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The "China, Inc." Challenge to Global Trade Governance

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

5. *See* John Miller & Marcus Walker, *China Dethrones Germany as Top Goods Exporter*, Wall St. J. (Jan. 6, 2010), http://www.wsj.com/articles/SB126272143898416853; *see also* Steven Mufson, *China Surpasses Germany as World's Top Exporter*, Wash. Post (Jan. 11, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/10/AR2010011002647.html.

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

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

8. Calculation based on information provided at *Chronological List of Disputes Cases*, World Trade Organization: Trade Topics: Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited May 22, 2016) [hereinafter WTO Dispute List].

9. *Disputes by Country/Territory*, World Trade Organization: Trade Topics: Dispute Settlement: The Disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited May 22, 2016) [hereinafter WTO Disputes by Country/Territory].

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

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

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

receives less attention in the Western media. In 2014, the WTO Appellate Body[13] ruled for China in two different cases, finding that the U.S. Department of Commerce violated WTO commitments when imposing trade remedies against several Chinese products.[14]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23. *See, e.g.*, Ian Bremmer, The End of the Free Market 128–45 (2010); Usha C. V. Haley & George T. Haley, Subsidies to Chinese Industry (2013); Andrew Szamosszegi & Cole Kyle, An Analysis of State-owned Enterprises and State Capitalism in China (2012).

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

25. *See generally* Nicholas Lardy, Markets over Mao (2014).

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

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

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

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

26. *See generally* Richard McGregor, The Party (2010).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33. *See* John Jackson, The World Trading System 248 (2d ed. 2000) (describing his interface theory for global trade rules).

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

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

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

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

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

35. *Id.* ¶ 15.

36. *See infra* Part III.C.

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

I. The Origin and Nature of the Challenge

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

A. The Uniqueness of China's Economic Structure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44. *Id.* at 85–114.

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

46. Among the methods employed by the state to reduce its stake in SOEs were allowing employee buyouts of enterprises, sales to outsiders, reorganization, leasing, the formation of joint ventures, and so on. *See* Chen Ding, Corporate Governance, Enforcement, and Financial Development 61 (2013).

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

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

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

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

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

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47. *See generally* Zhu Rongji, Zhu Rongji on the Record: The Road to Reform (2013).

48. *See, e.g.*, Bernard Bortolotti & Mara Faccio, *Government Control of Privatized Firms*, 22 Rev. Fin. Stud. 2907 (2009); Sunita Kikeri & Aisheru Kolo, *State Enterprises*, World Bank Pub. Pol'y J. 304 (2006); Robert Millward, *Public Enterprise in the Modern Western World*, 82 Annals Pub. & Coop. Econ. 375 (2011).

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

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

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

52. *See id.*

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

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

55. He Fan, *The Long March to the Mixed Economy*, 6 East Asia Q. 3, 5 (2014) (discussing the government strategy "to stimulate competition among SOEs").

exchanges[56] and its board includes four independent directors.[57] Even if one is aware that China Mobile is an SOE, one might assume that it operates no differently than SOEs elsewhere. That is, one might think it has an autonomous management but with representatives of relevant ministries. One might not presume that the government actively manages it as a portfolio company, in the same way that a private equity company might treat its holdings. Further, one might not presume that oversight over such a large portion of the economy is concentrated in the hands of a single government agency instead of being scattered across the relevant ministries. But this is, in fact, the composition and governance structure of China, Inc.

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

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

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

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

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56. *See Overview*, China Mobile, http://www.chinamobileltd.com/en/about/overview.php (last visited May 22, 2016).

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

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

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

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

61. Mohan Guruswamy & Zorawar Singh, Chasing the Dragon 113 (2010).

62. Barry Naughton, *SASAC Rising*, 14 China Leadership Monitor, Apr. 2005, at 9 (describing SASAC's role).

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

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

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

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

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

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

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

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

65. Chen, *supra* note 39.

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

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

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

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

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

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

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

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68. Veljko Fotak et al., *The Financial Role of Sovereign Wealth Funds*, *in* The Oxford Handbook of Corporate Governance 581, 598 (Mike Wright et al. eds., 2013).

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

70. *See Investments*, Cent. Huijin Inv. Ltd. (June 30, 2015), http://www.huijin-inv.cn/wps/portal/!ut/p/a1/04_Sj9CPykssy0xPLMnMz0vMAfGjzOL9DMwMDJ2DDbwMfB3dDBwtDFx9_Y29jPxDzYAKInErcPc2xqvf15SAfhMi9Tu7O3qYmPsYGBiYWBgZeLo4ebiYW_oaGHiaEaffAAdwNCDk_3D9KHxKwCGAV4EJTAE-P4AV4HFkQW5oaGiEQaZnuqIiAF07oL0!/dl5/d5/L2dBISEvZ0FBIS9nQSEh/.

71. Michael E. Martin, Cong. Research Serv., RL34337, China's Sovereign Wealth Fund 2–3 (2010), https://www.fas.org/sgp/crs/row/R41441.pdf.

72. *See id.* at 8–10.

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

74. China Everbright Bank Co., Ltd., Annual Report 54 (2010), http://www.ebchinaintl.com/en/investors/report/ar2010.pdf.

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

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

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

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

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

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

75. Shanghai Pudong Dev. Bank Co., Ltd., 2013 Annual Report 75 (2014), http://www.spdb.com.cn/chpage/c510/ (follow "Investor Relations" hyperlink).

76. *Id.*

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

series of reforms, the SPC was reconstituted as the NDRC in 2003.[78] Like SASAC, it also reports independently to the State Council. The NDRC represents a third element differentiating China from other economies.

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

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

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

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

79. *See* Ministério do Planejamento, http://www.planejamento.gov.br/ (last visited May 22, 2016).

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

81. *See* Ministério da Planificação e Desenvolvimento, http://www.mpd.gov.mz/ (last visited May 22, 2016).

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

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

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

85. *Id.*

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

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

The NDRC acts as the state's quarterback. It coordinates the state's actions across the economy to ensure that they work collectively as a team to serve the state's interest. The full weight of the NDRC's power became apparent following the Great Recession in 2008–2009. Whereas other governments struggled to shape an effective economic response, China was able to push forward its RMB 4 trillion ($586 billion) stimulus package very quickly.[91] The NDRC directed the funding toward a wide range of projects.[92] Despite a sharp downturn in trade, Chinese leaders managed to keep the economy growing above 9% in 2009 and back into double digits by 2010.[93]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

97. *Id.* at 707–08.

98. *Id.* at 711.

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

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

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

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

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99. *Id.* at 708.

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

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

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

103. *Id.*

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

5. *Communist Party Involvement and Control*

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

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

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

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

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

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

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

108. *Id.* at 69.

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

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

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

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

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

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

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

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

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

114. *Id.* at 89.

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

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

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

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

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

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

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

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

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

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

119. *Id.* at 2.

120. Ryan Rutkowski, *A Shrinking Leviathan*, China Econ. Watch (Jan. 24, 2013, 9:12 AM), http://blogs.piie.com/china/?p=2227.

121. *See, e.g.*, Nathaniel Aherns, China's Competitiveness: Case Study: Huawei 2–9 (2013) (noting Huawei's success over Shanghai Bell, an SOE).

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

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

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

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122. Lenovo Group Ltd., Never Standing Still 2014/15 Annual Report 81 (2015).

123. Haier, Annual Report 2014, 112 (2014).

124. Huawei, Building a Better Connected World, 2015 Annual Report 101 (2015).

125. Alibaba Group Holding Ltd., U.S. Sec. & Exch. Comm'n Form 20-F 32, 149–50 (2015).

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

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

128. Victor Shih, Factions and Finance in China 30–46 (2008); *see* Hong Ru, *Government Credit, a Double-edged Sword*, MIT Sloan Management (Jan. 17, 2015), http://hongru.mit.edu/sites/default/files/documents/Ru%202014%20%28Job%20Market%20Paper%29.pdf.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. *The WTO and Alternative Economic Structures*

The bulk of the WTO legal rules that exist today grew out of the Uruguay Round of trade negotiations (1986–1994). China was not a party to the Uruguay Round negotiations. Nor was it clear during the course of the talks that China would eventually join.[136] China had begun negotiations in 1986 to rejoin the GATT, but those talks were put on hold in the wake of the Tiananmen Square incident of June 1989.[137] Only in 1993, when the Uruguay Round negotiations were nearing their conclusion, did China's accession negotiations restart in earnest.[138] Therefore, the Uruguay Round negotiators did not immediately need to consider interests vis-à-vis China.

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

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

137. Jeremy T. Paltiel, *Hinges and Latches on the Open Door: The Normative Parameters of China's WTO Accession*, *in* China's Reforms and International Political Economy 131, 138 (David Zweig ed., 2007).

138. *Id.*

139. The GATT itself was a compromise between the United Kingdom, which sought to preserve imperial preferences for Commonwealth countries, and the United States, which did not. *See* Douglas Irwin et al., The Genesis of the GATT 13–21 (2009) (discussing the importance of this issue in the overall context of the U.S.-U.K. decision to create the GATT). In addition, several Latin American countries sought to preserve flexibility for their economic model within the system. *See* Giuliano Garavini, After Empires: European Integration, Decolonization, and the Challenge from the Global South 1957–1986 23 (Richard R. Nybakken trans., 2012).

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

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

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

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

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

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

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

142. Howard J. Wirada, Corporatism and Comparative Politics ix (1997).

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

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

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

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

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

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

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

144. *See, e.g.*, Alice Amsden, Asia's Next Giant (1992); Alice Amsden, The Rise of "The Rest" (2003); Chalmers Johnson, MITI and the Japanese Miracle (1982); Joseph Stiglitz, *Some Lessons from the East Asian Miracle*, 11 World Bank Research Observer, Aug. 1996, at 151, 155–57.

145. *See, e.g.*, Johnson, *supra* note 144; Kenichi Miyashita & David Russell, Keiretsu (1995); Richard Steers et al., The Chaebol (1991).

146. *See* Quamrul Alam et al., *Shock Therapy Versus Gradualism: The Central Eastern Europe (CEE) and East Asia Compared—A Review of Literature*, 2 Int'l Bus. Research, Apr. 2009, at 3.

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

148. *See Membership Required*, Economist (July 31, 2008), http://www.economist.com/node/11848496; Rudolf Traub-Merz, *All China Federation of Trade Unions* iii (International Labour Organization, Working Paper No. 13, Sept. 2011).

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

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

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

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

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

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

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

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

149. Lin & Milhaupt, *supra* note 27, at 711.
150. Protocol of Accession, *supra* note 34, §§ 5–6, 9.
151. *Id.* §§ 2(C), 6, 8–10, 13–14.

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

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

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

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

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

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

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

155. These explanations are not mutually exclusive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

longing to the same pro-reform faction[165] and had publicly expressed their support of the earlier economic policies, including WTO entry.[166] In particular, Premier Wen Jiabao, who oversaw the economy, was seen as a protégé of the outgoing Premier Zhu and viewed as having secured his job only with his mentor's backing.[167] Finally, outsiders viewed Hu as a cautious leader, prone to continuing the Party's consensus-based decision-making process.[168] Given these factors, negotiators did not think that a change in leadership would dramatically alter China's economic structure or policies. As I discuss in the next section, this turned out to be incorrect.

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

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

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

166. In February 2002, as Vice President, Hu spoke at the Central Party School emphasizing the need to focus on the challenges and opportunities associated with WTO entry. *See* Kerry Brown, Hu Jintao: China's Silent Ruler 78 (2012).

167. Andrew J. Nathan & Bruce Gilley, China's New Rulers: The Secret Files 101, 120 (2003).

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

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

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

171. *Id.*

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

China's economic reformers are often painted as adopting an incremental, gradualist approach.[172] Nevertheless, certain events have functioned as pivotal turning points. China's WTO entry in 2001 is considered to be one such pivot. However, another set of events, less well known but also critical, occurred two years later in 2003.[173]

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

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

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

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

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

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

174. Leslie Hook & Jamil Anderlini, *Hu Jintao Reasserts Party's Tight Grip*, Fin. Times (Nov. 8, 2012, 8:09 PM), http://www.ft.com/intl/cms/s/0/b89dbb68-28ce-11e2-b92c-00144feabdc0.html#axzz42ENRRTec (describing the Hu-era vision as one "insisting that state dominance of the economy and one-party rule will be maintained").

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

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

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

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

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

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

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

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

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

178. *See* Barry Naughton, *The State Asset Commission: A Powerful New Government Body*, 8 China Leadership Monitor, Fall 2003, at 1; Jianyu Wang, *The Political Logic of Corporate Governance in China's State-owned Enterprises*, 47 Cornell Int'l L.J. 631, 646 (2014).

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

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

181. *Id.* at 14–15.

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

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

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

II. Just How Well Equipped Is the WTO to Handle the Rise of China, Inc.?

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

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

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

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

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

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

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

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

A. *Issues for Which WTO Law Proves Sufficient*

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

1. *State-coordinated Economic Action*

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

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

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

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

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

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

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

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

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

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

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

188. *Id.* ¶¶ 108–09.

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

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

2. *Local Content Requirements*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *State Trading Enterprises*

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

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

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

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

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

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

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

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

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

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

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

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

212. *Id.* § 5, Annex 2.

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

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

B. Emerging Points of Tension in WTO Law

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

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

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

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

214. Matthew Garrahan, *China Eases Restrictions on Hollywood Films*, FIN. TIMES (Feb. 19, 2012, 6:12 AM), http://www.ft.com/intl/cms/s/0/d24696e6-5abd-11e1-b056-00144feabdc0.html#axzz42ENRRTec.

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

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

1. *Subsidies and the "Public Body" Debate*

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

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

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

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

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

215. These are subsidies "contingent . . . upon export performance" and subsidies "contingent . . . upon the use of domestic over imported goods." SCM Agreement, *supra* note 198, art. 3.
216. *Id.* art. 5.
217. *Id.* art. 1.1(a).
218. *Id.*
219. *See* Protocol of Accession, *supra* note 34, § 10.2.

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

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

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

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

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

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

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

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

222. *Id.*

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

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

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

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

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

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

225. *Id.* ¶ 318.

226. *Id.* ¶ 317.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* ¶ 349.

231. *Id.* ¶ 350.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

238. *Id.* ¶ 4.29.

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

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

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

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

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

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

China remains a rare exception in having accepted such a condition for WTO entry.[245] NME status made it relatively easier for WTO members to impose higher antidumping duties against Chinese goods that threaten domestic producers. Unsurprisingly, many have done so with gusto. China has been the leading target of new antidumping measures each year since the WTO's founding in 1995.[246] However, the NME provision expires in December 2016, raising the question of how the WTO will treat China in post-2016 antidumping proceedings.

For years, this question drew little attention. But as the 2016 deadline approaches, the debate has heated up. Some scholars have suggested that the expiration of the NME provision requires that China be treated automatically as a market economy.[247] Others, including myself, have suggested that market economy status is not guaranteed[248]—WTO members can no longer simply declare China to be a NME but must subject it to the same factual inquiry as any other WTO member.[249] In other words, the burden simply shifts back to the investigating authorities of the importing country to prove that China is not a market economy.

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

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

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

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

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

247. *See, e.g.*, Liu Jingdong, *Analysis of Market Economy Status in International Law*, *in* The Opportunity and Challenge of International Law (2014); Matthew Nicely, *Time to Eliminate Outdated Non-market Economy Methodologies*, 9 Global Trade & Customs J. 160 (2014); Rao, *supra* note 244.

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

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

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

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

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

* * *

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

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

251. *Id.*

252. *See* Austl. Customs & Border Protect. Serv., Report to the Minister No. 148: Certain Aluminum Extrusions Exported to Australia from the People's Republic of China 35 (2010) (finding that Chinese prices did not always "reasonably reflect competitive market costs" and therefore requiring that certain adjustments be made when determining normal value); *see also* Andrew Percival, *Australia's Irrational Approach to Trade with China*, Corrs Chambers Westgarth (Dec. 13, 2012), http://www.corrs.com.au/thinking/insights/australia-s-irrational-approach-to-trade-with-china/.

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

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

III. Tackling the Challenge: Options and Implications

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

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

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254. *See, e.g.*, Deborah Z. Cass, The Constitutionalization of the World Trade Organization (2005); Ernst-Ulrich Petersmann, *Multilateral Trade Governance in the WTO Requires Multilevel Constitutionalism*, *in* Constitutionalism, Multilevel Trade Governance and Social Regulation 5 (Christian Jorges & Ernst-Ulrich Petersmann eds., 2006); Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 Int'l J. Const. L. 556 (2011).

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

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

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

A. WTO Dispute Settlement: Understanding Its Limitations and Risks

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

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

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

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

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

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

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

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

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

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

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

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

261. *Id.* at 1014.

262. *Id.* at 1010–14.

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

264. *Id.* at 236.

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

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

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

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

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

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

267. For discussion of the politics underlying WTO judicial lawmaking generally, see Ryan Brutger & Julia Morse, *Balancing Law and Politics*, 10 Rev. Int'l Orgs. 179 (2015).

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

269. *See* Manfred Elsig & Mark Pollack, *Agents, Trustees, and International Courts*, 20 Euro. J. Int'l Rel. 391, 410 (2014) (finding "ample evidence that WTO Members seek to support candidates whom they consider close to their own positions on salient issues" and condition their support for potential candidates on their views on important contemporary issues).

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

B. WTO Negotiations: Existing Roadblocks Lead to Stasis

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

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

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

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

271. *Id.* art. X.

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

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

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

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

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

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

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

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

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

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

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

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

1. *The TPP and China, Inc.*

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

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

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

277. World Trade Organization, *supra* note 4.

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

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

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

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

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

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

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

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

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

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282. *Id.*

283. *Id.*

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

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

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

287. *Id.*

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

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

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

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

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

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

291. *Id.* art. 17.6.

292. *Id.* art. 17.10.

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

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

295. AmCham China, Challenges and Opportunities in China's Investment Environment (2014); U.S. Chamber of Commerce, Competing Interests in China's Competition Law Enforcement (2014); U.S.-China Business Council, Competition Policy and Enforcement in China (2014); Press Release, European Union Chamber of Commerce in China, European Chamber Releases Statement on China AML-related Investigations (Aug. 13, 2014); Neil Gough, *Western Companies Appear to Push Back Against Chinese Crackdown*, N.Y. Times, Sept. 4, 2014,at B3; *Unequal Before the Law?*, Economist (Aug. 23, 2014), http://www.economist.com/news/business/21613348-chinas-antitrust-crackdown-turns-ugly-foreign-carmakers-forefront-unequal.

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

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

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

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

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

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

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

298. *Id.*

299. *See, e.g.*, U.S. Chamber of Commerce, *supra* note 295, at 15-16.

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

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

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

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

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

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

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

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

304. *See id.* art. 16.7.

305. *See, e.g.*, U.S. Chamber of Commerce, *supra* note 295, at 2–4, 47–52; U.S.-China Business Council, *supra* note 295, at 14–15.

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

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

308. *See* Theodore Moran, *Should US Tech Companies Share Their "Source Code" with China*, China Econ. Watch (Oct. 28, 2015, 4:45 PM), http://blogs.piie.com/china/?p=4542.

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

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

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

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

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

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

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

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

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

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

316. *Id.* art. 14.13.2.

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

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

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

2. *Understanding the Systemic Impact*

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

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

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

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

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

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

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

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

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

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

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

321. *See generally* Chang-Fa Lo, *Dispute Settlement Under Free Trade Agreements*, *in* The WTO in the Twenty-first Century 457 (Yusuhei Taniguchi et al. eds., 2007).

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

323. *See* Richard Baldwin, *The Systemic Impact*, *in* Mega-regional Trade Agreements 26 (World Economic Forum, 2014), http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf.

324. *See* OxFam, Signing Away the Future (2007), https://www.oxfam.org/sites/www.oxfam.org/files/Signing%20Away%20the%20Future.pdf.

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

But we should consider what outcome we desire if the China, Inc. challenge persists. Are we truly ready to turn our backs on the postwar global economic order built on strong multilateralism? Are we prepared to embrace instead a new legal order built on fragmented pluralism with variable geometric arrangements? If not, the proponents of trade multilateralism in China and elsewhere must do more to force the difficult reforms and compromises necessary to cope with the systemic pressures emerging from China's rise. If these nations simply wait for China, Inc. to fall apart, trade multilateralism may well fall alongside it.