

Reading Materials for Session 2:
The Phase 1 Agreement and Its Implementation

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Most USCBC members view China-U.S. phase-one trade deal as positive: survey

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Craig Allen, president of the U.S.-China Business Council (USCBC), reacts during an interview with Xinhua at the USCBC headquarters in Washington D.C., the United States, Oct. 10, 2019. (Xinhua/Xiong Maoling)

"There's strong commitment to implementation of phase one," said Craig Allen, USCBC president, "The coronavirus doesn't change any of that, though it might affect the timeline."

Overwhelmingly view the China-U.S. phase one economic and trade agreement as positive for the commercial environment and bilateral relations of their respective nations, according to a survey released Thursday.

Some 33 percent of respondents view the deal as "positive," while 45 percent view it as "somewhat positive," showed the survey, which was conducted shortly after the deal was released last month.

Among those with a positive view, the majority believes the agreement stabilizes their bilateral relationship and prevents imminent imposition of new tariffs, according to the USCBC, which represents over 200 U.S. companies that do businesses in China.

Some 6 percent of respondents with a positive view believe that the agreement "adds more certainty to the business environment and improves trust with suppliers," the survey showed.

Around 60 percent of respondents indicated they will be directly impacted by the commitments listed in the text of the phase-one deal, the survey showed.

In order of importance, expanding trade, intellectual property rights protection, and technology transfer commitments were listed as having "the most acute impact" on respondents, according to the survey.

Some companies also reported that the reduction of tariffs and expansion of business opportunities as key impacts on their operations.

Craig Allen, USCBC president, told reporters at a news conference Thursday that the ongoing coronavirus situation in China could delay the purchases of U.S. products, but he is confident about the implementation of the deal.

"There's strong commitment to implementation of phase one," said Allen. "The coronavirus doesn't change any of that, though it might affect the timeline," he added.



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Trade truce? United States and China reach Phase One agreement

17 January 2020

On 15 January 2020 President Donald J. Trump and Chinese Vice Premier Liu He signed a "Phase One" agreement between the United States and China, a truce halting the escalating trade tensions between the two global trading heavyweights. The Phase One agreement follows an investigation by the Office of the United States Trade Representative (USTR) into Chinese trade practices that culminated in substantial and expansive U.S. tariffs on more than US\$350 billion worth of Chinese exports to the United States. The agreement is scheduled to become effective on 14 February 2020.

The Phase One agreement includes commitments by China, including: (1) purchasing an additional US\$200 billion in U.S. goods (manufactured, agriculture, and energy) and services, compared with baseline Chinese purchases in 2017; (2) introducing sectoral reforms, including improved intellectual property protections; (3) prohibiting forced technology transfers; (4) removing barriers to U.S. agricultural imports; and (5) liberalizing financial services. The agreement also includes a commitment to cooperate on macroeconomic policy and exchange rates.

The Phase One agreement addresses certain U.S. priorities, such as trade secrets, pharmaceutical patents, forced technology transfers, market access for U.S. agricultural and financial services products, and other longstanding U.S. concerns about intellectual property rights. Notwithstanding, U.S. tariffs remain in effect on more than US\$350 billion worth of Chinese goods, and several systemic issues were put off for a phase two agreement. Accordingly, while potentially significant, the Phase One deal should be viewed as a short-term truce until the parties attempt to resolve more challenging systemic issues. In addition, the deal rests heavily on China's implementation of its specific terms – in order to enforce the parties' commitments, the deal contains an innovative "dispute settlement arrangement," permitting either party to impose additional tariffs if consultations do not produce a solution.

China's commitments to increase U.S. imports of U.S. goods and services by US\$200 billion compared to 2017 baseline

China agreed to increase imports of U.S. goods (manufactured, agriculture, and energy) and services, between 1 January 2020 and 31 December 2021, by at least US\$200 billion as compared to a 2017 baseline. China has been wary about publicizing the specifics of its commitments, and certain enumerated targets are ambitious. The Phase One agreement includes specific sectoral

commitments, as well as specific four-digit Harmonized Tariff System numbers, for articles that China has committed to purchase during the two-year period:

Product category	Additional U.S. exports to China on top of 2017 baseline (in US\$ billion)		
	Year One	Year Two	Two-year total
Manufactured goods	32.9	44.8	77.7
Agriculture	12.5	19.5	32.0 ¹
Energy	18.5	33.9	52.4
Services	12.8	25.1	37.9
Total	76.7	123.3	200.0

China agrees to implement domestic sectoral reforms

- Intellectual property (IP):** China committed to provide additional protections for [trade secrets](#), [pharmaceutical patents and data exclusivity](#), and [confidential business information](#). It also agreed to crack down on a host of longstanding IP rights abuses, e.g., counterfeiting, abusive trademarks registrations, and e-commerce market. China further pledged to issue an Action Plan within 30 days of the agreement's entry into force outlining changes to its IP regulations. Specific changes include civil liability for trade secrets theft, shifting burden of proof to the defendants when there is a reasonable indication of trade secrets theft, an easier preliminary injunction process for trade secrets owners, criminal investigations and penalties enforcement, and the prohibition of trade secrets disclosure (and subsequent enforcement) by government officials. China also agreed to increase penalties and damages for IP theft. Substantive outcomes depend on China's implementation of these commitments, since U.S. companies have often faced difficulties in securing remedies in China's legal system.
- Technology transfer:** China agreed to enact regulations prohibiting [technology transfer](#) as a condition for market access or advantages, and enhancing due process and transparency and preventing government pressure for such transfers. Transfers of U.S. technology and trade secrets have been one of the biggest complaints by U.S. industry with respect to trading with and operating in China. They were also a key basis for the Section 301 investigation and subsequent imposition of tariffs. Since China has argued that such transfers are "voluntary" and has made repeated commitments to previous U.S. administrations to halt the practice, whether these commitments yield substantive policy changes depends (again) on China's implementation of these commitments.
- Trade in food and agricultural products:** The United States made important gains in addressing several longstanding nontariff barriers to [U.S. farm products](#). These policy changes address barriers faced by U.S. agricultural imports entering the Chinese market. Both countries agreed that their sanitary and phytosanitary measures should be science- and risk-based in order to facilitate imports of U.S. food and agricultural products. For example, the Phase One agreement sets deadlines for the implementation of sanitary and phytosanitary measures. China also commits to addressing regulatory barriers to U.S. food and agricultural products, including dairy, infant formula, meat, poultry, rice, potatoes, nectarines, blueberries, avocados, barley, alfalfa pellets, hay, feed additives, dried distillers' grains with solubles, seafood, and pet food.
- Financial services:** China agreed to remove restrictions on [U.S. financial institutions and insurance companies](#). For example, foreign equity limits are to be eliminated, and wholly

¹ China will "strive" to purchase US\$5 billion more per year than the specific agriculture commitments.

U.S.-owned financial services companies are to be permitted to provide certain services. China also will accelerate consideration of applications by U.S. companies seeking to provide financial services, including banking, credit rating, electronic payments, financial asset and fund management, and insurance services. These commitments include reforms that will be effective beginning 1 April 2020, seven months earlier than China's previous commitment. On the other side, the United States agreed to the nondiscriminatory treatment of Chinese financial service providers in the United States and to consider expeditiously pending requests from Chinese financial services providers, including CITIC Group, China Reinsurance Group, and China International Capital Corporation. In recent years, China has signaled its interest in opening up and internationalizing its capital markets, so these reforms could offer new market opportunities in China.

- **Chinese tariffs on U.S. exports:** China's retaliatory tariffs on roughly US\$60 billion of U.S. exports were not addressed and apparently will remain in effect. They could be waived on a case-by-case basis to facilitate U.S. purchases, as China's US\$200 billion purchase commitment will be difficult to fulfill if the tariffs remain in effect.

What does China get out of the deal?

China secured U.S. commitments on certain market access issues (e.g., expeditious consideration of licenses for certain Chinese financial institutions (though the outcome of such considerations are uncertain)) and achieved some important policy goals. First, the United States agreed to drop its List 4b tariffs that were scheduled to go into effect on 15 December and would have hit several big exports – including smartphones, laptops, apparel, toys, video game consoles, etc. The United States also [agreed](#) to reduce its List 4a tariffs, which affect key exports of consumer goods, from 15 percent to 7.5 percent.

Second, the Phase One deal arrests the deterioration in U.S.-China trade relations, which were poised to become even worse. More importantly, the deal represents a step toward shoring up business confidence, particularly for the Chinese private sector, which has borne the brunt of the trade war and remains pivotal for the country's economic growth and employment.

Finally, China has bought additional time to negotiate with the United States. Future talks are necessary to address several substantive issues not covered by the Phase One deal.

China and the United States reaffirm International Monetary Fund (IMF) commitments on monetary policy

China and the United States simultaneously affirmed their respective autonomy to [implement monetary policy](#) under their domestic laws, reaffirmed commitments to avoid currency manipulation, and agreed to the regular public disclosure of monetary policy metrics. The United States and China also agreed that failure to abide by their respective monetary policy commitments under the agreement would trigger its dispute resolution process (see below). Disputes not resolvable under the agreement will be addressed at the IMF.

Bilateral evaluation enforcement arrangement

Finally, the United States and China have agreed to implement an evaluation and dispute resolution arrangement "to ensure prompt and effective implementation" of the Phase One agreement. China and the United States committed to establishing mutual Bilateral Evaluation and Dispute Resolution Offices to be led by a Deputy U.S. Trade Representative and Vice Minister, respectively, to implement the arrangement. Furthermore, the two sides also agreed to establish a Trade Framework Group, which will be chaired by the USTR and a designated Chinese Vice Premier, to evaluate implementation of the agreement.

The agreement contemplates monthly consultations at the Assistant USTR level, quarterly consultations at the Deputy USTR/Vice Minister level, and biannual consultations at the USTR/Vice Premier level to oversee implementation. It establishes a unique dispute resolution process to resolve concerns about alleged violations of specific obligations. The process entails consultations with designated officials to be followed by an appeals process to more senior officials, including the USTR and a designated Chinese Vice Premier. If the parties cannot agree on a solution, the aggrieved party can respond by imposing higher tariffs. The other party cannot retaliate, unless it wants to take the ultimate step of terminating the agreement, which is permitted on 60 days' notice.

Lastly, the United States and China will resume regular meetings on monetary policy and other economic issues. Those discussions will be led by the U.S. Secretary of the Treasury and a designated Chinese Vice Premier.

Conclusion

The Phase One agreement reflects an important de-escalation of the 18-month old trade dispute between the United States and China. Notwithstanding, trade tensions between the two trading titans remain high as evidenced by the maintenance of U.S. tariffs on US\$350 billion in Chinese exports and the unclear fate of Chinese tariffs on more than US\$60 billion in U.S. exports. Finally, while phase two negotiations are expected to begin in the near term, any new agreement is not expected until after the 2020 U.S. presidential election.

Contacts



Warren H. Maruyama
Partner, Washington, D.C.
T +1 202 637 5716
warren.maruyama@hoganlovells.com



Chandri Navarro
Partner, Washington, D.C.
T +1 202 637 5640
chandri.navarro@hoganlovells.com



H. Deen Kaplan
Partner, Washington, D.C.
T +1 202 637 5799
deen.kaplan@hoganlovells.com



Jared R. Wessel
Partner, Washington, D.C.
T +1 202 637 6472
jared.wessel@hoganlovells.com



Jonathan T. Stoel
Partner, Washington, D.C.
T +1 202 637 6634
jonathan.stoel@hoganlovells.com



Craig A. Lewis
Partner, Washington, D.C.
T +1 202 637 8613
craig.lewis@hoganlovells.com



Roy G. Zou
Office Managing Partner, Beijing
T +86 10 6582 9596
roy.zou@hoganlovells.com



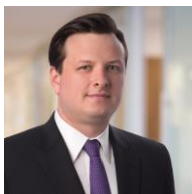
Ivan Zapien
Partner, Washington, D.C.
T +1 202 637 5613
ivan.zapien@hoganlovells.com



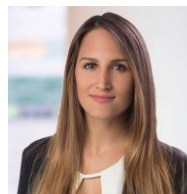
Stephen F. Propst
Partner, Washington, D.C.
T +1 202 637 5894
stephen.propst@hoganlovells.com



Benjamin Kostrzewa
Registered Foreign Lawyer, Hong Kong,
Washington, D.C.
T +852 2840 5080 (Hong Kong)
T +1 202 637 5600 (Washington, D.C.)
ben.kostrzewa@hoganlovells.com



Patrick de Lap erouse
Associate, Washington, D.C.
T +1 202 637 6836
patrick.delaperouse@hoganlovells.com



Maria A. Arboleda
International Arbitration and Trade
Advisor, Washington, D.C.
T +1 202 637 2873
maria.arboleda@hoganlovells.com

www.hoganlovells.com

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The Phase 1 IP Agreement: Its Fans and Discontents

How much will the IP Sections of the [Phase 1 Agreement](#) (the “Agreement”) with China change IP strategies in China? For the most part, the Agreement adds much less than its appearance might suggest. Many of the important changes that the Agreement memorializes have recently been codified into law or set into motion for forthcoming codification. There are some important prospective changes in the text, particularly regarding pharmaceutical patent protections and in civil and criminal enforcement. If these changes are well-implemented, that could augur significant changes in the future. Nonetheless, a cautious approach should be taken to these changes as well, as many of them have a long history of disappointing US rightsholders. An additional problem with the Agreement is its reliance on administrative mechanisms that have a track record of not providing sustained protection for IP rights.

The IP-related sections are found in Chapter 1 of the Agreement (“Intellectual Property”) and Chapter 2 (“Technology Transfer”). Chapter 1 is divided into the following sections: General Obligations, Trade Secrets and Confidential Information, Pharmaceutical-Related Intellectual Property, Patents, Piracy and Counterfeiting on E-Commerce Platforms, Geographical Indications, Manufacture and Export of Pirated and Counterfeit Goods, Bad-Faith Trademarks, Judicial Enforcement and Procedure in Intellectual Property Cases, and Bilateral Cooperation on Intellectual Property Protection. Chapter 2 concerns Technology Transfer and is not divided into separate sections.

There are many concerning textual aspects of the Agreement. For example, it is unclear why “Technology Transfer” was not considered an IP issue in the Agreement. Additional ambiguities are supplied by inconsistent use of legal language as well as differences in the English and Chinese texts, both of which are understood to be equally valid (Art. 8.6). A careful reading shows that in many cases the Agreement does not afford any new progress on particular issues, but merely serves as a placeholder on issues that have long been under active discussion (e.g., on post-filing supplementation of pharmaceutical data in patent applications). There are also several provisions that appear to break new ground, such as in consularization of court documents by foreigners and enforcement of civil judgments.

Reactions from the dozens of people I spoke with about the Agreement in the US and China have been mixed. One prominent Chinese attorney thought that Chinese IP enforcement officials were now much more likely to be responsive to US requests in forthcoming enforcement proceedings. Several individuals thought that the Agreement would be a [great stimulus](#) to IP agencies and the courts in their enforcement efforts as well as in drafting new laws, regulations and judicial interpretations. Many academics were perplexed by the unclear language in the Agreement. Some experts shared my view that the Agreement places an undue emphasis on the wrong issues, such as punitive damages, administrative campaigns, and criminal punishment at the expense of compensatory civil compensation. Due to the numerous errors and inconsistencies in the Agreement, many people speculated that the negotiators on the US side and/or the Chinese side may not have been adequately consulting with experts, bringing to mind the Chinese expression of “building a chariot while the door is closed (without consulting others)” (闭门造车). The administrative and Customs enforcement provisions were dismissed by many as out of date or just for show. On the other hand, it did appear that the Chinese negotiators did rely upon their interagency experts. Susan Finder, the author of the Supreme People’s Court (SPC) Monitor, told me that the SPC (and likely the Supreme People’s Procuratorate [SPP]) provided input to the Chinese negotiating team.

Review of the Individual Sections and Articles

The trade secret provisions generally memorialize amendments already made to China’s Anti-Unfair Competition Law, including an expanded scope of definition of “operator” (Art. 1.3), acts that constitute trade secret infringement (Art. 1.4), as well as a shifting of burden of proof in civil proceedings where there is a reasonable basis to conclude that a trade secret infringement has occurred (Art. 1.5). Interestingly, the United States asserts in this section that it provides treatment equivalent to such shifting of a burden of proof. I am unaware of any [nationwide burden-shifting in US civil trade secret proceedings](#), except – as a stretch – insofar as US discovery proceedings provide an opportunity to compel production of evidence from an adverse party. This view was also shared by others I had spoken to.

The trade secret provisions also require China to provide for preliminary injunctions in trade secret cases where there is an “urgent situation”. The use of [preliminary injunctions to address early-stage trade secret theft has long been under discussion between the US and China](#). This is an awkward hybrid of Chinese and English legal standards. Generally the test in Chinese law for “action preservation” as in US law for “preliminary injunctions” is whether there is irreparable injury arising from such urgent situation which necessitates provisional relief (See [Sec. 101 of Civil Procedure Law](#)) An “urgent” situation which is not likely to cause irreparable injury does not require granting of a preliminary injunction. [China’s judicial practice](#) currently permits the use of preliminary injunctions where there is a risk of disclosure of confidential information (关于审查知识产权纠纷行为保全案件适用法律若干问题的规定, Art. 6.1). It appears likely that the current test for preliminary injunctions are unaffected by this provision, and the provision just memorializes current Chinese law – notwithstanding that is unclear about the standards and scope of action preservation procedures in China

The Agreement also uses inconsistent nomenclature to describe preliminary injunctions. As noted, the Chinese text does not refer to preliminary injunctions but refers to an overlapping concept of “action preservation.” Other provisions of the English language text of the Agreement discuss “preliminary injunctions or equivalent effective provisional measures” (Art. 1-11).

Historically, Chinese judges have been [highly reluctant to issue preliminary injunctions](#). As Susan Finder has noted in an email to me, the language in the Agreement also does not address the underlying structural problem that judges may be reluctant to give injunctions because they are concerned they will be found to have incorrectly issued them, and hence held accountable under the judicial responsibility system. The Agreement also does not account for the fact that provisional measures serve a different function in the Chinese system compared to the United States. China concludes its court cases far more quickly than the United States, thereby providing more immediate relief, often without needing recourse to provisional measures if there is not an urgent need.

The Agreement also requires China to change its trade secret thresholds for “initiating criminal enforcement.” (Art. 1.7). The Agreement does not specify what measures are to be reformed, such as the Criminal Law or Judicial Interpretations, or standards for initiating criminal investigations by public security organs and/or the procuracy and State Administration for Market Regulation (SAMR) administrative enforcement agencies (See, e.g., [关于公安机关管辖的刑事案件立案追诉标准的规定（二）](#)). The issue of what constitutes “great loss” for calculating criminal thresholds has itself been the subject of [discussion and changing standards over the years](#).

As mentioned in Susan Finder’s November 26, 2019, [blogpost](#), a judicial interpretation on trade secrets is on the SPC’s judicial interpretation agenda for 2020, scheduled for issuance in the first half of the year. Additional guidance may be expected from the procuratorate, SAMR, and Ministry of Public Security to address criminal enforcement issues.

Consistent with the Foreign Investment Law, the Agreement also prohibits government authorities from disclosing confidential business information (Art. 1.9).

The Pharmaceutical-Related Intellectual Property section of the Agreement requires China to adopt a patent linkage system, much as was originally contemplated in the [CFDA Bulletin 55](#), but subsequently did not appear [in the proposed patent law revisions of late 2018](#). Linkage will be granted to an innovator on the basis that a (a) company has a confidential regulatory data package on file with China’s regulatory authorities, and (b) where a third party, such as a generic pharmaceutical company, seeks to rely upon safety and efficacy information of the innovator. The drafters seem to be describing a situation similar to an Abbreviated New Drug Application (ANDA) in the United States under the [US Hatch-Waxman regime](#). According to US procedures, a generic company needs to demonstrate, inter alia, bioequivalent safety and efficacy to an innovator’s pharmaceutical product in order to obtain regulatory approval. Notice is thereafter provided to the patent holder or its licensee of the application

for regulatory approval to address the possibility that the generic company may be infringing the innovator's patent(s).

This linkage regime, if properly implemented, will be an important step for China's struggling innovative pharmaceutical sector. China's proposed linkage regime also extends to biologics (Art 1.11). Taiwan has also recently [introduced a linkage regime](#).

In order to implement the linkage regime, the Agreement requires an administrative or judicial process for an innovator to challenge a generic company's market entry based on the generic company's infringement of a patent held by the innovator. As drafted, the Agreement omits a requirement to amend China's patent law or civil procedure law to permit a court to act when there is an "artificial infringement" by reason of approval of an infringing product for regulatory approval, notwithstanding the lack of any infringing manufacturing, use or sale of the product prior to its introduction into commerce in China. [The lack of a concept of "artificial infringement" could make it especially difficult to implement a civil linkage regime in China](#). The US Chamber of Commerce and the Beijing Intellectual Property Institute (BIPI) had previously recommended revising Article 11 of China's patent law to address this issue. BIPI had noted in its [report](#) that "Lacking of artificial infringement provisions results in lacking [sic] of legal grounds for the brand drug company to safeguard their legal rights." This provision likely reflects continuing turf battles between the courts and China's administrative IP agencies in enforcing IP rights. Implementation of a linkage regime by China's National Medical Products Administration (NMPA) may be possible in the alternative, as a matter of its regulation of pharmaceutical products, however, there may be concerns that NMPA lacks the necessary expertise and independence to properly adjudicate pharmaceutical patent disputes.

The Agreement also does not reference regulatory data protection, which was one of China's WTO obligations, nor does it reference China's efforts to adopt an 'orange book' similar to the US FDA's to govern patent disclosures and regulatory data protection as recommended by CFDA Bulletin 55. This section also reiterates in general terms a commitment by China to provide for [post-filing supplementation of data](#) in pharmaceutical patent matters, which has been a long-standing request of the US reflected in several JCCT commitments. Permitting post-filing supplementation is necessary to support a linkage regime. [In the absence of any meaningful patent grants, China's patent linkage commitments would be a hollow outcome](#).

The Patent section continues the focus on pharmaceutical IP by providing for patent term extension due to regulatory delays for pharmaceutical patents, including patented methods of making and using pharmaceutical products (Art. 1.12). The [draft patent law](#) already provides for patent term extension. The additional encouragement is welcome.

There are no provisions in this Agreement addressing non-pharmaceutical patent concerns. Companies that may have concerns about such issues as: standards-essential patent prosecution or litigation, low-quality patents, patent trolls, procedures involving civil or administrative litigation involving patents or Customs enforcement of patents, China's increasing interest in litigating global patent disputes for standards-essential patents, the

relationship between industrial policy and patent grants, expanding the scope of design patent protection, China's amending its plant variety protection regime and acceding to the most recent treaty obligations, etc., will find that their issues are not addressed.

Section E on "Piracy and Counterfeiting on E-Commerce Platforms" addresses "enforcement against e-commerce platforms". By its terms, it does not specifically discuss e-tailers, online service providers or other third parties.

The text (Art. 1.13) seeks to clarify and update the E-Commerce Law by "eliminat[ing] liability for erroneous takedown notices submitted [presumably by rightsholders] in good faith," extending mandating a time period of 20 days for rightsholders to file an administrative or judicial response to a counter-notification, and penalizing counter-notifications taken in bad faith. Joe Simone ([SIPS](#)) has told me this Article's 20 day period may require an amendment to the E-Commerce law, which currently requires a 10 day period.

Article 1.14 specifically addresses infringement on "major" e-commerce platforms. As part of this commitment, China also agreed to revoke the operating licenses of e-commerce platforms that repeatedly fail to curb the sale of counterfeit and pirated goods. It is unclear from this text if this provision is limited to "major" platforms as the title suggests (in both English and Chinese), or to platforms of any size as the Article itself states. In addition, it is unclear what kind of "operating license" is involved such as a general business license or a license to operate an internet business. Whatever license is involved, this remedy has theoretically been available for some time for companies that sell infringing goods. As I recall, [past efforts to use license revocations](#) to address IP infringement had little success. Smaller enterprises might be able to circumvent the license revocation, perhaps by transferring businesses to another platform. In the past, companies also evaded enforcement obligations by establishing a new business incorporated or operated under their name or that of a relative or friend. This provision, similar to other IP provisions of the Agreement, rehashes earlier JCCT commitments with apparent disregard to lessons previously learned or developments in Chinese law and its economy.

Article 1.14 notes, unlike other Articles which note that the United States has equivalent procedures, tellingly states that the United States "is studying additional means to combat the sale of counterfeit or pirated goods." According to [news reports](#), the USTR has threatened to place Amazon on the list of "notorious markets." Since the publication of the Agreement, Peter Navarro at the White House has also [threatened](#) to crack down on US platforms due to the increased pressure of the trade deal to "combat the prevalence of counterfeit or pirated goods on e-commerce platforms."

The Geographical Indications (GI) Section (F) continues long-standing US engagement with China with respect to its GI system. The Agreement requires that multi-component terms that contain a generic term will not be protected as a GI, [consistent with prior bilateral commitments](#). China will also share proposed lists of GI's it exchanges with other trading partners with the US to help ensure that generic terms are not protected as GI's. The

competing GI systems of the United States and China have been the subject of decades of diplomacy. This Section arguably is intended primarily to show political support for American companies that manufacture or distribute generic food and other products that compete with GI-intensive products such as wine and cheese. It is also likely intended to support US advocacy around these issues at the WTO, WIPO and bilaterally.

Section G requires China to act against counterfeit pharmaceuticals and related products, including active pharmaceutical ingredients (API) and bulk chemicals (Art. 1.18). It is unclear if these APIs need to be counterfeited to be seized, or if they should be liable for seizure because they are low quality or contribute to the manufacturing of counterfeit goods. The issue of API's and bulk chemicals contributing to the production of counterfeit medicine has long been a discussion point between the US and China and [had been the subject of JCCT outcomes](#). Providing API's to counterfeiters is already a crime and civil violation. It can also give rise to administrative liability, although administrative agencies have often not prioritized contributory liability. Thanks to Joe Simone again, for providing me with the benefit of his experiences in this area.

China is also required to act against "Counterfeit Goods with Health and Safety Risks" (Art. 1.19). The text does not explicitly address unsafe products that do not bear a counterfeit trademark or the enforcement agencies that will implement this commitment. Generally, the burden of enforcing against counterfeit products belongs to trademark enforcers, rather than enforcement officials involved in product quality or consumer protection violations. However, the NMPA and/or the Ministry of Industry and Information Technology are specifically named as enforcement agencies in a related provision to this one (Art. 1.18).

This section also seeks to address "Manufacture and Export" of these goods, including "block[ing]" their distribution (chapeau language). It does not elaborate on how such cross-border steps will be undertaken – such as by Customs agents, law enforcement authorities, cooperation between food and drug regulatory agencies, or through bilateral or multilateral law enforcement cooperation.

The failure to clearly designate a responsible agency in these administrative and law enforcement commitments can lead to problems with enforcing IP rights. The academic literature, including that of [Prof. Martin Dimitrov](#), has suggested that when multiple agencies have unclear and overlapping IP enforcement authority, they may be more inclined to shirk responsibility. I hope that coordination mechanisms for these and other outcomes have been well-negotiated to address this issue.

Article 1.20 addresses the destruction of counterfeit goods by Customs, in civil judicial proceedings and in criminal proceedings. Article 1-20(1) requires Customs to not permit the exportation of counterfeit or pirated goods. Due to the growth of e-commerce and B2C exports from China via online platforms, container-sized seizures have become rarer, and the practical consequences of this provision may be limited. Moreover, rightsholders have not often complained of Customs' destruction procedures. A WTO case brought by the United States

involving Chinese customs destruction procedures also failed to identify losses to the United States by reason of China's not disposing of seized goods outside of the channels of commerce consistent with its WTO obligations to seize goods on import (DS362) (see 0% auctioned on imports, below). At that time, when containerized shipment seizure was more common, only 3.7% of imported and exported goods were auctioned by value and 1.9% by shipments.

		2005	2006	2007	Total
By shipment³³⁸					
Exports + imports	Auctioned	4	7	1	12
	Destroyed	143	227	248	618
By value					
Exports + imports	Auctioned	7.10%	3.54%	0.59%	3.70%
	Destroyed	92.90%	96.46%	99.41%	96.30%
Imports only	Auctioned	0%	0%	0%	0%
	Destroyed	100.00%	100.00%	100.00%	100.00%

My former colleague, Tim Trainer, has [identified](#) what is new in the Agreement in Customs as seizures in transit.

The Article does not define what is a “counterfeit” good, or whether manufacturing a product for export may constitute an infringement of the rights of a third party that holds the right in China, which is the so-called [OEM](#) problem. In a typical OEM scenario, the importer in a foreign country owns the relevant rights in the importing country, but not in China.

Article 1.20(2)(d) requires the courts to order that a rightsholder be compensated for injury from infringement in civil judicial procedures, presumably when goods are seized. It is unclear to me why the Agreement does not address the critical issue of affording adequate civil damages generally, why it is limited to the Customs context, and why the Agreement does not generally address the overuse of low [statutory damages](#) in IP-related civil disputes generally.

The Agreement requires that materials and implements which are “predominantly” used in the creation of counterfeit and pirated goods shall be forfeited and destroyed. This “predominant use” test is derived from the TRIPS agreement. It regrettably provides a basis for goods that are demonstrated to have a less than dominant use (e.g., 49.9 percent) to avoid forfeiture and destruction. A better test might have been to encourage China to use a “substantial use” test, or a test based simply on use in commercial-scale counterfeiting and piracy. IP owners may wish to consider using judicial asset preservation measures by the courts in order to address issues involving the seizure of goods that are also used for legitimate manufacturing purposes.

Destruction of counterfeit goods by Market Supervision Bureaus in administrative trademark enforcement proceedings is not discussed in this Agreement and has been an area of concern by rightsholders in the past. This omission is concerning as China's administrative enforcement of trademarks has historically been a highly active area of IP enforcement on behalf of foreign rightsholders.

Section H addresses the bad-faith registration of trademarks. No specific action is required by China in the text. I have previously discussed [the importance of expanding concepts of "good faith" in IP protection in China](#) with hopes that it would be addressed in resolving the trade war and had specifically noted two issues addressed in the Agreement: bad-faith registration of trademarks, and ensuring that employees were covered objects of China's trade secret law. Certain steps have already been [undertaken](#) by relevant agencies to address the important issue of bad faith trademark registrations, including: supporting oppositions/invalidation against marks filed in bad faith and with no intention to use (Article 4 of the Trademark Law); addressing the problem of trademark agencies that knowingly facilitate those bad faith trademark filings under Article 4, and imposing administrative fines against bad faith trademark applicants for a purpose other than use or judicial punishments against pirates that bring trademark infringement lawsuits against brand owners victimized by bad-faith registrations.

Given the lack of identified concrete next steps in this important area, China may not be planning to do little more legislation in this area in the near future, and/or waiting to better evaluate the impact of recently implemented measures and policies, including provisions allowing [fines](#) to be imposed against trademark pirates. Joe Simone has suggested that one helpful measure to consider in the future might be for courts to award compensation for legal and investigation fees in bad faith cases, ideally by the same courts handling invalidation and opposition appeals.

Section I requires the transfer of cases from administrative authorities to "criminal authorities" when there is a "reasonable suspicion based on articulable facts" that a criminal violation has occurred. "Criminal authorities" are not defined. This could include the Ministry of Public Security and/or the Procuracy. The intent behind this provision is likely to ensure more deterrent penalties for IP violations and avoid the use of administrative penalties as a safe harbor to insulate against criminal enforcement. This problem of low administrative referrals is an old and thorny one. In bilateral discussions of the last decade, we would often inquire about the "administrative referral rate" of China, which is the percentage of administrative IP cases that were referred to criminal prosecution, [which has historically been quite low](#). See [National Trade Estimates Report \(2009\)](#) at pp. 101-102. However, if administrative agencies are required to transfer cases to the Public Security Bureau or Procuratorate, it will have little impact unless these agencies accept the case and initiate prosecutions. A loophole in this text may be that it does not mandate that a case is accepted after it has been referred by administrative agencies, thereby risking non-action by prosecutors. As administrative agencies have more limited investigative powers, the evidence provided by administrative authorities may also often be insufficient to initiate a criminal investigation.

Article 1.27 requires China to establish civil remedies and criminal penalties to “deter” future intellectual property theft or infringements. These requirements are also found in the TRIPS Agreement. The English language text of the Agreement conflates the role of civil remedies and criminal penalties and their deterrent impact. Civil remedies should, at a minimum, deter or stop (制止, 阻止) the defendant from repeating the infringing act, whereas criminal remedies might also provide broader social deterrence (威慑 as in nuclear “deterrence”, which is found in the [Chinese](#) version of the Agreement). This paragraph and the Agreement more generally do not underscore the important role of compensatory civil damages in providing deterrence.

The Agreement also requires China to impose penalties at or near the maximum when a range of penalties is provided and to increase penalties over time.

These provisions regarding criminal enforcement generally reflect concerns articulated in the unsuccessful WTO IP case the US brought against China to lower its trademark and copyright criminal thresholds (DS362). However, the lost lesson from that case is that criminal thresholds are not as important as other factors in creating deterrence. Prosecutors may still decline in fact to prosecute cases, even if they are required by law to accept cases. Law enforcement may also lack adequate resources. Judges may also have discretion in imposing sentences. The calculation of the thresholds themselves, whether based on illegal income or harm caused, may be difficult to assess. The civil system also needs to play a robust role in creating respect for IP. The proof of the limited impact of lowering criminal thresholds is that criminal IP cases significantly increased in China after it lost the WTO case. After the United States “lost” that WTO case, the number of criminal IPR cases rapidly increased to [a high of approximately 13,000 in 2013](#). Whether the Chinese data of 2013 was calculated to include only IPR-specific crimes or crimes that may encompass IPR-infringing products (such as involving substandard products), this was a dramatic increase from approximately 2,684 criminal IP cases or 907 IPR infringement crimes from 2007. The bottom line is that simply increasing criminal cases through lower thresholds may not be enough to create a healthy IP environment.

Another issue of concern is that foreigners have often been named as defendants in serious civil or criminal cases. The first significant criminal copyright case in China involved [American defendants distributing counterfeit DVD's](#). More recently, patent preliminary injunction cases were granted in favor of two different Chinese entities in two cases against American defendants ([Micron and Veeco](#)). The largest patent damages case involved the first instance decision in [Chint v. Schneider Electric \(330 million RMB\)](#). The NDRC investigation of Qualcomm similarly pioneered [high antitrust damages in an IP licensing matter](#). In many instances, the final decisions in pioneering cases where foreigners lost were also never published. Given this track record, we might not want to be advocating for harsher enforcement in the absence of greater commitments to due process and transparency.

The Agreement also pioneers by providing for expeditious enforcement of judgments (Article 1.28). According to Susan Finder, the SPC already lists judgment debtors in its database. This is

a welcome area of engagement and should also be supported by continuing transparency in this area.

Over the past several years, there has been an increasing incidence of multijurisdictional IP disputes, particularly in technology sectors. The Agreement does not address the problems arising from these cases. It does not mention that China does not enforce US judgments, although the US has begun enforcing some Chinese money judgments, nor does it address the practice of many Chinese courts to fast track their decision making to undercut US cases. Generally, US lawyers cannot conduct discovery in China and formal international procedures to collect evidence are slow. Both Chinese and US courts often rarely apply foreign law, even when such law may be more appropriate to resolution of a dispute. Based on a recent program I attended at Renmin University, it also appears likely that Chinese courts will issue their own anti-suit injunctions soon. The Agreement also does not require anything further in terms of judicial assistance in gathering evidence. These are areas for potential cooperation as well as confrontation. Indeed [Berkeley and Tsinghua have held a continuing series of conferences on this topic](#). At the recent Renmin University conference, British, German, US and Chinese judges exchanged their views on these topics in a cordial and productive manner. It is my hope that this topic is an area of collaboration, not confrontation.

Regarding copyright, Article 1.29 provides for a presumption of ownership in copyright cases and requires the accused infringer to demonstrate that its use of a work protected by copyright is authorized. It would also have been helpful if the US and China had discussed the problem of title by title lawsuits in China, which has also increased costs of litigation through requiring multiple non-consolidated lawsuits for one collection of songs, photos or other works. One Chinese academic confided in me that the current practice of requiring that each individual title be the subject of an individual lawsuit was not the original practice in China's courts and that the old practice was more efficient for both the courts and rightsholders.

The Chinese and English texts of the Agreement also differ to the extent that the English text refers to the US system of related rights, while the Chinese text refers to the Chinese (and European system) of neighboring rights.

In terms of civil procedure, Article 1.30 permits the parties to introduce evidence through stipulation or witness testimony under penalty of perjury, as well as requiring streamlined notarization procedures for other evidence. China's ability to implement "penalty of perjury" submissions is limited by China generally lacking a concept of authenticating a document under penalty of perjury, which also hampers lawyer's ability to represent clients by powers of attorney. The implementation and impact of this provision is unclear.

Article 1.31 permits expert witness testimony. Expert witnesses are already permitted under existing Chinese law, although the trend appears to favor greater use of them. Moreover, Chinese courts have been expanding the role of expert technology assessors to provide support for technologically complex cases. Once again the implementation and impact of this provision

is uncertain, although we can expect further developments from the courts in this area, particularly in [anticipated guidance concerning evidence in IP cases](#).

Article 1.35 requires that China adopt an action plan to implement the IP chapter of the Agreement. In an additional welcome development, the Agreement also supports reinstatement of cooperative relationships with the USPTO, the USDOJ and US Customs.

Chapter 2 addresses US allegations regarding forced technology transfer. It prohibits China from seeking technology transfer overseas consistent with its industrial plans subject to the qualifier that such plans “create distortion.” Distortion is not defined.

Other provisions prohibit require technology transfer as a condition of market access, using administration or licensing requirements to compel technology transfer and maintaining the confidentiality of sensitive technical information. These are consistent with the recently enacted [Foreign Investment Law and other legislation](#).

The Technology Transfer provisions do not address whether the provisions that were removed from the [TIER](#) are now governed by China’s Contract Law and proposed Civil Code provisions on technology transfer contracts. Clarity on this important issue could help support the autonomy of parties to freely negotiate ownership of improvements and indemnities. The Agreement also does not address the regulation of licensing agreements by antitrust authorities or [under China’s contract law or proposed civil code for the “monopolization” of technology](#). The Civil Code provisions are now pending before the NPC and could have appropriately been raised as “low hanging fruit” in this Agreement. Antitrust concerns in IP had also been raised by several parties in the [301 report concerning IP concerns](#) (at pp. 180-181). Hopefully, these issues will be decided in the Phase 2 Agreement.

Some additional hope for IP commercialization is afforded by the commitments by China in the Agreement to increase its purchases of services by \$37.9 billion from the United States during the next two years, which include purchases of IP rights as well as business travel and tourism, financial services and insurance, other services and cloud and related services. Considering the central role played by forced technology transfer in this trade war, it was to be hoped that a specific commitment on purchases of IP rights might have been secured.

Concluding Observations

It is often difficult to discern the problems that the Agreement purports to address and/or the appropriateness of the proposed solution(s). In some instances, it also appears that USTR [dusted off old requests](#) to address long-standing concerns that may also not have high value due to technological and economic changes. For example, it is unclear to me if commitments in the Agreement regarding end-user piracy (Art. 1.23) by the government are as necessary today when software is often delivered as an online cloud-based service and not as a commodity. The leading software trade association’s position in the [301 investigation](#) did not mention end-user piracy as a top-four priority (p. 4). Moreover, China had already been

conducting software audits for several years and piracy rates had been declining. The commercial value of these commitments is also uncertain under China's recent "[3-5-2 Directive](#)", where the Chinese government is obligated to replace foreign software and IT products completely with domestic products within the next three years. The Agreement already contains commitments for China to increase its share of cloud-based services. The issue does have a long and sad history. The U.S. Government Accountability Office [had calculated 22 different commitments](#) on software piracy in bilateral JCCT and economic dialogues between 2004 and February 2014.

Among the more [anachronous provisions](#) of the Agreement are the five separate special administrative IP campaigns that the Agreement mandates. The general consensus from a range of disciplines and enforcement areas (e.g., IP, counterfeit tobacco products, pollution, and taxation) that campaigns result in "[short term improvements, but no lasting change.](#)" Moreover, the focus of these campaigns, including Customs enforcement and physical markets appears outdated due to the growth of e-commerce platforms.

The situation was predictable: "[late-term administrations may ... be tempted to condone campaign-style IP enforcement, which can generate impressive enforcement statistics but have limited deterrence or long-term sustainability.](#)" The Administration took this one step further, with enforcement campaign reports timed to be released during the various stages of the Presidential campaign. Here are some of the administrative campaign reports we can expect, with some corresponding milestones in the Presidential campaign season:

March 15: China is required to publish an Action Plan to strengthen IP protection and to report on measures taken to implement the Agreement and dates that new measures will go into effect. (Art. 1.35)

May 15: China is required to substantially increase its border and physical market enforcement actions and report on activities by Customs authorities within three months (or by April 15, 2020) (Art. 1.21).

May 15: China is required to report on enforcement activities against counterfeit goods that pose health or safety risks within four months and quarterly thereafter (Art. 1.19).

June 15: China is required to report on enforcement at physical markets within four months and quarterly thereafter (Art. 1.22). This report will coincidentally be released at the same time as the Democratic Party Convention.

August 15: China is required to report on counterfeit medicine enforcement activity in six months and annually thereafter (Art. 1.18). This report will coincidentally be released approximately one week before the Republican Convention.

September 15: China is required to report on third party independent audits on the use of licensed software within seven months, and annually thereafter (Art. 1.23).

Also, a quarterly report is required regarding the enforcement of IP judgments (Art. 1.28). There is no explanation provided in the Agreement for the timing of each of these reports, their sequential staging or why the usual date for release of government IP reports (April 26) is not being used.

There are many other important IP areas not addressed in the Agreement. The Agreement offered a missed opportunity to support judicial reform, including China's new national appellate IP court, the new internet courts as well as local specialized IP courts at the intermediate level. The Agreement also entails no obligations to publish more trade secret cases, to make court dockets more available to the public, and to generally improve transparency in [administrative](#) or [court](#) cases, which might have made the Agreement more self-enforcing. [Due to the relatively small number of civil and criminal trade secret cases](#) and recent legislative reforms, the greater publication of cases would be very helpful in assessing the challenges in litigating this area and China's compliance with the Agreement. The new appellate IP Court will be especially critical to the effective implementation of the important changes in China's trade secret law as well as the implementation of the patent linkage regime. The patent linkage provision also similarly neglects to describe the critical role of the courts in an effective linkage regime. The Agreement to a certain extent memorializes [the ongoing tensions between administrative and civil enforcement in China](#) and regrettably reemphasizes the role of the administrative agencies in managing IP through campaigns and punishment.

The trade war afforded a once in a lifetime opportunity to push for market mechanisms in managing IP assets through a reduced role for administrative agencies and improved civil remedies in China's IP enforcement regime. A high cost was paid in tariffs to help resolve a problem that the Administration [estimated](#), or [exaggerated](#), to be as high as [600 billion dollars](#). The reforms in the Agreement hardly total up to addressing a problem of that magnitude, and in many cases appear more focused on yesterday's problems. While the continued emphasis on administrative agencies and limited focus on civil remedies is disappointing, there are nonetheless many notable IP reforms in the Agreement in addition to legislative reforms already delivered. I hope that a Phase 2 agreement will deliver additional positive changes that also address the challenges of the future

Please send me your insights, comments, criticisms or corrections! Happy Spring Festival!

Please send in any comments or corrections!

Revised 1/23/2020, 1/27/2020



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Trade Wars: A New Beginning?

Why is this year's [Special 301 Report](#) (the "Report") from USTR (April 29, 2019) different from prior reports? In prior years, this report often repeated materials found elsewhere, such as in the [National Trade Estimate Report](#) (March 2020). This year's Report reflects the Phase 1 Trade Agreement (January 15, 2020) (the "Agreement") and the subsequent Chinese [Action Plan](#) (April 20, 2020). More importantly, it also suggests how the US might wish to see the implementation of the Agreement and negotiate a Phase 2 Agreement. There are a number of welcome surprises that suggest a new beginning.

Most importantly, the Report demonstrates a renewed commitment to the rule of law and the role of markets in protecting IP. As noted in many of the [postings](#) of this [blog](#), these were areas that I found seriously deficient in the Agreement. The Agreement revitalized administrative campaigns and enforcement mechanisms and encouraged punitive mechanisms. It generally underemphasized compensatory damages and other civil remedies, including appropriate civil procedures, and did not adequately emphasize the need to let market mechanisms govern IP creation and commercialization.

The Report addresses issues that the Phase 1 Agreement did not, such as "poor quality patents", "the presence of competition law concepts in the patent law" and challenges faced in trademark prosecution. The Report also notes that there are "obstacles in establishing actual damages in civil proceedings," including a lack of "preliminary injunctive relief." These are useful statements, but even more important are the references to judicial procedures. The Report states that "Chinese judicial authorities continue to demonstrate a lack of transparency", including publishing only "selected decisions rather than all preliminary injunctions and final decisions." In addition, "administrative enforcement authorities fail to provide rights holders with information." The issue of transparency has been repeatedly reported on in this [blog](#) as key to effective oversight of the Agreement. The Report also notes that "[a] truly independent judiciary is critical to promote the rule of law and to protect IP rights." The Report mentions the need for transparency in China's IP system five separate times. By comparison, Chapter 1 of the Agreement mentions transparency once (with respect to Geographical Indications), and not once with respect to judicial or administrative proceedings.

The Report comes down particularly hard in favor of legal process in its discussion on the social credit system, particularly the CNIPA/NDRC et al, Memorandum of Cooperation on Joint Disciplinary Actions for Seriously Dishonest Subjects in the Field of Intellectual Property (Patent) [关于对知识产权（专利）领域严重失信主体开展联合惩戒的合作备忘录](#)》 (the “Dishonesty Measures”) (December 5, 2018) by noting that “these measure lack critical procedural safeguards, such as notice to the targeted entity, clear factors for determinations, or opportunities for appeal.” The Report further concludes that “The United States objects to any attempt to expand the ‘social credit system’ in the field of IP.”

This statement suggests a further distancing of the administration from rhetoric and outcomes of December 2018-May 2019 when the primary goal appeared to be strong legal commitments to punish IP infringement without explicit consideration of due process. The Dishonesty Measures were likely enacted to appease US concerns on IP on the margins of the G-20 summit (November 30- December 1, 2018). The concern then appeared to be that they were not sufficiently well-codified, not that they lacked due process. Larry Kudlow [said](#) after the G-20 in 2019, that IP-related provisions (most likely the Dishonesty Measures) need to be “codified by law in China” and should not just be a “state council announcement.”

I am personally gratified to see the reintroduction of concerns over due process and rule of law into the Administration’s discourse of IP, although I believe the complexity of the relationship between IP protection and the social credit system may require further study. I suspect that it may be difficult for rightsholders commercializing their rights or seeking to enforce judgments to completely distance themselves from the social credit system.

The Report also notes that the US had initiated dispute resolution proceedings against China at the WTO regarding China’s technology licensing regime and that China revised the measures the US had challenged in March 2019. The Report concludes that “[t]he significance of these revisions is under review.” The Report does not note that the US had agreed to suspend the WTO case due to these legislative revisions, until [May 1, 2020](#), at which time (the date of writing of this blog) it needs to decide whether or not to reinstate this case. Perhaps USTR did not want to show its hand regarding what it would do effective May 1, 2020 – two days after the Report was issued. Presumably, the United States will seek an extension of time in light of the continuing “review.”

Whatever decision is made at the WTO, the US team deserves credit for the legislative changes in licensing, forced tech transfer and trademarks that were made in the spring of 2019 and for re-emphasizing due process, the market, and rule of law, in the Report and in United States advocacy for better IP protection in China.



Two Months In: Assessing Implementation of the U.S.-China Phase One Trade Deal

By Wendy Cutler and James Green



(Official White House Photo by Shealah Craighead)

April 15th, 2020

April 14 marked the two-month anniversary of the entry into force of one of the most high-profile trade agreements ever negotiated, the U.S.-China Phase One trade deal. The world has changed dramatically over the past 60 days, with the outbreak of the COVID-19 pandemic, and overall U.S.-China relations continue to deteriorate. Nevertheless, Washington and Beijing have maintained their efforts to implement the detailed provisions of the trade accord.

It's premature to judge whether the agreement has succeeded in achieving its objectives of further opening and promoting structural reforms in China's economy while rebalancing bilateral trade flows. However, it's not too soon to offer perspectives on implementation thus far. It's a mixed picture, with some encouraging progress but also some missed deadlines and serious doubts on whether the purchasing commitments can be met. The fallout from the coronavirus outbreak obviously plays a role here, but the uneven record also reflects the long-standing challenges of implementing any complex trade agreement.

After a year and half of tariff hikes and tense negotiations, the United States and China reached a trade deal last December, which, in the words of the Office of the United States Trade Representative (USTR), "Requires structural reforms and other changes to China's economic and trade regime in the areas of intellectual property, technology transfer, agriculture, financial services, and currency and foreign exchange." It also featured Chinese commitments to purchase substantially more U.S. goods and services during 2020 and 2021, with specific values assigned to categories of products. USTR emphasized that it was an "historic and enforceable" deal, with an unprecedented dispute resolution system providing the possibility for reimposition of

terms should other solutions not be found.

GLOBAL NETWORK

Even in the face of the coronavirus outbreak and the resulting economic downturn, Chinese officials have followed through on many commitments. Most notably, Beijing has checked the box when it comes to easing agricultural restrictions on U.S. exports of poultry, beef, pet food, and potatoes, among other products. There is also good news on the financial services front. China's Securities Regulatory Commission announced it was scrapping limits on foreign ownership and granted approvals to Goldman Sachs and Morgan Stanley in late March to increase their stakes in securities joint ventures to 51 percent — putting both on the road to wholly foreign-owned companies. This follows the granting of a license to JPMorganChase in December 2019 for its wholly owned securities business in China. On intellectual property rights protection (IPR), there has also been some progress. In March, the Supreme People's Court issued a draft IPR enforcement plan and proposed a handful of judicial interpretations addressing IP protections and procedures. Lastly, Chinese authorities reportedly have been granting regular tariff exclusions to imports of U.S. agriculture and manufactured goods.

Despite these encouraging signs, the implementation record is not as clear nor necessarily as positive in other areas. Recognizing that we may not have a full picture, there has been a lack of visible progress in a number of areas, including: streamlining agriculture biotechnology approvals for bio-engineered seeds/crops; the issuance of a detailed IPR action plan; and lifting ownership and scope-of-business restrictions for U.S. insurance firms by April 1. Some of these adjustments require legislative or regulatory changes at a time when Chinese lawmakers and economic authorities, understandably, have had a severely circumscribed ability to meet. The National People's Congress has been pushed back for several months from its usual March timeframe, for instance. But it's important to keep in mind that the legislature's standing committee meets every other month and has the authority to issue laws on behalf of the full body.

Despite some high-profile purchases of soybeans, pork, and wheat this year, it is unclear where China stands on meeting its commitments to purchase an additional \$200 billion of U.S. goods and services beyond 2017 levels over the next two years. This target — a unique feature of the trade agreement — was already a stretch under the best of circumstances, but the coronavirus outbreak pushed this obligation to the cusp of the impossible. According to just-published Chinese trade data, Chinese imports for the first quarter of this year fell by 2.9 percent over 2019. And even once Chinese demand picks up, U.S. exporters will face challenges shipping the amount of goods specified in the agreement as the pandemic continues to spread across the United States.

In light of certain shortcomings in implementation, why hasn't the Trump Administration invoked the dispute resolution procedures against China that were so highly touted at the deal's conclusion? There seem to be three reasons. First, both governments are rightfully consumed with addressing the public health emergencies and economic fallout from the coronavirus outbreak. Second, politics plays a role, with both Presidents Trump and Xi sharing an interest in showing that the agreement is working and preferring, for the moment at least, not to provoke each other on this aspect of the bilateral relationship.

Finally, it's becoming apparent that assessing compliance is often not a black or white issue. There are typically shades of grey in implementation of trade agreements, particularly in light of ambiguities in the legal texts. In many cases, calls need to be made on whether things are moving in the right direction and thus quiet conversations would be the most useful in keeping things on track versus going down the dispute settlement route. One additional consideration here: to pursue dispute resolution cases, on-the-ground information from U.S. companies is critical. Yet, U.S. companies have historically been reluctant to report unfair treatment in China to the U.S. Government for fear of retribution. Given the publicity around trade with China, we suspect firms will be extra cautious in bringing forward such complaints, coupled with a fear that the Administration may impose more tariffs.

As we enter into the third month of the U.S.-China trade agreement, we can expect continuing ups and downs in implementation. That's only natural for an agreement with seven chapters of detailed commitments. At the end of the day, however, the agreement won't be judged solely by technical compliance with specific provisions. Rather, the fundamental question will be whether the agreement achieved its objectives of opening and reforming the Chinese economy while rebalancing the bilateral trade relationship. The jury is still out.

This article is by Asia Society Policy Institute Vice President Wendy Cutler and McLarty Associates Senior Advisor James Green.

The “China, Inc.” Challenge to Global Trade Governance

Mark Wu*

In the past decade, the World Trade Organization has adjudicated over forty disputes between China and other powerful economies. These cases are often trumpeted as a sign of the enduring strength of the trade regime and the efficacy of international law in managing geopolitical tensions associated with China's rise. This Article suggests that this positive assessment obfuscates dangers lurking on the horizon. It explains why the rise of China presents a major challenge to the multilateral trade regime. At the heart of this challenge is the fact that China's economic structure is sui generis, having evolved in a manner largely unforeseen by those negotiating WTO treaty law.

As a result, the WTO can deal effectively with only a limited range of disputes—those in which Chinese policies largely resemble elements of other alternative economic structures. Outside of this set of issues, the WTO faces two very different but equally serious challenges. The first is reinterpreting certain legal concepts to adapt and fit an unforeseen Chinese context. The second is deciding whether to expand the scope of its legal rules to accommodate issues that currently fall outside its jurisdiction. This Article explores options for meeting these challenges. It suggests that the most likely outcome is one in which China's rise will exacerbate the diminishing centrality of WTO law for global trade governance.

INTRODUCTION

The World Trade Organization is widely heralded as a model for how international law can manage and mitigate tensions between states amid a changing geopolitical order.¹ When it comes to the rise of China—arguably, the most significant geopolitical challenge of our times—this might appear to be the case. A cursory glance gives rise to optimism.

Consider the following facts: in 1978, China accounted for less than 1% of global trade.² By 2000, its share grew to 3%—an impressive gain, but by

* Assistant Professor of Law, Harvard Law School. Many thanks to William Alford, Gabriella Blum, Che Pizhao, Ding Ding, Noah Feldman, Paul Gewirtz, Jack Goldsmith, Benjamin Liebman, Liu Jingdong, Petros Mavroidis, Curtis Milhaupt, Mariana Prado, Intisar Rabb, Holger Spamann, Alan Sykes, Chantal Thomas, Joel Trachtman, Yang Guohua, and David Zaring for their excellent insights and suggestions on earlier drafts of this Article. This project benefited from comments and suggestions provided by participants at presentations given at Columbia Law School, the University of Toronto Law School, the American Society of International Law Mid-Year Research Forum, the Chinese Academy of Social Sciences Eleventh International Law Forum, Harvard Law School, and UC Berkeley School of Law. Mark Jia provided superb research assistance for which I am immensely grateful.

1. See John Ikenberry, *The Rise of China and the Future of the West*, 87 FOREIGN AFF., Jan.–Feb. 2008, at 23.

2. In 1978, China ranked thirty-second in the world in terms of its trade volume. See Xiaojun Li, *China as a Trading Superpower*, in CHINA'S GEOECONOMIC STRATEGY 25, 25 (Nicholas Kitchen ed., 2012).

no means dominant.³ A decade later, its share had more than tripled,⁴ and China became the world's top exporter.⁵ In 2013, China surpassed the United States to become the world's largest overall trading nation.⁶ Depending on how one counts, the Chinese economy now ranks as the largest or second-largest in the world.⁷

Not surprisingly, as China's importance in global trade has increased, so too has the number of WTO disputes concerning China. Between 2006 and 2015, forty-four cases—representing over a quarter of the WTO's caseload—have involved China as a complainant or a respondent.⁸ Only the United States and the European Union (“EU”) outrank China in active disputes.⁹

Government officials give the impression that WTO dispute settlement is effective. In the 2012 U.S. presidential election, President Barack Obama boasted that his administration had filed more WTO cases against China in his first term than his Republican predecessor had during the preceding eight years.¹⁰ Recent high-profile examples include the *China—Raw Materials*¹¹ and *China—Rare Earths*¹² cases, in which the WTO ruled against Chinese export controls on inputs critical to high-tech industries.

Nor has the WTO simply served as a forum for Western governments to vindicate their rights against China. The reverse is increasingly true, but

3. Valentina Romei, *China and US Battle for Trade Leadership*, FIN. TIMES (Jan. 10, 2014, 06:08 AM), <http://blogs.ft.com/ftdata/2014/01/10/china-and-us-battle-for-trade-leadership/>.

4. World Trade Organization, *World Trade Report 2011*, at 31 (2011).

5. See John Miller & Marcus Walker, *China Detronizes Germany as Top Goods Exporter*, WALL ST. J. (Jan. 6, 2010), <http://www.wsj.com/articles/SB126272143898416853>; see also Steven Mufson, *China Surpasses Germany as World's Top Exporter*, WASH. POST (Jan. 11, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/10/AR20100111002647.html>.

6. Angela Monaghan, *China Surpasses US as World's Largest Trading Nation*, GUARDIAN (Jan. 10, 2014), <https://www.theguardian.com/business/2014/jan/10/china-surpasses-us-world-largest-trading-nation>.

7. See, e.g., *China Set to Overtake U.S. as Biggest Economy in PPP Measure*, BLOOMBERG NEWS (Apr. 30, 2014), <http://www.bloomberg.com/news/2014-04-30/china-set-to-overtake-u-s-as-biggest-economy-using-ppp-measure.html>; *Crowning the Dragon*, ECONOMIST (Apr. 30, 2014), <http://www.economist.com/blogs/graphicdetail/2014/04/daily-chart-19>; Hugo Duncan & David Martosko, *America Usurped: China Becomes World's Largest Economy – Putting USA in Second Place for the First Time in 142 Years*, DAILY MAIL (Oct. 8, 2014), <http://www.dailymail.co.uk/news/article-2785905/China-overtakes-U-S-world-s-largest-economy-IMF-says-economy-worth-17-6trillion-America-falls-second-place-time-1872.html>.

8. Calculation based on information provided at *Chronological List of Disputes Cases*, WORLD TRADE ORGANIZATION: TRADE TOPICS: DISPUTE SETTLEMENT, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited May 22, 2016) [hereinafter WTO Dispute List].

9. *Disputes by Country/Territory*, WORLD TRADE ORGANIZATION: TRADE TOPICS: DISPUTE SETTLEMENT: THE DISPUTES, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited May 22, 2016) [hereinafter WTO Disputes by Country/Territory].

10. See Mark Landler, *In Car Country, Obama Trumpets China Trade Case*, N.Y. TIMES (Sept. 18, 2012), <http://www.nytimes.com/2012/09/18/us/politics/in-car-country-obama-trumpets-china-trade-case.html>.

11. Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter *China — Raw Materials*].

12. Appellate Body Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014) [hereinafter *China — Rare Earths*].

receives less attention in the Western media. In 2014, the WTO Appellate Body¹³ ruled for China in two different cases, finding that the U.S. Department of Commerce violated WTO commitments when imposing trade remedies against several Chinese products.¹⁴

All of this has fostered a perception that all is well with the WTO, at least as far as dispute settlement is concerned.¹⁵ Optimists paint the growing number of China-related cases in a positive light. Emblematic of this viewpoint is Professor Ka Zeng’s suggestion that “the growing utilization of the [WTO Dispute Settlement Mechanism] may have helped to channel the tensions surrounding the bilateral trade relationship and prevented intense interest group pressure from impairing overall U.S.-China trade relations.”¹⁶ This is undoubtedly true. But it obfuscates another growing tension.

What academics and other commentators have missed (or at least, have avoided mentioning) is that since the Great Recession, the pattern of WTO cases among the major trading powers—the United States, the European Union, Japan, and China—has shifted dramatically. Until the mid-2000s, the three major advanced economies (the United States, the EU, and Japan) regularly brought cases against one another.¹⁷ But since 2009, disputes among these established powers have virtually come to a halt. Only three such complaints have been filed, and only one has proceeded to requiring that a WTO Panel be constituted.¹⁸

Instead, WTO disputes among major powers almost exclusively involve China. Between 2009 and 2015, China-related cases accounted for 90% of

13. The Appellate Body is a standing body of seven jurists appointed for four-year terms whose role is to hear appeals of decisions of WTO Panels. For more information, see *Appellate Body*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited May 22, 2016).

14. Appellate Body Report, *United States — Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/AB/R (July 7, 2014); Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (Dec. 18, 2014).

15. See, e.g., Michael Froman, U.S. Trade Representative, Keynote Address at the WTO Public Forum (Oct. 1, 2013) (“The dispute settlement body of the WTO is second to none as a respected forum for the resolution of international frictions.”).

16. Ka Zeng, *China, America, and the WTO*, DIPLOMAT (Feb. 7, 2013), <http://thediplomat.com/2013/02/china-america-and-the-wto/>.

17. From 1995 to 2005, over 40% of the cases filed by the United States were against Japan, the EU, or one of its member states. Nearly half of the cases filed by the EU were against the United States or Japan, and two-thirds of the cases filed by Japan were against the United States. Calculations based on information provided by WTO Disputes by Country/Territory, *supra* note 9.

18. The Panel is the first-instance body that adjudicates the claim once it is clear that the mandatory consultations have not succeeded. The three complaints are: Request for Consultations by the United States, *European Communities — Certain Measures Affecting Poultry and Poultry Meat Products from the United States*, WT/DS389/1 (Jan. 16, 1989); Request for Consultations by the European Union, *United States — Anti-dumping Measures on Imports of Stainless Steel Sheet and Strip in Coils from Italy*, WT/DS424/1 (Apr. 1, 2011); Request for Consultations by the European Union, *United States — Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/1 (Dec. 19, 2014). A Panel was composed for the last dispute on April 22, 2015.

the cases brought by the 4 largest economies against each other.¹⁹ China's rise is thus reconfiguring WTO dispute settlement in a potentially worrying manner. Even when a status quo power's legal interest aligns with China's, it has not joined forces with China to challenge its ally.²⁰ The reverse also holds true.²¹ Instead, since the Great Recession WTO litigation has increasingly bifurcated into an "Established Power(s) versus China" dynamic.

While trade diplomats do not acknowledge it publicly, the WTO is struggling to adjust to a rising China. The objective of this Article is to describe and assess this challenge. To be clear, the problem is not the high volume of cases involving China. As China's share of global trade rises, it is only natural that its share of WTO disputes should as well.²² Moreover, the WTO continues to have a larger volume of cases involving the United States and the EU; yet, no one quietly speaks of needing to adjust to an American or European challenge to the institution. Instead, the nature of this challenge is subtler.

The root of the challenge, I argue, lies with China's distinctive economic structure. Some commentators refer to this structure as Chinese state capitalism.²³ This terminology suggests that the Chinese economy resembles other economies, such as Russia's or Brazil's, that are also labeled as state capitalist. I contend, however, that China's economy is fundamentally different—even unique. Therefore, I resist adopting the moniker of "state capitalism" in this Article. Instead, I employ the shorthand reference of "China, Inc." to describe the Chinese economy.²⁴

What distinguishes China, Inc.? Contradictions pervade the Chinese economy today. While one might think of the economy as state-dominated, private enterprises drive much of China's dynamic growth.²⁵ In addition,

19. Calculation based on WTO Dispute List and WTO Disputes by Country/Territory, *supra* notes 8–9.

20. Consider, for example, the *EU — Renewable Energy* dispute, in which neither Japan nor the United States joined China in challenging the EU's local content requirement for renewable energy, even though both had brought similar cases elsewhere. See Request for Consultations by China, *European Union and Certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452/1 (Nov. 7, 2012).

21. Similarly, China did not join the U.S. complaint in challenging India's local content requirement in the *India — Solar Cells* dispute. See Requests for Consultations by the United States, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/1 (Feb. 11, 2013).

22. However, note that China's share of WTO disputes is disproportionately large as compared to its share of world trade. In 2013, China accounted for 11% of global trade. World Trade Organization, *International Trade Statistics 2015*, at 44 (2015). Yet China accounted for 38% of WTO disputes between G20 countries during 2009–2015. Calculation based on WTO Dispute List and WTO Disputes by Country/Territory, *supra* notes 8–9.

23. See, e.g., IAN BREMMER, *THE END OF THE FREE MARKET* 128–45 (2010); USHA C. V. HALEY & GEORGE T. HALEY, *SUBSIDIES TO CHINESE INDUSTRY* (2013); ANDREW SZAMOSSZEGI & COLE KYLE, *AN ANALYSIS OF STATE-OWNED ENTERPRISES AND STATE CAPITALISM IN CHINA* (2012).

24. Others have also used the term "China, Inc." to describe the unique organization of the Chinese economy. See, e.g., TED FISHMAN, *CHINA, INC.* (2006); Bill Powell, *China, Inc. Is on a Spending Spree Abroad*, NEWSWEEK (Apr. 4, 2016), <http://www.newsweek.com/chinese-foreign-investments-starwood-hotels-443706>. I elaborate upon the exact meaning of the term, as I employ it, in Part I *infra*.

25. See generally NICHOLAS LARDY, *MARKETS OVER MAO* (2014).

economic intervention does not always flow through the state. Alongside the state is the Chinese Communist Party (“Party”), a separate political actor that plays an active role in the management of state-owned enterprises (“SOEs”).²⁶ The economy embraces market-oriented dynamics, yet it is not strictly a free-market capitalist system. Networked hierarchies and embedded relationships exist among businesses, but not necessarily in the way they operate elsewhere in the world.²⁷

Challenges arise from the fact that the contours of today’s China, Inc. include elements that many outsiders did not anticipate at the time of China’s WTO accession. This may seem remarkable, given that China joined the WTO just fifteen years ago. Nevertheless, over this short period, the Chinese economy has undergone an impressive transformation. As I will discuss, key elements of the Chinese economy have emerged that did not exist, at least in their present forms, in 2001. These elements make it difficult to determine certain legal issues under WTO rules—such as whether an entity is associated with the state, or how to characterize the overall form of China’s economy. These elements also raise the stakes associated with certain activities that fall outside the scope of the WTO’s present jurisdiction. Consequently, the WTO rules, as written, are not fully equipped to handle the range of economic problems associated with China’s rise.

Consider two examples. First, in an economy with a complicated web of relationships between the state, the Party, and firms with links to one or both actors, how do we determine what entities count as an extension of the state? What if the links run through only the Communist Party, but not the state? What if the links are only informal, and no direct control mechanisms exist? Should WTO law treat Chinese firms of this type no differently than a Western company whose executives or board members maintain informal relationships with members of the governing political party? Or does the nature of such relationships in China somehow differ such that the law should differentiate between Chinese and Western firms, even if they look relatively similar on paper? If so, what is the basis for doing so?

Second, is China a market economy? Certainly, it is not a command economy. But while market forces play a key role in many sectors, so does the Party-state.²⁸ The aggressive interventions following the stock market bubble burst in 2015 reminded us how the Chinese government’s behavior can

26. See generally RICHARD MCGREGOR, *THE PARTY* (2010).

27. Li-Wen Lin & Curtis Milhaupt, *We Are the (National) Champions*, 65 *STAN. L. REV.* 697 (2013).

28. Previous high-level Party documents have described market forces as playing a “basic” role in resource allocation, while the most recent such directive issued at the Third Plenum of the Chinese Communist Party’s 18th Congress in 2013 indicated that the market is now supposed to play a “decisive” role in allocating resources. See Arthur R. Kroeber, *Xi Jinping’s Ambitious Agenda for Economic Reform in China*, BROOKINGS INST. (Nov. 17, 2013), <http://www.brookings.edu/research/opinions/2013/11/17-xi-jinping-economic-agenda-kroeber>. Some saw this rhetorical upgrade as “potentially very significant.” See *id.* However, the Party-state has not quite retreated from its unique supervisory role in the Chinese economy.

differ from that of governments overseeing other major economies.²⁹ Nevertheless, are these differences sufficient to justify treating Chinese exporters differently than others in trade remedy cases?

Provisions of China's WTO Protocol of Accession allowed the WTO to evade several of these questions in the years immediately following China's re-entry into the global trading system. But as these temporary provisions expire, such questions rise to the fore. Trade diplomats must now confront the dilemma of how to tackle these questions—whether through WTO negotiations, in WTO dispute settlements, or through free trade agreements. Such decisions will have long-term implications for the WTO system, particularly if trade diplomats choose to work around the WTO multilateral process.

Thus the WTO faces a challenge: can the institution craft a predictable and fair set of legal rules to address new trade-distortive behavior arising out of China, Inc.? If not, key countries may turn away from the WTO to address these issues. This will weaken the institution. On the other hand, if the WTO crafts new rules that the Chinese view as unfair or discriminatory, this will also weaken the institution. After all, China is the world's largest exporter and already, or soon to become, the world's largest economy.³⁰ Retaining Chinese faith in the WTO dispute settlement system is critical to the institution's long-term well-being. The WTO must balance these dual objectives carefully.

To be clear, my argument is not that the WTO system is failing altogether in addressing China-related trade issues. The WTO dispute settlement system has effectively resolved certain disputes and will continue to do so. But the system has its limits.

This Article seeks to demarcate those limits. It addresses the question of why faith in the WTO is waning, particularly when it comes to negotiating and crafting clearer legal rules to address the legality of Chinese behavior. This is despite the fact that the institution has served its purpose effectively as a forum to enforce China's trade obligations. On the numerous occasions when the WTO has ruled against China, the Chinese government has willingly complied with the judgment and usually altered its laws or regulations to comply with WTO rules.³¹ Yet many commentators in the West remain skeptical, and some have started to urge their governments to move

29. Edward Wong et al., *China's Response to Stock Market Plunge Rattles Traders*, N.Y. TIMES, Sept. 10, 2015, at A1.

30. See *supra* notes 6-7 and accompanying text.

31. For the first fourteen years following China's WTO accession in 2001, there have not been any complaints of noncompliance following a WTO ruling and the initiation of article 21.5 proceedings. For a discussion of the nature of Chinese compliance, see Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525 (2014).

beyond the WTO in dealing with China.³² This Article explains why this view persists and why it is not entirely irrational.

The WTO system works but only up to a point. For a range of China-related trade issues, the WTO offers an effective forum. But its continued efficacy will be tested in the years ahead. By design, the WTO has largely managed to avoid a series of difficult interpretative questions concerning China's economic structure in the years immediately following China's accession. However, as the transition period ends, such questions will surface with greater frequency in litigation. How the WTO resolves such questions will have important implications for the continued willingness of major powers to turn to the WTO dispute settlement system to resolve trade tensions. Furthermore, for another range of issues, the WTO system, if left unchanged, will prove impotent. The WTO's jurisdictional mandate, as currently demarcated, does not allow it to tackle such issues.

Collectively then, elements associated with China's development pose a systemic challenge to the future capacity of the WTO to handle trade tensions between major powers. The WTO, as a young institution, faces an inflection point. Can the WTO adapt to address the new legal challenges associated with China's rise? Can it continue to function as an effective interface between different economic systems, allowing them to trade harmoniously?³³ If so, will the WTO rely more on judicial lawmaking or treaty making? Is its current jurisdictional scope sufficient or must it be expanded? How the WTO answers these questions and addresses the China, Inc. challenge will shape its future relevance for global trade governance.

Of course the WTO faces other challenges beyond China. Similar questions arise on account of other new developments not necessarily anticipated or addressed when the rules were originally written. But because of China's size and importance, the challenges associated with China, Inc. are particularly pressing for the institution. They also raise interesting questions for what we seek as the desirable structure for global trade governance. At its heart, the problem is political rather than economic: do we seek a "one-size-fits-all" set of multilateral trading rules? If so, to what extent will we allow WTO jurists to shape these rules and/or will we accommodate Chinese interests in future WTO negotiations? If neither alternative proves attractive, to what extent will we tolerate growing regime fragmentation?

The Article has three goals. First, I classify instances when the WTO regime can clearly and adequately address problems related to China, Inc.

32. See, e.g., *Ten Years in the WTO: Has China Kept Its Promises?: Hearing Before the Cong.-Exec. Comm'n on China*, 112th Cong. (2011) at 4 (statement of Congressman Chris Smith) (testifying that China's WTO membership "has come with a cost to the credibility of the WTO, raising the question 'is China killing the WTO?' given China's state capitalism and poor governance"); Clyde Prestowitz, *China's Not Breaking the Rules. It's Playing a Different Game*, FOREIGN POL'Y (Feb. 17, 2012), <http://foreignpolicy.com/2012/02/17/chinas-not-breaking-the-rules-its-playing-a-different-game/>.

33. See JOHN JACKSON, *THE WORLD TRADING SYSTEM* 248 (2d ed. 2000) (describing his interface theory for global trade rules).

and when this will prove more difficult or problematic. I argue that, when the behavioral elements more closely resemble those of other former socialist and/or newly industrialized Asian economies, the problems are easier to handle. In contrast, difficulties arise when the action relates to either: (a) vague treaty provisions or (b) an issue area that advanced economies intentionally excluded from the WTO's jurisdiction. In short, the Article aims to provide a roadmap for when companies and governments can hope to turn to the WTO to resolve future cross-border disputes related to China and when they cannot.

Second, the Article draws attention to a series of emerging issues in WTO litigation. Special provisions of China's Protocol of Accession have allowed the WTO to sidestep several China-related questions in the immediate years following China's WTO accession. For example, until 2011, China's trading partners could easily limit Chinese imports through a special safeguard mechanism whenever Chinese imports caused unexpected injury to domestic producers.³⁴ Through the end of 2016, China's trading partners may treat China as a non-market economy unless China can demonstrate otherwise, making it relatively easy to apply higher tariffs in the form of antidumping duties against imports from China.³⁵ But as these special provisions expire, WTO members will increasingly need to rely on the general provisions of the WTO agreements for resolving their grievances against China. Questions of how to treat China's economic structure under general WTO rules, which have been suppressed to date, will come to the fore. This Article anticipates some of these questions before they surface in an actual dispute in the hope of promoting a rational discussion about emerging issues before they become politically charged elements of a trade conflagration.

Finally, the Article highlights potential ways in which the WTO and its member states might handle this systemic challenge. One option is for the global trade regime to respond as it has previously when confronted with new economic structures—by elaborating through additional multilateral treaty rules. But that option may be foreclosed. If that is the case, then the Article discusses and addresses two other possibilities—expansion through judicial lawmaking or through treaty making outside of the WTO. I discuss why the latter of these two possibilities is more likely. If this proves true, then the China, Inc. challenge will result in greater regime fragmentation.³⁶ The third aim of this Article then is to equip policymakers and academics with a tool for future scenario planning.

This Article proceeds as follows. Part I argues that China's economic structure is unique. Part II explains how this informs the limits of the WTO's efficacy in addressing issues arising out of China's economic struc-

34. World Trade Organization, Ministerial Declaration of 10 November 2001, WT/L/432 (2001), ¶ 16 [hereinafter Protocol of Accession].

35. *Id.* ¶ 15.

36. *See infra* Part III.C.

ture. Part III examines the options for meeting the dual challenge of interpreting legal concepts to fit the Chinese context, as well as shaping and revising laws to fit unanticipated circumstances. Part III also considers systemic implications. Overall, I contend that without major change China's rise, should it continue, will contribute to a gradual weakening of the WTO legal order.

I. THE ORIGIN AND NATURE OF THE CHALLENGE

The root cause of the China, Inc. challenge is the fact that the Chinese economy is structured differently from any of the other major economies. Equally important is the fact that treaty negotiators did not anticipate many of these differences at the time of China's accession to the WTO accession. In this Part, I explain these differences and why they pose new issues for WTO law. I also discuss why these issues are only surfacing now, more than a decade after China's WTO accession.

A. *The Uniqueness of China's Economic Structure*

China's growing economic prowess is clear. Today, China is home to the second largest number of Fortune 500 companies in the world.³⁷ The largest initial public offering ever was that of a Chinese technology company, Alibaba.³⁸ The world's four largest banks are all Chinese; China has more banks in the top 100 than any other country in the world.³⁹ Even Chinese law firms have started to branch out worldwide by acquiring or merging with firms in advanced economies.⁴⁰

Deeper integration into the world economy does not necessarily prompt deeper convergence. The Chinese economy today bears little resemblance to that of twenty-five years ago. But neither does it resemble that of any other economy in the world.

Many scholars beg to differ. Foreign commentators are often tempted to apply conceptual frameworks developed elsewhere to the Chinese context.⁴¹

37. Wei Tian, *China Has Second-most Fortune 500 Companies*, CHINA DAILY (July 11, 2012), http://europe.chinadaily.com.cn/business/2012-07/11/content_15568721.htm.

38. Elzio Barretto, *Alibaba IPO Ranks as World's Biggest After Additional Shares Sold*, REUTERS (Sept. 22, 2014), <http://www.reuters.com/article/alibaba-ipo-value-idUSL3N0RN1C920140922>.

39. Liyan Chen, *2015 Global 2000: The World's Largest Banks*, FORBES (May 6, 2015), <http://www.forbes.com/sites/liyanchen/2015/05/06/2015-global-2000-the-worlds-largest-banks/#18e8efa624f1>.

40. See, e.g., Catherine Ho, *Global Law Firm Dentons Poised to Merge with Chinese Firm Dacheng*, WASH. POST (Jan. 25, 2015), https://www.washingtonpost.com/business/capitalbusiness/global-law-firm-dentons-poised-to-merge-with-chinese-firm-dacheng/2015/01/23/9cb0707c-a314-11e4-903f-9f2faf7cd9fe_story.html; Jessica Seah, *King & Wood and Mallesons Confirm Ambitious Merger Plans*, ASIAN LAWYER (Dec. 15, 2011), <http://www.americanlawyer.com/id=1202535701845/King—Wood-and-Mallesons-Con-firm-Ambitious-Merger-Plans?slreturn=20160128104154>.

41. See, e.g., Seung-Wook Baek, *Does China Follow "the East Asian Development Model"?*, 35 J. CONTEMP. ASIA 485, 486-96 (2005); John Knight, *China as a Developmental State*, 37 WORLD ECON. 1335, 1335-46 (2014).

According to one common argument, China's economic structure represents but one variant of "state capitalism."⁴² State capitalism refers to an economy in which "the state acts as the dominant economic player and uses markets primarily for political gain."⁴³ Russia, Saudi Arabia, Venezuela, the United Arab Emirates, Iran, and Ukraine are all considered examples.⁴⁴

The Chinese state certainly bears political objectives in mind when managing the economy. But experts disagree whether the state is dominant and whether political objectives are paramount.⁴⁵ I sidestep this debate and simply suggest that even if one characterizes China as "state capitalist," one must nevertheless acknowledge that China represents its own unique variation—one not found anywhere else in the world today and that other societies would struggle to replicate. In other words, I contend that the Chinese model is exceptional.

Six elements render China's current economic structure distinct. If considered in isolation, any one factor might resemble elements found in other economies. But the interactions among these six elements collectively make the Chinese economy exceptional. They give rise to an economy where the Party-state remains all-powerful, but private enterprise drives significant economic activity. They also highlight the difficulty of applying labels such as "market vs. non-market" and "private-led vs. state-led" to the Chinese context.

1. *The State as a Corporate Holding Entity: SASAC*

One myth of the Chinese economy is that the state's presence is everywhere. It is not. Between 1997 and 2003, the state sold off nearly half of its SOEs.⁴⁶ Premier Zhu Rongji believed that the central government should

42. See, e.g., BREMMER, *supra* note 23, at 5; *Themes and Variations*, Special Report, ECONOMIST, Jan. 21, 2012.

43. BREMMER, *supra* note 23, at 5.

44. *Id.* at 85–114.

45. Compare Ian Bremmer, *State Capitalism Comes of Age: The End of the Free Market?* 88 FOR. AFFAIRS 40, 40–41 (May–June 2009) (pointing to China as part of a recent "large and complex phenomenon of state capitalism" in which the state "uses markets primarily for political gain"), with Michael A. Witt & Gordon Redding, *China: Authoritarian Capitalism*, in THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS 11 (Michael A. Witt & Gordon Redding eds., 2014) (arguing that China actually resembles a liberal market economy). Relatedly, the historic dominance of the state in managing the Chinese economy has also been the topic of contentious debate. Compare Philip C.C. Huang, *Profit-making State Firms and China's Development Experience: 'State Capitalism' or 'Socialist Market Economy'?*, 38 MOD. CHINA 591, 622 (2012) (pointing to "[t]he inability of neoliberal economics to grasp the major role played by the state and by state firms in China's economic development"), with Ivan Szelenyi, *The Nature of the Chinese Formation and the Making of Its Welfare Regime: A Comment on Philip Huang's 'Profit-making State Firms and China's Development Experience: 'State Capitalism' or 'Socialist Market Economy'?*", 38 MOD. CHINA 646 (2012) (arguing that early reform started from below rather than being imposed in a top-down manner by the state).

46. Among the methods employed by the state to reduce its stake in SOEs were allowing employee buyouts of enterprises, sales to outsiders, reorganization, leasing, the formation of joint ventures, and so on. See CHEN DING, CORPORATE GOVERNANCE, ENFORCEMENT, AND FINANCIAL DEVELOPMENT 61 (2013).

focus only on supporting critical sectors, and that even in those sectors it should subject SOEs to market discipline.⁴⁷

A number of essential sectors remain in the state’s hands, including energy, railways, shipbuilding, steel, and telecommunications. This is not altogether unusual. Even in many avowed capitalist countries, the public sector still controls many of these sectors.⁴⁸

What sets China apart is the fact that these SOEs are controlled by a single government agency. Known as the State-owned Assets Supervision and Administration Commission of the State Council, “SASAC” is the world’s largest controlling shareholder.⁴⁹ SASAC is undoubtedly one of the most powerful economic actors in the world today. Yet few people outside of China understand its critical role.

Organized in 2003, SASAC today controls more than half of the Chinese companies on the Fortune Global 500 list of the world’s largest corporations.⁵⁰ Examples include China Mobile, Sinochem, Dongfeng Motors, and Baosteel.⁵¹ In total, as of this writing, 106 SOEs fall under SASAC’s control at the central government level.⁵² These companies are sometimes referred to as China’s “national champions,”⁵³ but there is competition between them as well. For example, SASAC controls China’s three major telecommunications companies, its three major petrochemical corporations, its three major steelmakers, and so on.⁵⁴ By having them fight with each other for market share, the state ensures that SOEs are subject to market forces and stay competitive.⁵⁵

To outsiders, many of these corporations look like individual entities. China Mobile, for example, is listed on the New York and Hong Kong

47. See generally ZHU RONGJI, *ZHU RONGJI ON THE RECORD: THE ROAD TO REFORM* (2013).

48. See, e.g., Bernard Bortolotti & Mara Faccio, *Government Control of Privatized Firms*, 22 *REV. FIN. STUD.* 2907 (2009); Sunita Kikeri & Aisheru Kolo, *State Enterprises*, *WORLD BANK PUB. POL’Y J.* 304 (2006); Robert Millward, *Public Enterprise in the Modern Western World*, 82 *ANNALS PUB. & COOP. ECON.* 375 (2011).

49. Marcos Aguiar et al., *SASAC: China’s Megashareholder*, *BCG PERSPECTIVES* (Dec. 1, 2007), https://www.bcgperspectives.com/content/articles/globalization_strategy_sasac_chinas_megashareholder/.

50. Bin Zhao, *Creating a Trainmaker Monopoly Is in Conflict with China’s Reform Agenda*, *SEEKING ALPHA* (Dec. 18, 2014, 4:35 PM), <http://seekingalpha.com/article/2767035-creating-a-trainmaker-monopoly-is-in-conflict-with-chinas-reform-ambition>.

51. For a list of the Global Fortune 500, see *Global 500*, *FORTUNE*, <http://fortune.com/global500/> (last visited May 22, 2016). For verification that these companies are SASAC-controlled, see *Zhongyang Minglu*, SASAC, <http://www.sasac.gov.cn/n86114/n86137/c1725422/content.html> (last updated Dec. 29, 2015).

52. See *id.*

53. See, e.g., Lin & Milhaupt, *supra* note 27.

54. For a list of the specific firms, see *Zhongyang Minglu*, *supra* note 51; see also State Council: State-owned Economy Should Maintain Absolute Control of Seven Sectors (Dec. 18, 2006), http://www.gov.cn/ztl/2006-12/18/content_472256.htm (noting the state’s determination to maintain control of key pillar industries).

55. He Fan, *The Long March to the Mixed Economy*, 6 *EAST ASIA Q.* 3, 5 (2014) (discussing the government strategy “to stimulate competition among SOEs”).

exchanges⁵⁶ and its board includes four independent directors.⁵⁷ Even if one is aware that China Mobile is an SOE, one might assume that it operates no differently than SOEs elsewhere. That is, one might think it has an autonomous management but with representatives of relevant ministries. One might not presume that the government actively manages it as a portfolio company, in the same way that a private equity company might treat its holdings. Further, one might not presume that oversight over such a large portion of the economy is concentrated in the hands of a single government agency instead of being scattered across the relevant ministries. But this is, in fact, the composition and governance structure of China, Inc.

Each level of government replicates this structure. Provinces and municipalities have their own SASAC, reporting up to the central government's SASAC,⁵⁸ and these local agencies serve as the controlling shareholders of the critical SOEs in their regions.⁵⁹ For example, Jiangsu Province's SASAC controls the province's key enterprises in sectors such as agriculture, hospitality, minerals, and so on.⁶⁰

Just how unusual is this model of economic organization? Imagine if one U.S. government agency controlled General Electric, General Motors, Ford, Boeing, U.S. Steel, DuPont, AT&T, Verizon, Honeywell, and United Technologies. Furthermore, imagine this agency were not simply a passive shareholder, but also behaved as a private equity fund would with its holding companies. It could hire and fire management, deploy and transfer resources across holding companies, and generate synergies across its holdings. While the West may once have marveled at Japan's powerful Ministry of Information Trade and Industry ("MITI") in its heyday, SASAC's grip over the Chinese economy today is even more direct and all encompassing.

Yet it would be incorrect to assume that the state always meddles in the economy. In many ways, SASAC operates as other controlling shareholders do. It is happy to grant management operational autonomy so long as it delivers along the agreed-upon metric.⁶¹ The difference is that the metric is not pure profit, but rather the Chinese state's interest, broadly defined.⁶²

Nor would it be correct to assume that SASAC's power gives it full responsibility for the Chinese economy. The government has carefully kept

56. See *Overview*, CHINA MOBILE, <http://www.chinamobileltd.com/en/about/overview.php> (last visited May 22, 2016).

57. See *Board of Directors*, CHINA MOBILE, <http://www.chinamobileltd.com/en/about/directors.php> (last visited May 22, 2016).

58. For a list of provincial and local SASACs, see *Local SASAC*, SASAC, <http://www.sasac.gov.cn/n87184/n87210/c1337644/content.html> (last updated Jan. 4, 2016).

59. Temporary Regulation on State-owned Assets Supervision and Administration art. 12 (promulgated by the State Council, May 13, 2003), http://news.xinhuanet.com/fortune/2003-06/04/content_905211.htm.

60. SASAC of Jiangsu Provincial Government, <http://www.jssasac.gov.cn> (last visited May 22, 2016).

61. MOHAN GURUSWAMY & ZORAWAR SINGH, CHASING THE DRAGON 113 (2010).

62. Barry Naughton, *SASAC Rising*, 14 CHINA LEADERSHIP MONITOR, Apr. 2005, at 9 (describing SASAC's role).

certain functions out of SASAC’s reins, lest it accumulate too much control. For example, although SASAC is the controlling shareholder for state assets, it does not invest the country’s foreign reserves.⁶³ The state also holds its assets in financial institutions in a separate vehicle. Moreover, as I will discuss below, the Party has regularly demonstrated its supremacy over SASAC.

Nevertheless, even though SASAC’s control is not absolute, its presence renders the Chinese economy unique. Many WTO members have SOEs, but in most countries government control remains largely fragmented across different ministries or agencies.⁶⁴ Even state capitalist countries lack a single holding entity akin to SASAC. The closest analogue is arguably the Gulf States, but there, control links to the monarch and his family. Through SASAC, China has developed a different model for state economic oversight and deployment of state assets.

2. *State Control of Financial Institutions: Central Huijin and Other Vehicles*

The Chinese state’s consolidated portfolio control extends to the lifeblood of the economy: the financial sector. The state encourages competition and innovation in finance, but also sets the boundaries and retains ultimate control over financial resources.

At the apex of the financial system are the “Big Four” commercial banks—the Bank of China (“BOC”), the Industrial and Commercial Bank of China (“ICBC”), the China Construction Bank (“CCB”), and the Agricultural Bank of China. Each is a powerhouse. All are larger than any American, European, or Japanese bank.⁶⁵

To an outsider not familiar with the financial industry, the Big Four may look like normal commercial banks, their global competitors. All are listed on the Hong Kong stock exchange, and their shareholders include thousands of global portfolio managers.⁶⁶ All have branches worldwide, including in the United States, Europe, and Australia. In 2012, the Federal Reserve allowed ICBC to become the first Chinese bank to take over a U.S. bank, giving it ten branches in California and three in New York.⁶⁷ To the average consumer, BOC looks no different from Citibank or Deutsche Bank. Any

63. These are managed by China Investment Corporation, a separate corporation. See Friedrich Wu & Arifin Seah, *The Rise of China Investment Corporation*, 9 *WORLD ECON. J.* 45 (2008).

64. See Maria Vagliasindi, *Governance Arrangements for State-owned Enterprises* (World Bank Sustainable Development Network, Working Paper No. 4542-9-11, 2008).

65. Chen, *supra* note 39.

66. Daniel Inman & Enda Curran, *Why China’s Banks Are Turning to Preferred Shares*, *WALL ST. J.* (Mar. 14, 2014), <http://www.wsj.com/articles/SB10001424052702304908304579561543967849568>; see also Gordon Chang, *China Unloading Bank Shares, Transferring Debt Risk to Foreigners*, *FORBES* (Sept. 7, 2014), <http://www.forbes.com/sites/gordonchang/2014/09/07/china-unloading-bank-shares-transferring-debt-risk-to-foreigners/#5ca3578a2b34>.

67. Eva Woo & Shelley Smith, *ICBC Sets Tone as It Takes Over US Bank*, *CHINA DAILY* (Jan. 25, 2011, 10:57), http://usa.chinadaily.com.cn/business/2011-01/25/content_11914688.htm; Hibah Yousuf, *Three Chinese Banks Expanding in U.S.*, *CNN MONEY* (May, 9, 2012), <http://money.cnn.com/2012/05/09/markets/china-banks-us-expansion/>.

American can stroll up to a BOC branch in New York or Chicago, open a savings account, and rest assured the Federal Deposit Insurance Corporation will protect her deposits—just as she would at Citibank.

Though the Big Four may compete with one another, they all remain firmly in the hands of the state. Again, a single entity—but importantly, not SASAC—acts as the controlling shareholder for the banks. That entity is Central Huijin Investment Ltd. (“Central Huijin”).⁶⁸ An unfamiliar outsider might think Central Huijin is yet another Chinese investment fund, but it is much more than that. Formed in 2003, Central Huijin functions as the state’s bailout instrument for financial institutions.⁶⁹ In exchange for additional capital, banks provide Central Huijin with shares. Over time, it has become the largest shareholder of the Big Four and several other banks.⁷⁰

Central Huijin is managed today as a wholly run subsidiary of the China Investment Corporation, China’s sovereign wealth fund.⁷¹ Through Central Huijin, the state can order the Big Four to direct funds to serve its policy objectives.⁷² Again, consider the *sui generis* nature of this arrangement. The closest analogue would be if, in the aftermath of the 2008 financial crisis, the U.S. Treasury Department set up a single government entity to act as the controlling shareholder of JPMorgan Chase, Bank of America, Citibank, and Wells Fargo.

The state also owns a majority share in nine of the ten second-tier commercial banks that operate below the Big Four.⁷³ However, Central Huijin’s means of control are more opaque. In some, such as China Everbright, Central Huijin remains the leading shareholder.⁷⁴ But the absence of Central Huijin among the top shareholders does not necessarily mean that the state gives up influence. Instead, the vehicles of state control differ by bank.

Consider, as an example, the Shanghai Pudong Development Bank (“SPDB”). If one scanned the list of SPDB’s leading shareholders, Central Huijin and the Ministry of Finance are nowhere to be found. Instead, the

68. Veljko Fotak et al., *The Financial Role of Sovereign Wealth Funds*, in THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 581, 598 (Mike Wright et al. eds., 2013).

69. Before Central Huijin’s formation, the People’s Bank of China (“PBOC”) directly injected funds into flailing banks. In 2003, the PBOC instead directed \$45 billion of foreign exchange reserves into the newly formed Central Huijin, which then used the funds to bail out CCB and BOC in exchange for the majority of those banks’ shares. Central Huijin has since repeated this exercise with other banks. See Victor Shih, *Beijing’s Bailout of Joint-stock and State-owned Banks*, 5 CHINA BRIEF (2005).

70. See *Investments*, CENT. HUIJIN INV. LTD. (June 30, 2015), http://www.huijin-inv.cn/wps/portal/!ut/p/a1/04_Sj9CPykssy0xPLMnMz0vMAfGjzOL9DMwMDJ2DDbwMfB3dDBwtDFx9_Y29jPx DzYA KInErcPc2xqvfl5SAfhM9tU7O3qYmPsYGBiYWBgZeLo4ebiYW_oaGHiaEaffAAadwNCDk_3D9KHxKwCGAV4EJTAE-P4AV4HFkQW5oaGiEQaZnuqIiAF07oL0!/dl5/d5/L2dBISEvZ0FBIS9nQSEh/.

71. MICHAEL E. MARTIN, CONG. RESEARCH SERV., RL34337, CHINA’S SOVEREIGN WEALTH FUND 2–3 (2010), <https://www.fas.org/sgp/crs/row/R41441.pdf>.

72. See *id.* at 8–10.

73. Lucy Hornby & Coco Li, *China Should Sell State Shares in Mid-tier Banks—Minsberg Vice Chairman*, REUTERS (Mar. 11, 2013), <http://www.reuters.com/article/china-banks-govt-stakes-idUSL3N0C31HS20130311>.

74. CHINA EVERBRIGHT BANK CO., LTD., ANNUAL REPORT 54 (2010), <http://www.ebchinaintl.com/en/investors/report/ar2010.pdf>.

top shareholders include a list of seemingly innocuous investment funds, such as the Shanghai International Group, Shanghai International Trust Co., and the Shanghai Guoxin Investment & Development Corporation.⁷⁵ None have more than a 20% stake, suggesting a diversified shareholding structure.⁷⁶ But if you think SPDB is a true commercial bank alternative to the state-controlled Big Four, you’re mistaken.

In fact, the three investment funds mentioned above are all holding companies of the Shanghai SASAC. In addition to the above firms, the other major shareholder is China Mobile (a holding company of the central SASAC). The state, therefore, remains firmly in control of SPDB. The only difference is that its control is not concentrated through Central Huijin. Instead, it is spread across various holding companies of central and municipal SASACs.

Through Central Huijin and other financial vehicles, the Chinese state has a larger pool of financial resources at its direct disposal than any other comparable government in the world.⁷⁷ Assets are organized through a consolidated portfolio model. While this may encourage selective competition, the state ultimately remains firmly in charge—it can redirect the financial system to fulfill its policy objectives whenever it deems necessary. This model of financial sector organization is the second element that serves to render China distinct.

3. *State Control over Planning and Inputs: NDRC*

In the preceding sections, I argued that the Chinese state holds a much firmer grip on its economy than other regimes, including those of state capitalist economies. Control is exercised through a series of centralized and local vehicles, whose links to the state are not always well known in the West. Control, however, is but one part of the equation. How does the Chinese state translate shareholder control into coordinated action to fulfill its policy objectives?

The answer is the National Development and Reform Commission (“NDRC”). The NDRC is the present-day incarnation of the State Planning Commission (“SPC”). During Mao’s reign, the SPC was the central planning authority that oversaw the Soviet-style planned economy. Following a

75. SHANGHAI PUDONG DEV. BANK CO., LTD., 2013 ANNUAL REPORT 75 (2014), <http://www.spdb.com.cn/chpage/c510/> (follow “Investor Relations” hyperlink).

76. *Id.*

77. See *Country Comparison: Reserves of Foreign Exchange and Gold*, THE WORLD FACTBOOK (CIA), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2188rank.html> (ranking China first in the world in total value of reserves in foreign exchange and gold as of December 31, 2015); see also Niu Teihang & Lye Liang Fook, *The Challenges of Managing China’s Huge Foreign Reserves: From Huijin to China Investment Corporation*, EAI Background Brief No. 352, NUS EAST ASIA INSTITUTE 1 (2007), <http://www.eai.nus.edu.sg/publications/files/BB352.pdf> (last visited May 22, 2016) (identifying Central Huijin as an important institution that channels and holds these reserves).

series of reforms, the SPC was reconstituted as the NDRC in 2003.⁷⁸ Like SASAC, it also reports independently to the State Council. The NDRC represents a third element differentiating China from other economies.

The existence of a planning ministry or commission is itself not altogether unusual. Various WTO members have such an entity, including Brazil,⁷⁹ India,⁸⁰ and Mozambique.⁸¹ Nor is it necessarily unusual for such an entity to report directly to the national executive to coordinate economic policymaking. In the United States, for example, the National Economic Council (comprised of various department and agency heads) resides within the White House and its head reports directly to the President.⁸² The NDRC stands out because of the extensive range of resources that it has at its disposal to drive economic policymaking.

The NDRC oversees the creation of China's Five-Year Plan, a role that the SPC once played. But unlike other countries, such as India, where the Five-Year Plan serves merely as an aspirational guide, the NDRC has several tools available to implement its plan. The NDRC is in charge of pricing commodities that are not yet completely set by the market. Examples include electricity, oil, natural gas, and water.⁸³ This allows the Chinese state to set input prices, thereby affecting costs.⁸⁴ In addition, whenever a large infrastructure project or investment requires government approval, the NDRC is the final authority, regardless of whether the entity seeking approval is an SOE, private company, foreign company, or joint venture. Examples include new bridges, factories, and even a Disneyland theme park.⁸⁵ This oversight provides the NDRC with broad power to affect market supply and capacity. It also gives the NDRC an important role in deciding how to allocate the state's investment funds.

In addition, the NDRC has the power to implement policies that affect the economy. For example, it is the key enforcement agency for China's

78. The State Development Planning Commission ("SPDC") succeeded the SPC in 1998. For a discussion of the 2003 reforms that led to the NDRC's creation, see *infra* Part I.B.4.

79. See MINISTÉRIO DO PLANEJAMENTO, <http://www.planejamento.gov.br/> (last visited May 22, 2016).

80. See *Modi Replaces Planning Commission, Aiming to Boost Growth*, REUTERS (Jan. 1, 2015), <http://in.reuters.com/article/india-planningcommission-modi-idINKBN0KA1NA20150101>.

81. See MINISTÉRIO DA PLANIFICAÇÃO E DESENVOLVIMENTO, <http://www.mpd.gov.mz/> (last visited May 22, 2016).

82. See *White House National Economic Council: Home*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/nec> (last visited May 22, 2016).

83. *China to Reform Prices in Energy Sector*, XINHUA (Feb. 29, 2012), http://news.xinhuanet.com/english/china/2012-02/29/c_122767792.htm.

84. The NDRC also provides guidance on pricing for a wide range of other goods and services. Examples include train tickets, pork, and cooking oil. Although the NDRC lacks ultimate decision-making authority over such prices, its clout over producers is so large that most producers will follow the NDRC's guidance. See Dexter Roberts, *China's Economic Policy Factory*, BLOOMBERG BUSINESSWEEK (June 20, 2013), <http://www.bloomberg.com/bw/articles/2013-06-20/chinas-economic-policy-factory-the-ndrc>.

85. *Id.*

Anti-Monopoly Law.⁸⁶ The NDRC also oversees China’s strategic petroleum reserves.⁸⁷ It also manages China’s energy sector, placing it in charge of developing China’s carbon trading markets.⁸⁸ Other responsibilities include coordinating industrial policies, formulating strategies and policies for service sector development, and overseeing strategies for sustainable development.⁸⁹

This structure is replicated at the provincial and local levels (similar to the structure of SASAC).⁹⁰ Each province and municipality has its own Development and Reform Commission (“DRC”), which coordinates economic policy for that region. The provincial/local DRC reports vertically to the NDRC as well as horizontally to the corresponding level of government. This structure ensures that the state has the full ability to coordinate economic policies both within and across sectors and regions.

The NDRC acts as the state’s quarterback. It coordinates the state’s actions across the economy to ensure that they work collectively as a team to serve the state’s interest. The full weight of the NDRC’s power became apparent following the Great Recession in 2008–2009. Whereas other governments struggled to shape an effective economic response, China was able to push forward its RMB 4 trillion (\$586 billion) stimulus package very quickly.⁹¹ The NDRC directed the funding toward a wide range of projects.⁹² Despite a sharp downturn in trade, Chinese leaders managed to keep the economy growing above 9% in 2009 and back into double digits by 2010.⁹³

China’s planning commission therefore holds a broader range of powers than its counterparts in other countries. Some commentators have gone so far as to describe it as China’s “Super-Ministry” or “number one ministry,” noting that the NDRC is “unrivaled in its influence and ability to push for

86. See Angela Huyue Zhang, *Bureaucratic Politics and China’s Anti-Monopoly Law*, 47 CORNELL INT’L L.J. 671, 689–90 (2014).

87. Daniel Nieh, *The People’s Republic of China’s Development of Strategic Petroleum*, U. PA. C. UNDERGRADUATE RESEARCH ELECTRONIC J. 1, 15 (2006), <http://repository.upenn.edu/cgi/viewcontent.cgi?article=1037&context=curej>.

88. *China Launches World’s No. 2 Carbon Trading Market*, SYDNEY MORNING HERALD (June 18, 2013), <http://www.smh.com.au/business/carbon-economy/china-launches-worlds-no2-carbon-trading-market-20130618-2ofam.html>.

89. *Main Functions of the NDRC*, NAT’L DEV. & REFORM COMM’N, <http://en.ndrc.gov.cn/mfndrc/> (last visited June 24, 2016).

90. See Zhang, *supra* note 86, at 700.

91. David Barboza, *China Unveils Sweeping Plan for Economy*, N.Y. TIMES, Nov. 9, 2008, at A1.

92. See, e.g., Barry Naughton, *Understanding the Chinese Stimulus Package*, 28 CHINA LEADERSHIP MONITOR, Nov. 13, 2008, at 9; Fu Jing & Si Tingting, *NDRC Reveals Details of Stimulus Package*, CHINA DAILY (Nov. 27, 2008), http://www.chinadaily.com.cn/bizchina/2008-11/27/content_7246758.htm; Yongnian Zheng & Minjia Chen, *How Effective Will China’s Four Trillion Yuan Stimulus Package Be?* 7 (Univ. Nottingham China Policy Institute Briefing Series, Issue 49, Mar. 2009).

93. See *GDP Growth (Annual %)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (last visited May 22, 2016).

its ingrained preference for a government-led economic system.”⁹⁴ Even as its powers have been clipped in the past two years, the NDRC remains a key driving force coordinating the Chinese economy.⁹⁵ The presence of a single economic coordination agency with wide-ranging scope both horizontally and vertically also helps to render China unique.

4. *Chinese-style Corporate Groups and Affiliated Networks*

Beyond the NDRC, SASAC, and Central Huijin, the state has other instruments at its disposal to coordinate economic action. A fourth distinct element of the Chinese economy is the presence of nested corporate group structures. These allow state-owned and state-affiliated entities to develop linkages with each other and exploit complementarities to further advance state interests.

Corporate conglomerates and networks can be found in many economies besides China. But the Chinese form of organization is special. Unlike those found elsewhere in Asia, Chinese corporate groups are not diversified across a range of industrial sectors. Instead, they tend to be vertically integrated, narrowly focused on a particular sector, and built around a national champion such as Sinopec (the world’s highest revenue-generating company) or China Mobile (the world’s largest mobile phone operator). Professors Li-Wei Lin and Curtis Milhaupt suggest that two analytical concepts are important for understanding how Chinese networks operate, both within and across Chinese corporate groups. First, they establish the notion of a “networked hierarchy.” Chinese corporate groups, they suggest, are constructed in a vertical hierarchy with SASAC at the apex and core components such as listed companies, finance companies, and research institutes underneath.⁹⁶ Through “institutional bridging”—a second concept—these groups link horizontally with one another, with universities, and with the Party-state organ. “Institutional bridging” refers to the numerous pathways, both formal and informal, that link the various entities with one another.⁹⁷ Examples include shareholding structures, personnel rotations, exercise of cash flow rights, and so on. Through these mechanisms, the state can redirect resources both within and across corporate groups.

The overall effect is that the various state-controlled economic entities not only link with one another through vertical shareholding relationships through SASAC or Central Huijin; they also link horizontally with various state-controlled entities with which they share overlapping interests.⁹⁸ The

94. See, e.g., Peter Martin, *The Humbling of the NDRC*, 14 CHINA BRIEF, Mar. 6, 2014, at 14; Roberts, *supra* note 84.

95. See, e.g., Martin, *supra* note 94, at 16–17; Ryan Rutkowski, *The Price of Power*, CHINA ECON. WATCH (July 16, 2013, 4:02 PM), <http://blogs.piie.com/china/?p=2913>.

96. Lin & Milhaupt, *supra* note 27, at 707–11, 716–21.

97. *Id.* at 707–08.

98. *Id.* at 711.

linkages are looser, on the one hand, because the entities generally do not interweave through a formal cross-shareholding relationship. On the other hand, they are also more encompassing because they span a wider breadth of subject matter, such as personnel decisions and overall development policy.⁹⁹

Some have mistakenly understood the “China, Inc.” moniker to mean that China is one big state-led corporatist regime.¹⁰⁰ It is important to note that these networks are not so tight as to necessarily reduce all elements of competition or eliminate the impact of market-driven forces.¹⁰¹ Unlike the economies of South Korea and Japan, the Chinese economy consists of more than a few large corporate groups. No Chinese corporate group, for example, has the breadth of Samsung, Mitsubishi, Siemens, or Tata. Nor does one national champion necessarily dominate each sector. The domestic telecommunications market, for example, has three major players that compete with each other for share and profits—albeit with each player owned by the state through SASAC. Market forces continue to play an important role, but with many control mechanisms put in place by the state to temper its undesired effects.

As Lin and Milhaupt note, “networked hierarchy” and “institutional bridging” lead to both positive and negative effects. These networks “enhance efficiency by fostering information sharing, reducing opportunism through repeat play, providing high-powered incentives, and reducing frictions in policy implementation.”¹⁰² But they also “reduce competition and transparency, multiply agency relationships, and soften budget constraints.”¹⁰³ In short, they can both enhance and hamper the competitiveness of China’s state-controlled firms.

Overall, the corporate group structures and network mechanisms are characteristically Chinese. They differ from those found elsewhere, including those of mainland China’s closest cultural neighbors—Hong Kong, Taiwan, and Singapore.¹⁰⁴ These structures and mechanisms further contribute to the exceptional nature of China’s economic structure.

99. *Id.* at 708.

100. See, e.g., FISHMAN, *supra* note 24. For a further discussion of what constitutes corporatism, see *infra* notes 142–143 and accompanying text.

101. See Erica Downs, *Whatever Became of China, Inc.*, CHINA ECON. Q. 22, 22–23 (2014).

102. Lin & Milhaupt, *supra* note 27, at 708.

103. *Id.*

104. ADRIAN DAVIES, THE GLOBALISATION OF CORPORATE GOVERNANCE 37–38, 40 (2011); John Farrar, *Developing Corporate Governance in Greater China*, 25 UNSW L.J. 462 *passim* (2002). While relationships (*guanxi*) play a role in all these economies, the exact corporate structure differs from the “networked hierarchy” notion associated with Chinese corporate groups, and the state in these other economies does not facilitate “institutional bridging” to the same degree. Lin & Milhaupt, *supra* note 27, at 705–08, 754–55 (noting how the concept extends simply beyond relationships and arises from linkages to the Party and SASAC, while also highlighting how Singapore offers a potential alternative pathway).

5. *Communist Party Involvement and Control*

A fifth distinct element concerns the role played by the Chinese Communist Party in running the Chinese economy. In many state capitalist or corporatist countries, the dominant political party is synonymous with the state.¹⁰⁵ Many mistakenly assume this also to be the case in China. In fact, it is not.

Although China is a one-party state, the Party functions as its own organ independent of the state. For example, although the Party oversees the state's public security and judiciary, it also operates its own separate investigation, detention, and disciplinary processes.¹⁰⁶ Ultimate power still resides within the Party and not the state. However, both the Party and the state mechanisms can be used to advance each other's ends. The dual-track nature of the Chinese political economy also renders China exceptional.

How specifically does the Party manifest its grip on the economic structure described above? Controlling appointments provides an important tool. The Party's all-powerful Central Organization Department decides what roles Party members assume as they move up the ranks. This includes not only Party roles, but also positions within the state. Consequently, the Party appoints the leadership of SASAC, the NDRC, and Central Huijin, as well as the various ministries charged with overseeing the economy. It also controls appointments of CEOs and top management of SOEs, as well as state-run banks.¹⁰⁷ In many instances, the CEO of an important SOE or state-run bank will carry a Party rank equivalent to that of a vice minister or a provincial Party secretary.¹⁰⁸

The Party's Central Organization Department can decide to rotate individuals between jobs in the state and private sector, across sectors and regions. For example, an individual might be rotated through stints as the director of economic reform in a city, institute director of a think tank, vice governor of a province, vice minister of finance, and chairman of the sovereign wealth fund.¹⁰⁹ Even when candidates are promoted from within a firm, above a certain level, the Party must approve the promotion. Ultimately then, a Party cadre's performance evaluation matters more than the firm's human resources department. From an incentives standpoint, even though individuals may work for an SOE or state organ, their career trajectory depends on how well they can fulfill the Party's objectives.

105. For example, consider the United Socialist Party of Venezuela or the Zimbabwe Africa National Union.

106. See, e.g., *Policing the Party*, *ECONOMIST* (Sept. 1, 2012), <http://www.economist.com/node/21561895>; Jerome Cohen, *Human Rights and the Rule of Law in China, Prepared Testimony Before the Congressional-Executive Commission on China*, CFR (Sept. 20, 2006), <http://www.cfr.org/china/human-rights-rule-law-china/p11521>.

107. MCGREGOR, *supra* note 26, at 89.

108. *Id.* at 69.

109. See *Biography of Lou Jiwei's Career*, CHINAVITAE, http://www.chinavitae.com/biography/Lou_Jiwei/career (last visited May 22, 2016).

Note the distinctiveness between China’s model and other economies with close links between government and industry. In France, for example, individuals may also rotate between stints in government and state enterprises. But such rotations are managed by the civil service, not a political party. Whereas the former strives to be apolitical, the latter is explicitly political in its objectives and evaluations, which inevitably affects individual incentives and behavior.

Appointments are not the only control mechanism. Each organization with more than three Communist Party members must form a Party committee within the organization. This requirement extends not only to SOEs, but also to private companies and foreign firms.¹¹⁰ The inner workings of the party committees are not made public. Nevertheless, this structure provides the Party with a high degree of potential oversight over Chinese corporations. As one commentator has remarked, the Party has positioned itself as a panopticon, “allowing it to keep an eye on any state or non-state agency, while shielding itself from view at the same time.”¹¹¹

For governance purposes, the Party occasionally will take actions unheard of in other capitalist economies. In 2003, for instance, the Party decided overnight to rotate the heads of China’s three dominant telecommunications companies, all of which are companies publicly traded on the New York or Hong Kong stock exchange.¹¹² The companies’ boards were not consulted beforehand, nor were the individuals themselves given prior notice.¹¹³ Nor was this a one-off exception. In 2009, the Party again rotated the heads of three state airlines into rival firms. These periodic moves are designed to keep errant individuals in check and ensure that competition serves Party objectives.¹¹⁴

Most recently, the administration of President Xi Jinping has moved to reassert the Party’s control over the powerful state agencies charged with overseeing the economy. Following the Third Plenum in November 2013, the Party formed a Central Leading Group for Overall Reform to be chaired by President Xi himself.¹¹⁵ The Central Leading Group was to drive key economic reforms, rather than leaving them to the NDRC, out of the Party’s concern that the NDRC was not moving fast enough. The Party also sacked several former top SASAC and NDRC officials on anti-corruption charges,

110. Foreign companies with a Communist Party committee in their China operations include IBM, Nokia Siemens, Hyundai, and Canon. See Rachel Lu, *Memo to Congress re: Huawei—IBM China Has Communist Party Committees Too*, TEA LEAF NATION (Oct. 10, 2012), <http://minzhuzhongguo.org/ArtShow.aspx?AID=30520>.

111. MCGREGOR, *supra* note 26, at 17.

112. JING LENG, CORPORATE GOVERNANCE AND FINANCIAL REFORM IN CHINA’S TRANSITION ECONOMY 151 (2009).

113. MCGREGOR, *supra* note 26, at 84–89.

114. *Id.* at 89.

115. Dexter Roberts, *Xi’s New Reform Group Holds First Meeting*, BLOOMBERG BUSINESSWEEK (Jan. 23, 2014), <http://www.bloomberg.com/bw/articles/2014-01-23/xis-new-reform-group-holds-first-meeting>.

detaining them under the Party's disciplinary rules, rather than under formal law.¹¹⁶ These actions remind individuals that, while the interests of the Party, state, and corporations may align closely, ultimately, it is the Party's interests that trump.

Compared with political parties in other neo-authoritarian regimes with strong state capitalism (for example, the political parties that dominate Russia or Venezuela), the Chinese Communist Party is in a league of its own. With a membership exceeding 80 million, it is the world's largest political party.¹¹⁷ But its impressiveness lies beyond its sheer size. The Party's deep entrenchment in business, its broad control mechanisms, and its ability to direct resources are all highly distinctive to China.

6. *The Intertwined Nature of Private Enterprises and the Party-state*

So far, the discussion might lead one to conclude that the Chinese economy is run by oligarchs and SOEs advantaged by their Party ties. Yet this is far from true. In reality, only a handful of sectors are dominated by SOEs.¹¹⁸ What makes China complicated is that, while the Party-state holds vast control levers, it allows market forces to play out in huge swaths of the economy. Furthermore, much of the Chinese economy remains uncaptured by the forces of crony capitalism that characterize other state capitalist societies.

As Nicholas Lardy underscores, "China achieved extraordinary rapid economic growth after 1978 primarily because market forces came to play an ever larger role in resource allocation."¹¹⁹ His research contradicts the argument that China's growth is a result of a state-directed strategy eschewing reliance on the market. Although the Party-state may possess impressive centralized mechanisms of formal control, it is no longer the dominant pervasive force that it was in the Maoist era. In fact, the public sector in China employs a smaller fraction of the overall labor force compared to the public sectors of France or the United States.¹²⁰

The Party-state's willingness to subject firms in most sectors to market forces means that a private enterprise can prevail over an SOE in domestic markets and emerge as the state's "national champion."¹²¹ Private shareholders, rather than SASAC, control many of China's leading global mul-

116. Chen Xia, *The Corrupt Officials Uprooted by China's New Leadership*, CHINA.ORG.CN (Sept. 4, 2013), http://www.china.org.cn/china/2013-09/04/content_29907560.htm.

117. Membership remains highly selective, with an acceptance rate of only 14%. *China's Communist Party 'Exceeds 80 Million Members'*, BBC News (June 24, 2011), <http://www.bbc.com/news/world-asia-pacific-13901509>.

118. LARDY, *supra* note 25, at 77.

119. *Id.* at 2.

120. Ryan Rutkowski, *A Shrinking Leviathan*, CHINA ECON. WATCH (Jan. 24, 2013, 9:12 AM), <http://blogs.piie.com/china/?p=2227>.

121. See, e.g., NATHANIEL AHERNS, CHINA'S COMPETITIVENESS: CASE STUDY: HUAWEI 2-9 (2013) (noting Huawei's success over Shanghai Bell, an SOE).

tinational companies. Examples include Lenovo for electronics,¹²² Haier for household appliances,¹²³ Huawei for telecommunications equipment,¹²⁴ Alibaba for e-commerce,¹²⁵ and Xiaomi for smartphones.¹²⁶ Yet just because the state is not the dominant shareholder does not mean that the state does not have a role. Instead, as some commentators have noted, the labels associated with formal shareholding structures can mislead, because “the boundary between state and private ownership of enterprise is often blurred in contemporary China.”¹²⁷

How have the Party and the state forged links with private firms? Numerous mechanisms abound. State-owned banks, for example, finance private firms.¹²⁸ The state enlists industry associations and local chambers of commerce to coordinate action within a given sector and/or region and to assist with trade disputes.¹²⁹ The state also establishes informal, backdoor channels with private firms to communicate about regulatory issues.¹³⁰ At times, the state, or an investment fund with close links to the Party-state, will go so far as to purchase equity in private firms.¹³¹ Finally, as already mentioned above, Party committees exist inside most private firms. Not all of these mechanisms are necessarily unique; many exist between governments and private firms elsewhere. But the sheer breadth of these links sets the Chinese economy apart from its peers.

Importantly, the state does not always impose or even necessarily coerce these linkages. Private entrepreneurs everywhere realize the benefits of currying government favor; many are willing to expend the necessary currency to gain it. China is no different. In an economy where the state continues to play such a dominant role, many Chinese entrepreneurs will proactively seek to forge links with the Party-state. For example, when Alibaba bought back shares from foreign investors, Yahoo and Softbank, it then turned around to sell the shares to the China Development Bank’s private investment arm and two investment funds run by princelings (that is, the sons of Party lead-

122. LENOVO GROUP LTD., NEVER STANDING STILL 2014/15 ANNUAL REPORT 81 (2015).

123. HAIER, ANNUAL REPORT 2014, 112 (2014).

124. HUAWEI, BUILDING A BETTER CONNECTED WORLD, 2015 ANNUAL REPORT 101 (2015).

125. ALIBABA GROUP HOLDING LTD., U.S. SEC. & EXCH. COMM’N FORM 20-F 32, 149–50 (2015).

126. Radu Iorga, *Here’s What’s Behind the Xiaomi Ownership: Stocks, Percentages and All You Need to Know*, GSM DOME (Dec. 16, 2014), <http://www.gsmdome.com/heres-whats-behind-xiaomi-ownership-stocks-percentages-need-know>.

127. Curtis Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 671 (2015).

128. VICTOR SHIH, FACTIONS AND FINANCE IN CHINA 30–46 (2008); see Hong Ru, *Government Credit, a Double-edged Sword*, MIT SLOAN MANAGEMENT (Jan. 17, 2015), <http://hongru.mit.edu/sites/default/files/documents/Ru%202014%2028Job%20Market%20Paper%29.pdf>.

129. Henry Gao, *Public-private Partnership*, 48 J. WORLD TRADE 983, 987–89, 997–1001 (2014).

130. See Milhaupt & Zheng, *supra* note 127, at 687 (noting how the state conducts informal “interviews” with managers of private firms).

131. Stephen Aldred & Irene Jay Liu, *The Princeling of Private Equity*, REUTERS (Apr. 9, 2014), <http://www.reuters.com/article/us-china-privateequity-special-report-idUSBREA3900D20140410>.

ers).¹³² All this happened through an open, transparent, and legal process that resulted in a win-win for both sides. Investors gained healthy returns from Alibaba's IPO, while Alibaba gained sufficient goodwill to embark on a lucrative new business in the financial sector that had otherwise been closed to private firms.¹³³ After the Party opened up membership to entrepreneurs, many happily joined. One study found that 95 of the top 100 executives at private firms are affiliated with central or local Party-state organizations.¹³⁴

To summarize, the final distinguishing element of China's economic structure is as follows: the Party-state oversees a more complex set of formal mechanisms for controlling important economic activity than its counterparts in any other major economy in the world. But despite possessing this power, it has decided that its long-term interests are best served not by always rewarding its cronies, as governments in state capitalist societies elsewhere often do, but instead by allowing the market in many sectors to determine winners and losers. This type of political economy arrangement is highly unusual. Even with an all-powerful Party-state, the private sector outperforms SOEs and plays a key role in driving growth.¹³⁵ Such an arrangement is sustainable because the Party-state retains an impressive array of formal and informal mechanisms to entwine private enterprises into its web.

* * *

On each of the six dimensions discussed above—state assets oversight, financial sector organization, role of state planning, forms of corporate networks, political party involvement, and state-private sector linkages—China stands apart. When considered in their totality, this unique combination of elements gives rise to “China, Inc.” China's economic structure involves a complex web of overlapping networks and relationships—some formal and others informal—between the state, Party, SOEs, private enterprises, financial institutions, investment vehicles, trade associations, and so on. This economic structure is not static: Chinese leaders have been remarkably adaptive and pragmatic in their economic stewardship.

Even as economic growth slows and leaders call for another round of radical economic reforms, one fact should be made clear: China's Communist leaders are no longer following anyone else's economic playbook. Their successes over the past three decades have made them increasingly confident in their ability to forge a distinctively Chinese way forward.

132. Michael Forsythe, *Alibaba's IPO Could Be a Bonanza for the Scions of Chinese Leaders*, N.Y. TIMES, July 21, 2014, at B1.

133. Kane Wu, *China's Ant Financial, Now Valued at \$60 Billion, Draws Mighty Allies*, WALL ST. J. (Apr. 26, 2016), <http://www.wsj.com/articles/alibaba-affiliate-gains-clout-in-chinas-financial-system-1461671985> (highlighting growing ties between Alibaba and state financial companies).

134. Milhaupt & Zheng, *supra* note 127, at 684.

135. See LARDY, *supra* note 25, at 59.

B. *Why China, Inc. Constitutes a New Development for WTO Law*

Simply because a WTO member’s economic structure does not conform to that of others does not mean that WTO rules cannot accommodate it. After all, state-led economies have readily co-existed alongside capitalist economies at the WTO and its predecessor, the General Agreement on Tariffs and Trade (“GATT”), for many years. The international organization is largely agnostic about its members’ underlying economic structure, so long as members engage in the collective enterprise of liberalizing trade. Why then does China’s unique economic structure pose a distinct challenge?

Difficulties arise because WTO rules were not written with China, Inc. specifically in mind. Although some of these rules were drafted recently—in some cases, fewer than fifteen years ago—several of the formal elements discussed above post-date the WTO Agreements and China’s WTO accession protocol. Hence, the law must be reexamined in light of these new developments.

1. *The WTO and Alternative Economic Structures*

The bulk of the WTO legal rules that exist today grew out of the Uruguay Round of trade negotiations (1986–1994). China was not a party to the Uruguay Round negotiations. Nor was it clear during the course of the talks that China would eventually join.¹³⁶ China had begun negotiations in 1986 to rejoin the GATT, but those talks were put on hold in the wake of the Tiananmen Square incident of June 1989.¹³⁷ Only in 1993, when the Uruguay Round negotiations were nearing their conclusion, did China’s accession negotiations restart in earnest.¹³⁸ Therefore, the Uruguay Round negotiators did not immediately need to consider interests vis-à-vis China.

Uruguay Round negotiators, however, did not blindly believe that the world’s economies would necessarily converge on the liberal model. From its inception, the global trading system has contemplated the possibility that a member’s economy may adopt a different structure than a market-oriented structure.¹³⁹ Legal rules were forged to facilitate trade among countries with

136. See Raj Bhala, *Enter the Dragon: An Essay on China’s WTO Accession Saga*, 15 AM. U. INT’L L. REV. 1469, 1480 (2000) (indicating that some, including American trade officials, did not share enthusiasm for China rejoining and quoting former Assistant USTR Douglas Newkirk’s remarks that “[t]he GATT wasn’t written with a socialist market economy in mind”).

137. Jeremy T. Paltiel, *Hinges and Latches on the Open Door: The Normative Parameters of China’s WTO Accession*, in CHINA’S REFORMS AND INTERNATIONAL POLITICAL ECONOMY 131, 138 (David Zweig ed., 2007).

138. *Id.*

139. The GATT itself was a compromise between the United Kingdom, which sought to preserve imperial preferences for Commonwealth countries, and the United States, which did not. See DOUGLAS IRWIN ET AL., *THE GENESIS OF THE GATT* 13–21 (2009) (discussing the importance of this issue in the overall context of the U.S.-U.K. decision to create the GATT). In addition, several Latin American countries sought to preserve flexibility for their economic model within the system. See GIULIANO GARAVINI, *AFTER EMPIRES: EUROPEAN INTEGRATION, DECOLONIZATION, AND THE CHALLENGE FROM THE GLOBAL SOUTH 1957–1986* 23 (Richard R. Nybakken trans., 2012).

different economic structures rather than force a country to adopt another's structure. Specifically, Uruguay Round negotiators foresaw the possibility of four alternative economic structures besides the market-oriented model.

First, negotiators considered the command economy structure prevalent in Communist countries. After the GATT was formed in 1947, Communist governments came to power in two of its original signatories, Czechoslovakia and Cuba. Although the GATT explicitly contemplated the possibility of state interference in the economy,¹⁴⁰ Czechoslovakia worried that its command economy structure might lead other countries to treat its exports unfairly. It pushed for the addition of explicit rules governing trade with a "non-market economy" ("NME").¹⁴¹ The end result was an explicit acknowledgment in the law that members may have different, but equally legitimate, forms of economic organization.

During the 1980s, several socialist countries abandoned the pure form of a command economy and experimented with introducing market elements. This process accelerated following the collapse of Communism in Eastern Europe. In its place arose the concept of a "transition" economy—one in which elements of the centrally planned economic system remained intact but were gradually dismantled in favor of a market-oriented system. Unlike the command economy alternative, negotiators assumed this second alternative structure to be temporary.

A third form that featured prominently at the time was that of corporatism. Corporatism refers to "a system of social and political organization in which major [societal and interest groups] are integrated into the governmental system, often on a monopolistic basis or under state guidance, tutelage, and control, to achieve coordinated national development."¹⁴² Each functional group is granted a "deliberate representational monopoly within their respective categories in exchange for observing certain controls on the selection of leaders and articulation of demands and supports."¹⁴³ Examples include labor or agricultural producers. The most ardent practitioners of corporatism were to be found in Latin America and parts of Europe.

Finally, the other economic form under heavy scrutiny during the Uruguay Round was the integrated conglomerate-led structure found in East Asia. Examples include Japan's *keiretsu*-led and South Korea's *chaebol*-led structures. Each industrial conglomerate features cross-shareholding relationships that integrate companies across multiple sectors. In addition, each has its own financing vehicle. The state works closely with conglomerates to

140. See General Agreement on Tariffs and Trade art. XVII, Apr. 15, 1994, 1867 U.N.T.S. 208 [hereinafter GATT].

141. See *id.* Ad Note art. VI.

142. HOWARD J. WIRADA, CORPORATISM AND COMPARATIVE POLITICS ix (1997).

143. Philippe Schmitter, *Still the Century of Corporatism?*, 36 REV. POL. 85, 93–94 (1974).

drive economic policy.¹⁴⁴ During the 1980s and the early 1990s, Western academics developed a fascination with this alternative economic structure and engaged in a vigorous debate over whether it represented a form superior to market capitalism.¹⁴⁵ The conglomerate-led model came under heavy scrutiny during the Uruguay Round.

Negotiators crafted WTO rules with all of these economic structures in mind. Drawing on this heterogeneous set of models, the negotiators sought to anticipate scenarios arising under each system that might give rise to trade tensions. They then sought to create explicit legal rules to manage such tensions. Therefore, the China, Inc. challenge does not arise from the fact that the Chinese economic structure differs from market capitalism in its purest form. WTO rules, after all, accept different systems. Instead, the challenge stems from the fact that China, Inc. does not conform to *any* of the alternative economic forms envisioned under WTO rules.

2. *How China, Inc. Differs from Other Alternative Economic Structures*

It goes without saying that China, Inc. is no longer a command economy. But it is also different from the three other alternative economic structures contemplated under WTO rules.

First, consider how China’s economy differs from that of other post-transition economies. Unlike the economies of Central and Eastern Europe, China did not engage in a “shock therapy” approach to SOEs.¹⁴⁶ China’s aim has not been to transition to a market economy; instead, it has forged its own hybrid structure with certain sectors largely in the hands of private enterprises while others remain under state control. While Chinese leaders may speak today of allowing market forces to play a bigger role in the economy, no one suggests that the Party-state should retreat to the same extent as it has in other transition economies.¹⁴⁷

China’s economic structure is also not corporatist in form. Although labor and industry associations exist, all continue to operate as part of the Party apparatus.¹⁴⁸ These groups lack genuine power to bargain on behalf of their

144. See, e.g., ALICE AMSDEN, *ASIA’S NEXT GIANT* (1992); ALICE AMSDEN, *THE RISE OF “THE REST”* (2003); CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982); Joseph Stiglitz, *Some Lessons from the East Asian Miracle*, 11 *WORLD BANK RESEARCH OBSERVER*, Aug. 1996, at 151, 155–57.

145. See, e.g., JOHNSON, *supra* note 144; KENICHI MIYASHITA & DAVID RUSSELL, *KEIRETSU* (1995); RICHARD STEERS ET AL., *THE CHAEBOL* (1991).

146. See Quamrul Alam et al., *Shock Therapy Versus Gradualism: The Central Eastern Europe (CEE) and East Asia Compared—A Review of Literature*, 2 *INT’L BUS. RESEARCH*, Apr. 2009, at 3.

147. See Kevin Hamlin & Xin Zhou, *China Vows Bigger Role for Markets as Party Closes Summit*, *BLOOMBERG* (Nov. 12, 2013), <http://www.bloomberg.com/news/articles/2013-11-12/china-vows-bigger-role-for-markets-as-party-closes-summit> (stating “[state-owned enterprises] will remain ‘dominant’ indicating limits on rolling back government involvement”).

148. See *Membership Required*, *ECONOMIST* (July 31, 2008), <http://www.economist.com/node/118484> 96; Rudolf Traub-Merz, *All China Federation of Trade Unions* iii (International Labour Organization, Working Paper No. 13, Sept. 2011).

constituencies in the political economy, unlike their counterparts in corporatist economies. In China, the Party-state remains firmly in control.

Finally, China's economy has also not developed along the lines of the Asian conglomerate-led model. There is no Chinese equivalent of Samsung, Hyundai, Mitsui, or Mitsubishi. Lin and Milhaupt rightly note:

[I]n contrast to the main postwar Japanese *keiretsu* and Korean *chaebol* corporate groups, Chinese business groups are vertically integrated firms focused on a particular industry or sector, not diversified groups involved in a wide range of industries. In complementary fashion, and again in contrast to *keiretsu* and *chaebol* structures, shareholding is hierarchical: firms higher in the structure own downstream subsidiaries, but there is very little upstream or cross-ownership among group firms.¹⁴⁹

In short, the Chinese economy differs from the economic models that influenced the Uruguay Round agreements. Although the Chinese economy is more transparent and market-oriented than it was prior to WTO accession, it has not yet converged along the lines of either a market economy or one of the alternative economic structures. China, Inc. remains a distinct form of its own.

3. *Why China, Inc. Does Not Figure Heavily in WTO Rules*

While the above analysis explains why the Uruguay Round agreements do not address China's economic structure, a separate question remains. Because China joined the WTO after its creation, China could have been made subject to additional rules beyond those of the Uruguay Round agreements. Between 1995 and 2001, WTO members negotiated directly with China over such provisions. By this time, China's economic reforms had already restarted, and China's emerging strength as a trading nation had become increasingly apparent. Why then do the China-specific rules embedded in China's Protocol of Accession also fail to sufficiently address issues associated with China, Inc.?

To the extent that negotiators could anticipate potential problems, they did try to carve out specific provisions in the Protocol to address them. For example, the Protocol includes rules specific to China's state trading regime and price controls.¹⁵⁰ It also imposes several transparency requirements designed to bring Chinese economic policies more into the open.¹⁵¹

Why then are there not more rules dealing with economic issues specific to China? After all, several sinologists at the time warned that China's economic development would likely take its own course. Professor William

149. Lin & Milhaupt, *supra* note 27, at 711.

150. Protocol of Accession, *supra* note 34, §§ 5–6, 9.

151. *Id.* §§ 2(C), 6, 8–10, 13–14.

Alford, for example, cautioned that U.S. trade policy would “defeat itself” because it “displayed a disturbing indifference both to the legacy of the Chinese past and the implications of its current political, legal, and economic circumstances.”¹⁵² Professor Dwight Perkins noted that China would be inclined to develop a new approach for economic governance rather than simply embrace the market or the Korean/Japanese industrial policy approach.¹⁵³ Others also warned that uniquely Chinese features would not necessarily disappear overnight following WTO accession.¹⁵⁴

With the historical record still sealed, one can only speculate why the negotiators did not heed this warning and pursue additional specific rules more aggressively. Four potential reasons come to mind.¹⁵⁵

First, in the 1990s, many doubted claims of Chinese exceptionalism and instead believed that China would converge along the lines of other economies. This was especially true of some prominent academics who were not sinologists, but who may have had greater influence in shaping post-Cold War foreign policy. It was also, in part, true of the media.

One camp believed that China, although nominally Communist, would eventually follow the path of other transition economies. The end of the Cold War triggered a triumphalist belief that the market economy was ascendant.¹⁵⁶ Another camp believed that an East Asian development model was emerging,¹⁵⁷ which China was destined to follow.¹⁵⁸ Describing China’s economic structure in the late 1990s, *The Economist* noted that Chinese con-

152. William Alford, *Making the World Safe for What?*, 29 N.Y.U. J. INT’L L. & POL. 135, 140, 145 (1996); see also WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* (1995); William Alford, *Exporting the ‘Pursuit of Happiness,’* 113 HARV. L. REV. 1677, 1707–08 (2000); William Alford, *A Piracy Deal Doesn’t Make a China Policy*, WALL ST. J., July 17, 1996, at A14.

153. Dwight Perkins, *Industrial and Financial Policy in China and Vietnam: A New Model or a Replay of the East Asian Experience*, in *RETHINKING THE EAST ASIAN MIRACLE* 247, 249 (Joseph E. Stiglitz & Shahid Yusuf eds., 2001).

154. See, e.g., Thomas Rawski, *China Reform Watch* 38 CHINA PERSPECTIVES 28 (2001) (suggesting the re-emergence of Chinese statist features). Note that more scholars began expressing these views following China’s accession, specifically following developments of the Sixteenth Party Congress in 2002. See Donald Clarke, *China’s Legal System and the WTO: Prospects for Compliance*, 2 GLOBAL STUD. L. REV. 97 (2003).

155. These explanations are not mutually exclusive.

156. See Charles Gore, *The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries*, 28 WORLD DEV. 789, 789–90 (2000); John Williamson, *A Short History of the Washington Consensus*, in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* 14 (Narcís Serra & Joseph E. Stiglitz eds., 2008); see also Robert Kagan, *The End of the End of History*, NEW REPUBLIC (Apr. 23, 2008), <https://newrepublic.com/article/60801/the-end-of-the-end-history>.

157. See generally WORLD BANK, *THE EAST ASIAN MIRACLE* (1993) [hereinafter 1993 World Bank report].

158. See, e.g., Masahiko Aoki et al., *Beyond the East Asian Miracle: Introducing the Market Enhancing View*, in *THE ROLE OF GOVERNMENT IN EAST ASIAN ECONOMIC DEVELOPMENT* 1 n.1 (1997) (describing China as part of the East Asian regional production network that includes the economies cited in the 1993 World Bank report); Kenneth Waltz, *Structural Realism After the Cold War*, 25 INT’L SEC. 5, 35–36 (2000) (“Whether reluctantly or not, Japan and China will follow each other on the route to becoming great powers.”); see also SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (describing China as part of a Sinic civilization that also influences Southeast Asia and Japan).

glomerates “are borrowing some things from Japan, especially the *keiretsu* system” but then famously predicted that the Chinese conglomerates’ “real role models are South Korea’s conglomerates, the mighty *chaebol*.”¹⁵⁹ A third camp, which included some sinologists, believed that China was destined to evolve along the lines of the corporatist model.¹⁶⁰

Although these camps disagreed as to where China would wind up, they shared a common belief that China would converge toward an economic model already considered under WTO rules. If negotiators bought into any of these arguments, then they would have felt that the existing WTO rules were largely sufficient.

Second, negotiators may have thought that the better approach to deal with these issues was through the creation of general rules that provided China’s trading partners with increased flexibility to take action against China. Even if they subscribed to Chinese exceptionalism, they may have doubted their ability to forecast accurately the course of China’s development and instead preferred a generalist approach.

Two particular provisions are worth noting. First, China’s trading partners declared that regardless of whatever economic structure China embraced, they were free to consider China to be a NME for antidumping investigations for fifteen years following China’s WTO accession.¹⁶¹ Second, they also declared that at any point in the first ten years, they were free to backtrack on their tariff concessions, by raising tariffs temporarily through the WTO safeguards mechanism against Chinese imports only.¹⁶² Chinese negotiators pushed back hard against what they viewed as discriminatory provisions, but in the end agreed to these WTO-plus provisions.¹⁶³

Third, China’s trading partners may have misjudged the degree to which China’s leadership-in-waiting, led by former President Hu Jintao, would alter China’s economic structure once it assumed power in 2002. They expected that the new administration would simply continue the economic policies of its predecessor.¹⁶⁴ After all, the new leaders were viewed as be-

159. *China Adopts the Chaebol*, *ECONOMIST* (June 5, 1997), <http://www.economist.com/node/90635>.

160. See, e.g., Bruce J. Dickson, *Cooptation and Corporatism in China: The Logic of Party Adaptation*, 115 *POL. SCI. Q.* 517, 532–38 (2001); Jean C. Oi, *The Evolution of Local State Corporatism*, in *ZOUPING IN TRANSITION: THE PROCESS OF REFORM IN RURAL NORTH CHINA* 35 (Andrew G. Walder ed., 1998); Jonathan Unger & Anita Chan, *China, Corporatism, and the East Asian Model*, 33 *AUSTR. J. CHINESE AFF.* 29 (1995).

161. See Protocol of Accession, *supra* note 34, § 15. The importance of a trading partner’s ability to apply NME status against China was well known to negotiators and had been critiqued already by legal academics. See William Alford, *When Is China Paraguay?*, 61 *S. CAL. L. REV.* 79 (1987).

162. Protocol of Accession, *supra* note 34, § 16.

163. See Julia Qin, “WTO-plus” *Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol*, 37 *J. WORLD TRADE* 483, 502 n.83 (2003).

164. See Dali L. Yang, *China in 2002: Leadership Transition and the Political Economy of Governance*, 43 *ASIAN SURV.* 25, 25 (2003) (describing the new leadership as a set of “trusted lieutenants and supporters to ensure political and policy continuity”).

longing to the same pro-reform faction¹⁶⁵ and had publicly expressed their support of the earlier economic policies, including WTO entry.¹⁶⁶ In particular, Premier Wen Jiabao, who oversaw the economy, was seen as a protégé of the outgoing Premier Zhu and viewed as having secured his job only with his mentor's backing.¹⁶⁷ Finally, outsiders viewed Hu as a cautious leader, prone to continuing the Party's consensus-based decision-making process.¹⁶⁸ Given these factors, negotiators did not think that a change in leadership would dramatically alter China's economic structure or policies. As I discuss in the next section, this turned out to be incorrect.

Fourth, the notion of granting China permanent normal trading relations faced considerable political resistance in the United States and elsewhere. Even if they believed that China was destined toward economic exceptionalism, China's trading partners nevertheless may have designed their strategy with political objectives in mind. In particular, the Clinton Administration may have found the convergence narrative a much more compelling selling point to push its agenda on Capitol Hill.¹⁶⁹

Whatever the reasons, China's negotiating counterparts, at least publicly, considered themselves successful in their endeavor to contain China's ability to utilize its economic structure to its advantage. Testifying before Congress, U.S. Trade Representative Charlene Barshefsky declared that the "agreement deals appropriately with the special and unusual characteristics of the Chinese economy."¹⁷⁰ She then boasted that "no agreement on WTO accession has ever contained stronger measures to strengthen guarantees of fair trade and to address practices that distort trade and investment."¹⁷¹ Little could one have anticipated that, three years later, elements of China's economic structure would alter dramatically.

165. George J. Gilboy & Eric Heginbotham, *China's Coming Transformation*, 80 FOREIGN AFF., July–Aug. 2001, at 26, 36 (describing Hu Jintao as seeking to promote reformers and completing the efforts of his reform predecessors). Within the reform faction, some scholars were already noting differences between the Shanghai clique and the Communist Youth Party clique, with Jiang and Hu belonging to different cliques. However, these differences were not believed to align with different economic objectives.

166. In February 2002, as Vice President, Hu spoke at the Central Party School emphasizing the need to focus on the challenges and opportunities associated with WTO entry. See KERRY BROWN, HU JINTAO: CHINA'S SILENT RULER 78 (2012).

167. ANDREW J. NATHAN & BRUCE GILLEY, CHINA'S NEW RULERS: THE SECRET FILES 101, 120 (2003).

168. Joseph Kahn, *Change in China: Man in the News; Mystery Man at the Helm Hu Jintao*, N.Y. TIMES (Nov. 15, 2002), <http://www.nytimes.com/2002/11/15/world/change-in-china-man-in-the-news-mystery-man-at-the-helm-hu-jintao.html>; see also Murray Scot Tanner, *After Jiang, Hu? Can Hu Jintao Beat the "Successor's Dilemma?"*, in ASIA PROGRAM SPECIAL REPORT 7 (Woodrow Wilson International Center for Scholars, June 2001) (describing Hu's need to move cautiously to retain his predecessor's support while building his own power base).

169. See Alford, *Making the World Safe for What?*, *supra* note 152, at 145 (arguing that the administration sacrificed long-term national interests for short-term electoral and commercial gain).

170. *Hearing on the Accession of China to the WTO Before the H. Comm. on Ways and Means*, 106th Cong. 39 (2000) (statement of U.S. Trade Representative Charlene Barshefsky).

171. *Id.*

4. *The Emergence of China, Inc. After WTO Accession*

China's economic reformers are often painted as adopting an incremental, gradualist approach.¹⁷² Nevertheless, certain events have functioned as pivotal turning points. China's WTO entry in 2001 is considered to be one such pivot. However, another set of events, less well known but also critical, occurred two years later in 2003.¹⁷³

When China's accession negotiations finished in 2001, many of the distinct elements of today's China, Inc. were not yet in place. Take, for example, three elements: SASAC, Central Huijin, and the NDRC. None would have been familiar to WTO accession negotiators because none existed in their current form in 2001. All three came into being only as a result of the Hu-Wen administration's government reorganization in 2003, an overarching strategy to deliver on economic growth while maintaining tight political control.¹⁷⁴

This is not to suggest that the Chinese concealed their true intentions. Throughout the 1990s, Chinese leaders openly and repeatedly stated that they sought to forge their own unique economic system.¹⁷⁵ Moreover, economic developments in China's reform era have proceeded largely through incremental rather than through radical, abrupt policy shifts. Thus, the development of China, Inc. should not be understood as a deliberate *ex post* act to circumvent WTO rules.

Instead, some Westerners refused to take the Chinese proclamations at face value. A famous anecdote stems from former President George H.W. Bush's visit in 1998. When meeting with Premier Zhu, President Bush asked how China's privatization plan was proceeding. Premier Zhu, taken aback, responded that China was not undergoing privatization but simply corporatizing its state assets. President Bush reportedly responded, with a nudge and a wink, that no matter how the Premier described the process, "we know what's going on."¹⁷⁶

The precise plans were put into motion with the leadership transition in 2002. At the 16th Party Congress in November 2002, outgoing General Secretary Jiang Zemin's valedictory report made a veiled reference that the Party "should explore systems and modes for managing state property more

172. See, e.g., Steven M. Goldstein, *China in Transition: The Political Foundations of Incremental Reform*, 144 CHINA Q. 1105 (1995).

173. For a discussion of pivotal legal developments in 2003 related to the economic developments discussed below, see Donald Clarke, *Legislating for a Market Economy in China*, 191 CHINA Q. 567, 575-76 (2007).

174. Leslie Hook & Jamil Anderlini, *Hu Jintao Reasserts Party's Tight Grip*, FIN. TIMES (Nov. 8, 2012, 8:09 PM), <http://www.ft.com/intl/cms/s/0/b89d8bb68-28ce-11e2-b92c-00144feabd0.html#axzz42ENRRTec> (describing the Hu-era vision as one "insisting that state dominance of the economy and one-party rule will be maintained").

175. See, e.g., President Jiang Zemin, Speech at Luncheon by the America China Society and Five Other Organizations (Oct. 30, 1997), <http://asiasociety.org/speech-president-jiang-zemin-peoples-republic-china>.

176. MCGREGOR, *supra* note 26, at 43.

effectively.”¹⁷⁷ In March 2003, the National People’s Congress then authorized SASAC’s formation to take effect that June. This move consolidated power and oversight over SOEs from various ministries and bureaucratic agencies into the hands of a single powerful entity.¹⁷⁸

In 2003, the new administration also decided to change how it rescued financial institutions. Traditionally, the central bank, the People’s Bank of China (“PBOC”), directly injected funds into flailing banks. In 2003, the state created a new entity, Central Huijin, into which the PBOC injected \$45 billion of foreign exchange reserves. Central Huijin then used the funds to bail out two of the Big Four banks, CCB and BOC, in exchange for the majority of the bank’s shares.¹⁷⁹ This new mechanism led to a reorganization and tightening of the state’s control over China’s financial sector.

Also in 2003, the new administration decided to merge the SPC’s successor agency with two other agencies, the State Council Office for Restructuring the Economic System and the State Economic and Trade Commission.¹⁸⁰ This led to the creation of the NDRC. It was therefore during the Hu-Wen era that the NDRC assumed its status as China’s super-ministry.¹⁸¹

In short, important contours of today’s China, Inc. were crafted in the aftermath of its WTO accession. Had China’s trading partners anticipated these changes during China’s WTO negotiations, they could have crafted legal rules tailored to address scenarios in which the changes might disadvantage foreign producers.

Few Western scholars, writing after Premier Zhu’s 1998 reforms but prior to China’s WTO entry in 2001, believed that the Chinese leadership would reconsolidate and centralize control to the extent that the Hu-Wen administration did in the ensuing 2003 reforms. Even those who accurately forecasted this development believed that the leadership could not pull it off.¹⁸² Yet, for a decade and counting, China’s leaders have largely succeeded in spurring market-led growth while maintaining strict state control.

If the contours of China, Inc. have been in place since 2003, why then has the WTO system worked to date? Why has it not faced a China, Inc. challenge sooner? For the first decade following China’s WTO accession, the special provisions negotiated in the Protocol allowed WTO members to sidestep controversies related to China’s economic structure. However, sev-

177. General Secretary Jiang Zemin, Report to the 16th Party Congress of the Communist Party of China (Nov. 17, 2002), <http://www.china.org.cn/english/features/49007.htm>.

178. See Barry Naughton, *The State Asset Commission: A Powerful New Government Body*, 8 CHINA LEADERSHIP MONITOR, Fall 2003, at 1; Jianyu Wang, *The Political Logic of Corporate Governance in China’s State-owned Enterprises*, 47 CORNELL INT’L L.J. 631, 646 (2014).

179. See Victor Shih, *Beijing’s Bailout of Joint-stock and State-owned Banks*, CHINA BRIEF (Aug. 16, 2005), http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=30797&no_cache=1#.VtIQmpMrJE4.

180. Martin, *supra* note 94, at 14.

181. *Id.* at 14–15.

182. See Rawski, *supra* note 154, at 7–9 (describing resurgent statism and market-oriented reforms as incompatible and noting that one of these tendencies must ascend).

eral of these provisions will expire. The China-specific safeguard already expired in 2011, and the NME provision for antidumping will soon expire in December 2016.

Once these rules disappear, China's trading partners will no longer be able to rely on these special provisions to address their trade conflicts with China. Instead, they will need to return to the core WTO agreements negotiated in the Uruguay Round. The question thus re-emerges as to whether the core WTO rules can sufficiently govern issues arising out of China's economic structure.

II. JUST HOW WELL EQUIPPED IS THE WTO TO HANDLE THE RISE OF CHINA, INC.?

Even though WTO rules were written without China, Inc. in mind, this does not mean that WTO law will prove altogether ineffective. As noted earlier, China's trading partners have filed over thirty disputes against China in the past decade in which they have largely prevailed.¹⁸³ Governments tout the WTO as an effective forum for inducing China to play by the rules.¹⁸⁴ Yet, despite these litigation victories, some commentators increasingly complain that "the WTO is utterly unable to come to terms" with Chinese economic practices.¹⁸⁵ How should one make sense of this paradox?

Part II elaborates on the precise nature of the challenge posed by the rise of China, Inc. I suggest that China-related WTO issues can be divided into two categories. The first are issues that fall under the WTO's jurisdiction and resemble practices found under other economic models. These are disputes that the WTO is perfectly well equipped to address. Part II.A highlights three such issues. As I will explain, they constitute the source of the large volume of existing China-related WTO litigation.

The problem is that, as discussed in Part I.A, not all of China's trade practices resemble those of other alternative economic systems. How then are existing WTO legal rules to be interpreted to fit the Chinese context when the rules themselves were drafted without China, Inc. in mind? These issues represent emerging points of tension for the WTO system. Part II.B highlights two such examples. Whether the WTO wishes to or not, it will be forced to confront these issues head-on. But with the negotiating arm of the institution in stasis, this job will fall heavily on the WTO's judiciary. Whether the WTO's Dispute Settlement Body ("DSB") is up to the task remains to be seen.

183. See WTO Disputes by Country/Territory, *supra* note 9.

184. See, e.g., *EU Wins a Dispute on Chinese Anti-dumping Duties*, EURO. COMM'N (Feb. 13, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1257>; Landler, *supra* note 10.

185. Derek Scissors, *The Most Important Chinese Trade Barriers, Testimony Before the U.S. House of Representatives*, HERITAGE FOUND. (Jul. 19, 2012), <http://www.heritage.org/research/testimony/2012/07/the-most-important-chinese-trade-barriers>.

Further complicating the situation, a number of China-related trade conflicts concern issues that fall outside of the WTO's existing jurisdiction or which the WTO has chosen not to address. I reserve discussion of these issues for Part III. Nevertheless, they also raise important questions of whether key actors will choose to move beyond the WTO to address their trade concerns.

This dichotomy explains why, on the one hand, the WTO has resolved a large volume of China-related trade disputes, and yet, on the other hand, its critics remain dissatisfied. The first category gives rise to the increasing volume of WTO litigation. But the latter category simultaneously gives rise to the WTO's China, Inc. challenge.

A. Issues for Which WTO Law Proves Sufficient

The distinctive structure of China, Inc. presents the Chinese government with various mechanisms to advantage Chinese firms over their foreign competitors. However, WTO law is not altogether ineffective in constraining such behavior. For a subset of issues, WTO law proves effective. These issues share a commonality—as long as they involve a problem that could also arise in at least one of the alternative economic structures considered by WTO law, WTO law proves adequate.

1. State-coordinated Economic Action

Given the close links between the Chinese Party-state and Chinese enterprises, both state-owned and private, one concern is that the state may coordinate action across Chinese enterprises to the detriment of foreign competitors. Consider three possibilities: First, Chinese producers could coordinate to lower prices in order to gain increased global market share. Second, for export markets already dominated by Chinese producers, they could coordinate to raise export prices in order to increase profits. Third, Chinese producers could agree to divide overseas markets between themselves, so that each firm focuses on a particular geography or consumer demographic without generating unnecessary competition.

Each of these coordinated actions could subject Chinese enterprises to action by competition authorities in export markets. To avoid this possibility, Chinese enterprises would seek to avoid any overt appearance of collusion. This is where the state could step in to assist, both to facilitate coordination and to monitor against potential defection.

One possible mechanism is through state-run industry associations. However, given the close scrutiny paid to associations by competition authorities, most likely, the state would employ subtler methods. For example, the state could provide directives through the firms' party committees. The minutes of such meetings, unlike the minutes of trade associations' meetings, remain secret. The state could also monitor behavior through state-owned banks.

Banks, when evaluating and monitoring loans, could require exporters to provide certain information about their business practices. The NDRC, in turn, could ask banks to report this information, allowing it to monitor the firms' behavior.

In each of the above examples, state coordination does not take on an overt form. The state does not gather exporters in a room to issue a dictate. Nevertheless, exporters, aware of the state's gaze, will self-regulate to keep their actions in line. This would benefit Chinese exporters overall, to the detriment of foreign competitors.

China, Inc., however, is not the only alternative economic system where state-led export coordination is potentially troubling. Government agencies have also played a powerful coordinating role in corporatist and conglomerate-led economies. The quintessential example was Japan's MITI in its heyday.¹⁸⁶

Because the GATT/WTO has already confronted issues of state-coordinated economic actions in an earlier line of cases, trade law is readily equipped to deal with this type of action by China, Inc. In the *Japan — Semi-conductors* case, a GATT panel held that a government could violate trade law by issuing administrative guidance and fining firms for not notifying the government of their actual practices.¹⁸⁷ This is the case, even if the guidance provided was noncompulsory and simply suggestive.¹⁸⁸ Twelve years later, in the *Argentina — Bovine Hides* case, the WTO further ruled that a government violates WTO law by simply facilitating an industry association's monitoring of exporters' actions if such facilitation leads to the creation of a *de facto* trade restriction.¹⁸⁹ These earlier disputes provide a solid jurisprudential base to draw upon for finding similar action by China, Inc. illegal.

Therefore, while the unique economic structure of China, Inc. provides ample opportunity for state-led coordination of export action, this type of government action does not pose an insurmountable challenge for the WTO. For this class of actions, WTO law clearly allows China's trading partners harmed by such action to bring a claim. The challenge is evidentiary, not legal: the complainant must obtain proof of the state's trade-restrictive behavior. Provided it can do so, WTO law stands ready to constrain such acts.

Two recent cases, *China — Raw Materials* and *China — Rare Earths*, offer proof. In both instances, government policies sought to coordinate action among upstream suppliers of key minerals in order to benefit domestic firms

186. See generally JOHNSON, *supra* note 144.

187. See Report of the Panel, *Japan — Trade in Semi-conductors*, L/6309 (May 4, 1988), GATT BISD (35th Supp.), at 116 (1989) [hereinafter *Japan — Semi-conductors*].

188. *Id.* ¶¶ 108–09.

189. Panel Report, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (Dec. 19, 2000) [hereinafter *Argentina — Bovine Hides*].

downstream.¹⁹⁰ The Appellate Body found that such policies violated provisions of the GATT and China’s Protocol of Accession.¹⁹¹ WTO law proved sufficient to undo the trade-distortive behavior arising out of China, Inc.

2. *Local Content Requirements*

Another class of concerns relates to attempts by the Party-state to bully foreign firms into shifting their manufacturing to China, partnering with Chinese firms, and/or buying from Chinese suppliers.¹⁹² To do so, the government may require that a foreign firm purchase a given percentage of its inputs from domestic sources. In exchange for economic benefits, the government stipulates local content requirements.¹⁹³

Foreign firms might choose not to accept such requirements. But such refusal risks ceding the large Chinese market to rivals. The government’s leverage derives from the domestic market’s sheer size as well as China, Inc.’s unique structure. Consequently, China is remarkably effective at playing foreign firms off one another to obtain favorable terms for its domestic interests.¹⁹⁴ Its strategy facilitates job creation, technology transfer, and skills upgrading.

While the Chinese government may possess greater leverage than most governments, the phenomenon is not uniquely Chinese. A recent Peterson Institute study described local content requirements as a “global problem,” offering examples from Brazil, Canada, India, and Nigeria.¹⁹⁵ More than a hundred proposals have been made since 2008 alone, reducing trade by an estimated \$93 billion annually.¹⁹⁶ China is only the latest in the long line of governments that have deployed this strategy.

Consequently, because this phenomenon predates the rise of China, Inc., WTO law is well positioned to address this aspect of China, Inc. WTO treaties contain several explicit prohibitions against its use. GATT Article III:5, for example, forbids WTO members from “establish[ing] or maintain[ing] any internal quantitative regulation . . . which requires, directly or indirectly, that any specified amount or proportion of any product which is

190. Jane Korinek & Jeonghoi Kim, *Export Restrictions on Strategic Raw Materials and Their Impact on Trade and Global Supply*, 45 J. WORLD TRADE 255, 257–59 (2011); Keith Bradsher, *China Tightens Grip on Rare Minerals*, N.Y. TIMES, Sept. 1, 2009, at B1.

191. See *China — Raw Materials*, *supra* note 11; *China — Rare Earths*, *supra* note 12.

192. John Bussey, *China: Bullying to Prosperity*, WALL ST. J. (Oct. 14, 2011), <http://www.wsj.com/articles/SB10001424052970204774604576629200721570470>; Norihiko Shirouzu, *China Spooks Auto Makers*, WALL ST. J. (Sept. 16, 2010), <http://www.wsj.com/articles/SB10001424052748704394704575495480368918268>.

193. For an example specific to China, see GARY HUFBAUER ET AL., *LOCAL CONTENT REQUIREMENTS: A GLOBAL PROBLEM* ch. 6 (2013).

194. Paul Mozur, *Using Cash and Pressure, China Builds Its Chip Industry*, N.Y. TIMES, Oct. 27, 2014, at B1.

195. See generally HUFBAUER ET AL., *supra* note 193.

196. CHATHLEEN CIMINO ET AL., *PROPOSED CODE TO DISCIPLINE LOCAL CONTENT REQUIREMENTS* 1, 11 (PIIE Policy Brief No. PB14–6, 2014).

the subject of the regulation must be supplied by domestic sources.”¹⁹⁷ Article 3.1 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) explicitly classifies “subsidies contingent . . . upon the use of domestic over imported goods” as one of two types of prohibited subsidies.¹⁹⁸ The Agreement on Trade-Related Investment Measures (“TRIMS”), governing investment rules, also lists requirements to “purchase or use . . . products of domestic origin or from any domestic source” as an illustrative example of a prohibited investment measure.¹⁹⁹

These provisions have given rise to a line of WTO case law finding local content requirements illegal. Most involve the car industry. In both the *Indonesia — Autos* and *Canada — Autos* cases, the WTO ruled against conditional tax and duties exemptions tied to local manufacturing.²⁰⁰ In the *India — Autos* case, the WTO ruled against import restrictions tied to the use of domestic parts.²⁰¹

Therefore, even though the Chinese government may possess unprecedented power to direct foreign firms to manufacture in China and/or purchase from Chinese firms, WTO law still has the potential to serve as an effective constraint. On at least five occasions in the past decade, the WTO has served as a venue for complaints lodged against the Chinese government for local content requirements.²⁰² In most instances, China’s trading partners have successfully settled the complaint or prevailed in the ensuing litigation.²⁰³

197. GATT, *supra* note 140, art. III:5.

198. Agreement on Subsidies and Countervailing Measures art. 3.1(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

199. Agreement on Trade-Related Investment Measures art. 2.2, Annex ¶ 1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186.

200. Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry*, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) [hereinafter *Indonesia — Autos*]; Appellate Body Report, *Canada — Certain Measures Affecting the Automobile Industry*, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada — Autos*].

201. Appellate Body Report, *India — Measures Affecting the Automobile Sector*, WT/DS146/AB/R, WT/DS175/AB/R (Mar. 19, 2002).

202. See, e.g., Request for Consultations by the United States, *China — Measures Affecting the Imports of Automobile Parts*, WT/DS340/1 (Apr. 3, 2006); Request for Consultations by Canada, *China — Measures Affecting the Imports of Automobile Parts*, WT/DS342/1 (Apr. 19, 2006); Request for Consultations by the United States, *China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1 (Feb. 7, 2007); Request for Consultations by the United States, *China — Measures Concerning Wind Power Equipment*, WT/DS419/1 (Jan. 6, 2011); Request for Consultations by Mexico, *China — Measures Relating to the Production and Exportation of Apparel and Textile Products*, WT/DS451/1 (Oct. 18, 2012).

203. Appellate Body Report, *China — Measures Affecting the Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008); Communication from China and the United States, *China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/14 (Jan. 4, 2008); Press Release, U.S. Trade Representative, China Ends Wind Power Equipment Subsidies Challenged by the United States in WTO Dispute (June 7, 2011) (<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/june/china-ends-wind-power-equipment-subsidies-challenged>). The Mexico-China textiles dispute remains pending.

3. *State Trading Enterprises*

Another potential concern stems from China, Inc.’s potential control over the trade distribution channels made available to foreign firms. The state can grant exclusive rights to particular firms to import, purchase, market, and/or sell particular goods in the domestic market. Such firms may be SOEs, but they may also be private firms with close links to the Party-state.²⁰⁴ By restricting such rights, the state introduces market distortions that can benefit particular domestic producers or consumers, while potentially disadvantaging foreigners.²⁰⁵ Such fears particularly abound for agricultural imports.²⁰⁶

State control over trade, however, is not a uniquely Chinese phenomenon. This type of control exists not only in command economies, but also in certain mixed and market economies,²⁰⁷ which predate the rise of China, Inc. Consequently, WTO rules exist to address these concerns. GATT Article XVII includes a number of obligations for state trading enterprises, including requirements that they “act in a manner consistent with the general principles of non-discriminatory treatment” and “make any . . . purchases or sales in accordance with commercial considerations.”²⁰⁸ Countries are also required to notify the WTO of the products subject to trade via state trading enterprises.²⁰⁹ The scope of these obligations has been clarified further through WTO case law.²¹⁰

Furthermore, when negotiating China’s accession, trading partners correctly anticipated that state control over trading might give rise to trade tensions. They therefore included additional language in the Protocol of Accession requiring China to “provide full information on the pricing mechanism of its state trading enterprises for exported goods.”²¹¹ China was also required to designate its full list of state trading enterprises as part of its schedule.²¹²

This combination of prior rules coupled with China-specific rules has meant that WTO law has been well equipped to handle conflicts concerning state trading in China. Although the structure of China, Inc. allows the state

204. HEIWEI TANG, *THE DOMESTIC SEGMENT OF GLOBAL SUPPLY CHAINS IN CHINA UNDER STATE CAPITALISM* (Federal Reserve Bank of Dallas, Working Paper No. 186, 2014).

205. See, e.g., Steve McCorriston & Donald MacLaren, *The Trade Distorting Effect of State Trading Enterprises in Importing Countries*, 49 EUR. ECON. REV. 1693 (2005); Michael Roberts, *The Unique Role of State Trading Enterprises in World Agricultural Trade*, 6 DRAKE J. AGRIC. L. 287 (2001).

206. Steve McCorriston & Donald MacLaren, *The Trade and Welfare Effects of State Trading in China with Reference to COFCO*, 33 WORLD ECON. 615 (2010).

207. Linda Young, *Prevalence and Reform of State Trading Enterprises in World Grain Markets*, 47 CAN. J. AGRIC. ECON. 351 (1999).

208. GATT, *supra* note 140, art. XVII:1.

209. *Id.* art. XVII:4.

210. See Appellate Body Report, *Canada — Measures Relating to Export of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (Aug. 30, 2004).

211. Protocol of Accession, *supra* note 34, § 6.

212. *Id.* § 5, Annex 2.

to exercise direct or indirect control over key trading and distribution channels, WTO members can vindicate their rights when discriminatory treatment arises. The *China — Audiovisuals* case provides one example.²¹³ Even after China joined the WTO, Chinese authorities continued to require that the foreign films be imported and distributed through SOEs and state-designated firms. The United States argued successfully that the state-trading scheme was discriminatory. To resolve the case, China later agreed to raise its quota of foreign studio films by 70%.²¹⁴ Again, the WTO bolstered the economic interests of foreign producers in the face of problematic behavior arising out of China, Inc.

* * *

The above examples demonstrate that under certain circumstances, despite the unique nature of China, Inc., the WTO can serve as an effective forum for resolving trade disputes. Most likely, these are situations in which the behavior of China, Inc. resembles that of other alternative economic structures. In such instances, a body of treaty text and jurisprudence already exists to address the problematic behavior. These laws can be applied to the China, Inc. context, allowing China's trading partners to vindicate their rights.

B. *Emerging Points of Tension in WTO Law*

The problem arises from the fact that not all issues arising out of China, Inc. so clearly resemble parallel issues found in another economic system. China, Inc. also raises a series of new legal questions not found in other economic systems that the WTO has yet to confront. Hence, unlike the issues in the prior section, the WTO cannot simply apply an existing legal principle to resolve the dispute. Instead, it must examine these issues anew with China, Inc. in mind.

To be clear, such questions need not be limited to the Chinese context. As my examples below will demonstrate, they can arise elsewhere. But prior to the development of China, Inc., these issues did not give rise to major trade disputes. The unique nature of China, Inc. raises the stakes. Even when other countries litigate these issues in cases not involving China, China, Inc. lurks in the background.

Because these issues relate to a legal concept already embedded within WTO law, the WTO cannot choose to evade the question. Instead, it is forced to interpret the legal concept. But it is not altogether clear that the

213. Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China — Audiovisuals*].

214. Matthew Garrahan, *China Eases Restrictions on Hollywood Films*, FIN. TIMES (Feb. 19, 2012, 6:12 AM), <http://www.ft.com/intl/cms/s/0/d24696e6-5abd-11e1-b056-00144feabd0c.html#axzz42ENRR Tec>.

WTO’s interpretation will necessarily vindicate the rights of trading partners claiming a grievance. The very question of how the law applies to China, Inc. remains unclear.

Consider the following two issues, both of which linger as points of tension today.

1. *Subsidies and the “Public Body” Debate*

One issue that the WTO has been forced to confront is the question of which Chinese enterprises, banks, and entities should be considered an extension of the state. Should this be judged on the basis of ownership alone? If not, what other factors matter, and how should they be weighed?

The question matters because WTO rules prohibit certain forms of subsidies.²¹⁵ They also allow WTO members to seek recourse against specific subsidies with adverse trade effects.²¹⁶ However, these rules apply only to subsidies provided by governments and their associated entities.²¹⁷ They do not apply to cross-subsidies provided by private firms. To prevent governments from circumventing WTO rules by simply establishing nongovernmental entities to serve as a “pass-through” vehicle for subsidies, treaty drafters created the legal concept of a “public body.”²¹⁸ WTO rules also extend to a subsidy provided by a public body.

Prior to the rise of China, Inc., what constituted a “public body” was not of major dispute. Entities such as public utilities—which might be situated outside of a government but were subject to government control—fell into this category. Most of these entities are subject to statutory guidelines, making their link to governments clear. China, Inc., however, muddies the waters.

Negotiators correctly foresaw that subsidies to Chinese SOEs would remain a source of trade friction. Because of their experience with command and transition economies, they sought to clarify which types of financial contributions given by the state to an SOE would qualify as a subsidy.²¹⁹ Yet they failed to anticipate the need to clarify a different scenario—those in which a Chinese entity, outside of government but with ties to it, *provides* rather than receives a subsidy. Do WTO rules nevertheless cover such subsidies because of the entity’s links to the state?

Consider two scenarios: (1) a bank provides a loan to an enterprise with preferential terms lower than those provided to its normal customers; and (2) a firm sells a good to a customer at a discounted price. Such behavior

215. These are subsidies “contingent . . . upon export performance” and subsidies “contingent . . . upon the use of domestic over imported goods.” SCM Agreement, *supra* note 198, art. 3.

216. *Id.* art. 5.

217. *Id.* art. 1.1(a).

218. *Id.*

219. See Protocol of Accession, *supra* note 34, § 10.2.

happens in economies everywhere. The question is whether different rules should apply in the China, Inc. context.

Normally, provided the bank or firm is (a) not an extension of the government and (b) not entrusted or directed by the government to carry out such activity, WTO rules would not cover such action. For example, Mitsubishi UFJ giving a preferential loan to Mitsubishi Motors does not implicate the Japanese government. The same holds true if GE Capital offers a preferential loan to GE Aviation. One business may subsidize the other, but this is a private, not governmental, decision. Similarly, if Samsung Semiconductor sells microprocessors to Samsung Electronics at a cheaper price than Apple, this too comprises a private transaction that does not implicate the South Korean government. Such actions remain outside the purview of the WTO.

But what if BOC or any of the other Chinese state-owned banks provide the preferential loan? Is the WTO to treat this bank's actions the same as those of any other global commercial bank? After all, it shares many of the same attributes. It has branches worldwide; its shares are listed overseas, allowing foreigners to readily acquire an ownership stake. Or does it matter that its main shareholder is the Chinese state and it falls under the purview of Central Huijin? Do these differences render its preferential loans a subsidy, subject to WTO rules, when similar actions by commercial banks elsewhere would not qualify?

Similarly, what are we to make of Baosteel selling its steel at a discounted price to a Chinese enterprise? Is this a subsidy subject to WTO rules? Or is this simply a private commercial transaction similar to Samsung's? With other alternative economic structures, the distinction between public and private has been relatively clear.²²⁰ With China, Inc., however, the lines blur. Which Chinese commercial entities with links to the state constitute a "public body"?

This issue came to the fore in the late 2000s, when the U.S. Department of Commerce ruled in domestic administrative agency determinations that certain Chinese state-owned banks and SOEs were "public bodies."²²¹ The United States then imposed higher tariffs against Chinese exporters that had received preferential loans or deals from the SOEs and banks in the form of countervailing duties ("CVDs"). China filed a complaint at the WTO in 2008 arguing that the U.S. determination was wrong, and hence that the CVDs were illegal.²²²

In the landmark *US — AD/CVD* dispute, the Panel sided with the United States,²²³ but the Appellate Body later reversed.²²⁴ The Appellate

220. No GATT or WTO disputes concerning the interpretation of "public body" surfaced prior to China's WTO accession.

221. Request for Consultations by China, *United States — Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, 1–3, WTO Doc. WT/DS379/1 (Sept. 19, 2008).

222. *Id.*

223. Panel Report, *United States — Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (Oct. 22, 2010).

Body rejected the per se majority ownership test that the United States had employed and that the Panel had upheld.²²⁵ It declared instead that “the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.”²²⁶

A public body, the Appellate Body declared, “must be an entity that possesses, exercises or is vested with government authority.”²²⁷ Where an express statutory delegation of authority exists, the inquiry is straightforward. However, even without express delegation, an entity may nevertheless still constitute a public body. What is important is “evidence [of] a sustained and systemic practice” of the entity “exercising governmental functions.”²²⁸ Ownership, by itself, does not suffice. Evidence must show that “the formal indicia of government are manifold” and “such control has been exercised in a meaningful way.”²²⁹

The Appellate Body’s jurisprudence clarifies the status of only a limited set of firms in the Chinese economy. For example, state-owned banks, such as BOC, are considered public bodies because China law formally acknowledges its quasi-governmental role. Article 34 of China’s Commercial Banking Law stipulates that banks must “carry out their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies.”²³⁰ BOC’s Global Offering also advised investors that the “Chinese Commercial Banking Law requires commercial banks to take into account government macroeconomic policies in making lending decisions.”²³¹

Not all instances are this straightforward. Many Chinese firms’ prospectuses may not contain explicit acknowledgement along the lines of the BOC’s. These scenarios remain complicated. Would SASAC’s ability to remove the firm’s top management or the NDRC’s coordination on sector-specific policy suffice to render the firm a “public body?” What if the firm simply has a Party committee within its ranks and refuses to disclose minutes explaining the committee’s role? Such firms clearly differ from their counterparts elsewhere. But do these differences suffice to render these entities an extension of the state when their counterparts are not? These questions remain unanswered, with Chinese scholars advocating differing

224. Appellate Body Report, *United States — Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011).

225. *Id.* ¶ 318.

226. *Id.* ¶ 317.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* ¶ 349.

231. *Id.* ¶ 350.

positions.²³² In the coming years, the WTO will have to grapple with these difficult issues.

Even with Chinese banks whose status under the law might appear to be settled, the potential exists for future disagreement. Today, the classification of state-owned banks as “public bodies” turns on article 34 of the Commercial Banking Law, which explicitly recognizes the link between banks and state industrial policies. But consider what would happen if China amended this provision such that the law no longer encapsulated this link. Similar uncertainty would pervade the treatment of Chinese banks, as now exists with firms in other sectors.

This challenge is not unique to the WTO. U.S. courts, for example, have had to analyze whether the Bank of China is an instrumentality of the Chinese state and therefore entitled to sovereign immunity.²³³ Government agencies reviewing foreign investment have grappled with similar questions when deciding whether to approve a Chinese investment.²³⁴

At the heart of the matter is the following question: what proves that a commercial entity is part of the state? Having rejected the formal ownership test, the WTO must clarify what else matters. To ignore the differences altogether will disgruntle China’s trading partners. But to distinguish on the basis of China-specific factors, such as Party committees, will likely lead Chinese officials to complain of discrimination. For now, the Appellate Body has danced carefully around the issue by relying on an abstract notion of “government authority” without clarifying what is necessary to demonstrate such authority.²³⁵

Nevertheless, the WTO cannot evade these questions indefinitely. In the three years since the *US — AD/CVD* decision, the “public body” question has re-surfaced in two cases.²³⁶ Even without China as a litigant, the stakes are high. In a dispute between the United States and India, the Appellate Body rejected the U.S. argument that one can identify whether a firm is a public body on account of whether the government can employ the resources of an entity that it controls as its own.²³⁷ However, the Appellate Body also

232. See, e.g., Ming Du, *China's State Capitalism and World Trade Law*, 63 INT'L & COMP. L.Q. 409, 435–39 (2014); Ru Ding, ‘Public Body’ or Not: *Chinese State-owned Enterprise*, 48 J. WORLD TRADE 167, 184–88 (2014).

233. See, e.g., *Universal Consolidated Companies v. Bank of China*, 35 F.3d 243 (6th Cir. 1994); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998).

234. See Ming Du, *When China's National Champions Go Global*, 48 J. WORLD TRADE 1127, 1135 (2014).

235. See Thomas J. Prusa & Edwin Vermulst, *United States — Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, 12 WORLD TRADE REV. 197, 199 (2013) (noting the potential for the Appellate Body to further clarify on scenarios “in which a state-owned corporation acting under commercial conditions would not necessarily be considered a public body”).

236. Appellate Body Report, *United States — Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (Dec. 8, 2014) [hereinafter *US — Carbon Steel (India)*]; Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (Dec. 18, 2014).

237. *US — Carbon Steel (India)*, *supra* note 236, ¶¶ 4.27–4.29.

made clear that context matters, leaving open the possibility for treating China differently.²³⁸

This issue implicates nothing short of billions of dollars of cross-border trade. If the Appellate Body eventually embraces a broad concept of “public body,” then WTO members will have wide latitude to impose higher duties on Chinese firms that receive preferential treatment from state-owned banks and enterprises. This will lower the competitiveness of lower-cost Chinese exports. It is no wonder then that the “public body” debate is emerging as a contentious point of tension within the WTO system.

2. *China’s Status in Post-2016 Antidumping Cases*

A second, equally high-stakes question is the treatment of China in antidumping cases after 2016. Again, the question concerns the technical interpretation of an obscure WTO treaty provision. At stake is the relative ease with which China’s trading partners may impose higher tariffs against Chinese products through trade remedy proceedings—affecting billions of dollars in trade.

WTO law allows a country to impose antidumping duties when a foreign producer is “dumping” its product into an export market, and causing or threatening to cause injury to a domestic producer.²³⁹ The dumping inquiry is usually done through a comparison of prices in the home and export market.²⁴⁰ However, because the home market price may be distorted in a NME, WTO law allows for reliance on a comparable third-country market.²⁴¹ Wider latitude exists in determining the level of antidumping duties against NMEs because of the flexibility in selecting the third-country comparator.

Whether a country is a NME is a factual inquiry that must be justified in the domestic administrative decision. To avoid controversy, and to ensure greater latitude in imposing antidumping duties against Chinese goods, WTO members negotiated a provision in China’s Protocol of Accession allowing China to be treated as a NME for the first fifteen years following its WTO accession unless the Chinese exporter can “clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production, and sale of that product.”²⁴² This concession reverses the usual burden that falls on the investigating authority rather than on the exporter.²⁴³ In essence, China’s trading partners sought to

238. *Id.* ¶ 4.29.

239. GATT, *supra* note 140, art. VI.

240. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.2, Jan. 1, 1980, 1186 U.N.T.S. 814.

241. GATT, *supra* note 140, *Ad Note* art. VI.

242. Protocol of Accession, *supra* note 34, § 15(a)(ii).

243. See Appellate Body Report, *European Communities — Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, ¶¶ 286–89, WT/DS397/AB/R (July 15, 2011) (confirming that Paragraph 15(a) amounts to a temporary burden-shifting requirement).

lock in temporarily their prior practice of treating China as a NME, as most major economies had prior to China's accession.²⁴⁴

China remains a rare exception in having accepted such a condition for WTO entry.²⁴⁵ NME status made it relatively easier for WTO members to impose higher antidumping duties against Chinese goods that threaten domestic producers. Unsurprisingly, many have done so with gusto. China has been the leading target of new antidumping measures each year since the WTO's founding in 1995.²⁴⁶ However, the NME provision expires in December 2016, raising the question of how the WTO will treat China in post-2016 antidumping proceedings.

For years, this question drew little attention. But as the 2016 deadline approaches, the debate has heated up. Some scholars have suggested that the expiration of the NME provision requires that China be treated automatically as a market economy.²⁴⁷ Others, including myself, have suggested that market economy status is not guaranteed²⁴⁸—WTO members can no longer simply declare China to be a NME but must subject it to the same factual inquiry as any other WTO member.²⁴⁹ In other words, the burden simply shifts back to the investigating authorities of the importing country to prove that China is not a market economy.

If this latter line of reasoning prevails, then the expiration of paragraph 15(a)(ii) will likely trigger friction at the WTO over whether or not China is a market economy. It remains to be seen how China's trading partners will treat China afterward. Should any fail to treat China as a market economy, however, China can challenge this determination before the WTO. Any such challenge will force the WTO to examine whether China's economy, in fact, operates along market principles.

Even if the WTO treats China as a market economy after paragraph 15(a)(ii) expires, factual debates over the uniqueness of the Chinese economy may still feature prominently in WTO disputes. This is because WTO rules

244. Rao Wenjia, *China's Market Economy Status Under WTO Antidumping Law After 2016*, 5 *TSINGHUA CHINA L. REV.* 151, 156 (2013).

245. Note that Vietnam is another country to have agreed to such a condition for its WTO accession. See Working Party on the Accession of Vietnam, *Accession of Vietnam*, ¶ 255, WTO Doc. WT/ACC/VNM/48 (Oct. 27, 2006).

246. See *Anti-Dumping*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByExpCty.pdf (last visited May 22, 2016).

247. See, e.g., Liu Jingdong, *Analysis of Market Economy Status in International Law*, in *THE OPPORTUNITY AND CHALLENGE OF INTERNATIONAL LAW* (2014); Matthew Nicely, *Time to Eliminate Outdated Non-market Economy Methodologies*, 9 *GLOBAL TRADE & CUSTOMS J.* 160 (2014); Rao, *supra* note 244.

248. See, e.g., Brian Gatta, *Between 'Automatic Market Economy Status' and 'Status Quo'*, 9 *GLOBAL TRADE & CUSTOMS J.* 165 (2014); Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9 *GLOBAL TRADE & CUSTOMS J.* 94 (2014); Bernard O'Connor, *Market Economy Status for China Is Not Automatic*, VOXEU (Nov. 27, 2011), <http://www.voxeu.org/article/china-market-economy>.

249. *Accord* Miranda, *supra* note 248, at 103; see also Chad P. Bown & Petros C. Mavroidis, *One (Firm) Is Not Enough: A Legal-economic Analysis of EC-fasteners*, 12 *WORLD TRADE REV.* 243 (2013) (suggesting that the Appellate Body may have already laid down jurisprudence opening the door for WTO members to continue treating China as a NME beyond 2016).

also allow countries to rely on an alternative methodology and reject home market prices when the “particular market situation” of the exporting country “does not permit a proper comparison.”²⁵⁰ It also allows for adjustments when sales do not occur through the “ordinary course of trade.”²⁵¹ Again, the alternative methodology makes it easier for a country’s trading partners to levy higher tariffs against that country’s products through antidumping duties. Although such an approach has not been widely used against Chinese goods to date, it may gain popularity if the NME approach is effectively foreclosed.

At present, not much WTO jurisprudence exists to clarify what constitutes a “particular market situation.” After 2016, however, the WTO may well find itself embroiled in examinations over such questions as applied to China, Inc. Would the fact that the state subsidizes the price of a raw material input suffice to find that Chinese prices do not “permit a proper comparison?” Australia, which already considers China a market economy, used a form of this argument to set higher antidumping tariffs against Chinese goods in 2012—triggering much controversy.²⁵² What about the state’s dominance of the banking sector that sets loans or its ability to set electricity prices? Already, the U.S. Department of Commerce is considering such arguments in non-China cases.²⁵³ Whether these justifications hold up when applied to China after 2016 remains to be seen.

Again, the legal issues raise the thorny question of the extent to which the WTO will permit countries to treat China differently on account of its economy’s unique combination of elements. So far, paragraph 15(a)(ii) has shielded the WTO from opining on this matter in the realm of antidumping cases. But once the NME carve-out expires, the questions will inevitably rise to the fore in WTO litigation. As was true with the “public body” debate, the rise of China, Inc. likely will force the WTO to confront interpretative questions over terminology in its treaties. Resting in the balance will be hundreds of millions of dollars in trade flows.

* * *

The WTO is not necessarily ill suited to handle the issues discussed in this section. After all, the DSB has tackled novel issues repeatedly since its inception. But China’s rise does present the WTO with a daunting challenge: can the WTO craft a predictable set of rules that allow China’s trad-

250. Agreement on Implementation of Article VI, *supra* note 240, art. 2.2.

251. *Id.*

252. See AUSTRAL. CUSTOMS & BORDER PROTECT. SERV., REPORT TO THE MINISTER NO. 148: CERTAIN ALUMINUM EXTRUSIONS EXPORTED TO AUSTRALIA FROM THE PEOPLE’S REPUBLIC OF CHINA 35 (2010) (finding that Chinese prices did not always “reasonably reflect competitive market costs” and therefore requiring that certain adjustments be made when determining normal value); see also Andrew Percival, *Australia’s Irrational Approach to Trade with China*, CORRS CHAMBERS WESTGARTH (Dec. 13, 2012), <http://www.corrs.com.au/thinking/insights/australia-s-irrational-approach-to-trade-with-china/>.

253. See, e.g., U.S. Dep’t of Commerce, *Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 70 Fed. Reg. 9041 (Feb. 24, 2005).

ing partners to take action against trade-distortive actions without making the Chinese feel as though they are singled out for harsher treatment? Or, given the high stakes, will one side inevitably feel dissatisfied and lose faith in WTO dispute settlement? Time will tell whether the WTO can meet this challenge. What is certain, though, is that the unique nature of the Chinese economy creates new tensions for interpreting WTO law.

III. TACKLING THE CHALLENGE: OPTIONS AND IMPLICATIONS

Proponents of the WTO system point to how well the system has been working, as China and her trading partners amicably resolve a vast number of trade disputes under the WTO framework. But as Part II discussed, such disputes have been confined to a class of issues in which China's behavior resembles those of governments of other alternative economic systems that predate China's rise. What happens when an issue falls outside of this category? Part III examines the three options available to the WTO: (1) WTO dispute settlement, (2) WTO treaty negotiations, and (3) mega-regional free trade agreements. I discuss the limitations and potential consequences of each of these options.

Which of these options proves most desirable differs depending on one's normative inclination. If one considers maintaining the centrality of the multilateral system in the creation and adjudication of trade rules as critical, then both the first and second options—which reinforce the existing system—are preferable to the third option. Those who may adopt such a view include WTO officials as well as norms-oriented scholars who envision WTO law as a form of global constitutionalism or as part of an expanding global administrative law.²⁵⁴ They may also include government officials in some developing countries who believe that their country's interests are best advanced through a strong multilateral regime.²⁵⁵ However, both options, I argue, are less than ideal. The first option, I suggest, faces inherent limits on account of the law itself and is fraught with risk for the WTO. The second option, I explain, faces considerable roadblocks and is nearly impossible to execute in the present political economy.

254. See, e.g., DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (2005); Ernst-Ulrich Petersmann, *Multilateral Trade Governance in the WTO Requires Multilevel Constitutionalism*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* 5 (Christian Jorges & Ernst-Ulrich Petersmann eds., 2006); Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 *INT'L J. CONST. L.* 556 (2011).

255. See *Global Trade After the Failure of the Doha Round*, *N.Y. TIMES*, Jan. 1, 2016, at A22; *WTO Talks Conclude: India Says 'Disappointed' on Doha Issues*, *HINDU BUS. LINE* (Dec. 19, 2015), <http://www.thehindubusinessline.com/economy/latest-wto-draft-text-fails-to-clearly-reaffirm-doha-development-agenda/article8008592.ece> (noting the preference of a large group of developing countries to continue with the Doha mandate for multilateral negotiations).

On the other hand, if one adopts a realist view that the WTO law reflects simply a bargain between countries to resolve coordination problems,²⁵⁶ then the third option is likely to be preferable. Both the first and second options involve too high a political cost to be paid at the domestic level to be feasible, making the third option the most viable and attractive. However, as I will highlight, it too comes with a cost to the multilateral system.

For those who may be seeking a simple and straightforward solution to the China, Inc. challenge, regrettably, no such panacea exists. At the end of the day, my argument is that the rise of China, Inc. is likely to affect the existing WTO system negatively in one way or another. Confronted with these relative costs and the constraints imposed by the domestic political economy, China’s trading partners will rightly opt for the third option—moving outside of the WTO’s multilateral framework to tackle issues emerging from China, Inc.

A. *WTO Dispute Settlement: Understanding Its Limitations and Risks*

One option for the WTO is to turn to the DSB, its judicial arm, to address the emergent China, Inc. issues. Some deem the DSB the “crown jewel” of the WTO system.²⁵⁷ Unsurprisingly then, one might look to the WTO’s judicial authorities to resolve China, Inc. trade issues.

To some extent, this is already happening. As practices of Chinese SOEs and commercial banks increasingly affect global trade, the DSB has already been called upon to clarify the meaning of treaty text drafted before the emergence of China, Inc.²⁵⁸ In other words, the DSB interprets the terms of the original bargain as applied to a new unique economic system unforeseen at the time of the drafting.

Such behavior is to be expected. After all, courts are regularly called upon to engage in dynamic interpretation of legal text. The global trading system is somewhat unusual in the sense that during its first half century (1944–1994), countries re-examined and updated the treaty text every few years. Therefore, as compared to other legal regimes where the law remains more static, it has engaged in arguably less dynamic interpretation of statutory law.²⁵⁹ The two-decade period since the conclusion of the Uruguay Round is the longest time that the regime has gone without significantly updating the law.

256. Realists are not wed to the multilateral system per se, but believe that states simply seek value-maximizing arrangements to resolve coordination problems. The value of seeking a broader multilateral arrangement with more parties differs depending on the context. See ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS* 163–70 (2008).

257. See, e.g., Press Release, Pascal Lamy, WTO Director-General, WTO Disputes Reach 400 Mark (Nov. 6, 2009), https://www.wto.org/english/news_e/pres09_e/pr578_e.htm.

258. See *supra* notes 222–28 and accompanying text.

259. See generally ISABELLE VAN DAMME, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* (2009).

Consequently, the rise of China, Inc. will likely elevate the importance of dynamic treaty interpretation in WTO dispute settlement. If Doha Round negotiators cannot negotiate new treaty law to address the changing global economic landscape, then the DSB will be called upon to do so in their stead.

However, such an approach is fraught with potential danger for the WTO as an institution. First, as it interprets treaty provisions dynamically, the WTO Appellate Body may come under increased criticism for engaging in improper “activist” interpretation. The reaction to the Appellate Body’s “public body” test in the *US — AD/CVD* decision offers a glimpse of this possible future. After the Appellate Body issued its ruling, three high-profile individuals involved in drafting the original provision strongly condemned the interpretation as divorced from the letter and spirit of the treaty, and disputed its logic and coherence.²⁶⁰ They derided the Appellate Body for “relying on a[n] . . . academic construction divorced from economic realities,” contending that this interpretation would have a chilling effect on governments’ willingness to turn to the WTO to resolve such disputes.²⁶¹ Furthermore, they argued that the test developed is excessively onerous and perversely incentivizes greater opacity.²⁶² Although more muted in his criticism, Professor Joost Pauwelyn also described the Appellate Body as “opt[ing] for an inward looking, judicial approach” that in the eyes of some may amount to “activism.”²⁶³ He disparaged the Appellate Body’s reasoning as “circular,” noting that “we are now left with what could turn out to be a very unclear and subjective test of ‘governmental authority/function.’”²⁶⁴

This criticism did not go unnoticed. Arguably, one could read the Appellate Body’s subsequent discussion of the “public body” issue in the recent *US — Carbon Steel (India)* decision as an indirect reaction to this criticism and an attempt to shore up the jurisprudence to preserve institutional prestige.²⁶⁵ Whatever one makes of this ruling, the “public body” controversy may well foreshadow the type of tensions that the WTO can expect if the Appellate Body adjudicates issues arising out of China, Inc. using dynamic interpretation.

Second, if the focus shifts toward the judiciary and away from negotiations, then the stakes associated with judicial appointments rise. Although

260. Michael Cartland et al., *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. WORLD TRADE 979 (2012). The three authors are, respectively, the former chair of the negotiating group on subsidies and countervailing duties during the Uruguay Round, the former chief negotiator on subsidies for the European Commission, and the former director of the WTO Rules division.

261. *Id.* at 1014.

262. *Id.* at 1010–14.

263. Joost Pauwelyn, *Treaty Interpretation or Activism? Comment on the AB Report on United States — Ads and CVDs on Certain Products from China*, 12 WORLD TRADE REV. 235, 240 (2013).

264. *Id.* at 236.

265. *US — Carbon Steel (India)*, *supra* note 236, ¶ 4.29.

governments nominate Appellate Body members, they also function in an independent capacity as a person of “recognized authority” and are charged to “be unaffiliated with any government.”²⁶⁶ This image of a high-functioning technocratic judicial body contributes to its relative prestige among international courts. However, given the high stakes associated with China-related trade issues, dispute settlement may become more politicized in the years to come.²⁶⁷ In opposing the reappointment of Professor Seung Wha Chang to the Appellate Body in May 2016, the United States explicitly mentioned its objection to rulings in two cases concerning China in which Professor Chang served on the division.²⁶⁸ Over time, WTO members may increasingly apply litmus tests to treaty interpretation and sensitive China, Inc. issues when screening nominees.²⁶⁹ Or they may engage in implicit bargaining over nominees. Such developments would undercut the institutional prestige of the Appellate Body and WTO dispute settlement.

Third, the WTO judiciary will not be able to address all forms of emergent problems. While the emergent issues highlighted in Part II.B relate to China, Inc. disputes with a clear textual hook for the DSB, this does not necessarily hold true for all trade controversies arising out of China, Inc. For example, the WTO has limited authority to confront issues surrounding competition laws, investment, currency manipulation, and so forth. Despite calls for WTO action by the private sector, China’s trading partners have found that WTO law does not necessarily provide recourse for such problems. The limited jurisdiction of the WTO’s DSB hampers the institution’s ability to deal with all emerging issues.

Therefore, while the WTO may rely upon dynamic treaty interpretation to address certain challenges arising out of “China, Inc.,” such a strategy carries its own risks and limitations. It is unclear whether the DSB can carefully craft jurisprudence that satisfies all parties, and in some cases, it may lack the jurisdictional mandate to do so.

So far, the DSB has proven adroit in addressing areas where China’s practices resemble those of other alternative economies and concern a legal concept already incorporated into WTO law. However, the WTO judiciary is unlikely to resolve fully issues outside of these areas. As the recent controversy over Professor Chang’s nonreappointment highlights, powerful states

266. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

267. For discussion of the politics underlying WTO judicial lawmaking generally, see Ryan Brutger & Julia Morse, *Balancing Law and Politics*, 10 REV. INT’L ORGS. 179 (2015).

268. Statement by the United States at Meeting of the WTO Dispute Settlement Body (May 23, 2016), https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf, at 4–5 (highlighting its objection to DS437 and DS449, both of which concerned trade remedy disputes brought by China).

269. See Manfred Elsig & Mark Pollack, *Agents, Trustees, and International Courts*, 20 EURO. J. INT’L REL. 391, 410 (2014) (finding “ample evidence that WTO Members seek to support candidates whom they consider close to their own positions on salient issues” and condition their support for potential candidates on their views on important contemporary issues).

will push back hard against efforts by WTO jurists to interpret treaty provisions beyond what was explicitly negotiated in the treaty text. It is unrealistic to expect that jurists can singlehandedly address the entire set of China, Inc. challenges through dynamic interpretation. Governments must therefore engage in reshaping international trade law to address this phenomenon.

B. *WTO Negotiations: Existing Roadblocks Lead to Stasis*

The second option then is for governments to negotiate additional treaty text to clarify how to interpret concepts at the heart of the emerging issues. Treaty addenda could also bring additional trade-related domains, such as competition law or digital trade, under the DSB's jurisdiction.

Negotiating additional treaty text could happen one of four possible ways. In the most limited way, WTO members could negotiate an understanding for a WTO Ministerial Conference or the General Council to approve.²⁷⁰ A second path would be to amend an existing WTO agreement.²⁷¹ These two mechanisms might suffice for a narrow issue such as clarifying what factors ought to be considered in determining a "particular market situation" for antidumping cases, but would not likely work for broader issues such as competition policy. A third path is for a limited set of WTO members to negotiate a standalone plurilateral agreement that others are permitted, but not required, to join.²⁷² Finally, additional treaty text could be included as part of a new comprehensive undertaking required of all WTO members. The latter two mechanisms would work for both narrow and broad issues left unaddressed by existing WTO law.

Drafting additional treaty text through negotiations has the appeal of allowing governments to clarify their intentions directly. It also allows governments to negotiate potential trade-offs in other trade-related domains in exchange for more or fewer restrictions on China, Inc. Nevertheless, this will be extremely difficult to pull off. Despite the multiple pathways available for negotiating new treaty text, given the political economy surrounding current WTO negotiations, none are particularly feasible. Consider first the two narrow pathways through which the WTO members would negotiate an understanding or an amendment to address an emergent issue. The narrow scope of negotiations would constrict the range of potential trade-offs that countries can make in order to reach agreement. These pathways prove difficult to execute without widespread consensus among countries as to the clarification or correction necessary to address the issues emerging out of China, Inc. Such consensus is lacking at present. Not surprisingly, then,

270. Marrakesh Agreement Establishing the World Trade Organization art. IX, Apr. 15, 1994, 1867 U.N.T.S. 154.

271. *Id.* art. X.

272. *Id.* art. X.9.

such pathways are rarely utilized. Since the WTO’s inception, only a handful of protocol amendments and only a few understandings have been issued.

This leaves open two alternative pathways for negotiating additional text: as part of a plurilateral treaty or as a comprehensive single undertaking. The plurilateral pathway has the benefit of greater flexibility, requiring consensus among only a limited set of countries rather than all WTO members. However, this strength is also its weakness. Not all WTO members would need to bind themselves, which diminishes the incentives for China to compromise. From China’s perspective, this leaves open the possibility that even after China compromises, the WTO could still subject it to differential treatment across jurisdictions. This appeals less to China than a scenario in which it can be guaranteed that, in exchange for certain textual compromises, the benefits will extend across the board.

Furthermore, the domestic political economy may serve as a further constraint in a plurilateral scenario encompassing China. On issues such as discriminatory antitrust enforcement or required examination of source code, citizens in the United States, EU, and elsewhere may view China’s conduct as an absolute wrong rather than acceptable practice left unconstrained by international law. They therefore will not be so willing to grant leeway to negotiators to give concessions to China in order to restrain what they view as problematic Chinese behavior. The difficulties that the WTO members have faced reaching agreement with China on much less politically sensitive WTO plurilateral agreements foreshadow the difficulties with this avenue.²⁷³

This leaves open the last possibility of negotiating additional treaty text as part of a comprehensive multilateral trade negotiation. On paper, this scenario provides the most flexibility for compromise: the broad negotiating scope allows for trade-offs across issue areas. However, many of the issue areas related to China, Inc. do not fall under the WTO’s negotiating mandate established in the Doha Declaration.²⁷⁴ Following the Nairobi Ministerial in December 2015, the future of the Doha Round itself is in doubt.²⁷⁵ In addition, few of the negotiating proposals put forward to date by China have received active consideration. This suggests that even if, in theory, the multilateral setting offers the broadest possibility for a negotiated compromise, in practice, WTO members will find it politically difficult to grant China additional concessions. The stalled multilateral negotiations offer little hope of a pathway for addressing existing concerns.

273. See Jonathan Weisman & Paul Mozur, *W.T.O. Fails on High-tech Tariff Deal*, N.Y. TIMES, Dec. 13, 2014, at B1.

274. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (known as the Doha Declaration).

275. Statement, World Trade Organization, WTO Members Secure “Historic” Nairobi Package for Africa and the World (Dec. 19, 2015), https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm (acknowledging, at the end of the Nairobi Ministerial Conference, a “divide” on the future of the Doha Round).

WTO negotiations therefore do not offer strong prospects for successfully addressing the existing challenges. Although multiple pathways exist, all contain sizeable roadblocks. As much as the WTO might aspire to serve as a forum for countries to negotiate solutions to emergent China, Inc. problems, it will struggle to convince its member governments that this is the best option going forward.

*C. Mega-regional Trade Agreements: Forging New Rules
Through the TPP and Beyond*

If WTO multilateral negotiations stall and the judiciary offers only a partial solution, nations will need to turn to a third option: venturing outside of the WTO regime altogether to craft new legal rules to address issues arising from China, Inc.

The main mechanism for WTO members to create additional treaty rules without exiting the WTO regime is through negotiating free trade agreements (“FTAs”) and/or customs unions with other WTO members.²⁷⁶ Over the past decade, the number of FTAs has increased dramatically.²⁷⁷ Nevertheless, until 2012, the United States, European Union, and Japan concluded FTAs primarily with smaller economies that were part of their multinational companies’ supply chain or that served as strategic partners.²⁷⁸ Only in 2013 did the four largest economies begin to explore the possibility of concluding FTAs with one another.²⁷⁹

1. *The TPP and China, Inc.*

By far, the most far-reaching of these so-called mega-regional trade agreements to date is the Trans-Pacific Partnership (“TPP”), signed in February 2016 by the United States, Japan, Canada, Australia, and eight other WTO members in the Asia-Pacific.²⁸⁰

In January 2015, President Obama explicitly referenced China and trade strategy in his State of the Union speech. He suggested that China, through its policies, would like to rewrite the rules for trade engagement so as “to put our workers and our businesses at a disadvantage.”²⁸¹ He implored Con-

276. See GATT, *supra* note 140, art. XIV.

277. WORLD TRADE ORGANIZATION, *supra* note 4.

278. For a list of regional trade agreements by country, see *WTO Regional Trade Agreements Information System*, WTO, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last updated June 23, 2016) (last visited June 24, 2016).

279. Reiji Yoshida, *Abe Declares Japan Will Join TPP Free-trade Process*, JAPAN TIMES (Mar. 16, 2013), <http://www.japantimes.co.jp/news/2013/03/16/business/abe-declares-japan-will-join-tpp-free-trade-process/#.V08sGZMrJE4>; Larry Elliott, *Europe and US Launch Plans for Ambitious Transatlantic Deal*, GUARDIAN (June 17, 2013), <https://www.theguardian.com/business/2013/jun/17/europe-us-transatlantic-trade-deal>.

280. Trans-Pacific Partnership, Jan. 26, 2016 [hereinafter TPP].

281. Press Release, The White House, Office of the Press Secretary, Remarks by the President in State of the Union Address (Jan. 20, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>.

gress to grant him trade promotion authority for “strong new trade deals with Asia to Europe that aren’t just free, but also fair.”²⁸² That way, the United States and her allies, instead of China, will shape the future of trade law. To bipartisan applause, he declared that this approach was simply “the right thing to do.”²⁸³

Although China is not a party to the TPP, several commentators believe that negotiators drafted the TPP with China in mind.²⁸⁴ The TPP, in their eyes, serves as a “building block” for developing new trade rules.²⁸⁵ China would then need to choose whether to embrace these rules eventually or risk displacement from the new preferential trade arrangements.

President Obama’s remarks following the TPP’s conclusion reinforced the belief that a key strategic rationale for the agreement aims to counter China’s rise. “[W]e can’t let countries like China write the rules of the global economy,” he declared.²⁸⁶ Instead, he explained that the TPP allowed the United States and her allies to “write those rules, opening new markets to American products while setting high standards.”²⁸⁷

How exactly are China’s trading partners using mega-regional trade agreements to address trade issues arising out of China, Inc.? In numerous instances, the strategy has been to define new rules in areas where the WTO has been unable or unwilling to act. In order to gain preferential access to major economies representing more than one third of global GDP, one must sign on to these new rules. Consider three examples from the TPP.

First, countries are using mega-regional trade agreements to define new rules regulating state-owned enterprises. China’s trading partners have worried about the ability of China, Inc. to deploy firms associated with the Party-state to advantage upstream and downstream producers. While the SCM Agreement allows WTO members to take action against subsidies with adverse effects provided by a public body, an open question remains over which SOEs count as a public body, as discussed in Part II. Moreover, the Appellate Body’s past jurisprudence on this matter has been subject to much criticism.²⁸⁸

282. *Id.*

283. *Id.*

284. See, e.g., Sanchita Basu Das, *The Trans-Pacific Partnership as a Tool to Contain China: Myth or Reality?*, ISEAS PERSPECTIVE, May 17, 2013, https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2013_31.pdf; Wen Jin Yuan, *The Trans-Pacific Partnership and China’s Corresponding Strategies*, FREEMAN BRIEFING REPORT (Ctr. for Strategic & Int’l Stud., June 2012), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/120620_Freeman_Brief.pdf.

285. See, e.g., Finbarr Bermingham, *TPP “Should Be Building Block” to Deal with China*, GLOBAL TRADE REV., Mar. 10, 2015; Das, *supra* note 284, at 7.

286. Press Release, The White House, Office of the Press Secretary, Statement by the President on the Trans-Pacific Partnership (Oct. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership>.

287. *Id.*

288. See *supra* notes 260–64 and accompanying text.

Rather than simply allow rulemaking to proceed through WTO case law, China's trading partners have decided instead to draft new treaty law, outside of the WTO, clarifying what constitutes an SOE and its obligations. The TPP defines an SOE as a primarily commercial entity in which the government owns the majority of share capital, controls the majority of voting rights, or has the power to appoint the majority of board members.²⁸⁹ All SOEs—regardless of whether they are considered a public body or not under WTO law—must “act[] in accordance with commercial considerations in its purchase or sale of a good or service.”²⁹⁰ In addition, TPP members cannot provide noncommercial assistance to SOEs that adversely affect the interests of other TPP countries, nor can they allow their SOEs to do so.²⁹¹ Finally, TPP members must provide greater transparency into their SOEs. TPP governments must make a list of SOEs available on a public website, and upon request, they must release information about shareholding, voting rights, board composition, revenue, assets, financial reporting, and so on.²⁹²

Even with China absent from the TPP, at least one source has acknowledged that the TPP's legal provisions on SOEs were drafted clearly with Chinese SOEs in mind.²⁹³ Nor is this effort at additional rulemaking to curtail the impact of preferential SOE policies on trade confined to the TPP. Other ongoing negotiations, including the Trans-Atlantic Trade and Investment Partnership (“TTIP”) and the Trade in Services Agreement (“TiSA”), also aim to craft additional new rules regulating SOEs.²⁹⁴

Competition policy presents a second area where countries have turned away from the WTO toward mega-regional trade agreements. Western businesses have raised serious concerns over discriminatory enforcement of anti-trust laws by Chinese authorities.²⁹⁵ Although similar concerns arise

289. TPP, *supra* note 280, art. 17.1.

290. *Id.* art. 17.4. Note that an exception is made “to fulfill any terms of its public service mandate that are not inconsistent” with its requirement for nondiscriminatory treatment in the sale of a good or service. *Id.*

291. *Id.* art. 17.6.

292. *Id.* art. 17.10.

293. See Shiro Armstrong, China and the Trans-Pacific Partnership, Address at the Crawford School of Public Policy Seminar Series (May 8, 2012) (<https://crawford.anu.edu.au/pdf/events/2012/20120508-ppt.pdf>), at 13 (quoting an unnamed U.S. advisor stating, “We drafted the SOE chapter specifically aimed at China”).

294. Tsuyoshi Kawase, *Trans-Pacific Partnership Negotiations and Rulemaking to Regulate State-owned Enterprises*, VOXEU (July 29, 2014), <http://www.voxeu.org/article/trans-pacific-partnership-negotiations-and-rulemaking-regulate-state-owned-enterprises>.

295. AMCHAM CHINA, CHALLENGES AND OPPORTUNITIES IN CHINA'S INVESTMENT ENVIRONMENT (2014); U.S. CHAMBER OF COMMERCE, COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT (2014); U.S.-CHINA BUSINESS COUNCIL, COMPETITION POLICY AND ENFORCEMENT IN CHINA (2014); Press Release, European Union Chamber of Commerce in China, European Chamber Releases Statement on China AML-related Investigations (Aug. 13, 2014); Neil Gough, *Western Companies Appear to Push Back Against Chinese Crackdown*, N.Y. TIMES, Sept. 4, 2014, at B3; *Unequal Before the Law?*, ECONOMIST (Aug. 23, 2014), <http://www.economist.com/news/business/21613348-chinas-anti-trust-crackdown-turns-ugly-foreign-carmakers-forefront-unequal>.

elsewhere besides China, two differences stand out in the China, Inc. context.

The first concern arises from the explicit institutional linkage between antitrust enforcement and economic strategy. The NDRC serves as one of the two key enforcement agencies for China’s Anti-Monopoly Law (“AML”).²⁹⁶ Because the NDRC also sets the overall economic strategy for China, Inc., this heightens suspicion that China undertakes antitrust investigations selectively to implement the government’s overall economic plans. No other major economy allows the institution enforcing antitrust laws also to direct the state’s overall economic strategy.

The second difference lies in the nature of the law itself. To avoid instances where the AML might be used to undermine the Party-state’s control over China, Inc., article 7 of the AML carves out firms in “industries which are under the control of . . . the State-owned economic sector and have a bearing on the lifeline of the national economy or national security” as its own distinct category.²⁹⁷ In such industries, the state retains discretion to regulate and control their operations “so as to safeguard the interests of consumers and promote technical progress.”²⁹⁸ Foreign observers have expressed concern that the provision might be used to bolster China’s national champions.²⁹⁹ Again, in no other major economy does the law itself seek to preserve oligopolies based upon state ownership and regulate such industries differently.

Having failed to get competition issues included as part of the WTO’s negotiating agenda, the United States, EU, Japan and other allies have regularly sought to include competition chapters in their FTAs.³⁰⁰ The TPP is no exception.

The TPP requires that countries “adopt or maintain national competition laws that proscribe anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare.”³⁰¹ While this language may seem rather innocuous, the treaty importantly constrains the bounds of what can be deemed a permissible objective for competition law. Note that China’s AML, by contrast, stipulates additional objectives, includ-

296. The other enforcement agencies are the Ministry of Commerce and the State Administration for Industry and Commerce. See Zhang, *supra* note 86, at 680.

297. Antimonopoly Law of the People’s Republic of China art. 7 (promulgated by the Standing Committee of the National People’s Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), <http://fldj.mofcom.gov.cn/article/c/200811/20081105917420.shtml>, translated at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml> [hereinafter AML].

298. *Id.*

299. See, e.g., U.S. CHAMBER OF COMMERCE, *supra* note 295, at 15-16.

300. See, e.g., U.S.-Korea Free Trade Agreement ch. 16, S. Kor.-U.S., Feb. 10, 2011, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta#>; EU-South Korea Free Trade Agreement ch. 11, 2010 O.J. (L 127) 1; Agreement Between Australia and Japan for an Economic Partnership ch. 15, July 8, 2014, <http://dfat.gov.au/trade/agreements/jaepa/official-documents/Documents/jaepa-chapters-1-to-20.pdf>.

301. TPP, *supra* note 280, art. 16.1.

ing the amorphous objective of “promoting the healthy development of a socialist market economy.”³⁰² The worry stems from the notion that the state, when applying antitrust laws in furtherance of China, Inc., might use this element of the law to justify its actions.

In addition, the TPP contains specific requirements for procedural fairness in competition law, including procedures to introduce evidence and expert testimony; seek review of the sanction and remedy; and consult with national competition authorities on legal, factual, or procedural issues.³⁰³ It also contains transparency requirements regarding enforcement policies and practices, as well as final decisions.³⁰⁴ Both issues have been raised as points of concern by foreign businesses in China.³⁰⁵ Including such text represents an explicit strategy to establish competition policy principles to combat the apparently unfair or anticompetitive practices of China, Inc.³⁰⁶

A third example concerns new regulations in the TPP on the flow of data. Foreign technology companies operating in China have expressed concerns over Chinese government demands that they store data about Chinese users in China and turn over encryption keys and source code for inspection.³⁰⁷ While these requests occur ostensibly for national security purposes, some worry that they might serve as a means to transfer technology to Chinese companies.³⁰⁸ The intertwined nature of China, Inc. makes it hard to determine true intent.

While countries besides China impose regulations on cyber flows,³⁰⁹ the scale of these regulations and the enforcement tools marshaled by the Party-state put China, Inc. in a league of its own. No other major economy comes close to matching the scale of the “Great Firewall” and the Party-state’s

302. AML, *supra* note 297, art. 1.

303. See TPP, *supra* note 280, art. 16.2.

304. See *id.* art. 16.7.

305. See, e.g., U.S. CHAMBER OF COMMERCE, *supra* note 295, at 2–4, 47–52; U.S.-CHINA BUSINESS COUNCIL, *supra* note 295, at 14–15.

306. See *China and Competition Policy: Hearing Before H. Judiciary Subcomm. on Competition*, 111th Cong. 2 (2010) (testimony of Shanker Singham on behalf of the U.S. Chamber of Commerce).

307. See, e.g., Paul Mozur, *China Tries to Extract Pledge of Compliance from U.S. Tech Firms*, N.Y. TIMES, Sept. 16, 2015, at B1; Paul Mozur, *Jitters in Tech World over New Chinese Security Law*, N.Y. TIMES, July 3, 2015, at B3; Andrea Peterson, *Obama Is Upset That China Wants Tech Companies to Undermine Their Own Security*, WASH. POST (Mar. 3, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/03/03/obama-is-upset-that-china-wants-tech-companies-to-undermine-their-own-security/>; Gerry Shih, *China’s Cyber Laws Could Saddle Firms with Redundant Data Centers: U.S. Lobby*, REUTERS (April 13, 2015), <http://www.reuters.com/article/us-china-cybersecurity-localisation-idUSKBN0N50UC20150414>; Gillian Wong, *U.S. Business Group Urges China to Ease Data Restrictions*, WALL ST. J. (April 13, 2015), <http://www.wsj.com/articles/u-s-business-group-urges-china-to-ease-data-restrictions-1428974445>.

308. See Theodore Moran, *Should US Tech Companies Share Their “Source Code” with China*, CHINA ECON. WATCH (Oct. 28, 2015, 4:45 PM), <http://blogs.piie.com/china/?p=4542>.

309. See Anupam Chander & Uyen P. Le, *Data Nationalism*, 64 EMORY L.J. 677, 713 (2015); Stephen Ezell et al., *Localization Barriers to Trade: Threat to the Global Innovation Economy*, INFO. TECH. & INNOVATION F. (Sept. 2013), <https://www.copyrightalliance.org/sites/default/files/resources/2013-localization-barriers-to-trade.pdf>.

online censors.³¹⁰ No other state takes as active a role in overseeing the operations of its leading technology companies.³¹¹ Moreover, in no other country are those accused of monitoring information flows and facilitating cyber-espionage so closely tied to the country’s military and largest industrial enterprises.³¹²

WTO law lacks clear rules concerning data flows or other cyber-related actions. Hence, the WTO lacks a clear jurisdictional mandate to adjudicate such disputes. Some have suggested trying to take action against Chinese cyberespionage through the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) and/or the SCM Agreement, but so far, no government has taken up this proposal.³¹³ Instead, both the United States and Japan have attempted to raise the issue of data flows in cyberspace within the WTO’s Work Programme on E-Commerce.³¹⁴ These efforts, however, have not led to any tangible results.

Consequently, China’s trading partners are turning away from the WTO and toward mega-regional trade agreements to forge new rules to address the new frontier of digital trade. The TPP bars restrictions on “the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business.”³¹⁵ It also prohibits governments from requiring that a business “use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”³¹⁶ Similar proposals have also been floated in the TiSA negotiations. In short, China’s trading partners seek to use FTAs such

310. See FREEDOM HOUSE, *FREEDOM ON THE NET 2* (2014), <https://freedomhouse.org/report/freedom-net/freedom-net-2014#.VtjVO1Kuy5I> (placing China alongside Iran and Syria).

311. For example, concerns have been raised about the links between Chinese technology companies ZTE and Xiaomi with the Chinese state. See Michael Lee, *Backdoor Found in ZTE Android Phones*, ZDNET (May 15, 2012, 4:36 AM GMT), <http://www.zdnet.com/article/backdoor-found-in-zte-android-phones/>; Sam Oliver, *Xiaomi’s Redmi Note Allegedly Sending User Data to China Surreptitiously*, APPLEINSIDER (July 30, 2014, 12:34 PM PDT), <http://appleinsider.com/articles/14/07/30/xiaomis-redmi-note-allegedly-sending-user-data-to-china-surreptitiously>.

312. See David E. Sanger et al., *Chinese Army Unit Is Seen as Tied to Hacking Against U.S.*, N.Y. TIMES, Feb. 19, 2013, at A1; see also MANDIANT, *APT1 EXPOSING ONE OF CHINA’S CYBER ESPIONAGE UNITS* (2013), <https://www.fireeye.com/content/dam/fireeye-www/services/pdfs/mandiant-apt1-report.pdf>.

313. See, e.g., JAMES LEWIS, *CONFLICT AND NEGOTIATION IN CYBERSPACE* 49–50 (2013); Stuart Malawer, *Confronting Chinese Economic Cyber Espionage with WTO Litigation*, N.Y. L.J. (Dec. 23, 2014), <http://www.newyorklawjournal.com/id=1202712784205/Confronting-Chinese-Economic-Cyber-Espionage-With-WTO-Litigation>; Christina Skinner, *An International Law Response to Economic Cyber Espionage*, 46 CONN. L. REV. 1165 (2014); Diane Cardwell, *Solar Company Seeks Stiff U.S. Tariffs to Deter Chinese Spying*, N.Y. TIMES, Sept. 2, 2014, at B1; Letter from Senator Charles Schumer to Michael Froman, U.S. Trade Representative (May 22, 2014), <http://www.schumer.senate.gov/Newsroom/record.cfm?id=351779>.

314. See, e.g., Communication by the United States, *Work Programme on E-Commerce*, WTO Doc. S/C/W/359 (Dec. 17, 2014); Ministry of Economy, Trade, and Industry, *Towards eQuality, MITI’s Proposal for WTO E-Commerce Initiative* (2d draft) (Japan), <http://www.meti.go.jp/english/information/data/cw001019e.html>.

315. TPP, *supra* note 280, art. 14.11.2.

316. *Id.* art. 14.13.2.

as the TPP to enshrine new trade governance norms banning certain forms of internet regulation by China.

These three examples highlight two different ways in which China's trading partners are resorting to mega-regional trade agreements to address China-related trade issues. The first approach aims to shape new rules to clarify areas where WTO jurisprudence remains open or where trading partners may seek a broader requirement against the practices of China, Inc. than the DSB is prepared to issue. The SOE-"public body" issue takes this form. The second approach relies upon mega-regional agreements to extend trade rules to new areas that fall outside of the WTO's existing jurisdictional mandate. These new areas apply to all, but these issue areas often especially concern the outsized practices of China, Inc. The new rules on competition and digital trade in the TPP serve as examples of this second way in which China's trading partners are employing mega-regional agreements.

Clearly then, even without China included in the negotiations, the rise of China, Inc. is influencing the specific treaty provisions found in the TPP. The same likely applies to TTIP and other mega-regional trade agreements. Whether this strategy succeeds remains an open question. Significant hurdles, both domestic and international, stand in the way of the agreements' conclusion and ratification. It is entirely possible that domestic political opposition will derail some or even all of the ongoing negotiations.

2. *Understanding the Systemic Impact*

The creation of additional trade rules through FTAs by itself does not necessarily hurt the WTO regime. The regime recognizes the possibility of variable geometric arrangements,³¹⁷ and some scholars have suggested that FTAs may serve as a "building block" for future multilateral trade deals.³¹⁸ The exact impact depends instead on the dynamic effects that the FTAs may pose for the multilateral system.

Nevertheless, even if existing mega-regional negotiations do not bear fruit, evidence suggests negative short-term implications for the WTO and trade multilateralism. Already, mega-regional trade negotiations are supplanting the WTO as the key venue for negotiating new trade rules.³¹⁹ This

317. See GATT, *supra* note 140, art. XXIV.

318. See, e.g., Richard Baldwin, *Multilateralising Regionalism*, 29 *WORLD ECON.* 1451 (2006).

319. In the United States and Japan, recent intense debates over trade agreements have centered on the TPP, not the multilateral WTO negotiations. See, e.g., David Nakamura, *Obama Pushes Trans-Pacific Partnership*, *WASH. POST* (Feb. 26, 2015), https://www.washingtonpost.com/politics/obama-pushes-trans-pacific-partnership-in-flurry-of-local-calls/2015/02/26/2c2065da-bdf7-11e4-8668-4e7ba8439ca6_story.html; Hiroko Tabuchi, *Japan Moves to Enter Talks on Pacific Trade*, *N.Y. TIMES*, Mar. 16, 2013, at B3; Senator Elizabeth Warren, *The Trans-Pacific Partnership Provision Everyone Should Oppose*, *WASH. POST* (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html. Similarly, public debates in the EU have focused primarily on the proposed Trans-Atlantic Trade and Investment Partnership with the United States rather than on the WTO. See European Parliament Press Release No.

diverts limited resources and dilutes attention away from finding compromise solutions to the moribund Doha Round talks. At a time when resuscitating the talks requires focused engagement from major trading powers, their attention is directed elsewhere.

If countries ratify the TPP, and if other mega-regional trade agreements come to fruition, the WTO may face even greater negative implications. With these deals in place, a significant proportion of global trade will be governed by not just WTO rules, but also by a supplementary set of “deep integration” rules shaped outside the WTO.³²⁰ Moreover, disputes under these new agreements will be resolved outside the WTO.³²¹ Consequently, both from a rulemaking and adjudication standpoint, the centrality of the WTO to global trade governance will diminish.³²² The end result will be a trading system with a web of treaties that is messier and more fragmented.

The systemic costs extend beyond the WTO. Without a single multilateral forum for crafting trade-offs across issues, countries will find it harder to reach solutions on problems requiring large-scale cross-border cooperation, such as climate change or food security, that trade rules can affect.³²³ While large emerging economies such as China and India may feel comfortable with increased fragmentation, the declining importance of the multilateral system has outsized consequences for most other developing countries. FTAs allow larger states to exploit power asymmetries to shape new rules to an even greater extent than under the WTO’s multilateral framework.³²⁴ Developing countries will find themselves increasingly sidelined when it comes to rulemaking for new trade issues.

Altogether, then, mega-regional trade agreements serve as an imperfect vehicle for addressing trade-related problems associated with China, Inc. Beyond the systemic costs identified above, the largest problem remains that TPP does not include China as a party, nor does China intend to join such an agreement in the foreseeable future.³²⁵ Consequently, China has no obli-

20150317IPR351, What’s in the TTIP for Europeans? Hearing and Debate with Commissioner Malmström (Mar. 17, 2015), http://www.europarl.europa.eu/pdfs/news/expert/infopress/20150317IPR35107/20150317IPR35107_en.pdf.

320. The TPP partners along with the EU account for nearly 60% of world GDP. Calculation based on information provided at *GDP Ranking Table*, WORLD BANK DATA CATALOG, <http://data.worldbank.org/data-catalog/GDP-ranking-table> (last updated Apr. 11, 2016).

321. See generally CHANG-FA LO, *Dispute Settlement Under Free Trade Agreements*, in *THE WTO IN THE TWENTY-FIRST CENTURY* 457 (Yusuhei Taniguchi et al. eds., 2007).

322. See *TPP Risks Weaker World Trade System—Ex WTO Boss*, N.Z. HERALD (July 21, 2014), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11296831.

323. See Richard Baldwin, *The Systemic Impact*, in *MEGA-REGIONAL TRADE AGREEMENTS* 26 (World Economic Forum, 2014), http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf.

324. See OXFAM, *SIGNING AWAY THE FUTURE* (2007), <https://www.oxfam.org/sites/www.oxfam.org/files/Signing%20Away%20the%20Future.pdf>.

325. See *What You Should Know About the TPP*, XINHUA (Oct. 6, 2015), http://news.xinhuanet.com/fortune/2015-10/06/c_1116744901.htm. China has not ruled out this possibility altogether, but officials note that further economic reforms are a precondition, making it unlikely that this would occur within

gation to follow such rules. Instead, China forges ahead with its own FTAs without the types of provisions described above.³²⁶ For now, the TPP and other mega-regional trade agreements serve at best as vehicles to prevent other economies, such as Vietnam, from emulating elements of China's economic structure.³²⁷

Nevertheless, given the stalemate in multilateral negotiations and the limitations of the WTO dispute settlement system, China's trading partners may view mega-regional trade agreements as the best-available pathway forward. Despite their costs and imperfections, such agreements offer the best mechanism to develop new rules to combat issues associated with China's unique economic structure. Even if such rules will not bind China at present, they offer a chance to establish norms, linked with additional preferential trade access for those that choose to accept them.

In short, the rise of China, Inc. is reshaping the means through which advanced economies are choosing to develop new trade rules. Instead of working through the WTO, they are forging new treaty provisions grounded in mega-regional trade agreements negotiated outside the WTO. Whether endeavors such as the TPP and TTIP will ultimately succeed or fail remains unknown. But for now these mega-regional deals are the option deemed most effective, and hence most actively pursued, to address the trade problems arising out of China, Inc.

Yet the WTO risks increased marginalization. China's trading partners are losing faith that the open issues triggered by China, Inc. can be resolved fully through the WTO dispute settlement mechanism or through multilateral negotiations. Instead, as Part II suggested, today China's trading partners primarily turn to WTO dispute settlement for only a subset of issues—those where the practices of China, Inc. resemble those of other alternative economies and where they therefore feel confident that the DSB can properly uphold their rights as enshrined in WTO law. In instances where China's behavior can be distinguished, however, China's trading partners prefer to shift away from the WTO and toward mega-regional trade agreements to shape new trade law and governance norms. As they do so, the WTO's centrality will diminish, leaving trade governance more fragmented than it was before China's rise.

the next several years. See Shannon Tiezzi, *Will China Join the Trans-Pacific Partnership*, DIPLOMAT (Oct. 10, 2014), <http://thediplomat.com/2014/10/will-china-join-the-trans-pacific-partnership/>.

326. For more information on China's FTA strategy, see Ka Zeng, *China's Free Trade Agreement Diplomacy*, 9 CHINESE J. INT'L POL. (forthcoming 2016).

327. This is not to suggest that such concern is a key motivation for the TPP. Other important economic considerations, some but not all of which relate to China, are also at work.

CONCLUSION

For seven decades, the postwar global economic project has been to forge links between national economies through a trading system built on the tenets of multilateralism and legalism. This effort, championed by the United States and its European allies, has resulted in an ever-increasing scope of trade rules and an ever-increasing number of nations choosing to join this order. China's reintegration into the global economy, its peaceful rise, and the successful management of trade disputes following China's WTO accession are often held out as proof of the project's continuing success.

But is this truly the case? While many dare not state it directly for fear of offending China, China's rise may well accelerate the project's undoing. When embarking on the process of reintegrating China, China's major partners may not have anticipated the extent to which the Chinese Party-state would reshape its economic structure along its own unique path. Over the past decade, we have witnessed the rise of "China, Inc.," a form of economic exceptionalism with intertwined linkages between the state, the Party, and public and private enterprises. This system is giving rise to continued trade frictions between China and her trading partners. The WTO possesses limited ability to resolve such frictions. While the WTO may trumpet its successful resolution of over forty cases involving China, other issues go unaddressed. Moreover, more points of additional tension loom on the horizon, as legal concepts developed without China, Inc. in mind will need to be reinterpreted to fit the context.

Can the WTO and trade multilateralism survive this onslaught? Or will China's rise contribute to their gradual weakening? At present, the latter looks increasingly to be the case. As the WTO fails to rise to the challenge of dealing with problematic elements of China's trade practices, nations are voting with their feet by going elsewhere to resolve these problems. Most alarmingly, the advanced economies that built and championed the postwar project in the first place are leading the way. In the wake of the changing geopolitics and economic patterns associated with China's rise, they now appear set to turn their backs on their own project.

If these new efforts prove successful, the centrality of the WTO to global economic governance will diminish. Of course, this outcome is not preordained. These new efforts may fail. Economic and political developments in China may cause China, Inc. to morph into an economic structure more in line with the rest of the world's structures. In the end, the China, Inc. challenge may prove temporary.

But we should consider what outcome we desire if the China, Inc. challenge persists. Are we truly ready to turn our backs on the postwar global economic order built on strong multilateralism? Are we prepared to embrace instead a new legal order built on fragmented pluralism with variable geo-

metric arrangements? If not, the proponents of trade multilateralism in China and elsewhere must do more to force the difficult reforms and compromises necessary to cope with the systemic pressures emerging from China's rise. If these nations simply wait for China, Inc. to fall apart, trade multilateralism may well fall alongside it.