

International Economic Law in the Era of Great Power Rivalry

ABSTRACT

It is a common refrain for policymakers, scholars, and journalists to declare that the United States and China are heading toward, or already engaged in, a New Cold War. International legal theory holds that powerful states tend to use international law as an instrument to stabilize their dominance. However, when powerful states see the existing international legal order as severely constraining their policymaking discretion, they may seek to adjust the system to make it more compatible with their own preferences or even replace international law with domestic law. It is therefore unsurprising that the United States has recently announced that there are cracks in the foundations of international economic order developed after the Second World War and that to compete with China, it is essential for the United States to build an international economic system fit for contemporary geopolitical realities.

This article seeks to document the nascent features of international economic law in the era of great power rivalry, explain how such new features have disrupted the conventional wisdom of international economic law, and speculate on their trajectory. It argues that the great power rivalry has a profound impact on both the normative premises and substantive rules of international economic law. The new features of international economic law in the era of great power rivalry include: (1) the transformation of the guiding philosophy of international economic law from economic interdependence to economic de-risking; (2) the shift of the style of settlement of international economic disputes from judicialization to “de-judicialization”; (3) the normalization of unilateralism in international economic regulation; (4) the securitization of international economic relationships; (5) the return of industrial policy to redraw the boundary between the government and market; and (6) the death of multilateralism and the rise of value-based regionalism. Moreover, the new features outlined in this article will not be temporary, but an integral part of international economic law for a long time to come. The future of international economic law is likely to be more fragmented and more embedded in domestic policy goals of a nation-state. However, despite the decline of the international legal framework governing global economy established over the past seventy years, this article argues that, both descriptively and normatively, international economic law will still play an important role, albeit much smaller than before, in managing the U.S.–China great power rivalry.

TABLE OF CONTENTS

I. INTRODUCTION	2
II. EXPLAINING THE DRIVERS OF U.S. – CHINA STRATEGIC RIVALRY	7
A. Power Shift in International Politics	7
B. The Great Delusion of Economic Engagement	10
C. China’s Disruptive State-led Capitalism	12
D. The Changing Dimensions of China’s Foreign policy	15
III. MAPPING INTERNATIONAL ECONOMIC LAW IN THE ERA OF GREAT POWER RIVALRY	19
A. From Economic Interdependence to Economic De- Risking	19
B. From “Judicialization” to “De-Judicialization” of International Economic Disputes	24
C. The Normalization of Unilateralism	28
D. The Securitization of International Economic Relationships	33
E. The Return of Industrial Policy	40
F. The Death of Multilateralism and the Rise of Value-based Regionalism	44
IV. TOWARDS A NEW INTERNATIONAL ECONOMIC LAW	48
A. The Emergence of a “New Washington Consensus” 48	
B. Imagining the Future of International Economic Law	55
1. International Economic Law Fragmented	55
2. International Economic Law Re- Embedded	59
V. CONCLUSION	66

I. INTRODUCTION

Contrary to Fukuyama’s prophesy in 1989 that the fall of communism signaled “the end of history,” that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government,¹ the world is witnessing the return of great power rivalry in international politics.² In the National Security Strategy (NSS) released in October 2022, the Biden Administration concluded that the post-Cold War era is definitively over and that the world is at an inflection point. The United States and its

¹ Francis Fukuyama, *The End of History?*, 16 THE NATIONAL INTEREST 3, 4 (Summer 1989).

² MATTHEW KROENIG, THE RETURN OF GREAT POWER RIVALRY: DEMOCRACY VERSUS AUTOCRACY FROM THE ANCIENT WORLD TO THE U.S. AND CHINA 2 (2020) (explaining that the United States has been the World’s leading state for the past seven decades, but that great power rivalry has returned in recent years with China and Russia becoming more assertive on the international stage).

democratic allies are in the midst of a strategic competition with authoritarian regimes to shape the future of the international order.³ In particular, while Russia poses an immediate and ongoing threat to U.S. interests, China presents the most consequential geopolitical challenge as China is the only competitor with both the intent and the power to reshape the international order.⁴ The report predicts that the competition between the United States and China is both global and multifaceted, across economics, technology, diplomacy, development, security, and global governance.⁵ To succeed in the strategic competition and maintain U.S. primacy over China, the Biden Administration has adopted a three-pronged grand strategy of “invest, align, compete”, calling for the United States to embrace a modern industrial policy, align the U.S. efforts with like-minded allies and partners, and outcompete China in key technological and economic areas.⁶ It is now a common refrain for policymakers, scholars, and journalists to declare that the United States and China are heading toward, or already engaged in, a “New Cold War.”⁷

The 2022 NSS was not the first time the United States saw China posing a challenge to its power and interests.⁸ If anything, it is more detailed, sophisticated, and with clearer strategic objectives compared with the 2017 NSS of the Trump Administration.⁹ Nor was the United States the only country which saw the need to address the systemic challenges posed by China to its interests, security, and values.¹⁰ The European Commission stated that China was, simultaneously, a “cooperation and negotiating partner,” “economic competitor,” and “a systemic rival” in 2019.¹¹ Since then, the political and economic environment has changed drastically with tit-for-tat sanctions for human rights violations in Xinjiang and the suspension of the legislative process for ratifying the EU–China Comprehensive Agreement on Investment (CAI), the most ambitious agreement that China has

³ The White House, *National Security Strategy* 6 (Oct. 2022).

⁴ *Id.*, at 11.

⁵ *Id.*, at 24.

⁶ Secretary of State Antony J. Blinken, *The Administration’s Approach to the People’s Republic of China* (May. 26, 2022), <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/>.

⁷ Hal Brands and John Lewis Gaddis, *The New Cold War: American, China, and the Echoes of History*, 100 FOREIGN AFF. 10 (2021); Christopher Layne, *Preventing the China-U.S. Cold War from Turning Hot*, 13 THE CHINESE J. INT’L. POL. 343, 347 (2020).

⁸ For example, the 2017 National Security Strategy by the Trump Administration described China as a “strategic competitor” and a “revisionist power”. See The White House, *National Security Strategy* 27 (2017).

⁹ Shadi Hamid et al, *Around the Halls: Assessing the 2022 National Security Strategy* (Oct. 14, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/10/14/around-the-halls-assessing-the-2022-national-security-strategy/>.

¹⁰ NATO, *NATO 2022 Strategic Concept* 5 (June. 29, 2022); Kana Inagaki et al, *China’s Rise Pushes Asia-Pacific Nations to Embrace NATO*, FIN. TIMES (July. 3, 2022).

¹¹ European Commission, *EU-China: A Strategic Outlook* 1 (Mar. 12, 2019).

ever concluded with a third country.¹² China–EU relations hit a new low point after the eruption of the Ukraine war when China refused to condemn Russia’s invasion.¹³ The EU’s new economic security strategy plan issued in June 2023 calls for member states to reduce security risks across supply chains, critical infrastructure, and technology from China.¹⁴ Systemic rivalry is now at the core of Europe’s relationship with China.¹⁵

Fully aware of an increasingly hostile international environment, Chinese President Xi Jinping has urged the nation to prepare for rising risks and uncertainties ahead that may challenge China’s security and development. Xi vowed to show the “spirit of struggle” and a firm determination to never yield to coercive power. In Xi’s words:

The world has entered a new period of turbulence and change... External attempts to suppress and contain China may escalate at any time... We must therefore be more mindful of potential dangers, be prepared to deal with worst-case scenarios, and be ready to withstand high winds, choppy waters, and even dangerous storms.¹⁶

It is a truism that international norms and rules cannot be understood in isolation from underlying geopolitical realities and power dynamics. Deeply embedded in politics, international law is affected by political interests, power, and institutions.¹⁷ Powerful states tend to use international law as an instrument to stabilize their dominance. However, when powerful states see the existing international legal order as severely constraining their policymaking discretion, they may seek to adjust the system through various techniques such as withdrawing from or reshaping international law to make it more compatible with their own preferences, or even replacing international law with domestic law.¹⁸ It is therefore unsurprising that the United States

¹² Jack Ewing, *European Lawmakers Block a Pact with China, Citing Human Rights Violations*, N. Y. TIMES (May. 20, 2021).

¹³ The Editorial Board, *The Ukraine War Will Define EU-China Relations*, FIN. TIMES (Apr. 5, 2023).

¹⁴ Josep Borrell, High Representative of the European Union for Foreign Affairs and Security Policy, *Economic Security: A New Horizon for EU Foreign and Security Policy* (June. 23, 2023), https://www.eeas.europa.eu/eeas/economic-security-new-horizon-eu-foreign-and-security-policy_en.

¹⁵ Ian Bond et al., *Rebooting Europe’s China Strategy* 15 (German Institute for International and Security Affairs Report, May 2022).

¹⁶ Xi Jinping, *Hold High the Great Banner of Socialism with Chinese Characteristics and Strive in Unity to Build a Modern Socialist Country in All Respects*, Report to the 20th National Congress of the Communist Party of China (Oct. 16, 2002), https://www.fmprc.gov.cn/eng/zxxx_662805/202210/t20221025_10791908.html.

¹⁷ Emilie M. Hafner-Burton, David G. Victor and Yonatan Lupu, *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT’L L. 47, 51-60 (2012).

¹⁸ Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. J. 369, 371 (2005); William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT’L L. J. 1, 15-16 (2015).

announced that there are “cracks in the foundations of [the] international economic order” developed after the Second World War,¹⁹ and to compete with China, it is essential for the United States to build “an international economic system fit for contemporary realities.”²⁰ For this purpose, senior officials in the Biden Administration have recently delivered a series of speeches, setting out what is called a “New Washington Consensus” which lays strategic rivalry with China at the centre of the new thinking.²¹ Similarly, Chinese President Xi Jinping has called for China to “lead the reform of the global governance system,” transforming institutions and norms in ways that will reflect Beijing’s values and priorities.²²

Leading commentators across international relations, international business studies, and international law have lamented the return of great power rivalry to international politics and warned that it may lead to a fraying global trade and investment system or even the demise of the rules-based international economic order.²³ There is a wide consensus that the normative landscape of international economic law is changing, but we are just beginning to understand the exact shape of the coming post-neoliberal, geoeconomic order and the complex, evolving new international economic rules emerging from such a new order.²⁴

Conversely, law and legalization affect political processes and political outcomes. The relationship between law and politics is reciprocal, mediated by institutions. See Judith Goldstein et al., *Legalization and International Politics*, 54 INT’L ORG. 385, 387 (2000).

¹⁹ Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution (Apr. 7, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/>.

²⁰ National Security Strategy 2022, *Supra* note 3, at 34-35.

²¹ Sullivan, *Supra* note 19; Remarks by Secretary of the Treasury Janet L. Yellen on the U.S. – China Economic Relationship at John Hopkins School of Advanced International Studies (Apr. 20, 2023); Ambassador Katherine Tai’s Remarks at the National Press Club on Supply Chain Resilience (June. 15, 2023); Remarks by U.S. Secretary of Commerce Gina Raimondo on the U.S. Competitiveness and the China Challenge (Nov. 30, 2022).

²² Cao Desheng, *Xi Urges Global Governance Reforms*, CHINA DAILY (May. 19, 2022); Katherine Morton, *China’s Global Governance Interactions*, in CHINA AND THE WORLD 156, 175-176 (David Shambaugh ed., 2020).

²³ Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 THE YALE J. INT’L. L. ONLINE 1, 17 (2019); Vineet Hegde, Jan Wouters & Akhil Raina, *Is the Rules-Based Multilateral Trade Order in Decline? Current Practices, Trends and Their Impact*, CAMBRIDGE INT’L. L. J. 32, 53 (2021); *A Fraying System*, THE ECONOMIST (Oct. 9, 2021).

²⁴ Robert Howse and Joanna Langille, *Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future*, 117 AM. J. INT’L. L. 1, 16-17 (2023) (arguing that there is no consensus on how economic governance should be structured at either the domestic or international level); RANA FOROOHAR, *HOME COMING: THE PATH TO PROSPERITY IN A POST-GLOBAL WORLD* (2023) (arguing that the post-neoliberal economic order is likely be far more local, heterodox, complicated, and multipolar than what came before it); Anthea Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment*, 22 (4) J. INT’L ECON. L. 655, 659-660 (2019) (describing a new geoeconomic order characterized by

This article seeks to document some nascent features of international economic law in the era of great power rivalry, explain how such new features have disrupted the conventional wisdom of international economic law, and speculate on their trajectory.²⁵

Part II explains the key factors driving the U.S.–China strategic rivalry. These factors include the power shift in international politics and the decline of the U.S. hegemony; the dashed hopes of transforming China into a responsible stakeholder in the current international order through economic engagement; the ineffectiveness of international economic law in tackling China's disruptive state capitalism model; and China's increasingly assertive foreign policy. Part III argues that the great power rivalry in international politics has a profound impact on both the normative premises and substantive rules of international economic law. The new features of international economic law in the era of great power rivalry include: (1) the transformation of the guiding philosophy of international economic law from economic interdependence to economic de-risking; (2) the shift of the style of settlement of international economic disputes from judicialization to “de-judicialization”; (3) the normalization of unilateralism in international economic regulation; (4) the securitization of international economic relationships; (5) the return of industrial policy to redraw the boundary between the government and market; and (6) the death of multilateralism and the rise of value-based regionalism.

Part IV proceeds to examine critically the U.S. ambition to reform the international economic system under the banner of “the New Washington Consensus.” It argues that the new features outlined in Part III will not be temporary, but rather an integral part of international economic law for a long time to come. The future of international economic law is likely to be more fragmented and more embedded in the domestic policy goals of a nation-state. However, the re-orientation of the international economic order carries the latent risk of a “Schmittean moment” or “domestication” of international economic law, referring to a major shift toward an ideal of unfettered national sovereignty as the only appropriate forum for making international economic policies, brushing away the international normative benchmark.²⁶ Despite

a growing securitisation of economic policy and economisation of strategic policy); DANI RODRIK, STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY (2018) (defending the importance of national sovereignty as one of the necessary paradigms to fix the broken world order); See generally ALVARO SANTOS, CHANTAL THOMAS AND DAVID TRUBEK (EDS), WORLD TRADE AND INVESTMENT LAW REIMAGINED (2019).

²⁵ International economic law is defined as the rules regulating transborder transactions in goods, services, currency, investment, and intellectual property. Issues of private international law are excluded from the definition. See Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT'L. L. 769 (2006). In this article, particular attention is paid to international trade and investment law.

²⁶ Alessandra Arcuri, *International Economic Law and Disintegration: Beware the Schmittean Moment*, 23 (2) J. INT'L ECON. L. 323, 328 (2020); Alvaro Santos,

the decline of the international legal framework governing the global economy established over the past seventy years, this article argues that, both descriptively and normatively, international economic law will still play an important role, albeit much smaller than before, in managing the U.S.–China great power rivalry. Part V concludes the article by suggesting the future research directions.

II. EXPLAINING THE DRIVERS OF U.S. – CHINA STRATEGIC RIVALRY

A. *Power Shift in International Politics*

Many commentators argue that we are witnessing the rapid and profound redistribution of power in the international system. The post–Cold War condition of unipolarity marked by the United States’ position as a peerless superpower has been shaken by the relative downturn of the U.S. economy and the relative decline of U.S. power.²⁷ In particular, China is rapidly emerging as a serious contender for the U.S. dominance and the future decades will see even greater increases in China’s power and influence.²⁸ By contrast to the limited scope of interaction between communist economies and the larger world economy in the Cold War, China is for the most part deeply integrated into the global economy. China is currently the world’s second–largest economy, the largest manufacturer and trader in goods, the second largest trader in service and recipient of foreign direct investment flows, and the top trading partner of over 120 countries and regions.²⁹ On its current trajectory, many analysts predicted that China will overtake the United States as the largest economy in the world well before the middle of the century.³⁰ At the same time, China’s increasing investments in military modernization have yielded significantly improved capabilities.³¹

China’s rapid rise as a world power has been a tremendous source of confidence and pride for the ruling Chinese Communist Party (CCP). Ebullient rhetoric such as “the east is rising while the

International Investment Law in the Shadow of Populism: Between Redomestication and Liberalism Re-Embedded, 11 GOVERNANCE AND POLITICS 203, 205 (2023).

²⁷ Fareed Zakaria, *The Self-Destruction of American Power: Washington Squandered the Unipolar Moment*, 98 (4) FOREIGN AFF. 10 (2019); GIDEON RACHMAN, EASTERNIZATION: ASIA’S RISE AND AMERICA’S DECLINE FROM OBAMA TO TRUMP AND BEYOND (2017).

²⁸ Christopher Layne, *The US-Chinese Power Shift and the End of the Pax Americana*, 94 INT’L AFF. 89, 94-103 (2018); Avery Goldstein, *US-China Rivalry in the Twenty-First Century: Déjà vu and Cold War II*, 2 (1) CHINA INT’L. STRATEGY REV. 48, 53-54 (2020).

²⁹ Hong Kong Trade Development Council, *Economic and Trade Information on China* (July. 18, 2023), <https://research.hktdc.com/en/article/MzIwNjcyMDYx>.

³⁰ Jonathan D. Moyer et al., *Measuring and Forecasting the Rise of China: Reality over Image*, 32 J. CONTEMP. CHINA 191, 205-206 (2023); Ali Wyne, *How to Think about Potentially Decoupling from China*, 43 WASH. Q. 41, 43 (2020).

³¹ U.S. Department of Defence, *Military and Security Developments Involving the People’s Republic of China 2022*, Annual Report to Congress (Oct. 26, 2022).

west is declining.” “China has stood up, grown rich, become strong, and is moving towards centre stage,” “time and momentum are on our side,” and “China can finally look at the world as an equal” have become commonplace in Chinese official discourse.³² At a meeting between senior U.S. and Chinese officials in Anchorage, Alaska in March 2021, China’s then top diplomat Yang Jiechi rebuffed Secretary Blinken and asserted that “the United States does not have the qualification to say that it wants to speak to China from a position of strength.”³³ China believes that its growing power entitles it to have greater influence in world affairs. China no longer has to accept a subordinate role as a “rule-taker” rather than a “rule-maker.”³⁴

International relations theory maintains that a power transition usually brings instability to international politics. The catchy phrase “Thucydides’ Trap” describes how the structural conflict between an established power and a rising power may lead to disastrous consequences: established powers fight preventive wars in a bid to remain on top, and rising powers launch conflicts to dislodge the reigning power and claim their “place in the sun.”³⁵ According to this telling, World War I and World War II were primarily the result of the decline of the British Empire and the rise of Imperial and then Nazi Germany.³⁶ A peaceful power transition is possible. For instance, the United States assumed the great power mantle from the United Kingdom without provoking a war in the early 20th Century. But it was a rare exception.³⁷

The rise of China has raised an important question: the United States has been the most powerful country in the world for the past seventy-plus years, but will Washington’s reign as the world’s leading superpower continue? To put the question into perspective, the Soviet Union’s GDP did not exceed 60% of that of the United States even in its peak days during the Cold War.³⁸ China’s GDP at market exchange rates reached \$17.9 trillion in 2022, compared with US’s \$25.4 trillion.³⁹ Measured by purchasing power parity, the yardstick that the International Monetary Fund judges to be a better metric than market exchange rates for comparing national

³² Feng Zhang, *The Xi Jinping Doctrine of China’s International Relations*, 14 (3) ASIA POL. 9, 12-15 (2019); Li Yuan, *Why China’s Confidence Could Turn to be a Weakness*, N. Y. TIMES (Aug. 9, 2022).

³³ Justin McGurry, *US and China Publicly Rebuke Each Other in First Major Talks of Biden Era*, THE GUARDIAN (Mar. 19, 2021).

³⁴ Weifang Zhou & Mario Esteban, *Beyond Balancing: China’s Approach towards the Belt and Road Initiative*, 27 J. CONTEMP. CHINA 487, 500 (2018); Zhaohui Wang, *The Economic Rise of China: Rule-Taker, Rule-Maker, or Rule-Breaker?*, 57 ASIAN SURV. 595, 597-598 (2017).

³⁵ GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES’ TRAP?* 63 (2017).

³⁶ *Id.*, at 55-85.

³⁷ KORI SCHAKE, *SAFE PASSAGE: THE TRANSITION FROM BRITISH TO AMERICAN HEGEMONY* (2017).

³⁸ Marc Trachtenberg, *Assessing Soviet Economic Performance During the Cold War: A Failure of Intelligence?*, 1 TEX. NAT’L SEC. REV. 76, 83 (2018).

³⁹ The World Bank, *Gross Domestic Product 2022*, https://databankfiles.worldbank.org/public/ddpext_download/GDP.pdf.

economies, China's economy already surpassed the United States in 2014.⁴⁰ The United States will face its most dynamic and formidable peer competitor whose economic size and material capabilities at the government's disposal roughly match those of the United States in modern history.⁴¹ China's emergence as a great power will be a test of a core proposition on which the U.S. primacy has rested since the second World War that the United States could meet the strategic challenge of the day from a position of national strength.⁴²

Despite many characteristics of a U.S. decline—deeply polarized domestic politics, slowing growth, crushing debt, ethnic and racial divisions, and increasing inequality to name a few,⁴³ some argue that the U.S. lead over China in long-term national power advantages is enormous and is unlikely to narrow significantly anytime soon.⁴⁴ For instance, even if China surpasses the United States as the world's largest economy in the next decade, its GDP per capita will still be about one-fourth that of America.⁴⁵ China is also well behind the United States in military and soft power indices.⁴⁶ Consequently, although China will continue to narrow the gap in most dimensions of power in the coming two decades, it will not have the military power or political influence to challenge the United States. If the United States and its democratic allies can coordinate their policies, they will represent the largest part of the world economy and will have the capacity to organize a rules-based international order that can protect their interests and help shape Chinese behaviour.⁴⁷

More recently, a growing number of China observers have argued that China may have reached the peak of its powers and that China's rise is nearing its end.⁴⁸ Unprecedented demographic

⁴⁰ Wayne M. Morrison, *China's Economic Rise: History, Trends, Challenges and Implications for the United States*, Congressional Research Services RL33534 9-11 (June 25, 2019).

⁴¹ Graham Allison, Nathalie Kiersznowski, Charlotte Fitzek, *The Great Economic Rivalry: China vs the U.S.* 4-7 (Harvard Kennedy School Belfer Center for Science and International Affairs Paper, 2022).

⁴² Hal Brands, *Choosing Primary: U.S. Strategy and Global Order at the Dawn of the Post-Cold War Era*, 1 (2) TEX. NAT'L SEC. REV. 8, 10-11 (2018); Sourabh Gupta, George Kennan, "The Sources of Soviet Conduct", and Its Application to the China Challenge (ICAS Issue Brief, 2022), <https://chinaus-icas.org/research/george-kennan-the-sources-of-soviet-conduct-and-its-application-to-the-china-challenge/>.

⁴³ Francis Fukuyama, *The End of American Hegemony*, THE ECONOMIST (Aug. 18, 2021); NIALL FERGUSON, THE GREAT DEGENERATION: HOW INSTITUTIONS DECAY AND ECONOMIES Die 3-19 (2014).

⁴⁴ MICHAEL BECKLEY, UNRIVALLED: WHY AMERICAN WILL REMAIN THE WORLD'S SOLE SUPERPOWER 33-134 (2018).

⁴⁵ Simon Cox, *Will China's Economy Ever Overtake America's in Size?*, THE ECONOMIST (Nov. 18, 2022).

⁴⁶ John G. Ikenberry, *Why American Power Endures: The U.S.-Led Order Isn't in Decline*, 101 FOREIGN AFF. 56, 62-73 (2022).

⁴⁷ Joseph S. Nye, *How Not to Deal with a Rising China: A US Perspective*, 98 (5) INT'L AFF. 1635, 1648-1650 (2022).

⁴⁸ See generally MICHAEL BECKLEY AND HAL BRANDS, DANGER ZONE: THE COMING CONFLICT WITH CHINA (2022); Roger McShane, *Has China Reached the Peak of Its Powers?*, THE ECONOMIST (Nov. 18, 2022).

decline, the trade and technology war with the United States, the CCP's arbitrary use of power such as self-defeating zero-covid policy and aggressive crackdown on previously booming technology sector, the overstretched property market, national security raids on foreign firms, and other serious economic problems have cast a long shadow on China's economic future.⁴⁹ Other observers contest that argument, insisting that even though there are mounting doubts about China's economic future, China has enough resources, regulatory levers, and experience to avert a systemic crisis.⁵⁰ After all, few believe that weaknesses and contradictions in the Chinese system itself will lead to the collapse of China.⁵¹

A rising China that has reached near-parity will be the most formidable geopolitical rival for the United States and will be able to constrain the exercise of the U.S. power globally. There is not a shred of evidence that either China or the United States will be bowing out of the great power competition. President Biden reportedly told his Chinese counterpart President Xi that "it has never been a good bet to bet against America."⁵² The U.S. has also demonstrated the determination and confidence to defend its primacy by taking actions to challenge the standard narrative of China's unstoppable ascent and America's inexorable decline. Tellingly, just a few days before the CCP's 20th national congress at which President Xi secured an unprecedented third term as China's top leader, the Biden Administration had implemented a slew of unprecedentedly tough controls on the export of U.S. chip technology to China.⁵³

B. *The Great Delusion of Economic Engagement*

For a long time, Western elites were enthusiastic about the prospect that China's integration into the liberal international order would not only boost international trade and investment, but also encourage China's transformation towards a market economy, discipline China's domestic legal system, and instill in China a

⁴⁹ Adam S. Posen, *The End of China's Economic Miracle*, 102 (5) FOREIGN AFF. 118, 124-127 (2023); Stephen Roach, *Xi's Costly Obsession with Security: How a Quest for Control Threatens China's Economic Growth*, FOREIGN AFF. (November 28, 2022); Stella Yifan Xie, *China's Economy Won't Overtake the U.S., Some Now Predict*, WALL ST. J. (Sept. 2, 2022).

⁵⁰ Oriana Skylar Mastro and Derek Scissors, *China Hasn't Reached the Peak of Its Power*, FOREIGN AFF. (Aug. 22, 2022); Matthew Lynn, *Nothing can Stop China's Relentless Rise*, THE TELEGRAPH (May. 6, 2022); See generally THOMAS ORLIK, CHINA: THE BUBBLE THAT NEVER POPS (2022).

⁵¹ Kurt M. Campbell & Jake Sullivan, *Competition without Catastrophe: How American Can Both Challenge and Coexist with China*, 98 (5) FOREIGN AFF. 96, 98 (2019).

⁵² *Remarks of President Joe Biden – State of the Union Address* (Mar. 1, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/>.

⁵³ Michael Schuman, *Why Biden's Block on Chips to China is a Big Deal*, THE ATLANTIC (Oct. 25, 2022), <https://www.theatlantic.com/international/archive/2022/10/biden-export-control-microchips-china/671848/>.

sense of the rule of law that is the basis of democratic reform.⁵⁴ The assumption was that deepening commercial, diplomatic, and cultural ties would transform China's internal development and external behavior. For instance, when President Clinton explained why the U.S. should support China's entry into the World Trade Organization (WTO), he stated:

By joining the WTO, China is not simply agreeing to import more of our products; it is agreeing to import one of democracy's most cherished values: economic freedom. The more China liberalises its economy, the more fully it will liberate the potential of its people... And when individuals have the power... they will demand a greater say.⁵⁵

Broadly speaking, the idea was to encourage China to be a "responsible stakeholder", i.e., to work with the United States to sustain the current international system, to shape China's behavior within the international system in a way that aligned more closely with the U.S. interests and values, and to make China accept its position as a status quo power.⁵⁶ For some time, the positive impact of China's WTO membership on China's progress with respect to the rule of law and good governance has been referred to as a prominent example of how the WTO may promote good governance norms in the domestic context.⁵⁷

More recently, however, a new consensus has emerged that China's increased participation in the liberal international economic order has not effectuated China's deeper engagement with market economy transformation or embrace of liberal political reform. Contrary to U.S. expectations, China's rapid economic growth has only served to legitimize the CCP and its state-led economic model. Beijing has doubled down on state control of society and the economy, as illustrated by the crackdown on democracy in Hong Kong and serious human rights violations in Xinjiang, the constraint of flow of capital and information, and the pursuit of decoupling from Western economies in high-tech and high-value sectors.⁵⁸ The White House painted a pessimistic picture:

⁵⁴ John J. Mearsheimer, *The Inevitable Rivalry: America, China, and the Tragedy of Great Power Politics*, 100 (6) FOREIGN AFF. 48, 51-55 (2021).

⁵⁵ Clinton's Speech on China Trade Bill at the Paul H. Nitze School of Advanced International Studies of the John Hopkins University (Mar. 8, 2000), <https://archive.nytimes.com/www.nytimes.com/library/world/asia/030900clinton-china-text.html>.

⁵⁶ Robert B. Zoellick, *Whither China: From Membership to Responsibility?*, Remarks to National Committee on U.S.-China Relations (New York, Sept. 21, 2005); Julia Bowie, *China: A Responsible Stakeholder?*, THE NAT'L INTEREST (May. 10, 2016).

⁵⁷ Richard B. Stewart and Michelle Rattton Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 573 (2011).

⁵⁸ Kurt M. Campbell and Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, 97 FOREIGN AFF. 60, 62-65 (2018); John Lee, *Understanding*

... Over the past two decades, reforms [in China] have slowed, stalled, or reversed. The PRC's rapid economic development and increased engagement with the world did not lead to convergence with the citizen-centric, free and open order as the United States had hoped. The Chinese Communist Party has chosen instead to exploit the free and open rules-based order and attempt to reshape the international system in its favor.⁵⁹

Reflecting on the limited impact of engagement on China's economic and political reforms, former National Security Advisor Robert C. O'Brien called the conventional thinking on engagement with China "the greatest failure of American foreign policy since the 1930s."⁶⁰ It is a rare bipartisan consensus in the United States that Chinese capitalism was developed by current communist elites to further entrench their grip on power. As such, it is unlikely to induce the CCP to do anything that could weaken its control of the Chinese society and economy and U.S. policymakers should not expect the inevitability of democratization in China.⁶¹

C. *China's Disruptive State-led Capitalism*

Fundamentally different from both command economies and free market economies in structuring political and economic power, China's economic model features the melding of the power of an authoritarian state with the power of market capitalism. Even though market reforms have led to a rapid expansion of the private sector, the government of China continues to exercise extensive direct and indirect control over the allocation of resources through instruments such as government ownership, the control of key economic actors, and government directives.⁶² After President Xi took office in 2012, the CCP further strengthened its grip on power, economy, and society.⁶³ It is now clear that China no longer sees

and *Countering China's Approach to Economic Decoupling from the United States* 19-26 (Hudson Institute, 2022).

⁵⁹ The White House, *United States Strategic Approach to the People's Republic of China* (May 20, 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf>.

⁶⁰ Robert C. O'Brien, *The Chinese Communist Party's Ideology and Global Ambitions* (June 26, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/chinese-communist-partys-ideology-global-ambitions/>.

⁶¹ AARON L. FRIEDBERG, *GETTING CHINA WRONG* (2021); Rana Mitter and Elsbeth Johnson, *What the West Gets Wrong about China: Three Fundamental Misconceptions*, HARV. BUS. REV. 42, 42-45 (May-June 2021).

⁶² MARGARET M. PEARSON, MEG RITHMIRE & KELLE S. TSAI, *THE STATE AND CAPITALISM IN CHINA* 21-36 (2023); Li-Wen Lin and Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 (4) STAN. L. REV. 697, 716-734 (2013).

⁶³ NICOLAS R. LARDY, *THE STATE STRIKE BACK: THE END OF ECONOMIC REFORM IN CHINA?* 2 (2019); Ming Du, *Unpacking China's State Capitalism*, 24 GERMAN L. J. 125, 138-141 (2023).

its state-led capitalism as a way station on the road to liberal capitalism, but rather as a sustainable model in its own right.

The world trading system that has existed since 1947 was based on the liberal understanding that market forces will dictate competitive outcomes and that governments do not pre-empt the market mechanism.⁶⁴ There has been a widely shared view that at least in critical sectors of the economy, China's state-led, non-market approach to the economy and trade is fundamentally incompatible with the rules-based world trading system.⁶⁵ It has led to a non-reciprocal, protected Chinese domestic market, persistent excess capacity, forced technology transfer, and other unfair trade practices, all to the detriment of workers and business in other countries and the global economy at large.⁶⁶

One prominent example concerns state-owned enterprises (SOEs), which dominate the commanding heights of the Chinese economy and are a hallmark of China's state capitalism. By 2018, China's SOEs accounted for 4.5% of the global GDP, more than the entire economic output of France, India, or Brazil.⁶⁷ To ensure that SOEs play a dominant role in the national economy and in implementing industrial plans, the CCP has recently strengthened control over SOEs through appointment of key executives and intervention in major business decisions.⁶⁸ Instead of developing a market environment of fair competition for enterprises of all kinds of ownership and providing them with non-discriminatory treatment, Chinese SOEs often benefit from artificial competitive advantages, such as preferential access to financing, inputs, services, and the use of other government policies and practice. The differential treatment tilts the playing field to the disadvantage of foreign and private competitors and creates distortive effects on international trade around the world.⁶⁹ In addition, one of the most acute concerns regarding Chinese SOEs is that their corporate and

⁶⁴ PETROS C. MAVROIDIS & ANDRE SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS 162-166 (2021); WTO Deputy Director General Alan William Wolff, *Covid-19 and the Future of World Trade* (May. 27, 2020), https://www.wto.org/english/news_e/news20_e/ddgaw_27may20_e.htm.

⁶⁵ UNITED STATES TRADE REPRESENTATIVE, 2022 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 3 (Feb. 2023); European Commission Staff Working Document, *On Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations* 3, Brussels, SWD (2017) 483 final/2 (Dec. 20, 2017); Clara Weinhardt & Tobias ten Brink, *Varieties of Contestation: China's Rise and the Liberal Trade Order*, 27 REV. INT'L POL. ECON. 258, 260 (2020). A contrary view argues that the WTO legal architecture preserves diversity of governance models and regulatory approaches in the domestic orders of member states. See Robert Howse and Langill, *Supra* note 24, at 18-25.

⁶⁶ Communication from the United States, *China's Trade Disruptive Economic Model*, WT/GC/W/745 (July. 16, 2018).

⁶⁷ Andrew Batson, *Some Facts about China's State Capitalism*, in CHINESE STATE CAPITALISM: DIAGNOSIS AND PROGNOSIS 9, 12 (Scott Kennedy and Jude Blanchette eds., 2021).

⁶⁸ Tamar Groswald Ozery, *The Politicization of Corporate Governance: A Viable Alternative?*, 70 (1) AM. J. COMP. L. 43, 55-68 (2022).

⁶⁹ OECD, *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?* 52-53 (2016).

investment decisions may be driven by political and strategic objectives rather than commercial and market considerations.⁷⁰ The recent expansion of Chinese SOEs' global footprint has further aggravated widespread concerns of host countries about the implications of Chinese SOEs for national security, fair competition, reciprocity, transparency, corruption, human rights, and even the function of the free market at home.⁷¹

Another example is China's proactive formulation and execution of mandatory and ambitious industrial policies. China's industrial policies deploy extensive government guidance, massive subsidies, forced technology transfer, overseas mergers and acquisitions, and other types of regulatory support, while limiting market access and government procurement for foreign goods and services, to seek the dominance of SOEs and other targeted domestic companies in domestic and international markets.⁷² One of the most far-reaching industrial plans is known as Made in China 2025.⁷³ The plan seeks to reduce China's dependence on foreign technology and make China dominant in global high-tech manufacturing by replacing foreign technologies, products, and services with domestic ones in ten strategic industries, including next-generation information technology and advanced robotics.⁷⁴ Made in China 2025 sets specific targets: China aims to achieve 70 percent self-sufficiency in high-tech industries by 2025, and by 2049—the hundredth anniversary of the People's Republic of China—it seeks a dominant position in global markets. By comparison, industrial policies in other countries, such as Germany's Industry 4.0 plan, are much smaller in scale, and they are almost entirely dedicated to basic research with no subsidies provided for actual manufacturing or sales of products. They generally also adopt an open approach in which a wide range of foreign partners can participate and lack targets for replacing imports or quotas for indigenous production.⁷⁵

Moreover, it has become a growing concern that current international economic law may not be effective in disciplining many of China's non-market policies and practices.⁷⁶ For example, the limits of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) in tackling China's subsidy problem

⁷⁰ Jennifer Lind & Daryl G. Press, *Markets or Mercantilism? How China Secures its Energy Supplies*, 42 INT'L SEC. 170, 204 (2018).

⁷¹ Ming Du, *Chinese State-owned Enterprises and International Investment Law*, 53 GEORGETOWN J. INT'L L. 627, 660-672 (2022).

⁷² BARRY NAUGHTON, *THE RISE OF CHINA'S INDUSTRIAL POLICY: 1978-2020* 99-123 (2021).

⁷³ USTR, *Supra* note 65, at 22-23.

⁷⁴ Jost Wübbcke et al., *Made in China 2025: The Making of a High-tech Superpower and Consequences for Industrial Countries* 20 (Metrics Papers on China No.2, 2016)

⁷⁵ European Union Chamber of Commerce in China, *China Manufacturing 2025: Putting Industrial Policy Ahead of Market Forces* 6-7 (2017).

⁷⁶ USTR, *Supra* note 65, at 12; The European Commission, *WTO Modernisation: Future EU Proposals on Rulemaking* (June 2018), https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf; Stephen Ezell, *False Promises II: The Continuing Gap Between China's WTO Commitments and Its Practices* 4 (The Information Technology & Innovation Foundation, 2021).

have long been criticized.⁷⁷ Similarly, it was argued that the SOE rules in the WTO and international investment law are inadequate in addressing the concerns about Chinese SOEs.⁷⁸ This is because the international trade and investment regime that took shape in the post-war period simply did not anticipate many of the unique features of China's political economy.⁷⁹ It is rather awkward to apply market-oriented WTO rules to China where extensive governmental intervention is the rule, not an exception. Even though some problematic policies and practices being pursued by the CCP may be found inconsistent with China's WTO obligations after an expensive and long litigation process, many other interventions fall into a grey area: they violate the spirit, if not always the letter, of WTO rules.⁸⁰ In fact, many of the most harmful policies and practices being pursued by China are not even disciplined by WTO rules.⁸¹ It is impractical to expect that the deep-rooted, systemic conflict between fundamentally different economic systems could be solved by the WTO dispute settlement mechanism.⁸²

D. *The Changing Dimensions of China's Foreign policy*

China's foreign policy used to be guided by a cardinal doctrine that was summed up by the former paramount leader Deng Xiaoping as "hiding its capabilities and biding its time."⁸³ Deng advised that China should "keep moderate and prudent, not serve as others' leader or a standard bearer and not seek expansion or hegemony."⁸⁴ The rationale for the doctrine was that since China was still weak, it should foster a peaceful international political

⁷⁷ Chad P. Bown and Jennifer A. Hillman, *WTO'ing a Resolution to the China Subsidy Problem*, 22 J. INT'L ECON. L. 557, 567-572 (2019) (arguing that the problems of the SCM agreement include the narrow definition of subsidy, the high evidentiary burden in proving the existence of a subsidy, the failure of the subsidy notification process, and the ineffectiveness of remedies in disciplining subsidies); Victor Crochet and Vineet Hegde, *China's Going Global Policy: Transnational Production Subsidies under the WTO SCM Agreement*, 23 J. INT'L ECON. L. 841, 862 (2000) (arguing that the SCM Agreement does not address China's problematic transnational production subsidies).

⁷⁸ Du, *Supra* note 63, at 141-149 (arguing that WTO rules and SOE rules in the CPTPP are unlikely to be successful to counteract China's state capitalism); Du, *Supra* note 71, at 633 (arguing that international investment law is poorly designed to deal with Chinese SOEs because it is premised on some untenable assumptions).

⁷⁹ Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261, 285 (2016).

⁸⁰ Mavroidis and Sapir, *Supra* note 64, at 8; Dani Rodrik, *The WTO has Become Dysfunctional*, FIN. TIMES (Aug. 5, 2018).

⁸¹ For example, it was found that formal and enforceable international law has reached its limits in addressing the challenges arising from China's exchange rate misalignment problem. See Claus D. Zimmerman, *Exchange Rates Misalignment and International Law*, 105 AM. J. INT'L L. 423, 476 (2011); see also Crochet and Hegde, *Supra* note 77, at 633.

⁸² USTR, *Supra* note 65, at 3.

⁸³ State Councillor Dai Bingguo, *Adhere to the Path of Peaceful Development* (Dec. 6, 2010), http://www.china.org.cn/opinion/2010-12/13/content_21529346.htm.

⁸⁴ *Id.*

environment for economic development. China would not challenge the U.S. global leadership and other countries should not fear the rapid growth of China's power.⁸⁵

Over the past decade, however, China's foreign policy has grown more assertive as the country grew wealthier and more powerful.⁸⁶ To begin with, China has tapped its growing capabilities to harden its approach to safeguarding more resolutely what the CCP defines as the country's "core interests," including national sovereignty, national security, territorial integrity and national reunification, China's political system, and overall social stability.⁸⁷ In the South China Sea, China pushed ahead its contested sovereignty claims to land features and their associated maritime rights by constructing artificial islands on top of reefs and low-tide elevations that it controlled in the Spratlys islands. Faced with an adverse arbitral award, China dismissed it as "nothing more than a piece of wastepaper."⁸⁸ In response to a controversial visit by the then U.S. House Speaker Nancy Pelosi to Taiwan, Beijing launched unprecedented large-scale military live-fire drills, precipitating the fourth Taiwan strait crisis.⁸⁹ Beijing has also repressed Uyghurs in Xinjiang, crushed a democracy movement in Hong Kong, and exchanged tit-for-tat sanctions over Xinjiang and Hong Kong with the United States and Europe.⁹⁰

Aspiring to be respected as a global leader, China has appeared to be increasingly willing to flex its economic muscle to demand deference from other countries and multinational corporations. For instance, China imposed an array of economic sanctions that froze many categories of Australian exports after Canberra called for an independent inquiry into the origins of Covid-19.⁹¹ After Taiwan opened a representative office in Lithuania in November 2021, China downgraded diplomatic relations with Lithuania and banned all Lithuanian imports and exports.⁹² Beijing has also threatened to ban international airline, retail, film, and hotel industries from operating in China if they do not recognize Chinese sovereignty claims regarding Hong Kong,

⁸⁵ Yan Xuetong, *From Keeping a Low Profile to Striving for Achievement*, 7 THE CHINESE J. INT'L. POL. 153, 155-157 (2014).

⁸⁶ Jessica Chen Weiss, *The China Trap: U.S. Foreign Policy and the Perilous Logic of Zero-Sum Competition*, 101 (5) FOREIGN AFF. 40, 43 (2022); Nien-Chung Chang Liao, *The Sources of China's Assertiveness: The System, Domestic Politics or Leadership Preferences?*, 92 INT'L AFF. 817, 817-818 (2016).

⁸⁷ Avery Goldstein, *China's Grand Strategy under Xi Jinping: Reassurance, Reform, and Resistance*, 45 INT'L SEC. 164, 187-191 (2020).

⁸⁸ Simon Denyer & Emily Rauhala, *Beijing's Claims to South China Sea Rejected by International Tribunal*, WASH. POST (July. 12, 2016). On a critical study of the award, see Chinese Society of International Law, *The South China Sea Arbitration: A Critical Study*, 17 CHINESE J. INT'L. L. 207, 207-748 (2018).

⁸⁹ Bonny Lin et al., *Tracking the Fourth Taiwan Strait Crisis* (Oct. 2022), <https://chinapower.csis.org/tracking-the-fourth-taiwan-strait-crisis/>.

⁹⁰ SUSAN L. SHIRK, OVERREACH: HOW CHINA DERAILED ITS PEACEFUL RISE 208 (2022).

⁹¹ *China Punishes Australia for Promoting an Inquiry into Covid-19*, THE ECONOMIST (May. 21, 2020).

⁹² Andrew Higgins, *In an Uneven Fight with China, A Tiny Country's Brand Becomes Toxic*, N. Y. TIMES (Feb. 21, 2022).

the South China Sea, Tibet, and Taiwan in their published material or websites.⁹³

Furthermore, unlike the period of hiding and biding during which China had merely sought to adapt to the existing international order, China has sought to promote alternative global norms and standards across various domains of international relations to make them more in line with China's governance model, interests, and values.⁹⁴ This is because the existing international order is rooted in norms that privilege liberal democratic values and universal rights. These norms are intrinsically antagonistic to the organizing principles on which the CCP system is based and therefore are an enduring threat to the regime's legitimacy.⁹⁵ For example, while Western States argue that international human rights law possesses a universal character based on international treaties, customary international law, and, above all, the normative and moral values of human rights, China emphasizes sovereignty over human rights.⁹⁶ In addition, China stresses that national and regional particularities and various political, economic, social, cultural, historical, and religious backgrounds can be legitimate reasons to justify disregard for individual or minority claims.⁹⁷ Meanwhile, China routinely casts itself as a developing country that needs to focus on vindicating economic and social rights before it can emphasize political and civil rights.⁹⁸ Likewise, in opposition to a free and open approach to govern cyberspace, China has promoted a guiding principle of "internet sovereignty," which emphasizes the right of each state to establish its own rules governing content, data storage, and the flows of information that are permitted to cross borders.⁹⁹

Next, China has set out to build its own set of regional and international institutions, such as the Asian Infrastructure Investment Bank, the New Development Bank, and, most notably, the Belt and Road Initiative (BRI), Beijing's flagship infrastructure investment programme. While the new institutions and programs have given China agenda setting and convening power, they often depart from the standards and values upheld by existing

⁹³ Elizabeth Economy, *Xi Jinping's New World Order: Can China Remake the World Order*, 101 (1) FOREIGN AFF. 52, 62 (2022).

⁹⁴ Nadège Rolland, *China's Vision for a New World Order* 6 (The National Bureau of Asian Research Special Report No. 83, 2020); ELIZABETH C. ECONOMY, THE WORLD ACCORDING TO CHINA 29-60 (2021).

⁹⁵ *Id.*

⁹⁶ Jing Men, *Between Human Rights and Sovereignty – An Examination of EU-China Political Relations*, 17 EUR. L. J. 534, 540-544 (2011).

⁹⁷ PHIL C. W. CHAN, CHINA, STATE SOVEREIGNTY AND INTERNATIONAL LEGAL ORDER 121-122 (2015).

⁹⁸ Jerome A. Cohen, *Law and Power in China's International Relations*, 52 N.Y. U. J. INT'L. L. & POL. 123, 156 (2019).

⁹⁹ Chien-Huei Wu, *Sovereignty Fever: The Territorial Turn of Global Cyber Order*, 81 ZAORV 651, 656-657 (2021).

international institutions.¹⁰⁰ For instance, one criticism frequently levied at the BRI is that, by providing alternative sources of finance to authoritarian regimes with “no strings attached,” China is undermining efforts by other countries and international organizations that require democratic reform, good governance, and social responsibility in recipient countries as conditions of receiving development finance.¹⁰¹ Moreover, the terms of China’s BRI deals lack transparency.¹⁰² Some BRI infrastructure investments were even suspected to be “debt-trap diplomacy,” an attempt by China to entice recipient countries to take on debts for unrealistic projects and then to use their indebtedness to extract concessions that could compromise their sovereignty. But the allegation of “debt-trap diplomacy” was widely dismissed as “a myth.”¹⁰³

These tensions were further exacerbated by the eruption of the Covid–19 pandemic, China’s zero–Covid strategy which rocked global supply chains, and more recently China’s refusal to condemn the Russian invasion of Ukraine.¹⁰⁴ To defend China’s positions and actions, Chinese diplomats have increasingly employed confrontational rhetoric that the Western media calls “wolf warrior diplomacy.”¹⁰⁵ China’s international image has considerably deteriorated in the West and China is increasingly pictured as a revisionist and hostile power. China’s aggressive international behaviours have in turn triggered pushback from the United States, Europe, as well as many of China’s Asian neighbours.¹⁰⁶

China’s assertive foreign policy gives rise to speculations about China’s endgame. One view believes that China’s actions are defensive, seeking to make the world safer for the CCP and easier for authoritarian states to coexist alongside democracies.¹⁰⁷ An

¹⁰⁰ Campbell and Ratner, *Supra* note 58, at 68; Srikanth Kondapalli, *Regional Multilateralism with Chinese Characteristics* in CHINA AND the World 313-339 (David Shambaugh ed., 2020).

¹⁰¹ Jingdong Yuan et al., *China’s Evolving Approach to Foreign Aid* 24 (Stockholm International Peace Research Institute Policy Paper 62, 2022).

¹⁰² Michael Bennon and Francis Fukuyama, *The Obsolescing Bargain Crosses the Belt and Road Initiative: Renegotiations on BRI Projects*, 38 OXFORD. REV. ECON. POL. 278, 283 (2022).

¹⁰³ Lee Jones and Shahar Hameiri, *Debunking the Myth of “Debt Trap Diplomacy”: How Recipient Countries Shape China’s Belt and Road Initiative* 28 (Chatham House, 2020); Deborah Brautigam and Meg Rithmire, *The Chinese “Debt-Trap” is a Myth*, THE ATLANTIC (Feb. 6, 2021), <https://www.theatlantic.com/international/archive/2021/02/china-debt-trap-diplomacy/617953/>.

¹⁰⁴ Edward Wong and Ana Swanson, *Ukraine War and Pandemic Force Nations to Retreat from Globalization*, N. Y. Times (Mar. 22, 2022).

¹⁰⁵ PETER MARTIN, CHINA’S CIVILIAN ARMY: THE MAKING OF WOLF WARRIOR DIPLOMACY 5 (2021) (arguing that China’s wolf warrior diplomats have become symbols of the threat posed by a rising China).

¹⁰⁶ LUKE PATEY, HOW CHINA LOSES: THE PUSHBACK AGAINST CHINESE GLOBAL AMBITIONS 15 (2020); Evan S. Medeiros, *The Changing Fundamentals of US-China Relations*, 42 (3) WASH. Q. 93, 119 (2019).

¹⁰⁷ Jessica Chen Weiss, *A World Safer for Autocracy?*, 98 (4) FOREIGN AFF. 92, 93-94 (2019); Thomas J. Christensen, *No New Cold War: Why US-China Strategic Competition will not be Like the US-Soviet Cold War* 11-16 (Asan Institute for Policy Studies, 2020).

opposing view holds that China has been pursuing a grand strategy to remake the international order in its own authoritarian image and displace the United States as the hegemonic power at the regional and global level.¹⁰⁸ Even if China may not seek global hegemony, China's economic power, technology innovations, and growing military will allow it to seek a global order that is more coercive, illiberal, and hostile to liberal democratic values.¹⁰⁹ Ultimately, it does not really matter what China's endgame is. The strategic competition between the United States and China presents a more challenging struggle ahead than the Cold War of the late twentieth century was.¹¹⁰

III. MAPPING INTERNATIONAL ECONOMIC LAW IN THE ERA OF GREAT POWER RIVALRY

How has the return of great power competition in international politics, in particular the U.S.–China rivalry, shaped the conceptualization, structure and function of international economic law? This part outlines six broad changes that have taken place. These features are not entirely novel. For example, the protection of national security was listed as an exception to trade liberalization obligations since the very beginning of the GATT/WTO multilateral trading system. The point is that these features are now seen in a new light, and they collectively represent a significant departure from the conventional understanding of how international economic law works. Beneath these new features of international economic law lies a broader, popular anxiety over whether the global economic system is fit for the contemporary reality of great power competition.

A. *From Economic Interdependence to Economic De-Risking*

Globalisation and economic interdependence were traditionally viewed through a benign lens. The dominant view was that economic interdependence underpinned by international economic law incentivized the relevant actors to continue to cooperate, thus achieving economic growth and exerting a pacifying

¹⁰⁸ RUSH DOSHI, *THE LONG GAME: CHINA'S GRAND STRATEGY TO DISPLACE AMERICAN ORDER* 5-6 (2021); MICHAEL PILLSBURY, *THE HUNDRED-YEAR MARATHON: CHINA'S SECRET STRATEGY TO REPLACE AMERICA AS THE GLOBAL SUPERPOWER* (2015); Daniel Tobin, *How Xi Jinping's "New Era" Should Have Ended U.S. Debate on Beijing's Ambitions* 3-7 (CSIS Report, 2020).

¹⁰⁹ Rolland, *Supra* note 94, at 6; Economy, *Supra* note 94, at 29-60; Liza Tobin, *Xi's Vision for Transforming Global Governance: A Strategic Challenge for Washington and Its Allies*, 2 (1) *TEX. NAT'L SEC. REV.* 154, 165 (2018).

¹¹⁰ Tobin Harshaw, *China's Challenge to the U.S. is So Much More Than Cold War II*, *BLOOMBERG* (Feb. 19, 2022); Charles Edelman and David O. Shullman, *How China Exports Authoritarianism: Beijing's Money and Technology is Fueling Repression Worldwide*, *FOREIGN AFF.* (Sept. 16, 2021) (arguing that the CCP's methods may be different and more subtle, but the challenge to liberal democracy is just as potent as or even more disruptive than that once presented by the Soviet Union).

effect on world politics.¹¹¹ However, economic interdependence may not always enhance state interests and national security. To begin with, while mutual interdependence did reduce the likelihood of interstate conflict, asymmetric trade ties may undermine the pacific effects of commerce. This is because asymmetrical economic interdependence may render one state more dependent on the other, allowing states with larger economic markets to leverage market access for strategic ends.¹¹² For instance, in response to South Korea's decision to jointly deploy the terminal high-altitude area defense (THAAD) missile system with the United States, which China perceived as undermining its national security interests, China tapped its substantial economic leverage to punish Seoul by blocking market access of South Korean goods and services in a range of sectors including entertainment, consumer products, and tourism. South Korea's economic dependence on China makes it particularly vulnerable to retaliation as China is South Korea's largest export market, accounting for about 25 percent of South Korea's annual exports.¹¹³ Furthermore, states that rely on critical goods from foreign countries and lack a substitute supplier may be sensitive to shocks or manipulation. A remarkable example was Russia's control over Eurasian energy infrastructure, which enabled its use of gas cut-offs to coerce its vulnerable neighbours into policy concessions.¹¹⁴ More recently, the Covid-19 pandemic and Russia's invasion of Ukraine have further exposed unique economic vulnerabilities, demonstrated by supply chain bottlenecks from computer chips to advanced medical equipment and critical raw materials.¹¹⁵

Lastly, it is now apparent that the networked structure of global economic flows has facilitated "weaponized interdependence," i.e., states' use of global economic networks to achieve geostrategic objectives.¹¹⁶ Great powers with political and economic authority over central economic nodes in the international networked structures through which money, goods, and information travel can weaponize networks to gather information or choke off economic and information flows, discover

¹¹¹ John R. Oneal et al., *The Liberal Peace: Interdependence, Democracy, and International Conflict, 1950-85*, 33 (1) J. PEACE RESEARCH 11, 23-24 (1996); Jon C. Pevehouse, *Interdependence Theory and the Measurement of International Conflict*, 66 (1) J. POL. 247, 263-264 (2004).

¹¹² Erik Gartzke and Oliver Westerwinter, *The Complex Structure of Commercial Peace Contrasting Trade Dependence, Asymmetry, and Multipolarity*, 53 (3) J. PEACE RESEARCH 325, 340 (2016).

¹¹³ Florence Wen-ting Yang, *Asymmetrical Interdependence and Sanctions: China's Economic Retaliation over South Korea's THAAD Employment*, 55 (4) ISSUES & STUD. 1, 18-21 (2019).

¹¹⁴ Mikael Wigell and Antto Vihma, *Geopolitics versus Geoeconomics: The Case of Russia's Geostrategy and Its Effects on the EU*, 92 INT'L AFF. 605, 616 (2016).

¹¹⁵ Judith Evans, *Covid-19 Crisis Highlights Supply Chain Vulnerability*, FIN. TIMES (May 28, 2020); OECD, *The Supply of Critical Raw Materials Endangered by Russia's War on Ukraine* (Aug. 4, 2022), <https://www.oecd.org/ukraine-hub/policy-responses/the-supply-of-critical-raw-materials-endangered-by-russia-s-war-on-ukraine-e01ac7be/>.

¹¹⁶ Henry Farrell and Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 (1) INT'L SEC. 42, 45 (2019).

and exploit vulnerabilities, compel policy change, and deter unwanted actions.¹¹⁷ For example, in response to Russia's invasion of Ukraine, the European Union, United States, United Kingdom, and others announced that selected Russian banks are removed from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) messaging system, which delivers secure transferring payment instructions among more than 11,000 financial institutions and companies in over 200 countries. The exclusion from the SWIFT would ensure that Russian banks are disconnected from the international financial system and their ability to operate globally severely harmed, with major negative impact on Russia's economy immediately as well as in the long term.¹¹⁸ Since the network hubs of globalization are disproportionately located in the advanced industrial countries, in particular the United States, the United States has exploited weaponized interdependence far more frequently than other countries.¹¹⁹

In the era of great power competition, the United States has increasingly viewed its relations with China as a situation rife with weaponized interdependence possibilities, and made more frequent use of tariffs, sanctions, export controls, licensing denials, investment screening, divestment orders, and the like.¹²⁰ For example, in weaponizing its dominant chokepoint positions in the global semiconductor value chain, the Biden Administration unveiled sweeping export controls to ban the export to China of advanced chips, as well as chip design software and chipmaking equipment. Not only do the prohibitions cover exports from American firms, but also apply to any chipmaker worldwide that uses U.S. semiconductor technology.¹²¹ Given the vital importance of chip technology in nearly every emerging technology and the lack of viable alternatives, the unprecedented export ban demonstrates the U.S. government's resolve to preserve its control over chokepoint technologies in the global semiconductor technology supply chain and heralds "a new U.S. policy of actively strangling large segments of the Chinese technology industry—strangling with an intent to kill."¹²² In a similar fashion, it was advised that the United States may exploit China's continued dependence on the

¹¹⁷ *Id.*

¹¹⁸ Kristen E. Eichensehr, *United States and Allies Target Russia and Belarus with Sanctions and Other Economic Measures*, 116 AM. J. INT'L. L. 614, 616 (2012).

¹¹⁹ DANIEL W. DREZNER, HENRY FARRELL & ABRAHAM L. NEWMAN (EDS), *THE USES AND ABUSES OF WEAPONIZED INTERDEPENDENCE* 4-5 (2021).

¹²⁰ Sen. Tom Cotton, *Beat China: Targeted Decoupling and the Economic Long War* 25-28 (Feb. 2021); Jon Bateman, *U.S. – China Technological "De-Coupling": A Strategy and Policy Framework* 1-3 (Carnegie Endowment for International Peace Report, 2022).

¹²¹ Ana Swanson, *Biden Administration Clamps Down on China's Access to Chip Technology*, N. Y. TIMES (Oct. 7, 2022).

¹²² Gregory Allen, *Choking Off China's Access to the Future of AI* (Centre for Strategic & International Studies Report, 2022), <https://www.csis.org/analysis/choking-chinas-access-future-ai>.

U.S. dollar to engage in international trade and financial transactions, which leaves Chinese banks and companies susceptible to U.S. sanctions.¹²³

In May 2023, the G7 countries agreed that a central part of their economic strategy towards China is “de-risking, not decoupling” from the Chinese economy.¹²⁴ The strategy involves addressing both technological and economic risks. First, de-risking requires protecting a narrow set of advanced technologies critical for national security with the greatest focus on technology that could tilt the military balance.¹²⁵ That would likely choke off the flow of critical technologies and know-how to China and thwart China’s ascendance to a technology and military superpower. Second, on economic risks China poses, de-risking fundamentally means reducing dependence on Chinese products, having resilient, effective supply chains outside China, and being free from economic coercion.¹²⁶

While decoupling stands for an eventual unwinding of economic integration between the United States and China over the past forty years, “de-risking” sounds more prudent and targeted in the sense that it aims to limit such an effect only in areas where it undercuts the national security and industrial competence of the United States.¹²⁷ Still, “de-risking” is a choice of a very ambiguous word and its meaning uncertain. For example, what is precisely the nature of the risk from China? Beyond the most common risks such as national security, resilience of supply chains and technology supremacy, does it include threats to democracy and human rights and China’s unfair trade practices? How is a particular risk evaluated and balanced against a country’s other interests in deciding what action should be taken? Clearly, different interpretations will lead to divergent policy choices, and there is no way of knowing what the new “de-risking” policy is until further actions take place.¹²⁸ After all, the term “de-risking” carries negative connotations of indiscriminate and unnecessary exclusion as it originally refers to actions taken by a financial institution to “terminate, fail to initiate, or restrict a business relationship with a customer, or a category of customers, rather than manage risk associated with that relationship consistent with risk-based

¹²³ Thomas Oatley, *Weaponizing International Financial Interdependence* in Drezner et al., (eds), *Supra* note 119, 117-119; Sun Yu, *China Meets Banks to Discuss Protecting Assets from US Sanctions*, FIN. TIMES (May. 1, 2022).

¹²⁴ G7 Hiroshima Leaders’ Communiqué (May. 20, 2023), para. 51, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communicue/>.

¹²⁵ *Remarks by President Biden in a Press Conference in Hiroshima, Japan* (May. 21, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/21/remarks-by-president-biden-in-a-press-conference/>.

¹²⁶ Sullivan, *Supra* note 19.

¹²⁷ Gideon Rachman, *De-risking Trade with China is a Risky Business*, FIN. TIMES (May. 29, 2023).

¹²⁸ Paul Gewirtz, *Words and Policies: De-risking and China Policy*, Brookings Commentary (May. 30, 2023), <https://www.brookings.edu/blog/order-from-chaos/2023/05/30/words-and-policies-de-risking-and-china-policy/>.

supervisory or regulatory requirements.”¹²⁹ At issue is how to disconnect from China enough to reduce the threat of coercion without encouraging paranoia that causes excessive harm. China’s official Xinhua News Agency commented that “de-risking” is just “decoupling in disguise.”¹³⁰

In response to an increasingly hostile external environment, China has articulated a “dual circulation” strategy, seeking to reduce reliance on its export-oriented development model, or external circulation, and put more emphasis on its huge domestic market of 1.4 billion consumers, or internal circulation.¹³¹ At its core, “dual circulation” is a strategy to fortify China’s economic resilience by bolstering indigenous capabilities to avoid overreliance on the global economy while making foreign firms more dependent on the Chinese market.¹³² Self-reliance in science and technology is at the centre of China’s effort to reduce external vulnerabilities.¹³³ For instance, China vows to achieve self-sufficiency in semiconductors by 2030 through a “whole of the nation” approach, whereby all national resources are mobilized to achieve a strategic objective.¹³⁴ By the same logic, China has taken steps to reduce its reliance on the U.S. dollar and exposure to potential international financial sanctions by promoting the internationalization of the Chinese Yuan.¹³⁵ Recent measures include the establishment of the Cross-Border Interbank Payment System (CIPS) to offer clearing and settlement services in cross-border Yuan payments and arrangements with Argentina, Brazil, United Arab Emirates, and other countries to allow bilateral trade to be conducted through Yuan, ditching the US dollar as an intermediary.¹³⁶ In addition, China launched a digital Yuan in the

¹²⁹ Section 6215 (c)(1) of the Anti-Money Laundering Act of 2020 (AMLA), Pub. L. No. 116-283, Div. F, Title LXII. (Jan. 1, 2021).

¹³⁰ *China Rejects US Claims Over “De-Risking” Not “Decoupling”*, BLOOMBERG (May 29, 2023), <https://www.bloomberg.com/news/articles/2023-05-29/china-rejects-us-claim-that-it-s-de-risking-not-decoupling#xj4y7vzkg>.

¹³¹ Hung Tran, *Decoupling/reshoring Versus Dual Circulation: Competing Strategies for Security and Influence* (Atlantic Council Issue Brief, 2021), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/decoupling-reshoring-versus-dual-circulation-competing-strategies-for-security-and-influences/>.

¹³² *China’s “Dual-Circulation” Strategy Means Relying Less on Foreigners*, THE ECONOMIST (Nov. 5, 2020).

¹³³ Stephen Olson, *How China’s Dual Circulation Strategy Heralds a New Era for Global Trade and Business*, S. CHINA MORNING POST (June 25, 2021), <https://www.scmp.com/comment/opinion/article/3138451/how-chinas-dual-circulation-strategy-heralds-new-era-global-trade>.

¹³⁴ Jin Keyu, *How China is Fighting the Chip War with America*, N. Y. TIMES (Oct. 27, 2022).

¹³⁵ DANIEL MCDOWELL, *BUCKING THE BUCK: US FINANCIAL SANCTIONS AND THE INTERNATIONAL BACKLASH AGAINST THE DOLLAR* 136 (2023).

¹³⁶ Frank Tang, *China’s Yuan Makes Brazilian Inroads, as De-dollarisation Reflects Cracks in US Currency Settlements*, S. CHINA MORNING POST (Apr. 3, 2023), <https://www.scmp.com/economy/china-economy/article/3215857/chinas-yuan-makes-brazilian-inroads-de-dollarisation-reflects-cracks-us-currency-settlements>.

hopes that it could one day allow China to conduct international transactions outside the SWIFT.¹³⁷

In summary, both the United States and China are actively restructuring aspects of their economic engagement. Empirical evidence shows that the top two largest economies in the world have meaningfully reduced the share of their imports from each other, and a partial decoupling of U.S. and Chinese technology ecosystems is well underway.¹³⁸ If weaponized interdependence becomes a regular tool of statecraft, economic interdependence itself is seen as a national security vulnerability, and great powers proactively pursue economic de-risking, the international economic order is destined to be less open, less free, less prosperous, and more competitive.

B. *From “Judicialization” to “De-Judicialization” of
International Economic Disputes*

The concept of judicialization was developed to describe one of the defining phenomena of the twentieth century in world politics—namely, in many issue-areas, there was a move towards strengthening delegation to increasingly independent and powerful third-party judicial and quasi-judicial arbitral tribunals.¹³⁹ In particular, the highly judicialized dispute settlement system has been a defining attribute of international trade and investment law. As the “crown jewel” of the WTO architecture, the WTO dispute settlement system (DSS), established in 1995, was applauded as representing a move of international trade law from a diplomacy-based to a rule-based system.¹⁴⁰ The DSS has exclusive and compulsory jurisdiction over trade disputes and WTO Members bear an international law obligation to comply with the adopted panel and Appellate Body reports.¹⁴¹ As of 31 December 2022, WTO Members had referred 615 disputes to the WTO Dispute Settlement Body since 1995. There had been 283 panel reports and 169 Appellate Body reports adopted, creating a rich jurisprudence concerning WTO rules.¹⁴²

¹³⁷ Nir Kshetri, *China’s Digital Yuan: Motivations of the Chinese Government and Potential Global Effects*, 32 J. CONTEMP. CHINA 87, 94-95 (2023).

¹³⁸ Steven A. Altman and Caroline R. Bastian, *DHL Global Connectedness Index 2022: An In-Depth Report on the State of Globalization* 8-9 (Feb. 2023); Michael A. Witt et al., *Decoupling in International Business: Evidence, Drivers, Impact, and Implications for IB Research*, 58 (1) J. WORLD BUS. 1, 2-3 (2023).

¹³⁹ Goldstein et al., *Supra* note 18, at 389-390; KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* 3-4 (2014).

¹⁴⁰ J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 (2) J. WORLD TRADE 191, 192-193 (2001); Cosette D. Creamer, *Can International Trade Law Recover? From the WTO’s Crown Jewel to Its Crown of Thorns*, 113 AM. J. INT’L L. UNBOUND 51 (2019).

¹⁴¹ John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109, 123 (2004).

¹⁴² WTO, *Dispute Settlement Activity – Some Figures*, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm; WTO, *Appellate Body Annual Report for 2019- 2020* 16, WT/AB/30 (July. 31, 2020).

The arbitral system of investor-state dispute settlement (ISDS) is another example of the judicialization of international economic relations. Allowing foreign investors to bring claims against host states without the need for home state espousal, the ISDS mechanism was designed to “de-politicize” investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral, and qualified tribunal.¹⁴³ In the process, ISDS has become more judicialized, acquiring some of the trappings of judicial procedures.¹⁴⁴ By the end of 2022, the total number of publicly known ISDS claims reached 1,257 and at least 890 ISDS proceedings had been concluded.¹⁴⁵

Yet, more recently, a backlash against judicialization in international economic law has emerged. The scope and depth of judicial governance in international trade and investment are less than they used to be.¹⁴⁶ The WTO Appellate Body has ceased functioning since December 2019 because the United States has been blocking a consensus on appointments of Appellate Body members. Losing WTO members have nevertheless appealed panel reports into the void, leaving many disputes in a state of limbo.¹⁴⁷ In an attempt to overcome the current paralysis of the Appellate Body, the European Union and twenty-four WTO Members agreed on the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) pursuant to Article 25 of the WTO Dispute Settlement Understanding.¹⁴⁸ The MPIA essentially provides a temporary measure for those WTO members who wish to have an Appellate Body-like appeals process. As of 31 December 2022, parties to ten disputes have resorted to the MPIA for review of panel reports and arbitrators have issued awards in two such proceedings.¹⁴⁹ However, the MPIA does not offer a long-term solution for WTO dispute settlement crisis since the majority of the WTO Members, including the United States, have not yet agreed to participate in

¹⁴³ Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. 1, 4 (1986).

¹⁴⁴ Alan Redfern, *The Changing World of International Arbitration*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 45, 49-50 (David D. Caron et al eds., 2015).

¹⁴⁵ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2023: INVESTING IN SUSTAINABLE ENERGY FOR ALL 77-79 (2023).

¹⁴⁶ Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521 (2019); Johann Robert Basedow, *Why De-Judicialize? Explaining State Preferences on Judicialization in World Trade Organization Dispute Settlement Body and Investor-to-State Dispute Settlement Reforms*, 16 REGUL. & GOVERNANCE 1362 (2022).

¹⁴⁷ Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to from here?* (IISD Policy Analysis, 2022), <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis>

¹⁴⁸ WTO, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, JOB/DSB/1/Add.12 (Apr. 30, 2020).

¹⁴⁹ WTO, *Dispute Settlement Activity – Some Figures*, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

the MPIA.¹⁵⁰ The Biden administration has recently reiterated that it was not prepared to agree to launch the process to fill vacancies on the WTO Appellate Body.¹⁵¹

Why did the United States cripple the WTO DSS? In the view of the United States, the Appellate Body engaged in judicial overreach on a range of procedural and substantive matters, disregarded the rules set by WTO Members, and added to or diminished rights or obligations under the WTO Agreement.¹⁵² In particular, the United States alleged that the Appellate Body's interpretations of the trade remedy provisions in the antidumping and subsidies agreements, such as public body, out-of-country benchmarks and double remedies, have unduly constrained market economy countries from exercising their legal rights to address economic distortions caused by China.¹⁵³ Likewise, China has grown increasingly disenchanted with the institutional centrality of the multilateral trading system in what it perceived as a more hostile international environment.¹⁵⁴ Accordingly, both Washington and Beijing concluded that adherence to the trade rules may not be in their best national interests because trade law constrains policy choices. Both countries turned away from trade multilateralism and resorted to aggressive unilateralism and coercive power in international economic relations that violate the letter and spirit of the WTO agreements.¹⁵⁵ Precisely because the world's two largest economies are in a strategic competition where the winning tactics are perceived to require measures that disregard the fundamental trade rules, the WTO has been thrown into crisis.¹⁵⁶

Like the WTO DSS, the ISDS is currently undergoing a legitimacy crisis. Criticisms levelled at the ISDS are manifold: lack of an appeal process, lack of stability and predictability in arbitral awards, questionable independence and impartiality of arbitrators, lack of gender and geographical diversity among arbitrators, the regulatory chill effect, and lengthy and costly ISDS proceedings.¹⁵⁷ Given these challenges, a growing number of states have terminated BITs with ISDS clauses, withdrawn from the ICSID Convention, or created new constraints on using ISDS.¹⁵⁸ In

¹⁵⁰ William J. Davey, *WTO Dispute Settlement: Crown Jewel or Costume Jewellery*, 21 *WORLD TRADE REV.* 291, 294 (2022).

¹⁵¹ USTR, *2023 Trade Policy Agenda & 2022 Annual Report* 197 (Mar. 2023).

¹⁵² USTR, *REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION* 1-2 (Feb. 2020).

¹⁵³ *Id.*, at 9-12.

¹⁵⁴ Henry Gao, *China's Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation*, 21 *WORLD TRADE REV.* 342, 355-357 (2022).

¹⁵⁵ Kristen Hopewell, *Beyond U.S. – China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade*, 116 *AM. J. INT'L L. UNBOUND* 58 (2022).

¹⁵⁶ Daniel Ikenson, *Strategic Reglobalization: Great Power Rivalry Comes for the Multilateral Trading System* 5 (Hinrich Foundation Report, Oct. 2022).

¹⁵⁷ Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, *The Legitimacy Crisis and the Empirical Turn*, in *THE LEGITIMACY OF INVESTMENT ARBITRATION* 4-7 (Daniel Behn et al., eds., 2022).

¹⁵⁸ Sergio Puig and Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 *AM. J. INT'L L.* 361, 366 (2018).

response to this backlash against ISDS, competing proposals were advanced to restructure the system.¹⁵⁹ Nevertheless, it must be stressed that even though backlash has occurred, states have not fully dejudicialized the ISDS. Many states remain committed to it. In 2022 alone, investors initiated forty-six publicly known ISDS cases under international investment treaties.¹⁶⁰

Deeply sceptical that ISDS undermines national sovereignty and promotes offshoring which hurts parts of the U.S. economy, the U.S. significantly curtailed the degree to which foreign investors can resort to ISDS in the United States-Mexico-Canada Agreement (USMCA). For example, the USMCA eliminates ISDS with respect to investment disputes between the United States and Canada. With respect to Mexico, with some limited exceptions, the USMCA restricts ISDS to claims alleging discrimination or direct expropriation and requires claimants to exhaust local remedies first.¹⁶¹ Similarly, more recent Chinese BITs have included procedural and substantive limitations or prerequisites to ISDS.¹⁶² China has up to date only limited exposure to ISDS and has never lost a single case.¹⁶³ Given China's position as the second largest FDI destination in the world, there is little doubt that the number of investment disputes involving China will rise in the future. In fact, six investment arbitration cases were filed against China by foreign investors from January 2018 to August 2023, more than what China had experienced for more than thirty years since the conclusion of its first BIT in 1982.¹⁶⁴ As some have pointed out, it may take an actual losing case for a state to realize that the reach of BITs may be greater and the sovereignty costs higher than it anticipated.¹⁶⁵ It is almost certain that an adverse ISDS ruling would have a negative impact on foreign investors' current liberal access to ISDS in Chinese BITs, as was the case in other developing countries such as Brazil and India.¹⁶⁶ This is particularly the case if China perceives ISDS as unfair, biased, or abused as a tool of great power rivalry to its disadvantage.

¹⁵⁹ Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L. L. 410 (2018).

¹⁶⁰ UNCTAD, *Supra* note 145, at 77.

¹⁶¹ Jerry L. Lai, *A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms*, 35 EMORY INT'L. L. REV. 259, 281-284 (2021).

¹⁶² SONIA E. ROLLAND AND DAVID M. TRUBEK, EMERGING POWERS IN THE INTERNATIONAL ECONOMIC ORDER 118-119 (2019).

¹⁶³ Ming Du, *Explaining China's Approach to Investor-State Dispute Settlement Reform*, 28 EUR. L. J. 281, 294 (2023).

¹⁶⁴ *Id.*, at 282.

¹⁶⁵ Joost Pauwelyn and Rebecca J. Hamilton, *Exit from International Tribunals*, 9 J. INT'L DISP. SETTLEMENT 679, 684 (2018).

¹⁶⁶ Du, *Supra* note 163, at 282. The first adverse arbitral award against the government of India in the case of *White Industries* in 2011 prompted public outcry and led to a complete review of the country's BITs. India adopted a new model BIT that, while it incorporates ISDS, conditions its use on the initial pursuit of remedies before domestic courts for at least five years. See Grant Hanessian & Kabir Duggal, *The 2015 India Model BIT: Is This the Change the World Wishes to See?*, 32 ICSID REVIEW 216, 221-225 (2017).

If judicialization of international politics diminishes state sovereignty and involves a shift of power toward international adjudication, de-judicialization removes legal oversight from the remit of international courts and arbitral tribunals. It represents the reacquisition of power by national executives and legislatures and regains Members' legitimate policy space.¹⁶⁷ Exit from international tribunals and taking the law into one's hands may be part of a winning strategy in the era of great power rivalry; however, it threatens fair competition, openness, transparency, the rule of law, and other fundamental values in international economic relations.

C. *The Normalization of Unilateralism*

Unilateralism tends to carry pejorative connotations in international law because it usually relates to a state taking legislative or enforcement action outside its territorial jurisdiction and requiring other sovereign states to alter their behaviour in some way.¹⁶⁸ Unilateral acts become especially contentious where one state seeks to impose its values on another state and where that other state has not consented to the imposed values.¹⁶⁹ Instead of international cooperation and multilateral governance, unilateralism is frequently viewed as disruptive and puts at risk the security and predictability of international economic relations.

But not all unilateralism is unjustified.¹⁷⁰ In many cases effective multilateral action is simply impossible, so the choice is not between unilateralism and multilateralism but between unilateralism and inaction.¹⁷¹ Nor is unilateral action always destabilizing. It sometimes plays a catalytic role in promoting the development of international norms.¹⁷² For instance, prior to the establishment of the WTO, the United States regularly imposed unilateral trade restrictions pursuant to Sections 301-310 of the Trade Act of 1974 (Section 301) on other countries that violated the GATT rules or had, in the U.S. view, unreasonable trade policies. This strategy of "aggressive unilateralism" was a critical impetus for many countries to agree to broaden the trade regime's coverage to include trade in services and intellectual property.¹⁷³ Moreover, not all unilateral measures with extraterritorial application are

¹⁶⁷ Karen J. Alter, Emilie Hafner-Burton and Laurence R. Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449 (2019).

¹⁶⁸ Bernhard Janson, *The Limits of Unilateralism from European Perspective*, 11 EUR. J. INT'L L. 309, 310 (2000).

¹⁶⁹ Philippe Sands, *Unilateralism, Values and International Law*, 11 EUR. J. INT'L L. 291, 293 (2000).

¹⁷⁰ Monica Hakim, *Unfriendly Unilateralism*, 55 HARV. INT'L L. J. 105, 134-135 (2014).

¹⁷¹ Daniel Bodansky, *What is So Bad about Unilateral Action to Protect Environment?*, 11 EUR. J. INT'L L. 339 (2000).

¹⁷² Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law*, 1 TRANSNAT'L ENV'T L. 31, 34 (2012).

¹⁷³ Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 113, 130 (Jagdish Bhagwati & Hugh T. Patrick eds, 1990).

inconsistent with international economic law even if they may impose significant economic costs on the trading partners. In particular, while several early GATT panels ruled that unilateral trade restrictions designed to address environmental challenges outside the jurisdiction of the state were prohibited, the WTO Appellate Body has established the principle since *US–Shrimp* that WTO law does not necessarily prohibit such unilateral trade measures insofar as certain conditions are satisfied.¹⁷⁴

In the era of great power rivalry, unilateral action has become a regular tool used by powerful states with significant market power to pursue various policy objectives and reshape their trade and investment relations. While some unilateral measures purport to fill perceived gaps in international economic law, others fly in the face of existing international treaty obligations. For example, a core part of the WTO bargain is the legal promise that Members will not take the law into their own hands by unilaterally determining the illegality of other members' actions outside the WTO dispute settlement mechanism.¹⁷⁵ When the European Union challenged the consistency of Section 301 with the WTO law in *US–Section 301 Trade Act* in 1999, the United States committed to act in each and every case in conformity with WTO dispute settlement procedures.¹⁷⁶ Contrary to the U.S. commitments, the Trump Administration launched Section 301 investigations in 2018, eventually leading to unilateral imposition on roughly \$350 billion of Chinese imports, and China retaliated with tariffs on \$100 billion of U.S. exports.¹⁷⁷ A WTO panel found that the U.S. tariffs were inconsistent with the WTO law in 2020.¹⁷⁸ Nevertheless, the panel report remains symbolic since the United States has appealed it into the void left by the inoperative WTO Appellate Body, leaving the dispute unresolved. Other unilateral measures based on the US domestic laws with extraterritorial effects include, *inter alia*, the Uyghur Forced Labour Prevention Act, which imposed a ban on virtually all imports from China's Xinjiang region over concerns of the prevalence of forced labour¹⁷⁹, the inclusion of currency undervaluation in its subsidy investigation,¹⁸⁰ the export

¹⁷⁴ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp & Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), ¶ 121; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp & Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001).

¹⁷⁵ Article 23 of the DSU.

¹⁷⁶ Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999), ¶ 8.1.

¹⁷⁷ Pablo D. Fajgelbaum and Amit K. Khandelwal, *The Economic Impacts of the US-China Trade War*, 14 ANN. REV. ECON. 205, 206 (2022).

¹⁷⁸ Panel Report, *United States — Tariff Measures on Certain Goods from China*, WT/DS543/R (Sept. 15, 2020), ¶ 8.1.

¹⁷⁹ Fleur Britten, *US Ban on Cotton from Forced Uyghur Labour Comes into Force*, THE GUARDIAN (June 21, 2022), <https://www.theguardian.com/world/2022/jun/21/us-ban-on-cotton-from-forced-uyghur-labour-comes-into-force>.

¹⁸⁰ Department of Commerce, *Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings*, 85 (23) FED. REG. (Feb. 4, 2020).

control on semiconductor chips,¹⁸¹ and the use of secondary sanctions.¹⁸² Any hopes that unilateralism would be a short-lived policy were shattered when the Biden administration continued virtually all of the previous administration's trade policies.

The European Union also concluded that unilateral trade measures are the most effective way available to pursue its objective of "open strategic autonomy," which emphasises the EU's ability to make its own choices and shape the world around it to reflect its strategic interests and values.¹⁸³ Accordingly, there is a long list of EU regulations that attempt to apply the objectives and values of the European Union and act unilaterally on the regulation of the international economy.¹⁸⁴ The most prominent examples of the EU's unilateralism include the Carbon Border Adjustment Mechanism (CBAM) Regulation targeting imports of carbon-intensive products to prevent offsetting the EU's greenhouse gas emissions reduction efforts through imports of products manufactured in non-EU countries where climate change policies are less ambitious than in the European Union;¹⁸⁵ the Deforestation Regulation to prevent companies from placing commodities linked with deforestation and forest degradation onto the EU market;¹⁸⁶ and the Forced Labour Regulation to prohibit the import and export of products on the EU market which are made with forced labour.¹⁸⁷ Primarily aimed at China, the European Union's adopted Foreign Subsidies Regulation seeks to curb Chinese companies' ability to buy European firms or outbid them for EU government contracts with subsidies granted by the

¹⁸¹ Request for Consultation by China, *United States — Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WT/DS615/1 (Dec. 15, 2022).

¹⁸² Alan Rappeport, *The U.S. Accused Chinese Companies of Supporting Russia's Military*, N. Y. TIMES (June 22, 2022). Secondary sanctions are also called extraterritorial sanctions, defined as "economic restriction imposed by a sanctioning state that is intended to deter a third-party country or its citizens and companies from transacting with a sanctioned state". See Jeffery A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 926 (2009).

¹⁸³ European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy* 13-14, COM (2021) 66 final (Feb. 18, 2021); Geraldo Vidigal, *The Unilateralization of Trade Governance: Constructive, Reconstructive, and Destructive Unilateralism*, 50 LEGAL ISSUES OF ECON. INTEGRATION, 1-2 (2023).

¹⁸⁴ Alan Herve, *European Unilateralism as a Tool for Regulating International Trade: A Necessary Evil in a Collapsing Multilateral System* 4-5 (Foundation Robert Schuman European Issues No. 626, 2022).

¹⁸⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, COM (2021) 564 final, 2021/0214(COD) (Jul. 14, 2021).

¹⁸⁶ European Commission, *Proposal for a Regulation on the Making Available on the Union Market as Well as Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation*, COM (2021) 706 final 2021/0366 (COD) (Nov. 17, 2021).

¹⁸⁷ European Commission, *Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market*, Brussels, COM (2022) 453 final 2022/0269 (COD) (Nov. 14, 2022).

Chinese government¹⁸⁸ and the proposed EU Anti-Coercion Instrument aims to deter and counter alleged economic coercion in EU–China relations.¹⁸⁹

In response to increasingly targeted sanctions against Chinese entities and individuals, China has taken a leaf out of the Western countries' playbook and enacted new laws and regulations that appear to mimic measures long used by the United States and the European Union.¹⁹⁰ In June 2021 China adopted a new *Anti-Foreign Sanctions Law* (AFSL), following the Ministry of Commerce's publication of *Provisions on the List of Unreliable Entities* in September 2020, which drew inspiration from the U.S. Department of Commerce's Entity List¹⁹¹ and *Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures* in January 2021, which was modelled on the EU blocking statute and designed to deter secondary sanctions.¹⁹² The AFSL created a legal apparatus of the highest level under the Chinese legal system to authorize countermeasures, such as freeze of assets and prohibition of business or cooperation with any China-based individuals or entities, against foreign entities and individuals seeking to implement discriminatory restrictive measures against Chinese citizens or entities.¹⁹³ Countermeasures against individuals on the sanctions list may be extended to their spouses, relatives, and entities with which they are associated.¹⁹⁴ The AFSL therefore forces foreign companies to take sides: compliance with Western sanctions against China would incur legal liabilities in China, and vice versa. This could affect companies that refuse to do business with Huawei or other Chinese entities such as Xinjiang Production

¹⁸⁸ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market, Official Journal of the European Union L 330/1 (Dec. 23, 2022); Kim Mackrael, *EU Foreign-Subsidy Limits Target China but Also Hit U.S. Companies*, WALL ST. J. (Dec. 28, 2022).

¹⁸⁹ The European Commission Press Release, *Political Agreement on New Anti-Coercion Instrument to Better Defend EU Interests on Global Stage* (June. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3046.

¹⁹⁰ Jeannette Chu, *The New Arms Race: Sanctions, Export Control Policy, and China* (Centre for Strategic & International Studies Commentary, 2022), <https://www.csis.org/analysis/new-arms-race-sanctions-export-control-policy-and-china>.

¹⁹¹ Ministry of Commerce (China) Order No.4 of 2020 on Provisions on the Unreliable Entity List (Sept. 19, 2020), <http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml>.

¹⁹² Ministry of Commerce (China) Order No.1 of 2021 on Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (Jan. 9, 2021), <http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml>.

¹⁹³ Art. 4 of the AFSL.

¹⁹⁴ Art. 5 of the AFSL.

and Construction Corps based on recent sanctions by the United States, European Union, and other countries.¹⁹⁵

The AFSL also goes beyond countering sanctions imposed by foreign countries and allows China to implement its own countermeasures where it deems that actions of foreign entities or individuals endanger China's "sovereignty, security, and development interests."¹⁹⁶ China has so far imposed sanctions on a wide range of foreign politicians, businesses, and nongovernmental organizations in the United States, Canada, United Kingdom, and European Union. The broad strokes of China's AFSL have caused greater concerns over consequences that could have catastrophic effects on cross-border trade.¹⁹⁷

Moreover, China has stepped up its use of novel means, facilitated by the outsized influence of the party-state in corporate affairs, to apply unilateral trade coercion to define its terms of international engagement. For example, one unique feature of Chinese unilateral trade coercion is the use of informal, indirect, non-transparent, and deniable measures for strategic policy purposes of forestalling international criticism and condemnation.¹⁹⁸ China's anger at Lithuania for allowing Taiwan to open a representative office in Vilnius included discriminatory and coercive measures against exports from Lithuania and against exports of EU products containing inputs from Lithuania since December 2021. Chinese customs statistics show that trade from Lithuania to China dropped 80% from January to October 2022 as compared with the previous year.¹⁹⁹ In the same vein, Slovenia's hopes for closer ties with Taiwan met resistance as Chinese companies immediately terminated contracts and exited agreed-upon investments following Beijing's official expressions of chagrin.²⁰⁰

The normalization of unilateralism in the era of great power rivalry raises the fundamental question of the present and future regulation of international economic order. To begin with, unilateralism as routine state practice is a permanent feature of international life. But unilateralism is a form of asymmetric political power that can only be exercised by a few powerful states, who are usually acting in the shadow of domestic political interests and are undertaken in the absence of any direct accountability to those at the receiving end of the regulatory overreach. It therefore

¹⁹⁵ William Zheng, *Chinese Firms May be able to Hit Back at Foreign partners under New Anti-sanctions Law*, S. CHINA MORNING POST (June. 9, 2021).

¹⁹⁶ Art. 15 of the AFSL.

¹⁹⁷ Katja Drinhausen and Helena Legarda, *China's Anti-Foreign Sanctions Law: A Warning to the World* (June. 24, 2021), <https://merics.org/en/short-analysis/chinas-anti-foreign-sanctions-law-warning-world>.

¹⁹⁸ Ben Czapnik and Bryan Mercurio, *The Use of Trade Coercion and China's Model of Passive-Aggressive Legalism*, 26 J. INT'L ECON. L. 322, 341 (2023).

¹⁹⁹ European Commission Press Release, *EU Requests Two WTO Panels against China: Trade Restrictions on Lithuania and High-tech Patents* (Dec. 7, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7528.

²⁰⁰ Bruno Waterfield and Didi Tang, *Slovenia Latest EU Nation Hit by China for Backing Taiwan*, THE TIMES (Jan. 27, 2022).

undercuts the foundational principle of sovereign equality or the rule of law more generally.²⁰¹ Furthermore, unilateral measures are prone to trigger trade conflict and tit-for-tat countermeasures by target countries. Even if some agreement is reached, it usually involves diverting trade from other countries with small political clout to satisfy the strong. For example, meeting the terms of the U.S.-China “Phase One” Deal led China to divert trade from other countries, including U.S. trade allies, in favour of U.S. imports.²⁰² Unilateralism therefore poisons the ethos of fairness in trade relations, without which open markets are hard to sustain.²⁰³ Next, unilateral sanctions are notoriously ineffective in achieving foreign policy goals.²⁰⁴ For example, the aggressive trade sanctions on a broad range of goods from China by the United States failed to force China to capitulate to the U.S. core demands for major structure reform and mostly resulted in higher prices for U.S. consumers.²⁰⁵ Finally, there are concerns that the design and implementation of many unilateral trade measures may be simply inconsistent with the WTO legal framework.²⁰⁶ The WTO system is certainly showing its age and needs renewal. But the solution cannot consist of universal acceptance of unilateralism. Unchecked unilateralism without accountability mechanisms is unsustainable in our interconnected and institutionally pluralistic world.²⁰⁷

D. *The Securitization of International Economic Relationships*

National security measures were traditionally viewed as an *exception* to trade and investment rules in international economic law. States are permitted to invoke the national security exception in extraordinary circumstances to block cross-border trade and investment flows. Recognizing the challenges of regulating the

²⁰¹ Phoebe Okowa, *The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation*, 69 INT'L & COMP. L. Q. 685, 697-699 (2020).

²⁰² Virgil Bisio et al, *The U.S. – China “Phase One” Deal: A Backgrounder* (U.S. – China Economic and Security Review Commission Issue Brief, 2020).

²⁰³ JAGDISH N. BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 56 (1991).

²⁰⁴ Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SEC. 90, 109 (1997); Robert Wright, *Why Sanctions Often Fail*, THE NEW YORKER (Mar. 7, 2022).

²⁰⁵ Mary Amiti et al., *The Impact of the 2018 Tariffs on Prices and Welfare*, 33 (4) J. ECON. PERSP. 187, 207 (2019).

²⁰⁶ Submission by Indonesia and Brazil, *Joint Letter: European Union Proposal for a Regulation on Deforestation-FREE Products*, WTO Committee on Agriculture, G/AG/GEN/213 (Nov. 29, 2022); IRYNA BOGDANOVA, *UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS* 269 (2022); Chien-Huei Wu & Mao-Wei Lo, *Is Currency Undervaluation a Subsidy: US Law and Practice and the WTO Compatibility*, 55 J. WORLD TRADE 1017, 1038 (2021); Tom Guys and Cedric Ryngaert, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 89 BRIT. Y. B. INT'L L. 1, 62-65 (2019).

²⁰⁷ John Gerard Ruggie, *Doctrinal Unilateralism and Its Limits: America and Global Governance in the New Century* in AMERICAN FOREIGN POLICY IN A GLOBALIZED WORLD 31, 50 (David P. Forsythe, Patrice C. MacMahon and Andrew Wedeman eds. 2006).

national security exception and the detrimental effects if it were broadly invoked, states previously exercised restraint in invoking national security exception or challenging such before international trade and investment tribunals for fear of opening a Pandora's box.²⁰⁸ In the era of great power rivalry, by contrast, it is increasingly difficult to separate economic issues from broader considerations of national interest and national security because economic interdependence and digital and technological connectivity are themselves perceived as generating strategic vulnerabilities and posing national security risks.²⁰⁹ As national security policy evolves, states are more likely to find it imperative to deviate from their commitment to trade and investment liberalization. Moreover, precisely because geopolitical rivalries between China and the United States now play out *within* economic institutions such as the WTO rather than outside them, they have greater incentives to advance their strategic aims either by pushing the boundaries of security exceptions or by resorting to compulsory international dispute settlement mechanisms when confronted with their adversaries' overstretched security claims.²¹⁰ Accordingly, one distinctive feature of international economic law in the era of great power rivalry is the securitization of international economic relationships, evidenced by the expansion of the national security concept, the introduction of new national security screening mechanisms or the strengthening of existing ones in national laws, more restrictions on international trade and investment flows on national security grounds, and more frequent invocation of the national security exception in international economic disputes.

To begin with, the range of issues that may be credibly described as national security has expanded exponentially in recent years. Whereas the concept of national security was traditionally framed in terms of armed attack, civil war, terrorist activity, rioting, or some other nexus to warfare, diffuse concerns are now perceived as national security matters. For example, the supply of critical goods and services, critical technologies and infrastructure, sensitive personal data, cybersecurity, economic emergencies, infectious disease, organized crime, corrupt foreign officials, and even human rights violations, environmental degradation, and climate change are viewed as national security matters.²¹¹ As the range of security threats expands, so does the range of industries that may be considered security sensitive. The sensitive sectors are no longer limited to military and defence industries and can encompass, among others, telecommunications,

²⁰⁸ Roger P. Alford, *The Self-Judging WTO Security Exception*, UTAH L. REV. 697, 753-757 (2011).

²⁰⁹ Roberts et al, *Supra* note 24, at 659-660.

²¹⁰ J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L. J. 1020, 1060 (2020).

²¹¹ *Id.*, at 1034-1035; FIRRMA, *Supra* note 5, § 1703(a)(4)(B)(iii); Minister of Innovation, Sci. & Ind., Guidelines on the National Security Review of Investments, Gov't of Can. (Mar. 24, 2021), <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html> (Can.).

transportation, energy, water and food supply, education, health services, and the media.²¹²

In the era of great power rivalry, the conceptualization of national security has been stretched even further. Indeed, for the United States, the full spectrum of U.S.–China strategic competition is framed as a national security concern.²¹³ Accordingly, a wide range of issues that were not commonly understood as security concerns, such as China’s state-led economic model, erosion of human rights and democracy in Hong Kong, political and ideological differences, technological achievements, global capital market integration, and even China’s development of a central bank digital currency, were identified as national security threats.²¹⁴ To address such concerns, the United States understands national security as the retention of dominance and superiority over China in military, economic, technological, political and ideological spheres.²¹⁵ Likewise, driven by perceptions of both internal and external threats, China has adopted the concept of “a holistic view of national security,” currently encompassing sixteen types of security interests deemed essential to China’s sovereignty and development. They range from traditional security concerns such as political security, territorial security, military security, and economic security to new policy areas such as cultural security, scientific security, ecological security, and the security of China’s overseas interests.²¹⁶ The transformation of the national security concept in both the United States and China has dramatically increased the proportion of state measures affecting the global economy that could be justified on national security grounds.

Furthermore, the expansive concept of national security is now embedded in domestic trade and investment legislations in many countries. Take investment rules as an example. One of the most striking recent trends in investment policy was that numerous countries have introduced new or reinforced existing

²¹² Frédéric Wehrlé & Joachim Pohl, *Investment Policies Related to National Security – A Survey of Country Practices 23* (OECD Working Papers on Int’l Inv., Paper No. 2016/02, 2016).

²¹³ The U.S. National Defence Authorization Act for Fiscal Year 2019 declared that “long-term strategic competition with China is a national security priority that must be addressed through a combination of military, political, and economic means.” Pub. L. No. 115-232, §1261(a) (2018).

²¹⁴ 2021 Report to Congress of the U.S. - China Economic and Security Review Commission 11 (Nov. 2021); O’Brien, *Supra* note 60.

²¹⁵ Joel Slawotsky, *The Fusion of Ideology, Technology and Economic Power: Implications of the Emerging New United States National Security Conceptualization*, 20 CHINESE J. INT’L L. 3, 60–61 (2021); J. Benton Health, *Making Sense of Security*, 116 AM. J. INT’L L. 289 (2022).

²¹⁶ Chieh Huang, *China’s Take on National Security and Its Implications for the Evolution of International Economic Law*, 48 (2) LEGAL ISSUES OF ECON. INTEGRATION 119, 124-127 (2021).

national security screening mechanisms for foreign investment.²¹⁷ The Covid-19 pandemic has accelerated this trend in response to new national security concerns about foreign investment.²¹⁸ With enhanced screening procedures and more aggressive jurisdiction assertions of government agencies, there has been a marked increase in the scrutiny of international investment transactions based on national security grounds. For instance, the annual number of investigations conducted by the Committee on Foreign Investment in the United States (CFIUS) has increased from forty-five in 2012 to 162 in 2022.²¹⁹ At the same time, domestic legislation invariably affords government agencies almost unlimited discretion to prohibit a proposed investment or ban a product for national security concerns. To challenge a national security decision in domestic courts is usually fruitless because judicial review on such decisions is either unavailable or rather limited.²²⁰ Even if domestic courts have jurisdiction to exercise judicial review, they frequently show considerable deference to the decisions of the relevant government agencies.²²¹ This has led to criticisms that national security review tends to be discriminatory, arbitrary, coercive, and politicalized.²²²

At present, a cascade of coercive trade and investment measures targeting China are underpinned by alleged national security concerns. Recent U.S. practices include the dismantling of the supply chains of Chinese manufacturers like Huawei and ZTE, banning the use of TikTok on government-issued mobile devices, imposing punitive tariffs, blocking Chinese acquisitions of U.S. businesses, extensive sanctions on Chinese companies, technology export control, and restrictions on certain U.S. outbound investment in specific sensitive technologies in China.²²³ Leaving behind the old defensive posture, China has also taken proactive and forceful actions in an escalation of the country's tit-for-tat trade war with the United States, purportedly for national security

²¹⁷ See U.N. Conf. on Trade & Dev., National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments 4 (Dec. 2019).

²¹⁸ Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793, 796–97 (2020).

²¹⁹ U.S. Department of the Treasury, *CFIUS Annual Report to Congress* 21 (2022), <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-reports-and-tables>.

²²⁰ For example, Article 35 of Foreign Investment Law of the People's Republic of China (2019) provides: "The State establishes a security review system for foreign investment and conducts security review of foreign investment that affects or may affect national security. Security review decisions made in accordance with law are final decisions."

²²¹ Ming Du, *Huawei Strikes Back: Challenging National Security before the International Investment Arbitral Tribunals*, 37 EMORY INT'L L. REV. 1, 23 (2023).

²²² *Id.*, at 17–21; Hushboo Razdan, *Amid Micron Ban, US Working with Allies to Beat China's "Economic Coercion": Commerce Secretary*, S. CHINA MORNING POST (May. 28, 2023).

²²³ Demetri Sevastopulo, *White House Unveils Ban on US investment in Chinese Tech Sectors*, FIN. TIMES (Aug. 10, 2023); Stephen Kho & Yujin K. McNamara, *Focus on China: The Expansive Use of National Security Measures to Address Economic Competitiveness Concerns*, 17 U. PA. ASIAN L. REV. 368, 370 (2022).

reasons.²²⁴ For example, China has launched a series of targeted investigations into Western consultancy and due diligence firms' operations in the country, including Bain & Company, Mintz Group, and Capvision since March 2023. These global advisory firms were accused of providing sensitive information to overseas clients and intelligence agencies, triggering national security concerns.²²⁵ At the same time, China has drastically broadened the scope of its anti-espionage law that encompasses "all documents, data, materials, and items" that authorities deem related to national security and interests, and expanded the search and seizure powers of authorities, as well as imposing exit bans on individuals under investigation.²²⁶ More recently, China banned the sale of products made by Micron, the biggest U.S. memory chip maker, to China's key information infrastructure operators and announced that it would restrict exports of two critical metals that are crucial to the production of semiconductors, missile systems, and solar cells to protect national security interests.²²⁷

The proliferation of national security reviews has a profound impact on international trade and investment flows. China's Ministry of Commerce has identified the wide use of national security review as a major regulatory hurdle for Chinese investors in the United States.²²⁸ Similarly, China's recent national security raids on foreign firms have led to growing fears whether China is going against its stated aim of welcoming foreign investment.²²⁹ More importantly, the securitization of international economic relations strikes at the foundation of international economic governance. If national security is conceptualized as a fusion of economic, ideological, and technological supremacy, or where all matters are seen through a security prism, how can one draw the line between the protection of legitimate security concerns and impermissible protectionism in practice? What stops a state from claiming any trade and investment transaction poses a national security threat? As Roberts warned, without proper control of its potential abuse, an expansive conceptualization of national security can "eat the heart out of the old international economic world order," which was largely based on economic efficiency and

²²⁴ Helena Legarda, *China's New International Paradigm: Security First in the CCP's Next Century: Expanding Economic Control, Digital Governance and National Security* 53, 60 (Nis Grünberg & Claudia Wessling eds, 2021).

²²⁵ Joe Leahy et al., *The Full Treatment: China Sends a Message with Raid on Consultancy*, FIN. TIMES (May. 9, 2023).

²²⁶ Helen Davidson, *China Widens 'Already Breath-taking' Scope to Arrest Foreigners for Espionage*, THE GUARDIAN (Apr. 27, 2023).

²²⁷ James T. Areddy and Sha Hua, *China Restricts Exports of Two Minerals Used in High-Performance Chips*, WALL ST. J. (July. 4, 2023).

²²⁸ Ministry of Commerce Regular Press Briefing, Ministry of Com. China (July. 25, 2019), <http://english.mofcom.gov.cn/article/newsrelease/press/201908/20190802889887.shtml>.

²²⁹ *The Crackdown on Foreign Firms will Deter Global Business – and Undermine China's Own Interests*, THE ECONOMIST (June. 15, 2023).

interdependence, and move international economic norms to security-oriented self-reliance and self-sufficiency.²³⁰

International trade and investment agreements usually contain a general exception clause, allowing a state to escape its trade and investment commitments.²³¹ In contrast to the conventional practice that security measures were not subject to any form of judicial oversight and instead were managed through diplomatic negotiations and mutual restraint in the multilateral trading system, states now regularly bring complaints against national security decisions before either the WTO panels or international investment arbitral tribunals.²³²

The national security exception embodied in Article XXI of the GATT was often argued to be “self-judging” or “non-justifiable” in the sense that each state has complete discretion to determine for itself whether the exception applies. However, this view has been firmly rejected by all WTO panels up to date.²³³ A WTO panel’s approach to interpreting the GATT security exception imposes a two-step framework. First, the existence of a “war,” “emergency in international relations,” or other basis for invoking the exception is reviewed objectively by the panel. The panel in *Russia–Traffic in Transit* defined “emergency in international relations” as “a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.” In that panel’s view, “such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.”²³⁴ More recently, however, the panel in *United States–Origin Marking Requirements* considered that “emergency in international relations” generally refers to “a state of affairs, of the utmost gravity, which represents a breakdown or near-breakdown in the relations between states or other participants in international relations.”²³⁵ This interpretation arguably represents a lower threshold as it covers a wider range of situations

²³⁰ Anthea Roberts et al., *Geoeconomics: The U.S. Strategy of Technological Protection and Economic Security*, LAWFARE (Dec. 11, 2018), <https://www.lawfareblog.com/geoeconomics-us-strategy-technological-protection-and-economic-security>.

²³¹ Article XXI of the GATT 1994; UNCTAD, *The Protection of National Security in IIAs* 39 (2009).

²³² Peter L. H. van den Bossche and Sarah Akpofure, *The Use and Abuse of the National Security Exception under Article XXI (b) (iii) of the GATT 1994*, in *A NEW GLOBAL ECONOMIC ORDER: NEW CHALLENGES TO INTERNATIONAL TRADE LAW* 121, 124-127 (Chia-Jui Cheng ed, 2022); Lizzie Knight and Tania Voon, *The Evolution of National Security at the Interface between Domestic and International Investment Law and Policy: The Role of China*, 21 J. WORLD INV. & TRADE 104, 131-136 (2020).

²³³ Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (Apr. 5, 2019), ¶ 7.102; Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R (June 16, 2020), ¶ 7. 241; Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS556/R (9 December 2022), para 7.146; Panel Report, *United States – Origin Marking Requirements*, WT/DS597/R (21 December 2022), para 7.309.

²³⁴ *Id.*, *Russia – Traffic in Transit*, ¶ 7.76 and 7.77.

²³⁵ Panel Report, *United States – Origin Marking Requirements*, *Supra* note 233, para 7.290.

beyond what the panel in *Russia–Traffic in Transit* outlined.²³⁶ Following this legal standard, the WTO panels ruled that the U.S. imposition of tariffs on steel and aluminium products from China and origin marking requirements on goods produced in Hong Kong did not meet the provisions of GATT XXI since the situations at issue did not meet the threshold of requisite gravity to constitute “an emergency in international relations.”²³⁷ Second, if the basis for invoking Article XXI is fulfilled, both the respondent state’s articulation of its essential security interests and the necessity of the measures adopted to protect the proffered security interests are subject to a highly deferential good-faith test, which only demands a minimum requirement of plausibility.²³⁸ In *Saudi Arabia–IPRs*, the panel held that even if there was an emergency in international relations, the non-application of criminal procedures and penalties to an intellectual property pirate company did not have any plausible relationship to Saudi Arabia’s protection of its essential security interests.²³⁹

Given the proliferation of restrictive measures based on alleged national security concerns, it is commendable for WTO panels to establish guardrails to help contain potential abuse of the national security exception. Especially, WTO panels make it clear that political and economic differences between member states are not sufficient to trigger the invocation of Article XXI unless they give rise to a near-breakdown in the inter-state relations. This interpretation is likely to delegitimize an overly broad conception of the national security concept and many trade restrictions imposed on China by the United States, such as the chip export ban, may not be justifiable under Article XXI.²⁴⁰ However, the trivialization of the national security argument in trade disputes in the era of great power rivalry carries grave political risk for the legitimacy of the WTO dispute settlement system where geopolitical concerns and economic affairs are increasingly linked.²⁴¹ The United States appealed the panel reports into the void and announced that it would seek an authoritative interpretation of GATT Article XXI to the effect that a national security decision of a WTO Member cannot be reviewed by a WTO panel.²⁴² Given the opposing views on the issue, it may be challenging for such an interpretation to be adopted at the WTO.

²³⁶ *Id.*, para 7.315 and footnote 438.

²³⁷ *Id.*, para 7.358; Panel Report, *United States – Steel and Aluminium Products*, *Supra* note 233, para 7.166;

²³⁸ Panel Report, *Russia – Traffic in Transit*, *Supra* note 233, ¶ 7.109 and 7.138.

²³⁹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, *Supra* note 233, ¶ 7.293.

²⁴⁰ WTO, *China Initiates WTO Dispute Complaint Targeting US Semiconductor Chip Measures* (Dec. 15, 2022), https://www.wto.org/english/news_e/news22_e/ds615rfc_15dec22_e.htm.

²⁴¹ Tatiana Lacerda Prazeres, *Trade and National Security: Rising Risks for the WTO*, 19 WORLD TRADE REV. 137, 148 (2020).

²⁴² Statements by the United States at the Meeting of the WTO Dispute Settlement Body (Jan. 27, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press->

Similar to WTO panels, all investment arbitral tribunals held that, absent specific wording in the applicable IIAs, national security exception clauses are not self-judging.²⁴³ Even a self-judging national security exception in IIAs, which allows a state to adopt such measures “which it considers” necessary for protecting essential security interests, does not provide a complete shield from judicial scrutiny as states remain subject to the general obligation to carry out their treaty commitments in good faith.²⁴⁴ A clear trend emerging from investment arbitration case law is that arbitral tribunals usually grant a wide margin of deference to the host country in determining the existence of a national security risk and it proves to be very difficult for a foreign investor to challenge the national security assessment of a host country.²⁴⁵

E. *The Return of Industrial Policy*

Industrial policy is defined as any type of government intervention that “attempts to improve the business environment or to alter the structure of economic activity towards sectors, technologies or tasks that are expected to offer better prospects for economic growth or societal welfare than would occur in the absence of any such intervention.”²⁴⁶ Industrial policy measures may include protective tariffs or other trade restrictions, direct subsidies and tax credits, public spending on research and development, or government procurement.²⁴⁷

Although industrial policy is widely employed in many countries to promote specific industries, it is also highly controversial. On the one hand, proponents argue that the

releases/2023/january/statements-united-states-meeting-wto-dispute-settlement-body.

²⁴³ CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶¶ 371–73; Devas v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merit, ¶ 219 (Perm. Ct. Arb. 2016).

²⁴⁴ Mohammad-Ali Bahmaei and Habib Sabzevari, *Self-Judging Security Exception Clauses as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review*, ASIAN J. INT'L L. 1, 26 (2022); William Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-precluded Measures in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 370 (2007). This view is nevertheless contested as critics argued that there is no explicit textual warrant for a good faith view of security measures; that the good faith test in international law is ambiguous; and that investment tribunals may impose significant constraints on sovereign states to take security measures. See Ji Ma, *International Investment and National Security Review*, 52 VAND. J. TRANSNAT'L L. 899, 933–37 (2021); Jose E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in Y.B. INT'L INV. LAW & POLICY 379, 425–26 (Karl P. Sauvant ed., 2009).

²⁴⁵ See, for example, Devas Award on Jurisdiction and Merit, *supra* note 243, ¶ 245; Deutsche Telekom AG v. India, PCA Case No. 2014-10, Interim Award, ¶¶ 281-287 (Perm. Ct. Arb. 2017); Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, ¶¶ 607 (Mar. 27, 2020).

²⁴⁶ Ken Warwick, *Beyond Industrial Policy: Emerging Issues and New Trends* 16 (OECD Science, Technology and Industry Policy Papers No.2, 2013).

²⁴⁷ Anshu Siripurapu & Noah Berman, *Is Industrial Policy Making a Comeback?*, Council on Foreign Relations Backgrounder (Nov. 18, 2022), <https://www.cfr.org/backgrounder/industrial-policy-making-comeback>.

government has both the ability and the duty to redress pervasive market failures and structure the economy in the national interest since a free market may fail to do so.²⁴⁸ For example, it may be prudent for the government to invest in a particular infant industry that has the potential to generate manifold spillovers and linkage effects.²⁴⁹ What's more, industrial policy may be essential to secure supply of critical materials, medical supplies, or military equipment.²⁵⁰ On the other hand, critics counter that governments lack the information and capability to select and promote the sectors that may have a latent comparative advantage. Rather than correcting the market failure, industry policy may make matters worse.²⁵¹ The intervention also leads to rent-seeking and corruption, where politically well-connected companies are rewarded not for the quality of their products and services but for their skill at lobbying lawmakers.²⁵² Other obstacles that prevent industrial policies from generating better outcomes than the market include lack of discipline regarding scope, duration, and budgetary costs of industrial policies; interaction with other government policies that distort the market at issue; and substantial unseen cost.²⁵³

Industrial policy was widely adopted after the Second World War during the reconstruction of Japan and Europe as well as after the independence of many of the former colonies in Africa, Asia, and Latin America.²⁵⁴ Since the late 1970s, the ideational dimension of international economic order has changed from the original embedded liberalism to a neoliberal project.²⁵⁵ During the neoliberal era, markets were seen as optimally efficient means of organizing economies and state intervention as disturbing the natural tendency for competition, specialization, trade and investment to generate economic growth.²⁵⁶ With the rise of neoliberalism, industrial policy was discredited in the academic and policy debates, although traditional industrial policy tools were

²⁴⁸ Howard Pack and kamal Saggi, *Is There a Case for Industrial Policy? A Critical Survey*, 21 THE WORLD BANK RESEARCH OBSERVER 267, 268 (2006).

²⁴⁹ DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 104-109 (2007).

²⁵⁰ Siripurapu & Berman, *Supra* note 240.

²⁵¹ William F. Maloney and Gaurav Nayyar, *Industrial Policy, Information, and Government Capacity*, 33 THE WORLD BANK RESEARCH OBSERVER 189, 211 (2018) (arguing that industrial policy, however desirable, may not be feasible because the economics profession to date has been unable to offer robust information on the nature or magnitude of the presumed market failures).

²⁵² Warwick, *Supra* note 246, at 23.

²⁵³ Scott Lincicome and Huan Zhu, *Questioning Industrial Policy: Why Government Manufacturing Plans are Inefficient and Unnecessary* 12-21 (Cato Institute White Paper, 2021).

²⁵⁴ Wim Naudé, *Industrial Policy: Old and New Issues* 10 (UNU-WIDER Working Paper No. 2010/106, 2010).

²⁵⁵ Nicholas Mulder, *The Neoliberal Transition in Intellectual and Economic History*, 84 (3) J. HIST. IDEAS 559, 560 (2023).

²⁵⁶ JAMIE PECK, CONSTRUCTIONS OF NEOLIBERAL REASON (2010).

not completely abandoned.²⁵⁷ The popularity of unfettered markets has declined dramatically since the 2008 global financial crisis. The traditional approach to trade—marked by aggressive liberalization and tariff elimination—has increasingly been viewed as incurring significant costs such as stagnant real wages and concentration of wealth, fragile supply chains, inability to avert climate change, de-industrialization, offshoring, and the decimation of manufacturing communities.²⁵⁸ Around the world, economists, policymakers, and ordinary citizens have come to see that neoliberalism has reached its limits and started a new search for more robust responses to challenging problems.²⁵⁹

The shape of the future of the international economic order beyond neoliberalism remains heavily contested. But one unmistakable feature of such an order is that state interventionism has bounced back.²⁶⁰ In particular, pitting liberal democracies against Chinese authoritarianism, the great power rivalry has prompted governments to try to align business interests with national strategic ones.²⁶¹ When traditional trade tools and the multilateral trading system failed to address the impact of China's massive non-transparent, state-directed industrial dominance policies, there is an emerging trend of Western countries launching their own industrial policy as a critical part of the re-balancing effort. As the former U.S. National Economic Council Director Brian Deese argued:

We should be clear-eyed that the idea of an open, free-market global economy ignores the reality that China and other countries are playing by a different set of rules. Strategic public investment to shelter and grow champion industries is a reality of the twenty-first century economy. We cannot ignore or wish this away.²⁶²

During the 2008 financial crisis, New York Times columnist Thomas Friedman marveled at China's "enlightened autocracy" and suggested the United States emulate Beijing's industrial

²⁵⁷ Antonio Andreoni and Ha-Joon Chang, *The Political Economy of Industrial Policy: Structural Interdependencies, Policy Alignment and Conflict Management*, 48 *STRUCTURAL CHANGE & ECON. DYNAMICS* 136 (2019).

²⁵⁸ *Remarks by Ambassador Katherine Tai at the Roosevelt Institute's Progressive Industrial Policy Conference* (Oct. 7, 2022), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/october/remarks-ambassador-katherine-tai-roosevelt-institutes-progressive-industrial-policy-conference>.

²⁵⁹ Miatta Fahnbulleh, *The Neoliberal Collapse: Markets Are Not the Answer*, 99 (1) *FOREIGN AFF.* 38 (2020).

²⁶⁰ Karl Aiginger & Dani Rodrik, *Rebirth of Industrial Policy and an Agenda for the Twenty-First Century*, 20 *J. INDUS. COMP. & TRADE* 189, 189-191 (2020); *Many Countries are Seeing a Revival of Industrial Policy*, *THE ECONOMIST* (Jan. 10, 2022).

²⁶¹ *Government's Widespread New Fondness for Interventionism*, *THE ECONOMIST* (Jan. 10, 2021).

²⁶² Atlantic Council, *The Biden White House Plan for a New US Industrial Policy* (June 23, 2021), <https://www.atlanticcouncil.org/commentary/transcript/the-biden-white-house-plan-for-a-new-us-industrial-policy/>.

policies.²⁶³ Fast forward to 2022, the Biden Administration enacted the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, and the Inflation Reduction Act (IRA) as part of a modern American industrial policy designed to strengthen manufacturing, hasten a green energy transformation, create well-paid jobs, and ensure that the United States retain its leadership in strategic technologies and industries of the twenty-first century.²⁶⁴ The new industrial policy in large part consists of federal tax credits, government grant programmes, and infrastructure projects. Taken together, the policy represents over \$1 trillion of strategic public investment in innovation, technology, manufacturing, workforce training, and infrastructure, including \$52 billion in domestic semiconductor manufacturing and \$369 billion in clean energy and green technology.²⁶⁵ Given the massive state intervention in the economy and its potential impact on the world economy, the European Union complained that the United States has adopted a “China-style industrial policy model” of major subsidies to boost domestic production.²⁶⁶ It is also ironic that Washington decried China’s industrial subsidies and restrictions on foreign investment for decades. When globalization no longer seems to serve U.S. strategic interests, policymakers in Washington have turned against it.

The problem is that industrial policy may lead to unfair competition, closed markets, and fragmentation of critical supply chains if not well designed.²⁶⁷ In fact, one of the bitterest complaints against the IRA, the most aggressive action the United States has even taken to confront the climate crisis, from U.S. trade partners is that preferential treatment for U.S. domestic firms will encourage clean-energy companies to relocate to the United States to benefit from the IRA’s generous subsidies.²⁶⁸ Moreover, industrial policies may include elements that violate WTO rules. For example, the \$7500 consumer tax credit offered by the IRA for purchasing electric cars applies exclusively to electric cars whose final assembly takes place in North America. In addition, half of the tax credit is linked to the origin of the batteries and at least 50 percent of the value of battery components must be manufactured in North America. The other half of the tax credits are correlated to the source of critical minerals used for electric vehicle and at least 40 percent of the value of critical minerals must be extracted, processed, and/or recycled in the United States or a country the

²⁶³ Ikenson, *Supra* note 156, at 20.

²⁶⁴ John Cassidy, *Joe Biden’s Innovative Attempt to Reshape the American Economy*, THE NEW YORKER (Feb. 7, 2023).

²⁶⁵ Raimondo, *Supra* note 21.

²⁶⁶ William Horobin & Arne Delfs, *France Accuses US of Pursuing China-Style Industrial Policy*, BLOOMBERG (Nov. 22, 2022).

²⁶⁷ Alessio Terzi, Aneil Singh and Monika Sherwood, *Industrial Policy for the 21st Century: Lessons from the Past 21-24* (European Economy Discussion Paper 157, 2022).

²⁶⁸ David Kamin and Rebecca Kysar, *The Perils of the New Industrial Policy: How to Stop a Global Race to the Bottom*, 102 FOREIGN AFF. 92, 99 (2023).

United States has a free trade agreement with. The minimum requirements for both battery component and critical minerals will increase by 10 percent each year.²⁶⁹ Since such provisions contain clearly discriminatory local content requirements, they breach the WTO's national treatment principle which requires that imported goods are offered treatment no less favourable than similar domestic products. They also constitute import substitution subsidies and trade-related investment restrictions that are prohibited by the SCM Agreement and the Agreement on Trade-Related Investment Measures, respectively.²⁷⁰

Once one state adopts an aggressive industrial policy, other states may be compelled to follow suit for fear of being left out of the competition, triggering an industrial policy arms race. Out of concerns of the competitive effects of the IRA, the European Commission proposed the Green Deal Industrial Plan in February 2023. One critical component of the plan is to loosen the European Union's state aid rules to make it easier for member states to grant subsidies to industry, including authorizing governments to match the subsidies offered by a third country.²⁷¹ Similarly, the European Union has agreed to a 43 billion Euro plan to boost its semiconductor industry after the U.S. CHIPS and Science Act, aiming to double the European Union's share of global chip output to 20 percent by 2030.²⁷² South Korea, Japan, and Taiwan have also enacted their own competing semiconductor subsidies.²⁷³ A shared feature of all these economic plans is the intention to prioritize domestic industries over foreign competitors and move closer to industrial and energy self-sufficiency.²⁷⁴ The implications of the industrial policy arms race are immense since these policies threaten the most fundamental rules and principles of the multilateral trading system.

F. *The Death of Multilateralism and the Rise of Value-based Regionalism*

Multilateralism has been in paralysis for some time. The Twelfth Ministerial Conference in June 2022 brought back a silver lining by reaching agreement on several significant issues such as WTO reform, e-commerce, fisheries subsidies, agriculture, and food security. In particular, WTO Members signed onto the WTO

²⁶⁹ See Part 4 of the IRA.

²⁷⁰ Andy Bounds, *EU Accuses U.S. of Breaking WTO Rules with Green Energy Incentives*, FIN. TIMES (Nov. 6, 2022); Sherzod Shadikhodjaev, *Industrial Policy and the World Trade Organization* 157-164 (2018).

²⁷¹ Laura Millan and Akshat Rathi, *Competition from the US is Forcing Europe to UP Its Green Game*, BLOOMBERG (Mar. 13, 2013), <https://www.bloomberg.com/news/features/2023-03-13/how-europe-plans-to-respond-to-the-us-inflation-reduction-act?leadSource=verify%20wall>.

²⁷² Foo Yun Chee, *EU Takes on United States, Asia with Chip Subsidy Plan*, REUTERS (Apr. 18, 2023).

²⁷³ Kamin and Kysar, *Supra* note 268, at 99.

²⁷⁴ Joan Villoslada and Angel Saz-Carranza, *The EU Response to the U.S. Inflation Reduction Act* 25 (EsadeGeo-Centre for Global Economy and Geopolitics Position Paper, 2023).

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Agreement on Fisheries Subsidies, only the second new multilateral agreement reached at the WTO since its inception.²⁷⁵ But, overall, few states have high hopes for multilateralism.²⁷⁶ Indeed, one of the casualties of intense rivalry and growing distrust between the two largest economies is the decline of a rules-based multilateral trading system.

A central premise of the global trading system is that, by eliminating the unilateral incentive that governments have to manipulate their terms of trade, governments escape from a terms-of-trade-driven prisoner's dilemma and create a positive, non-zero-sum game that mutually benefits all parties involved.²⁷⁷ But when economic interdependence itself is seen as creating national security vulnerabilities, and what matters are not mutual gains but relative gains as trade and investment are viewed through the lens of competition rather than cooperation, the multilateral trading system has lost its equilibrium. Strategic competitors will seek to create spheres of independence and decouple their integration in at least some key economic and technological areas to limit vulnerabilities, leading to less efficient but more secure trade relationships.

The recent U.S. trade policy has reflected this mindset. U.S. Treasury Secretary Yellen has made it clear that, rather than being highly reliant on countries such as China where the United States has geopolitical tensions, U.S. trade policy will involve “friend-shoring” to diversify supply chains away from countries that present geopolitical and security risks to trusted trade partners that are committed to a set of fundamental norms and values about how to operate in the global economy.²⁷⁸ Such norms and values range from respect for national sovereignty, protection of democracy, universal human rights, and fundamental freedoms to commitment to transparency, clean energy, and market economic practices.²⁷⁹ The goal of “friend-shoring” is to prevent nations like China and Russia from leveraging their market advantages in key raw materials, products, or tech-industry inputs to disrupt the U.S. economy.²⁸⁰ Likewise, the president of the European Central Bank Lagarde highlighted that after Russia's invasion of Ukraine, it has become increasingly untenable to isolate trade from universal

²⁷⁵ Ngozi Okonjo-Iweala, *The WTO's Contribution to the Challenges of Global Commons*, 26 (1) J. INT'L ECON. L. 12, 14 (2023).

²⁷⁶ Alan Beattie, *The WTO is on Life Support – but the World Still Needs it*, FIN. TIMES (June 19, 2022).

²⁷⁷ ROBERT W. STAIGER, A WORLD TRADING SYSTEM FOR THE TWENTY-FIRST CENTURY 51 (2022).

²⁷⁸ *Remarks by Secretary of the Treasury Janet L. Yellen on Way Forward for the Global Economy* (Apr. 13, 2022), <https://home.treasury.gov/news/press-releases/jy0714>; Brian Deese, *Remarks on a Modern American Industrial Strategy at Economic Club of New York* (Apr. 20, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/20/remarks-on-a-modern-american-industrial-strategy-by-nec-director-brian-deese/>.

²⁷⁹ Yellen, *Id.*

²⁸⁰ Bryce Baschuk, *What 'Friend-Shoring' Mean for Trade in a Less-Friendly World*, WASH. POST (Dec. 19, 2022).

values such as respect for international law and human rights, with the effect of “making the alliances to which suppliers’ countries belong more important.”²⁸¹ In other words, free trade can only really be free if countries are operating with shared values and the identity of trading partners matters.²⁸²

The move from the ideal of a single, deeply integrated multilateral trading system to “friend-shoring”—prioritizing trade with allies and partners who share the same values—represents a fundamental shift for the global trade order. The upshot of the shift is the decline of multilateralism and the continuing rise of regionalism.²⁸³ Trade and investment flows will likely be increasingly shaped by common values and geostrategic compatibility. Those countries which do not share these common values will be excluded from future trade arrangements, and trade and investment with those countries are likely to face more barriers.²⁸⁴ Indeed, all the major U.S. initiatives in the trade sphere in recent decades, be it the TPP or the Indo-Pacific Economic Framework for Prosperity (IPEF), are regional trade arrangements excluding China. Likewise, China has been proactive in negotiating regional trade agreements such as the Regional Comprehensive Economic Partnership (RCEP) and the BRI. More recently, China formally submitted a request to accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in September 2021.²⁸⁵ At the core of China’s regional trade strategy is to expand China’s international ties to ensure its access to alternative international markets, and thus reduce the U.S.’ ability to isolate China and restrain its power and economic growth.²⁸⁶

Traditionally, closer economic partnership was pursued through Free Trade Agreements (FTAs). But FTAs are not the only available option.²⁸⁷ With growing concerns about the impact of unbridled globalization and the adoption of the new “Worker Centric” trade policy in the United States, traditional FTAs are seen as part of the problem and their adjustments are required to protect and empower workers, drive wage growth, and lead to

²⁸¹ Christine Lagarde, *A New Global Map: European Resilience in a Changing World* (Apr. 22, 2022), <https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220422~c43af3db20.en.html>.

²⁸² Rana Foroohar, *It is Time for a New Bretton Woods*, FIN. TIMES (Apr. 18, 2022); Petros C. Mavroidis, *Is IPEF an Avatar of Things to Come (or Just a Digression)?* (May. 5, 2022), <https://ielp.worldtradelaw.net/2022/05/petros-mavroidis-on-the-indo-pacific-economic-framework.html>.

²⁸³ Shannon K. O’Neal, *The Myth of the Global*, 101 FOREIGN AFF. 158, 164-165 (2022).

²⁸⁴ Aaron L. Friedberg, *The Growing Rivalry between America and China and the Future of Globalization*, 5 (1) TEX. NAT’L SEC. REV. 95, 117-118 (2021).

²⁸⁵ Eleanor Olcott, *China Seeks to Join Transpacific Trade Pact*, FIN. TIMES (Sept. 16, 2021).

²⁸⁶ Jappe Eckhardt and Hongyu Wang, *China’s new Generation Trade Agreements: Importing Rules to Lock in Domestic Reform?*, 15 REGUL. & GOVERNANCE 581, 582-584 (2021).

²⁸⁷ Kathleen Claussen, *Trade’s Mini-Deals*, 62 VA. J. INT’L. L. 315, 318 (2022).

better economic outcomes for all.²⁸⁸ Instead, the United States has moved beyond traditional FTAs and charted new bilateral and regional economic arrangements with allies and partners around the world outside the WTO framework.²⁸⁹ One category of such economic arrangements is mini-sectoral trade deals like the Global Arrangement on Sustainable Steel and Aluminium (GASSA), the world's first carbon-based sectoral deal on steel and aluminium trade with the European Union, and a series of critical minerals deals with partners such as Japan. Announced initially in October 2021, the GASSA envisions a group of like-minded states seeking to curtail market access for carbon-intensive steel and aluminium products from other countries, in particular China, restore market-oriented conditions, and address global overcapacity in the metals sector.²⁹⁰ Although the details of the GASSA remain to be fleshed out, one key feature of GASSA is that its members will enjoy more favourable treatment among themselves for green steel and aluminium and impose jointly tariffs on metals produced in environmentally harmful ways.²⁹¹ But such sectoral agreements will almost certainly be inconsistent with WTO non-discrimination rules and may not be justified under GATT Article XX exceptions.²⁹²

Moreover, the Biden Administration has set up numerous trade dialogues and economic framework agreements, including the IPEF, U.S.–EU Trade and Technology Council, the U.S.–Taiwan Initiative on 21st Century Trade, and Partnership for Global Infrastructure and Investment. One common theme across these regional economic arrangements is that, as “friend-shoring” vehicles, they are expected to boost U.S. cooperation with its allies and trade partners and to advance geoeconomic competition with China.²⁹³ Take the IPEF as an example. Launched in May 2022, the IPEF is a policy tool to counter China's increasing influence in

²⁸⁸ Thomas J. Schoenbaum, *The Biden Administration's Trade Policy: Promise and Reality*, 24 GERMAN L. J. 102, 116 (2023).

²⁸⁹ Atlantic Council, *Supra* note 262.

²⁹⁰ The European Commission, *Joint EU-US Statement on a Global Arrangement on Sustainable Steel and Aluminium* (Oct. 31, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5724

²⁹¹ Ana Swanson, *US Proposes Global Green Steel Club That Would Put Tariffs on China*, N. Y. TIMES (Dec. 7, 2022).

²⁹² Timothy Meyer and Todd N. Tucker, *A Pragmatic Approach to Carbon Border Measures*, 21 WORLD TRADE REV. 109, 111 (2022); Giulia Claudia Leonelli, *Carbon Border measures, Environmental Effectiveness and WTO Law Compatibility: Is There a Way Forward for the Steel and Aluminium Climate Club?*, 21 WORLD TRADE REV. 619, 629-632 (2022).

²⁹³ Jacob Katz Cogan, *The United States Launches the Indo-Pacific Economic Framework for Prosperity and the Americas Partnership for Economic Prosperity*, 116 AM. J. INT'L L. 868, 871 (2022); Jiaying Li & Pan Che, *Tech War: US-EU United Front on Tech to Erode China's Supply Chain Advantages, Analysts Say*, S. CHINA MORNING POST (May. 17, 2022); Min-Hua Chiang, *Geopolitical Concerns Propel US-Taiwan Economic Talks*, EAST ASIA F. (April. 8, 2023), <https://www.eastasiaforum.org/2023/04/08/geopolitical-concerns-propel-us-taiwan-economic-talks/>.

the Indo-pacific region.²⁹⁴ The IPEF is not a traditional FTA since it has so far eschewed tariff liberalization or enhanced market access. Instead, the IPEF rests on four key pillars: trade, supply chains, clean economy, and fair economy. In September 2022, the IPEF partners issued a set of ministerial statements announcing the negotiation objectives for each of the four pillars.²⁹⁵ For the trade pillar, for instance, the IPEF partners will negotiate commitments in labour, environment, digital economy, agriculture, transparency and good regulatory practices, competition policy, trade facilitation, inclusivity, and technical and economic cooperation. The IPEF is designed to be flexible so that participating countries are not required to join all four pillars. The legal effect of the IPEF agreements opts for variable geometry with some binding and some not.²⁹⁶

IV. TOWARDS A NEW INTERNATIONAL ECONOMIC LAW

A. *The Emergence of a “New Washington Consensus”*

The “Washington Consensus” was a phrase coined by John Williamson in 1989 to refer to a set of ten economic policy instruments that had come to be accepted as appropriate within Washington-based international financial institutions including the International Monetary Fund, the World Bank, and the U.S. Treasury.²⁹⁷ The original conception of the “Washington Consensus” had three big ideas: macroeconomic discipline, a market economy, and openness to the world (at least in trade and foreign direct investment).²⁹⁸ Since its inception, however, the term “Washington Consensus” has been interpreted to mean different things from what was envisioned in the original conception. One widespread interpretation uses it as a synonym for neoliberalism or market fundamentalism.²⁹⁹ Embodying a trilogy of policies known as “liberalization, privatization, and stabilization,” neoliberalism rests on two main planks. The first is increased competition achieved through deregulation and the

²⁹⁴ Blinken, *Supra* note 6.

²⁹⁵ USTR, *United States and Indo-Pacific Economic Framework Partners Announce Negotiation Objectives* (Sept. 9, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/united-states-and-indo-pacific-economic-framework-partners-announce-negotiation-objectives>.

²⁹⁶ Cogan, *Supra* note 293, at 871.

²⁹⁷ The original list of ten policies includes maintaining fiscal discipline, reordering public expenditure priorities, reforming tax policy, liberalizing interest rates, maintaining a competitive exchange rate, trade liberalization, liberalization of inward foreign direct investment, privatizing state enterprises, deregulating barriers to entry and exit, and securing property rights. See John Williamson, *A Short History of the Washington Consensus* in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* 14, 16-17 (Narcis Serra and Joseph E. Stiglitz eds, 2008).

²⁹⁸ John Williamson, *Did the Washington Consensus Fail?*, Outline of Speech at the Centre for Strategic & International Studies Washington, DC (Nov. 6, 2002), <https://www.piie.com/commentary/speeches-papers/did-washington-consensus-fail>.

²⁹⁹ Williamson, *Supra* note 297, at 22.

opening up of domestic markets, including financial markets, to foreign competition. The second is a smaller role for the state, achieved through privatization, a light touch approach to regulation, avoiding industrial policy, and limits on the ability of governments to run fiscal deficits and accumulate debt.³⁰⁰ In the 1980s, neoliberalism emerged as the world's dominant economic paradigm and radically changed the global economy, the role of government in the economy, capital-labor relations, and the corporate sector.³⁰¹ It also sounded the death knell on the era in which the state had played a leading role in initiating industrialization and import substitution.³⁰²

After decades of turbulence in the global economy and countries' mixed successes at pursuing neoliberal policy reforms,³⁰³ however, the phrase Washington Consensus raises red flags among some economists and policymakers. Many critics argued that the original list of ten policies dictated by the Washington Consensus was incomplete and additional policies were needed to improve economic performance, that several items on the list did not seem to be consistent with successful development strategies in Asian countries, or that the list was too general as to how far to go in achieving those policy objectives.³⁰⁴ Although there were long economic expansions, brief and mild recessions and a low rate of inflation in the neoliberal era, it is also widely acknowledged that the Washington Consensus relied too heavily on markets and private enterprise to generate growth, paid little attention to issues related to pacing and sequencing of reforms and the shocks that might occur as a result, and, to a large extent, ignored the distributional aspects of the growth patterns that might result.³⁰⁵

The Biden Administration concluded that the Washington Consensus has undermined the socioeconomic foundations of strong and resilient democracies, and that it is unable to meet the contemporary challenges the United States is facing today: an industrial base being hollowed out, accelerating climate crisis and the urgent need for a just and efficient energy transition, rising income inequality, and a new environment defined by geopolitical and security competition. Therefore, the neoliberal era is ending, and a "New Washington Consensus" is needed.³⁰⁶ The New

³⁰⁰ Jonathan D. Ostry et al., *Neoliberalism: Oversold?*, 53 (2) FIN. & DEV. 38, 41 (2016).

³⁰¹ DAVID M. KOTZ, *THE RISE AND FALL OF NEOLIBERAL CAPITALISM* 12 (2015).

³⁰² Williamson, *supra* note 298.

³⁰³ Kevin B. Grier and Robin M. Grier, *The Washington Consensus Works: Causal Effects of Reform, 1970-2015*, 49 J. COMP. ECON. 59, 69 (2021); Dani Rodrik, *Goodbye Washington consensus, Hello Washington Confusion?*, 44 J. ECON. LITERATURE 973, 975 (2006).

³⁰⁴ Michael Spence, *Some Thoughts on the Washington Consensus and Subsequent Global Development Experience*, 35 (3) J. ECON. PERSP. 67, 68-69 (2021); Joseph E. Stiglitz, *Is there a Post-Washington Consensus Consensus?* in Serra and Stiglitz (eds), *Supra* note 297, at 53-54.

³⁰⁵ Spencer, *Id.*, at 79-80; Fahnbulleh, *Supra* note 259, at 38-39.

³⁰⁶ Sullivan, *Supra* note 21.

Washington Consensus was articulated most coherently by Jake Sullivan, the National Security Advisor in the Biden Administration, at Brookings institute on April 27, 2023. Essentially, the New Washington Consensus is a modern industrial and innovation strategy that invests in economic and technological strength, promotes diversified and resilient global supply chains, sets high standards from labour and the environment to trusted technology and good governance, and deploys capital to deliver on public goods like climate and health.³⁰⁷ The New Washington Consensus is expected to simultaneously revive domestic manufacturing, revitalise the U.S. middle-class and democracy, and combat climate change while establishing a lasting competitive edge over China.³⁰⁸

In his remarks, Sullivan laid out the five pillars of the New Washington Consensus to build a fairer, more durable global economic order. The first pillar is a modern American industrial strategy that will see a new role for the state in directing the trajectory of the economy. The new industrial policy aims to deploy public investments and catalyse private investment in sectors deemed foundational to U.S. economic growth and strategic for national security such as semiconductor and clean energy.³⁰⁹ The CHIPS and Science Act and the IRA discussed in section III.E above reflect Biden's new industrial strategy.

The second pillar involves working with partners to ensure that they adopt similar industrial policies, with the goal of establishing a strong, resilient, and leading-edge techno-industrial base that the United States and its like-minded allies can invest in and rely upon together.³¹⁰ In other words, the United States seeks to rewire global supply chains, replacing market-driven offshoring which are criticized as lacking resilience in the face of geopolitical competition with what Yellen calls "friend shoring," a concentration of strategic supply chains in countries allied with Washington.³¹¹ In Sullivan's telling, this shift is already broadly accepted among some key U.S. allies. For example, the European Union has shifted from complaining about the distortive effects of Washington's new industrial policy to matching it with equally vast public investment in chips and green energy.³¹² In addition, the United States has aligned incentives and launched negotiations on supply chains for critical minerals and batteries with the European Union, Canada, Japan, and others in the hopes that the new

³⁰⁷ *Id.*

³⁰⁸ Gideon Rachman, *How America is Reshaping the Global Economy*, FIN. TIMES (June. 5, 2023).

³⁰⁹ Sullivan, *Supra* note 21.

³¹⁰ *Id.*

³¹¹ Andrew Gawthorpe, *Biden's New Washington Consensus is Weaponizing Trade*, WORLD POL. REV. (May. 15, 2023), <https://www.worldpoliticsreview.com/us-china-trade-war-globalized-united-states-economy-policy-biden/>.

³¹² Aime Williams and Amanda Chu, *Biden Subsidies Stoke Arms Race among States to Woo Projects*, FIN. TIMES (May. 7, 2023); Laura Pitel et al., *Germany 'Close to Deal' with Intel for € 20bn Chip Plant*, FIN. TIMES (June. 16, 2023).

industrial policy will be more of a source of cooperation than friction.³¹³

The third pillar is moving beyond traditional trade deals that focus on market access to innovative new international economic partnerships, like the IPEF, that focus on the core contemporary global challenges of climate change, digital economy, resilient supply chains, and corporate tax competition that past models of economic engagement did not address. Sullivan argues that addressing these challenges will enable governments to better harness innovation in clean energy, digital, and technical sectors while fortifying national economies against a range of vulnerabilities.³¹⁴

The fourth pillar is building soft power in emerging economies by mobilizing trillions of dollars in investment to deal with their development challenges, including updating operating models of the multilateral development banks, closing the infrastructure gap, and providing debt relief.³¹⁵ As an example, the G7 initiated the partnership for Global Infrastructure and Investment (PGII), a \$600 billion infrastructure partnership that aims to finance infrastructure projects in low- and middle-income countries, as the West's answer to China's BRI.³¹⁶ In contrast to some past BRI projects criticized for environmental hazards, labour violations, corruption scandals, and unsustainable debt burdens in recipient countries, the PGII seeks to support economically viable projects with transparent disclosures and high environmental, social, and governance standards and in service of long-term, inclusive, and sustainable growth.³¹⁷

The fifth pillar is protecting foundational technologies with “a small yard and high fence,” taking restrictive measures such as export controls that are focused on a narrow slice of technology and a small number of countries to ensure that next-generation advanced technologies will not fall into the wrong hands to work against democracies and national security.³¹⁸

The New Washington Consensus represents a broader intellectual shift and an unheralded revolution in the U.S.'s approach to global economic governance.³¹⁹ As an example, whilst the unifying principle of the old Washington Consensus was the greatly expanded role of market relations and market forces in the regulation of economic activity with a reduced role for regulation

³¹³ *Joint Statement by President Biden and President von der Leyen* (Mar. 10, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/10/joint-statement-by-president-biden-and-president-von-der-leyen-2/>.

³¹⁴ Sullivan, *Supra* note 21.

³¹⁵ *Id.*

³¹⁶ *The G7 at last Presents an Alternative to China's Belt and Road Initiative*, THE ECONOMIST (July. 7, 2022).

³¹⁷ Elizabeth C. Losos and T. Robert Fetter, *Building Bridges? PGII Versus BRI* (Sept. 29, 2022), <https://www.brookings.edu/blog/future-development/2022/09/29/building-bridges-pgii-versus-bri/>

³¹⁸ Sullivan, *Supra* note 21.

³¹⁹ Rachman, *Supra* note 308.

by states and other institutions,³²⁰ the New Washington Consensus emphasizes a much bigger role of the state.³²¹ To be sure, the New Washington Consensus is not about ubiquitous state intervention, seeking to minimize the market or reverse globalization. Sullivan emphasized that the new U.S. industrial policy is about making long-term investments in sectors vital to national interest and crowding in private investment, not replacing private investment, or picking winners and losers.³²² There is some evidence that the new industrial policy is yielding nearly instant results. The Financial Times identified more than seventy-five large-scale manufacturing announcements in the United States and companies have committed \$204 billion in both the clean-energy and semiconductor industries as of April 2023 since the passage of the CHIPS Act and the IRA in August 2022, twice what companies in those sectors spent in 2021—and twenty times what they spent in 2019.³²³ Moreover, the New Washington Consensus rejects the idea that the most important goals of economic policy are efficiency and economic growth, but holds that the chief aims of economic policy should be to promote sustainability, resilience, inclusiveness, and national security. As Slaughter and Garlow commented, “it is an economic policy, a trade philosophy and a political strategy focused on making as much as selling, producing as much as buying, and dignity as much as efficiency.”³²⁴

But many important questions on the New Washington Consensus remain unanswered. Whether it is successful or not will depend on how it is implemented. To begin with, it is doubtful whether there exists a consensus on the New Washington Consensus. It is unclear whether other countries, even the U.S. allies, will commit to making this economic order a reality.³²⁵ For example, U.S. allies such as the European Union and Japan have shown continued commitment to traditional FTAs that Sullivan’s speech rejects.³²⁶ Such traditional FTAs focus on reducing barriers to capital, goods, and technology and increasing market access at least among security allies.³²⁷ Likewise, it is unclear

³²⁰ Kotz, *Supra* note 301, at 41.

³²¹ Franklin Foer, *The New Washington Consensus*, THE ATLANTIC (May. 9, 2023), <https://www.theatlantic.com/ideas/archive/2023/05/biden-economics-industrial-policy-trump-nationalism/673988/>.

³²² Sullivan, *Supra* note 21; See also Deese, *Supra* note 278.

³²³ Amanda Chu and Oliver Roeder, *Transformational Change: Biden’s Industrial Policy Begins to Bear Fruit*, FIN. TIMES (Apr. 17, 2023).

³²⁴ Anne-Marie Slaughter and Elizabeth Garlow, *Beyond Industrial Policy*, PROJECT SYNDICATE (Mar. 27, 2023).

³²⁵ Emily Benson, *Not an Easy Sell, But Creative*, Reactions to National Security Advisor Jake Sullivan’s Brookings Speech (May. 2, 2023); Malcom Kyeyune, *The ‘New Washington Consensus’ is Dead on Arrival* (May. 2, 2023), <https://compactmag.com/article/the-new-washington-consensus-is-dead-on-arrival>.

³²⁶ Mireya Solis, *Bold Vision, Success in Question*, Reactions to National Security Advisor Jake Sullivan’s Brookings Speech (May. 2, 2023).

³²⁷ European Commission Press Release, *EU and New Zealand Sign Ambitious Free Trade Agreement* (July 9, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3715; Department for Business and Trade Press Release, *UK Signs Treaty to Join Vast Indo-Pacific Trade Group as New Data Shows Major Economic Benefits* (July. 16, 2023),

whether U.S. allies hold the same threat perception of China as the United States. Given China's economic size and its pivotal role in global supply chains, China is more likely to be viewed as a risk and an opportunity for most other countries. Even U.S. allies may not be of one mind regarding their relationships with China, nor in many cases are they united with Washington about the best way to manage China's behaviour.³²⁸ Therefore, it remains uncertain to what extent other countries are prepared to embrace economic inefficiencies and forgoing sales in China's market in support of friend-shoring supply chains and the U.S. hegemony.³²⁹ This gives rise to the collective action problem for the United States. The New Washington Consensus also relies on a fundamental assumption that it is an entrenched bipartisan consensus impervious to political change in the United States, which may or may not be guaranteed.³³⁰

Second, one may wonder if it is too soon to dethrone liberal policies championed by the old "Washington Consensus." On the one hand, the data shows that expanding trade was central to the most successful period of wealth expansion and poverty reduction in history, and it delivered enormous benefits to the U.S. economy and U.S. consumers.³³¹ On the other hand, enacting stringent "Buy American" provisions, undermining the rules-based global trading system, and engaging in below-zero-sum subsidy arms races not only incur high costs but also may run counter to the U.S. strategic objectives.³³² For instance, the Buy American provisions in U.S. laws upset allies and undermine the national security alliance. They also make the energy transition more expensive and slow its adoption.³³³ If other countries do not accept higher barriers to their products in the U.S. market and adopt the same policies, the result will be welfare losses and reduced productivity growth for all concerned.

Third, while the IPEF is touted as a new model designed to tackle 21st century economic challenges, the U.S. trade community

<https://www.gov.uk/government/news/uk-signs-treaty-to-join-vast-indo-pacific-trade-group-as-new-data-shows-major-economic-benefits>.

³²⁸ Henry Foy and Demetri Sevastopulo, *US Steps up Pressure on European Allies to Harden China Stance*, FIN. TIMES (Nov. 29, 2022); Lindsey W. Ford and James Goldgeier, *Retooling America's Alliances to Manage the China Challenge*, Brookings Report (Jan. 25, 2021).

³²⁹ Ryan Hass, *Three Quibbles with Sullivan*, Reactions to National Security Advisor Jake Sullivan's Brookings Speech (May. 2, 2023).

³³⁰ Jonathan Weisman and Reid J. Epstein, *Republicans' Problem in Attacking Biden: They Helped Pass His Economic Bills*, N. Y. TIMES (June. 29, 2023).

³³¹ Alan Wm. Wolff et al., *Have Trade Agreements Been Bad for America?* 5-8 (Peterson Institute for International Economics Policy Brief 22-17, 2022); John G. Murphy, *Adding Facts and Data to the New Washington Consensus* (May. 7, 2023), <https://www.uschamber.com/international/setting-the-record-straight-on-the-new-washington-consensus>.

³³² James C. Capretta and Stan Veuger, *The New Washington Consensus on Trade is Wrong*, FOREIGN POL. (June. 12, 2023).

³³³ David Dollar, *Buy American is a Mistake*, Reactions to National Security Advisor Jake Sullivan's Brookings Speech (May. 2, 2023).

is deeply concerned that omitting traditional market access provisions may limit IPEF's economic and strategic significance. After all, offering access to the U.S. market is the primary carrot that U.S. policymakers have in their trade negotiations with other countries. The lack of market access negotiations removes incentives for other countries to agree to provisions sought by the United States (e.g., strong labor and environmental commitments) and disadvantage U.S. firms given that the United States is outside of all major FTAs in the Indo-Pacific region, including the CPTPP and the RCEP.³³⁴ It remains to be seen how the IPEF will be fleshed out in negotiations and whether it will be able to rewrite the regional economic order in the Indo-pacific.

Fourth, the New Washington Consensus has troubling implications for the partners and allies of the U.S. as well as other developing countries. Although senior officials of the Biden Administration stressed that the United States would coordinate its actions with allies, many allies fear that the new U.S. industrial policy will inevitably favour domestic producers and workers and come at the expense of producers and workers in Europe and Asia.³³⁵ In addition, operationalising the "friend shoring" concept itself is problematic. How might a policymaker decide if, and to what extent, a particular trade partner can be "trusted," and so preference it in policy settings? Global supply chains based on security and political logic are not necessarily more resilient than those based on economic logic, for the simple reason that political and security calculations can change.³³⁶ Given the clash between the commercial interests of companies and countries, the support offered by the closest geopolitical friends may be just confined to the realm of rhetoric and undercut in practical terms by a reality that many friends are also fierce commercial rivals who have domestic political constituencies to satisfy.³³⁷

For developing countries, the New Washington Consensus will also make it even harder for them to develop competitive industries of their own as they do not have deep pockets to compete in the subsidy arms race.³³⁸ It raises serious questions about how much harm the domestic policies of one state can cause to others and what sorts of policy externalities should be internalized by each state. Moreover, since the new techno-industrial supply chain to be

³³⁴ *Business and Agriculture Community Letter to the Administration on the IPEF* (May. 26, 2023), <https://www.uschamber.com/assets/documents/IPEF-Business-and-Agriculture-Letter-May-2023.pdf>; Alan Beattie, *The U.S. Trade Pledge to the Indo-Pacific is Empty*, FIN. TIMES (June. 8, 2023); Cleo Willems & Niels Graham, *TTC, IPEF, and the Road to an Indo-Pacific Trade Deal: A New Model* 9-10 (Atlantic Council GeoEconomics Centre Report, 2022).

³³⁵ Rachman, *Supra* note 308.

³³⁶ Adam Posen, *America's Zero-Sum Economics Doesn't Add Up*, FOREIGN POL. (Mar. 24, 2023), <https://foreignpolicy.com/2023/03/24/economy-trade-united-states-china-industry-manufacturing-supply-chains-biden/>.

³³⁷ James Laurenceson and Shiro Armstrong, *Learning the Right Policy Lessons from Beijing's Campaign of Trade Disruption against Australia*, 77 AUSTRALIAN J. INT'L AFF. 258, 269-270 (2023).

³³⁸ Noah Kaufman, Sagatom Saha, and Christopher Bataille, *Green Trade Tensions*, FIN. & DEV. 22, 24 (June 2023).

constructed under the New Washington Consensus is only available to the United States and its allies, it is a prerequisite for other countries to be part of the U.S.-led alliance system to enjoy the benefits.³³⁹ It remains to be seen whether other developing countries are willing to make such a stark geopolitical choice. In fact, many developing countries prefer not to take sides in the context of current China–US strategic competition, but rather adopt a hedging strategy between the two powers.³⁴⁰

Finally, senior U.S. officials took pains to stress that “de-risking” from China does not mean cutting China out of global supply chains or undermining China’s economic growth and technological modernization, but rather aims to address narrowly targeted national security concerns with carefully tailored measures.³⁴¹ This shows that the Biden Administration is fully aware of the risks of imposing overly broad trade and investment restrictions in the name of national security to the global economy. Still, given that the full spectrum of U.S.–China strategic competition is framed as a national security concern and that the U.S. objective is to maintain primacy over China, the implementation of de-risking measures may not be narrowly targeted and carefully calibrated. As Rodrik asked:

Are the export controls on advanced chips well-calibrated, or did they go too far in sabotaging Chinese technological capacity without sufficiently benefiting US national security? Given that the restrictions are being expanded to other critical sectors, such as artificial intelligence and nuclear fusion, can we still describe them as targeting only a “narrow slice” of technology? ³⁴²

B. *Imagining the Future of International Economic Law*

1. International Economic Law Fragmented

It is unlikely for the United States and China to go back to the good old days prior to 2018, the year when the trade war started.³⁴³ For both sides to put aside their differences and work together is likely to require China to commit to fundamental political and economic reforms. If China adheres to its unique political-economic model, it is unlikely for the two countries to revert to business as usual. But how likely is China to change its authoritarian regime

³³⁹ Gawthorpe, *Supra* note 311.

³⁴⁰ Lee Hsien Loong, *The Endangered Asian Century*, 99 FOREIGN AFF. 52, 59 (2020); Seth Schindler et al., *The New Cold War and the Rise of the 21st Century Infrastructure State*, 47 TRANSNAT. INST. BRIT. GEOGRAPHERS 331, 332 (2022).

³⁴¹ Sullivan, *Supra* note 21; Yellen, *Supra* note 21.

³⁴² Dani Rodrik, *Washington’s New Narrative for the Global Economy*, PROJECT SYNDICATE (May. 5, 2023).

³⁴³ Adam Tooze, *Washington Isn’t Listening to Business on China Anymore*, FIN. TIMES (May. 5, 2023); Weixing Hu, *The United States, China, and the Indo-Pacific Strategy*, 20 (3) CHINA REV. 127, 131-132 (2020).

and abandon its state capitalism model? As many observers have pointed out, the China model is deliberately designed to strengthen the CCP's hold at home and to enhance its power on the world stage.³⁴⁴ In light of the rare bipartisan consensus on the challenges posed by China, it is fair to say that the U.S.–China relationship has been fundamentally reconceptualized and reoriented.³⁴⁵ Geopolitics and national security concerns are now playing a much larger role in complementing economics in shaping national and international interactions. Thus, the new features of international economic law outlined in part III above are unlikely to be temporary but rather will be an integral part of international economic law for a long time to come. We will have to live with an increasingly fragmented international economic system.

But will the great power rivalry lead to a complete de-coupling of the U.S. economy from China and fragment the international economic order into regional trading blocs, each having its own respective sphere of influence? Petricevic and Teece argue that the new global economic structure is likely to be a “bifurcated governance” at the macro-level and a “value-chain decoupling” at the micro-level.³⁴⁶ Similarly, Baschuk argues that the U.S. policy of “friend-shoring” would lead to a world divided between free-market democracies and authoritarian regimes, a world in which supply chains could be more diversified and less subject to economic coercion, but also a world that’s poorer and less productive.³⁴⁷ The WTO estimates that breaking the global economy into two trading blocs would reduce global GDP by 5% in the long run just from diminished specialization and technology spill-overs.³⁴⁸

The good news is that the bleak picture of decoupling between the United States and China leading to a wider fracturing of the world economy into rival blocs has not happened, at least not yet. There is very limited evidence of close allies of the United States and China reducing their focus on flows with the rival bloc.³⁴⁹ Moreover, even though the role of international economic law in global economic governance may be marginalized in the era of great power rivalry, it would be hyperbole to assert that the multilateral trading system is in existential crisis, or that a “bifurcated world” is inevitable, for at least three reasons.

First, trade will continue to be an important driver of economic growth in the era of great power rivalry. Both Washington and

³⁴⁴ Sheena Chestnut Greitens, *Xi Jinping’s Quest for Order: Security at Home, Influence Abroad*, FOREIGN AFF. (Oct. 3, 2022); Julia Bowie and David Gitter, *Abroad or at Home, China Puts Party First*, FOREIGN POL. (Dec. 5, 2018).

³⁴⁵ See generally, LEAH BITOUNIS AND JONATHON PRICE (EDS), *THE STRUGGLE FOR POWER: U.S. – CHINA RELATIONS IN THE 21ST CENTURY* (2020).

³⁴⁶ Olga Petricevic and David J. Teece, *The Structural Reshaping of Globalization: Implications for Strategic Sectors, Profiting from Innovation, and the Multinational Enterprise*, 50 J. INT’L BUS. STUD. 1487, 1490 (2019).

³⁴⁷ Baschuk, *Supra* note 280.

³⁴⁸ *Remarks by WTO Director General Okonjo-Iweala at National Foreign Trade Council: Strengthening the WTO and the Global Trading System* (Apr. 27, 2022), https://www.wto.org/english/news_e/spno_e/spno25_e.htm.

³⁴⁹ Altman and Bastian, *Supra* note 138, at 23-29.

Beijing know that openness to trade is essential to their economic growth. Thus some amount of mutual hands-tying with respect to beggar-thy-neighbour measures is beneficial to all. More importantly, despite the political rhetoric that economic interdependence with China must be de-risked for both economic and national security reasons, efforts to reduce dependence from China to limit its influence would be very complicated, expensive, and time-consuming due to the size of the Chinese economy and its centrality in global value chains.³⁵⁰ As U.S. Treasury Secretary Yellen acknowledged, the two countries are so deeply intertwined that a full separation of the U.S. and Chinese economies would not only be disastrous for both countries, but also destabilizing for the global economy more generally.³⁵¹ Similarly, president of the European Commission von der Leyen argued that decoupling is clearly not viable, desirable, or even practical for Europe.³⁵² Unless something terrible happened, such as a military conflict over Taiwan, a total breakdown in U.S.–China trade and investment appears unlikely because both sides still benefit from bilateral economic relations. Therefore, even though the U.S.–China rivalry has constricted flows of trade and investment between the two countries, none has so far embraced protectionism to a scale that would destroy the WTO. In fact, despite the trade war and rising diplomatic tensions, statistics showed that trade between the United States and China hit a record high in 2022.³⁵³ To further complicate the matter, no single country can solve transnational challenges such as climate change, nuclear arms control, and pandemics alone. It will be important for the United States to obtain constructive cooperation from China on the supply of the international public goods necessary to form and maintain the international order. Therefore, the U.S.–China relationship should be seen as a “cooperative rivalry” that requires equal attention to both sides of competition and cooperation.³⁵⁴

Second, if history is any guide, international institutions can still play an important role in managing the U.S.–China power rivalry.³⁵⁵ In the Cold War era, for example, the U.S. and the Soviet

³⁵⁰ U.S. Chamber of Commerce, *Understanding U.S.-China Decoupling: Macro Trends and Industry Impacts* 18 (2021); Yuqing Xing, *China and Global Value Chain Restructuring*, 15 CHINA ECON. J. 310, 312-315 (2022).

³⁵¹ Yellen, *Supra* note 21.

³⁵² Speech by President von der Leyen at the European Parliament Plenary on the Need for a Coherent Strategy for EU-China Relations (Apr. 18, 2023), https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2333.

³⁵³ Eric Martin and Ana Monteiro, *US-China Goods Trade Hits Record Even as Political Split Widens*, (Feb. 7, 2023), <https://www.bloomberg.com/news/articles/2023-02-07/us-china-trade-climbs-to-record-in-2022-despite-efforts-to-split?leadSource=verify%20wall>.

³⁵⁴ Joseph S. Nye Jr, *Power and Interdependence with China*, 43 (1) WASH. Q. 7, 19 (2020).

³⁵⁵ Secretary-General Antonio Guterres's Address to the Opening of the General Debate of the 75th Session of the General Assembly (Sept. 22, 2020), <https://www.un.org/sg/en/content/sg/statement/2020-09-22/secretary-generals->

Union used multilateralism to advance arrangements within their respective blocs, as well as to regulate the rivalry between them, at times to moderate excesses in competition and its impact on other countries.³⁵⁶ Today, despite the intense power rivalry and a dysfunctional WTO Appellate Body, both China and the United States continue to engage the WTO dispute settlement processes. For example, China resorted to the WTO dispute settlement system to challenging the U.S. export control with respect to certain advanced computing semiconductor chips and manufacturing products.³⁵⁷ The United States also made it clear that it supports WTO dispute settlement reform and that it is prepared for continued and deepened engagement with other WTO members.³⁵⁸ One may be deeply sceptical about the effectiveness of the WTO dispute settlement system or the sincerity of the U.S. interest in restoring a fully functioning dispute settlement system. But such scepticism misses the point. That both the United States and China continue to fall back on established norms to defend their position is an indication of the legitimate power of international economic law. Even though it may be inevitable that both the United States and China will resort to unilateral measures as well as bilateral and plurilateral bargains to manage their power rivalry, international economic law is still a useful instrument to keep such measures within certain bounds.³⁵⁹

Third, both the United States and China depend on global markets and alliances to sustain its own power. It is likely that the United States will continue to roll out measures targeting China that its allies and partners will then come under pressure to adopt.³⁶⁰ For example, following pressure from the United States, Japan and the Netherlands have agreed to tighten their export controls of chip manufacturing equipment and technologies to China.³⁶¹ However, even U.S. allies may not have strong incentives to embrace entirely hostile policies against China despite some of their shared concerns with the United States. Instead, they share the common interest in collaborating with both Washington and Beijing to strengthen the rules-based international economic order and preventing the U.S.–China power rivalry from disrupting the

address-the-opening-of-the-general-debate-of-the-75th-session-of-the-general-assembly.

³⁵⁶ Ngaire Woods, *The End of Multilateralism?* in EUROPE'S TRANSFORMATION: ESSAYS IN HONOUR OF LOUKAS TSOUKALIS 181, 182 (Helen Wallace et al eds, 2021).

³⁵⁷ WTO, *China Initiates WTO Dispute Complaint Targeting US Semiconductor Chip Measures* (Dec. 15, 2022), https://www.wto.org/english/news_e/news22_e/ds615rfc_15dec22_e.htm.

³⁵⁸ WTO, *Members Commit to Engagement on Dispute Settlement Reform* (Apr. 27, 2022), https://www.wto.org/english/news_e/news22_e/dsb_27apr22_e.htm.

³⁵⁹ Gregory Shaffer, *Governing China-US Trade Relations*, 115 AM. J. INT'L. L. 622, 629-634 (2021).

³⁶⁰ Rachman, *Supra* note 308.

³⁶¹ Andy Bounds and Demetri Sevastopulo, *Netherlands to Restrict Chip Exports after US Pressure over China Threat*, FIN. TIMES (Mar. 8, 2023); Iris Deng, *Tech War: China Slams Japan's Semiconductor Technology Export Controls*, S. CHINA MORNING POST (May. 23, 2023).

international status quo.³⁶² In the same vein, despite the contentious U.S.–China relationship, the view of the importance of Chinese market has not changed for the larger U.S. multinationals. Business ties between the two countries remain deep and some international companies are increasing investment in China.³⁶³ China has recently been on a charm offensive to boost the confidence of foreign companies in China by portraying China as a place of strong growth potential, reassuring them that China will unswervingly expand its opening up to the outside world, align with international economic and trade rules, give equal treatment to foreign investment, and facilitate trade and investment by removing government controls.³⁶⁴

Therefore, as long as U.S.–China great power rivalry persists, international economic law will be more fragmented. The new features of international economic law described in the last section will cast a long shadow on the future trajectory of the discipline. However, unless something tragic happens, it is highly unlikely that great power rivalry will lead to a complete de-coupling of U.S.–China economies or fragment the international economic order into regional trading blocs with respective spheres of influence. Despite the decline of the international legal framework governing the global economy established over the past seventy years, international economic law will still play a role, albeit much smaller than before, in managing the great power rivalry.

2. International Economic Law Re-Embedded

The Post World War II international economic order was originally based on the consensus of “embedded liberalism,” where countries retained considerable policy space to develop social welfare policies.³⁶⁵ Trade liberalization embedded within society and politics was a limited vision of free trade subject to numerous qualifications and exceptions where it conflicted with the requirements of domestic economic policies such as economic

³⁶² Ilan Vertinsky, *The Political Economy and Dynamics of Bifurcated World Governance and the Decoupling of Value Chains: An Alternative Perspective*, J. INT'L BUS. STUD. 1, 12 (2023).

³⁶³ Russell Flannery, *U.S. Businesses Look to De-risk, Not Decouple, Their China Ties*, FORBES (May 12, 2023), <https://www.forbes.com/sites/russellflannery/2023/03/12/us-businesses-look-to-de-risk-not-decouple-their-china-ties/?sh=37efdb682294>; Christian Kraemer, *German Firms Keep Investing in China Despite Moves to De-risk*, REUTERS (May 10, 2023), <https://www.reuters.com/business/german-firms-keep-investing-china-despite-moves-de-risk-2023-05-10/>.

³⁶⁴ Laura He, *China's New Premier Rolls out the Welcome Wagon for Foreign Companies*, CNN (Mar. 28, 2023).

³⁶⁵ John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393 (1982).

stability and full employment.³⁶⁶ However, the economic turmoil of the 1970s eroded political support for the normative priorities of embedded liberalism. Instead, the neoliberal view which emphasized the freeing of markets as the primary strategy for growth and prosperity has become the dominant ideology in international economic policy since the 1980s. But as will be detailed below, the neoliberal consensus has come under sustained criticism and is now in the midst of a legitimacy crisis.

To begin with, in the neoliberal view, an imagined ideal of free market acts as the primary reference point for the valuation of governmental action. Virtually all aspects of WTO Members' domestic policies are potentially open to re-description as trade barriers and are thereby potentially subject to discipline under international economic law.³⁶⁷ The neoliberal turn of the international economic system has purportedly narrowed the policy space for governments to pursue experimentation in development policy and to regulate in the public interest, such as protecting workers, sustainable development, and the clean-energy transition.³⁶⁸ Furthermore, many describe the current neoliberal consensus of international economy policy as involving a two-step process. In the first step, countries conclude free trade agreements to combat protectionist pressures and enhance the size of the global and national economic pie. In the second step, recognizing that trade liberalization creates winners as well as losers, the distributional effects of the liberalized international trading system are dealt with through domestic social policy.³⁶⁹ However, the second step of redistribution of trade gains is not occurring and trade is identified as an important cause of higher unemployment and reduced wages in communities that house import-competing manufacturing industries in Western countries.³⁷⁰

More fundamentally, revolutionary advances in transportation and communication technologies catalysed the unbundling of production among multiple countries, triggering a boom in "offshoring" of both manufacturing tasks and other business functions.³⁷¹ Such structural forces of economic globalization have increased the mobility and bargaining power of the owners of capital vis-à-vis labour and other interests, and made

³⁶⁶ ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM 29-30 (2011); Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L. L. 94, 97 (2002).

³⁶⁷ Lang, *Supra* note 366, at 221-240.

³⁶⁸ David Trubek, Alvaro Santos and Chantal Thomas, *World Trade and Investment in a Time of Crisis: Distribution, Development and Social Protection*, in Santos et al., *Supra* note 26, at 5; Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 82 (2017).

³⁶⁹ Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, U. ILL. L. REV. 1, 2-3 (2019); Harlan Grant Cohen, *What is International Trade Law For?*, 113 AM. J. INT'L. L. 326, 330-331 (2019).

³⁷⁰ David H. Autor, David Dorn & Gordon Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2125 (2013).

³⁷¹ Gene M. Grossman and Esteban Rossi-Hansberg, *Trading Tasks: A Simple Theory of Offshoring*, 98 AM. ECON. REV. 1978 (2008).

it harder for national governments to tax or put regulatory burdens on capital.³⁷² The result is not only erosion of governments' ability to create broad-based growth through public investments in infrastructure or fund social protection, but also an increased burden of taxation on labour.³⁷³ In other words, the success of step one increases the economic and political power of capital and grants it outsized authority over the shape and pace of step two.³⁷⁴ Firmly situated within the first step, international economic agreements have long been criticized as being unresponsive to issues of economic distribution or environmental justice.³⁷⁵ The empirical evidence shows that inequality within countries has widened dramatically, threatening domestic social stability and international cooperation.³⁷⁶

The existing criticisms of the neoliberal international economic system are amplified by the U.S.–China strategic rivalry as current international economic rules are perceived to be overly permissive of China's state-led capitalism and as putting the United States at a disadvantage when competing with China.³⁷⁷ Accordingly, a new normative justification for international economic policy that is deeply “re-embedded” within domestic society and politics, more attuned to domestic social welfare needs, domestic social values and stability, more sensitive to domestic regulatory concerns, and more responsive to the reality of the U.S.–China strategic rivalry is urgently needed.³⁷⁸ In this view, international economic policy should be re-embedded within, and secondary to, domestic policy goals. Rather than assessing solely in terms of their impact on aggregate economic welfare, international economic law should be assessed in terms of their benefits to domestic political decisions such as labour policy, redistribution, consumer protection, the digital economy, and the environment.³⁷⁹ Arguably, the “New Washington Consensus” was precisely a reflection of such new thinking. As Sullivan aptly put it: “Trade liberalization . . . is not an end in itself, but rather a means. Trade policy needs to be fully integrated into our economic strategy, at home and abroad.”³⁸⁰

³⁷² QUINN SLOBODIAN, *GLOBALISTS: THE END OF AN EMPIRE AND THE BIRTH OF NEOLIBERALISM* 33 (2018).

³⁷³ Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, 30 *EUR. J. INT'L L.* 1359, 1378-1382 (2019).

³⁷⁴ Harlan Grant Cohen, ... *And Trade*, *U. ILL. L. REV. ONLINE* 48, 53-54 (2019).

³⁷⁵ Timothy Meyer, *The Law and Politics of Socially Inclusive Trade*, *U. ILL. L. REV. ONLINE* 32, 44 (Spring 2019).

³⁷⁶ BRANKO MILANOVIC, *GLOBAL INEQUITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* 32-33 (2016).

³⁷⁷ Alan Wolff, *WTO 2025: Restoring the Binding WTO Dispute Settlement* 9 (Peterson Institute for International Economics Working Paper 22-5, 2022).

³⁷⁸ Kevin Kolben and Michele Rioux, *Re-Embedding Trade in the Shadow of Populism*, 11 (1) *Politics and Governance* 177, 178 (2023).

³⁷⁹ Cohen, *Supra* note 369, at 327.

³⁸⁰ Sullivan, *Supra* note 21.

The re-embedding of international economic policy in domestic policy goals in a world of complex transnational supply chains has profound implications for international economic law. It is no longer viable to insist on the claim that even though the operation of international economic law has far-reaching economic, social, distributional, and environmental effects, responsibility for such outcomes is primarily either a matter of domestic policy, or with a different international organization. Instead, international economic law needs to be retooled to facilitate domestic policies that serve people and societies more inclusively. For example, it was argued that international economic law should reorient around coordination and collection of taxes, given the power of capital vis-à-vis labour and government regulations because of its mobility.³⁸¹ For this purpose, 136 countries and jurisdictions have reached a historic global tax deal to halt the race-to-the-bottom on corporate taxes, with plans for a global minimum corporate tax rate of 15% to be imposed on multinational enterprises by 2023.³⁸² Others emphasized the need for international economic law to promote regulatory convergence in high standard environmental and labour protections and prevent regulatory leakage such as simply moving undesirable behaviours to less regulated states.³⁸³

This article argues that in the post-neoliberal era of great power rivalry where no single governance paradigm has emerged to replace neoliberalism, re-embedding international economic law implies safeguarding and expanding domestic policy space to adopt policies that may diverge from the conventional idea of economic liberalization.³⁸⁴ Both great powers and other developed and developing states need policy space to experiment heterogeneous development strategies, to protect essential security interests and de-risk from strategic rivals, and to protect domestic social contracts from being undermined by global economic forces. This could be achieved through a few legal techniques.

To begin with, a key technique is conscious resistance to a neoliberal reading of international economic rules, proper interpretation of the existing flexibilities embedded in the rules, and deferential review by international dispute settlement bodies of a state's domestic regulations. Indeed, some believe that the current international economic legal order is well-suited to a post-neoliberal world of great power rivalry. For instance, it was argued that, although the WTO is often criticized for foreclosing policy space, the WTO legal architecture in fact preserves diversity of governance models and regulatory approaches in the domestic orders of member states.³⁸⁵ In addition, the WTO judiciary has

³⁸¹ Shaffer, *Supra* note 369, at 17-22.

³⁸² Chris Giles et al., *136 Nations Agree to Biggest Corporate Tax Deal in a Century*, FIN. TIMES (Oct. 8, 2021).

³⁸³ Cohen, *Supra* note 369, at 342-344.

³⁸⁴ Shaffer, *Supra* note 359, at 625; Andrew Lang, *Heterodox Markets and 'Market Distortions' in the Global Trading System*, 22 (4) J. INT'L ECON. L. 677, 677-719 (2019).

³⁸⁵ Howse and Langille, *Supra* note 24, at 18-25.

largely endorsed the approach of substantive deference to states' domestic regulations and ensured that the WTO disciplines preserve a healthy balance between trade liberalization and the right to regulate.³⁸⁶ Likewise, it was argued that existing WTO rules, coupled with China's WTO-plus obligations, provided tools to constrain China's state capitalism, and it has been a missed opportunity as these existing rules were not used.³⁸⁷ Similar claims were also raised in international investment law scholarship. For instance, some scholars argue that a partial reorientation of investment case law or further clarification of some ambiguous terms such as "indirect expropriation" and "fair and equitable treatment" in international investment agreements will safeguard states' regulatory space to protect public interests.³⁸⁸

Furthermore, based on the premise that current international economic norms have not done enough to ensure that trade liberalization supports important social values, some commentators proposed to negotiate new rules that allow for tougher rules on, among other things, non-market economies, environmental protection, and a more equitable distribution of wealth.³⁸⁹ Such grand bargains may be made either at the multilateral, regional, or bilateral levels. For instance, Shaffer proposed that developed countries should negotiate a deal that would allow them to impose "social dumping" duties on imports that were produced under exploitative labor conditions, subject to strict procedural, substantive, and injury requirements to combat abuse.³⁹⁰ Alternatively, additional chapters such as labour, environment, state-owned enterprises, and development may be added in FTAs. The inclusion of environmental provisions is now a standard component of recent Chinese FTAs.³⁹¹ In particular, China agreed to adopt an adjusted version of the European Union's sustainable development model in the CAI.³⁹² China's request to accede to the CPTPP is also a clear indication that China is prepared to embrace stricter environmental, labor, and SOE

³⁸⁶ *Id.*, at 31-35.

³⁸⁷ HENRY GAO AND WEIHUAN ZHOU, BETWEEN MARKET ECONOMY AND STATE CAPITALISM: CHINA'S STATE-OWNED ENTERPRISES AND THE WORLD TRADING SYSTEM (2022).

³⁸⁸ Ying Zhu, *Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?*, 60 HARV. INT'L L. J. 377, 416 (2019); Joshua Paine, *Autonomy to Set the Level of Regulatory Protection in International Investment Law*, 70 INT'L & COMP. L. Q. 697, 699-700 (2021).

³⁸⁹ Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 Vand. L. Rev. 985, 1002-1008 (2017).

³⁹⁰ Shaffer, *Supra* note 369, at 33-34.

³⁹¹ Axel Berger et al., *Towards Greening Trade? Environmental Provisions in Emerging Markets' Preferential Trade Agreements* in SUSTAINABILITY STANDARDS AND GLOBAL GOVERNANCE 61, 71-72 (Archana Negi et al., eds., 2020).

³⁹² Lorenzo Cotula, *EU-China Comprehensive Agreement on Investment: An Appraisal of its Sustainable Development Section*, 6 BUS. & HUM. RTS. J. 360, 365-367 (2021).

disciplines embodied in the CPTPP.³⁹³ Similarly, some scholars have proposed that states develop carve-outs from ISDS or from the scope of international investment agreements entirely as a tool for protecting policy space.³⁹⁴

Yet another technique is to employ soft law or informal international law-making, instead of enforceable rules that restrain the capacity of members to take actions they consider in their best interests.³⁹⁵ Soft and informal international economic legal instruments offer significant advantages in the era of great power rivalry because they are easier and less costly to negotiate, impose lower sovereign costs on states in sensitive areas, and provide greater flexibility for states to cope with uncertainty, cooperate with even strategic rivals, and learn over time.³⁹⁶

These policy tweaks are moving in the right direction, and undoubtedly, they should be adopted. Still, it is unclear whether they provide an adequate answer to the underlying causes of the challenges facing international economic law in the era of great power rivalry. First, there may be limits as to how existing international economic rules could be reasonably interpreted simply because such rules were laid down decades ago when many of the thorny issues that states are facing today were not fully anticipated. The debate on the consistency of the EU's new carbon border adjustment mechanism (CBAM) regulation with the WTO law is a typical example.³⁹⁷ Second, as Andrew Lang forcefully argued, deferential/procedural review by the WTO judiciary of a state's domestic regulations cannot deliver a less intrusive form of judicial scrutiny to preserve substantive regulatory autonomy for WTO Members. It is impossible to design a form of WTO review which is even meaningfully devoid of substantive implications for domestic state-market relations, environmental or social regulation, or redistributive effects.³⁹⁸ The same argument applies to international investment tribunals as well.

Third, international cooperation based on shared consensus allowing the re-embedding of international economic policy can be difficult to come by. For instance, given the track record of the WTO's failures in negotiating labor issues, it is challenging to imagine why developing countries would have the incentive to agree to new rules that would permit the unilateral imposition of

³⁹³ Eleanor Olcott, *China Seeks to Join Transpacific Trade Pact*, FIN. TIMES (Sept. 16, 2021).

³⁹⁴ Joshua Paine and Elizabeth Sheargold, *A Climate Change Carve-out for Investment Treaties*, 26 (2) J. INT'L ECON. L. 285, 286 (2023).

³⁹⁵ Ikenson, *Supra* note 156, at 22-23.

³⁹⁶ Gregory C. Shaffer and Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 719-721 (2010); JOOST PAUWELYN, RAMSES A. WESSEL AND JAN WOUTERS (EDS), *INFORMAL INTERNATIONAL LAWMAKING* (2017).

³⁹⁷ Geraldo Vidigal and Ingo Venzke, *Of False Conflicts and Real Challenges: Trade Agreements, Climate Clubs, and Border Adjustment*, 116 AM. J. INT'L L. ONLINE 202, 203 (2022) (stating that the EU's CBAM or some of its aspects may contravene commitments made in the WTO and other trade agreements).

³⁹⁸ Lang, *Supra* note 366, at 346.

duties on their products and remove their labor cost advantage.³⁹⁹ Therefore, grand bargains on social and environmental issues at the multilateral level may be unrealistic. Similarly, as all the criticism against labour and environmental provisions in FTAs and, more recently the IPEF, shows, it is unclear to what extent social inclusion and economic justice could be successfully promoted at the bilateral or regional level either.⁴⁰⁰ Thus, the fallback option of unilateral action to preserve policy space and hopefully catalyse international coordination is sometimes inevitable.

Most importantly, while recognizing that the key feature of international economic law in the era of great power rivalry is the re-embedding of international economic policy in domestic policy goals, it is of utmost importance to be aware of the risk of a “Schmittean moment” or “domestication” of international economic law, referring to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international economic order.⁴⁰¹ Under such a “hyper sovereign” paradigm,⁴⁰² the nation-state is idealized as the only appropriate forum for making international economic policies, brushing away the international normative benchmark, rendering national law the governing standard, and bringing back to the domestic arena any international trade and investment disputes. All these features are applauded as a recognition of a purportedly more intellectually honest ‘political’ dimension of international economic law.⁴⁰³ To be sure, the nation-state should not be assumed to always do wonderful things for its citizens. Authoritarian states, for example, can oppress citizens through violence, sacrifice the livelihoods of indigenous and local communities in the name of national welfare, and operate with serious gender, racial, and religious biases, and with a blind spot for environmental impact and climate sustainability. It is a false dichotomy to equate a nation-state with democracy and global governance with democratic deficit.⁴⁰⁴

³⁹⁹ William J. Davey, *Comment on Shaffer, Retooling Trade Agreements for Social Inclusion*, U. ILL. L. REV. ONLINE 17, 18 (Spring 2019).

⁴⁰⁰ There is a large body of literature arguing that the impact of environmental, labour and SOE clauses of FTAs are rather weak and limited, raising serious doubts as to whether they can effectively deliver on the promise to enhance environmental and labour standards or crack down on non-market practices. See James Harrison et al., *Governing Labour Standards through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapter*, 57 (2) J. COMMON MKT. STUD. 260, 273 (2019); Marco Bronckers and Giovanni Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, 24 J. INT’L ECON. L. 25, 26 (2021); Billy Melo Araujo, *Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality*, 67 INT’L & COMP. L. Q. 233, 253 (2018).

⁴⁰¹ Arcuri, *Supra* note 26, at 328; Santos, *Supra* note 26, at 205.

⁴⁰² Antony Anghie, *International Law in a Time of Change: Should International Law Lead or Follow?* 26 AM. U. INT’L L. REV. 1315, 1339-1440 (2011).

⁴⁰³ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 19 (2008).

⁴⁰⁴ Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT’L ORG. 1, 2 (2009) (arguing that multilateralism can enhance domestic democracy in a number of important ways).

Moreover, even though the neoliberal interpretation of international economic law may be blamed for the legitimacy crisis of the global economic order, the nation-state can have its own share of responsibility through its very domestic policies.⁴⁰⁵ Therefore, re-embedding international economic law is not a complete return of the nation-state. Sovereignty can only be sustainable when it has limits. The fundamental challenge remains how to operationalize the concept of policy space while keeping arbitrary and protectionist abuse of unilateral economic measures within certain bounds to avoid the risk that they unravel the international economic law architecture entirely.

V. CONCLUSION

The global economic system created in the post-World War II era is now being disrupted and undergoing significant structural changes. Longstanding rules on trade and investment are being rewritten. Even though neoliberalism is over, no consensus has emerged on an alternative paradigm for the global economy to replace neoliberalism. Granted, many forces other than great power competition have shaped international economic law, such as the increasing urgency of the climate change crisis, the looming global recession, the Covid-19 pandemic, the rise of nationalism and threats to democracy, and the digitalization of trade and economic relations.⁴⁰⁶ This article does not seek to discuss separately the impact of these forces on the trajectory of international economic law but focuses on the U.S.–China strategic rivalry, widely believed to be the defining geopolitical feature of the first half of the twenty-first Century and a central driver of the reconfiguration of international economic order.⁴⁰⁷ Nevertheless, it is clear that other factors will entangle with, and reinforce the intensity of, the U.S.–China rivalry, with the effect of making international economic law more fragmented and re-embedded in domestic policy-making processes.

As alluded to in the article, the structural reshaping of the global economic system triggered by the strategic rivalry between the United States and China also has profound consequences for third countries and multinational corporations in the world. For example, as the U.S.–China rivalry intensifies, the room for third countries to hedge shrinks.⁴⁰⁸ A case in point is Italy's plan to leave the BRI to avoid getting dragged into the escalating tensions

⁴⁰⁵ Shaffer, *Supra* note 369, at 17-19.

⁴⁰⁶ Andrea K. Bjorklund and Gabrielle Marceau, *New (Paradigms in) International Economic Law*, 26 J. INT'L ECON. L. 3, 4-6 (2023).

⁴⁰⁷ Martin Wolf, *US-China Rivalry Will Shape the 21st Century*, FIN. TIMES (Apr. 10, 2018).

⁴⁰⁸ Alexander Korolev, *Shrinking Room for Hedging: System-Unit Dynamics and Behaviour of Smaller States*, 19 INT'L RELATIONS OF THE ASIA-PACIFIC 419, 420 (2019).

between Washington and Beijing.⁴⁰⁹ Similarly, amid political and economic uncertainty, more and more multinational corporations have implemented the so-called “China plus one” strategy of avoiding investing only in China and diversifying business operations and supply chains into other promising developing countries.⁴¹⁰ Other than suggesting that third countries and multinational corporations have an interest in preventing the U.S.–China strategic rivalry from disrupting the rules-based international economic order, this article does not explore in depth how other countries and multinational corporations respond to the U.S.–China great power rivalry and how their actions may impact the development of international economic law. But clearly these are important research questions for the future.

⁴⁰⁹ Varg Folkman, *Italy Intends to Leave China’s Belt and Road Initiative, Defence Minister Says*, POLITICO (July. 30, 2023), <https://www.politico.eu/article/italy-leave-belt-and-road-initiative-china-minister-guido-crosetto/>.

⁴¹⁰ Willy C. Shih, *Global Supply Chains in a Post-Pandemic World*, 98 (5) HARV. BUS. REV. 82, 84 (2020).



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