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A New World Order: The Rule of Law, or the Law of Rulers?

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ARTICLE
A NEW WORLD ORDER:
THE RULE OF LAW, OR THE LAW OF RULERS?

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I. THE “BRETTON WOODS SYSTEM”

President Trump’s on-going “trade war” with China is symptomatic of broader global changes to the world order that have been evolving for decades. To a large degree, these changes are grounded in the continuum of modern historical and geopolitical trends and a reiteration and possible resuscitation of 19th Century Great Power rivalries. This emerging new year in which we write brings with it the 75th anniversary of D-Day—and the New World Order ushered in by the “American Century” that soon followed.¹ The transformation, created by the United States and key partners, was affected through

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1. The term “American Century” was coined by Henry Luce, the co-founder of the Time-Life popular magazine firm, in a prescient essay published in Life in 1941. Henry Luce, *The American Century*, LIFE, Feb. 1941, at 61-65.

what we shall refer to as the “Bretton Woods System” (“BWS”) that emanated from the Bretton Woods Conference, held in July 1944 in the small New Hampshire hamlet of that name. Though that gathering was essentially designed to address pressing international financial relations following the war (its formal name was the United Nations Monetary and Financial Conference), its impact soon extended to the political sphere as well, and by extension to associated legal and social issues.² It is within this larger domain that we deploy the BWS designation. This *weltanschauung*, while imperfect and in need of a 21st Century update, has nevertheless led to unprecedented global peace and prosperity over the past seventy-five years.³

But while changes are warranted, it is our belief that there is no reason to fundamentally alter or abandon the foundations of the BWS—nor to undermine the enduring principles of political democracy, market-based economic transactions, and transparent international rules, regulations, and laws on which it was built. Unfortunately, we are witnessing today serious attempts to do just that. In response, we believe there is a compelling need to reassess the BWS in the light of current realities and to formulate, not a new paradigm, but necessary correctives that will maintain the benefits of this remarkable creation yet will also acknowledge both present and future exigencies. To pursue policies contrary to the values inherent in the BWS, we assert, would create an existential danger to the world and its inhabitants and as such must be confronted and disrupted.

The BWS was the outcome of sober reflection on the dangers of uncoordinated policy decisions made by independent state actors who placed their own perceived needs above all else, regardless of collateral outcomes. While such behavior might have had relatively negligible consequence in prior times, the growth of an interconnected world system brought about by advances in technology and trade relations, spurred by the leadership of Great Britain in the latter half of the 19th Century, now meant that unilateral decision making could have serious

2. For an informative review of this gathering, see BENN STEIL, *THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER* (2013).

3. For an informative background on themes discussed in his article, see *Who Will Run the World? America, China and Global Order*, FOREIGN AFFAIRS, January/February 2019, Vol. 98, No. 1.

and potentially mortal spill-over effects for other participants, be they actively engaged or innocent bystanders.⁴ Yet there were few if any existing mechanisms to manage this new and increasingly interconnected system of international relations; instead, the prior pattern of “Great Power” rivalries and intrigues remained in effect. This arrangement had prevailed from the end of the Napoleonic Wars in 1814 up to the Paris Peace Conference of 1919, and its participants were the major nation states of the era, essentially all European but later joined by both the United States and Japan—rising powers of the late 19th Century.⁵

The result was a world system so fragile that disruption and chaos were almost bound to occur at some point—which it finally did in horrifying fashion, starting in 1914 and lasting through 1945. While no doubt there were many who understood the threat to global peace and stability contained in such an archaic arrangement—not the least of whom was President Woodrow Wilson and his cherished notion of a League of Nations⁶—the roots of Great Power stasis were simply too deep to overcome in any peaceful fashion. Only the unprecedented destruction of World War II forced a termination to that old order, generating from its ashes a belief by many that finally the time for tectonic-level change had arrived. Under new leadership from a remarkable union of men, principally Americans who had not previously commanded a world stage, these individuals were fiercely determined to prevent future catastrophes through a fundamental reordering of the fractured world system.

The result was the conference at Bretton Woods attended by 730 delegates from the forty-four nations who constituted the Allied forces in the war.⁷ An inspiration for this gathering was the Atlantic Charter drafted by Franklin Delano Roosevelt and Winston Churchill in 1941, where clauses 4 and 5 of that document drew a direct line between fair

4. See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000*, ch. 4 and 5 (1987).

5. Among others, see *id.*; ROY BRIDGE & ROGER BULLEN, *THE GREAT POWERS AND THE EUROPEAN STATES SYSTEM, 1814-1914* (2d ed. 2004).

6. See ADAM TOOZE, *THE DELUGE: THE GREAT WAR, AMERICA AND THE REMAKING OF THE GLOBAL ORDER, 1916-1931* (2014), especially Part III, chapters 13-18.

7. See *Archive*, US DEP'T OF ST., <https://2001-2009.state.gov/r/pa/ho/time/wwii/98681.htm> [<https://perma.cc/QT33-YQCG>] (last visited Apr. 28, 2019).

and rule-based global trade and prospects for global peace and prosperity.⁸ While the US delegation clearly took the lead, this was by no means a one-nation show. Indeed, the British economist J. Maynard Keynes, the creator of macroeconomics and arguably the greatest economic theoretician since Adam Smith, was the principal architect of many of the new concepts encased in the BWS.⁹ Moreover, we would also be seriously remiss to overlook the looming shadow of the Cold War that soon engulfed global relations in nearly every aspect of connectivity. The clash of ideologies represented by the West and the Soviet Union were clearly understood by the conference attendees and their respective governments.¹⁰ But all that being said, it is just as clear that principles and concepts enshrined in the American experiment of nationhood were the foundational factors in the BWS that ultimately emerged.¹¹ Throwing off the historical isolationism that had hindered an American role in world affairs for so long, the “greatest generation” arose to the challenge and stamped the future with its signature. The *longue durée* that followed—that is, the post-WWII era of relative peace and prosperity that we have enjoyed for seventy-five years—is a testament to the strength and integrity of that foundation.¹²

Nothing, however—as we well know—is forever. Indeed, change appears to be the only constant, though its pace does vary. As such, it was that the infrastructure of the BWS was perhaps inevitably subjected to shifts, some minor and others seismic in nature. The key macro factor that altered the post-WWII era was America’s rejection of the political isolationism that had characterized much of its previous history and in its place an embrace of global economic and political engagement, largely driven by the goal of containment of the Soviet

8. See Hunter Nottage, *Trade in War’s Darkest Hour*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/tradewardarkhour41_e.htm [<https://perma.cc/ZD4T-MN3E>] (last visited Apr. 28, 2019).

9. See STEIL, *supra* note 3.

10. See *id.* See also RAYMOND MIKESSELL, *THE BRETTON WOODS DEBATES: A MEMOIR* (1994). Mikesell, a close friend of chief US representative Harry Dexter White, is often credited with being the last surviving economist who attended the conference.

11. This reflects the authors’ opinions.

12. For an informed overview of the influence of liberalist foreign policy on the development of US posture in the post-World War II era, see KENNETH WALTZ, *MAN, THE STATE AND WAR* (1969). For a detailed account of the workings of the conference, see STEIL, *supra* note 3.

Union and its opposing ideological claims. As we noted above, the economic structure of this enjoinder of the world was based on a philosophy of Western values regarding trade and finance: the rule of laws and regulations, and adjudicative means to resolve differences as they arose.¹³ These principles were enshrined in the creation of various institutions designed to manage outcomes in an orderly and principled fashion that valued economic (and related political) stability. These included the International Monetary Fund (“IMF”), the World Bank, the International Bank for Reconstruction and Development (“IBRD”), the “Bretton Woods Agreement” itself that set fixed currency exchange rates among participant nations, and the General Agreement on Trade and Tariffs (the GATT, a watered down substitute for the originally proposed International Trade Organization (“ITO”) that was vetoed by recalcitrant isolationist elements of the Republican Party in the US Senate).¹⁴ In 1995 the GATT was replaced by the World Trade Organization (“WTO”) as the principal global body regulating international commerce).¹⁵

Over time these and related institutions came to be cogs in what was loosely defined as the “Washington Consensus,” that is the basis upon which the global economy would operate. The fundamentals were a reverence for the market system of exchange and favoritism for deregulation over public controls, the liberalization of trade and the reduction of cross-border barriers, the preeminence of the private sector over state enterprise, and respect for private property and legal mechanisms to insure its protection.¹⁶ The term Washington Consensus was a clear indication of where the seat of power resided, and the values that would define it. And though this system was economic in nature, our broader definition of the BWS as we use it in this paper is also meant to be indicative of its political and legal underpinnings—that is democracy, judicial system equity and transparency, a respect for

13. For background, see the seminal work by the 18th Century French political philosopher Charles Montesquieu; this is available in English in MONTESQUIEU: THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds., 1989).

14. For detailed description of the demise of the ITO, see DOUGLAS IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY (2017), chapter 10.

15. For background, see *History of Trade*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/history_e.htm [<https://perma.cc/4UHN-3MT6>] (last visited Apr. 28, 2019).

16. See IRWIN, *supra* note 15.

individual freedoms such as expression, religion, and other basic human rights. Associated institutions meant to capture these principles included the United Nations (“UN”) and its several off-shoots (e.g., UN Educational, Scientific and Cultural Organization (“UNESCO”), and the International Labor Organization (“ILO”), originally formed in 1919 and integrated into the UN in 1946), the International Court of Justice, the Permanent Court of Arbitration (“PCA”), and many other such bodies formed in the post-World War II era to address international issues as the nations of the world converged into what has been defined as “globalization.” And finally, we could also add defense-related organizations such as The North Atlantic Treaty Organization (“NATO”) and the relatively short-lived South East Asia Treaty Organization (“SEATO”), as well as various UN agencies devoted to non-nuclear proliferation.¹⁷

As this multitude of organizations and institutions took shape, a direct result was the opening and deepening of financial, technological, and trade channels between nations both large and small, advanced and emerging, hemispherically north and south.¹⁸ And, as anticipated, global wealth and prosperity began to rise. While wealth and income distribution obviously did not quickly shift to perfect (or even reasonable) equality, the establishment of capitalist regimes in far flung corners of the world that had not previously been able to participate in such a system did generate hope and aspirations for millions, especially so in the so-called “emerging markets.” More significantly, global war did not return.¹⁹

17. For interesting commentary on the “consensus” and its faults, see Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank’s ‘Economic Growth in the 1990s: Learning from a Decade of Reform*, 44 J. ECON. LITERATURE 973 (2006), available at <https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/goodbye-washington.pdf> [<https://perma.cc/N7EJ-T46X>].

18. See IRWIN, *supra* note 15; RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* (2016).

19. For data on Gini coefficient and post-War wealth distribution, see among other sources Evan Hillebrand, *Poverty, Growth, and Inequality Over the Next 50 Years*, in *Looking Ahead in World Food and Agriculture: Perspectives to 2050* (Piero Conforti ed., 2011); UNITED NATIONS DEVELOPMENT PROGRAMME, *THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT* 72–74 (2011); Bob Sutcliffe, *Postscript to the article ‘World inequality and globalization,’ OXFORD REV. OF ECON. POL’Y* (Spring 2004), <http://siteresources.worldbank.org/INTDECINEQ/Resources/PSBSutcliffe.pdf> [<https://perma.cc/5VVA-XVLX>].

Perhaps the ultimate vindication of the beneficial effects of the BWS was the demise and disintegration of the Soviet Union in December of 1991.²⁰ Yet ironically, if not painfully, a collateral outcome of the BWS was the rise of these so-called Emerging Nations—especially that of the Peoples Republic of China, an event that is arguably the most significant transformation since the maturation of the United States as the world’s premier economic power in the latter decades of the 19th Century. Moreover, this role reversal is one that today portends a possible end to the BWS as we understand it. For our purposes in this paper, the rise of China represents a powerful threat to the underlying values and principles of what we have termed the Bretton Woods System. The question going forward is whether or not those values and principles will hold, or will they be superseded by a significantly different “consensus” that returns us to the world of Great Power rivalries that dominated global relations for so long and ultimately ended in the deaths of tens if not hundreds of millions of lives and the destruction of much of the civilized world. To wit, which way the future?

II. IMPLICATIONS OF THE END OF THE BWS

Some, particularly hard-liners in the Trump Administration such as Peter Navarro, the President’s Director of Trade and Manufacturing Policy, seem to believe that any accommodation of China’s reintegration into the world economy and its role as a responsible stakeholder in a US-led BWS should be perceived as a threat to American hegemony.²¹ Others, however, see this relationship as one offering tangible benefits for all concerned parties as long as the

20. See The End of the Soviet Union; Text of Declaration: 'Mutual Recognition' and 'an Equal Basis', N.Y. TIMES (Dec. 22, 1991), <https://www.nytimes.com/1991/12/23/world/end-soviet-union-text-accords-former-soviet-republics-setting-up-commonwealth.html> [<https://perma.cc/3XS8-KVFF>].

21. In 2005, then Deputy Secretary of State Robert Zoellick’s keynote address to the National Committee on US-China Relations called for China to be a “responsible stakeholder” and that “the United States welcomes a confident, peaceful, and prosperous China, one that appreciates that its growth and development depend on constructive connections with the rest of the world.” *Robert Zoellick’s Responsible Stakeholder Speech*, NAT’L COMMITTEE ON U.S. CHINA REL., <https://www.ncusr.org/content/robert-zoellicks-responsible-stakeholder-speech> [<https://perma.cc/FZ9A-4J8Q>] (last visited Apr. 28, 2019). See also PETER NAVARRO, *CROUCHING TIGER: WHAT CHINA’S MILITARISM MEANS FOR THE WORLD* (2015).

fundamental principles of the system remain intact. We agree with the latter, though with some caveats. We think it would be far more useful to understand and manage the evolving new system of global economic relationships not through reliance on such simplifications as “the rise of China” or historical paradigms such as a “Thucydides Trap” or other such gloss²² (and its equally simplistic notion that this “rise” implies America’s decline), but rather through the historical prism of China’s return to Great Power status after its “Century of Humiliation” at the hands of the West.²³ We believe that viewing the 21st Century through a narrow lens of binary displacement between the US and China for dominance may be misguided as it fails to sufficiently account for the complexities of international relations and the role of geography in determining and shaping of geopolitical dynamics. The post-Cold War world has been witness to various theories that purportedly explain international relations, such as “The End of History,” “The Reset of History,” “The Clash of Civilizations,” “The World is Flat,” “The Revenge of Geography,” “The Rise of the Rest,” and “The G-Zero World,” among seemingly countless others.²⁴ While we in no way wish to satirize these efforts at explication, each useful within its own context, we nevertheless believe that each in isolation does not adequately capture the true dynamic of international affairs and the changes that are occurring today (admittedly a Herculean effort for a single tome). International trade, we assert, is merely symptomatic of larger, highly complex, and more profound global forces, which in turn require a broader canvas if one desires to competently understand what is transpiring in our world system at this time. Thus, while one might find temporary comfort in the relatively narrow compartmentalization

22. This concept was popularized by the influential Harvard political scientist Graham Allison in 2012. See Graham Allison, *Thucydides Trap Has Been Sprung in the Pacific*, *FIN. TIMES* (Aug. 21, 2012), <https://www.ft.com/content/5d695b5a-ead3-11e1-984b-00144feab49a> [<https://perma.cc/L4QT-X9AF>].

23. For informative background, see DAVID SCOTT, *CHINA AND THE INTERNATIONAL SYSTEM, 1840-1949: POWER, PRESENCE, AND PERCEPTIONS IN A CENTURY OF HUMILIATION* (2009).

24. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992); Samuel Huntington, *The Clash of Civilizations*, *FOREIGN AFFAIRS*, Summer 1993; THOMAS FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE 21ST CENTURY* (2005); ROBERT KAPLAN, *THE REVENGE OF GEOGRAPHY: WHAT THE MAP TELLS US ABOUT COMING CONFLICTS AND THE BATTLE AGAINST FATE* (2013); FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008); IAN BREMMER, *EVERY NATION FOR ITSELF: WINNERS AND LOSERS IN A G-ZERO WORLD* (2012).

of systems, trends, and changes covered in these above-cited works (especially convenient in a lowest common denominator communications environment that favors pithy Tweets and Instagrams), a more nuanced and subtle analysis is necessary to formulate sound and sustainable policy today.²⁵

Let us offer one example of what we mean. While there are serious concerns about the exponential geopolitical impact of China's Belt and Road Initiative ("BRI") and its apparent intent to restore that nation's stature as a world power,²⁶ there does not seem to be adequate discussion about traditional Great Power politics—especially in the Asia Pacific region—that might limit the objectives China seems to be seeking through the BRI. The role and international posture of India is a case in point. That nation, another rapidly growing economy and one of the original emerging market nations known as the "BRICs" (that is Brazil, Russia, China and India) popularized by the Goldman Sachs economist James O'Neill in 2001,²⁷ is also a long-standing geopolitical rival of China for regional influence and power. One manifestation of that rivalry involves serious differences over national borders in the Jammu and Kashmir area of northern India—a problem that led to brief armed conflict in the past and which only recently was on the verge of more military confrontation between the two nations.²⁸ India is also obviously greatly concerned about the emerging China-Pakistan economic relationship that has been a product of the BRI. In response, India has acted to strengthen alliances with Japan and Australia to, if not contain China's thrust into its immediate region, at least to minimize its influence over this next-door neighbor with whom it has

25. For an informative background on this theme see *Letting Go, Trump, America and the World*, FOREIGN AFFAIRS, Mar./April 2018, Vol. 97, No. 2.

26. See, e.g., RICHARD T. GRIFFITHS, REVITALIZING THE SILK ROAD: CHINA'S BELT AND ROAD INITIATIVE (2017); TOM MILLER, CHINA'S ASIAN DREAM: EMPIRE BUILDING ALONG THE NEW SILK ROAD (2017); NADÈGE ROLLAND, CHINA'S EURASIAN CENTURY? POLITICAL AND STRATEGIC IMPLICATIONS OF THE BELT AND ROAD INITIATIVE (2017).

27. See Jim O'Neill, *Building Better Global Economic BRICs*, GOLDMAN SACHS (Nov. 30, 2001), <https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf> [<https://perma.cc/8BG5-6NKF>].

28. See Annie Gowen & Simon Denyer, *China and India are Dangerously Close to Military Conflict in the Himalayas*, WASHINGTON POST (Aug. 17, 2017), https://www.washingtonpost.com/world/asia_pacific/china-and-india-locked-in-tense-military-standoff-at-border/2017/08/16/30e7bb42-810c-11e7-9e7a-20fa8d7a0db6_story.html?utm_term=.20e22344f08b [<https://perma.cc/L9Z5-MDSX>].

had fraught relations since their joint creation in 1947.²⁹ There are other examples, including the resurgence of illiberal regional powers such as Turkey and Iran (and their complex historical relations with Russia) that will complicate and perhaps inhibit the growth and influence of the BRI.³⁰ Suffice it to say that the volatile chess board of the Eurasian landmass,³¹ with its current technological and economic vibrancy, is sufficiently complex and charged with its own geopolitical and strategic issues that it will not and cannot be resolved solely by China's economic prowess and development initiatives. It will, we assert, require engagement by the US-led BWS to achieve stability in this region.

Accordingly, over the past generation we have heard numerous calls for reforms to the composition of the UN Security Council to reflect the realities of today's multipolar world, many of which seem reasonable on the surface given the dramatic transformation in global power centers since the end of World War II.³² Yet that being said, it does not seem plausible that China—a current permanent member of the Council³³—would advocate for India (or for that matter Brazil,³⁴ another “BRIC” country) to become permanent members as this would surely complicate its growing commercial and political relationships with other countries in their respective regions, such as the above noted

29. See Russell Brines, *The Indo-Pakistani Conflict* (1968).

30. See the several analyses of this region provided by the Center for Strategic and International Studies (CSIS). *Russia and Eurasia*, CTR. FOR STRATEGIC & INT'L STUD., <https://www.csis.org/regions/russia-and-eurasia> [<https://perma.cc/W4QH-CDTR>] (last visited Apr. 28, 2019).

31. Eurasia is a term used quite often to refer to the geographic region that links Europe and Asia; the OECD lists 13 countries as belonging to Eurasia. For a detailed discussion on this topic, see also Christopher J. Fettweis, *Eurasia, the “World Island”: Geopolitics, and Policymaking in the 21st Century*, PARAMETERS, Summer 2000, at 58-71.

32. See Richard Butler, *Reform of the United Nations Security Council*, 1 PENN ST. J. OF L. & INT'L AFFAIRS 23 (2012); see also *France reiterates support for India's permanent seat in reformed UN Security Council*, ECON. TIMES (Mar. 4, 2019), <https://economictimes.indiatimes.com/news/politics-and-nation/france-reiterates-support-for-indias-permanent-seat-in-reformed-un-security-council/articleshow/68250699.cms> [<https://perma.cc/TTZ2-DY6C>].

33. There are five permanent members of the Council: Russian Federation, China, France, UK, and US.

34. See Butler, *supra* note 32.

Pakistan, or Chile in the Southern Hemisphere.³⁵ China's visionary road to geopolitical global dominance through the BRI and other such avenues will likely experience the typical pains of adolescent growth when its actions engender resentment among its adversaries as well as its trade partners—resentments that have been built on long standing historical factors that will not easily disappear simply because China is expanding its economic clout through international investment.³⁶ It is within these kinds of deeply seated relationships—cultural, political, ethnic, and geographic as well as economic—that any envisioning of a new world order must find its bearings if it is to have any chance of sustainable success.³⁷

This is a lesson we would assert that applies to the United States as well, and perhaps especially so given the Trump Administration's somewhat constrained historical perspective that we have seen displayed to date in its approach to international relations.³⁸ As we will elaborate below, informed and nuanced American diplomacy can help ensure that the world remains relatively peaceful and prosperous, as it has since the end of World War II even as the center of economic and demographic power shifts eastward. But it will require diplomatic competence and diligence, including an appreciation and comprehension of history, to get there. Bluster alone, be it from US leaders or others, will not move the needle.

III. CHINA, THE US, AND THE WORLD TRADE ORGANIZATION

In July of 2018 Mr. Dennis Shea, US Ambassador to the WTO presented to the WTO General Council a striking rebuke of the trade policies of China, comments which he later added to in the 14th Trade

35. Just as, for example, a call by the US for inclusion of Japan or Germany as members of the Security Council—which would no doubt elicit rejection by China and France and/or the UK, respectively.

36. This sentence reflects authors' opinion.

37. For a deeper discussion on the historical context and narrative of the BRI, see PETER FRANKOPAN, *THE NEW SILK ROADS: THE PRESENT AND FUTURE OF THE WORLD* (2018), in which the BRI is analyzed in the prism of the Chinese axiom of *tianxia* (all under heaven) which places China at the heart of power and civilization.

38. See Richard Haass, *America and the Great Abdication*, *THE ATLANTIC* (Dec. 28, 2017), <https://www.theatlantic.com/international/archive/2017/12/america-abidcation-trump-foreign-policy/549296> [<https://perma.cc/GC32-CA9J>].

Policy Review of the United States given to a panel of WTO delegates in December of that year.³⁹ In those prepared remarks he clearly noted that one of the most critical issues facing the WTO membership is China's failure to fully embrace the open, market-oriented policies on which this institution was founded and to which it remains committed. Despite repeated portrayals of itself as a staunch defender of free trade and the global trading system, China, this report claims, is in fact among the most protectionist economies of the world.⁴⁰ Contrary to members' expectations, China has not been moving toward a fuller embrace of market-based policies and practices since it became a full participant in the WTO in 2001 after many years of denied acceptance (a controversial move on which we will comment further below).⁴¹ In fact, the opposite is true; the state's role in China's economy has been increasing.⁴² Were China's economy small, the problems posed by its mercantilist approach to trade and investment would not have as serious repercussions for China's trading partners and the WTO itself; any number of the world's 195 nations have instituted stringent barriers towards inward bound trade.⁴³ But China's economy is not small. Over the past seventeen years China's economy and its role in the global trading system have grown dramatically. Measured in Purchasing Power Parity ("PPP"),⁴⁴ China has surpassed the United States in annual Gross Domestic Product ("GDP") output; in sheer volume, its

39. For December 2018 remarks, see *Statement of the United States by Ambassador Dennis Shea at the 14th WTO Trade Policy Review of the United States of America*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Dec. 17, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/december/statement-united-states-ambassador> [<https://perma.cc/R268-8A7F>].

40. *Id.*

41. *Ambassador Shea: China's Trade-Disruptive Economic Model and Implications for the WTO*, U.S. MISSION TO INT'L ORG. IN GENEVA (July 26, 2018), <https://geneva.usmission.gov/2018/07/27/55299> [<https://perma.cc/K63M-98QC>] [hereinafter Shea].

42. *Id.* For a detailed discussion on China's economy trending back toward state ownership, see also generally NICHOLAS LARDY, *THE STATE STRIKES BACK: THE END OF ECONOMIC REFORM IN CHINA* (2019) by the Peterson Institute.

43. Shea, *supra* note 41.

44. Purchasing power parity is a theoretical exchange rate that allows one to buy the same amount of goods and services in every country. The purchasing power parity calculation tells how much things would cost if all countries used the US dollar. See Kimberly Amadeo, *Purchasing Power Parity, How to Calculate PPP and How to Use It*, THE BALANCE (Mar. 4, 2019), <https://www.thebalance.com/purchasing-power-parity-3305953> [<https://perma.cc/FPT7-VDZQ>].

annualized merchandise trade of over US\$4 trillion ranks it as number one in the world, ahead of the United States and Germany.⁴⁵ China's size magnifies the harm caused by its state-led, mercantilist approach to trade and investment, and this harm is growing every day and can no longer be tolerated.⁴⁶ If the BWS is to be sustained, states the US position, then China must reverse and revise its course—a proposition with which the authors agree.

Ambassador Shea also noted in his July 2018 critique that the Chinese government and the Chinese Communist Party (“CCP,” which for all intents and purposes is the government of that nation) have a constitutional mandate, echoed in China's broader legal framework, to develop a “socialist market economy.”⁴⁷ To this end, the government continues to exercise control directly and indirectly over the allocation of resources through instruments such as government ownership and control of key economic sectors and government directives to individuals with agency in a wide array of firms throughout the economy.⁴⁸ While obvious in the workings of state-owned enterprise (“SOE”), this control is exercised in a more subtle fashion in other firms through the role of the often invisible “*shugi*” or CCP hierarchy assigned to work alongside the nominal leadership;⁴⁹ nothing of substance transpires at these firms without the consent of this invisible hand—that is, the Party—and often it is the Party that directs major initiatives by seemingly independent economic incumbents, especially as they affect labor force issues.⁵⁰

As a result of these interventions, the means of production are not sufficiently allocated or priced according to market principles. Instead, the government/CCP continues to control or otherwise influence the price of key factors of production, including land, labor, energy, and capital.⁵¹ Just as when China acceded to the WTO in 2001, SOEs

45. Shea, *supra* note 41.

46. Shea, *supra* note 41.

47. Shea, *supra* note 41.

48. Shea, *supra* note 41.

49. Shea, *supra* note 41.

50. Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665 (2015).

51. *Id.*

continue to play an outsized role in China's economy today.⁵² Moreover, the government and the Chinese Communist Party have for decades exercised control over these enterprises through the appointment of key executives and the provision of preferential access to important inputs.⁵³ Recently, the Party also has taken steps to increase its strength and presence within all business organizations in China; for example, there were well informed rumors that the unexpected exit of the ride-hailing firm Uber from China in 2016 and the merger of its operations there with local incumbent Didi Chuxing was orchestrated by the state as it saw Uber—based in the United States—as too powerful a competitor in an industry that was rapidly growing and employing tens of thousands of workers.⁵⁴ It should be noted that these non-market outcomes were not limited to discrimination only against US business firms operating in China. The efforts were apparently so pervasive that the Delegation of German Industry and Commerce released a public statement in November 2017 pushing back against attempts by the Communist Party “to strengthen their influence in wholly foreign-owned German companies in China.”⁵⁵

These behaviors are all in direct opposition to what US political leaders in the 1990s thought would result from their acquiescence to China's long-standing pleas for membership in the WTO (a request

52. For more recent concerns, see Li Yuan, *Private Businesses Built Modern China. Now the Government is Pushing Back*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/business/china-economy-private-enterprise.html> [<https://perma.cc/FM6G-874E>].

53. One of the authors has a keen personal recollection of exactly this happening. When teaching in Shanghai in 2007 at CEIBS (China Europe International Business School, the leading business school in the country), one of the executive students noted that there would soon be a reorganization at the top of her firm China Telecom, the leading telephone network, a point disputed by others in the class due to the relatively strong performance of that company whose shares were publicly traded both in China as well as in the US through ADRs. The following Monday morning, it was announced that the head of China Mobile, the dominant cell phone provider, would take over as head of China Telecom, while the head of the latter would move to China Mobile as CEO. There had been no public discussion of this switch in the press and no apparent business rationale for the move. It was simply engineered and executed by the CCP for its own reasons.

54. See, e.g., Brian Solomon, *Uber Surrenders in China, Joins Forces With Rival Didi*, FORBES (Aug. 1, 2016), <https://www.forbes.com/sites/briansolomon/2016/08/01/uber-ends-billion-dollar-china-fight-makes-peace-with-rival-didi/#1158c90c296f> [<https://perma.cc/PM26-QS4C>].

55. *Id.*

first initiated in 1986). At that time President Bill Clinton came to favor the notion that the constant harangues for internal reforms to Chinese policies in such areas as democracy, human rights (including religious freedom), and economic decision making would be more forthcoming were the United States to forego its prior negation of Chinese entry.⁵⁶ Rather, he reasoned, that entry would spur economic development and the rise of a new middle class that would itself demand significant reforms from its government.⁵⁷ That, at least, was the hope. But as we have seen, the reality has been quite the opposite.⁵⁸ Under President Xi Jinping, who rose to power in 2012 and now holds an apparent lifetime appointment, the state and Party have tightened considerably their control over almost all aspects of Chinese society, including personal freedoms, market transactions, and social/cultural and legal institutions.⁵⁹ In retrospect, President Clinton's hopes proved illusory at best, and plain wrong at worst. The rule of law, as it is understood in the West and certainly within the context of the BWS, has simply failed to materialize over the 18 years since China joined the WTO.⁶⁰

Instead, China's system of governance treats law as an instrument of the state, in the sense that it is used to facilitate the government's industrial policy goals and to secure discrete economic outcomes that might not otherwise emerge through purely market driven transactions. The courts are structured to respond to the Party's direction, a fact that manifests itself almost daily when one reviews local judicial

56. See President Clinton's speech of March 8, 2000, at the SAIS of Johns Hopkins University, in which he outlined his views on this subject. *Full Text of Clinton's Speech on China Trade Bill*, N.Y. TIMES (Mar. 8, 2000), <http://movies2.nytimes.com/library/world/asia/030900clinton-china-text.html> [<https://perma.cc/F2EH-36GA>].

57. *Id.* For a detailed discussion of China's entry into the WTO and various US Administrations' approach to China and trade policy, see RICHARD MCGREGOR, *ASIA'S RECKONING-CHINA, JAPAN, AND THE FATE OF U.S. POWER IN THE PACIFIC CENTURY* (2017), especially chapter 6.

58. Kurt M. Campbell & Ely Ratner, *The China Reckoning, How Beijing Defied American Expectations*, FOREIGN AFFAIRS, March/April 2018, Vol. 97, No. 2. See also *How the West Got China Wrong*, ECONOMIST (Mar. 1, 2018), <https://www.economist.com/leaders/2018/03/01/how-the-west-got-china-wrong> [<https://perma.cc/LNU3-Z5HQ>].

59. See ELIZABETH ECONOMY, *THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE* (2018)

60. For informative background on the evolution of US-China trade policy and relations, see CONG. RESEARCH SERV., RL33536, *CHINA-US TRADE ISSUES* (2018), available at https://www.everycrsreport.com/files/20180706_RL33536_eed6a32ac8ba111bd2a6b944a327f191664346b3.pdf [<https://perma.cc/MND6-USVX>] [hereinafter CHINA-US TRADE ISSUES].

decisions.⁶¹ For but one recent example, the incarceration of Canadian nationals working in China is transparently a quid pro quo related to Canada's arrest and potential extradition to the United States of a leading executive of Huawei, the large telecoms equipment manufacturer based in Shenzhen and one of China's leading global enterprises.⁶² Chinese law, it seems, is protean in nature and tends to conform not to deeply grounded and transparent principles but rather to the exigencies of the moment as understood and interpreted by the CCP.⁶³

Currently, China is seeking to attain both domestic market dominance and global leadership in a wide range of advanced technologies such as AI, communications, optics, and any number of fields related to defense.⁶⁴ In pursuit of this overarching objective, China has of late undertaken major efforts, including the controversial "Made in China 2025" industrial plan that was promulgated in 2015.⁶⁵ The intent of this ambitious strategic initiative, produced under the leadership of Chinese Premier Li Keqiang, was to migrate the country from its position as a supplier of cheap and low-skilled labor to a position of designing and creating high value added goods and services in cutting edge technologies that would presumably dominate the future global economy.⁶⁶ It is an aggressive program that was and is orchestrated by the state and does not take its cue from market signals; its direction and funding come directly from government mandates produced by public bureaucrats. A key goal of this Made in China 2025 initiative is to increase the domestic content of Chinese made or

61. ECONOMY, *supra* note 59.

62. ECONOMY, *supra* note 59.

63. Authors' opinion.

64. *See, e.g.*, KAI-FU LEE, *AI SUPERPOWERS: CHINA, SILICON VALLEY, AND THE NEW WORLD ORDER* (2018).

65. *Id.* For an overview of the Made in China 2025 program, see the Center for Strategic and International Studies (CSIS, a bipartisan Washington, DC-based think tank) website. Scott Kennedy, *Made in China 2025* (June 1, 2015), <https://www.csis.org/analysis/made-china-2025> [<https://perma.cc/YTZ2-JMZ2>]. In addition, *see* Dan Harris, *China's Ten Favorite Industries*, CHINA LAW BLOG, (August 25, 2015), <https://www.chinalawblog.com/2015/08/chinas-ten-favorite-industries.html> [<https://perma.cc/BK6Q-F35C>], and also see *China betting big on these 10 industries*, CHINADAILY (June 30, 2015), http://www.chinadaily.com.cn/bizchina/2015-06/30/content_21138379.htm [<https://perma.cc/QP9Z-PWK8>].

66. China's BRI supports this program by reallocating lower grade industrial production to recipient counties to maintain its high tech and value-added manufacturing domestically.

assembled goods to forty percent by 2020 and seventy percent by 2025; this will pertain to products in high-tech sectors such as green energy processes (e.g., solar power), aerospace, pharmaceuticals, automobiles including electric vehicles, communications, IT in general (e.g., artificial intelligence (“AI”) and robotics), and other critical industries which at the present time in China are dominated by foreign suppliers who have a technological lead over national incumbents.⁶⁷ According to reports, the government has committed over US\$300 billion in public funding to the program—with a goal to supplant the United States as the world’s leading technology manufacturing nation by 2025.⁶⁸ Much of this is targeted to subsidize the Research and Development (“R&D”) outlays which are usually necessary to enable major technological breakthroughs, and which in market economies typically are supplied only from risk capital provided by private interests who seek profits.⁶⁹ In essence, the Made in China 2025 program (an extension of its earlier “Indigenous Innovation” policy) is designed to create a new Silicon Valley but to do so under the direct guidance of the state and with the risks and returns to be borne by the state—for its own political purposes. This appears to be a key reason why the Trump Administration, in its current “trade war” with China, is demanding an end to this program as a condition for tariff relief.⁷⁰ However, some have commented that China has no intention of backtracking on such an important program and that its commitment to change is not credible.⁷¹

China’s industrial policies thus will deploy massive market-distorting subsidies and provide other forms of financial support for targeted domestic industries. But as we have seen in the past, such policies can generate the epiphenomena of severe and persistent excess production capacity. This in turn can render serious damage to the global economy, not only through direct exports from China by the

67. See Kennedy, *supra* note 65.

68. Kennedy, *supra* note 65.

69. Kennedy, *supra* note 65.

70. See Bob Bryan, *China Looks Like It’s Going to Give Trump a Huge Symbolic Trade War Win, Fueling Hope for a Big Deal*, BUS. INSIDER (Dec. 12, 2018), <https://www.businessinsider.com/us-china-trade-war-made-in-china-2025-trump-win-2018-12> [<http://perma.cc/S22L-R4XP>].

71. See KAI-FU LEE, *supra* note 64.

subsidized industries, but also because lower global prices stemming from the glut of supply make it difficult for even the most efficient competing producers to remain viable. This is what has of late occurred in the international steel, aluminum, and solar panel sectors—and no doubt has made both management and labor leaders in affected industry firms enthusiastic supporters of the Trump Administration’s own nationalist “America First” economic policies which are themselves undermining the Bretton Woods System at this time.⁷² It should require little historical hindsight to realize that similar “beggar thy neighbor” economic sentiments are what helped drive nations to war and destruction in the days of Great Power politics.

IV. *USTR REPORT ON CHINA AND THE WTO*

On February 28, 2018, Mr. Robert Lighthizer, the current US Trade Representative (“USTR”) who has long been concerned with and opposed to China’s non-market economic policies, issued President Trump’s Trade Policy Agenda and Annual Report, outlining how the Administration is promoting free, fair, and reciprocal trade and strongly enforcing US trade laws. Among other issues the report notes is how the USTR is responding to unfair trade practices, including defending US rights and trade remedy laws before the WTO and under US trade agreements, asserting that China is not a market economy and does not have the right to engage in government interference and intervention in market mechanisms, distorting market outcomes and undermining WTO rules, without consequence.⁷³

In June 2018, the White House Office of Trade and Manufacturing Policy issued a scathing report illustrating how China has pursued a variety of unreasonable actions that harm US intellectual property (“IP”) rights, innovation, and technology development.⁷⁴

72. KAI-FU LEE, *supra* note 64.

73. *Trump Administration Sends Annual Trade Agenda Report to Congress*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Feb. 28, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/february/trump-administration-sends-annual> [<https://perma.cc/LXP7-HUES>] [hereinafter USTR 2017 Report].

74. White House Off. of Trade & Manufacturing Policy, *How China’s Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World*, WHITE HOUSE (June 18, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf> [<https://perma.cc/28NW-DZ5K>].

These types of policies and practices injure not only the United States but also other WTO Members.⁷⁵ Moreover, the report notes that China continues to benefit asymmetrically from its WTO membership. That country is now the world's largest automotive market, the world's largest oil importer, the world's largest steel manufacturer, and the world's largest meat consumer.⁷⁶ The report further notes that while China undoubtedly struggles with poverty-related challenges in some areas of its economy, especially the rural agricultural sector, the claim that it is a "developing country,"⁷⁷ on par with many others such as those located in sub-Saharan Africa—and therefore should be exempt from abiding by or contributing to progressive liberalization of global trade rules—is simply not credible, when measured against numerous indicators of China's rapid development and accumulation of wealth over the past thirty years.⁷⁸ Indeed, many economists now fear that China is falling into the "middle income trap," a position hardly compatible with the status of a "poor nation."⁷⁹

75. In addition to foregoing sales of original products to counterfeited goods, or to Chinese products using their know-how, non-Chinese companies also often need to lower their prices to compete in China due to these actions. These firms spend billions of dollars to address possible infringements, according to a 2011 report by the US International Trade Commission. That report said trademark infringement was the most common form of IP violation in China, but copyright infringement was the most damaging; it estimated that US IP-intensive firms lost US\$48 billion in 2009 because of Chinese infringements. While China has made some efforts to improve its oversight and enforcement of laws prohibiting such behaviors, they nevertheless continue. See Grant Clark and Shelly Hagan, *What's Intellectual Property and Does China Steal It?*, BLOOMBERG (Mar. 22, 2018), <https://www.bloomberg.com/news/articles/2018-03-22/what-s-intellectual-property-and-does-china-steal-it-quicktake> [https://perma.cc/R934-ZJ28].

76. See USTR 2017 Report, *supra* note 73.

77. For example, in 2017, while China started a nationwide campaign to protect foreign firms' international property rights, its Ministry of Commerce noted that China is a developing country and doesn't have a perfect system to protect IP, acknowledging that there's much work to do. Of 50 countries in the US Chamber of Commerce's International IP Index, which measures a country's commitment to fostering and protecting innovation through legal rights, China ranks 25th (the United States is ranked first). While China earned praise in that survey for its reforms on patent and copyright protections, and its efforts to raise awareness of IP rights, it was still criticized for continuing high levels of infringement and insufficient legal safeguards. See *supra* note 76.

78. See Damien Ma, *Can China Avoid the Middle Income Trap?*, FOREIGN POL'Y (Mar. 12, 2016), <https://foreignpolicy.com/2016/03/12/can-china-avoid-the-middle-income-trap-five-year-plan-economy-two-sessions> [https://perma.cc/2RK8-J4S2].

79. *Id.*

Since joining the WTO in 2001 China has repeatedly signaled that it is pursuing economic reforms. However, its use of the term “reform” differs from the type and kind of reform that a country would be pursuing were it embracing market-oriented principles. For China, economic reform typically implies perfecting the government’s and the CCP’s management of the economy and strengthening the state sector, particularly SOEs who employ large numbers of people,⁸⁰ so as to maintain its legitimacy as part of the social contract that the Party imposed on the country in 1949 when Mao’s revolution succeeded. In essence, Chinese citizens would enjoy economic development and a rising standard of living, but they would attain these benefits only in the absence of full political participation. Political decisions and outcomes remain the purview of the Party, not an electorate in any real sense of that term and the democratic processes that it implies.⁸¹ As long as China remains on this path, we would assert, the probabilities for the WTO to convince China to “reform” its economic policies remain problematic.⁸²

China’s response to criticism about its trade-disruptive economic model is to assert that China strictly adheres to its WTO obligations, holds itself out as a “model” for other WTO members to emulate, and asserts that it “firmly observes and upholds the WTO rules and supports the multilateral trading system that is open, transparent, inclusive and non-discriminatory.”⁸³ Many, however, disagree. The aforementioned 2017 USTR Report notes that China had agreed to revise hundreds of laws, regulations, and other measures to bring that nation into conformity with its WTO obligations, as required by the terms set forth in its Protocol of Accession.⁸⁴ US policymakers hoped that these terms would dismantle existing state-led policies and practices that were incompatible with an international trading system expressly based on open, market-oriented policies and rooted in the principles of

80. *ECONOMY*, *supra* note 59.

81. See *CHINA IN THE ERA OF XI JINPING: DOMESTIC AND FOREIGN POLICY CHALLENGES* (Robert Ross & Jo Bekkevold eds., 2016).

82. U.S. Trade Representative, *2017 Report to Congress On China’s WTO Compliance*, OFF. OF U.S. TRADE REPRESENTATIVE (Jan. 2018), [https://ustr.gov/sites/default/files/files/Press/Reports/China 2017 WTO Report.pdf](https://ustr.gov/sites/default/files/files/Press/Reports/China%2017%20WTO%20Report.pdf) [<https://perma.cc/NAJ7-5GPD>].

83. See USTR 2017 Report, *supra* note 73.

84. USTR 2017 Report, *supra* note 73.

nondiscrimination, market access, reciprocity, fairness, and transparency. But those hopes were dashed, and repeatedly so. China largely remains a state-led economy today, and the United States and other trading partners continue to encounter serious problems with China's trade regime.⁸⁵ Meanwhile, China has used the imprimatur of WTO membership to become a dominant player in international trade. Given these facts, as we have suggested repeatedly above, in retrospect it now seems clear that the US 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.⁸⁶

Today, almost two decades after it pledged to support the multilateral trading system of the WTO, China pursues a wide array of continually evolving interventionist policies and practices aimed at limiting market access for imported goods and services from foreign suppliers. At the same time, China offers substantial government guidance, resources, and regulatory support to Chinese industries, including initiatives designed to extract advanced technologies from foreign companies in sectors across the economy, as a requirement for those firms to gain access to the large local market. The principal beneficiaries of China's policies and practices are Chinese SOEs and other significant domestic companies attempting to move up the economic value chain.⁸⁷

The USTR Report noted that this situation is worse today than it was five years ago.⁸⁸ While some of the legal changes and related economic reforms that China made in the years immediately following its WTO accession offered the potential for a fuller embrace of market principles (for example, there was a decided reduction in tariff barriers for exports to that country), over time these efforts stalled. Despite Chinese pronouncements to the contrary, the state's role in the economy has increased, as have the breadth and depth of concerns

85. USTR 2017 Report, *supra* note 73.

86. USTR 2017 Report, *supra* note 73. *See also* MCGREGOR, *supra* note 58.

87. A comprehensive review of China's alleged violations of trade policies was published by the Trump Administration in 2018. *See* White House Off. of Trade & Manufacturing Policy, *supra* note 75. This report, it should be noted, was written under the auspices of Mr. Peter Navarro, President Trump's trade advisor who has a long history of objecting to China's economic and political policies.

88. White House Off. of Trade & Manufacturing Policy, *supra* note 75.

facing US and other foreign companies seeking to do business in China or attempting to compete with favored Chinese companies in their home markets.⁸⁹ Since China's accession to the WTO and up to the current Trump Administration, the United States has repeatedly attempted to work with China in a cooperative and constructive manner.⁹⁰ Using intensive, high-level bilateral dialogues, the United States has sought to resolve significant trade irritants and also to encourage China to pursue market-oriented policies and become a more responsible member of the WTO.⁹¹ These bilateral efforts largely have been unsuccessful— not because of failures by US policymakers, but because reciprocal Chinese policymakers both appear and act uninterested in moving toward a true market economy.

We do find it encouraging, however, that the US is not retreating totally into a posture of economic isolationism, despite contrary views from President Trump in both his presidential rhetoric and his administration's actions. To do so, we believe, would only insure a regression to the past that would lead to catastrophic geopolitical/economic outcomes. Yet an insufficiently researched question is the motivation behind China's behavior in what the United States and others believe is non-compliance with the rules and regulations of global commerce. Is there some surreptitious rationale for this, perhaps having to do with a desire by Chinese leaders to supplant the US as the global hegemon and "take over the world," as some on the right have surmised?⁹² Or is the issue one of miscommunication or misunderstanding perhaps best recognized as a clash of cultures—stemming from an assumption that the rule of law resonates as powerfully in China as it does in the West? We will return to this question below.

89. CHINA-US TRADE ISSUES, *supra* note 61, at 31-57.

90. CHINA-US TRADE ISSUES, *supra* note 61, at 31-57.

91. CHINA-US TRADE ISSUES, *supra* note 61, at 31-57.

92. See, e.g., Joe Hildebrand, *China's Secret Plan to Take Over the World*, NEWS.COM.AU (Oct. 19, 2017), <https://www.news.com.au/finance/economy/world-economy/chinas-secret-plan-to-take-over-the-world/news-story/cd114b46e10194325422e2ef3f4eb5db> [<https://perma.cc/N2HH-2U54>].

V. *B2C: BACK TO CHINA . . . AND GLOBAL REALITIES*

China has proven more than capable to engage in a 21st Century version of mercantilism without having yet to resort (and we empathize yet) to more atavistic means to advance its perceived domestic and global trade interests.⁹³ The nation's ongoing interactions with both African and Latin American nations to secure natural resources and influence are but one example, while its BRI to alter the prevailing geopolitical landscape and global world order—though of late hitting some road bumps—is another.⁹⁴ Easily added to this list would be the Asia Infrastructure Investment Bank (“AIIB”), a new global development bank from China that mimics the World Bank created by US-led Allies as part of the BWS in 1944, and The New Development Bank, led by China with its “BRICS”⁹⁵ partners.⁹⁶ Regrettably, the AIIB came about in part due to prior US Administrations' inability to secure Congressional approval to proposed changes to the IMF that would bestow new voting procedures to reflect China's increased role and prominence in the global economy.⁹⁷ Equally important to note is

93. This reflects the authors' opinion; it is our reasoned opinion based on the totality of what we have written here and in prior publications.

94. Also, China's TPP equivalent Regional Comprehensive Economic Partnership (“RCEP”), is encumbered by the divergent interests and perspective of its members as it is not considering rules on the regulation and transparency of SOEs, the prevention of corruption, and guarantees of workers' rights, all of which are included in the TPP. In this regard, China is averse to services liberalization. Meanwhile, India is prioritizing services liberalization and Japan and Australia are seeking comprehensive goods and services liberalization in the same manner of the CPTPP. See Mie Oba, *TPP, RCEP and the Liberal Economic Order, Proponents of the Liberal Economic Order Have Reason to be Concerned*, THE DIPLOMAT (Sept. 2, 2018), <https://thediplomat.com/2018/09/tpp-rcep-and-the-liberal-economic-order> [<https://perma.cc/V7YB-TU59>].

95. For the BRICS acronym, see *supra* note 27 above. The final “S” was added by China in 2010 when it invited South Africa to join the original group of four nations—Brazil, Russia, India, and China. O'Neill, *supra* note 27.

96. In addition, regional facilities have been put together to provide support at times of financial distress, including the Chiang Mai Initiative which pools foreign-exchange reserves of the ASEAN+3 countries and the Contingency Reserve Arrangement, which BRICS members can rely upon. For details, see *Chiang Mai Initiative Multilateralization*, Bangko Sentral Ng Pilipinas (Jan. 2019), <http://www.bsp.gov.ph/downloads/Publications/FAQs/CMIM.pdf> [<https://perma.cc/3U5V-6C8Q>].

97. See Leonid Bershidsky, *IMF Reform Is Too Little, Way Too Late*, BLOOMBERG (Dec. 18, 2015) <https://www.bloomberg.com/opinion/articles/2015-12-18/imf-reform-is-too-little-way-too-late> [<https://perma.cc/95ZG-8NKL>]. See also Edwin M. Truman, *IMF Quota and Governance Reform Once Again*, PETERSON INST. FOR INT'L ECON. (Mar. 2018),

that it also started despite the US lobbying its allies not to join.⁹⁸ While the Trump Administration has of late pursued several initiatives to, if not reverse, then at least mitigate the formation and potential influence of the AIIB and other Chinese global economic initiatives (such as the BUILD Act [Better Utilization of Investments Leading to Development Act of 2018] and the ARI Act [Asia Reassurance Initiative]), these appear relatively mild compared to the magnitude of China's aggressive global agenda. In fact, in the area of multilateral trade agreements and despite the Administration's stated abhorrence of the constraints and inequities of such agreements, voiced in conjunction with its unfortunate and ill-advised withdrawal from the Trans Pacific Partnership ("TPP"), it did negotiate successfully the United States-Mexico-Canada Agreement ("USMCA") to replace The North American Free Trade Agreement ("NAFTA"), a twenty-five-year-old pact in need of substantive revisions due to evolving conditions in the global economic environment—though we should note that as of this writing Congressional approval of the USMCA remains problematic.

While time will tell if these changes were merely face-saving cosmetics for a President desperate for a "win" given his campaign rhetoric, the outcome could have been significantly worse, such as total abnegation of NAFTA with no successor program in its place.⁹⁹ The realities of living in a globally interdependent world where allies (e.g., Greece and the Mediterranean area of the European Union teetering on

<https://piie.com/system/files/documents/pb18-9.pdf> [<https://perma.cc/Y84A-9CVE>]; Mark Weisbrot & Jake Johnston, *Voting Share Reform at the IMF: Will it Make a Difference?*, CTR. FOR ECON. POL'Y RES. (Apr. 2016), <http://cepr.net/images/stories/reports/IMF-voting-shares-2016-04.pdf> [<https://perma.cc/2RB7-P23E>].

98. Matthias Sobolewski & Jason Lange, *U.S. urges allies to think twice before joining China-led bank*, REUTERS (Mar. 16, 2015), <https://www.reuters.com/article/us-europe-asia-bank/u-s-urges-allies-to-think-twice-before-joining-china-led-bank-idUSKBN0MD0B320150317> [<https://perma.cc/BAS3-XA7G>]. See also Joseph Stiglitz, *Why America Doesn't Welcome China's New Infrastructure Bank*, HUFFPOST (Apr. 13, 2015), https://www.huffpost.com/entry/america-china-investment-bank_b_7055222 [<https://perma.cc/W5LZ-92LX>].

99. Katie Lobosco, *Trump poised to make NAFTA ultimatum to congressional Democrats*, CNN (Dec. 5, 2018) <https://www.cnn.com/2018/12/05/politics/trump-nafta-threat/index.html> [<https://perma.cc/WL69-SKFT>]. See U.S. Int'l Trade Commission, *U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, U.S. INT'L COMMISSION (Apr. 2019), https://www.usitc.gov/publications/332/pub4889.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery [<https://perma.cc/P6WZ-QT8B>].

insolvency) can do almost as much harm as enemies (e.g., Russia and revanchist policies in its Near Abroad) are sobering reminders that the conduct of unilateral, neo-isolationist, transactional foreign policy only forestalls the inevitability of engaging internationally, though at much higher costs and with fewer options for goal achievement. One need only be reminded of America's delayed entry into WWII to realize this.

These trade policy initiatives at least minimally acknowledge that in spite of the Trump Administration's "America First" platform and its constant demand for redress of Allied imbalances with respect to financial burden sharing, it still recognizes that the US must engage globally on some level.¹⁰⁰ This is both positive and welcomed, because the goal of China in its global economic policies and ambitions, we claim, has been to reassert its status as a Great Power and to do so at the expense of the US-led BWS that has been so beneficial to so many for the past seventy-five years (not the least of whom have been the citizens of China themselves). To overturn that in favor of an autocratic regime that denies democracy, minimizes personal freedoms, and seeks state control of key economic institutions and behaviors would be imprudent and counterproductive to both China and the world.

Notwithstanding China's stated goal to uphold the international global order of free trade,¹⁰¹ its decision to ignore a ruling against it in a key legal case over control of strategic reefs and atolls in the South China Sea seems inconsistent with its aforementioned policy of compliance with international law.¹⁰² The judgment in that case from an international tribunal in the Hague was in favor of claims by the

100. See John Hudson et al., *Trump Invokes New Demand for Extracting Billions of Dollars from US Allies*, WASHINGTON POST (Mar. 9, 2019), https://www.washingtonpost.com/world/national-security/trump-invokes-new-demand-for-extracting-billions-of-dollars-from-us-allies/2019/03/09/d472b9cb-09d5-481e-9475-291378986dbb_story.html?utm_term=.313113489ae7 [<https://perma.cc/SFX4-SLS4>].

101. See President Xi's 2018 speech at the annual World Economic Forum held in Davos and various articles on this topic. *President Xi's speech to Davos in full*, WORLD ECON. F. (Jan. 17, 2017), <https://www.weforum.org/agenda/2017/01/full-text-of-xi-jinping-keynote-at-the-world-economic-forum> [<https://perma.cc/VUL5-LTRW>]; Kim Hjelmgaard & Donna Leinwand Leger, *Davos: China's Xi invokes Gettysburg Address in defense of free trade*, USA TODAY (Jan. 17, 2017), <https://www.usatoday.com/story/news/world/2017/01/17/china-xi-jinping-davos-world-economic-forum/96658058> [<https://perma.cc/J9WX-5XLC>].

102. Campbell & Ratner, *supra* note 58; ECONOMIST, *supra* note 59.

Philippines.¹⁰³ China's President Xi noted that China's territorial sovereignty and marine rights in the seas would not be affected by the ruling, which declared large areas of the sea to be neutral international waters or the exclusive economic zones of other countries.¹⁰⁴ While it is concerning, equally disquieting is the fact that no permanent members of the UN Security Council have ever complied with a ruling by the PCA on an issue involving the Law of the Sea. In fact, none of the five permanent members of the UN Security Council have ever accepted any international court's ruling when (in their view) it infringed on sovereignty or perceived national security interests.¹⁰⁵ While it may seem antithetical to American views to ask whether China should do as we say, or, by contrast, as we do, it is even more disconcerting in the face of the "America First" policies of the Trump Administration.¹⁰⁶ Those policies, at least when taken at face value, appear to seek disengagement from the world, or at least embracement

103. The PCA delivered its award in the Philippines' case against China over maritime disputes in the South China Sea. In a bid to thwart Beijing's attempt to turn the South China Sea into its own sovereign territory, the Philippines contended that China's claim to exclusive sovereignty over all the islands and shoals within the so-called "nine-dashed line" – which encompasses 86 percent of the Sea – has no basis in international law. See Permanent Ct. of Arb., *The Tribunal Renders Award on Jurisdiction and Admissibility; Will Hold Further Hearings*, PERMANENT CT. OF ARB. PRESS RELEASE (Oct. 29, 2015), <https://www.pcacases.com/web/sendAttach/1503> [<https://perma.cc/72VQ-HVW4>]. For details of this episode, see Tom Phillips et al., *Beijing rejects tribunal's ruling in South China Sea case*, THE GUARDIAN (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> [<https://perma.cc/K6UH-JL4H>].

104. *Id.*

105. In the Republic of Nicaragua v. The United States of America (1986), the ICJ ruled in favor of Nicaragua and against the US and awarded reparations to Nicaragua. The ICJ held that the US had violated international law by supporting the Contras in their rebellion against the Nicaraguan government and by mining Nicaragua's harbors. The US refused to participate in the proceedings after the Court rejected its argument that the ICJ lacked jurisdiction to hear the case. The US also blocked enforcement of the judgment by the UN Security Council and thereby prevented Nicaragua from obtaining any compensation. Nicaragua subsequently withdrew the complaint from the court in 1992 following a repeal of the law which had required the country to seek compensation. (This case was adjudicated against the background of the "Contra Wars" being waged in Central America by the Reagan Administration—factors that may have influenced both the jurists in this case as well as the US rejection of proceedings). For its summary, see *Nicaragua v. United States of America* ICJ Judgment of 27 June 1986, H2O (Aug. 23, 2016), https://h2o.law.harvard.edu/text_blocks/29108 [<https://perma.cc/JF3Z-PU5R>].

106. David A. Graham, *'America First': Donald Trump's Populist Inaugural Address*, THE ATLANTIC (Jan. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-inaugural-speech-analysis/513956> [<https://perma.cc/P6ZV-MCPV>].

of a more transactional basis rather than adherence to well established laws and precedents—an approach that would seem to provide China with reason to further pursue such conduct in support of its own interests, rather than comply with the existing framework of the BWS and its foundational principles. Is this the appropriate way forward as the BWS faces fierce headwinds of change that might lead to its disintegration?

VI. *WHAT IS TO BE DONE?*

“Hitherto,” observed Marx, “philosophers have sought to understand the world; the point, however, is to change it.”¹⁰⁷ Is President Trump correct in his stated belief that the BWS System needs change, regardless of the underlying rationale? While a retreat from the BWS leaves understandable worry from a macro geopolitical perspective, there is also reason to promote a sense of optimism that it can be altered and improved upon without sacrifice of its basic principles or a reversion to an era of Great Power politics of the past. Some people—and we include ourselves in this—are deeply concerned over the potential impact of President Trump’s disengagement from the 20th Century world order that the United States created and led for so long. This retreat has spawned the poisonous ancillaries of social tensions stoking populism, populism stoking social tension, trade friction stemming from “America First” policies, a surge in internally displaced people and refugees, and other social, economic, political, and cultural issues effecting all countries. For too many, the “rise of China” can account for much of the chaos in which we find the world today, and as such the simplistic nostrums offered by President Trump and the easy encomiums of his own “greatness” would appeal to his followers to be the only way out. We find this both risible and indeed dangerous.

It should be clear by now that the authors of this Article strongly favor retention of the Bretton Woods System. As described above, this would include the market mechanism to determine what is produced and how it is distributed, transparent laws and regulations to oversee

107. See Lev Churbanov, "Preface" to Karl Marx–Frederick Engels Collected Works: Vol. 5: Marx and Engels, 1845–47. N.Y. Int'l Publishers, 1976, p. xiv.

economic behavior, an independent judicial system to resolve disputes, democratic processes to choose public leaders, supporting institutions to facilitate process, and respect for individual rights, among other principles.¹⁰⁸ And, of course, the BWS advocates free trade among the nations. However, while these pillars of the system should not be altered in any fundamental manner, we have also argued that the evolved global political economy of the 21st Century does justify revisions that would better align its framework with today's realities.

We noted earlier in this review that the divide separating China and the West, in terms of trade policy, is perhaps due to a "clash of cultures" as much as anything else.¹⁰⁹ An insufficiently explored subject is the rationale for China's rejection of international law: is it due to a desire to overturn the "system" and replace it with one that implants China as the global hegemon? This would be a seeming replay of Great Power politics of the past, but now with a new protagonist on the stage. For those who hold such a perspective, it greatly simplifies the rationale to oppose China's ambitions as well as the need to undertake more nuanced analysis into the motivation for its (presumed) objectives: "if they 'win' then it must imply that we 'lost'"—and who would want to lose? Accordingly, stop the rise of China! Impose tariffs, limit investments, impugn its leaders, win a big beautiful victory!

Unfortunately, this reductionist approach downplays reasoned analysis, or at the least it fails acceptable standards of serious investigation. A more informed approach, we would assert, requires a deeper dive into China's cultural norms and beliefs and how they might animate its leaders' perspectives on economic transactions and relations. Western cultural traditions, as we know, arose out of the ancient worlds of Greece and Rome, which incorporated an appreciation of laws and obligations of the citizenry to abide by them.¹¹⁰ Accompanying Judeo-Christian values became enmeshed in the social and political fabric of Western nations, and helped form the basis of what we have termed the BWS: laws were codified based on theories of social justice and equity, and the needs of the state were

108. See Part I above, The "Bretton Woods System."

109. See Part IV above, USTR Report on China and the WTO, especially the end paragraph

110. See J. M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* (1992).

carefully balanced against personal rights of individual citizens—that is, a social contract between citizen and state was enjoined.¹¹¹ The desire for personal power was clearly acknowledged, but mechanisms were created to prevent damage to the collective needs of the whole by those who would abuse their power—typically achieved through a system of laws and courts.¹¹² Absent such constraints, it was correctly assumed, purely self-aggrandizing behavior could lead to a Hobbesian state in which brute force alone would dominate and stability would be constantly at risk as the fight for power and privilege took its toll.¹¹³ Democratic political institutions, it might be added, were critical to the preservation of stability as they provided for a safety valve that could be invoked if the finely balanced system of regulated restraints gave way to tyrannical behavior by elites in power. The tyrant could be voted out.

As we have seen, the economic benefits of globalization eventually broke down past barriers that had limited free trade.¹¹⁴ Though not without friction and costs, these aggregate benefits proved substantial enough to spread to most sectors of society in most regions of the world following the termination of hostilities in 1945.¹¹⁵ Yet as the BWS that enshrined the principles underlying this arrangement of economic interchange began to fray with the rise of China in particular and the Asia-Pacific region in general,¹¹⁶ concomitant questions regarding their universality also emerged.¹¹⁷ Should outcomes be a function of compliance with stated rules, regulations, and laws, or should each case be weighed on its own merits regardless of any broader legal context? And if so, who was to decide? The “trolley problem” of ethical choice, involving deontological *vs.* consequentialist approaches—that is, utilitarianism *vs.* a rules-bound

111. *Id.*

112. *Id.*

113. *Id.*

114. *See, e.g.*, JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

115. *Id.*

116. One should not forget the trade violations committed by Japan in the 1970s and 1980s. *See* LAURA TYSON, *WHO’S BASHING WHOM? TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES* (1992) for a balanced review.

117. *Id.*

system—emerges.¹¹⁸ The issue is one of universal values, and especially those involving Chinese approaches to cross-border trade, intellectual property ownership rights, government funding of business firms, “social stability” needs and their maintenance, and the like, as opposed to the foundational principles of Western society that underpin the BWS.¹¹⁹ Is there a “Confucian” system of values that differs from the West in areas critical to global commerce? To work well, globalization and global trade require an even playing field—which implies that all actors in the game have and abide by similar values. Is this in fact the reality of the highly diverse world in which we live today? Even within our Western sphere, let alone on a global basis, the current political divisiveness in numerous nations might give one pause as to the answer.

However, while we are sympathetic to the diversity of peoples and their values the world over, we disagree that global commerce should conform to different rule regimes in different geographies. Indeed, there can be no “global” commerce under such conditions: trade becomes purely transactional. As we saw when bi-lateral trade agreements were the norm in the United States, prior to a turn to multilateralism under FDR’s Secretary of State Cordell Hull in the 1930s, instability was the typical result for the global economy.¹²⁰ In essence, this was the Great Powers problem.

But we are also cognizant of the difficulties inherent in establishing a rules-based multilateral system. These are, admittedly, not insignificant; they involve time-consuming negotiations to reach agreements among the many participants (one need only to recollect the failed Doha Round of the WTO to understand this).¹²¹ Moreover, in democratic regimes where vested local interests have much to either gain or lose through outcomes, there is enormous pressure on trade negotiators to achieve certain results, regardless of their equity for

118. Among other sources, see Judith Jarvis Thomson, *The Trolley Problem*, 94 *YALE L.J.* 1395 (1985).

119. This reflects the Authors’ opinion.

120. See IRWIN, *supra* note 15.

121. See Kimberly Amadeo, *DOHA Round of Trade Talks*, *THE BALANCE* (Jan. 5, 2019), <https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365> [<https://perma.cc/AK58-YADD>].

all.¹²² And, to compound the difficulties, a nation's citizenry needs to agree to the system and its results—which can strain even the most involved of observers given the often-times mind-numbing complexity of trade rules and regulations, most of which hardly lend themselves to persuasive communication in the current climate of thirty-second sound bites and forty-character Tweets.¹²³

But we must again return to the past in support of our recommendations: without such a framework—our BWS—the danger to civil society is magnified tenfold or more. The required effort is demanding, certainly, but the costs of failure are far greater. Accordingly, what we do advocate is refinement and revision rather than termination.¹²⁴ We believe several key changes are necessary today:

1. To remain relevant in a 21st Century multipolar BWS, the WTO (as well as the IMF) must align representation with countries' relative economic weight, and systemic importance with commensurate responsibilities to maintain the global trading and financial system. The decision-making apparatus, benefits, and responsibilities of these necessary institutions should be amended to give greater weight, influence and responsibilities to new economic actors, specifically China.¹²⁵ However, this change should be strictly

122. This reflects the Authors' opinion.

123. This reflects the Authors' opinion.

124. For additional insights on the author's views on the BWS, see William Jannace & Paul Tiffany, *Bretton Woods 4.0 Finding New Relevance in a New World Order*, THE BRETTON WOODS COMMITTEE (Feb. 19, 2019), <https://www.brettonwoods.org/article/bretton-woods-4.0-finding-new-relevance-in-a-new-world-order> [<https://perma.cc/KTT5-HVRW>]. See also William Jannace & Paul Tiffany, *Accounting for Trade: President Trump and the "Geopolitical Balance Sheet"*, NYU GLOBAL AFF. PERSP. ON GLOBAL ISSUES (Spring 2017), http://pgi.nyu.edu/wp-content/uploads/2017/06/PGI.SP17.FINAL_.11.pdf [<https://perma.cc/FZ6V-NN9A>].

125. China continues to borrow an average of US\$2 billion a year from the World Bank, making it one of the top borrowers—despite being the world's second-largest economy and itself a major global lender. The IBRD has loaned more than US\$7.8 billion to China since the country surpassed the bank's "graduation" income threshold for lending in 2016. The World Bank's current threshold to trigger IBRD country graduation discussions is US\$6,895 in gross national income (GNI) per capita. Lending to countries above this threshold has been controversial, with the US critical of ongoing lending to China. Critics have pushed for strict graduation standards that would make wealthier borrowers ineligible for bank loans (i.e., "graduation"). Under the 2018 agreement, World Bank shareholders agreed to limit loans to countries above the threshold to only projects that focus on: global public goods (projects that benefit the world at large); and,

contingent on verifiable commitments by China to abide by the WTO as a developed—not developing—country, and to assume responsibilities under the IMF commensurate with its financial strength.¹²⁶

2. The United States should acknowledge the benefits of the AIIB in its investment projects throughout the world that enhance local needs; moreover, the United States should pursue either membership or observer status, and in this role advocate for enhanced governance and transparency in the organization. At the same time, however, the United States should not abandon the World Bank and its mission, but rather should spearhead continued efforts to facilitate coordination and cooperation between these two institutions (as well as the Asian Development Bank and The New Development Bank). If, at some future point, it becomes apparent that a single entity is best positioned to accomplish objectives, then a merger should be pursued.

3. The United States and its traditional BWS allies should assume a leadership position in facilitating an expansion of South-to-South and East-to-East trade and commerce. This initiative should be undertaken with an explicit goal of *not* undermining or threatening China's BRI program, but rather with complementing it in a manner that leads to increased prosperity in both African and Latin American nations.

capacity-building (projects that help the countries “graduate” away from World Bank lending). Given its climate and environmental issues, China has been able to avail itself of this program. See Scott Morris & Gailyn Portelance, *A Closer Look at the World Bank's Sizable China Portfolio*, CTR. FOR GLOBAL DEV. (Jan. 10, 2019), <https://www.cgdev.org/blog/closer-look-world-banks-sizable-china-portfolio> [https://perma.cc/LDE2-NTR4].

126. A critical issue with the current structure of the WTO system is its negotiation function based upon the consensus principle (involving all 164 members). This has proven too rigid, and as such unable to facilitate improvements in the trade rule system. Further exacerbating this problem is that the WTO remains grounded in an outdated approach to flexibilities, which allows over two-thirds of its membership—including China, India, Brazil, South Africa and Indonesia—to claim, “special and differentiated treatment” (SDT). See also PK Vasudeva, “Reforming WTO,” *The Statesman* (Oct. 8, 2018), at <https://www.thestatesman.com/opinion/reforming-wto-1502694011.html> [https://perma.cc/B3BQ-FH4M] for informative commentary. We should note, however, that the Trump Administration currently appears to be undertaking measures that would undermine the WTO rather than reform it—a position with which we strongly disagree. One reason for our disagreement is that the US has benefitted perhaps more than any other nation from WTO rulings and procedures. See Jeffrey Schott, *US-China Trade Friction: The WTO Dimension*, PETERSON INST. FOR INT'L ECON. (Jan. 23, 2019), <https://piie.com/system/files/documents/schott2019-01-23ppt.pdf> [https://perma.cc/K8YP-WYVK].

4. The US should take the lead in updating laws and rules pertaining to Intellectual Property. Patent laws for the protection of IP were a function of a world in which physical goods predominated and cross-border trade was limited. Yet today technology is increasingly embodied in intangible services that move instantaneously across borders, rather than in tangible products; indeed, we are rapidly moving into the “digital era” of global commerce.¹²⁷ China, as we have noted, has not abided by IP commitments made under its WTO membership and has caused significant damage to Western firms as a result.¹²⁸ Within the context of the WTO and the World Intellectual Property Organization (“WIPO”), the US should therefore advocate for tougher standards regarding IP protection (and China, it might be noted, continues to file patents at a growing pace even as it seeks protection from the very system it has previously taken advantage of).¹²⁹ However, in the spirit of cooperation and compromise that we think is necessary to the creation of a viable world system going forward, we recommend that the United States and China should take the lead in convening a global forum—perhaps under the auspices of the WTO and WIPO—to bring patent law into the present times, clearly a pressing need as advances in AI promise to revolutionize many sectors of future economic activity.¹³⁰ By providing China with a leadership role, it is our intention and hope that the country’s leadership would retreat from its past practices and embrace a sincere effort to re-establish and maintain appropriate ownership rights to IP.

127. See HENRY CHEESEMAN, *CONTEMPORARY BUSINESS LAW* (8th ed. 2015), especially chapters on digital commerce law.

128. See authors’ comments in Part IV above USTR Report on China and the WTO.

129. In 2017 China became the second largest source of international patent applications filed *via* WIPO. The list was led by two Chinese communications technology firms, Huawei and ZTE, followed by Intel, Mitsubishi, and Qualcomm. China at current trends is projected to overtake the US within three years as the largest source of applications filed under WIPO’s Patent Cooperation Treaty (PCT). See *China Drives International Patent Applications to Record Heights; Demand Rising for Trademark and Industrial Design Protection*, WORLD INTELL. PROP. ORG. (Mar. 21, 2018), https://www.wipo.int/pressroom/en/articles/2018/article_0002.html [<https://perma.cc/5ZB7-52R6>].

130. A study from the WIPO notes a surge in AI based-inventions, led so far by IBM and Microsoft. See Michael Castelluccio, *WIPO: U.S. and China Lead the World in AI Innovation*, SF MAGAZINE (Feb. 6, 2019), <https://sfmagazine.com/technotes/february-2019-wipo-u-s-and-china-lead-the-world-in-ai-innovation> [<https://perma.cc/5SDG-DVL7>].

5. The US dollar serves as the de facto global reserve currency,¹³¹ an outcome of the Bretton Woods agreements in 1944 and the political and economic realities of that time, as the UK faced massive financial problems and could no longer support the British Pound as the reserve currency.¹³² Today, however, there is a general need to depoliticize such a critical tool to global commerce, a fact long recognized by other nations who have had to conduct their own monetary policy under a comprehensive strategic safety net maintained by the United States.¹³³ In connection with a revitalized 21st Century BWS, the US should work with China to build upon ongoing progress to promote China's Renminbi ("RMB," that is, the "people's currency") as a reserve currency—a fitting role for the world's second largest economy. But to do so, we acknowledge, China will need to make substantial changes to the management of its currency (global hegemons have, for example, historically borne the responsibility of maintaining open capital accounts and often run trade deficits required to support the system as a whole).¹³⁴ While we advocate for such changes in China's current posture, we also realize that such a transformation will be difficult for the country's leadership. Yet that being said, a refusal to undertake them would perhaps be a fatal blow to any possibilities of China assuming a global economic leadership role in the context of cooperation that we recommend in this paper.

131. The USD is the world's major reserve currency because most countries choose to hold the bulk of their currency reserves in this medium. Historically, to fulfill this role, a country must possess liquid financial markets capable of taking in large levels of investment; a reputation and proven record of safety and the rule of law that eases security concerns; and a willingness to endure current account deficits. Currently only the US maintains all three criteria—and no other country has been willing and able to assume such burdens. While China is gradually and cautiously seeking such status, it well recognizes this responsibility can cause its currency to appreciate, thus dampening economic growth and generating unemployment. Given the paramount need to minimize these two outcomes (as the government's legitimacy depends on this), it remains to be seen how enthusiastic China will be to assume such a role. See David Lubin, *How US Monetary Policy Tamed Chinese Foreign Policy*, CHATHAM HOUSE (Jan. 17, 2019), <https://www.chathamhouse.org/expert/comment/how-us-monetary-policy-tamed-chinese-foreign-policy?> [https://perma.cc/58D6-4QAG].

132. This reflects the authors' opinions.

133. STEIL, *supra* note 2.

134. See generally work by Barry Eichengreen and particularly, BARRY EICHENGREEN, ARNAUD MEHL, AND LIVIA CHITU, *HOW GLOBAL CURRENCIES WORK PAST, PRESENT, AND FUTURE* (2019).

The recommendations above, obviously, are very crudely sketched concepts that beg for greater specificity and clarity. However, that is neither our purpose or possibility in the confines of this Article. Rather, they are meant to stimulate discussion that will preserve the BWS that has served so many so well for so long, but to do so in the context of current realities. Those discussions, we believe, should also be driven by a common understanding: the need for economic détente between the United States and the People's Republic of China before a crisis stage comparable to the Cold War stand-off following the end of WWII is reached. We are not calling for a surrender of China's economic might in order to "make America great again" or any other such humiliation; these recommendations recognize that the People's Republic of China would not memorialize a relatively inferior position vis a vis the US in any new reconfiguration of a BWS. As China's economy continues to grow, even at a slower pace than in the past, it is reaching a point where it deserves as well as demands a prominent seat at the table. It is better to provide this seat peacefully, we hold, than risk a catalytic event such as WWI to effect the promotion, testimony to what can happen when emotions rather than reason rule the day.¹³⁵ Yet while advocating a peaceful reconfiguration of global economic relationships, we just as adamantly assert that China needs to engage in sincere and verifiable economic reforms if it expects to be awarded a prominent presence at the global table.

Our presumption, then, is that we can reverse the zero-sum game mentality that the Trump Administration appears to be pursuing at this time regarding China and its economic and political aspirations, executed through trade wars, investment restrictions, and other such tactics. While the United States might prevail in such a confrontation—an outcome we think likely at this point in time—it would also prove a

135. It should be noted that the 19th Century hegemon, Great Britain, had reached its economic climacteric in the mid-1870s, after which both a newly created Germany and the US began to achieve greater economic strength (without either having a reserve currency status). By the early 20th Century the US had become the dominant economic power of the world, securing global pre-eminence in the wake of the destruction of Europe in World War I. It is precisely through an examination of this failed model of global relations—the Great Powers era—that we find justification for a reinvigoration of the BWS as perhaps the sole means to retain peace and prosperity going forward today. For a comprehensive discussion of this topic, see ADAM TOOZE, *THE DELUGE: THE GREAT WAR, AMERICA AND THE REMAKING OF THE GLOBAL ORDER, 1916-1931* (2014).

Pyrrhic victory at best. This is one key lesson of the era of the Great Powers. Accordingly, we advocate openness and transparency in the reconfiguration of the rules of the game regarding international trade. Doing so would better expose China and its citizens, we believe, to the comparative beneficial aspects of what we have termed the Bretton Woods System.

One further dimension to our recommendations, however, deserves address. This involves the role of the private sector in confronting the challenges of today's global economy. We maintain there is hope for redress through actions and initiatives that an enlightened global private sector can and should undertake, within the general context of the BWS but through an enlarged role for private action in the face of governmental retreat from its obligations, be it by the US or elsewhere. While we hardly see this as a panacea for the complexity of today's situation—and as well we fully acknowledge its limitations when compared to the powers of state-led and financed programs and initiatives¹³⁶—we nevertheless offer it as an additional tool that would prevent what we consider a worse option: the return to a world of Great Power rivalries.

When viewed through the lens of today's Environmental, Social and Governance movement ("ESG"), some of the meta problems confronting the world today seem neither intractable nor beyond the scope of available financial resources.¹³⁷ ESG tools that have been and can be further channeled to the resolution of social issues that will both generate profit and yet still fulfill purpose include the following: Socially Responsible Investing; Impact Investing; Corporate Social Responsibility; and Agri Business/Ethical Investing, with more such structures and initiatives no doubt to follow as this movement grows in stature. To fit these private sector investment strategies into the parameters of our paper, we would also envision the creation of additional financial vehicles and policies that support firms who abide by the norms of free and fair trade and refrain from investments in firms

136. That is, the financial strength of governments and their statutory powers obviously provides more resources than a private sector actor could wield.

137. See the US-SIF (The Forum for Sustainable and Responsible Investment) website (<https://www.ussif.org>) and the UN PRI website (<https://www.unpri.org>) for information on the scope of this asset class. See also the UN's Principles for Responsible Investment.

(or countries) that flaunt them.¹³⁸ Through such actions, we assert, the principles that underpin our invoked BWS construct might also be applied by private sector actors motivated by social public purpose. In this way a retreat from globalization by governments through policies of economic nationalism would not necessarily imply a reversion to the Great Power politics of the past and all of the ills that it generated. Socially responsible private sector actors, we assert, can do much to fill this growing void.¹³⁹ Properly focused private sector investment in regions of the world under climate stress, for example, may be able to help them become so-called Geopolitically Sustainable Societies (“GSS”).¹⁴⁰ ESG initiatives represent an opportunity for private sector actors to stretch beyond narrowly defined profit objectives of the capitalist enterprise and instead achieve outcomes that aid and abet the

138. In its Concept Paper on WTO modernization, the EU recommended that it was crucial to bring the WTO and its trade agenda closer to citizens and ensure that trade contributes to the pursuit of broader objectives set by the global community, in particular as regards sustainability and Sustainable Development Goals (SDGs). Specifically, it was recommended that the EU prepare an analysis of SDG targets and identify ways in which trade policy could contribute to their achievement, and also that the EU should pursue such discussions in the WTO. See EU Concept Paper, “WTO Modernisation, Future EU Proposals on Rulemaking.” Accessed at: http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

139. However, to be fair we must also acknowledge the risks inherent in such a path—we are not as naïve as this view might appear. Not all private sector firms will fulfill outsourced public sector tasks traditionally undertaken by public actors only to serve public good motivations; in fact, some firms appear to be willing to engage in reprehensible tasks—for a profit—specifically to minimize the negative publicity that would redound to the government were such tasks to be undertaken. One recent example (among many) involves the founder of Blackwater, the US-based defense contractor, and his new firm that recently agreed to build for China a “training facility” to process hundreds of thousands of Muslims in China’s western provinces in an indoctrination program that ostensibly would break them of their religious convictions and in their place instill a respect and love for the Chinese state. The point: the private sector cannot automatically be expected to undertake tasks traditionally done by governments, thus filling the void created by governmental retreat from international relations. We know that some firms and their leaders pursue profit simply for its own sake, regardless of the collateral damage it might cause, and will always do so. For details on Blackwater’s founder, see Alexandra Stevenson & Chris Buckley, *Blackwater Founder’s New Company Strikes a Deal in China. He Says He Had No Idea*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/business/erik-prince-xinjiang-china-fsg-blackwater.html> [<https://perma.cc/447L-43GX>].

140. There are currently at least 12 global initiatives addressing climate change supported by various firms, including oil and gas companies and others that are heavy emitters of fossil fuels. These include, among others: The TCFD, We Are Still In; Climate Action 100+; and RE 100. See *NIRI Policy Statement—ESG Disclosure*, NAT’L INV. REL. INST. (Jan. 2019), <https://www.niri.org/NIRI/media/NIRI/Advocacy/ESG-Policy-Statement-final.pdf> [<https://perma.cc/FXT6-UL5L>].

underlying principles of the BWS—clearly a beneficial “win-win” reward for all involved parties.¹⁴¹ The private sector is neither inherently evil nor opposed to the legitimate requirements of the public sector. Business firms, we believe, can undertake activities in cross-border development, finance, and trade that will generate outcomes compatible with the foundations of the BWS. They become in effect a force multiplier towards this end.

As we reflect on the 75th anniversary of D-Day and the successful conclusion of World War II, we must remember that but a few years prior to that—five to be exact—the invasion of Poland by Hitler’s troops started an all-consuming war in Europe that soon engulfed the entire planet in its horror and destruction. But in the face of looming catastrophe, a united leadership of countries with both different political systems and histories ultimately arose and soon the forces for world redemption stood together to fight the tyranny and oppression that Hitler and his cohort of Axis Powers had created. The “greatest generation,” we must remember, was not limited to American citizenship alone. And today similarly, many of our most pressing global problems appear imminently addressable if we can mobilize the will to marshal private resources that are clearly available and in abundance. While such resources will still require coherent and coordinated government oversight, a framework rooted in a stable and transparent rule of law can lead to positive outcomes for all.

VII. CONCLUSION

“No man is an island,” wrote the English poet John Donne nearly 400 years ago,¹⁴² in words that perhaps are even more appropriate in today’s deeply interconnected global system. We believe that now would be an appropriate time in our history for nations to again come together and address collective problems in very much the way our predecessors did some seventy-five years earlier. The Bretton Woods System was of necessity forged from a ravaged world left in near total destruction; while its architects are those celebrated by history, such as FDR, Marshall, Keynes, Acheson, Churchill, Truman and

141. This reflects the authors’ opinion.

142. JOHN DONNE, NO MAN IS AN ISLAND, available at <https://allpoetry.com/No-man-is-an-island> [<https://perma.cc/59YZ-XV3J>].

numerous others,¹⁴³ the bricks and mortar of the structure they built were the blood, limbs, and lives of those countless millions lost during that tragic time.

Today we can and indeed must honor their collective sacrifice by recommitting ourselves to a renewed and more responsive New World Order, that is a reinvigorated Bretton Woods System for the 21st Century—one that embodies the underlying and enduring principles of democracy and markets but does so in the context of current realities. Moreover, this also implies that the nations that exercised the greatest degree of both political and economic power in the post-WWII era—principally the USA—must be willing to share that munificence with the emerging nations that will play such a vital role in the 21st Century global economy. By finding common ground, we can retain the peace and prosperity of the past seventy-five years well into this exciting new Century that we mutually inhabit. And if we do not, we well may be consigning ourselves to only a temporary and transient era of tranquility, one in which underlying forces of destruction loom large beneath the shallow veneer of peace. Of this, history speaks clearly and convincingly.

143. For a detailed account of the creation of the BWS, see DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* (Reissue ed. 1987).

