

China's Entry into the WTO

A Mistake by the United States?

JENNIFER HILLMAN

...it seems clear that the United States erred in supporting China's entry into the WTO on terms that have proven to be ineffective in securing China's embrace of an open, market-oriented trade regime

2017 USTR Report to Congress on China's WTO Compliance

I Introduction

On December 11, 2001, China was admitted to the World Trade Organization (WTO), the culmination of an American-supported process that opened China to global investment and helped make it the workshop of the world. Since then, the halls of Washington D.C. have been wracked by debates over how to understand – and manage – China's entrance onto the global stage.

By delineating the drivers of U.S. decision-making in the lead-up to China's accession to the WTO and cataloging actions taken in the years immediately following, this chapter hopes to offer a partial explanation of how and why the United States has grown skeptical of the rules-based trading system's ability to address concerns with China, despite serving for decades as its chief architect and as a key proponent of China's entry into the WTO. The chapter highlights the wide range of issues that many politicians thought could be addressed as part of China's accession processes, contrasting those views with the reality of what was both achievable and included in China's protocol to join a trade organization with a particular and circumscribed set of rules. While it would be misguided to attribute the current state of the international trading system solely to the choices

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of U.S. policymakers or the actions of China, U.S. decisions, particularly the decision to prevent new judges from being appointed to the Appellate Body and the decision to pursue unilateral tariffs on Chinese exports to the United States, have clearly had a major impact. These choices, once unimaginable, are best understood as part of Washington's reaction to China's rise along with perceived failures by the WTO.

(i) *Shifting Views of Engagement with Trade and China*

The old China consensus was built on a broad understanding of the benefits of engagement, an optimism about liberalization in China, a desire to avoid Sino-American confrontation as well as a belief that Chinese-American economic ties would provide material and, in some cases, domestic political benefits, for key U.S. stakeholders. These interests and beliefs were the basis of U.S.-China policy and ensured relative stability from administration to administration. It was under the auspices of this coalition that the pre-requisite for China's admission to the WTO – “permanent normal trading relations” between China and the United States – was established. Now, however, a growing conviction that the People's Republic of China (PRC) poses a fundamental threat to the United States' hegemonic role, as well as economic losses and growing income inequality associated with trade with China, has undermined support for the expansive trade policy the United States once regularly pursued.

Policymakers on both sides of the aisle have also become skeptical of the material benefits offered by engagement. Rather than opening markets to U.S. firms, a more cynical view that sees globalization and trade as hollowing out the U.S. manufacturing base and the middle class is increasingly common.¹ As China has moved up the global value chain and become a direct competitor in sectors previously thought to be U.S. strongholds like advanced computing and telecommunications, China's economic might and state-led practices have begun to pose a direct threat to the United States' defense industrial base and other influential elements within the U.S. political system.² Both parties have endorsed and continue to explore industrial policies that would have once been taboo.

¹ For a Republican example of this mindset, see: “Made in China 2025 and the Future of American Industry”, *U.S. Senate Committee on Small Business and Entrepreneurship*, 2019. For a Democratic example see: E. Warren, “A Plan for Economic Patriotism”, 2019.

² E.S. Medeiros, “The Changing Fundamentals of US-China Relations”, *The Washington Quarterly*, 41 (2019), 93–119.

At the same time, the political benefits of opposing a liberal trade policy have grown. Republican Party leaders, a traditional stronghold of free trade sentiment have, in recent years, grown more skeptical both of China and open trade policies more generally. The Democratic Party, long divided on trade, has been faced with the need to compete for blue-collar voters distributed in strategically important states and has grown skeptical that trade can deliver the broad-based growth imagined by members of the Clinton administration, who championed China's accession to the WTO.³ Those within the Democratic Party who see an open trade agenda as essential to both economic growth and successful competition with China have become more self-conscious of the political liabilities associated with trade and have tempered their aspirations accordingly.⁴

Washington's evolution has deep implications for the future of the WTO. Born in an era of American self-confidence, military dominance, and liberalizing ambition, the WTO is perceived in some quarters to be ill-suited for the current moment. In the face of a growing Chinese-American contest, the WTO's challenge is to avoid being trampled or sidelined while still working to preserve the multilateral, rules-based trading regime. This can only be accomplished if the WTO reorients itself to become a venue where competitors are able to come together to address pressing global problems like climate change, global health, income inequality, digital commerce, and the implications of significant non-market economy actors as members of the WTO.

(ii) *Policy of Engagement*

From at least the end of the Cold War to the late 2010s, the United States pursued a strategy of "engagement" towards China.⁵ Under the auspices

³ Trade issues became uncomfortable for Republican policymakers by the early 2000s. See: D.A. Irwin, *Clashing Over Commerce* (University of Chicago Press, 2017), p. 679. Donald Trump's political campaign heavily undercut support for free trade among the Republican base, though this support began to rebound midway through his term. See: B. Jones, "Americans Are Generally Positive about Free Trade Agreements, More Critical of Tariff Increases", *Pew Research Center*, 2018, www.pewresearch.org/fact-tank/2018/05/10/americans-are-generally-positive-about-free-trade-agreements-more-critical-of-tariff-increases/. L. Silver, K. Devlin, C. Huang, "Most Americans Support Tough Stance toward China On Human Rights, Economic Issues", *Pew Research Center*, 2021, www.pewresearch.org/global/2021/03/04/most-americans-support-tough-stance-toward-china-on-human-rights-economic-issues/.

⁴ See: S. Ahmed and R. Engel, editors, "Making U.S. Foreign Policy Work Better for the Middle Class", *Carnegie Endowment for International Peace*, 2020, 15–17, and 22–23. <https://carnegieendowment.org/2020/09/23/making-u.s.-foreign-policy-work-better-for-middle-class-pub-82728.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d>

⁵ The periodization of "engagement" is a subject of debate. David Lampton, for instance, dates the policy back to 1971, while Alastair Ian Johnston sees it as originating in Bill

of this strategy, the United States attempted to expand economic and political ties between the two countries. While trade normalization is the most prominent element of this strategy, it also included military-to-military dialogues, educational and scientific contacts, and collaboration in multilateral fora.

As a strategy, engagement was broadly intended as a way of managing the rise of China. The architects of engagement sought to accomplish a wide variety of goals, ranging from increased Sino-American collaboration on non-proliferation and environmental issues to accelerated economic growth in the United States.⁶ Among these goals were the political and economic liberalization of China. By approaching China with an open hand, U.S. officials believed they would be better positioned to accomplish these goals. The engagement was thought to produce comity and trust between the two powers, empower less confrontational elements within the regime, and set the groundwork for liberalization.

In recent years, the policy of engagement has been reconsidered.⁷ This shift has been substantially the result of China's growing geopolitical power, increasingly assertive behavior on the international stage, and a turn toward a more state-centric, Chinese Communist Party (CCP) controlled economy. The engagement was explicitly intended to prevent a Sino-American confrontation. Today, there is a sense that some sort of Chinese-American competition is inevitable and, perhaps concerningly, may even be desirable. China's pivot away from market reform has also undercut one of the primary rationalizations for engagement. Unlike their predecessors, policymakers in the United States are increasingly skeptical that reformist elements in China can change China's economic path or that U.S. actions can empower the reformists. Finally, domestic dynamics have made open trade writ large increasingly toxic and trade with China an especially hot-button issue.

As the U.S. policy towards a more assertive China has come under increased scrutiny, attitudes toward the WTO have shifted. Initial

Clinton's pivot to a more conciliatory China policy in the mid-1990s following an initial attempt to aggressively link trade openness to progress on humanitarian issues.

D.M. Lampton, "The China Fantasy", *The China Quarterly*, 191 (2007), 745–49.
A.I. Johnston, "The Failures of the 'Failure of Engagement' with China", *The Washington Quarterly*, 42 (2019), 99–114.

⁶ A.I. Johnston, "The Failures of the 'Failure of Engagement' with China", *The Washington Quarterly*, 42 (2019), 99–114.

⁷ See: W. Jisi et al., "Did America Get China Wrong? The Engagement Debate", *Foreign Affairs*, July/August, published on June 14, 2018, www.foreignaffairs.com/articles/china/2018-06-14/did-america-get-china-wrong. ClkX3QTaP0G28MhKT3Ue/Exmv0yh22d

optimism about the power of the WTO to discipline and mold China has been replaced by frustration with the WTO's apparent inability to confront Chinese abuses. That frustration has itself contributed to a lack of support for the WTO as an institution, particularly for its dispute settlement system and its Appellate Body.

II Implications of the Debate over Granting China “Permanent Normal Trade Relations” Status

As noted below, the process for China joining the WTO involved both the negotiation of China's WTO Protocol of Accession (Protocol) and its accompanying Working Party Report (Report) and legislation in the United States to grant China “permanent normal trade relations” (PNTR) to replace the annual review of whether Chinese goods could enter the United States under “Most Favored Nation” (MFN) rates of duty. PNTR was necessary to meet the prerequisite required of the United States to “immediately and unconditionally” grant Chinese goods the same tariffs and trade treatment as goods from all other WTO members – called MFN everywhere but the United States, where the term “normal trade relations” is used instead.⁸

(i) *Expansive View of the Role of the WTO Accession Process*

China's accession to the WTO was negotiated under the Clinton Administration, taking as their point of departure President Clinton's view that China could play a positive role in advancing environmental standards, fighting transnational crime, bolstering the international trading system, contributing to an arms control regime, and promoting stability in East Asia.⁹ While “political pluralism” and “free markets” in China were stated goals of the Clinton administration, these long-term objectives were part of a larger agenda that included pressing short-term concerns like the burgeoning North Korean nuclear program and the desire

⁸ GATT Article I: “any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

⁹ W.J. Clinton, “Remarks by the President in Address of China and the National Interest”, Voice of America, Washington DC, *The White House*, October 24, 1997, <https://clintonwhitehouse4.archives.gov/WH/New/html/19971024-3863.html.C1kX3Q TaP0G28MhKT3Ue/Exmv0yhh22d>

to diffuse tensions over Taiwan. PNTR was viewed internally by advocates, as Ambassador Charlene Barshefsky later recounted, as “the one chance the U.S. and China had to create an enduring foundation for the relationship.”¹⁰ The logic was that “if we treated China as an enemy, we were guaranteeing an enemy in the future. If we treated China as a friend, we could not guarantee friendship, but we could at least keep open the possibility of more benign outcomes.”¹¹

For the Clinton team, the benefits of engagement were not theoretical. They had seen how deeper ties could help diffuse both bilateral and regional stressors. The U.S. Trade Representative at the time, Mickey Kantor, would later argue that trade ties helped the two countries manage the 1995 Taiwan Strait Crisis, commenting that he was “convinced that the trade relationship was a strong connecting bond between the U.S. and China at a time when we needed it, particularly in late '95 and early '96.”¹² According to former Secretary of Defense William Perry, the threat posed by North Korea, “provided a pretty strong incentive to see if we could go out and re-establish a reasonable relationship with [China],” which had previously provided useful intelligence about North Korean ambitions.¹³

The Clinton administration also saw their ability to encourage and support reformers within the Chinese regime as essential to accomplishing their varied goals. The contention was the boost to Chinese economic growth contributed by PNTR would “bolster the confidence of Chinese leadership in ways that reduce their fear about political reform.”¹⁴

¹⁰ C. Barshefsky Interview, *William J. Clinton Presidential History Project*, Miller Center, University of Virginia, 2005, <https://millercenter.org/the-presidency/presidential-oral-histories/charlene-barshefsky-oral-history.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d>

¹¹ J.S. Nye, Jr., “Should China Be ‘Contained?’”, *Project Syndicate*, 2011, www.project-syndicate.org/commentary/should-china-be--contained.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

¹² M. Kantor Interview, *William J. Clinton Presidential History Project*, Miller Center, University of Virginia, 2002, <https://millercenter.org/the-presidency/presidential-oral-histories/michael-mickey-kantor-oral-history.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d>

¹³ Quoted in: Y.E. Yang, “Leaders’ Conceptual Complexity and Foreign Policy Change: Comparing the Bill Clinton and George W. Bush Foreign Policies toward China”, *The Chinese Journal of International Politics*, 3 (2010), 415–46.

W.I. Cohen, *America’s Response to China: A History of Sino-American Relations*, (Columbia University Press, 2019), p. 245.

¹⁴ See: Memorandum Kenneth Lieberthal, Senior Director for Asia on Clinton’s National Security Council, outlining the national security rationale for PNTR. S. Berger, Remarks to the East Asia Institute at Columbia University on China, New York, NY, 2000, <https://clinton.presidentiallibraries.us/items/show/11241>

Enabling “reformers” within China could allow the United States to pursue a wide range of priorities by creating a China that was “more cooperative on such crucial issues as nonproliferation, regional security, peacekeeping, human rights, and arms control.”¹⁵ Rejecting PNTR, however, would empower elements within China “who want to tighten the internal clamps, invest more heavily in the military-industrial complex, and hunker down for the ‘inevitable struggle’ with America bilaterally, regionally, and globally.” The “worst case” scenario was a “US-China confrontation across Asia.”

The United States’ ability to tip the scales in China’s domestic political debates was a core assumption of the engagement strategy. President Clinton suggested that refusing to engage with China “would encourage the Chinese to become hostile,” while National Security Sandy Berger argued that U.S. aggressive U.S. policies would “fuel the very inward-looking forces that trample human rights.”¹⁶ While the administration was also clear that China would ultimately choose its own destiny, there was a sense that the right set of U.S. actions could enable the rise of reformers who would be amicable to the United States and the international system.

(ii) *The PNTR Vote*

In the summer of 2000, nearly 18 months before China would formally join the WTO, came the Congress’ big moment to weigh in on U.S.-China trade policy. In the end, the vote was not particularly close, especially in the Senate, with the House voting in favor of granting PNTR to China in May 2000, 237–197; and the Senate following in September 2000, approving by a vote of 83–15.¹⁷ But the vote came only after fierce debate before a skeptical Congress. While technically the Congress had been acting on China policy through its annual decision to waive freedom-of-emigration requirements (called Jackson-Vanik provisions) that would have the effect of taking away China’s Normal Trade Relations (NTR) status, the reality was that while the House of Representatives voted to deny NTR to China in 1990, 1991 and 1992, there was no agreement

¹⁵ Ibid.

¹⁶ S. Berger, “Remarks by Samuel R. Berger: Building a New Consensus on China”, Council on Foreign Relations, New York, NY, 1997, <https://clinton.presidentiallibraries.us/items/show/9678>. W.J. Clinton, “Remarks by the President in Address on China and the National Interest”, 1997, <https://clintonwhitehouse4.archives.gov/WH/New/html/19971024-3863.html>

¹⁷ U.S.-China Relations Act of 2000 (H.R. 4444).

from the Senate, and neither legislative body took any action to change China's status after 1992.¹⁸ As a result, China had effectively been receiving NTR treatment and access to the U.S. market on terms comparable to other WTO members since 1980. But the lead-up to the 2000 vote to grant China NTR status on a permanent basis underscored deep divisions and concerns over the future economic relationship between the United States and China.

The Clinton Administration put on a full-court press, with most of the cabinet weighing in to support a vote in favor of shifting U.S. policy from one in which China's access to the U.S. market had to be, at least technically, reviewed each year, with the possibility that it's "most favored nation/normal trade relations" status could be removed at any time. In urging Congress to pass PNTR legislation, President Clinton noted that supporting China's entry to the WTO was in the United States' broader national interest because it represented "the most significant opportunity we have had to create positive change in China since the 1970s."¹⁹ He made clear, however, that it would also advance U.S. economic interests, describing the U.S. agreement as "the equivalent of a one-way street. It requires China to open its markets – with a fifth of the world's population, potentially the biggest markets in the world – to both our products and services in unprecedented new ways. All we do is to agree to maintain the present access which China enjoys."²⁰

President Clinton described the outcome of the affirmative vote in the House as "a historic step toward continued prosperity in America, reform in China, and peace in the world" and for "an America that will be more prosperous and more secure; for a China that is more open to our products and more respectful of the rule of law at home and abroad."²¹

¹⁸ "Termination of the Application of Title IV of the Trade Act of 1974 with Respect to the People's Republic of China", *Senate Finance Committee*, S. Rept. 106–305, 106th Congress, 2000, www.congress.gov/congressional-report/106th-congress/senate-report/305/1?s=2&r=9

¹⁹ W.J. Clinton, Speech on China Trade Bill, Paul H. Nitze School of Advanced International Studies of the Johns Hopkins University, 2000, www.iatp.org/sites/default/files/Full_Text_of_Clinton_Speech_on_China_Trade_Bi.htm.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

²⁰ W.J. Clinton, Speech on China Trade Bill, 2000, www.iatp.org/sites/default/files/Full_Text_of_Clinton_Speech_on_China_Trade_Bi.htm.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

²¹ W.J. Clinton, "Remarks by the President on Passage of Permanent Normal Trade Relations with China", *The White House*, 2000, https://1997-2001.state.gov/regions/eap/000524_clinton_china.html.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

At the same time, Clinton recognized that nothing about the trajectory of China or the U.S.-China relationship was guaranteed – but represented a chance for the U.S. and China to build a better and different future in the Asia Pacific community.

The American business community for its part believed that the normalization of trade relations with China would offer an economic windfall. The business community had long been advocates of increased trade with China. Their lobbying – supported by the Chinese government – helped reverse Clinton’s initial China policy, which had linked trade access to progress on human rights.²² As Warren Christopher, Clinton’s Secretary of State and an advocate for the linkage policy, later put it, “the business community had convinced the president that trade for America was a higher value, or perhaps to put it more charitably, that nothing would be accomplished in the field of human rights by denial of trade, and so that became the basic policy.”²³

Advocates argued that PNTR would promote U.S. security and economic interests and have little downside. Then-Senator Joe Biden, for instance, argued that it would “help promote stability across the Taiwan Straits,” encourage China to reform its economic system, and “enhance their respect for the rule of law,” while offering the United States “one-way” trade concessions.²⁴ Those supporting PNTR for China focused on the economic gains and the chance to support economic reforms in China, with even Federal Reserve Chairman Alan Greenspan declaring PNTR would “create new opportunities for American businesses and farmers.” Critics, on the other hand, focused on China’s poor human rights record, its continued threats to Taiwan, its contribution to nuclear proliferation, its violation of environmental standards for development, and its labor abuses.

The Clinton administration explicitly pushed PNTR as a way of accelerating Chinese marketization and democratization, suggesting that it

²² H. Hung, “The Periphery in the Making of Globalization: The China Lobby and the Reversal of Clinton’s China Trade Policy, 1933–1994”, *Review of International Political Economy*, 4 (2021) 1004–27.

²³ W. Christopher and S. Talbott Interview, *William J. Clinton Presidential History Project*, Miller Center, University of Virginia, 2002, <https://millercenter.org/the-presidency/presidential-oral-histories/warren-christopher-and-strobe-talbott-oral-history.ClkX3QTaP0G28MhKT3Ue/Exmv0yhh22d>

²⁴ “Giving Permanent Normal Trade Relations Status to Communist China: National Security and Diplomatic, Human Rights, Labor, Trade, and Economic Implications”, Committee on Foreign Relations, S. Hrg. 106–744, 106th Congress, 2000, www.govinfo.gov/content/pkg/CHRG-106shrg67840/html/CHRG-106shrg67840.htm

would “strengthen reformers” who were “trying to move policy in the right direction.”²⁵ The deal was seen as a potential boon to U.S. exporters, something that excited many Congressional supporters, while USTR Charlene Barshefsky indicated that the administration had “no reason to expect any substantial increases in Chinese imports at all.”²⁶

(iii) *The Reality of China's Accession Commitments*

While the arguments in the United States for granting China PNTR status in order to pave the way for its entry into the WTO may have focused on a broad range of geostrategic, political, national security, human rights, and economic issues, along with the empowerment of the reformists in China, the negotiations in Geneva were limited to trade issues and to the trading rules that China was signing up to.

When the accession negotiations were ultimately concluded and China joined the WTO in December 2001,²⁷ it did so only after making a substantial number of commitments and changes to its domestic economic laws, including:

- Major reductions in Chinese tariffs. Average tariffs on industrial products were reduced to 9.4% by 2005; elimination of all tariffs on high-technology products; auto tariffs fell from 80–100% to 25% by 2006; agriculture tariffs fell to an average of 17.5% by 2004.
- Elimination of import quotas and licensing requirements by 2005.
- Granting import and distribution rights to foreign corporations, which allowed them to set up wholly owned distribution, sales (including retail), shipping, and service networks over a three-year phase-in period.
- Financial services and telecommunications – ending the outright ban on any foreign ownership but leaving a number of restrictions and limitations on foreign ownership in place.

²⁵ G. Sperling, “PNTR and the Prospects for a More Open China”, Remarks to the Committee for Economic Development, Washington, DC, 2000, <https://clintonwhitehouse4.archives.gov/textonly/WH/EOP/nec/html/PunkteChinaSpeech2.html.C1kX3QTaP0G28MhKT3Ue/Exmv0yh22d>

²⁶ “The Administration’s Proposal for Permanent Normal Trade Relations with China”, Committee on Agriculture, S. Hrg. 106–52, 106th Congress, 2000, http://commdocs.house.gov/committees/ag/hag10652.000/hag10652_of.htm

²⁷ For a thorough analysis of the negotiations and process of China’s accession to the WTO, see: P. Blustein, *Schism: China, America and the Fracturing of the Global Trading System* (Centre for International Governance Innovation, 2019).

- Other services – increased market access for professional services, including accounting, consulting, engineering, medical, and information technology, while maintaining numerous restrictions and limitations.
- Commitment to implement and enforce international standards on the protection of intellectual property; provision for increased access and distribution rights for a specified number of motion pictures, music, and software.

The WTO-Director General at the time, Supachai Panitchpadi, described China's accession agreement as signaling "China's willingness to play by international trade rules and to bring its often opaque and cumbersome government apparatus into harmony with a world order that demands clarity and fairness."²⁸

The USTR report to Congress in 2004 summed up the process and the outcome:

The United States and other WTO members negotiated with China for 15 years over the specific terms pursuant to which China would enter the WTO. As a result of those negotiations, China agreed to extensive, far-reaching, and often complex commitments to change its trade regime, at all levels of government. China committed to implement a set of sweeping reforms that required it to lower trade barriers in virtually every sector of the economy, provide national treatment and improved market access to goods and services imported from the United States and other WTO members, and protect intellectual property rights (IPR). China also agreed to special rules regarding subsidies and the operation of state-owned enterprises, in light of the state's large role in China's economy. In accepting China as a fellow WTO member, the United States also secured a number of significant concessions from China that protect U.S. interests during China's WTO implementation stage. Implementation should be substantially completed – if China fully adheres to the agreed schedule – by December 11, 2007. By contrast, the United States did not make any specific new concessions to China, other than simply to agree to accord China the same treatment it accords the other 146 members of the WTO.²⁹

None of these commitments, however, directly addressed the broader issues and aspirations for change within China that were an integral part

²⁸ S. Panitchpakdi and M.L. Clifford, *China and the WTO: Changing China, Changing World Trade* (Wiley, 2002).

²⁹ "2004 Report to Congress on China's WTO Compliance", *United States Trade Representative*, 2004, p. 3, https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2004/asset_upload_file281_6986.pdf

of the debate over the passage of PNTR. For example, none of them spoke to issues such as nuclear proliferation or human rights that had been critical points underlying support for PNTR.

III Special Scrutiny for China

The level of concern in some quarters about granting China PNTR and paving the way for its entry into the WTO can be seen in two unusual provisions that were included in the PNTR legislation: (1) the establishment of the U.S.-China Economic and Security Review Commission (“China Commission”) and (2) the statutory requirement that USTR report to Congress every year on China’s compliance with its WTO obligations. No other country has similar provisions or undergoes the level of scrutiny that China does.

(i) *The China Economic and Security Review Commission*

The China Commission was created with the legislative mandate to monitor, investigate, and submit to Congress an annual report on the national security implications of the bilateral trade and economic relationship between the United States and China, and to provide recommendations, where appropriate, to Congress for legislative and administrative action. Even the title of the Commission with its joint focus on security and economics reflects the desire to use PNTR and China’s accession to the WTO as leverage over security and geostrategic issues as well as trade and economic matters. From its inception, the Commission was skeptical that China would live up to its WTO commitments without constant and extraordinary vigilance from the U.S. In its very first (2002) report issued less than one year after China’s accession, the Commission recommended that: (1) the U.S. shore up its toolbox by renewing the “Super 301” law that identifies priority practices and priority countries for trade liberalization, (2) commence WTO litigation over non-compliance with intellectual property rights, (3) engage in a more intensive examination of WTO compliance, and (4) consider a national security-based case to protect the U.S. steel industry.

The Commission also focused early attention on one of the major issues upsetting the balance of concessions reached through China’s WTO accession – currency manipulation. Starting in the early 2000s and continuing for at least a decade thereafter, China kept the exchange rate of

its currency pegged at artificially low levels.³⁰ Such currency manipulation made Chinese exports to the world cheap but exports to China more expensive. The Commission noted that “China’s currency manipulation acts as a subsidy for Chinese exports to the United States and a tax on imports from the United States, and serves as an incentive for U.S. and foreign firms to move production to China.”³¹ The Commission noted in 2005 that most economists believe that the Chinese renminbi (RMB) is undervalued by 15–40 per cent.³² China’s ability to manipulate its currency by buying dollars and other foreign currency in China at a fixed rate contributed to an excessive reliance on export-led growth that deepened distortions in the Chinese economy and in its trading relationships.

By the mid-2000s, the China Commission’s reports were sounding the alarm about the “profound differences between the open-market approach of the United States and the managed trade principles and predatory practices observed by the Chinese government.”³³ It began using a “responsible stakeholder” index to assess whether China not only observes international norms but works to strengthen them, finding that China was far from meeting that standard.³⁴ Following Chinese President Xi Jinping’s first state visit to the United States in 2015, the Commission reports cataloged long and growing lists of grievances the United States has against Chinese behavior, with currency manipulation, forced technology transfer, intellectual property theft, and excessive use of state subsidies often topping the list.³⁵ The most recent (2020) report concludes:

³⁰ *Currency Conflict and Trade Policy*, C. Fred Bergsten and Joseph E. Gagnon, Peterson Institute for International Economics, June 2017.

³¹ 2005 Report to Congress of the U.S.-China Economic and Security Review Commission, p. 4.

³² *Ibid.*

³³ 2006 Report to Congress of the U.S.-China Economic and Security Review Commission, p. 2, 2006.

³⁴ *Ibid.*

³⁵ 2015 report: “The grievances include the alleged theft by Chinese hackers of personal records of 22 million people, including U.S. government employees, their families, and friends; state-sponsored cyber espionage against U.S. companies to steal trade secrets and pass them to Chinese competitors; an unprecedented island-building campaign in disputed waters of the South China Sea; and a series of new laws restricting access by foreign companies to China’s market or demanding technology transfers in return for such access.”

2015 Report to Congress of the U.S.-China Economic and Security Review Commission, *U.S.-China Economic and Security Review Commission*, 2015. 2020 report: “Over the years, we have tracked the People’s Republic of China’s (PRC) accountability to its global commitments, including those made in its accession to the World Trade Organization. Two decades later, the Chinese Communist Party (CCP) selectively adheres to its global

The CCP has launched determined and systematic efforts to hollow out global governance institutions, suppress internal opposition, subjugate free peoples in Hong Kong and around China's periphery, dominate global economic resources, and project military power. These efforts threaten vital interests of the United States and the security and vitality of an increasing number of countries around the globe. A clear understanding of the CCP's adversarial national security and economic ambitions is essential as U.S. and allied leaders develop the policies and programs that will define the conditions of global freedom and shape our future.³⁶

(ii) *Annual USTR Reports on China's WTO Compliance*

To attempt to hold China to its WTO commitments, the United States used a multi-tracked approach. One track involved a series of annual high-level bilateral talks between U.S. and Chinese officials over three successive presidential administrations. These talks, initially called the Joint Commission on Commerce and Trade (JCCT, started in 2004), the Strategic Economic Dialogue, begun in 2006, and the Strategic and Economic Dialogue (S&ED) begun in 2009, were intended to push China towards complying with and internalizing WTO rules and norms and making other market-oriented changes. The second track involved WTO disputes to challenge China's compliance with its WTO obligations.

Both tracks for holding China to its WTO commitments have been cataloged over the past 20 years in the annual report that USTR is required to submit to Congress under the mandate included in the legislation granting China PNTR status. The initial report, submitted in 2002, reflects considerable optimism, noting the significant progress China made in implementing its WTO commitments, including "reviewing more than 2,500 trade-related laws and regulations, repealing 830 of them, and amending 325 more."³⁷ The report also acknowledges the considerable resources devoted to restructuring the various trade-related government ministries and agencies and to the education and training of central and

economic, trade, and political obligations and has abandoned any concern for international opinion. Now the CCP envisions itself atop a new hierarchical global order in which the world acquiesces to China's worldview while supplying it with markets, capital, resources, and talent." "2020 Report to Congress of the U.S.-China Economic and Security Review Commission", *U.S.-China Economic and Security Review Commission*, 2020.

³⁶ "2020 Report to Congress of the U.S.-China Economic and Security Review Commission", *U.S.-China Economic and Security Review Commission*, 2020.

³⁷ "2002 Report to Congress on China's WTO Compliance", *United States Trade Representative*, 2002, <https://china.usc.edu/sites/default/files/article/attachments/2002-report-chinas-wto-compliance.pdf>

local government officials. It also emphasized the commitments that the U.S. thought it had obtained regarding China's transition to a market economy: "For much of the past two decades, China had been gradually transitioning toward a market economy from what in the late 1970s was a strict command economy. In acceding to the WTO, China was required by the United States and other WTO members to agree to accelerate this process of market reform in order to comply with WTO requirements."³⁸

At the same time, the USTR Report raised early concerns over transparency, agriculture, intellectual property rights, and services. Just two years later, the 2004 report was even more hopeful, quoting two trade associations' view that "China is now substantially in compliance with its WTO obligations – a marked improvement over last year."³⁹ The report also noted continued areas of concern, including intellectual property rights, services, agriculture, industrial policies, and transparency. It added that the work of one of the many high-level dialogue groups – the Joint Commission on Commerce and Trade (JCCT) – was "highly constructive."

Over the next number of years, these annual reports continued to report on bilateral dialogues and WTO disputes, coming to the general conclusion that the intensive dialogues with China generated positive outcomes on a number of contentious issues, while U.S. use of WTO dispute settlement continued to generate favorable settlements and favorable WTO dispute settlement decisions. The reports also continued to note ongoing problem areas, including principally intellectual property rights, industrial policies, trading rights, agriculture, and services, including distribution services. Increasingly the reports focused on the Chinese government's interventionist policies and practices and the large role of state-owned enterprises and other national champions in China's economy, which generated significant trade distortions giving rise to trade frictions. The final Obama Administration report (2016) noted the major expansion in U.S. goods and services exports to China but concluded that "despite these positive results, the overall picture currently presented by China's WTO membership remains complex."⁴⁰

³⁸ Ibid.

³⁹ "2004 Report to Congress on China's WTO Compliance", *United States Trade Representative*, p. 4, https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2004/asset_upload_file281_6986.pdf

⁴⁰ "2016 Report to Congress on China's WTO Compliance", *United States Trade Representative*, 2017, p. 2, <https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf>

Once the Trump Administration took office, however, the tone and underlying message changed to one of failure. The view shifted, noting that “China largely remains a state-led economy today, and the United States and other trading partners continue to encounter serious problems with China’s trade regime. Meanwhile, China has used the imprimatur of WTO membership to become a dominant player in international trade.” The report concluded: “Given these facts, it seems clear that the United States erred in supporting China’s entry into the WTO on terms that have proven to be ineffective in securing China’s embrace of an open, market-oriented trade regime.”⁴¹

IV Failure to Use the WTO and China Accession Tools

Critical to gaining support for bringing China into the WTO were the tools built into China’s protocol of accession and the WTO rules themselves that many in the United States believed would both protect the American market from any downside risks and hold China to account for its commitments.

Key among the provisions designed to guard against harm to domestic economies around the world were:

- (a) a selective safeguard provision lasting 12 years permitting countries to impose safeguards (tariffs or quotas or other restraints) if they found that an increase in imports from China alone was causing disruption to their domestic producers of comparable products,⁴²
- (b) a right to apply for non-market economy status when calculating anti-dumping duty rates to imports from China, at least for a period of 15 years⁴³;

⁴¹ “2017 Report to Congress on China’s WTO Compliance”, *United States Trade Representative*, 2018, p. 2, <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>

⁴² Section 16 of China’s Protocol of Accession. See: *Accession of the People’s Republic of China*, WTO Doc. WT/L/432, 2001.

⁴³ Because of the ambiguous wording of Section 15 of China’s Protocol relating to the non-market economy calculation of anti-dumping margins, doubt remained over what the situation was at the end of the 15-year period after China’s accession. While China initially challenged the EU’s continued use of a non-market economy methodology for determining antidumping margins, at the request of China, the dispute was allowed to lapse without a published report from the panel. See: *European Union – Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/13, 2016.

- (c) a provision making it easier to apply countervailing duties to subsidized imports from China if distorted market conditions in China present “special difficulties” to countries in identifying and measuring subsidies;⁴⁴ and
- (d) a provision lasting until December 31, 2008, limiting China’s textile and apparel exports to amounts no greater than 7.5% (6% for wool products) above the amount entered in the previous year if Chinese imports were impeding the orderly development of trade.⁴⁵

(i) *Failures to Guard Domestic Markets*

Among the most highly touted of the provisions designed to guard against any potential harm from China was a product-specific, selective safeguard provision that allowed WTO members to impose safeguards (which normally can only be applied to imports from all sources) on imports from China alone.⁴⁶ The provision included a lower threshold for its application than traditional safeguard measures which require a showing that imports have caused “serious injury” to a domestic industry producing comparable goods. Here, the standard permitted the application of a China-only safeguard if Chinese imports were causing “market disruption.” In addition, a clause in this new safeguard allowed a second country to justify its own imposition of a new import restriction after a first country has implemented a China safeguard on the basis of a “trade deflection” threat alone, without having to carry out its own injury investigation. In the United States, the common answer to Congressional concerns over a potential flood in imports from China was the existence of this special safeguard and the ease in its application. The process to implement it called upon the independent U.S. International Trade Commission (USITC) to investigate all claims of market disruption and to report to the President any affirmative findings, along with recommendations for actions to be taken to address the market disruption caused by Chinese imports.⁴⁷

⁴⁴ Section 15(b) of China’s Protocol of Accession. See: *Accession of the People’s Republic of China*, WTO Doc. WT/L/432, 2001. H. Gao, “Rethinking China Trade Policy: Lessons Learned and Options Ahead”, *National Foundation for American Policy*, 2021, <https://nfap.com/wp-content/uploads/2021/01/Rethinking-China-Trade-Policy.NFAP-Policy-Brief.January-2021-2.pdf.ClkX3QTaP0G28MhKT3Ue/Exmv0yh22d>

⁴⁵ Paragraph 242 of the Working Party Report. See: *Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, 2001.

⁴⁶ Section 16 of China’s Protocol of Accession: Transitional Product-Specific Safeguard Mechanism. See: *Accession of the People’s Republic of China*, WTO Doc. WT/L/432, 2001.

⁴⁷ Section 421 of the Trade Act of 1974, 19 U.S.C. § 2451.

The President was given the authority to accept, modify or reject the USITC's recommendations.⁴⁸

In the 12 years that the China-specific safeguard provision was in effect and despite the substantial increase in imports from China in a wide variety of products, the United States imposed a China-specific safeguard only once.⁴⁹ Part of the reluctance stemmed from decisions made by the Bush administration not to impose safeguards despite a recommendation from the USITC in five cases to do so.⁵⁰ Failure to obtain a remedy despite proving market disruption may have deterred potential complainants while concerns over WTO decisions striking down global safeguards may have contributed to reticence in applying for safeguard relief. The one China-specific safeguard that was imposed – on passenger vehicles and light truck tires – came eight years after China's accession to the WTO. It was also the first such safeguard challenged by China, with the WTO's Appellate Body upholding the United States' determination to apply safeguard measures to Chinese tires.⁵¹

Antidumping (AD) (selling goods in foreign markets for less than prices at home) and countervailing duties (CVD) (offsets for government subsidies), however, were more commonly deployed. From 2001 to 2020, WTO members have reported imposing 917 AD measures against Chinese imports, approximately 30% of the total reported, and 129 CVDs against Chinese imports, approximately 46% of the total actions.⁵² For U.S. industries, the primary tool to respond to increased imports from China, particularly in the 2000s, was anti-dumping duties, with the use of the "non-market economy methodology" permitted under Section 15(b) of China's protocol of accession to calculate the amount of those duties. As of September 2021, the United States has 142 AD orders in place on various goods from China, far more than the number of AD measures against imports from any other country.⁵³

⁴⁸ 19 U.S.C. § 2451(k).

⁴⁹ "Certain Passenger Vehicle and Light Truck Tires from China", *U.S. International Trade Commission*, Investigation No. TA-421-7, 2009, www.usitc.gov/publications/safeguards/pub4085.pdf

⁵⁰ "U.S.-China Trade: The United States Has Not Restricted Imports under the China Safeguard", *U.S. Government Accountability Office*, 2005, www.gao.gov/products/gao-05-1056

⁵¹ *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO Doc. WT/DS399, 2009.

⁵² "Subsidies and Countervailing Measures", *World Trade Organization*, www.wto.org/english/tratop_e/scm_e/scm_e.htm

⁵³ "Antidumping and Countervailing Duty Orders in Place", United States International Trade Commission, www.usitc.gov/trade_remedy/documents/orders.xls

Prior to 2007, the United States did not apply its CVD law to countries considered to be nonmarket economies (NMEs) based in part on a conclusion by the Department of Commerce (Commerce) that it could not determine where government action began or ended and therefore could not specifically identify subsidies. In 1986, the US Court of Appeals for the Federal Circuit in *Georgetown Steel Corp. v. United States* upheld this interpretation of the CVD statute as reasonable. In 2006, Commerce changed its position, accepting a petition seeking a CVD on imports of coated free-sheet paper from China. Commerce distinguished the current Chinese economy from the Soviet-style economies at issue in *Georgetown Steel* and found that the imported Chinese paper was subsidized. Numerous CVD cases followed, with 80 CVD orders now in place against imports from China. But the rest of the world has been less willing to use this tool, perhaps in part because it involves a direct challenge to the practices of the Chinese government and the CCP compared to anti-dumping cases, which focus on the behavior of individual companies. Even less clear is how willing countries are to use the “special difficulties” tool provided in Paragraph 15 to overcome evidentiary hurdles in proving the existence of a subsidy.

The textile-specific growth limit was similarly far less utilized than might have been expected, given China’s dominant position as a supplier of textiles and clothing. In the United States, the use of such safeguards became bogged down in protracted legal battles over the application when there was only a threat of market disruption.⁵⁴

The world’s failure to use these tools – at least not early and often enough – was part of what allowed China’s relatively unchecked rise in exports to the world.⁵⁵ In the United States, China’s rise was documented and labeled in a 2016 article titled “The China Shock: Learning from Labor-Market Adjustment in Large Change in Trade,” by David Autor from MIT, David Dorn (University of Zurich) and Gordon Hanson (UC-San Diego).⁵⁶ The article noted that China’s economic size, speed of growth,

⁵⁴ “U.S.-China Trade: Textile Safeguard Procedures Should Be Improved”, *U.S. Government Accountability Office*, 2005, www.gao.gov/products/gao-05-296

⁵⁵ As noted by Paul Blustein, it was not just the US that suffered. Studies show labor market harms in Spain, Norway, Turkey and the U.K. Brazilian textile and clothing workers demanded increased tariffs to respond to a large influx of Chinese clothing. Honduran and other Central American apparel industry workers also experienced layoffs and additional hardships after losing out to competition from China. See: P. Blustein, *Schism: China, America and the Fracturing of the Global Trading System* (Centre for International Governance Innovation, 2019).

⁵⁶ D.H. Autor, D. Dorn, and G.H. Hanson, “The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade”, *Annual Review of Economics*, 8 (2016), 205–40.

and import penetration were all of an order of magnitude different from previous waves of imports from Japan or Mexico or others. Imports from China grew from 1.0 per cent of the US GDP in 2000 when China's accession to the WTO was being negotiated to 2.6 per cent of GDP ten years later. The impact on communities where goods competing directly with Chinese imports (such as furniture, toys, electronics, jewelry, shoes, and clothing) were particularly profound, due in part to the lack of sufficient safety nets or trade adjustment assistance and in part due to the unexpected immobility of labor.

While the U.S. imposed 199 anti-dumping and countervailing tariffs, primarily targeting raw and semi-processed imports with some cases addressing finished goods like furniture and tires, the wave of imports appeared to simply overwhelm many companies, leading to a conclusion that the trade rules were not up the task of coping with the China shock and to the parallel determination that it was a mistake for the United States to have allowed China to enter the WTO on the terms that it did.⁵⁷

(ii) *Failure to Hold China to Its Commitments on Transparency, Market Economy Orientation, Rule of Law, and More*

A critical aspect of its advocacy for PNTR and China's accession to the WTO was the assertion that China's conduct would be "monitored by more than 130 other WTO Members with a common interest in seeing China's market opened."⁵⁸ "Unlike our bilateral agreements," the Clinton administration argued, "we will not be alone in our enforcement efforts if China fails to live up to its commitments."⁵⁹

The most significant commitments for which compliance was sought involved those that required China to open up its market under numerous specific commitments with respect to trade in goods, agriculture, and

⁵⁷ "2017 Report to Congress on China's WTO Compliance", *United States Trade Representative*, 2018, <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>; and

R.E. Lighthizer Testimony, "Evaluating China's Role in the World Trade Organization Over the Past Decade", *U.S.-China Economic and Security Review Commission*, 2010, www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf

⁵⁸ China PNTR Speech in Shakopee, MN and Akron, OH, *Clinton Digital Library*, 2000, <https://clinton.presidentiallibraries.us/items/show/12215>

⁵⁹ "China PNTR Q&A", *Clinton Digital Library*, 2000, <https://clinton.presidentiallibraries.us/items/show/11229>

particular services commitments;⁶⁰ various commitments with respect to the rule of law and transparency in the Chinese system,⁶¹ intellectual property rights requirements,⁶² and numerous commitments intended to keep China on the path toward becoming a fully market-oriented economy.⁶³

For the first few years following China's 2001 accession to the WTO, most WTO members took a "wait and see" approach. For its part, the United States filed 23 different cases against specific Chinese practices, with its first case filed in 2004, winning all that was completed, settling eight of them through mutual agreement, with three still pending.⁶⁴

⁶⁰ For example, Section 5 of China's Protocol of Accession establishes the right to trade all goods other than a short list throughout the customs territory of China, Section 7 provides for the elimination of non-tariff measures and Section 12 commits China to opening its market to agriculture imports on a specific schedule. See: *Accession of the People's Republic of China*, WTO Doc. WT/L/432, 2001.

⁶¹ For example, Section 2 of China's Protocol of Accession requires China to apply its laws constitutively throughout the country and stated that the only Chinese laws or regulations pertaining to trade in goods, services, intellectual property rights or foreign exchange controls that could be enforced are those that published and readily available to the United States and other WTO members. In addition, China committed to put in place an independent judicial review process for all actions pertaining to its laws and decisions impacting trade or intellectual property rights. See: *Accession of the People's Republic of China*, WTO Doc. WT/L/432, 2001.

⁶² As a coalition representing, among others, the Motion Picture Association of America and the Software and Information Industry Association, wrote: "We are convinced from our own experience that inclusion of China within the framework of multilateral rules and obligations embodied in the WTO is the single best instrument we have to ensure continuing improvement in China's protection of intellectual property." R.A. Kapp, "PNTR Trade Status for China: Ten Key Considerations", *The United States-China Business Council*, 2000, <https://clinton.presidentiallibraries.us/items/show/11248>

⁶³ For example, Section 9 of China's Protocol of Accession states that, with certain specified exceptions, China "shall low prices for traded goods and services in every sector to be determined by market forces," while Section 6 requires China to refrain from influencing the purchase and sale decision of its state trade enterprises. See: *Accession of the People's Republic of China*, WTO Doc. WT/L/432, 2001.

⁶⁴ *China – Value-Added Tax on Integrated Circuits*, WTO Doc. WT/DS309, 2004; *China – Auto Parts*, WTO Doc. WT/DS340, 2006; *China – Taxes*, WTO Doc. WT/DS358, 2007; *China – Intellectual Property Rights*, WTO Doc. WT/DS362, 2007; *China – Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363, 2007; *China – Measures Affecting Financial Services and Foreign Financial Suppliers*, WTO Doc. WT/DS373, 2008; *China – Grants, Loans, and Other Incentives*, WTO Doc. WT/DS387, 2008; *China – Raw Materials*, WTO Doc. WT/DS394, 2009; *China – Electronic Payment Services*, WTO Doc. WT/DS413, 2010; *China – GOES*, WTO Doc. WT/DS414, 2010; *China – Measures Concerning Wind Power Equipment*, WTO Doc. WT/DS419, 2010; *China – Broiler Products*, WTO Doc. WT/DS427, 2011; *China – Rare Earths*, WTO Doc. WT/DS431, 2012; *China – Autos (US)*, WTO Doc. WT/DS427, 2012; *China – Certain Measures Affecting the Automobile and Automobile Parts Industries*, WTO Doc. WT/DS450, 2012; *China – Demonstration Bases*, WTO Doc. WT/DS498, 2015; *China – Tax Measures Concerning*

The entire rest of the world combined brought a comparable number of cases, with many countries appearing reluctant, particularly early on, to challenge China for fear of retaliation or for lack of evidence from China's opaque system. However, each of these cases was somewhat narrowly focused on individual measures or particular sectors. None spoke to the bigger, more systemic issues that are at the heart of U.S. concerns with China or to China's failure to fulfill its notification and transparency requirements.

What might have been a better approach would have been a “big, bold, coalition-based case” that would have represented an “opportunity to bring together enough of the trading interests in the world to put sufficient pressure on China to make it clear that fundamental reform is required if China is to remain a member in good standing in the WTO.”⁶⁵ Just such a case was recommended by the U.S.-China Economic and Security Commission, based in part on the author's testimony to the Commission.⁶⁶

In my construction, the case could include claims to address China's: (1) coercion of technology transfers in light of China's commitment that it would not condition investments on the transfer of technology,⁶⁷ (2) restrictions on the right of foreign companies to license their technology (or choose not to license it) under the conditions and terms that they would like in violation of China national treatment and MFN commitments;⁶⁸ (3) direction of outbound investment to obtain cutting-edge

Certain Domestically Produced Aircraft, WTO Doc. WT/DS501, 2015; *China – Raw Materials II (US)*, WTO Doc. WT/DS508, 2016; *China – Agricultural Producers*, WTO Doc. WT/DS511, 2016;

China – TRQs, WTO Doc. DS/517, 2016; *China – Subsidies to Producers of Primary Aluminium*, WTO Doc. WT/DS519, 2017; *China – Intellectual Property Rights II*, WTO Doc. WT/DS542, 2018; *China – Additional Duties*, WTO Doc. WT/DS558, 2018.

⁶⁵ Testimony of J. Hillman, “The Best Way to Address China's Unfair Policies and Practices is Through a Big, Bold Multilateral Case at the WTO”, *U.S.-China Economic and Security Review Commission*, 2018, www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

⁶⁶ “2018 Report to Congress of the U.S.-China Economic and Security Review Commission”, *U.S.-China Economic and Security Review Commission*, 2018, www.uscc.gov/sites/default/files/2019-09/2018%20Annual%20Report%20to%20Congress.pdf

⁶⁷ Section 7.3 of China's Protocol of Accession. See: *Accession of the People's Republic of China*, WTO Doc. WT/L/432, 2001.

⁶⁸ Paragraph 256, Working Party Report, one of the legally binding paragraphs of China's Working Party report. See: *Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, 2001.

technology in service of China's industrial policy, in violation of China's commitment to treat foreigners on a reciprocity basis;⁶⁹ (4) investment restrictions that preclude or unreasonably delay market entry for foreign companies in violation of China's commitment not to condition investments on performance requirements or technology transfer;⁷⁰ (5) use of export taxes to restrict or encourage certain exports over others, in violation of China's commitment not to charge such export taxes other than on a specific list of products;⁷¹ (6) services restrictions that are inconsistent with China's GATS schedules, (7) restrictions on agriculture imports under non-transparent and non-science based sanitary and phytosanitary measures, (8) lack of transparency and access to China's laws, regulations and rules on timely basis, (9) failure to establish independent judicial review of trade-related administrative decisions,⁷² and (10) failure to meet the reasonable expectations of WTO members that China's economy would become a market-oriented one.⁷³

The last claim that I suggested is the one designed to get at the heart of the United States' concern – that China's U-turn away from market orientation to an ever more state-controlled economy violates the spirit, if not always the letter, of the WTO.

(iii) *China's Turn Away from Market-Oriented Reforms*

The overarching Marrakesh Agreement establishing the WTO declares that the organization was designed as a world trading system "based upon open, market-oriented policies." China, for example, expressly declared as part of its accession commitments that "that all state-owned and state-invested enterprises would make purchases and sales based

⁶⁹ Paragraph 256 of China's Working Party Report (one of the paragraphs that is legally binding). See: *Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, 2001.

⁷⁰ Section 7.3 of China's Protocol of Accession. See: *Accession of the People's Republic of China*, WTO Doc. WT/L/432, 2001. China's basic national treatment commitment is underscored in Paragraph 18 of the Working Party report (one of the legally binding paragraphs): "The representative of China further confirmed that China would provide the same treatment to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China. See: *Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, 2001.

⁷¹ Section 11.3 of China's Protocol of Accession. See: *Accession of the People's Republic of China*, WTO Doc. WT/L/432, 2001.

⁷² Section 2(D) Judicial Review, China's protocol of Accession. See: *Accession of the People's Republic of China*, WTO Doc. WT/L/432, 2001.

⁷³ This last claim would be a "non-violation" claim under Article XXIII of the GATT.

solely on commercial considerations, e.g., price, quality, marketability and availability ...”⁷⁴

As a result, the United States and all other WTO members had legitimate expectations that China would increasingly behave as a market economy – that it would achieve a discernable separation between its government and its private sector, that private property rights and an understanding of who controls and makes decisions in major enterprises would be clear, that subsidies would be curtailed, that theft of IP rights would be punished and diminished in amount, that SOEs would make purchases based on commercial considerations, that the Communist Party would not, by fiat, occupy critical seats within major “private” enterprises and that standards and regulations would be published for all to see.

But starting in the mid-2000s, China began what has now become a complete U-turn back to becoming a state and Communist Party dominated economy.⁷⁵ While parts of the economy appear to have a thriving private sector, intervention by the government and the CCP has become far more pervasive. Institutions were established giving Beijing tighter control over China's large and fast-growing SOEs (overseen by the State-owned Assets Supervision and Administration Commission (SASAC)) and its banks (influenced via Central Huijin Investment). The overlapping ways in which China's economy is unique and state driven results in a phenomenon dubbed “China, Inc.” that is hard to reach with WTO rules.⁷⁶ Concerns about the direction of China's economy greatly intensified with the rise of Xi Jinping as China's leader in 2012 and the release of the Made in China 2025 plan designed to create Chinese self-sufficiency in a range of critical technology sectors.

These concerns were succinctly summarized in the statement made by the then U.S. Ambassador to the WTO, Dennis Shea, in a May 8, 2018 statement to the WTO General Council:

China ... is consistently acting in ways that undermine the global system of open and fair trade. Market access barriers too numerous to mention; forced technology transfers; intellectual property theft on an

⁷⁴ Paragraph 46 of the Working Party Report (legally binding paragraph). See: *Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, 2001.

⁷⁵ N. Lardy, *The State Strikes Back: The End of Economic Reform in China?* PIIE, January 2019, www.piie.com/bookstore/state-strikes-back-end-economic-reform-chinaC1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

⁷⁶ M. Wu, “The ‘China, Inc.’ Challenge to Global Trade Governance”, *Harvard International Law Journal*, 57 (2016), https://harvardilj.org/wp-content/uploads/sites/15/HLI210_crop.pdf.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

unprecedented scale; indigenous innovation policies and the Made in China 2025 program; discriminatory use of technical standards; massive government subsidies that have led to chronic overcapacity in key industrial sectors; and a highly restrictive foreign investment regime.⁷⁷

It is this collective failure by China that underlies the trade friction between the United States and China.

The concerns over the market orientation of China's economy are shared by many other WTO members. When the G-20 trade ministers met in September 2020, for example, much of the discussion centered on strengthening the WTO, beginning with a reaffirmation of commitment to the objectives and principles in the Marrakesh Agreement. But when it came to affirming that "market-oriented policies" is a principle of the WTO, China objected. It is this fundamental split that has led some leading trade scholars to conclude that "the world is now presented with two conflicting economic systems: (1) a Western-led, market-driven, model based on the rule of law and (2) an authoritarian state-driven model championed by China," and that the solution is to "establish a 'compact' among like-minded developed market economies to agree to new common approaches to counter unfair non-market practices; address critical twenty-first-century economic issues such as the digital economy, climate change and the environment, and labor; and improve economic ties in industries that are key to innovation, economic growth, and national security."⁷⁸

V Conclusion: Implications of the Failures and Where We Go from Here

The failure of China's accession to the WTO to meet the very large and arguably unrealistic expectations across the economic, trade, geopolitical, and national security arenas likely portends a permanent shift in the U.S. approach to China. The initial vision of the Clinton administration was that the WTO could serve as the backstop to the Sino-American trade relationship – a facially neutral arbiter that could help enforce the liberal trade rules that Washington preferred. It was created and nurtured in an

⁷⁷ Statement as delivered by D. Shea, Deputy U.S. Trade Representative and U.S. permanent Representative to the WTO, WTO General Council, Geneva, 2018, <https://geneva.usmission.gov/2018/05/08/ambassador-dennis-sheas-statement-at-the-wto-general-council/.CikX3QTaP0G28MhKT3Ue/Exmv0yhh22d>

⁷⁸ W. Reinsch and J. Caporal, "Toward a New Global Trade Framework", *Center for Strategic and International Studies Trade Commission on Affirming American Leadership*, 2021.

era where U.S. strategists saw trade with China and the rest of the world as a largely unambiguous good, capable of advancing both their strategic and domestic political ambitions. For the reasons noted above, that view has fundamentally changed.

This new reality means, at a minimum, that the U.S. will need to rely on a far wider array of tools than simply the WTO and its dispute settlement process to address its concerns.⁷⁹ It also means that reforms at the WTO will need to be deeper and more directed at addressing the fundamental schism between market-oriented economies and state-controlled ones.

A fulsome explanation of what the U.S. should do outside of the WTO is beyond the scope of this paper, but it should include at a minimum renewed attention to the work of the U.S.-EU-Japan trilateral cooperative process aimed at developing new rules on subsidies and tech transfer and greater reliance on the deep transatlantic alliance with Europe, the recently reinvigorated Quadilateral Security Dialogue (Australia, India, Japan, and the United States) and alternative forums such as the G-7, the G-20, and the OECD to develop a more coordinated approach to the China trade challenge. Also included should be an exploration of the U.S. rejoining the Trans-Pacific Partnership (now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP)) in order to ensure that the United States has a seat at the table while the trade architecture in Asia is put in place and reassure our trading partners that the United States remains committed to the region. The U.S. must also follow through on the Biden administration's Build Back Better plan to shore up American competitiveness and supply chain resilience, particularly in key sectors and technologies. It must also rely on both bilateral and plurilateral dialogues to address the many geostrategic and national security concerns raised by a more assertive China.

At the WTO, the United States needs to lead the effort to fix the WTO. The WTO is in desperate need of reform and revitalization, but that will not happen absent U.S. leadership and commitment. Reforming the WTO would also allow it to be a more effective tool among many that the United States will need to address its China concerns. The reforms need to focus on the structural flaws at the WTO, including the imbalance between its dispute settlement, negotiating, and executive functions and

⁷⁹ M. Wu, "Managing the China Trade Challenge: Confronting the Limits of the WTO", Working Paper for *The Penn Project on the Future of US-China Relations*, 2020, https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/b/732/files/2020/10/Mark-Wu_Limits-of-WTO_Final.pdf.C1kX3QTaP0G28MhKT3Ue/Exmv0yhh22d

the unsustainable bifurcation between developed and developing countries that China has exploited despite its immense economic heft and the power of its trade. The reforms will also need to focus on the gaps in the substantive rules, starting with new disciplines on the transfer of technology, the classification of State-Owned Enterprises (SOEs), and the rules on subsidies. Additional efforts should also be made to bring into the WTO the e-commerce and digital trade provisions from the USMCA or the CP-TPP.

While it is clear that the WTO should not and cannot serve as the only forum for working out America's concerns with the rise of China, the WTO cannot and should not be abandoned. It should be fixed in its own right as the premier forum for bringing together the world's trading nations to negotiate and enforce rules, exchange information, disseminate best practices, and provide transparency with respect to trading practices and measures. In so doing, the WTO can begin what will be a long process of developing rules or norms to address concerns over China's industrial policies, its non-tariff barriers, and its abuse of intellectual property and technology rights.

In the end, the United States expected too much of the WTO and the WTO delivered too little. Righting that balance will require a stronger, more responsive, and more inclusive WTO and a more robust tool kit to address the national security and geostrategic concerns that the WTO was never going to be in a position to resolve.