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**World Trade Organization Dispute Resolution and China:
Is the System Broken, Flawed, or Working Exactly as Written?**

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Abstract

China highlights the flaws and limitations of the World Trade Organization's dispute resolution process. China's importance in the global economy led to its selection. The paper overviews China's accession process, the two initial safeguards against subversion—the Transitional Product-Specific Safeguard Mechanism and the Transitional Review Mechanism, and how the WTO's process can be subverted. The paper also analyzes the WTO process subversion counter approaches used by other Member States, mainly the United States. The two major flaws of the process are the lack of protections in place against subversion and the inability to revoke membership once it has been given. The United States, in order to counter subversions by China, halted the resolution process by the blocking of Appellate Body nominations. Policy options for the United States of America and the WTO differ. The policy recommendation for the United States is to continue blocking the appellate appointments until measurable, verified changes have occurred either within the WTO or by Members that subvert its dispute resolution process.

Keywords: World Trade Organization, dispute, China, United States, policy, appellate, Safeguard Mechanism, Transitional review Mechanism

World Trade Organization Dispute Resolution and China: Is the System Broken, Flawed, or Working Exactly as Written?

The World Trade Organization (WTO) is a global organization that promotes and regulates international trade between countries by providing a framework for resolving trade disputes among its members. Its dispute resolution process was designed to ensure fairness, predictability, and stability in the global market. However, in recent years, this intricate mechanism has come under scrutiny, revealing significant flaws that warrant closer examination.

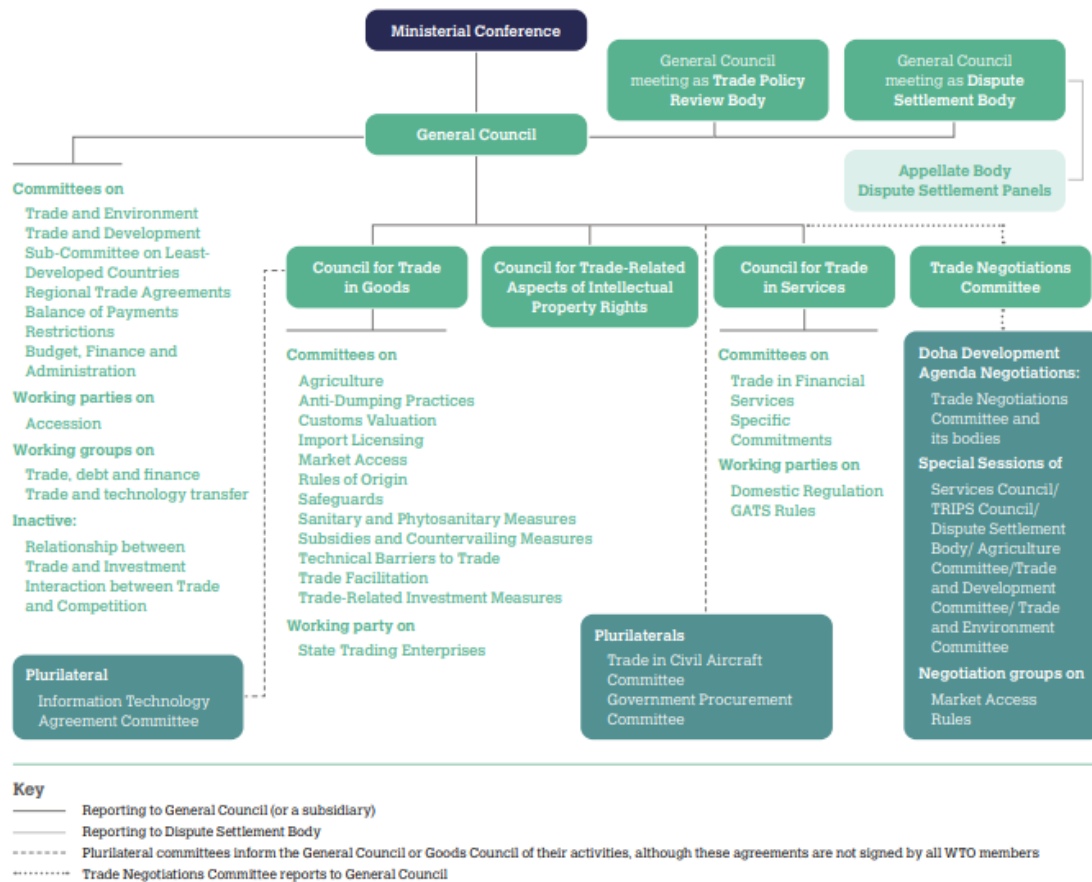
This paper aims to explore the dynamics and shortcomings of the WTO dispute resolution process, shining a spotlight on China to expose the system's vulnerabilities. A study of China is significant given its global prominence in trade and its unique approach to trade policies. The paper will provide an overview of China's accession process, including how China presented itself to the WTO, why China was crucial to the organization, and the various protections or lack thereof in place to prevent any subversion of the WTO's goals. Additionally, we will explore the possibilities and limitations of the WTO with unresponsive members, any changes in China's behavior to be a conducive partner, and potential implementable policy solutions if the system is not unequivocally broken.

WTO Background and Dispute Resolution Process

The WTO has a complicated organizational structure, as seen in Figure 1.

Figure 1

WTO Organizational Chart (WTO, “WTO organizational chart”)



Its functions are “administering WTO trade agreements,” “handling trade disputes,” “monitoring national trade policies,” providing “technical assistance and training for developing countries,” as well as being a “forum for trade negotiations,” and working “with other international organizations.” (WTO, “Who we are”) There are sixteen agreements that all members are a part of “and two different plurilateral agreements” which do not apply to everyone. (WTO, “Overview”) These sixteen agreements are on the trade topics of “goods, services and intellectual property” with a focus on liberty and exceptions, lower trade barriers, open markets,

dispute resolution, country economic development, and transparency through reporting both by the country and the WTO. (WTO, “Overview: A Navigational Guide”)

Because the WTO is a rules-based system, the dispute resolution process is critical to maintaining an effective organization. Disputes arise if a member State believes another member has violated a WTO agreement. There is a preexisting agreement that disputes must be solved through the WTO process and support the outcome of the dispute resolution process if both countries are members. The WTO dispute resolution process is different from the previous General Agreement on Tariffs and Trade (GATT) process because it has a clear timeline for the dispute process, more binding findings, and a quicker resolution than before. If either body countries decide to appeal the ruling, it goes to the Appellate Body under the Dispute Settlement Body where three of the seven permanent members hear the appeal. (WTO, “A unique contribution”)

If a country is found in the wrong, it should correct its trade policy or face remedies, the term used by the WTO for punishments and incentives, to comply with the rulings. Remedies or compensation are decided through another round of negotiations. If adequate remedies are not decided on, the country initiating the dispute can ask for permission from the WTO’s Dispute Settlement Body to temporarily retaliate against the non-complying, non-remedying country. (WTO, “A unique contribution”)

China’s Accession Process

There are four stages to a WTO application, and the applying country “or customs territory” must have “full autonomy in the conduct of its trade policies” as the initial condition for application. (WTO, “Membership, alliances and bureaucracy: How to join the WTO: the accession process”) The steps are providing information to the WTO, negotiating commitments

and benefits, drafting membership terms including a report, protocol of accessions, and schedules, and deciding, by the WTO General Council or the Ministerial Conference, whether or not the applicant can join the organization. (WTO, “Membership, alliances and bureaucracy: How to join the WTO: the accession process”)

It took almost fifteen years for China to become a member of the WTO. (WTO, “WTO successfully concludes negotiations on China's entry”) China finished negotiations with the WTO on its membership terms on September 17, 2001. Following their induction, China had a phase-out period of three years to become compliant with some of its commitments while other Agreements, like the Trade-related Aspects of Intellectual Property Rights (TRIPS), would become effective immediately upon their accession. There would also be in place a special Transitional Safeguard Mechanism for twelve years after their accession “in cases where imports of products of Chinese origin cause or threaten to cause market disruption to the domestic producers of other WTO members.” (WTO, “WTO successfully concludes negotiations on China's entry”) After their accession, China would be protected against direct measures against their imports that violate the WTO Agreement. China in exchange, would implement its commitments to “open and liberalize its regime in order to better integrate in the world economy and offer a more predictable environment for trade and foreign investment in accordance with WTO rules.” (WTO, “WTO successfully concludes negotiations on China's entry”)

While lobbying to become a member of the WTO, China’s representative at the Ministerial Conference presented many reasons why the WTO should allow China to join the organization, specifically as a “developing country” member. (WTO, “Report of the Working Party on the Accession of China”) China’s representatives claimed an overwhelming economy reform that had been occurring since 1979 and saw its largest changes within “the banking,

finance, taxation, investment, foreign exchange ("forex") and foreign trade sectors" in 1994. (WTO, "Report of the Working Party on the Accession of China") Overall, China claimed to be liberalizing its economic policies to support open markets and other WTO principles. WTO member nations garner an economic benefit from their inclusion in the organization. As a result of the benefits of membership, China sought and succeeded in becoming a WTO member. In the context of international relations, China's accession to the WTO is a significant event that has far-reaching implications for the world's economic landscape.

The WTO hoped that China's membership would cause the WTO to "take a major step towards becoming a truly world organization" because it influences global economic trade. (WTO, "WTO successfully concludes negotiations on China's entry") This belief built upon the realization of how important China was to the global economy.

"In 2000 China was the 7th leading exporter and 8th largest importer of merchandise trade - exports: 249.2 billion dollars (3.9% share), imports: 225.1 billion dollars (3.4% share). For commercial services China was the 12th leading exporter and the 10th largest importer - exports: 29.7 billion dollars (2.1% share), imports: 34.8 billion dollars (2.5% share)." (WTO, "WTO successfully concludes negotiations on China's entry")

It was important to the WTO's credibility as an international trade organization to include China as a member whose country had a booming impact on trade. There was also the belief that China's inclusion in the WTO would mutually benefit existing members. (WTO, "Report of the Working Party on the Accession of China")

Report on China's Accession and Protections against Potential WTO Subversion

The process of accession was a mechanism to determine China's intentions with the WTO and how it would operate as a member. China did not receive unlimited developing country membership but had many areas evaluated with a more "pragmatic" approach that was tailored specifically to China's accession. Many of the commitments China made as part of the accession process had various concerns recorded. There were concerns that China would violate their non-discrimination commitments to which China responded that they would not, and when pressed further said that laws and policies that violate this commitment would be removed before the date outlined in the accession documents. When their ability to comply with foreign exchange and payments was criticized, China's rebuttal stated that as new International Monetary Fund (IMF) members, their market would see reform beyond the steps they had already taken. They also committed to providing more information on this topic as part of the transitional review mechanism. Other topics in the "Report of The Working Party on the Accession of China" included investments, prices, competition, framework for making and enforcing policy, imports, exports, internal policies that would affect foreign trade, intellectual property rights, etc. (WTO, "Report of the Working Party on the Accession of China") There was pushback on various aspects of China's accession which China committed to addressing to align with the WTO, but based on the concessions and commitments made by China, the Working Party decided to invite China into the WTO. (WTO, "Report of the Working Party on the Accession of China")

The WTO Protection in place regarding China's accession and the risk for subversion of WTO guidelines was the Transitional Product-Specific Safeguard Mechanism. The mechanism was to protect any WTO Member from Chinese products that "cause[d] or threaten[ed] to cause

market disruption to the domestic producers of like or directly competitive products.” (WTO, “Report of the Working Party on the Accession of China”) A consultation could have been requested with China to seek a solution and the WTO Member could have applied for action through the Committee on Safeguards. If a solution was not reached in 60 days, the WTO Member could have limited imports and taken other measures to remedy their market, but China could have also done other steps. This safeguard was only in place for twelve years after China’s accession. Because China became a member in 2001, this safeguard expired in 2013. (WTO, “Report of the Working Party on the Accession of China”)

Another protection in place upon accession is the Transitional Review Mechanism. This mechanism requires China to provide information to the WTO for its review of China’s commitments each year for eight years. There is no mention in this section of what will happen if China does not comply with its commitments. While it will be helpful for the WTO to have access to this information, The General Council does not have any power beyond recommendations. (WTO, “Report of the Working Party on the Accession of China”)

China’s Subversion of the WTO

In the eighth Trade Policy Review of China, the WTO’s closing remarks while politically correct and elegant, brought up many concerns the WTO had with China as a member. China, in 2020, had “benefited enormously from the multilateral trading system,” and other WTO Members felt that China was not providing enough support for WTO principles. (WTO, “Trade Policy Review: China-Concluding remarks by the Chairperson”) Some of the Members’ concerns included high tariffs in some industries, “continuously insufficient [Intellectual Property Right] IPR protection,” China’s approach to “cybersecurity and data management,” their “wide definition of national security, insufficient measures to address steel overcapacity,

and the use of forced” labor within the country. (WTO, “Trade Policy Review”) Foreign companies in China faced discrimination through “inconsistent application of regulations, hidden subsidies,” and a political business environment that did not apply to local companies. (WTO, “Trade Policy Review”) A main complaint of other Members was China’s unfulfillment of its transparency commitments. China was also accused by other Members of decreasing transparency and equality “in response to political disagreements with other trading partners” which is against the WTO Agreement. (WTO, “Trade Policy Review”) Nineteen years after joining the WTO, China does not comply with the commitments it made as part of its accession but has been able to receive all the positives of being a WTO Member without punishment.

In a report to the U.S. Congress in 2022 about China’s WTO compliance in 2021, the report found that China was still non-compliant with the WTO’s principles and its accession agreement. China’s SOEs and nonmarket economy “has increased rather than decreased over time” which has hurt the United States. (USTR, 2022, 2) They have intentionally avoided “WTO rules to achieve its industrial policy objectives” while using nonmarket approaches, and even actively corrupted “WTO oversight mechanisms” by not fulfilling their transparency commitments. (USTR, 2022, pg. 2)

China’s Argument Against being a Nonmarket Economy and U.S. Reaction

When China became a WTO Member, other Members argued that China’s government intervention in its economy would make looking at their “prices and costs for determining dumping margins” unreliable because of China’s lack of market principles. (Morrison, 2019) Other Members were allowed “to continue to use an alternative (surrogate country) methodology for assessing prices and costs on products subject to antidumping (AD) measures” as part of China’s accession. (Morrison, 2019) China, on December 12, 2016, through the WTO dispute

resolution process, brought a “case against the United States and the European Union” because they were both treating China as a non-market economy (NME) with the belief that “its WTO accession protocol required all WTO members to terminate their use of the alternative methodology by December 11, 2016.” (Morrison, 2019) Other Members point to a provision of the Protocol that China has not completed, “allow[ing] prices for traded goods and services in every sector to be determined by market forces,” as proof that China can be treated as an NME. (Morrison, 2019)

The United States, since 1981, “has classified China as a nonmarket economy (NME) for trade remedy cases.” (Morrison, 2019) The NME status “means any foreign country that the U.S. Department of Commerce deems not to ‘operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.’” (Morrison, 2019) A surrogate country is used to determine AD rates or a standard NME AD duty rate unless the firms prove they are operating within market principles alone. China is against being an NME because it results in a higher AD rate than if their values had been used. NMEs can become a Market Economy Status (MES) under Commerce after they apply and are reviewed to meet certain core market principles. (China’s status was reviewed under this process in 2017 and determined to be an NME. (Morrison, 2019)

Flaws and Limitations of the WTO and Alternatives Methods of Dispute Resolution

If the goal of China is to subvert the WTO, the WTO provides no long-term protection against subversion. The WTO included no long-term protections within China’s accession documents, the legally binding membership agreement, to prevent subversion of the WTO. The two protections in place, the Transitional Product-Specific Safeguard Mechanism and the Transitional Review Mechanism, while useful, were temporary measures that have expired.

Potential long-term protection assumed to be included in all formal organizational documents is a process for how to revoke membership. The WTO has no process for revoking membership once granted, even if a WTO Member is not complying with their commitments. There is only a process for withdrawal if WTO Members choose to withdraw and give notice to the Director-General of the WTO. (WTO, 2019)

The United States has attempted two approaches, outside of the WTO dispute resolution process, to solve its trade relationship with China. The first approach was through bilateral dialogues “to push China toward complying with and internalizing WTO rules and norms and making other market-oriented changes.” (USTR, 2022, pg. 2) While these dialogues seemed to be productive, any commitments made would ultimately continuously fail due to their inability to be enforced. (USTR, 2022, pg. 2) The second approach was within the WTO by bringing cases against China. This worked for the specific policies challenged but did nothing to change China as a whole or address the underlying problem of China’s nonmarket economy in an international organization built for market economies. China only implements changes that it was already planning to make or advantageous ones without changing over to a market economy. (USTR, 2022, pg. 3) The possible changes in China’s behavior have limits within the WTO since the previous tactics have been ineffective.

The Current WTO Dispute Resolution System and the Temporary Solution

In 2019, the WTO dispute resolution process was halted when Members could not agree on Appellate Body reforms. (Azevêdo, 2020) The United States blocked the appointments of candidates to the Appellate Body rendering it nonfunctional. (Geneva Trade Platform, 2023) The United States continued its blocks because of the unfair nature of the Appellate Body and its creation of opinions beyond its powers, but this information was provided by the new body for

temporary appeals. (Geneva Trade Platform, 2023) The United States has said that China obstructs facts to where the Appellate Body is an ineffective “disciplinary tool” (USTR, 2022, pg. 11) and unable to address the problem of China’s NME inclusion within the WTO. (USTR, 2022, pg. 12) In 2020, there were hopes by the WTO that this would be temporary as a solution would soon arise while in the interim Members were exploring “options to keep two-stage dispute settlement operational while we search for a permanent arrangement.” (Azevêdo, 2020) “In June 2022[,] the 12th WTO Ministerial Conference outcome document,” said a resolution would be reached by 2024. (Geneva Trade Platform, 2023)

One of these temporary solutions is the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) which is written within the WTO Agreements as a Plurilateral Agreement and functions similarly to the Appellate Body after the rest of the WTO dispute settlement process has been used. While MPIA does not believe the Appellate Body will be functional by 2024, the MPIA is committed to disbanding once the Appellate Body is functioning again. It is important to note, China is a member of the MPIA while the United States is not. (Geneva Trade Platform, 2023)

Because there is no process to remove a member from the WTO, one solution is for China to voluntarily withdraw from the WTO as an NME in a market-oriented international organization. They will not withdraw because of the benefits they receive without very many tangible drawbacks, like becoming the second largest economy in the world in part through joining the WTO, so this solution seems unlikely. Another solution is to amend the WTO to allow for the removal of members. This solution is also unlikely to pass because all WTO Members would have to agree to changes, including China. (USTR, 2022, pg. 14) Because WTO rules are ineffective and China is critical to the global economy, change is unlikely to occur, so

the United States and other countries should focus on strengthening their systems to maintain an edge against distortions within the WTO process. (USTR, 2022, pg. 20)

Policy Recommendations for a more Effective U.S. Response to WTO Subversions

The United States needs to change its approach. It was recommended by the Office of the United States Trade Representative (USTR) during the Biden Administration to continue bilateral engagement in areas where success can be made. The United States is trying to enforce the Phase One Agreement it made with China, and if China makes progress on it, it will be a promising sign of its intentions. Second, the United States should focus on its domestic trade tools to ensure a more advantageous economic position to counteract China's disruptions. Finally, the United States should build bonds to work cooperatively inside and outside of the WTO to create solutions for China's NME status and its negative effects. (USTR, 2022, pg. 4)

These recommendations will not be effective if China does not change its approach and display a willingness to be a conducive partner. The USTR is recommending doing more of the same ineffective techniques, so it is unclear what hope the WTO and the United States should have for these techniques to become more effective. Changes in China that would be a promising first step are actions rather than words. The WTO and independent nations have plenty of commitments from China on changes they promised to back, but without any progress towards becoming an MES-based country, China's commitments are hollow techniques to continue to benefit from the WTO without having to abide by any of its rules. Until changes are made, the U.S. will most likely continue to block appointments of candidates to the WTO Appellate Body rendering the international organization's dispute resolution process nonfunctional for all members, including China, as a temporary solution.

Conclusion

In conclusion, the World Trade Organization's ineffectiveness poses significant challenges to maintaining fair trade, as highlighted by a case study of China. The WTO's dispute resolution process provides a framework for addressing issues but has limited ability to enforce its rules. As China's role in the global economy becomes increasingly critical, the United States and other countries need to focus on strengthening their systems to maintain a competitive edge against distortions within the ineffective WTO system. This paper highlights the need to examine the possibilities and limitations of the WTO with powerful economic States as unresponsive members, examines the importance of assessing changes in member's conducive partner behavior, and explores potential solutions to fix the broken system. Overall, it is crucial to prioritize domestic policies that protect against unfair trade practices rather than relying solely on the WTO to address them, unless the necessary, unlikely changes are made by China or within the WTO. The U.S. policy deliberately causing WTO's dispute resolution process to be non-functional, while less than ideal, should be continued until China displays a willingness to work within the WTO's rules rather than take advantage of the system, or until the WTO dispute resolution process becomes more resilient to subversion.

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