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# U.S. TRADE POLICY TOWARD CHINA: THE TRUMP ADMINISTRATION AND FUTURE PROSPECTS

by

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## TABLE OF CONTENTS

INTRODUCTION .....	1
U.S. TRADE POLICY TOWARD CHINA BEFORE THE TRUMP ADMINISTRATION ..	2
U.S. TRADE POLICY TOWARD CHINA UNDER THE TRUMP ADMINISTRATION .	10
U.S. TRADE POLICY APPROACHES ADVOCATED BY TRADE LAWYERS .....	15
VIEWS OF VARIOUS AMERICAN STAKEHOLDERS .....	21
PROPOSED NEW TRADE POLICY APPROACHES .....	40
CONCLUSION.....	52
BIBLIOGRAPHY.....	57

## LIST OF ABBREVIATIONS

ASCM	Agreement on Subsidies and Countervailing Measures
CCP	Chinese Communist Party
CFIUS	Committee on Foreign Investment in the United States
CPTPP	Comprehensive and Progressive Agreement for the Trans-Pacific Partnership
CSIS	Center for Strategic and International Studies
EPA	Economic Partnership Agreement
EU	European Union
FOIP	Free and Open Indo-Pacific
FTA	Free Trade Agreement
FTAAP	Free Trade Area of the Asia-Pacific
GATT	General Agreement on Tariffs and Trade
IEEPA	International Emergency Economic Powers Act
IMF	International Monetary Fund
IOT	Internet of Things
ISDS	Investor State Dispute Settlement
MFN	Most-favored-nation
NAFTA	North America Free Trade Agreement
NBR	National Bureau of Asian Research
NDRC	National Development and Reform Commission (China)
NSS	National Security Strategy of the United States
NVNI	Non-Violation, Nullification and Impairment
PNTR	Permanent Normal Trading Relations
PRC	People's Republic of China
RCEP	Regional Comprehensive Economic Partnership
ROK	Republic of Korea

SASAC	State-owned Assets Supervision and Administration Commission (China)
SED	U.S.-China Strategic Economic Dialogue
SOEs	State-Owned Enterprises
TPP	Trans-Pacific Partnership
USCBC	US-China Business Council
USMCA	United States-Mexico-Canada Agreement
USTR	United States Trade Representative
WTO	World Trade Organization

This paper is Noriyuki Shikata's academic work conducted during his stay at the Program on U.S.-Japan Relations. Views expressed in this paper are his personal ones, and do not represent the view of the Government of Japan.

## INTRODUCTION

Under the Trump Administration, U.S. trade policy approaches to China have undergone major changes. Why have these changes taken place? When did the new developments leading toward these changes start? Are the current U.S. trade policy approaches to China likely to continue after President Trump leaves office? How have the views of U.S. experts on trade policy approaches to China changed before and during the Trump Administration, and what kinds of new policy approaches are now more convincingly advocated by U.S. experts and professionals under the new circumstances, with possible significant impacts upon the international trading system?

During the 2016 presidential campaign, U.S. presidential candidate Donald Trump focused on the serious economic problems and challenges that American society had been facing due to U.S. trade and economic relations with China, and, after he was elected, President Trump started to implement much tougher U.S. trade and economic policy toward China, especially making use of a series of tariffs against imports from China. Meanwhile, the views of U.S. policy experts and the American public concerning these China-related issues also seem to have undergone considerable changes.

Among U.S. government agencies, China experts, trade policy professionals, the business community, and political leaders, what kinds of trade policy approaches are currently deemed appropriate for the United States under these new circumstances?

Through analyzing various major views and opinions publicly expressed by politicians, experts, and stakeholders in the United States, I wish to explore what kinds of new trade policy approaches toward China could be more powerfully advocated in American society in the years

to come. This would affect not only future U.S. trade policy toward China, but also the future of the international trading system.

## **U.S. TRADE POLICY TOWARD CHINA BEFORE THE TRUMP ADMINISTRATION**

How have U.S. views of trade policy approaches toward China been evolving through successive U.S. administrations, especially after China's accession to the WTO and before the inauguration of the Trump Administration? What is the background of these changes?

In the early 1970s, U.S. President Richard Nixon initiated the normalization process toward establishing diplomatic relations with China, and, in June 1971, he officially ended the U.S. trade embargo on China after 21 years. Through this lifting of restrictions with a list of potential “non-strategic” trade items, U.S. companies started to export such goods directly to China. This relaxation “allowed U.S. exporters the freedom to sell agricultural, industrial and office equipment, most farm, fish and forestry products, fertilizers, coals, and select chemicals to China. Locomotives and large-scale transportation equipment remained prohibited.”<sup>1</sup> In February 1972 after this new initiative by the United States, Nixon visited China, becoming the first U.S. president to visit the Chinese mainland.

In 1977, Deng Xiaoping returned to power from political exile, and, as senior Vice Premier, started to make the case for reform in China and opening up the nation to modernize the Chinese economy after General Secretary Mao Zedong's Cultural Revolution of 1966-77, which resulted in a seriously isolated, stagnant economy. China's GDP per capita in 1952 was the 59<sup>th</sup> highest in

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<sup>1</sup> Richard Nixon Foundation, “6.10.1971 – White House Announces End to U.S.-China Trade Embargo” 10 June 2014, <https://www.nixonfoundation.org/2014/06/6-10-1971-white-house-announces-end-u-s-china-trade-embargo/>.

the world, but in 1978 it fell to the 134<sup>th</sup> (out of 167 countries).<sup>2</sup> In 1978, Premier Deng, determined to kick start the policy of economic reform and opening up, began his overseas visits to directly observe the actual situation of economic modernization particularly in the developed economies. He first visited Japan in November 1978, and, after the United States and China established diplomatic relations on January 1, 1979, he visited the United States at the end of that month, meeting President Jimmy Carter at the White House. He visited not only Washington, DC, but also Atlanta, Houston, and Seattle, touring factories of such major American companies as Ford and Boeing. In 1980, the United States started normalizing trade relations with China, granting China most-favored-nation (MFN) status on an annual basis based on Title IV of the Trade Act of 1974. The renewal of MFN status granted to China continued without much congressional controversy until 1989.<sup>3</sup> Throughout the 1980s, Chinese exports to the United States increased significantly year after year, as Deng's reform and opening-up process made impressive progress. According to U.S. Census statistics, by 1989, U.S. imports from China, reaching \$12 billion, had increased six-fold since 1981.

After the Tiananmen Square Incident in June 1989, however, harsh U.S. criticisms emerged against the brutal measures taken by the Chinese communist and military authorities vis-à-vis Chinese students and other demonstrators across the nation. Deeply disturbed by the shocking humanitarian situation in China, the U.S. Congress began to make proactive use of annual votes

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<sup>2</sup> Based on Penn World Tables 8.0 cited in Paul Blustein, *Schism: China, America and the Fracturing of the Global Trading System* (Ontario: Center for International Governance Innovation, 2019) p.21. According to the National Bureau of Statistics, *China Statistical Yearbook*, 2018, China's GDP per capita was RMB385 (about US \$156) in 1978. In 2017, it increased to RMB 59,660 (about US\$ 8,830). <https://www.unicef.cn/en/figure-21-gdp-capita-19782017>; <http://www.stats.gov.cn/tjsj/ndsj/2018/indexeh.htm>.

<sup>3</sup> See Douglas A. Irwin, *Clashing Over Commerce: A History of US Trade Policy* (The University of Chicago Press, 2017) pp.663-664.

to revoke the MFN status granted to China in order to put more pressure on China to improve its human rights situations and carry out other political reform measures.

In May 1993, a few months after assuming office, President Bill Clinton signed an executive order linking China's MFN status to "overall, significant progress" on human rights issues, initially focusing on this as his major China policy.<sup>4</sup> Facing strong oppositions from Chinese leaders, however, he shifted to a more "constructive engagement" approach, especially focusing on trade with China.<sup>5</sup> From the Chinese point of view, these annual votes in the 1990s were regarded very negatively, and China strongly requested the United States to end this practice during the course of her bilateral negotiations with the United States on China's accession to the World Trade Organization (WTO) in the late 1990s. In November 1999, after prolonged bilateral negotiations, the United States announced that a bilateral agreement with China had been reached and that it would support China's accession to the WTO.<sup>6</sup>

In order for the U.S. government to realize this agreement, the U.S. Congress needed to approve permanent normal trading relations (PNTR) status with China. Clinton, who was determined to achieve the historic landmark of China's accession to the WTO, worked hard to persuade many members of Congress to give China PNTR status. In May 2000, strongly lobbied by the Clinton Administration, the U.S. House of Representatives voted by a wide margin (237 to 197), to give China PNTR status. Republicans voted 164-57 in favor, and Democrats voted 140-73 against. This passage was realized in spite of strong opposition from labor unions, human

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<sup>4</sup> Executive Order 12850 of 28 May 1993. "Conditions for Renewal of Most-Favored-Nation Status for the People's Republic of China in 1994," <https://www.archives.gov/files/federal-register/executive-orders/pdf/12850.pdf>.

<sup>5</sup> See Blustein, *Schism* pp.33-35

<sup>6</sup> For the details of the U.S.-China bilateral negotiations for China's accession to the WTO, see Blustein, *Schism* pp.28-77.

rights groups such as Human Rights Watch and Amnesty International, and environmental groups, which were concerned about more competition from low-paid Chinese workers without sufficient environmental and labor regulations implemented in undemocratic China.<sup>7</sup> Dartmouth Professor Douglas A. Irwin noted that “even some groups on the political right” opposed the bill, explaining, “Many conservatives feared that the transfer of advanced technology to China would threaten America’s national security.”<sup>8</sup>

In spite of significant opposition inside the Democratic Party, at the end of the day, a total of 73 Democrats supported the vote, about half as many Democrats who opposed it. The U.S. decision to grant PNTR status to China was something China strongly demanded in return for the long list of substantial unilateral Chinese commitments made in order for China to join the WTO. This passage in the U.S. Congress opened the way for the Clinton Administration to realize China’s entry into the WTO, which was a major political victory for Clinton. Toward the end of his administration, he had made tremendous political efforts for achieving this goal as a priority legislative item, and he was strongly supported by most of the U.S. business and agricultural community.<sup>9</sup> Agricultural groups, for instance, strongly backed the bill, regarding China as a promising market for their exports such as soybeans and cotton.

In a speech at the Paul H. Nitze School of Advanced International Studies of the Johns Hopkins University in March 2000, Clinton stated the following:

By joining the WTO, China is not simply agreeing to import more of our products; it is agreeing to import one of democracy’s most cherished values: economic freedom. The more China liberalizes its economy, the more fully it will liberate the potential of its people – their initiative, their imagination, their remarkable spirit of enterprise.

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<sup>7</sup> Blustein, *Schism* pp.64-66

<sup>8</sup> Irwin pp.664-65

<sup>9</sup> For details, see I.M. Destler, *American Trade Politics* (4<sup>th</sup> Edition, Institute for International Economics, 2005) pp.254-255, 274-277.; [Blustein, *Schism* pp.65-66]

And when individuals have the power, not just to dream but to realize their dreams, they will demand a greater say...

So if you believe in a future of greater openness and freedom for the people of China, you ought to be for this agreement. If you believe in a future of greater prosperity for the American people, you certainly should be for this agreement. If you believe in a future of peace and security for Asia and the world, you should be for this agreement. This is the right thing to do. It's an historic opportunity and a profound American responsibility. I'll do all I can to convince Congress and the American people to support it. And today I ask for your help.<sup>10</sup>

The Bush Administration, assuming office in January 2001, basically inherited the Clinton Administration's trade policy to engage China as China joined the WTO in December 2001, and continued the existing policy approach of engagement with China to a large extent. For example, in September 2005, Deputy Secretary of State Robert Zoellick gave a speech with the theme that China should become a "responsible stakeholder" in the international economic system. He stated, "The United States will not be able to sustain an open international economic system—or domestic U.S. support for such a system—without greater cooperation from China, as a stakeholder that shares responsibility on international economic issues."<sup>11</sup>

Trade expert Paul Blustein, observing the first few years of the Bush Administration's trade policy toward China, says, "Like the Clinton Administration before it, the Bush Administration was predominantly of the opinion that Beijing was progressing gradually but purposefully toward economic liberalization, thanks to the impetus of WTO membership."<sup>12</sup>

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<sup>10</sup> "Full Text of Clinton's Speech on China Trade Bill," *New York Times*, 9 March 2000.

<sup>11</sup> Robert B. Zoellick, "Whither China: From Membership to Responsibility?" Remarks to the National Committee on U.S.-China Relations, New York, 21 September 2005, <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm>.

<sup>12</sup> See [Blustein, *Schism* p.123]; Paul Blustein, "The Untold Story of How George W. Bush Lost China," *Foreign Policy*, 2 October 2019, <https://foreignpolicy.com/2019/10/04/the-untold-story-of-how-george-w-bush-lost-china/>.

In the meantime, since 2003, given the surge of Chinese exports to the United States and China's rising trade surplus with the United States along with a fundamentally undervalued fixed exchange rate against the dollar, Senator Charles Schumer (D-NY) and Senator Lindsey Graham (R-SC) proposed a bill that would impose 27.5 percent tariffs on all Chinese imported goods if China refused to let the yuan rise in value against the dollar. In April 2005, they announced that the Republican and Democratic leadership in the Senate had agreed to a floor vote on their legislation, and kept strong pressure on the Bush Administration to address this issue.<sup>13</sup>

In May 2006, Bush nominated Henry Paulson, Chief Executive of Goldman Sachs, as his Treasury Secretary. Paulson requested responsibility for overall U.S. economic policy toward China based on his extensive prior business experiences in dealing with China, and Bush agreed. Paulson initiated the U.S.-China Strategic Economic Dialogue (SED) in order to comprehensively and strategically address the economic and financial issues between the United States and China. Under mounting pressure from the U.S. Congress to address China's "currency manipulation" at that time, Paulson, in engaging President Hu Jintao in a private bilateral meeting in September 2006, proposed, "if your currency appreciated 3 percent against the dollar before the end of our first SED session this December, the result would be good for China and it would help me convince Congress that the SED is working." Hu's response was, "I understand."<sup>14</sup> The yuan, however, appreciated only by 1.3 percent in the last quarter of 2006, and 2.2 percent by the spring of 2007.

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<sup>13</sup> Press Release by the Office of Senator Lindsey Graham, "Graham's China Currency Bill to Get Senate Floor Vote," 7 April 2005, <https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=814D2FDD-37AE-47A7-95B6-41C17B4B23B4>.

<sup>14</sup> Henry M. Paulson, *Dealing with China: An Insider Unmasks the New Economic Superpower* (New York: Twelve, 2015) p.197.

Blustein, after interviewing the Bush administration officials engaged in the dialogue, regards the outcome of the SED as “incremental at best,” and asserts, “In any event, the Strategic Economic Dialogues were overtaken by other developments—in U.S. financial markets.”<sup>15</sup> In September 2008, Lehman Brothers went bankrupt, the U.S. financial crisis erupted, and the United States was obliged to depend on Chinese emergency economic stimulus measures, which included spending nearly \$600 billion or 12.5 percent of its GDP, to shore up the global economy.<sup>16</sup> Blustein describes the Chinese reaction to the U.S. financial crisis as follows:

In China, reformers who favored additional progress toward liberalizing markets and rolling back party-state control were thrown on the defensive. Statists were emboldened. Increasingly confident in the virtues of its own model, Beijing diverged from the economic approach [of] its trading partners; in so doing, it undermined support for the rules-based WTO system abroad.<sup>17</sup>

Upon its inception in 2009, the Obama Administration, facing severe economic difficulties after the U.S. financial crisis of the past year, was initially more interested in making use of China to achieve U.S. economic recovery. Jeffrey A. Bader, then senior director for Asian Affairs of the National Security Council wrote, “Since economic recovery was President Obama’s highest priority upon taking office, a principal question he asked his advisors was how U.S.-China policy could contribute to the recovery of some of the 8 million jobs that had been shed in late 2008 and early 2009.”<sup>18</sup> Obama, after talking with American CEOs operating in China in late 2009, however, began to show keen interest in addressing the real problems that the American companies were facing in the Chinese market. According to Bader, over the course of

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<sup>15</sup> [Blustein, *The Untold Story*]

<sup>16</sup> [Blustein, *Schism* pp.131-32]

<sup>17</sup> [Blustein, *The Untold Story*]

<sup>18</sup> Jeffrey A. Bader, *Obama and China’s Rise: an Insider’s Account of America’s Asia Strategy* (The Brookings Institution, 2012) p.112.

2010, Obama and his top economic advisors had a number of discussions about U.S. economic policy options towards China, including the following proposed measures.<sup>19</sup>

- Increased bilateral and multilateral pressure on China to appreciate its currency
- Aggressive use of the China-specific Section 421 of the Trade Act of 1974 [Action to address market disruption] to prevent surges of imports
- Sanctions against companies that had engaged in intellectual property rights violations to prevent them from investing in the United States
- WTO cases against a variety of offending Chinese practices
- Designation of China as a currency manipulator; pursuit of a WTO case alleging China's currency was undervalued (with or without a Treasury designation)
- Either support or remain neutral (rather than oppose) various congressional bills that would retaliate against China.

During the Obama Administration, there were already signs that more critical views of U.S. trade with China were emerging. For example, Obama himself made the following critical comments on China in September 2016, when his administration announced launching another WTO case against China:

This is the 14th WTO case we've launched against China since I took office and the 23<sup>rd</sup> overall, and we've won every case that's been decided....it should bring an end to China's illegal subsidies, remove significant barriers on American exports, and level the playing field for American farmers...But it's not enough to enforce the existing rules; as our global economy evolves, we have to ensure America plays a leading role in setting the highest standards for the rest of the world to follow. That's what the Trans-Pacific Partnership, or TPP, is all about: putting American workers, farmers, and businesses first. It protects American innovation and intellectual property, enforces groundbreaking environmental and labor commitments, expands export opportunities for our farmers and businesses, and

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<sup>19</sup> [Bader pp.113-114]

sets the highest benchmarks in history for holding America's trading partners accountable.<sup>20</sup>

The Obama Administration, after engaging China in various high-level bilateral trade and economic dialogues and consultations, was also increasingly concerned about China's trade practices and made proactive use of the WTO dispute settlement mechanism, as well as negotiating the Trans-Pacific Partnership (TPP), with the aim of establishing high-standard trade rules to be applied to the Asia Pacific region in the 21<sup>st</sup> century. There was an expectation that the TPP would raise the level of trade rules across the Asia Pacific region, and China would eventually be obliged to also commit itself to this higher standard of international trade rules.<sup>21</sup>

## **U.S. TRADE POLICY TOWARD CHINA UNDER THE TRUMP ADMINISTRATION**

During his presidential campaign, candidate Donald Trump harshly criticized both China and the Obama Administration's trade policy, and he made China-related trade issues one of his major messages. In June 2016, for example, during a campaign stop at Alumisource, a metals recycling facility in Monessen, PA, Trump, in discussing his trade policy approach, mentioned the following as related to China:

China's entrance into the World Trade Organization has enabled the greatest job theft in the history of our country... Almost half of our entire manufacturing trade deficit in goods with the world is the result... of trade with China....The Trans-Pacific Partnership is the greatest danger yet. The TPP... would be the death blow for American manufacturing. It would give up all of our economic leverage to an

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<sup>20</sup> <https://obamawhitehouse.archives.gov/the-press-office/2016/09/13/statement-president-world-trade-organization-enforcement-action>.

<sup>21</sup> On this point, there are different views. Blustein argues that the Obama Administration focused on negotiating the TPP on the "misplaced" assumption "that China would be obliged to change its ways in response to this 'mega-regional' trade pact." [Blustein, *Schism* pp.207-21, 229]

international commission that would put the interests of foreign countries above our own... I'm going to instruct the U.S. Trade Representative to bring trade cases against China, both in this country and at the WTO...China's unfair subsidy behavior is prohibited by the terms of its entrance to the WTO and I intend to enforce those rules and regulations. And basically, I intend to enforce the agreements from all countries, including China...if China does not stop its illegal activities, including its theft of American trade secrets...I will use every lawful presidential power to remedy trade disputes, including the application of tariffs consistent with Sections 201 and 301 of the Trade Act of 1974, and Section 232 of the Trade Expansion Act of 1962.<sup>22</sup>

After assuming office in 2017, President Trump followed up on what he said during the presidential campaign, resorting to unprecedented trade measures against China by imposing series of higher tariffs against wide-ranging Chinese goods, and then, while keeping higher tariffs, introduced a new approach by intensively negotiating a bilateral trade deal with China.

Under the Trump Administration, the U.S. Trade Representative (USTR) wrote on its website:

Since China acceded to the WTO in December 2001, the United States and China have pursued a series of high-level bilateral dialogues in the areas of trade and investment...Through these dialogues, the United States has sought not only to resolve significant trade and investment irritants, but also to encourage China to pursue market-oriented policies and become a more responsible member of the WTO. *These bilateral efforts largely have been unsuccessful because Chinese policymakers have not been interested in moving toward a true market economy.*<sup>23</sup> (emphasis added)

The Trump administration believes that Chinese policymakers' lack of interest "in moving toward a true market economy" was the reason why bilateral trade negotiations by previous administrations were unsuccessful after China acceded to the WTO in 2001. In a 2018 Report to Congress on China's WTO compliance, the USTR noted:

In theory, the WTO membership could *adopt new rules requiring members like China to abandon nonmarket economic systems and state-led, mercantilist trade*

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<sup>22</sup> Donald Trump, "Declaring America's Economic Independence," Speech at Alumisource, Monessen, PA, 28 June 2016, <https://time.com/4386335/donald-trump-trade-speech-transcript/>.

<sup>23</sup> <https://ustr.gov/countries-regions/china-mongolia-taiwan>.

*regimes. For several reasons, however, it is unrealistic to expect success in any negotiation of new WTO rules that would restrict China's current approach to the economy and trade in a meaningful way.*<sup>24</sup> (emphasis added)

This view indicates that the Trump Administration believes that the WTO's role would be limited in addressing U.S. trade issues with China. If that is the case, what could the United States do besides making use of the WTO? The U.S. government has taken various unilateral trade-related measures based on U.S. domestic laws, and has also taken a bilateral approach in negotiating a new trade deal with China. Would this approach be successful in addressing most U.S. concerns regarding the Chinese market?

On January 15, 2020, President Trump signed the Economic and Trade Agreement between the U.S. and China, a "Phase One" trade deal, with Vice Premier Liu He at the White House. This agreement includes specific chapters on intellectual property, technology transfer, agriculture, financial services, currency, expanded trade and dispute resolution.<sup>25</sup> All the items in the agreement are those that the U.S. government has expressed strong interest in addressing as related to trade issues with China. In the fact sheet released by the USTR, there is the following reference to the dispute resolution chapter of the agreement:

The Dispute Resolution chapter sets forth an arrangement to ensure the effective implementation of the agreement and to allow the parties to resolve disputes in a fair and expeditious manner. This arrangement creates regular bilateral consultations at both the principal level and the working level. It also establishes strong procedures for addressing disputes related to the agreement and allows each party to take proportionate responsive actions that it deems appropriate. The United States will

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<sup>24</sup> USTR, "2018 Report to Congress on China's Trade Compliance" (February 2019) (2018 "USTR Report") p.23. <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>.

<sup>25</sup> <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/economic-and-trade-agreement-between-government-united-states-and-government-peoples-republic-china>.

vigilantly monitor China's progress in eliminating its unfair trade practices and implementing these obligations.<sup>26</sup>

It is notable that, in this newly reached Phase One deal, this bilateral dispute resolution mechanism is introduced. This means that the U.S. government would not need to make use of the WTO dispute settlement mechanism in order to address trade issues with China as long as they could be covered under those provisions agreed upon in this bilateral agreement.

After this Phase One deal, both governments are expected to continue negotiations toward the next phase of the bilateral trade deal. It is unlikely that most U.S.-China trade issues will be quickly resolved given the deeply rooted structural problems of the Chinese economy. Implementation issues surrounding the Phase One deal could also emerge, or future rounds of bilateral negotiations toward a Phase Two agreement could face major obstacles.<sup>27</sup> That is because the fundamental trade problems for the United States vis-à-vis China originate from the basic structure of the Chinese economy, which is state-led and “mercantilist,” and not regarded as “market-oriented” by the Trump Administration. In the meantime, no major change of direction in President Xi Jinping’s policy regarding the management of the Chinese economic system has been seen, although some new symbolic measures have been introduced to relax foreign investment restrictions and strengthen provisions to protect intellectual property rights. As Blustein says: “Any pact the two sides reach will fall well short of permanently resolving their differences. China’s political and economic system is not about to change in fundamental

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<sup>26</sup>[https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/US\\_China\\_Agreement\\_Fact\\_Sheet.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/US_China_Agreement_Fact_Sheet.pdf)

<sup>27</sup> For a critical assessment of the Phase One agreement in terms of the prospects for its implementation, see Chad P. Bown, “Unappreciated hazards of the US-China phase one deal.” *Peterson Institute for International Economics* 21 January 2020, <https://www.piie.com/blogs/trade-and-investment-policy-watch/unappreciated-hazards-us-china-phase-one-deal>.

ways, nor is the U.S. political establishment about to alter its conclusion that China is America's most formidable strategic rival.”<sup>28</sup>

Furthermore, as the negative economic impacts of the coronavirus outbreak upon China have become significant after the Phase One agreement was reached in January 2020, it is quite possible that China may not be able to fulfill its target of imports from the United States due to a possible decline of demand for U.S. products, which is likely to prompt the United States to claim a violation of the Phase One agreement by China. As of early April 2020, Trump publicly emphasized the importance of China's honoring the Phase One agreement. As U.S. society and its economy have been severely damaged by the spread of coronavirus since March 2020, American sentiments against China are becoming even more negative with the strong U.S. perception that China did not provide relevant information with transparency regarding the severity of coronavirus to the United States and the rest of the world in a timely manner so that other countries would be better prepared for the outbreak. Many Americans realized that so many medical goods such as medicines, masks and other protective gear are imported from China, and felt that acute shortages of such essential products in the United States under the critical circumstances caused additional deaths due to disruption of supply-chains with China. This new reality has lead senior Trump Administration officials such as White House Trade Advisor Peter Navarro to more strongly argue that the United States should reduce offshoring production to overseas, particularly China, as well as its dependence upon imports from China, and instead produce such essential goods inside the United States.<sup>29</sup> These growing sentiments in

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<sup>28</sup> [Blustein, *Schism* p.8]

<sup>29</sup> Fox News interview with White House trade advisor Peter Navarro on 23 February 2020, <https://www.foxnews.com/transcript/peter-navarro-on-how-us-is-fighting-the-spread-of-coronavirus>.

the United States are likely to further influence U.S. trade policy toward China for months and years to come as the U.S. economy suffers severely as a result of the coronavirus outbreak.

## **U.S. TRADE POLICY APPROACHES ADVOCATED BY TRADE LAWYERS**

The U.S. government is expected to continue to resort to various additional measures to address China-related trade problems during years to come regardless of the result of the presidential election in November 2020. In reaching the Phase One deal, the United States lifted only a small portion of the existing tariff measures vis-à-vis China. Most of the remaining tariffs are expected to continue until the next bilateral trade deal. The Phase One deal indicates that the United States is determined to address China trade issues by making use of the newly established bilateral dispute settlement mechanisms. Under these emerging circumstances, would the United States abandon the use of the WTO to address China-related trade issues? Or is there still room for the United States to utilize the WTO to address these issues?

In fact, those concerns about the Chinese economy and trade practices that have been expressed by the Trump Administration are not entirely new. Back in June 2010, over six years before the start of the Trump Administration, in his testimony before the U.S.-China Economic and Security Review Commission, current USTR Robert E. Lighthizer was already arguing similar points.<sup>30</sup> In discussing possible U.S. policymakers' responses to the China trade problems, he argued, "I believe they [U.S. policymakers] should stop being so passive, take a

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<sup>30</sup> Robert E. Lighthizer, Testimony Before the U.S.-China Economic and Security Review Commission: "Evaluating China's Role in the World Trade Organization Over the Past Decade." 9 June 2010, <https://www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf>.

number of straightforward steps to mitigate the harm caused by Chinese mercantilism, and consider more imaginative steps to deal with China.”<sup>31</sup> In discussing a “more imaginative” approach, he made the case that “we should consider aggressive interpretation of WTO provisions that might help us deal with Chinese mercantilism.”<sup>32</sup> As an example of such an approach, he referred to making use of Article XXIII of the General Agreement on Tariffs and Trade (GATT) as follows:

Article XXIII of the GATT states that “[I]f any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired... as the result of ...the failure of another contracting party to carry out its obligations,” then the contracting party may make proposals to the other relevant party or parties to resolve the issue. If the parties cannot resolve the issue satisfactorily, then the complaining party may seek permission “to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.” Some have suggested that this provision might serve as the basis for a sweeping challenge to China’s system.<sup>33</sup>

He further stated, “Of course, we cannot be certain that the WTO would adopt any of these theories—or that, if adopted, they would make a significant difference in China’s behavior in the foreseeable future. But to attack a problem as large as our trade deficit with China, U.S. officials must be prepared, at a minimum, to consider very aggressive positions at the WTO.”<sup>34</sup>

Professor Jennifer Hillman of Georgetown University Law Center, a former member of the WTO Appellate Body as well as former General Counsel in the Office of the USTR, in her

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<sup>31</sup> [Lighthizer p.28]

<sup>32</sup> [Lighthizer p.30]

<sup>33</sup> [Lighthizer p.32]

<sup>34</sup> [Lighthizer p.31]

testimony before the U.S.-China Economic and Security Review Commission in June 2018, also made the case for using this “non-violation” claim under Article XXIII of the GATT as follows:

The non-violation clause of Article XXIII represents a real-world attempt to solve the broader problem of contractual incompleteness. It provides a legal cause of action against measures that do not violate the treaty but that nevertheless upset the reasonable expectations of the parties and can be aimed at policies that might otherwise be beyond the reach of the GATT/WTO agreements... the wide-spread concerns with China’s economy and the difficulties it has raised for WTO members suggest that this is indeed time for an exceptional approach. As made clear in Harvard Law Professor Mark Wu’s “China Inc.” analysis, China’s economy is structured differently from any other major economy and is different in ways that were not anticipated by WTO negotiators.<sup>35</sup>

Hillman believes that resorting to a non-violation claim is the best option, but if it proves impossible, she also described other unilateral U.S. options as follows:

All of these are much inferior choices to a coalition-based WTO case because all of them involve unilateral action by the United States...unilateral action is most likely to attract retaliation from China and least likely to get at the heart of the problem. Moreover, other than trade remedies, most of these unilateral responses would likely [to] result in measures that violate the United States’ WTO obligations, thereby giving China both standing and potentially the moral high ground to complain.<sup>36</sup>

Then she refers to the following nine potential actions against China the United States could take:<sup>37</sup>

1. Anti-dumping and countervailing duty actions—price discrimination and subsidies
2. Safeguards
3. Section 337 – intellectual property rights
4. Section 232 – national security

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<sup>35</sup> Jennifer Hillman, Testimony before the U.S.-China Economic and Review Security Commission, 8 June 2018, p.10, <https://www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf>.

<sup>36</sup> [Hillman p.13]

<sup>37</sup> [Hillman pp.13-17]

5. Section 301 – violations or unreasonable or discriminatory actions
6. International Emergency Economic Powers Act (IEEPA)
7. Trading with the Enemy Act (TWEA)
8. Committee on Foreign Investment in the United States (CFIUS)
9. Export Controls

Having mentioned these potential unilateral U.S. actions, Hillman nonetheless argued, the single best tool the United States has is “its ability to bring together like-minded countries to challenge China’s commitments to...the WTO.” She strongly recommended that the United States “pick up that tool and pull together a coalition-of-the-concerned to bring a bold and comprehensive challenge to China’s economic system and its persistent violations of its WTO.”<sup>38</sup>

Expressing a different perspective on this issue, Professor Mark Wu of Harvard Law School, in his testimony before the U.S.-China Economic and Security Review Commission in February 2019, pointed out the difficulties in implementing such a “coalition-of the concerned” approach for the following four reasons:<sup>39</sup>

- The resources necessary to acquire the proof to meet the evidentiary burden to demonstrate such a claim are rather large.
- Not only must the United States cajole its firms (and /or intelligence officials) to provide this evidence, it will also need to convince allies to do the same.
- The case will require at least three years to prepare and litigate before it bears any fruit.
- The United States will only be able to retaliate if it lifts its current blockage of WTO Appellate Body appointments.

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<sup>38</sup> [Hillman p.17]

<sup>39</sup> Mark Wu, *Testimony Before the U.S.-China Economic and Security Review Commission Hearing on U.S. Companies in China*, 28 February 2019, p.12.  
<https://www.uscc.gov/sites/default/files/Wu%20Testimony%20-%20US-China%20Econ%20Sec%20Review%20Cmsn%20-%20Feb%202019.pdf>.

Why have these international trade lawyers been debating these issues of non-violation, nullification and impairment (NVNI) cases? In analyzing the fundamental challenges posed by China's economic structure a few years after China's accession to the WTO, Wu, in his article on "China Inc.," enumerated the following six elements that make China's economic structure different from that of any other WTO members.<sup>40</sup>

- The Party-state retains control of the Chinese economy through the State-owned Assets Supervision and Administration Commission (SASAC), established in 2003, which controls the shares of the biggest State-Owned Enterprises (SOEs).
- It also controls the Chinese financial sector through Central Huijin Investment Ltd., also established in 2003, by maintaining significant ownership stakes in China's most important banks.
- Such entities as the National Development and Reform Commission (NDRC) and the Central Financial and Economic Affairs Commission of the Party shape an overarching plan to guide the economy.
- There are other entities led by the Party that shape an overarching plan to guide the economy.
- The Party's Organizational Bureau retains control over top-level appointments.
- As private entities succeed, the Party may seek to co-opt them by taking a financial stake or inviting business leaders to join the Party and/or take on positions of responsibility. Moreover, entities with three or more Party members, including private and foreign ones, are required to have an operating Party cell. This allows the Party to retain some degree of oversight over private entities that it does not control.

Wu contended that "Any of these elements might be found in another country, but it is how the combination of these six elements operates in tandem that makes China unique. Together they give rise to 'China Inc.'"<sup>41</sup> Based on this perspective, he argues: "WTO cases are effective only against a limited range of problematic Chinese trade practices. Importantly, existing WTO

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<sup>40</sup> Mark Wu, "The 'China Inc.' Challenge to Global Trade Governance," *Harvard International Law Journal* (2016), pp.269-284, <http://www.harvardilj.org/>. ; [Wu, Testimony pp.6-7]

<sup>41</sup> [Wu, Testimony p.6]

rules were not written with China's unique economic structure in mind. Moreover, they were developed prior to the rise of digital trade. Therefore, while the United States ought to devote resources to WTO litigation, there are limits to how much can be achieved because the law itself is outdated."<sup>42</sup> He contends, "The WTO dispute settlement system has effectively resolved certain disputes and will continue to do so, but the system has its limits." He further argues, "without major change in China's rise, it will contribute to a gradual weakening of the WTO legal order."<sup>43</sup>

In contrast to this point of view, Professor James Bacchus, former American member of the WTO Appellate Body, argues the following:

The WTO dispute settlement has considerably more potential than the Trump Administration thinks, and it offers, over the long run, a far more effective means of responding to protectionist Chinese trade policies than the current Trump policy of applying illegal unilateral tariffs... WTO complaints alone cannot solve all of America's commercial problems related to China, they can be a crucial part of the ongoing effort to encourage China to see that the best way for it to rise is not by the mercantilism and protectionism of state-managed trade but, instead, by becoming a market-oriented, rule-following, fully developed nation.<sup>44</sup>

As cited above, there are major differences of views among experienced American trade law experts on this issue of the value of WTO complaints against China. Given the trade policy that the Trump Administration has actually carried out, however, it seems that, at least for the time being, the United States may not prioritize proactive use of existing WTO rules to address China-related issues, due to the perceived limits of their effectiveness.

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<sup>42</sup> [Wu, Testimony p.12]

<sup>43</sup> [Wu, *The "China Inc."* p.269]

<sup>44</sup> James Bacchus, Simon Lester and Huan Zhu, "Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented", *CATO Institute*, 15 November 2018, <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa856.pdf>.

## VIEWS OF VARIOUS AMERICAN STAKEHOLDERS

I have examined the major informed views of American international trade law experts on China-related trade issues. In the meantime, what are the recent views of the American public and other U.S. stakeholders?

### *Views of the American public toward China*

As U.S.-China trade conflicts escalated, regardless of political party affiliation, the American view of China has been rapidly deteriorating. The Chicago Council on Global Affairs released the following survey results in June 2019 based on a poll conducted in February 2019.<sup>45</sup>

- A majority of Americans (63 percent) now describe the United States and China as “mostly rivals,” up from 49 percent who said the same in March 2018.<sup>46</sup>
- Only one in three (32 percent) say the United States and China are “mostly partners,” down from 50 percent in March 2018.
- Though Americans have long considered China an unfair trading partner, this marks the first time in this survey, dating to 2006, that majorities from all partisan groups have described the United States and China “mostly rivals.”

Another survey conducted in March 2020 by the Pew Research Center and released a year later shows that the share of Americans who have unfavorable views of China reached a 15-year high since this question was first asked, jumping up from 47 percent in 2017 to 66 percent in 2020, while favorable views of China declined from 44 percent to 26 percent in the same period during the Trump Administration.<sup>47</sup> Among those who say they have an unfavorable opinion of

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<sup>45</sup> <https://www.thechicagocouncil.org/publication/lcc/public-and-opinion-leaders-views-us-china-trade-war>.

<sup>46</sup> <https://www.thechicagocouncil.org/publication/lcc/public-and-opinion-leaders-views-us-china-trade-war>.

<sup>47</sup> [https://www.pewresearch.org/global/2020/07/30/americans-fault-china-for-its-role-in-the-spread-of-covid-19/pg\\_20-07-30\\_u-s-views-china\\_0-01/](https://www.pewresearch.org/global/2020/07/30/americans-fault-china-for-its-role-in-the-spread-of-covid-19/pg_20-07-30_u-s-views-china_0-01/).

China, Republicans have been consistently more negative than Democrats.<sup>48</sup> As for the issues that Americans think pose problems for the United States, 85 percent consider the U.S. trade deficit with China as serious, and 84 percent consider the loss of U.S. jobs to China as serious, followed by China's impact on the global environment (91 percent) and cyberattacks from China (87 percent).<sup>49</sup>

In recent years, former Treasury Secretary Paulson acknowledged the notion that China's rise is increasingly viewed by Americans as having been realized at America's expense. He did not attribute this shift of views to the Trump Administration. In remarks in Singapore in November 2018, he stated:

[T]his negative view of China unites politicians from both left and right who agree on nothing else. Trade with China has hurt some American workers. And they have expressed their grievances at the ballot box. So while many attribute this shift to the Trump Administration, I do not. What we are now seeing will likely endure for some time within the American policy establishment. China is viewed – by a growing consensus – not just as a strategic challenge to the United States but as a country whose rise has come at America's expense.<sup>50</sup>

#### *Views of the U.S. business community*

As the Trump Administration expanded its tariff measures against China during 2018 and 2019, the U.S. business community has increasingly shown reservations about introducing further U.S. tariff measures. China is the largest manufacturing base as well as consumer market in the world, and China has also taken corresponding counter-measures against the United States.

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<sup>48</sup> [https://www.pewresearch.org/global/2020/07/30/americans-fault-china-for-its-role-in-the-spread-of-covid-19/pg\\_20-07-30\\_u-s-views-china\\_0-06/](https://www.pewresearch.org/global/2020/07/30/americans-fault-china-for-its-role-in-the-spread-of-covid-19/pg_20-07-30_u-s-views-china_0-06/).

<sup>49</sup> <https://www.pewresearch.org/global/2020/04/21/u-s-views-of-china-increasingly-negative-amid-coronavirus-outbreak/>.

<sup>50</sup> [https://www.paulsoninstitute.org/press\\_release/remarks-by-henry-m-paulson-jr-on-the-united-states-and-china-at-a-crossroads/](https://www.paulsoninstitute.org/press_release/remarks-by-henry-m-paulson-jr-on-the-united-states-and-china-at-a-crossroads/).

As tension between the United States and China escalates, if American companies are shut out from trade with China or investing in China, more serious concerns that many American multinational companies would suffer even more significantly will emerge.

In the meantime, many American companies do have real dissatisfaction about insufficient access to the Chinese market and issues of a level-playing field as related to Chinese subsidies, as well as issues of protection of intellectual property rights. In this sense, many American companies are not necessarily against the Trump Administration's trade policy toward China.

For example, China still maintains joint venture obligations for foreign firms to enter the Chinese market. Because of these legal obligations, many foreign companies in China have felt that valuable technologies are *de facto* transferred to their Chinese partners in the process of implementing joint ventures. Deep concerns about "forced technology transfer" and stealing intellectual property rights have existed among many U.S. and other multinational companies in China.<sup>51</sup> In this regard, many U.S. companies welcome the U.S. government's tough stance in urging China to significantly improve its relevant domestic laws and regulations. From this perspective, the Phase One deal was appreciated by most of the American companies concerned.<sup>52</sup> Also, there are existential problems of globally competitive U.S. companies, especially social media platforms, having been unable to enter or operate in the Chinese market in a meaningful way. Such firms include Google, Amazon, Facebook, Apple, and Twitter.

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<sup>51</sup> Regarding the issues of forced technology transfer and stealing intellectual property rights during the Obama and Trump Administrations, see [Blustein, *Schism* pp.119-122, 132-136, 195-200]

<sup>52</sup> According to a member survey released on 13 February 2020 by the US-China Business Council (USCBC), a Washington-based trade association of companies that do business in China, 78 percent of respondents expressed a favorable view of the deal, as it halts tariff increases and stabilizes the bilateral relationship. Only 12 percent hold a negative view of the agreement. <https://www.uschina.org/media/press/us-companies-favor-phase-one-deal-split-section-301>.

Facebook, Google, and Twitter have all encountered the political issue of censorship by Chinese authorities. China blocked U.S. social media platforms including Facebook, Twitter, and YouTube in 2009 with its “Great Firewall.” Google started a search service for Chinese users in 2000, but in March 2010, it was banned in mainland China. There are also increasingly serious problems of “data localization requirements,” which demand that foreign companies not move the data they have acquired as a result of research and commercial activities in China outside the country. These requirements were mandated by the enactment of the Chinese Cyber Security Law in 2016.

At the same time, there is also the problem of the slow pace of Chinese market liberalization for U.S. multilateral companies. After being excluded for years from the Chinese market, while Chinese rivals become successful and dominant in China, it is deemed too late by now for many U.S. companies to re-enter the Chinese market. Direct rivalries between major U.S. and Chinese companies, or national champions, include: Google vs. Baidu, Facebook vs. WeChat, Twitter vs. Weibo, and Amazon vs. Taobao/Tmall (both owned by Alibaba Group). The Xi Jinping Administration has announced its intention to further liberalize foreign investment restrictions; however, this is widely regarded as “too little too late,” not leading to addressing the major concerns about “the level playing field” held by many U.S. companies.<sup>53</sup>

#### *Views of U.S. Asia and trade policy experts*

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<sup>53</sup> According to a survey conducted by the USCBC in June 2019, its member U.S. companies raised “competition with Chinese companies on an unlevel playing field” as a core concern. U.S. companies cited the following problems: delayed or denied licenses and approvals by the Chinese government, restrictions on data flows, insufficient intellectual property rights enforcement, uneven enforcement of rules and regulations, discriminatory innovation policies, and investment restrictions on U.S. and other foreign companies. <https://www.uschina.org/media/press/while-china-profits-grow-so-do-worries-us-companies>.

In July 2019, an open letter to Trump and members of Congress was published in *The Washington Post* under the title “China is not an enemy.” In this article, signed by many American academics and Asia experts, deep concerns were expressed “about the growing deterioration in U.S. relations with China, which we believe does not serve American or global interests.”<sup>54</sup> The following points, which I think deserve attention, were expressed:

- The challenges presented by China require a firm and effective response, but the current U.S. approach to China is fundamentally counterproductive.
- With the right balance of competition and cooperation, U.S. actions can strengthen those Chinese leaders who want China to play a constructive role in world affairs.
- U.S. efforts to treat China as an enemy and decouple it from the global economy will damage the U.S. international role and reputation and undermine the economic interests of all nations.
- The best U.S. response to Chinese practices is to work with our allies and partners to create a more open and prosperous world in which China is offered the opportunity to participate.
- The United States should encourage Chinese participation in new or modified global regimes in which rising powers have a greater voice.

Given the fact that the Phase One agreement has been reached, the concerns expressed in this opinion piece may have been alleviated to some extent. It depends, however, on how the deal is implemented, as well as how the next round of negotiations will be carried out.

At the same time, there are other U.S. experts who point out aspects of Chinese behavior from more critical perspectives. For example, Elizabeth Economy, director for Asia Studies at the Council on Foreign Relations, observes the following regarding Xi Jinping’s China:

Under Xi’s leadership, China’s domestic political and economic landscape does not reflect progress toward an open, transparent, or democratic system...As such, China under Xi Jinping poses a set of distinct new challenges...China’s innovation strategy, the BRI [Belt and Road Initiative], and SOE reform reflect non-market

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<sup>54</sup> M. Taylor Fravel, J. Stapleton Roy, Michael D. Swaine, Susan A. Thornton and Ezra Vogel. “China Is Not an Enemy,” *The Washington Post* 3 July 2019.

principles and behavior that pose a challenge to U.S. economic interests at home, in China and globally...while China takes advantage of the openness of the United States and other market-based liberal democracies to further its economic interests and advance its political and cultural influence, it increasingly constrains opportunities for foreign actors to participate in China's political and economic development. This has direct costs for U.S. business...<sup>55</sup>

Nicholas R. Lardy, Senior Fellow with the Peterson Institute of International Economics, observes:

Since 2012...this picture of private, market-driven growth has given way to a resurgence of the role of the state in resource allocation and a shrinking role for the market and private firms. Increasingly ambitious state industrial policies carried out by bureaucrats and party officials have been directing investment decisions, most notably in the program proclaimed by President Xi Jinping known as "Made in China 2025."<sup>56</sup>

As is clear from the comments made by the China experts above, there is a strong view that, since 2012, under Xi Jinping, in spite of successive public messages coming from Chinese leaders, the Chinese state has been playing an even larger role in the private sector through targeted industrial policy such as Made in China 2025.<sup>57</sup> This has led the United States to regard China as moving toward a non-market economy. There is also a strong perception that the open nature of American society has been taken advantage of by the "closed" Chinese system in terms of access to American high technology. This seems to be one of the major reasons why the U.S. trade policy toward China has become tougher during the Xi Administration.

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<sup>55</sup> Elizabeth C. Economy, *The Third Revolution: Xi Jinping and the New Chinese State* (Oxford University Press, 2019) p.236.

<sup>56</sup> Nicholas R. Lardy, *The State Strikes Back : The End of Economic Reform in China?* (Washington, DC: Peterson Institute for International Economics, 2019) pp.122-127. He is one of those who signed the above open letter to the Washington Post dated 3 July 2019.

<sup>57</sup> Regarding the issues surrounding Made in China 2025 including its WTO rules consistency, see [Blustein, *Schism* pp.169-183]

*Views of U.S. presidential candidates and congressional leaders*

U.S. Democratic presidential candidates and congressional leaders have also been extremely critical of China's trade practices, while proposing different approaches to China from the Trump Administration.

Former Vice President Joe Biden, in a presidential campaign speech in Iowa in June 2019, expressed his view of China saying: "We are in a competition with China. We need to get tough with China. They are a serious challenge to us, and in some areas a real threat."<sup>58</sup> In January 2020, at Democratic presidential candidate debate, he discussed his approach on China trade issues, saying, "We've got to bring the other 25 percent [of the world economy] of our allies with us to set the rules of the road so China cannot continue to abuse their power by stealing our intellectual property and doing all the other things, using their corporate state system to our significant disadvantage."<sup>59</sup> In July 2019, he expressed his interest in promoting collaboration with other TPP members to set new international trading rules to address China-related trade issues, arguing:

I would not rejoin the TPP as it was initially put forward. I would insist that we renegotiate pieces of that with the Pacific nations... so that we could bring them together to hold China accountable for the rules of us setting ...as to how trade should be conducted. Otherwise, they're going to do exactly what they're doing, fill the vacuum and run... the table.<sup>60</sup>

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<sup>58</sup> <https://thehill.com/homenews/campaign/447954-biden-now-labeling-china-a-serious-challenge-to-us>.

<sup>59</sup> <https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2020/01/14/democratic-debate-transcript-what-the-candidates-said-quotes/4460789002/>.

<sup>60</sup> <https://time.com/5616518/2020-democratic-debate-night-2-transcript/>.

While acknowledging the value of the TPP's setting high-standard trade rules in relation to China, he clearly indicated his intention to renegotiate some of the provisions under the TPP for the United States to return to the TPP in the future.

In her contribution to Foreign Affairs in November 2018, Senator Elizabeth Warren (D-MA) mentioned the following regarding China:

In Asia, we should encourage our allies to enhance their multilateral cooperation and build alternatives to China's coercive diplomacy. We should also respond to China's efforts to force foreign companies to hand over sensitive technology in order to gain access to the Chinese market and penalize its theft of U.S. intellectual property.<sup>61</sup>

Mayor Pete Buttigieg has referred to China as "authoritarian capitalism." At a foreign policy speech on June 11, 2019, he said:

[A]s we mark the 30<sup>th</sup> anniversary of the Tiananmen massacre, the challenge of China presents perhaps the most pressing example anywhere of the need to stand for American values amid the rise of a potent alternative... The Chinese alternative is the international expansion of authoritarian capitalism. As we speak, the Chinese government is developing a repressive digital surveillance state...<sup>62</sup>

At the Democratic presidential candidates' debate on June 27, 2019, Buttigieg argued that tariffs against China would not change China's fundamental economic model, and stressed the need to invest in U.S. infrastructure and education, saying the following:

[W]e've got to recognize that the China challenge really is a serious one. This is not something to dismiss or wave away. And if you look at what China is doing, they're using technology for the perfection of dictatorship. But their fundamental economic model isn't going to change because of some tariffs... the biggest thing we've got to do is invest in our own domestic competitiveness. If we disinvest... in our own infrastructure, education, we are never going to be able to compete...<sup>63</sup>

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<sup>61</sup> Elizabeth Warren, "A Foreign Policy for All: Strengthening Democracy—At Home and Abroad," *Foreign Affairs*, January/February 2019, <https://www.foreignaffairs.com/articles/2018-11-29/foreign-policy-all?cid=int-flb&pgtype=hpg>.

<sup>62</sup> <https://peteforamerica.com/videos/national-security-new-era/>.

<sup>63</sup> <https://www.nbcnews.com/politics/2020-election/full-transcript-2019-democratic-debate-night-two-sortable-topic-n1023601>.

House Speaker Nancy Pelosi (D-CA), in an interview with Bloomberg in October 2019, asserted that Democrats would be tougher on China than Trump by aligning with the European Union (EU) to bring additional pressure on China. While acknowledging that Trump was correct to identify China's aggressive trade policy as a threat to the United States, she criticized his approach as "ineffective" and argued he has further damaged the U.S. position by engaging in a trade conflict with the EU at the same time.<sup>64</sup>

In July 2019, Senate Minority Leader Chuck Schumer (D-NY), supporting Trump's decision to impose a 10 percent tariff on \$300 billion worth of Chinese goods from September 1 that year, emphasized: "We have to be really tough on China. They've taken advantage of us... America has lost trillions of dollars and millions of jobs because China has not played fair. And being tough on China is the right way to be."<sup>65</sup> Schumer criticized the Phase One deal, however, in a letter to President Trump, saying:

With the signing of the so-called "phase one" trade agreement... I write to express my serious concern that a weak agreement – one that fails to address the structural inequities in the U.S.-China trade relationship – will harm American workers and businesses for years to come... the terms of the agreement will result in very little progress in reforming China's rapacious trade behaviors and seems like it could send a signal to Chinese negotiators that the United States can be steamrolled.<sup>66</sup>

Senator Marco Rubio (R-FL) is one of the most vocal critics of China in the Senate. In March 2018, after Trump announced new trade measures against China, he said, "President Trump's

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<sup>64</sup> Jenny Leonard, "Pelosi Says U.S. Should Align with EU to Pressure China on Trade," *Bloomberg*, 1 November 2019, <https://www.bloomberg.com/news/articles/2019-11-01/pelosi-says-u-s-should-align-with-eu-to-pressure-china-on-trade>.

<sup>65</sup> Bob Frederics, "Schumer: We Have To Be Tough on China," *New York Post*, 1 August 2019, <https://nypost.com/2019/08/01/chuck-schumer-backs-trump-on-new-china-tariffs/>.

<sup>66</sup> <https://www.democrats.senate.gov/newsroom/press-releases/ahead-of-phase-one-deal-signing-schumer-urges-president-trump-to-stay-tough-on-china-says-chinese-govt-must-commit-to-correcting-harmful-trade-practices-and-warns-a-weak-agreement-will-undermine-american-workers-and-businesses>.

trade actions against China are the right thing to do. China has used the wealth of the American people to crush human rights and destabilize our economic order. The actions announced today are good first steps toward re-asserting American economic leadership.”<sup>67</sup>

In a speech in March 2019, he stated the following, emphasizing the importance of realizing “fundamental structural changes to the U.S.-China economic relationship”:

Until the Chinese Communist government fundamentally alters its goals and methods, the United States must stay focused on the critical issues of economic theft and competition. If we accept a deal that does not bring fundamental structural changes to the U.S.-China economic relationship, we risk losing this century’s most important strategic, economic, and geopolitical competition.<sup>68</sup>

Based on this view, Rubio introduced the *Fair Trade with China Enforcement Act* (S. 2), to ensure that U.S. trade with China is in its own long-term best interests – “starting by imposing duties on Chinese capital goods in the sectors targeted by the “Made in China 2025” plan, to ensure that American buyers do not inadvertently finance the long-term displacement of their own country’s manufacturing. It would also impose a tax on Chinese entities that earn investment and dividend income in the United States, in order to discourage Chinese attempts to price out American exports.”<sup>69</sup> (emphasis added).

*Views of the U.S. Government (White House, USTR, Department of State, Department of Commerce, Department of the Treasury, Department of Defense)*

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<sup>67</sup> <https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=50316527-CDF3-406A-9139-81B7E4130A0C>.

<sup>68</sup> <https://www.rubio.senate.gov/public/index.cfm/2019/3/rubio-receives-american-trade-hero-award-for-work-on-china-trade>.

<sup>69</sup> Ibid.

While the Trump Administration has introduced a tougher set of trade policies toward China, there are various U.S. government departments that have also influenced this policy approach as well as sent out public messages on these matters. In that sense, the current administration's policy could be regarded as having been influenced by a mixture of these various institutional views as well as individual senior political appointees.

#### (1) White House

Under the Trump Administration, *National Security Strategy* (NSS) issued in December 2017, argued, "China and Russia want to shape a world antithetical to U.S. values and interests. China seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor." It referred to China 23 times, and pointed out, "For decades, U.S. policy was rooted in the belief that support for China's rise and for its integration into the post-war international order would liberalize China. Contrary to our hopes, China expanded its power at the expense of the sovereignty of others."<sup>70</sup>

Vice President Mike Pence, in his speech on China on October 4, 2018 at the Hudson Institute, expressing the Administration's comprehensive view of China, stated the following:

[T]he Chinese Communist Party has also used an arsenal of policies inconsistent with free and fair trade, including tariffs, quotas, currency manipulation, forced technology transfer, intellectual property theft, and industrial subsidies doled out like candy, to name a few. These policies have built Beijing's manufacturing base, at the expense of its competitors – especially America...

Now, through the "Made in China 2025" plan, the Communist Party has set its sights on controlling 90 percent of the world's most advanced industries, including robotics, biotechnology, and artificial intelligence. To win the commanding heights of the 21<sup>st</sup>-century economy, Beijing has directed its bureaucrats and businesses to

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<sup>70</sup> <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf>. p.25.

obtain American intellectual property – the foundation of our economic leadership – by any means necessary...

As we respond to China’s trade practices, we will continue to demand an economic relationship with China that is free and fair and reciprocal, demanding that Beijing break down its trade barriers, fulfill its trade obligations, and fully open its economy, just as we have opened ours. We will continue to take action until Beijing ends the theft of American intellectual property, and stops the predatory practice of forced technology transfer...<sup>71</sup>

On May 20, 2020, in accordance with the 2019 National Defense Authorization Act, the White House published a report, “U.S. Strategic Approach to the People’s Republic of China,” describing “a whole-of-government strategy” with respect to the PRC. This report was “compiled by the White House and coordinated broadly across the U.S. executive branch.”<sup>72</sup> In this report, there are following major relevant points made which are deemed likely to have direct implications for U.S. trade policy toward China.<sup>73</sup>

- Since 1979, United States policy toward the PRC was largely premised on a hope that deepening engagement would spur fundamental economic and political opening in the PRC and lead to its emergence as a constructive and responsible global stakeholder, with an open society. It has become evident that this approach underestimated the will of the Chinese Communist Party (CCP) to constrain the scope of economic and political reform in China.
- The CCP has chosen to exploit the free and open rules-based order and attempt to reshape the international system in its favor.
- The United States is building cooperative partnerships and developing positive alternatives with foreign allies, partners and international organizations to support the shared principles of a free and open order.
- After joining the WTO, Beijing did not internalize the norms and practices of competition-based trade and investment, and instead exploited the benefits of WTO membership.
- The principles of the United States’ approach to China are articulated both in the NSS and the U.S. vision for the Indo-Pacific region.

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<sup>71</sup> <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/>.

<sup>72</sup> <https://www.whitehouse.gov/articles/united-states-strategic-approach-to-the-peoples-republic-of-china/>.

<sup>73</sup> <https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.20.20.pdf>.

- Agreements with Beijing must include stringent verification and enforcement mechanisms.
- For those unfair Chinese trade practices that are subject to dispute settlement at the WTO, the United States continues to pursue and win multiple cases.
- Together with other like-minded nations, the United States promotes an economic vision based on principles of sovereignty, free markets, and sustainable development. Alongside the EU and Japan, the United States is engaged in a robust trilateral process to develop disciplines for state-owned enterprises, industrial subsidies, and forced technology transfers.

In this report, the White House, emphasizing “a whole-of-government strategy,” clearly stated that the United States no longer embraces such ideas as “responsible stakeholder” or “constructive engagement” with regard to China. The United States also attaches importance to close collaboration with like-minded countries such as the EU and Japan based on the principles of “a free and open order,” and there is a role to be played by the WTO for dispute settlement on China’s unfair trade practices.

On May 29, 2020, President Trump, at his press conference focused on China, Hong Kong and the WHO, announced that he is directing his administration to begin “the process of eliminating policy exemptions that give Hong Kong different and special treatment” in light of a May 28 decision by China’s National People’s Congress to impose a new national security law upon Hong Kong.<sup>74</sup> He strongly criticized the law, saying, “It extends the reach of China’s invasive state security apparatus into what was formerly a bastion of Liberty. China’s latest incursion, along with other recent developments that degraded the territory’s freedoms, makes clear that Hong Kong is no longer sufficiently autonomous to warrant the special treatment that we have afforded the territory since the handover.” He explained that his announcement “will affect the full range of agreements we have with Hong Kong, from our extradition treaty to our

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<sup>74</sup> <https://www.rev.com/blog/transcripts/donald-trump-press-conference-transcript-on-china-hong-kong-and-the-who>.

export controls on dual use technologies and more, with few exceptions,” further stating, the United States will “take action to revoke Hong Kong’s preferential treatment as a separate customs and travel territory from the rest of China.”

Given the fact that Hong Kong has been playing a vital intermediary role in trade and investment between the United States and China, this new announcement could, for instance, significantly restrict exports and re-exports of sensitive technology from the United States to Hong Kong, as well as diminish the role of Hong Kong as a regional financial center, which would severely damage the Chinese economy.

## (2) USTR

USTR Lighthizer has been trying to accomplish what he set out in his testimony at the U.S.-China Commission in 2010. The 2018 USTR Report stated, expressing its strong view that in recent years China has been “moving further away from open, market-oriented policies and has more fully embraced a state-led, mercantilist approach to the economy and trade”:

[W]e make the following assessments as we more closely analyze China’s record as a WTO member:

- (1) WTO membership comes with expectations that an acceding member not only will strictly adhere to WTO rules, but also will support and pursue open, market-oriented policies;
- (2) China has failed to comply with these expectations;
- (3) *In recent years, China has moved further away from open, market-oriented policies and has more fully embraced a state-led, mercantilist approach to the economy and trade;* and
- (4) China’s market-distorting policies and practices harm and disadvantage its fellow WTO members, even as China reaps enormous benefits from its WTO membership....This discussion also highlights the need for new and more effective strategies – *including taking actions outside the WTO where necessary* – to address

the problems presented by China's non-market economic system.<sup>75</sup> (emphasis added)

The 2018 Report also refers to the USTR's aggressive approach to China, "using all available tools," as follows:

The United States' approach to China is more aggressive than in the past. Out of necessity, the United States is now using all available tools – including domestic trade remedies, bilateral negotiations, WTO litigation and strategic engagement with like-minded trading partners – to respond to the unique and very serious challenges presented by China.<sup>76</sup>

The 2018 USTR Report, in discussing effective strategies, mentions the following points regarding the U.S. government approach toward China in collaboration with the EU, Japan, and other like-minded WTO members.<sup>77</sup>

- Like-minded WTO members should focus their efforts on developing and implementing effective strategies for fixing the very serious problems posed by China and its trade regime. Given the limits of the current WTO rules and mechanisms, *these strategies initially must include actions not currently set out in the WTO agreements.*
- Until China transforms its approach to the economy and trade, the United States will take all appropriate actions to ensure that the costs of China's non-market economic system are borne by China, not by the United States.
- The United States also will continue working with the EU and Japan in an important trilateral partnership focused on finding ways to address the systemic trade distortions caused by China's nonmarket economic system. The three partners are considering effective actions that can be taken in the near term, and also are *examining possible model rules for disciplining a state-led, mercantilist trade regime.* As this work progresses, the three partners *intend to reach out to other like-minded WTO members.* (emphasis added)

### (3) Department of State

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<sup>75</sup> [2018 USTR Report, pp.6-7]

<sup>76</sup> [2018 USTR Report p.3]

<sup>77</sup> [2018 USTR Report p.25]

Secretary of State Mike Pompeo, in his October 2019 speech titled “China Challenge,” explained his broad view of the diplomatic agenda on China and asserted:

[W]e accommodated and encouraged China’s rise for decades... even when that rise was at the expense of American values, Western democracy, and security, and good common sense... We encouraged China’s membership in the World Trade Organization and other international organizations, premised on their commitment to adopt market reforms and abide by the rules of those organizations. And all too often, China never followed through... China has engaged in unfair predatory economic practices and it’s utilizing state assets to build its economic footprint all around the world... We want a transparent, competitive, market-driven system that is mutually beneficial for all involved...<sup>78</sup>

Secretary Pompeo’s view of the problems surrounding the current Chinese economic model is based on an identical notion expressed by the White House and the USTR.

#### (4) Department of Commerce

In October 2019, Secretary of Commerce Wilbur Ross stated, in regard to trade issues with China, emphasizing the effectiveness of imposing tariffs on imports from China, as well as of making use of the Entity List approach to also address the Chinese human rights situation and other U.S. foreign policy objectives:

I believe that China came to the negotiations mainly because we imposed substantial tariffs on them, but also because of the personal relationship between President Trump and President Xi... because they sell us more than four times as many goods as we sell them, the given amount of tariff action means that they will run out of bullets before we do. And also, their economy is only 60 percent the size of ours; therefore a given amount of tariffed product hurts them far more than us...

The tariffs are now having a direct impact on Chinese producers and – perhaps more importantly – are accelerating the hollowing-out of Chinese supply chains. China already was suffering some manufacturing emigration because of rising costs. Companies have begun to move operations elsewhere in Southeast Asia, to Africa, and to North America. That will be hard to stop.

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<sup>78</sup> <https://www.state.gov/the-china-challenge/>.

China's problem with Hong Kong<sup>79</sup> also hinders its economy, and may further accelerate an exodus of foreign producers. Last week, the Commerce Department added 28 Chinese governmental and commercial organizations to the Entity List. That list restricts the export of items used to target Uighurs and other ethnic minorities.<sup>80</sup> We have also responded to China's Belt-and-Road Initiative with our new Indo-Pacific Strategy...<sup>81</sup>

Secretary Ross emphasized the usefulness of U.S. tariff measures against Chinese products, which are "accelerating the hollowing-out of Chinese supply chains." This view seems to be closely aligned with that of President Trump. In implementing the Entity List by the Commerce Department, he also takes into account human rights situations of Uighurs and other ethnic minorities in China.

#### (5) Department of the Treasury

The U.S. Treasury Department has also played an important role in addressing China trade problems, focusing on China's devaluation of its currency. In August 2019, U.S. Secretary of the Treasury Steven Mnuchin determined that China is a "currency manipulator." This is the first time in 25 years since the Clinton Administration designated China as currency manipulator in 1994. According to the release, Under Section 3004 of the Omnibus Trade and Competitiveness Act of 1988, the Treasury Secretary must "consider whether countries manipulate the rate of exchange between their currency and the U.S. dollar for purposes of preventing effective balance

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<sup>79</sup> Press Statement by U.S. Department of State Spokesperson in November 2019 states the following: "We urge Beijing to honor the commitments it made in the Sino-British Joint Declaration, including commitments that Hong Kong will 'enjoy a high degree of autonomy' and that the people of Hong Kong will enjoy human rights, the freedoms of expression and peaceful assembly— core values that we share with Hong Kong." <https://www.state.gov/situation-in-hong-kong/>.

<sup>80</sup> Regarding the addition by the U.S. Department of Commerce of Chinese organizations to the Entity List for engaging in or enabling activities contrary to the foreign policy interests of the U.S, see: <https://www.commerce.gov/news/press-releases/2019/10/us-department-commerce-adds-28-chinese-organizations-its-entity-list>.

<sup>81</sup> <https://www.commerce.gov/news/speeches/2019/10/remarks-secretary-wilbur-ross-federalist-society>.

of payments adjustments or gaining unfair competitive advantage in international trade.” The release says, “As a result of this determination, Secretary Mnuchin will engage with the IMF [International Monetary Fund] to eliminate the unfair competitive advantage created by China’s latest actions.” It further states:

This pattern of actions is also a violation of China’s G20 commitments to refrain from competitive devaluation... Treasury places significant importance on China adhering to its G-20 commitments to refrain from engaging in competitive devaluation and to not target China’s exchange rate for competitive purposes. Treasury continues to urge China to enhance the transparency of China’s exchange rate and reserve management operations and goals.<sup>82</sup>

As we see the weakening of Yuan to its lowest level in 11 years against the U.S. dollar in May 2020, this situation may ignite another round of heightened frictions between the United States and China on this issue.

#### (6) Department of Defense

The Department of Defense is increasingly worried about Chinese civil-military integration and China’s acquiring cutting-edge military and dual-use technology including cyber-theft capabilities, “with the aim of becoming the preeminent power in the Indo-Pacific.” The Trump Administration’s National Defense Strategy labeled China a “strategic competitor.” Assistant Secretary of Defense for Indo-Pacific Security Affairs, Randall Shriver, stated in a May 2019 press briefing on the 2019 Report on Military and Security Developments in China:

Under the Civil Military Integration Initiative, China’s leaders are incentivizing the civilian sector of the economy to enter the defense market to achieve greater efficiencies, innovation and growth. Our report also talks about China’s continuing use of cyber theft, its targeted investment, its exploitation of private Chinese nationals’ access to foreign military technology, all to support its modernization

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<sup>82</sup> Press Release by U.S. Department of the Treasury, “Treasury Designates China as a Currency Manipulator”, 5 August 2019. <https://home.treasury.gov/news/press-releases/sm751>.

goals. In 2018, we saw specific efforts targeting such areas as aviation technologies and anti-submarine warfare technologies... China's leaders are leveraging their growing diplomatic, economic, as well as their military clout to secure China's status as a great power, and with the aim of becoming the preeminent power in the Indo-Pacific.

In 2018, China continued to implement long-range, state-directed planning, such as Made In China 2025, that challenges the economies of high-tech exporting nations to support China's development, including, indirectly, its military development. They're also leveraging the One Belt One Road initiative to enhance its global role and to shape other countries' interests so that they align with China. After noticing the Made in 2025 and One Belt One Road have caused some concern, China's leaders have softened their rhetoric and have sought to re-brand to some extent. However, the fundamental goals of these programs have not changed...China conducts influence operations...targeting media, culture, business, academia and the policy communities in the United States and other countries...

We want...a level of awareness for any U.S. company doing business in China...and should those companies have an interest in — in doing business with the United States Department of Defense — part of the defense industrial base, understand that there may be potential trade-offs...[W]e are very concerned about being vulnerable and closing those gaps. *It's been a focus of this department. And at some point there might be discrete decision points that companies have to make.* But we start from a position of wanting to have a dialogue and spreading the awareness and making sure that we understand and the companies understand what those trade-offs may be in the future.<sup>83</sup> (emphasis added)

As is clearly stated above, the Department of Defense has been increasingly concerned about Chinese access to sensitive technologies that would further enhance Chinese military capability, posing further economic and security threats to the United States and the rest of the Indo-Pacific region. From this perspective, the Pentagon is paying more attention to intellectual property rights protection, developments in Made in China 2025, cyber espionage by China, U.S. business dealings with Chinese companies in the sensitive technology sector, Huawei and 5G, and Chinese access to sensitive technologies at U.S. educational institutions. Given this view, U.S. trade policy toward China could be more significantly influenced by national security

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<sup>83</sup> <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1837011/assistant-secretary-of-defense-for-indo-pacific-security-affairs-schrivver-press/>.

considerations in the future. In the U.S. government, calls for introducing stricter controls to prevent China from having access to those sensitive dual-use technologies have been on the rise, led by views such as those from the Pentagon.

## **PROPOSED NEW TRADE POLICY APPROACHES**

Under the newly emerging circumstances surrounding U.S.-China trade relations, new trade and economic policy approaches and new international trade rules are being actively pursued and proposed by the U.S. government and various U.S. experts, and it is possible that they will have considerable implications for the future of U.S. trade policy toward China as well as the international trading system.

### *The proactive use of the WTO including its dispute settlement mechanism*

The 2018 USTR Report points out that China's compliance with the WTO rules is very low, and there is a strong U.S. perception that, even after losing at WTO panels, China repeatedly broke the related WTO rules. The USTR considers Chinese trading practices as a "threat" to the international trading regime.

It has also been very difficult to agree on new high-standard trade rules through negotiations among all the WTO members including China. Thus, U.S. expectations toward the WTO are relatively low. The USTR under the Trump Administration has been trying to pursue "new ways" besides making use of existing WTO rules. In this regard, Lighthizer, in his speech at the Center for Strategic and International Studies (CSIS) in September 2017, stated the following:

I believe that there is one challenge on the current scene that is substantially more difficult than those faced in the past, and that is China. The sheer scale of their coordinated efforts to develop their economy, to subsidize, to create national champions, to force technology transfer, and to distort markets in China and throughout the world is a threat to the world trading system that is unprecedented.

*Unfortunately, the World Trade Organization is not equipped to deal with this problem. The WTO and its predecessor, the General Agreement on Tariffs and Trade, were not designed to successfully manage mercantilism on this scale. We must find other ways to defend our companies, workers, farmers, and indeed our economic system. We must find new ways to ensure that a market-based economy prevails.*<sup>84</sup> (emphasis added)

On the other hand, as represented by former American Appellate Body member James Bacchus, there are those who argue that the United States can still make better use of the WTO dispute settlement mechanism by filing more WTO complaints against China to address Chinese trade practices.<sup>85</sup> Blustein proposes two overarching principles that should govern the approach for the United States and other concerned countries to take in their efforts to modify China's trade practices.

First, the WTO should be the chief policy instrument for dealing with Beijing. The trade body remains the best way of inducing China to play by the rules, and its authority should be nurtured to the maximum extent possible; steps that undermine it should be avoided.

Second, China should be treated as the trading system's single biggest problem, meriting a concerted campaign in which Washington rallies like-minded countries to its side and builds a broad alliance.<sup>86</sup>

*Negotiation of new WTO rules in emerging areas where such rules do not exist*

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<sup>84</sup> Robert Lighthizer, "U.S. Trade Policy Priorities," *Center for Strategic and International Studies*, 18 September 2017, <https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative>.

<sup>85</sup> [Bacchus, Lester and Zhu, "Disciplining China's Trade Practices"]

<sup>86</sup> [Blustein, *Schism* p.230]

With the transformation of global economic activities such as the increasing use of digital resources, there are a number of emerging areas where new international trading rules need to be created. Given the difficulties in reaching new agreements among WTO members, as we saw in the case of the failure to conclude the Doha-Round negotiations after years of trying, there are more emerging issues where the WTO cannot resolve conflicts because relevant WTO rules simply do not exist. Such issues include: digital trade, subsidies and “public body” related issues, competition policy, post-2016 antidumping cases against China, investment promotion and protection, liberalization of services as related to communications and transportation logistics, and regulatory transparency.<sup>87</sup>

*Negotiation of new international trading rules among like-minded countries*

Given this problematic situation, there have been ongoing efforts involving the United States, the EU, and Japan to agree upon the new international trading rules as well as to realize necessary WTO reform. In January 2020, the Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States, and the EU was issued, referring to the following shared views, which are closely related to the concerns that the United States has raised vis-à-vis China in the context of revising WTO rules or creating new rules under the WTO.<sup>88</sup>

- To strengthen existing WTO rules on industrial subsidies including adding new types of unconditionally prohibited subsidies to the Agreement on Subsidies and Countervailing Measures (ASCM).
- To identify additional instances of “harmful subsidization” and their scope, which justify a reversal of the burden of proof.

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<sup>87</sup> [Wu, *Testimony*]

Mireya Solis, “Follower No More?: Japan’s Leadership Role as a Champion of the Liberal Trading Order” in *The Crisis of Liberal Internationalism* (Washington, D.C.: Brookings, 2020) p.91.

<sup>88</sup> <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union>.

- A new strong incentive for WTO Members to notify subsidies properly should be added to the ASCM.
- The ASCM should be amended to describe the circumstances in which domestic prices can be rejected and how a proper benchmark can be established including the use of prices outside of the market of the subsidizing Member.
- The interpretation of “public body” by the WTO Appellate Body in several reports undermines the effectiveness of WTO subsidy rules. To determine that an entity is a public body, it is not necessary to find that the entity “possesses, exercises or is vested with government authority.” They will continue working on a definition of “public body” on this basis.
- They discussed possible elements of core disciplines that aim to prevent forced technology transfer practices of third countries, the need to reach out to and build consensus with other WTO Members on the need to address forced technology transfer policies and practices, including through export controls, investment review for national security purposes, their respective enforcement tools, and the development of new rules.

Other good examples of cooperation among like-minded countries are negotiating high-standard plurilateral agreements on digital trade outside of the WTO. These include: The TPP, the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP), the U.S.-Japan Trade Agreement, and the Japan-EU Economic Partnership Agreement (EPA).

The TPP includes such high-standard chapters as Electronic Commerce, Competition Policy, and SOEs, all of which have much to do with existing trade issues with China. After concluding TPP negotiations, the USTR explained the following on the respective chapters:

- Electronic Commerce (Chapter 14): This chapter establishes rules against localization requirements that force businesses to place computer infrastructure in each market in which they seek to operate, rather than allowing them to offer services from network centers that make business sense.<sup>89</sup>
- Competition Policy (Chapter 16): Competition policy systems vary widely in the Asia Pacific...Some [Parties] have no competition policy at all; others use opaque systems in which case filings can appear to be arbitrary or designed to reduce the market share of U.S. or other foreign businesses...TPP’s Competition Policy chapter encourages effective and transparent competition policy systems

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<sup>89</sup> <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-6>.

that encourage market-based competition and protect consumers against monopoly tactics.<sup>90</sup>

- SOEs (Chapter 17): This chapter ensures that, in providing any non-commercial assistance to SOEs, TPP Parties agree to not cause adverse effects to the interests of other TPP Parties, and requires TPP Parties, upon request, [to provide] additional information about the extent of government ownership or control and the non-commercial assistance they provide to SOEs.<sup>91</sup>

China, however, has not yet embraced such high-standard provisions in its trade agreements and does not seem to be forthcoming at this juncture. In addition to “China Inc.,” Wu argues that there is a form of “digital protectionism” in China and that “the tentacles of ‘China Inc.’ extend deeply into ‘China.com’” in the following manner:

Through the growth of the Internet of Things (IOT) and data-driven analytics, the digital and physical domains will increasingly intersect. As they do, the various restrictions placed on the digital domain will have greater negative spillover effects for a broader array of American companies operating in China. These include concerns over requirements for data localization, restrictions on the cross-border transfer of data, mandatory source code disclosure for regulatory review, content controls and censorship, etc. For critical digital sectors (e.g., cloud computing), the government will use a similar array of policy instruments – i.e., investment restrictions, regulatory approval delays, subsidies, etc. – to direct outcomes to favor its interests.<sup>92</sup>

As for the merit of “alliance-based approaches to counter Chinese practices,” Wu is dubious about how much would be achieved through such approaches as “a coalition of G7 countries” or regional trade agreements such as CPTPP and/or WTO plurilateral agreements. He says:

There are strong merits to embrace such an approach for reasons related to our strategic alliances, norms construction in international law, etc. But we ought to be realistic about the fact that they are unlikely to achieve dramatic reform of “China Inc.”...In short, we ought not deceive ourselves into thinking that tackling the

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<sup>90</sup> <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Competition.pdf>.

<sup>91</sup> <https://ustr.gov/sites/default/files/TPP-Ensuring-Fair-Competition-with-State-Owned-Enterprises-Fact-Sheet.pdf>.

<sup>92</sup> [Wu, *Testimony* pp.10-11]

“China Inc.” challenge is as simple as just returning to the pre-Trump era policies of combining WTO litigation with new regional trade agreements.<sup>93</sup>

As shown above, the United States is increasingly dissatisfied with the current WTO rules as well as the increasingly dim prospects of agreeing on new high-standard multilateral trading rules, which would bind China. The Trump Administration has low expectations of the WTO, and it has taken the approach of negotiating bilateral agreements with China while trying to formulate new trade rules among “like-minded countries,” such as the EU and Japan, in order to agree on new high-standard trade rules.

On the other hand, Bacchus proposes as an option “to negotiate an investment framework agreement as a plurilateral agreement within the WTO – as WTO members have already done on information technology and government procurement.”<sup>94</sup> He argues that the new WTO-plus rules negotiated in such mega FTAs as the TPP could be “linked to the WTO and scaled up over time to include all WTO members.” Emphasizing the importance of sustainable development, he further argues, “Global public perception of the legitimacy of the WTO can be boosted if the members of the WTO turn, as they must, to reimagining WTO rules – to revising existing rules and to devising new rules – consistently with the objectives of sustainable development as set out in the United Nations Sustainable Development Goals.”<sup>95</sup>

*Proposed options for new U.S. trade and economic policy approaches*

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<sup>93</sup> [Wu, *Testimony* pp.11-14]

<sup>94</sup> [Bacchus, *The Willing World* p.365]

<sup>95</sup> [Bacchus, *The Willing World* pp.374-75]

In November 2019, the National Bureau of Asian Research (NBR) published a special report “Partial Disengagement: A New U.S. Strategy for Economic Competition with China,” which proposes a four-part strategy for an effective U.S. response to the economic challenges presented by China. This report recommends the following strategy by moving toward a posture of “partial economic disengagement” from China: <sup>96</sup>

- Achieve a ceasefire in the current tariff war.
- Strengthen defensive measures to reduce vulnerabilities to surveillance, sabotage, or disruption, and to slow diffusion of critical technologies to China.
- Invest in innovation, technology, and education.
- Strengthen trade and investment relationships, cooperation, and information-sharing with close allies. While continuing to seek reform of multilateral institutions, the United States should work with key allies to bolster a partial (as opposed to a global) open trading system. This system should be built on high-standard plurilateral trade agreements and common approaches to securing data and promoting economic development.

Regarding the “high-standard plurilateral trade agreements,” the report asserts that “U.S. policymakers should focus on achieving regional trade agreements and building consensus around high standards for investment, trade in goods and services, and issues related to information and emerging technologies,” and further recommends, “As a first step, Washington should build on its recent success in negotiating a bilateral trade agreement with Japan to reopen discussion regarding possibly joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.”<sup>97</sup>

Given Trump’s decision to withdraw from the TPP at the beginning of his administration, at this juncture, we do not see growing political support for the United States to return to the

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<sup>96</sup> Charles W. Boustany Jr. and Aaron L. Friedberg, “Partial Disengagement: A New U.S. Strategy for Economic Competition with China,” *National Bureau of Asian Research (NBR)*, NBR Special Report no.82, November 2019: p.2.

<sup>97</sup> *Ibid.*, p.24.

TPP. Among the 2020 Democratic presidential candidates, Biden supported the TPP as President Obama's vice president, and he now makes the case that, when the United States returns to the TPP, some of the provisions should be renegotiated. Other presidential candidates such as Bernie Sanders and Elizabeth Warren, have expressed strong opposition to the TPP.

Senator Sanders has strongly opposed FTAs including the TPP. He issued the following statement in April 2018 after Trump reportedly mentioned that he was directing his advisers to look into rejoining the TPP:

In a series of broken promises President Trump made to the working people of this country, rejoining the job-killing Trans-Pacific Partnership would be the biggest yet. Joining the TPP would not bring back one American job that has been outsourced to China. Instead, it would force more American workers to compete with desperate workers in Vietnam who make 65 cents an hour and migrant computer workers in Malaysia who are working as modern day slaves. It is bad enough to force U.S. workers to compete with low-wage labor; they should not be forced to compete with no-wage labor.<sup>98</sup>

He also asserted before, "During my 23 years in Congress, I helped lead the fight against NAFTA [North America Free Trade Agreement] and PNTR with China. During the coming session of Congress, I will be working with organized labor, environmentalists, religious organizations, Democrats, and Republicans against the secretive TPP trade deal."<sup>99</sup>

In February 2016, Senator Warren delivered remarks on the floor of the Senate urging her colleagues not to approve the TPP agreement, citing her opposition in particular to the Investor State Dispute Settlement (ISDS) provision under the TPP.<sup>100</sup>

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<sup>98</sup> <https://www.sanders.senate.gov/newsroom/press-releases/sanders-slams-trumps-proposal-to-rejoin-trans-pacific-partnership>.

<sup>99</sup> <https://www.sanders.senate.gov/download/the-trans-pacific-trade-tpp-agreement-must-be-defeated?inline=file>.

<sup>100</sup> [https://www.warren.senate.gov/files/documents/2016-2-2\\_Warren\\_TPP.pdf](https://www.warren.senate.gov/files/documents/2016-2-2_Warren_TPP.pdf).

In spite of some strong opposition to the TPP in the United States, there is still a window of opportunity for the U.S. government to decide to participate in the future. After Trump announced the U.S. withdrawal from the TPP in January 2017 with his first executive order as president, the remaining 11 TPP members decided to renegotiate the TPP without major changes in its provisions so that the revised TPP, now the CPTPP, could enter into force while keeping the door open for the United States to return. CPTPP members signed the agreement in March 2018, and the CPTPP entered into force at the end of 2018 after the ratifications by six Parties. This minimum revision of the TPP still provides an opportunity for the United States to return to the TPP or the CPTPP. In February 2018, 25 U.S. Republican senators sent the president a letter including the following passage:

We write in support of your recent comments expressing interest in re-engaging with the Trans-Pacific Partnership (TPP) to bring about a stronger agreement for the United States...TPP can serve as a way to strengthen ties with our allies in the region, counter the influence of the People's Republic of China (PRC), and increase pressure on the PRC to adopt substantive and positive economic reforms...<sup>101</sup>

Two months later, President Trump tweeted, "Would only join TPP if the deal were substantially better than the deal offered to Pres. Obama. We already have BILATERAL deals with six of the eleven nations in TPP, and are working to make a deal with the biggest of those nations, Japan, who has hit us hard on trade for years!"<sup>102</sup> Just before this tweet, Trump was reported to have asked his senior economic and trade advisors, Larry Kudlow and Robert Lighthizer, to look at the possibility of rejoining the TPP, "when Senator John Thune,

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<sup>101</sup> <https://www.daines.senate.gov/imo/media/doc/021618%20Letter%20to%20POTUS%20on%20TPP1.PDF>.

<sup>102</sup> Twitter@realDonaldTrump, 12 April 2018.

Republican of South Dakota, questioned Mr. Trump about returning to the pact, arguing that the Trans-Pacific Partnership was the best way to put pressure on China.”<sup>103</sup>

After some of its members including Japan and Australia tried to minimize the change from the TPP, the CPTPP decided to “freeze” 22 provisions from the TPP after the U.S. withdrawal. These provisions are largely related to intellectual property rules such as data protection for biologics and copyright extension, as well as investment, which the United States strongly requested over the course of the TPP negotiations. CPTPP members agreed that they could re-engage with the United States when the United States returns to the group. The CPTPP welcomes any countries and regions that are willing to commit themselves to such high-standard trade rules for future accession. Thailand, the UK, Taiwan, and the Republic of Korea (ROK) have expressed their interest in joining the CPTPP.<sup>104</sup> The Asia Society Policy Institute’s report led by former USTR TPP negotiator Wendy Cutler says, “Adding participants would increase the CPTPP’s economic value and move its rules closer to becoming the regional and possibly global standard on intellectual property, investment, digital trade, state-owned enterprises (SOEs), and other issues.”<sup>105</sup>

What about China? It seems that there are some voices inside the Chinese government calling for China to also join the CPTPP.<sup>106</sup> These views have not been censored by the Chinese

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<sup>103</sup> Ana Swanson, “Trump Proposes Rejoining Trans-Pacific Partnership” *The New York Times* 12 April 2018, <https://www.nytimes.com/2018/04/12/us/politics/trump-trans-pacific-partnership.html?referringSource=articleShare>.

<sup>104</sup> Regarding the role of Japan to revive the TPP and conclude the CPTPP, see [Solis pp.92-94]; Regarding the situation of individual accession candidates, See Wendy Cutler et al, “Trade in Trouble: How the Asia Pacific Can Step Up and Lead Reforms,” *the Asia Society Policy Institute*, May 2019, pp.6-7.

<sup>105</sup> [Wendy Cutler et al, “Trade in Trouble” p.7]

<sup>106</sup> Laura Zhou and Wendy Wu, “Beijing ‘looking into joining trans-Pacific trade pact’ to hedge against US,” *South China Morning Post*, 11 October 2018.

authorities, and they are expressed by Chinese trade experts in the Chinese state-owned media, making cases such as “China already meets 80 percent of the provisions of the CPTPP.”<sup>107</sup> At the press conference held by Premier Le Keqiang on May 28 2020, responding to a question, “Does China have a plan to join the TPP?”, he answered, “As for your question about TPP, I suppose what you mean is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership(CPTPP). China has a positive and open attitude toward joining the CPTPP.”<sup>108</sup> This comment may imply that China will present a new, more proactive policy approach as related to the CPTPP.

Besides the TPP and CPTPP, there are other mega-trade negotiations moving forward involving the major Asia Pacific countries. One is the Regional Comprehensive Economic Partnership (RCEP), consisting of Japan, China, South Korea, 10 ASEAN countries, Australia, New Zealand, and India. The members constitute nearly half of the world population and about 30 percent of the global GDP and trade. The RCEP has been under negotiation since 2013 and is aiming at concluding the negotiation in 2020. Another is the Japan-China-ROK FTA, which consists of about 20 percent of the global GDP and trade. This negotiation started in 2013, and, based on the progress of the RCEP negotiation, the three countries have been discussing what “its own value,” i.e., raising the standard of the rules in comparison to the RCEP, could be agreed upon. Each of these three mega-FTAs are regarded as “building blocks” for “a trans-Pacific, region-wide Free Trade Area of the Asia-Pacific (FTAAP),” which the U.S. has embraced as a long-term goal since the George W. Bush Administration in 2006.

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<sup>107</sup> Liu Bin and Yu Jimin, “To Be Ready, Willing and Able,” *China Daily* 17 May 2010, [http://www.chinadaily.com.cn/global/2019-05/17/content\\_37470274.htm](http://www.chinadaily.com.cn/global/2019-05/17/content_37470274.htm).

<sup>108</sup> [http://english.www.gov.cn/premier/news/202005/29/content\\_WS5ed058d2c6d0b3f0e9498f21.html](http://english.www.gov.cn/premier/news/202005/29/content_WS5ed058d2c6d0b3f0e9498f21.html).

As a policy recommendation by trade experts, the Asia Society Policy Institute’s Policy Report stated in May 2019, “The United States should consider rejoining the TPP at some point, as U.S. exporters are losing out without preferential access to important CPTPP markets and the United States has already adopted many TPP provisions in the USMCA [United State-Mexico-Canada Agreement].”<sup>109</sup>

In the meantime, under the Trump Administration, the U.S. government has been promoting cooperation with such countries as Japan, Australia, India, and ASEAN members under the concept of the “Free and Open Indo-Pacific (FOIP).” In November 2018, the U.S. State Department issued a fact sheet under the title of “Advancing a Free and Open Indo-Pacific Region,” saying, “The United States is taking a whole-of-government approach to advance fair and reciprocal trade, promote economic and commercial engagement that adheres to high standards and respects local sovereignty and autonomy, and mobilize private sector investment into the Indo-Pacific.”<sup>110</sup> In November 2019, another State Department report, “A Free and Open Indo-Pacific: Advancing a Shared Vision,” emphasized the importance of enhancing economic prosperity in the Indo-Pacific region through “continuing efforts to promote free, fair and reciprocal trade.”<sup>111</sup>

Under the FOIP, such basic principles as the rule of law, freedom of navigation, and improving connectivity across the region are emphasized. Improving institutional connectivity across the Indo-Pacific region through expanding high-level FTAs in the region is vital in achieving the objectives of the FOIP. For instance, under the FOIP, Japan and the United States

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<sup>109</sup> [Wendy Cutler et al, “Trade in Trouble” p.14]

<sup>110</sup> Office of Spokesperson, Department of State, 18 November 2018, <https://www.state.gov/advancing-a-free-and-open-indo-pacific-region/>.

<sup>111</sup> Department of State, *A Free and Open Indo-Pacific: Advancing a Shared Vision*, 4 November 2019: p.14, <https://www.state.gov/a-free-and-open-indo-pacific-advancing-a-shared-vision/>.

have been closely cooperating in such fields as energy, digital connectivity, and quality infrastructure across the Indo-Pacific region.<sup>112</sup> The current CPTPP members all belong to the Indo-Pacific region, and there are mutually complementary dynamics between the FOIP and the CPTPP. From this perspective, the CPTPP offers a window of opportunity for the U.S. government to consider as a major new initiative to further elevate the FOIP to a next stage in close collaboration with other like-minded Indo-Pacific countries such as Japan, Australia, and New Zealand.

Given the anticipated and growing importance of the Indo-Pacific region in the world economy during the 21<sup>st</sup> century, as well as to transform the unprecedented economic challenges facing the region in light of the COVID-19 outbreak into a new engine of growth for the world economy, it could make sense for the United States to consider a renewed opportunity to further develop the FOIP by embracing the CPTPP as one of the crucial pillars of the FOIP.

## CONCLUSION

U.S. trade and economic policy towards China is expected to continue to be tough for years to come during and after the Trump Administration. This is to a large extent as a result of rising overall negative sentiments and accumulated frustrations in the United States against Chinese trade practices, unique Chinese economic structures that are regarded as not consistent with the

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<sup>112</sup> Office of the Spokesperson, U.S. Department of State, *2019 Japan-U.S. Strategic Energy Partnership Statement: Recent Major Developments*, 4 November 2019, <https://www.state.gov/2019-japan-u-s-strategic-energy-partnership-statement-recent-major-developments/>.

spirit of the WTO law, as well as growing national security concerns surrounding rapidly expanding Chinese economic and technology capabilities aimed at becoming a stronger military power that would match that of the United States. The U.S. Congress is increasingly bipartisan in its critical views of China's trade practices as well as its support for introducing more aggressive trade and economic policy approaches. This situation could lead the U.S. administration to continue to take a tough policy approach to China for several years to come.

In this policy area of international trade and investment, how the United States will try to address this "China Question" will significantly affect not only the Chinese and the global economy, but also the foundation of the international trading system. There is a growing view in the United States that the current WTO rules cannot sufficiently address the problems of "China Inc." or China's state-led, "mercantilist," "non-market-economy." Nor is the WTO regarded as being effective in addressing the emerging issues posed by the unique Chinese economic system, which manifested itself after China's accession to the WTO. Under these circumstances, the U.S. government could continue to take unilateral trade and economic measures against China, which could negatively affect the smooth functioning of the existing WTO regime.

In recent years, China has proactively advocated for maintaining the WTO regime, fighting against protectionism, and promoting free trade as the world's largest trading nation. For example, at the World Economic Forum in Davos in January 2017, Xi Jinping asserted "We must remain committed to developing global free trade and investment, promoting trade and investment liberalization and facilitation through opening-up and saying no to protectionism."<sup>113</sup> China, the second largest economy in the world, has a tangible interest in maintaining a smoothly functioning WTO system. Whether China is willing to commit herself to significantly higher

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<sup>113</sup> <https://america.cgtn.com/2017/01/17/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>.

international trading rules coupled with further reform and opening up, however, remains unclear in light of the current Chinese domestic political landscape under Xi Jinping. Even today, China asserts that she is a “developing country.” In order to effectively control the Chinese economy, the Chinese Communist Party seems to be determined to hold on to “China Inc.” and “China.com.” Whether China is willing to carry out new major market-oriented and opening-up reforms remains unclear despite some symbolic reform measures. As long as such real market-oriented reform is not realized, the critical U.S. view of China is expected to continue or even intensify.

At the same time, various influential experts and politicians in the United States make the case that the United States should work more closely with like-minded countries and regions such as the EU and Japan to address China-related trade problems and to agree upon new trade rules as well as to realize necessary WTO reform. Such recently negotiated high-standard mega-FTAs as the TPP and the Japan-EU EPA offer a good basis for initiating negotiations for plurilateral agreements on specific issue areas within the WTO. Concluding such plurilateral agreements under the WTO would be conducive to strengthening the WTO system.

Given China’s remarkable economic development realized through expanded international trade and investment after joining the WTO two decades ago, China is now expected to more proactively embrace higher standards of international trading rules. As more Chinese companies have invested overseas, China is also increasingly interested in protecting Chinese investments, as well as protecting her own intellectual property rights. A more ambitious Chinese position on international trading rules would be beneficial for sustainable development of the future Chinese economy. Considering the possible significant negative impacts upon global trade caused by the further intensified U.S.-China trade frictions as well as by the unprecedented economic damage

caused by the on-going coronavirus outbreak, we still have some new windows of opportunities to pursue this venue, but time could be limited.

In order to avoid the weakening and even the collapse of the WTO regime or the international trade norms under the deepening international economic crisis, the countries concerned are expected to redouble their efforts to encourage China to further reform and open up while keeping their respective economies open. They also need to improve the existing WTO rules and to negotiate creative new trade rules fit for the 21<sup>st</sup> century. Given the unprecedented global economic difficulties brought about by the coronavirus, there is a danger that a number of WTO members may be tempted to introduce many additional protectionist measures, which could further damage global trade and economy. In order to avoid such a vicious cycle, like-minded countries such as the United States, the EU, and Japan are expected to step up their efforts to agree upon new trade rules and proactively engage themselves in consultations with other WTO members. This is a critical juncture to save the international trading system as well as to upgrade it. If we fail to realize this, all the members of the WTO, including China, the United States, the EU, and Japan, would seriously suffer as a result.

Furthermore, the United States could revisit the TPP as related to the FOIP initiated under the Trump administration. In order to elevate the FOIP into the next stage, it will be quite useful to make use of existing mega-FTAs in the region. Luckily for the United States, the CPTPP is waiting for the United States to come back. For the United States to change its policy direction, and for the U.S. Congress to pass the trade agreement, renewed vigorous political and economic discussion of the merits and demerits of such an agreement under the FOIP in the era of the Indo-Pacific will be necessary in the United States.

At the same time, it is critically important that China, as the second largest economy in the world with increasingly more competitive and sophisticated industries, further reform and open up her economy to fit into the WTO regime and emerging high-standard international trade norms. These possible reform measures to be taken by China would be beneficial not only for China itself, but also for the rest of the world.

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