

FOREWORD

ECONOMIC NATIONALISM: U.S. AND CHINESE STYLE

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The United States and China have the two largest national economies in the world and are also the world's leading proponents of Economic Nationalism. In this context, this term refers to the use of national policies to promote exports while creating barriers to imports and is a 21st century version of 17th century mercantilism. Both nations hold these policies, but there is a stark contrast in how they are implementing them. As both nations have similar, but conflicting goals, they have been locked in a two-year trade dispute that could destabilize the global economy as a whole. Recently, the two nations announced a historic phase I agreement to suspend trade hostilities. This development provides a good opportunity to explore some of the ramifications of the rise of Economic Nationalism and what it portends for the future.

I. INTRODUCTION

In 2019, the United States and China are embroiled in the midst of a trade dispute¹ that has awakened the echoes of an earlier period in the first decades of the twentieth century when the entire world seemed to be on the verge of economic collapse and calamitous war.² During

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¹ For an overview and various stages of the U.S.-China trade dispute up to the present, see Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/> [hereinafter *The US-China Trade War*].

² See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 18 (3d ed. 2017) [hereafter CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*].

the high tide of Economic Nationalism and protectionism culminating in the 1930s leading to the Second World War, nations erected protectionist trade barriers that prevented trade and viewed each other with suspicion and mistrust; these factors helped to precipitate an immensely destructive world war.³ Have nations such as the United States and China reembraced Economic Nationalism, and is the world on the verge of another catastrophe, at least of an economic nature? The papers in this volume help to examine this question and explore the possibility of charting a course forward based upon trade harmony.⁴

The use of the terms “Economic Nationalism” to describe national policies in the United States and China has gained popularity in the current climate,⁵ and the purpose of this symposium is to explore the implications of these policies. We must first begin with a definition of these terms. Although these terms can have different meanings to different people depending on the context, we prefer a simple economic definition: Economic Nationalism is the use of laws, regulations, and policies by a nation to increase its export of goods while at the same time creating barriers to imports.⁶ In this sense, Economic Nationalism is a modern version of the 17th century theory of mercantilism.⁷ Under this definition, both the United States and China have adopted Economic Nationalism as national policy,⁸ although both nations use different means to effectuate such policy.

³ *Id.*

⁴ For one proposed way forward, see Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL’Y REV. 115 (2019).

⁵ Those who report on the rise of Economic Nationalism see it as a threat to the global economy. See, e.g., Monica de Bolle, *The Rise of Economic Nationalism threatens Global Cooperation*, REALTIME ECON. ISSUES WATCH (Sept. 4, 2019), <https://www.piie.com/blogs/realtime-economic-issues-watch/rise-economic-nationalism-threatens-global-cooperation>; Jamie Merchant, *Economic Nationalism is Suicide*, THE NATION (Feb. 5, 2019), <https://www.thenation.com/article/economic-nationalism-brex-it-trump-globalization>.

⁶ For a more rigorous economic definition, see Daniel C.K. Chow, Ian Sheldon, & William McGuire, *The Revival of Economic Nationalism and the Global Trading System*, 40 CARDOZO L. REV. 2134, 2147-52 (2019).

⁷ See Laura LaHaye, *Mercantilism*, THE LIBRARY OF ECONOMICS AND LIBERTY, <https://www.econlib.org/library/Enc/Mercantilism.html>.

⁸ See Parts II and III *infra* for development of this thesis.

The United States and China are the two leading proponents of Economic Nationalism in the global economy.⁹

Economic Nationalism appeals to nations as many have long desired to create a trade surplus, i.e. when exports exceed imports, and to avoid a trade deficit, i.e. when imports exceed exports.¹⁰ A trade surplus means that a nation is earning more revenue through trade (i.e. exports) than it is spending (i.e. imports).¹¹ A trade deficit has the opposite effect, i.e. a nation is spending more than it is earning.¹² A long term trade surplus will allow a nation to become wealthy.¹³ A long term trade deficit will cause a nation to lose wealth unless the nation is able to borrow money or capitalize on other growth factors, such as innovation in technology or inward capital flows.¹⁴

China is a remarkable example of how a nation can become immensely wealthy in a short period of time through an export driven economy.¹⁵ In the span of a few decades, China's economy, once backward and impoverished, has become the second largest economy in the world, with the prospect of surpassing the U.S. economy and becoming the world's largest in the near future.¹⁶ China's rise has caused concern and alarm for the United States, and other nations, because the United States believes that China has used illegal means and unfair trade practices to achieve these results.¹⁷

⁹ See *id.*

¹⁰ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 30. When economists talk about trade balances, they usually refer to the trade in goods, but trade balances also exist with respect to the trade in services and other smaller categories.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Fareed Zakaria, *Trump is Right: China's a Trade Cheat*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/opinions/global-opinions/trump-is-right-chinas-a-trade-cheat/2018/04/05/6cd69054-390f-11e8-8fd2-49fe3c675a89_story.html.

¹⁶ See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 18 (3d ed. 2015) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS].

¹⁷ See Zakaria, *supra* note 15.

The ascension of Donald J. Trump to the U.S. presidency in 2016 marked a turning point in U.S. policy toward China.¹⁸ Although previous U.S. administrations have been critical of China, the current U.S. policy has become overtly bellicose toward China (and other nations).¹⁹ The United States has imposed punitive trade sanctions, in the form of heavy tariffs, against China and its other trading partners to coerce and pressure them into making trade concessions.²⁰ China has responded with retaliatory trade sanctions against the United States raising the specter of an all-out trade war that could plunge the global economy into turmoil and chaos.²¹

II. U.S. ECONOMIC NATIONALISM

The United States' approach to Economic Nationalism is built on its use of trade policy. The trade policy of the United States explicitly encourages the use of the tools of international trade, such as trade sanctions and trade agreements, to promote U.S. exports and to reduce U.S. imports.

A. *Use of Trade Sanctions*

The cornerstone of the Trump Administration's trade policy is the use of tariffs and other trade sanctions against China and other U.S. trading partners that are engaged in unfair trade practices.²² The use of these sanctions is designed to coerce or pressure U.S. trading partners into decreasing their exports to the United States and opening up their

¹⁸ Donald J. Trump, President of the U.S., State of the Union Address (Feb. 5, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address-2/> (“We are now making it clear to China that after years of targeting our industries, and stealing our intellectual property, the theft of American jobs and wealth has come to an end. Therefore, we recently imposed tariffs on \$250 billion of Chinese goods – and now our Treasury is receiving billions of dollars a month from a country that never gave us a dime.”).

¹⁹ *Id.*

²⁰ *See infra* text accompanying note 23.

²¹ *See infra* text accompanying note 26.

²² *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 25 (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf> (after decrying the lack of success in negotiations with China on rectifying its unfair trade practices, the United States Trade Representative stated, “[T]he United States intends to focus its efforts on enforcement going forward. . . . The United States is determined to use every tool available to address harmful Chinese policies and practices . . .”).

internal markets to U.S. exports. In the case of China, as of this writing, the United States has imposed additional tariffs on \$550 billion of Chinese imports,²³ which means that all or the vast majority of all goods imported from China are subject to these new punitive tariffs.²⁴ Some of these tariffs have been suspended in light of ongoing trade talks but they could be reinstated if the talks do not culminate in an agreement or if an agreement is reached and later breaks down.²⁵ China has in turn imposed retaliatory tariffs on \$185 billion of U.S. goods.²⁶ The United States' tariffs are punitive in nature, i.e. they are imposed on top of existing tariffs, and are designed to inflict economic pain on China.

The economic effect of a tariff is to reduce consumer demand for the import.²⁷ A tariff is a tax that is imposed by the importing country at the point of entry for the import.²⁸ In the case of Chinese imports, most importers must pay the tariff in order to admit the goods to the U.S. internal market, but most importers then pass on the increased cost in the form of higher retail prices charged to the ultimate consumer.²⁹ Higher prices for consumers will tend to reduce their demand for the import, leading to lower import volumes.³⁰ In the case of China, the use of tariffs by the United States has led to a significant decrease, contributing to a serious downturn in its economy.³¹

B. The Use of Bilateral Trade Agreements to Increase Exports

²³ See *The US-China Trade War*, *supra* note 1.

²⁴ The latest figures for 2019 are not yet available, but in 2018, the United States imported \$539.5 billion in goods from China. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, U.S.-CHINA TRADE FACTS, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>. It is reasonable to assume that tariffs on \$550 billion of Chinese imports in 2019 will mean that new tariffs imposed will cover a substantial majority, if not the entirety, of Chinese imports.

²⁵ *Id.*

²⁶ *Id.*

²⁷ CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 201.

²⁸ *Id.* at 200.

²⁹ *Id.*

³⁰ *Id.*

³¹ Finbarr Bermingham & Kathleen Magramo, *China Economy to Sink Further with US Trade War and Pork Crisis to Drive Record Low Growth Lower Still*, SOUTH CHINA MORNING POST (Oct. 18, 2019), <https://www.scmp.com/economy/china-economy/article/3033600/china-economy-set-sink-further-us-trade-war-and-pork-crisis>.

The goal of using punitive tariffs is to force U.S. trading partners into making trade concessions that require reducing exports to the United States and purchasing more U.S. imports. The Trump Administration claims that prior U.S. administrations have entered into unfair trade agreements that allow U.S. trading partners to take advantage of the United States. The Trump Administration claims that these trade agreements need to be revised and corrected and boasts that significant progress has already been made.³²

Under the pressure of punitive sanctions, nations are expected to come to the bargaining table and make trade concessions in exchange for having the sanctions lifted. In the case of South Korea, U.S. tariffs on imports of steel and aluminum resulted in a renegotiation of the U.S.-Korea Trade Agreement with the parties reaching a revised agreement on March 27, 2018.³³ Under the new agreement, South Korea promised to limit its exports of steel to the United States to 2015-17 levels.³⁴ In the ongoing negotiations between the United States and China, the countries have agreed on the general parameters of a phase one trade agreement that would require China to purchase \$40-50 billion of U.S. agricultural product exports annually.³⁵

Unlike previous administrations, the Trump Administration focuses on bilateral agreements instead of multilateral agreements.³⁶ The use of bilateral agreements allows the United States to focus its efforts on improving the trade relationship with one single trading

³² THE WHITE HOUSE, PRESIDENT DONALD J. TRUMP HAS DELIVERED RECORD BREAKING RESULTS FOR THE AMERICAN PEOPLE IN HIS FIRST THREE YEARS IN OFFICE (Dec. 31, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivered-record-breaking-results-american-people-first-three-years-office/> (claiming that “President Trump is negotiating better trade deals for the American people after years of our country being taken advantage of” and listing the trade agreements already revised).

³³ Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, 37 B.U. Int’l L. J. 1, 26 (2019) [hereinafter Chow, *United States Unilateralism*].

³⁴ *Id.*

³⁵ See *The US-China Trade War*, *supra* note 1.

³⁶ OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT’S 2017 TRADE POLICY AGENDA 6, <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20%20The%20President%27s%20Trade%20Policy%20Agenda.pdf> (“[G]oing forward, we will tend to focus on bilateral negotiations . . .”).

partner. As multilateral agreements involve multiple partners, there can be trade-offs and compromises that dilute the ability of the United States to focus its pressure tactics on any single nation.³⁷ This departure from the use of multilateral agreements is not only a break from previous U.S. administrations, but it is also inconsistent with the last seven decades of trade agreements dating back to the end of the Second World War.³⁸ In general, the current approach of the United States is to leverage its economic power and put pressure on individual trading partners to capitulate and offer trade concessions.

C. Disregard of the World Trade Organization

The current trade tactics used by the United States (discussed above) are in open disregard of the law of the World Trade Organization (WTO).³⁹ Established in 1995 in Geneva, Switzerland as a successor to the General Agreement on Tariffs and Trade (GATT) founded in 1947,⁴⁰ the WTO was instrumental in the first two decades of its existence in greatly expanding global trade.⁴¹ The WTO helped to build upon the rules-based trading system created by the GATT and create a legal framework for reducing barriers to the trade in goods, services, and technology (or intellectual property).⁴² The United States

³⁷ *Id.*

³⁸ The era of multilateralism began with the establishment of the Bretton Woods institutions and reached a peak with the founding of the WTO in 1995. *See* CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 18, 26-29.

³⁹ *See* Chow, *United States Unilateralism*, *supra* note 33, at 14-18.

⁴⁰ CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 26-29. Towards the end of the Second World War, the United States led a conference held in Bretton Woods, New Hampshire to help create the international institutions that would guide the post-war economy. The conference envisioned a triumvirate structure consisting of the World Bank, which would lend money to alleviate poverty, the International Monetary Fund (IMF), which would create stability in cross border currency flows, and the International Trade Organization (ITO), which would reduce barriers to trade. The World Bank and IMF were created but the ITO never came into existence, due mainly to opposition by the U.S. Congress. In the meantime a multilateral treaty, the GATT, had already been adopted on a provisional basis to jump start the post-war economy. The ITO was to administer the GATT, but because the ITO was stillborn, the GATT took on a life of its own as a treaty without an organization to administer it. In 1995, the WTO took on the role that was originally envisioned for the ITO. *Id.*

⁴¹ *See* Chow, Sheldon, & McGuire, *The Revival of Economic Nationalism*, *supra* note 6, at 2136.

⁴² CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 2, at 26-29. Under the WTO, trade in goods is disciplined by the General Agreement on Trade in Goods (1994), trade in services is regulated by the General Agreement on Trade

was the leading nation in establishing the WTO and was its leading proponent during most of the latter half of the twentieth century.⁴³

In a break with previous U.S. administrations, the United States currently acts in open defiance of the WTO.⁴⁴ The United States believes that the WTO has been exploited by other nations, such as China, that are able to obtain favorable trade advantages at the expense of the United States. The Trump Administration believes that the WTO no longer represents an evenhanded or neutral forum in which U.S. interests will be fairly treated. As a result, the United States has rejected the WTO's overall approach to the regulation of international trade. The WTO establishes a rules-based tariff system that places strict limits on when and how a nation can increase its tariffs.⁴⁵ All WTO tariffs are the result of years of negotiations and can be increased only under a set of conditions carefully circumscribed by WTO rules. In using its current tactics, the United States has imposed tariffs unilaterally and in defiance of the rules of the WTO.⁴⁶ Indeed, the United States has openly stated that as a matter of sovereignty, it has the right to freely ignore and disregard the rules of the WTO.⁴⁷ In its place, the United States intends to act unilaterally to further its interests at the expense of other nations, if necessary.⁴⁸

in Services (1994), and trade in technology or intellectual property is regulated by the Agreement on Trade Related Intellectual Property Rights (1994). *See id.* at 28.
⁴³ *See* CATHLEEN D. CIMINO-ISAACS, CONG. RESEARCH SERV., IN10945, WORLD TRADE ORGANIZATION (WTO): U.S. PARTICIPATION AT RISK?, (2018), <https://fas.org/sgp/crs/row/IN10945.pdf> (noting that the United States was a key architect of the WTO).

⁴⁴ *See* Chow, *United States Unilateralism*, *supra* note 33, at 6-7.

⁴⁵ *See id.* at 14-18.

⁴⁶ *See id.*

⁴⁷ OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2019 TRADE POLICY AGENDA AND 2018 ANNUAL REPORT 27, https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf ("The United States remains an independent nation, and our trade policy will be made here – not in Geneva. We will not allow the WTO Appellate Body and dispute settlement system to force the United States into a straitjacket of obligations to which we never agreed.").

⁴⁸ OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2018 TRADE POLICY AND 2017 ANNUAL REPORT 2, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF> ("The Trump Administration . . . [has] an aggressive trade enforcement agenda designed to prevent countries from benefiting from unfair trading practices. We will use all tools available – including unilateral action where necessary – to support this effort.").

III. CHINESE ECONOMIC NATIONALISM

Unlike the United States, China does not use trade policy to promote its Economic Nationalism. Rather, China uses industrial policy, i.e. policies directed at its internal economy, as its engine of Economic Nationalism.

A. *Industrial Policies Directed to Promote Economic Nationalism*

1. *State-Owned Enterprises as National Champions*

China uses a web of what are known as “indigenous innovation policies”⁴⁹ designed to transform its state-owned enterprises (SOEs) into “national champions,” i.e. leading companies in the modern global economy able to compete successfully with the world’s largest multinational corporations (MNCs).⁵⁰ SOEs are business entities that are administrative units of the state; as opposed companies that are privately owned, SOEs are owned by the State and managed and controlled by state officials.⁵¹ Although privately owned enterprises have displaced many SOEs in China in recent years, SOEs remain dominant in all strategic economic sectors, such as steel, telecommunications, banking, electric and gas power, water supply, air and rail transportation, and oil and gas exploration.⁵² Through its control of SOEs, the Communist Party and China’s leaders are able to control the economy.⁵³ Thus, SOEs serve a vital role not only in China’s economy but also in its political structure.

China promotes SOEs by providing government subsidies in the form of direct financial payments, indirect benefits, and preferential legal treatment.⁵⁴ The State can provide direct subsidies in

⁴⁹ See Daniel C.K. Chow, *The Myth of China’s Open Market Reforms and the World Trade Organization*, U. PENN. J. INT’L L. 19-20 (forthcoming 2020) [hereafter Chow, *Myth of China’s Open Market Reforms*] (manuscript copy on file with the author).

⁵⁰ *Id.* at 20.

⁵¹ See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF CHINA IN A NUTSHELL* 21 (3d ed. 2015).

⁵² See Chow, *Myth of China’s Open Market Reforms*, *supra* note 49, at 19.

⁵³ See *id.*

⁵⁴ Jane Cai, *Why China’s Subsidized State-Owned Enterprises Anger US, Europe, and its own Private Companies*, SOUTH CHINA MORNING POST (Feb. 21, 2019),

the form of financial payments to SOEs or can arrange for favorable loans as the State also controls all of China's banks. These subsidies provide a significant trade advantage to SOEs by enabling them to export their products at a lower cost, which is ultimately to the detriment of their U.S. competitors. Although subsidies are illegal under the WTO and are subject to sanctions in the form of countervailing duties imposed by the importing country,⁵⁵ China's complex and opaque economic system makes it difficult for its trading partners to detect and prove the existence of the myriad forms of subsidies that SOEs receive. By subsidizing exports, China is able to increase its exports, the first prong of Economic Nationalism.

China also provides favorable treatment to SOEs in the internal market through these subsidies and through discriminatory legal regulation and enforcement.⁵⁶ The same subsidies that promote exports also create cost advantages in dealing with domestic competition from foreign companies doing business in China. In addition, China provides favorable legal treatment for SOEs while using the laws harshly against foreign competitors. For example, in the pharmaceutical sector, China has engaged in a pattern of aggressive enforcement of competition and anti-bribery laws against multinational pharmaceutical companies doing business in China, while domestic Chinese firms, many of them state-owned, have escaped such treatment although they have engaged in even more egregious conduct.⁵⁷

The discriminatory application of the law favors SOEs while also burdening foreign competitors and acts as a non-tariff import trade barrier. Although discriminatory legal regulation is not an overt type of trade barrier, like tariffs, the effect of discriminatory legal regulation is to operate as an import barrier. When put into practice, foreign competitors will find it difficult to conduct business and will be reluctant to sell their products in China due to the effects of the

<https://www.scmp.com/news/china/diplomacy/article/2184707/why-chinas-subsidised-state-owned-enterprises-anger-us-europe>.

⁵⁵ CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 517.

⁵⁶ See Daniel C.K. Chow, *Three Major Problems Threatening Multinational Pharmaceutical Companies Doing Business in China*, 19 COLUM. SCI. & TECH. L. REV. 47, 65 (2017).

⁵⁷ See *id.*

discriminatory law, regulation, and enforcement. As a result, fewer foreign products will be sold in China.

2. *Technology Transfer and Theft of Intellectual Property Rights*

China's web of industrial policies also results in the transfer of technology and intellectual property from multinational companies to SOEs. China's current laws make it difficult for MNCs to enforce their intellectual property rights against counterfeiting and piracy, and the laws make it similarly difficult for MNCs to prosecute the theft of trade secrets.⁵⁸ Until the passage of the new Foreign Investment Law, effective on January 1, 2020,⁵⁹ MNCs were required to partner with an SOE to form a joint venture to do business in many sectors in China.⁶⁰ As part of the joint venture agreement, the MNCs were required to transfer their technology to the joint venture, where the SOE would be able to access the technology and, in many instances, appropriate it for their own uses. Acquiring advanced technology from foreign competitors is encouraged by China through its "Made in China 2025" policy, which proposes that China achieve dominance in high-end technology fields by 2025.⁶¹

B. *Use of Currency Controls*

In the past, China has been accused of engaging in currency manipulation to further its goals of Economic Nationalism. Unlike most major economies, China does not allow its exchange rate to float, i.e. be determined by the market forces of supply and demand.⁶² Rather, China pegs its currency to the U.S. dollar.⁶³ The United States has long accused China of manipulating its exchange rate by

⁵⁸ See Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, NW. J. INT'L L. & BUS. at 8-9 (forthcoming 2020) (copy of file with the author).

⁵⁹ Laney Zhang, *China: Foreign Investment Law Passed*, LIBRARY OF CONGRESS: GLOBAL LEGAL MONITOR (May 30, 2019), <https://www.loc.gov/law/foreign-news/article/china-foreign-investment-law-passed/>.

⁶⁰ See CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 16, at 467 (discussing Foreign Industrial Guidance Catalog, which sets forth those industries that require joint ventures).

⁶¹ See Chow, *Myth of China's Open Market Reforms*, *supra* note 49, at 19.

⁶² See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 45.

⁶³ *Id.*

undervaluing its currency by as much as 40%.⁶⁴ For example, suppose that when the Chinese exchange rate was eight Chinese RMB to one U.S. dollar, the United States claimed that that the actual or market rate should have been four Chinese RMB to one U.S. dollar. By undervaluing the RMB, China was able to use the exchange rate to make Chinese goods cheaper for U.S. consumers and U.S. goods more expensive to Chinese consumers, leading to more Chinese exports to the United States and fewer U.S. imports to China.⁶⁵ Although recent changes have greatly limited China's ability to manipulate its currency, the United States currently argues that China continues to manipulate its currency and has recently designated China as a currency manipulator under U.S. law, allowing the United States to impose sanctions under federal law.⁶⁶

C. *China and the WTO*

Unlike the United States, China is a strong supporter of the WTO and strictly adheres to WTO rules and decisions.⁶⁷ When it joined the WTO two decades ago, China had little capacity or expertise in international trade and played a passive role in the WTO.⁶⁸ Today, China is one of the most frequent users of the WTO dispute settlement system⁶⁹ and has won significant victories against the United States.⁷⁰ The WTO allows its members to litigate trade disputes before its dispute settlement body consisting of panels that act like a trial court and an Appellate Body that acts like an appeals court.⁷¹ In a short period, China has become one of the WTO's most frequent and

⁶⁴ Edward Wong & Mark Landler, *China Rejects U.S. Complaints on Its Currency*, N.Y. TIMES (Feb. 4, 2010) (economists believe that China undervalues its currency by 25-40%), <https://www.nytimes.com/2010/02/05/world/asia/05diplo.html>.

⁶⁵ CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 45.

⁶⁶ U.S. DEP'T OF THE TREASURY, TREASURY DESIGNATES CHINA AS CURRENCY MANIPULATOR (Aug. 5, 2019), <https://home.treasury.gov/news/press-releases/sm751>.

⁶⁷ Jacob M. Schlesinger, *How China Swallowed the WTO*, WALL ST. J. (Nov. 1, 2017), <https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308> (Quoting China ambassador to the U.S. Cui Tiankai) ("Since our accession to the WTO, China has always followed the WTO rules.").

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (discussing a series of WTO rulings from 2011 to 2017 that went in favor of China and against the United States).

⁷¹ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 2, at 83-84.

successful users of the dispute settlement system.⁷² By contrast, the United States would rather resolve trade disputes outside of the WTO and is actively seeking to undermine the WTO dispute settlement system.⁷³ Due to U.S. opposition, the WTO Appellate Body now has less than three active members and is unable to convene, a result that has paralyzed the WTO's appellate review of its panel decisions on trade disputes.⁷⁴ The paralysis of the WTO's dispute settlement mechanism has triggered a crisis within the WTO, one in which the United States and China will take different sides. It is ironic that the United States, once the champion of the WTO and its rules-based trading system, has now crippled the WTO and that China, long accused of ignoring the rules of the multilateral trading system and rules-based trade, seems to be the stronger proponent of the WTO.⁷⁵

IV. CONCLUSION

This brief overview of U.S. and Chinese style Economic Nationalism indicates that while their goals are similar, the two nations are using different approaches to achieve them. The United States uses an open and blunt trade policy approach that employs highly visible tools to directly achieve its economic goals. The United States has adopted an overtly bellicose stance on trade and a defiant attitude

⁷² *Id.*

⁷³ See Daniel C.K. Chow, *U.S. Trade Infallibility and the Crisis of the WTO* (forthcoming 2020) (on file with the author).

⁷⁴ Jamey Keaten & Paul Wiseman, *World Trade without Rules? U.S. shuts Down WTO Appeals Court*, AP NEWS (Dec. 10, 2019), <https://apnews.com/a08cc387ff5c1af859e6f17020e29a91>. Although the Trump Administration opposes adding new members to the WTO Appellate Body to replace retiring members, U.S. opposition began under the Democrat administration of President Obama. See Victoria Guida, *U.S. Stands Alone against WTO Appellate Body Member*, POLITICO (April 24, 2016), <https://www.politico.com/tipsheets/morning-trade/2016/05/us-stands-alone-against-wto-appellate-body-member-catfish-drug-snap-with-obama-in-vietnam-dueling-tp-letters-214457>. This agreement between Trump and Obama is one indication that U.S. dissatisfaction with the WTO is a bipartisan issue on which both major political parties agree.

⁷⁵ The differing positions of the United States and China on the WTO can be attributed to the perceived favoritism that the WTO showers on China. The United States has accused the WTO of "enabling Beijing's state-directed mercantilism, in turn allowing China to flood the world with cheap exports while limiting foreign access to its own market." Schlesinger, *supra* note 67. Peter Navarro, trade adviser to President Trump, has stated that "[t]he WTO's abject failure to address emerging problems caused by unfair trade practice countries like China has put the U.S. at a great disadvantage." *Id.*

towards the WTO. China uses a complex and opaque web of industrial policies to create the economic conditions within China's internal market that will help China achieve its goals. China is a supporter of the WTO and its rules-based trading system. To the extent that the U.S. approach is more direct and transparent, the United States has been the subject of recent criticism by the media and its trading partners. However, while China's policies are more embedded in its economy and are less obvious, China has also engaged in strategic trade behavior. The actions and policies of both nations originate from a desire to improve their trade balances by increasing exports and decreasing imports.

As both the United States and China are out to achieve similar goals, the two nations are locked in a conflict. It defies logic to think that in a bilateral trade relationship the United States and China can both export more to the other than they import. This is one factor that gives rise to the conflict that has now embroiled the two countries in a long and unresolved trade dispute. Given the intransigence of both nations on their demands, many observers despair that there is no practicable permanent way forward that avoids either an all-out conflict or a decoupling of the two economies.

As of this writing the two countries recently announced a historic phase I agreement that will temporarily suspend their trade hostilities, the first real positive development in a rancorous two year trade dispute.⁷⁶ Whether this agreement is a temporary respite or the first step in a long term cooperation remains to be determined. Nevertheless, this development offers a good opportunity to explore the complexities and ramifications of this and other trade issues in the global economy and to shed some light on a viable and harmonious path forward.

⁷⁶ OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, UNITED STATES AND CHINA REACH PHASE ONE TRADE AGREEMENT (Dec. 13, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach> (noting that the trade agreement requires structural reforms to China's regime in areas of intellectual property, technology transfer, agriculture, financial services, and currency and foreign exchange).