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*THE UNITED STATES COULD USE WTO PROCEDURES TO ADDRESS THE TRADE
DISTORTIONS RESULTING FROM CHINA'S POLICIES AND PRACTICES*

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1 Introduction

Since its 2001 accession to the World Trade Organization (WTO), China has become a dominant economy in world trade but also a major source of trade friction for the United States and other WTO members. These trade frictions stem from the non-market elements of China’s economic system, and they have interfered with the full integration of China into the rules-based multilateral trading system. Given China’s sheer economic size, if left unaddressed these frictions have the potential to threaten the very existence of the multilateral trading system itself.

How should the United States address its trade frictions with China? I argue here that existing WTO procedures, possibly augmented and employed in novel ways, may provide the best path forward. I begin by describing more broadly why the WTO should remain the constitution of the world trading system of the twenty-first century. I then turn to the specific question of how the WTO’s existing provisions could be utilized by the United States to address its trade frictions with China and thereby more fully integrate China into the rules-based multilateral trading system.²

The case for the GATT/WTO The multilateral trading system is in trouble. Governed by the WTO, which came into existence in 1995 and builds on and extends the principles of its twentieth century predecessor agreement, the General Agreement on Tariffs and Trade (GATT), this system of global trade rules is facing a growing list of twenty-first century challenges that include the rise of large emerging markets led by China, efforts to address climate change, the growing importance of digital trade, the rise of offshoring and global value chains, and the push for regulatory harmonization as an end in itself. These challenges reflect changes in the global economy that have occurred in recent decades, and they raise questions about the legitimacy of the GATT/WTO as the arbiter of global trade rules.

Is the WTO, an institution that has traditionally been about “shallow integration” with a focus on trade impediments imposed at the border rather than on “deep integration” that results from direct negotiations over behind-the-border measures, capable of meeting these challenges? Or do we need a new global trade order for the twenty-first century?

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²The remainder of this section, as well as sections 2-5 of this written testimony, represent a repackaging of the material in the Preface to and Chapter 7 of Staiger (2022).

In Staiger (2022) I address these questions, and I argue that the best hope for creating an effective world trading system for the twenty-first century is to build on the foundations of the world trading system of the twentieth century. I construct this argument in two steps: first, by developing an understanding of why GATT worked and the economic environment it is best suited for, and second, by evaluating from the perspective of this understanding whether the changes in the global economy that have occurred in recent decades imply the need for changes in the design of the GATT/WTO. Throughout I adopt the view that design should reflect purpose, and that identifying the fundamental purpose of a trade agreement in a given economic environment – that is, what problem the agreement should solve for the member governments – is essential to understanding its appropriate design in that environment.

Building on these steps, I argue that the “terms-of-trade theory” of trade agreements – which holds that the problem for a trade agreement to solve stems from the international price effects of a country’s trade policy on that country’s trading partners (the international spillovers or “terms-of-trade externalities”) that are not accounted for when governments make their trade policy decisions unilaterally, and holds that solving this problem amounts to helping governments internalize these spillovers in their policy choices – provides a compelling framework for understanding the purpose of a trade agreement in the twentieth century and the success of GATT.³ And I argue that, according to this understanding, the logic of GATT’s design features transcend many, though not all, of the current challenges faced by the WTO.

Two overarching themes emerge from the research that I describe in Staiger (2022). A first theme is this: Trade agreements that lack deep-integration provisions are not necessarily “weak” agreements; by the same token, those trade agreements that contain the most developed deep-integration provisions should not necessarily be seen as the “gold standard.” Indeed, where the terms-of-trade theory is applicable the opposite may be closer to the truth, as shallow-integration agreements then hold out the possibility that countries could reach the international efficiency frontier without sacrificing national sovereignty.

A second theme is more subtle. When it comes to trade agreements it could be said that the primary task of national governments during the GATT era was to dismantle the excessively high trade barriers of the large industrialized countries, and to move the world from a starting point far away from the international efficiency frontier to a position on the frontier – or in the language of the terms-of-trade theory, to escape from a terms-of-trade driven prisoner’s dilemma; and by the end of the twentieth century much, though not all, of this task had been completed. For the twenty-first century, by contrast, it could be

³More specifically, a terms-of-trade externality arises whenever one country’s restrictive import policies reduce the price that foreign exporters can receive for exports of their product to that country. When countries negotiate over their trade policies, foreign exporters gain a forum to voice, through their governments, their concerns over the injury caused by the reduced exporter prices that can be charged when serving the first country’s markets; by negotiating trade policies that take account of these concerns, a mutually beneficial liberalization of the first country’s import restrictions is possible.

said that while in many ways the fundamental problem for trade agreements to solve has not changed, the primary task for the WTO has shifted, away from helping governments traverse *to* the efficiency frontier, and toward providing them with the flexibility they need to remain *on* the frontier in the face of various shocks to the world trading system, including the rise of China and the large emerging economies, the digitalization of trade, and the rising threat of climate change. For this era, how well countries are able to rebalance and renegotiate their commitments within the GATT/WTO framework is likely to become paramount to the WTO's success. I argue that in principle, the GATT/WTO is as well-equipped for this second task as the GATT proved to be for the first task. And while the rise of offshoring and global value chains, and the push for regulatory harmonization as an end in itself, may reflect a change in the purpose of trade agreements and therefore present more fundamental challenges to the GATT/WTO approach, I argue that there is still a strong case for building on the GATT/WTO foundation to address these particular twenty-first century problems where they arise.

In short, the message I offer in Staiger (2022) can be summarized as follows: The best advice for designing a world trading system for the twenty-first century may not be Facebook founder Mark Zuckerberg's famous motto "Move fast and break things," but rather Britain's now-ubiquitous war-time slogan from World War II, Keep Calm and Carry On. With this advice I am not claiming that reforms to the world trading system are not needed, or that all is well at the WTO. But I am claiming that the basic architecture of the GATT/WTO – and of the GATT, in particular – is well-suited to guide the design of the world trading system of the twenty-first century.

Identifying the WTO's China challenge Is the basic architecture of the GATT/WTO up to the task of integrating China into the rules-based multilateral trading system? I argue below that it is, but only once the underlying China-specific challenge that the WTO must confront is identified and distinguished from a number of other challenges with which the WTO must also contend but which are not China-specific. In particular, below I argue that the rise in economic importance of the large emerging and developing economies, with China playing a leading role, has created three interrelated challenges for the world trading system.

First, there appears to have emerged a substantial departure from reciprocity between China and its major industrialized trading partners. Below I suggest that the implied need for *rebalancing market access commitments* can be addressed with GATT/WTO non-violation claims. Second, even once reciprocity between China and its major industrialized trading partners is established, there is a possibility that the Uruguay Round tariff commitments made by industrialized countries now imply the grant of a greater level of market access than some of these countries are comfortable with. Below I suggest that the implied need for *reconsideration of the level of market access commitments*, where necessary, can be addressed with GATT Article XXVIII renegotiations.

The first of these challenges centers on China. And owing to its sheer size in world trade, China undoubtedly plays a leading role in the second challenge. In Appendix A I include a more detailed discussion of how existing WTO flexibilities might be harnessed to address these two challenges. The third challenge arises from an asymmetry in the level of market access commitments between the developing/emerging economies and the industrialized countries. This asymmetry is a result of the historical lack of participation of non-industrialized countries in 50 years of GATT reciprocal tariff negotiations, and it has led to what Bagwell and Staiger (2014) call a “latecomers problem” for the WTO that may be hindering the ability of many developing and emerging economies to gain from GATT/WTO membership. Because China made more significant (though, as it turned out, perhaps still not reciprocal) market access concessions as part of its 2001 protocol for accession to the WTO than have any other emerging and developing economy WTO members to date, this third challenge is less about China than about other emerging and developing economies.⁴ I suggest that the latecomers problem can be addressed with GATT Article XXVIII renegotiations between industrialized countries, followed by GATT Article XXVIII bis negotiations between industrialized and developing/emerging countries.

In the following sections I consider in more detail each of these three challenges, and I describe how the WTO, with some possible adjustments, is in principle well-designed to address them. Admittedly, my comments here are focused squarely on market access issues, and do not directly address U.S. concerns over intellectual property rights violations and other related issues associated with digital/new technologies. But by serving as a trust-building exercise for the United States and China on the more WTO-familiar issues that my comments are meant to address directly, it is possible that the way may be paved for addressing these other issues in the future.

2 Rebalancing market access commitments

Industrialized countries have grown increasingly frustrated with the inability of WTO rules to effectively discipline China’s economic policies, owing to the non-market features of China’s economy. For example, in its 2020 *Report to Congress on China’s WTO Compliance*, the United States Trade Representative stated:

...China’s non-market approach has imposed, and continues to impose, substantial costs on WTO members. In our prior reports, we identified and explained the numerous policies and practices pursued by China that harm and disadvantage U.S. companies and workers, often severely. It is clear that the costs associated with China’s unfair and distortive policies and practices have been substantial. For example, China’s non-market economic system and the industrial policies that flow from it have systematically distorted critical sectors of the global economy such as steel,

⁴On the unusually far-reaching market access commitments that China agreed to in its protocol of accession to the WTO relative to other developing and emerging economy GATT/WTO members, see for example, Lardy (2001).

aluminum, solar and fisheries, devastating markets in the United States and other countries. China also continues to block valuable sectors of its economy from foreign competition, particularly services sectors. At the same time, China's industrial policies are increasingly responsible for displacing companies in new, emerging sectors of the global economy, as the Chinese government and the Chinese Communist Party powerfully intervene on behalf of China's domestic industries. Companies in economies disciplined by the market cannot effectively compete with both Chinese companies and the Chinese state. (USTR 2021, p 2)

Similar frustrations about China's economic policies have been voiced by the EU (see, for example, European Commission, 2016).

Wu (2016, p 284) attributes this frustration not so much to any one specific China policy or even a handful of specific policies, but rather to China's "complex web of overlapping networks and relationships – some formal and others informal – between the state, Party, SOEs [state owned enterprises], private enterprises, financial institutions, investment vehicles, trade associations, and so on." Adding to this frustration is the fact that many of the distinct elements of China's unique economic model were put in place after its 2001 accession to the WTO. But rather than reflecting frustration with a bad-faith effort on the part of China to escape from its WTO commitments, it is more accurate to say that the growing frustration among industrialized countries reflects their unmet expectations that China would have by now evolved further in the direction of a market-oriented economy than it, in fact, has. Summarizing the nexus of non-market forces operating in China with the moniker "China, Inc.," Wu puts the point this way:

This is not to suggest that the Chinese concealed their true intentions. Throughout the 1990s, Chinese leaders openly and repeatedly stated that they sought to forge their own unique economic system. Moreover, economic developments in China's reform era have proceeded largely through incremental rather than through radical, abrupt policy shifts. Thus, the development of China, Inc. should not be understood as a deliberate ex post act to circumvent WTO rules. (Wu, 2016, p. 292, footnotes omitted)

As Wu (2016) describes it, China, Inc. poses a particularly subtle challenge for the WTO. This is because the pursuit of complaints against China's policies through the WTO dispute settlement system has not been altogether unsuccessful in helping China's trading partners address these concerns. As Wu documents, for certain kinds of issues, such as state-coordinated economic actions, local content requirements and state trading enterprises, the GATT/WTO legal framework has proven to be effective against those countries that have used such policies in the past, and it continues to be effective against China's use of these policies. The real challenge lies in other issues raised by China's policies – the definition of a "public body" in the context of defining the reach of WTO disciplines on subsidies, or whether China's trading partners can treat it as a non-market economy for purposes of administering their antidumping laws –

which involve technical legal and factual questions that the WTO dispute settlement body has little prior experience resolving, with trade stakes that are potentially enormous. Left unaddressed and in light of China’s sheer size, these issues have the potential to upset the fundamental balance between market access rights and obligations that lies at the core of the GATT/WTO bargain. They are the kinds of thorny issues posed by China, Inc. on which, Wu argues, the WTO could founder.

What is the nature of the WTO’s China challenge? So how should the WTO confront the China, Inc. challenge? To answer this question, it is clarifying to first ask: What is the purpose of a trade agreement?

The literature on the economics of trade agreements has shown that the purpose of a trade agreement in a wide range of settings can be seen as expanding market access to internationally efficient levels, a purpose that is formally equivalent to providing member countries with an avenue of escape from an international terms-of-trade-driven prisoner’s dilemma.⁵ But in all of the settings that this literature considers, market forces – subject to the kinds of government policy interventions that typify those found in market economies – are assumed to shape the decisions of firms and consumers everywhere.

Does the purpose of a trade agreement change when one of the countries adopts an economic system like China, Inc.? Reassuringly, it is straightforward to see that the answer to this question is “no,” as long as international prices continue to be determined by the international market clearing conditions that equate quantities demanded to quantities supplied on world markets.⁶ This is because when one country chooses to organize the economic activity within its borders under a policy regime that features important non-market elements, it does not alter the fundamental international externality – namely, the international-price or terms-of-trade externality – that is generated by the unilateral policy choices of this country and the unilateral policy choices of its trading partners, and that underpins the essential insufficient-market-access problem for a trade agreement to solve.

A simple way to see this is to think of noncooperative (unilateral) policies as being determined in two steps: First, facing the constraints imposed by international market clearing conditions, a national “social planner” in each country determines the economic magnitudes (the “allocation”) within its national borders and the implied quantities of goods and services that it will offer for exchange across its borders; and second, in each country the national social planner then chooses whether to decentralize the implementation

⁵This point was made by Bagwell and Staiger (1999, 2002). See Bagwell, Bown and Staiger (2016) and Staiger (2022) for recent reviews of this literature.

⁶As Antras and Staiger (2012 a, b) emphasize, a different form of international price determination may be associated with the rise of offshoring, and this can alter the purpose of a trade agreement from that which I have emphasized here. Given China’s important role in global value chains, this raises a potential issue with the path for addressing the current impasse with China that I propose below. But that is a potential issue associated with offshoring, not China per se. I discuss the challenges to the WTO associated with the rise of offshoring in chapter 10 of Staiger (2022).

of the desired within-country allocation using a market system and appropriate tax/subsidy/regulatory policies or instead impose this allocation directly on its citizens by fiat. The choice made in this second step could be interpreted as determining whether a country is market-oriented or not. Choosing the first option amounts to the “primal” approach often used by economists to solve the optimal policy problem for a market economy, whereby the fictional planner decides on the allocation and then implements the desired allocation in a market economy with the appropriate policy instruments. Choosing the second option simply omits the use of markets to implement the desired allocation, and instead implements this allocation by fiat. But the choice between these two options will not impact the nature of the problem for a trade agreement to solve, because either way it is still the international terms-of-trade externality associated with unilateral decisions – which is driven by the quantities of goods and services that countries offer for exchange across national borders, not by what happens inside national borders to generate those quantities – that creates the problem for a trade agreement to solve.

Confirming that the purpose of a trade agreement is unchanged when a country adopts an economic system like China, Inc. is clarifying, because it indicates that the challenge for the WTO posed by China’s entry into the world trading system is not to find the capacity to evolve beyond its essential market-access focus in order to successfully accommodate China. Rather, the challenge, succinctly put, is this: The WTO must find a way for China to make additional policy commitments, tailored to compensate for the non-market elements of its economy, that can serve the role of preserving the market access implied by its tariff bindings, much as the role that GATT articles play for market-oriented economies.⁷ Evidently, there is no reason to think that China’s entry into the world trading system raises issues that are fundamentally inconsistent with the WTO’s underlying mandate. To the contrary, the market access orientation of the GATT/WTO provides a useful guardrail for what China should be willing to contemplate – and what other WTO members have a right to expect – in the context of its WTO commitments.

In essence, then, the current circumstances that the WTO finds itself in with regard to China’s economic policies can be summarized as follows. Upon China’s 2001 accession to the WTO, its major industrialized trading partners believed that existing WTO rules, in combination with (a) the very substantial tariff bindings and additional specific market access commitments they had secured from China as part of its accession negotiations and (b) their expectation that China would evolve strongly in the direction of a more market oriented economy, were sufficient to ensure that China’s tariff bindings represented market access

⁷As I describe further in Staiger (2022), as a GATT/WTO legal matter market access is defined by the competitive relationship between imported and domestically produced products, and a negotiated tariff commitment is treated as a commitment to a particular competitive relationship between imported and domestic products and hence as a market access commitment. And as Petersmann (1997, p. 136) observes, “...the function of most GATT rules (such as Articles I-III and XI) is to establish conditions of competition and to protect trading opportunities...”.

commitments that would deliver the appropriate balance between rights and obligations, a balance that is embodied in the GATT/WTO norm of *reciprocity*. But the initial set of specific commitments that China agreed to as a condition for accession to the WTO appears to have turned out to be unsatisfactory for this purpose. This is not because China has failed to live up to its specific commitments or to comply with WTO rulings against it when it has not.⁸ Rather, it is because China has not evolved toward a market economy as quickly as these trading partners expected, and it does not now appear that China is likely to evolve toward a market-oriented economy as strongly as these trading partners once hoped.

The non-violation clause If this is an accurate summary of the China, Inc. challenge faced by the WTO, then the non-violation clause provides a promising path for WTO members to address the current impasse.⁹ This provision, which was an important focus of the drafters of GATT in 1947 (see Hudec, 1990) and whose relevance was reaffirmed with the creation of the WTO in 1995 (see Petersmann, 1997), allows one GATT/WTO member government to seek compensation from another for adverse trade effects of the other’s policies, even though those policies do not violate specific obligation under the GATT/WTO agreement.

The argument for the relevance of the non-violation clause in addressing U.S.-China trade frictions is made forcefully by Hillman (2018) who, in describing the role of a non-violation claim in the context of her testimony before this committee about the best way for the United States to address the challenges created by China’s economic policies, observes:¹⁰

It is exactly for this type of situation that the non-violation nullification and impairment clause was drafted. 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 discernible 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

⁸ As Wu (2016) notes, many of the specific commitments agreed to by China as part of its WTO Protocol of Accession (see WTO, 2001) can be litigated successfully in the WTO (and have been, where violation claims against it have been brought), so they are not the source of the challenge posed by China, Inc.. And on China’s record of compliance with WTO rulings against it, see Webster (2014) and Zhou (2019).

⁹ Of course, this presumes that the impasse among WTO members that is holding up the confirmation of WTO Appellate Body judges is resolved, so that the current vacancies in the Appellate Body that make it unable to review appeals are filled.

¹⁰ The non-violation clause in the original GATT 1947 was incorporated into the WTO Agreements in GATT 1994, in the General Agreement on Trade in Services (GATS), and in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, WTO members agreed to an extendable 5-year moratorium on the use of the non-violation clause in TRIPS, and this moratorium is still in place today. Hence, it is not clear that the non-violation clause could be utilized to address concerns about China’s intellectual property rights regime.

of IP [intellectual property] 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. It is this collective failure by China, rather than any specific violation of individual provisions, that should form the core of a big, bold WTO case. Because addressing these cross-cutting, systemic problems is the only way to correct for the collective failures of both the rules-based trading system and China. (Hillman, 2018, pp 10-11)

Importantly, by focusing on the departure from reciprocity in market access commitments and the implied imbalance itself, rather than specific policies that may have violated WTO legal obligations and led to this imbalance, the non-violation complaint can side-step the kinds of thorny legal and factual issues noted above and described by Wu (2016). This feature of non-violation complaints is highlighted by Sykes (2005) in the context of disciplines on domestic subsidies:

A nice feature of the nonviolation doctrine is the fact that it does not require subsidies to be carefully defined or measured. A complaining member need simply demonstrate that an unanticipated government program has improved the competitive position of domestic firms at the expense of their foreign competition. (Sykes, 2005, p 98).

Moreover, under a successful non-violation claim the defendant government is under no obligation to remove the measures at issue, but if it does not remove them then the claimant government is owed compensation, the level of which is subject to arbitration by the WTO Dispute Settlement Body. Hence, a non-violation claim would provide China with the freedom to decide whether and, if so, how best to offer secure market access commitments to its trading partners that can reestablish reciprocity, with the knowledge that if its offer of market access commitments is not sufficient for this purpose then its trading partners have the right to restore reciprocity by withdrawing market access concessions of their own as part of the resolution of a successful non-violation claim. In this way, the non-violation clause would be serving the role it was designed to serve, namely, as Petersmann (1977, p. 172) observes, to provide a check on the domestic policy autonomy of member-countries,

...and to prevent the circumvention of the provisions in GATT Article XXVIII ... if a member, rather than withdrawing a concession de jure in exchange for compensation or equivalent withdrawals of concessions by affected contracting parties, withdraws a concession de facto.

And crucially, any disagreements over the magnitude of the policy adjustments required to restore reciprocity between China and its trading partners would be

referred to the relevant WTO dispute settlement bodies for a ruling, thereby keeping the resolution of these issues within the rules-based multilateral system.

What kinds of commitments might China offer as a way to reestablish reciprocity? It is possible that China might be able to find certain policy commitments that would have clear market access implications without undermining core features of its chosen economic system. And it is also possible that transparency issues would warrant the use of certain quantity targets rather than tariff bindings as a second-best tool for generating market access commitments.¹¹ Indeed, the use of quantity targets as a means of securing market access commitments from a non-market economy is not without precedent in the GATT/WTO, as such targets were utilized in the GATT accession agreements for Poland and Romania (see, for example, Kostecki, 1974, and Haus, 1991). In Appendix B I provide more detail on the earlier GATT/WTO experience with integrating non-market economies into the trading system. More generally, it is likely that a combination of measures might be needed to secure market access commitments from China, but it is also likely that China is in the best position to know what combination of measures would be most effective while minimizing inconsistencies with its desired economic system.

This perspective also yields an important insight into the nature of the challenge that China, Inc. poses for the world trading system, and the choices that are available to the WTO membership to address this challenge. Recall from above that there were two elements to China's accession negotiations: (a) a list of agreed specific market access commitments, and (b) an expectation that China would evolve strongly toward a market economy. And recall that the imbalance between China's market access rights and obligations has emerged as a result of the failure of (b): China has not evolved toward a market economy to the extent that its trading partners expected. Does this imply that the only solution is for China to now promise to evolve to a market economy at the speed and to the degree that fulfills those expectations? Not at all, because it is clear from the above that there is an alternative solution, and one that is more targeted to the underlying source of the trade tension. The alternative is for China to agree to additional specific market access commitments of its own choosing, and thereby to compensate for the unanticipated non-market features of its economy – and hence for the shortfall in part (b) – by augmenting its specific commitments in part (a). This is what the non-violation clause can facilitate. Looked at in this way, there is no reason to think that, unless China chooses to relinquish China, Inc., “decoupling” China from the world trading system is the inevitable endgame.

On this last point my position diverges somewhat from Hillman (2018, p. 13), who describes the choice facing China as one of reforming its economic system

¹¹While China's record of compliance with its commitment to purchase US goods and services in the 2020 “Phase One” Agreement with the United States has not been good (see Bown, 2022), that agreement was negotiated between the parties outside of the rules-based multilateral trading system. Given China's record of compliance with WTO legal findings (see note 8), there is reason to believe any quantity targets that China agreed to in the context of a non-violation claim would be met.

or exiting the WTO. There is still the important question of whether China can, in fact, find ways to make the needed additional market access commitments given the unique features of its economic system. And this would no doubt be a difficult task. But as observed above, several of the non-market economies of Eastern Europe found creative ways to do this when they joined the GATT in the 1960's and 70's, suggesting that China might find similarly unorthodox ways to make market access commitments that can respond to those non-market features of its economic system that were not anticipated by WTO members at the time of China's WTO accession but that China wishes to preserve. And while finding effective disciplines on China's subsidies will be particularly important and may ultimately entail reforms of the WTO's Agreement on Subsidies and Countervailing Measures in the wider context of WTO multilateral or plurilateral negotiations (see Bown and Hillman, 2019), Zhou and Fang (2021) argue that these reforms are not necessary to address the China-specific issues that arise in the context of subsidy disciplines and that such reforms would be better approached outside the context of China-specific trade tensions.

Clarifying the challenge for the WTO posed by China, Inc. also has a potential side benefit. As is well known, bringing successful non-violation claims in the GATT/WTO is exceptionally difficult, and indeed this is so by design. As one WTO Panel report put it, "... The non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules" (WTO, 1998). But once it is understood that the goal of a non-violation claim is to find a way to allow China to make meaningful market access commitments, and not to confront China with a choice between reforming its economy or decoupling from the world trading system, it becomes more likely that China might see it in its own interests to facilitate a successful rebalancing within the context of such a claim. As such, enlisting China's support in bringing such a claim might even be feasible. This is because it is in China's own interests, just as it is in each WTO member's own interests, to be part of a world trading system that is effective in permitting the voluntary exchange of secure, negotiated market access commitments between its members. And this is especially so if the current imbalances in the world trading system attributable to China's accession to the WTO are putting the WTO at serious risk of foundering. So, while enlisting China's support in bringing such claims against it would be unprecedented, it is not unreasonable to attempt to do so, given the unique challenge that China poses for the WTO and the world trading system.

This is not to say that the more traditional WTO violation claims against China, where viable, should not also be brought, just as with viable violation claims against any WTO member. Indeed, in her testimony before this committee Hillman (2018) lists 11 specific issue areas where violation claims against China might be viable (and as Hillman notes, her list is not meant to be exhaustive). But as both Hillman and also Wu (2016) make clear, even if such violation claims were all successful, they are not likely to address the fundamen-

tal sources of the imbalances that have emerged in China's market access rights and obligations and that have led to the growing frustrations of industrialized countries with China, Inc. By channeling these frustrations into non-violation claims, where such claims might perhaps be aided by China itself and where the process of filing and resolving these claims might also serve as a mechanism for resolving among the parties any pending or imminent violation claims, the existing GATT/WTO procedures for dispute settlement can be most effectively put to use.

Finally, an added benefit of addressing this issue with non-violation claims is that it helps to draw a clean distinction between concerns over non-reciprocity with China on the one hand, and the possibility that even with reciprocity established a WTO member might wish to rethink its *own* level of market access commitments, on the other. With this distinction cleanly drawn, these two separable issues could then be addressed on separate tracks. As I describe next, the second issue is best addressed within the context of Article XXVIII renegotiations. And the separation of these two issues is crucial, because while the maintenance of reciprocity should be a central concern of attempts to address the second issue (and would be under Article XXVIII renegotiations), by design it *cannot* be a feature of the solution to the first issue (and would not be under a non-violation claim, where the whole point is to address an *imbalance* and thereby *restore* reciprocity).

3 Reconsideration of the level of market access commitments

Suppose that the imbalance between China's market access rights and obligations in the WTO can be addressed, and that reciprocity is restored in the world trading system. Does this mean that all of the major challenges to the world trading system presented by the rise of the large emerging markets will have been met? In this and the next section I suggest that the answer to this question is "no," by describing two additional challenges that would still remain. A first challenge relates to the impact on industrialized country income inequality that the rise of large emerging markets has had. Whether this impact would be mitigated or rather exacerbated by the restoration of reciprocity with China depends in part on how reciprocity is restored; and in particular this depends on whether reciprocity with China is restored by an expansion of access to the markets of China, or rather by a reduction in access to the markets of the industrialized world. I discuss this challenge in this section. A second challenge relates to the history of reciprocal tariff negotiations in GATT, the historical lack of participation by nonindustrialized countries in these negotiations, and how that history has positioned the world trading system going forward in the presence of the large emerging markets today. I discuss this challenge in the next section.

Concerns about the possible adverse effects of trade on income inequality

are not new, and indeed such effects are central predictions of the standard neoclassical models of trade. But as of the mid 1990's the general view among economists was that as an empirical matter the distributional impacts of trade were relatively modest. Today that view is markedly less sanguine, thanks in part to changes in the nature and scale of trade over the past three decades – including a dramatic rise in the manufacturing exports of developing and emerging economies – and thanks in part also to changes in the focus of the economics research investigating these effects (a shift in focus from economy-wide impacts to local labor market effects).¹² This observation is especially illuminating for the current discussion, because the WTO tariff commitments in place today are the product of multilateral market access negotiations in the Uruguay Round that were completed in 1994 with the signing of the Marrakesh Agreement that created the WTO on January 1 1995. In this light, there is a possibility that the Uruguay Round tariff commitments made by some industrialized countries now imply the grant of a greater level of market access than these countries are comfortable with given the level of income inequality that they are now grappling with.¹³

In short, it would not be unreasonable if those industrialized countries that have experienced a significant increase in income inequality over the past several decades now wanted to pause and reconsider some of their existing tariff commitments, given that these commitments were made before the rise of the large emerging markets at a time when it was thought that the potential for trade to generate significant income inequality issues within industrialized countries was small. Nevertheless, several important hurdles would have to be cleared before one can convincingly argue that the reimposition of tariffs is an appropriate response to a country's concerns about income inequality.

A first hurdle is to demonstrate that there are not alternative policy responses that are available to the government to address its concerns about income inequality at lower overall cost to the economy. At a general level, the targeting principle (Bhagwati and Ramaswami, 1963) implies that tariffs will almost never be the first-best policy choice for achieving any particular goal (the exception being for purposes of terms-of-trade manipulation, a “beggar-thy-neighbor” consideration that should play no role in clearing this first hurdle). For example, at least for those countries that have the means to finance them, the use of production or wage subsidies would typically dominate tariffs as a policy tool for addressing concerns about income inequality.¹⁴ Of course, in the

¹²See Krugman (2019) for a nice summary of the evolution of economists' thinking on the link between trade and income inequality. The local labor market impacts of trade competition were first considered by Borjas and Ramey (1995); Autor, Dorn and Hanson (2013) were the first to investigate the regional/local labor market impacts of trade with China.

¹³Not all countries experienced rising income inequality over this period. See Bourguignon (2019) on the cross-country diversity of trends in income inequality over the past 30 years.

¹⁴In this regard, the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement), which regulates the use of subsidies relating to trade in goods, includes a provision (Article 8.2(b)) that identifies assistance to disadvantaged regions as “non-actionable,” granting WTO member governments wide latitude to implement the kinds of subsidies that might be called for in addressing income inequality related to the local labor market effects of

real world such policies may not, in fact, be widely available to all countries. Indeed, this may be true even for rich countries: For example, after describing the labor market policies and programs that are available in the United States, Kletzer (2019, p 171) concludes that “despite the array of US programs, there is considerable evidence that these labor market interventions are inadequate.”¹⁵ But the targeting principle at least provides a rebuttable presumption that better policy responses than tariffs can be found to address concerns about income inequality. So this is not an easy hurdle to clear.

A second hurdle is to demonstrate that the proposed tariff increases would actually have the intended effect on income inequality. This demonstration is complicated by the fact that technology as well as the supplies of labor and capital within the industrialized countries have changed dramatically over the period that income inequality has risen, and it is therefore almost certainly true that “turning back the clock” with tariffs to achieve the trade patterns and volumes that a country experienced in an earlier time would not bring back the income distribution that the country had experienced at that time. Notice, though, that the effectiveness of tariffs as a response to rising income inequality in a country does not hinge on whether trade has *caused* the rise in inequality; rather it is simply a question of whether the use of tariffs – and the price effects that their use would generate in the country – might be part of the optimal response to addressing inequality, whatever its causes, given the technologies and factor supplies that exist today.¹⁶

Where does this discussion leave us? The reimposition of tariffs surely cannot be the centerpiece of an appropriate response to concerns about income inequality. But in light of the complexity of the issues involved and the plausible lack of first-best policy instruments to address these issues, neither does there appear to be a compelling reason that tariff responses – above all other possible second-best policy responses – should be taken off the table. In the abstract, a sensible position might therefore be that industrialized countries that have experienced rising income inequality and have concerns about this development should be able to reconsider some of their Uruguay Round tariff commitments as part of a broader package of policy interventions to address these concerns.

How would the restoration of reciprocity between China and its industrial-

trade. However, this provision was temporary, and it was allowed to lapse at the end of 1999. Reforming the SCM Agreement to reinstate Article 8 in some form would help to remove WTO legal barriers that could have the effect of precluding the use of subsidies over tariffs for purposes of addressing income inequality concerns, and on these general grounds would be supported by the targeting-principle logic. See, for example, Charnovitz (2014), who makes similar arguments for the reinstatement of Article 8 in some form as that article relates to environmental subsidies.

¹⁵That said, it should be noted that Kletzer (2019) advocates for implementing a program of wage insurance in the United States, not the use of tariffs.

¹⁶I am abstracting from the dynamic effects of tariffs on technologies and factor supplies. There is also the deeper question whether income inequality as typically measured, or rather broader measures of economic inequality such as inequality in job tenure prospects and the prospects for one’s children, should be the target of policy interventions, and how trade policy interventions would measure up to other available policy responses with such targets in mind. See Bourguignon (2019) for an illuminating discussion of these issues.

ized trading partners impact these considerations? As I mentioned above, that would depend in part on how reciprocity is restored. If reciprocity with China is restored as a result of a reduction in access to the markets of the industrialized world, then this implies that some industrialized-country tariffs would rise, and these tariff increases might be structured so as to mitigate income inequality concerns in industrialized countries. On the other hand, if reciprocity with China is restored as a result of an expansion of access to the markets of China, then this implies that China would be liberalizing its import regime which, if this does not impact China's overall trade imbalance, implies that China will also be exporting more, a scenario that is likely to exacerbate the existing income inequality concerns of industrialized countries.¹⁷ The upshot is that restoring reciprocity between China and its industrialized trading partners is unlikely to address existing concerns over income inequality, and might even exacerbate these concerns.

Article XXVIII renegotiations This brings me to the possibility of GATT Article XXVIII renegotiations. Specifically, while I argued above that the non-violation clause is well-designed to deal with concerns over non-reciprocity with China, I now argue that Article XXVIII is well-designed to deal with the possibility that, even with reciprocity established, a WTO member might wish to rethink its own level of market access commitments.

In brief, according to Article XXVIII, if a country wants to reverse an earlier GATT/WTO tariff negotiation and raise its MFN tariff binding for any reason, it is free to do so. It only needs to offer compensation to its affected trading partners – or barring that, accept equivalent withdrawals of market access from those trading partners – so that the balance of reciprocal market access rights and obligations from the original negotiation is preserved. Hoda (2001) describes the mechanics of Article XXVIII renegotiations in detail, and provides a comprehensive history of the hundreds of renegotiations that have occurred over the GATT and early WTO years.

As Hoda (2001) explains, the key features of Article XXVIII renegotiations are that a country is allowed to modify or withdraw the tariff commitments that are the subject of its renegotiations, even if it cannot (within defined time limits) reach agreement in those negotiations with its impacted trading partners; and that its impacted trading partners are then allowed to respond – at most – in a reciprocal manner by withdrawing “substantially equivalent” tariff commitments of their own, where any disagreements over what constitutes substantially equivalent tariff commitments are subject to rulings of the relevant

¹⁷Absent any impact on its overall trade imbalance, and holding its terms-of-trade fixed, China's unilateral import liberalization would lead to equivalent increases in its exports; and if China is large in the import markets where it liberalizes, then its terms of trade should deteriorate, implying an even larger increase in its exports to maintain its existing trade balance. Of course, if China were to make policy changes that altered its overall trade balance, additional considerations would come into play. Krugman (2019) provides a recent discussion of the potentially important impact of trade imbalances on U.S. income inequality in the short run.

GATT/WTO dispute settlement bodies. In this way, with reciprocal actions defining the disagreement or “threat” point for the negotiations, Article XXVIII renegotiations avoid the possibility that a threatened or actual breakdown in those negotiations could hold up the modifications that a country desires to make to its tariff commitments. At the same time these renegotiations imply that the original balance of negotiated reciprocal tariff commitments between the country and its trading partners is preserved; this last feature is important, because as Bagwell and Staiger (1999, 2002) have shown and as I discuss in Staiger (2022), the application of reciprocity that delivers it ensures that inefficient terms-of-trade motives are removed from the country’s incentives to initiate the renegotiation.

These features of Article XXVIII are the reason that legal scholars claim that GATT/WTO tariff commitments are designed to operate as “liability rules.” For example, Pauwelyn (2008) distinguishes between GATT articles that are designed as liability rules and others that are designed as property rules, and he designates tariff commitments as liability rules on the basis of the renegotiation opportunities provided by Article XXVIII (as well as other similar but temporary escapes such as the GATT Safeguard clause Article XIX). In explaining the logic of this design, Pauwelyn (2008, p 137) writes:

... Trade negotiators cannot foresee all possible situations, nor can they predict future economic and political developments, both at home and internationally. As a result of this uncertainty, they wanted the flexibility of a liability rule.

An important benefit of a liability rule is that it can allow for “efficient breach.” Schwartz and Sykes (2002, p S181) put the point this way:

Economic theory teaches that a key objective of an enforcement system is to induce a party to comply with its obligations whenever compliance will yield greater benefits to the promisee than costs to the promisor, while allowing the promisor to depart from its obligations whenever the costs of compliance to the promisor exceed the benefits to the promisee. In the parlance of contract theory, the objective is to deter inefficient breaches but to encourage efficient ones.

It is exactly in the spirit of efficient breach that limited use of Article XXVIII renegotiations might be made by those industrialized countries that are concerned about rising inequality and wish to reconsider some of their Uruguay Round tariff commitments as part of a broader package of policy interventions to address these concerns. Importantly, under the rules of Article XXVIII, those countries would not be making this choice “for free.” Rather, they would be making this choice with the knowledge that any modification or withdrawal of tariff commitments would be met with reciprocal withdrawals of market access by their effected trading partners. If a country still prefers to raise its tariffs under these conditions, then that is how the GATT renegotiation process

approximates efficient breach.¹⁸

It is also instructive to consider what can happen in a renegotiation of trade commitments that are not designed to operate as liability rules. Although it is not directly comparable to the Article XXVIII renegotiation of a GATT tariff commitment, the Brexit negotiations for the withdrawal of the United Kingdom from the European Union provide something of a cautionary tale. These negotiations, which had no meaningful equivalent to the reciprocity “buy out” provision of GATT’s Article XXVIII that could have acted as a threat point for the outcome of the negotiations, officially began on March 29 2017 when the United Kingdom activated its withdrawal notice under Article 50 of the Treaty on European Union, and the negotiations were concluded in October of 2019. As is well known, the initial two-year negotiation period had to be extended in order that an agreement on the terms of withdrawal could be reached, and the negotiations were fraught with seemingly ample room for strategic behavior.¹⁹ The liability-rule structure of GATT Article XXVIII renegotiations acts as an insurance policy against the possibility that such renegotiations would devolve into a Brexit-like situation.

4 The latecomers problem

I have argued that there are three interrelated challenges for the world trading system created by the rise in economic importance of the large emerging and developing economies. In this section I focus on the third of these challenges, which Bagwell and Staiger (2014) have called the “latecomers problem.” As I noted in the Introduction, this challenge is less about China than it is about other emerging and developing economies. Following Bagwell and Staiger, I now briefly describe the latecomers problem and how it might be addressed with GATT Article XXVIII renegotiations between industrialized countries followed by Article XXVIII bis negotiations between industrialized and developing/emerging countries.

As I detail in Staiger (2022), according to the terms-of-trade theory, negotiations that abide by MFN and reciprocity can eliminate third-party spillovers from bilateral tariff bargaining. This feature underpins the efficiency properties of a tariff negotiating forum such as GATT that relies heavily on bilateral tariff bargaining and is built on the pillars of MFN and reciprocity.²⁰

But historically GATT has extended to its developing country members an exception to the reciprocity norm, codified under “special and differential treatment” (SDT) clauses. These SDT clauses were intended to provide developing countries with a “free pass” on the MFN tariff cuts that the developed countries negotiated with one another, and in this way allow developing country exporters

¹⁸Maggi and Staiger (2015) provide a formal rationale for the efficient-breach role that the reciprocity rule can play in a model where international transfers are costly.

¹⁹See, for example, Martill and Staiger (2014) on the bargaining strategy pursued by the UK in its Brexit negotiations.

²⁰These points are developed in Bagwell and Staiger (1999, 2002, 2005, 2010, 2018), and supporting empirical evidence is provided in Bagwell, Staiger and Yurukoglu (2020).

to then share with exporters from developed countries in the benefits of greater MFN access to developed country markets.

As Bagwell and Staiger (2014) point out, however, in the presence of SDT the fact that third-party spillovers from bilateral tariff bargaining are neutralized when those bargains abide by MFN and reciprocity now carries with it a more negative connotation: It implies that, by design, these SDT clauses *cannot* succeed at their intended purpose. This is because, as I describe more fully in Staiger (2022), when two (developed) countries engage in a bilateral tariff negotiation that abides by MFN and reciprocity while the third (developing) country sits it out, the third country gets nothing from the negotiation of the other two countries.

Indeed, a wide range of anecdotal and empirical evidence suggests that developing countries have gained little from more than half a century of GATT/WTO-sponsored tariff negotiations. For example, based on interviews with WTO delegates and secretariat staff members, Jawara and Kwa (2003, p. 269) conclude:

Developed countries are benefitting from the WTO, as are a handful of (mostly upper) middle-income countries. The rest, including the great majority of developing countries, are not. It is as simple as that.

In an implicit acknowledgement of this fact, the WTO's Doha Round was semi-officially known as the Doha Development Agenda, because a fundamental objective of the round was to improve the trading prospects of developing countries. But as the declaration from the WTO Ministerial Conference in Doha, Qatar, November 14, 2001, states in part:

We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations... .

Ironically, as Bagwell and Staiger (2014) observe, according to the terms-of-trade theory it is the GATT/WTO's embrace of SDT that explains the disappointing developing country experience with GATT/WTO membership to begin with; and this suggests that the Doha Round could not succeed in one of its fundamental objectives under the bargaining protocol that it adopted.

Even if one accepts this diagnosis for the lack of developing country gains from GATT/WTO membership, simply abandoning SDT at this point and bringing the developing and emerging market countries to the tariff bargaining table is unlikely to be sufficient to address the issue, and this is where the latecomers problem becomes relevant for the Doha Round: because they are "latecomers" to the bargaining table relative to the industrialized countries, developing and emerging market countries are unlikely to find industrialized-country bargaining partners that can reciprocate the substantial tariff cuts that they might have to offer.²¹ This kind of asymmetry is at the heart of various diagnoses of the central sticking points at Doha, such as this diagnosis from *The Economist* (April 28, 2011):

²¹If the arrival of the developing and emerging economies had been anticipated by the industrialized countries at the time that the latter were engaged in tariff negotiations, then the findings of Bagwell and Staiger (2010) on bilateral sequential tariff bargaining in a GATT/WTO-

...the real bone of contention is the aim of proposed cuts in tariffs on manufactured goods. America sees the Doha talks as its final opportunity to get fast-growing emerging economies like China and India to slash their duties on imports of such goods, which have been reduced in previous rounds but remain much higher than those in the rich world. It wants something approaching parity, at least in some sectors, because it reckons its own low tariffs leave it with few concessions to offer in future talks. But emerging markets insist that the Doha round was never intended to result in such harmonization. These positions are fundamentally at odds.

Article XXVIII renegotiations and Article XXVIII bis negotiations

In some sense, then, the industrialized countries find themselves in a position in the Doha Round not unlike the position that the United States tried very hard to avoid in the context of sequential bilateral tariff bargaining under the 1934 Reciprocal Trade Agreements Act (see Staiger, 2022): New potential bargaining partners have arrived, but because of previous MFN tariff bargains with each other, the industrialized countries have not preserved sufficient bargaining power to engage in a substantial way with these new potential partners.²² This is the essence of the latecomers problem. Here I argue that existing GATT/WTO flexibilities can be used to address the latecomers problem within the rules-based system.

The essential idea is to find a way to implement the set of tariff commitments that the current WTO membership would choose to negotiate if countries were not constrained in their negotiations by their pre-existing tariff bindings. This means providing countries with the flexibility to first raise their existing GATT/WTO tariff bindings in an orderly way when necessary, so that they can then engage in reciprocal MFN tariff bargaining with all willing WTO-member bargaining partners. As Bagwell and Staiger (2014) emphasize, there are obvious dangers in encouraging such flexibility for this first step, and sufficient care would need to be taken to prevent uncontrolled unraveling of existing tariff commitments. That said, the flexibility needed for the first step is already provided in GATT by the Article XXVIII renegotiation provisions which I discussed in detail in section 3 (i.e., industrialized countries could renegotiate in an upward direction some of the bindings to which they had previously agreed in negotiations with other industrialized countries), while the flexibility for the second step is provided by the standard bilateral tariff bargaining protocols that have been employed in the various GATT rounds under Article XXVIII bis (i.e., these industrialized countries could then engage in a round of reciprocal tariff bargaining with the “latecomer” emerging and developing countries). So, at

like bargaining forum as an efficient means of accommodating new countries into the world trading system might apply. But it is the unanticipated arrival of the “latecomers” that makes achieving efficient tariff bargaining outcomes in the GATT/WTO framework more difficult.

²²Mattoo and Staiger (2020) argue that the latecomers problem and its implications for the preservation of tariff bargaining power in the WTO system may be helpful for interpreting recent United States trade actions as signifying a switch from “rules-based” to “power-based” tariff bargaining. I discuss their paper further in Staiger (2022).

least in principle, the WTO has the design features that would allow its member governments to address the latecomers problem. But a necessary ingredient for success would be to revisit the commitment to SDT.²³

5 Conclusion

The architecture of the GATT/WTO is based on sound economic principles, and it is well-designed to meet the challenges faced by the world trading system of the twenty-first century. These challenges include the important task of integrating China more fully into the rules-based multilateral trading system. But to accomplish this task, it is critical that the underlying China-specific challenge for the WTO is identified, and that it is distinguished from a number of other challenges with which the WTO must also contend but which are not China-specific. In particular, I have argued that the rise in economic importance of the large emerging and developing economies, with China playing a leading role, has created three interrelated challenges for the world trading system.

First, there appears to have emerged a substantial departure from reciprocity between China and its major industrialized trading partners. I have suggested that the implied need for *rebalancing market access commitments* can be addressed with GATT/WTO non-violation claims. Second, even once reciprocity between China and its major industrialized trading partners is established, there is a possibility that the Uruguay Round tariff commitments made by industrialized countries now imply the grant of a greater level of market access than some of these countries are comfortable with. I have suggested that the implied need for *reconsideration of the level of market access commitments*, where necessary, can be addressed with GATT Article XXVIII renegotiations.

The first of these challenges centers on China. And owing to its sheer size in world trade, China undoubtedly plays a leading role in the second challenge. The third challenge arises from an asymmetry in the level of market access commitments between the developing/emerging economies and the industrialized countries, an asymmetry that is the result of the historical lack of participation of non-industrialized countries in 50 years of GATT reciprocal tariff negotiations. This has led to a *latecomers problem* for the WTO that may be hindering the ability of many developing and emerging economies to gain from GATT/WTO membership. Because China made more significant (though, as it turned out, perhaps still not reciprocal) market access concessions as part of its 2001 protocol for accession to the WTO than have any other emerging and developing economy WTO members to date, this third challenge is less about China than about other emerging and developing economies. I have suggested that the latecomers problem can be addressed with GATT Article XXVIII renegotiations between industrialized countries, followed by GATT Article XXVIII bis negotiations between industrialized and developing/emerging countries.

²³See Bagwell and Staiger (2014) on the possibility that negotiated reductions in US agricultural subsidies in the context of the Doha Round might serve the same purpose as Article XXVIII renegotiations in the first step of the process described above.

For meeting each of these twenty-first century challenges to the world trading system, and others that I detail in Staiger (2022), the basic design features of the GATT/WTO appear well-suited. From this perspective, I believe that working within the WTO framework holds out the best chance of integrating China fully into the rules-based multilateral trading system.

6 Appendix A: A Way Forward on US-China Trade Relations

In this Appendix I reproduce my Concurring Statement included in the *Joint Statement of The US-China Trade Policy Working Group*, “US-China Trade Relations: A Way Forward,” October 27 2019. That Working Group, of which I was a member, was composed of a group of economists and legal scholars from China and the United States who believe that both the United States and China could benefit from a new framework for trade negotiations. The Joint Statement describes one such framework. My Concurring Statement proposes a way to enlist existing WTO flexibilities in pursuit of the goals of the Joint Statement, and I believe that this proposal and a set of answers to frequently asked question that I composed at the time are still relevant.

6.1 Concurring Statement of Robert W. Staiger for the Joint Statement of The US-China Trade Policy Working Group

In this concurring statement I propose a way to enlist existing WTO flexibilities in pursuit of the goals of the Joint Statement. I begin from a distillation of the five changes described in the Background section of the Joint Statement into two distinct issues that have contributed substantially to the current US-China impasse.

First, US expectations of reciprocal market access expansion into the Chinese market arising from China’s 2001 entry into the WTO have not been met. This requires a rebalancing of the existing WTO market access commitments between the US and China to achieve the degree of reciprocity in these commitments that was intended to arise from their 2001 negotiations.

Second, US expectations of the balance between the internal benefits and costs of its own tariff commitments agreed to at the 1994 conclusion of the Uruguay Round have not materialized. This may require a rethinking and possible renegotiation of some of the Uruguay Round tariff commitments made by the US, subject to the preservation of reciprocity (once achieved) with China and with other US trading partners who would be impacted by this renegotiation.

To address these two issues and end the trade war, the following three-step procedure is proposed:

Step 1. The US and China should agree to end their trade war immediately and revert to tariffs consistent with their respective WTO commitments (e.g., their tariff levels prior to March 1 2018).

Step 2. Rebalancing: (i) The US should agree to pursue through the WTO dispute resolution process its concerns about unmet expectations of market access expansion in China, by filing a non-violation claim against China; (ii) In return, China should agree to take the unorthodox step of submitting materials in support of this claim (details of which could be part of the agreement to end the trade war) to the WTO dispute resolution body, thereby augmenting the normal non-violation-claim process and ensuring the success of the US claim in this case; and (iii) The US and China should agree that, once a successful non-violation claim has been adjudicated, both countries will abide by any subsequent WTO rulings on the amount of trade compensation that the US is owed by China (or permissible US retaliation).

Step 3. Renegotiation: The US should agree that, as implied by Step 1, any further permanent upward adjustments to its WTO tariff commitments that would have trade implications for China will be undertaken within the context of Article XXVIII renegotiations in the WTO.

Discussion The proposal acknowledges the legitimacy of US concerns over non-reciprocity with China (first issue), but asks the US to seek redress for these concerns via a non-violation case brought – with China’s assistance – in the WTO dispute forum, thereby rerouting the US-China trade dispute on this issue into WTO dispute resolution processes that are designed to address such issues in the context of measured, reciprocal, compensatory tariff responses which are themselves subject to the restraints of international control, rather than in the context of uncontrolled unilateral retaliatory tariff actions. At the same time, by drawing a distinction between US concerns over non-reciprocity with China on the one hand and the possibility that the US might rethink its own level of market access commitments (second issue) on the other, the proposal allows these two issues to be disentangled and addressed on separate tracks, and thereby builds on the distinct WTO provisions which are designed to address these issues and which, once augmented to reflect the exceptional circumstances of the US-China trade conflict, can provide the needed flexibilities. The proposal leaves unaddressed some of the important issues facing the US and China (e.g., those relating to digital/new technologies). But in describing a way for both countries to engage in good-faith efforts to address more familiar issues, the proposal may also serve as a trust-building exercise and help pave the way for solutions to these other issues in the future.

6.2 FAQs

Question on the Balance of the Proposal The two stated motivations for your suggested approach could be read as being unbalanced; they both discuss unrealized expectations on the US side. Is this proposal unbalanced?

Answer. While the proposal might at first look unbalanced in favor of the US, it actually provides a lot for China.

First, it disentangles US trade concerns into one concern that is squarely about China (unmet US expectations of reciprocity) and another concern that is more about US market access commitments with all of its trading partners (though of course China is a big part of this as well), and in so doing takes some of the focus of US trade anger off of China.

Second, it provides China with a way to learn about the intent of the US. Is the US seeking to find solutions to legitimate trade concerns that it has with China, or is the US simply interested in preventing China from overtaking the US in terms of economic strength? By agreeing to a path down which the US could reasonably address its legitimate trade concerns, China can learn something about US intent that is valuable to it.

Questions on the Non-Violation Claim (Proposal Step 2) Use of the non-violation claim has met with little success in the history of the GATT/WTO. In light of the apparent difficulty of bringing successful non-violation claims, why would the US agree to commit to using this path to address its concerns about unmet expectations of market access expansion in China?

Answer. The proposed agreement to end the trade war addresses the difficulty of bringing a successful non-violation claim by, in this instance, enlisting China's assistance in the US non-violation claim against it: with both the US and China committing – as part of their agreement to end the trade war – to submit materials to the WTO Panel in support of the US non-violation claim, the success of this claim in this case should not be in question.

Question. But why would China agree to provide assistance for the US non-violation claim against it?

Answer. The proposed agreement to end the trade war would have China commit to take the unorthodox step of providing assistance for the US non-violation claim against it, in exchange for a commitment from the US that the US will stay within the relevant WTO dispute resolution processes to address its concerns about unmet expectations of market access expansion in China.

In effect, China is agreeing to actions that will make the non-violation claim a more viable tool for the US to use to address these concerns, and the US is agreeing in turn to address these concerns with the non-violation claim.

Question. OK, suppose the US and China go down this path and it results in a successful US non-violation claim against China. Then what?

Answer. In response to the successful US non-violation claim against China, China could then choose to make adjustments to its policies that had the effect of increasing US access to the Chinese market, thereby bringing the US and China WTO commitments into balance and eliminating the basis for the US non-violation claim; or China could choose not to make adjustments to its policies, in which case the US would then be allowed under WTO rules to make adjustments to its policies that had the effect of decreasing Chinese access to the US market, thereby bringing the US and China WTO commitments into

balance and eliminating the basis for the US non-violation claim; or more likely, the required rebalancing might occur through some combination of both China policy adjustments and US policy adjustments.

But crucially, in all cases, any disagreements between the two countries over the magnitude of the policy adjustments required to bring their WTO commitments into balance would be referred to the relevant WTO dispute settlement bodies for a ruling, and as part of their agreement to end the trade war both the US and China would commit to abide by these rulings.

Question on Article XXVIII renegotiations (Proposal Step 3) When countries try to renegotiate their trade commitments, it can lead to a quagmire; just look at the Brexit negotiations. If the US were to decide to back away from some of its Uruguay Round tariff commitments by attempting to renegotiate them in the WTO, wouldn't the implied Article XXVIII renegotiations suffer from the same problems, making this approach impractical?

Answer. According to the provisions of Article XXVIII, a country is allowed to modify or withdraw the tariff commitments that are the subject of its renegotiations, even if it cannot reach agreement in those negotiations with its impacted trading partners; and its impacted trading partners are then allowed to respond – at most – in a reciprocal manner by withdrawing “substantially equivalent” tariff commitments of their own, where any disagreements over what constitutes substantially equivalent tariff commitments are subject to rulings of the relevant WTO dispute settlement bodies (and as part of their agreement to end the trade war both the US and China would commit to abide by these rulings).

In this way, with reciprocal actions defining the disagreement or “threat” point to the negotiations, Article XXVIII renegotiations avoid the possibility that a threatened or actual breakdown in those negotiations could hold up the modifications that a country desires to make to its tariff commitments, while at the same time ensuring that the original balance of negotiated reciprocal tariff commitments between the country and its trading partners is preserved.

Question on Digital/New Technologies What does your suggested approach do for the important issues relating to digital/new technologies, where there are no WTO commitments/rules?

Answer. The proposal does not directly address the digital/ new technologies issues. But related to the answer to the first question posed above, by serving as a trust-building exercise on the more WTO-familiar issues that the proposal is meant to address directly, it may also help pave the way for addressing these other issues in the future.

7 Appendix B: A Brief History of Non-Market Economy Accessions to the GATT/WTO²⁴

In this Appendix I provide a brief history of non-market economy (NME) accessions to the GATT/WTO. My purpose here is twofold: First, to establish that NMEs have not traditionally been viewed as incompatible with GATT/WTO obligations; second, to illustrate some of the creative ways that have been utilized to secure reciprocal market access commitments from acceding NMEs in past GATT/WTO accessions.

The first GATT experience with integrating a non-market economy into the trading system came in the 1950's when Czechoslovakia (a founding GATT member) transitioned toward a centrally planned economy. As Thorstensen et al (2013) observe:

The transition of Czechoslovakia (to a NME) also brought difficulties in the application of Article XV:6. The provision deals with the membership of the contracting parties at the International Monetary Fund, stating that parties that fail to join the Fund shall enter into special exchange arrangements with the CONTRACTING PARTIES. The Article aimed to avoid parties to adopt exchange rate policies incompatible with the rules of the multilateral financial system that could impact on international trade. . . . Czechoslovakia claimed that a country with complete monopoly of foreign trade could change the par value of its currency without affecting international commercial transactions and without impairing any concessions made under the GATT. Thus, a waiver from the obligations under GATT Article XV:6 was accorded to the country. . . . The case of Czechoslovakia is relevant because it shows that its transition to a centrally planned economy was never regarded, neither by other contracting parties, nor by itself, as incompatible with its obligations in the Multilateral Trading System. The parties considered the need to adjust some of the rules, in order to adapt to the particularities of centrally planned economies, but the core of the system would remain intact. [p 779, footnotes omitted]

Thorstensen et al (2013) go on to describe how the efforts to integrate NMEs into GATT, which in addition to Czechoslovakia included the accessions of Yugoslavia (1966), Poland (1967), Romania (1971) and Hungary (1973) and which reflected a range of adjustments tailored to the specific circumstances of each acceding NME, were nevertheless all based on the “interface principle,” a term that Jackson (1990, pp 81-82) used to mean the creation of “mechanisms that would mediate between the different economic structures, providing rules to reduce the incompatibilities among them.”

Poland provides a striking illustration of the potential for simplicity in the mechanisms that were adopted to mediate between NMEs and other GATT

²⁴Appendix B reproduces material taken from Bown, Chad P., Ralph Ossa, Alan O. Sykes and Robert W. Staiger, “What to do about China and Trade,” February 2022, in process.

members in accordance with the interface principle. The heart of Poland's market access commitments in its 1967 protocol of accession to GATT came in the form of a commitment to grow the total value of its imports at a pre-specified annual rate as follows:

1. Subject to paragraph 2 below, Poland shall, with effect from the date of this Protocol, undertake to increase the total value of its imports from the territories of contracting parties by not less than 7 per cent per annum.

2. On 1 January 1971 and thereafter on the date specified in paragraph 1 of Article XXVIII of the General Agreement Poland may, by negotiation and agreement with the CONTRACTING PARTIES, modify its commitments under paragraph 1 above. Should this negotiation not lead to agreement between Poland and the CONTRACTING PARTIES, Poland, shall, nevertheless, be free to modify this commitment. Contracting parties shall then be free to modify equivalent commitments.

The challenges in integrating NMEs with market economies while attempting to minimize deviations from the core GATT principle of reciprocity was made especially difficult in light of the second core GATT principle of nondiscrimination (MFN), raising the issue of how to handle MFN. This was a contentious question in the context of GATT accession for earlier NMEs such as Hungary, Poland and Romania (see Douglass, 1972, Kostecki, 1974 and Haus, 1991). The account by Douglass (1972) of Poland's GATT accession negotiations is especially informative on this issue:

The complexity of devising a method for Poland to reciprocate for most-favored-nation treatment was exacerbated by the difficulty of quantifying, during the negotiating stage, the advantages of accession. Poland's first serious offer (in 1959) was based on the concept of "global quotas," under which Poland proposed to commit herself to purchasing specified quantities or values of specific goods from those contracting parties who offered tariff concessions. ...

Because the proposal for global quotas was unacceptable to the contracting parties, Poland modified it in 1963, and promised: (i) to draft future plans in such a way as to ensure that a "reasonable" share of the growth of the Polish market would be awarded to GATT countries, (2) to offer assurances that any foreign exchange earnings obtained as the result of tariff reductions (or reductions of other barriers to trade) would be used to increase imports from those countries which undertook such reductions, "on conditions and in proportions to be agreed upon during negotiations," and (3) to commit herself to negotiate for "the inclusion in her import plans of certain categories of goods with guarantees that [the] percentage growth in Polish imports [from countries which have undertaken tariff reductions] would be higher than average."

Thus we can see that Poland and the contracting parties were moving away from the idea of specific global quota commitments toward a general

obligation to increase imports from the contracting parties as a group, but it is clear that Poland still sought a means to enforce non-discriminatory treatment by contracting parties by awarding shares of her imports to those nations which did not discriminate against her. ...

After eight years of negotiations, the contents of the Protocol for Accession were agreed upon in 1967. ... in return for most-favored-nation treatment, Poland agreed to increase her imports from the contracting parties by seven percent per annum for three years, commencing in 1968. Since the Protocol left no hint of global quotas, Polish planners deciding how to meet this quantitative import commitment had considerably more latitude to determine from whom and in what quantities Poland would import. ... [Douglass, 1972, pp 754-758, footnotes omitted]

In essence, it appears that in the case of Poland's accession to GATT, Poland agreed to increase its imports by 7 per cent per year from GATT contracting parties as a group, but maintained the right to allocate that increase across GATT members in proportion to its increased export volumes (and associated foreign exchange) to each GATT member, essentially in accordance with a bilateral reciprocity norm in the presence of MFN (see, for example, Bagwell and Staiger, 2005, 2010, and the discussion in chapter 4 of Staiger, 2022). And to better mimic MFN tariff cuts while relying on quantitative import commitments, Douglass suggests that the following technique for Poland might be considered when engaging in reciprocal bargaining over market access concessions:

... in exchange for a reduction in Country X's tariff on a product of which Poland is a substantial exporter – for example, coal or rolled metal products – Poland could commit herself to the importation of a specific quantity of some other specific commodity, but not necessarily from Country X, though typically X would be a major producer of this other commodity and would be likely to benefit from the concession. Under this approach the most-favored-nation principle would still be realized, since other nations who are large producers of coal or rolled pipe would enjoy the advantage of the tariff reduction in Country X, as would Country X's competitors enjoy the advantage of bidding for Poland's import commitment, a purchase which Poland's importing foreign trade enterprise must base solely on "commercial considerations" anyway. [Douglass, 1972, p 764, footnotes omitted]

Whether or not something similar might work in the case of China is an open question. Relative to the Polish accession to GATT, there is at least one obvious and potentially important difference with the case of China's commitments in the WTO, namely, the sheer size and dominance of China in the world economy relative to Poland, who at the time of its accession to GATT was characterized as a "medium-sized planned economy nation" (Douglass, 1972, p 762).

On the other hand, unlike Hungary, who in preparation for its accession to GATT implemented a new system of economic management in 1968 that was intended to elevate the use of tariffs as the primary instrument of trade control

in relations with market economies, Poland was *not* expected to transition in any meaningful way toward a market economy at the time of its accession.²⁵ In fact, along this dimension it could be argued that at the time of its accession China's case was expected to be more like that of Hungary, but in hindsight has turned out to be closer to that of Poland.

More specifically, in the case of Hungary's accession to GATT, Kostecki (1974) observes that

The new system of economic management, implemented in Hungary in 1968, introduced the customs tariff as a chief instrument of trade control in relations with the market economies. The functions and effects of the Hungarian tariff were at the centre of interests of the contracting parties due to the fact that Hungary, when acceding to GATT, intended to negotiate its level of protection exclusively on the basis of tariffs, without including in the Hungarian protocol for accession any quantitative import commitments. If the tariff had not been recognized as an essential element of the Hungarian system of trade control vis-a-vis the market economies, Hungary would have been treated in GATT along the Polish pattern. As it was, some members of the working party expressed their doubts as to whether the effects of the Hungarian tariff were not weakened by other instruments of trade control. If this were so, a quantitative import commitment would be required. In the opinion of some representatives such a commitment could be replaced by Hungarian tariff concessions after a transitional period. [Kostecki, 1974, p 406]

Hence, at least in the opinion of some as Kostecki notes, the Hungarian accession protocol to GATT should have been designed as a transitional agreement during which time Hungary should be treated as a planned economy until its "new system of economic management" had proven effective in introducing the tariff as its primary instrument of trade control in relations with market economies. The Hungarian accession to GATT therefore shares important features with how industrialized countries approached negotiations over China's protocol of accession to the WTO; whereas the expectation that China will eventually transition to a market economy is now no longer widely held, moving the issues associated with China's market access commitments in the WTO now closer to those associated with Poland's accession to GATT.

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²⁵This may explain why, as Douglass (1972, p 760) notes, there was no firm date in Poland's Protocol of Accession for the end of the transitional period, and Article XXVIII renegotiations which could occur every three years were presumably the instrument with which GATT members expected to handle the open-ended nature of the quantitative commitments with Poland (Douglass, 1972, pp 763-764).

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