

## TOWARDS A CONCERT OF ASIA? A PROPOSED INTERNATIONAL SECURITY REGIME

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*The rise of China, both economically and militarily, is widely perceived as threatening several of China's Asian neighbors and as undermining the United States' influence in East Asia. The evidence does indeed show that an arms race is beginning to build up in East Asia, and that some of China's neighbors may be moving to balance against it. Warning of the dangers of these trends, the distinguished Australian strategic analyst Hugh White urges a diplomatic effort to create a power-sharing arrangement or "Concert of Asia" that would defuse these tensions and maintain peace and security in the region. Modeled on the nineteenth century "Concert of Europe" that arose in the wake of the French Revolutionary and Napoleonic Wars and different in kind from a "balance of power" system, the proposed Concert of Asia would consist of four leading Asian or Pacific Great Powers—the United States, China, Japan and, eventually, India.*

*White fully acknowledges the inherent difficulties in creating such a Concert. But his proposal is even more problematic than he believes. Concert systems arise after major, counter-hegemonic wars and survive for about as long as the defeated hegemon is felt to represent a threat. Neither of these conditions exists in East Asia. If the peace of East Asia holds at all, it will likely be through a fragile balance of power instead. But such a balance could easily tip over into war.*

*Nonetheless, confidence-building measures that could eventually lead to something like a Concert system might conceivably be feasible even at the present time. This paper raises and explores the possibility of demilitarizing certain strategically sensitive areas in Asia, such as the South China Sea, as a prelude to more intensive Great Power co-operation in the region.*

The rise of China is the most important political fact of the early twenty first century.<sup>1</sup> China's growth since the end of the Maoist Era and the start of its pro-market policies in 1979 has been explosive. Accompanying those developments has been the equally stunning rise in China's global prestige and influence and its emergence as a major military power. China's relationship with the United States has also changed dramatically in that interval: so symbiotic had the two nations become on economic and other levels that in 2007, Niall Ferguson and Moritz Schularick coined the term "Chimerica" to describe the relationship.<sup>2</sup>

But China's spectacular rise has also had its unnerving aspects. Scholars, diplomats and policy analysts have been debating what China's roles as both a significant military and a trade power

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<sup>1</sup> For a comprehensively documented account of the rise of China, see MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* (2d ed. 2012). See also THOMAS J. CHRISTENSEN, *THE CHINA CHALLENGE: SHAPING THE CHOICES OF A RISING POWER* (2015) [hereinafter, Christensen, *China Challenge*]. But see TIMOTHY BEARDSON, *STUMBLING GIANT: THE THREATS TO CHINA'S FUTURE* (2013). For a Chinese perspective, see generally ZHANG WEIWEI, *THE CHINA WAVE: RISE OF A CIVILIZATION STATE* (2012). For a brief review of different perspectives on the durability and consequences of China's rise, see generally HENRY KISSINGER ET AL., *DOES THE 21<sup>ST</sup> CENTURY BELONG TO CHINA? KISSINGER AND ZAKARIA VS. FERGUSON AND LEE: The Monk Debate on China* (Rudyard Griffiths & Patrick Luciani eds., 2011) and CHRISTOPHER A. FORD, *THE MIND OF EMPIRE: CHINA'S HISTORY AND MODERN FOREIGN RELATIONS 7-8* (2015). For two notable analyses of the contradictory responses of American policy-makers and scholars toward a rising China, compare Thomas J. Christensen, *Fostering Stability or Creating a Monster? The Rise of China and U.S. Policy toward East Asia*, 31 *INTERNATIONAL SECURITY*, 81 (Summer, 2006) with Aaron L. Friedberg, *The Future of U.S.-China Relations: Is Conflict Inevitable?*, 30 *INTERNATIONAL SECURITY*, 7 (Fall, 2005).

<sup>2</sup> See Niall Ferguson & Moritz Schularick, *Chimerica and the Global Asset Market Boom*, 10 *INTERNATIONAL FINANCE*, 215 (2007), available at <http://www.strongwind.com.hk/pdfs/TuiJian/ChimericaAssetBoom.pdf>. "Chimerica" stood for a global economic order based on the combination of China's export-led growth and United States over-consumption. Thus, Ferguson and Schularick invited their readers to conceptualize the two nations as having "one economy called Chimerica: the sum of China, the world's most rapidly growing emerging market, and America, the world's most financially advanced developed economy. Chimerica accounts for only 13% of the world's land surface, but a quarter of its population and fully a third its GDP. What is more noteworthy, it has accounted for over 60% of the cumulative growth in world GDP over the past five years." *Id.* at 228. But only two years later, the authors pronounced Chimerica dead, as a casualty of the Western financial crisis of 2008-09. See Niall Ferguson & Moritz Schularick, *The End of Chimerica* (Harvard Business School, Working Paper No. 10-037, 2009), available at <http://www.hbs.edu/faculty/Publication%20Files/10-037.pdf>.

means for the stability of East Asia and the Pacific Rim. Is China creating a new security environment in East Asia and the world that is dangerous for its near neighbors? Is China seeking to overshadow its neighbors, become the undisputed regional hegemon and supersede the United States as the dominant power in the area? Will China seek, in time, to create a modernized form of the “tribute system,” the way in which China managed its relations with foreign countries for two millennia?<sup>3</sup> Is a “hierarchical” understanding of the world order, in which China holds pride of place, imprinted (so to say) on China’s foreign policy?<sup>4</sup> Are the United States and China

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<sup>3</sup> For a capsule description, see Yongjin Zhang, *The Tribute System*, OXFORD BIBLIOGRAPHIES (2013), available at <http://www.oxfordbibliographies.com/view/document/obo-9780199920082/obo-9780199920082-0069.xml>. There is an extensive literature on the Chinese tribute system or, perhaps better, “Sinosphere.” (The term “tribute system” is a Western construct; there is no Chinese word for it.) See, e.g., Ford, *supra* note 1, at 94-100; ANDREW PHILLIPS, WAR, RELIGION AND EMPIRE: THE TRANSFORMATION OF INTERNATIONAL ORDERS, 149-260 (2011); Yongjin Zhang & Barry Buzan, *The Tributary System as International Society in Theory and Practice*, 8 CHINESE JOURNAL OF INT’L POLITICS 1 (2012); Zhang Feng, *Rethinking the ‘Tribute System’: Broadening the Conceptual Horizon of Historical East Asian Politics*, 2 CHINESE J. OF INT’L POLITICS 545 (2009), and compare Yuan-kang Wang, *Harmony and War: Confucian Culture and Chinese Power Politics* 145-51, 179-80 (2011) (threat or use of Chinese military force was crucial to maintaining and enforcing tributary system) with David C. Kang, *East Asia Before the West: Five Centuries of Trade and Tribute* 54-106 (2010) and David C. Kang, *China Rising: Peace, Power and Order in East Asia* 23-49 (2007) (arguing that the Chinese-dominated early modern East Asian system before Western ascendancy in the region was prevailingly stable and peaceful, that “tribute” consisted primarily of trade, that unlike the European system, East Asia did not see smaller states balancing against the hegemonic power, and that periods of Chinese weakness were more prone to lead to international conflict than its periods of strength). For the suggestion that China may want the restoration of a modernized form of the tributary system, see Jacques, *supra* note 1, at 507-09; Ford, *supra* note 1, at 273. Some contemporary Chinese thinkers may even be attempting to create the intellectual framework for such a restoration. See William A. Callahan, *Chinese Visions of World Order: Post-hegemonic or a New Hegemony?*, 10 INT’L STUD. REV., 749 (2008); Ford, *supra* note 1, at 245-47.

<sup>4</sup> See Ford, *supra* note 1, at 57 (“the Chinese intellectual tradition is suffused with a monist political ideology that conceives of international order in fundamentally hierarchical terms and idealizes interstate order as tending toward a universal hegemony or actual empire. For this reason, it lacks a meaningful concept of coequal, legitimate sovereignties pursuant to which states may coexist over the long term in nonhierarchical relationships.”); *id.* at 273 (“Chinese history provides no precedent for the stable, long-term coexistence of coequal sovereigns, and its traditional ideals of moral government and statecraft, at least, cannot even admit such a possibility.”). By contrast, the “Westphalian” world order, which (Western) international law presupposes, is “pluralistic,” in that it assumes the existence of many, formally equal state sovereigns, and indeed may even make such pluralism normative.

on track for a major war? Are China and its Asian neighbors on such a track?<sup>5</sup>

Even the most knowledgeable and authoritative experts disagree. In a recent analysis by Robert Black and Ashley Tellis, published by the Council on Foreign Relations, the United States effort to integrate China into the liberal international order that the United States constructed after the Second World War is seen to be failing. These authors contend that the United States now “needs a new grand strategy toward China that centers on balancing the rise of Chinese power rather than continuing to assist its ascendancy.”<sup>6</sup> Among the core elements of this new strategy, the authors argue, must be “improving the capabilities of U.S. military forces to effectively project power all along the Asian rimlands despite any Chinese opposition.”<sup>7</sup> For these analysts, “China is and will remain the most significant competitor to the United States for decades to come. China’s rise thus far has already bred geopolitical, military, economic, and ideological challenges to U.S. power, U.S. allies, and the U.S.-dominated international order.”<sup>8</sup>

On the other hand, Thomas Christensen, a former Deputy Assistant Secretary of State for East Asian and Pacific Affairs, argues that “globalized economies, changes in military technologies, and the disincentives for territorial expansion have altered international politics since the early decades of the twentieth century, when a zero-sum view of politics still held sway.”<sup>9</sup> More fully:

The kinds of temptation that led to great power wars during the previous power transitions are much less prominent in Asia today than they were in the Western Hemisphere and Asia in the past.

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<sup>5</sup> See Jonathan Holslag, *China’s Coming War With Asia* 119 (2015) (“The deep, implicit driver of China’s Asia policy remains the maximization of power: power to control the frontier lands, to secure the position of the Party as the legitimate political government, to protect China’s sovereignty, and to recover lost territory.”). Holslag is at pains to emphasize that in his view, “[t]he main cause of China’s revisionism is not some sort of evil plot among its officials and leaders. It is structural.” *Id.* at 109. In other words, China’s alleged revisionism is an outcome of the “security dilemma,” discussed *infra*, for which status quo powers such as the US and Japan are no less responsible than China, see *id.* at 169.

<sup>6</sup> ROBERT D. BLACKWILL & ASHLEY J. TELLIS, REVISING U.S. GRAND STRATEGY TOWARD CHINA, 4 (2015).

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 5-6.

<sup>9</sup> Christensen, *China Challenge*, *supra* note 1, at 2.

Substantial changes in global economics and politics have made the current international system more robust than previous systems. Broader economic trends have made territorial conquest of colonies less tempting, and changes in both economics and weaponry have decreased the need for invasion and conquest of either peer competitors or their smaller allies. Furthermore, the institutions set up by the United States and its allies after World War II were beneficial not just to themselves but to all states willing to open up their economies to a rule-based global order. No country has benefited from that global order more than China, particularly since it joined the World Trade Organization (WTO) in 2001. Since domestic stability is paramount for the [Chinese Communist Party] and the maintenance of stability depends in large part on economic growth, I can see few reasons why China would intentionally seek conflict with its trade and investment partners or undercut the institutional framework that has enabled its historic economic development.<sup>10</sup>

This article makes no attempt to resolve such disagreements. Instead, it argues that even if one judges a war between the United States and China to be unlikely (and even those holding a relatively benign view of future United States-China relations agree that a war between them is *possible*), it would be so catastrophic if war *did* take place that both nations must urgently take steps now to reduce or eliminate the risk of conflict. In particular, the article examines in depth the fascinating proposal by the Australian international relations scholar, Hugh White, that the United States, China, Japan and (eventually) India should be working together towards the establishment of a “Concert of Asia,” modeled on the Concert of Europe that the Great Powers erected after the Napoleonic Wars.<sup>11</sup> The Concert of Europe established an international system that preserved the peace on that continent for a generation or longer;

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<sup>10</sup> *Id.* at 40.

<sup>11</sup> See HUGH WHITE, *THE CHINA CHOICE: WHY WE SHOULD SHARE POWER* (2012). For a critique of White’s argument along different lines from mine, see Andrew Phillips, *From the Age of Asymmetry to the Great Reconvergence: Securing Order in the Asian Century*, 65 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS, 94 (2011).

White's proposed Concert of Asia is designed to do the same for our period, thus enabling both China and the rest of the world to adjust peaceably to the former's new power and position. I argue that White's proposal, though stimulating and attractive, simply cannot be realized in the existing conditions of East Asia: the main historical precedents for successful "concert" systems (post-Napoleonic Europe and the post-Independence United States) tell too strongly against it. However, the United States and its Allies, working together with China, *can* take realistic and plausible steps in the near term for *conflict prevention*. This paper explores one such possible measure: the demilitarization of the South China Sea.

The paper is divided into five parts. Part I is a general survey of the causes of China's rise, the consequences that the rise of China has entailed or seems likely to entail, and the concerns that the United States and other States have felt in watching these developments. Part II examines two possible strategies – balancing and containment – that are potential responses if China's rise is viewed as a security threat. Part III raises the question whether the pursuit of such strategies is creating a classic "security dilemma" in East Asia, threatening the peace of the region. Part IV examines and evaluates White's proposed "Concert of Asia." Part V puts forward a modest alternative to White's more ambitious conception: a progressive series of confidence-building measures designed to reduce the risk of conflict in East Asia.

I write as a scholar and practitioner of international law, not as an international relations theorist (still less as a trained Sinologist). Nonetheless, I make liberal use of the doctrines and insights of modern international relations theory. In this, I follow many other contemporary writers on international law who have recognized the interest and value of international relations theory for our own subject.<sup>12</sup>

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<sup>12</sup> For a pioneering study, see generally Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989). For Abbott's later writings on the interrelationship of the two disciplines, see generally Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L RELS. 9 (2005); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361 (1999); Kenneth W. Abbott, *Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L. J. 1 (1993). Other international law scholars have also seized on the utility and relevance of international relations theory. See, e.g., Anne-Marie Burley, *Law and the Liberal Paradigm in International Relations Theory*, 86 AM. SOC.

## I. *The Rise of China: Causes, Consequences and Concerns*

China has already become, by several measures, the second largest economy in the world, surpassing Japan; and it has overtaken the United States, or is poised to do so, by at least some metrics. China has enjoyed annual growth rates of 9-10% for thirty years; by contrast, the United States economy is growing at 3% or less annually.<sup>13</sup> One study put the size of the Chinese economy in 2011

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INT'L L. PROC. 180 (1992); Jack Goldsmith, *Book Review: Sovereignty, International Relations Theory, and International Law*, 52 STANFORD L. REV. 959 (2000); Niels Peterson, *How Rational Is International Law?*, 20 EUR. J. INT'L L. 1247 (2009); Eric Posner & Alan Sykes, *Optimal War and Jus ad Bellum*, 93 GEO. L. J. 993 (2005); Eric Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003); Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L. J. 139 (1996); Anne-Marie Slaughter, *International Law and International Relations Theory* in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES (Eyal Benvenisti & Moshe Hirsch eds., 2004); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006); Fernando R. Teson, *Realism and Kantianism in International Law*, 96 AM. SOC. INT'L LAW. PROC. 113 (1992); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004). For significant book-length studies, see generally ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* (1999); MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* (1999); ANTONIA CHAYES & ABE CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); ERIC POSNER, *PERILS OF GLOBAL LEGALISM* (2009); and JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008). For a useful survey of the subject, see generally Michael Byers, *International Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 612 (Christian Reus-Smit & Duncan Snidal eds., 2008).

<sup>13</sup> To be sure, expert opinion is sharply divided as to whether China's growth will continue, and if so, at what rate. For a working paper co-authored by a former United States Secretary of the Treasury, see Lant Pritchett & Lawrence H. Summers, *Asiaphoria meets regression to the mean* (National Bureau of Economic Research, Working Paper No. 20573, Oct. 2014), available at <http://www.nber.org/papers/w20573.pdf>. The authors argue that because regression to the mean is empirically the most salient feature of economic growth, it is likely that China's rapid growth rate will tail off. They also argue that high levels of state control and corruption in China along with high measures of authoritarian rule make a discontinuous decline in growth more likely than general experience would suggest. Also raising the possibility that China may have entered into the "middle-income trap," see CHRISTOPHER COKER, *THE IMPROBABLE WAR: CHINA, THE UNITED STATES & THE LOGIC OF GREAT POWER CONFLICT*, 51 (2014). And some analysts believe that China's changing demographic patterns may inhibit future growth, as its population ages and the size of its workforce shrinks; in any event, China is said to have a

at 87% of that of the United States; even the more conservative view of the International Monetary Fund placed it at about half the size of the United States economy in 2012.<sup>14</sup> The United States has been the largest economy in the world since the late nineteenth century; it will be a momentous—and, for the United States, possibly traumatic—event when China displaces it.<sup>15</sup> China's transformation has also been astonishingly rapid: “A country that was two-thirds rural two decades ago has now more than 130 cities with more than one million people each, compared to just 19 in 1978. . . . The increase in an urban population that now numbers 740 million has run parallel to a surge in industry. China last year churned out about eight times the crude steel and eighteen times the cars and trucks it did two decades ago.”<sup>16</sup>

China is deploying its wealth to extend its cultural influence and “soft power.”<sup>17</sup> A foreign tourist who arrives at Beijing Capital International Airport is likely to be awed by the scale, sophistication and modernity of the facility. Nations sometimes use airports as a way of presenting themselves to foreign visitors—of projecting an image of themselves that they desire foreigners to see and accept.<sup>18</sup>

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much less favorable demographic profile than its rival, India. See Gordon Chang, *Coming Soon: China's Demographic Doomsday*, in THE NATIONAL INTEREST (August 10, 2015), available at <http://nationalinterest.org/feature/coming-soon-chinas-demographic-doomsday-13534>. For a short survey of differing opinions among leading economists, see Chris Matthews, *The Great China Growth Debate: Ripe for a slowdown or full speed ahead?*, in FORTUNE (Nov. 5, 2014), available at <http://fortune.com/2014/11/05/china-growth/>. For a broad, theoretical argument that China's growth will plateau unless it transforms itself from being an “extractive” economy in which the Communist Party occupies a place of political and legal privilege, see DARON ACEMOGLU & JAMES ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY, 437-43 (2013).

<sup>14</sup> See Linda Yueh, *Is China About to Overtake the U.S. as the World's Largest Economy?*, BBC News: Business, April 30, 2014, available at <http://www.bbc.com/news/business-27216705>.

<sup>15</sup> Indeed, Americans may already have absorbed the fact. According to the Pew Research Center, only 40% of Americans opined in 2014 that the United States was the world's leading economic power. Pew Research Center, *What Country is the World's Leading Economic Power?* (2014), available at <http://www.pewglobal.org/database/indicator/17/country/233/>. And globally, a median of 49% across 44 countries (and 49% in the United States itself) responded that China has replaced or will replace the United States as the world's leading superpower. Pew Research Center, *Global Opposition to U.S. Surveillance and Drones, but Limited Harm to America's Image* (July 14, 2014), available at <http://www.pewglobal.org/files/2014/07/2014-07-14-Balance-of-Power.pdf>.

<sup>16</sup> Chun Han Wong, *China Blast Corrodes Faith in Leadership*, in THE WALL STREET JOURNAL, AUG. 21, 2015, at A1.

<sup>17</sup> See Joseph S. Nye, Jr., *Soft Power*, 80 FOREIGN POLICY 153, 154 (1990) (discussing the shift in importance of soft power after the end of the Cold War).

<sup>18</sup> For other cases in which the Chinese government has sought to make a statement through its public buildings, see ZHENG WANG, NEVER FORGET NATIONAL HUMILIATION:

Certainly the impressive Ben Gurion Airport at Tel Aviv does that: the arriving or departing visitor comes away with the sense of the intimate and millennial ties of the Jewish people to the land of Israel. Beijing's state-of-the-art airport conveys a different sense: that of rising power, wealth and technological mastery. And China is building an even newer airport, Beijing Daxing International Airport, due to be completed in 2017.<sup>19</sup> Since 2004, China has also established about 480 Confucius Institutes in dozens of countries throughout the world, in order to encourage the study of the Chinese language and the nation's culture.<sup>20</sup> China's rapidly growing wealth, power and cultural influence were also vividly demonstrated at the 2008 Olympics, hosted in Beijing, in which China proudly demonstrated its achievements to the world.<sup>21</sup>

Economic power normally translates into political and military power, and that is also happening with China. For the present, the United States and its allies hold global military primacy, insofar as that can be measured by defense spending. The United States spends more on defense than all other major powers

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HISTORICAL MEMORY IN CHINESE POLITICS AND FOREIGN RELATIONS, 50-60 (2012). On the significance of architecture to a state's self-representation, see RAYMOND QUEK, *Nationalism and Architecture*, in NATIONALISM AND ARCHITECTURE, 1 (Raymond Quek, Darren Dean & Sarah Butler eds., 2012). To illustrate, it has been argued that the monumental, neoclassical style widely used in government buildings in the 1930s (whether by liberal, fascist or communist regimes) reveals points of congruence among those regimes. See WOLFGANG SCHIVELBUSCH, THREE NEW DEALS: REFLECTIONS ON ROOSEVELT'S AMERICA, MUSSOLINI'S ITALY, AND HITLER'S GERMANY, 1933-1939, at 1-11 (2006).

<sup>19</sup> See *World's Biggest Airport Beijing with 200 million capacity*, YOUTUBE, available at <http://www.youtube.com/watch?v=coQ2Hki6zc4>.

<sup>20</sup> See *Confucius Institutes Worldwide*, available at <http://www.confucius.ucla.edu/about-us/confucius-institutes-worldwide>. In general, the Chinese government has been providing official sponsorship for the revival of purportedly "Confucian" values and traditions. See also LIONEL M. JENSEN, MANUFACTURING CONFUCIANISM: CHINESE TRADITIONS AND UNIVERSAL CIVILIZATION, 11-14 (2003); *Confucius Says, Xi Does*, in THE ECONOMIST, July 25, 2015, available at <http://www.economist.com/news/china/21659753-communist-party-turns-ancient-philosophy-support-confucius-says-xi-does?fsrc=nlw%7Cchig%7C23-07-2015%7CNA> ("though the party has quietly been rehabilitating Confucius for some time, under Mr Xi the pace has quickened. In February 2014 he convened a "collective study" session of the ruling Politburo at which he said that traditional culture should act as a "wellspring" nourishing the party's values. Official accounts of the session made no mention of Confucius, but party literature made it clear that the values Mr Xi spoke of—such as benevolence, honesty and righteousness—were those espoused by the philosopher."). For the ebb and flow of "Confucianism" as a cultural influence in China, see Shaohua Hu, *Confucianism and Contemporary Chinese Politics*, 35 POLITICS & POL'Y 136, 138-42 (2007).

<sup>21</sup> See *Beijing Opening Ceremony*, NBC SPORTS, available at [http://www.youtube.com/watch?v=e\\_qeLewYUqg](http://www.youtube.com/watch?v=e_qeLewYUqg).

combined. And the United States, Europe and Japan together accounted in 2010 for about two-thirds of global military spending. Nonetheless, a global turn in military power is well underway.

An 89-page United States Department of Defense Report released in July 2015 claimed that China's defense spending amounted to \$165 billion in 2014. (China maintained that the amount was \$136 billion.<sup>22</sup>) The Pentagon reported that "China's military modernization has the potential to reduce core U.S. military technological advances" and that "China's officially disclosed military budget grew at an average of 9.5 percent per year in inflation-adjusted terms from 2005 through 2014" – a growth rate that the Pentagon expects China to sustain for the foreseeable future.<sup>23</sup>

The Pentagon analyzed the strategic objectives of China's military build-up as follows:

Since 2002, China's leaders – including current President Xi Jinping -- have characterized the initial two decades of the 21st century as a "period of strategic opportunity." They assess that during this time, international conditions will be conducive to domestic development and expanding China's "comprehensive national power," a term that encapsulates all elements of state power, including economic capacity, military might, and diplomacy. China's leaders anticipate that a successful expansion of comprehensive national power will serve the Chinese Communist Party's overriding strategic objectives, which include

- Perpetuating Chinese Communist Party (CCP) rule;
- Sustaining economic growth and development;
- Maintaining domestic political stability;
- Defending national sovereignty and territorial integrity; and
- Securing China's status as a great power and, ultimately, reacquiring regional preeminence.

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<sup>22</sup> DEP'T OF DEFENSE, *Military and Security Developments Involving the People's Republic of China 2015*, at 49, (hereinafter "2015 Pentagon Report") available at [http://www.defense.gov/pubs/2015\\_China\\_Military\\_Power\\_Report.pdf](http://www.defense.gov/pubs/2015_China_Military_Power_Report.pdf).

<sup>23</sup> *Id.* at i.

Though there is debate in Chinese academic circles over whether China can sustain the period of strategic opportunity though this decade, Chinese leaders have continued to reiterate the importance of this “period” to achieving these key strategic objectives and are seeking to prolong it.

China’s leaders routinely emphasize the goal of reaching critical economic and military benchmarks by 2020.<sup>24</sup>

China’s military spending, though only a third that of the United States, is greater than that of twenty-four neighboring Asian nations combined, including Japan, India, Indonesia, South Korea, and Taiwan.<sup>25</sup> Even accepting China’s official estimate that its 2014 defense budget amounted to \$136.3 billion, that amount still surpassed the combined total of \$127.5 billion for Japan, India, South Korea and Taiwan.<sup>26</sup> Or to offer another comparison, China’s defense budget is more than three times the size of India’s.<sup>27</sup> Furthermore, although the United States military is considerably larger than China’s, the United States has global commitments, whereas China is (at present) concerned primarily with regional activity.<sup>28</sup>

### ***The Background to China’s Post-1978 Growth***

What makes China’s economic and military rise even more impressive is the fact that it has largely been achieved since 1978—a period of less than forty years.<sup>29</sup> Moreover, China’s progress must be seen against the backdrop of more than a century of invasion, war, famine and destruction. China was fully “opened” to the

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<sup>24</sup> *Id.* at 21.

<sup>25</sup> *Asian Nations Stock up on Weapons to Counter China’s Might*, JAPAN TIMES, Sept. 13, 2014, available at <http://www.japantimes.co.jp/news/2014/09/13/asia-pacific/asian-nations-stock-up-on-weapons-to-counter-chinas-might/#.VBnxAP0o45s>. For a brief review of the speed and scale of China’s military build-up, see Adam P. Liff & G. John Ikenberry, *Racing Toward Tragedy? China’s Rise, Military Competition in the Asia Pacific, and the Security Dilemma*, 39 INT’L SEC. 52, 66-69 (2014).

<sup>26</sup> See 2015 Pentagon Report, *supra* note 22, at 50.

<sup>27</sup> Zachary Keck, *China’s Military Spending vs Asia’s Military Spending*, THE DIPLOMAT (Feb. 6, 2014), available at <http://thediplomat.com/2014/02/chinas-military-spending-vs-asias-military-spending/>.

<sup>28</sup> More data can be found on the website of the Stockholm International Peace Research Institute, available at <http://www.sipri.org/research/security/china/publications> and available at <http://first.sipri.org/search?country=CHN&dataset=military-expenditure>.

<sup>29</sup> See EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA (2013).

Western trade and intervention only after the two Opium Wars of the mid-nineteenth century (1839; 1860),<sup>30</sup> and only entered into the Western “treaty” system at about that time.<sup>31</sup> China’s painful encounter with the West was also marked by episodes of popular resistance and humiliation, such as the Boxer Rebellion, which is still well-remembered in China;<sup>32</sup> the Opium Wars;<sup>33</sup> and the legal regime of “unequal treaties” that the West imposed upon it.<sup>34</sup> In the

<sup>30</sup> See JULIA LOVELL, *THE OPIUM WAR: DRUGS, DREAMS AND THE MAKING OF CHINA* (2012).

<sup>31</sup> See Ford, *supra* note 1, at 149-53, 168-70; John K. Fairbank, *The creation of the treaty system*, *THE CAMBRIDGE HISTORY OF CHINA VOLUME TEN: LATE CH’ING 1800-1911, PART 1*, at 213 (John K. Fairbank ed., 1978).

<sup>32</sup> See PAUL A. COHEN, *HISTORY IN THREE KEYS: THE BOXERS AS EVENT, EXPERIENCE, AND MYTH* (1998).

<sup>33</sup> See Lovell, *supra* note 30, at 9 (“In China today, the Opium War is the traumatic inauguration of the country’s modern history. History books, television documentaries and museums chorus a received wisdom about the conflict.”). Lovell questions that “received wisdom” and argues that the Chinese government has been fabricating it.

<sup>34</sup> In the nineteenth century, more powerful Western nations, including the United States, succeeded in imposing “unequal treaties” on (then) weaker non-Western states such as Japan, China, and the Ottoman Empire. See, e.g., *Denunciation of the Treaty of November 2<sup>nd</sup>, 1865, between China and Belgium*, PCIJ, SER. A 8 (1925) (describing rights of Belgians in China under treaty); MICHAEL R. AUSLIN, *NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY* (2004) (studying diplomacy of unequal treaties with Japan); Ingrid Detter, *The Problem of Unequal Treaties*, 11 I.C.L.Q. 1069, 1073–75, 1078–80 (1962) (surveying unequal treaties between Western powers and China); Ford, *supra* note 1, at 121-156 (narrating evolution of unequal treaty system); Gustavo Gozzi, *The Particularistic Universalism of International Law in the Nineteenth Century*, 52 HARV. J. INT’L L. 73, 79-80 (2010) (discussing China), available at [http://www.harvardilj.org/wp-content/uploads/2010/10/HILJ-Online\\_52\\_Gozzi.pdf](http://www.harvardilj.org/wp-content/uploads/2010/10/HILJ-Online_52_Gozzi.pdf); Christian Tomuschat, *Asia and International Law – Common Ground and Regional Diversity*, 1 ASIAN J. INT’L L. 217, 222 (2011) (discussing China); Report of Edward A. Van Dyck, *Capitulations of the Ottoman Empire Since the Year 1150* (G.P.O. 1881) (study both of “capitulations” in Ottoman Empire and of Ottoman Empire’s place in public international law). Typically under such “unequal treaties,” Western nationals residing in those countries and accused of crimes under local law were to be tried, not in the courts of the local sovereign, but in their own sovereign’s “consular courts” within those territories. One common justification offered for this manifestly unequal practice (which, of course, derogated from the territorial sovereignty of the weaker power) was that they were “essential to the peaceful residence of [Western] Christians within those countries and the successful prosecution of commerce with their people.” *In re Ross*, 140 U.S. 453, 463 (1891). The unequal treaty system did not merely reflect the Western perception that China’s judicial system was insufficiently developed. Rather, it derived from the more fundamental belief that China, unlike the Western states, was not truly “civilized,” and hence was not entitled to equal recognition under international law. See Brett Bowden, *The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilization*, 7 J. HIST. INT’L L. 1, 20 (2005). Western legal scholars and other public intellectuals commonly affirmed the opinion either that China was not “civilized” or that its civilization had become “arrested.” See EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS*, 115 (2002); Beate Jahn, *Barbarian thoughts: imperialism in the philosophy of John Stuart Mill*, 31 REV. INT’L STUD.

last century or so, China has witnessed the collapse of the imperial government and Qing dynasty (1911); the emergence of a republican form of government (1912); a phase of internecine war in which much of the country was dominated by local war lords (1920s);<sup>35</sup> the beginning (or rather renewal) of Japanese aggression in 1931, with the annexation of Manchuria;<sup>36</sup> a full-scale war with Japan from 1937 to 1945, in which much of China was subdued and occupied by Japanese forces, horrifying atrocities were committed by the invaders,<sup>37</sup> and perhaps fifty million Chinese were killed;<sup>38</sup> a civil war between Nationalists and Communists ending in 1949; a Communist victory; a severe famine during the Great Leap Forward (in which some 30-45 million people, mostly peasants, died);<sup>39</sup> and a devastating Cultural Revolution.<sup>40</sup> The Oxford historian Rana Mitter, commenting on the period between the late 1930s and the

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599, 602-03 (2005). For contemporary Chinese attitudes to the “unequal treaties” and those treaties’ relationship to Chinese nationalism, see PETER HAYS GRIES, CHINA’S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY 47 (2004). See also DONG WANG, CHINA’S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005).

<sup>35</sup> See ADAM TOOZE, THE DELUGE: THE GREAT WAR AND THE REMAKING OF THE GLOBAL ORDER, 1916-1931 at 477-84 (2014).

<sup>36</sup> Japan had previously waged a successful war against China in 1894-5 that ended with the Shimonoseki Treaty, under which Japan acquired Taiwan, and Korea (which Japan acquired soon after) became independent of China.

<sup>37</sup> See Timothy Brook, *The Tokyo Judgment and the Rape of Nanking*, 60 J. ASIAN STUD. 673 (2001). The incident known as the “Rape of Nanking” remains vivid in the minds of contemporary Chinese and Japanese alike, and controversy over the affair remains alive in both countries. See Da Qing Yang, *Convergence or Divergence? Recent Historical Writings on the Rape of Nanjing*, 3 AMER. HIST. REV. 842 (1999).

<sup>38</sup> In the war with Japan, “China lost at least two million men in battle, and twelve million Chinese civilians died as a direct result of warfare. Others died from starvation, destruction of dams and dikes, and disease and mistreatment in the Chinese army.” ODD ARNE WESTAD, RESTLESS EMPIRE: CHINA AND THE WORLD SINCE 1750, at 249 (2012). Rana Mitter estimates that China’s war with Japan “saw around 20 million military and civilian Chinese deaths.” RANA MITTER, A BITTER REVOLUTION: CHINA’S STRUGGLE WITH THE MODERN WORLD, at 156 (2004). The severity of China’s losses helps explain its persisting antagonism towards Japan.

<sup>39</sup> See FRANK DITKÖTTER, MAO’S GREAT FAMINE: THE HISTORY OF CHINA’S MOST DEVASTATING CATASTROPHE, 1958-1962 (2011); MITTER, *supra* note 38, at 156.

<sup>40</sup> See RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO’S LAST REVOLUTION (2006); MITTER, *supra* note 38, at 200-43. Some scholars have argued, however, that China’s Cultural Revolution made possible the extraordinary transformation that occurred later under Deng Xiaoping. See Lucien W. Pye, *Reassessing the Cultural Revolution*, 108 CHINA Q. 597, 610 (1986) (“If China had not been scarred by the violent turmoil of the late 1960s and early 1970s, the most likely alternative to Mao’s revolutionary utopianism would have been little more than the dreary prospect of an orderly, bureaucratic form of communism. It seems unthinkable that China would or could have adopted the bold modernizing policies of the post-Mao era if the society had not experienced the shock of the Cultural Revolution.”).

early 1970s, writes that “these decades are inexorably marked by constant, endless, numbing death.”<sup>41</sup> By any reckoning, tens of millions, of Chinese have died from violence or starvation over the past century. Given that recent history, China’s rise since 1978 can only be described as spectacular.

To what is this remarkable progress owed? Expert opinions differ, but several critical factors can be identified.<sup>42</sup> First, it is owed to the extraordinary qualities of intelligence, foresight and statesmanship that China’s leadership has shown since 1978, and to the amazing resilience, energy and entrepreneurship of the Chinese people.<sup>43</sup> Second, a combination of domestic factors worked strongly in favor of China’s rapid development. These factors included high investment and savings rates;<sup>44</sup> a tax structure that emphasizes value-added taxation over income taxes;<sup>45</sup> an inexhaustible reserve of (generally young) labor;<sup>46</sup> the absence of

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<sup>41</sup> MITTER, *supra* note 38, at 156.

<sup>42</sup> A full-length study of the question is provided in RONALD COASE & NING WANG, *HOW CHINA BECAME CAPITALIST* (2012). See also WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33534, *CHINA’S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES* 2-8 (2015), available at <https://www.fas.org/sgp/crs/row/RL33534.pdf> (“Economists generally attribute much of China’s rapid economic growth to two main factors: large-scale capital investment (financed by large domestic savings and foreign investment) and rapid productivity growth[...] Economic reforms led to higher efficiency in the economy, which boosted output and increased resources for additional investment in the economy.”).

<sup>43</sup> Coase and Wang point to the crucial role of “the disadvantaged and marginalized” in spurring China’s growth, especially in the agricultural sector. COASE & WANG, *supra* note 41, at 46-53. “In China, it was the peasants, the unemployed urban residents, and other marginalized actors in the socialist economy that turned out to be the vanguard of market transformation.” *Id.* at 67. For the argument that the social structure of China’s “grass roots” have contributed to its rapid economic growth, see Martyn King White, *The Social Roots of China’s Economic Development*, 144 CHINA Q. 999 (1995); see also YuKong Zhao, *What Drives China’s Success?*, FORBES, Oct. 2, 2014, available at <http://www.forbes.com/sites/realspin/2014/10/02/what-drives-chinas-success/>.

<sup>44</sup> Michael Pettis, a professor of finance and economics at Peking University, lays particular emphasis on China’s unprecedentedly high household savings rate, together with its high levels of government and corporate saving and of domestic investment, and its correspondingly low levels of domestic income and consumption, as causes of what he argues is China’s “unbalanced” growth. “The[]growth strategies engineered by Beijing forced households to subsidize investment and production, thus generating rapid economic and employment growth at the expense of household income growth.” MICHAEL PETTIS, *THE GREAT UNBALANCING: TRADE, CONFLICT, AND THE PERILOUS ROAD AHEAD FOR THE WORLD ECONOMY* 79 (2013).

<sup>45</sup> Roger H. Gordon and Wei Li, *Taxation and Economic Growth in China* (2002), <http://econweb.ucsd.edu/~rogordon/hongkng4.pdf>

<sup>46</sup> Note, however, that China’s growth has been heavily capital intensive rather than labor intensive, owing to the extremely low cost of capital. PETTIS, *supra* note 44, at 87. *Id.*

labor and environmental regulations;<sup>47</sup> redundancies in employment in the state sector; incentives for officials to promote growth; cheap loans for exporters; a competitive currency; and overall social and political stability. Third, early in the reform period, the central government introduced the system of so-called township and village enterprises (TVEs) which, despite operating on principles of public finance radically different from those used by public sector bodies in the West, essentially transformed local governments into profit-making enterprises, thus stimulating important new investment.<sup>48</sup> Fourth, the Chinese government also created conditions that encouraged foreign business and investment (especially after 1992);<sup>49</sup> it shifted entrepreneurial talent from the state bureaucracy to private business and slowly began recognizing private property rights.<sup>50</sup> Fifth, especially since the 1990s, the private sector of the Chinese economy has arguably contributed even more to the nation's growth rate than the sector controlled or subsidized by the government.<sup>51</sup> Finally, China's growth was owed to the very hospitable international environment for trade and investment that was created and sustained by United States hegemony in the post-

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<sup>47</sup> China has, of course, paid a shocking price for disregarding the degradation of its environment. See, e.g., ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* 39-90 (2d ed. 2010). A deadly explosion in mid-August 2015 of hazardous chemicals stored in a warehouse near a residential district of Tianjin, China—a port city located in a “showcase” economic development zone not far from Beijing—stunned Chinese public opinion and provoked widespread questioning about the government's environmental policies. The calamity, which claimed over 150 lives, injured more than 700, and left millions more wondering about the effects of toxic fallout, led many outraged Chinese to wonder whether the effects of rapid economic expansion on public safety and environmental quality had become unacceptable. Aggravating the concerns was the fact that a 2013 environmental impact study by the Tianjin Academy of Environmental Sciences had not mentioned that the proximity of the hazardous chemicals to residences and transport hubs was in violation of governmental regulations. See Andrew Jacobs, Javier C. Hernández & Chris Buckley, *Behind Deadly Tianjin Blast, Shortcuts and Lax Rules*, N.Y. TIMES, Aug. 30, 2015, available at <http://www.nytimes.com/2015/08/31/world/asia/behind-tianjin-tragedy-a-company-that-flouted-regulations-and-reaped-profits.html>.

<sup>48</sup> See COASE & WANG, *supra* note 41, at 53-56; FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 377 (2014) (describing the workings of the TVEs and stressing their role at the outset of China's growth spurt).

<sup>49</sup> See *Id.* at 59-64 (showing that early in the reform, the creation of Special Economic Zones, such as that in Shenzhen, were pivotal in opening China to the global economy).

<sup>50</sup> BEARDSON, *supra* note 1, at 54-55, 247-48 (illustrating the significant overlap between Party membership and the class of business entrepreneurs).

<sup>51</sup> NICHOLAS R. LARDY, *MARKETS OVER MAO: THE RISE OF PRIVATE BUSINESS IN CHINA* (2014).

Second World War period, especially to the openness of markets in the developed world, above all that of the United States, to Chinese exports,<sup>52</sup> and to the flow of direct foreign investment into China,<sup>53</sup> which was accompanied by positive spillover effects.<sup>54</sup> China has skillfully pursued the opportunities offered to it by the open global economy to drive its economic growth. It is only in recent years that China has begun to press the development of its domestic consumer market.<sup>55</sup>

### *China Viewed as a Threat*

Until very recently, and perhaps even now, United States elites have regarded China's growth benignly.<sup>56</sup> Chinese exports to the United States have greatly benefited United States consumers, and Chinese loans have financed both our government and private business projects. China is also a major market for United States exporters, and an important destination for United States capital investment. For much of the post-1978 period, moreover, United States policymakers have thought that China's economic growth would also promote political changes, leading eventually to the demise of Communist Party of China (CPC) power and the

<sup>52</sup> WESTAD, *supra* note 37, at 378, 384-85.

<sup>53</sup> See Holslag, *supra* note 5, at 56 ("In 1978, foreign direct investments in China were almost negligible, but they reached US\$3 billion in 1989 and from then onwards continued to grow spectacularly.").

<sup>54</sup> COASE & WANG, *supra* note 41, at 149-51.

<sup>55</sup> See Jeffrey Fung, *China's Shift to a Consumption-Driven Economy*, CORNELL CURRENT (Nov. 12, 2014), available at <http://www.cornellcurrent.com/2014/11/12/chinas-shift-to-a-consumption-driven-economy/>; Mark Purdy, *China's Economy, in Six Charts*, HARV. BUS. REV. (Nov. 29, 2013), available at <https://hbr.org/2013/11/chinas-economy-in-six-charts>.

<sup>56</sup> There are, of course, many signs that elite opinion is changing. Consider an op-ed by a former contender for the Democratic Party presidential nomination. Wesley Clark, Opinion, *Getting Real about China: To Manage China, Fix America First*, N.Y. TIMES (Oct. 10, 2014), available at <http://www.nytimes.com/2014/10/11/opinion/sunday/getting-real-about-china.html?partner=rss&emc=rss>. See also Fareed Zakaria, Opinion, *China's Growing Clout*, WASH. POST (Nov. 13, 2014), available at [http://www.washingtonpost.com/opinions/fareed-zakaria-chinas-growing-clout/2014/11/13/fe0481f6-6b74-11e4-a31c-77759f61eacc\\_story.html](http://www.washingtonpost.com/opinions/fareed-zakaria-chinas-growing-clout/2014/11/13/fe0481f6-6b74-11e4-a31c-77759f61eacc_story.html) ("[I]f China uses its growing clout to keep asking countries to choose between the existing arrangements or new ones, it might create conditions for a new kind of Cold War in Asia. It will certainly help to undermine and destroy the current international order, which has been a platform on which peace and prosperity have flourished in Asia for seven decades."); Andrew Browne, *Can China Be Contained?*, WALL ST. J. (June 12, 2015), available at <http://www.wsj.com/articles/can-china-be-contained-1434118534> ("U.S. foreign policy has reached a turning point, as analysts from across the political spectrum have started to dust off Cold War-era arguments and to speak of the need for a policy of containment against China.").

emergence of a more democratic form of government. This belief was underpinned by the assumption that a rising, prospering middle class would demand a greater political role and voice in China's affairs.<sup>57</sup> While campaigning for the United States Presidency in 1999, candidate George W. Bush declared that “[e]conomic freedom creates habits of liberty. And habits of liberty create expectations of democracy . . . Trade freely with China, and time is on our side.”<sup>58</sup> And some American analysts continue to affirm this belief.<sup>59</sup>

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<sup>57</sup> See STEFAN HALPER, *THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* 67 (2010).

<sup>58</sup> FRIEDBERG, *supra* note 1, at 16.

<sup>59</sup> See RICHARD ROSECRANCE, *THE RESURGENCE OF THE WEST: HOW A TRANSATLANTIC UNION CAN PREVENT WAR AND RESTORE THE UNITED STATES AND EUROPE* 33 (2013) (asserting that about 30% of China's population will be middle class by 2015 and that China would “normally” be democratizing). *But see* FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* 474-75, 481 (2011) (leaving open the question of whether China will follow path to democratization). Some would argue that China's traditional political culture is inherently inhospitable to democratic government. Lucian Pye has argued that a robust civil society, whose challenges to the State furthered the rise of democracy in the West, has traditionally not existed in China. Lucian Pye, *Civility, Social Capital, and Civil Society: Three Powerful Concepts for Explaining Asia*, 29 J. OF INTERDISC. HIST. 763 (1999). The tripartite division of Chinese life into the State, the public sphere (of mutual obligations based on kinship, clan, village, guild or other ties) and the private sphere, inhibited the development of powerful, autonomous, informal interests groups that could contest the claims of the State, bargain with it, or impose their will on it. *Id.* at 777-80. Pye did not claim that China would not make the transition to democracy; indeed, he maintained that it *could*. *Id.* at 780. But if it did so, then the transition would take a markedly different course from that in the West. *Id.* at 782. In a subtle analysis, Rana Mitter suggests that pluralism and liberalism, both of which are considered crucial elements of democracy in the West, have not had influential supporters in China, even among those who advocate “democracy” there. He attributes this in large part to the sense of national “crisis” that has haunted Chinese intellectuals for decades. MITTER, *supra* note 38, at 281-83. Mitter also argues, however, that the example of the vigorous democracy of Taiwan, which while smaller than the mainland is undoubtedly “Chinese,” demonstrates that there is no intrinsic incompatibility between Chinese culture and democracy. *Id.* at 305-08. Finally, we should also reject the notion that Chinese society is somehow incapable of grasping the concept of human rights. To be sure, traditional Confucian emphases on the linkages between duties and specific social roles, on hierarchy and on non-adversity may militate against full acceptance of human rights régimes. See Justin Tiwald, *Confucianism and Human Rights*, in *HANDBOOK OF HUMAN RIGHTS* 244 (Thomas Cushman ed., 2012); Glenn R. Butterson, *Pirates, Dragons, and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1107-12 (1996); Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303, 308-09 (1982). But, as scholars have argued, the demand for human rights has been powerful in China. See MARINA SVENSSON, *DEBATING HUMAN RIGHTS IN CHINA: A CONCEPTUAL AND POLITICAL HISTORY* 51-58, 200-06, 311-12 (2002). Peng-chun Chang, a leading Chinese philosopher and diplomat, played a leading role in the creation of the Universal Declaration of Human Rights (1948). HANS JOAS, *THE*

Increasingly, however, China strikes many in the American policy-making community and public as a growing threat—a kind of fusion of the economic dynamism of Japan of the 1980s with the military power of the Soviet Union of the 1950s. And the strategic mistrust is felt on both sides: interviews with Chinese leaders in 2012 revealed that many of them regard the United States as China’s main national security threat.<sup>60</sup> In its May 2015 White Paper on China’s military strategy, the Chinese Ministry of National Defense stated that while “[i]n the foreseeable future, a world war is unlikely,” nonetheless there are “new threats from hegemonism, power politics and neo-interventionism.”<sup>61</sup> The risks of a military confrontation between the United States and China are surely not negligible in the case of Taiwan,<sup>62</sup> and the United States Defense Department has recently outlined a maritime security strategy that reflects American military planners’ growing concerns over China’s land reclamation projects and other activities in the South China Sea.<sup>63</sup> Improbable as it still seems, therefore, a future war between

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SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS 186-87 (Alex Skinner trans., 2013).

<sup>60</sup> Chinese leaders “believe that the ultimate goal of the U.S.... is to maintain its global hegemony [and so] conclude that America will seek to constrain or even upset China’s rise.” Kenneth Leiberthal & Wang Jisi, *Assessing U.S.-China Strategic Mistrust*, in CHINA CENTER MONOGRAPHS, at viii, (John L. Thornton China Ctr. Monograph Ser. No. 4, 2012), available at [http://www.brookings.edu/~media/research/files/papers/2012/3/30%20us%20china%20lieberthal/0330\\_china\\_lieberthal.pdf](http://www.brookings.edu/~media/research/files/papers/2012/3/30%20us%20china%20lieberthal/0330_china_lieberthal.pdf). See also *id.* at 10-11, 13. Likewise, a study published in 2013 by the Carnegie Endowment for International Peace found that “[i]n both the United States and China, elites and the general public expressed low levels of trust in the other country.” Symposium, *U.S.-China Security Perceptions Survey: Findings and Implications*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 9 (2013), available at [http://carnegieendowment.org/files/us\\_china\\_security\\_perceptions\\_report.pdf](http://carnegieendowment.org/files/us_china_security_perceptions_report.pdf). See also Holslag, *supra* note 5, at 148.

<sup>61</sup> CHINESE MINISTRY OF NAT’L DEF., DOCUMENT: CHINA’S MILITARY STRATEGY (May 2015), available at <http://news.usni.org/2015/05/26/document-chinas-military-strategy>.

<sup>62</sup> See Charles Glaser, *A U.S.-China Grand Bargain? The Hard Choice between Military Competition and Accommodation*, 39 INT’L SEC. 49, 69 (2015) [hereafter Glaser, *U.S.-China Grand Bargain*]; see also AARON L. FRIEDBERG, *BEYOND AIR-SEA BATTLE: THE DEBATE OVER U.S. MILITARY STRATEGY IN ASIA* 18-19, 49-50 (2014) [hereafter FRIEDBERG, *BEYOND AIR-SEA BATTLE*]; RICHARD C. BUSH, *UNCHARTED STRAIT: THE FUTURE OF CHINA-TAIWAN RELATIONS* 213 (2013); M. Taylor Fravel, *Power Shifts and Escalation Explaining China’s Use of Force in Territorial Disputes*, 32 INT’L SEC. 44, 81-82 (2007) (identifying dispute with Japan over Senkaku Islands and with United States over Taiwan as the “[o]nly two disputes involving China [that] might threaten major conflict and instability in the region”).

<sup>63</sup> U.S. DEPARTMENT OF DEFENSE, *THE ASIA-PACIFIC MARITIME SECURITY STRATEGY: ACHIEVING U.S. NATIONAL SECURITY OBJECTIVES IN A CHANGING ENVIRONMENT* 15-17 (2015), available at [http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P\\_Maritime\\_Security\\_Strategy-08142015-1300-FINALFORMAT.PDF](http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF). See also

the United States and China, perhaps even within the coming decade, cannot be ruled out.<sup>64</sup> Indeed, both the United States and the Chinese militaries “are arming for an all-out war and pursuing enormously expensive master strategies that assume that such a war will occur.”<sup>65</sup> A senior United States Navy intelligence officer with the Pacific Fleet affirmed in 2014 that the Chinese Navy is preparing for a “short, sharp war” with a vital United States ally,

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Editorial Board, *China should tread carefully in the South China Sea*, WASH. POST (Aug. 25, 2015), available at [https://www.washingtonpost.com/opinions/china-should-tread-carefully-in-the-south-china-sea/2015/08/25/f0c2b5b6-4a95-11e5-846d-02792f854297\\_story.html](https://www.washingtonpost.com/opinions/china-should-tread-carefully-in-the-south-china-sea/2015/08/25/f0c2b5b6-4a95-11e5-846d-02792f854297_story.html).

<sup>64</sup> See, e.g., Coker, *Improbable War*, *supra* note 12, at 181 (“war [between the United States and China] is not inevitable, but nor is it as improbable as many experts suggest”); see also DALE C. COPELAND, *ECONOMIC INTERDEPENDENCE AND WAR* 436-44 (2015) (war unlikely unless one side believes that the other seeks to deny its possibilities of expanded trade); Christensen, *China Challenge*, *supra* note 1, at 37-53 (arguing on both economic and military grounds against possibility of major war); NOAH FELDMAN, *COOL WAR: THE FUTURE OF GLOBAL COMPETITION* 129-30, 162-63 (2013) (discussing risks of shooting war, including proxy wars, but also emphasizing likelihood of deepening cooperation); RANDALL PEERENBOOM, *CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST?* 273-81 (2007) [hereinafter Peerenboom, *China Modernizes*]; Joachim Krause, *Assessing the danger of war: parallels and differences between Europe in 1914 and East Asia in 2014*, 90 INT’L AFF. 1421, 1423-24 (2014). There is, of course, a substantial body of expert opinion to the effect that war, or at least war between two nuclear-armed Great Powers, is no longer a realistic possibility. For recent contributions to this debate, see THE NEXT GREAT WAR? THE ROOTS OF WORLD WAR I AND THE RISK OF U.S.-CHINA CONFLICT (Richard N. Rosecranz & Steven D. Miller eds., 2015); CHRISTOPHER COKER, *CAN WAR BE ELIMINATED?* xii (2014); IAN MORRIS, *WAR! WHAT IS IT GOOD FOR? CONFLICT AND THE PROGRESS OF CIVILIZATION FROM PRIMATES TO ROBOTS* (2014); RANDALL L. SCHWELLER, *MAXWELL’S DEMON AND THE GOLDEN APPLES: GLOBAL DISCORD IN THE NEW MILLENNIUM* (2014); JOSHUA S. GOLDSTEIN, *WINNING THE WAR ON WAR: THE DECLINE OF ARMED CONFLICT WORLDWIDE* (2012); STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011); JOHN MUELLER, *THE REMNANTS OF WAR 2* (2004); Carl Kaysen, *Review Is War Obsolete?: A Review Essay*, 14 INT’L SEC. 42 (1990); WERNER LEVI, *THE COMING END OF WAR* (1981); Bruno Tertrais, *The Demise of Ares: The End of War as We Know It?*, 35 WASH. Q. 7 (2012) (useful summary of the case that inter-state war is on the way out). The idea can be traced back to (among others) the German sociologist, Norbert Elias, though it can be found in the writings of some Enlightenment figures, such as the Scottish historian William Robertson. See NORBERT ELIAS, *THE CIVILIZING PROCESS* (English trans. ed. 1969 & 1982); see also William Robertson, *A View of the Progress of Society in Europe*, in 3 THE WORKS OF WILLIAM ROBERTSON 64 (1825) (effect of chivalry in limiting ferocity of war). For a study of pre-1914 arguments for “the natural decline of warfare,” see DAVID PAUL CROOK, *DARWINISM, WAR AND HISTORY* 98-129 (1994).

<sup>65</sup> Doug Saunders, *Why are the U.S. and China preparing for war with one another?*, GLOBE & MAIL (July 12, 2013), available at <http://www.theglobeandmail.com/globe-debate/us-and-china-smile-for-cameras-prepare-for-war/article13196146/>.

Japan.<sup>66</sup> Those who think that a major power war is impossible in contemporary circumstances would do well to recall statements such as those of the distinguished British historian G.P. Gooch, who wrote in 1912—just two years before the outbreak of the cataclysmic First World War—that “[w]e can now look forward with something like confidence to the time when war between civilized nations will be considered as antiquated as the duel.”<sup>67</sup>

The benign assumptions about China commonly made in the past were based on the experience of the West, and do not seem to correspond to the situation in China or other parts of East Asia.<sup>68</sup> Middle class affluence need *not* translate into demands for democratization;<sup>69</sup> indeed, a rising middle class may *prefer* a more autocratic form of government, if that government provides political stability, protects property and contract rights,<sup>70</sup> promotes domestic wealth creation, attracts international respect, and controls the poor and working class. Those conditions have been broadly met, so far, by the CPC.<sup>71</sup> On the other hand, “[o]ver the past two decades or so,

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<sup>66</sup>Perry Chiaramonte, *China preps military for ‘short, sharp war’ with Japan*, U.S. Navy analyst says, FOXNEWS.COM (Feb. 19, 2014), available at <http://www.foxnews.com/world/2014/02/19/china-preps-military-for-short-sharp-war-with-japan-says-us-navy/>.

<sup>67</sup> Quoted in ARTHUR J. MAY, *THE PASSING OF THE HAPSBURG MONARCHY 1914-1918* 82 (1966).

<sup>68</sup> HALPER, *supra* note 57, at 134.

<sup>69</sup> See Bruce Bueno de Mesquita & George W. Downs, *Development and Democracy*, 84 FOREIGN AFF. 77-78 (2005) (“[G]reater wealth alone does not automatically lead to greater political freedom . . . [T]here is now plenty of evidence to suggest that autocratic and illiberal governments . . . can delay democracy for a very long time”).

<sup>70</sup> China’s rapid economic growth has apparently been accomplished even in the absence of a robust “rule of law” protecting property and contract rights. See RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 462-92, 496-98 (2002) (providing a careful analysis of the rapid economic growth without a robust “rule of law” protecting property and contract rights, as well as a cautious argument that the further entrenchment of rule of law and enforceable property rights will be necessary to sustain China’s growth). See also Peerenboom, *China Modernizes*, *supra* note 61, at 35-40 (rule of law may not be necessary or significant in a poor, rural-based economy, where substitutes in private ordering are available; but it becomes more significant at higher levels of economic development); *id.* at 75 (noting that property rights are enforceable in Chinese courts). In any case, the problematic nature of the very question “Does China have the rule of law?” should be appreciated. See Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 229-33 (2002).

<sup>71</sup> Moreover, to say that the Chinese government is not “democratic” in the Western sense is emphatically *not* to say that it is unaware of, or unresponsive to, domestic public opinion. “[T]he authorities do monitor public opinion and use it in deciding policy. They govern as if they were running for election but the elections never come. There is an (unnegotiated) civil contract between the state and the individual: the state will seek to provide social stability and rising prosperity without unreasonable taxation or wealth redistribution; in return, the citizen should enter the political space only by invitation. The contract has

high-income [Western] countries have actively promoted democracy across the low-income world, with the result that democracy *increased* political violence.<sup>72</sup>

### *Democracy vs. Meritocracy*

Indeed, for much of the world, it is *democracy*, not *autocracy*, that seems increasingly outdated.<sup>73</sup> From this perspective, “actually existing democracy in the Western world no longer sets a clear-cut positive model for other countries.”<sup>74</sup> Some would even argue that China’s “authoritarianism” or (better) “meritocracy,” with appropriate modifications, could provide a more attractive model for the future, including that of the West.<sup>75</sup> In general, political and legal institutions that have served the West well for centuries are widely seen to be failing.<sup>76</sup> The argument that governmental legitimacy depended on democratic institutions may have seemed persuasive in the immediate aftermath of the West’s Cold War victory;<sup>77</sup> it does so no longer. Chinese thinkers contend plausibly that their country’s “meritocratic” system of leadership selection<sup>78</sup> is better at serving their public’s welfare than the United

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worked well for hundreds of millions of people.” BEARDSON, *supra* note 1, at 237; *see also* FELDMAN, *supra* note 61, at 91-92.

<sup>72</sup> DANIEL A. BELL, *THE CHINA MODEL: POLITICAL MERITOCRACY AND THE LIMITS OF DEMOCRACY* 19 (2015).

<sup>73</sup> *See* JOSHUA KURLANTZICK, *DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT* (2014); HALPER, *supra* note 57, at 130-34 (declining support globally for Western-style democracy).

<sup>74</sup> BELL, *supra* note 72, at 3.

<sup>75</sup> *See Id.* at 179-80; HALPER, *supra* note 57. *See also* CHARLES A. KUPCHAN, *NO ONE’S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN* 93-105 (2012) (analysis of the strengths and vulnerabilities of China’s non-democratic form of government).

<sup>76</sup> *See generally* NIALL FERGUSON, *THE GREAT DEGENERATION: HOW INSTITUTIONS DECAY AND ECONOMIES DIE* (2013).

<sup>77</sup> *See* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992).

<sup>78</sup> China employs different types of criteria for selecting leadership at the local, intermediate and national levels of government. At the local level, the system tends to be more “democratic;” at the top level, it is purely “meritocratic;” the intermediate level is something of a hybrid. The criteria for selection into and promotion within the highest reaches of the national leadership are rigorous. China emphasizes “that public officials should have the managerial skills, professional knowledge, and broad understanding of China and the world necessary to lead the country to full modernity and global prominence.” BELL, *supra* note 72, at 185. China’s national leaders must have demonstrated their proficiency at governing in many capacities and over several decades:

To get to the top, party officials must typically start from leadership at a primary-level office and then be promoted successively to the

States model of electoral democracy would be.<sup>79</sup> Arguably, too, the prolonged and careful vetting that China's leadership undergoes before rising to the very top provides a solution for what Francis Fukuyama calls China's traditional "Bad Emperor" problem, *i.e.*, the difficulty that authoritarian systems have in ensuring "a continuing supply of good leaders."<sup>80</sup>

Zhang Weiwei, a leading Chinese international relations expert, argues that Western-style electoral democracy is both unsuitable to China and unlikely to evolve there. This is a matter both of the permanent circumstances of China's existence and of its deep-set political culture:

In China's long history, all governments are expected to show special concern for improving people's

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township level, a county division, a department bureau, and the provincial ministry level. A public official aiming to reach the position of vice-minister has to be promoted from senior member to deputy section chief, section chief, . . . deputy division chief, division chief, deputy bureau chief, bureau chief, and vice-minister. If one meets the minimum length of service at each rank, one needs at least twenty years to reach the position of vice-minister . . . The top candidates are sent for further training at party and administrative schools in China, and many promising officials are sent to top universities abroad to learn best administrative practices from around the world. Out of seven million leading cadres, only one out of 140,000 makes it to the province/ministry level. A select few move up the ranks and make it to the party's Central Committee and then the twenty-five member Politburo. The members at the very apex of political power – the Standing Committee of the Politburo – must normally have served as governors of two provinces, each the size and population of most countries. In short, top leaders must pass through a battery of merit-based tests and accumulate decades of extensive and diverse administrative experience.

*Id.* at 186-87.

<sup>79</sup> See Zhang Weiwei, Opinion, *Meritocracy Versus Democracy*, N.Y. TIMES, Nov. 9, 2012, available at [http://www.nytimes.com/2012/11/10/opinion/meritocracy-versus-democracy.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/11/10/opinion/meritocracy-versus-democracy.html?pagewanted=all&_r=0). While China's meritocratic selection process for its governing elite traces back to the Confucian past, the current system was put in place by Deng Xioping. VOGEL, *supra* note 28, at 701-03.

<sup>80</sup> FUKUYAMA, *supra* note 46, at 383. Fukuyama asserts that "[c]ontemporary China faces precisely this kind of problem," but acknowledges that for "several decades" China has performed "extremely well" as compared to "many democratic regimes." *Id.* It is unclear, specifically, why this should be considered a *Chinese* problem – or why China's performance-driven selection methods are not as good an answer to it as any other. Other scholars have indeed suggested that the current Chinese oligarchy may in fact provide the solution to the "bad emperor" problem. See YURI PINES, *THE EVERLASTING EMPIRE: THE POLITICAL CULTURE OF ANCIENT CHINA AND ITS IMPERIAL LEGACY* 170 (2012).

livelihood, tackle natural and man-made disasters and cope with all the challenges posed by China's huge population and vast territory . . . Over the past millennia, the Chinese have shaped a political culture characterized by a longer-term vision and a more holistic way of perceiving politics. Most Chinese tend to value highly their country's overall stability and prosperity. It is unimaginable that most Chinese would ever accept the so-called multi-party democratic system with a change of central government every four years, and furthermore, all prosperous dynasties in the Chinese history were all associated with a strong and enlightened State. [The CPC] continues the long tradition of a unified Confucian ruling entity, which represents or tries to represent the interest of the whole society, rather than a Western-style political party which openly represents group interests . . . The experience of China's Republican Revolution of 1911 serves to illustrate the point. The Revolution copied the Western political model and the whole country immediately fell into chaos and disintegration, with warlords, each supported by one or a few foreign powers, fighting each other for their own interests.<sup>81</sup>

Another leading Chinese theorist and intellectual, Yu Keping, has argued powerfully in favor of democracy for China. But on closer inspection, it appears that what is being defended is a type of democracy that is markedly different from the Western conception, and that is characterized as having specifically Chinese characteristics. One might even describe it as a responsive form of authoritarianism:

What does Chinese-style democracy exactly mean? The CCP proposes four types of democracy in China: democratic election, democratic decision-making, democratic management, and democratic supervision. But as far as democratic elections go, Chinese government seems to concentrate more on political

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<sup>81</sup> Zhang, *supra* note 1, at 60.

deliberation. Thus, some scholars consider the Chinese way of democracy as “deliberative democracy”. China insists on practicing the CCP’s dominant rule and not necessarily a multiparty system or parliamentary politics. However, Chinese polity is not simply a single party politics, but the political system of “multi-party cooperation and political consultation under the leadership of the CCP.” China also does not implement a complete “checks and balances” to separate legislative, executive, and judicial bodies, but there is a relative independence among legislation, administration, and judiciary branches, which are divided into three separate systems.<sup>82</sup>

However, even if China *were* to become more democratic as the West understands it, that outcome would not necessarily serve China’s, American or the world’s interests well.<sup>83</sup> Empirical studies tend to support the view that electoral democratization at lower levels of national wealth is unlikely to lead to economic development and may indeed hinder it.<sup>84</sup> (“Premature” democracies such as India, Indonesia or the Philippines serve to illustrate this thesis.) Moreover, a more democratic China might well prove to be a more nationalistic, bellicose one.<sup>85</sup> The Arab Spring may have

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<sup>82</sup> Yu Keping, *Democracy in China: Challenge or Opportunity?*, HARV. KENNEDY SCH., at 8 available at <http://www.ash.harvard.edu/extension/ash/docs/democracyinchina.pdf>. See also Yu Keping, *How to Achieve Orderly Democracy*, SINOCISM CHINA NEWSL. (July 14, 2013), available at <https://sinocism.com/?p=9749>.

<sup>83</sup> Even those experts who forecast a coming “crackup” of Communist Party rule in China believe that it would be “highly unstable and unsettled.” See David Shambaugh, *The Coming Chinese Crackup*, WALL ST. J. (March 6, 2015), available at <http://www.wsj.com/articles/the-coming-chinese-crack-up-1425659198>. For a critique of Shambaugh’s analysis, see Chen Dingding, *Sorry, America: China is NOT Going to Collapse*, NAT’L INT. (March 10, 2015), available at <http://nationalinterest.org/feature/sorry-america-china-not-going-collapse-12389>.

<sup>84</sup> See PEERENBOOM, *China Modernizes*, *supra* note 61, at 63-5; 79-80; HALPER, *supra* note 57, at 133-34. On the contingency of the linkages among democracy, human rights, and economic development, see Jack Donnelly, *Human Rights, Democracy and Development*, 21 HUM. RTS. Q. 608 (1999).

<sup>85</sup> See Edward Mansfield and Jack Snyder, *Democratic Transitions, Institutional Strength, and War*, 56 INT’L ORG. 297, 298 (2002) (“We find that the heightened danger of war grows primarily out of the transition from an autocratic regime to one that is partly democratic. The specter of war during this phase of democratization looms especially large when governmental institutions, including those regulating political participation, are especially weak. Under these conditions, elites commonly employ nationalist rhetoric to

brought down some longstanding dictatorships in the Middle East and threatened others; but the Arab world has not been made less violent or war-prone as a result. On the other hand, so long as the vast differences between China's political ideology and system of government and those of the United States exist, they will tend to deepen suspicion between the two nations and heighten the risk of armed conflict.<sup>86</sup>

Moreover, the Chinese government's longstanding resistance to the more exorbitant claims made by proponents of human rights doctrine is not wholly self-serving.<sup>87</sup> Chinese strategists believe that the promotion of international human rights is an important ingredient in an overall United States strategy to insure global American hegemony.<sup>88</sup> Furthermore, China may well be justified in arguing that liberal Western democracies' evaluations of its human rights record are biased, and hold it to a higher standard than other non-democracies, or even than comparable democracies like India.<sup>89</sup> In fairness, China's performance may be better measured by a "contender model," which would evaluate it in a comparative context against those nations most like it, rather than

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mobilize mass support but then become drawn into the belligerent foreign policies unleashed by this process. We find, in contrast, that transitions that quickly culminate in a fully coherent democracy are much less perilous.").

In a perceptive passage, the philosopher Adam Ferguson, one of the most prominent figures of the eighteenth century Scottish Enlightenment, observed that nationalist feelings among the lower ranks of society can drive a state to war, despite the contrary judgments of its leading statesmen.

[I]t is among [the peasants] that we find the materials of war and dissension laid without the direction of government, and sparks ready to kindle into a flame, which the statesman is frequently disposed to extinguish. The fire will not always catch where [the statesman's] reasons of state would direct, nor stop where the concurrence of interest has produced an alliance. "My father," said a Spanish peasant, "would rise from his grave, if he could foresee a war with France."

Adam Ferguson, *Of the Principles of War and Dissension*, in AN ESSAY ON THE HISTORY OF CIVIL SOCIETY, 37-38 (1757), available at [http://oll.libertyfund.org/titles/ferguson-an-essay-on-the-history-of-civil-society?q=peasant#Ferguson\\_1229\\_47](http://oll.libertyfund.org/titles/ferguson-an-essay-on-the-history-of-civil-society?q=peasant#Ferguson_1229_47). One can readily imagine a Chinese peasant expressing the same sentiment, in relation to a war with Japan.

<sup>86</sup> See MARK L. HAAS, *THE IDEOLOGICAL ORIGINS OF GREAT POWER POLITICS, 1789-1989* (2005) (ideological differences between States tend to cause heightened threat perceptions and consequently affect their foreign policies).

<sup>87</sup> For a helpful summary of the main features of China's human rights outlook, see PEERENBOOM, *China Modernizes*, *supra* note 61, at 85-90.

<sup>88</sup> See Yong Deng, *Hegemon on the Offensive: Chinese Perspectives on U.S. Global Strategy*, 116 POLI. SCI. Q. 343, 351-52 (2001).

<sup>89</sup> See PEERENBOOM, *China Modernizes*, *supra* note 61, at 169-74.

by the “offender model” commonly applied by Western governments and human rights activists (which holds China to an absolute standard).<sup>90</sup> Moreover, harsh criticism of China’s human rights record, especially if it seems to be applying a double standard, may be self-defeating and work to promote feelings of nationalism and resentment.<sup>91</sup> China’s emphasis on promoting the *welfare* of its population through economic growth rather than on improving its human rights performance is arguably a defensible choice for a developing State.<sup>92</sup> Although China’s emphasis on “social stability” often leads to human rights abuses, nonetheless the country’s leadership believes that such stability “is what enabled China to lift hundreds of millions of people out of poverty in a mere few decades, generate huge economic growth, and peacefully re-establish China as a major power.”<sup>93</sup> Moreover, China’s people seem to endorse the views of their leadership on these matters: “[t]here is little doubt that the large majority of Chinese consider the current political system to be the appropriate system for their country.”<sup>94</sup> The Chinese Communist Party appears, thus far, to have been successful in drawing legitimacy from traditional Chinese norms of good government.<sup>95</sup>

## II. *Balancing and “Containment”*

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<sup>90</sup> See Yang Wang, *China Reexamined: The Worst Offender or a Strong Contender?*, 106 MICH. L. REV. 1143, 1148-52 (2008).

<sup>91</sup> *Id.* at 165.

<sup>92</sup> See Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1762 & n.15, 1771-72 (2008).

<sup>93</sup> Paul Gewirtz, *What China Means by ‘Rule of Law,’* N.Y. TIMES (Oct. 19, 2014), available at [http://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html?\\_r=0](http://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html?_r=0).

<sup>94</sup> BELL, *supra* note, 72 at 137. Bell also points to a survey showing that China’s people evince a higher level of trust in their political institutions than do the populations of eight other Asian societies, including Japan, South Korea and Taiwan. *Id.*

<sup>95</sup> See HALPER, *supra* note 57, at 150 (“The CCP has learned to draw legitimacy and strength from the underlying Confucian roots of Chinese culture. Confucian precepts are based on a role-based system of ethics, in which the governed and the governors respect and protect each other’s place, so long as each side fulfills its side of the bargain. Thus is the Confucian utopia for a harmonious society. The ruled are subservient to the ruler, but only because the ruler fulfills the important duties of ensuring livelihood, shelter, education, and security from foreign invasion. If the ruler fails in these regards, then Chinese peasantry have a heritage for bottom-up rebellion that is almost unrivaled in history.”).

As discussed above, China's rise has caused anxiety both among its near neighbors and in the United States. Especially since the financial crisis of 2008 (the effects of which are still being felt in the West), some observers perceive China's conduct as having become more aggressive, particularly with regard to the disputed islands in China's coastal periphery, including the South and East China Seas.<sup>96</sup> China claims ownership of more than 80% of the South China Sea—to the consternation of other coastal States in the area—and has backed up its claims with actions that have provoked confrontations with Vietnam and the Philippines.<sup>97</sup> (The Philippines has initiated proceedings before the Permanent Court of Arbitration under the United Nations Convention on the Law of the Sea (UNCLOS)<sup>98</sup> to resolve part of its disputes with China.<sup>99</sup>) China is

<sup>96</sup> For an in-depth study of China's claims to these islands and its actions concerning them, see RONALD O'ROURKE, CONG. RESEARCH SERV., R42784, MARITIME TERRITORIAL AND EXCLUSIVE ECONOMIC ZONE (EEZ) DISPUTES INVOLVING CHINA: ISSUES FOR CONGRESS (2014), available at <http://fas.org/spp/crs/row/R42784.pdf>. Chinese military analysts have written since 2010 about the "new situation" in the international strategic environment created by the financial crisis of 2008. In the most recent writing, references to a "harmonious world" have disappeared. See David Bradley, *A 'New Situation': China's Evolving Assessment of its Security Environment*, 14 China Brief 6 (2014), available at [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Btt\\_news%5D=42690&tx\\_ttnews%5BbackPid%5D=758&no\\_cache=1#.VDGkaP0o45s](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=42690&tx_ttnews%5BbackPid%5D=758&no_cache=1#.VDGkaP0o45s).

<sup>97</sup> See Howard W. French, *China's Dangerous Game*, ATLANTIC, Nov. 2014, at 96, available at <http://www.theatlantic.com/magazine/archive/2014/11/chinas-dangerous-game/380789/>. For legal analyses of the islands dispute in the South China Sea, see BILL HAYTON, *THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA* 108-20 (2014); Jacques deLisle, *Troubled Waters: China's Claims and the South China Sea* (2012), 56 ORBIS 608, available at [http://ac.els-cdn.com/S0030438712000658/1-s2.0-S0030438712000658-main.pdf?\\_tid=1582dd86-3eb2-11e4-ad90-00000aab0f01&acdnat=1410989711\\_1c7694beafbdab9b531d3f6a132f5c00](http://ac.els-cdn.com/S0030438712000658/1-s2.0-S0030438712000658-main.pdf?_tid=1582dd86-3eb2-11e4-ad90-00000aab0f01&acdnat=1410989711_1c7694beafbdab9b531d3f6a132f5c00); Masahiko Asada, *Senkaku/Diaoyu Islands*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (updated 2007), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2015?rkey=WGpspE&result=3&prd=EPIL>. The United States disagrees with China's view of its legal rights with respect to the EEZ. See O'ROURKE, *supra* note 93, at 3-7.

<sup>98</sup> United Nations Convention on the Law of the Sea (the UNCLOS), 1833 U.N.T.S. 3 / [1994] A.T.S. 31 / 21 I.L.M. 1261 (1982) (entered into force November 16, 1994), available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm).

<sup>99</sup> See Republic of the Phil. v. China, 2013-19, (Perm. Ct. Arb. 2013), available at <http://www.pccases.com/web/view/7>. The proceeding, which primarily concerns the Spratly Islands and the "maritime features" (islands, rocks, reefs) around them, began in January 2013, when the Philippines notified China of its claim under the United Nations Convention on the Law of the Sea (UNCLOS) to maritime jurisdiction in the South China Sea (or what the Notification referred to as "the West Philippine Sea"). A month later, China responded with a diplomatic note to the Philippines, rejecting and returning the latter's Notification. Thereafter, China elaborated its views in a December 2014 "Position Paper." See Republic of the Phil. v. China, 2013-19, (Perm. Ct. Arb. 2013), available at <http://www.pccases.com/web/view/7>. The Philippines asserted that it was not contesting

also engaged in a dispute with Japan over the uninhabited Senkaku/Daioyu Islands (which are located close to significant underwater oil and gas reserves<sup>100</sup>). Although signs of a more conciliatory approach on both sides have appeared,<sup>101</sup> this dispute has also led to rising tensions and military incidents.<sup>102</sup>

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*sovereignty* over the disputed “maritime features” of the South China Sea (which would involve consideration of the parties’ “historic rights,” compare *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. REPORTS 2008, p. 12), but was rather asking the PCA to determine the status of the relevant “maritime features” *under the UNCLOS*.

Roughly, the UNCLOS’ rules determine how different types of maritime features support different types of claims to territorial waters and “exclusive economic zones” (EEZ). Thus, a rock above water generates a claim to the twelve-mile territorial sea around it, but nothing more; a reef submerged at high tide generates no claims; and a habitable “island” generates claims *both* to the surrounding territorial sea *and* to an EEZ for up to 200 nautical miles out.

In a unanimous decision of October 29, 2015, the PCA ruled that it had jurisdiction to consider several of the Philippines’ claims, and reserved decisions with respect to other claims for consideration together with the merits. See *Philippines v. China*, PCA Case No. 2013-19 (Oct. 29, 2015), available at <http://www.pcacases.com/web/sendAttach/1506>. The Chinese Ministry of Foreign Affairs thereupon released a statement saying that China would disregard any findings by the PCA in the merits phase of the case, and declaring that the PCA’s decision was “null and void, and has no binding effect on China. See Do Viet Cuong, *Don’t Believe China’s South China Sea Case Statement*, in *The Diplomat* (Nov. 3, 2015), available at <http://thediplomat.com/2015/11/dont-believe-chinas-statement-on-the-south-china-sea-case/>.

<sup>100</sup> See U.S. Energy Info. Admin., *East China Sea* (2014), available at [http://www.eia.gov/countries/analysisbriefs/east\\_china\\_sea/east\\_china\\_sea.pdf](http://www.eia.gov/countries/analysisbriefs/east_china_sea/east_china_sea.pdf). By contrast, some experts believe that the areas of the South China Sea in dispute between China and its neighbors “actually contain relatively little oil and gas.” HAYTON, *supra* note 94, at 147. However, the Department of Defense reports that “[t]hrough figures vary substantially, the Energy Information Administration estimates that there are approximately 11 billion barrels and 190 trillion cubic feet of proved and probable oil and natural gas reserves in the South China Sea.” U.S. DEP’T OF DEF., *THE ASIA-PACIFIC MARITIME SECURITY STRATEGY: ACHIEVING U.S. NATIONAL SECURITY OBJECTIVES IN A CHANGING ENVIRONMENT* 5 (2015), available at [http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P\\_Maritime\\_Security\\_Strategy-08142015-1300-FINALFORMAT.PDF](http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF).

<sup>101</sup> See Shannon Tiezzi, *A China-Japan Breakthrough: A Primer on their Four-Point Consensus*, *DIPLOMAT*, Nov. 7, 2014, available at <http://thediplomat.com/2014/11/a-china-japan-breakthrough-a-primer-on-their-4-point-consensus/> (before a meeting between Japanese Prime Minister Abe and Chinese President Xi, the two nations issued somewhat differing diplomatic notes that referred, among other things, to the Senkaku/Diaoyu Islands. The Japanese text avoids mentioning that China makes claim to the islands, but acknowledges that “different views” exist as to how the dispute arose.).

<sup>102</sup> See JAMES MANICOM, *BRIDGING TROUBLED WATERS: CHINA, JAPAN, AND MARITIME ORDER IN THE EAST CHINA SEA* 190-208 (2014); Carlos Ramos-Mrosovsky, *International Law’s Unhelpful Role in the Senkaku Islands*, 29 *J. INT’L L.* 903 (2008).

Commentators such as the Indian strategic analyst Brahma Chellaney, surmise that under President Xi Jinping, China's People's Liberation Army has gained ascendancy over the civilian leadership of the Chinese Communist Party and is driving China, which he sees as increasingly "a praetorian State," towards more confrontational policies with its neighbors.<sup>103</sup> Certainly since Xi's accession to the presidency in 2010, China's leadership seems to some observers to have become more authoritarian in domestic policy and more challenging overseas.<sup>104</sup> Xi has reportedly "rehabilitated a group of ultra-hawkish generals and military advisers, some of whom were outspoken in their belief in an 'inevitable' showdown with the United States."<sup>105</sup> Public statements by high-ranking Chinese officials have added to anxieties about its intentions: for example, in an important speech, General Wang Guanzhong unveiled China's "New Security Concept for Asia," that "appears to be an effort to redefine the idea of security on terms that cast China as a regional security provider and the United States as an over-assertive outsider that threatens to undermine regional security."<sup>106</sup>

Whatever China's intentions may be, the undoubted growth of China's military power is creating a situation in which other nations seem to be moving towards a "balance of power" against it. Thus, the distinguished American strategist Edward Luttwak has argued in *The Rise of China vs. The Logic of Strategy* (2012) that China's military expansion is calling into an existence a countervailing coalition of Asian States, who fear that China may undermine their independence. For Luttwak, China faces a trade-off

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<sup>103</sup> Brahma Chellaney, *Defensive India Needs to Take Firmer Stand Against China*, HINDUSTAN TIMES, Sept. 18, 2014, available at <http://www.hindustantimes.com/StoryPage/Print/1265782.aspx>. For some incidents illustrating China's new-found assertiveness, see COKER, *Improbable War*, *supra* note 12, at 135.

<sup>104</sup> See Robert Marquand, *Xi Jinping emerges as forceful No. 1 – rewriting China's power playbook*, CHRISTIAN SCI. MONITOR (Oct. 8, 2014), available at <http://www.csmonitor.com/World/Asia-Pacific/2014/1008/Xi-Jinping-emerges-as-forceful-No.-1-rewriting-China-s-power-playbook>. But see Alastair Iain Johnston, *How New and Assertive is China's New Assertiveness?*, 37 INT'L SEC. 7 (2013) (criticizing "new assertiveness" argument).

<sup>105</sup> COKER, *Improbable War*, *supra* note 12, at 135.

<sup>106</sup> David Cohen, 'A Clash of Security Concepts': China's Effort to Redefine Security, 14 CHINA BRIEF 1(2014), available at [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Btt\\_news%5D=42465&tx\\_ttnews%5BbackPid%5D=758&no\\_cache=1#.VDGoWf0o45s](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=42465&tx_ttnews%5BbackPid%5D=758&no_cache=1#.VDGoWf0o45s). China's navy seems already to be in a position to contest United States dominance at sea. See James R. Holmes, *China's Navy is already challenging the U.S. in Asia*, DIPLOMAT, Oct. 16, 2014, available at <http://thediplomat.com/2014/10/chinas-navy-is-already-challenging-the-us-in-asia/>.

between growing economic prosperity and increasing military strength. Should it pursue the latter, it will find itself checked by the economic and military counter-measures of its neighbors. For Luttwak, the economically robust, militarily weak European Union would seem to be the proper model for China.

There might, in fact, be substantial benefits to China if it followed this approach.<sup>107</sup> China has few natural resources of its own, and is therefore heavily dependent on international trade. But most of China's sources of raw materials are located at great distances from it. About half of China's oil imports come to it from the Middle East, some 6000 miles away.<sup>108</sup> Iron from Australia or Brazil also travels thousands of miles. True, China's trading partner and near neighbor Russia can and does meet some of these needs.<sup>109</sup> And China is taking ruthless advantage of Russia's current economic problems.<sup>110</sup> But China may not want to become over-dependent on Russia, with which it has had a troubled history, and which could again become an adversary.<sup>111</sup> China could build naval forces and establish military bases closer to its suppliers in order to guarantee the flow of raw materials, but it would be cheaper for China to free-ride on the protection of international sea lanes and commercial traffic that the United States Navy provides as a global public good. Furthermore, if China began an ambitious naval armaments program, it would stimulate countermeasures from the United States, Japan, and others.

Moreover, China depends on access to Western and Japanese markets for its security and prosperity. In the current global production chain, China provides the place of final the

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<sup>107</sup> See Yuen Foong Khong, *Primacy or World Order? The United States and China's Rise – A Review Essay*, 38 INT'L SEC. 153, 172 (2013/4) ("China's best shot at dislodging the United States is to continue growing at 6 to 8 percent annually for another quarter century."); FELDMAN, *supra* note 61, at 23-25 (benefits to China of a gradual military build-up).

<sup>108</sup> DAVID SHAMBAUGH, CHINA GOES GLOBAL: THE PARTIAL POWER 163 (2013) (47% of China's oil imports come from Middle East).

<sup>109</sup> See *id.* at 164. See also BEARDSON, *supra* note 1, at 315 (Kazakhstan also figures importantly in China's energy import planning, as does Turkmenistan).

<sup>110</sup> Fred Weir, *China cashes in on Russia's shrinking economic options*, CHRISTIAN SCI. MONITOR, Oct. 14, 2014, available at <http://www.csmonitor.com/World/Europe/2014/1014/China-cashes-in-on-Russia-s-shrinking-economic-options-video>.

<sup>111</sup> See SHAMBAUGH, *supra* note 105, at 7; BEARDSON, *supra* note 1, at 316. On the critical importance of the Malaccan Strait to the global economy, see Hans-Dieter Evers and Solvay Gerke, *The Strategic Importance of the Straits of Malacca for World Trade and Regional Development*, ZEF WORKING PAPER SERIES No. 17 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1020877](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020877).

assembly of goods sold to Western or Japanese consumers. China receives import content in the form of high and medium tech goods, like small computers; adds low tech content; and then exports the finished product. (Unlike Germany, another successful exporter, China does not contribute significant high tech content to the final product. Thus, while Germany adds about sixty percent to the value added to the product, China adds about thirty percent.). China is seeking both to expand its domestic market for its manufactures and to acquire greater high tech capability. But it still depends on foreign markets. Military conflict would jeopardize its access to them, disrupting China's economy and threatening its domestic stability.

Finally, anti-militarism has been an important strain in traditional Chinese thought and culture. While it would be an exaggeration to claim that China's wars were usually defensive and undertaken only as a last resort, all major schools of Chinese thought (with the exception of "Legalism") tended to discourage the use of force. Moreover, imperial China may have been deterred from military adventures by its longstanding strategic stalemate with northern nomads.<sup>112</sup> To the extent that China bases its claims to regional and global leadership on the splendor of its civilization or on the attractiveness of the current "China model,"<sup>113</sup> it may therefore be reluctant to pursue aggressive or expansionist policies.<sup>114</sup>

### ***Control of the Seas***

Nonetheless, it seems most unlikely that China will be content to remain, like the European Union, an economic colossus but a military pygmy.<sup>115</sup> Even apart from the desire for international standing, influence, and prestige, basic considerations of self-defense would impel Chinese militarization. Simply consider China's dependence on imported energy. Almost 80% of

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<sup>112</sup> See Shaohua Hu, *Chinese Pacifism*, 32 *ASIAN AFF.* 256 (2006). For a more critical perspective on traditional Chinese "pacifism," see Don J. Wyatt, *Confucian Ethical Action and the Boundaries of Peace and War*, in *BLACKWELL COMPANION TO RELIGION AND VIOLENCE* (Andrew R. Murphy ed. 2011).

<sup>113</sup> See HALPER, *supra* note 57, at 32.

<sup>114</sup> See generally Robert D. Kaplan, *Asia's Cauldron: The South China Sea and the End of a Stable Pacific* 8-11 (2014).

<sup>115</sup> BLACKWILL & TELLIS, *supra* note 6, at 17 ("China does not see its interests served by becoming just another 'trading state,' no matter how constructive an outcome that might be for resolving the larger tensions between its economic and geopolitical strategies.").

China's oil imports pass through the Strait of Malacca between Malaysia and Singapore,<sup>116</sup> creating what former Chinese President Hu Jintao called China's "Malacca dilemma."<sup>117</sup> "In every respect can the Strait of Malacca be regarded as a life line of the rising dragon"<sup>118</sup> (As if to dramatize the strategic importance of the Strait of Malacca, United States Secretary of Defense Ashton Carter made a well-publicized aerial transit over the area from a V-22 Osprey in May 2015).<sup>119</sup> China surely does not want to permit the United States Navy to exercise unchallenged control over such a vital artery indefinitely.

As Admiral Alfred Thayer Mahan famously pointed out in his classic work *The Influence of Sea Power Upon History: 1660–1783*,<sup>120</sup> control over such maritime chokepoints is a matter of

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<sup>116</sup> Chen Shaofeng, *China's Self-Extrication from the "Malacca Dilemma" and Implications*, 1 Int'l J. of China Stud. 1, 2 (2010).

<sup>117</sup> ZhongXiang Zhang, *China's Energy Security, the Malacca Dilemma and Responses*, 39 Energy Policy 7612, 7613 (2011) (explaining that "over the past few years top Chinese leaders have come to view the Strait of Malacca as a strategic vulnerability . . . In November 2003, the Chinese President Hu Jintan declared that 'certain major powers' were bent on controlling the strait, and called for the adoption of new strategies to mitigate the perceived vulnerability. Thereafter, the Chinese press devoted considerable attention to the country's 'Malacca dilemma.'"). See also Charles L. Glaser, *How Oil Influences U.S. National Security*, 38 Int'l Sec. 112, 131-37 (2013) [hereinafter Glaser]; Chia Lin Sien, *The Importance of the Straits of Malacca and Singapore: The Social and Marine Science Perspectives*, 2 SING. J. INT'L & COMP. L. 301, 303-04 (1998). See generally Marc Lanteigne, *China's Maritime Security and the "Malacca Dilemma,"* 4 Asian Sec. 143 (2008).

<sup>118</sup> Chen Shaofeng, *supra* note 116, at 2, 9 ("In the eyes of some Chinese strategic analysts, the Strait of Malacca is one of the strategic locations that the U.S. endeavours to command in that they are crucial for Washington to gain geopolitical preeminence, check the rise of China and other powers, and control the flow of world energy . . . China particularly worries that the U.S. might interdict seaborne oil flows into China in the event of military action against Taiwan . . . Such a concern seems reasonable.").

<sup>119</sup> Council on Foreign Relations, *Remarks by Defense Secretary Carter "A Regional Security Architecture Where Everybody Rises"* (May 30, 2015), (transcript available at <http://www.cfr.org/regional-security/remarks-defense-secretary-carter-regional-security-architecture-everyone-rises/p36591>) ("Yesterday, I took an aerial transit of the Strait of Malacca. And when viewed from the air, it is even clearer how critical this region's waterways are to international trade and energy resources. We've all benefitted from free and open access to the South China Sea and the Strait of Malacca. We all have a fundamental stake in the security of the South China Sea. And that's why we all have deep concerns about any party that attempts to undermine the status quo and generate instability there, whether by force, coercion, or simply by creating irreversible facts on the ground, in the air, or in the water.").

<sup>120</sup> A.T. MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783*, 32 (12<sup>th</sup> ed. 1890), available at <http://www.gutenberg.org/files/13529/13529-h/13529-h.htm> (noting the devastating strategic consequences for Spain that flowed from its loss of Gibraltar to Britain: "But for the loss of Gibraltar, the position of Spain would have been closely analogous to that of England. Looking at once upon the Atlantic and the Mediterranean,

extreme strategic sensitivity to states. On occasion, disputes over their control have led to war.<sup>121</sup> Thus, the Russo-Japanese War of 1904-05 was due, in part, to the imperative need that both Great Powers felt to dominate the Tsushima Strait;<sup>122</sup> Imperial Russia may have entered, or even engineered, the First World War in order to seize the Dardanelles;<sup>123</sup> Germany's violation of Belgian neutrality in 1914 precipitated Britain's intervention in the war, owing in part to the need to prevent German control of critical ports near the English Channel;<sup>124</sup> Imperial Germany constructed the Kiel Canal to balance against British naval superiority;<sup>125</sup> Spain's seizure in 1940 of the internationalized zone of Tangier—which commanded the southwestern shore of the entrance to the Mediterranean and so encroached on Gibraltar—caused grave concern to Great Britain,

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with Cadiz on the one side and Cartagena on the other, the trade to the Levant must have passed under her hands, and that round the Cape of Good Hope not far from her doors. But Gibraltar not only deprived her of the control of the Straits, it also imposed an obstacle to the easy junction of the two divisions of her fleet.”). *See generally* James Holmes & Toshi Yoshihara, CHINESE NAVAL STRATEGY IN THE 21<sup>ST</sup> CENTURY: THE TURN TO MAHAN (2008) (noting that Mahan's classic work informs China's strategic thinking).

<sup>121</sup> *See* CHRISTOPHER M. BELL, THE ROYAL NAVY, SEAPOWER AND STRATEGY BETWEEN THE WARS 69-72 (2000) (noting that the region around the Malaccan Strait has figured in naval war planning in the past. During the inter-war period, the British Royal Navy intended to use its naval base at Singapore to attack Japanese trade and transport routes if war in the Far East broke out.). *See also* John Ferris, 'It Is Our Business in the Navy to Command the Seas': *The Last Decade of British Maritime Supremacy, 1919-1929*, in FAR-FLUNG LINES: STUDIES IN IMPERIAL DEFENCE IN HONOUR OF DONALD MACKENZIE SCHURMAN 124, 139-40 (Greg Kennedy & Keith Neilson eds., 1997).

<sup>122</sup> Russia wished to be able to move its shipping and naval forces safely and efficiently between Vladivostok and Port Arthur, which necessitated passage through the Japanese-Korean Strait; Japan regarded such close proximity of another Great Power to its home islands as a grave strategic threat. *See* IAN NISH, THE ORIGINS OF THE RUSSO-JAPANESE WAR 2 (1985) (noting that “Russia wanted naval supremacy in the Korean straits, and Japan as an aspiring naval power could not accept that”); *id.* at 254 (“It is hard to imagine [the Russian Admiralty] giving in over Russia's right to the passage of the seas around the south of Korea”); *See also* Vice Admiral Yoji Koda, *The Russo-Japanese War: Primary Causes of Japanese Success*, 58 *Naval War College Rev.* 11, 22 (2005).

<sup>123</sup> *See* DOMINIC LIEVEN, TOWARDS THE FLAME: EMPIRE, WAR AND THE END OF TSARIST RUSSIA 73-76, 285-87 (2015); SEAN McMEEKIN, THE RUSSIAN ORIGINS OF THE FIRST WORLD WAR 29-30 (2011); EUGENE ROGAN, THE FALL OF THE OTTOMANS: THE GREAT WAR IN THE MIDDLE EAST 32-33 (2015).

<sup>124</sup> *See* RICHARD NED LEBOW, COERCION, COOPERATION, AND ETHICS IN INTERNATIONAL RELATIONS 93 (2007); Jack S. Levy, *Preferences, Constraints, and Choices in July 1914*, 15 *Int'l Sec.* 151, 166 (1990—1991).

<sup>125</sup> *See* Wilhelm Otto Lampe, *The Kiel Canal*, in THE BALTIC SEA: NEW DEVELOPMENTS IN NATIONAL POLICIES AND INTERNATIONAL COOPERATION 133, 134 (Renate Platzöder & Philomène A. Verlaan eds., 1996).

then at war with Germany and Italy;<sup>126</sup> the United States and Iran have repeatedly clashed in and around the Strait of Hormuz, through which a fifth or more of the world's oil passes;<sup>127</sup> during the Cold War, the Soviet Union warned the United States against using the Vilkitsky Strait, which connects the Kara and Laptev Seas off the Arctic coast;<sup>128</sup> and the strategic importance of the Suez Canal to the British Empire,<sup>129</sup> or of the Panama Canal Zone to the United States,<sup>130</sup> can hardly be questioned.<sup>131</sup> It would scarcely be

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<sup>126</sup> M.B., *The Status of Tangier*, 17 Bull. of Int'l News 1618, 1618 (1940) (confirming that Britain feared the loss of "free and unassailable entry to the Straits of Gibraltar [which for her was] a primary strategic necessity.").

<sup>127</sup> See, e.g., Glaser *supra* note 117, at 127-29; Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 261 at ¶¶ 23-26; Caitlin Talmadge, *Closing Time: Assessing the Iranian Threat to the Strait of Hormuz*, 33 Int'l Sec. 82, 82 (2008) ("Iranian closure of the Strait of Hormuz tops the list of global energy security nightmares.").

<sup>128</sup> See Donat Pharand, *Soviet Union Warns United States Against Use of Northeast Passage*, 62 AM. J. INT'L L. 918, 927 (1968).

<sup>129</sup> See AFAF LUTFI SAYYID-MARSOT, A SHORT HISTORY OF MODERN EGYPT 74 (1985) (explaining the Suez Canal retained its vital interest to Britain even after loss of the Indian Empire, leading Britain (joined by France and Israel) to launch a disastrous campaign to recover it after Egyptian government confiscated it.). See also JOHN DARWIN, THE EMPIRE PROJECT: THE RISE AND FALL OF THE BRITISH WORLD-SYSTEM, 1830-1970, 590-92 (2009).

<sup>130</sup> MAHAN, *supra* note 120, at 33 (explaining that "The position of the United States with reference to [the Panama Canal] will resemble that of England to the Channel, and of the Mediterranean countries to the Suez route."). Urging Congress to authorize the project of a Canal, President William McKinley "showed acute consciousness of [its] strategic character;" he told Congress that national policy called for it "more imperatively than ever." NORMAN J. PADELDFORD, THE PANAMA CANAL IN PEACE AND WAR 18, 31 (1943) (describing the Canal as "more a military and a political instrument" than a conduit for world trade, and insisting that "permanent national interests demand that the United States never relax its vigilance for the maintenance and protection of the Panama Canal."). See generally George H.W. Bush, Address to the Nation on Panama (Dec. 20, 1989) (transcript available at <http://millercenter.org/president/bush/speeches/speech-3422>); JOHN MAJOR, PRIZE POSSESSION: THE UNITED STATES GOVERNMENT AND THE PANAMA CANAL 1903-1979, 155 (1993) (Asserting that Operation Just Cause, as the United States invasion of Panama in 1989 was called, was justified partly in terms of the United States' continuing security interest in the Canal).

<sup>131</sup> The extraordinary strategic sensitivity of both the Suez and Panama Canals was underscored by the fact that a special international legal regime was created for each. See *The S.S. "Wimbledon"*, 1923 PCIJ ser. A, No. 1, 26 (Comparing the multilateral Convention of Constantinople of 1888, which governed the Suez Canal, prohibiting the construction of fortifications commanding that canal; the Anglo-American Hay-Pauncefote Treaty of 1901, which applied to the Panama Canal, did not forbid the United States to erect such fortifications.); See also 1936 Convention Regarding the Regime of the Straits (Resolution adopted July 20, 1936), available at <http://cil.nus.edu.sg/1936/1936-convention-regarding-the-regime-of-the-straits/> (a special international legal regime was also created for the Dardanelles).

remarkable, therefore, if China viewed the Malaccan Strait with intense interest.<sup>132</sup>

American strategists have of course identified China's strategic vulnerability to what they call a "distant blockade" of its energy supplies, an instrument of coercion that could be used either in the event of war or even to bring extreme pressure on China before a war broke out.<sup>133</sup> Military analyst Aaron Friedberg explains that "as part of a distant blockage, U.S. and allied air and naval forces (possibly backstopped by land-based anti-ship cruise missiles) would seek to prevent shipping bound for China from passing through a few narrow choke points far removed from its own territory. The simplest variant of this plan would focus on stopping, seizing or diverting large oil tankers as they approached the Malacca Strait at the southernmost opening of the South China Sea, or the Lombok and Sunda straits that pass between the islands of the Indonesian archipelago further to the east."<sup>134</sup> Such a naval blockade could inflict serious damage on China's economy and would leverage American naval strength, while also avoiding a direct attack on Chinese territory and so lowering the risks of escalation.<sup>135</sup>

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<sup>132</sup> Tim Johnson, *Remaking World Trade? China's Might Driving Plan for Nicaragua Canal*, Pulitzer Center on Crisis Reporting, (June 19, 2015), available at <http://pulitzercenter.org/reporting/nicaragua-central-america-canal-progress-displacement-environment> (Noting that it is not without interest that China is thought to be behind a project to build a new canal in Nicaragua; the project has inevitably invited questions about China's motivation: "Another looming unknown: how the global balance might change with a Chinese-built and -financed canal dug across an isthmus that has been a nearly exclusive American zone for 200 years.").

<sup>133</sup> See Gabriel B. Collins & William S. Murray, *No Oil for the Lamps of China?*, 61 *Naval War College Rev.* 79, 81-89, 92 (2008) (examining the military, political, economic and legal aspects of a "distant" blockade) ("China is not fundamentally vulnerable to a maritime energy blockade in circumstances other than global war."). United States military strategists have also considered a "close" maritime blockade against China, seeking to wage a "war of economic strangulation" by denying China the use of the waters inside the so-called "first island chain" that surrounds its coast. See e.g., Eirik Torsvoll, *Detering Conflict with China: A Comparison of the Air-Sea Battle Concept, Offshore Control, and Deterrence by Denial*, 39 *Fletcher F. World Aff.* 35, 44-45 (2015). See generally Christopher Michaelson, *Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved*, 8 *J. CONFLICT & SEC. L.* 363 (2003) (analyzing the potential legal issues in naval blockades); Sean Mirski, *Stranglehold: The Context, Conduct and Consequences of an American Naval Blockade of China*, 36 *J. Strategic Stud.* 385 (2013) (studying military and political effects of combining close and distant blockades).

<sup>134</sup> FRIEDBERG, *BEYOND AIR-SEA BATTLE*, *supra* note 62, at 105-06.

<sup>135</sup> *Id.* at 107.

Further, China is unlikely to concede the United States uncontested supremacy over the Asian oceanic rim, the world's most dynamic economic area, accounting for 61% of the global population and for 50% of all its commercial shipping, and holding substantial reserves of oil and gas.<sup>136</sup> The "Taiwan Strait Crisis" of 1995-96 revealed to China's military the need to develop the military technology to counter United States naval predominance in the first "island chain" off China's coast. Sensing that Taiwan might be drifting towards a declaration of independence, China test-fired unarmed ballistic missiles into the waters off Taiwan. The Clinton Administration responded forcefully by deploying two aircraft-carrier battle groups to the area. Realizing that it might eventually have to fight a war with the United States over Taiwan and that the United States could deploy overpowering naval forces in the Taiwan Strait against it, China began to develop the military capabilities needed to contest United States dominance in those waters.<sup>137</sup> China may also want to be able to project its powers outside its region, either to protect its growing interests abroad or simply to demonstrate its strength to other States. During the Libyan civil war of 2011, the Chinese Navy sent the missile frigate *Xu Zhou* into the Mediterranean, for the stated purpose of evacuating Chinese nationals from Libya.<sup>138</sup> Overall, it appears that China is "pursuing a maritime strategy consciously designed to achieve near term national security objectives and longer-term regional maritime dominance through both combatant and merchant fleets."<sup>139</sup>

### *Economic Interdependence*

Furthermore, globalized economic interdependence works two ways. South Korea and Australia, two traditional United States

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<sup>136</sup> See Prem Mahadevan, *Strategic Trends 2013: Key Developments in Global Affairs*, 40 Center for Strategic Studies 37 (2013).

<sup>137</sup> See FRIEDBERG, *BEYOND AIR-SEA BATTLE*, *supra* note 62, at 18-19, 25-8; Torsvoll, *supra* note 133, at 35 ("[China has developed] a vast and complex [missile technology that forms] the backbone of what has been labeled anti-access and area denial (A2/AD) capabilities [that have] increasingly threaten[ed] the U.S. military's previously unfettered access to the region.").

<sup>138</sup> Greg Torode & Minnie Chan, *PLA Navy sends warship to safeguard Libya evacuees*, The South China Morning Post, Feb. 26, 2011.

<sup>139</sup> PETER MATTIS, *ANALYZING THE CHINESE MILITARY: A REVIEW ESSAY AND RESOURCE GUIDE ON THE PEOPLE'S LIBERATION ARMY* 16 (2015) (quoting Bernard Cole, *The Great Wall at Sea: China's Navy Enters the Twenty-First Century* 167 (2012))

allies, have so much trade with China that in the event of a conflict between China and the United States, they would have to choose between abandoning United States military protection or seeing their economies crash. It is not certain how they would choose. China's trade and financial relationships with other nations thus gives it extraordinary leverage in dealing with them—and that includes the United States.<sup>140</sup> As other Great Powers have done,<sup>141</sup> China could (and does) use the leverage that its trade and financial relations give it to secure its most important strategic objectives.<sup>142</sup> For instance, in a dispute in 2010 with Japan over the detention of a Chinese fishing trawler captain, China blocked exports to Japan of a so-called rare earth elements, a vital category of minerals used in products including hybrid cars, wind turbines, smartphones and

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<sup>140</sup> See FELDMAN, *supra* note 61 at 11-12, 15 (pointing out the devastating economic consequences to *China* of armed conflict with the United States: “[N]ever before has the dominant world power been so economically interdependent with the rising challenger it must confront.”).

<sup>141</sup> See generally ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FREE TRADE (1945) (Arguing the commercial policy of Nazi Germany, especially in relation to southeastern Europe in the 1930s, was designed to leverage Germany's trade advantages in order to politically control weaker states). The central idea of Hirschman's analysis was that Germany sought to translate those states' economic dependence on access to German markets into control of their politics and strategy. If Germany with its vast market could largely monopolize the export trade of those smaller economies, they would experience great difficulties, including political unrest, if Germany cut off trade with them. The threat of such a cut-off gave Germany a powerful hold over those states' international behavior. Germany was less likely to suffer from the trade interruption than its smaller partners because a smaller proportion of the German economy would be engaged in international trade. Once trade dependency was achieved, Germany exploited its market power to create both political and economic benefits for itself. On the economic side, it could impose higher tariffs on products in accordance with the level of dependency on the German market. On the political side, the payoff would come in the form of increased ability to dominate the smaller state's military strategy and foreign policy. Hirschman believed that economic nationalism of the kind practiced by Nazi Germany was an inherent predisposition of large states, who would always be tempted to use the threat of trade interruption as a tool of power politics.

<sup>142</sup> See 2015 Pentagon Report, *supra* note 22, at 3 (“China has . . . used punitive trade policies as instruments of coercion during past tensions, and could do so in future disputes.”). Thus in 2011, China used its trading power strategically to force General Electric, a major US corporation, to share its advanced avionics technology with a Chinese partner and to relocate the manufacturing of its products from the US to China in order to be able to sell into the Chinese aircraft and avionics market. See Clyde Prestowicz, *Our Incoherent China Policy*, in *The American Prospect* (Fall 2015), available at <http://prospect.org/article/our-incoherent-china-policy-fall-preview#.Vgf6BSZzIoE.mailto>.

The US of course has used trade policy for strategic objectives as well, See Eric A. Posner and John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 14 (2006). The current exclusion of China from the US-led Transpacific Partnership, discussed *infra*, may well be such a case.

guided missiles.<sup>143</sup> China produces more than 90% of the world's supply of these metals.<sup>144</sup> In general, "China is aggressively asserting its economic clout to win diplomatic allies, invest its vast wealth, promote its currency and secure much-needed natural resources."<sup>145</sup> Effective use of its economic and financial leverage would also seem to argue in favor of a policy of pursuing economic over military power. Again, however, China will probably seek to grow militarily as well, despite the risks that will ensue from that course.

We also should not assume that the growth of trade between China and its major partners will bring about a more peaceable security environment. China's largest regional trading partner is Japan. Trade between China and Japan grew to about \$334 billion in 2012 even as political relations between the two Asian giants were deteriorating. And the volume of trade between them has declined since then, in large part *because of* political tensions. Japanese direct investment in China dropped precipitously in 2013, as Japanese firms began shifting capital towards competitors such as Vietnam and Indonesia, where anti-Japanese protests are less likely.<sup>146</sup> In any case, although the idea that the growth of international trade secures peace between trading partners has had important defenders, it seems very doubtful.<sup>147</sup> Indeed, "economic

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<sup>143</sup> See Keith Bradsher, *Amid Tension, China Blocks Vital Exports to Japan*, N.Y. TIMES, Sept. 22, 2010.

<sup>144</sup> See UPDATE 2 – *China loses appeal of WTO ruling on rare earth exports*, REUTERS, Aug. 7, 2014 (Noting that China's restrictions on the exports of rare earth metals has been held to be inconsistent with World Trade Organization (WTO) rules; in 2014, China lost an appeal in the WTO in a suit brought by the United States, Japan and the European Union challenging the legality of its restrictions on the export of such metals. ). See generally Reports of the Appellate Body, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS5431-3/AB/R (adopted July 14, 2014).

<sup>145</sup> Clifford Krauss & Keith Bradsher, *China's Global Ambitions, With Loans and Strings Attached*, N.Y. TIMES, July 24, 2015, available at [http://www.nytimes.com/2015/07/26/business/international/chinas-global-ambitions-with-loans-and-strings-attached.html?\\_r=0](http://www.nytimes.com/2015/07/26/business/international/chinas-global-ambitions-with-loans-and-strings-attached.html?_r=0).

<sup>146</sup> See Michael Schuman, *China and Japan May Not Like Each Other, but They Need Each Other*, TIME, Dec. 1, 2013, available at <http://world.time.com/2013/12/01/china-and-japan-may-not-like-each-other-but-they-need-each-other>.

<sup>147</sup> A sophisticated full-scale study of the question is Dale Copeland, *Economic Interdependence and War* (2014). See also Katherine Barbieri, *The Liberal Illusion: Does Trade Promote Peace?* (2005) (empirical evidence does not support thesis that trade interdependence tends to reduce militarized conflict); David Rowe, *The Tragedy of Liberalism: How Globalization Caused the First World War*, 14 SECURITY STUD. 407 (2005); Kenneth N. Waltz, *The Myth of National Interdependence*, in *Realism and International Politics* 152-65 (2008). For a review of the "peace through trade" theory, see Robert J. Delahunty, *Trade, War, and Terror: A Reply to Bhala*, 9 U. ST. THOMAS L.J. 161

interdependence may heighten rather than defuse political tensions.<sup>148</sup>

Nonetheless, China's military expansion should not be attributed to inherent aggressiveness, desire for domination, or even radical dissatisfaction with the current world order.<sup>149</sup> Rather, we could view it as a natural response to the risk that a coalition is gradually forming to balance against it.<sup>150</sup> China is understandably beginning to feel itself increasingly surrounded by potential adversaries, not least of them the United States, which it believes may be subtly pursuing a policy of "containment." These fears have become more acute since the start of the so-called "Pivot to Asia" under the present United States Administration.<sup>151</sup> For one China observer, "U.S. military strategy in East Asia seems calculated to inflame relations with China . . . American provocation transcends presidencies: it was evident under Clinton and George W. Bush and it continues under Obama."<sup>152</sup>

### *China's Rivalry with Japan*

Obviously, too, Chinese leaders and private citizens view with dismay Japan's expensive rearmament program; the Japanese

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(2011). If anything should discredit the idea that economic interdependence will bring about peace, it is surely the frequency of civil war.

<sup>148</sup> Denny Roy, *Hegemon on the Horizon? China's Threat to East Asian Security*, 19 INT'L SEC. 149, 158 (1994).

<sup>149</sup> See Dingding Chen & Xiaoyu Pu, *Debating China's Assertiveness*, 38 INT'L SEC. 176, 177 (2013/4).

<sup>150</sup> John Mearsheimer, *Can China Rise Peacefully?*, THE NATIONAL INTEREST, Oct. 25, 2014, available at <http://nationalinterest.org/commentary/can-china-rise-peacefully-10204>. ("[A]lmost anything China does to improve its military capabilities will be seen in Beijing as defensive in nature, but in Tokyo, Hanoi, and Washington it will appear offensive in nature. That means China's neighbors are likely to interpret any steps it takes to enhance its military posture as evidence that Beijing not only is bent on acquiring significant offensive capabilities but has offensive intentions as well. And that includes instances where China is merely responding to steps taken by its neighbors or the United States to enhance their fighting power").

<sup>151</sup> On the "pivot," see CRS Report for Congress, *Pivot to the Pacific? The Obama Administration's "Rebalancing" toward Asia*, March 28, 2012, available at <http://fas.org/spp/crs/natsec/R42448.pdf>. But President Obama seems to be reconsidering the "pivot," see Francis Fukuyama, *Dealing with China*, HOOVER INSTITUTION (2014), available at [http://www.hoover.org/sites/default/files/fukuyama\\_dealingwithchina.pdf](http://www.hoover.org/sites/default/files/fukuyama_dealingwithchina.pdf), and it is unclear whether the Obama Administration intends to carry through on the "pivot." See Zachary Keck, *Can the U.S. Afford the Asia Pivot?*, THE DIPLOMAT, March 5, 2014, available at <http://thediplomat.com/2014/03/can-the-us-afford-the-asia-pivot/>. Chinese strategists had seen United States moves in Asia as menacing even before the pivot, however. See Friedberg, *supra* note 1, at 23-24.

<sup>152</sup> Beardson, *supra* note 1, at 273.

Cabinet's reinterpretation of Article 9 of the Constitution of Japan, which is entitled "Renunciation of War"<sup>153</sup>; Japan's emerging trade

<sup>153</sup> On the background of the adoption of this provision, see James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS. 171, 172-76 (1990). Article 9 was drafted, ratified and promulgated in 1946, largely under pressure from General Douglas MacArthur, then the Supreme Commander of the Allied Powers (SCAP) in occupied Japan. MacArthur originally directed that the provision preclude Japan from recourse to war "even for preserving its own security," *id.* at 173, but that language was eventually deleted. Since the outbreak of the Korean War in 1950, Article 9 has been interpreted "flexibly." See *id.* at 176-81; Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT'L L. J. 393, 397-99 (1999). The Japanese Supreme Court has rejected the argument that Article 9 prohibits Japan from engaging in self-defense that is legitimate under international law, see the 1959 *Sunakawa Case*, English trans. at available at [http://www.courts.go.jp/app/hanrei\\_en/detail?id=13](http://www.courts.go.jp/app/hanrei_en/detail?id=13); see also Alfred C. Opler, *The Sunakawa Case: Its Legal and Political Implications*, 76 POL. SCI. Q. 241 (1961) (stationing of United States forces consistent with War Renunciation Clause); Theodore McNelly, *The Renunciation of War in the Japanese Constitution*, 77 POL. SCI. Q. 350 (1962) (background of Article 9). And Japan has long maintained a military in the form of the Japanese Self-Defense Force (JSDF), whose constitutionality under Article 9 the Japanese courts have avoided questioning. See Michael A. Panton, *Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 ASIA-PAC. L. & POL'Y J. 163, 212-4 (2010) (reviewing case law); Glenn D. Hook & Gavan McCormack, *Japan's Contested Constitution: Documents and analysis* 16-17 (2001) (same); Auer, *supra* note 150, at 181-83 (same); Fisher, *supra* note 53, at 409-14 (same); Hideo Wada, *Decisions Under Article 9 of the Constitution – The Sunakawa, Eniwa and Naganuma Decisions*, 9 LAW JAPAN 117 (1976) (same). Until recently, however, Japanese governments have insisted that the JSDF will be deployed only in defense of Japan *itself*. See JAPAN, ARTICLE 9 OF THE CONSTITUTION (2006), available at <http://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf> (comprehensive review of legal and policy issues).

In July, 2014, however, the Japanese Cabinet under Prime Minister Shinzo Abe expressed itself to be willing to engage in *collective* self-defense together with a nation with which it has a "close relationship" in circumstances in which the survival of the Japanese nation is at risk. See CABINET DECISION ON DEVELOPMENT OF SEAMLESS SECURITY LEGISLATION TO ENSURE JAPAN'S SURVIVAL AND PROTECT ITS PEOPLE (July 1, 2014), available at [http://www.mofa.go.jp/fp/nsp/page23e\\_000273.html](http://www.mofa.go.jp/fp/nsp/page23e_000273.html). This document should be read together with Japan's NATIONAL SECURITY STRATEGY (December, 2013), available at <http://www.cas.go.jp/jp/siryoku/131217anzenhoshou/nss-e.pdf>. In these two documents, the Japanese government expresses deep anxiety over the current state of the international security environment in East Asia. Japan's new policy is by no means a radical departure from its earlier, evolving practices. See William Choong, *Defense and Japan's Constitutional Debate*, 57 SURVIVAL 173, 181 (2015) ("In the light of Japan's gradual process of normalization and remilitarization to date, the current push to embrace collective self-defense should be seen as more evolutionary than revolutionary."); see also Eisuke Suzuki, *Japan: Farewell to 'One Country Pacifism'*, THE DIPLOMAT, Aug. 31, 2015, available at <http://thediplomat.com/2015/08/japan-farewell-to-one-country-pacifism/> (arguing that Japan is "moving, however slowly, in the appropriate direction of re-molding Japan into a normal country that is internationally responsible for its conduct"). But the Japanese Cabinet's "reinterpretation" of the nation's Constitution has caused shock waves in China and elsewhere in Asia.

and security arrangements with the United States and Australia<sup>154</sup>; and the developing “strategic partnership” between Japan and India.<sup>155</sup> Nationalistic feelings, moreover, are currently at very high levels among young people in both China and Japan.<sup>156</sup> A poll taken

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Thereafter, in April 2015, the United States and Japan promulgated revised “Defense Guidelines.” See GUIDELINES FOR U.S. JAPAN DEFENSE COOPERATION, Apr. 27, 2015, available at [http://www.defense.gov/pubs/20150427\\_-\\_GUIDELINES\\_FOR\\_U.S.-JAPAN\\_DEFENSE\\_COOPERATION.pdf](http://www.defense.gov/pubs/20150427_-_GUIDELINES_FOR_U.S.-JAPAN_DEFENSE_COOPERATION.pdf). Originally issued in 1979 and revised after the end of the Cold War in 1997, the updated Guidelines are designed to provide for the closer integration of the two nations’ military forces. See James J. Przystup, Institute for National Strategic Studies, *The U.S.-Japan Alliance: Review of the Guidelines for Defense Cooperation* (2015), available at <http://inss.ndu.edu/Portals/68/Documents/stratperspective/inss/Strategic-Perspectives-18.pdf>; Yuki Tatsumi, *4 Takeaways from the New U.S.-Japan Defense Guidelines*, THE DIPLOMAT, Apr. 29, 2015, available at <http://thediplomat.com/2015/04/4-takeaways-from-the-new-us-japan-defense-guidelines/>. Chinese leaders have denounced this new mutual security arrangement. See Shannon Tiezzi, *China Decries New U.S.-Japan Defense Guidelines*, THE DIPLOMAT, May 1, 2015, available at <http://thediplomat.com/2015/05/china-decries-new-us-japan-defense-guidelines/>. The South Korean government has also indicated concern. See Tae-Jun Kang, *South Korea Frets Over U.S.-Japan Defense Guidelines*, THE DIPLOMAT, April 28, 2015, available at <http://thediplomat.com/2015/04/south-korea-frets-over-us-japan-defense-guidelines/>. More recently still, the Japanese Diet has enacted legislation authorizing the use of Japanese forces in armed combat abroad, against provoking concern from both its neighbors and much of the Japanese public. See Jonathan Soble, *Japan’s Parliament Approves Overseas Combat Role for Military*, N.Y. TIMES, Sept. 18, 2015, available at [http://www.nytimes.com/2015/09/19/world/asia/japan-parliament-passes-legislation-combat-role-for-military.html?\\_r=0](http://www.nytimes.com/2015/09/19/world/asia/japan-parliament-passes-legislation-combat-role-for-military.html?_r=0).

<sup>154</sup> See Bill Merkle, *Japan’s New Geopolitics*, THE NATIONAL INTEREST, Aug. 13, 2015, available at <http://www.nationalinterest.org/feature/japans-new-geopolitics-13566>.

<sup>155</sup> The *Tokyo Declaration for India-Japan Special Strategic and Global Partnership* was issued on September 1, 2014. While not a mutual defense treaty, the *Declaration* clearly contemplates closer military ties between Japan and India. One clause states:

11. The two Prime Ministers affirmed their shared belief that at a time of growing turmoil, tensions and transitions in the world, a closer and stronger strategic partnership between India and Japan is indispensable for a prosperous future for their two countries and for advancing peace, stability and prosperity in the world, in particular, in the interconnected Asia, Pacific and Indian Ocean Regions. Prime Minister Abe briefed Prime Minister Modi on Japan’s policy of “Proactive Contribution to Peace” and Japan’s Cabinet Decision on development of seamless security legislation. Prime Minister Modi supported Japan’s initiative to contribute to peace and stability of the region and the world.

For an analysis of the deepening ties between India and Japan, see Brahma Chellaney, *Asia’s Best Friends Shape an Axis*, JAPAN TIMES, Sept. 2, 2014, available at <http://www.japantimes.co.jp/opinion/2014/09/02/commentary/japan-commentary/asia-best-friends-shape-an-axis/#.VCwWAv0o45s>.

<sup>156</sup> See Fukuyama, *Dealing with China*, *supra* note 148, at 3.

in 2014 revealed that most Chinese, and nearly a third of the Japanese, expect a war between the two countries.<sup>157</sup> The underlying cause of the growing tension between China and Japan is not so much about territory as position: their rival claims to the Senkaku/Diaoyu Islands may provide a trigger, but the deeper quarrel is over their relative place in Asia's hierarchy.<sup>158</sup> China's relations with other Asian nations, including Vietnam, Myanmar, Indonesia, the Philippines and Australia have also been deteriorating,<sup>159</sup> although those developments may be offset by China's growing closeness to Russia<sup>160</sup> (its main partner in the Shanghai Cooperation Organization<sup>161</sup>) and even, to some degree, to South Korea<sup>162</sup> and Taiwan.<sup>163</sup> Most of all, however, China is

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<sup>157</sup> See Zachary Keck, *Most Chinese Expect War with Japan*, THE DIPLOMAT, Sept. 11, 2014, available at <http://thediplomat.com/2014/09/poll-majority-of-chinese-expect-war-with-japan/>.

<sup>158</sup> See generally Sheila A. Smith, *Intimate Rivals: Japanese Domestic Politics and a Rising China* 4-9, 20-3 (2015); James Holmes, *Asia's Worst Nightmare: A China-Japan War*, THE NATIONAL INTEREST, Oct. 26, 2014, available at <http://nationalinterest.org/commentary/asias-ultimate-nightmare-china-japan-war-9662?page=show>. Nations fight over rank and status, perhaps even more often than they do over land, resources, or other material goods. See Richard Ned Lebow, *Why Nations Fight: Past and Future Motives for War* (2010).

<sup>159</sup> On the military and political responses of the United States and four of China's near neighbors (Australia, Japan, Vietnam and Singapore) to China's growing military prowess, see Liff & Ikenberry, *supra* note 24, at 69-86.

<sup>160</sup> See Pepe Escobar, *The birth of a Eurasian century*, LE MONDE DIPLOMATIQUE, May 19, 2014, available at <http://mondediplo.com/openpage/the-birth-of-a-eurasian-century>; Dingding Chen, *Are Russia and China Moving Toward a Formal Alliance?* THE DIPLOMAT, May 30, 2014, available at <http://thediplomat.com/2014/05/are-china-and-russia-moving-toward-a-formal-alliance/>. In a televised appearance on April 17, 2014, Russia's President Vladimir Putin said: "Are there plans to establish new blocs? I don't know; we haven't thought about this. But it is absolutely clear that we will be expanding collaboration with China. Our trade with the United States is 27.5 [billion], but trade with China is 87 billion, and it is growing. And experts will agree that China is gradually becoming the number one economic power. The question is when it will happen: in 15, 20 or 25 years. But everybody understands that it is inevitable." *Direct Line with Vladimir Putin*, PRESIDENT OF RUSSIA, Apr. 17, 2014, available at <http://eng.kremlin.ru/news/7034>.

<sup>161</sup> The Shanghai Cooperation Organization has been described as "a sort of anti-NATO, which functions partly to put a spoke in America's wheel, but also allows China and Russia to jockey for position in Central Asia." Beardson, *supra* note 1, at 278.

<sup>162</sup> See Scott A. Snyder, *Can Beijing and Seoul Become Strategic Partners?*, THE DIPLOMAT, July 16, 2014, available at <http://thediplomat.com/2014/07/can-beijing-and-seoul-become-strategic-partners/>. South Korea has been pursuing a policy of "strategic hedging" between the United States and China for some time. See Robert S. Ross, *Bipolarity and Balancing in East Asia in Balance of Power: Theory and Practice in the 21<sup>st</sup> Century*, at 267, 270 (T.V. Paul, James J. Wirtz & Michael Fortmann eds., 2004).

<sup>163</sup> See Coker, *Improbable War*, *supra* note 12, at 114-15; Westad, *supra* note 37, at 393-94; Jonathan Sullivan, *Taiwan and China Edge Ever Closer*, N.Y. TIMES, Feb. 17, 2014,

concerned with the possibility of deepening American antagonism, which it sees reflected in the closer ties the United States is developing militarily and otherwise with several of China's more powerful or more hostile neighbors, including Japan, India,<sup>164</sup> Korea,<sup>165</sup> and Vietnam (where deadly anti-Chinese riots have occurred in 2014).<sup>166</sup> For example, the United States and Vietnam have drawn closer on a variety of fronts since the two nations entered into diplomatic relations in 1995, and a Nuclear Cooperation Agreement between them was signed this year.<sup>167</sup>

We are thus seeing what looks like the beginning of an arms race in east and south Asia. Consider the matter of naval armaments.<sup>168</sup> The United States and its Allies have maintained naval supremacy in Asia since the end of the Second World War; but the situation is increasingly competitive and dynamic. According to *The Japan Times*:

China's submarine fleet . . . is projected to match U.S. numbers by 2020, at 78 vessels each. Many of the Chinese submarines will be stationed at a giant underwater base on Hainan Island, which juts into the South China Sea.

China's moves have spurred a submarine shopping spree across Asia.

This year, Vietnam received the third of six submarines it ordered from Russia plus maritime

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*available at* <http://www.nytimes.com/2014/02/18/opinion/taiwan-and-china-edge-ever-closer.html>.

<sup>164</sup> See Kupchan, *supra* note 72, at 83-84.

<sup>165</sup> For a useful and current review of South Korea's relations with China, Japan and the United States, see Richard Weitz, *Strategic Posture Review: South Korea*, WORLD POLITICS REVIEW, Sept. 18, 2014, *available at* <http://www.worldpoliticsreview.com/articles/14076/strategic-posture-review-south-korea>. In the author's opinion, the United States-South Korea alliance remains "healthy" and now extends beyond the mere protection of South Korea itself.

<sup>166</sup> Jonathan Kaiman & Kate Hodal, *Anti-China riots turn deadly in Vietnam*, THE GUARDIAN, May 15, 2014, *available at* <http://www.theguardian.com/world/2014/may/15/anti-china-riots-turn-deadly-in-vietnam>.

<sup>167</sup> See MARY BETH D. NIKITIN, MARK E. MANYIN & MARK HOLT, CONG. RESEARCH SERV., R43433, U.S.-VIETNAM NUCLEAR COOPERATION AGREEMENT: ISSUES FOR CONGRESS 1 (2014), *available at* <http://www.fas.org/sgp/crs/nuke/R43433.pdf>.

<sup>168</sup> Emerging arms races can be found in other potential theaters of conflict, including, alarmingly, outer space. See Coker, *Improbable War*, *supra* note 12, at 163-70.

patrol aircraft capable of hunting down Chinese subs. Russia is the top military exporter to Asia, followed by the U.S. and then European countries such as the Netherlands.

Over the summer, Vietnamese and Chinese ships rammed each other repeatedly after China moved an oil rig into waters claimed by both countries. Vietnam's military spending expanded by 83 percent over the past five years, making up 8 percent of government spending.

Similarly, Japan is replacing its entire fleet with more modern submarines, South Korea is adding bigger attack submarines and India plans to build six new subs.<sup>169</sup>

### III. *An Asian Security Dilemma?*

International relations theorists have analyzed the kind of situation that exists in East Asia as a variant of what they call the "Thucydidean trap" or the "security dilemma."<sup>170</sup> The security dilemma is a situation in which even non-hostile States interested only in their own preservation and with no desire to attack other States can find themselves on the path to war. The essential postulates of the security dilemma are these: 1) a condition of international "anarchy," meaning only the absence of any authority that transcends and controls individual States; 2) the consequent need for each State to depend on itself (or its allies) for its security; 3) uncertainty regarding the present or future intentions of other States; 4) the risk of destruction if a State fails to prepare for the aggressive or predatory actions of other States. In those conditions, States will take precautionary actions, such as armaments programs and alliances, to protect themselves against present or anticipated threats from other States. Because of the uncertainty of the intentions of other States, the difficulty of distinguishing between

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<sup>169</sup> *Asian nations stock up on weapons to counter China's might*, JAPAN TIMES, Sept. 14, 2014, available at <http://www.japantimes.co.jp/news/2014/09/13/asia-pacific/asian-nations-stock-up-on-weapons-to-counter-chinas-might/#.VEIJ7f0o45s>.

<sup>170</sup> See Coker, *Improbable War*, *supra* note 12, 105-09 (applying concept to United States-China relations).

offensive and defensive weapons, and the tendency to assume a “worst case” outcome in a context of extreme uncertainty, even defensively motivated actions by another State will trigger alarm and be perceived as threatening the security of the State that observes them. The “threatened” State will respond with measures of like kind, generating an escalating pattern of mutual suspicion and mistrust, preparations for war and, often, armed conflict.<sup>171</sup> The security dilemma is a path that can lead to war: as one strategic analyst put it, the security dilemma “is, in essence, an amplifier of anxieties, in which the defensive exertions of the participants stimulate each other and feedback upon themselves.”<sup>172</sup>

The concept of a “security dilemma,” though it cannot explain the origins of all wars, has been central to much American international relations scholarship.<sup>173</sup> John Mearsheimer’s *The Tragedy of Great Power Politics* (2001), a major study in international relations theory, starts from the security dilemma. Mearsheimer says:

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<sup>171</sup> For a brief analysis of the security dilemma, see Jack S. Levy, *War and Peace*, in HANDBOOK OF INTERNATIONAL RELATIONS 350, 353-54 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002) [hereinafter Levy, *War and Peace*]. See also Liff & Ikenberry, *supra* note 24, at 58-61 (defining original concept of security dilemma and explaining later refinements). For a full-length treatment, see Ken Booth & Nicholas J. Wheeler, *The Security Dilemma: Fear, Cooperation and Trust in World Politics* (2008). See also John Herz, *Idealist Internationalism and the Security Dilemma*, 2 WORLD POLITICS 157 (1950); reprinted in John H. Herz, *The Nation-State and the Crisis of World Politics: Essays on International Politics in the Twentieth Century* 72-98 (1976). Early formulations of the security dilemma can be discerned in Thucydides, *History of the Peloponnesian War*, Bk. I, ¶ 23, and in Machiavelli, *The Prince*, Ch. III. For later accounts, applications and criticisms of the security dilemma, see, e.g. John J. Mearsheimer, *The Tragedy of Great Power Politics* (2001); Charles L. Glaser, *The Security Dilemma Revisited*, 50 WORLD POLITICS 171 (1997) [hereinafter, Glaser, *Security Dilemma Revisited*]; Robert Jervis, *Arms Control, Stability, and Causes of War*, 16 POLI. SCI. Q. 239 (1993); Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POLITICS 167, 181 (1978); Randall L. Schweller, *Neorealism’s Status-Quo Bias: What Security Dilemma?*, 5 SEC. STUD. 90 (1991).

<sup>172</sup> Aaron Friedberg, *Ripe for Rivalry: Prospects for Peace in a Multipolar Asia*, 18 INT’L SECURITY 5, 28 (1992/3).

<sup>173</sup> See Robert Jervis, *Perception and Misperception: The Spiral of International Insecurity*, in THEORY AND PRACTICE OF INTERNATIONAL RELATIONS 201 (William Olson, David McLellan & Fred Sondermann eds., 6<sup>th</sup> ed., 1983); Charles L. Glaser, *Security Dilemma Revisited*, *supra* note 173, at 172 (“We can . . . appreciate the importance and impact of security dilemma and offense-defense arguments by realizing that scholars have now employed these arguments effectively to address many of the most important questions of international relations theory and security policy”).

The essence of the [security] dilemma is that the measures a state takes to increase its own security usually decrease the security of other states. Thus, it is difficult for a state to increase its own chances of survival without threatening the survival of other states. John Herz first introduced the security dilemma in a 1950 article in the journal *World Politics*.<sup>[174]</sup> After discussing the anarchic nature of international politics, he writes, “Striving to attain security from . . . attack, [states] are driven to acquire more and more power in order to escape the impact of the power of others. This, in turn, renders the others more insecure and compels them to prepare for the worst. Since none can ever feel entirely secure in such a world of competing units, power competition ensues, and the vicious circle of security and power accumulation is on.” The implication of Herz’s analysis is clear: the best way for a state to survive in anarchy is to take advantage of other states and gain power at their expense. The best defense is a good offense. Since this message is widely understood, ceaseless security competition ensues. Unfortunately, little can be done to ameliorate the security dilemma as long as states operate in anarchy.<sup>175</sup>

Bear in mind, moreover, that the “security dilemma” in its pure form describes the situation of States *that are not hostile to each other*. In the case of East Asia, however, there are already antagonisms between several of the relevant States—China and Japan; China and Vietnam, China and India<sup>176</sup>—that exacerbate the

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<sup>174</sup> John Herz, *Idealist Internationalism and the Security Dilemma*, 2 *WORLD POLITICS* 157 (1950), reprinted in John H. Herz, *The Nation-State and the Crisis of World Politics: Essays on International Politics in the Twentieth Century* (1976).

<sup>175</sup> John J. Mearsheimer, *The Tragedy of Great Power Politics* 35-36 (2001).

<sup>176</sup> Brahma Chellaney, *Asian Juggernaut: The Rise of China, India, and Japan* 169 (2006) (“Sharing one of the world’s longest and most rugged frontiers, China and India are the only two countries today without a fully defined frontline.”). Yet after three decades of negotiation, the two powers have failed to resolve their disagreements; in fact, China may *want* an unsettled border in order to pin down large numbers of Indian Army troops who could otherwise serve on India’s border with Pakistan. *Id.* at 170-1. Most astonishingly, China lays claim to the northeastern Indian province of Arunachal Pradesh, *id.* at 174, where the two nations continue to have episodic military confrontations. *See* India-China

difficulty of avoiding conflict between them. Thus, the “security dilemma” cannot explain *all* of the increasing tension and military build-up in the East Asian region—even if it *can* explain much of them.<sup>177</sup>

States that find themselves in a security dilemma search for ways out of their predicament. One common escape device is to enter into military alliances with other States that they consider friendly, or at least as fearful of a common threat as they are. Banded together with allied States, a State may be more confident about its own security: combined with the forces of the other States, it may be able to withstand, or even overcome, the State that it regards as threatening. The problem is, however, that alliance formation may simply recreate the security dilemma at a higher level. For if State A, considering B to be a danger to its security, allies with C to check that danger, then B, fearing the combined force of A and C, may ally with D as a counter-measure. The security dilemma, in other words, can lead through the process of alliance formation to the construction of a balance of power system, with all its inherent instability.

In these difficult circumstances, the main players in the Asian strategic environment, including the United States, are apparently being drawn, almost irresistibly, towards a deepening security dilemma and eventually, therefore, into a tense and unsteady balance of power system. The Obama Administration’s

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Border Dispute, [http://www.globalsecurity.org/military/world/war/india-china\\_conflicts.htm](http://www.globalsecurity.org/military/world/war/india-china_conflicts.htm); *see also* China’s Arunachal Pradesh Fixation, THE DIPLOMAT (Dec. 16, 2013), <http://thediplomat.com/2013/12/chinas-arunachal-pradesh-fixation/>.

<sup>177</sup> Liff and Ikenberry usefully distinguish between two basic competitive strategic settings in which military competition (including arms races) occurs: that of the traditional, idealized security dilemma (where both states are security seekers motivated by mistrust and uncertainty but not wishing to upset the international status quo), and a second situation in which the states do have a direct conflict of interest (say, over territory or some other material issue) and in which one or both of them seek changes in the status quo in a fundamentally zero-sum manner. *See* Liff & Ikenberry, *supra* note 24, at 63-64. They discern elements of both types of military competition in China’s current relations with its neighbors: thus, China’s relationship with Australia approximates to that of a pure security dilemma; its relationship to Vietnam incorporates more direct conflicts of interest; its relation to Japan stands somewhere in between. They conclude that “[t]raditional, full-scale security dilemma-induced arms races do not appear to be occurring—at least not yet. Nevertheless, there is evidence of a security-driven spiral gradually unfolding between China and several states that is driving investments in military capabilities and that may worsen significantly in the years ahead.” *Id.* at 88.

“pivot to Asia” seems to be a step in that direction.<sup>178</sup> So, too, are calls in the United States for the creation of an “Asian NATO.”<sup>179</sup> And the Trans-Pacific Trade Pact (TPP), a United States-supported trade agreement that would cover some 40% of United States imports and exports and that currently includes twelve Pacific-rim nations (but which China was not invited to join) can be considered the economic component of the “pivot.”<sup>180</sup> It has been described as “one of the pillars of U.S. rebalancing strategy in the Asia Pacific [that] is trying to create a club that excludes China.”<sup>181</sup> Thus, China

<sup>178</sup> The “pivot” seems to have been designed as a “strategic marketing exercise,” intended to avoid the appearance of United States weakness after the American withdrawals from Iraq and Afghanistan. Hayton, *supra* note 94, at 200.

<sup>179</sup> Shigeru Ishiba, the Secretary General of Japan’s Liberal Democratic Party and a former Defense Minister, has called for “an Asian version of NATO.” See Shigeru Ishiba, *Asia needs body like NATO*, JAPAN TIMES, Mar. 6, 2014, available at <http://www.japantimes.co.jp/news/2014/03/06/national/politics-diplomacy/ishiba-asia-needs-body-like-nato/#.VdxyXf0o6M8>; see also Zachary Keck, *Is an Asian NATO Possible?*, THE DIPLOMAT, Apr. 17, 2014, available at <http://thediplomat.com/2014/04/is-an-asian-nato-possible/>. On Chinese concerns about an “Asian NATO,” see Jonathan Ward, *Chinese Analysts Interpret Modi’s New India*, CHINA BRIEF, June 19, 2014, at 8-11, available at [http://www.jamestown.org/uploads/media/China\\_Brief\\_Vol\\_14\\_Issue\\_12\\_\\_\\_\\_.pdf](http://www.jamestown.org/uploads/media/China_Brief_Vol_14_Issue_12____.pdf).

<sup>180</sup> See Hayton, *supra* note 94, 205-206.

<sup>181</sup> Jonathan Soble, *Failure of Obama’s Trans-Pacific Trade Deal Could Hurt U.S. Influence in Asia*, N.Y. TIMES, Jun. 16, 2015, (quoting Song Guoyou, Professor at the Center for American Studies at Fudan University in Shanghai), available at [http://www.nytimes.com/2015/06/17/world/asia/obama-trans-pacific-partnership-asia.html?\\_r=0](http://www.nytimes.com/2015/06/17/world/asia/obama-trans-pacific-partnership-asia.html?_r=0). Japanese Prime Minister Shinzo Abe reinforced this perception by telling the US Congress in April 2015 that the TPP was not only about trade but also “about our security. . . Long term, its strategic value is awesome.” *Id.* In a similar vein, US Secretary of Defense Ash Carter said (shortly before a visit to Japan) that the TPP was “as important to me another aircraft carrier.” Jacob M. Schlesinger & Mitsuru Obe, *TPP: Momentum on Trade Deal Bolsters U.S., Japan Efforts to Counter China*, WALL ST. J., April 17, 2015, available at <http://www.wsj.com/articles/tpp-momentum-on-trade-deal-bolsters-u-s-japan-efforts-to-counter-china-1429249448>. The strategic value of the TPP to the US has been explained as follows:

Besides creating jobs, the TPP may also alter the balance of power in the Asia-Pacific. The treaty will increase the rate of economic growth in the United States and in an array of friendly nations while simultaneously diverting trade flows away from Washington’s greatest competitor, China. More important than any of these absolute changes in economic output, though, is the *relative* change in *national power*, itself the product of economic might. Whereas trade is often discussed in absolute terms, relative gains are more important in the often zero-sum world of international politics. If the TPP can change the trajectory of American power relative to China’s, it may be the single most important factor in whether the United States retains its “indispensable” role in the 21st Century.

could fairly infer that the United States and its allies are developing a two-pronged strategy—military and economic—for countering its rise. On the other side, China’s growing friendship and collaboration with Russia can be interpreted as an early stage in the formation of an opposing power bloc. In other words, the world seem to be starting out on a path that could well lead to major war in Asia. Certainly the precedents are alarming.

### *Wars of hegemonic transition*

It gets even worse. The risk of eventual major war with China appears significant, not only from the perspective of “balance of power” theory, but also from that of its leading “structuralist” rival, “power transition” theory.<sup>182</sup>

Some leading international relations theorists (within the broader school of thought called “realists”) have argued for the theory that major wars often arise during periods of “power transition,” in which a previously dominant but declining hegemon attacks, or is attacked by, a rising hegemon seeking to displace it.<sup>183</sup> Jack Levy, a leading international relations scholar, explains the power-transition theory as follows:

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Sean Mirski, *The Trans-Pacific Partnership: China, America, and the Balance of Power*, THE NATIONAL INTEREST, Jul. 5, 2015, available at <http://nationalinterest.org/print/feature/the-trans-pacific-partnership-china-america-the-balance-13264>. Likewise, the TPP is intended to jump-start Japan’s economic growth, and thus contribute to maintaining Japanese power and the centrality of the US-Japan alliance in East Asia. See Hayley Channer, *How Japan Can Support America’s Pivot: TPP and a Strong Economy*, THE NATIONAL INTEREST, May 19, 2014, available at <http://nationalinterest.org/blog/the-buzz/how-japan-can-support-americas-pivot-tpp-strong-economy-10488>.

However, China has apparently expressed some interest in joining the TPP at a later stage, indicating that it does not necessarily regard the agreement as threatening. See Victor Beattie, *Obama: China ‘Put Out Feelers’ on Joining TPP*, THE VOICE OF AMERICA, Jun. 4, 2015, available at <http://www.voanews.com/content/obama-china-put-out-feelers-about-joining-tpp/2806949.html>.

<sup>182</sup> Balance of power and power transition together form “the two major strands of structural theorizing” in international relations. “Power transition theories suggest that hegemony, rather than balance, is the natural state of affairs in the international system. Conflict arises when an existing hegemon’s power inevitably wanes relative to some upcoming challenger.” The theories differ in that “balance of power sees stability when power levels near, while transitionism views this situation as fraught with conflict potential.” JOHN ARQUILLA, *DUBIOUS BATTLES: AGGRESSION, DEFEAT, AND THE INTERNATIONAL SYSTEM* 10 (1992).

<sup>183</sup> See, e.g., DALE C. COPELAND, *THE ORIGINS OF MAJOR WAR* (2000) (arguing that declining hegemons tend to cause preventive wars); ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981).

Hegemons commonly arise and use their strength to create a set of political and economic structures and norms of behavior that enhances the stability of the system at the same time that it advances their own security. Differential rates of growth lead to the rise and fall of hegemons . . . and the probability of a major war is greatest at the point when the declining leader is being overtaken by the rising challenger. Either the challenger initiates a war to bring the benefits from the system into line with its rising military power, or the declining leader initiates a preventive war to block the rising challenger while the opportunity is still available.<sup>184</sup>

The British Empire in the late nineteenth and early twentieth century can be seen as a declining hegemon, whose supremacy was being challenged by two rising hegemons, Germany and the United States. Interestingly, the liberal international order that Britain created and sustained as a hegemon, which provided conditions highly favorable to economic growth and international trade, also made possible the rise of the German and American challengers to Britain. Britain was eventually able to beat back the German challenge, but only at the cost of fighting two major wars that exhausted it and brought about the loss of its hegemonic position. Britain managed the power transition to American hegemony peacefully, without having to go to war; but it important to recall that Anglo-American relations in the late nineteenth century were not always easy, and that the United States demanded that Britain give up any thoughts it might have had to playing a leading role in the affairs of this hemisphere. As United States Secretary of State Richard Olney wrote in a dispatch to Britain during the 1895 Anglo-American dispute over Venezuela's borders, "today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition."<sup>185</sup> Despite its naval superiority over the United States, Britain wisely compromised.<sup>186</sup>

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<sup>184</sup> Levy, *War and Peace*, *supra* note 171, at 355.

<sup>185</sup> See, e.g., R.A. HUMPHREYS, ANGLO-AMERICAN RIVALRIES AND THE VENEZUELA CRISIS OF 1895, 17 TRANSACTIONS OF THE ROYAL HIST. SOC. 131, 150 (1967).

<sup>186</sup> *Id.* at 163. For a full account of Britain's strategic objectives and diplomatic methods in relation to the United States in the Venezuelan boundary dispute and other controversies

The rise of the United States and Germany and the decline of Britain illustrate that power transitions to a new hegemonic order may, but need not, lead to war. They also show that merely by their success in establishing a secure and stable global order, hegemony may create the conditions in which powerful challengers to that order may emerge. The United States-dominated global order undoubtedly provided the environment in which China could rise and become a challenger. The key question is whether the power-transition that seems to be underway now will result in war between the United States and China or not. And even if it does not lead to war, might it lead to the practical exclusion of the United States from the affairs of East Asia, as the aggressive United States application of the Monroe Doctrine led to Britain's practical exclusion from the affairs of the Western hemisphere?

The historical record is discouraging. Harvard's Richard Rosecrance has argued that of the thirteen challenges to hegemony since 1500, ten have resulted in major war.<sup>187</sup> (The three he identifies that did not were the United States challenge to Britain in the late 19<sup>th</sup> century; the Soviet challenge to the United States in the Cold War; and—oddly—the Japanese challenge in the 1980s to the Soviets.) Among power transitions that *did* lead to hegemonic wars are the Dutch challenge to Spain in the seventeenth century; the British challenge to the Dutch in the eighteenth century; the French challenges to the British in the eighteenth and early nineteenth centuries; and the German challenges to Britain in the twentieth century.

In these unpropitious circumstances, is it imaginable that there might be a "Concert of Asia," modeled on the successful nineteenth century Concert of Europe?

#### IV. *A Concert of Asia?*

In a brilliant, original and provocative book, the highly regarded Australian strategist Hugh White has argued for a "Concert of Asia," modeled on the early nineteenth century Concert of Europe.<sup>188</sup> If one of the most compelling duties of international

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between the two states in the late nineteenth and early twentieth centuries, see STEPHEN R. ROCK, *APPEASEMENT IN INTERNATIONAL POLITICS* 25-47 (2000).

<sup>187</sup> See ROSECRANCE, *RESURGENCE*, *supra* note 56, at 94-95 & 185-186 n.1.

<sup>188</sup> White, *supra* note 11. White is not the only important international relations theorist to argue for a "grand bargain" with China in which the United States accepts the necessity of fundamental alterations in the East Asian strategic environment. For example, Charles

relations theorists and of international lawyers is to try to conceptualize institutional arrangements that will maintain the peace of nations,<sup>189</sup> White discharges that duty in a most impressive way.

In essence, White is proposing a power-sharing arrangement designed to resolve the disputes that might lead to Great Power armed conflict and so maintain the peace and stability of East Asia. The two central pillars of the proposed Concert would be China and the United States, but they would be joined by two other Great Powers, India and Japan.<sup>190</sup> White writes:

The central idea of this book is that such an understanding is possible today between the United States and China . . . [T]he best way for America to respond to China's growing power is to agree with China to share the leadership of Asia. This kind of order is hard to imagine, harder still to achieve, and if achieved, it would be difficult to maintain. It would hardly be worth considering if the alternatives were not so bad. But if there is any way to avoid both the dangers of Chinese domination and the risks of rivalry, it will be through a new order in which China's authority and influence grow enough to satisfy the Chinese, and America's role remains large enough to ensure that China's power is not misused.<sup>191</sup>

White fully recognizes the extreme difficulty of achieving such a power-sharing relationship. It would involve, he admits, diplomacy of the highest order, of a kind the world has not seen for decades. The two major States involved, the United States and China, would have to reach a common understanding as to the scope and limits of their powers. They would, for a start, have to

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Glaser has proposed that the United States negotiate an agreement with China that ends the American commitment to defend Taiwan. See GLASER, U.S.-CHINA GRAND BARGAIN, *supra* note 62. Interesting as Glaser's proposal is, there is insufficient space to explore it here.

<sup>189</sup> See Benjamin Miller, *Is peace possible—and how? The four-fold response of international relations theory*, 63 INT'L J. 163 (2009/10).

<sup>190</sup> Despite their obvious vulnerabilities, both Japan and India continue to rank among the world's Great Powers. See Walter Russell Mead, *The Seven Great Powers*, THE AMERICAN INTEREST, Jan., 2015, available at <http://www.the-american-interest.com/2015/01/04/the-seven-great-powers/>.

<sup>191</sup> *Id.* at 126.

acknowledge that each other's basic objectives are legitimate. For China, that would mean accepting a continuing American presence in East Asia and an important influence on events in that region; for the United States, it would mean acceptance of the fact that as China's power grows, its demands for greater authority and influence in the region are legitimate.

To reach such an agreement, both China and the United States would have to make major concessions. Perhaps the most significant of these is that each side would have to accept the other *as an equal*. China would have to abandon any thought of a return to something like the classic "tributary system" in East Asia, in which it held unchallenged dominance over its near neighbors (excepting Japan), and which provided a comprehensive order within which the military, diplomatic and trade relations subsisting in East Asia were conducted. Or, to put the matter in terms more familiar to Americans, China would have to forego any idea of a "Monroe Doctrine" for East Asia<sup>192</sup> that excluded the United States from the region.<sup>193</sup> For its part, the United States would have to give up any attempt to destabilize or change China's form of government: it would have to accept CPC control of China as permanent and legitimate, even if that meant that China remained persistently undemocratic. The United States would also have to dial down, though not silence, its criticism of China's human rights practices and policies. Both these choices would be extremely hard for the United States to make ideologically.<sup>194</sup> Furthermore, just as China would have to agree not to seek primacy in the region, so too would the United States. Any American attempt at "containing" China would have to be set aside. Both sides would have to agree,

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<sup>192</sup> John Mearsheimer forecasts that outcome as a long-term goal for China, should its economic growth continue. "A much more powerful China can also be expected to try to push the United States out of the Asia-Pacific region, much as the United States pushed the European great powers out of the Western Hemisphere in the nineteenth century. We should expect China to devise its own version of the Monroe Doctrine, as imperial Japan did in the 1930s. In fact, we are already seeing inklings of that policy. For example, Chinese leaders have made it clear they do not think the United States has a right to interfere in disputes over the maritime boundaries of the South China Sea, a strategically important body of water that Beijing effectively claims as its own." Mearsheimer, *Can China Rise Peacefully?*, *supra* note 150.

<sup>193</sup> Exclusion from the most vital and dynamic area of the global economy would be disastrous for the United States, even if it did not endanger its existence. The situation for the United States would be like that in which Britain would have found itself if Napoleon's "Continental System" had succeeded in shutting it out from trading with the Continent.

<sup>194</sup> See Feldman, *supra* note 61, at 38-48; 114-116.

not of course to forego strategic competition altogether, but to mute it for the sake of the larger interests of the East Asian region as a whole. Nothing side would consider taking actions that would deeply injure or affront the other. Rather, they would seek to resolve major disputes by negotiation, together with other Concert Powers. While the parties would not necessarily accept limitations on their arms programs, they would forswear the effort to achieve a clear preponderance of military power. And all parties would have to explain and defend these compromises and power-sharing arrangements to their citizens.

White envisages that both Japan and India would become members of the Concert of Asia—but not Russia (which is more a European than an Asian power) nor important but medium-size States like South Korea, Indonesia or Vietnam. He proposes this requirement because a Concert system works best if its membership is small (which it would be with only four members) and if the parties to it are major powers of roughly comparable strength. (That seems to mean having sufficient power to make agreements by some combination of other Powers unworkable. Thus, India alone could probably frustrate an initiative to which China, the United States and Japan had agreed.) Acting in concert, China, India, Japan and the United States could perhaps settle the most vexing problems that threaten the peace of East Asia, including North Korea's (and perhaps eventually Vietnam's) nuclearization; the future of Taiwan; the ownership of the South China Sea islands; and the fate of India's border provinces.

To be sure, White acknowledges that both Japan and India could balk at these proposals. In Japan's case, it would mean abandoning its post-Second World War alliance with the United States, Japan would no longer be an American client. Instead it would have to rearm to a point at which it could credibly resist any of the other Concert Powers—including the United States—if it considered its demands inordinate. Such a course would obviously be both expensive and worrying for Japan; it would probably entail major political and constitutional upheaval. The status quo in East Asia since the end of the Second World War has suited Japan very well: relying for its security on the United States' military protection, it has been able to achieve unprecedented prosperity (Indeed, American administrations have sometimes considered

Japan to be something of a free-rider).<sup>195</sup> But the post-War status quo is collapsing, and the realistic alternatives for Japan are not attractive: either gradually becoming a strategic client of China's, or relying on an increasingly undependable American alliance. But for a Concert to work, Japan cannot be entirely in the American camp: it must be able to sway between the United States and China. Problems in joining the Concert would also exist for India. Apart from anything else (such as the loss of its traditional close relationship with Russia), India might regard the problems that beset East Asia as too remote from its concerns. Longer-term, however, a Concert of Asia would have to include a rising power like India in order to remain effective.

Could China, the United States, Japan and (eventually) India agree to an arrangement of this kind? As White fully acknowledges, the odds are surely long. In particular, it would be necessary to overcome the deep mistrust that exists between China and Japan. Mindful of Japan's attempt to conquer it in the nineteen thirties and forties, China might well fear remilitarization on the part of Japan, even if that was the price of ending the United States-Japan alliance. Japan would somehow have to appear to China as at once far more powerful and yet still unthreatening.

China would also have to make sacrifices that it might well consider unacceptable. Many Chinese political and economic leaders appear to think that China's rise to regional and perhaps global dominance is irresistible; therefore, time is on China's side. From such a perspective, it would make little sense to exchange future hegemony for current convenience. Moreover, China would have to abandon its traditional claim to be entitled to unassailable pre-eminence within its region (or, indeed, within the known world). Confucius is reported to have said: "In heaven, there are not two suns; in a country, there are not two kings."<sup>196</sup> China would have to forsake its deeply-held, millennial belief that unity, not plurality, is the natural order of world civilization. In the Concert's heaven, there would be three (and eventually four) suns: not only China's, but those of the United States, Japan and India as well.

But before we can reach a settled conclusion, however, it will be necessary to consider more deeply what a "concert" system

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<sup>195</sup> See Thomas J. Christensen, *China, the U.S.-Japan Alliance, and the Security Dilemma in East Asia*, 23 INT'L SEC. 49, 58-59 (1999).

<sup>196</sup> CONFUCIUS (KONG ZI), *THE BOOK OF RITES* (LI JI), 46 (Dai Sheng ed., James Legge trans., 2013).

is, how it differs from a balance of power system, why a Concert of Europe emerged and proved successful for so long in the nineteenth century, and whether that model could be followed in twenty-first century East Asia.

### *Concert Systems vs. Balances of Power*

A “concert” system must be contrasted with a “balancing” system. To oversimplify radically, a “concert” system involves a balance of *rights*, not a balance of *power*. Europe seems to have approximated most closely to a “concert” system in the period between the end of the Napoleonic Wars (1814/5) and the Crimean War (1853-6), which pitted Britain and France against Russia. In that (roughly) forty year period, the great powers of Europe not only avoided conflict with each other, but co-operated on important occasions to maintain the peace and order of the Continent. Change was indeed possible, with regard both to territorial boundaries and governmental systems; but it was brokered by the agreements of the concert members. Moreover, because no State that is part of a “concert” system seeks to dominate the others, but rather all are agreed on maintaining the status quo, a “concert” system avoids the nervousness and jockeying that accompanies a “balancing” system.

There are four essential differences between a “balance” and a “concert” system. First, in a balance system, no Power or bloc of Powers forswears the right to achieve dominance over any or all of the others. Each Power may properly aim at securing its own hegemony. Indeed, the very idea of balancing and rebalancing *presupposes* continuing State competition for dominance. What cabins power and prevents hegemony is the emergence of an opposing coalition of States. There need be no common purpose to the coalition other than to prevent a leading Power from becoming ascendant. States with widely different forms of government can unite into such a coalition.<sup>197</sup> In concerts, States may have markedly different forms of government, but they share a certain unity of purpose that survives shifting power differentials. Moreover, concert Members forego opportunities to augment their power in relation to others.

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<sup>197</sup> In the Thirty Years War, Catholic France joined Protestant Sweden in fighting the Catholic Holy Roman Empire over Germany. Authoritarian Russia fought alongside liberal Britain and France in 1914 against authoritarian Germany and Austria-Hungary. The liberal capitalist Anglo-American democracies banded together with Stalin’s U.S.S.R. in the Second World War.

Second, balances are often unstable (and arguably even more so when they are multipolar than when they are bipolar).<sup>198</sup> For one thing, they tend to produce arms races. Since no State has forsworn the objective of achieving dominance, any State in the balance may pursue an aggressive armaments program. Thus, in late nineteenth century Europe, a rising Germany sought to create a naval force that would rival or outstrip that of Britain.<sup>199</sup> Arms races can be fiscally damaging to all sides, but if one State begins an aggressive armaments program, other States have little choice but to compete up to the limits of their resources. Under the Reagan Administration, the United States used its superior economic strength and technological advantages to pursue an arms race that, coupled with the collapse of the price of oil (the Soviets' staple of international trade) eventually brought the Soviet Union to heel.<sup>200</sup> Concerts do not tend to provoke arms races.

Third, balance systems may tend to produce preventive wars.<sup>201</sup> If a State that has a military advantage over another State begins to see its lead slipping away, and especially if it lacks the resources to maintain its lead, it may yield to the temptation to strike at the other State while it still has the edge. Thus Germany in 1914 may have thought that Russia's dramatic population growth, expanding economy and plans for military recovery would erode its

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<sup>198</sup> International relations theorists debate whether bipolar or multipolar systems are the more stable. For the view that multipolar systems provide less permissive conditions for major war, see Dale C. Copeland, *Neorealism and the Myth of Bipolar Stability*, 5 SECURITY STUD. 29 (1996). For the view that bipolar systems are more stable, see Kenneth Waltz, *The Stability of a Bipolar World*, 93 DAEDALUS 881 (1964). And some contend that neither bipolarity nor multi-polarity is highly relevant to stability, see Ted Hopf, *Polarity, the Offense-Defense Balance, and War*, 85 AMER. POL. SCI. REV. 475 (1991).

<sup>199</sup> See, e.g., John H. Maurer, *Arms Control and the Anglo-German Naval Race before World War I: Lessons for Today?*, 112 POL. SCI. Q. 285 (1997).

<sup>200</sup> Reagan's defense build-up raised United States defense spending from \$134 billion in 1980 to \$253 billion in 1989. By the end, American defense spending reached 7 % of GDP. Those increases arguably compelled the Soviet Union in the 1980s to raise the share of its defense spending from 22 % to 27 % of GDP, while freezing the production of civilian goods at 1980 levels. See Ronald Hilton, *The Collapse of the Soviet Union and Ronald Reagan* (n.d.), available at [http://wais.stanford.edu/History/history\\_ussrandreagan.htm](http://wais.stanford.edu/History/history_ussrandreagan.htm). For the counter-argument that the United States arms build-up did *not* hasten the collapse of the Soviet Union, see Fred Chernoff, *Ending the Cold War: The Soviet Retreat and the US Military Buildup*, 67 INT'L AFF. (Royal Institute of Int'l Aff. 1944-) 111 (1991).

<sup>201</sup> Indeed, some balance of power theorists explicitly *approve* preventive war, if only to restore or maintain a disturbed equilibrium. Thus in his essay *Of Empire*, Lord Bacon wrote: "There is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war." Quoted in Per Murrseth, *Balance-of-Power Thinking from the Renaissance to the French Revolution*, 1 J. PEACE RESEARCH 120, 121 (1964).

lead over Russia in ground forces. In that situation, Germany was surely tempted to strike at Russia before it lost the advantage.<sup>202</sup> But in concerts, there is no such built-in tendency for preventive wars to occur.

Finally, in a balance system, the very existence of every State is constantly at risk. Although the complete disappearance of a large or medium-sized State is highly unusual (eighteenth century Poland is a rare instance), no State can rest certain that it will not be destroyed or dismembered if defeated in war. (Thus Germany in 1945, though not destroyed as a State, was partitioned into two antagonistic States, East and West Germany; and in 1919, though not partitioned, Germany suffered a substantial loss of population and territory.) Opposing States in a balance system do not need to recognize each other's *legitimacy*: they are free to discredit or subvert each other's governments, poison the loyalty of their populations, or wage continuing propaganda and diplomatic offenses against them. In concerts, major powers recognize the others' legitimacy, respect the others' boundaries and do not seek to destabilize the others' governments.

As I have suggested, Asia seems to be moving in the direction of a balance of power system, arraying China and (perhaps) Russia on the one side and the United States, Japan, some smaller Pacific powers and (perhaps) India on the other. While a balancing system might indeed preserve the peace and stability of East Asia, the situation would be fraught, much as the bipolar Cold War balance was. Moreover, without arms control agreements, the system would tend to produce arms races. And because there are many flashpoints in East Asia—North Korea, Taiwan, and the South

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<sup>202</sup> On the question whether the First World War was a preventive war on Germany's part, see Samuel R. Williamson, Jr., *July 1914 revisited and revised*, in *THE OUTBREAK OF THE FIRST WORLD WAR: STRUCTURE, POLITICS, AND DECISION-MAKING* 30 (Jack S. Levy & John A. Vasquez ed., 2014); Dale Copeland, *International relations theory and the three great puzzles of the First World War*, in *id.*, 167. In *THE RUSSIAN ORIGINS OF THE FIRST WORLD WAR* (2011), Sean McMeeken agrees that the war was preventive, but argues that the blame for it must be shared between Germany and Russia. On McMeeken's account, the question of Constantinople and the Dardanelles Strait was of overriding strategic importance to Russia, and Russia brought the war on in order to prevent the looming Ottoman naval build-up in the Black Sea. See *id.* at 29-40. "It is high time that Russia . . . receive its fair share of scrutiny for its role in unleashing the terrible European war of 1914 . . . Neither a deliberate German plot nor an avoidable accident, the First World War was the inexorable culmination of a burgeoning imperial rivalry between Wilhelmine Germany and tsarist Russia in the Near East, each lured in its own way down the dangerous path of expansionist war by the decline of Ottoman power." *Id.* at 243. McMeeken's analysis is challenged in Lieven, *supra* note 123, at 337-342.

China Sea Islands to name but a few—the system would be highly war-prone. Given the undesirability of that outcome, could we—despite the difficulties already noted—move towards a “concert” system instead?

### *The Concert of Europe*

Let us consider in closer detail the “Concert of Europe” that provides the historical model for White’s proposed “Concert of Asia.”

The Concert of Europe was created at the Peace Conference at Vienna in 1815, after the defeat of Napoleonic France.<sup>203</sup> Europe had been plunged into general war for almost a quarter century before, from the start of the French Revolutionary Wars in 1792 through the Napoleonic Wars that ended at Waterloo in 1815. The Powers, great and small, assembled for the peace conference had two overriding objectives. First, they wanted an end to any further wars or revolutions in the European State system. In effect, they wanted a “restoration” of the pattern of monarchic rule, or the *ancien régime*, under which nearly all of continental Europe had been governed before the outbreak of the French Revolution in 1789.<sup>204</sup> But second, they also wanted to *avoid* returning to the “balance of power” system that had prevailed in their international relations before 1789.<sup>205</sup> They considered that the “balance” system was too prone to war—that it encouraged, not merely competitive, but also predatory, practices among States. Of these instances, the most conspicuous was the progressive partition of the independent State of Poland by its more powerful neighbors, Prussia, Austria and Russia, which had eventually wiped Poland off the map. The Concert of Europe system was the result. It was, in the estimation of some historians, as well as in that of the participants themselves,

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<sup>203</sup> A classic study of the Conference is HENRY KISSINGER, *A WORLD RESTORED: METTERNICH, CASTLEREAGH, AND THE PROBLEMS OF PEACE, 1812-1822* (1973). See also CHARLES F. DORAN, *THE POLITICS OF ASSIMILATION: HEGEMONY AND ITS AFTERMATH*, 147-88 (1971).

<sup>204</sup> See James Joll, *The Ideal and the Real: Changing Concepts of the International System, 1815-1982*, 58 INT’L AFF. 210, 211 (1982).

<sup>205</sup> For a survey of the scholarly findings that the eighteenth century European balance of power was predatory and war-prone, see Robert J. Delahunty & John C. Yoo, *Kant, Habermas, and Democratic Peace*, 10 CHI. J. INT’L L. 437, 442-443 (2009).

a novel international system, and a brilliant triumph of skillful diplomacy.<sup>206</sup>

The Concert of Europe that emerged from the Vienna Peace Conference was founded on the ideas of *legality*, *legitimacy* and *right*, rather than primarily on that of power. Henry Kissinger writes:

Paradoxically, this international order, which was created more explicitly in the name of the balance of power than any other before or since, relied the least on power to maintain itself. This unique state of affairs occurred partly because the equilibrium was designed so well that it could only be overthrown by an effort of magnitude too difficult to mount. But the most important reason was that the Continental countries were knit together by a sense of shared values. There was not only a physical equilibrium, but a moral one. Power and justice were in substantial harmony. The balance of power reduces the opportunities for using force; a shared sense of justice reduces the desire to use force.<sup>207</sup>

Leaders of the successful coalition that had defeated Napoleonic France understood that while they had won a resounding victory, they had still to make a peace, and that for that peace to be durable, it had to be fair to all, including France. Shortly after the final defeat of Napoleon, Prussian General August Rühle von Lilienstern explained the vital differences between “victory” and “peace”:

Victory . . . is not always the necessary condition of conquest or of peace, and peace is not always the necessary result of victory and conquest . . . Victory and conquest are often causes of the continuation, the renewal and multiplication of war . . . [O]ne only wages war for [the sake of] peace, and . . . one should only wage war, in order afterwards to build it

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<sup>206</sup> See, e.g., DAVID C. HENDRICKSON, *UNION, NATION, OR EMPIRE: THE AMERICAN DEBATE OVER INTERNATIONAL RELATIONS, 1789-1941* at 75 (2009) (describing the Concert as “an inspired example of cooperation among states. . . a cooperative effort that was unprecedented, from which useful lessons may still be learned”).

<sup>207</sup> HENRY KISSINGER, *DIPLOMACY* 79 (1994).

the more firmly and intensively on the lawful understanding between States.<sup>208</sup>

Rühle's observations reflect a return to the traditional European understanding—ruptured by Napoleon—that the object of war can only be peace, and that a peace can be lasting only if it is accepted as just.<sup>209</sup>

How did the Concert system work?

Each Great Power in the concert—Britain, Prussia, Austria, Russia and, eventually, France accepted the existence of the other, regardless of the differences in the forms of government under which they lived. (Britain and, later, France were constitutional monarchies; Russia, Prussia and Austria were absolutist.) Further, *three* of the Powers—Russia, Prussia and Austria—formed a distinct sub-system, the “Holy Alliance,” that supported absolutism within each of its three members and promised to intervene in other monarchical States to prevent revolutions. Members of the Concert did not pursue competitive advantages over one another if such pursuits would have endangered their solidarity or tended to breed discontent: thus, the Vienna Peace Conference not only *restored* defeated France to its pre-war boundaries, but even *enlarged* them, in order to ensure that an aggrieved France would not return to war. Such concessions to international solidarity would, however, have cut against the balancing scheme, in which each State seeks to weaken or destroy potential rivals.

Because each State accepted or even guaranteed the existence of each other and forswore designs on each other's territory or population, States could breathe easier. The anxieties and suspicions that lead to arms races were abated. Disputes between two or more Concert members tended to be resolved at periodic diplomatic conferences of *all* the Concert members, rather than by bilateral use of force. Despite significant disagreements over the merits of different forms of government, no Concert member attempted to provoke revolution, stimulate dissent or otherwise seek to destabilize in any of the others. The two militarily dominant members of the Concert—Britain and Russia—did not use

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<sup>208</sup> Quoted in Beatrice Heuser, *Victory, Peace, and Justice: The Neglected Trinity*, 69 JOINT FORCES Q. 6, 8 (2013).

<sup>209</sup> For that interpretation, see Heuser, *supra* note 204, at 8 (discussing the object of war during the Napoleonic Wars).

their superior strength to weaken or overawe the weaker members—France, Prussia and Austria.

The Concert of Europe lasted for about a generation from 1815 until the outbreak of the Crimean War in 1853 which pitted two Concert powers (Britain and France) against a third (Russia). Fundamentally, the Crimean War arose out of the emerging risk of the collapse of the Ottoman Empire—not itself considered a “European” State,<sup>210</sup> but one so closely abutting on Europe that its fate was a matter of general European concern. Russia was seeking to aggrandize itself at the expense of the declining Ottomans; Britain and France feared that such aggrandizement would threaten their vital interests outside Europe.

As international security régimes go, the Concert system was a remarkable success. It prevented major war in Europe for nearly forty years; and when such a war broke it, it was over lands that were located on Europe’s periphery. And it did more than merely prevent Great Power war; rather, it helped to produce many other significant international public goods.<sup>211</sup>

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<sup>210</sup> The Ottoman Empire was formally admitted into the European States system only in 1856, under Article VII of the Treaty of Paris that ended the Crimean War. In that clause, the major European States “declare the Sublime Porte [*i.e.*, the Ottoman Empire] admitted to participate in the advantages of the Public Law and System (Concert) of Europe.” See generally Gerrit Gong, *The Standard of “Civilization” in INTERNATIONAL SOCIETY* (1984).

<sup>211</sup> Historian Paul Schroeder writes:

The most impressive aspect of post-1815 European politics is not simply the virtual absence of war. More notable is an array of positive results achieved in international politics in this era, of problems settled and dangers averted by diplomacy. . . . [A] short list of the accomplishments would have to include the following: the speedy evacuation of Allied armies from France and France’s quick reintegration into the European Concert; the completion and implementation of the federal constitution of Germany; the suppression of revolutions in Naples, Piedmont, Spain, and the Danubian Principalities by international action, without serious European quarrels; the recognition of Latin American independence; the prevention of war between Russia and Turkey for seven years (1821 to 1828), and a moderate end to that war after it did break out; the creation of an independent Greece; the prompt recognition of a new government in France after the revolution of 1830; the creation of an independent, neutralized Belgium. . . ; the prevention of international conflict in 1830-1832 over revolts in Italy, Germany, and Poland; the managing of civil wars in Spain and Portugal without great-power conflict; and two successful joint European rescue operations for the Ottoman Empire.

Several historically specific circumstances undoubtedly contributed to the Concert's success. After almost a quarter century of war and revolution, Europe was exhausted by both. European States demanded a respite—more, a long recovery—from those conditions. They were therefore strongly disposed to cooperate with one another in restoring and maintaining stability. Moreover, most European ruling dynasties feared for their survival after the French Revolution; even England, the least revolution-prone member of the Concert, witnessed serious internal disturbances during the Concert's life span.<sup>212</sup> Hence, European governments were unusually ready to cooperate with and make concessions to one another for the sake of maintaining peace. The fear of a recurrence of a revolution in France and the ensuing outbreak of another great war against that Power augmented the general desire to cooperate. Further, such inter-state competition as there was largely shifted into the non-European world: Russia sought to extend its Empire east into Asia and south into the Middle East; Britain pursued its imperial projects in Asia; France expanded into North Africa; Prussia and Austria were generally content to remain continental powers only. Finally and most importantly, a significant change in consciousness seems also to have occurred: European statesmen and diplomats began thinking and acting in terms of the interests of *Europe* as a collectivity, as against thinking only in terms of the national interests of their several States.

This last point is critical. The consciousness of a common European fate arose, not only from the shared experience of a generation of war and the heady excitement of a decisive military victory, but also from the very circumstances in which the end of the long war and the peace conference took place. During the last two years of the war, and even more during the Congress of Vienna, “the sovereigns and leading diplomats of the Allied countries had become accustomed to very close co-operation. They travelled together for hundreds of miles, they often stayed together in small inns, they saw each other almost every day . . . [T]hey seem to have begun to appreciate each other's interests and to share each other's apprehensions . . . [T]hey grew accustomed to dealing with foreign affairs in much the same way as they were used to tackle internal

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Paul Schroeder, 19<sup>TH</sup>-Century International System: Changes in the Structure, 36 WORLD POLITICS 1, 3 (1986).

<sup>212</sup> The “Peterloo Massacre” of 1819 is one such incident. See E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 669-699 (1966).

affairs: that is to say, they held discussion with a handful of people who mattered, and followed them up by concerted action.”<sup>213</sup> And they became aware that the international system they were creating was a novelty – in fact, a stunning diplomatic breakthrough. The British Foreign Minister Viscount Castlereagh wrote in 1818 that the Concert:

really appears to me to be a new discovery in the European Government, at once extinguishing the cobwebs with which diplomacy obscures the horizon, bringing the whole bearing of the system into its true light, and giving to the great Powers the efficiency and almost the simplicity of a single State.<sup>214</sup>

And in a report of March 1818, the Austrian statesman Friedrich von Gentz, who had been the secretary to the Congress of Vienna, wrote that “the political system that is established in Europe since 1814 and 1815 is a phenomenon unheard of in the history of the world.”<sup>215</sup>

The sense of belonging to a European “family” or society of states that stood over and above individual states and that had distinct claims of its own persisted for decades after the Congress of Vienna. Ten years after the end of the Napoleonic Wars, the Prussian statesman Friedrich Ancillon, described the Concert of Europe in this way:

The five great powers, closely united among themselves and with the others, form a system of solidarity, by which one stands for all and all for one; in which power appears only as protection for everybody’s possessions and rights; in which the maintenance of the whole and the parts within legal

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<sup>213</sup> H.G. SCHENK, *THE AFTERMATH OF THE NAPOLEONIC WARS: THE CONCERT OF EUROPE – AN EXPERIMENT* 125 (1947).

<sup>214</sup> *Id.* at 126.

<sup>215</sup> CARSTEN HOLBRAAD, *THE CONCERT OF EUROPE: A STUDY IN GERMAN AND BRITISH INTERNATIONAL THEORY 1813-1914*, at 17 (1970). Gentz went on to *contrast* the Concert system, “a principle of general union, reuniting the entirety of States through a federative tie, under the direction of five principal Powers,” with the balance of power, a principle that had “only too often troubled and bloodied Europe through three centuries.” As a result of the Concert, he claimed, Europe had become “a great political family.” *Id.*

bounds, for the sake of the peace of the world, has become the only aim of political activity; in which one deals openly, deliberates over everything collectively and acts jointly.<sup>216</sup>

This view of the Concert remained widely shared. The States assembled in the London Conference of 1831 could themselves declare: “*Chaque Nation a ses droits particuliers; mais l’Europe aussi a son droit; c’est l’ordre social qui le lui a donné.*”<sup>217</sup>

But the emergence of such a common consciousness is unlikely; its continued existence is fragile; and its disappearance tends to lead to a return to a balance of power system. That, indeed, is what happened in Europe after the breakdown of the European Concert in the Crimean War.

### *The Concerts of Europe and Asia Compared*

The success and longevity of the Concert of Europe depended on a change in the *consciousness* of Europe’s Great Powers: their leaders and diplomats came to think of, and defer to, the interests of Europe as a whole, rather than merely consulting their own national interests (as in a balancing system). The circumstances existing in Europe after the fall of Napoleon were exceptionally favorable to that development. In particular, the long war of the European Powers against France, which extended from 1792 to 1815, induced a sense of solidarity and a willingness to cooperate among the allied Powers that seem to have endured well beyond their victory. Some analysts therefore have argued that a “concert” system is only attainable in the wake of a major war.

Thus, Robert Jervis has noted that the Concert of Europe “was characterized by an unusually high and self-conscious level of cooperation among the major European powers. They did not play the game as hard as they could; they did not take advantage of others’ short-term vulnerabilities . . . Multilateral and self-restrained

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<sup>216</sup> HOLBRAAD, *supra* note 215, at 37.

<sup>217</sup> Martin Wight, *Why is there no International Theory?*, 17 *DIPLOMATIC INVESTIGATIONS* 35, 46 (Martin Wight & Herbert Butterfield eds., 1966) (“Each Nation has its particular rights; but Europe also has its own right, and it is the social order that has given it to it.”). One should also note that the idea of Europe as in some way composing a single unitary commonwealth, which ideally ought to be directed “towards a community of power rather than towards a balance of power,” had had distinguished intellectual forebears, including Archbishop Fénelon, Jean-Jacques Rousseau and Immanuel Kant. Maurseth, *supra* note 201, at 128-30.

methods of handling their problems were preferred to the more common unilateral and less restrained methods.”<sup>218</sup> What made this unusual outcome possible? For Jervis, the explanation lies in the long war the allies had fought against France’s drive for supremacy:

Concert systems form after, and only after, a large war against a potential hegemon because such a conflict alters the . . . assumptions [that States need to be able to ally freely if non-permanently with one another and that war is a legitimate tool of statecraft] and increases the incentives to cooperate . . . First, [counter-hegemonic war] leads to unusually close bonds among the states of the counter-hegemonic coalition, even though disputes and hostility within the coalition never disappear. It is hard to form such a coalition in the first place, and even the shared experience of fighting a winning war does not remove all sources of friction. But it does tend to produce significant ties among allies . . . [Second] is the belief that the defeated hegemon is not a normal state. Under the balance of power, all states are potentially fit alliance partners; none is seen as much more evil than any other. But a war against a potential hegemon alters this belief. France after the Napoleonic wars and Germany after the two World Wars were not seen as similar to other states. Instead, they were thought to be ineradicably aggressive . . . Thus, even though the victors may reintegrate the losing state into the international system – as the powers did after the Napoleonic wars – a significant part of the purpose of doing so is to continue to restrain it.<sup>219</sup>

Jervis’s analysis seems to be correct. In most circumstances, major States will have little interest in cooperating with one another when cooperation entails significant harm to their national interests. And they will often tend to *balance* against one another in order to

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<sup>218</sup> Robert Jervis, *From Balance to Concert: A Study in International Security Cooperation*, 38 *WORLD POLITICS* 58, 59 (1985).

<sup>219</sup> *Id.* at 60-61.

prevent any one State from becoming excessively powerful. The chances of extensive and durable cooperation are much improved, however, when the States in question have gone through a protracted but victorious war in alliance with one another against a State seeking supremacy, and remain fearful even after that victory that the defeated State will make another attempt. The memory of the war infuses the victors with the spirit of cooperation that creates the concert; the continuing fear that the defeated enemy may rise again keeps the concert alive.<sup>220</sup> In such conditions, but not in others, a concert system may emerge. Plainly, these conditions are *not* met for the members of the prospective Concert of Asia.

### *The “Concert” of North America*

Confirming this analysis is the case of the United States itself. The original union of the American States can be seen as a highly intensified “concert”—the Concert of North America.<sup>221</sup> The union was forged in the Revolutionary War, and was consolidated by the Constitution of 1787. The memory of the shared experience of war and victory encouraged the deeper and more integrated union that the Constitution was intended to create. In *The Federalist* No. 2, John Jay invoked the recollection of wartime solidarity, urging the American States and people to form a closer union because “by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, [they] have nobly established general liberty and independence.”<sup>222</sup> David Ramsay’s *History of the American Revolution*, first published in 1789, also affirmed that through the experience of the Revolutionary War, especially in the Continental Army, “a foundation was laid for the establishment of a nation, out of discordant materials.”<sup>223</sup> The specter of the return of British domination—which became a real threat in the War of 1812—helped cement the Union in this early phase. But the British

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<sup>220</sup> See *id.* at 65-67 (discussing fear of a recurrence of revolution in France and the ensuing risk of another counter-hegemonic war against it); see also ERIC HOBBSBAWM, ECHOES OF THE MARSEILLAISE: TWO CENTURIES LOOK BACK AT THE FRENCH REVOLUTION 4-5 (1990) (positing that the French Revolution was widely perceived throughout nineteenth century as marking a decisive turning-point in history).

<sup>221</sup> See HENDRICKSON, *supra* note 202 (discussing the (original) American Union as a form of heightened *international* cooperation).

<sup>222</sup> THE FEDERALIST NO. 2, at 6 (John Jay).

<sup>223</sup> DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 316 (2d ed. 1990).

threat receded after the War's end in 1815.<sup>224</sup> As the Founding generation died off, memories of the Revolutionary War faded and fears of Britain threat waned, the American Concert began to unravel. The lifespan of the early concert was about a generation. By 1820, the Missouri crisis raised the possibility that the Union would dissolve in sectional conflict.<sup>225</sup> It was restabilized for nearly another generation (until 1850) by the Missouri Compromise of 1820, which can be seen as a kind of balance of power arrangement. Under the Compromise, the South in effect received a guarantee of sectional equilibrium in the Senate, to be maintained thenceforward by admitting slave and free States in pairs.

Reviewing the situation in 1850, Florida Congressman David Yulee defended “the settled policy to preserve, as nearly as possible, in one of the branches of the Legislature of the Union, that balance of power between two of the great divisions of the republic, which is so important to the harmony and security of the whole, and to the permanency of the Union.”<sup>226</sup> And as the Senate voted for the admission of California in 1850 – which upset the sectional equilibrium in that body—Mississippi Senator Jefferson Davies objected that “we are about permanently to destroy the balance of power between the sections of the Union, by securing a majority to one, in both Houses of Congress . . . when those who are to have the control in both Houses of Congress will also have the Executive power in their hands.”<sup>227</sup> Ten years later, when a Northern-based anti-slavery party did indeed assume control of the Executive branch, the South concluded that the balance of power within the Union had swung decisively and permanently against it; and the Civil War ensued.

The history of the Concert of North America roughly parallels that of the Concert of Europe. It arose out of the experience of a long and difficult war that forged a common sense of purpose and the makings of a collective identity from different but allied States and peoples. It was held together by the fear of the

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<sup>224</sup> See ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS, & INDIAN ALLIES* 437-39 (2011).

<sup>225</sup> On the Missouri Compromise, see DON E. FEHRENBACHER, *SECTIONAL CRISIS AND SOUTHERN CONSTITUTIONALISM* 9-23 (1995) (noting that the end of the War of 1812, together with the advent of a general peace in Europe, helped to precipitate “the first sectional crisis over slavery”).

<sup>226</sup> JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY 1789-1861: A STUDY IN POLITICAL THOUGHT* 106 (1963).

<sup>227</sup> *Id.* at 109.

return of the defeated but still powerful foe. And it lasted for about a generation, or until the geopolitical threat posed by that foe abated. As before, these conditions are not met in East Asia.

#### V. “Conflict prevention” as an alternative to a “Concert”?

Perhaps a more modest project than a fully-fledged Concert of Asia might be feasible; certainly the idea may be worth consideration. The project in question could conceivably serve as a confidence-building measure, and so lead to further and deeper cooperation between the Great Powers of East Asia. In a nutshell, rather than attempting to create a “Concert,” the Great Powers should gradually institute a series of measures for “conflict prevention.”<sup>228</sup>

As we have seen, China has in recent years been asserting increasingly bold claims over the South China Sea, and taking forcible measures to back up those claims. Based more on history than on current international law, China now claims ownership over about 80% of those waters. About 40% to 50% of the world’s trade—and most of China’s imported oil supply—traverses these waters. They are obviously of the highest strategic sensitivity, not only to China, but to nations like Japan and South Korea.<sup>229</sup> One writer summarizes:

Oil heading east fuels the giant economies at the other end of the South China Sea: Taiwan, South Korea, China and Japan. To the west there flows the combined output of the workshops of the world: hardware and software, headwear and footwear. The best guess suggest that more than half the world’s maritime trade goes through the Straits of Malacca,

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<sup>228</sup> “Conflict prevention” can of course take many forms, but here it refers primarily to a deepening process of agreements through which States that were initially rivals or even outright enemies come to adjust their differences and learn to co-operate with one other. The Anglo-French agreements that led to the *entente cordiale* of 1904 is a good example. Britain and France had historically been enemies and, in the late nineteenth century, remained rivals for dominance in much of Africa. Their rivalry even threatened to lead to war. Gradually, however, the two States made agreements that reduced the tensions between them and, in time, led to a warm relationship. For a study of the background, see Christopher Andrew, *France and the Making of the Entente Cordiale*, 10 *Hist. J.* 89 (1967).

<sup>229</sup> See Alexander L. Vuving, *Vietnam, the US, and Japan in the South China Sea*, *THE DIPLOMAT*, Nov. 26, 2014, available at <http://thediplomat.com/2014/11/vietnam-the-us-and-japan-in-the-south-china-sea/> (“besides its economic value, the SCS also has an enormous strategic value for several countries and an increasing symbolic value for some of the disputants.”).

along with half the world's liquefied natural gas and one-third of its crude oil. If the ships stopped moving, it wouldn't be long before the lights in some parts of the world started going out.

The South China Sea is both the fulcrum of world trade and a crucible of conflict. There were battles in 1974 and 1988 and there have been dozens of less violent confrontations since. The United States has been involved since the beginning and India has begun to take an interest.<sup>230</sup>

China's pursuit of its claims have increasingly provoked incidents with its weaker neighbors in that region, including Vietnam and the Philippines. Both of the latter nations have been developing their coastal and other military forces in the hopes of deterring further Chinese encroachments on what they see as their own valid claims. Of late, the disputes appear to be intensifying, and include the risk of armed clashes between United States Navy vessels operating in China's Exclusive Economic Zone and naval Chinese forces.<sup>231</sup>

The proposal is, in essence, that the South China Sea be demilitarized (or more precisely, de-navalized).<sup>232</sup> Most of it should

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<sup>230</sup> Hayton, *supra* note 94, at xvi.

<sup>231</sup> See Bonnie S. Glaser, *Armed Clash in the South China Sea Contingency Planning Memorandum*, COUNCIL ON FOREIGN RELATIONS Apr. 2012, available at <http://www.cfr.org/world/armed-clash-south-china-sea/p27883>; *Recent Trends in the South China Sea Disputes*, BOSTON GLOBAL FORUM, June 2015, available at <http://bostonglobalforum.org/wp-content/uploads/Recent-Trends-changes-in-the-South-China-Sea-Disputes.pdf>.

<sup>232</sup> Recently, at a US-China Summit meeting in Washington, DC, President Xi announced that China would not "militarize" the artificial islands it has been building in the South China Sea. Although the extent of this commitment is uncertain, it is a welcome step in the direction recommended by this paper. See Carole E. Lee, Colleen McCain Nelson & Jeremy Page, *U.S.-China Summit Yields Tentative Deals*, in *The Wall Street Journal* at A6 (Sept. 26/7, 2015).

Previously, the ASEAN nations and China had agreed to a non-binding political "Declaration of Conduct" relating to the South China Sea, the 2002 *Declaration on the Conduct of Parties in the South China Sea*, available at <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>. This Declaration is – at best – "soft law," and some nations, including the US, wish to see it replaced by a "Code of Conduct" of greater legal effect. See *The White House National Security Strategy* 13 (February 2015) (supporting "the early conclusion of an effective code of conduct for the South China Sea between China and [ASEAN],") available at [https://www.whitehouse.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy.pdf](https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf); Le Hong Hiep, *Law and the South China Sea*, in *The*

be declared off-limits to the navies (and perhaps also the coastal forces) of any of the regional powers, including the United States, China and Japan. The core idea, plainly, is to defuse the growing tensions in Southeast Asia that arise from the disputes over these islands. The hope is that, if successful, the demilitarization of the South China Sea could lead in time to closer and more extensive cooperation between the United States, China and Japan on other matters of vital interest to them all. If the initial collaboration worked, later actions could be modeled on it—for instance, the demilitarization of the East China Sea and the waters surrounding the Senkaku/Diaoyu Islands. And if that later step worked, the three leading nations might then seek to move forward to the demilitarization, neutralization and unification of the Korean peninsula.<sup>233</sup> Gradually, the most acute points of conflict between them could be reduced. Something like a “Concert” of Asia might eventually begin to emerge.

There are precedents for the complete or partial demilitarization of strategically sensitive areas.<sup>234</sup> These have often included maritime areas, even extensive ones. Under Article XI of the Treaty of Paris (1856),<sup>235</sup> concluding the Crimean War, the Black

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*Diplomat* (July 19, 2011), available at <http://thediplomat.com/2011/07/law-and-the-south-china-sea/>. The proposal offered here would take the current Declaration of Conduct to an altogether higher level.

<sup>233</sup> For a different plan for the reunification of Korea, see Gregory Macris, *China on Korean Reunification: Spoiler, Beneficiary, or Something in Between?*, available at <https://www.usnwc.edu/Lucent/OpenPdf.aspx?id=156>.

<sup>234</sup> At the Congress of Vienna in 1815, the Great Powers used both demilitarization and “neutralization” (which is akin to demilitarization) as conflict prevention devices. See Alice Ackermann, *The Idea and Practice of Conflict Prevention*, 40 *J. Peace Res.* 339, 340 (2003); Louise Richardson, *The Concert of Europe and Security Management in the Nineteenth Century*, in *IMPERFECT UNIONS: SECURITY INSTITUTIONS OVER TIME AND SPACE* 52 (Helga Haftendorn, et al. eds., 1999); Malbone W. Graham, *Neutralization as a Movement in International Law*, 21 *AM. J. INT’L L.* 79, 82 (1927). Thus, the Treaty of Paris of November 20, 1815 prohibited fortifications in the town of Hüningen in Alsace. See 4 RUDOLF BERNHARDT, *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW: USE OF FORCE – WAR AND NEUTRALITY PEACE TREATIES N-Z* 32 (1982). For numerous other cases, see 3 J.H. W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 500-12 (1970); Friedrich Kratochwil, *Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System*, 39 *WORLD POLITICS* 27, 40-41 (1986).

<sup>235</sup> Treaty of Paris art. XI, 1856 (“ARTICLE XI. The Black Sea is Neutralised; its Waters and its Ports, thrown open to the Mercantile Marine of every Nation, are formally and in perpetuity interdicted to the Flag of War, either of the Powers possessing its Coasts, or of any other Power, with the exceptions mentioned in Articles XIV and XIX of the present Treaty”). There were minor exceptions to this general rule.

Sea was demilitarized.<sup>236</sup> The Rush-Bagot Treaty between the United States and Great Britain, concluded after the War of 1812, substantially demilitarized the Great Lakes of British and American warships.<sup>237</sup> In 1971, the UN General Assembly adopted a resolution calling for the Indian Ocean to be declared a “zone of peace.”<sup>238</sup> Later, in 1986, Soviet leader Mikhail Gorbachev, in an address to the Indian Parliament, supported a proposal to demilitarize the Indian Ocean.<sup>239</sup>

Land masses too have been demilitarized. The Egypt-Israel Peace Treaty (1979)<sup>240</sup> limits the forces Egypt can station on the Sinai Peninsula. Article 1 of the Antarctica Treaty of 1959 demilitarizes that continent.<sup>241</sup> The Versailles Treaty<sup>242</sup> and the Locarno Treaty<sup>243</sup> provided for the demilitarization of the Rhineland. Article 13 of the 1923 Lausanne Treaty<sup>244</sup> provided for the partial demilitarization of certain Greek islands. Article 9 of the Svalbard Treaty (1920)<sup>245</sup> commits Norway to the demilitarization of the Archipelago of Spitsbergen. In *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple for Preah Vihear (Cambodia v. Thailand)*, the International Court of Justice ordered the creation of a “provisional demilitarized zone”

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<sup>236</sup> Russia announced in 1870 that it would no longer observe the Treaty’s requirements with regard to the Black Sea. See PHILIP TOWLE, ENFORCED DISARMAMENT: FROM THE NAPOLEON CAMPAIGNS TO THE GULF WAR 51-65 (1997).

<sup>237</sup> The treaty originally took the form of an exchange of diplomatic notes, but was later ratified by the US Senate. For the text, see Richard Rush & Charles Bagot, *British-American Diplomacy Exchange of Notes Relative to Naval Forces on the American Lakes (1817)*, available at [http://avalon.law.yale.edu/19th\\_century/conv1817.asp](http://avalon.law.yale.edu/19th_century/conv1817.asp).

<sup>238</sup> See *UN General Assembly Resolution on Indian Ocean as Zone of Peace*, 11 Int’l Leg. Materials 217 (1972).

<sup>239</sup> See Steve Goldstein, *Gorbachev Endorses Demilitarizing Indian Ocean*, PHILA. INQUIRER, Nov. 28, 1986, available at [http://articles.philly.com/1986-11-28/news/26091452\\_1\\_indo-soviet-relations-nuclear-free-world-mikhail-s-gorbachev](http://articles.philly.com/1986-11-28/news/26091452_1_indo-soviet-relations-nuclear-free-world-mikhail-s-gorbachev).

<sup>240</sup> Peace Treaty Between Israel and Egypt, Isr.-Egypt, Mar. 26, 1979, 1138 U.N.T.S. 71, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201138/volume-1138-I-17855-English.pdf>.

<sup>241</sup> The Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71, available at [http://www.ats.aq/documents/ats/treaty\\_original.pdf](http://www.ats.aq/documents/ats/treaty_original.pdf)

<sup>242</sup> Treaty of Peace Between the Allied and Associated Powers and Germany, and Protocol [Treaty of Versailles], Arts. 42, 43, June 28, 1919, A.T.S. 1.

<sup>243</sup> Locarno Treaty, Arts. 1 and 2, Sep. 14, 1926, 54 L.N.T.S. 290.

<sup>244</sup> Treaty of Lausanne, July 23, 1923, U.K.T.S. 16, available at [http://wwi.lib.byu.edu/index.php/Treaty\\_of\\_Lausanne](http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne)

<sup>245</sup> Svalbard Treaty, Feb. 9, 1920, 2 L.N.T.S. 8, available at <http://emeritus.lovdata.no/traktater/texte/tre-19200209-001.html#map009>

around a Temple whose ownership is claimed by both Cambodia and Thailand.<sup>246</sup>

The proposed naval demilitarization would not have to be absolute. For one thing, the South China Sea has a long history of infestation by pirates.<sup>247</sup> Were it to be absolutely demilitarized, piracy would be sure to return. The obvious answer, however, is that demilitarization need not be complete. An international naval task force composed of warships from the United States, Chinese and Japanese Navy, under the rotating command of American, Chinese and Japanese Admirals, could be assigned responsibility for policing the waters and preventing pirate attacks.<sup>248</sup> Furthermore, it might also be necessary for warships to enter the demilitarized zone in order to provide humanitarian relief in the event of a natural or other catastrophe (The United States Navy was used to bring relief to the endangered population of Fukushima in Japan after the nuclear accident there in 2011). Warships of coastal powers would have to be permitted to enter the demilitarized in “hot pursuit” of criminal vessels breaking past the territorial waters of the pursuing authority. Any demilitarization agreement would have to provide for these and other such contingencies.

Demilitarization would not, of course, be a comprehensive solution to the problems at issue between China and its southern neighbors. There is an economic dimension, as well as a security dimension, to China’s interest in the South China Sea. Still outstanding would be the question of the ownership of the seabed resources linked to possession of the disputed islands or other maritime features in the South China Sea—though these appear to be much less valuable than China has believed.<sup>249</sup> While demilitarization could relieve tension over the movement of shipping across the South China Sea, it would not address the

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<sup>246</sup> 2011 ICJ Rep. 537, 552 at ¶ 61.

<sup>247</sup> See *Malaysia v. Singapore* at ¶ 57; Jonathan De Hart, *Pirates of the Southeast Seas*, THE DIPLOMAT, July 23, 2013, available at <http://thediplomat.com/2013/07/pirates-of-the-southeast-asian-seas/>.

<sup>248</sup> Since 2008, the Chinese Navy has taken part in multinational antipiracy operations in the Gulf of Aden. See Andrew S. Erickson & Austin M. Strange, *No Substitute for Experience: Chinese Antipiracy Operations in the Gulf of Aden*, 10 CHINA MARITIME STUDIES 9, 46-50 (2013), available at [https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/CMS10\\_Web\\_2.aspx](https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/CMS10_Web_2.aspx). (For the debates among Chinese legal experts over the issues that China’s participation involves, see *id.* at 46-50, 70-72.) This existing practice could serve as a model for collaborative antipiracy operations in the South China Sea.

<sup>249</sup> See Hayton, *supra* note 94, at 147-49. But see Kaplan, *supra* note 114, at 10.

ownership of the natural resources in and below the waters. To the extent that the disputes between China and its neighbors arise out of rival claims to the resources of the seabed in those waters, it would, therefore, also be necessary to compromise and adjust those claims and to develop reasonable rules for apportioning the resources at stake. That could not be done by a consortium of the United States, China and Japan alone. Still, those three nations could use their influence to shape a more definitive settlement of the issues. One possibility that might be explored would be a multilateral agreement to place the disputed areas under international control as a maritime preserve and share out the resources.<sup>250</sup>

There is also a substantial legal problem for the demilitarization proposal. Even if the United States, China and Japan agreed to refrain from sending warships into the demilitarized zone for other purposes, other naval powers would retain the right under international law to send or station their own warships there. A United States-China-Japan Agreement could not legally bar the Australian, Indian or Russian Navies, say, from entering the South China Sea in full force. The United States Navy has been particularly insistent that its warships have the right under international law, not only to traverse international waters, but even to mount surveillance on the warships of another country within that country's Exclusive Economic Zone (EEZ).<sup>251</sup> In the "*Cowpens*

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<sup>250</sup>See *Barren rocks, barren nationalism*, THE ECONOMIST, Aug. 25, 2012, available at <http://www.economist.com/node/21560882>.

<sup>251</sup>An EEZ is an area beyond and adjacent to a coastal state's territorial sea. In its EEZ, a coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds." See UNCLOS, arts. 55-56. At least some UNCLOS clauses, including "the institution of the exclusive economic zone," are considered to be customary international law. See *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, 1985 I. C.J. Rep. 13, ¶ 34. For background on the negotiating history of the UNCLOS, see *Maritime Dispute (Peru v. Chile)*, 2014 I. C.J. Rep. 3, ¶¶ 115-16, available at <http://www.icj-cij.org/docket/files/137/17930.pdf>. For the differing views of the effect of UNCLOS (or the customary law rules it is said to include) with regard to foreign warships in a state's EEZ, see Erik Franckx, *American and Chinese Views of Navigational Rights of Warships*, 10 Chinese Journal of International Law 187 (2011); Erik Slavin, *Analysts: US, China Legal Views make more 'Cowpens incidents' likely*, STARS AND STRIPES Dec. 19, 2013, available at <http://www.stripes.com/news/analysts-china-us-legal-views-make-more-cowpens-incidents-likely-1.258357> (stating that the United States legal position is that Navy may conduct surveillance and other operations in international waters even within 200 nautical miles of another nation; China and about 25 other nations dissent from that view).

incident” of 2013, a United States Navy Aegis cruiser, the *Cowpens*, was tracking a Chinese naval strike group including China’s sole aircraft carrier, the *Liaoning*, in international waters in the South China Sea. Reportedly, one of the ships in the Chinese group abruptly swerved onto the *Cowpens*’ path, risking a collision and forcing the *Cowpens* to make a radical maneuver to avoid ramming it. The United States Navy insisted after the incident (through Admiral Samuel Locklear, head of the Pacific Command) that the avoidance maneuver should not be taken as a precedent, and that the United States “will operate freely in international waters . . . That’s the bottom line. We will operate there.”<sup>252</sup> But if the United States asserts the right of its warships to operate freely in international waters in the South China Sea, it must necessarily concede the same right to the warships of other naval powers.

Part of the answer, however, may be for the three Great Powers concerned to seek a decision by the UN Security Council, acting under its Chapter VII authority, to ban other States’ warships from the area, with whatever limited exceptions might be applicable. The Council could also authorize the United States, Chinese and Japanese navies to eject any forbidden foreign warships from the waters, by force if necessary.<sup>253</sup> Under Article 25 of the UN Charter, Member States have agreed “to accept and carry out the decisions of the Security Council.”<sup>254</sup> And although a Security Council decision authorizing interference with the passage of warships through the South China Sea would likely conflict with the general international law of the sea, Art. 103 of the UN Charter provides that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Assuming, then, that the Council has authority under Chapter VII to order the waters demilitarized (in

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<sup>252</sup> French, *supra* note 94, at 99.

<sup>253</sup> Compare S.C. Res. 665 ¶ 1 (1990) (in which the Council “[c]alls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).”).

<sup>254</sup> On the legally binding character of Security Council decisions, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 16, 53-54, ¶¶ 115-16 (June 21).

order to prevent threats to or breaches of the peace in the area), and assuming too that no P5 Council member would veto the proposed Resolution and that the affirmative votes for it are sufficient, this could be at least an interim legal solution. Alternatively, the United States, China and Japan could seek to obtain voluntary agreements from other powers to respect the demilitarized zone by limiting or prohibiting entry into the zone by their naval forces.

In addition to the problems already identified (and they are substantial), other problems surely remain, and would have to be negotiated through. How, for example, should the parties deal with a situation like that of the Chinese interdiction of the USNS *Impeccable* in 2009?<sup>255</sup> The *Impeccable*, though owned by the United States Government and controlled by the Department of Defense, was operated by a private company. It was gathering intelligence inside China's EEZ near a Chinese submarine base when intercepted and forced to retreat by Chinese vessels. The incident caused recriminations on the part of the two nations affected: China claimed that the United States could not collect intelligence information by conducting operations inside its EEZ with its permission; the United States maintained that international law permitted it to engage in such activities in international waters. Should naval demilitarization include ships operated by private contractors on behalf of national militaries? And should intelligence gathering (or espionage) be among the activities precluded by any demilitarization agreement? Answering questions such as these would no doubt entail difficult bargaining, and it cannot be assumed that they would be resolved satisfactorily to all.

More importantly, as with White's "Concert" proposal, all three of the United States, China and Japan would stand to gain (if also to lose) from this proposal. The United States would lose its current naval dominance in the region—but would be assured that the Chinese Navy would not contest its supremacy and eventually oust it. China would abandon any hope it may be entertaining of securing dominance—but it would no longer leave the United States Navy in a position to disrupt its supply of Middle Eastern oil, or to choke off its sea trade. Japan would also be relieved of the risk that China would someday control the sea routes that are as critical to its survival as they are to China's. And in order to ensure that each of the three responsible Parties had the opportunity to test the proposal

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<sup>255</sup> For an account of this episode, see Hayton, *supra* note 94, at 209-11.

and see if it worked satisfactorily, a sunset provision—say, ten years—could be added, subject to indefinite renewal.

Despite the potential upside for the United States, however, it might well be the case that United States Navy strategists would consider the proposed bargain a poor one. As one well-informed analyst explains:

Moving warships and forces between the western United States and Asia requires freedom of navigation through the Pacific, the South China Sea, the Malacca Straits and the Indian Ocean. Going through Indonesia's internal waters, or between Indonesia and Australia, is navigationally and politically challenging, and heading south, around Australia, adds weeks to the journey to the Persian Gulf and, for a large fleet, tens of millions of dollars in extra fuel costs. If the EEZs were closed to military vessels the U.S. would lose access to its bases and allies around Asia. With the U.S. Navy at bay, Taiwan's defensive position would be severely weakened. Other East and Southeast Asian countries might feel similarly compromised. U.S. influence in Southeast Asia could drain away.<sup>256</sup>

To be sure, this scenario depicts the situation in which the United States Navy is ejected from the EEZs of Southeast Asia *without any compensating limit on China's ability to project naval power there*. Nonetheless, some of the difficulties envisaged, such as the greater difficulty of reaching the Persian Gulf, would remain.

Furthermore, demilitarization would have to be accompanied with a settlement of competing claims to the seabed resources, and China might well be unwilling to compromise on its claims. The Chinese government might well consider that it will soon be able to deploy its military and naval strength in the region to capture *all* of the resources it covets, denying Vietnamese and Filipino claims in their entirety. Or Chinese strategic planners might actually *want* an

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<sup>256</sup> Hayton, *supra* note 94, at 213. See Patrick M. Cronin, *America Must Take a Stand in the South China Sea*, THE NATIONAL INTEREST Sept. 5, 2015, available at <http://www.nationalinterest.org/feature/america-must-take-stand-the-south-china-sea-13779?page=3> (vigorously arguing that the US should *strengthen* its naval presence in the South China Sea – and be prepared to use it against China).

international incident or even a short, sharp war, from which Vietnam, the Philippines, or even the United States, emerged the loser. On the other hand, overt military conflict with weaker South Asian nations could do severe damage to China's international reputation. Vietnam, at least, is in a position to make any Chinese military victory a costly one. If the United States became involved, the strategic stakes would rise dramatically for China. A military victory would not be assured, and anything short of an unambiguous victory might damage the CPC's standing in the eyes of the Chinese population. China might well find it attractive to be seen as a responsible stakeholder and reliable partner in international affairs, as well as gaining much in both economic and security terms from the proposed bargain.

In short, the proposal advanced here undoubtedly raises poses painful choices for all three nations concerned, not least the United States. And American decision-makers (or Chinese, or Japanese) might well consider the costs and risks to be too high. Nonetheless, the potential rewards are inestimable: a generation or longer of peace in East Asia; an opportunity for China's economic expansion to continue; a protracted period in which China, its neighbors, and the United States could gradually adjust to China's rise; and perhaps a new confidence on China's part that it could occupy its rightful "place in the sun"<sup>257</sup> without provoking war in its region.

### *Conclusion*

The histories of both the Concert of Europe and the Concert of North America point to the same conclusions. A concert system arises out of a major, counter-hegemonic war, and persists for about a generation, or for as long as the threat of the defeated hegemon's revival is still felt. As the memories of the war vanish and the threat recedes, the concert system weakens, tending to revert to a balance of power instead. And the ensuing balance of power is itself fragile, likely to be disrupted by another major war among the erstwhile concert members.

If this analysis is right, then a Concert of Asia is exceedingly unlike to arise *before* a major, counter-hegemonic war. Yet the very

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<sup>257</sup> See Kaiser Wilhelm II of Germany, Speech to the North German Regatta Association (1901), available at <http://www.southalabama.edu/history/faculty/faust/Wilhelm%20II%20place%20in%20the%20sun.htm> ("in spite of the fact that we have no such fleet as we should have, we have conquered for ourselves a place in the sun.").

purpose of White's proposal was to *head off* such a war. The peace of East Asia, if it holds at all, will thus more likely be kept in place by a balance of powers, not a balance of rights. At best, we may be at the start of the Second Cold War.<sup>258</sup> At worst, we may see a Great Power war in East Asia in the foreseeable future.

These pessimistic conclusions should be tempered, however, by the possibility that confidence-building measures well short of a full Concert system could, perhaps, be implemented, and that once in place, it might be followed by other similar co-operative measures. Here it has been proposed that the United States, China and Japan consider a proposal to demilitarize the South China Sea, in the hopes of relieving tensions in that area, reducing the likelihood of regional armed conflict, securing the seaway to all parties and, eventually, compromising claims to that Sea's natural resources.

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<sup>258</sup> See Posner & Yoo, *supra* note 142, at 15.