

ARTICLES

IS CHINA'S RISE THE WTO'S DEMISE?

KEVIN J. FANDL*

ABSTRACT

Is the World Trade Organization (WTO) big enough for two economic superpowers? China's explosion onto the world economic stage has allowed new and unexpected challenges to emerge, most significantly, which path globalization should be guided down. For seventy years, the western world has approached globalization from a liberalist perspective, seeing it as a corollary to democracy and rules-based economic growth. Yet China, which benefited enormously from globalization, has excelled in the absence of democracy, and has challenged the idea that the liberal world order is necessary or even desirable.

With the WTO teetering on irrelevance, this is a moment to lift the hood and examine the engine of economic growth we have relied upon for decades. Though both China and the United States have the economic power to unilaterally pursue trade advantages (think NAFTA or the Belt and Road Initiative), it is not in the interest of either party to abandon the constraints imposed by the rules-based WTO system. The WTO provides an avenue to resolve disputes peacefully without the need for unilateral actions, which tend to escalate rather than resolve trade disputes. The WTO also enshrines the ideals of liberal trade by denouncing trade barriers of all kinds and pursuing open exchange. The WTO also establishes, by consensus, the rules of the road that allow countries large and small to compete in a mostly fair and equitable environment. This is a necessary and effective system that neither China nor the United States could or should abandon.

I. INTRODUCTION	576
II. FOUNDATIONS OF THE WORLD TRADE SYSTEM	578

* Kevin J. Fandl, MA/JD (American University), Ph.D. (George Mason University), was the Irvin Gross Research Fellow and Associate Professor of Business Law at the Temple University Fox School of Business. He was the former Chief of Staff for International Trade and Intellectual Property at the U.S. Department of Homeland Security National Intellectual Property Rights Center. Special thanks to the guidance and advice of Simon Lester, Associate Director of the Cato Institute Herbert A. Stiefel Center for Trade Policy Studies, in the research for this article. Dr. Fandl unfortunately passed away in June 2021 before the publication of this article. Many thanks to James M. Lammendola, MA/JD, Associate Professor of Practice at the Temple University Fox School of Business, for his final review of this article on behalf of Dr. Fandl. © 2021, Kevin J. Fandl.

A.	<i>The Demise of Mercantilism</i>	579
B.	<i>Trade and the Liberal World Order</i>	582
C.	<i>Giving Trade a Home</i>	584
D.	<i>Threat #1: The United States</i>	588
E.	<i>Threat #2: China</i>	591
III.	THE U.S.-CHINA TRADE WAR	596
A.	<i>Introduction</i>	596
B.	<i>The Trump Administration’s Trade Platform</i>	597
IV.	U.S.-CHINA RELATIONS BACKGROUND: FROM OPIUM TO PING PONG.	601
A.	<i>A Concise History of U.S.-China Relations</i>	603
1.	The Century of Humiliation (1839 – 1949).	604
2.	Nixon Goes to China	608
V.	ANALYSIS: WILL U.S.-CHINA TENSIONS BRING THE WTO TO AN END?	613
A.	<i>China Joins the Game</i>	614
B.	<i>Areas of Significant Disruption</i>	619
1.	China’s Growing Economic Footprint.	620
2.	China’s Status as a Developing Country	622
3.	Pandemic Fallout.	627
VI.	A PATH FORWARD: CONCLUDING REMARKS	631

I. INTRODUCTION

The global economic system as we know it is a relic; it requires reform, top to bottom. We should begin with one of its leading institutions, the World Trade Organization. We should abolish it.¹

These are the words of a freshman Republican Senator from Missouri, Josh Hawley, who initially made the case that the United States should unilaterally abolish the World Trade Organization (WTO), seeing it as a tool to benefit China.² After being informed that the United States lacked the legal authority to abolish an international organization, Hawley introduced a joint resolution to withdraw from it instead.³ Eventually, Hawley’s proposal was shot down by the Senate

1. Josh Hawley, Opinion, *The W.T.O. Should Be Abolished*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/opinion/hawley-abolish-wto-china.html> (making the case to withdraw from the World Trade Organization).

2. *Id.*; but see Simon Lester, *Senator Hawley’s Many Misunderstandings of the WTO*, CATO INST. (May 5, 2020), <https://www.cato.org/blog/senator-hawleys-many-misunderstandings-wto> (providing a reasoned critique of Senator Hawley’s mistake-laden proposal).

3. See Josh Hawley, *Senator Hawley Introduces Joint Resolution to Withdraw from WTO*, (May 7, 2020), <https://www.hawley.senate.gov/senator-hawley-introduces-joint-resolution-withdraw-wto>.

Finance Committee;⁴ however, the cat was out of the bag—the WTO was in the crosshairs of Congress, and China was the reason. But Hawley was not the first to criticize the WTO during the Trump Administration. President Trump has personally railed on the WTO with strong rhetoric and actions meant to undermine the institution.⁵

The WTO was not initially an institution that the U.S. Congress actively sought or defended. In fact, the precursor organization—the International Trade Organization—was stillborn in 1948 after Congress voted not to support it.⁶ This left the system of rules governing international trade, the General Agreement on Tariffs and Trade (GATT), to operate in the absence of a coordinating body.⁷ When an international body was again proposed during trade negotiations in 1990, congressional support was tepid.⁸

Yet, despite some vocal opposition to the institution, the WTO survived congressional approval in 1994 and quickly became a guidepost for enforcing rules-based liberal trade policies, as well as the most influential and widely used body to resolve trade disputes.⁹ Since 1995, nearly 600 disputes have been filed with the WTO's dispute settlement body. The United States has been one of the most active participants in those disputes, both as a complainant and as a respondent. However, despite its success, after twenty-five years the WTO has collected ample dust and is in need of reform.

4. See Doug Palmer, *New Ruling Quashes Hawley's Hope for Senate WTO Withdrawal Vote*, POLITICO (July 1, 2020), <https://www.politico.com/news/2020/07/01/ruling-quashes-hawley-hope-senate-wto-withdrawal-347732> (explaining that the Senate Finance Committee decided not to vote on the resolution this session, effectively killing the bill).

5. See Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE 6, 8 (2018) (describing President Trump's position on the WTO since taking office); see also Jonathan Swan, *Scoop: Trump's Private Threat to Upend Global Trade*, AXIOS (June 29, 2018), <https://perma.cc/M7WD-3MWZ>.

6. See generally Ayse Kaya, *Designing the Multilateral Trading System: Voting Equality at the International Trade Organization*, 15 WORLD TRADE REV. 25 (2016) (providing a thorough overview of the politics surrounding the vote for the International Trade Organization).

7. See Nicholas Lamp, *The Club Approach to Multilateral Trade Lawmaking*, 49 VAND. J. TRANSNAT'L L. 107, 127–28 (2016) (describing the protocols from the ITO that remained active within the GATT once the ITO failed to come into existence).

8. See Ralph Nader, *The World Trade Organization's Sharp Teeth*, ST. LOUIS POST-DISPATCH, Aug. 17, 1994, at 7B (making the case to proceed with approval of the WTO with caution, suggesting that it would be the first international organization that does not give Americans veto power or weighted authority).

9. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (implementing into domestic law the GATT and WTO rules crafted during the Uruguay Round of GATT negotiations).

China's role within the WTO has been one of the concerns of past administrations. But the Trump Administration has used China's rise within the WTO system to challenge the very existence of that system. Mr. Trump levied unilateral tariff increases on China in violation of WTO rules.¹⁰ China retaliated both unilaterally and through the WTO with a series of complaints against the U.S. tariffs.¹¹ However, even if those cases reach a first-level decision, a final decision cannot be rendered due to the ongoing U.S. blockade of new WTO Appellate Body judges. Thus, the trade war between the two largest economic powers in the world must be waged outside the WTO system, drawing our attention to the need for these world trade rules at all.

This Article asks whether the combined effect of U.S. intransigence toward the WTO and the failure to abide by the rules-based system in waging a trade war on China will destroy the rules-based system that has guided countries for seventy-five years. The Article begins with a foundational overview of the origins of the world trade system and the liberal world order within which it is embedded. That Section also discusses the two key threats to the survival of the WTO—reform of the Appellate Body and the rise of China. The following Section discusses the U.S.-China relationship and how recent actions evolved into both economic and political disputes. It then provides context on China to better appreciate the long and often storied history between the two countries. Finally, the Article provides an analysis of the effects of the trade war, a global health pandemic, and the most significant economic depression since 1930, and explains why there is more chance of WTO survival than destruction. The Conclusion attempts to pave a pathway forward to preserve the rules-based trading system in the midst of a tense political relationship.

II. FOUNDATIONS OF THE WORLD TRADE SYSTEM

Today's world trade system consists of largely export-oriented, free trade supporting countries that play by an established set of rules and resolve disputes within a structured dispute settlement system. Tariffs have declined to an average of 1% for developing countries and between 4% and 10% for developed countries.¹² And while this reflects

10. *Timeline: Key Dates in the U.S.-China Trade War*, REUTERS (Jan. 15, 2020), <https://www.reuters.com/article/us-usa-trade-china-timeline/timeline-key-dates-in-the-u-s-china-trade-war-idUSKBN1ZE1AA> (laying out a timeline for the tit-for-tat tariffs between the two countries).

11. *Id.*

12. U.N. CONF. ON TRADE AND DEV., KEY STATISTICS AND TRENDS IN TRADE POLICY 5, UNCTAD/DITC/TAB/2019/1 (2018) (describing trends in global tariff rates).

the approximately 40% of goods traded within the Most Favored Nation system governed by the WTO, goods traded outside that system face significant tariffs.¹³ In addition, tariffs are only one barrier to market access. A number of non-tariff barriers from customs regulations to intellectual property protections reflect the incompleteness of the trade liberalization process.¹⁴

However, in a world of mostly liberal rules-based trade, rarely do countries threaten military force to acquire market access. And when trade disputes arise, they are resolved peacefully. The costs of trade, from transport to tariffs to communication, have dropped so low that exporters in small, emerging markets are becoming key components within global supply chains. If we continue down this road, free trade will only get freer and economic growth will continue to spread to the far corners of the Earth.

While most of us have grown up in this system of free and rules-based trade, we cannot overlook the fact that this system is young. The concept of trade-based economic growth may have been born in the late eighteenth century in the midst of the first industrial revolution and the writings of Adam Smith;¹⁵ however, the politics of trade would take another 150 years to catch up to the economics of trade. This Section begins with a short overview of how we arrived at this point.

A. *The Demise of Mercantilism*

Colonialism and mercantilism prevailed as the dominant approaches to trade in much of the eighteenth and nineteenth centuries. While the British, Spanish, and Portuguese grew wealthy through their colonies, most European countries also maintained high tariffs, preventing significant growth in trade. British frustration with protective tariffs—particularly the Corn Laws—shifted Britain away from its protectionist roots and quickly placed it on a path to free trade.¹⁶ The end of the Napoleonic Wars in 1815 opened the door to grain imports in Britain, lowering the cost of grain for consumers. To keep the price of domestic grain high, Parliament enacted the Corn Laws that same year, which reduced consumer access to cheap grains and led to retaliatory tariffs

13. *Id.* at 7.

14. *Id.* at 4–5.

15. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

16. “Corn” in this context refers to several grains, such as wheat, oats, and barley.

on British exports. Farmers and consumers rebelled against these laws and advocated for broader access to free trade.¹⁷

Let the farmer perfectly understand that his prosperity depends upon that of his customers—that the insane policy of this House has been to ruin his customers, and that Acts of Parliament to keep up prices are mere frauds to put rents into landlords' pockets, and to juggle his tenants.¹⁸

Repeal of the Corn Laws in 1846 began a trend of trade liberalization in Britain that quickly spread to continental Europe.¹⁹ In 1860, Parliament signed the Cobden-Chevalier Treaty, the first successful bilateral trade treaty between the United Kingdom and France.²⁰ Duties on agricultural and manufactured goods declined throughout the remainder of the nineteenth century. In the United States, tariffs remained high throughout much of the nineteenth century and into the beginning of the twentieth century. High tariffs in the early United States were a deliberate strategy of Alexander Hamilton and his followers, who believed that protective tariffs would enable the development of industry and empower the United States to become less dependent upon exports from the United Kingdom and Europe.²¹ The

17. See C. DONALD JOHNSON, *THE WEALTH OF A NATION: A HISTORY OF TRADE POLITICS IN AMERICA* 25 (2018) (providing an extensive overview of the history of the advent and repeal of the Corn Laws).

18. RICHARD COBDEN, *SPEECHES ON QUESTIONS OF PUBLIC POLICY*, M.P. 25–26 (John Bright & J. E. Thorold Rogers eds., T. Fisher Unwin 3d ed. 1908).

19. See Antonio Tena-Junguito, Markus Lampe & Felipe Tãmega Fernandes, *How Much Trade Liberalization Was There in the World Before and After Cobden-Chevalier?*, 72 *J. ECON. HIST.* 708, 713–14 (2012) (discussing the protective agricultural tariffs during the 19th century).

20. See Markus Lampe, *Explaining Nineteenth-Century Bilateralism: Economic and Political Determinants of the Cobden-Chevalier Network*, 64 *ECON. HIST. REV.* 644, 644 (2011) (discussing the foundations of the Cobden-Chevalier Treaty of 1860). *But see* W.O. Henderson, *The Anglo-French Commercial Treaty of 1786*, 10 *ECON. HIST. REV.* 104 (1957) (describing the first commercial treaty as the 1717 Treaty of Utrecht, followed by the equally unsuccessful 1786 Anglo-French Commercial treaty).

21. See Bruce Bartlett, *The Truth About Trade in History*, CATO INST. (July 1, 1998), <https://www.cato.org/commentary/truth-about-trade-history> (quoting from Hamilton's Report on Manufactures: "The superiority antecedently enjoyed by nations who have preoccupied and perfected a branch of industry, constitutes a more formidable obstacle . . . to the introduction of the same branch into a country in which it did not before exist. To maintain, between the recent establishments of one country, and the long-matured establishments of another country, a competition upon equal terms, both as to quality and price, is, in most cases, impracticable. The disparity . . . must necessarily be so considerable, as to forbid a successful rival ship, without the extraordinary aid and protection of government."); *see also* Tariff Act of 1789, 1 Stat. 24 (1789).

early U.S. tariffs also served as a key source of revenue for nascent U.S. development.²²

By the start of the twentieth century, tariffs were low in the United Kingdom and continental Europe, and the United States also began lowering its tariffs to boost access to foreign markets for its newly competitive industrial sector. Congress enacted the Sixteenth Amendment to the Constitution in 1909, which authorized Congress to collect income taxes, a new and substantial source of revenue for the U.S. government that would come to replace the need for tariffs for that purpose.²³ Further, President Wilson signed the Underwood Tariff in 1913, which lowered overall import tariffs.²⁴ However, following World War I, U.S. and worldwide tariffs surged again. Republicans in Congress pushed through the Fordney-McCumber tariff of 1922,²⁵ which raised tariffs while also empowering the President to adjust tariff levels by up to 50% without congressional approval. The Tariff Act of 1930²⁶ went further and increased tariffs by as much as 50-100%.²⁷

The high tariffs caused international trade to slow substantially as trading countries retaliated against U.S. tariffs, creating a vicious cycle of increasing tariffs that we would see again during the Trump Administration many years later.²⁸ Some historians have suggested that the collapse of the world trade system and rapidly emerging depression gave Adolf Hitler a scapegoat to blame in his rise to power.²⁹ Yet what was absolutely clear from this period in history is that the global crisis created by World War II and the Great Depression shaped the views of policymakers for generations to come and squarely aligned economic stability with political stability.

22. See, e.g., Brian Domitrovic, *When Tariffs Worked*, FORBES (Mar. 9, 2018), <https://www.forbes.com/sites/briandomitrovic/2018/03/09/when-tariffs-worked/#39a8d7af70f9>.

23. U.S. CONST. amend. XVI.

24. Revenue Act of 1913, 38 Stat. 114 (1913).

25. Fordney-McCumber Tariff, Pub. L. No. 67-318, 42 Stat. 858 (1922).

26. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930).

27. See David Greene, *Smoot-Hawley Tariff Act: A Classic Economics Horror Story*, NAT'L PUB. RAD., Apr. 5, 2018 (explaining that over 800 goods received some type of protection under the Act); see also Bartlett, *supra* note 21 (describing the protectionist push of Republican administrations in the early 19th century).

28. See, e.g., John Steele Gordon, *The Long View: The Great Mistake*, 90 BARRON'S 53 (2010).

29. See, e.g., Andrew Glass, *Hoover signs Smoot-Hawley Act, June 17, 1930*, POLITICO (June 17, 2014), <https://www.politico.com/story/2014/06/this-day-in-politics-herbert-hoover-smoot-hawley-act-107908>.

B. *Trade and the Liberal World Order*

The election of progressive Democrat Franklin D. Roosevelt in 1932 signaled a seismic shift in public sentiment in the United States. The horrors of World War II and the Great Depression left Americans looking for protection in the form of a larger federal government, as well as protection from the growing global threats of fascism and communism. Roosevelt capitalized on this moment to dramatically expand the size and scope of the federal government and also to exert global American influence in an effort to curtail emerging threats. He began what would later be called the liberal world order.³⁰

The liberal order they went on to build was less about the triumphant march of liberal democracy than about pragmatic, cooperative solutions to the global dangers arising from interdependence. Internationalism was not a project of tearing down borders and globalizing the world; it was about managing the growing complexities of economic and security interdependence in the pursuit of national well-being.³¹

Among an array of domestic and international entities, for purposes of our discussion this Section will focus on only one—the GATT of 1947.³² As scholar Richard Baldwin observed, “[t]he GATT was launched in unusual times.”³³ He explained that the United States and United Kingdom recognized the need for deeper commercial integration in order to offset the rise of the Soviet Union and to recuperate from the fallout of the war and depression.³⁴ And unlike the U.K.-led approach to trade liberalization earlier that century, the new system would be led by global institutions with U.S. leadership.

The GATT is the foundational multilateral body of rules that would guide countries toward globalization in a stable and coherent manner. The GATT was built upon the framework of the Reciprocal Trade

30. See, e.g., Daniel Deudney & G. John Ikenberry, *The Nature and Sources of Liberal International Order*, 25 REV. INT’L STUD. 179, 180–82 (April 1999).

31. G. John Ikenberry, *The Next Liberal Order*, FOREIGN AFF., July/Aug. 2020, <https://www.foreignaffairs.com/articles/united-states/2020-06-09/next-liberal-order> (seeing Roosevelt as a defensive tactician rather than a globalist).

32. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. (1947) [hereinafter GATT] (noting the original 23 signatories to the original GATT Agreement, which took effect in 1948).

33. Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. ECON. PERSP. 95, 97 (2016) (discussing the historical context for the formation of the GATT).

34. *Id.* at 97–98.

Agreements Act of 1944, a U.S. trade agreement that utilized a system of reciprocity to extract tariff concessions from trading partners and a concept of exclusivity to make those concessions meaningful.³⁵ The original idea of the negotiating parties was to form the International Trade Organization (ITO), which would be a United Nations organization with the International Court of Justice as its dispute resolution arm and the GATT as its commercial arm.³⁶ Ultimately, the GATT, known as the commercial chapter of the ITO, was separated from the ITO process and ratified before the ITO. This approach was meant to allow a GATT “round” to take place to establish baseline tariff concessions before launching the ITO.

In the end, however, the U.S. Congress was unwilling to support the establishment of the ITO. In its strong advocacy against the ITO, the Tariff League stated that “the ITO Charter is not a useful tool; it will not promote trade.”³⁷ Rather, they urged Congress to continue negotiating bilateral agreements with those countries willing to meet U.S. demands.

Still operating under the assumption that the ITO would come into existence, twenty-two countries signed the Final Act authorizing the creation of the GATT in October 1947.³⁸ Recognizing that approval of the GATT could be thwarted if it were presented as a binding treaty or new organization, the GATT was structured as a trade agreement that allowed countries to exempt themselves from provisions that conflicted with domestic legislation, and also made clear that the GATT was not a new organization but rather a set of rules.³⁹ When the chairman of the negotiating committee was asked how the GATT could operate in the absence of an organization, the chairman responded:

No doubt at that first meeting the contracting parties will take whatever steps are needed to settle such questions as future procedure, Secretariat, and such other arrangements which may be necessary for them to carry out their functions during the very short time in which it is envisaged that it is necessary for joint action to be taken by the contracting parties.⁴⁰

35. See Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615 (1970).

36. *Id.* at 619 (describing the positioning of the GATT within the ITO negotiations).

37. *Demands Congress Reject ITO Charter*, N.Y. TIMES, Oct. 28, 1948.

38. GATT, *supra* note 32.

39. Hudec, *supra* note 35 at 632–33 (explaining that member states were known as “contracting parties” to bypass the need for legislative approval among the new members of the GATT).

40. U.N. ECON. & SOC. COUNCIL, PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT 40, U.N. Sales No. 1947.II.4 (1947).

The GATT operated, without an organization, as the only multilateral set of rules governing international trade for the next forty-eight years. And despite its lack of enforcement power, the GATT is credited with substantially reducing global tariffs in low- and high-income countries.⁴¹ “As the GATT’s liberalization process started working its magic, exports of manufactured goods boomed - growing twice as fast as the production of manufactured goods from the late 1960s until just before the collapse of trade in 2009.”⁴² The boom in economic growth was broadly linked to trade liberalization resulting from the GATT.⁴³

There was a growing consensus throughout the twentieth century that trade not only promoted peace but that it fostered economic development. “Openness to international trade accelerates development of poor countries: this is one of the most widely held beliefs in the economics profession, one of the few things on which Nobel prize winners of both the left and the right agree.”⁴⁴ By the time of the Uruguay Round of the GATT in 1986, countries—including the United States—were ready to take the next step in trade: creating a world trade organization.

C. *Giving Trade a Home*

The World Trade Organization (WTO) is the realization, in diluted form, of the ITO vision from decades prior. During that interim period, the GATT Contracting States held eight multilateral trade rounds. Nearly every round welcomed new members and the outcome of each round was more tariff reductions and expanded market access for members. By the time of the 1986 launch of the Uruguay Round, GATT membership had grown to 123 countries and expansive negotiations included, at the behest of the Reagan Administration, services, intellectual property, technology, and non-tariff barriers to trade, among other things.⁴⁵ Perhaps most significantly, the negotiations also included a new dispute settlement system that would become the most active and productive multilateral dispute resolution mechanism in existence.

41. See Baldwin, *supra* note 33 at 98 (calling the GATT a “tariff-cutting juggernaut”).

42. *Id.* at 106.

43. *Id.*

44. David Dollar & Aart Kraay, *Growth is Good for the Poor*, 7 J. ECON. GROWTH 195, 202 (2002).

45. See Ernest H. Preeg, *The Uruguay Round Negotiations and the Creation of the WTO*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 122 (Martin Daunton, Amrita Narlikar, & Robert M. Stern eds., 2012).

The Uruguay Round took place over one of the most significant periods of change in recent memory. With the fall of the Berlin Wall, the Soviet Union disintegrated into a number of new, market-oriented states, pushing Europe to integrate further.⁴⁶ Parts of Asia unified under the Asia-Pacific Economic Cooperation (APEC) Agreement, while the United States pursued its own regional integration with the North America Free Trade Agreement (NAFTA). And as the number of developing countries participating in the Uruguay Round far exceeded any previous round, the nature of the negotiations shifted toward issues relevant to North-South trade, such as establishing a framework to reduce agricultural subsidies.⁴⁷

Negotiations nearly broke down as agreement had not yet been reached on European agricultural subsidies by the time George H.W. Bush was voted out of office in 1992. In what one observer called “an extraordinary US diplomatic manoeuvre,”⁴⁸ the United States found a way to convince Europeans to negotiate cuts in their agricultural subsidies in order to move the Uruguay Round forward. The United States had won two successive GATT cases over European subsidies on oilseeds.⁴⁹ After the Europeans failed to comply with the decision, the United States announced a 200% retaliatory tariff on imports of European agricultural exports. These tariffs would have had a substantial impact on European agricultural exporters and their economy. Accordingly, by the time President Clinton took office in 1993, the European Community agreed to more cuts in subsidies and the negotiations were able to continue.⁵⁰

Of all the significant achievements of the Uruguay Round, perhaps the most unexpected was the formation of the WTO itself. This idea had been discussed frequently since the failure of the ITO, but it was not even on the agenda for the Uruguay Round meeting.⁵¹ Canada

46. *Id.* at 127.

47. *Id.* at 126 (explaining that the agricultural subsidies issue delayed agreement by three years).

48. *Id.* at 130 (recounting the actions of the lame duck president and his trade negotiator, Carla Hills at the end of 1992).

49. See Panel Report, *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, WTO Doc. L/6627-37S/86 (Jan. 25, 1990); see also Panel Report, *Follow-up on the Panel Report “European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins,”* WTO Doc. DS28/R-39S/91 (Mar. 31, 1992).

50. See Preeg, *supra* note 45, at 130 (explaining the “Blair House Accord” on agricultural subsidies agreed to on November 20, 1992).

51. *Id.* at 131 (explaining that the creation of an organization was not part of the original Uruguay Round mandate).

made the original proposal in April of 1990 with significant support from developing countries, who saw such an institution as helpful to strengthen their role within the growing trade system.⁵² Developed countries—especially the United States—sought commitment by all countries to the comprehensive package of GATT rules in the form of a “Single Undertaking.” This meant that, unlike in previous iterations of the GATT, countries would not be able to select *a la carte* the commitments they were willing to take on and those they were not. All member states would play by the same rules.

The Clinton Administration enjoyed strong economic growth of nearly four percent per year, a growing middle class, and the only federal budget surplus since 1969.⁵³ Much of this growth was attributed to domestic tax reform; however, President Clinton also strongly advocated for more trade liberalization, including the conclusion of NAFTA⁵⁴ and a number of other significant trade agreements.⁵⁵ Despite fears that the United States would again kill the creation of a world trade organization, Congress approved the Uruguay Round Agreement with a House vote of 288-146 and a Senate vote of 76-24.⁵⁶ With U.S. support, the WTO officially came into operation on January 1, 1995.

The final agreement, subscribed to by most countries engaged in international trade, included the following central elements:

- Dispute Settlement: a rules-based dispute settlement system with a lower (panel) body and an upper (appellate) body to manage trade disputes. These rules also empowered the body to authorize retaliation in the event of non-compliance.⁵⁷

52. *Id.* at 131–32.

53. See, e.g., Dylan Matthews, *The Clinton Economy in Charts*, WASH. POST. (Sept. 5, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/09/05/the-clinton-economy-in-charts/> (describing the various factors affecting economic growth during the Clinton economy).

54. See, e.g., Andrew Glass, *Clinton signs NAFTA into Law, Dec. 8, 1993*, POLITICO (Dec. 8, 2018) (recalling the slow process—24 years—of concluding this historic trade agreement).

55. See Lael Brainard, *Trade Policy in the 1990s*, BROOKINGS INST. (June 29, 2001), <https://www.politico.com/story/2018/12/08/clinton-signs-nafta-into-law-dec-8-1993-1040789> (describing the numerous trade agreements negotiated by the Clinton Administration, from NAFTA to the U.S.-Chile FTA to approval to support China’s entry into the WTO).

56. Approval and Entry into Force of Uruguay Round Agreements, 19 U.S.C.A. § 3511 (1994).

57. DSU, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N. T.S. 401, 33 I.L.M. 1226 (1994).

IS CHINA'S RISE THE WTO'S DEMISE?

- Services: trade in services, from financial to telecommunication, had been growing quickly and would now be regulated similar to trade in goods.⁵⁸
- Intellectual Property: protecting the value of patents, copyrights and trademarks was of increasing importance to developed countries and would now be protected within the broader trade regime.⁵⁹
- Agriculture: developed countries agreed to reduce their subsidies of agriculture, allowing developing countries more market access.⁶⁰
- Textiles: developed countries agreed to phase-out their quotas on imported textiles over a ten-year period.⁶¹
- Market access: all members reduced their import tariffs and increased the number of goods that would be open to negotiation (bound) in future rounds.⁶²

The Agreement contained many other valuable provisions which have been explained at length elsewhere.⁶³ For our purposes, suffice it to say that the WTO was the culmination of many decades of hard-fought trade liberalization efforts by advocates of the liberal world order established after World War II. But with the Cold War now in the past and capitalist models now dominating the global economic landscape, it seemed that the rules-based institutional regime set forth by the WTO would unite the world around the “trade for peace”⁶⁴ ideals

58. GATT, *supra* note 32.

59. TRIPS, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

60. Agreement on Agriculture, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 (1994).

61. Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1125 (1994).

62. Understanding the WTO: Basics—Principles of the Trading System, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Feb. 27, 2021).

63. *See generally* HARVEY M. APPLEBAUM & LYN M. SCHLITT, THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES (Practising Law Institute, 1995). *See also* Preeg, *supra* note 45.

64. Note that the WTO launched its own “trade for peace” initiative in 2017, which “aims at using the WTO accession process as a pathway to economic growth and development, fundamental elements for national, regional and international peace and security.” *See* Trade for Peace Through WTO Accession, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/acc_e/tradeforpeace_e.htm (last visited Feb. 27, 2021).

of the early twentieth century.⁶⁵ However, for two related and significant reasons, this has not happened.

D. *Threat #1: The United States*

First, as with any international institution, the success of the WTO is largely dependent upon the efforts of its strongest supporters. In the case of the WTO and the overall multilateral trading system, that success has been tied to U.S. support, which has declined precipitously since the 1990s, if not before. Many members—especially the United States, Chile, and the European Union—continued to pursue smaller trade agreements outside the multilateral system, agreements that are permitted under GATT rules.⁶⁶ In recent years, these trade agreements have accelerated and expanded in their scope of coverage.⁶⁷ These agreements can be tailor-made to the particular members, but unlike in the multilateral WTO context, they can also exclude countries that may be less attractive to the larger players.⁶⁸

To make matters worse, the United States has actively stymied the operation of the WTO's centerpiece—the dispute settlement system—by blocking the appointment of new Appellate Body judges. This began as a bargaining chip used by the Obama Administration to seek reforms of that body.⁶⁹ But given the Trump Administration's disdain for international organizations and agreements,⁷⁰ the dismantling of the

65. See Franklin Delano Roosevelt, Message to Congress on the Trade Agreements Act (March 26, 1945) (“[W]e cannot succeed in building a peaceful world unless we build an economically healthy world.”).

66. GATT, *supra* note 32, art. XXIV (allowing the establishment of customs unions that eliminate tariffs on substantially all trade).

67. See Baldwin, *supra* note 33, at 106-08 (discussing the potential undermining of multilateral negotiations because of more extensive bilateral negotiations).

68. See, e.g., Kevin J. Fandl, *Bilateral Agreements and Fair Trade Practices: A Policy Analysis of the Colombia-U.S. Free Trade Agreement*, 10 YALE HUM. RTS. & DEV. L.J. 64 (2006).

69. See Carmen Francis & Oksana Migitko, *WTO Appellate Body Impasse: Potential Paths Forward*, MONDAQ (Feb. 20, 2020), <https://www.mondaq.com/canada/international-trade-investment/895684/wto-appellate-body-impasse-potential-paths-forward> (explaining the bases for U.S.-led reforms at the WTO); see also Simon Lester, *Questions about WTO Appellate Review Reform Proposals and Alternatives*, INT'L ECON. L. & POL'Y. BLOG (May 21, 2019), <https://ielp.worldtradelaw.net/2019/05/questions-about-wto-appellate-review-reform-proposals-and-alternatives.html> (outlining the numerous considerations in any discussion over reforms at the WTO).

70. See Meghan Mcgee, *Europe Needs to Push Back Against Trump*, FOREIGN POL'Y (July 10, 2020), <https://foreignpolicy.com/2020/07/10/trump-europe-nato-transatlantic-push-back/> (discussing Trump's attacks on NATO); Katie Rogers & Apoorva Mandavilli, *Trump Administration Signals Formal Withdrawal From W.H.O.*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html> (describing Trump's push to withdraw from the World

dispute settlement system accelerated and became more of a principled attack than a threat to encourage reforms.⁷¹

The objections raised by the Obama Administration (and still of concern today) over the practices of the Dispute Settlement Body include the following:

- Appellate body members remain on to complete appeals after their terms have expired.
- The Appellate Body frequently misses the prescribed deadline to complete an appeal (ninety days).
- Appeals address issues of fact when they are supposed to stay focused on legal issues.
- The Appellate Body often issues advisory opinions, which it is not empowered to issue.
- Prior cases are relied upon with near precedential effect, despite the non-precedential nature of the proceedings, and;
- The Appellate Body often reaches decisions that go beyond the bounds of their mandate.⁷²

According to former Appellate Body member and current Georgetown Law Professor Jennifer Hillman, the United States is not looking to provide its own version of the WTO but simply for recognition by other members that it has strayed from its mandate.

Health Organization); Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017) (withdrawing from the Trans-Pacific Partnership regional trade agreement); Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scored*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html> (discussing Trump's withdrawal from the Iran Nuclear Arms Agreement); Office of the Press Secretary, The White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017) (explaining the United States decision not to implement the non-binding provisions of the Paris Climate Change Accord); *INF Nuclear Treaty: US Pulls Out of Cold War-era Pact with Russia*, BBC NEWS (Aug. 2, 2019), <https://www.bbc.com/news/world-us-canada-49198565> (describing the U.S. withdrawal from the 1987 The Intermediate-Range Nuclear Forces Treaty).

71. See, e.g., Chad Bown & Soumaya Keynes, *Why Did Trump End the WTO's Appellate Body? Tariffs.*, PETERSON INST. FOR INT'L ECON. (Mar. 4, 2020) (suggesting that the Trump Administration's attack on the WTO has more to do with the ongoing trade war than with the running of the dispute settlement system).

72. See, e.g., Jennifer Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL ON FOREIGN REL. (Jan. 14, 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> (providing a clear and comprehensive assessment of U.S. concerns over the WTO Appellate Body).

WTO countries are frustrated that the United States has been vocal in its complaints but silent in suggesting fixes. The United States claims it bears no burden to propose changes because it seeks none. Rather, the United States wants a collective recognition from all members that the Appellate Body has strayed from the rules and a process to restore the system to what was envisioned when the WTO was created in 1995.⁷³

To be clear, the dismantling of the WTO Dispute Settlement System would not alone terminate the rules-based international trade system that was built over the past seventy-five years.⁷⁴ At the time of this writing, disputes are still being heard by WTO panels, though if those decisions are appealed, the lack of at least three Appellate Body members to hear the appeal means that panel decisions are frozen in time.⁷⁵ However, without the “crown jewel” of the WTO in operation, the dependence on the WTO to facilitate peaceful trade significantly diminishes.

The GATT system encouraged countries to lower tariff and non-tariff barriers, streamline customs procedures, be transparent in their rules, and to play fair with others. By the time of the WTO in 1995, developed country tariffs were already at their lowest point in history, and most countries had negotiated an array of bilateral and regional trade agreements to lock-in benefits with their trading partners.⁷⁶ So, while the achievement of the goal to establish an international institution for trade was achieved after 50 years, there was a growing feeling that the members may no longer have needed it.

73. *Id.*

74. See, e.g., E.U., *China and other nations work around U.S. freeze on WTO appeals*, WASH. POST (Jan. 24, 2020), https://www.washingtonpost.com/business/economy/eu-china-and-other-nations-work-around-us-freeze-on-wto-appeals/2020/01/24/e41f5248-3ea5-11ea-b90d-5652806c3b3a_story.html (discussing the mechanisms utilized to continue dispute settlement despite a frozen appellate body).

75. See Brandon J. Murrill, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?*, CONG. RES. SERV. (Dec. 16, 2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10385/2> (explaining that the seizure of the WTO Appellate Body may move countries to pursue bilateral or even unilateral approaches to trade).

76. Understanding the WTO: The Basics—The GATT Years: from Havana to Marrakesh, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Feb. 27, 2021) (explaining that developed countries tariffs prior to the formation of the WTO reached an average of 4.7%).

One final note on this point—the end of the WTO, or U.S. withdrawal from it,⁷⁷ would have a dramatic effect on market access for U.S. exporters. In particular, the United States would lose Most Favored Nation status, which gives it preferential tariff treatment in 163 countries.⁷⁸ This would be the equivalent of trading in an U.S. passport for a North Korean passport. Also, without the dispute resolution system, the United States would have to pursue trade remedies under bilateral agreements, if they exist, or through unilateral action, such as threatening higher tariffs on an offending country. Along with the trend of withdrawing from international political organizations,⁷⁹ withdrawal from the world's only international trade organization could signal the end of the liberal world order upon which that organization was based.⁸⁰

E. Threat #2: China

The second and related threat to the liberal world order is the rise of China. The liberal world order was launched in the West in the midst of China's own revolution in the East. Victory over imperial Japan in 1945 removed a strategic threat to China, paving the way for it to focus on domestic politics and the national economy.⁸¹ Of course, it would be decades before China would enact the economic reforms that would make it the powerful global market that it is today.

77. See Simon Lester, *Voting on WTO Withdrawal*, CATO INST. (June 23, 2020), <https://www.cato.org/blog/voting-wto-withdrawal> (discussing the Senate Parliamentarian's decision to allow a vote on WTO withdrawal on the basis of a proposal by freshman Senator Josh Hawley). *But see* Doug Palmer, *New Ruling Quashes Hawley's Hope for Senate WTO Withdrawal Vote*, POLITICO (July 1, 2020), <https://www.politico.com/news/2020/07/01/ruling-quashes-hawley-hope-senate-wto-withdrawal-347732> (explaining that the Senate Finance Committee could run out the clock on any vote on withdrawal from the WTO after 90 days).

78. See Pedro Nicolaci da Costa & Cathleen Cimino-Isaacs, *US Exit from WTO Would Unravel Global Trade*, PETERSON INST. OF INT'L ECON.: TRADE & INV. POL'Y WATCH (July 26, 2016, 5:45 PM) <https://www.piie.com/blogs/trade-investment-policy-watch/us-exit-wto-would-unravel-global-trade> (discussing the implications of U.S. withdrawal from the WTO).

79. Alex Pascal, *Against Washington's 'Great Power' Obsession*, THE ATLANTIC (Sept. 23, 2019) (describing U.S. withdrawal from multilateral institutions under the Trump Administration).

80. See Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. ONLINE 1 (2019) ("The result [of U.S. withdrawal from the WTO] could be a long-term decline of multilateralism, coupled with a new—potentially more devastating—form of cold war conflict.").

81. See, e.g., Robert Kagan, *The World America Made—and Trump Wants to Unmake*, POLITICO (Sept. 28, 2018), <https://www.politico.com/magazine/story/2018/09/28/donald-trump-ungaliberal-world-order-220738/> (suggesting that the end of Japanese power in East Asia empowered others in the region, including China, to pursue their domestic agendas).

China was an original contracting state to the GATT in 1948; however, following the 1949 revolution in China, the Republic of China government, which had been operating in exile in Taiwan, withdrew from the GATT.⁸² During the Uruguay Round of the GATT in 1986, the People's Republic of China announced its desire to rejoin the GATT.⁸³ As discussed in further detail below, when China sought entry into the WTO, it did so as a developing country seemingly reaching out an olive branch across the communist and capitalist chasm. Based upon its gross national income (GNI) at the time of its request for re-entry into the GATT, China was classified as a low-income country by the World Bank and would not jump to the "low-middle income country" status until 1997, after the conclusion of the Uruguay Round and the founding of the WTO.⁸⁴ However, by global standards, China was on track to become a major economic power even then, doubling its GDP every eight years since its 1979 economic reforms.⁸⁵

President Clinton observed the rapid economic rise of China and, after a series of disputes in which non-GATT remedies had to be applied, sought the powerful leverage that could be applied if China were part of the multilateral trading system.⁸⁶ Thus, Clinton took the first step—one that would damage him politically—to bring China into the fold by normalizing U.S.-China trade relations.⁸⁷ President George W. Bush finalized the grant of normalized trade relations with China on December 27, 2001.⁸⁸

Referring to the admission of China and Taiwan (which were approved at the same time), then-U.S. Trade Representative (USTR)

82. Michael A. Bezney, *GATT Membership for China: Implications for United States and Foreign Policy*, 11 U. PA. J. INT'L BUS. L. 193, 198 (1989) (explaining that, following the 1949 revolution in China, Taiwan took China's position at the GATT).

83. See Ministry of For. Affs., People's Republic of China, *Bilateral Agreement on China's Entry into the WTO Between China and the United States*, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18051.shtml (last visited Feb. 26, 2021).

84. See WAYNE M. MORRISON, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES, 1 CONG. RSCH. SERV., RL33534, 7 (2019) (explaining the root causes of China's economic growth since the revolution).

85. *Id.* at 5 (attributing most of China's growth to higher rates of saving than the rest of the world, which are used for large-scale investment in the economy and rapid productivity growth).

86. See Lael Brainard, *Trade Policy in the 1990s*, BROOKINGS INST., June 29, 2001 (discussing the trade policy agenda of the Clinton Administration toward China, among other things).

87. See William Clinton, President of the United States, Speech on China Trade Bill at the Paul H. Nitze School of Advanced International Studies of the Johns Hopkins University (Mar. 9, 2000).

88. Press Release, White House, President Grants Permanent Trade Status to China (Dec. 27, 2001) (taking effect on January 1, 2002).

Robert Zoellick noted, “[b]oth [countries] are already major influences in world trade. Their participation in the WTO will be a boost for us and them.”⁸⁹ When negotiations between China and the 142 Member States of the WTO concluded in September 2001, then-Director General Michael Moore enthusiastically stated:

International economic cooperation has brought about this defining moment in the history of the multilateral trading system. With China’s membership, the WTO will take a major step towards becoming a truly world organization. The near-universal acceptance of its rules-based system will serve a pivotal role in underpinning global economic cooperation.⁹⁰

The final 900-page accession text included far-reaching commitments for China within the GATT rules-based system. Among other things, China immediately joined the Trade Related Aspects of Intellectual Property (TRIPS) Agreement and vowed to protect intellectual property rights, opened the door to foreign investment in the form of joint venture agreements, limited agricultural export subsidies, and committed to modifying domestic laws to conform with the entire WTO agreement.⁹¹ To the West, this was a far-reaching commitment of China and a sign of its willingness to operate within the liberal world order.

Despite China’s impressive economic growth rate since 1979, there was a widespread belief that, at the time of China’s entry into the WTO, growth rates would slow as China’s economy matured.⁹² Average economic growth in China from 1979 through 2018 was 9.5%, the fastest rate ever recorded.⁹³ But, as expected, China’s growth began to slow as it approached middle-income levels. Between 2007 and 2018, China’s GDP growth dropped from 14.2% to 6.6%.⁹⁴ It was approaching what

89. See *China Officially Joins WTO*, CNN (Nov. 11, 2001, 1:17 AM), https://www.cnn.com/2001/WORLD/asiapcf/central/11/10/china.WTO/index.html?_s=PM:asiapcf.

90. Press Release, World Trade Organization, WTO successfully concludes negotiations on China’s entry (Sept. 17, 2001) (on file with WTO NEWS).

91. *Id.*

92. See generally Alan S. Alexandroff, *Concluding China’s Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China*, 3 UCLA J. INT’L L. & FOREIGN AFF. 23 (1998); Jan Hoogmartens, *Can China’s Socialist Market Survive WTO Accession? Politics, Market Economy, and Rule of Law*, 7 L. & BUS. REV. AM. 37 (2001); Raj Bhala, *Enter the Dragon: An Essay on China’s WTO Accession Saga*, 15 AM. U. INT’L L. REV. 1469 (2000).

93. MORRISON, *supra* note 84 (explaining that the World Bank described China’s growth rate as “the fastest sustained expansion by a major economy in history”).

94. *Id.* at 6.

development economists call the “middle-income trap.” The middle-income trap refers to an imprecise phenomenon in development economics in which a low-income country progresses toward middle-income status, usually as a result of rapid industrialization, and then languishes in this phase of slow economic growth.⁹⁵ At the time, China acknowledged that if it wanted to overcome the slowing economic growth, it would have to shift resources toward domestic investment in services, consumption, and innovation.⁹⁶

China’s desire to join the world trade system was, for some, a sign that China was interested in reforming its economy to become a participant in the modern, free, capitalist system that the liberal world order had promoted for decades. The thought was that, “China’s reformist leadership, in effect, is using the membership requirements of the World Trade Organization as a lever to achieve fundamental changes in state-owned enterprises and state-owned banks that they have long sought but which have been somewhat elusive.”⁹⁷ Whether it was an active pursuit of internal economic reforms or the realization by Chinese leaders that a new road had to be taken to overcome slowing economic growth, integrating China into the rules-based system was seen by many as a win for the liberal world order.

The USTR in the Trump Administration took a far less congenial view of China than his predecessor during the Clinton Administration. In 2017, USTR Robert Lighthizer said that the United States had “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.”⁹⁸ So, was supporting China’s accession to the WTO a great mistake or a strategic victory? “WTO rules arguably do not cover many Chinese practices that were not contemplated at the time the WTO was created in 1995.”⁹⁹

95. See, e.g., Richard F. Doner & Ben Ross Schneider, *The Middle Income Trap: More Politics than Economics*, 68 *WORLD POLITICS* 608, 634–35 (2016) (calling out China as a unique case in which they may already be passing out of the “middle income trap”); see also Fernando Gabriel Im & David Rosenblatt, *Middle-Income Traps: A Conceptual and Empirical Survey* (World Bank, Policy Res. Working Paper No. 6594, 2013) (surveying the limited evidence of the existence of middle-income trap countries, mainly in Latin America).

96. Doner & Schneider, *supra* note 95; Im & Rosenblatt, *supra* note 95.

97. Nicholas R. Lardy, *Permanent Normal Trade Relations for China*, BROOKINGS INST., Policy Brief No. 58, at 5 (May 2000) (describing the state of China at the time of their accession to the WTO).

98. U.S. Trade Representative, 2017 Report to Congress on China’s WTO Compliance 2 (Jan. 2018), <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

99. Shaffer, *supra* note 80, at 9.

Lighthizer's complaint is that China's accession to the WTO failed to bring about the hoped-for levels of trade liberalization. His argument fails to recognize two important points. First, without U.S. support of China's accession process, China would still have joined the WTO but would not have shared any associated economic benefits with the United States.¹⁰⁰ Second, China's accession did lead to important tariff reductions, market access, and numerous reforms that moved China closer to free market economies than it had been at the start of the process.¹⁰¹ In effect, the United States hitched its wagon to a train that was already leaving the station. There was no viable alternative.

The question we are left with at the moment is not whether accession was a good idea (it was a foregone conclusion), but rather how Chinese accession to the WTO will change the world trade system. The market access that China acquired through accession to the WTO undoubtedly boosted China's economic power, giving them Most Favored Nation status with most of the world, effectively creating a massive export market for their manufactured goods. But it also gave the world access to China, capitalizing on their low labor costs to boost productivity and lower the cost of consumer goods from iPhones to automobiles.

In 2015, China took the next step toward avoiding the middle-income trap by pushing forward with economic reforms centered around innovation and enhanced productivity. The centerpiece of this agenda is "Made in China 2025," an aggressive plan to upgrade and modernize ten key manufacturing sectors with substantial government investment and assistance.¹⁰² Their plan includes sourcing as much as 70% of manufactured basic components domestically and ranking second or third globally in robotics, high-end automation, and new energy vehicles.¹⁰³ In 2017, USTR Lighthizer called this plan, "a very, very serious challenge, not just to us, but to Europe, Japan and the global trading system."¹⁰⁴

The next Section will turn to the U.S.-China trade war, which has become the principal rationale for the Trump Administration's

100. In effect, China would receive and grant most favored nation status to every WTO member other than the United States.

101. See Philip Levy, *Was Letting China into the WTO a Mistake?*, FOREIGN AFF. (Apr. 2, 2018) (arguing that support for China's accession to the WTO was the best option at the time), <https://www.foreignaffairs.com/articles/china/2018-04-02/was-letting-china-wto-mistake>.

102. See MORRISON, *supra* note 84, at 36 & n.106 (describing the Made in China 2025 initiative).

103. *Id.* at 36.

104. Adam Behsudi, *Lighthizer: 'Made in China 2025' a Threat to Global System*, POLITICO (Nov. 6, 2017, 10:00 AM), <https://www.politico.com/tipsheets/morning-trade/2017/11/06/lighthizer-made-in-china-2025-a-threat-to-global-system-223188>.

challenge to the viability of the WTO. To begin, it will need to provide some foundation for the relationship between the two countries, and that will require a brief trip down memory lane.

III. THE U.S.-CHINA TRADE WAR

A. *Introduction*

The Trump Administration did not begin the trade war with China. Nor did it begin the devolution toward protectionism. Its actions undoubtedly accelerated these outcomes but as explained below, the process had already begun.

Protectionist sentiments existed throughout much of U.S. history, from the founding fathers' interest in protecting agriculture to the industrialists lobbying to protect burgeoning industry in the late nineteenth century to the complex maneuvering of special interests to insulate their industry from competition today. What has changed, however, is the belief system associated with trade. The early twentieth century showed the United States the value and immense benefits of free trade and the significant negative implications of protectionism witnessed during the Great Depression. In an effort to prevent such a calamity from happening again, the United States encouraged its allies to relinquish protectionist attitudes and pursue free trade in the interest of peace. And most did just that.

The economic and political models of free trade and democracy became interlinked, and, by the nineteenth century, the United States began to associate the opening of markets with the opening of minds. This idea became embedded in our international institutions as we pursued even deeper global integration following the end of the Cold War in 1991.¹⁰⁵ But with that deeper integration and more open markets came risks to the U.S. domestic market. U.S. firms could more easily operate in other countries, which meant the transfer of U.S. jobs and avoidance of tax revenue. U.S. consumers had vastly more open access to goods made abroad, further hurting U.S. manufacturing. It seemed that in the push to open the world to trade, the United States failed to recognize the opportunities its own firms and consumers would pursue as a result.

Though globalization of markets has continued uninterrupted (prior to the COVID-19 pandemic), policymakers in the United States

105. See, e.g., Robert Cooper, *The Post-Cold War World: Integration and Disintegration*, 10 J. DEMOCRACY 8, 9 (1999) (discussing the creation of institutions such as NATO and the expansion of the European Union).

in both the Republican and Democratic political parties have soured on trade. At no time has this been more evident than during the election of 2016 in which the three most prominent candidates—a conservative,¹⁰⁶ a moderate,¹⁰⁷ and a liberal,¹⁰⁸ supported withdrawing from the most far-reaching trade agreement ever proposed, the Trans-Pacific Partnership. That agreement had been negotiated by the outgoing Democratic administration of Barack Obama as a tool to combat the rise of China and pursue broad economic growth in the Asia-Pacific region, but the American people and their representatives were no longer interested in further expansion of trade.

Thus, the Trump Administration, aggressive as it has been in attacking free trade and China, was tapping into the new belief system forming in America. Open trade had given the United States all that it had to give and perhaps it was time to shut the door for a bit.

B. *The Trump Administration's Trade Platform*

The Trump Administration was unapologetic in its approach to trade policy, pursuing a clear approach of economic and political nationalism. From the outset, the USTR, Robert Lighthizer, advocated a policy of shutting down multilateral channels for trade regulation and incentivizing U.S. companies to bring their operations back to U.S. shores.¹⁰⁹ Lighthizer is a long-time advocate of trade protectionism and believes that tariffs are a tried-and-true policy for protecting national interests.¹¹⁰ And he is a staunch critic of China, having argued against China's accession to the WTO in 2001.¹¹¹

106. See Reid J. Epstein & Colleen McCain Nelson, *Donald Trump Lays Out Protectionist Views in Trade Speech*, WALL ST. J. (June 28, 2016, 5:33PM), <https://www.wsj.com/articles/donald-trump-lays-out-protectionist-views-in-trade-speech-1467145538>.

107. See Heather Long, *Clinton Suddenly Sounds a Lot like Trump on Trade*, CNN BUS. (Aug. 11, 2016, 4:18 PM), <https://money.cnn.com/2016/08/11/news/economy/hillary-clinton-trade/index.html>.

108. See *Fight for Fair Trade and Workers*, BERNIE SANDERS OFF. WEBSITE, <https://berniesanders.com/issues/fair-trade/>.

109. See, e.g., OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (2018), <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017> (laying out the concerns over the multilateral trade system, among other complaints).

110. Robert E. Lighthizer, Opinion, *Lighthizer: Donald Trump is No Liberal on Trade*, WASH. TIMES (May 9, 2011) <https://www.washingtontimes.com/news/2011/may/9/donald-trump-is-no-liberal-on-trade/>.

111. Robert E. Lighthizer, Opinion, *What Did Asian Donors Want?*, N.Y. TIMES (Feb. 25, 1997), <https://www.nytimes.com/1997/02/25/opinion/what-did-asian-donors-want.html>.

Lighthizer's hawkish views on China have been a consistent part of his worldview.¹¹² This may be one of the reasons that President Trump wanted him to serve as USTR.¹¹³ Shortly after his appointment in 2017, Lighthizer asked, "How does allowing China to constantly rig trade in its favor advance the core conservative goal of making markets more efficient? Markets do not run better when manufacturing shifts to China largely because of the actions of its government."¹¹⁴ His actions as USTR undoubtedly aligned with this worldview.

Joining Mr. Lighthizer to advise the President on trade matters was Peter Navarro, an economist who also holds long-standing anti-China views. Navarro was appointed by President Trump to a newly created position as Director of the Office of Trade and Manufacturing Policy in April 2017.¹¹⁵ Navarro holds non-traditional economic views more aligned with mercantilists than with modern economists.¹¹⁶ He was described by *The Economist* as having "oddball views"¹¹⁷ and criticized by the Peterson Institute for International Economics as never having studied the world trade system or published any academic papers.¹¹⁸

Despite his outsider views and lack of reasoned basis for his approach, Navarro caught the attention of President Trump with his strong anti-China and anti-free trade views. His first major publication on China was released in 2006 and suggests that China's rapid rise

112. Andrew Restuccia & Megan Cassella, *'Ideological Soulmates': How a China Skeptic Sold Trump on a Trade War*, POLITICO (Dec. 26, 2018, 5:02 AM), <https://www.politico.com/story/2018/12/26/trump-lighthizer-china-trade-war-1075221>.

113. Jennifer Jacobs, *Trump Taps China Critic Lighthizer for U.S. Trade Representative*, BLOOMBERG (Jan. 3, 2017, 6:48 AM), <https://www.bloomberg.com/news/articles/2017-01-03/trump-said-to-pick-lighthizer-for-u-s-trade-representative-ixgysdcc>.

114. *Id.*

115. *Id.*

116. See, e.g., Justin Wolfers, *Why Most Economists Are So Worried About Trump*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/upshot/why-most-economists-are-so-worried-about-trump.html> ("The only official who identifies as an economist—Peter Navarro, who earned a Harvard Ph.D. in economics and will head up the newly formed National Trade Council—stands so far outside the mainstream that he endorses few of the key tenets of the profession."); *The Wonkless White House*, THE ECONOMIST (Feb. 10, 2017), <https://www.economist.com/democracy-in-america/2017/02/10/the-wonkless-white-house> ("Mr Navarro's views on trade are well outside the mainstream, and he is not a big hitter in academic circles.").

117. *Trumpnomics - Cooking up an Economic Policy*, THE ECONOMIST (May 13, 2017), <https://www.economist.com/briefing/2017/05/13/cooking-up-an-economic-policy>.

118. Linette Lopez, *The Clearest Articulation of What Trump Wants to Do to America's Economy Comes from One Person*, BUS. INSIDER, (Jan. 31, 2017, 3:22 PM), <https://www.businessinsider.com/what-is-trumpnomics-according-to-peter-navarro-2017-1?jwsourc=cl>.

extinguished manufacturing jobs around the world.¹¹⁹ A second book, *Death by China*, was released in 2011 and focused on China's unfair trade practices, from currency manipulation to theft of intellectual property.¹²⁰ A documentary film with the same title followed in 2012.

Surrounded on both sides by strong advocates for protectionism and antipathy toward China, President Trump was emboldened to advocate for a trade policy that centered on four main tenets:

1. Trade in goods deficits must be reduced, especially with China.
2. Globalization has resulted in losses of American jobs and must be reversed.
3. Outsourcing costs American jobs and must be countered with tariffs.
4. Trade agreements must be renegotiated.¹²¹

These objectives culminated in the new USTR policy issued under the Trump Administration in March 2017. That policy advocated the “America First” approach by emphasizing U.S. sovereignty, the non-binding nature of WTO decisions, the strict enforcement of U.S. trade laws, and the renegotiation of trade agreements.¹²² The White House began executing a series of Executive Orders to carry-out this new approach, including enhanced collection of antidumping and countervailing duties as well as the “Buy American and Hire American” Order.¹²³ These actions began a new era in trade more aligned with the economic concept of mercantilism than with the free trade approach applied for the last two centuries.¹²⁴

119. PETER NAVARRO, *THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON* (2006).

120. PETER NAVARRO & GREG AUTRY, *DEATH BY CHINA* (2011).

121. Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 *STAN. L. & POL'Y REV* 115, 124–26 (2019).

122. OFF. OF THE U.S. TRADE REPRESENTATIVE, *THE PRESIDENT'S 2017 TRADE POLICY AGENDA 2–6* (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%201%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf>.

123. Exec. Order No. 13,788, 82 *Fed. Reg.* 18,837 (Apr. 18, 2017); *see also* Schoenbaum, *supra* note 121, at 129–31 (listing a number of actions taken by the Trump Administration in support of the “America First” policy).

124. *See, e.g.*, Ikenberry, *supra* note 31 (providing a thorough evaluation of the effects of policies under the Trump Administration to undermine the liberal world order); *see also* Jean-Pierre Lehmann, *The Rising Spectre of Protectionism: Trump and the Global Trade Agenda*, *IMD* (Nov. 2016) (assessing the protectionist agenda of the Trump Administration at the outset).

Today, at least according to the Trump Administration, China poses a remarkable threat to the United States and to the American way of life. National Security Advisor Robert C. O'Brien painted a picture of China as the new Soviet Union and suggested that only aggressive actions against China can stem its rise: "America, under President Trump's leadership, has finally awoken to the threat the Chinese Communist Party's actions and the threat they pose to our very way of life."¹²⁵ He went on to suggest that there is no room for free thought or actions in China: "The Chinese Communist Party seeks total control over the people's lives. This means economic control, it means political control, it means physical control, and, perhaps most importantly, it means thought control."¹²⁶

China's recent illiberal actions with respect to democracy activism in Hong Kong,¹²⁷ treatment of minority ethnic populations,¹²⁸ and increasing restrictions on free speech¹²⁹ have no doubt raised the ire of supporters of the democratic principles inherent in western thought. And while similar restrictions happen in a number of states around the world,¹³⁰ China's outsized influence over world markets and politics makes such actions front page news. But China has not always been in a position to call its own shots. For centuries, it was the western world that was harming Chinese citizens, taking advantage of their unequal economic positions and subjecting them to lifetimes of pain. Thus, it is worth considering for a moment a bit of relevant Chinese history to better understand how we got to where we are today.

125. Robert C. O'Brien, Remarks on The Chinese Communist Party's Ideology and Global Ambitions (June 24, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/chinese-communist-partys-ideology-global-ambitions/>.

126. *Id.*

127. See Keith Bradsher, *China Approves Plan to Rein in Hong Kong, Defying Worldwide Outcry*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/05/28/world/asia/china-hong-kong-crackdown.html>.

128. See *Who are the Uighurs and Why is the US Accusing China of Genocide?*, BBC NEWS (July 20, 2020), <https://web.archive.org/web/20200720180211/https://www.bbc.com/news/world-asia-china-22278037>.

129. See Jennifer Williams & Conor Murray, *China's New National Security Law is Already Chilling Free Speech in Hong Kong*, VOX NEWS (July 1, 2020, 9:00 PM), <https://www.vox.com/world/2020/7/1/21309990/china-hong-kong-national-security-law-protests-arrests>.

130. See, e.g., Richard C. Paddock, *Thai Hotel That Put American in Jail Gets New Label on TripAdvisor*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/11/world/asia/thailand-hotel-tripadvisor-jail.html> (discussing the recent jailing in Thailand of an American tourist that posted a critical hotel review on TripAdvisor, violating a harsh Thai law limiting free speech).

IV. U.S.-CHINA RELATIONS BACKGROUND: FROM OPIUM TO PING PONG

The United States has been at the center of the post-World War II economic and political system since 1944. That year, President Franklin Roosevelt successfully achieved the progressives' goal of creating large, government-funded social programs to protect against unemployment and old-age, among other things.¹³¹ But Roosevelt also surmised that World War II was emblematic of the depth of integration of world economies, leading countries to take more aggressive global stances to protect their national economic interests.¹³² Because of this, Roosevelt pushed for a new form of global economic leadership—the Bretton Woods system.

The Bretton Woods conference in 1944, attended by the victorious Allies, established rules and institutions meant to curb the unilateral actions of countries that might undermine the peace and security won by the victors of the war.¹³³ Among these were the International Monetary Fund to protect against currency crises, and the International Bank for Reconstruction and Development to provide aid to develop infrastructure and strengthen government institutions. The rules of the game for trade were agreed to through the General Agreement on Tariffs and Trade in 1947 and ultimately culminated in the establishment of the WTO in 1995.¹³⁴

These rules and institutions were meant to be multilateral, growing in membership each year and thus deepening the desire to avoid military actions among partner nations. These rules and institutions operated democratically, like the country that pushed for their creation. And there was never a doubt that the values and direction of the United States would guide this new system.

For the first nearly fifty years of the Bretton Woods system, the only alternative to a democratically led, free-trade oriented world was the autocratic, controlled-economy approach advocated by the Soviet Union. Thus, when that system was exposed as flawed and the Soviet

131. Eric Rauchway, *Roosevelt's New Deal Offered Hope in Desperate Times. We Can Do the Same Now*, THE GUARDIAN [UK] (May 25, 2020) (describing the development of the “New Deal” policies of the Roosevelt Administration and explaining how they might be reapplied in light of the 2020 global health pandemic).

132. See generally Ronald R. Krebs, *Tell Me a Story: FDR, Narrative, and the Making of the Second World War*, 24 SECURITY STUD. 131 (2015) (describing the lead-up to World War II and the associated social programs implemented by President Roosevelt).

133. See *What Are Bretton Woods Institutions?*, THE BRETTON WOODS PROJECT (Jan. 1, 2019), <https://www.brettonwoodsproject.org/2019/01/art-320747/>.

134. See, e.g., CHAD BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 10–13 (2009) (explaining the formation of the GATT and WTO system).

Union dissolved into independent states, the Bretton Woods system effectively emerged as the only game in town.¹³⁵ That is, until China started playing.

As discussed earlier, China was not a major economic player in 1991. Thus, when the Soviet Union dissolved, the “China Model” was not looked to as an alternative to Bretton Woods. But by the early 2000s, rapid and sustained economic growth in China brought new attention to the political model behind the economic surge. Some analysts named China’s approach the “Beijing Consensus,” referring to an authoritarian, market-based approach to growth.¹³⁶ Chinese communist party leader Xi Jinping has consistently referred to his political approach as “Socialism with Chinese Characteristics,” an obvious attempt to distance their approach from the failures of Soviet communism.¹³⁷ But no matter how it is defined, China has effectively established an alternative to the Bretton Woods system and it has been attracting support around the world.¹³⁸

Accordingly, as China’s economic and political influence grew, a new challenge emerged to the survival of the Bretton Woods system and the country at the head of that system—the United States. China’s accession to the WTO in 2001 was meant to reign in their growing economic and political influence. In his 1998 article arguing in favor of China acceding to the WTO, law professor Frederick Abbott said:

These include providing most favored nation (MFN) treatment to goods and services of all WTO Members, treating goods imported into its market on the same basis as domestically produced goods, abandoning the use of quotas, and protecting intellectual property rights. Perhaps most important, as China’s economic integration with the rest of the world becomes more

135. William Jannace & Paul Tiffany, *A New World Order: The Rule of Law or Law of Rulers?*, 42 *FORDHAM INT’L L.J.* 1379, 1385 (2019) (describing the dissolution of the Soviet Union in 1991 as the pinnacle of Bretton Woods power).

136. See, e.g., STEFAN HALPER, *THE BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* (2010).

137. See, e.g., Chris Buckley, *Xi Jinping Thought Explained: A New Ideology for a New Era*, *N.Y. TIMES* (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/world/asia/xi-jinping-thought-explained-a-new-ideology-for-a-new-era.html>.

138. See David Shullman, *Protect the Party: China’s Growing Influence in the Developing World*, *BROOKINGS INST.* (Jan. 22, 2019), <https://www.brookings.edu/articles/protect-the-party-chinas-growing-influence-in-the-developing-world/> (discussing Chinese efforts to work with developing countries to acquire resources and advocating for the legitimacy of the China Model for political leadership).

deeply imbedded, its stake in maintaining peaceful external relations will grow.¹³⁹

Abbott's hopes may have been dashed after China finally did accede to the WTO three years later and in the twenty years since has done little to become the type of market that the United States had hoped for.

A. *A Concise History of U.S.-China Relations*

In order to understand U.S.-China trade policy, one must understand the recent history of U.S.-China relations. The recent actions taken by the Trump Administration and the reactions of the Xi Administration cannot be viewed as isolated incidents but rather should be seen as part of longer-term strategies. Failure to understand how we arrived at this moment in history will undoubtedly lead to policy misjudgments and unintended outcomes. Accordingly, this Section will take you through a succinct jaunt through the history of U.S.-China economic and political relations to give perspective into current events.

Americans had enjoyed Chinese culture in the form of tea, porcelain, and silk while they were subjects of the British crown, which traded extensively with China.¹⁴⁰ Shortly after U.S. independence, the first ship to sail under the new U.S. flag was the *Empress of China*, a merchant vessel bound for Guangdong, China, to trade with a friendly country in a time of animosity toward Americans.¹⁴¹ And though the Chinese distinguished Americans from the British, they were all considered “foreign devils” and approached with trepidation.¹⁴² The Port of Guangzhou in Southern China served as the transit point for outbound shipments of tea, porcelain, and silk, as well as the entry point for missionaries and diplomats from the United States. But just as demand for U.S. ginseng and fur pelts was growing in China,¹⁴³ the British discovered an even more profitable export—opium.

139. Frederick M. Abbott, *China's Accession to the WTO*, AM. SOC'Y OF INT'L L. INSIGHTS (Jan. 12, 1998), <https://www.asil.org/insights/volume/3/issue/1/chinas-accession-wto>.

140. See *America's Early Trade with China*, CHINA BUS. REV. (Jan. 1, 2013) (explaining that, despite 1784 being the first trade voyage to China, Americans had been long exposed to Chinese tea, silk and porcelain thanks to British trade with China).

141. John W. Swift, P. Hodgkinson & Samuel W. Woodhouse, *The Voyage of the Empress of China*, 63 PENN. MAG. HIST. AND BIOGRAPHY 24 (1939) (describing the historic first voyage to leave the former colonies following independence).

142. See, e.g., ARNOLD HENRY SAVAGE LANDOR, *CHINA AND THE ALLIES* 3 (1901).

143. James L. Clayton, *The Growth and Economic Significance of the American Fur Trade, 1790-1890*, 40 MINN. HIST. 210 (1966); see also John Steele Gordon, *When Trade Tipped the Other Way; The Huge*

Leveraging their Indian colony, the British East India Company began bringing large quantities of opium into China in the early 1800s.¹⁴⁴ The Americans soon caught on to the trend and began sourcing opium from Turkey to sell in the Chinese province of Canton.¹⁴⁵ Rapidly rising addiction rates and growing concern over the burgeoning health crisis, as well as the death of the Emperor's son due to overdose, led China to take steps to destroy the opium cargo of the British ships in Canton.¹⁴⁶ The British, seeing this as an affront to market access, employed military pressure to ensure the entry of this dangerous good.¹⁴⁷ Thus began the “century of humiliation” in China.

1. The Century of Humiliation (1839 – 1949)

Just before the opium wars began, the Chinese Commissioner in Canton, Lin Zexu, attempted to diplomatically resolve this crisis with a letter to Queen Victoria.¹⁴⁸ When the British crown failed to respond, Zexu unsuccessfully tried to negotiate with the merchants directly.¹⁴⁹ Zexu then seized the stores of opium from the ships, leading to the British military response and the defeat of the Chinese.¹⁵⁰ The Chinese conceded to British demands to open their markets to opium trade via the Treaty of Nanking in 1842. That treaty “provided the basis for the expansion of trade [and] served as the model for subsequent treaties between China and other Western nations.”¹⁵¹

Despite the bleak relationship between Britain and China, China's relationship with the United States during this time was far more

Profits that 19th-Century Traders Made by Selling Furs, Pelts and Other Luxuries to China Helped Fuel America's Expansion, WALL ST. J. (Oct. 12, 2012).

144. U.N. OFF. ON DRUGS AND CRIME, 2008 WORLD DRUG REPORT, at 174, U.N. Sales No. E.08.XI.1 (2008) (explaining how the British East India Company leveraged India to avoid Chinese import bans on opium).

145. Charles C. Stelle, *American Trade in Opium to China, 1821–39*, 10 PACIFIC HIST. REV. 57, 57 (1941).

146. See Kevin J. Fandl, *Up in Smoke: International Treaty Obligations and Marijuana Reform in the United States*, 58 AM. BUS. L.J. 163, 179 (2021).

147. U.N. OFF. ON DRUGS AND CRIME, *supra* note 144, at 175.

148. Lin Zexu, *Letter of Advice to Queen Victoria*, DIGIT. CHINA/HARVARD, https://cyber.harvard.edu/ChinaDragon/lin_zexu.html (last visited Feb. 27, 2021).

149. Jason A. Karsh, *The Root of the Opium War: Mismanagement in the Aftermath of the British East India Company's Loss of its Monopoly in 1834*, 80–83 (May 2, 2008) (B.A. thesis, University of Pennsylvania) (on file with ScholarlyCommons, University of Pennsylvania) (describing the decisions taken by China that led to the British reaction and the ultimate détente).

150. *Id.*

151. *Chronology of U.S.-China Relations, 1784–2000*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/countries/issues/china-us-relations> (last visited Feb. 27, 2021).

favorable. The United States sent Congressman Caleb Cushing to negotiate a treaty with China in 1844.¹⁵² China agreed to the treaty on all counts, granting the United States Most Favored Nation status, which gave it the same benefits that China had afforded the British under the Treaty of Nanking. This meant that the United States could trade on highly favorable terms with the Qing dynasty.¹⁵³

By 1858, China had signed treaties with a number of foreign powers, opening ports for trade and enabling those countries—including the United States—to open diplomatic representations in Beijing.¹⁵⁴ This period is seen historically as a loss of control and influence by the Chinese. Foreign influence—especially from the United States—was frequently blamed.

Around this time, the United States was in the midst of a gold rush and a rapid expansion westward. A substantial number of Chinese laborers traveled to the United States to take part in this economic opportunity. Their presence, and the cultural clash that ensued, led to vast discrimination and a number of state and federal efforts to restrict their entry.¹⁵⁵ These efforts culminated in the Chinese Exclusion Act of 1882, which effectively blocked the entry of Chinese citizens for the next sixty years.¹⁵⁶

Just as the presence of Chinese citizens in the United States was growing, the presence of Americans in China was also growing. And for similar reasons, the Chinese fought this expanding influence in their homeland. The Boxer Rebellion of 1900 targeted foreigners and sought to protect Chinese sovereignty from increasing foreign influence.¹⁵⁷ The United States joined other nations in extinguishing the rebellion, forcing the Qing administration to sign the Boxer Protocol, which included \$330 million in reparations to foreign nations.¹⁵⁸ This

152. *Treaty of Wangxia (Treaty of Wang-Hsia), May 18, 1844*, USC US-CHINA INSTITUTE, <https://china.usc.edu/treaty-wangxia-treaty-wang-hsia-may-18-1844> (last visited Feb. 27, 2021).

153. Note that the Qing Dynasty was in power in China from 1644-1911.

154. See Eric Yong Joong Lee, *The "Peace Treaty" as a U.S. Doctrinal Option and Its Application to the DPRK: A Historical and Analytic Review*, 51 CORNELL INT'L L.J. 101, 109-10 (2018) (discussing the application of most favored nation status to the UK, France, Russia and the United States under the Treaty of Tianjin).

155. See Kevin J. Fandl, *Taxing Migrants: A Smart and Humane Approach to Immigration Policy*, 7 NW. INTERDISC. L. REV. 127, 136-37, 139-42, 144 (2014).

156. The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

157. See, e.g., Cheng Jie, *Why Late Qing Constitutional Reform Failed: An Examination from the Comparative Institutional Perspective*, 10 TSINGHUA CHINA L. REV. 107, 109-10 (2017).

158. *Id.* at 111 (explaining that, following the defeat of the Boxers, the Qing Dynasty was forced to pay reparations of 450 million silver taels over the next 39 years).

final straw broke the back of the Qing Dynasty, sparking rebellions throughout China. The Dynasty fell in 1911.

With the fall of the Qing Dynasty, the Republic of China, known as the Kuomintang, was formed. Shortly following this new administration, World War I broke out, plunging countries once again into territorial battles. China remained neutral the first four years of the war, but finally asserted its claim over Japan in the Shantung (Jiaodong) Peninsula in 1917. That peninsula had been under German control and both the Chinese and Japanese asserted authority over the territory. At the end of the war, the Treaty of Versailles effectively ceded the peninsula to Japan in 1919.¹⁵⁹ And though the peninsula was returned to China in 1922,¹⁶⁰ the initial ceding of the territory to Japan by the West sparked nationalist sentiment and, ultimately, civil war in China.

The Chinese Communist Party (CCP) was formed in 1921 following a number of student protests against Japanese imperialism.¹⁶¹ Civil war broke out in 1927 between the CCP, which followed the principles of Marxism-Leninism, and the Kuomintang, led by the infamous Chiang Kai-shek. The Kuomintang took control of Southern China and designated Nanjing as their capital. The United States recognized the Kuomintang as the official Chinese government.

The two Chinese parties paused their civil war to create a unified front against the Imperial Japanese Army, which invaded Manchuria in 1933. By 1937, the second Sino-Japanese War was raging, and Japan had taken Nanjing, Beijing, and Tianjin. Japan attempted to break the Chinese spirit by massacring, raping and pillaging civilians in what became known as the “Rape of Nanking” in 1937.¹⁶² These acts outraged western nations, prompting the Roosevelt regime in the United States to send aid as well as military support to the Chinese and institute an oil embargo against Japan. This encouraged Japan to bomb Pearl Harbor, quickly drawing the United States into World War II and merging the Sino-Japanese war into the broader world war.

At the end of the war, Japan surrendered control of the island of Formosa (Taiwan) to the Chinese. The United States, under President Truman, sent George Marshall to negotiate an end to the Chinese civil

159. Treaty of Versailles, art. 156, June 28, 1919, 225 Consol. T.S. 188.

160. GORDON LEVIN, *WOODROW WILSON AND WORLD POLITICS: AMERICA'S RESPONSE TO WAR AND REVOLUTION* (1968).

161. See, e.g., Larry Catá Backer, *Chinese Constitutionalism in the “New Era”: The Constitution in Emerging Idea and Practice*, 33 *CONN. J. INT'L L.* 163 (discussing the formation of the Chinese Communist Party).

162. See IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (1997).

war, but his efforts failed.¹⁶³ The CCP and the Kuomintang resumed fighting in 1946 and the United States largely stayed out of the conflict. By 1949, the CCP under the leadership of Mao Zedong prevailed and the Kuomintang fled to Taiwan. Mao established the People's Republic of China on the mainland, while Chiang Kai-shek administered the Republic of China from Taiwan. The United States recognized the latter only for the next several years.

The Cold War that emerged out of the differing political and economic policies of the Soviet Union and the West following World War II defined the subsequent forty years. Fear of communism in the United States—the “Red Scare”—prevented effective communication or diplomacy between the Soviet Union, China, and the United States.¹⁶⁴ This culminated in the 1950 incursion of North Korea into South Korea, kicking off the three-year civil war there. China and the Soviet Union came to the aid of the North, while the West defended the South. Neither party prevailed and an armistice was agreed to in 1953.¹⁶⁵

By the late 1950s, following a number of conflicts over Taiwan between the PRC and the Republic of China, the Soviets and the Chinese distanced themselves from one another. This was partly due to the fact that the Soviets did not come to the aid of the PRC in its push for control over Taiwan, but also because Mao and Soviet leader Nikita Khrushchev disagreed on the principles of communism. While Khrushchev wanted to pursue economic development through heavy industry, Mao believed that investments in agriculture would be most successful.¹⁶⁶ Mao's decision to focus on agriculture with the 1958 launch of the Great Leap Forward program would lead to years of famine and poverty in China.¹⁶⁷

163. Alonzo L. Hamby, *Harry S. Truman: Foreign Affairs*, UVA MILLER CENTER, <https://millercenter.org/president/truman/foreign-affairs>.

164. The “Red Scare” began when President Truman signed Executive Order 9835, aiming to rid the government of communist infiltrators. *See* Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

165. Korean War Armistice Agreement (July 27, 1953), <https://2001-2009.state.gov/t/ac/rls/or/2004/31006.htm>.

166. *See, e.g.,* *China's Legal Reform at the Crossroads*, 169 (2) FAR EAST. ECON. REV. at 23–27 (Mar. 2006) (explaining the divergence of communist philosophy after Khrushchev denounced the ideas of Stalin in 1956); *see generally* Zhihua Shen and Yafeng Xia, *The Great Leap Forward, the People's Commune and the Sino-Soviet Split*, 20 J. CONTEMP. CHINA 72 (2011) (discussing the disputes over economic development leading China and the Soviet Union to pursue different strategies).

167. *See* Yixin Chen, *Cold War Competition and Food Production in China, 1957–1962*, 83 AG. HIST. 51, 52 (2009) (describing the “greatest famine in human history,” which took the lives of 30 million people).

2. Nixon Goes to China

Mao sought to reassert China's power on the global stage by incentivizing overproduction of agriculture that could be exported; however, rather than increasing yields, production was slowing. While most other countries were benefiting from the post-World War II economic growth period, China was backtracking. By the 1960s, this may have inspired Mao to be more receptive to foreign assistance, which the United States was ready to provide.¹⁶⁸

With the Cold War in full swing and U.S. animosity toward communism at a fever pitch, it may seem strange that a U.S. president would be advocating for improved relations with a devoutly communist country like China. But that is precisely what was happening in 1967, when soon-to-be President¹⁶⁹ Richard Nixon published an article in *Foreign Affairs* making the case for improved U.S.-Sino relations. His divergence from the general sentiment of the public was not haphazard—it was strategic.

In that article, Nixon emphasized the threat posed by communist China and reiterated the fact that the United States had not yet recognized the PRC as the legitimate Chinese government. However, he also presented a vision that would work to integrate the PRC into the community of nations as a means of dialogue and cooperation, rather than isolating it and ignoring its potential. In his words:

Taking the long view, we simply cannot afford to leave China forever outside the family of nations, there to nurture its fantasies, cherish its hate and threaten its neighbors. There is no place on this small planet for a billion of its potentially most able people to live in angry isolation.

[...]

For the short run, then, this means a policy of firm restraint, of no reward, of a creative counterpressure designed to persuade Peking that its interests can be served only by accepting the basic rules of international civility. For the long run, it means pulling China back into the world community—but as a great and progressive nation, not as the epicenter of world revolution.¹⁷⁰

168. William C. Kirby, *A Note on the 40th Anniversary of Nixon's Visit to China*, CROSS CURRENTS E. ASIAN HIST. AND CULTURE REV. NO. 2 (Mar. 2012), <https://www.hbs.edu/faculty/Pages/item.aspx?num=58187>.

169. Richard Nixon served as the 37th U.S. President from 1969–1974.

170. Richard M. Nixon, *Asia After Viet Nam*, FOREIGN AFF. 121, 123 (Oct. 1967).

Nixon concluded the article with the recommendation of a policy of “containment without isolation,”¹⁷¹ engaging with the PRC to prevent security threats from arising out of the unknown.

Following Nixon's election in 1968, relations between the Soviets and the Chinese deteriorated significantly. Border clashes in Mongolia as well as Soviet attacks on Chinese nuclear facilities, accompanied by the 1968 Soviet invasion of Czechoslovakia, made improved U.S.-Sino relations a top foreign policy priority for the new Nixon Administration.¹⁷² The first olive branch was a loosening of trade and tourism restrictions on China. In two White House proclamations in July and December 1969, the United States announced the following changes:¹⁷³

- American citizens would be given automatic passport validation to travel to China¹⁷⁴
- American tourists in China would be permitted to purchase up to \$100 in goods¹⁷⁵
- Subsidiaries of U.S. firms would be permitted to trade with China in non-strategic items¹⁷⁶

The following year, the President further eased trade restrictions on China by allowing certain non-strategic U.S. goods to be exported to China and the implementation of an expedited process for Chinese citizens to receive U.S. visas, and the allowance of Chinese banks to begin using U.S. dollars, among other things.¹⁷⁷

By 1970, the Cold War was in full swing, and the Vietnam War was proceeding seemingly without an end in sight. President Nixon was in search of a solution to both of these major foreign policy problems. He saw China as a potential resolution to both. China's less aggressive form of communism was seen as more palatable from the U.S. point of view as it did not involve the type of expansionary tactics applied by the Soviets. Yet China still had influence in Moscow as well as with the North Vietnamese. Accordingly, a détente with China could mean a

171. *Id.* at 123.

172. See Jaw-ling Joanne Chang, *United States-China Normalization: An Evaluation of Foreign Policy Decision Making*, UNIV. OF MD. SCH. OF L. OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. at 30–31 (1986).

173. U.S. Dep't of State Bulletin of April 12, 1971. See also HENRY KISSINGER, *WHITE HOUSE YEARS* 180 (1979).

174. U.S. Dep't of State Bulletin of April 12, 1971 at 510.

175. *Id.*

176. *Id.*

177. U.S. Dep't of State Bulletin of May 3, 1971 at 567–68.

powerful negotiating partner to slow the spread of Soviet communism and to end the conflict in Vietnam.¹⁷⁸

In the same vein, the PRC in China sought an opening to reconnect to the West and to leverage economic opportunities for its people. It took the first step by inviting the U.S. ping pong team, which had recently played alongside the Chinese team in Japan, to visit Beijing. The team accepted and, on the same day, President Nixon eased sanctions under a trade embargo that had been in place since 1970.¹⁷⁹

On July 15, 1971, President Nixon took to the television airwaves to announce his ongoing efforts to normalize trade and political relations with China.¹⁸⁰ In the announcement, he stated:

The meeting between the leaders of China and the United States is to seek the normalization of relations between the two countries and also to exchange views on questions of concern to the two sides I have taken this action because of my profound conviction that all nations will gain from a reduction of tensions and a better relationship between the United States and the People's Republic of China.¹⁸¹

That same month, U.S. National Security Advisor Henry Kissinger secretly traveled to China to prepare for the President's visit, which took place in February 1972. That visit coincided with the meeting of the United Nations General Assembly a few days later, in which countries would vote on admission to the PRC government. The United States agreed to support the PRC and, though they initially opposed expelling Taiwan, where the Republic of China continued to take refuge, the United States ultimately agreed to replace Taiwan with the PRC.¹⁸²

178. See Chang, *supra* note 172, at 30 (suggesting that rapprochement with China was done with the express intent of showing a strategic alliance in the face of Soviet aggression).

179. FRANK N. MAGILL, NIXON REMOVES AN EMBARGO ON TRADE WITH CHINA 1032-33 (1996); see also Luke Lee & John McCobb, *United States Trade Embargo on China, 1949-1980; Legal Status and Future Prospects*, 4 J. INT'L L. & POL'Y 1, 28 (1971).

180. Press Release, *Remarks to the Nation Announcing Acceptance of an Invitation to Visit the People's Republic of China*, July 15, 1971 ("As I have pointed out on a number of occasions over the past three years, there can be no stable and enduring peace without the participation of the People's Republic of China and its 750 million people. That is why I have undertaken initiatives in several areas to open the door for more normal relations between our two countries. In pursuance of that goal, I sent Dr. Kissinger, my Assistant for National Security Affairs, to Peking during his recent world tour for the purpose of having talks with Premier Chou En-lai.").

181. *Id.*

182. Chang, *supra* note 172, at 33 (discussing the UN vote of October 25, 1971 that sat the PRC in place of Taiwan in the General Assembly).

IS CHINA'S RISE THE WTO'S DEMISE?

Following Nixon's 1972 visit, the PRC and the United States jointly issued the "Shanghai Communiqué," which established the new relationship between the two parties.¹⁸³ Leading up to that document, both parties struggled to find common ground on the status of Taiwan, with the United States seeking to support it as an independent country and China refusing to see it as such. Ultimately, China agreed to begin normalizing trade and diplomatic relations with the United States and the United States agreed to support the "One China" policy that treated the status of Taiwan as an internal matter for China and not in need of U.S. intervention.¹⁸⁴

Though full normalization of relations between the United States and China would not be finalized until 1978, trade between the two nations rapidly increased throughout the 1970s. In 1971, trade between China and the United States stood at \$5 million. That rose to \$96 million in 1972, \$805 million in 1973, and \$934 million in 1974.¹⁸⁵ By 1980, trade between the two countries would top \$5 billion (see [Figure 1](#) and [Figure 2](#), below).¹⁸⁶

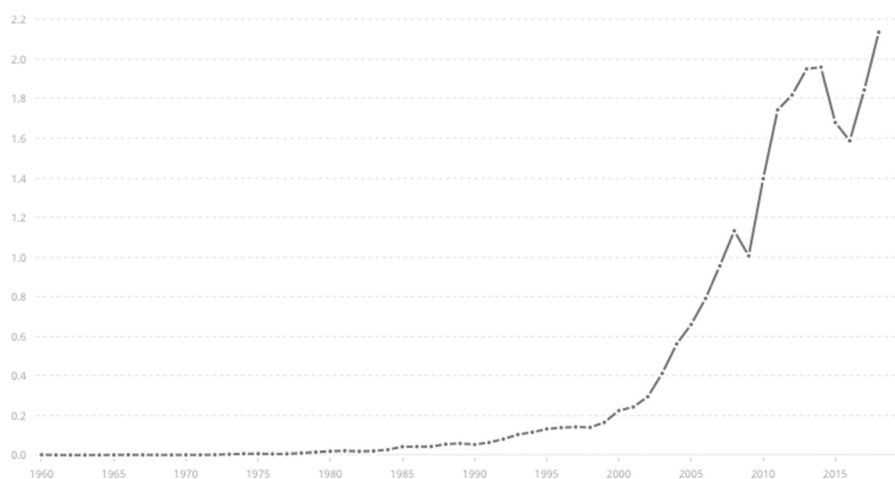


FIGURE 1. Chinese Merchandise Imports, in trillions (1960–2018).

Source: World Bank.

183. Public Papers: Nixon, 1972 at 376–79.

184. Chang, *supra* note 172, at 34–35.

185. A. DOAK BARNETT, CHINA AND THE MAJOR POWERS IN EAST ASIA 224 (1977). Note that U.S.-Taiwan trade at the time was far larger than U.S.-China trade, standing at \$1.6 billion in 1971.

186. WAYNE M. MORRISON, CHINA-U.S. TRADE ISSUES, RL33536, CONG. RESEARCH SERV., 1 (2018).

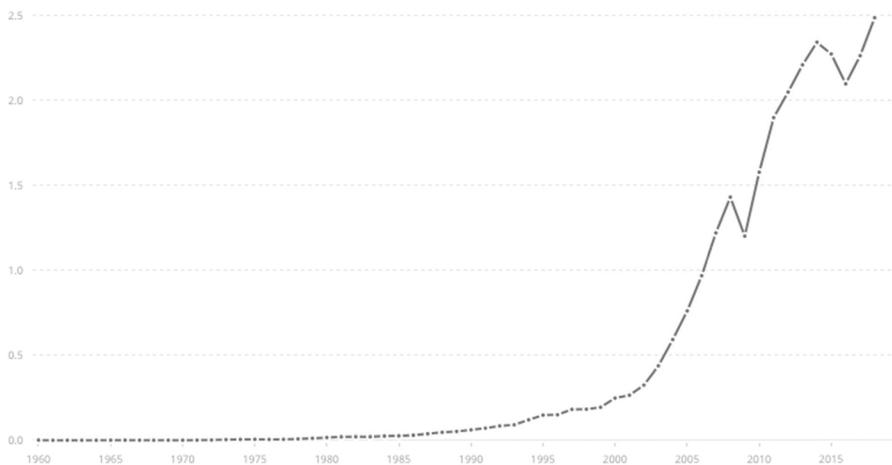


FIGURE 2. China Merchandise Exports, in trillions (1960–2018). Source: World Bank.

Diplomatic liaison offices, the precursors to embassies, were established in Beijing and Washington in 1973. However, with Nixon’s downfall and a general sentiment against major initiatives in Washington, President Ford, though he was the second president to visit China, made no progress toward normalization. Major change came the following year when Chairman Mao as well as Premier Zhou Enlai both died. Hua Guafeng replaced Chairman Mao and Deng Xiaoping, a reformer, became the new Chinese Premier. This changed the outlook for relations as President Jimmy Carter came to power in the United States.

President Carter was hesitant to take actions that would negatively impact the strong relationship between Taiwan and the United States, though he sought normalization of relations with the PRC. With the help of an adept national security advisor—Zbigniew Brzezinski—Carter was able to achieve what Nixon could not: a relationship with both Taiwan and China.¹⁸⁷ Recognizing that Deng Xiaoping was in need of an ally to support his economic reforms, Brzezinski exchanged

187. See Enrico Fardella, *The Sino-American Normalization: A Reassessment*, 33 *DIPLOMATIC HIST.* 545, 545–46 (2009) (explaining the successful negotiating techniques of Brzezinski).

a hands-off policy toward Taiwan with a commitment from China to allow the United States to maintain trade and security relationships with Taiwan.¹⁸⁸ In the end, the Carter Administration, despite its other foreign policy failures, set the conditions for full normalization with the PRC, which included an unofficial diplomatic presence in Taiwan and the continuation of some defensive arms sales, among other things.¹⁸⁹ Full diplomatic relations between the United States and China were established in 1978 after Carter agreed to the terms of the One China policy, which required the United States to recognize the PRC as the one government of China.¹⁹⁰

Premier Deng Xiaoping took dramatic steps in 1980 to bring China into the modern global economy, enacting a number of social and economic reforms. These included opening China to foreign investment, enabling Chinese nationals to own businesses, and decollectivizing agriculture.¹⁹¹ Thus began the rush of American and other foreign businesses to capture the vast Chinese market, and the economic (and political) growth of China began.

V. ANALYSIS: WILL U.S.-CHINA TENSIONS BRING THE WTO TO AN END?

“The greatest challenge for the maintenance of the WTO dispute settlement system is the growing political and economic competition between the United States and China.”¹⁹² Relations between the United States and China before and after China’s accession to the WTO are dramatically distinct. As explained above, China during the twentieth century was seen as a moderate political threat but not an economic threat. After 2001, China was not only a rising economic superpower and the destination for companies rushing to outsource production, but it was also an equal player in the world trade system. Whether China hoodwinked its way into the WTO to seize opportunities without any serious economic reforms, or whether it strategically played the game by the rules, the WTO became a tool for China to grow.

188. *Id.* at 546–47.

189. See Press Release, U.S. Dep’t of State, *Diplomatic Relations with the People’s Republic of China and Future Relations with Taiwan* 2 (December 1978).

190. Note that the 1979 Taiwan Relations Act enabled the United States to maintain relations with Taiwan without violating the One China policy.

191. See generally Bryan Lohmar et. al., *China’s Ongoing Agricultural Modernization: Challenges Remain After 30 Years of Reform*, 51 ECON. INFO. BULL. 3 (2009), https://www.ers.usda.gov/webdocs/publications/44377/12788_eib51b_1_.pdf?v=0.

192. Shaffer, *supra* note 80, at 6.

This Section will examine the post-accession strategies applied by the United States to address the rise of China, from temperance to trade war. More precisely, it will highlight the role played by the WTO in both facilitating and constraining Chinese trade expansion. It will conclude by discussing areas where significant disruption remains, and areas where cooperation may lead to a new beginning for the world trade system.

A. *China Joins the Game*

The rise of both the United States and China as world economic powers involved many of the same tactics, albeit a century apart. In the late nineteenth and early twentieth centuries, the United States employed protectionism through high tariffs and domestic investment to kick-start a competitive manufacturing sector. Once it was able to compete with England and other industrial exporters, the United States lowered tariffs and pushed for access to world markets for its products. Those exports quickly outdid competitors and helped the United States to expand its economy rapidly. China in the late 1900s and early 2000s used protectionism and domestic investment to guide its own economic development, unleashing its power on the world as a manufacturing hub only when it had the capacity to compete—and overwhelm the competition.

But there is a key difference in the rise of these two great powers—the institutional environment. When the United States burst onto the scene, the newness of global trade and unfamiliarity with rapid economic growth opened the door to experimentation with the best economic and political system in which to operate. The jury was still out on whether capitalism or communism should be the dominant economic model, and whether realism or liberalism would define the politics of the day. Following World War II, the United States attempted to put the world back together within a structure that it understood and believed beneficial for everyone. By the time China had its moment, a mature institutional structure had been built to protect the astonishing economic gains that had been made leading up to that moment. The jury was back, and the verdict had been returned—rules-based liberal trade works.

The U.S. trade war with China helps to contextualize the United States' concerns over China's rise. It is the culmination of years of efforts to contain China's rapid, though slowing, economic growth. President George W. Bush took what has been called a "sluggish" approach to China, seemingly allowing China to settle into its new role

as a WTO member.¹⁹³ U.S. firms were so enamored with their new access to China's market that they did not complain about Chinese practices, making it difficult for the USTR to mount a campaign against them.

Prior to its accession to the WTO, the United States pursued dispute resolution with China through unilateral means, such as trade sanctions. Bowing to pressure from Congress, the Bush Administration finally began to leverage the WTO dispute settlement system to pursue its cases against China. Economist Chad Bown suggested that this was likely a relief to China, considering the alternative.¹⁹⁴ The first case against China was brought in 2006 by the United States, Canada and the European Communities (EC), over imported auto parts.¹⁹⁵ In total, the Bush Administration filed six cases against China, and China filed three cases against the United States.

The WTO was proving to be an effective mechanism to resolve narrow disputes, often resulting in minor changes to Chinese laws or practices in ways beneficial to the United States. However, that forum was less effective at resolving larger structural concerns harbored by U.S. policymakers. To address these concerns, the Bush Administration launched the Strategic Economic Dialogue and the Senior Dialogue.¹⁹⁶ The *Dialogue* focused on a number of political issues, from arms proliferation to North Korea, as well as key economic issues, such as working to recover from the 2008 financial crisis, resolving structural imbalances in trade, and addressing China's heavy reliance on exports.¹⁹⁷

What perhaps was overlooked by the Bush Administration at the time was how economic power was shifting and, as a result, China's approach to their economy, which relied heavily on state-owned enterprises, was showing greater resilience in the face of economic crisis than the capitalist model.¹⁹⁸ The year after the 2008 economic crisis, China's

193. See Simon Lester and Huan Zhu, *The U.S.-China Trade War: Is There an End in Sight?*, 40 CATO J. 15, 17 (2020).

194. Chad P. Bown, *U.S.-China Trade Conflicts and the Future of the WTO*, 33 THE FLETCHER F. ON WORLD AFF. 1, 27, 30 (2009).

195. Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, WTO Doc. WT/DS342/15 (adopted Jan. 12, 2009).

196. See generally Lester & Zhu, *supra* note 195 (describing the China-focused strategies of the Bush, Obama and Trump administrations).

197. See, e.g., Charles Freeman, *The U.S.-China Strategic and Economic Dialogue*, CENTER. FOR STRATEGIC & INT'L STUD. (July 17, 2009).

198. MORRISON, *supra* note 188, at 1; see also Paul Blustein, *The Untold Story of How George W. Bush Lost China*, FOREIGN POL'Y (Oct. 2, 2019) (arguing that the Bush Administration should have been more aggressive against an increasingly emboldened China).

economy grew at 9.1%, far more than western economies.¹⁹⁹ And while the United States was pushing for China to embrace the principles of the liberal world order with more openness to free trade, Chinese leaders were running the other way. “Increasingly confident in the virtues of its own model, Beijing diverged from the economic approach [of] its trading partners; in so doing, it undermined support for the rules-based WTO system abroad.”²⁰⁰

President Obama came to power at the start of the global financial crisis, and he focused much of his first term on domestic policies to address the recovery. He visited China in 2009 during his first year in office, highlighting his recognition of China’s growing influence.²⁰¹ However, by November of 2011, Obama had unified disparate policies toward China into a single, comprehensive “pivot to Asia” policy.²⁰² The new policy included the ratification of the U.S.-South Korea free trade agreement, strong backing for Japan in its interactions with a more aggressive Chinese navy, the involvement of China in dialogues to reign in North Korean nuclear ambitions, and protection of navigation routes in the South China Sea. One of the centerpieces for the new strategy was the Trans-Pacific Partnership regional trade agreement, which was meant to offset the growing economic influence of China in the Southeast Asian region.

The Trans-Pacific Partnership (TPP) was principally about containment of China’s rise rather than engagement with China.²⁰³

[The TPP] would give us a leg up on our economic competitors, including . . . China. . . . As we speak, China is negotiating a trade deal that would carve up some of the fastest-growing markets in the world at our expense, putting American jobs, business and goods at risk. . . . America should write the rules. America should call the shots. Other countries should play by the rules that America and our partners set, not the other way

199. James Pethokoukis, *George W. Bush Didn’t Lose China*, AM. ENTER. INST. BLOG (Oct. 15, 2019).

200. *Id.*

201. See Cheng Li, *Assessing U.S.-China Relations Under the Obama Administration*, BROOKINGS INST. (Aug. 30, 2016) (describing Obama’s visit to China as underwhelming and ineffective in addressing human rights concerns that he intended to raise).

202. See Kenneth G. Lieberthal, *The American Pivot to Asia*, BROOKINGS INST. (Dec. 21, 2011) (providing a comprehensive outline of the new American foreign policy approach to China).

203. See Lester & Zhu, *supra* note 193, at 18–19 (discussing efforts of the Obama Administration to address China’s economic rise).

around. . . . The United States, not countries like China, should write them.²⁰⁴

In addition to the TPP, the Obama Administration launched fourteen complaints at the WTO over Chinese practices and one complaint using the rarely applied Section 421 process.²⁰⁵ Section 421 actions arise from the Trade Act of 1974 and apply specifically to China.²⁰⁶ They allow private parties to file a complaint at the U.S. International Trade Commission (ITC) requesting an investigation into Chinese imports that are increasing rapidly such that they are a significant cause or threat of material injury to a competing domestic industry.²⁰⁷ Six such complaints were filed under the Bush Administration, four of which were found by the ITC to be actionable—though no action was taken.²⁰⁸ The Obama Administration took a more aggressive stance, accepting the ITC recommendations to raise tariffs on imported Chinese tires.²⁰⁹

At the same time, the Obama White House continued to pursue friendly diplomatic relations with Beijing.²¹⁰ President Xi Jinping and President Obama met eleven times during Obama's two terms and the two countries worked closely together to expand the high-level strategic and economic dialogues started under the Bush Administration.²¹¹ In 2012, China increased its share of U.S. Treasury Bonds by \$200 million to a total of \$1.17 trillion.²¹² The United States and China began negotiating a bilateral investment treaty (BIT) in 2008 that would have

204. See Barack Obama, *The TPP Would Let America, not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016) https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html (laying out the strategic plan for the TPP) .

205. See Lester & Zhu, *supra* note 193, at 19.

206. Trade Act of 1974 § 421, 19 U.S.C. § 2451.

207. *Id.*; see also JEANNE J. GRIMMETT, CONG. RSCH. SERV., R40844, CHINESE TIRE IMPORTS: SECTION 421 SAFEGUARDS AND THE WORLD TRADE ORGANIZATION (WTO) (2011).

208. *Id.* at 14–15 (describing prior investigations under this section of the Trade Act).

209. See Certain Passenger Vehicle and Light Truck Tires from China, Inv. No. TA-421-7, USITC Pub. 4085 (July 2009) (Final); see also Proclamation No. 8414, 74 Fed. Reg. 47,861 (September 17, 2009) (noting that tariffs were set lower than the ITC had recommended and they were to phase out in three years).

210. See, e.g., Stacy A. Anderson, *Obama Welcomes Second Chinese President for State Dinner*, PBS NEWS HOUR (Sept. 24, 2015).

211. See Li, *supra* note 202 (explaining that the range of issues addressed during the Obama years greatly expanded).

212. See, e.g., Kenneth Rapoza, *China Sends Present to Obama, Buys More U.S. Debt*, FORBES (Jan. 17, 2013) (noting that China is the largest foreign holder of U.S. debt).

provided significant investor protections for both countries.²¹³ And the two countries also agreed to implement a ten-year visa to allow tourists, students, and business travelers from both countries to make more frequent trips between the two countries without having to re-apply for a visa.²¹⁴

By the time President Trump took office, relations between the United States and China were warm. Trump took a far more aggressive tone toward China, asserting that the actions of past presidents had not been strong enough.²¹⁵ Following lukewarm bilateral discussions with China in the first few months of his presidency, President Trump's USTR launched an investigation into certain Chinese trade practices in August 2017.²¹⁶ USTR released its findings in March 2018, concluding that China unfairly discriminated against U.S. exports, restricted market access for U.S. companies, and used cyberattacks to gain commercially-valuable information, among other things.²¹⁷ Accordingly, on April 3, 2018, under Section 301 of the Trade Act of 1974, President Trump imposed tariffs on \$50 billion in Chinese imports.²¹⁸ China immediately announced that it would retaliate on an equal amount of U.S. imports, thus kicking off the U.S.-China trade war.²¹⁹

213. See LAUREN GLOUDEMANN & NARGIZA SALIDJANOVA, POLICY CONSIDERATIONS FOR NEGOTIATING A U.S.-CHINA BILATERAL INVESTMENT TREATY 5, U.S.-CHINA ECON. AND SECURITY REVIEW COMM'N (2016) (laying out the considerations for concluding a BIT between the U.S. and China).

214. See U.S. DEP'T OF STATE, THE UNITED STATES AND CHINA AGREE TO EXTENDING VISAS FOR SHORT-TERM BUSINESS TRAVELERS, TOURISTS, AND STUDENTS, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/us-china-agree-to-extend-visas.html> (last visited Feb. 27, 2021). But see Emily Feng, *Visas Are The Newest Weapon In U.S.-China Rivalry*, NAT'L PUB. RADIO (Apr. 25, 2019, 5:12 AM), <https://www.npr.org/2019/04/25/716032871/visas-are-the-newest-weapon-in-u-s-china-rivalry> (reporting that some visa holders are having their visas canceled, potentially due to tensions between the U.S. and China).

215. See, e.g., Lester & Zhu, *supra* note 193, at 19–20 (describing Trump as the “chosen one” to take on China).

216. Initiation of Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40,213 (Aug. 24, 2017).

217. Notice of Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14,906 (Apr. 6, 2018).

218. See Chad Bown et al, *Trump and China Formalize Tariffs on \$260 Billion of Imports and Look Ahead to Next Phase*, PETERSON INST. FOR INT'L ECON. (Sept. 20, 2018, 10:00 AM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/trump-and-china-formalize-tariffs-260-billion-imports-and> (providing a comprehensive timeline of the developments in the U.S.-China trade war).

219. *Id.*

The more aggressive stance taken by the Trump Administration bleeds into his disdain for the WTO, where he has asserted that “[w]e lose the lawsuits, almost all the lawsuits in the WTO.”²²⁰ However, a report by the Peterson Institute for International Economics disputed this claim and explained that, of the twenty-three WTO cases the United States has brought against China since 2004, twenty were won by the United States, none lost, and three remain pending.²²¹ On the contrary, out of China’s sixteen complaints against the United States, China won only five.²²²

Regardless of the U.S. record of success against China at the WTO, President Trump continued to pursue unilateral actions against China (and most other countries) through the safeguards enshrined in U.S. trade laws.²²³ China has, likewise, resorted to unilateral actions outside of the WTO to retaliate against U.S. sanctions. In effect, the body built to resolve disputes like this has been sidelined by the two largest economic powers in the world.

The final sections of this Article will articulate the most significant areas of disruption between the United States and China that will have to be overcome in order to move forward and how a new administration in the United States may approach this relationship. Given the speed at which politics are operating at present, there is always a chance that unforeseen circumstances—such as a worldwide health pandemic—will throw mud in the water. But in broad terms, there are a few things upon which most policymakers and economists can agree.

B. *Areas of Significant Disruption*

There are many reasons to assume that the rise of China will bring an end to Western domination of world trade and politics and that the glory days of the United States are in the past. The end of the Cold War in the 1990s signified to many the preeminence of the liberal international model in shaping world politics, constraining major nations to concepts such as free and fair trade, liberal democratic values, and rule

220. See Daniel W. Drezner, *It's the End of the Liberal Economic Order as We Know It*, WASH. POST (Dec. 11, 2019), <https://www.washingtonpost.com/outlook/2019/12/11/its-end-liberal-economic-order-we-know-it/> (describing the tweet in which Mr. Trump made this false claim about the WTO).

221. See Jeffrey J. Schott & Euijin Jung, *The United States Wins More WTO Cases than China in US-China Trade Disputes*, PETERSON INST. FOR INT'L ECON. (Nov. 22, 2019), <https://www.piie.com/research/piie-charts/united-states-wins-more-wto-cases-china-us-china-trade-disputes>.

222. *Id.*

223. See Trade Act of 1974 § 301, 19 U.S.C. § 2411 (referring to market access threats); Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862 (referring to national security threats).

of law.²²⁴ Yet at this very same moment in history, China was giving birth to what might be seen as an alternative to this model—at the time, a less threatening pathway to economic development that involved more emphasis on markets than on democracy.

As discussed above, modern China was always seen as a more tolerable communist system than the Soviet Union. China seemed less intent on spreading its political ideas far and wide and it had little economic influence to do so even if it wanted to. But its stunning economic growth in the 1990s challenged that notion and placed China on a trajectory to eventually dominate markets and, potentially, world politics. Some prominent authors believe that this is a natural part of liberal internationalism—the rise of “multiple modernities” in international politics.²²⁵ Some others—especially in the media—do not see a possibility of the survival of two political models as viable in the current global economy.²²⁶ The next section will discuss this growing tension.

1. China’s Growing Economic Footprint

China’s economic rise has given it the power to spread its wings and expand its influence to all parts of the world as well as to the institutions built to govern that world. In its quest for raw materials and natural resources, China has established a presence on every continent.²²⁷ This has enabled it to grow at the exponential rate of colonial powers of the past that profited from mercantilist principles of extraction and export.²²⁸ Among other things, China is using its reach to develop new markets for its goods, especially its struggling state-owned steel and aluminum industries.²²⁹ China’s Belt and Road Initiative (BRI) is a key example of how China is leveraging foreign markets to create export

224. See, e.g., Francis Fukuyama, *The End of History?*, 16 NAT’L INT. 3 (1989) (describing the dominance of the liberal international order over communism as the last major battle in determining the direction of world politics).

225. G. JOHN IKENBERRY, *A WORLD SAFE FOR DEMOCRACY* 33 (2020) (hinting at the rise of countries like China).

226. See, e.g., Yuwa Hedrick-Wong, *China, Populism, and the Demise of the Liberal Global Economic Order*, FORBES (Nov. 3, 2019), <https://www.forbes.com/sites/yuwahedrickwong/2019/11/03/china-populism-and-the-demise-of-the-liberal-global-economic-order/?sh=417552307682>.

227. See Shullman, *supra* note 138 (explaining the reasons behind China’s expansion into developing markets).

228. See Wenran Jiang, *Fuelling the Dragon: China’s Rise and Its Energy and Resources Extraction in Africa*, 199 CHINA Q. 585 (2009) (discussing China’s thirst for energy in Africa).

229. See Shullman, *supra* note 137 (arguing that China’s economy is slowing and thus it is in search of new export markets).

opportunities and link the success of those economies to an economic commitment to China.²³⁰

As part of the BRI, Chinese firms have taken an aggressive approach to bidding on significant infrastructure projects outside of China. Among others,²³¹ this includes a 283-million-euro contract to build a bridge in Croatia,²³² a \$4 billion contract to build the long-delayed metro in Bogotá, Colombia,²³³ and a \$2.1 billion rail project connecting Budapest to Belgrade.²³⁴ A number of countries have raised concerns about these investments, arguing that they are oppressive in their terms or that they unfairly benefit Chinese firms.²³⁵ The Chinese leadership has recognized these concerns and publicly stated that they will address them: “We will continue to follow a high-standard, people-centered and sustainable approach to promote high-quality Belt and Road cooperation with partner countries.”²³⁶

China's footprint is not limited to extractive industries and exports. In recent years, Chinese firms have substantially increased their presence abroad through key acquisitions of firms in Europe and the United States, mostly in high-tech sectors that align with the Made in China 2025 strategy.²³⁷ As of 2019, Chinese firms had invested over \$13

230. See Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELATIONS (Jan. 28, 2020, 7:00 AM), <https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative> (describing the trillion-dollar effort by China to rebuild the original Silk Road and the consequences of their investments).

231. See, e.g., Keith Bradsher, *China Renews Its 'Belt and Road' Push for Global Sway*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/business/china-belt-and-road.html> (providing context for the numerous Chinese investments as part of the Belt and Road Initiative).

232. *Chinese Contractors Winning Bid for EU Funded Peljesac Bridge in Croatia Raises Eyebrows*, Silk Rd. Briefing (May 11, 2018), <https://www.silkroadbriefing.com/news/2018/05/10/chinese-contractors-winning-bid-eu-funded-peljesac-bridge-croatia-raises-eyebrows/>.

233. *Colombia Awards \$4 Billion Contract for Bogota Metro to China-Canada Consortium*, REUTERS (Oct. 17, 2019, 10:00 PM), <https://www.reuters.com/article/colombia-metro/update-1-colombia-awards-4-billion-contract-for-bogota-metro-to-china-canada-consortium-idUSL2N2721HV>.

234. Krisztina Than & Anita Komuves, *Hungary, China Sign Loan Deal for Budapest-Belgrade Chinese Rail Project*, REUTERS (Apr. 24, 2020, 11:50 AM), <https://www.reuters.com/article/us-hungary-china-railway-loan/hungary-china-railway-loan-idUSKCN226123>.

235. See, e.g., Maria Abi-Habib, *How China Got Sri Lanka to Cough Up a Port*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html> (describing the handover of a port in Hambantota, Sri Lanka to China after Sri Lanka defaulted on its loan to China).

236. Xi Jinping, President of China, *Together for a New Chapter in BRICS Cooperation* (Nov. 15, 2019), <https://www.fmprc.gov.cn/ce/ceun/eng/zgyw/t1716044.htm>.

237. See Elisabeth Braw, *China Is Bargain Hunting—and Western Security Is at Risk*, FOREIGN POL'Y (Apr. 15, 2020, 3:55 PM), <https://foreignpolicy.com/2020/04/15/china-is-bargain-hunting-and-western-security-is-at-risk/>.

billion in European firms and \$25 billion in U.S. firms and the pace of that investment has been increasing.²³⁸ According to a report by a German think tank, China is investing primarily “in smart manufacturing, digitalization and emerging technologies, [and] wants to leapfrog and leave foreign competitors behind.”²³⁹

Finally, it is worth noting that China also uses its approach to international development as a means of establishing commercial relationships. Their approach of “trade as aid” uses investment in economic growth as a means to create long-term mutually beneficial relationships between China and the target country. This has enabled China to invest in economically lucrative projects that provide revenue to the development partner as well as economic dependence on China.²⁴⁰

2. China’s Status as a Developing Country

One of the many ways the Trump administration challenged Chinese trade practices relates to China’s status as a developing country at the WTO. President Trump criticized China several times for claiming special and differential treatment. For example, he stated that, “China, which is a great economic power, is considered a Developing Nation within the World Trade Organization. They therefore get tremendous perks and advantages, especially over the U.S. Does anybody think this is fair[?]”²⁴¹ Beyond Trump himself, the Trump administration offered proposals to reform the way WTO Members are classified as “developing.”²⁴²

Trump’s policy pronouncement here was clumsily framed and misleading but had a grain of truth to it. If China has become such a powerful player in the international economy, why is it classified as

238. *Id.* (explaining that many of their intended acquisitions have been stifled by government regulations).

239. Max J. Zenglein & Anna Holzmann, *Evolving Made in China 2025*, MERCATOR INST. FOR CHINA STUD. (July 2, 2019), <https://merics.org/en/report/evolving-made-china-2025>.

240. See Matt Ferchen, *How China Is Reshaping International Development*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 8, 2020), <https://carnegieendowment.org/2020/01/08/how-china-is-reshaping-international-development-pub-80703> (describing concerns about the reemergence of dependency models in development).

241. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 6, 2018, 10:32 AM) <https://twitter.com/realDonaldTrump/status/982264844136017921> (account suspended) [<https://www.thetrumparchive.com/?dates=%5B%2018-04-06%2C%2018-04-07%5D>]; see Jeff Mason & David Lawder, *Trump Targets China in Call for WTO to Reform ‘Developing’ Country Status*, REUTERS (July 26, 2019) (discussing the Trump Administration’s attitude toward the WTO designation of “developing countries”).

242. Memorandum on Reforming Developing-Country Status in the World Trade Organization, 84 Fed. Reg. 37,555 (July 26, 2019).

“developing” and why does it benefit from “special and differential” treatment? As explained below, the answer is that China was much poorer at the time it negotiated its accession, and the commitments it made when it acceded to the WTO were probably fair at the time. However, China is much wealthier now than when it began the accession process, and based on its growing wealth, there is a strong argument that it should liberalize more to take into account its current economic status.

There is no official WTO classification as to which countries are “developing.”²⁴³ This status is self-selected, based on politics more than law or economics, and can be contested. It is a controversial point that usually stays buried beneath the surface, but occasionally flares up into minor controversy. As explained in a WTO Secretariat note, developing country status grants members the opportunity to benefit from 183 special and differential treatment (SDT) provisions across WTO agreements and decisions.²⁴⁴ The note further classifies these provisions into six broad categories: (1) Provisions aimed at increasing trade opportunities for developing countries, (2) provisions under which WTO members should safeguard the interests of developing countries, (3) flexibility of commitments, of action, and use of policy instruments, (4) transitional time-periods, (5) technical assistance, and (6) provisions related to least developed-countries (LDCs).²⁴⁵ As explained below in relation to China’s accession, an acceding member’s ability to claim SDT for agreements and decisions adopted prior to its accession is governed largely by that member’s protocol of accession.²⁴⁶ This fact notwithstanding, any country that self-identifies as a “developing country” can make use of provisions under categories 1 through 5.

The WTO identifies LDCs based on U.N designation,²⁴⁷ but has no such measure of “developing country” status.²⁴⁸ This last point

243. *Who are the Developing Countries in the WTO?*, WTO, https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm (last visited Aug. 20, 2020).

244. Committee on Trade and Development, *Note by the Secretariat: Special and Differential Treatment in WTO Agreements and Decisions* ¶ 1.2, WTO Doc. WT/COMTD/W/239 (Oct. 12, 2018).

245. *Id.* ¶ 1.5.

246. Hannah Monicken, *China, India Defend “Special and Differential Treatment” at the WTO*, INSIDE U.S. TRADE (Feb. 22, 2019); see also NICHOLAS LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 63–105 (2002).

247. *Least-Developed Countries*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Aug. 20, 2020).

248. *Who are the Developing Countries in the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm (last visited Aug. 20, 2020); James Bacchus & Inu Manak, *The Development Dimension: What to Do About Differential Treatment in Trade*, CATO INST. 2 (2020), <https://www.cato.org/sites/cato.org/files/2020-04/PA-887-update.pdf>.

underscores the inadequacy of members being able to self-designate using the blanket term “developing country.” Countries with more advanced aggregate industrial and export capabilities, such as Brazil and China, are, in some sense, considered equivalent in status with less advanced countries, such as Bolivia and Mongolia. As a result, some developed Members, most prominently the United States, worry that these more advanced countries are taking advantage of the blanket “developing country” designation to avoid making additional commitments and free riding on the WTO’s agreements, undermining the purpose and effectiveness of the organization.²⁴⁹ These worries have compounded as some of the more advanced developing countries, most notably China, have become increasingly competitive in global markets vis-à-vis developed economies like the United States, the EU, and Japan.

By declaring itself a developing country for the purpose of the GATT/WTO accession negotiations, China was able to take on fewer commitments when it acceded to the WTO than the more advanced countries have. However, in reality, it did not receive as much SDT treatment as it might have hoped for and that some other developing countries receive.²⁵⁰ While China applied for accession in 1986, WTO members, particularly the United States and the European Union, took note of China’s rapid export growth throughout the 1990s as evidence of its increasing international competitiveness. China’s low per capita income notwithstanding, WTO members did not agree to grant China accession as a typical developing country and instead demanded commitments that better reflected the unique characteristics of its economy. Indeed, China’s Accession Protocol is full of “WTO-plus” commitments involving additional obligations taken on by China and “WTO-minus” commitments where other Members can treat China less favorably.

This is important because, as noted above, an acceding member’s protocol plays a critical role in determining the extent to which it can benefit from SDT provisions.²⁵¹ In the case of China, these benefits were significantly limited across several areas. For instance, China committed to a reduction of its average industrial tariff levels to 8.9 percent,

249. Draft General Council Decision, *Procedures to Strengthen the Negotiating Function of the WTO*, WTO DOC. WT/GC/W/764 (Feb. 15, 2019); Communication from the United States, *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance*, ¶¶ 4.1–4.6, WTO DOC. WT/GC/W/757/Rev. 1 (Feb. 14, 2019).

250. LARDY, *supra* note 246, at 64.

251. *Id.* at 63–105; *see also* Monicken, *supra* note 246.

which is significantly below those of other prominent developing countries such as Brazil and India, though not vastly different than those of other countries that acceded at a similar time.²⁵² China also committed to taking limited advantage of SDT provisions on the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Agriculture (AOA), including notable protections and leeway on funding for state-owned enterprises (SOEs) and agricultural subsidies.²⁵³ It also committed to eliminating agricultural export subsidies upon accession, going beyond both developed and developing WTO member states.²⁵⁴

However, and even though recent scholarship suggests that China's claims for SDT on agreements and decisions adopted after its entry into the WTO have been limited, two outstanding issues underpin developed Members' calls for China to undertake additional commitments. First, while China was, as reflected by the terms of its protocol of accession, treated as being a step beyond other developing countries during negotiations for its entry into the WTO, it did not go, nor has it gone since, as far as making concessions expected from developed countries in areas where it has become arguably as competitive a producer and exporter in certain goods as the most advanced countries. For instance, China's average bound tariff for non-agricultural products, and for specific goods within this category, such as electrical machinery and transport equipment, remains nearly triple those of the United States, the European Union, and Japan.²⁵⁵ Whereas 57.6, 47.5, and 81.2 percent of Chinese non-agricultural exports to these three countries, respectively, enter duty-free, only 33.8, 33.3, and 17.4 percent of U.S., Japanese, and European non-agricultural products, respectively, enter China duty-free.²⁵⁶

Second, China has persistently been subject to complaints from other member states for delays and a lack of transparency on implementing its accession commitments. Though WTO Members are aware, and China itself has explicitly declared, that the lack of progress on at

252. LARDY, *supra* note 246, at 65, 79; *see also* Monicken, *supra* note 246.

253. LARDY, *supra* note 246, at 80, 89–94; Leila Choukroune, *China and the WTO Dispute Settlement System: The Global Trade Lawyer and the State Capitalist*, 1 CHINA PERSPECTIVES 49, 51 (2012).

254. LARDY, *supra* note 246, at 93–94.

255. WORLD TRADE ORG., INT'L TRADE CTR., & U.N. CONF. TRADE DEV., WORLD TARIFF PROFILES 2020, at 73 (tariff profiles for China), 90 (tariff profiles for the European Union), 110 (tariff profiles for Japan), 186 (tariff profiles for the United States), available at https://www.wto.org/english/res_e/publications_e/world_tariff_profiles20_e.htm.

256. *Id.*

least some of these commitments is related more to technical difficulties than to deliberate non-compliance, the reality is that these shortcomings appear across sensitive issues that are bound to irritate other Members, including China's commitments to grant appropriate protection for intellectual property and provide "full notification" of existing subsidies programs.²⁵⁷ The WTO's 2018 review of Chinese trade policy, for instance, explicitly notes that China has either provided incomplete information about existing subsidies programs at the national and sub-national levels or failed to report them altogether, violating its accession commitments.²⁵⁸

The justification for these more limited commitments is that the category of "developing" covers a wide range of wealth and industrialization levels, and that China was "developing" when it applied to enter the GATT. It is still "developing" now, but it has gotten much wealthier during that time. When China began the process of joining the GATT in 1986, it was, in fact, quite poor. Its GDP per capita, taking into account purchasing power parity (PPP), was around \$677, compared to \$19,035 for the United States.²⁵⁹ When its accession to the WTO concluded in 2001, its GDP per capita (PPP) was around \$3,206, compared to \$37,101 for the United States.²⁶⁰ In terms of industrial production in major products, China's output increased between 1985, the year prior to beginning the accession process, and 2001, the year accession concluded.

Since 2001, China's economy has continued to grow considerably and it is catching up to the advanced economies, although it is not there yet. China's GDP per capita, measured with PPP, was \$18,116 in 2018.²⁶¹ While that is a vast improvement over where it was in 1986 or in 2001, it is still much lower than the United States' (\$62,870).²⁶² In terms

257. Trade Policy Review Body, *Report by the Secretariat: Trade Policy Review*, WTO Doc. WT/TPR/S/375, at 11–12 (June 6, 2018).

258. *Id.* at 10, 11–12.

259. World Economy Outlook Database: October 2019, Int'l Monetary Fund, <https://www.imf.org/en/Publications/WEO/weo-database/2019/October/download-entire-database> (select "By Countries" hyperlink).

260. *Id.*

261. World Economy Outlook Database: October 2019, Int'l Monetary Fund, <https://www.imf.org/en/Publications/WEO/weo-database/2019/October/download-entire-database> (select "By Countries" hyperlink).

262. *Id.* Whereas in 2001 China's GDP per capita (PPP) was only 9% of the United States' in the same year, its GDP per capita (PPP) in 2018 was 29% of the United States' in the same year. Calculations performed by the author.

of industrial production, China's output increased between 2001 and 2018.²⁶³

It is undeniable that China is much richer as a whole than it used to be, and this is largely thanks to the economic reform, including lowering its tariffs and liberalizing some sectors of the economy, that accompanied China's accession to the WTO. Seventeen years into its WTO membership, China has surged to become the second largest economy in the world, and parts of China are now as advanced as parts of the industrialized world. However, the low figure for average wealth means that China can still call itself "developing" in the context of the WTO.

3. Pandemic Fallout

The global health pandemic caused by the outbreak of COVID-19 has decimated the global economy, creating negative economic effects that will last for years, if not decades. Trade will, of course, continue as there is no viable alternative to securing economic growth and access to the goods and services that we need. However, the pandemic has resulted in two previously unforeseen consequences for China. First, the western world has begun to doubt the promises of reform in China, creating a new level of distrust and skepticism. Second, global businesses have realized the limits of putting all of their eggs in China's basket and have begun looking for the exit. Each of these pandemic side effects is likely to cause lasting damage to China.

China's economic reforms during Deng Xiaoping's era signaled to the world that China was moving in a capitalist direction, adopting liberal economic policies in order to spur economic growth.²⁶⁴ As those reforms showed great success, it made sense to assume that political reform would follow. Accordingly, by the time of China's WTO accession in 2001, political change seemed imminent:

The torturous negotiations that led to China's WTO entry at the turn of the century provided leverage to push through policy reforms to improve the efficiency of domestic industry and

263. China Statistical Yearbook 2002, National Bureau of Statistics, the People's Republic of China, ch. 13–23, <http://www.stats.gov.cn/english/statisticaldata/yearlydata/YB2002e/ml/indexE.htm>; China Statistical Yearbook 2019, National Bureau of Statistics of China, ch. 13–12, <http://www.stats.gov.cn/tjsj/ndsj/2019/indexeh.htm>. Note some production units have been amended by the author to facilitate inter-temporal comparisons.

264. See John P. Burns, *China's Governance: Political Reform in a Turbulent Environment*, 119 CHINA Q. 481 (1989) (describing China's primary focus on economic reforms rather than political reforms).

subjected Chinese firms operating within China and in international markets to the discipline of competition with formidable foreign rivals.²⁶⁵

The changes that China made had far more to do with economic reform to stimulate its own economic growth than with its desire to integrate into the liberal world order. Fiscal reforms, de-collectivization of agriculture, privatization of some industries, and opening the door to foreign investment helped to link China economically to the world while maintaining political distance. And though political reform has happened in China, it has not been toward the democratic ideals of the west but rather toward its own Chinese socialist model.²⁶⁶

Negative views of China by Americans have been on the rise since the start of the Trump Administration. However, the fact that the COVID-19 virus originated in Wuhan, China, and that China was initially very slow and combative in its response to the spread of the virus, has substantially exacerbated those negative views of China.²⁶⁷ According to a July 2020 Pew Research survey, 73% of Americans hold a negative view of China, up from 47% in 2018.²⁶⁸ Similar reactions have been recorded in Australia,²⁶⁹ Europe,²⁷⁰ and elsewhere. Widespread disillusionment with the “China experiment” may lead more countries to question their support for China’s promised market reforms, which seem increasingly unlikely to come about.²⁷¹

265. JACQUES DELISLE & AVERY GOLDSTEIN, *TO GET RICH IS GLORIOUS 6* (2019).

266. See Elizabeth C. Economy, *China’s Unprecedented Political Reforms*, COUNCIL ON FOREIGN REL. (Jan. 16, 2014) (describing China’s political reforms as relevant to the Chinese economy but disconnected from the liberal world order).

267. See, e.g., Jeremy Page, Wenxin Fan and Natasha Khan, *How It All Started: China’s Early Coronavirus Missteps*, WALL ST. J. (Mar. 6, 2020) (describing the lack of information sharing and cooperation early in the outbreak of Covid-19).

268. Laura Silver, Kat Devlin and Christine Huang, *Americans Fault China for Its Role in the Spread of COVID-19*, PEW RSCH. CTR. (July 30, 2020).

269. See Geoff Hiscock, *Calls for Coronavirus Inquiry Further Strains Australia’s Relations with China*, U.S. NEWS (May 12, 2020) (explaining that the Australian Prime Minister called for a public inquiry into the origins of the Coronavirus, upsetting China).

270. See Philippe le Corre and Erik Brattberg, *How the Coronavirus Pandemic Shattered Europe’s Illusions of China*, CARNEGIE ENDOWMENT FOR INT’L PEACE (July 9, 2020) (describing Europe’s waning hope for China to pursue market reforms).

271. See Ken Hughes, *Richard Nixon: Foreign Affairs*, THE MILLER CENTER, <https://millercenter.org/president/nixon/foreign-affairs> (speaking to several failed attempts at market reforms in China); see also Jiwei Ci, *Without Democracy, China Will Rise No Farther*, FOREIGN AFF. (Oct. 4, 2019).

China may not be a card-carrying member of the liberal world order at the moment, and perhaps it never will be.²⁷² But recall that the buildup of institutions, rules, and democracy promotion in the 1940s was a defensive strategy to the threats that were emerging out of the Soviet Union.²⁷³ Today, threats come from more ambiguous places: global climate change, terrorism, and of course, health pandemics that know no borders. Fighting those threats may not require democracy, but economic and political cooperation may mitigate the risk that these future crises bring to an end this period of economic prosperity and peace.

Related to the political fallout from the COVID-19 pandemic is an unfolding economic catastrophe. China leveraged its low-cost and hard-working labor market to attract companies from around the world and to boost their economic growth and development. And despite impressive gains over the past twenty years, the process is largely incomplete. In its own words, China continues to call itself a developing country.²⁷⁴ If those companies suddenly leave China, China will need to find new sources of foreign investment quickly in order to keep their development going.²⁷⁵

A recent Kearney Reshoring index report put the situation in clear terms:

Three decades ago, many US producers began manufacturing and sourcing in China for one reason: costs. The US-China trade war brought a second dimension more fully into the equation—risk—as tariffs and the threat of disrupted China imports prompted companies to weigh surety of supply more

272. *But see* Li Fan, *Don't Give Up on Chinese Democracy*, FOREIGN POL'Y (July 7, 2020) (sharing an optimistic view of China's steps toward democracy through local elections, <https://foreignpolicy.com/2020/07/08/chinese-democracy-civil-society-coronavirus/>).

273. *See* Ikenberry, *supra* note 31 (describing the origins of the liberal world order).

274. *See* Yiping Huang, *China is a Special Developing Country*, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/roomfordebate/2015/07/27/can-china-stand-on-its-own/china-is-a-special-developing-country>; *see also* Jacob M. Schlesinger and Alex Leary, *Trump Denounces Both China and WTO; President Presses Trade Organization to Change China's 'Developing Country' Status*, WALL ST. J. (July 26, 2019) (explaining objections by the Trump Administrations to China's self-designation as a developing country, which provides it with benefits in the world trade system).

275. *See, e.g.*, Yoko Kubota, *China Chases Foreign Capital to Fend Off Coronavirus Slowdown*, WALL ST. J. (April 9, 2020) (describing companies, such as Moncler and Four Seasons, that are limiting their investments in China and how this is spreading to other foreign companies), <https://www.wsj.com/articles/china-chases-foreign-capital-to-fend-off-coronavirus-slowdown-11586430003>.

fully alongside costs. COVID-19 brings a third dimension more fully into the mix, and arguably to the fore: resilience.²⁷⁶

As the global economy begins to recover from the worst effects of the pandemic, foreign companies in China may rethink their supply chains.²⁷⁷ Decoupling from China is not easy for many firms, but the number of U.S. firms looking for alternative production locations has increased substantially since the start of the pandemic.²⁷⁸ China has quickly tried to accommodate foreign firms to reverse this trend, but their actions may be too little, too late.²⁷⁹

These significant areas of disruption will have to be addressed by the next U.S. administration. Improving attitudes of Americans toward China will require changes in the level of openness and trust, and dialogue is the first step in that process. Xi Jinping has widespread support throughout China and his actions to help other countries in the face of the pandemic improved his image on the world stage.²⁸⁰ During the pandemic, China sent equipment and medical personnel abroad to Spain, Italy, Iraq, and elsewhere to both reduce the number of infections and to enhance their public image.²⁸¹ The United States has attempted to disparage China in the midst of the crisis, calling COVID-19 the “China Virus” or the “Wuhan Virus” rather than cooperating to fight rising infections.²⁸²

276. Peter Van Den Bosche, *Trade War Spurs Sharp Reversal in 2019 Reshoring Index, Foreshadowing COVID-19 Test of Supply Chain Resilience*, KEARNEY (2019), <https://www.kearney.com/operations-performance-transformation/article/?/a/trade-war-spurs-sharp-reversal-in-2019-reshoring-index-foreshadowing-covid-19-test-of-supply-chain-resilience-full-report>.

277. See Kenneth Rapoza, *New Data Shows U.S. Companies Are Definitely Leaving China*, FORBES (April 7, 2020) (explaining the numerous factors driving foreign firm flight from China).

278. See, e.g., Trefor Moss, *Pandemic Makes U.S.-China Economic Breakup More Likely, U.S. Businesses in China Say*, WALL ST. J. (April 17, 2020) (explaining that 44% of U.S. companies say decoupling from China would be impossible, down from 66% last October).

279. See Kubota, *supra* note 277 (reporting that China is offering more access to government officials and fast-track movement of goods to American firms).

280. See Astrid H.M. Nordin & Mikael Weissmann, *Will Trump Make China Great Again? The Belt and Road Initiative and International Order*, 24 INT'L AFF. 231 (2018) (relaying Xi Jinping's move to a more aggressive and open foreign policy).

281. See, e.g., Lily Kuo, *China Sends Doctors and Masks Overseas as Domestic Coronavirus Infections Drop*, THE GUARDIAN (Mar. 18, 2020), <https://www.theguardian.com/world/2020/mar/19/china-positions-itself-as-a-leader-in-tackling-the-coronavirus>.

282. Statement from Donald Trump, Remarks by President Trump in Press Briefing, THE WHITE HOUSE (July 23, 2020) (calling Covid-19 the “China Virus” during a press briefing).

IS CHINA'S RISE THE WTO'S DEMISE?

China's image has been tarnished in the West thanks to their response to COVID-19, their aggressive actions toward Hong Kong,²⁸³ and other human rights concerns.²⁸⁴ Likewise, the U.S. image abroad has been tarnished by abusive trade sanctions, withdrawal from major international agreements, and unbecoming remarks about foreign leaders.²⁸⁵ Repairing those images will require more effective diplomacy and less bellicose rhetoric. Improved trade relations, a return to open immigration policies and restarting the strategic economic dialogue would be a good place to start.

VI. A PATH FORWARD: CONCLUDING REMARKS

The battle over the future of world trade was fought and won by allies of the liberal world order in the 1940s with the creation of a rules-based, democratic system. The collapse of the Soviet Union further strengthened the belief in that model, which had become self-sustaining and nearly universal by that time. But by the time that system reached its crowning achievement with the establishment of the WTO, the founders of that very system had become disenchanted with their creation. Not since the 1920s had such doubts about the value of interdependence and liberalism been so strong. As Robert Kagan noted in the title of his recent book about challenges to the liberal world order, "The Jungle Grows Back."²⁸⁶

The interconnected world of global supply chains, borderless travel, and a shared interest in broad economic growth cannot survive a return to nationalist policies and mercantilist economics. The recent struggle over Brexit is but one example of the challenges we will face in disentangling what globalization has woven together over many decades. Yet as Kagan argues in his book, the liberal world order was never a

283. See *Dragon Strike: China Has Launched Rule by Fear in Hong Kong*, THE ECONOMIST (May 28, 2020), <https://www.economist.com/leaders/2020/05/28/china-has-launched-rule-by-fear-in-hong-kong> (discussing China's National Security Law, which is seen as an infringement into the independence of Hong Kong).

284. See *UK Accuses China of 'Gross' Human Rights Abuses Against Uighurs*, BBC NEWS (July 19, 2020), <https://www.bbc.com/news/uk-politics-53463403> (explaining concerns about the treatment of religious minorities in China).

285. See, e.g., Jacob Poushter, *How People Around the World See the U.S. and Donald Trump in 10 Charts*, PEW RSCH. CTR. (Jan. 8, 2020) (demonstrating the effects of the Trump Administration's interactions on U.S. foreign policy), <https://www.pewresearch.org/fact-tank/2020/01/08/how-people-around-the-world-see-the-u-s-and-donald-trump-in-10-charts/>.

286. ROBERT KAGAN, *THE JUNGLE GROWS BACK: AMERICA AND OUR IMPERILED WORLD* (2018) (referring to the trend toward nationalism and neorealist politics).

foregone conclusion—states were never really ready to cede the power necessary to run an effective global economic system.²⁸⁷

China’s rise in economic and political power in the past two decades adds a critical element to the question of the survival of the liberal world order and the future of the WTO in particular. Not since the Cold War had an alternative economic and political system existed, and even then, it was apparent that the Soviet model was not driving the international legal order. China, however, has the potential to disrupt the liberal world order and to influence the future of world trade. Their model of authoritarian-driven capitalism, or “socialism with Chinese characteristics,”²⁸⁸ emphasizes strong, centralized national governments that direct, but do not necessarily own, productive market forces.

Will China succeed where the Soviets failed? Have they found a way to improve upon the communist model by adapting and integrating some capitalist elements? Some commentators believe they have.²⁸⁹ And will they try to replace the liberal world order with Chinese socialism? Some politicians believe they will. Referring to the Chinese economic expansion known as the Belt and Road Initiative, a former German foreign minister said, “China is developing a comprehensive system alternative to the Western one, which, unlike our model, is not based on freedom, democracy and individual human rights.”²⁹⁰

287. *Id.*

288. See JOHN GITTINGS, *THE CHANGING FACE OF CHINA* (Oxford Univ. Press 2016) (explaining that the model set forth by Deng Xiaoping: “The proportion of planning to market forces is not the essential difference between socialism and capitalism. A planned economy is not equivalent to socialism, because there is planning under capitalism too; a market economy is not capitalism, because there are markets under socialism too. Planning and market forces are both means of controlling economic activity.”).

289. See, e.g., Eric Fish, *Has China Discovered a Better Political System Than Democracy?*, *THE ATLANTIC* (Oct. 28, 2015) (discussing whether a “China Model” yet exists and what it might mean for the future of the liberal order), <https://www.theatlantic.com/international/archive/2015/10/china-politics-communism-democracy/412663/>; see also DANIEL BELL, *THE CHINA MODEL: POLITICAL MERITOCRACY AND THE LIMITS OF DEMOCRACY* (Princeton Univ. Press rev. ed. 2016) (suggesting that China’s approach does not fit the mold of a good democracy or a bad authoritarian regime).

290. Daniel Bell, *China’s Political Meritocracy Versus Western Democracy*, *THE ECONOMIST* (June 12, 2018) (arguing that the Chinese do not desire world domination nor the export of their political model—it is for domestic application only), <https://www.economist.com/open-future/2018/06/12/chinas-political-meritocracy-versus-western-democracy>; see Dana Heide, Till Hoppe, Stephan Scheuer, and Klaus Stratmann, *EU Ambassadors Band Together Against Silk Road*, *HANDELSBLATT GLOBAL* (April 17, 2018), <https://global.handelsblatt.com/politics/eu-ambassadors-beijing-china-silk-road-912258> (accessed May 21, 2018); see also Elizabeth C. Economy, *Yes, Virginia, China Is Exporting Its Model*, *COUNCIL ON FOR. REL.* (Dec. 11, 2019)

IS CHINA'S RISE THE WTO'S DEMISE?

China's approach to trade follows this logic. Significant state subsidies allow Chinese firms to produce below market prices, unfairly and "illiberally" skewing the free market. Trade restrictions limiting foreign competition or requiring the transfer of critical technology further weaken the open trade model advocated by the liberal economic model. China's membership in the WTO was meant to constrain these actions and bring China into the rules-based trading system. Thus far, it has not worked as planned:

Since joining the WTO in 2001, China has not turned toward markets, as the West expected. Instead, it has distorted trade on a scale that is far bigger than the dumping and other causes of disputes between market economies that the WTO was designed to handle.

... China's state-owned firms and its vast and opaque subsidies have distorted markets and caused gluts in supply in commodities such as steel. Foreign firms operating in China struggle against heavy-handed regulations, and are required to hand over their intellectual property as a condition of market access.²⁹¹

Yet actions speak louder than words and the actions of both China and the United States indicate not a withdrawal from the rules-based system or a desire by China to impose its model on the world. Despite the unilateral attacks on trade, both the United States and China continue to utilize the WTO to air their grievances. Economist Chad Bown sees this as a positive indicator of their belief in the validity and necessity of the world trade system: "If they weren't filing these cases and holding up appointment of judges then the sense would be that they just want the organization to implode."²⁹²

The economic model that China built upon many of the liberal foundations of the West allowed it to outlast the Soviet Union and rise to be one of the economic superpowers of the world. Yet there has never

(arguing that, by training foreign officials on the China Model, China is effectively exporting its ideals to the world), <https://www.cfr.org/blog/yes-virginia-china-exporting-its-model>.

291. *A Plan to Save the WTO*, THE ECONOMIST, July 21, 2018, at 9.

292. Vivian Salama, *U.S. Files Complaints with WTO Against Trading Partners*, WALL ST. J. (July 16, 2018) (suggesting that both China and the U.S. continue to see value in the WTO, given their numerous lawsuit filings there related to the trade war), <https://www.wsj.com/articles/u-s-files-complaints-with-wto-against-trading-partners-1531767528>.

been a doubt that their success is also built upon the political principles of Chinese Socialism, which does not fit the liberal world order model. It would be naïve to assume that economic liberalization necessarily results in political liberalization.²⁹³ China has succeeded economically with little to no attempt at significant political reform.²⁹⁴ This aligns with the idea that, while democracy may lead to support for market reforms, market reforms do not necessarily lead to support for democracy.²⁹⁵

These findings should temper the expectations of the West that China's economic advances will change its political landscape. But this should also open for it the possibility that China's model is not averse to the advancement of global economic growth and does not pose a threat to the liberal world order. The common interest of the United States and China in protecting the wealth that has been built over the past eighty years from emerging threats, from pandemics to terrorists, must surely override the fears that propelled the United States and the Soviet Union toward their mutual destruction last century. There is no cold war with China. But there are skirmishes that weaken both sides in their drive for economic supremacy.

The WTO is the singular international trade organization in existence that has the task of guiding countries in their economic relations.²⁹⁶ And it has been responsible for maintaining peaceful trade relations between member states since the creation of its rules in 1947. The trade war and the global pandemic caused by COVID-19 have exposed significant weaknesses not only in global supply chains but also in the rules that govern modern trade. This has also exposed an opportunity for leaders of countries like China and the United States to reconsider the role of the WTO in managing the rapidly evolving trade system and the players in that system.²⁹⁷ To protect the gains of the

293. See Pauline Grosjean & Claudia Senik, *Democracy, Market Liberalization, and Political Preferences*, 93 REV. ECON. & STAT. 365 (2011) (reviewing democratization and market liberalization in former Soviet states and finding that, contrary to popular belief, democracy promotes market liberalization, but the contrary is not true).

294. See Mary E. Gallagher, "Reform and Openness": *Why China's Economic Reforms Have Delayed Democracy*, 54 WORLD POL. 338 (2002) (arguing that the timing of China's political reforms enabled them to liberalize their economy without changing their political approach).

295. See Grosjean & Senik, *supra* note 295, at 366 ("[E]conomic liberalization does not clearly enhance the support for democracy.").

296. See DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *THE GENESIS OF THE GATT* (2008) (discussing the purpose and evolution of the GATT and the WTO).

297. See WTO Official's 'Unavoidable Question': *Is the Group Fit for Purpose?*, INSIDE U.S. TRADE (June 5, 2020) ("The crisis heightens the need for an examination of the underlying principles and values of the WTO and addressing the degree to which the WTO is of sufficient continuing

past, economic powers must reform or even reinvent rules that will effectively manage twenty-first century trade. Tearing down that system is in no one's interest.

China has made clear that it does not see the WTO as the forum for the United States to resolve its concerns over China's economic system in general. China's trade Ambassador stated, "... the WTO rules are only a small cage which cannot fit into the behemoth like a country's economic system."²⁹⁸ The WTO should not be a casualty in the U.S.-China trade war.

Nobel Laureate Douglass North famously stated in 1991 that "[i]nstitutions are the humanly devised constraints that structure political, economic and social interaction."²⁹⁹ He explained that wealth maximizing individuals or countries would benefit from the predictability and security of effective institutions.³⁰⁰ The WTO has served that purpose for international trade by creating a transparent, predictable, and reliable system within which to conduct business. Yet the effectiveness of its rules and its dispute resolution system have been questioned and are in need of reform.³⁰¹

As we move forward into a new administration in the United States, we have reason to hope for progress in both U.S.-China relations and support for the WTO. President Biden has made clear that he sees a need to work in collaboration with allies to dialogue with and reign in China when necessary.³⁰² And although his economic agenda looks eerily similar to that of President Trump when it comes to an emphasis on American jobs,³⁰³ President Biden has long been an advocate of

relevance as it is or needs change."), <https://insidetrade.com/trade/wto-official%E2%80%99%E2%80%98unavoidable-question%E2%80%99-group-%E2%80%98fit-purpose%E2%80%99>.

298. See Brett Fornam, *China's WTO Ambassador: Reforms Cannot Solve Tensions with U.S.*, INSIDE US-CHINA TRADE (July 15, 2020) (quoting Chinese trade Ambassador Zhang Xiangchen in his recent statements on WTO reform and China), <https://insidetrade.com/daily-news/china's-wto-ambassador-reforms-cannot-solve-tensions-us>.

299. Douglass C. North, *Institutions*, 5 J. OF ECON. PERSP. 97 (1991).

300. *Id.* at 98.

301. See Jennifer A. Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL ON FOR. REL. (Jan. 14, 2020) (describing key reforms that should be made to the dispute settlement body of the WTO), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

302. See, e.g., Darrell M. West & Nicol Turner Lee, *What to Expect from Biden-Harris on Tech Policy, Platform Regulation, and China*, BROOKINGS INST. (Aug. 13, 2020) (presenting Candidate Biden's approach to the U.S. relationship with China, among other things), <https://www.brookings.edu/blog/techtank/2020/08/13/what-to-expect-from-biden-harris-on-tech-policy-platform-regulation-and-china/>.

303. Sean Sullivan & Jeff Stein, *Biden Releases U.S.-Centered Economic Plan, Challenging Trump's 'America First' Agenda*, WASH. POST. (July 9, 2020) (laying out then-Candidate Biden's economic plan, which emphasizes American jobs and using the power of the federal government to favor

international cooperation, including through agreements such as the Trans-Pacific Partnership and NATO.³⁰⁴ President Biden has stated that he sees a need to reform certain aspects of the WTO, such as the Government Procurement Agreement,³⁰⁵ but his defense of his worker-focused proposals as being compliant with WTO rules suggests a willingness to operate within the confines of the institution.³⁰⁶

China has shown its willingness to abide by the rules of the WTO—albeit more slowly than most countries had hoped—and to implement domestic legal changes when called upon to do so. This is a major win for rule of law and for the WTO. By operating outside those rules and bypassing the WTO, the United States has opened the door to China and other countries to do the same. When President Nixon went to China in 1972, he believed that it was better to work with China rather than to exclude them from the global community of nations.³⁰⁷ When President Clinton advocated on behalf of China’s admission to the WTO, he believed that including them within the global trading system was better than allowing them to craft their own rules of engagement.³⁰⁸ The current U.S. policy of isolating China from diplomatic and economic channels in order to assert leverage risks dismantling the tenuous bridge that past leaders built to connect East and West. Effective engagement and bridge-strengthening is the only way to confront the threats and build the economy of the future.

The success of the multilateral trading system will also depend upon the actions of China going forward. Under the Trump Administration, Xi Jinping has taken a more aggressive stance against democracy advocacy³⁰⁹

domestic firms), https://www.washingtonpost.com/politics/biden-releases-700-billion-plan-to-spur-american-economy/2020/07/09/f51b846c-c173-11ea-b178-bb7b05b94af1_story.html.

304. See Remarks as Prepared for Delivery by Vice President Joe Biden in New York City, New York (July 11, 2019) (expressing support for rebuilding the strength of international networks of nations to combat modern threats).

305. *Joe Biden Proposes a \$700 Billion-plus ‘Buy American’ Campaign*, CNBC (July 9, 2020) (explaining that Mr. Biden sees a need to renegotiate the Agreement to come more in alignment with worker rights), <https://www.cnbc.com/2020/07/09/biden-proposes-a-700-billion-plus-buy-american-campaign.html>.

306. See, e.g., Stephen Olson, *US Trade Policy Under Biden: Will it Differ from Trump?*, HINRICH FOUND. (Aug. 11, 2020) (“The perceived US ‘war’ on the WTO would cease under a Biden administration.”), <https://www.hinrichfoundation.com/research/article/us-china/us-trade-policy-biden/>.

307. See Hughes, *supra* note 273 (“There is no place on this small planet for a billion of its potentially most able people to live in angry isolation.”).

308. See Brainard, *supra* note 56 (discussing President Clinton’s advocacy for China).

309. Jim Sciutto, Gloria Borger & Jeremy Diamond, *Trump Promised Xi US Silence on Hong Kong Democracy Protests as Trade Talks Stalled*, CNN (Oct. 4, 2019) (referring to President Trump’s

and human rights.³¹⁰ President Biden,³¹¹ as well as the U.S. Congress,³¹² have spoken out about these topics and may take further actions to curtail them. In a Biden Administration, collective action against China is more likely to succeed than the unilateral actions taken by the Trump Administration. Cooperation in the resolution of these political matters may also encourage cooperation in the resolution of economic issues, including WTO reform.

This Article has attempted to convince its readers of the importance of maintaining and strengthening international institutions, in particular, the WTO. Rules-based international trade has brought lasting peace and widespread economic growth around the globe. To abandon that system in order to pursue a nationalist agenda will weaken the U.S. case against China and hasten the decoupling of the liberal world order that has sustained peace and economic growth for seventy-five years. Neither outcome is in the best interest of the United States or the world. One can only hope that a new administration in the United States will bring to bear an understanding of our history in order to pursue a peaceful and prosperous future.

willingness to abstain from criticizing China's actions to suppress democracy in Hong Kong), <https://www.cnn.com/2019/10/04/politics/trump-xi-hong-kong-protests/index.html>.

310. David Nakamura, *Once Reluctant to Hit China on Human Rights, Trump Moves to Use the Issue as a Cudgel Amid Growing Tensions*, WASH. POST (Aug. 9, 2020) (explaining that President Trump is criticizing China's human rights record in light of a failed trade deal), https://www.washingtonpost.com/politics/trump-china-human-rights/2020/08/08/b2d09172-d97b-11ea-930e-d88518c57dcc_story.html.

311. Trevor Hunnicut, *Biden Says New China National Security Law a 'Death Blow,' Weighs Sanctions*, REUTERS (July 1, 2020), <https://www.reuters.com/article/uk-hongkong-protests-usa-election/biden-says-new-china-national-security-law-a-death-blow-weighs-sanctions-idUKKBN24270E>.

312. Kevin Liptak, *Trump Signs Uyghur Human Rights Bill on Same Day Bolton Alleges He Told Xi to Proceed with Detention Camps*, CNN (June 17, 2020) (referring to a bill passed by Congress to investigate human rights violations against the Uighur population in China), <https://www.cnn.com/2020/06/17/politics/trump-uyghur-human-rights-bolton-china/index.html>.