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China's Defense of Its Human Rights Policies

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CHINA'S DEFENSE OF ITS HUMAN RIGHTS POLICIES

By *Daniel C.K. Chow**

Although the United States has launched repeated attacks on China's human rights policies for the past three decades, China's Communist Party has mounted an effective defense and counterattack that has resonated with China's citizens, the most important constituency for the Party. Without the trust and support of its citizens, the Party will lose its power. China has mounted this defense based on three prongs: tradition, law, and morality.

Appealing to traditional Confucian doctrine, the Party portrays itself as an authoritarian but benevolent patriarch. In the area of law, China, a skillful litigator in the World Trade Organization (WTO), has overturned the first wave of punitive tariffs imposed by the Trump Administration. China has also gained the higher moral ground. Cleverly using arguments first raised by politicians and others in the United States, China claims that the United States has engaged in human rights abuses far more egregious than any in China.

For the past three decades, the United States has attempted to pressure or cajole China into progress in its human rights policies without success. Meanwhile, China the tiger cub has grown into China the tiger. The United States must finally accept the sober realization that it is unlikely to influence significant positive change in China's human rights policies. Criticism of China's human rights policies can realistically only serve two purposes: it can justify sanctions against China in other areas, such as trade, the environment, and the military. This appears to have been the strategy of the Trump Administration, which advanced a new view of China as the arch villain of the modern world. Otherwise, criticism will serve a symbolic purpose only. Only with this sober recognition can the United States and the Biden Administration approach its relationship with China now and in the future with realistic expectations.

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I. INTRODUCTION

Although the United States sustained repeated attacks on the human rights policies of the People’s Republic of China (PRC or China) for three decades, China has been able to mount a highly effective defense of its policies with the constituency that matters most to the Communist Party of China (CPC or Party), the nation’s rulers. This constituency consists of the citizens of China, without whose support and confidence the CPC would ultimately lose its seat of power.¹ Not only has the CPC been able to shield itself from U.S. attacks, the Party has also hardened its grip on the country and solidified its power, all without any slackening of the restrictive measures employed by the Party on China’s own citizens.² How China has been able to achieve this impressive feat can be attributed to the political skill of the Party in understanding U.S. political and cultural

¹ Mike Pompeo, U.S. Secretary of State, Communist China and the Free World’s Future, (July 24, 2020) (“The CCP fears the Chinese people’s honest opinions more than any foe.”). Like all of the emperors of China before it, the Party realizes that it holds the Mandate of Heaven, i.e. legitimate power, only so long as it bestows protection and beneficence on its citizens; if the Party, as emperor, descends into tyranny and moral decay, it will lose the Mandate of Heaven and be deposed from the throne by a challenger who will receive a new Mandate of Heaven. *See infra* Part III.A.

² *See infra* Part II.B.3.

movements, its appeal to Chinese tradition and history, its use of the law of the WTO, and its savvy use of the PRC media to promulgate a counter-message to the citizenry of China.³

The historical U.S. approach towards human rights in Chinese policies can be divided into three periods. The first period, from 1989 to 2000, was marked by largely unsuccessful attempts by the U.S. Congress to condition trade benefits for China with progress in human rights.⁴ This period started with the Tiananmen Square uprising in 1989, when units of the People's Liberation Army killed thousands of unarmed Chinese citizens protesting peacefully for political reform and liberalization.⁵ Shocked by this event, the U.S. Congress attempted to pressure China into reforming its human rights policies.⁶ Under President Bill Clinton, the United States adopted a short-lived policy of linking Most Favored Nation (MFN) status which entitled China to trade benefits, to progress in human rights.⁷ U.S. policy underwent a major shift during this period when Clinton decided that constructive engagement with China, rather than conditioning MFN on progress in human rights, was the path to political liberalization and reform in China.⁸ Clinton successfully urged the U.S. Congress to support China's entry into the WTO on the grounds that China's economic

³ See *infra* Part III.

⁴ See *infra* Part II.A.

⁵ See *Tiananmen Protest Death Toll 'Was 10,000'*, BBC (Dec. 23, 2017), <https://www.bbc.com/news/world-asia-china-42465516>.

⁶ See *infra* Part II.A.1.

⁷ See *infra* Part II.A.1. The MFN is contained in Article I of the General Agreements on Tariffs and Trade and is considered a fundamental obligation of the World Trade Organization. GATT, Art. 1 provides in relevant part: "With customs duties and charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The result of the MFN principle is that it universalizes any trade benefit by requiring that a benefit given by a WTO member to any country must be extended to all members of the WTO.

⁸ See *infra* text accompanying notes 107–10.

reforms required by the WTO would lead to political reform and greater protection of human rights.⁹

The second period began in 2001 when China joined the WTO¹⁰ and obtained permanent MFN status as a matter of WTO law.¹¹ China's entry into the WTO ended the United States' threat of trade sanctions and began the use of engagement through the use of trade and investment to foster greater openness and economic reform that would lead to political reform.¹² During this period, Presidents Clinton, Bush, and Obama made human rights a central issue in the U.S. relationship with China.¹³ Soon after China's entry into the WTO, it became apparent that China was intent on increasing state control of every aspect of Chinese society, not on relaxing state control.¹⁴ With the elevation of Xi Jinping to the presidency of China in 2012, the CPC began to significantly harden its stance on human rights and adopt repressive measures to provide state control over all aspects of Chinese society.¹⁵ Symbolic of this toughened stance was Xi's elimination of term limits of the office of the presidency, installing himself as China's leader for life.¹⁶

The third and current period began in 2016 with the ascension of Donald J. Trump to the U.S. presidency. The Trump Administration marked a sharp break with previous administrations in its assessment of China. The Trump Administration portrayed China as a malevolent

⁹ See *infra* text accompanying notes 118–19.

¹⁰ China became a member of the WTO on December 11, 2001. *China and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Oct. 27, 2021).

¹¹ The MFN principle is contained in GATT, Art. I, which requires MFN treatment as a matter of right for every member of the WTO. See GATT, *supra* note 7, art. 1 (General Most Favored Nation Treatment).

¹² See *infra* Part II.B.

¹³ Every U.S. president starting with George H.W. Bush made human rights a central issue until President Donald J. Trump. See *infra* Part III.C.

¹⁴ See *infra* Part II.B.

¹⁵ See *infra* Part II.B.

¹⁶ James Doubek, *China Removes Presidential Term Limits, Enabling Xi Jinping to Rule Indefinitely*, NPR (Mar. 11, 2018, 7:42 AM), <https://www.npr.org/sections/thetwo-way/2018/03/11/592694991/china-removes-presidential-term-limits-enabling-xi-jinping-to-rule-indefinitely>.

and ruthless superpower intent on displacing the United States as the leading power in the world through any means possible, without any legal or ethical constraints.¹⁷ China is portrayed as a nation that cheats in trade, that steals U.S. technology and intellectual property, that has military ambitions in Asia and possibly beyond, and that violates the human rights of its own people.¹⁸ The Trump Administration portrayed China as the number one threat to the United States in both the military and economic spheres.¹⁹ According to Peter Navarro, Trump's special advisor on trade and a notorious China skeptic, "One of the great achievements of Donald J. Trump was to bring to the fore this concept of China as a significant, existential threat to this country."²⁰

Under the Trump Administration, human rights were no longer treated as a discrete issue central to the United States-China relationship. Instead, human rights were treated as another example of China's sins to create and support the United States' portrayal of China as the arch-villain of the modern world.²¹

The Trump Administration acknowledged the failure of previous administrations' policies of engagement when it claimed for the first time that "the United States erred in supporting China's entry into the WTO."²² The policy of engagement failed because China

¹⁷ See *infra* Part II.C

¹⁸ See *infra* Part II.C.

¹⁹ See *infra* Part II.C.

²⁰ Angelica Stable, *Navarro: 'We Are All China Hawks' Because of Trump*, FOX NEWS (Dec. 20, 2020), <https://www.foxnews.com/politics/navarro-we-are-all-china-hawks-because-of-trump>.

²¹ Andrew Leung, *How Can the U.S. Offer a Realistic Response to the 'China Challenge'*, SOUTH CHINA MORNING POST (Feb. 26, 2021), <https://www.scmp.com/comment/opinion/article/3123035/how-us-can-offer-realistic-response-china-challenge> ("With strong bipartisan consensus, China has become America's arch-enemy. It is thought to be undermining the US-led liberal order, seeking to supplant the United States as the regional, if not world, hegemon. Its ideology, economic practices and assertive behaviour are trampling on the values of human rights, fair play and regional stability.")

²² U.S. TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE (2017), <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

refused to fulfill its WTO commitments to undergo economic reform and to loosen the Party's control on China's economy.²³ Instead, China reaped all of the benefits of WTO membership without keeping its end of the bargain and thus was able to exploit and take advantage of trade with the United States, harming it in the process.²⁴ The focus of the Trump Administration shifted away from human rights in China to directly addressing the unfair trade advantages that China acquired in its relationship with the United States.²⁵ To directly address China's illegal trade practices, the Trump Administration announced a series of draconian measures that amounted to tariffs on \$500 billion dollars of Chinese imports, or virtually all imports from China.²⁶ Trump also imposed punitive tariffs on imports from other nations to correct years of unfair trade deals entered into by prior U.S. administrations.²⁷

The Trump Administration appeared to use arguments about China's human rights record to support its portrayal of China as a powerful and evil adversary.²⁸ Previous U.S. administrations believed that it was possible to induce constructive changes in China's treatment of human rights.²⁹ Under the policy of conditionality from 1989 to 2000, the reasoning was that imposing conditions on China in exchange for MFN status would effect change in China's human rights policies.³⁰ Under the policy of engagement from 2001–2016, China's economic reforms, adopted through its interactions with the West, would lead to political reform.³¹ The Trump Administration, however, did not have a coherent policy on how to induce positive change in China's human rights policies. Rather, the goal of the Trump Administration appeared to be to attack and thwart China in every area possible: trade, international organizations, military ambitions, and

²³ *Id.*

²⁴ *Id.*

²⁵ *See infra* text accompanying notes 148–56.

²⁶ *See infra* text accompanying notes 152–56.

²⁷ *See* Scott Horsley, *Trump Formally Orders On Steel, Aluminum Imports*, NPR (Mar. 8, 2018), <https://www.npr.org/2018/03/08/591744195/trump-expected-to-formally-order-tariffs-on-steel-aluminum-imports> (noting the United States imposes tariffs on steel and aluminum imports from all countries except Canada and Mexico).

²⁸ *See infra* Part II.C.

²⁹ *See infra* Part II.A–B.

³⁰ *See infra* Part II.A.

³¹ *See infra* Part II.B.

even China's own internal policies.³² China's human rights abuses were simply another area in which the country must be punished, but there was no theory on how to induce constructive change. To punish China, the Trump Administration instituted numerous trade sanctions against China for human rights violations.³³ On January 14, 2020, during the waning days of his tenure, Trump imposed a total trade ban on Chinese tomato and cotton imports that were the products of forced labor in Xinjiang Province.³⁴

The election of Joe Biden to the U.S. Presidency in 2020 is not likely to mark a fundamental change in U.S. policy towards China.³⁵ President Biden has already announced that he intends to keep all of the Trump Administration's tariffs on China in place,³⁶ and the Biden Administration is under pressure to keep a tough stance on China.³⁷ The Trump Administration's portrayal of China as a malevolent superpower seems to have gained traction with both political parties in the United States.³⁸

³² See *infra* Part II.C.

³³ See *infra* Part II.C.

³⁴ See *infra* Part II.C.

³⁵ Jacob M. Schlesinger, *What's Biden's New China Policy? It Looks a Lot Like Trump's*, WALL ST. J. (Sept. 10, 2020), <https://www.wsj.com/articles/whats-bidens-china-policy-it-looks-a-lot-like-trumps-11599759286>.

³⁶ *Biden Says Will Not Kill Phase 1 Trade Deal with China Immediately*: NYT, REUTERS (Dec. 2, 2020), <https://www.reuters.com/article/us-usa-trade-china/biden-says-will-not-kill-phase-1-trade-deal-with-china-immediately-nyt-idUSKBN28C0HV>.

³⁷ Biden has vowed to "pursue policies targeting China's 'abusive practices,' such as 'stealing intellectual property, dumping products, illegal subsidies to corporations' and forcing 'tech transfers' from U.S. companies to Chinese counterparts." *Id.*

³⁸ See Ryan Hass, *Lessons from the Trump Administration's Policy Experiment on China*, BROOKINGS INST. (Sept. 25, 2020), <https://www.brookings.edu/research/lessons-from-the-trump-administrations-policy-experiment-on-china/>; see also Laura Silver, Kat Devlin, & Christine Huang, *Republicans See China More Negatively Than Democrats, Even as Criticism Rises in Both Parties*, PEW RSCH. CTR. (July 30, 2020), <https://www.pewresearch.org/fact-tank/2020/07/30/republicans-see-china-more-negatively-than-democrats-even-as-criticism-rises-in-both-parties/>.

Throughout the entirety of these three periods spanning three decades, there was no noticeable progress in Chinese human rights by U.S. standards. To the contrary, in recent years, China has taken increasingly draconian measures on human rights. In 2020, China implemented anti-sedition laws against the pro-democracy protesters in Hong Kong,³⁹ which is in breach of China's commitment to allow autonomy for Hong Kong as a condition of the return of Hong Kong by the UK to Chinese sovereignty in 1997.⁴⁰ In addition, China has escalated the use of coercive tactics against the Uighur minorities in Xinjiang Province by using advanced technology data collection and analytics to monitor their movements.⁴¹ In 2017, China installed large new "reeducation" camps for over 1.5 million Uighurs out of a total population of about 10 million.⁴² Yet, despite these measures, the Party continues to enjoy the strong support of citizens in China.⁴³ In fact, as

³⁹ Zhonhua renmin gongheguo xianggang tebie xingzhengqu weihu guojia anquan fa (中華人民共和國香港特別行政區維護國家安全法) [Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2020, effective June 30, 2020); *English Translation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, XINHUA (June 30, 2020), http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm; see Chris Buckley & Keith Bradsher, *Brushing Aside Opponents, Beijing Imposes Security Law on Hong Kong*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/world/asia/china-critics-security-law-hong-kong.html>.

⁴⁰ Convention of Respecting an Extension of Hong Kong Territory, China-Gr. Brit., June 9, 1898/1989, 90 Brit. For. St. Pap. 17, 186 Consol. T.S. 310; see also Harry Harding, *The Future of Hong Kong*, 12 CHINA BUS. REV. 31, 32 (1985).

⁴¹ Jane Wakefield, *AI Emotion-Detection Software Tested on Uyghurs*, BBC NEWS (May 26, 2021), <https://www.bbc.com/news/2018/02/26/china-big-data-fuels-crackdown-minority-region> (discussing how AI software is used to detect changes in facial expressions that government officials consider suspicious and justification for detention and torture of suspects).

⁴² Patrick deHahn, *More Than 1 Million Muslims Are Detained in China—But How Did We Get That Number?*, QUARTZ (July 4, 2019), <https://qz.com/1599393/how-researchers-estimate-1-million-uyghurs-are-detained-in-xinjiang/>; Stephanie Nebehay, *1.5 Million Muslims Could Be Detained in China's Xinjiang*, REUTERS (Mar. 13, 2019), <https://www.reuters.com/article/us-china-xinjiang-rights/1-5-million-muslims-could-be-detained-in-chinas-xinjiang-academic-idUSKCN1QU2MQ>.

⁴³ See *infra* notes 209–17.

the United States has escalated its attacks, the citizens of China have rallied to increase its support of the PRC government.⁴⁴

China's ability to withstand and deflect U.S. criticism is due to a shrewd campaign launched by the Party to deliver a counter message to its citizens. This campaign by the Party consists of using a three-pronged approach based on tradition, law, and politics. Observers may question the validity or credibility of this approach and its supporting arguments. Critics may also lament the gullibility and naiveté of Chinese citizens in their pliant acceptance of Party propaganda. The purpose of this Article is not to condemn or defend the approach, but to explain why it has been effective with China's citizenry to counter U.S. critique of China's human rights record and what lessons the United States can draw.

First, the CPC portrays itself as a loyal disciple of Chinese tradition, historically destined as the legitimate ruler of China.⁴⁵ The CPC professes itself as a devotee of Confucianism, a social and political theory which can be traced to the philosopher Confucius, who lived 2,500 years ago.⁴⁶ Confucianism had a profound influence on social norms not only on China, but also in Japan, Korea, Vietnam and other Asian countries.⁴⁷ In terms of the sheer population involved, Confucianism was far more influential than its contemporary counterparts in western social and political thought.⁴⁸ Under Confucianism, the human rights of the individual are not an important concept and foreign to the social order.⁴⁹ Throughout thousands of years of Chinese history, Confucianism taught that persons owed a duty of obedience to superiors, that duty is fundamental to society and government, and that rights are secondary and derivative of the prior fulfilment of a duty.⁵⁰ Citizens who fulfill a duty of loyalty to the state

⁴⁴ See *infra* Part III.A.

⁴⁵ See *infra* Part III.A.

⁴⁶ DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY 108–09 (3d ed. 2017).

⁴⁷ *Id.*

⁴⁸ *Id.* Confucius was a contemporary of Aristotle and Plato. See DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 40 (3d ed. 2015).

⁴⁹ CHOW & LEE, *supra* note 46, at 45–46.

⁵⁰ *Id.* at 46.

are entitled to rights, but those who reject the fundamental duty to the state are subject to justified punishment.⁵¹ These concepts are deeply embedded in Chinese history and culture and resonate with China's public.⁵² Using these entrenched concepts, the Party portrays itself as an authoritarian but benevolent patriarch.⁵³ Appealing to Chinese history, the CPC portrays its ascension to power as a matter of destiny.⁵⁴ During the chaos of the first half of the twentieth century, when China was under constant threat by enemies from abroad and from within, the CPC saw itself as the savior of the Chinese people from the brink of annihilation.⁵⁵ Only the CPC could save the Chinese people and lead them to happy lives.⁵⁶ Like the emperors of China who preceded it, the CPC's ascension to power over rivals is evidence that the CPC holds the Mandate of Heaven—legitimate power—which can only be forfeited if the emperor becomes corrupt and descends into moral decay and tyranny.⁵⁷ A close reading of the current PRC Constitution illustrates how these concepts of tradition and history favoring the CPC are embedded in that document.⁵⁸

Second, the CPC also has effective legal arguments at its disposal. The CPC argues that the Trump Administration is acting in contravention of the law of the WTO in imposing trade sanctions against China.⁵⁹ Using this approach, China won a significant victory on September 15, 2020, when the WTO rejected U.S. tariffs on over \$200 billion of Chinese imports,⁶⁰ imposed during the Trump

⁵¹ See generally Na Jiang & Yifang Fu, *Reasons for Harsh Punishments in China*, 7 J. OF CIV. & LEGAL SCIS. 1 (2018); see also Justin Tiwald, *Punishment and Autonomous Shame in Confucian Thought*, 435 CRIM. JUST. ETHICS 5 (2017); Xue Yang, *The Confucianization of Law and the Lenient Punishments in China*, 10 INT'L J. OF CRIM. JUST. SCI. 32 (2015).

⁵² Grace Huang & Mary Grove, *Confucianism and Chinese Families: Values and Practices in Education*, 2 INT'L J. HUMANS. SOC. SCI. 10, 10, 13 (2012).

⁵³ See *infra* Part III.A.2.

⁵⁴ See XIANFA [CONSTITUTION] preamble (1982) (China).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ CHOW & LEE, *supra* note 46, at 44.

⁵⁸ See *infra* Part III.A.

⁵⁹ See *infra* Part III.B.

⁶⁰ See source cited *infra* note 232.

Administration's first wave of tariffs against China.⁶¹ A well-established jurisprudence in the WTO indicates that non-economic considerations such as workers' rights, a subset of human rights, cannot be used as the basis for justifying trade sanctions.⁶² This is an argument that finds support among the bulk of developing nation members of the WTO, which now constitute a majority of its membership.⁶³ These legal arguments based on WTO law did not impress the Trump Administration, showed a disdain for the WTO, and flouted its laws.⁶⁴ However, because other WTO nations, such as the twenty-seven states of the European Union, do not share the United States' contempt for the WTO, these arguments bear weight.⁶⁵ The United States has attempted to recruit other nations in condemning China's human rights record; while this effort has shown some success in the United Nations,⁶⁶ the legal barrier against the use of trade sanctions for human rights violations could prevent other nations from joining the United States in imposing trade sanctions against China.⁶⁷ This legal barrier will likely prevent the United States from forming a broad coalition of nations that use trade sanctions to punish China for human rights violations, but could leave the United States as the sole practitioner of this tactic, undermining and limiting its effectiveness.⁶⁸

Third, the CPC argues that, because the United States' condemnation of human rights in China is hypocritical, its arguments thereby lack credibility.⁶⁹ Mining the fertile ground of U.S. culture, politics, and media, the CPC cleverly selects arguments first made by U.S. parties that have gained traction in the United States.⁷⁰ China then

⁶¹ See source cited *infra* note 230.

⁶² See sources cited *infra* notes 226, 227.

⁶³ See sources cited *infra* notes 226, 227.

⁶⁴ See Daniel C.K. Chow, *United States Unilateralism and the World Trade Organization*, 37 B.U. INT'L L.J. 1, 8–9 (2019) (discussing how the United States may refuse to follow any WTO decision with which it disagrees).

⁶⁵ See *infra* Part III.B.

⁶⁶ See *infra* Part III.B.

⁶⁷ See *infra* Part III.B.

⁶⁸ See *infra* Part III.B.

⁶⁹ See *infra* Part III.C.

⁷⁰ See *infra* Part III.C.

turns these arguments against the United States.⁷¹ For example, China argues that the United States is plagued by systemic racism in all of its institutions because no less an authority than U.S. President Joe Biden has acknowledged its existence.⁷² Using the same arguments that have become popular in the United States, the CPC portrays the United States in the Chinese media as engaging in human rights abuses that are far more heinous and egregious than any in China.⁷³ China claims that the United States is the “world’s top human rights violator”⁷⁴ and is in no position to criticize China.⁷⁵

Part II of this Article will briefly examine the three stages of U.S. policy on human rights in China that span the last three decades since the events of Tiananmen Square in 1989. Part III will examine China’s strategy in defending its policies on human rights and its counter message directed against the United States. Part IV concludes that, in over three decades, U.S. policy on human rights in China has failed to influence any significant positive changes in China’s human rights policies due to China’s shrewd and effective defense of its policies and the CPC’s promulgated counter-message to its citizenry. Neither U.S. coercion nor cajolery has effected any meaningful changes in China’s human rights policies. Despite this lack of progress, the United States is likely to continue to criticize China’s human rights policies. It is now unrealistic to believe that the United States’ efforts

⁷¹ See *infra* Part III.C.

⁷² In response to a question on whether systemic racism exists in U.S. law enforcement, Biden, then a candidate for the U.S. Presidency, replied, “Absolutely, . . . but it’s not just in law enforcement, it’s across the board. It’s in housing, it’s in education, and it’s in everything we do. It’s real. It’s genuine. It’s serious.” Kathryn Watson, *Biden Says There’s “Absolutely” Systematic Racism in Law Enforcement and Beyond*, CBS NEWS (June 10, 2020), <https://www.cbsnews.com/news/joe-biden-systemic-racism-exists-law-enforcement/>.

⁷³ See *infra* Part III.C.

⁷⁴ See *infra* Part III.C at note 249.

⁷⁵ See Tim O’Connor, *China Issues Human Rights Report Attacking U.S. Racism, Gun Violence, Co-vid 19 Response*, NEWSWEEK (Mar. 24, 2021), <https://www.newsweek.com/china-human-rights-report-us-racism-violence-covid-1578501> (China issued a report on human rights abuses in the United States, noting that “[t]he U.S. government, instead of introspecting on its own terrible human rights record, kept making irresponsible remarks on the human rights situation in other countries, exposing its double standards and hypocrisy on human rights”).

to effect change in China will bear any meaningful results. Instead, U.S. criticism of China's human rights policies can be used to justify tough actions against China in other fields, such as trade. Otherwise, any U.S. criticism of human rights policies in China will have a symbolic effect only.

II. THREE STAGES OF U.S. POLICY ON HUMAN RIGHTS IN CHINA

A. The Failed Policy of Conditionality

After a period of unrelenting turbulence and violent upheaval due to intermittent wars and revolution during the first part of the twentieth century,⁷⁶ China entered a brief period of stability and tranquility after Mao Zedong vanquished all of his enemies to establish the People's Republic of China in 1949.⁷⁷ Facing extinction at various points in its short existence, Mao's Communist forces were able to prevail against overwhelming odds to defeat a vastly numerically superior enemy that enjoyed the support of the United States.⁷⁸ While the United States mourned the "loss" of China to communism,⁷⁹ the new nation withdrew from the global stage to focus its energies inward on introspection and self-purification.

After the death of Mao in 1976, China emerged from the chaos of the Cultural Revolution to direct its attention to its long neglected economy and finally turned outward to re-engage in international trade.⁸⁰ By the late 1980s, a robust first wave of foreign trade with China was underway when the People's Liberation Army shocked the world in June 1989 by firing upon and killing thousands of unarmed citizens peacefully protesting in Tiananmen Square for democratic

⁷⁶ CHOW & LEE, *supra* note 46, at 9–14.

⁷⁷ *Id.* at 14–15.

⁷⁸ *Id.* at 120–21.

⁷⁹ *Id.* at 18.

⁸⁰ *Id.* at 17–18, 33–35. The Cultural Revolution was a campaign of political terror instigated by Mao and aimed at Mao's rivals and enemies. *See id.* However, the Cultural Revolutions spiraled out of control and harmed about 1 million victims. *See id.* at 16–17.

reform.⁸¹ Nations condemned the killings and labelled China a rogue nation.⁸² In the United States, Congress began to respond to China's egregious violation of human rights.

1. The Jackson-Vanik Amendment and Most Favored Nation Status

Since 1980, U.S. Presidents had granted trade benefits to China in the form of Most Favored Treatment (MFN) tariffs under the Jackson-Vanik Amendment of the Trade Act of 1974.⁸³ The Jackson-Vanik Amendment permits the President to grant MFN status to a "non-market economy" provided that the country does not restrict emigration.⁸⁴ The Jackson-Vanik Amendment was targeted at the Soviet Union, which, at the time, restricted or prohibited its citizens from emigrating.⁸⁵ The United States began to apply this legislation to China, as it was not restricted to the Soviet Union, but drafted in general terms.⁸⁶ The U.S. President can decide to grant MFN status to China if the President finds that China is in full compliance with the Jackson-Vanik Amendment or the President could waive full compliance, a tact that Presidents had adopted since 1980.⁸⁷ Until the Tiananmen Square events in 1989, granting annual MFN status to China was not controversial.⁸⁸ After 1989, the annual renewal of China's MFN status became hotly contested in Congress until China acceded to the WTO in 2001 and

⁸¹ Daniel C.K. Chow, *How China Uses International Trade to Promote Its View of Human Rights*, 45 GEO. WASH. INT'L L. REV. 681, 681 n.1 (2013).

⁸² *Id.*

⁸³ See KERRY DUMBAUGH, CONG. RSCH. SERV., 98-603 F, CHINA'S MOST-FAVORED-NATION (MFN) STATUS: CONGRESSIONAL CONSIDERATION, 1989-1998, at 1 (1998). The Jackson-Vanik Amendment was enacted into law as part of Title IV of the 1974 Trade Act, Pub. L. No. 93-618, 88 Stat. 2056, signed into law on Jan. 3, 1975, by President Gerald Ford. The amendment was designed to pressure the Soviet Union to allow ease of emigration for Jews. See THOMAS J. PROBERT, THE INNOVATION OF THE JACKSON-VANIK AMENDMENT, IN HUMANITARIAN INTERVENTION: A HISTORY 323, 323 (Brendan Simms & D.J.B. Trim eds., 2011).

⁸⁴ DUMBAUGH, *supra* note 83, at 1.

⁸⁵ See VLADIMIR N. PREGELJ, CONG. RSCH. SERV., ORDER CODE 98-545, THE JACKSON-VANIK AMENDMENT: A SURVEY, at i (2005).

⁸⁶ See DUMBAUGH, *supra* note 83, at 1.

⁸⁷ *Id.*

⁸⁸ *Id.* at ii.

obtained MFN status as a matter of right.⁸⁹ Although the Jackson-Vanik Amendment focused on emigration policies, after the 1989 Tiananmen Square events, the United States began to link human rights with the granting of MFN status.⁹⁰

Obtaining MFN treatment from the United States was critical to China's nascent ascent as an exporting nation. With low labor costs and an industrious workforce, China fueled the growth of their economy by exporting goods to foreign nations in order to establish a trade surplus.⁹¹ Access to the vast U.S. market was critical to China's success as a net exporting nation.⁹² During this period, China was still emerging from grinding poverty and backwardness, far from the economic powerhouse that it is today, and was in no position to make demands on the United States.⁹³

During this incipient phase of its development, China faced the problem that the United States maintained a tariff system that penalized countries, such as China, that were not members of the WTO and did not acquire MFN status as a matter of right under WTO law.⁹⁴ The Harmonized Tariff Schedule of the United States (HTSUS), still currently in use, contains two columns of tariff rates. Under Column 1 are "General" rates for WTO countries and countries with which the United States has trade agreements.⁹⁵ These rates are at

⁸⁹ See GATT, *supra* note 7, art. I (requiring all WTO members to extend MFN to all other WTO members).

⁹⁰ DUMBAUGH, *supra* note 83, at 4.

⁹¹ See Jacob M. Schlesinger, *How China Swallowed the WTO*, WALL ST. J. (Nov. 1, 2017), <https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308>.

⁹² See Nicholas R. Lardy, *Issues in China's WTO Accession*, BROOKINGS INST. (May 9, 2001), <https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/>; Nicholas R. Lardy, *U.S.-China Economic Relations: Implications for U.S. Policy*, BROOKINGS INST. (Apr. 25, 2001), <https://www.brookings.edu/testimonies/u-s-china-economic-relations-implications-for-u-s-policy/>.

⁹³ See William Antholis, *New Players on the World Stage: Chinese Provinces and Indian States*, BROOKINGS INST. (Oct. 22, 2013), <http://csweb.brookings.edu/content/research/essays/2013/new-players-on-the-world-stage.html#>; see also Lardy, *supra* note 93.

⁹⁴ DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 150 (4th ed. 2020).

⁹⁵ *Id.* at 153–55.

historic lows due to repeated rounds of negotiations, which led to reductions through the WTO.⁹⁶ Every member nation of the WTO is entitled to the General rate under Column 1, sometimes referred to as the MFN rate as required by Article I of the GATT/WTO.⁹⁷ The MFN term is somewhat misleading as it implies favorable or preferential treatment, but the MFN term is in fact the rate applied to nearly all U.S. trading partners. For this reason, the United States now uses the term Permanent Normal Trade Relations (PNTR) instead of MFN to designate the general tariff rate applied under Column 1.⁹⁸ A non-WTO member country that does not have a trade agreement with the United States receives the Column 2 rates.⁹⁹ These rates were established under the Smoot-Hawley Tariff Act of 1930 during the height of international trade protectionism when nations viewed each other with mistrust and suspicion.¹⁰⁰ Also referred to as the statutory rate, the Column 2 rates are prohibitively high with rates that reach 60% in the HTSUS.¹⁰¹ Today, only certain pariah nations, such as Iran, North Korea, or Cuba, would be subject to the statutory rate in Column 2.¹⁰² In the 1990s, it was critical for China to receive MFN

⁹⁶ See *Tariffs: More Bindings and Closer to Zero*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm, (last visited Sep. 20, 2021); *Harmonized Tariff Schedule (2021 Preliminary Revision 2)*, U.S. INT'L TRADE COMM'N, <https://hts.usitc.gov/current> (last visited Oct. 27, 20, 2021).

⁹⁷ CHOW & SCHOENBAUM, *supra* note 94, at 153.

⁹⁸ Nicholas R. Lardy, *Permanent Normal Trade Relations for China*, BROOKINGS INST. (May 10, 2000), <https://www.brookings.edu/research/permanent-normal-trade-relations-for-china/> (“The cornerstone principle of the World Trade Organization is that members provide each other unconditional Most Favored Nation trade status, now called Permanent Normal Trade Relations (PNTR) in U.S. trade law.”).

⁹⁹ CHOW & SCHOENBAUM, *supra* note 94, at 153.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 153–54.

¹⁰² Iran, North Korea, and Cuba are subject to numerous additional U.S. sanction regimes that impose independent restrictions that totally prevent or limit trade aside from Column 2 tariffs. In the case of Iran, these regimes include the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 18 U.S.C. § 2332(d). Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 11-195, As Amended Through Pub. L. 112-239 (enacted January 2, 2013); Countering America’s Adversaries Through Sanctions Act, Pub. L. 11-44; Iran Freedom and Counter-Proliferation Act of 2012, Pub. L. 112-239. In the case of North Korea, these sanctions regimes include the North Korean Sanctions and

tariffs from the United States to gain access to the U.S. market to become the exporting powerhouse that it is today.

After the events of Tiananmen Square, China's granted MFN status became a hotly debated and controversial topic in the U.S. Congress.¹⁰³ Although the debate first focused on denying MFN status to China, the debate soon concerned whether to condition MFN status on progress in human rights.¹⁰⁴ Many in Congress argued that the annual renewal process for MFN was the strongest leverage that the United States had over China.¹⁰⁵ Beginning in 1990, Congress used the annual MFN renewal process to register its disapproval of China's repressive human rights policies and to put pressure on the administration of George H. W. Bush to take action against Beijing.¹⁰⁶ In 1991, Congress made several efforts to condition granting MFN status to progress in protecting human rights.¹⁰⁷ These efforts were vetoed by Bush. Although both congressional bodies attempted to override the veto, the vote failed by a narrow margin.¹⁰⁸ In 1993, President Clinton announced that he would explicitly link China's MFN status exclusively to human rights, a position that he reversed in 1994.¹⁰⁹ Clinton argued that a policy of constructive engagement with China would be more effective than using coercive tactics.¹¹⁰ Clinton's decision drew the support of pro-business interests, free traders, and agricultural constituencies who all stood to benefit from the

Policy Enhancement Act of 2016, Pub. L. 114-122, 130 Stat. 93; National Emergencies Act, 50 U.S.C. §§ 1601–1655; International Emergency Economic Powers Act, 50 U.S.C. §§ 1601–1651; and Section 5 of the United Nation Participation Act of 1945, 22 U.S.C. § 287(c). In the case of Cuba, these other regimes include the Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. §§ 7201–7211; Cuban Liberty and Democratic Solidarity Act of 1966, 18 U.S.C. §§ 6021–6091; Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001–6010; Sections 5 and 16 of the Trading with the Enemy Act, 50 U.S.C. App. §§ 5, 16.

¹⁰³ See DUMBAUGH, *supra* note 83, at 4.

¹⁰⁴ *Id.* at iii.

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 11–13.

¹⁰⁸ *Id.* at 13.

¹⁰⁹ DUMBAUGH, *supra* note 83, at 21–24.

¹¹⁰ *Id.* at 19–21.

decision.¹¹¹ Although Clinton delinked human rights from MFN, he was mindful of Congress' concerns; he sustained other sanctions against China and continued to prioritize human rights in dealing with China.¹¹² Congress continued debating China's MFN grant in spite of its human rights concerns. However, the process soon became an annual ritual in which Congress would bash and castigate China followed by its ultimate grant of MFN to China.¹¹³

B. The Policy of Constructive Engagement

The second stage in U.S. policy towards human rights in China began with China's accession to the WTO in 2001, which also marked the end of the use of annual reviews under the Jackson-Vanik Amendment. This stage is characterized by a policy of engagement with China to encourage its progress in protecting human rights.

1. China and the WTO

In 1948, China became an original party to the GATT, the predecessor to the WTO, but soon withdrew from the GATT as the new nation focused its energies internally and turned away from the global stage.¹¹⁴ In 1986, China submitted a new application for accession to the WTO and negotiated with WTO members for over a decade to reach an agreement on the conditions of its accession.¹¹⁵ Although each applicant must negotiate with the entire membership of the WTO, as a practical matter, the most important actor in this process was the United States, which had taken the lead in negotiations

¹¹¹ *See id.* at 25.

¹¹² *Id.*

¹¹³ *Id.* at 32. ("As one House Ways and Means Committee member put it, 'We all know we won't revoke MFN. This is a debate amongst ourselves, with no real value whatsoever.'").

¹¹⁴ Ministry of Foreign Affairs of the PRC, *Bilateral Agreement on China's Entry to the WTO Between China and the United States* (Nov. 17, 2000); Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B. C. INT'L & COMP. L. REV. 319, 325 (2004).

¹¹⁵ Ministry of Foreign Affairs of the PRC, *supra* note 114; Halverson, *supra* note 114, at 323 n.13.

with China.¹¹⁶ Without the support of the United States, China did not have a realistic chance of gaining admission to the WTO.¹¹⁷

Entry into the WTO was essential to China's mercantilist goals because tariffs under the WTO were "bound," or subject to ceilings established through rounds of negotiations over decades and were at historic lows.¹¹⁸ Once China gained admission to the WTO, China became entitled, under the MFN principle contained in GATT Article I, to the lowest tariffs from every WTO member, including the United States. As long as China remained outside of the WTO, nations could impose tariffs in any amount that they wished on Chinese imports.¹¹⁹ Gaining admission to the WTO and entitlement to MFN tariffs from all WTO members was critical to China rising to become the world's leading exporting nation in the span of just three decades.¹²⁰ Accession to the WTO also allowed China to avoid the controversial annual review under the Jackson-Vanik Amendment as China was entitled to MFN treatment from the United States under the WTO as a matter of right.

2. President Bill Clinton and Human Rights

China's accession to the WTO meant that the United States was required under Article I of the GATT/WTO to extend MFN treatment on a permanent basis to China. President Bill Clinton proved to be a key ally for China in its quest for WTO accession and permanent MFN. Clinton persuaded the U.S. Congress to vote in favor of PNTR for China based on his argument that constructive engagement with China would help promote human rights. In a key

¹¹⁶ Lardy, *Issues in China's WTO Accession*, *supra* note 98; Zhiqun Zhu, *To Support or Not to Support: The American Debate on China's WTO Membership*, 6 J. CHINESE POL. SCI. 77, 77 (2000).

¹¹⁷ See Lardy, *Issues in China's WTO Accession*, *supra* note 98; Schlesinger, *supra* note 91.

¹¹⁸ Absent the WTO, the importing nation is not subject to any legal restraints on the amount of the tariff. The issue of tariffs applied to Chinese imports is purely a bilateral issue between the importing nation and China.

¹¹⁹ See GATT, *supra* note 7, art. II:1(a)-(b) (tariff bindings) & art. I (MFN principle).

¹²⁰ Daniel C.K. Chow, *Why China Opposes Human Rights in the World Trade Organization*, 61 U. PENN. J. INT'L L. 61, 77-78 (2014).

speech given on March 9, 2000, at John Hopkins University, Clinton outlined the benefits of engagement with China:

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. . . . And when individuals have the power, not just to dream but to realize their dreams, they will demand a greater say.¹²¹

Clinton then explained the link between economic freedom and political freedom:

There's something even more revolutionary at work here. By lowering the barriers that protect state-owned industries, China is speeding a process that is removing government from vast areas of people's lives. . . . [China] will have fewer instruments . . . with which to control people's lives. And that may lead to very profound change. . . . [China] will find that the genie of freedom will not go back into the bottle. As Justice Earl Warren once said, liberty is the most contagious force in the world. . . . I understand that this is not in and of itself a human-rights policy. But still, it is likely to have a profound impact on human rights and political liberty.¹²²

Clinton's argument found a welcome reception in the U.S. Congress. Clinton began his speech with a reminder that the "loss" of China to communism after the Second World War led to bitter recriminations in the United States.¹²³ Clinton then dangled the

¹²¹ Full Text of President Bill Clinton, Speech on China Trade Bill, March 9, 2000, https://www.iatp.org/sites/default/files/Full_Text_of_Clinton_Speech_on_China_Trade_Bi.htm.

¹²² *Id.*

¹²³ *Id.*

prospect that engagement with China would lead to economic reform, which would lead, in turn, to political freedom. He even suggested that with reform, China could shed the shackles of communism and embrace democracy. China's acceptance of democracy was an intoxicating possibility and was instrumental in Congress granting PNTR to China, which China still enjoys today.

3. *China in the Post-WTO Period*

Immediately preceding and following China's accession to the WTO in 2001, China enacted reforms that strengthened the Party's control over key state-owned enterprises (SOEs)—business entities owned and controlled by the state—rather than loosening its control, as Clinton had predicted in his 2000 speech. In 1997, China adopted a policy of selling off certain non-essential, state-owned industrial enterprises to private operators.¹²⁴ The policy, called “Zhua Da Fang Xiao”—grasping the larger, letting go the smaller—was designed to focus and tighten state control in strategic industrial sectors while allowing private enterprise and control in non-strategic sectors.¹²⁵ China maintained and tightened state control through SOEs in all vital industrial sectors: banking, telecommunications, air and rail travel, steel and metals, oil and gas exploration and production, and electricity and water supply.¹²⁶

In 2003, China established two central level authorities, the State-Owned Assets Supervision and Administration Commission (“SASAC”)¹²⁷ and the Central Huijin Investment Ltd. (CHI),¹²⁸ to

¹²⁴ *Guidelines to the State-Owned Enterprises Directly under the Central Government*, STATE-OWNED ASSETS SUPERVISION & ADMIN. COMM'N OF THE STATE COUNCIL (Dec. 6, 2011), http://en.sasac.gov.cn/2011/12/06/c_313.htm; MIKAEL MATTLIN, BRUSSELS INST. OF CONTEMP. CHINA STUDIES, CHINESE STRATEGIC STATE-OWNED ENTERPRISES AND OWNERSHIP CONTROL 7–8 (2009); Mary E. Lovely & Yang Liang, ‘*State Enterprise Reform in China: Grasp or Release?*’ W.E. Upjohn Institute, at 85 (2018).

¹²⁵ *Id.* at 8.

¹²⁶ CHOW & LEE, *supra* note 46, at 24.

¹²⁷ MATTLIN, *supra* note 124, at 7.

¹²⁸ *About Us*, CENTRAL HUIJIN INVESTMENT LTD., http://www.huijin-inv.cn/huijineng/About_Us/index.shtml (last visited Oct. 27, 2021); Zoey Ye Zhang, *China's SOE Reforms: What the Latest Round of Reforms Mean for the Market*,

increase its control over the state sector. Both the SASAC and CHI are majority shareholders of their constituent SOEs and also actively manage their assets.¹²⁹ The SASAC owns and manages SOEs in the industrial sectors and the CHI owns and manages all of China's major banks.¹³⁰ Through the SASAC and CHI, the Party now controls the vital sectors of China's industrial and financial industries. In 2006, China adopted a set of indigenous innovation policies¹³¹ to help "national champions"—SOEs that can compete with the world's leading multinational companies.¹³² Among the most controversial aspects of these of these policies was the requirement that PRC government purchase products with locally produced intellectual property instead of foreign sourced goods.¹³³

In 2012, the elevation of Xi Jinping, General Secretary of the CPC, to China's Presidency marked a sharp shift in China's social policies, resulting in greater Party control over all aspects of Chinese citizens. Despite China's economic success, Xi believed that the Party had lost its legitimacy due to rampant corruption and moral decay and that the nation was in need of rejuvenation.¹³⁴ He was also determined that the CPC would not suffer the ignominious fate of the Soviet Communist Party that seemed to evaporate overnight under the

CHINA BRIEFING (May 29, 2019), <https://www.china-briefing.com/news/chinas-soe-reform-process/>.

¹²⁹ *Guidelines to the State-Owned Enterprises*, *supra* note 124; *About Us*, *supra* note 128.

¹³⁰ See *Guidelines to the State-Owned Enterprises Directly under the Central Government* *supra* note 124; ANDREW SZAMOSSZEGI & COLE KYLE, U.S.-CHINA ECONOMIC & SECURITY REVIEW COMM', AN ANALYSIS OF STATE-OWNED ENTERPRISES AND STATE CAPITALISM IN CHINA 73 (2011), https://www.uscc.gov/sites/default/files/Research/10_26_11_CapitalTradeSOES_tudy.pdf

¹³¹ U.S. INT'L TRADE COMM'N, CHINA: INTELLECTUAL PROPERTY INFRINGEMENT, INDIGENOUS INNOVATION POLICIES, AND FRAMEWORKS FOR MEASURING THE EFFECTS ON THE U.S. ECONOMY, at 1-7 (2010).

¹³² *Id.* at 5-6.

¹³³ *Id.* at 5-2 to 5-3.

¹³⁴ XUEZHI GUO, THE POLITICS OF THE CORE LEADER IN CHINA: CULTURE, INSTITUTION, LEGITIMACY, AND POWER 38-39, 46 (2019).

pressure of economic and political reform.¹³⁵ To restore the moral legitimacy of the Party, Xi immediately instituted a crackdown against corruption in the Party targeting both “tigers” and “flies” (high level and low level Party cadres).¹³⁶

Xi also reasserted party control over society by placing further restrictions on civil society in the name of national security, suppressing ethnic minorities and religious groups, and reducing the freedom of PRC citizens.¹³⁷ For example, in 2015 Xi launched a crackdown of more than 250 human rights activists, detaining many of them for years and convicting over a dozen of for “disturbing the social order and subversion.”¹³⁸ In 2017, China enacted a new Cybersecurity Law that established broad government control over online internet traffic in the name of social order and national security,¹³⁹ which has created one of the most restrictive internet censorship systems in the world.¹⁴⁰ The Cybersecurity Law also places a burden on private internet providers to monitor content and to assist China’s public security organs.¹⁴¹ Xi also further restricted the permissible areas of free speech and silenced independent journalists,¹⁴² including imprisoning a citizen-journalist who reported critically on the outbreak of the Coronavirus pandemic in Wuhan.¹⁴³

¹³⁵ Chris Buckley, *Vows of Change in China Belie Private Warning*, N.Y. TIMES (Feb. 14, 2013), <https://www.nytimes.com/2013/02/15/world/asia/vowing-reform-chinas-leader-xi-jinping-airs-other-message-in-private.html>.

¹³⁶ *Id.* at 186.

¹³⁷ THOMAS LUM & MICHAEL A. WEBER, CONG. RSCH. SERV., R45956, HUMAN RIGHTS IN CHINA AND U.S. POLICY: ISSUES FOR THE 116TH CONGRESS, at ii (Oct. 9, 2019).

¹³⁸ *Id.* at 2.

¹³⁹ Zhonghua renmin gongheduo wangluo anquan fa (中華人民共和國網絡安全法) [Cybersecurity Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 7, 2016, effective June 1, 2017).

¹⁴⁰ LUM & WEBER, *supra* note 137, at 4.

¹⁴¹ *Id.* at 2.

¹⁴² Javier C. Hernández, *We’re Almost Extinct’: China’s Investigative Journalists Are Silenced Under Xi*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/world/asia/china-journalists-crackdown.html>.

¹⁴³ *China Jails Citizen-Journalist for Four Years over Wuhan Virus Reporting*, REUTERS (Dec. 28, 2020), <https://www.reuters.com/article/us-health-coronavirus->

Also in 2017, China passed a new National Intelligence Law that creates a duty on citizens, organizations, and institutions to assist PRC authorities in intelligence work targeting PRC individuals and organizations.¹⁴⁴

Xi launched several initiatives to deal with unrest in Xinjiang Province, home to the Uighur ethnic minority, who objected to the rule of the Han majority and engaged in violent protests in 2009. In 2016, China adopted a policy of “sinicization” that would assimilate the Uighur minority—with their own language, culture, and religion—to Chinese culture and language and force them to adopt China’s socialist system and Party policies.¹⁴⁵ Beginning in 2017, PRC authorities have detained an estimated 1.5 million Uighurs (out of a population of about 10.5 million) in what China calls “re-education camps.”¹⁴⁶ China also uses surveillance cameras, facial, voice, eye, and gait recognition equipment to track the movement and activities of Uighurs.¹⁴⁷ PRC officials are also collecting massive amounts of data as part of its efforts to use big data analytics to monitor the activity of Uighurs and other groups.¹⁴⁸

More recently, in an effort to deal with widespread protests for democracy in Hong Kong, Xi imposed a new sweeping National Security Law with draconian punishments designed to suppress dissent.¹⁴⁹ These recent measures, especially those in Xinjiang, provoked a strong reaction from the Trump Administration as further discussed below.

china-journalist/china-jails-citizen-journalist-for-four-years-over-wuhan-virus-reporting-idUSKBN2920EI.

¹⁴⁴ LUM & WEBER, *supra* note 137, at 3.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at ii.

¹⁴⁷ *Id.* at 4–5.

¹⁴⁸ *Id.* at 5.

¹⁴⁹ Examples of draconian punishments include sending Hong Kong citizens to China for trial and imprisonment for protesting in Hong Kong. See Jennifer Jett & Austin Ramzy, ‘From Protestor to Prisoner: How Hong Kong is Stifling Dissent,’ N.Y. Times (May 28, 2021), <https://www.nytimes.com/2021/05/28/world/asia/hong-kong-arrests-court.html>.

C. The Trump Administration and Its Portrayal of China as the Arch Villain of the Modern World

The third and current stage of U.S. policies toward human rights in China began with the election of Donald J. Trump to the U.S. Presidency in 2016. In 2017, in an acknowledgement that the policy of engagement had failed, the Trump Administration announced that supporting China's accession to the WTO was a mistake because China never fulfilled its commitments to dismantle the state sector.¹⁵⁰ The premise of the policy of engagement was that China's new economic freedoms would inevitably lead to political freedom. Yet, according to the Trump Administration, China never fulfilled its WTO commitments to implement economic freedoms in its state-controlled economy.¹⁵¹

The Trump Administration's criticism that China failed WTO commitments was one aspect of a comprehensive new China policy. One of the chief architects of the Trump Administration's China policy was Peter Navarro, a former business school professor and an extreme China critic.¹⁵² Navarro viewed China as "brutal, amoral, ruthless, [and] cheating"¹⁵³ and China's illegal trade practices as the "central problem" of the modern world economy.¹⁵⁴ He argued that China is an "existential threat" to the United States.¹⁵⁵ Other Trump Administration officials viewed China in similarly stark terms. John

¹⁵⁰ OFF. OF THE U.S. TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE at 2, <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

¹⁵¹ *Id.*

¹⁵² See Binyamin Applebaum, *Trump Taps Peter Navarro, Vocal Critic of China, for New Trade Post*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/us/politics/peter-navarro-carl-icahn-trump-china-trade.html>.

¹⁵³ Tom Phillips, *'Brutal, Amoral, Ruthless, Cheating': How Trump's New Trade Tsar Sees China*, GUARDIAN (Dec. 22, 2016), <https://www.theguardian.com/world/2016/dec/22/brutal-amoral-ruthless-cheating-trumps-trade-industrial-peter-navarro-views-on-china>.

¹⁵⁴ See Adam Davidson, *Trump's Muse on U.S. Trade with China*, NEW YORKER (Oct. 12, 2016), <http://newyorker.com/business/currency/trumps-muse-on-u-s-trade-with-china>.

¹⁵⁵ See Mike Pompeo *supra* note 1.

Ratcliffe, Trump's Director of National Security, called China the "greatest threat to America today, and the greatest threat to democracy and freedom world-wide since World War II."¹⁵⁶

Although Trump officials have criticized China for human rights abuses, this critique of China was part of the Trump Administration's broadside attack on China. The Trump Administration did not have a discrete and well-considered policy on human rights in China.¹⁵⁷ Unlike previous approaches during the first and second phase of U.S. policy towards human rights in China, the Trump Administration had no policy on how to encourage positive change in China's human rights policies. Rather, the Trump Administration seemed to take the position that a powerful but malevolent China must be stopped in every arena and in every way possible, including human rights abuses. Concerns about human rights were used to bolster the Trump Administration's overall portrayal of China as the arch-villain of the modern world.

In a sharp break with previous U.S. administrations, the Trump Administration made the widespread use of punitive tariffs against China and other trading partners a cornerstone of its trade and economic policy.¹⁵⁸ The Trump Administration singled China out for especially harsh treatment. In escalating fashion, the Trump Administration imposed tariffs on \$34 billion of selected Chinese goods (April 16, 2018),¹⁵⁹ \$16 billion (June 20, 2018),¹⁶⁰ \$200 billion

¹⁵⁶ John Ratcliffe, *China Is National Security Threat No. 1*, WALL ST. J. (Dec. 3, 2020), https://www.wsj.com/articles/china-is-national-security-threat-no-1-11607019599?mod=opinion_lead_pos5.

¹⁵⁷ See David Dollar et al, *Assessing U.S.-China relations 2 years into the Trump presidency*, BROOKINGS (Jan. 15, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/01/15/assessing-u-s-china-relations-2-years-into-the-trump-presidency/>.

¹⁵⁸ Heather Long, *Trump has officially put more tariffs on U.S. allies than on China*, WASH. POST (May 31, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/05/31/trump-has-officially-put-more-tariffs-on-u-s-allies-than-on-china/>.

¹⁵⁹ OFF. OF THE U.S. TRADE REPRESENTATIVE, CHINA SECTION 301-TARIFF ACTIONS AND EXCLUSION PROCESS (2020), <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions>.

¹⁶⁰ *Id.*

(July 17, 2018),¹⁶¹ and \$300 billion (August 1, 2019).¹⁶² In total, tariffs were imposed on \$550 billion of Chinese imports—virtually all imports from China.¹⁶³

The Trump Administration has taken specific actions against China for its treatment of the Uighur minority in Xinjiang Province. Secretary of State Mike Pompeo used especially strident terms in describing China's treatment of ethnic minorities in Xinjiang. In 2019, Pompeo called China's treatment of the Uighurs the “stain of the century.”¹⁶⁴ In a parting shot against China as he was about to leave office, Pompeo claimed that China is “committing genocide and crimes against humanity in Xinjiang, China, targeting Uyghur Muslims and members of other ethnic and religious minority groups.”¹⁶⁵

On July 1, 2020, the Trump Administration issued the Xinjiang Supply Chain Business Advisory, urging U.S. business with supply

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Aimee Picchi, *Trump Boosting U.S. Tariffs on \$550 billion in Chinese Imports*, CBS NEWS (Aug. 24, 2019), <https://www.cbsnews.com/news/tariffs-china-trump-says-he-is-boosting-tariffs-chinese-imports-in-retaliation-trade-war-2019-08-24/>. In retaliation, China imposed tariffs on \$150 billion of U.S. imports. Subsequently, on January 14, 2020, China signed Phase I of the Economic and Trade Agreement between the United States and China that suspended or reduced tariffs on \$300 billion of Chinese imports, leaving tariffs on \$250 billion with further reductions linked to signing Phase II of the Agreement. *See* Economic and Trade Agreement Between the Government of the United States of America and the Government of The People's Republic of China, China-U.S., Jan. 15, 2020, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf. For a detailed analysis of the Economic and Trade Agreement see Daniel C.K. Chow, *A New and Controversial Dispute Resolution Approach under the U.S.-China Trade Agreement of 2020*, HARV. NEG. L. REV. (forthcoming 2021).

¹⁶⁴ David Brunnstrom & Lesley Wroughton, *Pompeo Calls China's Treatment of Uighurs 'Stain of the Century'*, REUTERS (July 18, 2020), <https://www.reuters.com/article/us-usa-religion-china/pompeo-calls-chinas-treatment-of-uighurs-stain-of-the-century-idUSKCN1UD20P>.

¹⁶⁵ Bill Chappell, *Pompeo Accuses China of Genocide Against Muslim Uighurs in Xinjiang*, NPR (Jan. 19, 2020), <https://www.npr.org/2021/01/19/958468971/pompeo-accuses-china-of-genocide-against-muslim-uighurs-in-xinjiang>.

chains linked to Xinjiang to consider the risks involved with doing business with Xinjiang entities that engage in human rights abuses, such as forced labor.¹⁶⁶ On July 11, 2020, the United States imposed export trade restrictions on eleven Chinese companies implicated in human rights abuses in Xinjiang.¹⁶⁷ The restrictions limit the ability of these entities to access U.S. products and technology exports.¹⁶⁸ This action added thirty-seven Chinese entities to trade blacklists in October 2019 and June 2020, which were already on trade blacklists for their involvement in human rights violations in Xinjiang.¹⁶⁹ Beginning on May 1, 2020, the United States issued a series of orders that blocked all imports from designated Chinese companies.¹⁷⁰ Three of the companies on this blacklist were specifically found to have used forced labor.¹⁷¹ On September 14, 2020, the Trump Administration blocked imports of computer parts, hair products, cotton, and linen products from companies in Xinjiang that were the fruits of forced labor.¹⁷² These orders were added to a dozen previous orders on various products from Xinjiang to combat forced labor.¹⁷³ On January 13, 2021, the United States banned all cotton and tomato imports from

¹⁶⁶ *Xinjiang Supply Chain Business Advisory*, U.S. DEP'T OF STATE (2021), <https://www.state.gov/xinjiang-supply-chain-business-advisory/>.

¹⁶⁷ U.S. DEPT. OF COMMERCE, Commerce Department Adds Eleven Chinese Entities Implicated in Human Rights Abuses in Xinjiang to the Entity List (July 20, 2020), <https://2017-2021.commerce.gov/news/press-releases/2020/07/commerce-department-adds-eleven-chinese-entities-implicated-human>. The restrictions limit the ability of these entities to access exports of U.S. products and technology. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ U.S. CUSTOMS & BORDER PROTECTION, *Withhold Release Orders and Findings*, <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings> (last visited Oct. 22, 2021).

¹⁷¹ Kevin Cirilli, *U.S. Government Bars Some China Xinjiang Firms on Alleged Abuse; Plans More*, BUSINESS STANDARD (Sept. 9, 2020), https://www.business-standard.com/article/international/us-govt-bars-some-china-xinjiang-firms-on-alleged-abuse-plans-more-120090900066_1.html.

¹⁷² Doug Palmer & Gavin Bade, *U.S. Blocks Certain Chinese Imports over Forced Labor*, POLITICO (Sept. 14, 2020) <https://www.politico.com/news/2020/09/14/us-blocks-chinese-products-forced-labor-414578>.

¹⁷³ *Id.*

Xinjiang, stating that they were the products of forced labor.¹⁷⁴ This ban supersedes many of the previous bans that targeted clothing and textiles produced from cotton grown in Xinjiang.

The United States also used the Global Magnitsky Human Rights Accountability Act¹⁷⁵ to place two PRC officials on a blacklist, freezing their U.S. assets and denying them entry visas to the United States.¹⁷⁶ These actions led China to retaliate by denying visas to several U.S. officials.¹⁷⁷ These actions by both countries are largely symbolic because the actions had no practical consequences. The Chinese and U.S. officials involved were not likely to travel and did not have a need for the visas.

It is too early to determine whether the Biden Administration will reverse or soften these policies. However, President Biden has announced that he intends to maintain all existing tariffs on China and has vowed to continue to take a tough approach to China.¹⁷⁸

III. CHINA'S DEFENSE OF ITS HUMAN RIGHTS POLICIES

China's defense of its human rights policies is primarily directed at its own citizenry, without whose support and confidence

¹⁷⁴ Eva Xiao, *U.S. Bans Cotton, Tomato Imports from China's Xinjiang Region*, WALL ST. J. (Jan. 13, 2021), <https://www.wsj.com/articles/u-s-bans-cotton-tomato-imports-from-chinas-xinjiang-region-11610572070>.

¹⁷⁵ Global Magnitsky Act, Title XII, Subtitle F of P.L. 114-328, 22 U.S.C. § 2656 note (authorizing the President to impose economic sanctions and deny entry into the United States to any foreign person identified as engaging in human rights abuse or corruption).

¹⁷⁶ U.S. DEPT. OF THE TREASURY, *Global Magnitsky Designations; Issuance of Global Magnitsky General License; Issuance of Global Magnitsky Frequently Asked Question* (July 31, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200731>.

¹⁷⁷ *China Says Will Take Countermeasures in Response to U.S. Visa Bans*, REUTERS (Dec. 22, 2020), <https://www.reuters.com/article/us-usa-china-rights/china-says-will-take-countermeasures-in-response-to-u-s-visa-bans-idUSKBN28W0PB>; *China Imposes New Visa Limits in Back-and-Forth with US*, AP NEWS (Dec. 22, 2020), <https://apnews.com/article/donald-trump-race-and-ethnicity-tibet-legislation-china-159016e93a430ef1739a7f71d1ab06d7>.

¹⁷⁸ See *Biden Says Will Not Kill Phase 1 Trade Deal With China Immediately*, *supra* note 36.

the CPC would lose its seat of power. China's approach depends on three prongs: Chinese tradition and culture, legal arguments based on WTO law, and a counterattack on the human rights abuses in the United States.

A. Chinese Tradition and History

1. Revival of Confucianism

Xi Jinping made a deliberate choice to revive Confucianism and to explicitly link the CPC with traditional Chinese culture.¹⁷⁹ Confucianism was denigrated under Mao Zedong as one of the “four olds” of corrupt feudal China that had to be rejected.¹⁸⁰ Under Xi, Chinese tradition is the “soul” of the nation.¹⁸¹ He stated that “the Chinese Communist Party is the successor to and promoter of fine traditional Chinese culture.”¹⁸² He also stated that the “values and spiritual world of the Chinese people have always been deeply rooted in the fertile soil of China's traditional culture.”¹⁸³ This revival of Chinese tradition is part of what Xi proclaims is the “China Dream,” a great spiritual rejuvenation with a return to national glory and ambitious economic and territorial goals.¹⁸⁴

Appealing to Confucianism and Chinese tradition, the CPC portrayed itself as an authoritarian but benevolent patriarch at the top of a strict hierarchy that will protect and guide the Chinese people to a

¹⁷⁹ Jin Kai, *The Chinese Communist Party's Confucian Revival*, THE DIPLOMAT (Sept. 30, 2014), <https://thediplomat.com/2014/09/the-chinese-communist-partys-confucian-revival/>.

¹⁸⁰ Christopher Klein, *What Was the Cultural Revolution?*, HISTORY (Aug. 9, 2019), <https://www.history.com/news/what-was-the-cultural-revolution>.

¹⁸¹ *On the Road: Traditional Culture Is the Soul of a Nation*, CHINA GLOBAL TELEVISION NETWORK (Oct. 20, 2019), <https://news.cgtn.com/news/2019-10-20/On-the-Road-Traditional-culture-is-the-soul-of-a-nation-KWGu8IdnZ6/index.html>.

¹⁸² Kai, *supra* note 179.

¹⁸³ *Id.*

¹⁸⁴ Graham Allison, *What Xi Jinping Wants*, THE ATLANTIC (May 31, 2017), <https://www.theatlantic.com/international/archive/2017/05/what-china-wants/528561/>.

better future in exchange for their loyalty and obedience.¹⁸⁵ The CPC views itself as the historically destined leader of China.¹⁸⁶ When a prostrate China was under attack from enemies within and without, only the CPC, under the leadership of Mao Zedong, could rise up to save the Chinese people and lead them to freedom and better lives.¹⁸⁷ While benevolent, the patriarch can also mete out punishment when disobedience threatens the social order.¹⁸⁸ These concepts, familiar to most Chinese citizens who are deeply embedded in traditional Chinese culture, apply at all levels of society.¹⁸⁹

Under Confucianism, the concept of human rights was unimportant and foreign to the social order.¹⁹⁰ The basic unit of society under Confucianism was the collective, not the individual.¹⁹¹ At the most elemental level of society, the family was the most important unit.¹⁹² Within this unit, all relationships were vertical in nature and that of a superior to an inferior. Husband-wife, father-son, older brother and younger brother were all relationships of a superior to an inferior. Only in the relationship of friend to friend was there equality in the relationship, but as this relationship was outside of the family, it was not considered fundamental.¹⁹³

This same hierarchical dynamic applied with even greater force to the nation, “guo jia” in Chinese or “nation family.” At the top of this hierarchy was the emperor who assumed the role of the patriarch or the father of the nation.¹⁹⁴ Although the emperor was the highest

¹⁸⁵ Chi Wang, *Xi's Strong Leadership Style has its Advantages*, SOUTH CHINA MORNING POST (Mar. 8, 2018), <https://www.scmp.com/comment/insight-opinion/article/2136235/xi-jinpings-strong-leadership-style-has-its-risks-also> (noting that “Xi hopes to paint himself as a benevolent, paternal leader of China”).

¹⁸⁶ XIANFA, preamble (1982) (China).

¹⁸⁷ *Id.*

¹⁸⁸ See CHOW & LEE, *supra* note 46, at 47 (discussing punishments under Confucian China).

¹⁸⁹ See *supra* notes 50–52.

¹⁹⁰ See CHOW & LEE, *supra* note 46, at 45–46.

¹⁹¹ See Betty H. Winfield et al., *Confucianism, Collectivism and Constitutions: Press Systems in China and Japan*, 5 COMMUNICATION LAW AND POLICY 323, 330 (2010).

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See CHOW & LEE, *supra* note 46, at 43.

being in the social order, his power was not absolute.¹⁹⁵ In exchange for his citizens' loyalty and obedience, the emperor had a reciprocal duty to protect and bestow beneficence on his people.¹⁹⁶ If the emperor became corrupt and descended into moral decay and despotism, he would forfeit the Mandate of Heaven—legitimate power—and be deposed by a challenger who would then assume the throne under a new Mandate of Heaven.¹⁹⁷ Under Confucianism thought, the inferior's duties of loyalty and obedience were deemed fundamental.¹⁹⁸ Only if this duty was fulfilled would the reciprocal duty of the superior be triggered.¹⁹⁹ The superior's duty was secondary or derivative to the inferior being's prior duty of fealty and obedience.

These Confucian concepts are embedded in the PRC Constitution, which contains many references to duties of citizens.²⁰⁰ This is unusual among modern constitutions, such as the U.S. Constitution, which focus on setting forth rights of citizens. For example, Chapter II of the PRC Constitution is entitled "The Fundamental Rights and Duties of Citizens." Article 33 states: "Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and other laws."²⁰¹ Consistent with Confucianism, rights are linked with duties, with the duties fundamental and the rights secondary.

The PRC Constitution also contains several explicit pronouncements of the duties of its citizens. Citizens must "safeguard the unification of the country and unity of all of its nationalities" (Art. 52);²⁰² "keep State secrets, protect public property, observe labour discipline and public order and respect social ethics" (Art. 53);²⁰³ "safeguard the security, honour and interests of the motherland" (Art.

¹⁹⁵ *Id.* at 43–44.

¹⁹⁶ *Id.* at 44.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 46.

¹⁹⁹ *Id.*

²⁰⁰ See Weng Li, *Philosophical Influences on Contemporary Chinese Law*, 6 *IND. INT'L & COMP. LAW REV.* 327, 330 (1996).

²⁰¹ XIANFA, art. 33 (1982) (China).

²⁰² *Id.* art. 52.

²⁰³ *Id.* art. 53.

54);²⁰⁴ and “defend the motherland and resist aggression” (Art. 55).²⁰⁵ At several points, the PRC Constitution also makes explicit that the interests of the State are superior to the interests of individual citizens: Article 51 states that “[c]itizens of the People’s Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the State.”²⁰⁶ Other provisions in the PRC Constitution explicitly limit the exercise of citizens’ rights if they conflict with state interests. For example, Article 36 states that citizens “enjoy freedom of religious belief,”²⁰⁷ but then adds that “[n]o one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the State.”²⁰⁸

2. Patriarch and Teacher

Like Confucius, Xi also sees himself as a teacher.²⁰⁹ The name Confucius or “Kong zi” contains the honorific “zi” which refers to a teacher or master. Consistent with the view that the patriarch should also teach his citizens, Xi has created the mobile application “Xuexi Qiangguo” or “Study the Great Nation.”²¹⁰ With over 100 million users, “Xuexi Qiangguo” is one of the most popular apps in China and people all over China are expected to conscientiously study the app, which contains lectures and quizzes.²¹¹ The app aims to teach Chinese citizens stories about Xi’s own past and the history of the CPC and instill in them a strong sense of pride and nationalism.²¹² The app

²⁰⁴ *Id.* art 54.

²⁰⁵ *Id.* art 55.

²⁰⁶ *Id.* art 51.

²⁰⁷ *Id.* art. 36.

²⁰⁸ *Id.*

²⁰⁹ *China Schools: Xi Jinping Thought Introduced Into Curriculum*, BBC (August 25, 2021), <https://www.bbc.com/news/world-asia-58301575>.

²¹⁰ Jane Li, *An App to Teach Xi Jinping Thought Can Study the Phones of Its 100 Million Users*, QUARTZ (Oct. 14, 2019), <https://qz.com/1727362/chinese-app-promoting-xi-jinping-thought-has-access-to-100-million-users-phones/>.

²¹¹ *Id.*

²¹² Shan Li & Philip Wen, *This App Helps You Learn About China, While China Learns All About You*, WALL ST. J. (Oct. 14, 2019), <https://www.wsj.com/articles/china-broadens-data-collection-through-propaganda-app-and-translation-service-11571058689>.

contains lectures and quizzes.²¹³ Party cadres are also expected to study the app regularly, and their use of the app is monitored and reported to Party leaders.²¹⁴

Xi has also instituted a Social Credit System, a combination of big data analytics and data collection.²¹⁵ The concept of social credit is linked to the key tenet of “moral credit” that was central to Confucianism. Citizens in a Confucian society were expected to aspire to be morally trustworthy and honest.²¹⁶ Under the Social Credit System, citizens and companies are ranked in accordance with their conduct and decisions.²¹⁷ Persons with poor social credit could be penalized by having limited access to education, housing, bank loans, and other benefits.²¹⁸ Many critics may view this system as an intrusive and Orwellian system of monitoring and supervision, but it can also be portrayed in a positive way to Chinese citizens. In accordance with Confucianism, the Social Credit System is a teaching tool, used by a benevolent and caring patriarch to guide citizens on the path of a morally honest and worthy life and to punish and correct those who lead a dissolute and unworthy one.²¹⁹ To inculcate this message at an early age with China’s youth, Xi instituted mandatory programs to study Xi Jinping thought in China’s high schools and elementary schools.²²⁰

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ MICHAEL D. SUTHERLAND, CONG. RSCH. SERV., IF11342, CHINA’S CORPORATE SOCIAL CREDIT SYSTEM 1 (Jan. 17, 2020); Drew Donnelly, *An Introduction to the China Social Credit System*, NEW HORIZONS, <https://nhglobalpartners.com/chinas-social-credit-system-explained/> (last updated Sep. 15, 2021).

²¹⁶ See Donnelly, *supra* note 215.

²¹⁷ *Id.*

²¹⁸ Amanda Lee, *What Is China’s Social Credit System and Why Is It Controversial?*, SOUTH CHINA MORNING POST (Aug. 9, 2020), <https://www.scmp.com/economy/china-economy/article/3096090/what-chinas-social-credit-system-and-why-it-controversial>.

²¹⁹ This observation is based on the author’s own opinion of how China might justify the Social Credit System to its citizens.

²²⁰ Anna Fifield, *China Thinks “Patriotic Education” Built a Loyal Generation. But in Hong Kong? Not So Fast.*, WASH. POST (Nov. 29, 2019), <https://www.washingtonpost.com/world/china-thinks-patriotic-education-built-a->

A long-term survey conducted by Harvard University found that nearly all citizens in China trust the central government in Beijing.²²¹ In 2016, the last year of the study, the survey found that 95.5% were “relatively satisfied” or “highly satisfied” with the PRC central government.²²² (By contrast, a Gallup Poll in 2020 found that only 38% of U.S. citizens were satisfied with the size and power of the federal government.)²²³ The Harvard study is viewed as particularly trustworthy since it was conducted by an institution outside of China.²²⁴ Two other studies by institutions outside of China show similar results. A survey by Statista, a global business data platform, showed that in 2020, 82% of Chinese citizens trusted their government, placing China first among twenty-six countries polled.²²⁵ The 82% is a precipitous drop from about 90% in 2019 and is likely related to the coronavirus pandemic outbreak.²²⁶ A study by York University in Canada similarly showed that over 90% of Chinese citizens trust the central government in handling the pandemic.²²⁷ Most other surveys find similar levels of trust and support for the central

loyal-generation-but-in-hong-kong-not-so-fast/2019/11/28/80f4d586-0c2c-11ea-8054-289aef6e38a3_story.html; Te-Ping Chen, *Reading, Writing and Xi Jinping Thought: China's Students Learn Leader's Philosophy*, WALL ST. J. (Mar. 23, 2018), <https://www.wsj.com/articles/reading-writing-and-xi-jinping-thought-chinas-students-learn-leaders-philosophy-1521797406>.

²²¹ Dan Harsha, *Taking China's Pulse*, HARV. GAZETTE (July 9, 2020), <https://news.harvard.edu/gazette/story/2020/07/long-term-survey-reveals-chinese-government-satisfaction/>.

²²² *Id.*

²²³ Lydia Saad, *Americans' Take on the U.S. Is Improved, But Still Mixed*, GALLUP (Jan. 27, 2020), <https://news.gallup.com/poll/284033/americans-improved-mixed.aspx>.

²²⁴ See Harsha, *supra* note 221.

²²⁵ *Level of Trust in Government in China 2016-2020*, STATISTICA (Jan. 2021), <https://www.statista.com/statistics/1116013/china-trust-in-government-2020/>.

²²⁶ *Id.*

²²⁷ Emily Feng, *As U.S. Views of China Grow More Negative, Chinese Support for Their Government Rises*, NPR (Sept. 23, 2020), <https://www.npr.org/2020/09/23/913650298/as-u-s-views-of-china-grow-more-negative-chinese-support-for-their-government-ri>; Cary Wu, *How Chinese Citizens View Their Government's Coronavirus Response*, THE CONVERSATION (June 4, 2020), <https://theconversation.com/how-chinese-citizens-view-their-governments-coronavirus-response-139176>.

government among China's citizens.²²⁸ In recent years, as the Trump Administration launched numerous broadside attacks on China, Chinese citizens' support for their government rose.²²⁹

Although critics may find the Party's use of Confucianism to be contrived and disingenuous, the Harvard study and other studies indicate that the CPC's strategy seems to have been highly successful with the one constituency that matters the most—China's own citizens.

B. Legal Arguments under the WTO

The second prong of China's defense of its human rights policies is based on legal arguments drawn from WTO law. As detailed earlier, the Trump Administration enacted a number of trade bans on imports from the Xinjiang Province, including a total trade ban on all cotton and tomato products.²³⁰ Although the Trump Administration criticized human rights abuses generally in Xinjiang, the administration specifically cited the products' forced labor as its rationale supporting the import ban.²³¹ However, China has many valid arguments based on WTO law and precedent that these trade sanctions based on forced labor are illegal.

U.S. tariffs on Chinese imports are "bound" under WTO law, which establishes a ceiling above which no U.S. tariffs can be imposed. The obligation is made explicit under GATT Article II:1(b) and considered one of the fundamental obligations of the GATT.²³² The

²²⁸ Feng, *supra* note 227 ("[O]ther larger-scale polls conducted in China have found high levels of satisfaction with the national-level government administration.").

²²⁹ *Id.*

²³⁰ Eva Xiao, *U.S. Bans Cotton, Tomato Imports from China's Xinjiang Region*, WALL ST. J. (Jan. 13, 2021), <https://www.wsj.com/articles/u-s-bans-cotton-tomato-imports-from-chinas-xinjiang-region-11610572070>.

²³¹ *Id.*

²³² GATT, Art. 2(1)(b) provides: ("The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions, or qualifications set forth in

United States can change the official tariff rates on goods from China only under carefully circumscribed conditions set forth in GATT Article XXVIII.²³³ The GATT/WTO also allows members to impose temporary higher tariffs due to exceptions explicitly recognized by GATT articles. For example, a WTO member can impose higher tariffs on imports or impose a complete trade ban when “necessary to protect human . . . life or health.”²³⁴ Although tariffs higher than the rate under the target nation’s GATT schedule would normally violate GATT Article II:1(b), and a trade ban would violate GATT Article XI²³⁵ prohibiting import quotas, the trade sanction is permitted under the exceptions provision of GATT Article XX(b)—the general exceptions provision.

Whether or not workers’ rights and human rights can justify trade sanctions in the GATT/WTO has long been controversial.²³⁶ After the WTO was established in 1995, the first WTO Ministerial Conference, the WTO’s highest authority, in Singapore in December 1996 adopted the following five-point declaration:

- We renew our commitment to the observance of internationally recognized core labor standards.

that Schedule, *be exempt from ordinary customs in excess* of those set forth and provided therein.”)

GATT, *supra* note 7, Art. 2(1) (emphasis added). The emphasized language means that the United States cannot exceed the tariff rate in its tariff schedule without violating Article 2(1)(b).

²³³ The modification of tariff schedules can be done only by negotiating with the affected party or parties. *See id.* art. XXVIII.

²³⁴ *See id.* art. XX(b). Article XX is the general exceptions article.

²³⁵ *See id.* art. XI (General Elimination of Quantitative Restrictions).

²³⁶ Labor rights are a subset of human rights, which are also not within the scope of the WTO. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW 395–98 (3d ed. 2017); Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?*, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm (last visited Oct. 10, 2021); Susan Ariel Aaronson, *Seeping in Slowly: How Human Rights Concerns Are Penetrating the WTO*, 6 WORLD TRADE REV. 413, 413–14 (2007); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT’L L. 815, 833–36 (2002).

- The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.
- We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards.
- We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.
- In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.²³⁷

The WTO elaborated on the position of developing countries on workers' rights as follows:

The WTO's developing-country members resist including labour standards in WTO rules because: (a) they see it as a guise for protectionism in developed-country markets, a smokescreen for undermining the comparative advantage of lower-wage developing countries; and (b) they argue that better working conditions and improved labour rights arise through economic growth—sanctions imposed against countries with lower labour standards would merely perpetuate poverty and delay improvements in workplace standards.²³⁸

²³⁷ World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, December 18, 1996, ¶4.

²³⁸ *Top 10 Reasons to Oppose the World Trade Organization? Criticism, Yes . . . Misinformation, No!*, WORLD TRADE ORG.,

The most important consequence of the Singapore Ministerial Declaration is that workers' rights cannot be used to justify an import or other trade restriction on goods from China. Workers' rights must be asserted in the ILO, which the Singapore Ministerial Declaration has designated as the proper forum with jurisdiction over this issue, not the WTO where the issue of workers' rights is not cognizable. Moreover, this position has strong political support from developing WTO member countries, which now comprise about a two-thirds majority of WTO members.²³⁹ Thus, the United States' rationale underlying its cotton and tomato trade ban, as a product of coerced labor, is a legally unjustifiable argument in the WTO. As a result, this U.S. trade ban, and all other current U.S. trade bans, based on coerced labor are illegal under GATT Article XI prohibiting quotas²⁴⁰ and Article I, which requires MFN treatment for China.²⁴¹

China proved to be an adept and effective litigant in WTO cases, winning a case contesting tariffs under the Trump Administration's first wave of tariffs, imposed in 2018.²⁴² In *United States – Tariff Measures on Certain Goods from China*,²⁴³ the WTO panel ruled that the Trump Administration's first wave of tariffs on over \$200 billion of goods from China were illegal under the GATT.²⁴⁴ The panel found that the tariffs violated GATT Article II because the tariffs were in excess of the bound rates to which the United States had

https://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/031ab_e.htm (last visited Feb. 1, 2021).

²³⁹ About two thirds of the WTO members are developing countries. See WORLD TRADE ORG., UNDERSTANDING THE WORLD TRADE ORGANIZATION 93 (5th ed. 2011), https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf.

²⁴⁰ See GATT, *supra* note 7, art. XI. A total trade ban violates Article XI because the ban is a quota of zero.

²⁴¹ See *id.* art. I. Imposing a trade ban on China violates MFN because it singles out China for discriminatory treatment. Under MFN, China is entitled to the same treatment that the United States gives to other WTO members, i.e., to be free of the tariffs.

²⁴² See Decision of the Arbitrator, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/ARB (Nov. 1, 2019).

²⁴³ Panel Report, *United States—Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020).

²⁴⁴ *Id.* at ¶ 8.1.c.

agreed to apply to imports from China and that the United States lacked justification for the excess rates.²⁴⁵ The United States attempted to justify the tariffs as retaliatory for China's lack of respect for U.S. intellectual property rights.²⁴⁶ The WTO rejected this argument because nothing in the WTO authorizes the imposition of tariffs for perceived violations of intellectual property rights.²⁴⁷ Undoubtedly, China will soon appeal the Xinjiang import tariffs on products of forced labor and will likely win that case against the United States because it can make the same argument: nothing in the WTO recognizes labor rights as a justification for imposing tariffs.

The illegality of its actions under the GATT/WTO will likely be of little consequence to the United States as it has openly scorned the WTO under the Trump Administration.²⁴⁸ However, China's argument that trade restrictions based on workers' rights are illegal can become a significant impediment to the U.S. recruitment of other countries to join in the ban.

The United States has recently attempted to garner international support for its condemnation of human rights abuses in Xinjiang. On October 6, 2020, at the United Nations headquarters, thirty-nine countries signed the U.S. Mission Joint Statement on the Human Rights Situation in Xinjiang and Developments in Hong

²⁴⁵ *Id.* at ¶ 7.96.

²⁴⁶ *Id.* at ¶ 7.100.

²⁴⁷ *Id.* at ¶ 7.179. The United States filed an appeal from the panel decision. The WTO Appellate Body cannot convene because its members fell below the number necessary to convene because the United States blocked the re-appointment of existing members and the appointment of new members. *See* Daniel C.K. Chow, *United States Trade Infallibility and the Crisis of the World Trade Organization*, 2020 MICH. ST. L. REV. 599, 600–01. The Obama Administration initiated the action to block, which was continued by the Trump Administration. *Id.* The actions by the United States have paralyzed the Appellate Body as it is unable to convene and decide cases. *Id.* This means that the appeal filed by the United States has suspended the panel decision in a legal limbo, making it unenforceable. *Id.* The United States will be able to continue imposing the challenged tariffs so long as the panel decision remains suspended indefinitely. This act by the United States, however, did not shield it from criticism from the EU, which sided with China in the dispute. *See infra* text accompanying note 238.

²⁴⁸ *See* Chow, *supra* note 64, at 8–11.

Kong.²⁴⁹ For the U.S. trade restrictions on products from Xinjiang to be truly effective, the United States needs to recruit other nations to adopt similar measures. A U.S.-led trade ban on goods from Xinjiang could create significant economic and political pressure on China if the ban is joined by a coalition of powerful trading nations, such as Australia, Canada, France, Germany, Japan, the United Kingdom, and France, all signatories to the Statement by the U.S. Mission.²⁵⁰ For these other countries, however, the illegality of the trade ban under WTO law may become a significant impediment as these other countries are WTO members who did not share the United States' disdain for the WTO. In *United States – Tariffs Measures on Certain Goods from China*, both Australia and the European Union, traditional U.S. allies, submitted briefs in favor of China and against the U.S. tariffs. The EU criticized the United States for acting unilaterally in imposing tariffs on China “whenever it considers that another Member is acting ‘unfairly[.]’ . . . Such unilateral responses to perceived unfair acts of another Member are themselves both unfair and illicit under the WTO agreement.”²⁵¹ These sentiments expressed by the EU indicate that China’s legal arguments under the WTO may shield it from the expansion of the U.S. trade ban on goods from Xinjiang.

C. China’s Counterattack on the United States

China bases the third prong of its human rights policy defense upon the political and moral argument that the United States is being hypocritical in attacking China because U.S. human rights abuses are far more egregious than any abuses in China.

²⁴⁹ Joint Statement on the Human Rights Situation in Xinjiang and the Recent Developments in Hong Kong, Delivered by Germany on Behalf of 39 Countries, U.S. MISSION TO THE U.N. (Oct. 6, 2020), <https://usun.usmission.gov/joint-statement-on-the-human-rights-situation-in-xinjiang-and-the-recent-developments-in-hong-kong-delivered-by-germany-on-behalf-of-39-countries/>.

²⁵⁰ Sarah Anne Aarup, *Ban on Uyghur imports becomes EU’s hot potato*, POLITICO (Oct. 15, 2021), <https://www.politico.eu/article/uyghur-china-europe-ban-imports-europe-trade-hot-potato-forced-labor/>.

²⁵¹ Tim Fernholz, *China Is Winning the Trade War*, QUARTZ (Sept. 15, 2020), <https://qz.com/1903856/the-wto-rules-trumps-china-tariffs-are-illegal/>.

China has bolstered its arguments about human rights abuses in the United States by using the same reasoning first presented by U.S. politicians and political groups. China is a careful observer of U.S. politics and culture and has mined these fertile grounds for arguments that have gained traction in the United States. For example, on June 6, 2020, an editorial appearing in the *China Daily*, the voice of the CPC, stated:

The U.S. administration has been quick to holler about what it claims are human rights abuses in other countries, but the angry chants that could be heard all weekend across the U.S. protesting at the killing of George Floyd by a police officer in Minneapolis, Minnesota, on Monday last week, the latest in a long line of African-Americans killed by white police officers, show that it should be looking closer to home.²⁵²

Xinhuanet, a web-based news service controlled by the CPC, also criticized the United States for “systematic racial discrimination.”²⁵³ For proof of systemic racism in the United States, China has to look no further than the words of President Joe Biden. While campaigning for president, Biden stated the following in response to the question of whether systemic racism existed in law enforcement: “Absolutely, but it’s not just in law enforcement, it’s across the board. It’s in housing, it’s in education, and it’s in everything we do. It’s real. It’s genuine. It’s serious.”²⁵⁴ A systemic problem is pervasive, reaching all institutions and organizations of a nation; for all of its criticism of China, the United States has never argued that human rights abuses are systemic in China.

²⁵² *Racism Stains US Claim to Greatness*, CHINA DAILY (June 1, 2020), <https://www.chinadaily.com.cn/a/202006/01/WS5ed4f651a310a8b24115a01a.html>.

²⁵³ *Update: China, on Behalf of 26 Countries, Criticizes U.S., Other Western Countries for Violating Human Rights*, XINHUA (Oct. 6, 2020), http://www.xinhuanet.com/english/2020-10/06/c_139420998.htm.

²⁵⁴ Watson, *supra* note 72.

China also promoted the 1619 Project,²⁵⁵ sponsored by the New York Times, which controversially declared that America fought the Revolutionary War with Britain in large part to preserve slavery.²⁵⁶ The Chinese state media is now repeating the 1619 Project's claim that 1619, the year that the slaves first arrived, "should actually be seen as the year of America's birth."²⁵⁷ Secretary of State Pompeo has denounced the 1619 Project as a gift to the CPC.²⁵⁸ Pompeo stated, "The Chinese Communist Party must be gleeful when they see the New York Times spout this ideology."²⁵⁹

The Chinese media further elaborated on the long history of discrimination from the earliest days of the United States²⁶⁰ to the present, when ugly incidents of discrimination against Asian-Americans erupted in response to the belief that the COVID-19

²⁵⁵ Stephen Ngedwa, *Barr & Trump Try to Rewrite Slave History But Fail in Reality*, CGTN (Sept. 19, 2020), <https://news.cgtn.com/news/2020-09-19/Barr-Trump-try-to-rewrite-slavery-but-fall-flat-in-reality-TUnzFABE8U/index.html>.

²⁵⁶ Leslie M. Harris, *I Helped Fact Check the 1619 Project. The Times Ignored Me*, POLITICO (Mar. 6, 2020), <https://www.politico.com/news/magazine/2020/03/06/1619-project-new-york-times-mistake-122248>.

²⁵⁷ *Id.*

²⁵⁸ Joel Gehkre, *Pompeo Denounces Marxist 1619 Project as Gift to Chinese Communist Party*, WASH. EXAMINER (July 16, 2020), <https://www.washingtonexaminer.com/policy/defense-national-security/pompeo-denounces-marxist-1619-project-as-gift-to-chinese-communist-party>.

²⁵⁹ *Id.*

²⁶⁰ E.g., Institute for Central Asia Studies, *Between Inside and Outside, the Double Standard of the US on Counter-Secessionism*, GLOBAL TIMES (Nov. 10, 2020), <https://www.globaltimes.cn/content/1206295.shtml>.

pandemic originated in China.²⁶¹ Based on these points, China claimed that the United States is “the world’s top human rights violator.”²⁶²

The PRC media also frequently broadcasts video of the violent protests in the United States that erupted after the death of George Floyd on May 25, 2020.²⁶³ The PRC media also broadcasted a video of Trump supporters who invaded and occupied the U.S. capitol building on January 6, 2021.²⁶⁴ The PRC media use these images to depict the United States as a violent and dangerous nation that is out of control and being torn apart by racial hatred and internal conflict. One message that the Party appears to convey is that without strong internal security controls, violent protests can erupt, destroying property and endangering public safety,²⁶⁵ which is assuaged by the Party’s second message reassuring the citizens of China that the Party’s use of strict controls would never allow such anarchy to occur in China.²⁶⁶

²⁶¹ E.g., Sun Haoran, *So Much Discrimination Toward Asian Americans, So Little Media Attention: Satirist Joe Wong*, GLOBAL TIMES (June 5, 2020), <https://www.globaltimes.cn/content/1190684.shtml>; see also Andrew Hay & Maria Caspani, *Fake Flyers and Face-Mask Fear: California Fights Coronavirus Discrimination*, REUTERS (Feb. 13, 2020), <https://www.reuters.com/article/us-china-health-usa-discrimination/fake-flyers-and-face-mask-fear-california-fights-coronavirus-discrimination-idUSKBN208063>.

²⁶² Riyaz ul Khaliq, *US World’s Top Human Rights Violator Says China*, ANADOLU AGENCY (July 16, 2020), <https://www.aa.com.tr/en/americas/-us-world-s-top-human-rights-violator-china-says/1912539>.

²⁶³ Ron Ruwitch, *In George Floyd Protests, China Sees a Powerful Propaganda Opportunity*, NPR (June 3, 2020), <https://www.npr.org/2020/06/03/868566978/in-george-floyd-protests-china-sees-a-powerful-propaganda-opportunity>; Huizhong Wu, *In China, U.S. Protests a Hot Topic on State, Social Media*, REUTERS (June 1, 2020) <https://www.reuters.com/article/us-usa-china-media/in-china-u-s-protests-a-hot-topic-on-state-social-media-idUSKBN23824K>; see also *infra* note 254.

²⁶⁴ See *Why Did US Politicians and Media Support Turmoil in HK but Condemn Rioters Now? Chinese FM Asks*, GLOBAL TIMES (Jan. 7, 2021), <https://www.globaltimes.cn/page/202101/1212113.shtml>; *China Compares U.S. Mob Attack on Capitol to Hong Kong Protests*, BLOOMBERG (Jan. 7, 2021), <https://www.bloomberg.com/news/articles/2021-01-07/communist-party-paper-casts-u-s-capital-chaos-as-karma>.

²⁶⁵ This observation is based upon the author’s own professional opinion in interpreting the message by the PRC media.

²⁶⁶ *Id.*

The PRC state media also frequently compares the violent protests in the United States to the democracy protesters in Hong Kong.²⁶⁷ The message that the Party appears to convey is that the United States is again being hypocritical in criticizing China for suppressing the protests in Hong Kong while U.S. police and military are also used in suppressing some of the violent protests in the United States.

The Party uses the media constantly to promulgate and reinforce these messages critical of the U.S. record on human rights. The PRC media claims that based on its own history of egregious abuses, the United States lacks credibility and is no position to criticize China's human rights record.²⁶⁸

IV. CONCLUSION

The history of U.S. policy on human rights in China is replete with missed opportunities and miscalculations. During the first phase (1989–1990), the United States had its greatest leverage over China. During this phase, the United States controlled two benefits that China desperately wanted: MFN (or PNTR) status and accession to the WTO. The United States might have been able to condition MFN status or WTO accession on meaningful structural reforms in China, but these opportunities were missed.

Secretary of State Pompeo was entirely correct when he stated that the Party places the opinion of its citizens above all of the condemnation and criticism of foreign nations.²⁶⁹ Like all emperors of China before it, the Party knows that it will continue to hold the Mandate of Heaven so long as it has the trust and support of the

²⁶⁷ Zhang Zhouxiang, *US Politicians Should Stop Dreaming and Face Reality*, CHINA DAILY (May 31, 2020), <https://global.chinadaily.com.cn/a/202005/31/WS5ed30e8da310a8b241159ab1.html>; Hu Xijin, *Watch Out! 'Beautiful Sight' in HK Is Spreading Across the US*, GLOBAL TIMES (May 30, 2020), <https://www.globaltimes.cn/content/1190031.shtml>.

²⁶⁸ See Chen Qingqing & Cao Siqi, *China issues annual US human rights report amid escalating Washington-led West's attacks on Beijing*, GLOBAL TIMES (Mar. 24, 2021), <https://www.globaltimes.cn/page/202103/1219366.shtml>.

²⁶⁹ See Mike Pompeo *supra* note 1.

citizens of China. For this reason, the Party invested extensive resources in creating the image of itself as an authoritarian but benevolent patriarch, a message that seems to resonate with China's citizens who exhibit a high level of trust in the Party. Moreover, the Party has been able to portray itself as being on higher moral ground than the United States. By cleverly using the same arguments first raised by U.S. parties, the Party has been able to paint a picture of the United States as a hypocritical abuser of human rights on a fundamental and systemic level whose criticism of China lacks credibility. As the Trump Administration increased its attacks on China in recent years, Chinese citizens' support of the Party has only increased. Whether one believes that the Party has manipulated or fooled the gullible citizens of China is immaterial—the Party has been remarkably successful in earning the trust and support of its citizens.

For three decades, the United States attempted to influence changes in China's human rights policies without success. The United States was unable to influence China, although for parts of this period, China was an emerging economy and nascent trader while the United States was the undisputed top military and economic power in the world. Now that China the tiger cub has grown into China the tiger, it seems improbable that the United States can influence meaningful changes in an area that is so sensitive and central to the Party's power in China. For example, take the issue of human rights in Xinjiang. This subject has been the focus of a sustained critical effort by a large group of nations. A total of thirty-nine countries, including the United States and the EU, have jointly condemned China's treatment of Uighurs in the United Nations.²⁷⁰ The United States has issued numerous specific trade bans on import products produced by forced labor from Xinjiang.²⁷¹ Yet, on September 26, 2020, Xi merely shrugged and brushed aside U.S. and EU condemnation in a conference in western China when he stated that his policy in Xinjiang was a “totally correct” success, and vowed more efforts to imprint Chinese national identity

²⁷⁰ Joint Statement on the Human Rights Situation in Xinjiang and the Recent Developments in Hong Kong, Delivered by Germany on Behalf of 39 Countries, *supra* note 249.

²⁷¹ See *supra* text accompanying notes 159–63.

‘deep in the soul’ of Uighurs and other largely Muslim minorities.”²⁷² Now that China has the second largest economy in the world and is projected to soon surpass the United States as the world’s largest economy, it seems unrealistic to believe that the United States can influence any meaningful change on such a powerful and skillful adversary when similar efforts have failed during the past three decades.

A large coalition of foreign nations imposing trade bans on imports from Xinjiang might create greater pressure on China, but China, a skillful and effective litigant in the WTO, will likely challenge the Xinjiang tariffs in the WTO and succeed. China has already won a WTO case that rejected the first wave of U.S. tariffs and will likely win this lawsuit as well. While the United States has shown disdain for the WTO, the same cannot be said for the EU, which took China’s side against the United States in challenging the first wave of Trump’s tariffs. The legal requirements of the WTO will impede the formation of a U.S.-led coalition to ban trade with China based on forced labor and human rights abuses.

The United States must now come to the sober realization that influencing China to make meaningful changes in its human rights policies is unrealistic. Despite all of the U.S. efforts over the past three decades, China’s human rights policies are presently more restrictive than at any time during the past three decades. The more powerful China becomes, the stronger the controls the Party exercises over all aspects of Chinese society. Rather than object to these controls, most citizens in China exhibit a very high level of trust in the Party and their support only grows in reaction to U.S. criticism of China.²⁷³ Given these developments, U.S. criticism of China’s human rights policies can realistically serve two goals. U.S. criticism of China’s human rights policies can be used to justify tough actions against China in other areas, such as trade, the environment, or military ambitions. This use of human rights seems to have been the approach of the Trump Administration and may also become the approach of the Biden

²⁷² Chris Buckley, *Brushing Off Criticism, Xi Calls Policies in Xinjiang “Totally Correct,”* N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/09/26/world/asia/xi-jinping-china-xinjiang.html>.

²⁷³ See *supra* notes 221–29.

Administration. Otherwise, U.S. criticism of human rights in China will likely serve a symbolic purpose only. Only with this sober recognition will the United States and the Biden Administration be able to approach its relationship with China now and in the future with realistic expectations.