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Romance of the Three Kingdoms now playing in
Geneva: WTO reform as a drama between the U.S.,
China and the EU

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Abstract

The impetus for current talk of ‘WTO reform’ largely stems from the tension between the United States and China, but both powers must take account of the third major trade power, the European Union. In this paper we discuss the elements of the WTO reform agenda with a focus on those tensions and the possibility of one power driving a wedge between the other two. We do so by drawing on the recent literature analysing the operation of the WTO and potential reform of its working practices and by evaluating responses to an expert survey, using the latter to assess the prospects for – and the potential shape of – a WTO reform and negotiation package that China might support.

Keywords

Multilateral cooperation; WTO reform; expert survey; EU; US; China

Introduction*

After 25 years, the rules and working practice of the World Trade Organization (WTO) undoubtedly need renovation. Yet, despite structural weaknesses and gaps in its rules evident right from the start,¹ the impetus for current talk of ‘WTO reform’ largely stems from the tension between the United States (U.S.) and China. Both powers must take account of the third major trade power, the European Union (EU). While our focus in this paper is on tensions inside the WTO, the three-way dynamic can be seen clearly in the commentary on the EU-China Comprehensive Agreement on Investment announced at the end of 2020.² Is it a political win for China alongside the Regional Comprehensive Economic Partnership (RCEP)? Does the deal complicate U.S. efforts to negotiate with China? Will it undermine U.S. efforts to work with the EU and other allies in dealings with China? All of these tensions are on display, albeit perhaps less dramatically, inside the WTO.

When people identify the aspects of the WTO that need reform—no progress on negotiation of important new issues, the Appellate Body in crisis, inadequate notifications of applied trade policies, working practices no longer fit for purpose—a concern with the impact of China on the trading system and the WTO is often in the background. The story line is not news: everyone knows that many of the things that the U.S. wants to change in the way the WTO functions are targeted mainly, though not exclusively, at China (Ismail, 2020, 82). This central U.S. objective affects many if not all WTO reform topics. It also affects the ability of developing countries to achieve their goals, as we show in this paper, because any proposal on development-related matters of interest to a large group of WTO Members will be considered by the U.S. in light of the implications it might have for addressing ‘the China problem’.

Behind the U.S. agenda in the WTO is its frustration, shared by other countries, that integration into the trading system has not changed China into a liberal market economy. This is why the U.S. emphasis on market-oriented principles is about pressure for domestic change in China more than about reform of the WTO. And that is part of the reason why China’s attitude to WTO reform is essentially conservative and reactive. It has no particular WTO reform agenda of its own, notwithstanding two WTO submissions and co-sponsorship of others.³

Is China’s domestic political economy incompatible with the WTO system? We doubt it, if only because it makes no sense for either the EU or China or the U.S. to try to go too far down the decoupling road, assuming that is even feasible. All Members will be better off reinforcing a multilateral system of rules to manage the inevitable frictions among interdependent economies organised on different principles. This applies as much to transatlantic regulatory cooperation as to challenges across the Pacific.

In this paper we discuss where Chinese, European and U.S. officials diverge on elements of the WTO reform agenda. We make little attempt to describe, let alone analyse, every issue on that agenda, nor do we describe the positions of all 164 Members. We draw on a series of papers we have co-authored on

* Matteo Fiorini undertook the data analysis and prepared the charts for this paper while he was at EUI; the paper would not have been possible without his superb assistance. We are grateful to Alice Tipping for helpful suggestions. This paper draws on joint research with Petros Mavroidis and Douglas Nelson and work undertaken in a European Union Horizon 2020 research and innovation supported project on realizing European soft power in external cooperation and trade (RESPECT; grant agreement No 770680) as well as a Bertelsmann Stiftung-supported research project on WTO reform.

¹ For a compelling case for institutional reform by one of the architects of the WTO, see (Ostry, 1999).

² Our title was inspired by Nakazawa (2021) who argues that the Chinese perception of a strategic victory ‘draws directly from the 14th-century Chinese historical novel ‘Romance of the Three Kingdoms,’ in which the strategy of driving a wedge between enemy forces appears time and time again.’

³ WTO (2019a, 2019c).

WTO reform.⁴ The main subjects include WTO working practices, notably consensus and special and differential treatment for developing countries, transparency of trade policy, deliberation in committees and other WTO bodies, and dispute settlement procedures. We also draw throughout on an original survey of the trade policy community conducted in June 2020 (Fiorini et al. 2021).⁵ The survey suggests that respondents from the EU and the U.S. are broadly aligned on the WTO reform agenda, while respondents from China often diverge from those in the EU and the U.S.

Reforming WTO will not solve the China-U.S. conflict, but it can enhance the salience of the organisation as a forum for these two large economies to address some of the tensions that have arisen between them, in the process helping to resolve the problems of the WTO. The roots of the China-U.S. trade conflicts are outside the WTO, which is why we begin in section 1 with a brief discussion of the systemic context of ‘WTO reform’ and the question of whether China is liberal in ways that matter for the trading system. Section 2 turns to the WTO reform agenda, noting that current plurilateral negotiations are a response to the problems created by the WTO consensus working practice. In section 3 we argue that the debate about how to recognise economic development differences and the application of ‘special and differential treatment’ has been an important negotiation obstacle but need not be, if regarded through a ‘China lens’. Section 4 moves from negotiations to problems with WTO transparency, which are especially marked in the domain of industrial subsidies, the topic of section 5. We then consider reforms to WTO working practices in section 6 before coming, in section 7, to the Appellate Body crisis. The payoff for WTO reform will be renewed capacity to negotiate both extant differences that divide China and the U.S. and, as important, to deal with novel problems, the focus of section 8. Section 9 concludes.

1. China and the liberal trade order

Many of the WTO’s problems are due to a general malaise in multilateralism and to structural changes in the world economy. Power matters; it has shifted, and the system has not caught up. Whether or not the United States ever was a ‘hegemon’ (Snidal, 1985), it manifestly is not one now. The country is uncomfortable in this new situation and is especially uncomfortable with the rise of China. One might normally expect a rising power to respond to its new status by demanding institutional change (Goddard, 2020), but it is not clear that that is what China wants in the WTO (Johnston, 2019). Indeed, some scholars think the challenge of rising powers in the WTO is not related to institutional arrangements but to the historical dominance of the U.S. (Hopewell, 2016). On the other hand, sometimes it is the established or declining power that seeks institutional change (Kruck and Zangl, 2020, 13), which may be a better description of what we are observing.

Generations of Atlanticism, that is, of shared elite perceptions on either side of that ocean, helped underpin the post-World War II order. Nothing comparable exists for the emerging 21st century order. Every round of multilateral trade negotiation under the GATT, including the Uruguay Round, only crystallised when the U.S. and Europe had reached a basic accommodation, which then provided the parameters for the rest of the bargains in the round. The EU and the U.S still disagree about many things,

⁴ For all of our papers on WTO reform in a project supported by the Bertelsmann Stiftung see <https://globalgovernanceprogramme.eui.eu/research-project/revitalizing-multilateral-governance-at-the-wto-2-0/>

⁵ The survey instrument includes questions on different challenges confronting the WTO and collects information on the priorities accorded to each by WTO delegations, government officials dealing with the WTO and other stakeholders. We reported on our method and the full results of the survey in Fiorini et al. (2020). In this paper we extract the results for respondents who identified the nationality of their organizations as one of China, the EU or the U.S. The sample consists of 215 respondents from the EU and 85 from the US. The number of respondents from the EU and US ensure that results are robust. It is important to stress that this is not the case for China: with only 18 respondents for China the results are at best indicative. However, we have some confidence that results are worth discussing because of the design of the survey instrument and the fact that respondents are experts, i.e., reflect the views of sophisticated Members of the Chinese trade policy community.

notably how to pursue regulatory cooperation and the role of the Appellate Body, but solving their outstanding conflicts will not remove the central blockage in the WTO.

The U.S. and China have not developed a trans-Pacific accommodation comparable to the one painstakingly established across the Atlantic. Such an accommodation would require a recognition by both parties that China now has a leadership role in global governance. China is a trade behemoth whose institutional role is not yet commensurate with its weight in the world economy. China knows that WTO reform means China reform. It will accept reforms that make the WTO better for all Members, but not ones that challenge its identity as a developing country, that deny it scope for the way it organises its economy, or that fail to recognise its status as a major power (Murray, 2018). The country evinces a contradictory duality in the image it seeks to project to the world and to its own citizens (Pu, 2019, 10).

The paradox of postwar order was that it encompassed commitments to free trade abroad and to the administrative state at home (Ruggie, 1982). This famous paradox has made practical people uncomfortable for a long time, whether they favoured one arm or the other; the rise of China simply makes their discomfort worse. Can the WTO as a normative framework survive if powerful Members like the U.S. and China have such divergent conceptions of the role of the state in the economy? Critiques of the heavy hand of the Chinese state are well known, but the U.S. government also plays a significant role in the economy, from welfare spending through regulation to supporting R&D in key sectors and incentivising investment through subsidies and public procurement. Although their instruments differ, all WTO Members defend their right to manage their economies in their own way.

Whether China has a system of government compatible with the implicit assumptions about the nature of a liberal state on which the GATT/WTO system was created is an open question (Mavroidis and Sapir, 2019). At its core, what Ruggie (1982) called the compromise of embedded liberalism was about reconciling domestic differences within a liberal trade order. If a leading state is not liberal, does the compromise of embedded liberalism break down? That is the real question that the U.S. asks in its paper on the importance of market-oriented conditions (WTO, 2018).

To what extent is the Chinese system not liberal in ways that matter for the WTO?

Can the WTO cope with a non-liberal state? That worry is what made China's WTO accession process so long and difficult. The Accession Protocol contains various measures that allowed other Members to observe implementation to ensure that China's engagement with the WTO and required domestic reforms met everybody's expectations. Many features of the WTO system work to manage frictions between varieties of capitalism, but this framework faced new pressures as the transitional provisions of China's accession protocol came to an end (Lang, 2019, 719). Growing U.S. uneasiness about China accelerated with the election of Donald Trump as President. His United States Trade Representative (USTR), Robert Lighthizer, believed China had not been playing by the rules.

The frustration with China's state capitalism model was behind the initiation of Trilateral meetings of the trade ministers of the U.S., Japan, and the EU. They have met five times since May 2018 when they 'reiterated their concern with the non-market-oriented policies of third countries and discussed actions being taken and possible measures that could be undertaken in the near future.' In that first statement they endorsed a joint scoping paper defining the basis for the development of stronger rules on industrial subsidies and state-owned enterprises (SOEs). They also mentioned technology transfer and non-compliance with their WTO transparency obligations by some governments (USTR 2018a).

The U.S. submitted a document in the WTO (without the involvement of the EU and Japan) in July 2018 (WTO, 2018). This document recalled the expectation that, when China joined the WTO, it would continue the transition to an economy based upon open, market-oriented policies. Instead, China's 'state-led, trade-disruptive economic model ... imposes substantial costs on and presents severe challenges to WTO Members.' Among its specific complaints, the U.S. asserted that China's opaque

system makes it hard for Members to assess that country's compliance with WTO obligations, notably because of inadequate subsidies notifications.

Before China joined the WTO, analysts worried that it would be unable to meet transparency requirements due to domestic politics, institutional capacity and the nature of the legal system. Although reforms occurred after 2001, not necessarily because of the WTO (Du and Kong, 2020, 905), issues with regulatory transparency, notification of subsidies and implementation of reforms at sub-central government levels persist.

The same themes recurred when the Trilateral ministers met again in September 2018; at that time they also 'called on advanced WTO Members claiming developing country status to undertake full commitments in ongoing and future WTO negotiations.' Yet, at subsequent stocktaking meetings in May 2019 and January 2020 ministers took no steps to launch any sort of process to bring other countries on board, least of all, the target of their concerns: China. Another commitment at the September 2018 meetings was honoured more in the breach: a commitment 'to promote the strengthening of the regular committees' activities and ... the development of a potential joint proposal by the three members focusing on the promotion of best practices and increasing efficiencies across [WTO] committees (USTR 2018b).' China is a co-sponsor of the EU proposal discussed below; Japan and the U.S. are not.

The U.S. has repeatedly raised concerns on which it thinks WTO reform depends, even going so far as to submit a draft resolution proposing that the General Council express its serious concerns with non-market-oriented policies and practices 'that have resulted in damage to the world trading system and lead to severe overcapacity, create unfair competitive conditions for workers and businesses, hinder the development and use of innovative technologies, and undermine the proper functioning of international trade (WTO, 2020a).'

Of course, there is zero chance that the U.S. proposal could attract consensus, with China opposed. China claims to support WTO reform as long as it preserves core values of the multilateral trading system such as non-discrimination and openness, safeguards the development interests of developing Members, and follows the practice of decision-making by consensus. China's paper (WTO, 2019c) presents ideas framed in ways meant to suggest that the U.S. is actually the problem, with proposals on:

- Breaking the Impasse of the Appointment Process of Appellate Body member
- Tightening Disciplines to Curb the Abuse of National Security Exception
- Tightening Disciplines to Curb Unilateral Measures Inconsistent with WTO Rules

The suggestions on improving so-called trade remedy rules similarly target areas where developed countries could be said to have abused the existing rules, for example, on price comparison in anti-dumping proceedings, or subsidy identification and calculation of benefits conferred. In response, China consistently makes the obvious and valid point that the market is not given free rein in OECD countries. Jesse Kreier, a former WTO official, commented on a November 2020 affirmative preliminary determination regarding alleged dumping of wine from Australia,⁶ in which the Chinese determination discusses Australian market conditions in detail, and, based upon the facts available, finds the existence of 'non-market conditions' including supportive measures through inter alia R&D funds and investment subsidies. These findings parallel findings of government intervention in the U.S. energy market.

The EU is sympathetic to the U.S. analysis but tellingly did not co-sponsor the General Council resolution. At an event celebrating the 25th anniversary of the organisation (Monnicken, 2020), EU Director-General for Trade Sabine Weyand said that 'the WTO is not the place to drive systems change. It's not about regime change. This is about dealing with the consequences of certain economic systems and making sure that these are being dealt with in a manner that everyone can live with. And that requires

⁶ China - Preliminary AD Determination on Australian Wine Posted on IELP by Jesse Kreier on December 02, 2020 Co-authored with Sandeep Chandy.

compromise on all sides.’ The EU prefers to focus on concrete spillovers of non-market practices that would be susceptible to action in the WTO. It is to those more concrete issues that we now turn.

2. Plurilateral negotiations as a response to the consensus problem

The accession of China at the 2001 Doha ministerial, an event that brought over a billion people under the rules of the trading system, is seldom recognised as a considerable success. The event was eclipsed by the launch of the ill-fated Doha Round at the same ministerial, a round undermined in part by a failure to consider whether the unfinished aspects of the Uruguay Round negotiations still made sense in light of Chinese accession (Wolfe, 2015).

The backward-looking Doha Round agenda prioritising tariffs on manufacturing and agricultural support policies became increasingly disconnected from 21st century priorities: policies affecting the digital economy, cross-border data flows, foreign investment, regulating the behavior of state-owned or state-controlled enterprises. The talks on domestic support in agriculture and on fisheries subsidies are still inching along, but in 2017 many countries decided to shift gears and move away from negotiations including all WTO Members and the working practice of consensus decision-making by launching plurilateral talks.

The so-called ‘joint statement initiatives’(JSI) that are now being pursued in the WTO span e-commerce, domestic regulation of services, investment facilitation, and measures to enhance the ability of micro and small and medium enterprises (MSMEs) to utilise the opportunities offered by the rules-based trading system. Most address coordination failures or entail joint efforts to identify good regulatory practices. These initiatives include a broad cross-section of the WTO membership. The EU participates in all four groups. Although the U.S. only participates in one JSI, U.S. respondents to our survey reveal close alignment with the EU respondents on the priority they assign to JSIs, as shown in Figure 1.

The estimates plotted in Figure 1 and the subsequent graphs reported below are obtained from a discrete choice model analysis in order to compare responses to the above-mentioned survey (Fiorini et al, 2021) by European, American and Chinese respondents, respectively.⁷ Estimation of each discrete choice model is achieved by clustering standard errors at the level of the regressor of interest. For each of the three comparisons reported in a figure, the baseline country (the US, the EU and EU again, respectively) is represented by the vertical red line at 0 on the horizontal axis. Point estimates to the right of the 0 line reveal higher utility for the group of respondents of interest; point estimates to the left reveal lower utility for this group. The distance from the line suggests the degree of alignment (divergence) on the priority respondents assigned to that question.

⁷ More precisely we estimate ordered probit models where the dependent variable is given by the answers to a specific question, with values ranging from 1 (very low/strongly disagree) to 5 (very high/strongly agree). The regressor of interest is a dummy variable taking value 1 if the respondent belongs to the group of interest (e.g. China) and 0 if she belongs to the respective baseline group (e.g. US). The results are reported in graphs that plot both point estimates and the respective 95% confidence interval. Estimation of each discrete choice model is done by clustering standard errors at the level of the unique bivariate regressor.

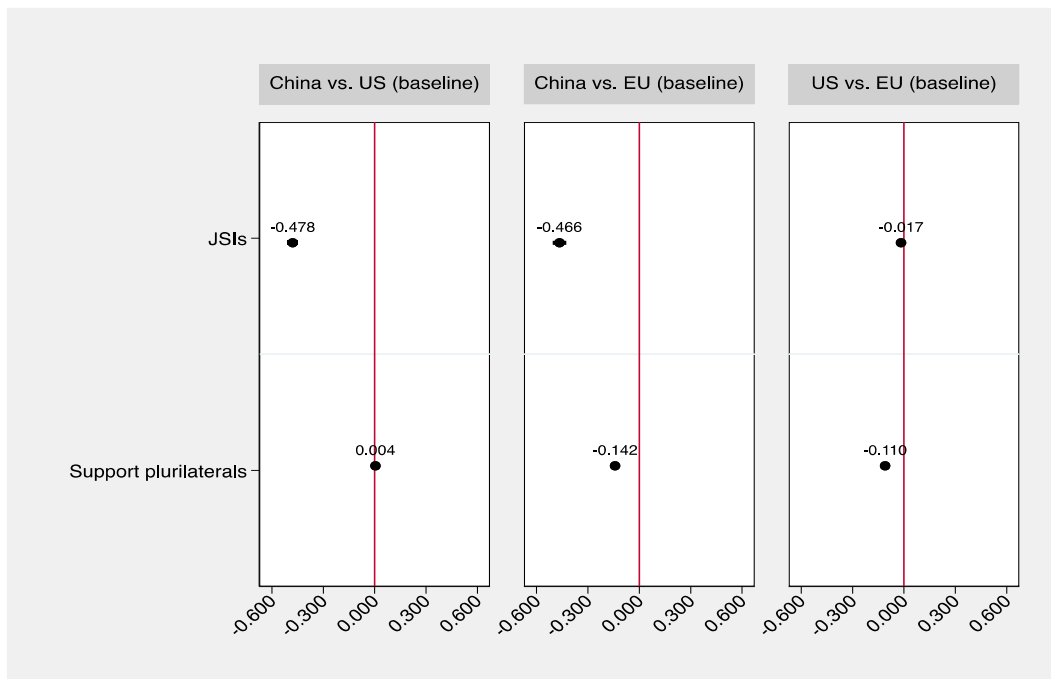
Figure 1: Plurilateral negotiations as a response to the consensus problem

Figure 1 shows that both EU and American respondents to the survey get far more utility from (attach greater priority to) concluding the JSI talks than Chinese respondents. To take the example of the first panel of Figure 1, a point estimate and associated confidence interval that is to the left of the centre line indicates lower utility for China than for the U.S. in successfully in concluding the JSIs. This is striking insofar as China was an initiating co-sponsor of three of the four groups and joined the fourth group – on e-commerce – soon after deliberations commenced. On another point, as we discuss in section 8 below, the pattern of preferences is different when it comes to launching talks on new issues (other than the 2017 JSIs), a question on which U.S. and Chinese respondents are aligned.

The EU objective in the e-commerce negotiations is to negotiate a set of provisions that will become a reference paper that participants could include in their GATT and GATS Schedules, which would ensure that these commitments apply on an MFN basis. This is the only plurilateral in which the U.S. participates, hence the only one that includes the EU, China and the U.S., which means the outcome could be de facto critical mass. Apparently, the U.S. would rather restrict the benefits of the initiative to the participants; that would be a poison pill since India and other Members would likely deny the consensus required by Article X.9 of the WTO Agreement to add such a plurilateral to Annex 4.

Plurilateral approaches are not a panacea, but they do offer a mechanism for large trade powers to cooperate without engaging in negotiations on trade agreements that liberalise substantially all trade (Hoekman and Sabel, 2021). Figure 1 also shows that on providing support for plurilateral agreements, China and the U.S. are aligned, with the EU respondents slightly less supportive. But underlying the interest in plurilaterals is the trade conflict between the U.S. and China, and, more broadly, trade tension resulting from the rapid growth in exports of emerging economies. That tension has been growing for decades. The Uruguay Round single undertaking, which forced all developing countries, and all those who subsequently acceded to the WTO, to accept the whole set of agreements, exacerbated the problem. The move to plurilaterals is only a partial solution to the difficulty of concluding negotiations by consensus. Each negotiation can only be concluded if a critical mass of Members participates, and the result will not be worthwhile if large traders claim that they need special and differential treatment. Here too the focus of U.S. concern is China.

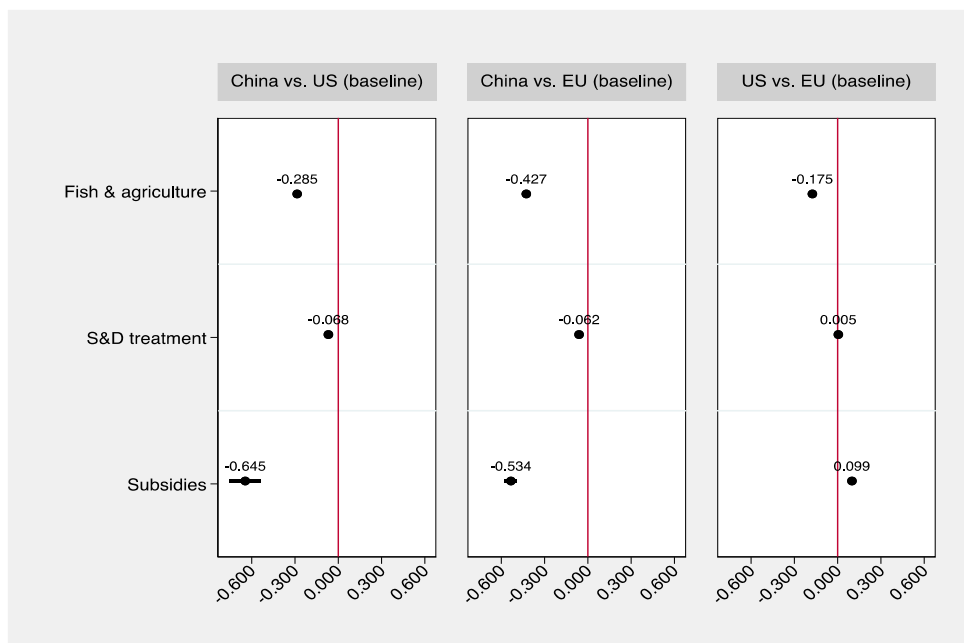
3. Special and differential treatment as a negotiation obstacle

Special treatment for developing countries is now part of WTO theology, to the point that it was baked into the 2001 Doha Development Agenda.⁸ In the negotiations on non-agricultural market access, it did not matter if small developing countries wanted less than full reciprocity in reduction commitments (paragraph 16 of the Doha declaration) but unwillingness of larger developing countries to make real commitments did matter. Whether existing special and differential treatment provisions make sense is one thing but asking for it in new negotiations is problematic if it vitiates the point of the exercise.

A lengthy document submitted by the U.S. to the General Council early in 2019 (WTO, 2019b) provides a great deal of data and commentary on WTO decisions, in support of the argument that self-declared developing country status no longer makes sense and undermines new negotiations. In 2019, the U.S. submitted a proposal for a decision on Procedures to Strengthen the Negotiating Function of the WTO with criteria for assessing which countries will not avail themselves of special and differential treatment in WTO negotiations (WTO, 2019d). The U.S. asked for this item to be placed on the agenda of one General Council meeting after another in 2019 and 2020, with some support from other Members but unrelenting opposition from China and most developing countries. As we see in Figure 2, the respondents from China, the EU and the U.S. are closely aligned in the utility they would receive from resolving differences on special and differential treatment but, surprisingly, in results not shown here, the three get significantly less utility than other Members from such a resolution.

For example, at the July 2020 meeting of the General Council the representative of China, echoing the introduction and much of the argumentation of (WTO, 2019a) said that in an international organisation with developed and developing Members, non-reciprocity was a means and a principle to realise equity. He concluded his lengthy intervention by noting that reclassification of WTO Members was not a way out: better to respect the current practice of self-designation of developing country status and at the same time to encourage those in a position to do so to make a greater contribution to the best of their capabilities. China was willing to do so, he said (WTO, 2020d).

Figure 2: Dealing with traditional problems



⁸ For a history of how the principle came to be, including why Members can designate themselves as a developing country needing more time to liberalize or to accept lesser obligations, see Low, Mamdouh and Rogerson, 2019, at page 8ff.

Whether China will contribute by being part of the critical mass on any JSI remains to be seen. The signs are not good if we consider two ‘old’ issues on the negotiating table where, as we see in Figure 2, Chinese respondents get much less utility than those from the EU and the U.S. We should note that the EU and the U.S. are also not aligned on these old issues. The first is the negotiation on fisheries subsidies. Launched in 2001, these talks have yet to be concluded, missing the latest deadline of end-2020. There are many reasons for the failure, but special and differential treatment was a factor. China’s position is ambiguous. Echoing Annex D paragraph 9 of the 2005 Hong Kong ministerial declaration (WTO, 2005), China supports disciplines that prohibit fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU-fishing, while ‘recognizing that appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of the negotiations (WTO, 2019f).’ Another proposal by the U.S. and others (WTO 2019e) includes a sliding scale of commitments that differentiates Members by proportion of marine capture production; this would provide all Members with differentiated levels of commitment, meeting developing countries’ substantive needs for flexibility if not their political need to maintain special and differential treatment as a fixture of all WTO agreements. In contrast, an Indian proposal on subsidies for fishing in a country’s exclusive economic zone that contribute to overcapacity, included in the last Chair’s text at the end of 2020 (WTO, 2020e), might significantly limit China’s access to special and differential treatment because of a provision stipulating this would apply only to developing countries with per capita incomes below US\$ 5,000. If China and India were not asking for special and differential treatment it would, of course, make things easier (in that the impact of exceptions would be much less and easier to swallow) but the U.S. seems opposed to broad carve outs by category of Member, so the Indian proposal might not be acceptable to them.

Agriculture, the second old issue, has seen a growing level of domestic support provided to farmers in China. This is a challenge for negotiations because the Doha Round framework, and China’s accession protocol, did not anticipate the problem. In his analysis of the state of play, Peter Ungphakorn (2020) notes that while the EU uses less than 10% of its entitlement for domestic support under the 1995 Agreement on Agriculture, the U.S. could be close to its limit. The increased compensation for farmers would mitigate the effects of the trade war launched against China, meaning that reductions in U.S. limits would bite into the support actually provided. One of the American complaints about China and some of the other developing countries is the way their entitlements under the Agreement expand as their farm sector grows because they rely on ‘de minimis’ limits, which are a percentage of production. It is not difficult to see why this issue irritates the U.S. A crude calculation suggests that China’s entitlement at \$141bn is now more than double that of the U.S. and growing.

The EU suggests ensuring that flexibilities be made available to those Members who actually need them to enable them to fully benefit from their membership in the organisation, an approach advocated by former WTO officials (Low, Mamdouh and Rogerson, 2019, 5). That makes more sense than elaborate proposals that will not be accepted, and signals that China is now too big to hide behind special and differential treatment.

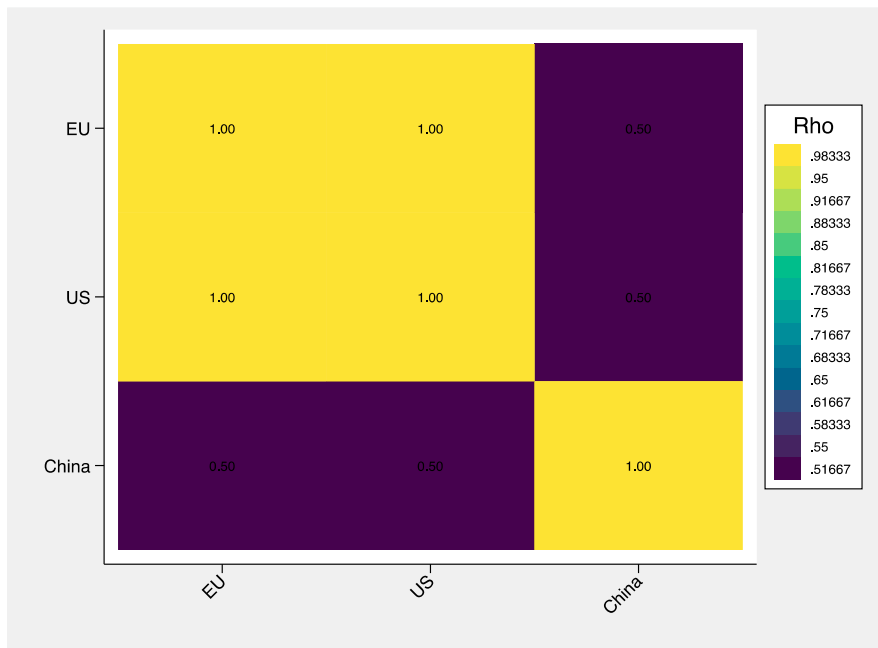
4. Improving transparency is central to WTO reform

Transparency of actor behaviour and expectations within regimes is one of their core requirements, and that requires high quality information (Wolfe, 2018). The WTO agreements have dozens and dozens of formal notification obligations; compliance varies by committee and by Member. One-time obligations to notify existing legislation can be simpler than ad hoc ex ante notifications of new regulations, which, in turn, are often easier to prepare than regular ex post notifications of subsidies. In the current context, only some of the COVID-19-related measures reported to the WTO are ‘notifications’. The WTO website lists regular (required) notifications with a COVID-19 connection, voluntary reporting of COVID-19-related measures, responses to Secretariat requests for information and the Secretariat’s own

information derived from web scraping and news reports.⁹ There are problems with all these sources of WTO information, and the problems are not all due to China.

Figure 3 reports a rank correlation analysis or heatmap of the Spearman rho for each category of respondents to our survey on their views on questions about notification and monitoring.¹⁰ This reveals that EU and US respondents are aligned with each other in giving a high or very high priority to improving transparency. Conversely, Chinese respondents gave this much lower priority.

Figure 3: How important is improving WTO transparency?



Inadequate notifications of trade policies is an old issue, but its inclusion on the ‘WTO reform’ agenda only began at the 2017 Ministerial Conference (MC 11) when Robert Lighthizer, then the United States Trade Representative, said that ‘it is impossible to negotiate new rules when many of the current ones are not being followed (USTR, 2017).’ The U.S. submitted a detailed proposal that reviewed how compliance with notification obligations under the Trade in Goods agreements is unsatisfactory. The U.S. proposal included punishment for Members who are behind in their notifications (WTO, 2017).

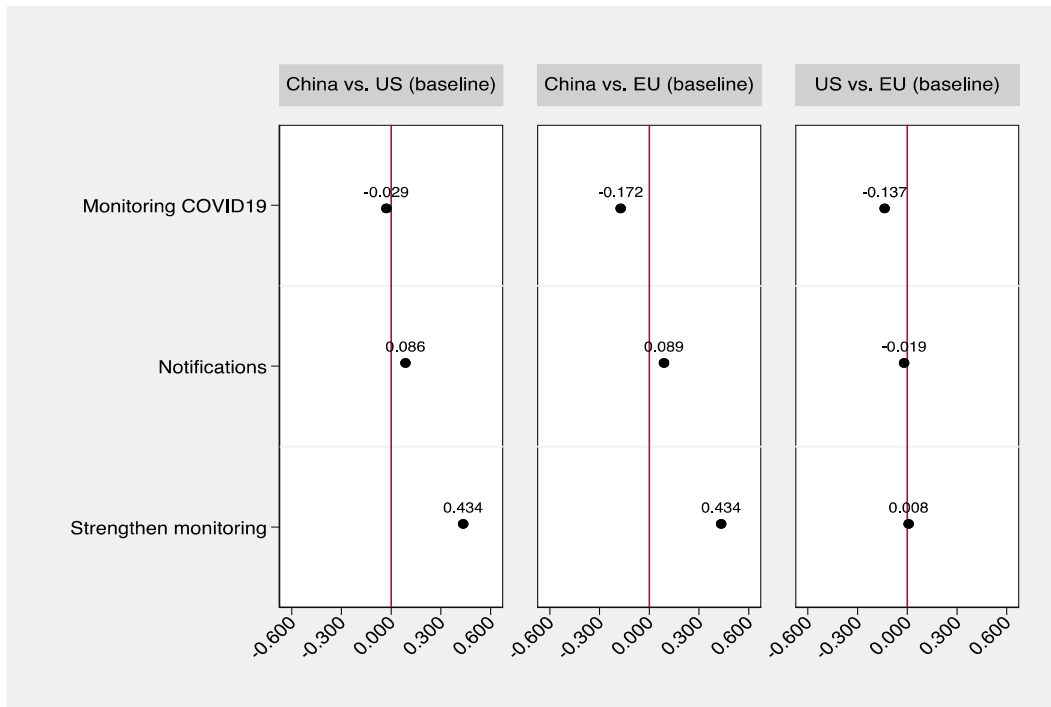
A much-revised version of that proposal (WTO, 2020b) is still before the General Council but now has a number of co-sponsors, including the EU. It suggests consideration of both systemic and specific improvements that can help Members improve compliance with notification obligations. Everyone knows that compliance with the notification requirements of the various WTO Agreements remains uneven, but there is no consensus on why. If the problem is a lack of capacity, then technical assistance to help them complete their notifications may be needed, although a failure to notify by the countries most likely to need technical assistance is a problem for them, not the system. If the real difficulty is outdated and overly complex notification requirements, then a thorough review would be warranted. Only if the reason for a poor notification record is bad faith would penalties as suggested by the U.S. be appropriate. That punitive approach, to which the EU also seems attached, is aimed at China, and yet, in Figure 4, Chinese respondents get slightly more utility than the U.S and the EU improving compliance with notification obligations. This may be because many of our Chinese respondents are academics,

⁹ https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm

¹⁰ Spearman’s rho is a nonparametric method for measuring the correlation between two variables using rank order information for each variable. It ranges between -1 and 1. The higher the number the more similar is the rank ordering.

who value transparency, but it suggests that this is one area of reform where there may be scope for convergence.

Figure 4: Improving transparency is central to WTO reform



Some of the problems with China’s notifications may be due to conscious unwillingness to provide the information, or a general lack of transparency in China’s governing institutions. Threats to identify the Chinese ambassador as a ‘Member with notification delay’ when offered the floor in the General Council (WTO, 2020b) will not help address the matter. Some of the problems may have little to do with the Ministry of Commerce in Beijing, let alone the delegation in Geneva, since more powerful domestic ministries may not see the benefits to themselves in preparing the information (Gao, 2018). What is clear is that China, along with most developing countries, will never join a consensus on the U.S. proposal as it stands.

The periodic monitoring reports prepared by the Secretariat ought to be able to provide supplementary information. The reports aim to enhance transparency of trade policy developments, consistent with the mandate of the Trade Policy Review Mechanism to aid in understanding Members’ trade policy but not to assess compliance with formal obligations. The reports therefore do not cover ‘subsidies’, which are defined for legal purposes in Article 1.1 of the Agreement on Subsidies and Countervailing Measures (ASCM). These reports should, in principle, cover the full extent of the ‘general economic support’ provided by governments. They do not.

The reports originally captured responses to the financial crisis when simply knowing the facts helped countries avoid an over-reaction. Central to coverage of general economic support, which goes beyond formal notifications, are responses to periodic questionnaires issued by the WTO Director-General (DG). The overall response is weak, and the response on general economic support is dismal. For the most recent report, 67 WTO Members and one Observer volunteered information on 638 COVID-19-related general economic support measures. The EU did so; the U.S. and China did not. The U.S. is less cooperative than China or the EU with the trade monitoring exercise, neither responding to the DG’s questionnaire nor verifying information the Secretariat found in other places (WTO, 2020c, Appendix 1). EU respondents to our survey get more utility on COVID-19 monitoring than those from

China or the U.S. (Figure 4). Conversely Chinese respondents get much more utility from strengthening regular monitoring than the EU and the U.S.

5, The old problem of subsidies is rapidly becoming much worse

One of the most contentious areas in trade policy is the negative international spillovers of industrial subsidies. Subsidies can help to address market failures and therefore might have a good economic rationale, but cooperation is needed to minimise negative spillovers of such measures on trading partners. As discussed at greater length by Hoekman and Nelson (2020), this is not simply a ‘China issue’. Subsidies of one type or another constitute the great majority of trade interventions imposed since 2009. Here too, the problem is inadequate information.

Governments can see distortions that look like they were caused by industrial subsidies offered by other countries, but they lack the data to illuminate that state support. In the early 1980s countries knew that some of the problems in farm trade were caused by subsidies, but fingers were pointed in all directions. The OECD developed an index that helped countries to see the overall incidence of agricultural subsidies, now called the Producer Support Estimate (PSE). The OECD has since developed a matrix based on that work to illuminate support to the aluminium and semiconductor industries, which both feature significant involvement of Chinese SOEs, but that work has not been brought to the WTO. It will not be easy, as we have seen with the supposed problem of over-capacity in the steel industry.

Overcapacity in the Chinese steel industry has been a U.S. concern for many years, both in bilateral discussions and in multilateral fora. China as host of the 2016 G20 summit wanted a successful outcome and therefore agreed to language in the Hangzhou communiqué that called for the creation of a Global Forum on Steel Excess Capacity to increase information sharing and cooperation, with OECD as facilitator. The subsequent Global Forum reports take a comprehensive approach to the global steel industry with information on crude steel capacity developments and government policies affecting excess capacity, including market-distorting subsidies and other government support measures. After the initial three years China perceived that the Forum had become a tool to pressure and attack it, so withdrew. The Forum continues and over time might lead to consensual understanding on good and bad subsidies in this area.

The Trilateral approach pursued by the EU, Japan and the US discussed above led to circular discussions in the WTO Subsidies and Countervailing Measures (SCM) committee. For example, in October 2020, according to a Geneva trade official, each of the three expressed their joint concern about the role of state subsidies in contributing to excess production capacity in sectors such as semiconductors, steel, aluminium and others. Noting that China no longer participates in the Global Forum while at the same time arguing that the WTO is not the appropriate forum for addressing overcapacity issues, the EU asked China where it thought the best place was for addressing these crucial issues. China replied that the problem of excess capacity in the steel sector has been resolved internally. It said the issue has been fully discussed in the Global Forum and that China was willing to continue exchanges on the matter on a bilateral basis. The U.S. and the EU again raised concerns about China's lack of information regarding subsidy programmes, referred to in official communications. China replied that MOFCOM publishes large amounts of information in its trade and economic gazettes as well on its website, and that its national enquiry point fulfils China's WTO transparency obligation. The U.S. countered that it had searched the MOFCOM Official Gazette thoroughly but was still unable to find this information.

SOEs are clearly a problem in the steel, aluminium, and semiconductor industries, but are they a problem more generally?¹¹ The Trilateral ministers think so, but we do not necessarily know enough about SOEs, especially in China, to be sure whether we have a problem, and hence, what ought to be

¹¹ This section draws on (Wolfe, 2017)

done. The Appellate Body seems to think that, in the terms of the ASCM, we define a body exercising ‘governmental authority’ by what it does, not by who owns it. The distinction may matter in the case of an SOE providing a subsidy but does not help in assessing other ways in which SOEs might affect the commercial interests of foreign firms. Moreover, without more information on the universe of SOEs, and what they do, or even simply, what their objectives are, the distinction has little operational utility, although the fact of the false distinction contributed to American dissatisfaction with the Appellate Body and its jurisprudence (Ahn, 2021).

The absence of specific WTO disciplines on SOEs, including the absence of a definition, leads to the non-existence of transparency requirements about who they are and what they do. By any definition, OECD countries have had many SOEs. Multilateral consensus on new rules might prove elusive, but China ought to be willing to participate in a negotiation for a Reference Paper on SOE transparency. At the broadest level, restrictions imposed because trading partners fear the motives of Chinese SOEs disrupt the investment strategies of those firms, and hence, their ability to participate in sophisticated global value chains. If all involved knew more, and had a space to discuss what they know, they might be more relaxed. More narrowly, the fact of SOEs is part of the story about how China does not operate as a market economy. More information might help to resolve uncertainty. Everyone needs to know more about SOEs, and the WTO provides neutral ground to make this possible.

Figure 2 above reports views on the priority attached to negotiating stronger rules on industrial subsidies by respondents to our survey. Not surprisingly, respondents from China are far apart from those in the U.S. and EU, while the latter two groups are close to agreement with each other. But a revamped subsidy regime requires participation of the U.S., the EU *and* China. The rules must be seen to support generalised gains from open trade and global production, not as an attempt to isolate or ‘reform’ China. At the same time, China should accept that it has a leading role to play in the regime. In the short term, agreement on binding rules is unlikely. Work on developing more informal discipline on subsidies based on information, dialogue and peer review may be more feasible. As noted by Hoekman and Nelson (2020), calling for a work programme on subsidies may be criticised as kicking the can down the road. It is not. WTO Members simply do not have enough information to develop a common understanding of where new rules are needed and the form they should take. One of the ways to get there is to make better use of WTO bodies.

6. WTO deliberative bodies can be better used

WTO committees and councils are first deliberative bodies for discussing emerging issues and addressing trade concerns without recourse to the dispute settlement system. Or at least they should be (Wolfe, 2020). The most effective WTO bodies in addressing trade concerns are the Technical Barriers to Trade (TBT) Committee and the Sanitary and Phytosanitary (SPS) Measures Committee. Members raise ‘specific trade concerns’ (STCs) to seek clarification, including of already adopted measures. Discussion can lead to modification or even withdrawal of a measure that has adverse consequences for trading partners. Discussion of trade concerns is increasing in other bodies. Since 1995, close to 6000 questions (much like an STC) have been raised in connection with individual notifications under the Committee on Agriculture (CoA) review process. Between mid-October 2014 and mid-October 2019 1,158 issues and concerns were raised in 129 formal meetings of 17 WTO committees and councils, other than SPS, TBT and CoA (WTO, 2020c). These numbers dwarf the number of formal disputes.

A handful of large traders make most frequent use of procedures to raise trade concerns, notably the U.S. and the EU. China is now number 5 on the list of users and is the target of more trade concerns than any country after India (WTO, 2020c). We see this pattern in questions raised about the response to COVID-19 during the second half of 2020. In the Council for Trade in Services, China accused India of taking a series of discriminative, and restrictive measures related to COVID-19. In the CoA Canada questioned the U.S. on a possible US\$14 billion Coronavirus Food Assistance Program payment while Australia, the EU, India, New Zealand and Paraguay questioned China’s COVID-related border control

measures. In the SPS committee Canada, supported by Australia, Brazil, Mexico, Paraguay, the UK and the U.S., raised concerns regarding China's suspension of imports from facilities where cases of COVID-19 are reported. Still, the procedures could be more extensively used, and participation could be enhanced.

One suggestion to this effect is to establish guidelines for all WTO bodies. Submitted by the EU and supported by 19 other Members, including China, this proposal – WTO document WT/GC/W/777/Rev.5 – which we refer to as 777 in what follows, aims to make better use of the possibility offered by WTO Council and committee meetings to discuss and resolve concerns with trade-related measures by equipping them with horizontal procedural guidelines (WTO, 2020f). At the July 2019 meeting of the General Council the co-sponsors stressed that the point of improving the discussion of STCs is to avoid escalation to the dispute settlement system. While China shared that objective in its remarks to the Council, the country has resisted some aspects of 777, which is not surprising given Figure 8 below that indicates that Chinese respondents get considerably less utility than respondents in the US and the EU from using WTO bodies to defuse potential disputes.

The 777 proposal begins with clarifying timelines for convening documents and other meeting arrangements, which are important for making efficient use of committee time. China shared that objective in its own reform paper (WTO, 2019c). The 777 proposal encourages submission of written questions and answers, which would enhance transparency for other Members, or firms having the same concern. Although the U.S. was cool to the 777 proposal for obscure reasons, it made a similar proposal in the SCM Committee for ensuring timely written responses to questions posed by Members on the subsidy programmes of other Members (WTO, 2020g). For its part, China has resisted every time the item comes up, arguing that the ASCM does not require Members to submit responses to such questions in writing, nor to provide them within a specific time-period, and that setting deadlines as proposed by the U.S. would impose substantial new notification obligations on WTO Members and cause difficulties for developing countries in particular.

Enhancing opportunities for dialogue

Policy dialogue in WTO bodies is important opportunity to consider what works well under agreements, what is not working, and what should be next on the agenda. Committees also need to hear from stakeholders who use their agreements including regulators, other international organisations and the private sector. Responses to our survey revealed that Chinese and U.S. respondents get more utility than EU respondents from greater engagement with stakeholders in WTO bodies (Figure 6). The WTO held over 100 'thematic sessions' from 2017 through 2019. By thematic we mean meetings that are sponsored by or associated with a WTO body in some way, but that are not part of its formal meetings. The pace slowed in 2020 for obvious reasons.

Wolfe (2021) reviews the use of thematic sessions by WTO bodies, finding that many did not hold any such meetings, and revealing substantial variation in how thematic meetings with stakeholders are organised, how themes are chosen, who speaks, the degree of transparency and funding. Over 40% of speakers in the events analysed are either Geneva-based delegates or WTO officials, or come from other international organisations. More than two-thirds of capital-based speakers came from G20 countries and only half the sessions had speakers from non-G20 countries. China was relatively well represented, with 9 Geneva-based Chinese government officials and 15 capital-based officials speaking in thematic sessions during the 2017-19 period, along with 7 business and 2 academic participants.

One way to improve the use of thematic sessions would be for every committee to organize discussion of the systemic issues posed by the operation of regional trade agreements in their respective policy areas, mitigating the absence of horizontal discussion of systemic issues in the Committee on Regional Trade Agreements. The RCEP might be an especially useful topic for such a session. At first glance, RCEP seems to have few WTO-plus or WTO-extra provisions, often relying on the WTO framework and notifications. Other Members might want to ask in such an informal session how often

China has willingly accepted a WTO framework in RCEP, putting into perspective claims of China’s system being incompatible with the WTO. A similar discussion of the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), which includes provisions on SOEs and to which Vietnam is a signatory, could help clarify what types of disciplines might be feasible to consider in the WTO.

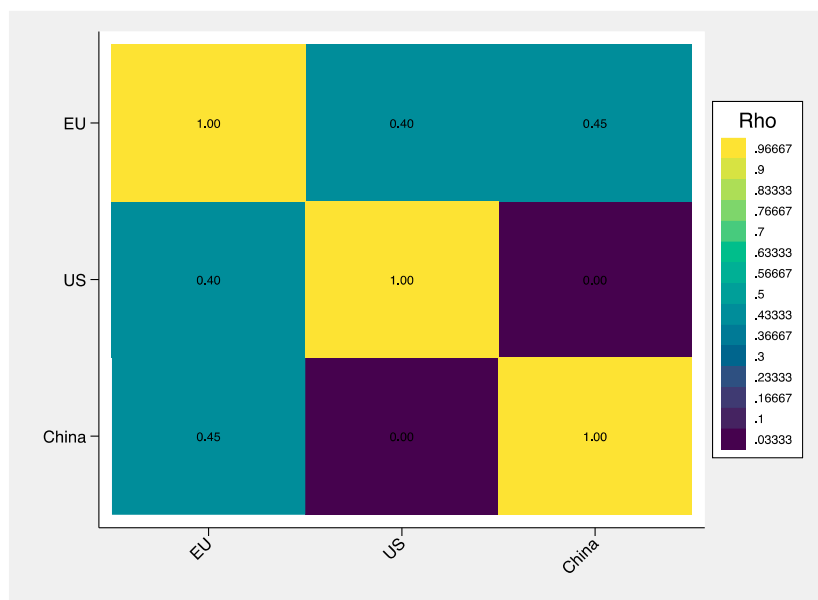
Taking the WTO online

There are lessons for the reform of WTO working practices in how Members managed to carry on talking through the pandemic.¹² It may be some time before regular meetings can resume, but when they do, Members should institutionalise some pandemic-related innovations. Beyond practical teething difficulties, adapting the WTO’s work to a virtual world posed some special challenges. Ensuring that all of the WTO’s diverse Members can participate while maintaining an agreed balance of rights and obligations within a reciprocal framework is complicated. Activities centered on learning, deliberation, and transparency have proven more straightforward than negotiating and agreeing to new binding commitments.

We begin here with a heat map in Figure 5 that shows little correlation on relative priorities accorded to different options by respondents to our survey. This included (i) deepening engagement with stakeholders (e.g., through thematic sessions); (ii) allowing binding decisions to be made in virtual meetings; (iii) making virtual meetings and video conferencing standard options; and (iv) delivering WTO technical assistance and training online and through video conferencing.

While it is reasonable to assume that greater inclusion through involvement from capitals would help to reduce contrasts in the capacity of different Members to participate fully in the WTO’s regular business, an important caveat is in order. There is a risk of an aggravated marginalisation of some developing countries on account of inadequate connectivity and/or the need for more training for operating in a more virtual environment. Support for a hybrid meeting model with some delegates in a meeting room and others online is likely to increase if these challenges are addressed.

Figure 5: How important is deepening engagement with capitals and stakeholders?



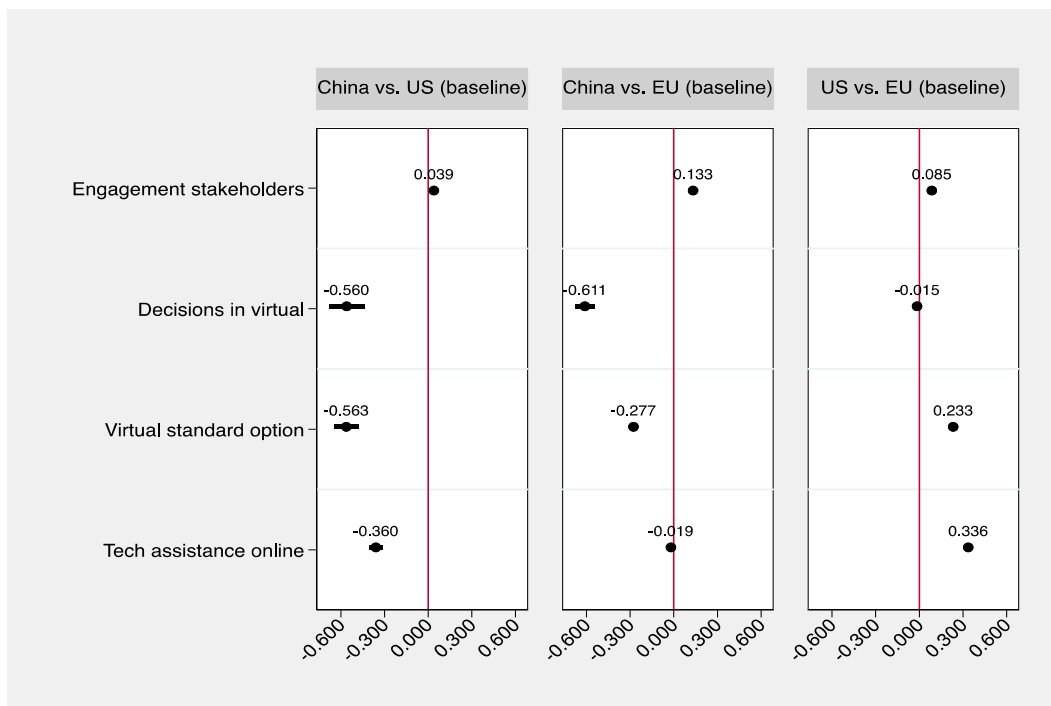
¹² This discussion is based on Low and Wolfe (2020)

Reliance on hybrid meeting arrangements involving capitals will not necessarily sit well with Geneva ambassadors, who may fear an erosion of their influence and functions. This concern is also reflected in our survey of the trade community, which reveals support for an intensified use of videoconferencing in the daily operations of the WTO, but Geneva-based respondents were less supportive than other government officials with making binding decisions in virtual meetings. Figure 6 shows that U.S. and EU respondents are aligned in the priority (utility) attached to making more use of virtual meetings and to allowing binding decisions in them, whereas respondents from China are considerably less supportive.

7. The Appellate Body crisis

A central dimension of the ‘value proposition’ offered by the WTO is independent, third-party adjudication of trade disputes reflected in the principle of de-politicised conflict resolution (Hoekman and Mavroidis, 2020). An effective dispute settlement mechanism is critical for existing WTO agreements to remain meaningful, and for the negotiation of new agreements. The different pillars of the WTO are interdependent. Resolving the Appellate Body crisis and bolstering the dispute settlement function is critical for the continued relevance of the WTO. The heat map in Figure 7 shows a striking degree of correlation on assigning a high priority to this cluster of issues across respondents to our survey.

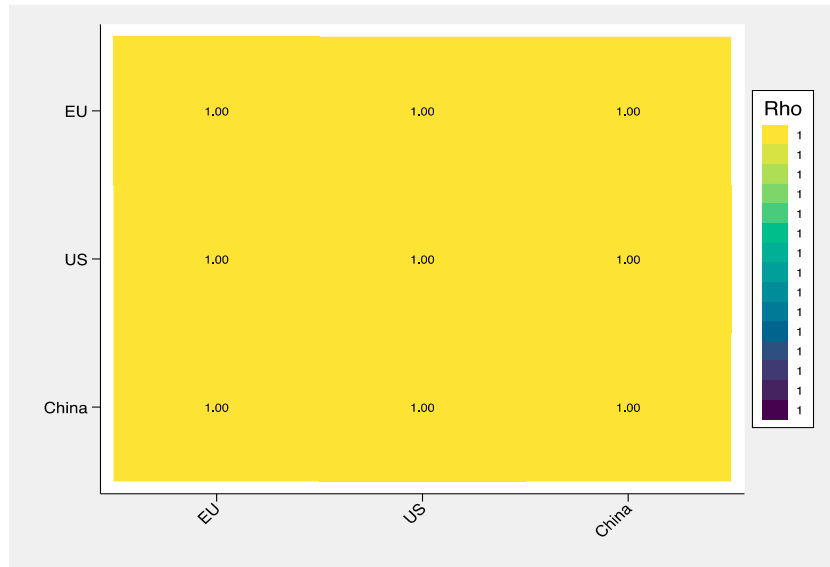
Figure 6: How important is deepening engagement with capitals and stakeholders?



The Trump Administration brought fewer cases against China than would appear warranted by documented U.S. objections to Chinese policies – e.g., the 2018 Section 301 USTR report. This may in part reflect a perception that matters objected to are not amenable to WTO disputes. The U.S. has been critical of the system, alleging that the Appellate Body has too frequently overstepped its mandate. The Appellate Body ceased operations in December 2019 because of U.S. refusal to agree to appoint new Appellate Body members and/or re-appoint incumbents. Resolution of the crisis requires reform of how the system works. This is not a matter that was idiosyncratic to the outgoing administration. U.S. concerns are long-standing, and the U.S. is not alone in at least some of its concerns (Fiorini et al, 2020).

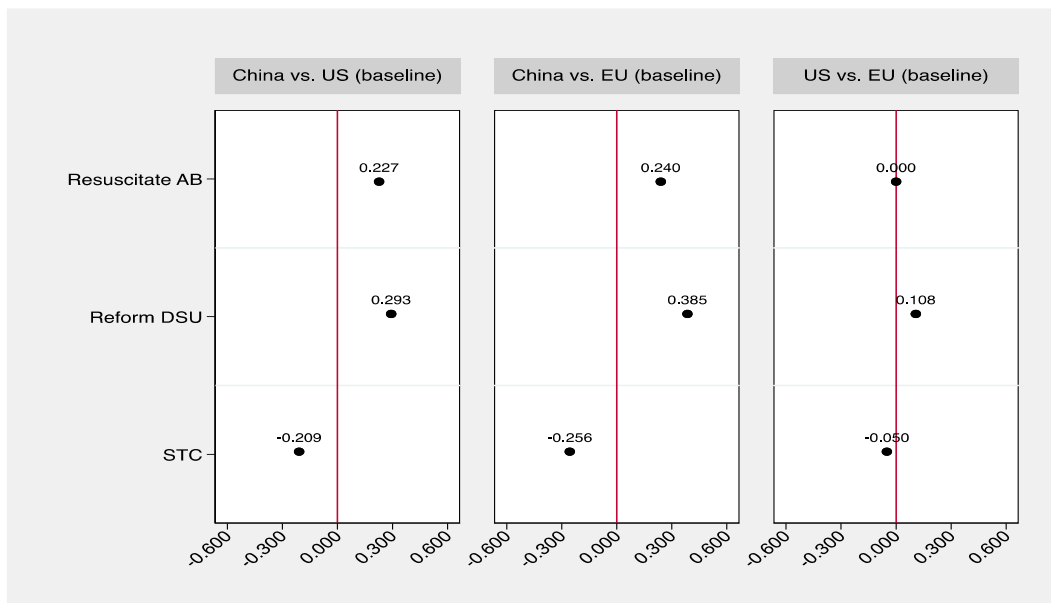
By the end of 2020, 16 appeals were pending before the dysfunctional Appellate Body and only five new cases had been filed, the lowest number for any of the WTO's 25 years. If appeal 'into the void' remains possible, issued panel reports will have no legal value, unless the disputing parties forego their right to appeal, and accept the panel report as the final word in their dispute. For the 24 participants in the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), including the EU and China, but definitely not the U.S., that route may provide a short-term alternative.

Figure 7: How important is improving WTO conflict management and decision-making?



As we see in Figure 8, Chinese respondents to the survey get more utility than the EU and U.S. respondents on making the Appellate Body operational again and reforming dispute settlement. We speculate that China values a functioning system that gives them some protection from U.S., or at least some recourse, if the U.S. does act unilaterally.

Figure 8: Conflict resolution

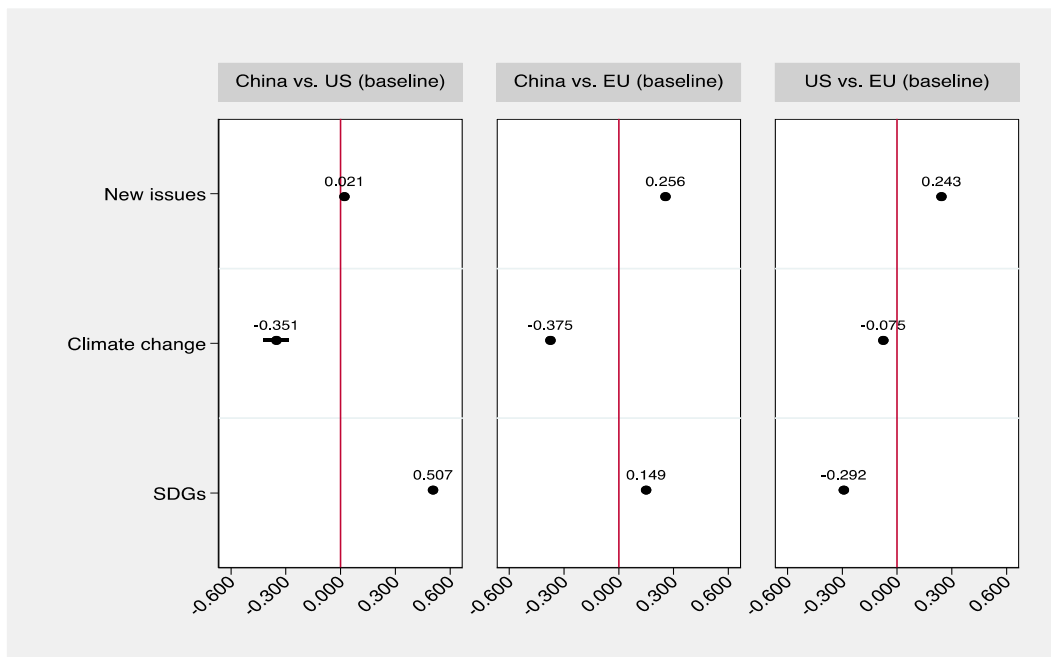


China is not a player in the Appellate Body debate, although its position is much closer to the EU position than to that of the U.S. This is reflected in China’s decision to join the MPIA and thus sustain the ability to appeal panel reports in disputes among signatories. Having invested considerable effort in developing trade law expertise in government and academia, China became a sophisticated user of dispute settlement to push back on U.S. and EU use of trade remedy law (Shaffer and Gao, 2018). Although China lost many of the cases brought against it, Appellate Body rulings on key matters, such as what constitutes a public body under the ASCM, fuelled U.S. frustration (Ahn, 2021). The U.S. would see no point in any kind of WTO reform that did not address this problem. And equally, the U.S. would see no point in any new agreements aimed at Chinese practices if dispute settlement remains slow and ineffective. All three trade powers have an incentive to make dispute settlement operational again.

8. Dealing with novel problems

We included three forward-looking questions on our survey concerning the priority attached to launching discussions on new issues, clarifying the role of trade policy in tackling climate change and the WTO role in promoting the sustainable development goals. As we see in Figure 9, there is alignment among Chinese and American respondents on the value of adding new issues to the agenda, but otherwise, divergence between Chinese respondents and those from the EU and the U.S. Results suggest that Chinese respondents attach less importance to the question of how trade policy should be used to address climate change, and put greater weight on the question of using trade to attain the sustainable development goals.

Figure 9: Dealing with novel problems



9. Conclusion

The WTO agenda is large. Prominent items include ensuring a consistent response to health crises, resolution of conflicts regarding the use of industrial-cum-tax-subsidy policies, taxation of digital services, data privacy regulation, and the role of trade policy in efforts to reduce the carbon intensity of economic activity. But the most important current priority area for WTO reform is to revisit the terms of engagement with China. The initial positive perceptions regarding China’s reintegration into the

world trade order have transformed into acrimony (Mavroidis and Sapir, 2021). The U.S. especially has raised a series of complaints before the WTO, mostly dealing with the role of the state in the workings of the economy. Unhappiness with Appellate Body rulings compounds the problem.

More transparency, constructive deliberation, willingness to negotiate on a plurilateral basis, and resolution of the dispute settlement crisis are all arguably necessary ingredients for a resolution of the China challenge. But they are not sufficient. Absent a willingness to negotiate clear rules of engagement by the major players – China, the EU, Japan, and the U.S. – the prospects are for deepening of regional blocs and greater economic decoupling, reflected in unilateral policies targeting competition from China and safeguarding of market competition.

Losing the WTO would be disastrous for regional agreements like CPTPP and RCEP, because such agreements cannot be comprehensive — they depend on rules, such as subsidies and trade remedies, that must be supplied multilaterally. None of the regional agreements has strong institutional arrangements in practice, whatever is put on paper, which might not impede successful implementation of their market access provisions but does undermine the effectiveness of new rules and can be fatal for regulatory cooperation. WTO transparency and accountability mechanisms are likely to remain the most useful for the trading system, which is why reform is so important. Plurilateral negotiations are the (short term?) future for negotiations on adding to the WTO rule book. In a plurilateral, countries that want to insist on older principles like special and differential treatment do not have to participate. The paradox of plurilaterals is that they are a response to the perceived failures of consensus and the single undertaking, but without China they will not succeed, for lack of critical mass.

So, should the old trade powers negotiate with, or around, China? The answer depends on the answer to another question: can new disciplines improve conditions for global value chains without China's participation? If acceptance by China of any new 21st century disciplines is thought important, it seems likely that those disciplines will eventually have to be discussed in a multilateral context. The Trilateral approach is a dead end. The basic premise of the mostly misguided approach of the Trump Administration was to use a huge increase in tariffs to alter China's best alternative to a negotiated agreement (BATNA). Perhaps the Biden Administration will maintain Trump's China tariffs. This is why the EU is ratcheting up its ability to act against subsidies, restrict the ability of Chinese firms to bid on public procurement, and screen inward investment. The EU will increasingly apply reciprocal measures to China, as will the U.S. Whether such pressure will increase China's willingness to engage in the WTO is an open question. The recent successful conclusion of the bilateral China-EU Comprehensive Agreement on Investment suggests that such a strategy may bear fruit.

China professes support for WTO reform, including of some working practices, but its general support does not always extend to action on the detail, notably on special and differential treatment in fisheries. China demands respect and non-discrimination. China does not accept being asked to do things that OECD countries do not ask of themselves and does not want to be treated differently from other developing countries. But China is both a very large economy and more prosperous than many other developing countries. It cannot and should not avoid engaging in deliberations aimed to differentiate developing country status from the invocation of special and differential treatment.

How will the three players manage their relations in the WTO? Can China drive a wedge between the other two? The EU insists that they are clear-eyed in seeing China as a negotiating partner for cooperation, an economic competitor and a systemic rival (European Commission, 2020). China played on the first to conclude the investment agreement with the EU at the end of 2020. The U.S. hopes that the EU understands that 'systemic rival' is the most important. What we have shown in this paper is that the EU respondents to our survey of the trade policy community see that alignment with the U.S. on economic competition is essential. In the end, we agree with Sabine Weyand, the EU Director-General for Trade, who tweeted on January 5, 2021, with respect to the investment agreement: 'We share the same planet, without engaging China in the rules-based system, whether on climate or trade, we will not be able to address the global challenges we face'.

The views of the expert respondents from China, the EU and the US to our survey reveal substantial differences on the relative importance of many areas of international trade policy and potential cooperation. This suggests that getting to yes will not be easy. But the survey results also provide hints regarding the potential for package deals and the issue linkages that will be needed to get to yes. How the three countries might best conclude such a package, given the potential for obstruction by some other WTO Members, is the subject for another paper.

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Author contacts:

Bernard Hoekman

Robert Schuman Centre for Advanced Studies, European University Institute

Villa Schifanoia, Via Boccaccio 121

I-50133 Florence

and CEPR

Email: Bernard.Hoekman@eui.eu

Robert Wolfe

School of Public Studies, Queen's University

Kingston, Ontario, Canada

Email: robert.wolfe@queensu.ca



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