



RESEARCH BRIEF

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Chinese Globalism at 20: Do Reciprocity and Non-Discrimination Matter for the Determination of Market Economy Status to China under the WTO?

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Key Points:

- The failure to grant market economy status (MES) to China under the WTO does not bode well for Chinese globalism, the WTO as an institution, and the rules-based multilateral trading regime.
- The policy implications for the failure to grant market economy status to China by the EU under the WTO Dispute Settlement procedure will impede and complicate global trade.
- “Multiprocity” (MFN reciprocity) and non-discrimination, the two fundamental principles of multilateralism, provide the legal basis for the non-MES to China and circumvention of some of its rights and obligations under the WTO.
- Major stakeholders, including the EU, the WTO, and academia, have an important role to reset multilateralism under the WTO.

Context and Research Objectives

The failure to graduate to market economy status (MES) by China even after a lapse of almost two decades of World Trade Organization (WTO)¹ membership, does not bode well for Chinese globalism. Nor is it a proud moment for multilateralism and its sustainability. With the backdrop of the non-MES treatment,² meted out by major trading partners, especially the European Union (EU) and the United States (US), China lodged a complaint with the WTO Dispute Settlement Body (DSB) against the EU and the US on December 12, 2016. China claimed that the limited authority to use such a price determination methodology expired fifteen years *automatically* after the date its of accession to the WTO, pursuant to Section 15(a)(ii) of the Accession Protocol.³ Accordingly, WTO members may not employ such methodology following the end of the transition period, on December 11, 2016. However, the EU and the US contended that such

¹ The World Trade Organization (WTO) is the multilateral trading institution that administers rules-based global trade order among the nations. The binding rules are in effect the WTO agreements, negotiated, signed and ratified by their parliaments or constitutional governing institutions. “These documents provide the legal ground rules for international commerce. They are essentially contracts, binding

governments to keep their trade policies within agreed limits.” WTO, *Understanding the WTO*, www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm

² For determination of price comparability in anti-dumping proceedings involving Chinese imports.

³ WTO, *European Union – Measures Related To Price Comparison Methodologies*, WT/DS516/1, G/L/1170,

a privilege is not automatic, and neither can China claim MES by default. China has to demonstrate that the market price mechanisms are well-established and the state's role⁴ does not distort the playing field for the other suppliers. However, China requested that the WTO DSB suspend its proceedings against the EU on May 7, 2019 and quietly lapsed its privilege (right) to request the resumption of panel proceedings,⁵ thus implying acquiescence to the non-MES.

This Research Brief aims to review the legal dimensions of the MES debate in light of the fundamental principles of multilateralism: reciprocity and non-discrimination. My goal is to analyze whether the rights conferred upon the WTO membership are granted automatically, by default, and whether the rights and privileges are, in part, determined by the level of concessions the WTO offers to other members. The threshold questions are: Are these commitments binding in nature? And, further, in the event of any deviation thereof, should the granted concessions or privileges of the member be rescinded or reduced, accordingly?

G/ADP/D116/1 (Dec. 15, 2016), www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm

⁴ Direct and tacit subsidies, state support and sponsorships of select firms and other market manipulations.

⁵ Pursuant to Article 12.12 of the DSU, the authority of the panel shall lapse after 12 months of the suspension of its work. WTO, *European Union - Measures Related to Price Comparison Methodologies*, WT/DS516/14 (June 15, 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filena me=q:WT/DS/516-14.pdf&Open=True>.

⁶ "It is no mere coincidence that the GATT system and the Cold War had almost identical lifespans; GATT entered into force the year after the Marshall Plan began and a year before the North Atlantic Treaty Organization came into being, and the terms of the Agreement Establishing the World Trade Organization were reached two years after the collapse of the Soviet Union." Craig VanGrasstek, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION*, 2013 Ch. 1.

Multilateralism under the WTO: Reciprocity and Non-Discrimination Principles

The multilateral trading system under the General Agreement on Tariffs and Trade (GATT, 1947) emerged to ensure the pre-World War II protectionist and higher tariffs policies which were detrimental to global peace and prosperity would not be repeated. The WTO⁶ not only subsumed the GATT 1947 but also widened the scope for the liberalization⁷ of trade in goods, services, and the trade-related aspects of intellectual property, as well as augmenting the principles of 'non-discriminatory treatment, and transparency.'⁸

The multilateralism under the WTO is fundamentally different in nature and application from other multilateral initiatives, for example the United Nations.⁹ Multilateralism under the WTO subsumes the concept of a non-discriminatory rules-based trade order. The multiplicity¹⁰ (reciprocity at a multilateral scale), openness, accountability and transparency, market-based fair-trade practices, institutional set-up (for the administration of these principles, agreements and dispute settlement), and inclusiveness (special and differential treatment for developing countries) among the contracting parties underpin the WTO's concept of multilateralism.

⁷ Ibid.

⁸ WTO, *Marrakesh Declaration of 15 April 1994*, https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm.

⁹ From the economic globalization perspective, the concept of unilateralism, bilateralism, Plurilateralism (regionalism) and multilateral can be characterized on a spectrum that captures nature, scale and scope (degree and depth of cooperation), and space (preferential or non-discriminatory) of interaction among the members. On the one extreme of the spectrum, unilateralism is mainly driven by state-centric trade policy objectives based on geostrategic interests. On the other end of the spectrum, multilateralism aims to subsume rules-based market oriented economic interplay based on the concept of non-discrimination and reciprocity.

¹⁰ Multiplicity has been coined by the author to describe reciprocity among the nations on multilateral scale based on the MFN and NT principles.

In contrast,¹¹ plurilateral arrangements are, by definition, discriminatory (i.e., preferential) agreements, as they are agreed within a subset of nations. The WTO does recognize such deviations but with caveats and conditionalities.¹² However, the plurilateral arrangements¹³ cannot per se be categorized as multilateralism under the WTO parlance. In order to multilateralize any of the plurilateral initiatives, the fundamental principles of the rules-based multilateral trading system, as enunciated under the GATT 1947/ WTO 1994 and summarized above, should encompass these principles and govern the interactions among the partners.¹⁴ The absence of these avowed principles will relegate to a such “power-based system where countries are free to bargain in a way that is not constrained by any particular set of agreed rules of behavior.”¹⁵ The “world trading system, based upon open, market-oriented policies and the commitments,”¹⁶ as set out in the WTO agreements, should govern the market access and define the rules of engagements for all stakeholders. No state’s sovereign influence or power should undermine their engagements and outcomes without due process of law in a transparent and impartial manner.¹⁷

¹¹ Multilateralism under the WTO has evolved with the incorporation of the non-discrimination principles of the GATT namely, the MFN and NT, which prohibit the pursuit of discriminatory trade policy practices by members against one another.

¹² “Aside from ‘grandfathering’ provisions, the only significant exception to MFN is made in Article XXIV which permits Customs Unions (CUs) and Free Trade Agreements (FTAs) and therefore sanctions preferential trade barrier reductions among a subset of GATT members as long as they go all the way to elimination.’ Kyle Bagwell & Robert W. Staiger, *Multilateral trade negotiations, bilateral opportunism and the Rules of GATT/WTO*, 67(2) J. INT’L ECON. (2005) 268-294.

¹³ like the EU, the United States-Mexico-Canada Agreement, the Chinese globalism under the Belt and Road Initiative, the Trans-Pacific Partnership, the Regional Comprehensive Economic Partnership etc.

¹⁴ This article is limited in scope and deals with the economic aspects of the globalization and multilateral trading regime under the GATT 1947/ WTO 1994. However, the

Chinese Globalism at 20 under the WTO

On December 11, 2021, China will celebrate its twentieth year of WTO membership. Since then, China has witnessed phenomenal growth in its economy in terms of gross domestic product, foreign trade and global value chain integration.¹⁸ Today, China ranks first in terms of world merchandise exports, second in world merchandise and commercial services import, and fifth in terms of commercial service exports for the year 2019, according to WTO¹⁹ statistics.

China’s accession to the WTO on December 11, 2001 marked a watershed moment on the multilateral cooperation landscape. China, as a socialist country, agreed to establish market economy mechanisms to regulate its domestic industry and to interface with the global economy under the framework of the WTO. The separation of state (political systems) and markets (economy) within national borders was a bold application and extension of the ‘one country, two systems’ principle.²⁰ As a new acceding member, China committed to accepting, under the principle of ‘single undertaking’, the legacy commitments and existing obligations, in their entirety and “shall conform to the obligations undertaken in the

multilateralism can only be espoused under the United Nations Systems for global peace, security and sustainability.

¹⁵ Ngaire Woods, *Strategic Rivalry and the Future of the World Bank*, presentation at the Annual Bank Conference on “Development Economics 2019, Multilateralism: Past, Present, and Future” (June 17-18, 2019), <https://live.worldbank.org/annualbank-conference-development-economics-2019-multilateralism-past-present-and-future>.

¹⁶ WTO, *supra* note 8.

¹⁷ VanGrasstek, *supra* note 6.

¹⁸ China has emerged as a global manufacturing hub and branded itself as a global factory and successfully attracted global capital, investments and innovative systems and technologies.

¹⁹ WTO, Trade Profiles 2020, www.wto.org/english/news_e/news20_e/publ_08oct20_e.htm.

²⁰ Derek Grossman, *Where Does China’s ‘One Country, Two Systems’ Stand in 2020?* THE DIPLOMAT (Feb. 13, 2020), <https://thediplomat.com/2020/02/where-does-chinas-one-country-two-systems-stand-in-2020/>.

WTO Agreement and the Accession protocol”²¹ by aligning its domestic legal framework within the set transition period.

Despite its many achievements and compliance with WTO obligations,²² some WTO members are not satisfied with China’s reform pace and policies. China’s trading practices have attracted widespread use of WTO trade safety measures; China²³ has been the most frequent target of investigations.²⁴ Members have also complained about free access to the internet,²⁵ foreign content,²⁶ media channels and net streaming entertainment services²⁷ as these are highly restrictive and regulated²⁸ in China. Speaking at a Roundtable in China, the Deputy DG WTO shared the major concerns raised by the WTO members regarding “Chinese policies in the areas of industrial subsidies, support for state-owned enterprises, protection of intellectual property, and data flow restrictions.” The Deputy DG further stated, “in terms of appropriate domestic policies,

China must continuously aim to optimize the business environment through fostering the functioning of markets.”²⁹

The US-China Trade tensions: fragmented Trade Policies and Stale multilateral Trade Regime

As of 2016, due to the failure of domestic economic policymaking to enhance employment opportunities and reduce income disparities, populist rhetoric shook the political landscape in the developed economies in order to shift the blame on trade liberalization. Insular industrial and trade policies pursued by major emerging economies especially China, India and South Africa further weakened the trade liberalization momentum.³⁰ Prompted by nationalistic and populist sentiments, fragmented trade policies and state-centric strategic designs³¹ have put stress on the multilateral trading regime.³² Since 2018, the US has imposed six tariff measures on Chinese imports, valuing US\$550 billion, to penalize China for its failure to transition to an open, market-

²¹ WTO, *Accession of The People’s Republic of China*, WT/L/432 (Nov. 23, 2001), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/432.pdf&Open=True>

²² set forth in the Accession Protocol to the WTO.

²³ In terms of members affected by new anti-dumping and countervailing investigations.

²⁴ WTO, Trade Monitoring Database, <https://tmdb.wto.org/en/explore#nogo>.

²⁵ E.H, *How does China Censor the Internet: With both the Great Firewall and the Golden Shield?* THE ECONOMIST (April 22, 2013), www.economist.com/the-economist-explains/2013/04/21/how-does-china-censor-the-internet.

²⁶ OECD, *OECD Services Trade Restrictiveness Index (STRI): The People’s Republic of China 2019*, (Dec. 2019), www.oecd.org/trade/topics/services-trade/documents/oecd-stri-country-note-china.pdf.

²⁷ Similarly, China’s score on the OECD STRI for the year 2019 is lower than the average relatively to the OECD countries.

²⁸ “China blocks many U.S. websites, including Facebook, Instagram, and some Google services, though the Chinese public has found ways to circumvent the so-called Great Firewall.” Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS (Feb. 17, 2017).

²⁹ The Fourth 1+6 Roundtable, “Promoting openness, stability and high-quality development of the world economy,”

Beijing, Nov. 21, 2019, www.wto.org/english/news_e/news19_e/ddgaw_21nov19_e.htm.

³⁰ “This confirms the trend already identified in the previous year: protectionism is on the rise. China was identified as the partner contributing the most to this trend (ten new barriers), underlining the complex nature of bilateral trade relations.” European Commission, *Report from the Commission to the Parliament and the Council on Trade and Investment Barriers*, (2017), https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156978.pdf.

³¹ Almost all major economies started to pursue nationalistic or strategic industrial policies prioritizing national industry and labor. China, India, USA and many other countries started “Made in my country” industrial and strategic sectoral development programs- a new sort of import substitution industrialization strategy. The Belt and Road Initiative launched by President Xi Jinping on Sept. 7, 2013 partly in response to the US-sponsored Trans-Pacific Partnership initiative.

³² “The idea of strategic rivalry explains the plethora of nationalistic trade policies and “beggar thy neighbor” strategies pursued by major economies.” Saeed Qadir, *Resetting Multilateralism: China’s Globalism and Competition Policy*, CHINA, LAW AND DEVELOPMENT RESEARCH BRIEF (Sept 25, 2019), https://cld.web.ox.ac.uk/sites/default/files/cld/documents/media/final_qadir_resetting_multilateral_competition_rules_o.pdf?time=1571302976293.

oriented economy even after nearly two decades. The US contends that the “state remains in control of China’s economy, and it heavily intervenes in the market to achieve industrial policy objectives.”

³³ China argued that being a developing country, efforts are underway to gradually open up and reform the economy.³⁴ In response to the US tariffs and trade restrictions, China retaliated in kind, by imposing tariffs on US imports worth US\$185 billion. The US and the EU are not alone in contesting the unfair trade practices of China as many emerging and developing economies have also resorted to trade safety measures.³⁵ China has also been actively defending its WTO privileges (market access) and has imposed more than 247 trade measures against WTO members.³⁶

However, the recent WTO panel decision comes as a moral victory and a sigh of relief for China as the WTO experts reported that the US had violated WTO rules by discriminatorily imposing tariffs on China, and that the US had not met its burden of demonstration that the measures were justified. China declared it a victory for multilateralism and reaffirmed that “China also hopes that the US would give full respect to the panel decision and the rules-based multilateral trading system.”³⁷ This panel report has, instead of providing a basis for diffusing trade tensions

between two major trade partners, added fuel to further bitterness. Mr Lighthizer, the US Trade Representative, responded, “This panel report confirms what the Trump administration has been saying for four years: The WTO is completely inadequate to stop China’s harmful technology practices.” The US has lodged an appeal contending that the ruling was based on fallacious legal arguments and full of errors and “is the acknowledgement that the WTO process impedes improvements in the global trading system.”³⁸

The Fundamental Principles of Multilateralism: Reciprocity and Non-Discrimination

The concept of the reciprocity (trade negotiations balancing concessions between two parties) and non-discrimination (Most Favored Nation (MFN) status and National Treatment (NT)) are at the heart of multilateralism, ensuring balanced bargains (give-and-take) and fair mix of reciprocal exchanges of market access concessions between the negotiating governments. Though the bulk of commitments and concessions are negotiated bilaterally during WTO negotiations, the non-discrimination³⁹ principle of the multilateral trading system transforms and multilateralizes the first-difference (marginal) reciprocity to the non-discriminatory⁴⁰ full reciprocity on multilateral

³³ USTR, 2019 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE, 8 (2020).

³⁴ WTO, CHINA TRADE POLICY REVIEW 2018, WT/TPR/S/375, www.wto.org/english/tratop_e/tpr_e/s375_sum_e.pdf.

³⁵ The WTO Trade Monitoring Report 2020 reveals China has been the most frequent target of anti-dumping and countervailing investigations accounting for 27% and 39% of all investigations initiated by the WTO members for the period from 2017 to 2019. WTO *supra* note 24.

³⁶ WTO, *supra* note 24.

³⁷ Ministry of Commerce PRC, *MOFCOM Spokesperson on WTO Panel Ruling of China Challenging US Section 301 Sanctions*, Sept. 17, 2020, <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/202009/20200903004185.shtml>.

³⁸ The panel report fails to address the underlying cause for the action by the USA as the panel did not examine or vet the arguments presented by the USA regarding intellectual property theft by China. Such a legal vacuum would

augment the animosities between the litigants and erode the trust in the efficacy of the DSB institutional effectiveness and legal prowess. Irrespective of the winner, the panel report should thoroughly present arguments and logic to situate their legal rulings. Cogent and convincing panel rulings would be beneficial for both parties as it would solve and not complicate the matters.

³⁹ as mandated by the GATT.

⁴⁰ “In a negotiating round, when one GATT contracting party offers to lower its tariff to increase the market access available to foreign exporters in another GATT country, that same lower tariff and terms of market access must be then granted to all other GATT countries on a non-discriminatory, MFN basis. This is clearly one of the most important reasons for desired membership in the agreement. Even if a country did not seek to utilize the GATT for its own tariff liberalization negotiations or as an external commitment device to facilitate internal reform, joining the GATT was useful because it provided some

scale. This is what I term ‘multiprocity.’ Such a process ensures that “each member offer to every other member access to its markets on nondiscriminatory terms.”⁴¹ The single undertaking principle also ensures that the bundle of obligations, prior agreements and legacy commitments constitute an integral part of the contract to enjoy the rights, concessions and privileges of the memberships.⁴² The members do have the right to take back concessions and rights in the event of the acceding members’ failure to comply with WTO conditionalities and obligations.

Therefore, the principle of multiprocity and non-discrimination ensures the following aim: “to generate among their members what Keohane has called expectations of ‘diffuse reciprocity.’”⁴³ That is to say, the arrangement is expected by its members to yield a rough equivalence of benefits in the aggregate and over time.”⁴⁴ Thus, it is clear that any deviations of such privileges would, by definition, reduce the reciprocal set of concessions. China’s Accession Protocol to the WTO is punctuated by many promises and obligations to transition to a market economy.⁴⁵ Accession protocols clearly indicate that in the event producers⁴⁶ cannot establish market economy conditions, then the importer may impose counter measures based on the reference prices elsewhere in similar markets. Therefore, the rights conferred upon the WTO membership are

guarantee that the country’s exporters would receive the “best” treatment made available to any other country in the agreement.” CHAD P. BROWN, *SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT* 17 (2009).

⁴¹ Bagwell & Staiger, *supra* note 12.

⁴² All issues are to be negotiated simultaneously and nothing is agreed on any one topic until everything is agreed on all topics. VanGrasstek, *supra* note 6.

⁴³ Robert o. Keohane, *Reciprocity in International Relations*, INTERNATIONAL ORGANIZATION 40 (1) (Winter 1986), 1-27.

⁴⁴ John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, INTERNATIONAL ORGANIZATION, 46 (3) (Summer, 1992), 561-598.

⁴⁵ WTO, *supra* note 21. The ‘market economy’ phrase appeared at least six times in the accession protocol.

not granted automatically, by default, but in effect they are, in part, determined by the level of compliance with WTO commitments.⁴⁷

Way Forward and Conclusion

Currently, the WTO is almost a moribund organization; for example, the US and other nations have blocked the selection process of the panel members and now the Director General. Bilateral or plurilateral engagements outside the purview of the WTO DSB mechanisms have predominantly become a norm and standard for settling contentious issues and disagreements. Pertinent examples are the Regional Comprehensive Economic Partnership and the US-China bilateral trade deals that bypass the WTO norms, systems and processes “undermining the global rules-based trading system.”⁴⁸ The WTO is the result of more than 75 years of effort which has produced a novel institution to regulate global trade and commerce. Despite many varied perspectives on the reforms, the institutional relevance and effectiveness of WTO depends on its efficacy to address some of the emerging challenges particularly relating to high-stake high-tech trade and investment exchanges (especially in the digital realm blurring traditional national boundaries), global public goods (environment, climate change, natural disasters, and pandemics), development deficit (inequalities in income and job opportunities) within and across nations,

⁴⁶ If producers under investigation cannot clearly show that market economy conditions prevail in the industry, then the importing member may use a methodology that is not based on a strict comparison with domestic prices or costs in China.

⁴⁷ These commitments are binding in nature and deviations, if any, may results the reduction or revocation of granted concessions or privileges of the member.

⁴⁸ Joshua P. Meltzer & Neena Shenai, *Why the purchase commitments in the US-China trade deal should not be replicated, ever*, BROOKINGS, (Feb. 4, 2020), www.brookings.edu/blog/up-front/2020/02/04/why-the-purchase-commitments-in-the-us-china-trade-deal-should-not-be-replicated-ever/.

unfair trading practices including forced technology transfers, intellectual property thefts, market power abuses by digital platforms and networks, erosion of consumer privacy and data protection, state-owned enterprises transparency and openness. A dysfunctional WTO would polarize global trade and undermine multilateral rules-based order. Such a sub-optimal scenario may lead to trading practices predating the second world war.

In order to reset multilateralism, the EU, the WTO, and academia should make concerted efforts to revive the WTO and prevail upon both contesting parties (US and China) to amend their ways commensurate with their WTO commitments.⁴⁹ As an honest broker and arbitrator of multilateral trading regime, the WTO has an important function to constrain and regulate global trade.⁵⁰

The WTO must proactively provide policy analysis and score cards so that the level of compliance can be gauged in an open, objective and transparent manner for all members. Both countries can roll back the trade restrictions introduced since 2018 and start negotiating a new method of engagement and reform.⁵¹ New dialogue and engagement processes and systems can be evolved to address the rising threat of climate change, pandemics, disease, poverty, sustainable development⁵² and unemployment in the age of automation “while retaining enough flexibility to accommodate a wide range of possibly divergent domestic policies, economic models, and paths of development.”⁵³

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⁴⁹ The rights and privileges are not inalienable birth rights and contingent upon the eternal compliance by the members per their respective commitments and the obligations made under the WTO agreements.

⁵⁰ “The net result, argued Paulson, is that ‘after 40 years of integration, a surprising number of political and thought leaders on both sides advocate policies that could forcibly de-integrate the two countries.’ And if that trend continues, ‘we need to consider the possibility that the integration of global innovation ecosystems will collapse as a result of mutual efforts by the United States and China to exclude one another.” Alan Alexandroff, Colin Bradford & Yves Tiberghien, *Toward “Effective Multilateralism” in Turbulent Times*, 5 GLOBAL SOLUTIONS JOURNAL (2020) 54.

⁵¹ WTO, *Informal Trade Policy Review Body meeting - trade Monitoring Report*, Remarks by WTO Director General

Roberto Azevêdo, July 24, 2020, www.wto.org/english/news_e/spra_e/spra305_e.htm

⁵² Homi Kharas, *International financing of the Sustainable Development Goals*, in FINANCING THE UN DEVELOPMENT SYSTEM TIME FOR HARD CHOICES (UN MPTF Office & Dag Hammarskjöld Foundation, Sept. 2019) www.daghammarskjold.se/wp-content/uploads/2019/08/financial-instr-report-2019-interactive.pdf#page=71.

⁵³ Homi Kharas, Dennis J. Snower & Sebastian Strauss, *The Future of Multilateralism: Toward a Responsible Globalization that Empowers Citizens and Leaves No One Behind*, 5 GLOBAL SOLUTIONS JOURNAL (2020) 78, www.global-solutions-initiative.org/wpcontent/uploads/2020/05/GSJ_issue5_NEU.pdf.