

# INTRODUCTION<sup>1</sup>

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*Rising geopolitical and geoeconomic tensions among major trade powers are undermining the rules-based multilateral trade order. In principle, the World Trade Organization (WTO) is the institution where trade-related conflicts should be resolved, but the organisation no longer provides an effective dispute settlement mechanism. Both China and the European Union (EU) are highly trade-dependent, and both have expressed a strong commitment to sustaining an open global trade order. Pursuit of issue-specific negotiations on an open plurilateral basis offers prospects for revitalising the WTO but does not remove the need for balance in the choice of issues put forward for negotiation and for systemic WTO reform to bolster the scope for deliberation and enhance support for implementation of agreements. Joint leadership by China and the EU to establish a balanced work programme that spans both old and new issues of interest to all WTO members is a necessary condition to reboot the rules-based trade order.*

Views in many OECD member countries on China's reintegration into the world trade order, often seen through the lens of its accession to the WTO in 2001, have become less positive over time (Winters 2021). Perceptions that very rapid growth in China and associated competitive pressures are due in part to the role of the state in China's economy and to 'unfair trade practices' have led to trade tensions. As what one country regards as an 'unfair' trade practice may constitute good economic policy to another, an important function of the WTO is to provide a platform for members to negotiate rules of the game that attenuate negative cross-border competitive spillovers generated by trade-related economic policies – and mechanisms to resolve disputes about implementation of negotiated agreements.

The WTO has not been fulfilling this function. Many members have prioritised bilateral or regional cooperation. Some – notably the United States (US) – have resorted to unilateral action instead of going through the WTO, targeting perceived unfair trade practices by China as well as other trading partners. Those affected can no longer challenge these measures through the WTO dispute settlement process because of parallel US action to shut down the WTO Appellate Body, reflecting unhappiness with rulings on disputes centering on US measures against imports from China and specific features of China's trade regime. Without a functioning Appellate Body, a WTO member that loses a dispute case at the first instance panel stage can 'appeal into the void', with the result that the panel report does not enter into force. This greatly reduces the effectiveness of the

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WTO dispute settlement system and the ability (incentive) of WTO members targeted by unilateral measures to contest these at the WTO, fostering recourse to unilateral retaliatory measures in turn.

China, the EU, and the US, the three WTO members with the largest global trade shares, play a critical role in keeping the WTO fit for purpose in a rapidly changing world economy. As argued by TU and Wolfe in the first chapter of this volume, WTO reform is a triangular challenge in the sense that if the three largest trade powers cannot agree, progress is not possible. Of course, such agreement is necessary, not sufficient, as systemic reforms require consensus among the membership. Satisfying the necessary conditions calls for tripartite deliberations focused on dealing with the underlying sources of tension and disagreement. This has been missing. Engagement has instead been bilateral (US-China, EU-China, EU-US) or deliberately excluded China – e.g. the EU-Japan-US trilateral meetings of trade ministers, the negotiations leading to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and talks initiated in 2013 on a Trade in Services Agreement. Recently, this pattern has begun to change, most notably reflected in the conclusion of negotiations on a Regional Comprehensive Economic Partnership (RCEP) agreement among Asia-Pacific countries, including China. RCEP, together with the China-EU Comprehensive Agreement on Investment (CAI), which addresses many contentious issues, suggest tripartite agreement on trade and investment-related policies may be possible.

Both China and the EU have been subject to unilateral US actions restricting trade. Both have strongly objected to the associated decision by the US to circumvent the WTO and the parallel US action to block new appointments to the Appellate Body. China and the EU are both participants in the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), established after it became clear that the Appellate Body would no longer be able to operate. The MPIA and the active participation of China and the EU in all of the ongoing ‘joint statement initiative’ negotiations among groups of WTO members illustrates willingness to cooperate on a plurilateral basis under WTO auspices. China and the EU also share some commonalities on specific matters that concern the US. An example is state-ownership or control of enterprises, which is a feature of the economic landscape in several EU member states.

The EU external policy strategy emphasises transatlantic cooperation (European Commission 2020, 2021a) and working with groups of countries – such as the Ottawa Group<sup>2</sup> – on subjects of common interest, including WTO reform. The recent EU trade policy review communication recognises China and India as ‘indispensable partners for WTO reform discussions’ and notes that ‘[d]iscussions with China and India should help to better understand our respective perspectives, including on the issues for which progress should be achieved at MC12 and beyond’ (European Commission 2021b: p. 17).

2 Australia, Brazil, Canada, Chile, the EU, Japan, Kenya, Republic of Korea, Mexico, New Zealand, Norway, Singapore, and Switzerland.

The essays in this volume argue that China and the EU should go beyond discussing their respective perspectives and cooperate to revitalise the WTO as a forum for agreeing on trade policy-related rules and the venue where trade disputes are resolved.

The authors comprise teams of mostly Chinese and European experts. Each chapter reviews the state of play in an area and suggests approaches to address policy tensions. Chapters focus on challenges that are of interest (concern) to most if not all WTO members. The aim is not to be exhaustive in covering the myriad of possible subjects that may – and arguably should – be on the table of the WTO. The focus is on ‘bread and butter’ issues pertaining to the operation of the organisation and a set of old and new policy areas that are central to the trading system. The essays complement and build on the rapidly expanding research and proposals for WTO reform.<sup>3</sup> The spirit of the project is captured by a remark made by EU Director-General for Trade, Sabine Weyand, at an event celebrating the 25th anniversary of the WTO to the effect that ‘the WTO is not the place to drive systems change. It is not about regime change. This is about dealing with the consequences of certain economic systems and to make sure that these are being dealt with in a manner that everyone can live with. And that requires compromise on all sides’ (Monicken 2020).

The contributions distinguish between systemic or crosscutting issues and substantive areas of trade-related policy. Part 1 includes five chapters that address systemic challenges: reviving the WTO negotiation and dispute settlement functions, improving transparency, the treatment of economic development differences, and managing the interface between trade policy and non-trade objectives, including national security. Chapters in Part 2 address substantive policy areas: agriculture, services, investment, subsidies, state-owned enterprises (SOEs) and trade-climate change. All are arguably core topics for the WTO in the sense of affecting most if not all WTO members. Many of the associated policies revolve around the use of tax/subsidies of one form or another. A common denominator is that the underlying policies can affect the conditions of competition on either the home market of national firms and/or foreign markets.

## 1. WTO REFORM: EU AND CHINA PERSPECTIVES

EU trade policy has multiple objectives, including sustainable development, combating global warming, and responding to the digital transformation of the global economy. It is also an instrument to promote European values as well as European commercial interests (European Commission 2021a).<sup>4</sup> WTO reform is a priority area of focus for EU trade policy, illustrated by the fact that the Annex to the Trade Policy Review Communication takes up almost as many pages as the whole trade strategy (European Commission 2021b).

3 Recent compilations and references to the literature on global trade policy challenges confronting the WTO include Evenett and Baldwin (2020), Fitzgerald (2020), and Hoekman and Zedillo (2021).

4 The RESPECT project, to which this volume of essays is a contribution, includes many papers analysing this dimension of EU external policies. See <http://respect.eu.eu/>.

The EU trade strategy notes that the first order of business is to restore a sense of common purpose among WTO members. Doing so requires proceeding incrementally, starting with short-term confidence-building measures, including concluding the fisheries subsidies negotiations and launching an initiative on trade and public health. The EU highlights the need to revisit how the WTO deals with disparities in levels of economic development and the design of – recourse to – special and differential treatment (SDT) provisions, arguing that restoring the credibility of the WTO as a negotiating forum requires a new approach to SDT. The EU also stresses the need for agreeing on new rules on digital trade and investment policies, addressing competitive distortions resulting from state intervention in the economy, and reinforcing the dispute settlement, monitoring, and deliberative functions of the WTO.

In its statements and submissions to the WTO, China has emphasised the need to break the impasse on appointing Appellate Body members, to tighten disciplines to curb abuse of the national security exception, and to bolster disciplines on unilateral measures that are inconsistent with WTO rules (MOFCOM 2018, WTO 2019, Gao 2021). China has noted the need to clarify rules on the use of trade remedies (e.g. price comparison in anti-dumping proceedings, what constitutes a subsidy, calculation of benefits conferred). China has also argued for a holistic approach to considering new rules to attenuate the spillover effects of national subsidy programmes, stressing that deliberations should include agricultural support policies. In response to arguments by OECD countries that disciplines are needed on the behaviour of SOEs, China has pointed out that state ownership as such should not be a matter for the WTO. On the latter point the EU concurs. The EU position calls for a level playing field, no matter the ownership and control structure of companies operating in a market.

Many scholars have pointed out the interdependence between the negotiation and dispute settlement functions of the WTO (e.g. Liu 2019, Hoekman and Mavroidis 2021). Making progress in substantive rulemaking on matters covered by WTO agreements is not possible without addressing systemic issues, including how to incorporate open plurilateral agreements into the WTO and re-establishing a functional dispute settlement mechanism. At the same time, clear signals by the major players of willingness to engage in substantive, policy-specific negotiations, including matters of particular interest to many developing countries, will help achieve needed systemic reforms that require consensus to be implemented.

WTO submissions by China and the EU, as well as policy documents issued by both WTO members, suggest a common view on the need for systemic reforms, but differences in the priority accorded to the need for revisiting or negotiating rules in specific policy areas. Taken together, it is clear that there is a large potential agenda for deliberation and eventual negotiation. This includes issues only partially covered by the WTO or not at all, such as policies towards foreign investment or the use of trade measures in national programmes to combat climate change. The large number of potential issues creates opportunities for bundling of subjects, but such packaging requires great care.

WTO reform and updating will need to proceed in stages. Efforts to reboot the WTO should differentiate between crosscutting, systemic reforms, and efforts to negotiate on specific policies. Core functional dimensions of the WTO include decision making, dispute settlement and transparency. To some extent the decision-making issue has been taken up, reflected in the willingness of groups of WTO members to pursue talks on a plurilateral as opposed to a universal basis. Many WTO members have called – repeatedly – for addressing Appellate Body crisis, and independent surveys make clear that this is the foremost reform priority for many WTO members (Fiorini et al. 2021). Substantive, issue-specific negotiations on rules that affect core interests of many WTO members will take time, whether this involves matters covered by WTO agreements, such as agriculture or subjects that are not, such as disciplines for SOEs, investment policies, and trade and sustainable development.

## 2. CROSSCUTTING (INSTITUTIONAL) CHALLENGES

### Revitalising the negotiation function

Establishing an agenda for negotiation is a complex endeavor, as is determining the appropriate approach to the conduct of negotiations and whether (and which) issues could/should be linked. The Doha Round Agenda and negotiating process – the Single Undertaking approach, entailing that nothing was agreed until everything was agreed – ended in deadlock. The consensus-based decision-making working practice permitted WTO members to oppose adding discussion of new policy priorities such as industrial subsidies, SOEs, or investment policies to expand the negotiating set beyond the Doha talks as originally conceived in 2001. The exercise of the veto option effectively sidelined the WTO for much of the post-2008 period.

After almost ten years of deadlock, in 2017, many countries decided to shift gears and launch talks on a plurilateral basis. The associated joint statement initiatives (JSIs) span e-commerce, domestic regulation of services, investment facilitation, and measures to enhance the ability of micro and small and medium enterprises (MSMEs) to utilise the opportunities offered by the rules-based trading system. The JSIs bring together a cross-section of the WTO membership. China and the EU participate in all four JSIs. Although the Trump administration chose to join only one of these initiatives, on e-commerce, the US engages in the other JSI activities as well. The e-commerce talks involve 80+ WTO members and focus on a mix of trade restrictive policies such as regulation of cross-border data flows and data localisation requirements and digital trade facilitation – issues like electronic signatures, e-invoicing, electronic payment for cross-border transactions, and consumer protection. Talks on services domestic regulation span 60+ WTO members and center on matters associated with authorisation and certification of foreign services providers with the aim to reduce the trade-impeding effects of domestic regulation. The

MSME and investment facilitation groups differ from the other two JSIs in addressing matters that are not covered in existing WTO agreements. The talks on MSMEs involve some 90 WTO members; those on investment facilitation over 100 members.

Plurilateral approaches are not a panacea, but they offer a mechanism to cooperate without all WTO members agreeing to participate. In their chapter, TU Xinquan and Robert Wolfe argue that leadership is needed by the three major powers to improve the institutional framework for negotiations that maintains the integrity of the WTO while confirming the end of the de facto veto held by WTO members reluctant to engage in deliberations or negotiations on issues put forward by other WTO members. The challenge they highlight is squaring the circle of the formal equality of members with the practical inequality of their willingness and capacity to participate. Tu and Wolfe argue that the move to plurilaterals is a partial solution to the difficulty of attaining consensus, but successful conclusion of a plurilateral negotiation requires a critical mass of WTO members to participate. They echo the suggestion by Hoekman and Sabel (2021) for proponents of plurilateral engagement to put in place new governance principles to assure non-participating WTO members that any plurilateral agreement will be supportive of the rules-based multilateral trading system. In addition, agreement must be sought on criteria and procedures to incorporate new non-discriminatory open plurilateral agreements addressing matters not covered by extant treaties into the WTO.

Even if plurilateral negotiations replace the single undertaking as an aggregation and forcing mechanism, it is important to recognise that the need for issue linkage and package deals is likely to remain. Plurilaterals do not remove the need for action in three crosscutting areas – transparency, SDT, and dispute settlement. Addressing these three systemic challenges arguably is important for WTO members to have incentives to pursue plurilateral agreements that extend beyond soft law cooperation, for WTO members that do not wish to engage in plurilaterals to accept that others do so, and more generally to improve the functioning of the multilateral trading system.

### **Transparency**

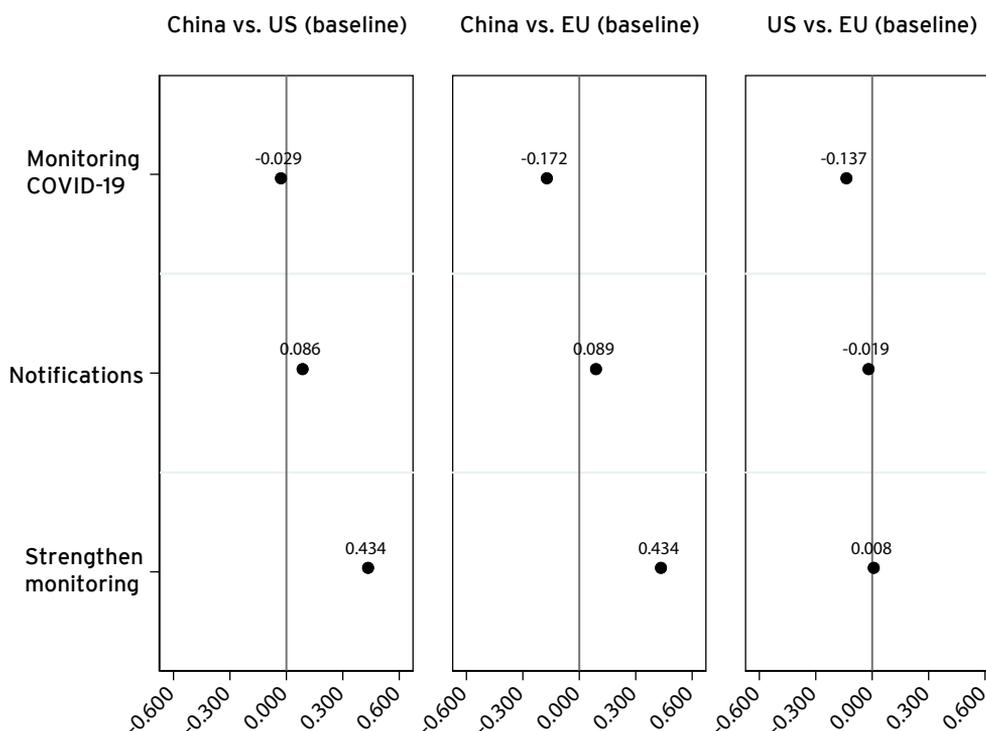
Transparency is a key input into negotiation, monitoring implementation of agreements, and dispute settlement. Transparency has been a major concern to the EU and the US, with China and other emerging economies often singled out for not living up to notification commitments. Less well understood is that this is also a matter of interest to China, and indeed, to most countries.<sup>5</sup> The US, for example, is less than exemplary when it comes to notifications of services trade policies. The US is also less cooperative

5 One reason for this is the general upward trend in the use of policies affecting trade. See e.g. Evenett (2021).

than China or the EU in providing information for the periodic WTO Secretariat trade monitoring exercise (WTO 2020a: Appendix 1) and many WTO members do not provide timely and comprehensive information on subsidy programmes.<sup>6</sup>

WTO agreements have numerous formal notification obligations. Inadequate notification of trade policies is longstanding, but its inclusion on the ‘WTO reform’ agenda only began when the US tabled a detailed proposal that reviewed the unsatisfactory compliance with notification obligations under GATT-related agreements. An important question that has not been adequately confronted is why compliance with notification requirements varies by WTO Agreement and by Member. If the problem is a lack of capacity, then technical assistance may be needed. If the problem is outdated and overly complex notification requirements, a thorough review is warranted (Wolfe 2018). In a recent expert survey (Fiorini et al. 2021), Chinese respondents attach higher priority to improving compliance with notification obligations and strengthening monitoring of trade policies than EU and US respondents (Figure 1). While the small sample size for Chinese respondents precludes inference, this result suggests transparency is a shared concern.

**FIGURE 1 EXPERT VIEWS ON TRANSPARENCY: CHINESE, EU, AND US RESPONDENTS**



Note: Point estimates indicate whether belonging to a given group is associated with less utility (if negative) or higher utility (if positive) from priority being assigned to the issue in the question, relative to the baseline group.

<sup>6</sup> In their chapter, Evenett and Kong note that the WTO secretariat stopped including information on so-called General Economic Support measures in their G20 trade monitoring reports on account of the lack of cooperation.

Source: Based on data reported in Fiorini et al. (2021).

In their contribution to this volume, Simon Evenett and KONG Qingjiang note that subsidies have a pride of place in discussions on transparency at the WTO. In part, this is because many members do not notify subsidy programmes on a timely basis (as of April 2021 one third of the membership had yet to submit notifications for 2015) and in part, it reflects the fact that subsidies have become the most frequently used policy instrument globally. A presumption that subsidies underpin the competitiveness of Chinese products in international trade and impedes the ability of foreign firms to contest the Chinese market is a major driver of the trilateral call by the EU, Japan, and the US for stronger international disciplines on industrial subsidies and SOEs as beneficiaries and channels of state support.<sup>7</sup> Improving the knowledge base regarding the magnitude and incidence of subsidies is a precondition for any effort to revisit extant WTO rules in this area (Hoekman and Nelson 2020). The absence of comprehensive and comparable data on the use of subsidies in leading trading nations has made it difficult to assess the extent of subsidies and thus their effects.

Evenett and Kong argue that a priority in enhancing subsidy transparency is to bolster the evidence on sub-central subsidies. They review available information on this for both China and the US, showing that such support is prevalent in both countries and has systemic implications. Enhancing transparency of central and sub-central subsidy programmes is important for both the national and local governments concerned and not just to potentially affected competitors. Better information and greater transparency will help make local government more accountable and reduce the scope for wasteful internal competition between sub-national jurisdictions. It would also permit central governments to submit more timely and comprehensive notifications to the WTO and allow for evidence-based deliberation of the cross-border ramifications of national subsidy policy.

### **Economic development differentials and reciprocity**

An important dimension of the challenge of squaring the circle of the formal equality of WTO members with the practical inequality of their willingness to participate is the heterogeneity in levels of economic development and capacity across the membership. Patrick Low notes that WTO members determine their own developmental designation, but most aspects of SDT require cooperative action of one kind or another from other members. A key argument in his chapter is that to address the SDT quandary a distinction must be made between regulatory SDT and market access SDT. The former focus on the rules of the trading system while the latter are instrumental in determining the terms of participation in a given market.

7 [https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158567.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf).

When it comes to *market access* SDT, non-reciprocal tariff and quota preferences are offered and withdrawn on a non-contractual basis under the full control of the party granting the concessional access. Beyond trade preferences, market access conditions offered to fellow members of the WTO arise from contractual commitments and are MFN-based. Market access outcomes are driven by reciprocal considerations in negotiations, not by SDT dispensations. Low shows that the incidence of above-average tariffs and quotas protecting sensitive products often does not correlate with declared developmental status. Low divides *regulatory* SDT provisions into five categories: i) best-endeavour provisions; ii) flexibilities; iii) transitional timeframes; iv) technical assistance; and v) provisions pertaining to least-developed countries. An analysis of the application of these elements of SDT to the WTO agreements shows that the only element of regulatory SDT exclusively in the hands of beneficiaries pertains to the ‘flexibilities’ category. Access to every other aspect of regulatory SDT requires cooperative action of one kind or another from other WTO members. The ‘flexibility’ category of SDT constitutes less than one-quarter of all SDT provisions, thus limiting the scope for opportunistic access to SDT by those considered undeserving. Low calls for concerted action to determine which members make use of this subset of SDT as a useful way of informing governments whether flexibilities are indeed used and to provide a basis for decisions by individual WTO members to indicate they do not intend to do so in the future.

### **The Appellate Body and dispute settlement crisis**

In their chapter, LIAO Shiping, and Petros Mavroidis argue that effective dispute settlement procedures are critical to sustain multilateral cooperation on trade. A central dimension of the ‘value proposition’ offered by the WTO is independent, third-party adjudication of trade disputes reflected in the principle of de-politicised conflict resolution. An effective dispute settlement mechanism is critical for existing WTO agreements to remain meaningful, and for the negotiation of new agreements, including new plurilateral agreements that embody binding commitments.

The US has long been critical of the Appellate Body, arguing it has too frequently overstepped its mandate. Although China lost many of the cases brought against it, Appellate Body rulings on key matters such as what constitutes a public body under the Agreement on Subsidies and Countervailing Measures helped fuel US frustration with WTO dispute settlement (Ahn 2021). The Appellate Body ceased operations in December 2019 because of US refusal to agree to appoint new adjudicators or re-appoint incumbents. By the end of 2020, sixteen appeals ‘into the void’ were pending before the now dormant Appellate Body. More telling, only five new disputes had been filed, the lowest since the establishment of the WTO in 1995. If appeal ‘into the void’ remains possible, issued panel reports will have no legal value, unless the disputing parties forego their right to appeal, and accept the panel report as the final word. The Multi-Party Interim Appeal Arbitration Arrangement (MPIA), which includes the EU and China, may provide a short-term alternative for the 24 WTO members that signed it, but does

not offer a solution. Liao and Mavroidis note that a resolution to the Appellate Body crisis requires commitment of all stakeholders, but especially the major trade powers, to reform WTO dispute settlement. Whether a redesigned dispute settlement system will continue to include two-instance adjudication or take another form is something they are agnostic on – what matters is to ensure conflict resolution continues to be depoliticised and encompasses all WTO members. Open and substantive negotiations among the WTO membership to re-establish an operational dispute settlement mechanism is a clear priority for the continued salience of the trade regime.

### **National security and non-trade objectives**

Another systemic challenge confronting the WTO is to manage the increasingly prevalent use of trade policy instruments motivated by non-trade objectives. CUI Fau, Catherine Hoeffler, and Stephanie Hofmann address this subject in their chapter, noting states have many concerns when trade does not align with political goals in areas such as food security, environment and climate change, labour rights, culture, or national security. The integrity of WTO rules and the success of efforts to reform the WTO requires to maintain some policy space for states to address such concerns while keeping the WTO as a system of trade rules. The WTO has over time developed processes and agreements that clarify and define rules for matters such as product standards and domestic regulation, based on application of the national treatment rule and agreed good administrative principles (e.g. necessity to restrict trade to attain a regulatory goal, proportionality, using measures that are least-trade restrictive, etc.). The immediate challenge confronting the WTO membership pertains to the use of trade measures motivated by national security concerns. Cui, Hoeffler, and Hofmann argue legitimate security grounds may not be able to be defined but can be embedded in other rules. They call for a more open process of the evaluation of states' invocation of the national security exceptions in WTO agreements, thereby increasing the efficiency and legitimacy of WTO rules.

### **3. SUBSTANTIVE SUBJECTS FOR NEGOTIATION**

The essays addressing substantive policy areas span a mix of 'old' and 'new' issues. A common denominator is that many of these policy areas have a subsidy dimension, reflecting the increasing prevalence of subsidy instruments and perceptions that the associated cross-border spillovers are significant. Subsidy programmes of some type are central in the long-running negotiations on fish, are prominent in agriculture, are essential in trilateral discussions between the EU, Japan, and the US pertaining to support to industrial activities, and figure importantly in efforts to combat climate change – e.g. reduction of fossil fuel subsidies, support for renewable energy. Implicitly, if regarded as measures that influence the choice of mode of supplying a market, subsidies are also an element of the digital and services trade policy agenda, e.g. taxation of digital services and electronic transmissions as a means for (re-)establishing a level playing field for companies in different sectors.

## Agriculture

Agriculture is important for many developing countries and many WTO members – including China – argue that any efforts at new rulemaking must encompass agriculture. LU Xiankun and Alan Matthews review the state of play in agriculture. They note the prominent role played by subsidies (domestic support measures) in agriculture, and that agricultural trade policy reform increasingly is an agenda spanning developing nations, which accounted for almost 60% of global food trade in 2018. Improving multilateral rules for domestic support will reduce market and production distortions, enhance stability of the global market for agricultural products, and help mitigate their environmental impact. Lu and Matthews argue radical steps are needed to break the logjam that has prevailed for over a decade on agricultural trade policies. They suggest WTO members start with revising the WTO methodology to calculate product-specific support to ensure it only captures instances where programmes transfer resources at above world market prices and does not penalise countries where transfers are negative – as is the case in India. They also suggest revising domestic support rules through the lens of climate change, as agricultural activity accounts for a quarter of all human-caused greenhouse gas emissions.

## Subsidies

As mentioned, one of the most contentious areas in trade policy are the (perceived) negative international spillovers of industrial subsidies. Subsidies can help to address market failures and therefore might have a good economic rationale, but cooperation is needed to minimise negative spillovers of such measures on trading partners. As has been demonstrated by data collected by the Global Trade Alert initiative,<sup>8</sup> this is not solely a ‘China issue’. Subsidies of one type or another constitute the majority of trade interventions imposed since 2009, accounting for more than 50% of all new measures imposed in the last decade. A revamped subsidy regime requires participation of all three major trade powers. A necessary condition for China to do so is that deliberations are not presented as an attempt to isolate or transform China.

Not all scholars agree new rules are needed. For example, Zhou et al. (2019) argue the unique challenges created by China’s economic model largely can be addressed by the WTO’s existing rules on subsidies coupled with the specific obligations China made in its accession protocol. They suggest greater and more effective use of WTO dispute settlement based on existing rules would have helped to clarify the need for new rules. In the event, with the removal of the Appellate Body a dispute settlement-centered strategy is no longer available to WTO members.

8 <https://www.globaltradealert.org/>.

In their chapter, LI Siqi and Luca Rubini call for updating existing WTO rules but argue that determining where and how to do so requires better knowledge on the prevalence of subsidy measures, the underlying policy goals and their effects. The implication is that any WTO law reform exercise must be informed by a serious and transparent, open and expert-based knowledge-gathering effort so that WTO members can develop a common understanding of where new rules are needed and the form they should take. A key element of any such exercise is greater transparency and a programme of data collection as called for by Evenett and Kong. A consequence of the lack of a common understanding and comprehensive database is that this is a subject that cannot be addressed in the short run: the required data compilation, analysis and deliberation will require time. As argued by Hoekman and Nelson (2020), this should not be regarded as a problem, as a common understanding among WTO members – or a group of WTO members working towards a plurilateral agreement to expand extant WTO rules – is a necessary condition for agreement.

In his contribution, LIU Jingdong identifies specific areas where the WTO Agreement on Subsidies and Countervailing Measures needs to be revised. This includes focusing on more precisely defining ‘public body’ – a matter on which there appears to be substantial agreement in the scholarly literature (e.g. Ahn 2021). Liu calls for strengthening rules regarding transparency and burden of proof, making notification requirements more specific, restoring the category of non-actionable subsidies, and incorporating both industrial and agricultural subsidies into one set of rules.

### **Services and digital trade**

Martina Ferracane and LI Mosi discuss the prevailing multilateral rules regulating digital trade, which predate the global internet. They argue that updating WTO rules is important, given the rapid growth in digital trade, unilateral implementation of new policies to regulate the digital economy that have both direct and indirect effects on trade in both goods and services, and the trend for countries to embed rules for cross-border trade in digital products in preferential trade agreements. Ongoing plurilateral negotiations on e-commerce in the WTO offer an opportunity to build on recent regional agreements to support cross-border digital trade. Ferracane and Li note there are commonalities in the preferences of China and the EU on some elements of digital trade policy. The EU has been much more hesitant than other OECD countries to include provisions on data flows in trade agreements and has only been able to agree to a small number of bilateral agreements determining that data protection regimes in partner countries are ‘adequate’. They conclude that prospects for cooperation may be greater than they appear to be.

Bernard Hoekman and SHI Jingxia focus on services trade policy more broadly: Since the establishment of the WTO in 1995, little has been done to adapt and expand multilateral disciplines to promote trade in services. Structural transformation trends are increasing the role of services in economic activity but have not been accompanied by expansion of WTO coverage of services trade policies, reducing the salience of the organisation to

the innumerable firms and households that provide and source services across borders. Hoekman and Shi note that ongoing talks among groups of WTO members on e-commerce and domestic regulation of services will help fill the gap but that much more is needed to expand and update the coverage of the General Agreement on Trade in Services (GATS). China and the EU, for different reasons, have a strong interest in supporting services trade, as do other large WTO members including India and the US. The authors argue that seeking to establish an open plurilateral agreement on services with signatories adding new commitments to their GATS schedules is more likely to be successful than a multilateral negotiation among all WTO members, and that to be meaningful such an agreement must include China and India. They echo the suggestion by Jürgen Kurtz and GONG Baihua in their chapter on investment that the recent China-EU Comprehensive Agreement on Investment provides a good basis for a China-EU led plurilateral initiative to resuscitate talks on trade in services in the WTO. This could include the 23 WTO members that launched negotiations on a Trade in Services Agreement (TiSA) in 2013 outside the WTO. The TiSA talks ceased at the end of 2016 because of the opposition of the Trump administration to the initiative, but arguably they would have done little to improve market access because China and India were not participants. Inclusion of China would help to attain critical mass and make participation more interesting for India.

### **Investment**

Kurtz and Gong discuss a policy area that is only partially covered by the WTO through commitments under the GATS on mode 3 supply of services, involving inward FDI in services sectors. Historically, foreign investment policies have been a fiercely contested issue for the international trade regime. The launch of JSI discussions on investment facilitation under WTO auspices suggests greater willingness among some WTO members to discuss investment policies. They argue that the China-EU CAI provides a basis for negotiating investment policy disciplines in the WTO on a plurilateral basis. While the prospects for ratification of the CAI by the EU are uncertain, the CAI provides a baseline for possible investment rules in the WTO, in the process potentially advancing rulemaking in related areas such as regulation pertaining to technology transfer and national security. Kurtz and Gong make a strong case that investment rules anchored both against the CAI outcomes and structured on an open plurilateral basis are a logical part of any effort to revitalise the WTO.

### **State-ownership or control of enterprises**

Together with the increasing focus on the competitive spillovers of domestic subsidy programmes, the behaviour of foreign state-owned enterprises has become a concern to many OECD country governments. As is true for subsidies, this is an area where there is limited transparency (information) and even less empirical evidence on the operation and effects of such entities, whether through direct production activities or indirectly by providing subsidised inputs or services to firms that gives them a competitive advantage.

China has many SOEs that play an important role in the economy. State ownership or control of firms across a range of sectors is also a feature of several European member states. In the EU state-ownership of firms is not considered problematical in the sense of distorting competition because all firms – whether private or (partially) publicly owned or controlled – are subject to the same competition policy disciplines. Moreover, EU disciplines on subsidies (state aids) apply to SOEs as well as to private firms.

Analogous to the case of investment policies, the prospects for agreement on rules pertaining to SOEs may be greater than is often assumed. Liu (2019), for example, argues that in principle, China should support concepts such as the role of market orientation and competition neutrality in regulating the behaviour of SOEs, as well as discussion of measures to better use trade for sustainable development, as doing so is consistent with China's national interest and strategic priorities.

In their chapter, Bernard Hoekman and André Sapir suggest that taking no action on SOEs is not an option given concerns about the competitive spillovers of Chinese SOEs. They argue that recent bilateral and regional agreements signed by China, the EU, and the US include provisions on SOEs and offer a basis on which to build, suggesting the possibility of negotiating a plurilateral agreement among major WTO members. Many of the extant proposals to address SOE-related spillovers suggest building on disciplines negotiated in recent trade agreements such as the CPTPP, USMCA, EU-Japan, etc. While an apparently pragmatic approach they note that the China-EU CAI illustrates that there is an alternative option, one that goes beyond a focus limited to state-ownership but is based on a broader approach that focuses on undertakings ('covered entities'). As the CAI approach was agreed by two of the big three WTO trade powers, it provides an alternative template for plurilateral deliberation in the WTO setting.<sup>9</sup>

Whatever approach is pursued, Hoekman and Sapir echo Evenett and Kong, and Li and Rubini in arguing that WTO members currently do not have sufficient information to develop a common understanding of where new rules may be needed, as opposed to tweaking existing WTO provisions. A first step could be for the EU and China – probably the two main jurisdictions where SOEs are headquartered – to take the lead to create a WTO Working Party on SOEs to prepare the ground for a plurilateral negotiation on new rules for SOEs. One element of work should be to develop a solid evidence base on the prevalence of SOEs, their economic performance, and estimates of associated cross-border competition spillover effects.

The appropriate role of trade policy in national programmes to reduce the carbon intensity of economic activity has been the subject of discussions in the WTO for many years, going back to the 1990s (Low 2021). This is a subject that has become increasingly prominent as countries implement their Paris Agreement commitments, with several

<sup>9</sup> In the event the CAI remains on ice for political reasons, launching plurilateral discussions in the WTO to include more countries while narrowing their scope may help to promote domain-specific cooperation on SOEs (and investment, as argued by Gong and Kurtz) that is not tied to a broader agreement spanning many issues.

countries launching negotiations on a plurilateral agreement on climate change, trade and sustainability (ACCTS) that spans both import liberalisation as foreseen by the discussions on a WTO Environmental Goods Agreement (EGA), and concerted action to reform specific tax-subsidy programmes to reduce greenhouse gas emissions. In their chapter on trade policy dimensions of programmes to combat climate change, ZHANG Jianping and XIE Zhiyu discuss several challenges posed to the multilateral trading system by national policies to respond to climate change and achieve carbon emission reduction and carbon neutrality goals, arguing that any trade measures imposed by countries must comply with WTO rules, including non-discrimination. They highlight the example of the EU's planned introduction of a carbon border adjustment mechanism (CBAM), noting that while much depends how this is designed and implemented, many developing countries are concerned that a CBAM may lead to discrimination. More broadly, they argue that WTO members disagree on the equitable allocation of carbon emission reduction obligations and the use of carbon border adjustment taxes and point to the need for the WTO to support the use of market-based instruments to lower greenhouse gas emissions. They conclude that a priority for WTO members is to finalise EGA negotiations on liberalisation of trade in low-carbon and environmental products and to launch discussions on alternative approaches to address climate issues in the WTO.

## CONCLUDING REMARKS

China and the EU have different in views on the relative importance of the cross-border spillovers associated with various types of international trade policy and the potential for joint gains from cooperation. This is neither surprising nor a problem. What matters is that both attach great value to a multilateral trade regime that can serve as an effective platform for negotiating rules for trade-related policies and resolving trade conflicts. Both oppose recourse to unilateralism. The successful conclusion of the bilateral Comprehensive Agreement on Investment between China and the EU at the end of 2020 illustrates cooperation on sensitive policy matters is possible, as do the extensive sector- and issue-specific bilateral dialogues between China and the EU over many years (Hu and Pelkmans 2020). China and the EU cannot provide the public good of an open rules-based multilateral trading system on their own. But jointly they carry significant weight in the WTO. Joint action to support the effort needed to address the governance challenges confronting the WTO can help to keep the organisation fit for purpose and relevant to its core constituencies.

A willingness to proceed on a plurilateral critical mass basis on issues where waiting for the full membership is not necessary arguably is a key part of revitalising the WTO. Greater reliance on variable geometry to facilitate trade in goods and services and support a shift to a greener, more digital economy is important for the WTO to become more relevant again to the international business community and to permit like-minded countries to cooperate on regulatory matters of common interest. Bolstering the deliberative capacity

of the WTO, compiling the data and generating the analysis needed for WTO members to explore the potential contours of new agreements are necessary ingredients. Permitting the WTO Secretariat greater latitude to support the membership through provision of information and encouraging greater participation by stakeholders in WTO deliberations to learn from practice and identify priorities for action to address negative cross-border spillovers would enhance the prospects for cooperation (Hoekman 2019). This does not entail a need for ‘structural’ reform – it simply requires a willingness by the membership to recognise that a ‘member driven’ organisation does not require unanimity for day-to-day operations and will benefit from full utilisation of the resources of the Secretariat and pro-active engagement with stakeholders (Wolfe 2021, Alben and Brown 2021).

The agenda confronting WTO members extends beyond the subjects addressed in the contributions to this volume. The topics selected reflect a collective view that these constitute core issues that are relevant to most WTO members and that require collective attention. There certainly is scope – and need – to make progress on other important subjects as well. An example is to draw lessons from the responses to the Covid-19 pandemic and putting in place a framework to bolster the role of trade in addressing global public health crises. Cooperation in this policy area is already being pursued on a plurilateral basis: the Ottawa Group (WTO 2020b) has put forward proposals for an agreement on trade and public health. The prospects for making progress on this subject and those discussed by contributors to this book is conditional on addressing the core cross-cutting challenges related to the operation of the WTO highlighted in part 1 of this eBook. A first order of business in the run-up to MC12 should be for China and the EU to work with other WTO members to establish a work programme to address the crosscutting institutional challenges confronting the organisation.

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