USALI Perspectives

Volume 1, Number 14
Published February 4, 2021

A China Bull in the WTO Shop

The WTO should address its China problem with new rules

by Petros C. Mavroidis

China's ascent to world-power status at least partially as a result of joining the World Trade Organization (WTO) in 2001 has almost monopolized headlines in recent months. It was a major theme in the recent U.S. elections; it is responsible for an important recent legislative initiative in the European Union; and it is consistently present in the thinking of policymakers worldwide. In *China and the WTO: Why Multilateralism Matters*, my co-author André Sapir and I examine the conundrum that China presents to the global economic system: Are the contributions of China's high-growth, export-oriented economy an unalloyed benefit for both the People's Republic and its trading partners? Or, as seems increasingly to be the prevailing opinion, has China's markedly different economic system made it a problem that needs solving?

China's participation in the WTO has provided it with almost uninhibited access to 163 markets, including the United States, from which it has profited immensely. Recording unprecedented growth rates, it has transformed itself from a low-income developing country to a global power in one generation. This is not, of course, due solely to its trade performance. China has long been a central player in global geopolitics and its economic potential has loomed large throughout East Asia and the world. Its export-led growth model has perfectly positioned it to take advantage of the elimination of trade barriers for its products worldwide. The rest of the world has profited from China's growth as well—at least in part. China's unprecedented export growth has benefited foreign consumers and stimulated capital gains for foreign investors. And yet, the silver lining of cheap Chinese consumer goods and corporate capital gains is tinged with gray.

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

In order to retain its principles and yet accommodate China, the WTO needs to translate parts of its implicit liberal understanding into explicit treaty language.

The claim of China's partners is that it did well by *not* doing good. China acceded to the WTO without making sufficiently clear commitments with respect to transfer of technology and its large sector of state-owned enterprises or SOEs. These two issues top the agenda of the WTO members, but the current WTO regime is inadequate to deal with them. Remaining idle, as Rodrik (2018) warns, is no option, while acting unilaterally, as the Trump administration did, is counterproductive. In order to retain its principles and yet accommodate China, the WTO needs to translate portions of its implicit liberal understanding into explicit treaty language. Here are the two most important changes it needs to make:

First, WTO agreements must explicitly address the transfer of technology. Chinese laws still require foreign investors in many sectors to enter into a joint venture with a Chinese partner. Chinese companies routinely request that technology be transferred as a precondition for entering into joint-venture arrangements. There is a genuine gap in WTO law in this context as the WTO does not address private behavior, and conditions are quite stringent for attributing the refusal of private agents (to enter into joint ventures) to the Chinese government. In the absence of an agreement on investment liberalization, the realistic way forward is to amend the Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS Agreement, and request that WTO members not enforce requirements for transfer of technology. This would be in line with the relevant provision of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which has been signed by 11 countries and entered into force in 2018 (See Article 9.10, Performance Requirements).

Second, the WTO must explicitly address the treatment of SOEs. This problem is self-inflicted. The WTO Appellate Body, through its erratic and acontextual case law, equated profit maximization with non-discrimination, and saw no reason to presume government influence even when governments owned 100 percent of company shares. To solve the problem, we do not need to amend WTO law, but simply to change the way it is enforced and recognize that when the state owns the majority of shares, there is a presumption that the company is government controlled. If history is any guide, however, risk-averse WTO members will prefer to amend WTO law to clarify the rules on government influence, rather than leave it to the Appellate Body. Once again, there is no need to reinvent the wheel: legislative initiatives undertaken in the realm of the CPTPP and the U.S.-Mexico-Canada Agreement offer an effective template (See Chapter 17 of the CPTPP, State-Owned Enterprises and Designated Monopolies).

President Xi's recent pushback against market-oriented reforms – as described by Hufbauer (2018); Lardy (2019), Milhaupt and Pargendler (2017), and Wu (2016) – makes our suggestions a matter of urgency. China today seems far from fulfilling the aspiration of transforming into a market economy in Western liberal terms that accompanied its accession process. Francis Fukuyama (1992) saw the end of history too early. We need to avoid a Thucydides trap, if at all possible. If the WTO framework is not strengthened, it may become impossible to forestall the Chinese Communist Party from instituting even stricter state controls over foreign trade and investment than already exist in China. The answer to the China crisis is more, not less WTO.

***

Petros C. Mavroidis is the Edwin B. Parker Professor of Foreign and Comparative Law at Columbia Law School.
