, one should not under-estimate the capacity of China to adjust to avoid punishment.

With this in mind, we go through the most prominent options advanced to address the China problem, before discussing our own preference, which is to address China through the multilateral channel.

### Stay idle

The world trade community, stakeholders and academics alike, have advanced various proposals to address the China problem. Some say, 'do nothing'. The reputed economist Dani Rodrik (2018), has advanced the most elegant voice in this context, claiming that the current situation should not be of concern to the WTO at all, as China, its idiosyncratic elements notwithstanding, should simply be accommodated within the four corners of the current multilateral edifice. All the more so, the argument goes, since China's growth has contributed to the growth of many other nations. Consequently, the argument goes, the world trading community should stay idle and desist from trying to persuade China to change.

We disagree. We see two problems associated with the 'do nothing' recommendation:

1. First, problems will persist, they will not magically disappear. Even though, we are still uncertain as to how the Biden Administration will act, it is highly unlikely that it will duck the issue and return to a world of 'business as usual'. And we know that, as a matter of fact, the EU has already been taking some China-specific action, which in and of itself is proof that staying idle, at least for some, is already no option.
2. More importantly, it is simply not true that the GATT/WTO regime was designed to fit every country – it was clearly predicated on the 'liberal understanding' that we

discussed earlier. It is not the case that the architects, the framers of the multilateral trading regime, wanted to provide a roof for every nation irrespective of its regime:

- a. the accession of Hungary, Romania, Poland and Yugoslavia is no evidence to the contrary. They were allowed in, because incumbents thought that this would be a coup against the Soviets in the wider context of the Cold War. By being exposed to the liberal trade order, and benefiting accordingly, the hope was that these countries would become the harbingers of changes for the wider set off Eastern Bloc countries;
- b. all accession protocols of former centrally planned economies, include best-efforts language concerning privatization, trading rights, investment liberalization, etc., that is mainstream Western liberal economies' institutions. The reason why they do not contain legal obligations to transform the economy have been explained above. But if the GATT/WTO was indeed conceived to accommodate all and sundry, why contain the language we referred to in this paragraph in various protocols of accession?

### React unilaterally

'Hit them where it hurts', sums up the strategy (a euphemism) adopted by the Trump Administration towards China. To address the China problem, the Trump Administration opted for a series of tariff hikes, followed by inconclusive bilateral negotiations, followed by additional tariffs, a roller-coaster of measures which had one thing in common: disrespect for the multilateral procedures.

Unilateral threats and tariff increases were the 'stick', or at least the intended stick in the thinking of the Trump Administration, meant to induce cooperative behavior by China. Relying on the research by Bown (2019) and Amity et al. (2019), among others, we can now safely conclude that this strategy has proved to be inefficient. But this is not the end of the story; if similar courses of action are followed in the future as well, countries confronting China risk facing countermeasures and a further weakening of the multilateral regime. This is indeed worrisome. This is a time where a lot is at stake. As we are facing a Thucydides' trap, in Allison's (2017) count, and we are shifting towards a multi-polar world with no obvious unique hegemon, international cooperation becomes all the more important.

### React through the multilateral channels

Our discussion of the issues up to this point has led us to conclude that none of the courses of action proposed so far can help the world trading community solve the 'China problem'. If the world trading community is serious about addressing SOEs and forced TT, then it would be well-advised to change its course of action.

Essentially, staying idle is no option for the reasons that we have advanced. We have also argued that the unilateral or bilateral courses of action advanced by the Trump

administration to deal with the 'China problem' are inappropriate or, at best, only partly efficient. Bilateral solutions only advance short-term, narrow issues such as trade imbalances rather than systemic problems like the inadequacy between the Chinese and WTO systems. The world trading community's interests would be better served by a different approach – namely, by amending the current trade law regime and bringing it into line with the original 'liberal understanding' of the GATT. In our view, only a legislative amendment will allow the WTO membership to solve the problems posed by SOEs and forced TT. Implicitly, thus, we believe that there is merit in the concerns raised. We also believe, though, that the eventual solution to the current problems should not be China-specific. Concerns about SOEs and forced TT are not unique to China. Similar problems exist with regard to other current or potential WTO members. Multilateral solutions are, therefore, necessary. We argue that China, because of its size, simply exacerbated a problem that already existed.

To avoid misunderstandings as to the scope of our endeavor, we should emphasize that we do not purport to offer a complete blueprint to reform the WTO in all its dimensions. We leave this much needed task to others and refer readers to the other contributions in this special issue and the references cited there. Our goal is more modest. We seek simply to propose WTO reforms that we consider essential to lessen the tensions in the trading system arising from China's size and the nature of its economic system.

The two concerns identified, the treatment of SOEs and TT can to some extent be addressed through adjudication. Imaginative proposals, such as that of Jennifer Hillman (2018), to pursue non-violation complaints (NVCs) against China, a legal instrument of ambiguous efficacy anyway, are, in our view, not a recipe for success. For starters, the evidentiary burden on complainants is quite high. They will be asked to show why they could not anticipate the impact of measures, all measures that pre-existed the accession of China to the WTO (and many of them have been identified in Hufbauer (1998), and in other academic writings as well). And then come the measures taken by President Xi post accession of China to the WTO. China will carry the burden there to show that these measures, which presumably could not have been reasonably anticipated by WTO members, did not affect the concessions entered. For there is no doubt, that, as the analysis of Blustein (2019), and Lardy (2019) has made clear, the majority of problematic measures regarding the scope and extent of state involvement in the workings of the Chinese economy, have been adopted after 2001, as Milhaupt and Pargendler (2017) have shown.

Even if China does not meet its burden of proof, (and this is really a long shot, as China did not promise to become a full-fledged market economy), it can always pay instead of withdrawing the measures. There is no hierarchy between property and liability rules with respect to NVCs. This is, in our view, particularly important, for even if we can imagine how a well-intentioned, imaginative WTO judgment might deflate the current state of uneasiness, it will, unavoidably, be case specific. Furthermore, decisions made by WTO judges carry less weight than formal legislative

amendments. In an era of doubt as to the legitimacy of the WTO Appellate Body, it is probably wiser (even though, we readily admit, more cumbersome) to opt for legislative solutions. In short then, the worries with respect to SOEs and TT can effectively be addressed only if new obligations are added to the current WTO regime.

## Conclusions

Our proposals are counterpoints to the two radically opposed solutions that have been put forward to deal with the existing clashes between the WTO regime and China's economic regime: on the one hand, demands that China radically change its economic regime to conform to Western ideals; on the other, that the WTO stay out of the controversy and that its members accept that they must accommodate China's state-controlled economy. We reject both proposals.

We have argued instead that there is a third way that is more promising. In order to retain its principles and yet accommodate China, the WTO needs to translate parts of its implicit liberal understanding into explicit treaty language. We advanced specific proposals to this effect that, if adopted, would induce China to change its economic behavior even as it retains its economic regime. In other words, the solution to the problem posed by China to the international trading system is not to demand a change in its economic regime but to induce a change in its economic behavior. In particular, we envisage a situation where China is able to retain its SOEs but where they behave in a market-friendly manner.

The recent pushback against market-oriented reforms that President Xi has masterminded and executed makes our suggestions a matter of urgency. China today seems a long way from the aspirations to transform into a market economy by 2016 that accompanied its accession process. It is, in our view, an additional reason to strengthen the current multilateral framework so that it acts as a counterbalancing force to constituencies arguing for heavier state (i.e., Chinese Communist Party) involvement in the economy. If the framework is not strengthened, it may become impossible to forestall the Chinese Communist Party from instituting even stricter state controls than already exist in China.

Our plea hence is that a call for renewed commitment to multilateralism is more warranted than ever. Unilateral action has increasingly proved to be ineffective. It is time to try the carrot while keeping the stick always available. Globalization has seemed for years to be a fact of life – a new fundamental and permanent foundation for the world economy. But China's accession to the WTO has revealed potential cracks in that foundation. As Bown and Irwin (2019, at p. 136) conclude in their excellent article:

The fall of the Berlin Wall and the collapse of communism opened up Eastern Europe and the former Soviet Union to global markets. The reforms of Deng Xiaoping did the same for China. But only in the unipolar moment, which began in 2001, when China

joined the WTO, were open markets truly global. Now, the period of global capitalism may be coming to an end. What many thought was the new normal may turn out to have been a brief aberration.

If there is still some hope to prove this (increasingly realistic) statement wrong, we argue, it is through a return to the values that helped establish the post-Second World War multilateral edifice. Although in this paper we have concentrated narrowly on the 'China problem', we also recognize that it is not a self-contained problem. Instead, it has profound implications for the economic ties that bind countries together in a globalized world – or the barriers that thrust them apart. In short, we view the solution to the China problem as a contribution to the much larger project of reinvigorating the multilateral regime.

## Notes

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1. This paper draws on Mavroidis and Sapir (2021).
2. See Irwin et al. (2008), Tumlir (1984), and Zeiler (1999). Japan presented the world trading regime with challenges as a result of its monumental growth rates in the 1960s and 1970s. Complaints against Japan were raised not only at the moment it acceded to the GATT but also a few years after it had joined. Already at the moment of its accession, it managed to provoke a record number of invocations of the non-application clause. Eventually, however, Japan became 'one of us', and its ascension to Quad status is the best proof to this effect.
3. Vogel (2019) has analyzed this issue probably more comprehensively than anyone else.
4. In order to avoid any misunderstanding, we do not use the term 'liberal understanding' throughout this paper in its possible ideological connotation. We use it simply, as equivalent to 'market economy'. Market economies of course differ in the way they approach social policies, among other things. But they all share one common element: they represent an economic system, where (economic) decisions and the ensuing pricing of goods and services are, for all practical purposes, determined by the interactions of private individuals, citizens, and businesses alike. Government interventions are meant to address market failures and not to dictate the way each and every transaction in the economy should take place.
5. Following the decision of the European Union, Japan, and the United States (the 'Trilateral'), during the 11th WTO Ministerial Conference of the WTO, to work together and confront China, they have been focusing on these two issues. See USTR, Joint Statement by the United States, European Union, and Japan at MC 11, 12 December 2017; USTR, Joint Statement of the Trilateral Meeting of the Trade Ministers of the United States, European Union and Japan, 23 May 2019.

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