

CAUSES AND CASUALTIES OF HISTORY’S LARGEST TRADE WAR

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I. INTRODUCTION

“Trade with China has killed over 29% of US manufacturing jobs in the US . . . China is robbing us blind!”¹

— Donald Trump, *Tweet on January 7, 2013*

“Our population is four times bigger than the U.S. We have 1.3 billion people, right? You have 300 million people. So China's economy should be four times higher than the U.S. economy. . . . This is difficult [for the U.S.] to accept.”²

— Da Wei, *Assistant President, University of International Relations, Beijing*

“It was the rise of Athens and the fear that this instilled in Sparta that made war inevitable.”³

— Thucydides

Since January of 2018, the US has implemented tariffs on hundreds of billions of dollars’ worth of Chinese goods, and China has reciprocated in like measure, creating the world’s largest trade war in history.⁴ The US and China are members of the World Trade Organization (WTO), a multilateral, international organization that expressly condemns the actions taken in this trade war, and alternatively facilitates a dispute settlement process.⁵ Despite both nations’ WTO membership—and having both consulted within the WTO Dispute Settlement Body (DSB) dozens of times in the past—they have recently decided to forego the DSB process and wage the trade war.⁶ It is difficult to see what the US or China has gained from their actions, however significant economic losses have been piling up on both

¹ Donald Trump (@RealDonaldTrump), TWITTER (Jan. 7, 2013, 2:03 PM), <https://twitter.com/realDonaldTrump/status/288390473868013568>.

² *Frontline: Trump’s Trade War* (PBS television broadcast May 7, 2019), <https://www.pbs.org/wgbh/frontline/film/trumps-trade-war/transcript/>.

³ David Frum, *Trump’s Trade War Was Futile*, THE ATLANTIC (Dec. 24, 2018) (quoting Thucydides), <https://www.theatlantic.com/ideas/archive/2019/12/trump-got-tough-on-china-it-didnt-work/603637/>.

⁴ See Kevin Lamarque, *Timeline: Key dates in the U.S.-China trade war*, REUTERS (Sept. 5, 2019), <https://www.reuters.com/article/us-usa-trade-china-timeline/timeline-key-dates-in-the-us-china-trade-war-idUSKCN1VQ24Y>; *Frontline: Trump’s Trade War*, *supra* note 2.

⁵ WORLD TRADE ORG., A HANDBOOK ON READING WTO GOODS AND SERVICES SCHEDULES 5, https://www.wto.org/english/res_e/booksp_e/handbook_sched_e.pdf; *Dispute Settlement Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (last visited Feb. 24, 2020).

⁶ See *Disputes by Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Feb. 24, 2020); Lamarque, *supra* note 4.

sides.⁷ In addition to creating significant international financial loss, the actions taken in this trade war have the potential to redefine international relations from mutually cooperative, multilateral institutions to bilateral, grudging acknowledgements between nations, reminiscent of the Cold War.⁸ The end result may be a world that looks “different in key respects—it will be less multilateral, predictable, justiciable, and enforceable.”⁹

With so much loss and significant worldwide norms and institutions on the line, why did the trade war happen, and what can be expected from its outcomes? Part II of this Note will discuss the history of the WTO, how it developed as a response to protectionism, and its current purpose in facilitating multilateral international economic exchange as well as serving as an international dispute settlement body. Part III will compare the history of US WTO involvement in contrast with China's difficult international history and eventual accession into the WTO. Part IV will discuss the purpose of the DSB and how China could have been held accountable to US allegations through that forum. Part V will address current US allegations against China and how these have been used as a justification for foregoing WTO standards and multilateralism and initiating the trade war. Part VI will address how the war might end and the dangerous possibilities that may result.

By discussing the above topics, this Note will demonstrate some of the reasons why the US and China have ignored the WTO and waged this war as well as how their decisions have ushered in an era of uncertainty and an inconspicuous beginning to the slow death of the current “multilateral, predictable, justiciable, and enforceable” world order.¹⁰

II. HISTORY OF THE WORLD TRADE ORGANIZATION

The United States and China are members of the World Trade Organization.¹¹ The United States has been deeply involved in international trade organizations

⁷ Kristalina Georgieva, *Decelerating Growth Calls for Accelerating Action*, INT'L MONETARY FUND (Oct. 8, 2019), <https://www.imf.org/en/News/Articles/2019/10/03/sp100819-AMs2019-Curtain-Raiser>.

⁸ *Id.*; *Frontline: Trump's Trade War*, *supra* note 2 (expressing Da Wei's fears that this war may result in a chance to see a new type of cold war, different from the one the US had with the USSR).

⁹ Sergio Puig, *The United States-Mexico-Canada Agreement: A Glimpse into the Geoeconomic World Order*, 113 AJIL UNBOUND 56, 56 (2019), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/055695FD26B96374402A0FFF52915F52/S2398772319000060a.pdf/united_statesmexicocanada_agreement_a_glimpse_into_the_geoeconomic_world_order.pdf.

¹⁰ *Id.*

¹¹ *Members and Observers*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 6, 2020).

since the creation of the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT) in 1947, and before that with the signing of the Atlantic charter in 1941.¹² China was also an original party to the GATT, but due to issues¹³ faced by China in the international community throughout the twentieth century, it only officially acceded to the WTO far more recently, in 2001.¹⁴ An explanation of protectionism, a history of the development of the WTO, and the implementation of "Most Favored Nation Status"—one of the primary incentives for WTO membership—is necessary in order to understand the purpose of the WTO, the agreements made by nations who comprise its membership, and the great international economic benefit afforded by this multilateral organization.

A. A Dichotomy: The Benefits of Free Trade vs. the Reality of Protectionism

Since Adam Smith's ground-breaking revelations, first published in *Wealth of Nations* in 1776, economists have largely agreed that international free trade and the elimination of protectionist measures benefit every nation involved.¹⁵ Smith conceptualized the benefit of international trade by presenting a relatable example: "It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. . . . What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom."¹⁶ This simple example, of a family making a purchase instead of producing a product, shows that trade benefits both the producer of the product and its buyer—because the buyer saves resources by avoiding costly production while the producer gains resources from the buyer's purchase. That revolutionary concept in 1776 is now almost universally accepted among economists.¹⁷ For example, it has been said that "[e]conomists are famous for disagreeing with one another, and indeed, seminars in economics departments are known for their vociferous debate. But economists reach near unanimity on some topics, including [free] international trade."¹⁸ Most economists agree on the benefits of free trade, however trade barriers—also known

¹² *Atlantic Charter*, THE AVALON PROJECT, <https://avalon.law.yale.edu/wwii/atlantic.asp> (last visited Feb. 24, 2020).

¹³ See *infra* Part III; See generally Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525, 536-40 (2014).

¹⁴ Press Release, World Trade Organization, WTO Ministerial Conference approves China's accession (Nov. 10, 2001), https://www.wto.org/english/news_e/pres01_e/pr252_e.htm (last visited Feb. 24, 2020).

¹⁵ See N. Gregory Mankiw, *Economists Actually Agree on This: The Wisdom of Free Trade*, N.Y. TIMES (Apr. 24, 2015), <https://www.nytimes.com/2015/04/26/upshot/economists-actually-agree-on-this-point-the-wisdom-of-free-trade.html>.

¹⁶ *Adam Smith Quotes*, ADAM SMITH INST., <https://www.adamsmith.org/adam-smith-quotes> (last visited Feb. 24, 2020).

¹⁷ Mankiw, *supra* note 15.

¹⁸ *Id.*

as protectionist measures—are often utilized in attempts to remedy domestic economic issues.¹⁹

Protectionism is a “policy of protecting domestic industries against foreign competition by means of tariffs, subsidies, import quotas, or other restrictions or handicaps placed on the imports of foreign competitors.”²⁰ Tariffs, the most common form of protectionism, are taxes on foreign goods, while subsidies are grants or loans given to domestic producers to offer them an advantage over foreign producers, and import quotas are limitations on the number of products that may be imported into a country.²¹ An example of a protectionist measure in the US today is the US sugar program, with the purpose of protecting domestic US sugar producers from foreign competition.²² According to the USDA, the “U.S. sugar program uses [subsidies], domestic marketing allotments, and [tariff-based import quotas] to influence the amount of sugar available to the U.S. market.”²³ While the US sugar program is intended to support US “sugar prices above comparable levels in the world market,”²⁴ most economists argue that this intended support is detrimental, and tariff-free access to the US market would substantially reduce the cost of sugar for US consumers.²⁵

The US sugar program is just one example of a number of harmful protectionist measures currently implemented more often in the US than in any other G20 nation.²⁶ In a survey of implemented protectionist measures by G20 countries, the US topped the list, with 1,198 total measures implemented from 2008 to 2017—nearly double the amount of protectionist measures implemented by India, the

¹⁹ See generally Simon J. Evenett & Johannes Fritz, *Will Trump Awe Rules?*, *THE 21ST GLOBAL TRADE ALERT REPORT*, 31 (July 3, 2017), <https://www.globaltradealert.org/reports/42>.

²⁰ *Protectionism*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/protectionism> (last visited Feb. 24, 2020).

²¹ *Id.*

²² *Sugar and Sweeteners: Policy*, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/topics/crops/sugar-sweeteners/policy.aspx> (last visited Feb. 24, 2020).

²³ *Id.*

²⁴ *Id.*

²⁵ See, e.g., Wilson Sinclair & Amanda M. Countryman, *Not So Sweet: Economic Implications of Restricting U.S. Sugar Imports from Mexico*, 51 *J. AGRIC. & APPLIED ECON.* 368 (2019) (article for tariff-free imports) (“[L]iberalizing the market would decrease U.S. sugar prices, translating to an average annual decrease in producer surplus of approximately \$660 million and increase in consumer surplus of \$1.67 billion.”).

²⁶ Evenett & Fritz, *supra* note 19, tbl. 6.1; Michael Crowley, *What is the G20?*, *N.Y. TIMES* (June 27, 2019), <https://www.nytimes.com/2019/06/27/world/asia/what-is-the-g20.html> (noting the countries included in G20: the United States, Argentina, Australia, Brazil, Britain, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, and the European Union).

second highest nation on that list.²⁷ This is significant because when the G20 leaders met in 2008, they agreed to “[r]eject protectionism, which exacerbates rather than mitigates financial and economic challenges.”²⁸

As most economists agree on the benefits of free trade, it would follow that the best trade scheme is one of free trade, devoid of barriers. However, at least at the time in which this Note is written, protectionist measures continue to hold a place in economic and foreign policies promoted by politicians and their constituents.²⁹ An economics professor argued that protectionism occurs because voters underestimate market mechanics, underestimate the benefit of conserving labor, distrust foreigners, and are pessimistic about the future of the economy.³⁰ Members of the public are unaware of the benefits of free trade over protectionism, and they instead prefer the short-term benefits of protectionist measures—such as subjecting imports to tariffs and receiving subsidies—in the hope of protecting the jobs of domestic workers and maintaining the economic status quo in the face of future uncertainty.³¹

President Trump’s presidential campaign largely responded to this public desire for protectionism with promises of a southern border wall, withdrawal from or reform of the North American Free Trade Agreement, and taking action against China, among other things.³² In President Trump’s inaugural address, he indicated that protectionist measures would be his primary priority:

From this moment on, it's going to be America First. Every decision on trade, on taxes, on immigration, on foreign affairs, will be made to benefit American workers and American families. We must protect our borders from the ravages of other countries making our products, stealing our companies, and

²⁷ Evenett & Fritz, *supra* note 19, tbl. 6.1. (noting the average for all nations in the survey was only 349 total protectionist measures implemented per nation).

²⁸ News Release, *Fact Sheet: Summit on Financial Markets and the World Economy*, OFFICE OF THE PRESS SEC’Y (Nov. 15, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081115-4.html>.

²⁹ Mankiw, *supra* note 15.

³⁰ BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* 51 (Princeton Univ. Press, 7th ed. 2007) (“The public always leans decidedly in favor of protection. Support for free trade bottomed out in 1977, when only 18% sympathized with eliminating tariffs, and 66% thought they were necessary. But public opinion remains protectionist in absolute terms. In 2002, sympathy for ending tariffs reached a historic high of 38%—versus 50% who took the opposite view. Furthermore, 85% of the respondents that year held that “protecting the jobs of American workers” should be a “very important” goal of foreign policy—an all-time high!”).

³¹ *Id.*

³² Scott Horsley, *Progress Report: President Trump’s Campaign Promises, 2 Years Later*, NPR (Jan. 20, 2019), <https://www.npr.org/2019/01/20/686531523/progress-report-president-trumps-campaign-promises-2-years-later#trade>.

destroying our jobs. *Protection will lead to great prosperity and strength.* . . . We will follow two simple rules: buy American and hire American.³³

Here, President Trump stated confidently that future economic protectionism from the goods and services of other nations will lead to prosperity and strength; however, this address was offered following the enactment of 111 protectionist measures in the previous year alone.³⁴ Economists agree that protectionism simply does not work, while liberalized international trade affords additional benefits to all nations involved.³⁵

While some government officials have catered to or agreed with the misunderstanding of protectionism, others have sought improved domestic and international economic conditions by binding their nations to free trade agreements and participating in international organizations dedicated to reducing trade restrictions.³⁶ Beginning only as a wishful idea, written into the Atlantic Charter in 1941, several nations joined together to create an international organization when they signed the General Agreement on Tariffs and Trade.³⁷

B. The First International Trade Organization, the GATT, and the Most Favored Nation Principle

In the middle of World War II, President Roosevelt and Prime Minister Churchill signed the Atlantic Charter, a document which established “certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.”³⁸ While the Charter was referenced to create an international declaration of human rights,³⁹ it also contained

³³ Jeremy Burke, *'From this moment on, it's going to be America First': Here's President Donald Trump's full inauguration speech*, BUS. INSIDER (Jan. 20, 2017), <https://www.businessinsider.com/trump-inauguration-speech-transcript-full-text-video-2017-1> (emphasis added).

³⁴ *Id.*; Evenett & Fritz, *supra* note 19, fig. 6.2.

³⁵ Mankiw, *supra* note 15.

³⁶ *See, e.g., The WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Apr. 6, 2020).

³⁷ *General Agreement on Tariffs and Trade*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade> (last visited Feb. 24, 2020).

³⁸ *Atlantic Charter*, *supra* note 12.

³⁹ Edward A. Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism*, 26 WILLAMETTE L. REV. 113, 123 (1989); *Atlantic Charter*, *supra* note 12, ¶¶ 4-5.

provisions that expressly relate to economic advancement and trade.⁴⁰ One of these hopes was to provide all nations with access, “on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.”⁴¹

When World War II ended, representatives from several nations began negotiations to fulfill the economic goals of the Atlantic Charter, seeking to establish a United Nations International Trade Organization, tasked with reducing protectionist trade restrictions throughout the world.⁴² This organization was never fully realized, but the organizers did arrive at a general, signed agreement.⁴³ The General Agreement on Tariffs and Trade, or GATT, was the result of these meetings, and it was signed by twenty-three nations in 1947.⁴⁴ The GATT took effect in 1948 and went through several successive evaluations and changes over the next several decades.⁴⁵

The primary focus of the GATT was to eliminate discrimination—a protectionist measure that favors one foreign nation over another by allowing more imports from one nation than another or enforcing greater tariffs on one nation more than another.⁴⁶ This was accomplished through the acceptance of the Most Favored Nation (MFN) principle as a requirement for GATT membership.⁴⁷ The concept of Most Favored Nation was included in the first article in the General Agreement, and stated that “any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”⁴⁸ In other words, GATT article I required that any privilege granted from one GATT member to another would have to be granted immediately and unconditionally to all other GATT members.⁴⁹ For example, if the United States decided to schedule a ten percent import tariff on steel, all other nations would be held to that same standard, and would pay nothing higher than a ten percent tariff on their own steel exports into the US. This principle afforded all GATT members an equal status in the organization, and any bilateral agreement would immediately become a multilateral agreement, to be applied by any other GATT member. The MFN principle became

⁴⁰ *Atlantic Charter*, *supra* note 12.

⁴¹ *Id.*

⁴² *General Agreement on Tariffs and Trade*, *supra* note 37.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Roy Santana, *Clash of the GATT negotiators*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gatt_e/clash_gatt_negotiators_e.htm (last visited Feb. 24, 2020).

⁴⁸ *See generally* General Agreement on Tariffs and Trade art. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

⁴⁹ Santana, *supra* note 47.

a significant incentive for other nations to join the organization.⁵⁰ Some changes occurred during the lifetime of the GATT as new nations continued to sign the GATT agreements.⁵¹

Significant barriers to free trade were reduced during the GATT years, including an overall reduction of tariffs throughout the world, which resulted in an average eight percent yearly world trade growth throughout that time.⁵² Worldwide average tariffs on industrial goods were reduced from forty percent in 1947 to less than five percent in 1993.⁵³ Several rounds of changes to the GATT over the decades of its lifetime lead to the eventual creation of the WTO,⁵⁴ and by the time the GATT was replaced, it had gained 125 signatories and its provisions governed ninety percent of the world trade.⁵⁵

50. *Id.*

51. *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. 24, 2020).

52. *Id.* at “Did GATT Succeed?”

53. *General Agreement on Tariffs and Trade*, *supra* note 37.

54. *GATT bilateral negotiating material by Round*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm (last visited Feb. 27, 2020). Members of the GATT gathered for multilateral negotiations in formal meetings, or rounds, in various locations and at various times after the creation of the organization in 1947. *Id.* Eight Separate rounds occurred throughout the years, including Geneva (1947), Annecy (1949), Torquay (1950-51), Geneva (1956), Geneva (1960-61), the Kennedy Round (1964-67), the Tokyo Round (1973-79), and the Uruguay Round (1986-94). During the Uruguay Round, GATT members met to discuss significant changes, and the result was an official transition into the World Trade Organization. *Id.* During the Uruguay round, the GATT underwent its most substantial revision to date, and the largest trade negotiation in world history was conducted. *The Uruguay Round*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Feb. 27, 2020). Where the provisions of the GATT previously only applied to material goods, the new provisions added in the Uruguay round were extended to services and information. *Id.* In addition to extending the system into new areas of trade, all other articles of the GATT were subject to review during this round. *Id.* The Uruguay round was originally scheduled to be completed in 1990, four years after it began; however significant disagreements between GATT members lead to three and a half more years of delays. *Id.* The other discussions during the additional year's debates lead to the creation of the World Trade Organization. *Id.* In 1994, the Uruguay round was formally concluded, and the WTO was created when representatives from 123 member-nations met in Marrakesh, Morocco, and signed the Marrakesh Agreement. *The Uruguay Round*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Feb. 27, 2020).

55. *General Agreement on Tariffs and Trade*, *supra* note 37.

C. The World Trade Organization

Signatories to the General Agreement on Tariffs and Trade successfully created the World Trade Organization during the last major GATT negotiation round in 1994.⁵⁶ The WTO is now the international organization which facilitates trade between the 164 nations that comprise its membership, with its policies now affecting ninety-eight percent of world trade.⁵⁷ The WTO continues to be a relevant forum for creating and negotiating multilateral trade agreements.⁵⁸ It is also a system utilized to resolve disputes and disagreements between members and a liaison to other international organizations like the World Bank and International Monetary Fund.⁵⁹

III. THE HISTORY OF THE UNITED STATES AND CHINA'S INTERACTIONS WITH THE WORLD TRADE ORGANIZATION

As mentioned in the previous section, the United States has been involved in international trade organization from the earliest discussions between the United States and Great Britain in World War I.⁶⁰ China, despite being an original party to the 1947 GATT alongside the United States, has been marginalized from collaborations with other nations and world organizations throughout the twentieth century.⁶¹ Consistent with this difficulty, China was unable to participate in the GATT organization and later experienced the most difficult WTO accession of any WTO member.⁶²

A. China's Difficult History in International Negotiations and Trade

China has been the recipient of unequal treatment and abuses throughout most of the twentieth century. For example, during the negotiations at the end of both world wars, territories seized from China were given to Japan and Russia instead of being returned to China.⁶³ Disagreements in treaty negotiations, such as these

⁵⁶ *Marrakesh Agreement Establishing the World Trade Organization*, OFFICE TRADE AGREEMENTS NEGOT. & COMPLIANCE, https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/WTO_Marrakesh_guide.asp (last visited Feb. 24, 2020).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See supra* Part II.

⁶¹ Webster, *supra* note 13.

⁶² *Id.* at 539 n.60; Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 323 (2004).

⁶³ Webster, *supra* note 13.

territorial issues, led to China's refusal to sign the Treaty of Versailles after World War I and Russia's refusal to meet with China for negotiations at the end of World War II.⁶⁴ Russia's decision to exclude China from primary post-war negotiations and other conditions meant China was sidelined during the formation of the United Nations.⁶⁵ China was later unable to join the United Nations for over twenty years, until 1971, when the nation finally succeeded in removing Chinese Taipei from the organization.⁶⁶ China was one of the original twenty-three signatories of the GATT in 1948, but after China's 1949 revolution, Chinese Taipei formally removed China from the organization.⁶⁷ Beijing never recognized this decision, yet the nation was effectively removed and thus was required to begin requesting readmission into the GATT in 1986.⁶⁸ Decades after GATT removal, and after an almost fifteen-year process, China was admitted into the WTO under conditions "described as the most difficult and exacting of any WTO accession."⁶⁹ China joined the WTO under difficult circumstances, and before and since its accession, the nation has been required to enact radical changes to satisfy WTO regulations.⁷⁰

B. The Most Difficult and Exacting Accession Process in WTO History

China eventually joined the WTO as a socialist market economy system with a goal to continue shifting into a full market economy during its time as a WTO member.⁷¹ According to a WTO press release at the time of China's accession, China committed to provide non-discriminatory treatment to all WTO members; eliminate dual pricing practices for products produced for sale in in country versus exports; not protect its domestic industries using price controls; implement WTO agreements and rules by altering its domestic laws to accommodate WTO rules; allow all enterprises the right to import and export goods and trade them throughout China; and not maintain or introduce export subsidies on agricultural products.⁷² While these seem like reasonable requirements for any new WTO member, China actually made additional shocking concessions, both in the sheer number of

⁶⁴ *Id.* at 537-38.

⁶⁵ *Id.* at 538.

⁶⁶ *Id.* at 538-39.

⁶⁷ Press Release, World Trade Organization, *WTO successfully concludes negotiations on China's entry*, n. 1 (Sept. 17, 2001), https://www.wto.org/english/news_e/pres01_e/pr243_e.htm (last visited Feb. 24, 2020).

⁶⁸ *Id.*

⁶⁹ Webster, *supra* note 13, at 539 (citing PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 113-14 (2005)).

⁷⁰ Halverson, *supra* note 62, at 322.

⁷¹ *Accession of The People's Republic of China*, WTO Doc. WT/L/432, Part I, § 15(d) (Nov. 23, 2001).

⁷² Press Release, World Trade Organization, *supra* note 67.

concessions undertaken and the degree to which these concessions would effect China's future governing structure and economy.⁷³

Professor Karen Halverson wrote that “[n]o country has endured as lengthy an accession process to the GATT/WTO as China, nor has any country acceding to the WTO been asked to take on as many concessions as the price for admission.”⁷⁴ China's accession protocol, which outlines the unique agreements China undertook in exchange for admission into the WTO, contains more severe obligations than those imposed on any other WTO member.⁷⁵ In fact, among the twenty-eight other nations admitted to the WTO (with thirteen admitted before China and fifteen after), China's accession protocol document stands out dramatically, with a weighty 111 pages of binding rules, agreements, and schedules, compared to only three or four pages of agreements for twenty-seven other members (and seven pages, in the case of Chinese Taipei).⁷⁶

Halverson documented a list of some of the most dramatic concessions made by China when joining the WTO.⁷⁷ One such severe concession was to reduce tariffs on industrial goods by an average rate of 8.9% and sustain them against future increase.⁷⁸ This number was extremely low compared to other large, developing countries at that time.⁷⁹ For example, in India, the average tariff rate was 32.4%, and in Brazil, it was twenty-seven percent.⁸⁰ However, in April of 2018 President Trump argued 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[?] We were badly represented. The WTO is unfair to US.”⁸¹ Being limited to 8.9% tariffs, while other countries in China's situation are allowed to impose around thirty percent tariffs, is certainly not a perk or advantage. China also agreed to liberalize of a number of previously limited service sectors; to eliminate all but a few quotas on agricultural goods; and to subject its domestic subsidies to tariffs by foreign nations.⁸² Furthermore, China was required to maintain a publicly-available journal of any and all WTO-related laws imposed, and it agreed to another limit on its sovereignty by conceding to annual reviews of its WTO

⁷³ Halverson, *supra* note 62, at 323, 325.

⁷⁴ *Id.*

⁷⁵ *Id.* at 326.

⁷⁶ *Protocols of accession for new members since 1995, including commitments in goods and services*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm (last visited Feb. 24, 2020).

⁷⁷ Halverson, *supra* note 62, at 326-31.

⁷⁸ *Id.* at 327.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Donald Trump (@realDonaldTrump), TWITTER (Apr. 6, 2018, 7:32 AM), <https://twitter.com/realdonaldtrump/status/982264844136017921> (emphasis added).

⁸² Halverson, *supra* note 62, at 327-28.

compliance for the eight years following its concessions.⁸³ China also agreed to retain “non-market economy status” during anti-dumping considerations, which allowed other nations to artificially construct the value of an offending product in their home market when retaliating against China for allegations of product dumping.⁸⁴ Finally, China agreed to be the only WTO nation subjected to a “Transitional Product-Specific Safeguard,” or TPSS rule, which bypassed a WTO “Safeguard” limitation, thereby allowing all other members to impose immediate quotas or tariffs upon a minimal showing of injury from China.⁸⁵ This rule was set for the first twelve years of China’s membership, and it also limited China’s retaliation for other nation’s impositions of safeguards.⁸⁶

Professor Halverson argues that all of these significant requirements caused three significant impacts on China.⁸⁷ First, they required China to make broad and deep commitments for market access; second, they bound China to Western norms of transparency; and third, “with respect to the ‘nonmarket economy’ treatment and the TPSS, [the WTO singled] out China for less than most-favored nation (MFN) treatment.”⁸⁸ The first and second requirements, which both required China to allow market access and meet Western norms of transparency, may have been beneficial. But the third requirement, which made China part of the WTO with less than MFN treatment and thereby placing China in a state of less-than multilateral participation, goes against the founding ideals and purpose of the WTO.⁸⁹ Indeed, China’s position upon joining the WTO is reminiscent of George Orwell’s *Animal Farm*, where “[a]ll animals are equal, but some animals are more equal than others.”⁹⁰

Many of the conditions contained in China’s accession protocol were imposed to counter a general fear that China’s hybrid economy, “in its . . . state of reform, still created the potential for a certain level of trade-distorting subsidization.”⁹¹ That fear was certainly substantial and widespread, as memorialized in China’s lengthy accession protocol—full of restrictions and expectations imposed by other

⁸³ *Id.* at 328.

⁸⁴ *Id.* at 329-30.

⁸⁵ *Id.* at 330-31.

⁸⁶ *Id.* at 331.

⁸⁷ Halverson, *supra* note 62, at 332.

⁸⁸ *Id.*

⁸⁹ See *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 28, 2020).

⁹⁰ GEORGE ORWELL, *ANIMAL FARM* 75 (Global Gray, 2019) (1945).

⁹¹ OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, *2018 Report to Congress On China’s WTO Compliance* 7 (2019), <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf> [hereinafter *2018 Report to Congress on China’s WTO Compliance*].

WTO members.⁹² President Clinton also listed some of these common concerns in a speech at Johns Hopkins University in March of 2000.⁹³ He said that critics of the China WTO agreement don't question the benefits but they do argue that "China is a growing threat to Taiwan and its neighbors—we shouldn't strengthen it. Or China violates labor rights and human rights—we shouldn't reward it. Or China is a dangerous proliferator—we shouldn't empower it. These concerns are valid."⁹⁴ However, President Clinton went on to say that despite these valid concerns, "[t]he question is not whether we approve or disapprove of China's practices. The question is what's the smartest thing to do?"⁹⁵ He then explained that the smart thing to do was to allow China to join the WTO, because the outside pressure on the government and the inside change in the Chinese people would transform China's economy to a more liberal state.⁹⁶ He said, "By joining the WTO, China is not simply agreeing to import more of our products. It is agreeing to import one of democracy's most cherished values, economic freedom. The more China liberalizes its economy, the more fully it will liberate the potential of its people."⁹⁷

WTO leadership felt similar positive expectations, and these positive expectations finally outweighed international concerns.⁹⁸ Thus, less than a year after President Clinton's speech—and after nearly twenty years of China's attempts to join and fifty-two years since China's unrecognized removal from the GATT—the nation was finally allowed to accede to the WTO in 2001.⁹⁹ At the time of China's accession, Mike Moore, the Director-General of the WTO, optimistically stated:

China, one of the fastest growing economies in the world, has made tremendous progress in the last decade in reducing poverty thanks to an economic system increasingly open to trade and foreign investment. Now this economy will be subjected to the rules-based system of the WTO, something which is bound to enhance global economic cooperation.¹⁰⁰

⁹² See generally *Accession of The People's Republic of China*, *supra* note 71; Halverson, *supra* note 62, at 326-31.

⁹³ *Clinton's Words on China: Trade Is the Smart Thing*, N.Y. TIMES (Mar. 9, 2000), <https://www.nytimes.com/2000/03/09/world/clinton-s-words-on-china-trade-is-the-smart-thing.html>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Press Release, World Trade Organization, *supra* note 14.

⁹⁹ Halverson, *supra* note 62, at 323; Press Release, World Trade Organization, *supra* note 14.

¹⁰⁰ Press Release, World Trade Organization, *supra* note 14.

Subsequent years have shown that President Clinton and Director-General Mike Moore's hopeful predictions were only partially correct, and since China's accession, the country has continued to be the subject of international frustration and a participant in many WTO disputes.¹⁰¹

IV. THE WTO DISPUTE SETTLEMENT PROCESS: A USEFUL BUT FOREGONE ALTERNATIVE TO THE TRADE WAR

One of the significant benefits to WTO membership is the ability for members to resolve disagreements through a formal process in the WTO Dispute Settlement Body.¹⁰² Forty-four DSB disputes have been instigated against China—twenty-three of which were initiated by the United States; while 167 disputes have been brought against the United States—sixteen of which were instigated by China.¹⁰³ China's compliance with WTO regulations and its protocol of accession have been the subject of these many WTO dispute settlement hearings.¹⁰⁴

While China is criticized for actions leading to WTO disputes, one plausible counterargument suggests that such disputes involving China are merely the result of the country's attempts to navigate an international organization that is fundamentally different than, and even opposed to, China's shifting economic structure.¹⁰⁵ For example, it should be a surprise to no one that perhaps the only WTO nation effectively granted less-than MFN status would try, with every plausible legal argument, to circumvent the list of requirements binding it to the WTO in a less-than MFN manner.¹⁰⁶ Maintaining a view that China is exceptional in explicitly violating WTO provisions and denying the results of Dispute Settlement Decisions also discounts China's attempts to assert its interests and maneuver within WTO constraints as do all other rational state actors.¹⁰⁷ In fact, China's record with international organizations reflects a similar interaction as that of the United States, for "like the United States, China exhibits differential levels of compliance, depending upon the particular regime under examination. The main difference is that the United States largely created these institutions and shaped their rules, whereas China, in many instances, has only recently joined them."¹⁰⁸ So how does a rational international actor, placed in a situation as *least equal* in the WTO, navigate the many provisions binding it to the WTO, while still trying to maximize

¹⁰¹ See *Disputes by Member*, *supra* note 6.

¹⁰² See generally *Dispute Settlement Body*, *supra* note 5.

¹⁰³ *Disputes by Member*, *supra* note 6.

¹⁰⁴ See *id.*

¹⁰⁵ See Webster, *supra* note 13, at 527.

¹⁰⁶ See Halverson, *supra* note 62, at 332.

¹⁰⁷ Webster, *supra* note 13, at 527.

¹⁰⁸ *Id.* at 528-29.

its international interests?¹⁰⁹ Facing this struggle has led China to WTO disputes and continued US criticisms,¹¹⁰ however, China is making progress and responding positively to international requirements and criticism.¹¹¹

A. China's Attempt at Asserting Market Economy Status

The United States argues that China maintains a non-market economic system, citing as proof language in the Chinese Constitution; the country's goals of strengthening state leadership; and the continued use of state-run enterprises.¹¹² However, these claims do not account for significant developments that have moved China out of a socialist market economy and into one that may be considered a market system.¹¹³ Nicholas R. Lardy, a Senior Fellow at the Peterson Institute for International Economics, has been studying China's economic changes for the past thirty years. Despite conceding that the Chinese state still exercises market control in China, Mr. Lardy stated:

It's more accurate to think of it as a market economy. The role of the state has diminished dramatically from where it was 20 to 30 years ago. When you look at the number of people employed by the state, it's less than France as a percentage of the labor force. China's not a pure market economy, but it's very hard to find pure market economies these days.¹¹⁴

So despite some continued state control, China is arguably a market economy, and is closer to a market system than a state-run economy.¹¹⁵ When China joined the WTO, its accession document reported that “[ninety-five] percent of the commodities and services in China have already been determined by the market forces. State pricing remains only for a certain percentage of those crucial products to maintain the ability of the government to curb the overall price level in emergent cases.”¹¹⁶ This statement asserts that China is exercising a small portion of control

¹⁰⁹ ORWELL, *supra* note 90.

¹¹⁰ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 15-18.

¹¹¹ See *Writing China: Nicholas Lardy, 'Markets Over Mao,'* WALL ST. J. (Sept. 2, 2014), <https://blogs.wsj.com/chinarealtime/2014/09/02/writing-china-nick-lardy-combats-conventional-wisdom-in-markets-over-mao/> [hereinafter *Writing China: Nicholas Lardy*].

¹¹² *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 12.

¹¹³ *Writing China: Nicholas Lardy*, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Accession of The People's Republic of China*, *supra* note 71.

of the economy in emergency situations, and the other ninety-five percent is market driven.¹¹⁷

Despite the arguments for market economy status in its WTO accession document and from economic experts watching China's economic changes, the nation has been unable to obtain market economy status in the WTO.¹¹⁸ In 2016, a fifteen-year provision from China's accession document expired—which previously limited the nation to non-market status and allowed other nations significant power against China in anti-dumping cases.¹¹⁹ China believed that when this provision expired, it would be able to claim market economy status and be granted more favorable treatment by other WTO nations.¹²⁰ As China continued to receive non-market treatment in anti-dumping cases, the nation decided to file a claim with the WTO to officially settle its market status for WTO purposes.¹²¹ After a number of proceedings, China decided to withdraw the 2016 claim to evaluate its market status in June of 2019.¹²² An official involved in the case said “China was on course to lose the bulk of the case.”¹²³ The official further stated that China “was going to win something, but it was overshadowed by the huge defeat that [China] had on the main claim.”¹²⁴ So despite China's claims that ninety-five percent of its markets are unregulated and many changes have been made since then, China is still considered and treated as a non-market economy by the WTO.¹²⁵

Aside from being seen as a non-market economy while it attempted to assert market economy status, there have been many other complaints by other nations against China.¹²⁶ Several disputes have been raised and a few settled within the WTO.¹²⁷ The Trump Administration, however, argued that five main issues

¹¹⁷ *Id.* As a side note, it is interesting that the “emergency cases” argument is at play here, which sounds very similar to the national security exemption argued by the Trump administration when seeking to justify the imposition of the tariffs which initiated the trade war. China has made great strides in transitioning into a market economy, and if this recent trend is any indication, it will likely continue in that direction.

¹¹⁸ Tom Miles, *China pulls WTO suit over claim to be a market economy*, REUTERS (Raissa Kasolowsky & Hugh Lawson eds., June 17, 2019), <https://www.reuters.com/article/us-usa-china-wto-eu/china-pulls-wto-suit-over-claim-to-be-a-market-economy-idUSKCN1TH10A>.

¹¹⁹ Jeffrey M. Telep & Richard C. Lutz, *China's Long Road to Market Economy Status*, 49(2) GEO. J. OF INT'L L. 693, 693, 699 (2018).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Miles, *supra* note 118.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Accession of The People's Republic of China*, *supra* note 71, at 82.

¹²⁶ *See Disputes by member*, *supra* note 6.

¹²⁷ *See id.*

remained unresolved,¹²⁸ and that the best way to resolve these was not through the WTO, but through the waging of a trade war.¹²⁹

V. THE UNITED STATES' JUSTIFICATIONS FOR THE TRADE WAR

China's major economic growth and its hybrid economy structure have long instilled fear in the American public and have inspired robust speeches by representatives about "getting tough" on the world's second-largest economy.¹³⁰ During the 2012 elections, President Obama and Senator Romney both made promises to this effect, with President Obama promising litigation against China for excessive use of government subsidies and Senator Romney stating that he would label China as a currency manipulator in his first day in office.¹³¹ President Trump had also taken issue with China prior to his presidency, voicing his concerns publicly as early as during the presidential campaign in 2000.¹³² He has also been tweeting about his concerns with China ever since 2011, and after nearly two decades of frustration, President Trump has now been able to take his desired action.¹³³

During his campaign for the presidency in June of 2016, Donald Trump said that:

China's entrance into the World Trade Organization has enabled the greatest jobs theft in history Fifty thousand factories across America have shut their doors in that time. Almost half of our entire manufacturing trade deficit in goods with the world is the result of trade with China.¹³⁴

This campaign trail statement by Trump evokes a series of questions, including whether China's actions as a member-nation of the WTO have been so unlawful as to constitute theft and whether the Trump Administration's retaliatory actions are justified against China's alleged thievery. Regardless of its legitimacy, President

¹²⁸ See *infra* Part IV.A.

¹²⁹ See *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 8.

¹³⁰ See generally Mark Lander, *In Car Country, Obama Trumpets China Trade Case*, N.Y. TIMES (Sept. 18, 2012), <https://www.nytimes.com/2012/09/18/us/politics/in-car-country-obama-trumpets-china-trade-case.html>; Trump, *supra* note 1; Georgieva, *supra* note 7.

¹³¹ Lander, *supra* note 130.

¹³² *Frontline: Trump's Trade War*, *supra* note 2, at 10:06.

¹³³ *China*, TRUMP TWITTER ARCHIVE, http://www.trumptwitterarchive.com/archive/China/ttff_ (last visited Feb. 28, 2020).

¹³⁴ *Full transcript: Donald Trump's jobs plan speech*, POLITICO (June 28, 2016), <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>.

Trump prioritized protectionist measures against China since the beginning of his time in office by instituting tariffs, subsidies, and other penalties that constituted the trade war.¹³⁵ These actions are purportedly justified due to the US Trade Representative's concerns with China's WTO compliance and President Trump's allegations against China.¹³⁶

A. Five Claims by the USTR to Justify the Trade War

The Trump Administration justifies the trade war by referencing China's alleged violations of WTO policies during the course of its membership in the WTO, as reported by the Office of the United States Trade Representative (USTR).¹³⁷ The USTR is based out of the White House, with the Trade Representative serving as a member of the President's cabinet and an advisor, negotiator, and spokesperson for trade issues.¹³⁸ Among other things, Congress requires the USTR to submit annual reports on China's and Russia's WTO compliance.¹³⁹ In its *2018 Report to Congress On China's WTO Compliance*, the USTR claimed that China has committed several disputed and unresolved violations.¹⁴⁰ The report argued that "[e]ven though the United States has routinely prevailed in these WTO disputes, they take years to litigate, consume significant resources and often require further efforts when China resists complying with panel or Appellate Body rulings."¹⁴¹ Some of China's cited WTO violations highlighted in the report include: (1) maintaining a non-market economic system; (2) maintaining a state-led, mercantilist approach to trade; (3) requiring technology transfers from international businesses working within its borders; (4) violations of anti-dumping policies related to excess capacity of products; and (5) distorting markets.¹⁴²

¹³⁵ Horsley, *supra* note 32.

¹³⁶ See *infra* Part IV.A-B.

¹³⁷ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 11-19.

¹³⁸ *About Us*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/about-ustr> (last visited Feb. 24, 2020).

¹³⁹ Press Release, *USTR Releases 2018 Reports on China's and Russia's WTO Compliance*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Feb. 4, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/february/ustr-releases-2018-reports-china's>.

¹⁴⁰ *USTR Releases 2018 Reports on China's and Russia's WTO Compliance*; see generally *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 11-19.

¹⁴¹ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 8.

¹⁴² *China*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm (last visited Feb. 24, 2020); *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 11-19.

1. China's Non-Market Economic System

The 2018 USTR report argues that China still maintains a non-market, state-run economic system. The report cites China's Constitution, directives and pronouncements by China's leadership, legislative and regulatory measures, industrial plans, and government and Chinese Communist party actions as sources for this claim.¹⁴³ Article 6 of the Chinese Constitution states that "the state upholds the basic economic system in which public ownership is dominant."¹⁴⁴ In a 2018 trade policy review to the WTO, China indicated that it "will long remain in the primary stage of socialism" and that it seeks to further improve the government's relationship with the market.¹⁴⁵ To assert control in regulatory measures, the Chinese state still maintains control over state-owned enterprises, which China claims are run independently of the state, and make decisions based on market principles.¹⁴⁶ However, at a 2017 economic conference, China asserted that one of six policies for their 2018 economic goals was to promote stronger state-owned enterprises by strengthening party leadership and infrastructure in state-owned enterprises.¹⁴⁷ The US trade representative also referenced the social credit system, "a new tool endorsed by the Party that the government will be using to monitor, rate and condition not only the conduct of all individuals in China, but also all domestic and foreign companies in China."¹⁴⁸ Given the USTR's findings—including China's constitutional mandate for a state-run economy, its overt goal of strengthening state leadership presence in businesses, its continued use of state-run enterprises, and the new social credit system—it can be argued that China still maintains a non-market, hybrid economic system.

2. China's State-Led Mercantilism

Similar to the argument about China's non-market system, the US trade representative further elaborated on concerns with China's state-led, mercantilist approach to trade and economic planning.¹⁴⁹ The report asserts, "[i]n China's economic framework, state planning through industrial policies conveys the state's instructions regarding sector-specific economic and trade objectives. While some sectors are deemed strategic and fundamental and therefore receive more attention

¹⁴³ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 12.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 13.

¹⁴⁸ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 13.

¹⁴⁹ *Id.* at 15.

and resources, no sector of the economy escapes the oversight of the government and the Party.”¹⁵⁰ Trade sectors are established and regulated in a top-down managerial style with the government itself deciding which sectors are more fundamental, and where the need is for more subsidies, resources, and oversight.¹⁵¹ China has gone through twelve successive five-year planning cycles since the People's Republic was established, and the state is currently in its thirteenth cycle.¹⁵² Through these cycles the Chinese state implements a top-down approach, where plans are formulated and executed by central government bodies, local bodies, and “various organs of the Party and key Chinese companies.”¹⁵³ One example of a well-known major economic plan, launched 2015, is “Made in China 2025.”¹⁵⁴ MIC 2025 focuses on ten key sectors—such as new information, robotics, energy efficient and new energy cars, and bio-medicine—in order to transform China into a leading manufacturing power.¹⁵⁵ The MIC 2025 plan relies on subsidies and government oversight of industries to upgrade manufacturing, enhance information technology, and improve base techniques for creation of key manufacturing components.¹⁵⁶

The US Trade Representative lists three key issues with MIC 2025 and other Chinese economic plans.¹⁵⁷ First, “adherence to the objectives of China's industrial policies is effectively mandatory” for Chinese domestic industries.¹⁵⁸ Second, financial support from the Chinese state to domestic industries is significantly larger than that of other countries, and financial support ranges from research and development to market-distorting financial support.¹⁵⁹ This leads to excess capacity of products, which also results in dumping of products on other WTO members.¹⁶⁰ Third, China's overabundant assistance to domestic producers disadvantages foreign competitors and leads to an unequal playing field for other WTO members.¹⁶¹

Mandatory participation of Chinese industries, subsidization of these industries, and support by the Chinese state result in issues for other WTO members,

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 15.

¹⁵⁴ *Id.*

¹⁵⁵ ‘Made in China 2025’ plan issued, THE STATE COUNCIL, THE PEOPLE'S REPUBLIC OF CHINA (last updated May 19, 2015), http://english.www.gov.cn/policies/latest_releases/2015/05/19/content_281475110703534.htm.

¹⁵⁶ *Id.*

¹⁵⁷ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 15-16.

¹⁵⁸ *Id.* at 15.

¹⁵⁹ *Id.* at 16.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

including product dumping and an unequal playing field for foreign competitors seeking to do business in and import goods into Chinese markets. Another cause for concern is China's requirement for technology transfers when foreign companies seek to do business in China.¹⁶²

3. Forced Technology Transfers

Forced technology transfers occur through a unique policy invention by the Chinese government, which utilizes discrimination such as foreign ownership restrictions to require technology sharing or technology transfer agreements before foreign entities can do business in China.¹⁶³ The USTR argues that this hurdle harms intellectual property rights, innovation, and technology development for US industries in China.¹⁶⁴ Additionally, the Chinese government directs and unfairly facilitates investment in and acquisition of US companies and assets to obtain US technologies.¹⁶⁵ Evidence is also asserted by the USTR that the Chinese government has conducted or supported cyber intrusions into US companies and networks, seeking intellectual property and sensitive commercial information from US firms.¹⁶⁶ The USTR argues that since the time evidence of these actions has been located, no significant changes have been made by the Chinese government to respond positively to USTR findings.¹⁶⁷ It further argues that while these issues cause significant harms to US companies and interests, other WTO members have also been negatively impacted by forced technology transfers.¹⁶⁸ Besides the Chinese government's instigation and support of forced technology transfers, the centralized government managed market system causes other significant harms to WTO members, in creating excess capacity of supplies and distorting domestic and international markets.¹⁶⁹

4. Excess Capacity

China has faced a number of WTO disputes relating to excess capacity, and the USTR finds that this remains a critical issue which still effects other WTO

¹⁶² 2018 Report to Congress On China's WTO Compliance, *supra* note 91, at 17.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 17-18.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 2018 Report to Congress On China's WTO Compliance, *supra* note 91, at 17.

¹⁶⁸ *Id.* at 18.

¹⁶⁹ *See generally id.* at 18-19.

members.¹⁷⁰ Excess capacity is a term used to describe an excess amount of goods in a certain industry, created by a non-market economic system.¹⁷¹ The trade representative describes it as “capacity that would not persist if market forces were operating properly. . . . [and] a sign that resources are not being allocated in an efficient manner.”¹⁷² Excess capacity leads to dumping of products in foreign markets, and dumping leads to injuries in the markets of China’s trading partners because there is a risk that foreign industries could be overrun and incapacitated by the influx of too many extra competing products dumped into their economies by China.¹⁷³ Excess capacity and dumping also lead to lower global pricing of supplies, which leads to domestic industries in many countries being priced out of their own markets.¹⁷⁴ The WTO prohibits dumping by imposing anti-dumping regulations and allowing for countermeasures by countries who have experienced the harmful effect of excess products dumped into their markets.¹⁷⁵ Canada, Australia, India, and the EU have taken advantage of WTO-approved countermeasures by imposing antidumping and countervailing duties on Chinese imports.¹⁷⁶ These countermeasures often prove insufficient in time and scope, so when the US implementation of countermeasures on China’s solar cell modules took effect in 2018, most US domestic solar manufacturers had either declared bankruptcy or moved production facilities to other countries.¹⁷⁷ A similar condition was caused by China’s tremendous growth in the steel industry from when it joined the WTO in 2001 to today. The trade representative report states “China’s steel capacity rose from 160 million metric tons (MT) in 2001 to 1,048 million MT in 2017.”¹⁷⁸ The USTR cites this as the reason for the Trump Administration’s steel tariffs, justified under Section 232 of the Trade Expansion Act of 1962.¹⁷⁹ The countermeasures imposed by the Trump Administration are similar to those enacted by other nations in response to the excess capacity of products exported from China.¹⁸⁰ In addition to the negative effects of excess capacity, the non-market economy in China uses other market distorting measures to promote its state-run

¹⁷⁰ *Id.* at 18.

¹⁷¹ *See id.*

¹⁷² *2018 Report to Congress On China’s WTO Compliance*, *supra* note 91, at 18.

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *Principles of the trading system*, *supra* note 89.

¹⁷⁶ *2018 Report to Congress On China’s WTO Compliance*, *supra* note 91, at 18.

¹⁷⁷ *Id.* at 18-19.

¹⁷⁸ *Id.* at 18.

¹⁷⁹ *Id.*; OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, *2019 National Trade Estimate Report on Foreign Trade Barriers* 97-98 (Mar. 2019), https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf.

¹⁸⁰ *2018 Report to Congress On China’s WTO Compliance*, *supra* note 91, at 19.

enterprises at the expense of other countries' firms in China and in market economies throughout the world.¹⁸¹

5. Market Distortions

The final concern noted in the 2018 trade representative report is the capacity for the non-market economic structure in China to create an artificial competitive advantage for Chinese state-run firms when competing with other companies.¹⁸² The USTR states that "This harm occurs because Chinese companies use the artificial competitive advantages provided to them by the interventionist policies and practices of the Chinese state to undersell their foreign competition."¹⁸³ Chinese companies are able to undersell foreign competition because subsidies and excessive government control and assistance in state-run firms gives them the resources that could not have been obtained in a market economy.¹⁸⁴ The trade representative cites this as the main reason for a "large number of antidumping and countervailing duty investigations that have been initiated against China by the investigating authorities of WTO members."¹⁸⁵ This large number of investigations shows that market distortion has become a significant concern for other WTO members.

The above five claims and several others were documented in the 2018 USTR report. Yearly reports of concerns against China have been documented since the 1990s; however, the difficulty for the United States is that these reports do not prove a violation of international law.¹⁸⁶ "Proper determination of a WTO violation usually requires an enormous expenditure of time, resources and perseverance" because a country has to conduct its own investigation, compile its findings, and plead its case in WTO consultations.¹⁸⁷ Perhaps due to this enormous difficulty, the Trump Administration has recently used the USTR arguments and other justifications to forego the WTO process and initiate its actions in the trade war.

B. The Trump Administration's Justifications for the Trade War

China's non-market system, its state-run mercantilism, forced technology transfers, excess capacity, and market distortions are certainly a cause for concern

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 18-19.

¹⁸⁵ *2018 Report to Congress On China's WTO Compliance*, *supra* note 91, at 19.

¹⁸⁶ Webster, *supra* note 13, at 554.

¹⁸⁷ *Id.*

for the United States and other WTO members. However, in order to achieve international legitimacy, protective countermeasures like the tariffs imposed by the Trump Administration either require the prior approval of the WTO dispute settlement body or justification found in a WTO rule exception.¹⁸⁸ Thus, on March 8, 2018, at the beginning of the trade war, President Trump's adjustment in US steel and aluminum import tariff rates were argued to be grounded in Section 232 of the Trade Expansion Act of 1962.¹⁸⁹ It was further argued that "the President's decision was based on a determination that the quantity and circumstances of US imports of steel and aluminum products – including the circumstances of severe excess capacity and resulting overproduction emanating from China – *threaten to impair U.S. national security*."¹⁹⁰ That statement referencing national security concerns due to excess capacity of products from China is critical to President Trump's claims for legitimacy in his actions in the Trade War, because Article XXI of the GATT states that "Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests; or . . . (iii) taken in time of war or other emergency in international relations."¹⁹¹ To restate that rule in the current context, President Trump's decision to adjust steel and aluminum tariffs without prior WTO approval cannot be scrutinized by the WTO because, it is argued that, the tariffs are a response to a national security threat.¹⁹² With this measure defined as necessary for national security, it would follow that reciprocal tariffs from China could be represented as unlawful retaliation.¹⁹³ The White House made this argument by saying that "[i]n April 2018, China imposed tariffs . . . in retaliation against the President's decision to adjust U.S. imports of steel and aluminum. . . . The United States will take all necessary action to protect U.S. interests in the face of such retaliation."¹⁹⁴

In April 2018, President Trump confidently asserted that China would understand this US position and that the trade war would soon end in his favor.¹⁹⁵ He stated in a tweet:

¹⁸⁸ General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

¹⁸⁹ *2019 National Trade Estimate Report*, *supra* note 179, at 98-99; Lamarque, *supra* note 4.

¹⁹⁰ *2019 National Trade Estimate Report*, *supra* note 179, at 98 (emphasis added).

¹⁹¹ General Agreement on Tariffs and Trade, *supra* note 188.

¹⁹² *2019 National Trade Estimate Report*, *supra* note 179, at 98.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Donald Trump (@realDonaldTrump), TWITTER (Apr. 8, 2018, 5:12 AM), <https://twitter.com/realdonaldtrump/status/982954355509907457>.

President Xi and I will always be friends, no matter what happens with our dispute on trade. China will take down its Trade Barriers because it is the right thing to do. Taxes will become [r]eciprocal [and] a deal will be made on Intellectual Property. Great future for both countries!¹⁹⁶

Unfortunately, President Trump's prediction of a swift end to the "dispute on trade" turned into history's largest trade war, as China sternly asserted its position and the United States maintained its own interpretation of the situation.

VI. POTENTIAL CONSEQUENCES OF THE TRADE WAR

On January 12, 2020, President Trump and Chinese Vice Premier Liu He signed an agreement to halt some of the trade war tariffs.¹⁹⁷ While this perhaps signals an end to the war in the near future, many are skeptical and believe the trade war will not end soon.¹⁹⁸ For example, a BBC reporter wrote, "For all the fanfare - and the unusual appearance of a president at the signing of a bilateral trade deal - this is more armistice than victory—with only a small proportion of the tariffs being reversed and relatively minor concessions granted by both sides."¹⁹⁹ The New York Times reported that "the agreement preserves the bulk of the tariffs that Mr. Trump has placed on \$360 billion worth of Chinese goods, and it maintains the threat of additional punishment if Beijing does not live up to the terms of the deal."²⁰⁰ With continued tariffs and threat of additional actions, the overarching sentiment toward January's deal is one of uncertainty.

Reflecting on the effect of this war, it is difficult to measure the few, if any, spoils gained by the United States from this conflict. Instead, hundreds of billions of dollars have been lost internationally and an estimated \$700 billion is expected to be lost in 2020 alone if the war continues.²⁰¹ Kristalina Georgieva, Managing Director of the International Monetary Fund, stated, "The results are clear. Everyone loses in a trade war."²⁰² Aside from the immediate monetary cost, the

¹⁹⁶ *Id.*

¹⁹⁷ Dharishini David, *US and China sign deal to ease trade war*, BBC NEWS (Jan. 15, 2020), <https://www.bbc.com/news/business-51114425>; see Ana Swanson & Alan Rappeport, *Trump Signs China Trade Deal, Putting Economic Conflict on Pause*, N.Y. TIMES (Jan. 15, 2020).

¹⁹⁸ David, *supra* note 197.

¹⁹⁹ *Id.*

²⁰⁰ Swanson & Rappeport, *supra* note 197.

²⁰¹ Georgieva, *supra* note 7, graphic "Projected GDP Loss from Trade Disputes."

²⁰² *Id.*

effects of this war—and similar international conflicts—have the disturbing potential to perpetuate the slow death of multilateral international institutions.²⁰³

Professors Rachel Brewster and Sergio Puig argue that President Trump's foreign policy is redefining the relationships that the United States has with other nations—from US participation in collaborative, multilateral organizations to bilateral agreements between the United States and individual nations, resulting in a world that relies more on power of individual nations than on laws that regulate everyone and bind all nations together.²⁰⁴ In a related article, Professor Puig predicted the effect of the new USMCA (a restructuring of the North American Free Trade Agreement, similar in effect to President Trump's negotiations with China)²⁰⁵ by stating that “[w]hile international trade law will recover, it will look different in key respects—it will be less multilateral, predictable, justiciable, and enforceable.²⁰⁶ This more transactional view of international trade law implies a limit on the role of law and an increase in the use of power.”²⁰⁷ President Trump's attempts to restore America's place as a world leader—by ignoring multilateral institutions and attempting to strong-arm other countries, like China, into compliance with the United States—will soon backfire as other nations surpass the United States in economic capability.²⁰⁸ Da Wei, Assistant President, University of International Relations, Beijing, stated:

Our population is four times bigger than the U.S. We have 1.3 billion people, right? You have 300 million people. So China's economy should be four times higher than the U.S. economy. . . . I know, and this is difficult [for the United States] to accept, right. Today we are only [sixty percent] of the size of the U.S. [economically]. I think we do have the right to be at least as powerful as the U.S., and even one day much [more] powerful than the U.S.²⁰⁹

²⁰³ See Rachel Brewster & Sergio Puig, *Introduction, Can International Trade Law Recover?*, 113 AJIL UNBOUND 38, 38-39 (2019), <https://www.cambridge.org/core/services/aop-cambridgecore/content/view/980D4A4D8D913FFE9080806966EF4DE4/S2398772319000059a.pdf/introduction.pdf>.

²⁰⁴ *Id.*

²⁰⁵ *United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Feb. 28, 2020) (The USMCA stands for the United States-Mexico-Canada Agreement, an arguably bilateral, U.S.-centric free trade agreement that replaced the more multilateral North American Free Trade Agreement).

²⁰⁶ Puig, *supra* note 9, at 56.

²⁰⁷ Puig, *supra* note 9.

²⁰⁸ *Frontline: Trump's Trade War*, *supra* note 2.

²⁰⁹ *Id.*

Solely by considering population size, Assistant President Wei presents a very realistic hypothesis: that China has the right to, and may, overtake the US economy.²¹⁰ China has a population roughly four times the size of the US, and the nation continues to show strong economic growth.²¹¹ America's best chance for continued relevance in the new world it will soon face—where other, larger economies inevitably take the forefront—is in ratifying established multilateral institutions and abiding by established international rules.²¹²

Continuing the trade war will only continue to be detrimental to the United States and China.²¹³ Professor Benjamin Laker predicts that the United States will probably end the war first, and both President Trump and General Secretary Jinping will both claim it as a political victory.²¹⁴ He stated that “both Presidents will declare victory and their people will believe them: arise the era of quantum politics: like the Schrodinger’s cat, the win is on both sides.”²¹⁵ He also wrote that “[w]hilst much is uncertain, we can be certain that Xi Jinping will outlast Trump, meaning this trade war will likely be settled sooner rather than later, because the American President needs this war to have been ‘won’ before beginning any second term in office.”²¹⁶ Hopefully his analysis is correct, and the upcoming presidential election will lead to the end of this war.²¹⁷

Unfortunately, the sad outcome of a mere political victory in “quantum politics” is one of the more optimistic outcomes.²¹⁸ A darker alternative would be the beginning of a new era of cold-war-style bilateralism.²¹⁹ On this point, Da Wei stated:

This is my optimistic scenario: that we will have a managed tension. But we do have the pessimistic scenario. We do have a chance to see a so-called . . . new cold war. I don’t think like the one the U.S. had with the USSR. But we will have another type of cold war that nobody ha[s] ever experienced. . . . That’s dangerous. That’s really dangerous. And if that happens—if that

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Georgieva, *supra* note 7.

²¹⁴ Benjamin Laker, *Who’s Winning the Trade War? And How Will It End?*, FORBES (Feb. 3, 2020), <https://www.forbes.com/sites/benjaminlaker/2020/02/03/whos-winning-the-trade-war-and-how-will-it-end/#4d0f75495460>.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Frontline: Trump’s Trade War*, *supra* note 2.

²¹⁹ *Id.*

happens, it will last for quite a long time. Then that's a tragedy for everyone, I think.²²⁰

VII. CONCLUSION

In conclusion, the United States and China's membership in the WTO encourages these nations to avoid protectionism, resolve disputes through a WTO endorsed structure, and continue to participate in multilateral, international trade agreements for the benefit of all WTO members. However, due to escalation on both sides, these nations have initiated history's largest trade war and lost hundreds of billions of dollars. If the conflict continues it could result in nearly a trillion more dollars in international economic loss, further destabilization of the WTO, a new Cold War between two of the world's superpowers, and the death of international, multilateral institutions. Hopefully the United States and China can avoid these bleak outcomes by fully ending the trade war, respecting and supporting multilateral agreements, and resolving current and future disputes within the structure of the World Trade Organization.

²²⁰ *Id.*

