Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises

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ABSTRACT

A range of WTO scholars, policy experts, and governmental officials have bought into the notion that the Trump Administration's unilateralism and its assault on China's trade policies and practices could and should be channeled instead into WTO reform efforts. While dealing with China through unilateral tariff hikes and more recently a bilateral phase I agreement, the notion of addressing some concerns through WTO reform has not fallen entirely on a deaf ear in the Administration. Thus, Japan and the EU have been able to engage the Administration in an initiative to revise and add new WTO rules in the areas of subsidies, state enterprises, and forced technology transfer. This article offers a critical assessment of this initiative, arguing that by and large the proposed changes will add incoherence to existing WTO rules and make it more difficult for WTO Members to engage in economic and industrial policies that are needed, for example, to address the economic consequences of the COVID-19 pandemic.

INTRODUCTION

Should the disruptive trade agenda of US President Donald Trump drive efforts to reform the World Trade Organization? In this essay, I argue the answer is no, at least as concerns subsidies and state enterprises. The concerns of the US Administration about China are genuine and legitimate. But as I shall explain, unilateral and bilateral approaches are most suited to addressing adequately many of these concerns; however, they should to the extent possible be made compatible with the WTO’s existing legal framework.

In broad rhetorical statements, Trump and his trade officials have said that the WTO must change radically or die. The US, as is well-known, has paralyzed the operation of the WTO Appellate Body, blocking appointments of new Members, based on a range of grievances, the most substantive being connected to Appellate Body interpretations

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of the law in trade remedies cases. At the same time, the Administration has not laid out anything like a comprehensive blueprint for WTO reform and indeed in its latest critique of the Appellate Body, a more than 100 page study published in February 2020, has suggested that the problems are due not to the existing rules of the WTO, but to the AB's allegedly egregious misapplication of them.1 More recently, a prominent Republican Senator, Josh Hawley, has brought forward a resolution in Congress that the US should withdraw from the WTO.2

A range of WTO scholars, policy experts, and governmental officials have nevertheless bought into the notion that the Trump Administration’s unilateralism and its assault on China’s trade policies and practices could and should be channeled instead into WTO reform efforts.3 While dealing with China through unilateral tariff hikes and more recently a bilateral phase I agreement,4 the notion of addressing some concerns through WTO reform has not fallen entirely on a deaf ear in the Administration. Thus, Japan and the EU have been able to engage the Administration in an initiative to revise and add new WTO rules in the areas of subsidies, state enterprises, and forced technology transfer. The notion here is that through these kinds of policies, China has been able to deploy its unique brand of state capitalism to ‘cheat’ on basic WTO commitments, its firms behaving like ruthless capitalists beyond China’s borders while being protected by a state apparatus that has virtually endless means to shape the terms of economic activity within the country.

While the Japan/EU/US initiative has a specific focus, there have been more general statements about the urgency of WTO reform in the G20 and also by a group of countries brought together by Canada—the ‘Ottawa Group’.5 These statements sometimes touch upon the areas targeted by the Japan/EU/US effort (hereinafter the Trilateral Initiative).

I. THE TRILATERAL PROPOSALS OF JANUARY 14, 2020

The proposals of the trilateral initiative focus on three areas for WTO reform: subsidies; state enterprises; and ‘forced’ technology transfer. On industrial subsidies, the emphasis

1 United States Trade Representative, ‘Report on the Appellate Body of the World Trade Organization’, February 2020. ‘It would be futile to agree to new rules -rules that could, themselves, be undermined by adjudicatory overreach-until there is clear understanding on why the original rules failed to constrain the Appellate Body’ (p. 14.)
2 Doug Palmer, ‘Hawley presses for vote to withdraw US from the WTO’ Politico, 5 July 2020, available at https://www.politico.com/news/2020/05/07/josh-hawley-us-withdraw-wto-243681 (visited 11 May 2020).
3 See for example, Chad Bown and Jennifer Hillman, ‘WTO’ing a Resolution to the China Subsidy Problem’, Peterson Institute for International Economics Working Paper No. 19-17, 22 October 2019, available at https://ssrn.com/abstract=3473890 (visited 11 May 2020).
4 Economic and Trade Agreement Between the United States of America and the People’s Republic of China, Phase 1, 15 January 2020, available at https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text (visited 11 May 2020).
5 The Communique of the Ottawa Ministerial on WTO Reform Group in January 2019 refers to ‘addressing pending and unfinished business, including market distortions caused by subsidies and other instruments’. Available at https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-01-24-davos.aspx?lang=eng (visited 11 May 2020).
is on expanding the list of subsidies prohibited outright, while creating a reversal of the burden of proof to establish negative impacts of the subsidies in other cases.

1. The current list of prohibited subsidies provided for in Article 3.1 of the Agreement on Subsidies and Countervailing Measures (ASCM) is insufficient to tackle market and trade distorting subsidization existing in certain jurisdictions. Therefore, new types of unconditionally prohibited subsidies need to be added to the ASCM. These are the following:
   a. unlimited guarantees;
   b. subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan;
   c. subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity;
   d. certain direct forgiveness of debt.

2. Certain other types of subsidies have such a harmful effect so as to justify a reversal of the burden of proof so that the subsidizing Member must demonstrate that there are no serious negative trade or capacity effects and that there is effective transparency about the subsidy in question. Subsidies having been discussed in this category include, but are not limited to: excessively large subsidies; subsidies that prop up uncompetitive firms and prevent their exit from the market; subsidies creating massive manufacturing capacity, without private commercial participation; and, subsidies that lower input prices domestically in comparison to prices of the same goods when destined for export. If such subsidy is found to exist and the absence of serious negative effect cannot be demonstrated, the subsidizing Member must withdraw the subsidy in question immediately.

A further proposal relates to the concept of ‘serious prejudice’ in the SCM Agreement:

3. The current rules of the ASCM identify in Article 6.3 instances of serious prejudice to the interests of another Member. However, these instances do not refer to situations where the subsidy in question distorts capacity. An additional type of serious prejudice linked to capacity should therefore be added to Article 6.3 ASCM. Further, work will continue on a provision defining the threat of serious prejudice.

In addition, the Trilateral Initiative suggests that there is a need for more guidance in the SCM Agreement as to ‘the determination of the proper benchmark for subsidies consisting of the provision of goods or services or purchase of goods by a government in situations where the domestic market of the subsidizing Member is distorted. Therefore, the ASCM should be amended to describe the circumstances in which domestic prices can be rejected and how a proper benchmark can be established, including the use prices outside of the market of the subsidizing Member.’

With respect to state enterprises, it is proposed that ‘the interpretation of “public body” by the WTO Appellate Body in several reports undermines the effectiveness of WTO subsidy rules. To determine that an entity is a public body, it is not necessary to..."
find that the entity “possesses, exercises or is vested with governmental authority”. The Ministers agreed to continue working on a definition of “public body” on this basis. On forced technology transfers, ‘The Ministers discussed possible elements of core disciplines that aim to prevent forced technology transfer practices of third countries, the need to reach out to and build consensus with other WTO Members on the need to address forced technology transfer issues and their commitment to effective means to stop harmful forced technology transfer policies and practices."

II. THE TRILATERAL AGENDA IN CONTEXT: INDUSTRIAL POLICY, ‘POLICY SPACE’ AND DEVELOPMENT AT THE WTO

Prior to the disruption generated by the election of Donald Trump as US President, an active debate had been going on in WTO policy circles about the suitability of existing WTO rules that constrain Member’s capacity to undertake activist industrial policy. To speak in very general terms, when the WTO rules were written and put into place in 1995, activist industrial policy had gone out of fashion in mainstream economics. Such efforts were regarded as mostly inefficient and ineffective. In the 21st century, a range of economic literature, much of it empirically based, has challenged this general negative view. The Subsidies and Countervailing Measures Agreement (SCM Agreement hereinafter) contained an albeit short list of subsidies that were explicitly carved out from the disciplines, such as some Research and Development and some regional subsidies. This permissive list (nonactionable) expired according to the terms of the SCM Agreement and was never revised or reinstated. In recent years, ‘green’ industrial policy concerns have come into focus; often states have developed schemes to promote renewable energy that link subsidies or price support for renewable generation to use of domestic products. These domestic content requirements are per se incompatible with the SCM Agreement (they are prohibited subsidies) but are also in tension with the basic National Treatment obligation in the GATT, nondiscrimination between domestic and imported like products. Views differ on whether domestic content requirements could be considered a legitimate form of policy intervention in some circumstances. But the SCM Agreement contains no Article XX-like exceptions provision. Thus, it does not permit a case-to-case assessment of whether a particular policy instrument is necessary to achieve a legitimate objective.

III. THE DANGERS OF SHORT-TERMISM

The dramatic gestures in Donald Trump’s trade policy have understandably captured attention, leading even respectable scholars to panicky conclusions that Trump has killed the multilateral trading system, or that the WTO will never be the same. To be
sure the Administration’s wake-up call regarding China has been a loud and disturbing one; but arguably necessary given the geopolitical challenges China’s system poses, not merely the commercial ones. At the same time, the wake-up call may be somewhat too late; despite Xi’s ambitions for global domination and the alarming loss of US jobs to China in the past two decades, China now faces serious internal economic and governance problems (the latter illustrated by its response to the coronavirus outbreak, for example). Whatever China might concede to the US in order to limit the short-term disruption of continuous Trump tariff hikes, its statements so far confirm what one would expect: China will certainly not agree, at least not any time soon, changes to WTO rules targeted at the flexibility it has to use state capitalism to manage its economy and political system, both of which are under considerable pressure. At the same time, the re-election prospects of Donald Trump are uncertain. What is certain is that, due to constitutional term limits, he will be out of office at the latest at the end 2024, and (as far as major policy changes probably what is called a ‘lame duck’ in his final year in office). While Trump has managed to do some deals with China and Japan without the participation of the US Congress, agreeing to reform of the WTO without Congressional consent would be an almost impossible departure from past constitutional and legislative practice.

How would a future (non-Trump) Administration view the initiative to focus reform of WTO subsidies and other industrial policy-related rules on constraining activist industrial policy? In the wake of the coronavirus pandemic, support for the use of fiscal measures to lessen the economic damage to US business and workers has been widespread, resulting in bipartisan support in Congress (and virtual consensus among Democrats) about the need for bailouts. On both the right and the left, lessons are being drawn about the need to ensure domestic manufacturing capacity in essential goods, such as pharmaceuticals and medical equipment, with strong support among progressives for using activist industrial policy to achieve these goals.11 Even an economic conservative President might eventually, given the challenge of climate change adaptation, to say nothing of mitigation, need to resort to economic tools of state direction to manage the emergency. Climate change promises in terms of disruption, to make the Trump Administration seem in comparison like a drop in the bucket. Given the great unlikelihood that any reform of WTO subsidies and other industrial policy-related disciplines can occur in the coming few years, the challenge of climate change would seem a much more justified frame for any reform initiative than the challenge of Trump, or even of China.

Indeed, even if we take the case of China, it is one thing as Trump as claimed (with some real justification) that China uses activist industrial policy tools to impede the kind of market access expected from its joining the WTO and its WTO commitments (including in the Protocol of Accession). But as for example in the case of 5G the US or other Western countries seek to ‘decouple’ from China in part for privacy and national security reasons, they may need to develop rapidly their own substitute technologies,

11 See Robert Howse and Zephyr Teachout, ‘ Sanders vs. Biden (and Trump) on China’, The Nation, 9 March 2020, available at https://www.thenation.com/article/politics/sander-biden-trump-china-coronavirus/ (visited 11 May 2020).
which, depending on the challenge, may well require new targeted industrial policies. Indeed, while in the Trilateral Initiative, the European Commission is seeking to tighten the constraining framework of WTO disciplines on industrial policy, the Commission is floating the idea of a 100 Billion Euro sovereign investment fund that would infuse equity into European tech companies that the Commission picks as ‘winners’ that could eventually be rivals of Google, Apple & Chinese tech giants.

IV. SUBSIDIES

A. Existing WTO law on subsidies and prior reform discussions

In order to assess the direction taken by the Trilateral Initiative, and its friends, to tighten existing disciplines on subsidies in the WTO and reinforce the legal framework in the SCM Agreement, it is useful to review that framework and criticisms of it that have been made over the last decades.

Prior to the Uruguay Round, the multilateral trading system did not contain any enforceable legal disciplines on domestic subsidies. The treatment of such subsidies in the GATT was ambiguous: on the one hand, their legitimacy as tools of public policy was affirmed while their capacity to distort trade was also acknowledged. On the other hand, self-help against such subsidies was permitted in the form of countervailing duties, provided that the subsidies caused ‘material injury’ to domestic industry in the importing country.

The Uruguay Round’s SCM Agreement placed export subsidies and domestic content requirements in the category of ‘prohibited’ measures. The agreement introduced a category of domestic subsidies termed ‘actionable’, which can be challenged in WTO dispute settlement; thus, it provided, for the first time, an explicit multilateral remedy against subsidization. In order for a subsidy to be challenged in WTO dispute settlement as ‘prohibited’ or ‘actionable’, it has to fall within the definition of ‘subsidy’ in Article 1 of the SCM Agreement, which means it must entail a ‘financial contribution’: governmental financial assistance to firms, from cash payments to equity infusions to the provision of goods and services below market prices. It must also confer a ‘benefit’ on an enterprise. And it must be ‘specific,’ either de jure (legally targeted at a particular industry or enterprise or group of industries or enterprises) or de facto (in fact used only or disproportionately by a particular industry, enterprise, or group of industries or enterprises). Article 2.1(b) of the SCM Agreement refines the concept of specificity:

‘Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.’

12 See Dani Rodrik, ‘Green Industrial Policy,’ 30 (3) Oxford Review of Economic Policy 469 (2014), 469–491.
13 Bjarke Smith-Meyer, Lili Bayer, Jakob Hanke and Ryan Heath, ‘European officials draft radical plan to take on Trump and U.S. tech companies,’ Politico, 22 August 2019, available at https://www.politico.com/story/2019/08/22/europe-plan-trump-tech-companies-1472326 (visited 11 May 2020).
In the case of ‘prohibited’ subsidies, for example export subsidies, specificity is presumed and does not have to be proven by the claimant.

If a subsidy meets the above criteria for actionability, a WTO member may either challenge the subsidy in WTO dispute settlement, seeking the remedy of removal of the offending measure, or it may countervail the subsidy. If a member pursues the first option, it must show the existence of certain ‘adverse effects’ on WTO members other than the subsidizing member, including the complaining member. These adverse effects are listed in Article 5 of the SCM Agreement, and include:

- injury to domestic producers of a like product in competition with the imported subsidized product (injury in this sense must exist if countervailing duties are to be imposed);
- nullification or impairment of benefits accruing ‘directly or indirectly’ under the GATT, in particular tariff concessions;
- serious prejudice to the interests of another member.

‘Serious prejudice’ is further defined in Article 6.3. To show ‘serious prejudice,’ the complaining WTO member must show that the effect of the subsidy is as follows:

- to displace imports of a ‘like’ product into the market of the subsidizing member;
- to displace exports of the complaining member to a third-country market;
- to significantly suppress or undercut prices in the same market with respect to like products;
- to create ‘an increase in the world market share of the subsidizing Member in a particular subsidised primary product or commodity [footnote omitted] as compared to the average share it had during the previous period of three years and this increase follows as a consistent trend over a period when subsidies have been granted’.

Where the member instead chooses the option of imposing a countervailing duty, it must comply with the various procedural and substantive criteria in the SCM Agreement that apply in the case of such actions, including the requirement of showing ‘material injury’. These criteria apply also where a member is countervailing a ‘prohibited’ subsidy. The SCM Agreement (Article 8) originally included a defined list of subsidies to be deemed ‘nonactionable’, that is, subsidies immunized from challenge in WTO dispute settlement as well as countervailing duty action, even if they were found to meet the criteria discussed above. This list included certain subsidies for research and development and environmental protection, and to disadvantaged regions. However, this provision for deemed nonactionability applied provisionally, for only the first 5 years that the SCM Agreement was in force. Since its effective expiration, WTO members have been unable to agree to either continue with the list as it now stands or create a different list. Therefore, today no subsidy programs are explicitly protected as nonactionable.
B. Prior criticisms of the WTO legal framework on subsidies and suggested reforms

Subsidies are not viewed by economists as intrinsically trade-distorting or welfare-reducing, and many are skeptical of any approach that attempts to use general rules to distinguish between subsidies that are harmful in this sense from others that may in fact enhance welfare through addressing positive externalities or spillovers from private economic behavior that would be otherwise be under-produced—the distinctions and criteria in the SCM Agreement have to my knowledge ever been defended by an outstanding trade economist as economically rational. A key difficulty is noted by Sykes: ‘All governments engage in expenditures that affect production costs for private firms. Public education, highway networks, public works projects and so on can enhance the competitiveness of domestic firms. Likewise, governments engage in numerous activities that raise production costs in the private sector, including a wide range of tax and regulatory measures. From the myriad ways that governments benefit and burden their domestic firms, how can one identify the activities that constitute undesirable ‘subsidies’?14 Sykes further notes, along these lines, ‘Firms that receive benefits under a particular ‘subsidy’ program in country X may bear tax or regulatory costs that competitors in country need not bear. Thus even if country Y competitors do not receive comparable ‘subsidies’, lower taxes or weaker regulations may actually afford them a net competitive advantage over their ‘subsidized’ competitors in country X’.15 In many cases, subsidies serve to produce ‘a more efficient resource allocation, that is, resource allocation more consonant with the actual production possibilities and consumer preferences than that yielded by wholly private transactions’.16 The task of evaluating whether subsidies contribute to or derogate from efficient resource allocation is daunting.

In a seminal 2006 economic analysis of the WTO subsidies rules in the American Economic Review, Bagwell and Staiger17 suggest that while no disciplines on subsidies would lead to fewer concessions on tariffs, as countries would be reluctant to bind tariffs if trading partners were free to cheat on concessions through targeted subsidies reducing the costs of competing domestic firms, too restrictive subsidies rules will also inhibit tariff concessions. According to Bagwell and Staiger, ‘if governments consider domestic subsidies to be a vital policy instrument, they may be leery of negotiating tariff commitments under the subsidy rules of the WTO, since such commitments may increase the likelihood that their subsidies will be the target of an SCM challenge. To understand this effect, observe that an SCM challenge of the home subsidy is worth less to the foreign government if the home government has not bound its tariff, because the home

14 Alan O. Sykes, ‘The Limited Economic Case for Subsidies Regulation’, E15 Task Force on Rethinking International Subsidies Disciplines, Geneva, 2015, 4, available at https://www.ictsd.org/sites/default/files/research/E15_Subsidies_Sykes_final.pdf (visited 11 May 2020).
15 Ibid.
16 Warren F. Schwartz and Eugene W. Harper Jr., ‘The Regulation of Subsidies Affecting International Trade’, 70 (5) Michigan Law Review 831 (1972), at 844.
17 Kyle Bagwell and Robert W. Staiger, ‘Will International Rules on Subsidies Disrupt the World Trading System?’, 96 (3) American Economic Review 877 (2006).
government is then free to adjust its tariff in response to the loss of the subsidy.'18 In the Bagwell and Staiger analysis the GATT approach of permitting countervailing and the possibility of a non-violation nullification and impairment (NVNI) complaint gives countries protection against use of subsidies for cheating on market access concessions while not creating undue uncertainty about whether a subsidy will be found illegal (as with the WTO rules, which may actually deter tariff concessions for the reasons given). In the case of export subsidies, Bagwell and Staiger (in earlier work) observe that a group of countries could agree not to engage in competitive subsidization and benefit from the resulting fiscal savings but they note this would be the equivalent of a price cartel, resulting in higher prices for third country consumers. Thus, the aggregate global welfare effects of such an agreement are ambiguous.

One approach to addressing some of these conceptual difficulties is that outlined by Horlick and Clarke:19 attempting to find as much consensus as possible on a list of subsidies that address public goods or otherwise have desirable qualities from the perspective of domestic and/or global welfare, which would be presumptively legal (the presumption being rebuttal in the case of discriminatory or arbitrary application of the subsidy). This would in effect revive the idea of nonactionable subsidies, which expired in the SCM Agreement when the original Uruguay Round list was not renewed. Along similar lines, there could also be a negative list of subsidies that are agreed to have negative consequences (such as fossil fuel subsidies, which aggravate the global crisis of climate change), and which would be progressively eliminated and/or prohibited (here the negotiations on fisheries subsidies, not yet successful but in an advanced stage, may serve as an example). Where subsidies are neither presumptively legal nor on a prohibited list, the case for either a multilateral or unilateral remedy would hinge on a clear demonstration of specific impacts on competitive opportunities, implying tighter standards for harm than the existing notion of ‘adverse effects’. Here, revision of the existing legal norms could be informed by the analysis of scholars such as Bagwell, Staiger, and Sykes,20 who emphasize, as noted above, that the strongest justification for subsidies disciplines is where subsidies clearly undermine the kinds of competitive opportunities reasonably expected from market access commitments, such as tariff bindings.

C. A normative framework for assessing domestic policy measures, including subsidies that have trade impacts

Given the many critiques of the existing legal framework for subsidies disciplines in the SCM Agreement, and the broader open-ended debate about industrial policy and policy space, as well as the China question, what is the appropriate point of departure for assessing the proposals of the Trilateral Initiative?

So far, the statements emerging from the Trilateral Initiative lack any real normative grounding for its proposals. Apart from free market or neoliberal rhetoric, which tends

18 Ibid., at 891.
19 Gary Horlick and Peggy Clarke, ‘Rethinking Subsidies Disciplines for the Future’, World Economic Forum, Geneva, January 2016.
20 Supra n. 14 and 17.
to assume markets are efficient unless interfered with by government, the references in the Initiative to ‘market distortion’ are question-begging. Whether a given subsidy introduces distortions into a market, or corrects market failures, or pursues some nonmarket goal such as social equity, is a difficult multifaceted question requiring case by case analysis—assuming the right conceptual tools are available to do such analysis. As Sykes explains: ‘Subsidies may create negative international externalities and distort global resource allocation. But they may also represent sensible policy responses to a range of market failures or play a useful role in addressing income inequality. The task of distinguishing the good from the bad is extremely complex as a practical matter. The [existing WTO] rules that purport to distinguish permissible from permissible subsidies . . . rely on arbitrary criteria, distinctions that elevate form over substance, and on the wrong analysis of government measures that inevitably masks the full effects of government activity on business enterprises’.21

Instead of reinforcing and perhaps compounding the incoherence just described, through tightening the existing rules, one should arguably start by a rigorous conceptual re-examination of how different kinds of government policies affect trade and shape global markets.

I propose the approach of the recent US-China Policy Working Group.22 The Working Group, which includes a number of eminent trade economists, both from the English-speaking world and China, starts from the proposition that in general domestic policy choices that are not discriminatory should not be banned or disciplined under WTO rules: ‘Individual nations must have the freedom (“policy space”) to design the policies and institutional arrangements that best fit their circumstances and collective preferences. This includes the right to make what other nations may consider policy mistakes.’ On the other hand, individual nations must also acknowledge how their choices may entail adverse implications for the well-being of other nations.

It is neither economically sensible nor politically sustainable to preclude all such adverse implications by using global rules or bargaining pressures that are perceived as intruding on a country’s sovereign right to make its own domestic policy choices. At the

21 Alan Sykes, ‘The Questionable Case for Subsidies Regulation: A Comparative Perspective’, 2(2) Journal of Legal Analysis (2010), 473–523.
22 US-China Trade Policy Working Group, Joint Statement, ‘US-China Trade Relations: A Way Forward’, October 27, 2019. The Members of the Group are: Jeffrey Lehman, Dani Rodrik, Yang Yao, Meredith Crowley, Rob Howse, Jiandong Ju, Feng Lu, Justin Yifu Lin, Eric Maskin, and Robert Staiger. A much larger group has signed the Joint Statement, including Philippe Aghion, Alan Deardorff, Gene Grossman, Gordon Hanson, Michael Spence and Joseph Stiglitz.
same time, allowing an individual nation absolute free rein, no matter what the impact on trade or on third countries, would allow it to impose unfair extraterritorial costs onto other nations.

The Working Group approach would prioritize policy space for the US and China, enlarging it perhaps relative to what prevails under the status quo (whether in spirit or the law of the WTO regime). But it also draws clear red lines around ‘beggar thy neighbor’ policies. This approach preserves the bulk of the gains from trade between the two economies, without presuming convergence in economic models. It is an arrangement that is intermediate between the ‘deep integration’ and ‘decoupling’ approaches we mentioned above. It is also generalizable multilaterally and is consistent with a multilateral approach that produces benefits to third nations. To operationalize our approach, we distinguish four categories (‘Buckets’) of policies.

‘Bucket 1 (The “Prohibited” Bucket): In this Bucket, Country A’s actions or policies are likely to create significant distortions in global markets and can be presumed to entail global economic losses. It is appropriate that international norms prohibit actions or policies in this Bucket. ‘Beggar thy neighbor’ policies are canonical examples that fall under this Bucket. For example, country A may impose export or import restrictions with the express purpose of reaping monopoly pricing gains on world markets undermining other countries’ competitiveness. Or country A may engage in discriminatory data policies that promote predatory pricing or rent extraction by national digital companies on foreign markets.

Bucket 2 (The ‘Bilateral Discussions and Adjustments’ Bucket): In this Bucket, Country A’s policies cause harm to country B without necessarily taking on a beggar-thy-neighbor character or entailing global economic losses. We put in this Bucket those policies for which a mutually beneficial bargain can be worked out between the two nations that entails the removal of the policies in question. This will typically occur when Country B’s perceived losses from the policy exceed the perceived gains to Country A from sticking with the policies. For example, Country A may engage in industrial policies that Country B’s producers consider unfair and harmful; Country B may prevail on Country A to remove or scale back these policies by offering an alternative economic benefit (e.g. a reduction of Country B’s tariffs).

Bucket 3 (The ‘Domestic Adjustments’ Bucket): In this Bucket, a mutually beneficial bargain cannot be negotiated—perhaps because Country A’s policies bring perceived gains to Country A that exceed the perceived losses by Country B, so that Country B is unable to offer Country A adequate exchange for removing or scaling back the policies in question. In this case, Country A keeps its policies and Country B is allowed

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23 Beggar-thy-neighbor policies are defined as ‘policies that seek to increase domestic economic welfare at the expense of other countries’ welfare’ (emphasis added). See Kenneth A. Reinert, Ramkishen S. Rajan, Amy Joceelyn Glass, and Lewis S. Davis (eds), Princeton Encyclopedia of the World Economy (Princeton: Princeton UP, 2009). Unlike other domestic policies that may entail negative repercussions across the border, they create domestic gains only to the extent that other nations lose. Further, they are globally negative-sum, because they create market inefficiencies (e.g. noncompetitive conduct). Our proposed Bucket 1 would contain policies that are adopted with this express beggar-thy-neighbor purpose in mind. Our proposed Bucket 2 would contain policies that may have beggar-thy-neighbor effects but where those effects are not the first-order motivation for the policy.
to undertake well-calibrated domestic policy adjustments that demonstrably aim to reduce or minimize harm to its domestic economy. For example, Country B may implement regulations on domestic firms to curtail the leakage of sensitive technological material to foreign firms. Or Country B may raise trade barriers to protect communities adversely affected by exports from Country A. What is essential here is that the ‘remedy’ employed by Country B must be proportionate and well-targeted at the domestic objective (i.e. it is not a threat targeting Country A or a raising of the stakes in a trade war).

Bucket 4 (The ‘Multilateral Governance’ Bucket): In this Bucket, Country A’s actions or policies (with or without any response from Country B) are likely to affect commerce with Country B in a way that is likely to cause spillover damage to the economy of Country C. It is appropriate that international norms and governance procedures be applied to manage such situations. For example, Country A may provide discriminatory trade benefits to Country B, such as by agreeing to reduce tariffs on one product from Country B without reducing tariffs on the same product from Country C.’

As noted, ‘Buckets 2 and 3 are ... designed to tackle cases where Country A’s policies have adverse implications for Country B, but the harm is the incidental consequence of, and not the primary motivation for, those policies. These are instances in which Country A might plausibly (and honestly) say, ‘we wish our policies did not have those negative consequences for you, but we need them for the well-being of our own economy/society . . .’

One advantage of this framework is that it offers a structure whereby the US and China can, together, make choices about how to rebalance their trading relationship in the future.

**D. Assessing the trilateral proposals on subsidies**

A central pillar of the trilateral proposals on subsidies is to put state aids that are associated with bailouts or other continuing support to failing firms into the ‘prohibited’ category: ‘unlimited guarantees; subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan; subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity; certain direct forgiveness of debt.’ Under the Working Group approach, it is fairly obvious that none of these kinds of subsidies would fall into Bucket 1, as policies that have an intrinsic beggar-thy-neighbor character, and indeed the purpose of distorting trade. For example, the federal bailout of the US auto industry in 2009, as private credit markets dried up, was aimed at least in part at preventing the financial crisis triggering an even worse economic crisis, by taking down a key US industry. While, if the US has not done the bailout, and the Big Three had collapsed, certainly this would have increased the market share of non-US competitors, the global impacts if the US had not proceeded with the bailout would have been complex: because the automakers operate globalized production chains, allowing them to fail might actually have imposed net costs on US trading partners. In any case, this is far from a situation where global economic losses can be presumed.
It might be objected that the US auto bailout is not a good example, because the Tri-lateral proposals only prohibit subsidies where there is no ‘credible restructuring plan’. But what is a credible restructuring plan? At the time of the decision concerning the auto bailout there was intense debate, and considerable uncertainty about whether the restructuring plan would work.24 Consider the US strident critiques of the Appellate Body as well as many panels in subsidies and anti-dumping cases; in many instances the US may be wrong that the Appellate Body or the panels departed from clear literal understandings of rules, even if right that a more deferential approach to domestic agencies is optimal. But do we really think that, the legitimacy of the dispute settlement organs having been put in question, it makes sense to give them the role of making a judgment on something as contentious as whether a restructuring plan in a bailout is ‘credible’?

It should always be remembered that dispute settlement in the WTO system can only result in one of two outcomes: either a finding of violation or that a violation of WTO rules has not occurred (apart from the almost nonexistent NVNI cases). In the EU State Aid regime, by contrast, while measures such as ‘unconditional guarantees’ may be presumptively illegal25 often where a Member State needs to undertake an industrial policy measure such as a bailout or refinancing of a state enterprise, the result is a negotiated solution that takes account of the legitimate social aims of the intervention while at the same time considering the possible negative effects on competition, and on other Member States. This is more akin, in practice, to the bilateral adjustment or multilateral cooperation approaches in Buckets 3 and 4 of our Working Group, than the prohibitive rules model of Bucket 1. The WTO simply lacks an institutional context that exists in the EU for negotiated solutions on industrial policy interventions.

This goes to another pillar of the Trilateral proposals, the amendment of the SCM Agreement to include additional or more specific rules ‘for the determination of the proper benchmark for subsidies consisting of the provision of goods or services or purchase of goods by a government in situations where the domestic market of the subsidizing Member is distorted.’ Such benchmarks will always be unstable in their dependency on notions such as market definition and what is an ‘undistorted’ or sufficiently ‘undistorted’ market that can provide an adequate comparator. It was decided at the Cancun Ministerial prior to the launch of the Doha Round to eliminate the agenda to develop a full-blown anti-trust or competition policy regime in the WTO— which is a bedrock position of developing countries in general and I would add has often been viewed skeptically in the US as well. Yet, without the expertise of an anti-trust institution, there are serious methodological hurdles to WTO dispute settlement organs developing their own approaches to these issues and legitimacy concerns about imposing those approaches through the WTO subsidies rules, which constrain both subsidies and unilateral countervailing duties. Further, the elusiveness to date of a WTO

24 See Knowledge Wharton, ‘The Auto Bailout 10 Years Later: Was It the Right Call?’. 12 September 2018, available at https://knowledge.wharton.upenn.edu/article/auto-bailout-ten-years-later-right-call/ (visited 11 May 2020).

25 See for example, Case C-438/16, European Commission v. France and IFP Energies Nouvelles, (2018).
anti-trust code reflects differences in approach and philosophy of internal anti-trust regimes and the authorities that enforce them, including between the US and the EU for example.\footnote{26} How could the WTO adjudicator, the absence of a multilateral agreement on anti-trust principles, legitimately choose between these different approaches in deciding a given case. This would enter into highly contested policy matters.

Finally, the Trilateral proposals would in the case of some subsidies not prohibited outright, such as ‘very large’ subsidies or subsidies that ‘prop up’ uncompetitive businesses, nevertheless reverse the burden of proof with regard to establishing negative trade effects, such that the subsidizing Member would be required to prove that there is no negative effect. It is very unclear how a single WTO Member could ever have the data available to establish that its subsidies have no negative trade effects. Requiring a proof with a high degree of certainty that there are no serious negative trade effects appears in practice to come close to prohibiting outright these subsidies. The idea that, because a subsidy is ‘very large’, serious negative trade effects should be presumed also just seems wrong, i.e. without an economic foundation. As for the concept of subsidies that ‘prop up’ uncompetitive businesses, here again concepts are introduced that seem ill-suited to elaboration and application in rules-based dispute settlement, and imply some implicit agreed competition policy norms, which are absent from WTO law and institutions.

V. STATE ENTERPRISES

As is indicated by the Trilateral statement of January 14, 2020, the concern about state enterprises derives from an interpretation of ‘public body’ by the Appellate Body that has been much criticized by the United States. Article 1.1 clearly distinguishes the concept of ‘government’ from that of a ‘public body.’ This reflects the fact that subsidies may well be granted by entities connected to or influenced by government but that do not have the formal status of governmental agencies (such as state-owned or controlled financial institutions). Nevertheless, in the \textit{US-Countervailing Measures (China)}\footnote{27} and in the \textit{US-AD/CVD (China)}\footnote{28} cases, the AB held that the concept of public body should be understood in light of the general rules of customary international law on state responsibility as codified in the ILC Articles on State Responsibility.\footnote{29} These rules determine whether conduct of a particular actor can be attributable to the \textit{state}. Thus the AB opined that state ownership or control are not in themselves sufficient to make a determination that an entity is a public body for purposes of Article 1.1; instead, the AB appeared to put considerable focus on whether the body was exercising regulatory

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26 See Merit E. Janow and Cynthia R. Lewis, ‘International Antitrust and the Global Economy: Perspectives on the Final Report and Recommendations of the International Competition Policy Advisor Committee to the Attorney General and the Assistant Attorney General for Antitrust’, 24 (1) Journal of World Competition 3 (2001).
27 Appellate Body Report, United States—Countervailing Duty Measures on Certain Products from China, WT/DS437/AB/R, adopted 16 January 2015.
28 Appellate Body Report, United States—Countervailing and Anti-Dumping Measures on Certain Products from China, WT/DS449/AB/R and Corr.1, adopted 22 July 2014.
29 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, United Nations, International Law Commission, 2001.
authority (police power over other actors) in the granting of a subsidy—as opposed to merely following an industrial policy priority of the government that owns or controls it, for instance.30

The AB interpretation of ‘public body’ is wrong, in that it ignores the lex specialis character of the provision in question, clearly going beyond the rules of attribution in the ILC Articles of State Responsibility. In any case, even absent a consideration of lex specialis, the AB might have better addressed the relationship between the concept of “public body” and the ILC Articles, for example more carefully examining how the notion of ‘public body’ works with the various kinds of attribution to the state indicated in the ILC Articles—rather than jumping to Article 5 of the ILC Articles that deals with situations where nonstate actors are exercising governmental authority. But before concluding that new WTO rules are needed to address state enterprises, we should place the question of ‘public body’ in a broader context—the overall treatment of state enterprises in the WTO.

Article XVII of the GATT requires that state enterprises make purchases and sales based on commercial considerations, and not engage in conduct that would be discriminatory if it were done by the state itself. Article XVII refers to any State enterprise established or maintained by a WTO Member and notably does not define State enterprise or restrict the concept in any way to enterprises that possess governmental or regulatory powers. Moreover, these disciplines include situations where the state has granted to a private entity some privilege or advantage, either de jure or de facto. There is no requirement of proof that the noncommercial or discriminatory conduct in question have been directed or authorized by government. It is reasonable to assume that where an enterprise associated with the state, is engaging in nonmarket conduct, the enterprise is doing so on account of its connection to government. This conduct is rightly treated as if it were the conduct of an organ of the state. However, the conduct may be justifiable under one of the GATT Article XX justifications if connected to legitimate public policy objectives, and if it does not constitute arbitrary or unjustifiable discrimination, or under the National Security exception, Article XXI.

The GATT was negotiated at a time when State Enterprises were a significant part of the economy in many countries, including the Western European countries. That these countries used enterprises not formally part of the state for direction and planning of the economy was assumed; moreover, at the time the GATT was being negotiated it was still unclear whether or not the Eastern countries would join. A basic presumption was that state enterprises existed primarily as a tool or instrument by which the government could guide or direct the economy. When the WTO rules on subsidies were negotiated, state enterprises had become more anomalous outside the East bloc, and certain developing countries. Western governments often attempted to commercialize these enterprises (rather than privatizing them outright), attempting to improve their efficiency through introducing market incentives, or profit-making mandates. Yet, indirectly, some sort of policy consideration was usually behind the decision not to privatize outright. In other words, governments wanted to gain the efficiency
advantage from introducing market incentives to the management and performance of these companies, while retaining some degree of public policy guidance.

The concept of ‘public body’ captures the ambiguous status of such reformed public enterprises where government retains means of guidance or influence (for example, through appointment of board members and senior management) but the company now has the form of a commercial enterprise in other respects. In all such cases, a presumption of governmental involvement or influence is warranted where the enterprise is acting in a manner that deviates from the normal market conduct of a competing private firm.

A more adequate appreciation by the Appellate Body of the existing approach to state enterprises under WTO law would give domestic authorities a greater margin of flexibility to countervail subsidies where the financial contribution does not come directly from the state, but is under some form (often nontransparent) of government influence. But the search for a new formula or phrase that would more adequately capture the role of state enterprises as instrumentalities direct but also indirect of government policy is likely futile; in leaving the concept open and thus broad, the drafters of the original GATT arguably displayed considerable wisdom. Moreover, it is not clear that language different from that of ‘public body’ or that in GATT Article XVII would significantly enhance discipline of governmental influence over market decisions, the primary substantive policy concern that underlies the entire public body controversy. As Wu explains, while China uses state enterprises as instrumentalities of policy it has the ability through various governmental and Communist Party channels to shape market behavior, even that of firms that are ostensibly entirely ‘private’.

The Trilateral proposal on state enterprises risks creating a harmful focus on state enterprises per se. On the one hand, China’s state and Communist Party are perfectly capable, through formal or informal means, of commandeering any private enterprise to achieve the goals of state and party. But the experience with privatization over the last decades does not justify establishing some kind of presumption against state enterprise or state ownership in WTO rules. It makes sense that the WTO should defer to decisions of domestic agencies that presume, in the case of China, that certain conduct has been influenced or guided by the state, even in the case of enterprises that are not formally charged with exercising governmental authority. On the other hand, many WTO Members still, or again, use public enterprise as a legitimate tool of public policy. The exceptionalism of China should not drive a general presumption, or tainting, of state ownership or control of businesses in the WTO, directed at more than 160 states who are Members. The challenge of economic recovery in the wake of the coronavirus pandemic will if anything entail the state having to take an even greater role as an investor; the state sector is likely to be crucial in maintaining jobs and restoring employment as the pandemic-continued economic crisis continues.

31 Mark Wu, ‘The “China Inc” Challenge to Global Trade Governance,’ 57 (2) Harvard International Law Journal 261 (2016), 261–324.
32 See Robert Howse, ‘Accountability in Public and Private Enterprise: The Uneasy Case for Privatization’ in John Allan (ed), Public Enterprise in an Era of Change (Regina: University of Regina Press, 1998).
VI. ‘FORCED’ TECHNOLOGY TRANSFER

In the industrial policy and economic development literature, technology transfer is widely regarded as an important and positive tool of development. As part of the Doha development agenda, a working group on technology transfer was established in the WTO: an essential premise of the working group’s activity was the view of many developing countries that existing WTO provisions are not sufficiently facilitative of technology transfer. In particular, the requirement to protect intellectual property rights in TRIPs may be a barrier to technology transfer that would be advantageous for developing countries. The notion that ‘forced’ technology transfer should be disciplined for prohibited under WTO appears at first glance to suggest that the balance in the WTO Agreements and particularly TRIPs should be shifted further in the direction of the developed nations that have the resources to undertake technological innovation and thus further away from that of developing countries who need access to this knowhow to boost economic growth. Is there any possible normative justification for such a tilt? Here I revert to the ‘buckets’ approach of our US China Working Group. There is certainly no reason to put technology transfer requirements (e.g. as a condition of accepting foreign investment or for investment incentives) in Bucket 1. There is an extensive literature evoking legitimate domestic policy goals as possible motivations for such strictures. The logic is that this would be a case where the US either has a good reason to compensate China for ceasing the practice or (Bucket 3) take unilateral measures against its negative impacts, rather than to have a prohibitive WTO rule that would shut down justified technology transfer requirements.

For the US, forced technology transfer is primarily a matter of US firms being required as a condition of mergers, joint ventures and other forms of close cooperation with Chinese companies, to allow the Chinese entities to various forms of technological know-how. The Chinese firms are often private enterprises, and no formal legal requirement need exists in China that they demand these conditions from US partners. However, the US has a legitimate suspicion that Chinese firms may act in concert with the state and/or the Communist Party to pass on this know-how to governmental agencies in ways adverse to US security interests.

In the Phase I US-China Trade Agreement, the parties have crafted a complex regime for dealing with this.

‘Article 2.2: Market Access
Neither Party shall require or pressure persons of the other Party to transfer technology to its persons in relation to acquisitions, joint ventures, or other investment transactions.

Article 2.3: Administrative and Licensing Requirements and Processes.
1. Neither Party shall adopt or maintain administrative and licensing requirements and processes that require or pressure technology transfer from persons of the other Party to its persons.

33 South Centre, ‘The Agenda for Transfer of Technology: the Working Group of the WTO on Trade and the Transfer of Technology’, SC/TADP/TA/1P/1, 2005, Geneva, available at https://www.southcentre.int/wp-content/uploads/2013/07/AN_IP1_Working-Group-of-WTO-on-Trade-and-Transfer-Technology_EN.pdf (visited 11 May 2020).
2. Neither Party shall require or pressure, formally or informally, persons of the other Party to transfer technology to its persons as a condition for, inter alia:
   (a) approving any administrative or licensing requirements;
   (b) operating in the jurisdiction of the Party or otherwise having access to the Party’s market; or
   (c) receiving or continuing to receive any advantages conferred by the Party.
3. Neither Party shall require or pressure, formally or informally, persons of the other Party to use or favor technology that is owned by or licensed to its persons as a condition for, inter alia:
   (a) approving any administrative or licensing requirements;
   (b) operating in the jurisdiction of the Party, or otherwise having access to the Party’s market; or
   (c) receiving or continuing to receive any advantages conferred by the Party.
4. The Parties shall make their administrative and licensing requirements and processes transparent.
5. The Parties shall not require or pressure foreign persons to disclose sensitive technical information not necessary to show conformity with the relevant administrative or regulatory requirements.

Clearly, the problem addressed is largely informal ‘pressure.’ But that kind of issue about technology transfer is inherently unsuited to be transferred to WTO rules. Should panels and the Appellate Body be really addressing the question of what is undue ‘pressure’ in dealings between companies as opposed to normal voluntary wrangling about the terms of a ‘deal’? As opposed to the kind of agreement represented by the Phase I accord, which anticipates future adjustment including through unilateral measures as a last resort, it is difficult to see how a multilateral universal rules-based approach could legitimately capture the distinction between ‘pressure’ on the one hand and voluntary bargaining about the terms and conditions of a corporate control or similar transaction.

But there is a more fundamental problem of principles. Even explicit regulatory or legislative technology transfer requirements are generally investment, not trade, measures. They were not included in TRIPs or TRIMs disciplines, and making general rules against the explicit technology transfer conditionalities would likely imply the opening of WTO negotiations on substantive prohibitive rules on the regulation of foreign direct investment—another topic that the resistance of developing notions has led to being excluded from the Doha Round flexibilities. Indeed, general WTO prohibitions on ‘forced’ technology transfer could undermine existing which are crucial to the balance in the TRIPS Agreement; for example, Article 40 allows certain kind of licensing to control anti-competitive practices.

VII. CONCLUSION
The coronavirus pandemic and its economic and social fallout illustrate the crucial role of the state in crisis management. The United States and the EU have hardly been exceptions, and fiscal measures—subsidies—have been a crucial dimension in the response. This would be an apt time to suspend the Trilateral Initiative to restrict further WTO Members’ flexibility to use subsidies and state enterprise as tools of public policy. Instead, the WTO rules need to be reexamined in light of concerns about their
insufficient flexibility for public policy and taking into account the views of economists such as those expressed in the US China Trade Policy Working Group. Under the GATT explicit trade measures, such as export restrictions on essential medical equipment for instance can be justified under exceptions provisions, including the general exceptions in Article XX, which pertain to a range of legitimate public policy objectives, including public morals and human life and health, as well as the conservation of natural resources. No such exception exists in the subsidies code of the WTO. It is time to rethink this gap and how to address it.

At the same time, this does not mean that the WTO should simply be indifferent to the trade impacts of subsidies. But more restrictive rules enforced by adjudicators without the support of a WTO anti-trust code are not the direction to go in. Instead, policy dialogue and a focus on negotiated reduction or elimination of specific categories of ‘bad’ subsidies (such as fossil fuel subsidies with negative climate change externalities) are a better direction to consider. In the case of pandemic-related subsidies measures, while affirming the flexibility of states to use fiscal policy tools to address the crisis, exchange of information about different WTO Members’ programmes (including business bailouts), and a dialogue about trade impacts of specific policies interventions may well allow for future adjustment of policies to avoid beggar-thy-neighbor trade effects, in which all WTO Members have an interest to avoid. This kind of policy dialogue approach is already bearing some fruit in terms of addressing export restrictions of essential medical equipment. In this respect, the notification and transparency aspects of the Trilateral proposals are, arguably, the most sound ones and most pertinent to our current situation.