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## WTO REFORM AND CHINA: DEFINING OR DEFILING THE MULTILATERAL TRADING SYSTEM?\*

*Henry Gao*

**Abstract:** *In November 2001, China finally acceded to the World Trade Organization, in a deal described by then WTO Director-General Mike Moore as a “defining moment in the history of the multilateral trading system.” In recent years, however, China has been accused of defiling the letter and spirit of WTO rules with its unique economic model. Believing that existing WTO rules are inadequate in dealing with the China challenge, key WTO Members have launched a new round of WTO reform, which is the subject of this article.*

*Contrary to popular belief, most of the problems concerning China are not new but reflect long-standing issues in China’s economic system which predate the WTO accession. Thus, the article starts by tracing China’s long and storied history with the GATT and WTO, highlighting the key commitments designed to alleviate the perceived problems with China’s unique economic system. The next part discusses China’s limited role in the ill-fated Doha Round, the first and only negotiating round ever officially launched by the WTO. This is followed by a comprehensive and in-depth analysis of the main issues in the current discussions on WTO reform, a process that started at the last WTO Ministerial Conference held in December 2017. In particular, the paper examines in detail the efforts by some major players to turn it into a so-called “China Round,” and China’s reactions. The paper concludes with a review of the failed attempt of the United States to address some of these issues through the trade war, and suggests that multilateral negotiation is the best way forward.*

**Key words:** *China, WTO, trade, reform, state capitalism.*

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## INTRODUCTION

Twenty-five years after its establishment, the World Trade Organization (“WTO”) is at a critical juncture: its first and only negotiating round is effectively dead, two of its largest Members are engaged in a no-holds-barred trade war, and its crown jewel—the Appellate Body—is in paralysis. The silver lining emerging amidst the gathering clouds, however, is a growing consensus among the WTO Membership for the exigency of WTO reform. Another consensus that has emerged is the importance of China to WTO reform, not only because it is a key member as the largest trader in the world, but also because, as some Members believe, there is an inherent tension between the WTO—an organization built upon market economy principles—and China, the biggest non-market economy in the world.

This paper will provide a comprehensive review of the main issues in WTO reform concerning China, starting with an overview of China’s WTO accession process, followed by a brief summary of the Doha Round negotiations, including the role China has played therein. This will be followed by a close examination of the proposals from the main players, including the United States, the European Union, and China. The Article will conclude with some policy suggestions on the best way forward.

## I. LONG MARCH: GATT, CHINA, AND WTO ACCESSION

*A. China and the GATT*

As one of the victorious Allied Powers, the Republic of China (“ROC”) participated in the work of the Preparatory Committee for the UN Conference on Trade and Employment from 1946 to 1947, which tried to establish the ITO.<sup>1</sup> When

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<sup>1</sup> For an overview of China’s participation in the early dates of the GATT, see Liu Xiangping, *Jin Wensi Yi Guanmao Zongxieding*, 5 *Ershiyi Shiji* (Wanglou Ban) 2–6 (2002), <http://www.cuhk.edu.hk/ics/21c/media/online/0204056.pdf>; see also Henry Gao, *China’s Participation in the WTO: A Lawyer’s Perspective*, 11 *SING. Y.B. OF INT’L L.* 41 (2007); SHI GUANGSHENG (ED), *ZHONGGUO JIARU SHIJI MAOYI ZUZH*

the ITO failed to come into being due to the unfavourable political environment in the United States, China joined 22 other countries in signing the Protocol of Provisional Application of the General Agreement on Tariffs and Trade (“GATT 1947”) and became one of its founding contracting parties on April 21, 1948.<sup>2</sup>

A year later, however, the Republican government lost the Civil War against the Communist Party of China (“CPC”) and was forced to retreat to the outlying island of Taiwan. The CPC took control of the bulk of the Chinese mainland and established a rival government—the People’s Republic of China (“PRC”)—on October 1, 1949. While the new government never officially announced its intentions toward the GATT,<sup>3</sup> the establishment of a trade organization of socialist countries—the Council for Mutual Economic Assistance—in 1949<sup>4</sup> made it unlikely that the PRC was keen to participate in the GATT, a “capitalist club” boycotted by the USSR since the very beginning.<sup>5</sup>

This resulted in a rather bizarre scenario, as the exiled Republican government could not honor its tariff reduction obligations for the goods shipped to the mainland while the

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ZHISHI DUBEN (SI): ZHONGGUO JIARU SHIJIE MAOYI ZUZHI TANPAN LICHENG [READER ON CHINA’S ACCESSION TO THE WORLD TRADE ORGANIZATION (FOUR): NEGOTIATION HISTORY OF CHINA’S ACCESSION TO THE WORLD TRADE ORGANIZATION] 12–14 (2011).

<sup>2</sup> *Id.* at 7; see also General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (listing “the Republic of China” as one of the founding contracting parties in the preamble).

<sup>3</sup> According to Article 55 of the Common Program of the Chinese People’s Political Consultative Conference of 1949, which served as China’s interim constitution until 1954,

“with respect to the treaties and agreements made by the Kuomintang government and foreign governments, the Central People’s Government of the Peoples’ Republic of China shall conduct examination and may either recognize, repeal, revise or renegotiate them according to their respective contents.” Several treaties were recognised or repealed according to this provision, but the Chinese government never explicitly stated how it would deal with the GATT. See Gao, *supra* note 1, at 42.

<sup>4</sup> While China never joined the CMEA for ideological and historical reasons, it has maintained economic exchange with CMEA countries. See Jude Howell, *Foreign Trade Reform and Relations with International Economic Institutions*, in THE CHINA HANDBOOK 173, 175 (Christopher Hudson ed., 2013); RAPHAEL SHEN, CHINA’S ECONOMIC REFORM: AN EXPERIMENT IN PRAGMATIC SOCIALISM 97 (2000).

<sup>5</sup> See Richard N. Gardner, STERLING-DOLLAR DIPLOMACY: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER xxii (1969).

CPC could enjoy the preferential tariffs for all goods originating from the mainland.<sup>6</sup> Upon discovering this, the United States threatened the ROC government with termination of Most Favored Nation (“MFN”) treatment,<sup>7</sup> and the latter responded by formally withdrawing from the GATT, which took effect on May 5, 1950.<sup>8</sup>

The murky state of the law on succession makes the validity of Taiwan’s withdrawal an interesting case study, as one could well argue that, because Taiwan, as of 1949, no longer represented China, it also did not have the right to withdraw from the treaty on China’s behalf in 1950. However, China did not protest at the time. It had more pressing concerns, including being embroiled in the Korean War. Even when it restored its seat in the United Nations in 1971,<sup>9</sup> China still did not raise the issue.<sup>10</sup> It was only after the launch of the economic reform and opening up in the late 1970s that China started to realize the importance of the MFN tariff regime under the GATT.<sup>11</sup> Thus, China joined the GATT as an observer in 1984,<sup>12</sup> and made a formal request to resume its

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<sup>6</sup> Liu, *supra* note 1, at 7.

<sup>7</sup> *Id.*; see SHI, *supra* note 1, at 14; see also Gao, *supra* note 1, at 42–43.

<sup>8</sup> GATT, *Contracting Parties, Communication from Secretary-General of United Nations Regarding China*, GATT Doc. GATT/CP/54 (Mar. 8, 1950).

<sup>9</sup> See G.A. RES. 2758 (XXVI), at 2 (Oct. 5, 1971) (deciding “to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it”).

<sup>10</sup> While the GATT 1947 was not a specialized agency of the United Nations, it generally followed the decisions of the United Nations on political issues. See *GATT Analytical Index: Guide to GATT Law and Practice*, 877 (6th ed. 1995). Thus, even though China did not raise the issue of GATT membership itself at the time, the GATT Contracting Parties still decided to revoke the Taiwan government’s observer status, which it has acquired since 1965. See GATT, *Contracting Parties, Twenty-Seventh Session, Summary Record of the First Meeting*, GATT Doc. SR.27/1 1, 1-4 (Nov. 19, 1971); see also Gao, *supra* note 1, at 43–44.

<sup>11</sup> See SHI, *supra* note 1, at 24–26.

<sup>12</sup> China first requested to observe the meetings of individual GATT sessions in 1982. See GATT, *People’s Republic of China: Attendance at Thirty-Eighth Session*, GATT Doc. L/5344 (Sept. 24, 1982). In 1984, China submitted a formal request to have observer status in meetings of the Council of Representatives and its subordinate bodies. See *China – Request for Observer Status*, GATT Doc. L/5712 (Oct. 16, 1984). Since then, China has been attending GATT meetings regularly as an observer. See Julia Ya Qin, *GATT Membership for Taiwan: An Analysis in International Law*, 24 N.Y.U. J. OF INT’L L. & POL. 1059, 1072 (1992).

GATT contracting party status in 1986.

*B. Resumption of GATT Contracting Party Status*

On July 10, 1986, China formally submitted the application to resume its status as a GATT contracting party.<sup>13</sup> On March 4, 1987, the GATT established a Working Party to handle China's application.<sup>14</sup> Things moved quickly initially, as the main players such as the United States wanted to use China as the example to encourage change in the Communist bloc.<sup>15</sup> By the beginning of 1989, the Working Party was ready to start the drafting of the Accession Protocol.<sup>16</sup> However, this process stalled after China cracked down on student protesters on June 4, 1989 and the West imposed sanctions on the country as a result.<sup>17</sup>

For the next two-and-a-half years, the Working Party went into hibernation.<sup>18</sup> Not until 1992, when the Fourteenth National Congress of the Communist Party adopted a Resolution to make the 'Socialist Market Economy' the goal of the reform,<sup>19</sup> did the accession negotiations resume. Nonetheless, this did not solve all the problems, as many observers were skeptical about the willingness of China to embrace true capitalism. For example, Douglas Newkirk, the

<sup>13</sup> *China's Status as A Contracting Party: Communication from the People's Republic of China*, GATT Doc. L/6017 (Oct. 26, 1984).

<sup>14</sup> *Minutes of Meeting: Held in the Centre William Rappard on 4 March 1987*, GATT Doc. C/M/160, at 9-12 (Mar. 30, 1987).

<sup>15</sup> Yang Yongzheng, *China's WTO Accession: The Economics and Politics*, 34 J. OF WORLD TRADE 77, 88-89 (2000).

<sup>16</sup> SHI, *supra* note 1, at 73-76.

<sup>17</sup> The Working Party meeting originally scheduled in June 1989 was cancelled due to concerns by the participants over "political and economic upheaval in China." See CHARAN DEVEREAUX, ROBERT Z. LAWRENCE & MICHAEL WATKINS, CASE STUDIES IN US TRADE NEGOTIATION VOLUME 1: MAKING THE RULES 252 (2006).

<sup>18</sup> Jeffrey Gertler, *China's WTO Accession—The Final Countdown*, in CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM 56 (Deborah Z. Cass et al. eds., 2003); see also James McGregor, *China's Entry Into GATT Is Stalled by Thorny 'Socialist Market Economy'*, WALL ST. J., March 3, 1993 at A11.

<sup>19</sup> Jian Zemin, *Jiakuai Gaige Kaifang he Xiandaihua Jianshe Bufa, Duoqu Youzhongguo Tese Shehui Zhuyi Shiye de Weida Shengli [Accelerate Steps of Reform and Opening Up and the Development of Modernization, Seize Greater Success in the Endeavor on Socialism with Chinese Characteristics]*, Report at the Fourteenth National Congress of the China Communist Party, [http://www.gov.cn/test/2007-08/29/content\\_730511.htm](http://www.gov.cn/test/2007-08/29/content_730511.htm) (Oct. 12, 1992).

then-Assistant U.S. Trade Representative, stated bluntly that “[t]he GATT was not written with a Socialist Market Economy in mind.”<sup>20</sup> Moreover, as a Party Resolution is not a law passed by Parliament, it is hard for outsiders to understand its significance. It was not until the goal was incorporated into the PRC Constitution in 1993<sup>21</sup> that others began to appreciate that China was indeed taking the commitment to market reform seriously.

During the first half of the 1990s, China participated in the Uruguay Round negotiations in the hope that discussions on its status could be concluded in time for it to become a founding member of the WTO.<sup>22</sup> Unfortunately, the world had changed significantly by this point. The Cold War was over, and China had lost its symbolic value as a reformer within the communist bloc. With the former Soviet countries also eager to join the GATT, the terms of accession for China were increasingly regarded as a template for other transition economies.<sup>23</sup> Thus, Western governments imposed more rigorous terms.<sup>24</sup> At the same time, the Uruguay Round negotiations turned out to be much more difficult than originally imagined, and most countries concentrated their resources on the Uruguay Round rather than on talks with China. Also, for the first time in history, the Uruguay Round included negotiations on trade in services and trade-related intellectual property rights. Rules on non-tariff measures were also strengthened. These issues posed new challenges to China, as it lacked experience in these new areas. For example, China did not have detailed regulations on import relief measures or experience conducting such investigations until

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<sup>20</sup> Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1480 (2000).

<sup>21</sup> Article 15 of the Constitution used to state, “[t]he state practices planned economy on the basis of Socialist public ownership” and was amended to “[t]he state practices Socialist market.” *Zhonghua Renmin Gongheguo Xianfa Xiuzhengan (1993 Nian)* [Amendment to the Constitution of the People's Republic of China (2013)] (adopted by the First Session of the Eighth National People's Congress on Mar. 29, 1993), [http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content\\_4585.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4585.htm).

<sup>22</sup> See Bhala, *supra* note 20, at 1480.

<sup>23</sup> NICHOLAS LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 63 (2002).

<sup>24</sup> LARDY, *supra* note 23.

1997, two years after the establishment of the WTO.<sup>25</sup>

On the other hand, China itself had also changed since the 1980s. First, the 1990s saw China's rise as a major trader, with goods 'Made in China' flooding many parts of the world. Many countries, both developed and developing, felt the threat of China not only in the world market but in their domestic markets, too. For them, letting China accede to the GATT to enjoy expanded market access opportunities without demanding a pound of flesh would have been unthinkable. At the same time, with the income level of the Chinese on the rise, more and more Western companies started to recognize the potential of China as the largest untapped market in the world. They demanded better market access opportunities in China, which went beyond tariff concessions, and this too required extensive negotiation.

Even though China declared its intention in early 1994 to complete substantive negotiations by the end of that year,<sup>26</sup> when the WTO was established on 1 January 1995, the end of the accession negotiations was still nowhere in sight.<sup>27</sup>

### C. *WTO Accession*

Frustrated that China did not become a founding Member of the WTO as it had wished, the head of Chinese delegation Gu Yongjiang stated at the meeting of the China Working Party on December 20, 1994 that "while China does not wish to close the door for negotiation, China will not take the initiative to request bilateral negotiations or meetings of the Working Party."<sup>28</sup> All work of the Working Party stopped for the better part of 1995,<sup>29</sup> and it was not until November 1995 that China

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<sup>25</sup> See Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, U. OF ILL. L. REV. 115, 152–53 (2018).

<sup>26</sup> In his letter to the Director General and contracting parties to the GATT on January 25, 1994, then Chinese premier Li Peng stated China's wish to "conclude the negotiation to resume its GATT membership quickly and become a founding Member of the WTO." SHI, *supra* note 1, at 118.

<sup>27</sup> SHI, *supra* note 1, at 134–39.

<sup>28</sup> See *id.* at 135–39.

<sup>29</sup> See *id.* at 436–42.

submitted a new request for accession to the WTO.<sup>30</sup> Subsequently, the GATT Working Party was converted into a WTO Accession Working Party in December 1995.<sup>31</sup> President Jiang Zemin personally set out three principles on WTO accession.<sup>32</sup> First, as an international organization, the WTO would not be complete without the participation of China. Second, China should join as a developing country. Third, China's accession should be based on a balance of rights and obligations. As we will soon see from the detailed analysis of the terms of the Chinese accession deal below, however, China has failed to achieve most of these principles.

In 1999 and 2000, China signed bilateral agreements with the United States and the (then) European Communities, respectively. The agreement with the United States is the most comprehensive and covers both market access on goods and services, as well as rules issues, especially those on trade remedies.<sup>33</sup> In contrast, the one with the European Communities focuses on sectors of specific interests to the European Communities, such as automobiles, telecommunications, insurance, and distribution.<sup>34</sup>

On November 10, 2001, at the Fourth Session of the Ministerial Conference in Doha, Qatar, WTO Members adopted the Chinese Accession Protocol, which was approved by the National People's Congress Standing Committee the next day. One month later, the protocol took effect and China finally became a Member of the WTO.

With an accession negotiation spanning fifteen years, China's WTO accession process was, until then, the longest in GATT/WTO history. This record was broken by Russia ten years later, but China's accession package remains the most complicated in the history of the WTO. This is not only due to its large trade volume, which ranked sixth largest at the time

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<sup>30</sup> *Communication from China*, WTO Doc. WT/ACC/CHN/1 (Dec. 7, 1995).

<sup>31</sup> *Id.*

<sup>32</sup> Rang Lishi Mingji, *Zhongguo Jiaru Shimao Zuzhi Tanpan Beiwanglu [Let History Remember: Memo on China's Accession to the WTO]* (Oct. 31, 2005), [http://www.gov.cn/ztl/content\\_87675.htm](http://www.gov.cn/ztl/content_87675.htm).

<sup>33</sup> See SHI, *supra* note 1, at 280–87.

<sup>34</sup> *Id.* at 387–88.

of accession, but also because of the unique nature of the Chinese economic system, which was in the process of transition from a traditional planned economy to a “Socialist market economy”,<sup>35</sup> a process that has not yet been completed, almost twenty years after China’s WTO accession and subsequently led to many problems.

What benefits did China get as a newly-minted WTO Member? Many commentators point to lower tariffs at the MFN rate and the removal of non-tariff measures. In my view, however, both of these benefits have been greatly exaggerated. First, even before its accession, China had signed bilateral trade agreements with most of its trade partners, which typically included MFN clauses granting China the same MFN rates as under other agreements,<sup>36</sup> including the WTO. Studies confirm that larger gains were reaped by China’s import industries while its exporting industries only saw modest gains.<sup>37</sup> Second, non-tariff barriers were a big problem before China’s accession, but rather than being eliminated, they have largely been retained and even entrenched by China’s accession deal.<sup>38</sup> Instead, I would argue that the biggest direct benefits resulting from China’s WTO accession are its abilities to use the WTO dispute settlement system and to participate in the rule-making efforts of the multilateral trading system. However, both benefits are also double-edged swords that could be used by and against China at the same time.<sup>39</sup>

While the direct benefits to China seem uncertain, the indirect benefits appear to be quite substantial, especially considering the phenomenal growth of China’s trade and economy since its accession. This is because China’s WTO accession has helped China to be further integrated into the world economy and become a key node in the global supply chain.

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<sup>35</sup> *McGregor, supra* note 18.

<sup>36</sup> *See, e.g.*, Agreement on Trade Relations, U.S.-People’s Republic of China, art. II, Jul. 7, 1979, 31 U.S.T. 4651.

<sup>37</sup> Ting-Wei Lai, Raymond Riezman & Ping Wang, *China’s Gains from WTO Accession: Imports vs Exports*, 24 REV. INT’L ECON. 837, 849–50 (2016).

<sup>38</sup> *See infra* p. 8.

<sup>39</sup> *See infra* Section III.

On the other hand, the price that China had to pay to get into the club seems rather hefty. First of all, China made substantive market access commitments on both goods and services. For goods, China agreed to reduce its overall tariff level from a basic point of 43% before the accession to 10% by 2005, making it one of the lowest levels in the world.<sup>40</sup> For services, China also made extensive commitments, covering more than 100 out of the total of 160 services sectors enumerated in the Services Sectoral Classification List.<sup>41</sup> Such a level of commitment is on par with that of major developed countries and was regarded as “the most radical services reform program negotiated in the WTO.”<sup>42</sup>

In addition to the market access commitments, concerns over China’s unique economic system also led to a wide range of rules commitments. Tailor-made for China, these commitments fall under two categories: obligations that are beyond those normally required of WTO Members, often called “WTO-plus obligations”; and rights that are below those generally enjoyed by WTO Members, referred to as “WTO-minus rights.”<sup>43</sup>

Many of the WTO-plus obligations were designed to enhance the transparency of China’s trade regime.<sup>44</sup> For example, China committed to translate all laws and regulations affecting trade in goods and services into one of the WTO official languages.<sup>45</sup> Also, in order to monitor China’s implementation of its accession commitments in the first ten years of its Membership, a special annual transitional review

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<sup>40</sup> Shi Miaomiao, *China’s Participation in the Doha Negotiations and Implementation of Its Accession Commitments*, in CHINA’S PARTICIPATION IN THE WTO 23, 28 (Henry Gao & Donald Lewis eds., 2005).

<sup>41</sup> Aaditya Mattoo, *China’s Accession to the WTO: The Services Dimension*, 6 J. INT’L ECON. L. 299, 333 (2003).

<sup>42</sup> *Id.*

<sup>43</sup> Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 490 (2003). See Gao, *supra* note 1, at 54–57.

<sup>44</sup> For a detailed discussion of these provisions, see Henry Gao, *The WTO Transparency Obligations and China*, 12 J. COMPAR. L. 329 (2018).

<sup>45</sup> Ministerial Conference, *Report of the Working Party on the Accession of China*, WTO Doc. WT/MIN(01)/3, ¶ 334 (Nov. 10, 2001) [hereinafter Report on the Accession of China].

mechanism was established.<sup>46</sup> The other obligations aimed to prevent the erosion of accession commitments. One example is the extension of national treatment to foreign individuals, enterprises, and foreign-funded enterprises, above and beyond the normal national treatment rules, which only cover measures applicable to products.<sup>47</sup> Another example is an explicit commitment to eliminate all taxes and charges on exports for most products.<sup>48</sup>

While onerous, these WTO-plus obligations can still be justified as necessary to bridge the gaps in China's economic and legal systems so that the accession commitments would not be easily evaded. On the other hand, the WTO-minus rights provisions are of a more defensive (or some might say protective) nature. They mainly cover the realm of trade remedies measures, where the normal WTO rules are weakened to make it easier for other WTO Members to invoke these protections against Chinese imports. For example, the normal WTO safeguard rules are watered down so that other Members may apply safeguard measures against Chinese imports whenever there are "market disruptions," rather than "serious injury" as mandated by the Agreement on Safeguards.<sup>49</sup> Such measures do not need to be applied on an MFN basis, and instead can be applied against China only.<sup>50</sup> Moreover, once one Member applies a safeguard measure against China, any other WTO Member can piggyback with its own safeguard measure to prevent diversion of Chinese exports into its own market as the result of the first safeguard measure.<sup>51</sup> Concerns over the reliability of the price data in China also led to the inclusion of the 'non-market economy status' provision in Section 15(a) of China's Accession Protocol, which essentially allows other WTO Members to disregard the domestic prices in China and use inflated third-country prices instead in anti-dumping investigations against

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<sup>46</sup> Ministerial Conference, *Protocol on the Accession of China*, WTO Doc. WT/L/432, § 18 (Nov. 23, 2001).

<sup>47</sup> *Id.* § 3.

<sup>48</sup> *Id.* § 11.3

<sup>49</sup> *Id.* § 16.

<sup>50</sup> *Id.* § 16.3.

<sup>51</sup> *Id.* § 16.8.

Chinese products. The provision was supposed to expire fifteen years after China's accession, but the United States and the European Union continued to use similar methodologies in their antidumping investigations when the time came. In response, China brought two separate WTO disputes against them.<sup>52</sup>

Among the two, only the case against the EU has led to the formation of a panel. The United States also worked with the EU on the case, which U.S. Trade Representative Robert Lighthizer regarded as the “most serious litigation matter that we have at the WTO right now.”<sup>53</sup> The panel was supposed to issue its final report by mid-2019, but it suspended its work in June 2019 at the request of China.<sup>54</sup> No formal reason was announced, but it has been speculated that this could be due to the unfavorable panel ruling in the interim report<sup>55</sup> or the United States' suspension of its case against China on intellectual property rights.<sup>56</sup> Section 15(b) includes a similar provision to water down the requirements for subsidy investigations against Chinese products, but it does not have an expiration date like its sister provision.

China's bid for developing country treatment was also

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<sup>52</sup> These two disputes are: DS515: United States — Measures Related to Price Comparison Methodologies; and DS516: European Union — Measures Related to Price Comparison Methodologies.

<sup>53</sup> The President's Trade Policy Agenda and Fiscal Year 2018 Budget, Hearing before the Committee on Finance, 115th Congress 12 (2017) (opening statement of Hon. Ron Wyden).

<sup>54</sup> See Communication from the Panel, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/13, at 1 (June 17, 2019).

<sup>55</sup> See Henry Gao & Weihuan Zhou, *The end of the WTO and the last case?*, EAST ASIA FORUM (July 10, 2019), <https://www.eastasiaforum.org/2019/07/10/the-end-of-the-wto-and-the-last-case/>; Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297, 316 (2019). The news was first reported in Bryce Baschuk, *China Loses Market-Economy Trade Case in Win for EU and U.S., Sources Say*, BLOOMBERG (Apr. 18, 2019, 8:34 AM), <https://www.bloomberg.com/news/articles/2019-04-18/china-is-said-to-lose-market-economy-trade-case-in-eu-u-s-win>.

<sup>56</sup> See Jesse Kreier, *China NME Case Suspended*, INT'L ECON. L. & POL'Y BLOG (June 20, 2019), <https://ielp.worldtradelaw.net/2019/06/china-nme-case-suspended.html>. The case was DS542: China — Certain Measures Concerning the Protection of Intellectual Property Rights.

not very successful.<sup>57</sup> This is more than a simple designation as developing countries are entitled to “special and differential treatment” set out in 155 rules which include exemptions from some WTO obligations and longer implementation periods for other obligations.<sup>58</sup> However, none of those rules define what a “developing country” is. Instead, each member is able to “self-designate,” subject to challenge from other Members.<sup>59</sup> This is what happened in China’s accession process, as concerns over China’s size and unique economic system led to the denial of many special and differential treatments reserved for developing countries.<sup>60</sup> For example, China agreed to forgo the special treatment under Articles 27.8, 27.9, and 27.13 of the Agreement on Subsidies and Countervailing Measures, which provide more accommodation to subsidies by developing countries.<sup>61</sup> Similarly, on agricultural subsidies, China agreed to cap its *de minimis* level at 8.5%, which is lower than the 10% allowed for developing countries.<sup>62</sup>

## II. CHINA AND THE DOHA ROUND

Given that its accession coincided with the launch of the Doha Round, China was able to participate in the new Round from the very beginning. It has been thought that, as the biggest developing country in the WTO, China would become the leader of the developing country camp.<sup>63</sup> In the first few years,

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<sup>57</sup> See Henry Gao & Weihuan Zhou, *Myth Busted: China’s Status as a Developing Country Gives It Few Benefits in the World Trade Organisation*, THE CONVERSATION (Oct. 6, 2019), <https://theconversation.com/myth-busted-chinas-status-as-a-developing-country-gives-it-few-benefits-in-the-world-trade-organisation-124602>.

<sup>58</sup> Committee on Trade and Development, *Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by the Secretariat*, WTO Doc. WT/COMTD/W/239 (Oct. 12, 2018).

<sup>59</sup> Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization 2* (World Bank Policy Research Working Paper No. 2388, 2000).

<sup>60</sup> Report on the Accession of China, *supra* note 45, ¶ 9.

<sup>61</sup> *Id.* ¶ 171.

<sup>62</sup> *Id.* ¶ 235.

<sup>63</sup> Yu Donghui, *Zhongguo Jiangyu 12 yue 19 ri Shouci Zuowei Zhengshi Chengyuan Chuxi WTO Huiyi* [China to Join WTO Meetings as a Formal Member for the First Time on December 19], CHINA NEWS (Nov. 14, 2001), <https://finance.sina.com.cn/g/20011114/129385.html>.

however, China deliberately kept a low profile.<sup>64</sup> China's official explanation was that it had already made heavy commitments as a Recently-Acceded Member ("RAM"), exceeding the commitments made by most WTO Members in the Uruguay Round.<sup>65</sup> Thus, China should not be expected to make new concessions, but should instead focus on implementing its accession commitments. The implicit reason is that China lacked experience in trade negotiations and wanted to learn before participating in the new Round.<sup>66</sup> The major players were initially sympathetic to China's RAM argument and did not demand much from China.

While its ambitious agenda covered many issues, the Doha Round negotiations focused mainly on agriculture in the first few years, with developing countries demanding that developed countries eliminate export subsidies and reduce domestic support on agriculture. This is understandable given the importance of agricultural exports for most developing country Members. China, however, has a different export structure which is centered mostly on industrial products and very little agricultural exports. Moreover, China is also one of the largest importers of agricultural commodities such as wheat, cotton, and soybeans. Thus, the reduction of subsidies would raise world commodity prices and be inimical to its trade interests. On the other hand, openly opposing the developing country position would have been politically insensitive. That partly explains why China chose to keep quiet in the first few years, and the other Members were also content to leave it alone due to China's insignificant role in agricultural exports.

After a deal on agricultural issue was reached in 2006,

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<sup>64</sup> For an overview of China's participation in WTO negotiations until 2006, see Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?*, in MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT 153–80 (Carolyn Deere-Birkbeck ed., 2011); see also Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115, 132–34 (2018).

<sup>65</sup> See Huang Rengang, *Multilateralism v. Regionalism: China's Participation in WTO Agriculture Negotiations*, in CHINA'S PARTICIPATION IN THE WTO 35, 39 (Henry Gao & Donald Lewis eds., 2015).

<sup>66</sup> See Gao, *supra* note 64, at 159–62.

the focus of the Round shifted to Non-Agricultural Market Access (“NAMA”), or industrial products. As a manufacturing powerhouse and the world’s largest exporter, China emerged as the elephant in the room. It was simply too big to be ignored. Moreover, having agreed to reduce their agricultural subsidies, the United States and the European Union wanted to obtain significant concessions on industrial products from major developing countries to justify their agricultural concessions. Thus, in the same year, China was invited to join the United States, European Union, Japan, Canada, India, and Brazil in the inner group of key players.<sup>67</sup> Citing the phenomenal growth of China’s exports since its accession to the WTO, the United States and European Union called China “the biggest beneficiary” of the multilateral trading system and urged China to be “more responsible” in negotiations.<sup>68</sup> In particular, they wanted China to make greater concessions in key sectors such as industrial machinery, chemicals, and electronics.<sup>69</sup> While China recognized that it had special responsibilities as a large developing country, it resented being singled out in the negotiations, just as it has resented the discriminatory clauses in its accession package.<sup>70</sup> Thus, when India created an impasse at the July 2008 Ministerial Conference by refusing to give up its request for special products and a special safeguard mechanism, China rejected the U.S. request to provide additional concessions on special products in agriculture and sectoral negotiations on industrial goods.<sup>71</sup> China’s decision was partly based on its domestic political

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<sup>67</sup> For an overview of China’s participation in WTO negotiations since 2006, see Henry Gao, *From the Doha Round to the China Round*, in CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS 79–97 (Lisa Toohey, Colin B. Picker & Jonathan Greenacre eds., 2015).

<sup>68</sup> See Robert B. Zoellick, Whither China: From Membership to Responsibility?, Remarks to National Committee on U.S.-China Relations (Sep. 21, 2005), <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm>; see also Susan Schwab, Remarks at the 40th Anniversary Gala Dinner of the National Committee on US-China Relations (Oct. 12, 2006).

<sup>69</sup> See PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM 272 (2009).

<sup>70</sup> Sun Zhenyu, China’s first ambassador to the WTO, complained about the discriminatory transitional review mechanism. See Sun Zhenyu, RINEIWA KONGZONG SUIYUE [BUSY YEARS IN GENEVA] 18 (2011).

<sup>71</sup> See BLUSTEIN, *supra* note 69, at 271–75.

difficulties, but an equally important reason was China's desire to be treated no differently from India.<sup>72</sup>

China's evolving role in the Doha Round can also be gauged by the number of submissions it has made in the negotiations. Its first proposal was submitted in June 2002, addressing the issue of fisheries subsidies.<sup>73</sup> The number of Chinese proposals slowly rose to more than ten over the next three years, reflecting China's cautious approach.<sup>74</sup> As China was offered "a seat at the big kids' table,"<sup>75</sup> its participation also intensified, with the number of Chinese proposals jumping to over one hundred just before the July 2008 meeting.<sup>76</sup>

### III. WTO REFORM: A CHINA ROUND?

#### A. *The China Challenge*

Since its accession to the WTO, China's exports have been growing exponentially. In 2009, China became the world's top goods exporter.<sup>77</sup> Four years later, China unseated the United States as the top trading nation in the world.<sup>78</sup> In contrast to the burgeoning Chinese economy, the United States and Europe have been suffering from relative decline since the

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<sup>72</sup> This is partly reflected in the passionate speech made by China's WTO Ambassador Sun Zhenyu when the talks collapsed in mid-2008. See H.E. Ambassador Sun Zhenyu, Permanent Mission P.R.C. to the WTO, Statement at the Informal Trade Negotiations Committee Meeting (August 11, 2008), <http://wto2.mofcom.gov.cn/article/chinaviewpoin/200808/20080805717988.shtml>; see also BLUSTEIN, *supra* note 66, at 274.

<sup>73</sup> Proposal to the Negotiating Group on Rules, *Proposal from the People's Republic of China on Fisheries Subsidies*, WTO Doc. TN/RL/W/9 (June 20, 2002). See GAO, *supra* note 64, at 161.

<sup>74</sup> See GAO, *supra* note 67, at 161.

<sup>75</sup> BLUSTEIN, *supra* note 69, at 274 (quoting THE INT'L HERALD TRIBUNE).

<sup>76</sup> GAO, *supra* note 67, at 161.

<sup>77</sup> *China Becomes World's No. 1 Exporter, Passing Germany*, N.Y. TIMES (Jan. 10, 2010), [https://www.nytimes.com/2010/01/11/business/global/11chinatrade.html#:~:text=BEIJING%20\(AP\)%20%E2%80%94%20China%20overtook,General%20Administration%20of%20Customs%20showed](https://www.nytimes.com/2010/01/11/business/global/11chinatrade.html#:~:text=BEIJING%20(AP)%20%E2%80%94%20China%20overtook,General%20Administration%20of%20Customs%20showed).

<sup>78</sup> Jamil Anderlini & Lucy Hornby, *China Overtakes US as World's Largest Goods Trader*, FIN. TIMES (Jan. 10, 2014), <https://www.ft.com/content/7c2dbd70-79a6-11e3-b381-00144feabdc0>.

global financial crisis in 2008.<sup>79</sup> China regards its rise as a long overdue restoration of its rightful position, as it has been the largest economy in the world for most of its history, except the brief aberration over the past 150 years.<sup>80</sup> The Western powers, however, view China's rapid development with suspicion, as they attribute China's success mostly to its state-led development model, with state-owned enterprises, massive subsidies, and heavy government intervention playing a major role.<sup>81</sup>

The most notorious example of the Chinese development model is the Made in China 2025 Plan, which was prepared in 2014 by the Chinese Academy of Sciences and the Chinese Academy of Engineering under the leadership of the Ministry of Industry and Information Technology ("MIIT"), along with the National Development and Reform Commission ("NDRC") and twenty government agencies.<sup>82</sup> Officially adopted by the State Council in 2015,<sup>83</sup> the Plan sought to move China up in the value chain of industrial activities and turn China into a manufacturing power that controlled core technologies in key sectors such as new information technology, numerical control tools, aerospace equipment, semiconductors, electric vehicles and biotech by 2025.<sup>84</sup> In particular, it aimed to achieve 70% self-sufficiency

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<sup>79</sup> See, e.g., Brantly Womack, *International Crises and China's Rise: Comparing the 2008 Global Financial Crisis and the 2017 Global Political Crisis*, 10 Chinese J. of Int'l Pol. 383, 392 (2017); see also, Francis Pike, *Was 2008 the Year China Triumphed over the West?*, THE SPECTATOR, Nov. 21, 2020, <https://www.spectator.co.uk/article/was-2008-the-year-china-triumphed-over-the-west->.

<sup>80</sup> See Zhu Yunhan, *Zhongguo zai 21 Shiji Quanguo Zhixu Chonggou zhong de Zuoyong* [China's Role in the Restructuring of Global Order in the 21st Century], 7 RUC PERSPECTIVES 8–9 (2016), [http://nads.ruc.edu.cn/upfile/file/20160525095445\\_157231\\_93990.pdf](http://nads.ruc.edu.cn/upfile/file/20160525095445_157231_93990.pdf).

<sup>81</sup> See WAYNE M. MORRISON, *CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES* (2019).

<sup>82</sup> State Council Information Office, *Zhongguo Zhizao 2025 de Mubiao he Zongti Silu* [The Objective and

Overall Concept of Made in China 2025] (Mar. 27, 2015), <http://www.scio.gov.cn/32344/32345/32347/20150327/zy32627/Document/1397412/1397412.htm>.

<sup>83</sup> State Council, *Guowuyuan Guanyu Yinfa <Zhongguo Zhizao 2025> de Tongzhi* [State Council Notice on Issuing <Made in China 2025>], GUOFA [2015] No. 28 (May 8, 2015), [http://www.gov.cn/zhengce/content/2015-05/19/content\\_9784.htm](http://www.gov.cn/zhengce/content/2015-05/19/content_9784.htm).

<sup>84</sup> *Id.*

in high-tech industries by 2025, and a dominant position in global markets by 2049—the hundredth anniversary of the People’s Republic of China.<sup>85</sup> To achieve these goals, the Plan employed problematic tactics such as direct government intervention, massive subsidies, investments and acquisitions in foreign markets by State Owned Enterprises (“SOEs”), and forced technology transfers.<sup>86</sup> These practices led to widespread criticisms against the Plan, with many governments regarding it not only as economic aggression but also a potential national security threat.<sup>87</sup> In June 2018, the European Union even brought a WTO case against China, alleging China’s various technology transfer measures violated various WTO rules including TRIPS, GATT 1994 and China’s Accession Protocol.<sup>88</sup> Given the backlash, China toned down the propaganda on the Plan, but observers suspect that it has always remained on the Chinese government’s agenda.<sup>89</sup>

To counter the Chinese threat, the United States led a concerted effort of like-minded countries to “level the playing field.”<sup>90</sup> In particular, building on the influential “China Inc.”

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See James McBride & Andrew Chatzky, *Is ‘Made in China 2025’ a Threat to Global Trade?* COUNCIL ON FOREIGN RELS. (May 13, 2019), <https://www.cfr.org/background/made-china-2025-threat-global-trade>.

<sup>88</sup> See Request for Consultations by the European Union, *China - Certain Measures on the Transfer of Technology*, WT/DS549/1 (June 6, 2018).

<sup>89</sup> See Lingling Wei, *Beijing Drops Contentious ‘Made in China 2025’ Slogan, but Policy Remains*, WALL ST. J. (Mar. 5, 2019), [https://www.wsj.com/articles/china-drops-a-policy-the-u-s-dislikes-at-least-in-name-11551795370?mod=article\\_inline](https://www.wsj.com/articles/china-drops-a-policy-the-u-s-dislikes-at-least-in-name-11551795370?mod=article_inline).

This is also confirmed by a report in March 2021, which noted that China has completed its main targets for building a manufacturing power in the Thirteenth Five-Year Plan. See also, e.g., Wang Zheng, *Woguo “Shisanwu” Zhizao Qiangguo he Wangluo Qiangguo Jianshe Zhuyao Mubiao Ruqi Wancheng* [Our Country Complete Main Targets for Building a Manufacturing Power and Cyber Power in the Thirteenth Five-Year Plan in Time], PEOPLE’S DAILY (Mar. 2, 2021), [http://www.gov.cn/xinwen/2021-03/02/content\\_5589587.htm](http://www.gov.cn/xinwen/2021-03/02/content_5589587.htm).

<sup>90</sup> Joint Statement by the United States, European Union and Japan at MC11, Office of the United States Trade Representative (“USTR”) (Dec. 12, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>.

paper authored by Harvard Law Professor Mark Wu,<sup>91</sup> the U.S.-led coalition has been arguing that the existing WTO rules are insufficient in dealing with the problems created by China's state capitalism.<sup>92</sup> At the 11th WTO Ministerial Conference in Buenos Aires, the United States, the European Union and Japan issued a joint statement condemning "severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises, forced technology transfer, and local content requirements and preferences" as "serious concerns for the proper functioning of international trade."<sup>93</sup> To address these concerns, they vowed to enhance trilateral cooperation in the WTO and in other forums.<sup>94</sup>

At the 11th Ministerial Conference, the United States set the agenda on the substance of the negotiation and strove to control the negotiations. At the conclusion of the conference, the United States Trade Representative Robert Lighthizer stated that "MC11 will be remembered as the moment when the impasse at the WTO was broken. Many members recognized that the WTO must pursue a fresh start in key areas so that like-minded WTO Members and their constituents are not held back by the few Members that are not ready to act."<sup>95</sup> In other words, instead of trying to seek consensus among all WTO Members like it did in the past, the United States would now work with the 'coalition of the willing' and move at its own speed.

### *B. The Main Proposals*

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<sup>91</sup> See Mark Wu, *The "China, Inc" Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261 (2016).

<sup>92</sup> See, e.g., Ambassador Shea: China's Trade-Disruptive Economic Model and Implications for the WTO, WTO General Council, Geneva, Jul. 26, 2018, <https://geneva.usmission.gov/2018/07/27/55299/>.

<sup>93</sup> USTR, *supra* note 90.

<sup>94</sup> *Id.*

<sup>95</sup> USTR Robert Lighthizer Statement on the Conclusion of the WTO Ministerial Conference, Office of the United States Trade Representative (Dec. 14, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/ustr-robert-lighthizer-statement>.

Since then, the trilateral group has intensified its work with several more joint statements. In turn, these statements have morphed into WTO reform proposals, with the key players all chipping in.

Among the major players, the European Union was the first to issue a comprehensive concept paper. Released on September 18, 2018, the *WTO Modernisation: Introduction to future EU proposals* covers three aspects: rule-making and development, regular work and transparency, and dispute settlement.<sup>96</sup> Three days later, Canada followed with its own discussion paper on *Strengthening and Modernizing the WTO*, which also includes three aspects: to “(1) improve the efficiency and effectiveness of the monitoring function; (2) safeguard and strengthen the dispute settlement system; and, (3) lay the foundation for modernizing the substantive trade rules when the time is right.”<sup>97</sup> In addition to the two comprehensive papers, both the European Union and Canada have also tabled various more specific proposals.<sup>98</sup>

The United States has not issued any comprehensive proposal but prefers to address the specific issues directly through stand-alone proposals.<sup>99</sup> In addition, Canada also convened a series of meetings with a group of like-minded countries. Informally referred to as the Ottawa Group, the group includes most of the key players in the WTO except the

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<sup>96</sup> See European Commission, *WTO Modernisation: Introduction to Future EU Proposals* (Sep. 18, 2018).

<sup>97</sup> Communication from Canada, *Strengthening and Modernizing the WTO: Discussion Paper*, WTO Doc. JOB/GC/201 at 1 (Sep. 24, 2018) [hereinafter Canada Communication].

<sup>98</sup> See, e.g., Communication from The European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, WTO Doc. WT/GC/W/752/Rev.2 (Dec. 10, 2018); Communication from Canada, *Strengthening the Deliberative Function of the WTO: Discussion Paper*, WTO Doc. JOB/GC/211 (Dec. 14, 2018).

<sup>99</sup> These include, for example, Communication from the United States, *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance*, WTO Doc. WT/GC/W/757/REV.1 (Feb. 14, 2019); Communication from Argentina, Costa Rica, The European Union, Japan, and the United States, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, WTO Doc. JOB/GC/204/JOB/CTG/14 (Nov. 1, 2018).

United States, China and India.<sup>100</sup>

The proposals by the European Union, United States, Canada, and the Ottawa Group share many commonalities, especially on the following groups of issues, which are of particular relevance to China.

The first group concerns the need to update the substantive rules of the WTO, such as clarifying the application of ‘public body’ rules to SOEs, expanding the rules on forced technology transfer, and addressing barriers to digital trade.<sup>101</sup> All of these are long-standing issues which have been litigated in the WTO.<sup>102</sup> They each reflect a major concern over China’s trade and economic systems, which employ measures that are perceived as unfair trade practices. The ‘public body’ issue in the first relates to China’s unique state-led development model, which emphasizes the role of state-owned firms in the Chinese economy, often without a clear boundary between the State and the firm. The second refers to China’s overzealous drive to obtain and absorb foreign intellectual property rights, where foreign firms are met with explicit or implicit demands to trade their technologies for markets. The third touches on the core of the authoritarian regime in China, where the government

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<sup>100</sup> The members include Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore and Switzerland. *See* Global Affairs Canada, *Ottawa Group and WTO reform*, (May 23, 2019), <https://www.canada.ca/en/global-affairs/news/2019/05/ottawa-group-and-wto-reform.html>.

<sup>101</sup> *See* European Commission, *supra* note 96, at. 4–6; Canada Communication, *supra* note 97, at 5.

<sup>102</sup> On public body, *see, e.g.*, Report of the Appellate Body, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (Mar. 11, 2011); on forced technology transfer, *see* Request for Consultations by the United States, *China—Certain Measures Concerning the Protection of Intellectual Property Rights* WTO Doc. WT/DS542/1 (Mar. 26, 2018); Requests for Consultations by the European Union, *China—Certain Measures on the Transfer of Technology*, WTO Doc. WT/DS549/1, G/L/1244, IP/D/39 (June 6, 2018); on digital trade barrier, *see* Report of the Appellate Body, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R at 3 (Dec. 21, 2009); *see also* the potential WTO case when Google pulled out of China, discussed in Henry S. Gao, *Google’s China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS*, 6 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 347 (2011).

maintains tight control over information and the Internet.<sup>103</sup>

The second group addresses the procedural issue of boosting the efficiency and effectiveness of the WTO's monitoring function, especially the rules relating to compliance with the WTO's notification requirements, with subsidies as the leading example.<sup>104</sup> While no WTO Member may claim a perfect record in subsidy notifications, China's failure in fulfilling that obligation seems to be particularly egregious. This seems to be a perennial problem, which the USTR has been complaining about ever since China's accession to the WTO.<sup>105</sup> For example, in April 2006—after much nudging from the United States—China submitted its first subsidies notification, nearly five years behind schedule.<sup>106</sup> However, even this disclosure remained incomplete as China did not notify subsidies by sub-central governments, which would take China another ten years to report.<sup>107</sup> Moreover, the next notification took China four more years to submit.<sup>108</sup> Frustrated over the slow progress, the United States invoked Article 25.10 of the SCM Agreement to file a 'counter notification' in October 2011, which identified more than 200 unreported subsidy measures.<sup>109</sup> To address the problem, the joint draft by the United States, the European Union, Japan and Canada on strengthening the notification requirements proposed some rather drastic measures, such as naming and shaming the delinquent Member by designating it as "a Member with notification delay," curtailing its right to make interventions in WTO meetings and nominations to chair WTO bodies, and even levying a fine at the rate of 5% of its

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<sup>103</sup> For an overview of China's data regulation framework, see Henry Gao, *Data Regulation with Chinese Characteristics*, in *BIG DATA AND GLOBAL TRADE LAW* (Mira Burri, ed. 2021) (forthcoming 2021).

<sup>104</sup> See European Commission, *supra* note 96, at 3–5, 9–11; Canada Communication, *supra* note 97, at 2.

<sup>105</sup> See THE UNITED STATES TRADE REPRESENTATIVE, 2002 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, 22–23 (Dec. 11, 2002).

<sup>106</sup> See THE UNITED STATES TRADE REPRESENTATIVE, 2018 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 75 (Feb. 2019).

<sup>107</sup> See *id.* at 77.

<sup>108</sup> *Id.* at 76.

<sup>109</sup> *Id.*

annual contribution to the WTO.<sup>110</sup>

The final significant group addresses development, another long-standing issue stemming from the call of the United States and the European Union for greater ‘differentiation’ among WTO Members. The underlying rationale is that, while developed countries have been willing to extend special and differential treatment to smaller developing countries, they are reluctant to extend the same treatment to large developing countries such as China which have become economic powerhouses in their own right. In their proposals, the European Union and Canada called for the rejection of “blanket flexibilities”<sup>111</sup> for all WTO Members, and proposed that it be replaced by “a needs-driven and evidence-based approach”<sup>112</sup> that “recognizes the need for flexibility for development purposes while acknowledging that not all countries need or should benefit from the same level of flexibility.”<sup>113</sup> The U.S. proposal goes further by proposing the automatic termination of special and differential treatment for Members that fall into one of the following four categories: OECD members, G20 members, classification as “high income” by the World Bank, or a share of at least 0.5% of global goods trade.<sup>114</sup> Such a classification system would strip many WTO Members of their developing countries status, including China, as it meets two criteria, that is, G20 membership and a large trade share.

### C. *The Response of China*

Realizing that it had become the unspoken target of WTO reform, China quickly responded with two documents. The

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<sup>110</sup> Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Israel, Japan, New Zealand, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, WTO Doc. JOB/GC/204/Rev.3 at 3–4 (Mar. 5, 2020).

<sup>111</sup> European Commission, *supra* note 84, at 6.

<sup>112</sup> *Id.* at 7.

<sup>113</sup> Canada Communication, *supra* note 97, at 5.

<sup>114</sup> See General Council, Draft General Council Decision from the United States: *Procedures to Strengthen the Negotiating Function of the WTO – Decision of X Date*, WTO Doc. WT/GC/W/764 (Feb. 15, 2019) at 1–2.

first was a December 2018 position paper setting out China's three principles and five suggestions on WTO reform.<sup>115</sup> In May 2019, China submitted a formal proposal on WTO reform, which further elaborated the main issues of concern to China, as well as the specific actions that need to be taken.<sup>116</sup> While many of the suggestions directly respond to the China-related reform proposals mentioned earlier, China also tried to turn the table by launching its own offensives. For example, China suggested that the first priority should be solving the existential issues facing the WTO, such as the impasse over the Appellate Body Member appointment process, the abuse of the national security exception and the resort to unilateral measures.<sup>117</sup> Of course, given the mounting pressure, most of the Chinese proposals directly address the aforementioned points.

First, with regard to the new substantive issues being proposed, while China expresses willingness to consider some of the issues, such as electronic commerce and investment facilitation, it objects to many proposals. For example, one of the five suggestions in China's position paper is the need to "respect members' development models," which means that China "opposes special and discriminatory disciplines against state-owned enterprises in the name of WTO reform."<sup>118</sup> This is duly reiterated in the reform proposal, which is listed under the heading of "Adhering to the Principle of Fair Competition in Trade and Investment."<sup>119</sup> While some Western commentators might be puzzled by such an adamant position on the SOE issue, this is not surprising at all as SOEs relate to two of the three "core interests" of China as famously defined by State Councillor Dai Binguo in 2009.<sup>120</sup> As mentioned

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<sup>115</sup> See Press Release, Ministry of Commerce, People's Rep. of China, China's Position Paper on WTO Reform (Dec. 20, 2018), <http://kw2.mofcom.gov.cn/article/chinanews/201812/20181202818679.shtml>.

<sup>116</sup> See China, Proposal on WTO Reform, WTO Doc. WT/GC/W/773 (May 13, 2019) [hereinafter China Proposal].

<sup>117</sup> See *id.*, ¶¶ 2.1–2.10.

<sup>118</sup> Press Release, Ministry of Commerce, *supra* note 115.

<sup>119</sup> China Proposal, *supra* note 116, ¶ 2.4.2.

<sup>120</sup> The three core interests are preserving China's basic state system and national security, national sovereignty and territorial integrity, and the continued stable development of China's economy and society. See generally Michael D. Swaine,

earlier, China resents being singled out in WTO negotiations.<sup>121</sup> Because these proposals clearly target China, it is no surprise that China would react so strongly. Moreover, even with respect to issues on which China seems to agree with other WTO Members, the Chinese position sometimes comes with a twist. Electronic commerce is one such example, with the Chinese proposal focusing on “cross-border trade in goods enabled by the Internet, as well as on such related services as payment and logistics services.”<sup>122</sup> As I discussed in another paper, this is very different from the position taken by the United States, which emphasizes digital transmissions and the associated issue of free flow of data.<sup>123</sup>

Second, on the procedural issue of subsidy notifications, China adopts a dual-track approach. On the defensive side, China proposes that developing countries only comply with the notification obligations on a best-endeavor basis,<sup>124</sup> and should receive more technical assistance for that purpose.<sup>125</sup> On the offensive side, China throws the ball into the court of developed countries by calling them to “lead by example in submitting comprehensive, timely and accurate notifications” and “improve the quality of their counter-notifications.”<sup>126</sup>

Third, with regard to development, China is taking a flexible approach. As a matter of principle, it has made clear that special and differential treatment is an ‘entitlement’ that China “will never agree to be deprived of.”<sup>127</sup> At the same time, it also indicated its willingness to “take up commitments commensurate with its level of development and economic

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*China's Assertive Behavior, Part One: On “Core Interests”*, 34 CHINA LEADERSHIP MONITOR 1 (2011). State-owned economy is the basic economic system according to Articles 6 and 7 of the Chinese Constitution, which also state that public ownership and state-owned economy shall be the leading force in the economy.

<sup>121</sup> See *supra* Part II for discussions on China’s reactions at the July 2008 Ministerial Conference.

<sup>122</sup> China Proposal, *supra* note 105, ¶ 2.22.

<sup>123</sup> See Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 J. INT’L ECON. L. 297, 308–10 (2018).

<sup>124</sup> This means that these obligations do not create binding obligations.

<sup>125</sup> See China Proposal, *supra* note 105, ¶ 2.28.

<sup>126</sup> *Id.*

<sup>127</sup> Press Release, Ministry of Commerce, *supra* note 104.

capability.”<sup>128</sup> Such an approach is not new but is actually consistent with what China has been doing for some time. For example, when trade facilitation was first brought within the scope of WTO negotiations as one of the four “Singapore Issues,” most developing Members were unwilling to participate as they believed that the benefits would mostly accrue to developed countries with large trade volumes while developing countries would need to foot the bill for modernizing their customs processes.<sup>129</sup> China, however, took a different position because it realized that it, as one of the largest and most diversified traders in the world, stood to benefit greatly from such an initiative. Thus, China actively participated in the negotiations and became one of the first developing countries to ratify the agreement upon its conclusion.<sup>130</sup> Moreover, China did not designate any Category C<sup>131</sup> measures and agreed to implement 94.5% of the measures immediately upon ratification.<sup>132</sup> All of its Category B measures were fully implemented by January 2020.<sup>133</sup>

#### IV. U.S.-CHINA TRADE WAR

When China joined the WTO, globalization was in its heyday

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<sup>128</sup> *Id.*

<sup>129</sup> See Martin Khor, *Many Developing Countries Against Trade Facilitation Rules in WTO*, THIRD WORLD NETWORK (June 28, 2003), <https://www.twm.my/title/twninfo35.htm>.

<sup>130</sup> China ratified the agreement on September 4, 2015, and was the sixteenth among all 153 WTO Members that have ratified the agreement. Most of the other fifteen first Members are developed countries such as the United States and Japan. See *Ratifications List*, WORLD TRADE ORG.: TRADE FACILITATION AGREEMENT FACILITY, <https://www.tfafacility.org/ratifications> (last visited Feb. 6, 2021).

<sup>131</sup> The agreement includes three categories of measures. Category A includes provisions that the Member will implement by the time the Agreement enters into force, Category B includes provisions that the Member will implement after a transitional period following the entry into force of the Agreement, and Category C includes provisions that the Member will implement on a date after a transitional period following the entry into force of the Agreement and requiring the acquisition of assistance and support for capacity building. See *The Trade Facilitation Agreement*, WORLD TRADE ORG.: TRADE FACILITATION AGREEMENT FACILITY, <https://www.tfafacility.org/trade-facilitation-agreement-facility> (last visited Feb. 6, 2021).

<sup>132</sup> See *Detailed Breakdown: China*, WORLD TRADE ORG.: TRADE FACILITATION AGREEMENT DATABASE, <https://www.tfadatabase.org/members/china/measure-breakdown?date=2020> (last visited Feb. 16, 2021).

<sup>133</sup> See *id.*

and optimism abounded. The sentiment was nicely summed up by U.S. President Bill Clinton in his speech<sup>134</sup> in 2000 promoting the bill that granted China permanent normal trading status:

By joining the W.T.O., China is not simply agreeing to import more of our products; it is agreeing to import one of democracy's most cherished values: economic freedom. The more China liberalizes its economy, the more fully it will liberate the potential of its people—their initiative, their imagination, their remarkable spirit of enterprise. And when individuals have the power, not just to dream but to realize their dreams, they will demand a greater say.'

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'The Chinese government no longer will be everyone's employer, landlord, shopkeeper and nanny all rolled into one. It will have fewer instruments, therefore, with which to control people's lives. And that may lead to very profound change.

In other words, it was widely believed that the WTO would help to transform China from Communism to Capitalism, with more freedom to the people, in both

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<sup>134</sup> U.S. President Bill Clinton, Speech at the Johns Hopkins University Paul H. Nitze School of Advanced International Studies (Mar. 9, 2000), [https://www.iatp.org/sites/default/files/Full\\_Text\\_of\\_Clinton's\\_Speech\\_on\\_China\\_Trade\\_Bi.htm](https://www.iatp.org/sites/default/files/Full_Text_of_Clinton's_Speech_on_China_Trade_Bi.htm).

economic and political spheres. This was to be achieved through the policy of “engagement,” which was adopted by successive U.S. administrations from Clinton to Obama.<sup>135</sup>

However, as time went by, the United States realized that Communism not only did not retreat, but also further advanced in China, with the state-owned economy growing stronger and the rule of the Party further entrenched in the process.<sup>136</sup> It was this disillusion over the transformative power of the multilateral trading system that led to the exploration of other means to help effect change in China. Initially, President Obama tried to build a “coalition of the willing” with the launch of the TPP negotiations in 2010, which included rules on SOEs, competitions, labor, government procurement and digital trade, all designed to address the challenges of China’s state capitalism. When President Trump came into office, however, the TPP deal was scrapped as he believed it was “disaster” that is bad for American business and workers.<sup>137</sup> Instead, President Trump resorted to another tool which he deemed more direct and effective: a trade war.

As a prelude, in August 2017, President Trump, through a Presidential Memorandum, requested the USTR, to “determine, consistent with section 302(b) of the Trade Act of 1974 (19 U.S.C. 2412(b)), whether to investigate any of China’s laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.”<sup>138</sup> On March 22, 2018, the USTR

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<sup>135</sup> There have been some debates on whether the engagement policy started with Clinton, but most agree that it was the Clinton Administration which made engagement the main theme of America’s China policy. Compare Neil Thomas, *Matters of Record: Relitigating Engagement with China*, MACRO POLO (Sept. 3, 2019), <https://macropolo.org/analysis/china-us-engagement-policy/>, with Orville Schell, *The Death of Engagement*, WIRE CHINA (June 7, 2020), <https://www.thewirechina.com/2020/06/07/the-birth-life-and-death-of-engagement>.

<sup>136</sup> For a discussion about the evolution of different stages of SOE reform in China, see Weihuan Zhou, Henry S. Gao & Xue Bai, *China’s SOE Reform: Using WTO Rules to Build a Market Economy*, 68 INT’L & COMPAR. L.Q. 977 (2019).

<sup>137</sup> Douglas A. Irwin, *Mr. Trump’s Trade War*, WALL. ST. J. (Dec. 15, 2017), <https://www.wsj.com/articles/donald-trumps-trade-war-1513356667>.

<sup>138</sup> Memorandum of Aug. 14, 2017, 82 Fed. Reg. 39,007 (Aug. 17, 2017).

released its Section 301 Report into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, which made positive findings on these issues, and suggested "[a] range of tools may be appropriate to address these serious matters including more intensive bilateral engagement, WTO dispute settlement, and/or additional Section 301 investigations."<sup>139</sup> On the same day, President Trump issued another Presidential Memorandum directing the USTR to raise tariffs against Chinese products, bring WTO cases against China's discriminatory licensing practices, and the Treasury Department to impose investment restrictions on Chinese firms.<sup>140</sup>

On April 3, 2018, the USTR published a proposed list of Chinese products that would be subject to an additional tariff of twenty-five percent.<sup>141</sup> In total, the list covers about 1,300 separate tariff lines with an estimated worth of roughly \$50 billion. China responded quickly, with the MOFCOM announcing an additional twenty-five percent tariff on 106 U.S. products with the same value.<sup>142</sup> In several rounds of tit-for-tat retaliations over the next one and half years, the stakes quickly escalated to cover \$550 billion worth of Chinese products and \$185 billion worth of U.S. goods.<sup>143</sup> In other

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<sup>139</sup> U.S. Trade Representative, *Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974* (2018).

<sup>140</sup> See Memorandum of Mar. 22, 2018, 83 Fed. Reg. 13,099 (Mar. 27, 2018).

<sup>141</sup> Press Release, U.S. Trade Representative, Under Section 301 Action, USTR Releases Proposed Tariff List on Chinese Products (Apr. 3, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/under-section-301-action-ustr>.

<sup>142</sup> Announcement by the Ministry of Commerce, People's Rep. of China, 关于对原产于美国的部分进口商品加征关税的公告 (*Guanyu dui Yuanchanyu Meiguo de Bufen Jinkou Shangpin Jiazheng Guanshui de Gonggao*) [Notice on the Collection of Additional Tariff on Some Imported Products from the United States], (Apr. 4, 2018), <http://www.mofcom.gov.cn/article/b/e/201804/20180402728516.shtml>.

<sup>143</sup> See Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, CHINA BRIEFING (Aug. 25, 2020), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline>. For a detailed analysis of the different phases of trade war, see Chad P. Bown, *US-China Trade War: The Guns of August*, PETERSON INST. FOR INT'L ECON.: TRADE & INV. POL'Y WATCH (Sept. 20,

words, the additional tariffs cover almost the entire bilateral trade between the two with only limited exceptions.<sup>144</sup>

The illegality of the additional tariffs by the United States is beyond doubt. Years before the current case, the Panel in *United States – Sections 301–310 of the Trade Act 1974* ruled unequivocally that Section 301, to the extent that it requires the United States to make a unilateral determination of compliance, violates Article 23.2(a) of the DSU, which requires that a Member shall “not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement.” However, relying on both the U.S. Statement of Administrative Action (“SAA”) accompanying the U.S. legislation implementing the results of the Uruguay Round<sup>145</sup> and the U.S. statements in that case,<sup>146</sup> the Panel was satisfied that the U.S. government had undertaken “never to adopt a determination of inconsistency prior to the adoption of DSB”<sup>147</sup> and thus concluded that the provisions at issue were not inconsistent with U.S. obligations under the WTO. With keen awareness of the volatility of politics, the Panel ended its report with the following prescient admonition:<sup>148</sup>

Significantly, all these conclusions are based in full or in part on the US Administration's undertakings mentioned above. It thus follows that should they be repudiated or in any other way removed by the US Administration or another

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2019, 12:00 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-war-guns-august>.

<sup>144</sup> According to the U.S. government, U.S. imports from China in 2018 amounted to only \$540 billion with export to China at \$120 billion. See *Trade in Goods with China*, U.S. CENSUS BUREAU: FOREIGN TRADE, <https://www.census.gov/foreign-trade/balance/c5700.html> (last visited Feb. 16, 2021).

<sup>145</sup> Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (adopted Jan. 25, 2000), ¶¶ 7.110–112.

<sup>146</sup> *Id.* ¶ 7.116.

<sup>147</sup> *Id.* ¶ 7.112.

<sup>148</sup> *Id.* ¶ 8.1.

branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted.

By taking unilateral measures against China without DSB authorization, the United States has violated its WTO obligation. Not surprisingly, this is also China's view, as articulated in its three successive WTO cases against the different rounds of US tariffs.<sup>149</sup> In addition, the specific weapons that the United States chose in the trade war—additional tariffs on top of its WTO bound tariffs against Chinese products—also violate the MFN and tariff binding obligations under Articles I:1 and II:1 of the GATT 1994 respectively. In response, the United States claims that the additional tariffs were necessary steps to address, as outlined in the USTR Section 301 report, China's distortive policies on technology transfer, which are "harmful, trade distorting policies not directly covered by WTO rules."<sup>150</sup> While such argument is unlikely to be accepted by a panel or the Appellate Body, the United States has been able to convince many WTO Members of the necessity of WTO reform to address what it perceives as the underlying problem.

By firing its own rounds of additional tariffs, however, China has also lost its innocence in the trade war. In its announcement on the additional tariffs, China stated that its retaliatory tariffs were necessary to "respond to the emergency caused by the violation of international obligations by the US, defend China's lawful self-interests," and were taken pursuant to "relevant laws and regulations such as The Foreign Trade Law of the People's Republic of China and basic principles of international law."<sup>151</sup> MOFCOM did not spell out the exact

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<sup>149</sup> DS543: United States—Tariff Measures on Certain Goods from China; DS565: United States—Tariff Measures on Certain Goods from China II; DS587: United States—Tariff Measures on Certain Goods from China III.

<sup>150</sup> Amb. Dennis Shea, Deputy U.S. Trade Representative, Statement at the WTO General Council (May 8, 2018), <https://geneva.usmission.gov/2018/05/08/ambassador-dennis-sheas-statement-at-the-wto-general-council>.

<sup>151</sup> Announcement, *supra* note 142.

provisions, but the most relevant would appear to be Article 7 of Foreign Trade Law, which states that if any country imposes discriminatory trade measures against China, China may take corresponding measures against such countries. However, this provision cannot provide sound legal justification as it is essentially a simplified version of Section 301 and thus suffers from the same problem. With regard to international law principles, Dr. Yang Guohua, a formal senior MOFCOM official, has mentioned<sup>152</sup> the following possibilities: the right of self-defence under Article 51 of the Charter of the United Nations, the termination or suspension of the operation of a treaty as a consequence of its breach by another party under Article 60 of the Vienna Convention on the Law of Treaties,<sup>153</sup> and necessary measures to safeguard an essential interest against a grave and imminent peril under Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.<sup>154</sup> The biggest problem with these general principles, however, is whether they could be used to justify blatant violations of explicit WTO obligations, notwithstanding the famous statement by the Appellate Body in *US – Gasoline* that WTO agreements are not to ‘be read in clinical isolation from public international law.’

After a roller-coaster ride spanning the better part of two years, the two sides finally signed a bilateral Phase One trade deal<sup>155</sup> on January 15, 2020. At ninety-six pages, the agreement includes seven chapters on the following issues: (1) intellectual property, (2) technology transfer, (3) trade in food and agricultural products, (4) financial services, (5)

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<sup>152</sup> Yang Guohua, *Zhongmei Maoyizhan Zhong de Guojifa* [International Law behind the Trade War between US and China], WUDA GUOJIFA PINGLUN [International Law Review of Wuhan University] (2018) 120, 135–38.

<sup>153</sup> Vienna Convention on the Law of Treaties art. 60, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

<sup>154</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1.

<sup>155</sup> Office of the United States Trade Representative, Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People’s Republic Of China, (Jan. 15, 2020), [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_And\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_And\\_China\\_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf).

macroeconomic policies and exchange rate matters and transparency, (6) trade expansion, and (7) dispute resolution. Most of the chapters covers rules or regulatory issues, with Chapter 6 setting out detailed market access commitments by spelling out in dollar values China's additional import targets for the next two years. The purchase commitments are supposed to solve the trade imbalance problem, which is what prompted President Trump to launch the trade war in the first place. Technically speaking, however, all the additional tariffs imposed by the United States over the past two years were triggered by the rules issues, as explained earlier. While the Agreement helped to avoid further escalation of the trade war, it has left most existing retaliatory tariffs intact<sup>156</sup> and institutionalized the unilateral and confrontational approach to resolving disputes, which could reignite the bilateral trade tensions.<sup>157</sup> Moreover, the deal fails to address the more significant and systemic issues, such as China's SOEs and industrial policies and subsidies. Instead, these issues are expected to be addressed by the two parties in their Phase Two negotiations.<sup>158</sup>

#### CONCLUSION: MULTILATERALISM TO UNILATERALISM, AND BACK AGAIN?

China, which started as a pariah state that rarely traded with the rest of the world, has not only re-integrated itself into the world economy, but also grown to be the largest trader in the world. At the time of China's accession to the WTO, pundits hailed the event as a historic triumph of capitalism that marked the end of history.<sup>159</sup> Nineteen years after China's accession, however, most observers are left with mixed feelings, as the

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<sup>156</sup> Chad Bown, US-China Trade War Tariffs: An Up-to-Date Chart, PIIE (Feb. 14, 2020), [www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart](http://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart).

<sup>157</sup> Weihuan Zhou, *WTO Dispute Settlement Mechanism Without the Appellate Body: Some Observations on the US-China Trade Deal*, 9 J. OF INT'L TRADE & ARB. L. (2020) 443, 451–53.

<sup>158</sup> United States Trade Representative, *2019 Report to Congress on China's WTO Compliance*, at 30 (Mar. 2020).

<sup>159</sup> See *Clinton's Words on China: Trade Is the Smart Thing*, N.Y. TIMES, Mar. 9, 2020, <https://www.nytimes.com/2000/03/09/world/clinton-s-words-on-china-trade-is-the-smart-thing.html>.

success of China's economic and trade development has led to unexpected consequences both within and beyond China. In particular, these problems are most vividly reflected in the U.S.-China trade war, which is still ongoing at the time of this writing.

At an ideological level, the two countries hold quite different views on the roles of the government. One believes, as eloquently put by Thomas Paine, that "government, even in its best state, is but a necessary evil"<sup>160</sup> and therefore should be subject to constant checks and balances to make sure that it does not encroach upon the rights of private citizens and businesses. The other, regards the government as "the key safeguard in achieving the China Dream of great rejuvenation of the Chinese nation"<sup>161</sup> and calls for further strengthening of the national governance capacity in all areas, including the economy. At a technical level, the two also employ different tools to regulate the economy, with one supporting a *laissez faire* approach unfettered by government intervention, while the other advocates for the State to take responsibility for promoting economic development through various means such as the use of state-owned enterprises in strategic sectors, periodic economic planning which prioritizes the development of certain industries, and tools of 'macroeconomic control' that regulate issues ranging from exchange rate policy, money supply, to housing development and birth control.

As it failed to address many of the deeper systemic

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<sup>160</sup> THOMAS PAINE, COMMON SENSE: ADDRESSED TO THE INHABITANTS OF AMERICA 1 (2006). President Trump, in particular, seems to be a strong believer in this with his mandate, upon assuming office, that "for every 1 new regulation, 2 old regulations must be eliminated." See *Read President Trump's Full Prepared Remarks for His First Address to Congress*, CNBC, Feb. 28, 2017, <https://www.cnbc.com/2017/02/28/read-president-trumps-full-prepared-remarks-for-his-first-address-to-congress.html>; see also Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

<sup>161</sup> Zhonggong Zhongyang Guanyu Jianchi he Wanshan Zhongguo Tese Shehui Zhuyi Zhidu, Tuijin Guojia Zhili Tixi he Zhili Nengli Xiandaihua Ruogan Zhongda Wenti de Jueding [CPC Central Committee Decision on Several Important Questions on Upholding and Improving Socialism with Chinese Characteristics and Accelerating the Modernization of the State Governance System and Governance Capability] (adopted by the Fourth Session of the Nineteenth Cent. Comm. of the Communist Party of China, October 312019), [http://www.gov.cn/zhengce/2019-11/05/content\\_5449023.htm](http://www.gov.cn/zhengce/2019-11/05/content_5449023.htm).

issues, the Phase One agreement is merely a temporary ceasefire, rather than a deal for a “perpetual peace,” as Kant would put it. Many alternative proposals have been put forward lately, with the most well-known among them being the recent Joint Statement on “US China Trade Relations-A Way Forward,”<sup>162</sup> drafted by the U.S.-China Trade Policy Working Group, a group of prominent economics and legal scholars from both countries, led by renowned Harvard economist Dani Rodrick. The Joint Statement calls for wide latitude for both countries in formulating their own “industrial policies, technological systems, and social standards”<sup>163</sup> the achievement of which could be realized through “well-calibrated” trade policies,<sup>164</sup> so long as the adverse effects on foreign actors are minimized.

Unfortunately, as it is premised on dubious political economy analysis, the Joint Statement does not provide practical solutions to the real issues in the bilateral negotiations.<sup>165</sup> Instead, by granting excessive policy space to the two largest trading nations, it would create a dangerous precedent for bypassing existing rules in favor of more “policy spaces” for national governments. This would, in turn, undermine the rule-based multilateral institutions, and run contrary to the aim of “perpetual peace,” because the “state of peace must be formally instituted, for a suspension of hostilities is not in itself a guarantee of peace.”<sup>166</sup>

One of the biggest lessons from the trade war is that unilateralism does not provide a good solution for the challenges resulting from China’s rise. Instead, such challenges must be addressed by the rule of law, either through multilateral rules and institutions to be negotiated in the ongoing discussions on WTO reform, or, in the meantime, by

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<sup>162</sup> US-CHINA TRADE POL’Y WORKING GRP., *US-China Trade Relations: A Way Forward*, Oct. 18, 2019, [https://cdn.shanghai.nyu.edu/sites/default/files/\\_us-china\\_trade\\_joint\\_statement\\_2019\\_0.pdf](https://cdn.shanghai.nyu.edu/sites/default/files/_us-china_trade_joint_statement_2019_0.pdf)

<sup>163</sup> *Id.*, at 1.

<sup>164</sup> *Id.*

<sup>165</sup> For a detailed analysis of the Joint Statement, see Weihuan Zhou & Henry Gao, *US-China Trade War: A Way Out?*, 19 *WORLD TRADE REV.* (forthcoming 2020).

<sup>166</sup> Immanuel Kant, *Perpetual Peace*, in *KANT: POLITICAL WRITINGS* 98 (H.S. Reiss ed., 1991).

creatively utilizing some of the existing rules, especially those on subsidies in both the WTO agreements and China's accession package.<sup>167</sup> It is exactly at times like this that we have to be reminded that, only the rule of law would provide the true foundations for a “perpetual peace.”

Fortunately, with the new U.S. administration, multilateralism may now be back in vogue. The new administration seems to be prepared to handle the China issue by teaming up with its allies. At the same time, there are also signs that China is willing to take up more commitments beyond its traditional positions. For example, in the recently concluded Regional Comprehensive Economic Partnership (“RCEP”),<sup>168</sup> China has agreed to rules such as free cross-border data transfer<sup>169</sup> and prohibition of data localization requirements,<sup>170</sup> commitments which were hitherto regarded by most commentators as impossible for China to accept.<sup>171</sup> Similarly, China also agreed, in the new Comprehensive Agreement on Investment with the European Union, to be subject to a dispute settlement mechanism on sustainable development commitments, including those on labor and environmental protection.<sup>172</sup> In his speech at the World Economic Forum on January 25, 2021, President Xi Jinping also emphasized, as an indirect message to the new U.S. administration, the need to uphold international law, strengthen multilateral institutions and embrace “consultation

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<sup>167</sup> See Weihuan Zhou, Henry Gao & Xue Bai, *China's SOE Reform: Using WTO Rules to Build a Market Economy*, 68 INT'L & COMPAR. L. Q. 977 (2019).

<sup>168</sup> N.Z. FOREIGN AFFS. & TRADE, Regional Comprehensive Economic Partnership, <https://www.mfat.govt.nz/assets/Uploads/RCEP-Agreement-Legal-Text.pdf>.

<sup>169</sup> *Id.* art. 12.15.

<sup>170</sup> *Id.* art. 12.14.

<sup>171</sup> See Nigel Cory, *Why China Should Be Disqualified From Participating in WTO Negotiations on Digital Trade Rules*, ITIF (May 9, 2019), <https://itif.org/publications/2019/05/09/why-china-should-be-disqualified-participating-wto-negotiations-digital> (arguing that China would never accept such rules). *But see* Henry Gao, *Across the Great Wall: E-commerce Joint Statement Initiative Negotiation and China* (June 19, 2020), <https://ssrn.com/abstract=3695382> (arguing that China might be willing to accept such rules under certain conditions).

<sup>172</sup> EU-China Comprehensive Agreement on Investment: The Agreement in Principle, EU-China, 30 Dec. 30, 2020, EUR. COMM'N 4, [https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc\\_159242.pdf](https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159242.pdf).

and cooperation instead of conflict and confrontation.”<sup>173</sup> With the joint efforts of the two largest economies in the world, the meeting of minds on WTO reform might be finally within reach.

In addition, as I noted in another paper, the COVID-19 pandemic, despite being a disruption to world trade in general, might provide some impetus towards advancing the multilateral approach on some of the WTO reform issues related to China.<sup>174</sup> To help their firms cope with the pandemic, many Western governments provided massive subsidies.<sup>175</sup> Such policy interventions raised several interesting issues:

First, the growing popularity of capital injections and equity infusions calls into question the ownership-based approach to the definition of state-owned enterprises. As discussed earlier, the United States and the European Union have been arguing that the determination of ‘public bodies’ shall be based primarily on governmental ownership instead of the exercise of governmental functions. However, as the pandemic has made more and more firms in the West rely on government equity infusions, the ownership-based argument has become less relevant in the policy debate. Instead, it would be more fruitful to differentiate firms based on what they do and the effects of such actions on the market, rather than on who contributes the capital, as China has been arguing.

Second, with the COVID-19 pandemic upending entire markets at unprecedented levels, it also becomes more difficult to ascertain the market benchmark, which is a key

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<sup>173</sup> Full Text: *Special Address by Chinese President Xi Jinping at the World Economic Forum Virtual Event of the Davos Agenda*, XINHUA, Jan. 25, 2021, [http://www.xinhuanet.com/english/2021-01/25/c\\_139696610.htm](http://www.xinhuanet.com/english/2021-01/25/c_139696610.htm).

<sup>174</sup> Dessie Ambaw, Peter Draper & Henry Gao, *Lessons from the Pandemic for Future WTO Subsidy Rules*, in *REVITALISING MULTILATERALISM: PRAGMATIC IDEAS FOR THE NEW WTO DIRECTOR-GENERAL 203–11*, (Simon Evenett & Richard Baldwin eds., 2020).

<sup>175</sup> See e.g., IMF, *Public Sector Support to Firms*, Special Series on Fiscal Policies to Respond to COVID-19 (2020); OECD, *Government support and the COVID-19 pandemic*, OECD Policy Responses to Coronavirus (COVID-19) (2020). Many of these subsidies are also tracked by the Global Trade Alert (“GTA”) database and analysed in the paper above.

issue in the determination of ‘benefit’—the third component of the ASCM’s subsidy definition. This is similar to the problem in the so-called non-market economies, where the whole market is distorted and does not provide reliable benchmarks. Such problem has traditionally been solved with the use of alternative benchmarks from surrogate countries, but now, with the pandemic sweeping the whole globe, it is extremely hard—if not impossible—to find such surrogate countries that could provide the necessary benchmarks. In other words, the distinction between non-market economies like China and traditional market economies might become moot.

Third, despite it being the first country hit by COVID-19, China was able to control the pandemic rather quickly while most of the West are still fighting it. As the result, most of the subsidy interventions have been provided by the United States and by European Union member states, while China, the country deemed by many to be the worst offender on subsidies before the pandemic, has not been a major subsidy provider this time. This could turn the tables on subsidy discussions as the United States and European Union now find themselves more on the defensive side. With this new set of negotiating dynamics, it could be easier to negotiate subsidies disciplines, especially if WTO members could agree on the types of subsidies which are necessary to combat the pandemic and aid the recovery.

To sum up, the unprecedented existential crisis facing humanity—COVID-19—could, ironically, save the reform efforts at the WTO to deal with its so-called “existential threat”<sup>176</sup>—China.

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<sup>176</sup> United States Trade Representative, *Statement By U.S. Trade Representative Robert Lighthizer on Section 301 Action* (July 10, 2018).

