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Governing the Interface of U.S.-China Trade Relations

By Gregory Shaffer[*]

Abstract

The strained U.S.-China trade relationship poses a frontal challenge to the multilateral trading system and has broad repercussions for international law. This Article addresses three dimensions of this relationship: (1) the economic dimension; (2) the geopolitical/national security dimension; and (3) the normative/social policy dimension. The Article advances a middle ground between those seeking to reinforce the World Trade Organization (WTO) system with new rules that limit the state's role in the economy, and those who reject WTO constraints in favor of a power-based system. It proposes pragmatic reforms to govern the interface of the two states' respective systems across these three dimensions to facilitate ongoing exchange while giving each country latitude to protect itself from the externalities of the other's policies. The result would be greater room for bilateral and plurilateral bargaining, but conducted within the umbrella of the multilateral system.

I. Introduction

The U.S.-China trade relationship is beset by a clash of capitalisms, a clash of power, and a clash of values. Severe strains in the relationship pose a serious challenge to the multilateral trading system and have broad repercussions for international law. This Article addresses the three central dimensions of this relationship: (1) the economic dimension; (2) the geopolitical/national security dimension; and (3) the normative/social policy dimension. It assesses how these dimensions of the U.S.-China trade relationship can be managed, maintaining an important role for multilateralism and international institutions like the World Trade Organization (WTO) in relation to power-based bargaining, plurilateral and regional trade deals, and unilateral measures. The Article focuses on the U.S.-China trade relationship because of the implications of their great power rivalry for the multilateral trade legal

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TABLE 1:
THREE ALTERNATIVES

Approach	Role of Law
Power-Based Bargaining[1]	End binding WTO dispute settlement
Rule-Based Neoliberalism[2]	Add more WTO legal constraints on state subsidies and state enterprises
Rebalancing Within a Multilateral Framework	Recognize policy space including proportionate defensive measures, with multilateral oversight and dispute settlement

order, but the principles that it sets forth apply broadly to the interface of heterogenous national systems in the context of geoeconomic competition.

The Article advances a *middle path* between those rejecting the WTO in favor of a power-based system for trade governance, and those seeking to reinforce the WTO system with new rules that limit the state's role in the economy. The first approach represents "*Power-Based Bargaining*" and the second "*Rule-Based Neoliberalism.*" Both alternatives have powerful advocates within the United States and Europe. This Article, in contrast, proposes pragmatic reforms that would facilitate ongoing exchange while assuring latitude for each country to protect itself from the externalities of the other's policies. The result would be greater room for bilateral and plurilateral bargaining, but such bargaining would be conducted within the umbrella of the multilateral system. Call this third approach "*Rebalancing Within a Multilateral Framework*." It involves the pragmatic rebalancing of national policy space in relation to international law constraints, including through accommodation of domestic safeguards on economic, national security, and social policy grounds. Table 1 summarizes the three approaches.

A version of this third approach was previously articulated by the United States-China Trade Policy Working Group, whose Joint Statement I signed.[3] However, this Article significantly adjusts the Working Group's framework to provide a much greater role for multilateral rules and dispute settlement, and it makes concrete recommendations to implement this approach's basic principles in response to current economic, national security, and social policy challenges. Because there is no one form of economic governance that promotes development, much less one that universally applies across national contexts, multilateral rules must be sensitive to different economic, political, and social choices. At the same time, each country's policies should be subject to external scrutiny for their transnational implications, and

[1] Some might substitute the term "realism" for "bargaining." For realists, the turn to law is a function of power and interest, with law playing little to no constitutive or independent institutional role. Nonetheless, law facilitates order under a realist model as well. John Mearsheimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43 INT'L SEC. 7 (2019).

[2] The term "neoliberalism" is politically charged with many meanings. *See* Daniel Rodgers, *The Uses and Abuses of "Neoliberalism,"* DISSENT (Winter 2018), *at* https://www.dissentmagazine.org/article/uses-and-abuses-neoliberalism-debate. Yet, the phrase captures the proposed doubling down of rules to constrain state industrial policy, and helps differentiate such an approach from earlier variants of embedded liberalism.

[3] The U.S.-China Trade Policy Working Group Joint Statement, *US-China Trade Relations: A Way Forward* (2019), *available at* https://rodrik.typepad.com/US-China%20Trade%20Relations%20-%20A%20Way%20Forward%20Booklet%20%28for%20print%29.pdf.

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other countries must be permitted to protect themselves from the external effects of that country's policies.

The approach proposed in this Article differs from two others that, respectively, advocate substantial economic decoupling from China with little role for law, on the one hand, and doubling down on constraining the state's role in the economy per a "liberal" economic model, on the other hand. The Trump administration exemplified the first approach, adopting unilateral tariff measures and moving toward significant if not—in its words—"complete" economic decoupling from China.[4] Its policies were widely criticized for their unilateralism, protectionism, and lack of effectiveness, but many critics sympathize with their targeting of China.[5]

Petros Mavroidis and Andre Sapir's new book, *China and the WTO*, presents the contrasting "liberal" approach of doubling down on international law and adding further legal requirements on governments to adopt liberal policies, and "not preempt the market mechanism," thereby further constraining governmental policy space.[6] In particular, they call for new legal requirements that go beyond non-discrimination norms to require governments and state-owned, state-invested, and state-linked enterprises to "behave in accordance with commercial considerations" and thus "create a good WTO" by bringing China "closer to 'Western' habits."[7] Mavroidis and Sapir deploy "the West/non-West" dichotomy "as a shortcut to denote the relative degree of state intervention in the economy,"[8] using the term "West" eighty-two times in reference to a "liberal," "market" economic model.[9] The adoption of their proposal could reflect what many call an "embedded neoliberal" economic model, one required and enforced by an international institution under international law.[10] In the end,

[4] David Lawder, *Trump Threat to "Decouple" U.S. and China Hits Trade, Investment Reality*, Reuters (June 23, 2020), *at* https://www.reuters.com/article/us-usa-trade-china-analysis/trump-threat-to-decouple-u-s-and-china-hits-trade-investment-reality-idUSKBN23U2WU (quoting the president raising "a complete decoupling from China" as an option); Michael Hirsh, *Trump's Economic Iron Curtain Against China*, For. Pol'y (Aug. 23, 2019), *at* https://foreignpolicy.com/2019/08/23/trumps-economic-iron-curtain-against-china-hawk-peter-navarro-american-factory-obama (quoting Trump, "'[o]ur great American companies are hereby ordered to immediately start looking for an alternative to China, including bringing your companies HOME and making your products in the USA").

[5] *See, e.g.*, David Dollar & Ryan Hass, *Getting the China Challenge Right*, Brookings (Jan. 25, 2021), *at* https://www.brookings.edu/research/getting-the-china-challenge-right; Max Boot, *Opinion: No One Does More to Hurt America and Help China Than Trump*, Wash. Post (July 21, 2020), *at* https://www.washingtonpost.com/opinions/2020/07/21/compete-with-china-we-first-need-defeat-trump.

[6] Petros C. Mavroidis & André Sapir, China and the WTO: Why Multilateralism Still Matters 165 (2021). They also characterize their approach as a "middle ground," but this time between "decoupling" and "staying idle." They characterize the approach of Dani Rodrik, the convenor of the U.S.-China Trade Policy Working Group, as "staying idle." *Id.* at 159. However, neither Rodrik nor this Article's framework represents "staying idle." Rather, both advocate granting more policy space for countries, as opposed to even more constraining WTO rules on the state's role in the economy.

[7] Mavroidis & Sapir, *supra* note 6, at 12 ("behave in a market-friendly manner"), 152 ("good WTO"), 153 ("'Western' habits").

[8] *Id.* at vii.

[9] Author's count (seventy-three "Western," eight "West," and one "West's"). *Id.* For example, they stress that the trade conflict with China differs from the West's earlier one with Japan because Japan became "Westernized," and thus "one of us," "integrated into the 'Western club.'" *Id.* at 7, 33, 142.

[10] *See, e.g.*, Damien Cahill, *Polanyi, Hayek and Embedded Neoliberalism*, 15 Globalizations 977 (2018); Sonia E. Rolland & David Trubek, *Embedded Neoliberalism and Its Discontents: The Uncertain Future of Trade and Investment Law*, *in* World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019); *see also* Quinn

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this approach has some resemblances to a power-based model in that it requires unilateral change by China to become like "the West." Were China to refuse to do so, the result would be power-based bargaining and the demise of multilateral trade governance through the WTO.[11]

In contrast, this Article eschews requiring that China and other emerging economies must become like "one of us" in the "West."[12] It rather provides a critical role for multilateral governance that does not require governments to abandon state intervention in the economy, such as through industrial policies and state ownership. Whatever one's views about the appropriate role of the state may be, governments should be free to make mistakes in advancing their economic development objectives. They should not be constrained by international law from pursuing particular interventionist development policies.[13] Under this approach, countries nonetheless are entitled to take measures to protect themselves from the externalities of other countries' practices. This could result in some economic decoupling as compared to the WTO system in its first two decades, but such measures could also lead to new normative settlements conducted under the umbrella of the multilateral system. This Article recognizes that the lack of transparency of many of China's trade practices makes both defensive measures and ongoing negotiations essential. The Article maintains, however, that the WTO's fundamental norm should remain non-discrimination, coupled with transparency, not market fundamentalism.[14]

The Article begins in Part II with an assessment of the geopolitical and domestic economic challenges of our time and then summarizes, in Part III, the Article's adjustment of the U.S.-China working group's guiding principles to retain a greater role for multilateral rules. The Article breaks down the issues along the economic, geopolitical, and social policy dimensions of the U.S.-China trade relationship. By the *economic* dimension, examined in Part IV, the Article refers to the U.S. critique of China's state capitalism, and in particular the use of state-owned enterprises and state subsidies, including in relation to technological development.[15]

Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism (2018); Kristen Hopewell, Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project 2 (2016).

[11] In this vein, cf. Center for Strategic & International Studies, *The WTO: Looking Forward* (Oct. 12, 2018), *at* https://www.csis.org/events/wto-looking-forward ("We need to recognize that the economic system of China is not compatible with the WTO norms;" and "the WTO as currently constituted is not equipped to deal with China"); Mark Wu, *The WTO and China's Unique Economic Structure*, *in* Regulating the Visible Hand?: The Institutional Implications of Chinese State Capitalism 313, 350 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2015) ("The Party-state's desire to preserve its unique political economy is threatening to shatter the liberal [WTO] project of building a strong multilateral trading regime. In the end, both cannot stand.").

[12] For an important, work that makes a moral argument for pluralism in light of moral disagreement in a world of sovereign states, and that cautions against universalist projects enforced unilaterally, see Brad R. Roth, Sovereign Equality and Moral Disagreement: Premises of a Pluralist Legal Order (2011).

[13] Margaret Thatcher famously declared that "there is no alternative" to the market economy. Margaret Thatcher, Speech to Conservative Party Conference (Oct. 20, 1967); *see also* Nick Robinson, *Economy: There Is No Alternative (TINA) Is Back*, BBC News (Mar. 7, 2013), *at* https://www.bbc.com/news/uk-politics-21703018 ("the phrase forever associated with Mrs Thatcher in the 1980s").

[14] On the development of the transparency requirements in the WTO, see Steve Charnovitz, *Transparency and Participation in the WTO*, 56 Rutgers L. Rev. 927 (2004); Padideh Ala'i, *Transparency and the Expansion of the WTO Mandate*, 26 Am. U. Int'l L. Rev. 1009 (2011).

[15] Office of the U.S. Trade Representative, 2019 Report to Congress on China's WTO Compliance (Mar. 2020), *at* https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2019/2019-report-chinas-wto-compliance; Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 Harv. Int'l L.J. 261 (2016).

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The *geopolitical/national security* dimension, examined in Part V, addresses U.S. concerns over China as a rising power bolstered by China's economic success in competing for innovation, coupled with worries regarding Chinese infiltration of infrastructure, gathering of data, and other forms of geopolitical leverage. The *normative/social policy* dimension, the subject of Part VI, concerns reactions to China's authoritarianism, human rights violations, and labor practices, which indirectly implicate U.S. workers, consumers, and the U.S. social bargain through purchases of Chinese products. Part VII addresses the role that multilateral dispute resolution can play in this new context. A brief conclusion follows.

In applying the framework across the three dimensions of the U.S.-China relationship—the economy, national security, and social policy—the Article develops specific proposals regarding each one. First, it assesses ways that the interpretation, reform, and application of WTO rules, including import relief rules, can provide greater leeway for the United States and other countries to respond to subsidies provided to state-owned enterprises and other state-connected businesses. Second, it considers how national security exceptions in trade agreements can be adapted to address cybersecurity, critical infrastructure, and related concerns. Third, it develops ways that existing WTO rules can be elaborated to permit countries to address social dumping. In each context, the Article considers the mechanisms being developed in bilateral and plurilateral agreements involving the United States, Europe, and China, respectively.

II. A New Situation Sense

Legal realists insist that rules should be adapted and applied in light of underlying social contexts.[16] For trade law, the underlying social and political contexts have radically changed internationally and domestically since the WTO's creation in 1995. Most dramatically, the United States is no longer the global hegemon, and the European Union also has relatively declined as an economic force. China, meanwhile, has become a global economic power as well as a regional military one. China's share of global GDP is now two-thirds that of the United States in nominal terms and over twenty percent more than the United States in terms of purchasing power.[17] Within a decade, China should become—once more—the world's largest economy.[18] China already is the world's largest trader, and two-thirds of countries trade more goods with China than the United States, compared to just one-fifth in 2001, the year China joined the WTO.[19] Particularly worrisome to the United States, China is a growing power in advanced technology, including information and communication technology. As a result, the United States and Europe, although still economically powerful, are less

[16] Gregory Shaffer, *Legal Realism and International Law*, *in* International Legal Theory: Foundations and Frontiers (Jeffrey L. Dunoff & Mark A. Pollack eds., 2021).

[17] *Top 20 Economies in the World*, Investopedia (Dec. 24, 2020) *at* https://www.investopedia.com/insights/worlds-top-economies (citing IMF data for 2019).

[18] *China's Economic Outlook in Six Charts*, IMF News (July 26, 2018), *at* https://www.imf.org/en/News/Articles/2018/07/25/na072618-chinas-economic-outlook-in-six-charts.

[19] Alyssa Leng & Roland Rajah, *Global Trade Through a US-China Lens*, Interpreter (Dec. 18, 2019), *at* https://www.lowyinstitute.org/the-interpreter/chart-week-global-trade-through-us-china-lens.

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able to dominate rulemaking than in the past to reflect their domestic laws, economic models, and interest group demands.[20]

It is not just the international context that changed; domestic contexts did as well. Inequality rose starkly in countries around the world, especially in the United States. The result has been levels of inequality not seen since the 1930s, contributing to a surge of populism and political tribalism, accompanied by greater wariness of economic globalization and the international institutions and laws that govern it.[21]

These processes deepened as the COVID-19 pandemic wreaked havoc. China's economy grew 2.3 percent in 2020,[22] while that of the United States declined by 3.5 percent[23] and the EU's plummeted by 4.8 percent (and 5.1 percent for the Eurozone).[24] Within the United States, the gap between Wall Street and Main Street widened. The U.S. stock market soared to record highs in 2020, with oligopolistic digital companies profiting,[25] while unemployment rose to over fourteen percent and scores of small and medium-sized businesses went bankrupt or were spared only through massive government subsidies.[26]

These domestic and international dimensions interrelate. Trade theory has long recognized that trade creates losers as well as winners. Globalization supported by international economic law created bargaining leverage for capital over labor, while constraining states' ability to tax mobile capital.[27] Trade, when linked with technological change and the free flow of capital,

[20] Gregory Shaffer, Emerging Powers and the World Trading System: The Past and Future of International Economic Law (2021).

[21] Greg Leiserson, Will McGrew & Raksha Kopparam, *The Distribution of Wealth in the United States and Implications for a Net Worth Tax*, Wash. Ctr. for Equitable Growth (Mar. 21, 2019), *at* https://equitablegrowth.org/the-distribution-of-wealth-in-the-united-states-and-implications-for-a-net-worth-tax (citing author's calculations from Board of Governors of the Federal Reserve System, *Survey of Consumer Finances*, *at* https://www.federalreserve.gov/econres/scfindex.htm).

[22] Jonathan Cheng, *China Is the Only Major Economy to Report Economic Growth for 2020*, Wall St. J. (Jan. 18, 2021), *at* https://www.wsj.com/articles/china-is-the-only-major-economy-to-report-economic-growth-for-2020-11610936187.

[23] Rachel Siegel, Andrew Van Dam & Erica Werner, *2020 Was the Worst Year for Economic Growth Since World War II*, Wash. Post (Jan. 28, 2021), *at* https://www.washingtonpost.com/business/2021/01/28/gdp-2020-economy-recession.

[24] European Comm'n Press Release, 17/2021, GDP Down by 0.7% in the Euro Area and by 0.5% in the EU (Feb. 2, 2021), *at* https://ec.europa.eu/eurostat/documents/portlet_file_entry/2995521/2-02022021-AP-EN.pdf/0e84de9c-0462-6868-df3e-dbacaad9f49f.

[25] Hamza Shaban & Heather Long, *The Stock Market Is Ending 2020 at Record Highs, Even as the Virus Surges and Millions Go Hungry*, Wash. Post (Dec. 31, 2020), *at* https://www.washingtonpost.com/business/2020/12/31/stock-market-record-2020.

[26] Data extracted from Fed. Res. Bank St. Louis, *Unemployment Rate*, https://fred.stlouisfed.org/series/UNRATE (U.S. unemployment peaked at 14.7%). Additionally, all but three states (Alabama, Missouri, and West Virginia) set all-time records for unemployment between February and July of 2020. Data extracted from U.S. Bureau of Labor Statistics, *Local Area Unemployment Statistics*, *at* https://www.bls.gov/web/laus/lauhsthl.htm; Madeleine Ngo, *Small Businesses Are Dying by the Thousands—and No One Is Tracking the Carnage*, Wash. Post (Aug. 11, 2020), *at* https://www.washingtonpost.com/business/on-small-business/small-businesses-are-dying-by-the-thousands-and-no-one-is-tracking-the-carnage/2020/08/11/660f9f52-dbda-11ea-b4f1-25b762cdbbf4_story.html.

[27] Dani Rodrik, Straight Talk on Trade: Ideas for a Sane World Economy (2017); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. Ill. L. Rev. 1 (2019); Gabriel Zucman, *How Corporations and the Wealthy Avoid Taxes (and How to Stop Them)*, N.Y. Times (Nov. 10, 2017), *at* https://www.nytimes.com/interactive/2017/11/10/opinion/gabriel-zucman-paradise-papers-tax-evasion.html (estimating that "$8.7 trillion, 11.5 percent of the entire world's G.D.P., is held offshore by ultrawealthy households in a handful of tax shelters, and most of it isn't being reported to the relevant tax authorities").

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placed downward pressure on the wages and job security of low-skilled workers, particularly in the United States.[28] Empirical studies show that massive imports from China, in particular, decimated many communities in the United States and Europe.[29] This invigorated populist politicians playing off nativist, racialized fears, and a loss of status.[30]

These two dimensions together constitute a double-edged shift in inequality.[31] From a global perspective, trade simultaneously helped reduce inequality *between* countries because of higher economic growth rates in Asia and the rise of a middle class in China and India, while it helped increase inequality *within* countries.[32] Since the WTO provides a core part of globalization's legal architecture, it is not surprising that U.S. citizens left behind helped elect a reality TV star and economic nationalist as president who bashed it. As China rose as an economic and military power, U.S. national security officials also became warier of the trading system's implications, which reframed U.S. assessments of trade with China in security and geopolitical terms.[33]

These shifts are critical to explaining how the United States became the great disruptor—"the wrecking ball"[34]—of the world trading system and demanded its structural overhaul. The United States neutered the WTO's dispute settlement system. By terminating the appeals system, it ended the binding force of WTO rulings (subject to a subset of WTO members' creating a separate arbitral procedure, discussed in Part VII).[35] Although the Biden administration is more internationalist in orientation than its predecessor, it is wary

[28] MATTHEW C. KLEIN & MICHAEL PETTIS, TRADE WARS ARE CLASS WARS: HOW RISING INEQUALITY DISTORTS THE GLOBAL ECONOMY AND THREATENS INTERNATIONAL PEACE (2020); BRANKO MILANOVIĆ, GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION (2016).

[29] David H. Autor, David Dorn & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121 (2013); Stefan Thewissen & Olaf van Vliet, *Competing with the Dragon: Employment Effects of Chinese Trade Competition in 17 Sectors Across 18 OECD Countries*, 7 POL. SCI. RES. & METHODS 215 (2019). The Autor, et al. study is criticized for not assessing net job effects from trade with China, as noted in Robert C. Feenstra & Akira Sasahara, *The "China Shock," Exports and U.S. Employment: A Global Input-Output Analysis*, 26 REV. INT'L ECON. 1053 (2018). Nonetheless, the impact on communities was significant, as was the political effect. David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, *Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure*, 110 AM. ECON. REV. 3139 (2020).

[30] Tom Jacobs, *Research Finds that Racism, Sexism, and Status Fears Drove Trump Voters*, PAC. STANDARD (Apr. 24, 2018), *at* https://psmag.com/news/research-finds-that-racism-sexism-and-status-fears-drove-trump-voters (citing work of Diana Mutz and others); Daniel Trilling, *The Irrational Fear of Migrants Carries a Deadly Price for Europe*, GUARDIAN (June 28, 2018), *at* https://www.theguardian.com/commentisfree/2018/jun/28/migrants-europe-eu-italy-matteo-salvini; ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD 576 (2018) ("Even an issue such as trade was saturated with racial markers.").

[31] SHAFFER, *supra* note 20, at 56.

[32] MILANOVIĆ, *supra* note 28, at 46–117. Over 850 million Chinese rose out of poverty in the last thirty-five years (to twenty-five million and declining) through trade-generated economic growth. World Bank Group, *DataBank: Poverty and Equity*, *at* http://databank.worldbank.org/data/reports.aspx?source=poverty-and-equity-database (number of poor at $1.90 per day at 2011 PPP).

[33] Jennifer Harris & Jake Sullivan, *America Needs a New Economic Philosophy. Foreign Policy Experts Can Help*, FOR. POL'Y (Feb. 7, 2020), *at* https://foreignpolicy.com/2020/02/07/america-needs-a-new-economic-philosophy-foreign-policy-experts-can-help.

[34] Author interview with Member of the WTO Secretariat, Geneva (June 30, 2017) ("Now the U.S. has become a wrecking ball to the system. It's like Gotham City where the Joker took over.").

[35] Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. ONLINE 37 (2018).

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of WTO legal constraints on its "make-in-America" domestic policy agenda.[36] U.S. administrations change, but across the political spectrum there has been a sea change in U.S. citizen views toward China.[37]

These U.S. shifts in perspective result from a number of factors, including the international and domestic structural changes described above, the onslaught of Trump and Biden administration rhetoric regarding the China threat, the authoritarian turn of the regime of President Xi Jinping, and the regime's enhancement of the role of the state and the Communist Party in China's economy and corporate governance.[38] In addition, under President Xi, the regime became much more aggressive in its behavior, ranging from its repression in Hong Kong and Xinjiang, its expansionism in the South China Sea and along its border with India, to its "wolf diplomacy" during the coronavirus pandemic.[39]

Given this new context, the question arises whether the United States and China can develop a framework to address the different dimensions of their trade relations in order for the multilateral system to remain relevant in supporting economic development, resilience, stability, and peace.

III. A Guiding Framework for the Three dimensions of the Relationship

A. The Guiding Frameworkt

Before examining particular rules, it is critical to develop a guiding framework for managing the three dimensions of the interface of U.S.-China trade relations.[40] The dominant paradigm in U.S. discourse is that either China must undertake significant reforms that reduce state intervention so that its economic system becomes more like that of the United States, or the two economies must significantly "decouple."[41] As part of decoupling, high tariffs, product bans, and export and investment controls would become the norm. The result could be deepening conflict and the unraveling of cooperation in other domains, such as over the

[36] *Biden's New China Doctrine*, Economist (July 17, 2021), *at* https://www.economist.com/leaders/2021/07/17/bidens-new-china-doctrine.

[37] According to the Pew Research Center, U.S. views of China have turned increasingly negative, with approximately 66% of U.S. adults, surveyed between March 3–29 of 2020, expressing unfavorable opinions of China, up from about 47% in 2017. Laura Silver, Kat Devlin & Christine Huang, *Americans Fault China for Its Role in the Spread of COVID-19*, Pew Res. Ctr. (July 30, 2020), *at* https://www.pewresearch.org/global/2020/07/30/americans-fault-china-for-its-role-in-the-spread-of-covid-19.

[38] Elizabeth C. Economy, The Third Revolution: Xi Jinping and the New Chinese State (2018); Lauren Yu-Hsin Lin & Curtis J. Milhaupt, *Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance*, 50 J. Legal Stud. 187 (2021).

[39] Kathrin Hille, *"Wolf Warrior" Diplomats Reveal China's Ambitions*, Fin. Times (May 11, 2020), *at* https://www.ft.com/content/7d500105-4349-4721-b4f5-179de6a58f08.

[40] John Jackson earlier theorized trade agreements in terms of providing an "interface" between different systems, focusing on the economic dimension. John H. Jackson, The World Trading System: Law and Policy of International Economic Relations 248 (2d ed. 1997) ("The Interface Question").

[41] See the statement of U.S. Ambassador to the WTO Dennis Shea, in *For U.S., WTO Reform Hinges on Economic Model "Convergence,"* Inside U.S. Trade (Nov. 19, 2020), *at* https://insidetrade.com/daily-news/us-wto-reform-hinges-economic-model-%E2%80%98convergence%E2%80%99; and support for this paradigm on the political right and left in the United States, in Keith Johnson & Robbie Gramer, *The Great Decoupling*, For. Pol'y (May 14, 2020), *at* https://foreignpolicy.com/2020/05/14/china-us-pandemic-economy-tensions-trump-coronavirus-covid-new-cold-war-economics-the-great-decoupling.

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amelioration of climate change, the combatting of global pandemics, the stemming of financial crises, and the fostering of peace.

There is, however, a middle ground that would facilitate ongoing trade while assuring policy space for each country to protect itself from the externalities of each other's actions, including to protect its national security and uphold its social commitments. This approach has several salutary features. It recognizes that different countries favor different approaches to organizing their economies in light of their contexts, values, and preferences. It is modest, arguing against the notion that "one size fits all" for development, much less for capitalism generally.[42] It contends that countries can learn from a diversity of approaches, and that such diversity enhances the global economy's resilience when financial crises strike. It eschews deep harmonization, and it calls for greater acceptance of domestic policy discretion. This approach thus favors a rebalancing of economic relations that increases domestic policy space as compared to current international trade rules as they have been interpreted within the WTO system. It would accommodate some decoupling of the two economies as they negotiate over particular trade conflicts, but it would preserve the overall multilateral system. Moreover, it could do so, for the most part, though applying the existing WTO legal framework in a more deferential manner.

The United States-China Trade Policy Working Group has developed a set of governing principles that accommodate the United States' and China's different economic systems and policy concerns in this vein.[43] The Working Group proposes to assess the governance of national policies in terms of four categories, or "buckets": (1) those policies proscribed for their predatory nature; (2) those subject to bilateral negotiations; (3) those providing for unilateral measures where bilateral negotiations fail, provided they are proportionate; and (4) those regulated through multilateral rules because of potential spillover effects from bilateral agreements on third parties.[44] In the words of its Joint Statement, a framework should respect "each country's ability to design and implement its own domestic policies, to promote productive negotiations about how to share the benefits and minimize the harms that attend bilateral trade, and to facilitate fair competition in the multilateral sphere of international trade."[45]

This Article adjusts the framework by expanding the first and fourth categories to incorporate the fundamental WTO principles of non-discrimination and transparency, by expanding the second category to include plurilateral agreements, and by maintaining a key role for WTO dispute settlement. Moreover, it shows how the framework's guiding principles can be applied to different situational contexts implicated in the U.S.-China trade relationship besides economic relations and claims of economic fairness. Yet, like the Working Group, it stresses that multilateral rules need to accommodate bilateral agreements and unilateral action, while ensuring that unilateral responses are proportionate and that bilateral deals do not prejudice third parties.

[42] Varieties of Capitalism: The Institutional Foundations of Comparative Advantage (Peter A. Hall & David Soskice eds., 2001).

[43] The U.S.-China Trade Policy Working Group, *supra* note 3.

[44] *Id.* at 4–5.

[45] *Id.* at 1.

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The Working Group prescribes national policies that are predatory in orientation under Category 1. The definition of a "beggar-thy-neighbor policy" is one that seeks "to increase domestic economic welfare at the expense of other countries' welfare."[46] China's export bans and taxes on critical materials, such as rare metals required in high-tech industries, exemplify such policies, as do U.S. export bans on inputs used in the production of silicon chips for Huawei and other Chinese companies.[47] However, as Part V shows, the analysis becomes complicated when a national security frame is used to assess "beggar-thy-neighbor" measures as opposed to an economic one, which illustrates the need to apply a framework of principles across all three dimensions of the relationship.

Under Category 2, where countries disagree on the legitimacy of different policy approaches, they still might negotiate a bilateral settlement. Given the stalemate in WTO negotiations and the tensions between the United States and China regarding their respective policies—such as over China's subsidies and technology policies, and the countries' respective tariff rates—ongoing negotiation between them is critical. These negotiations, in theory, can be multilateral, but it will be much easier to reach agreement through bilateral or plurilateral negotiations. This Article therefore expands the Working Group's Category 2 to encompass plurilateral agreements, including ones in which countries can coordinate their responses to China's (and any other countries') practices.

Under Category 3, where a bilateral agreement is not reached, a country may adjust and respond unilaterally to protect itself, but such action must be proportionate to the harm caused. The principle of proportionality is central to international law, from the law of war to international trade and investment law.[48] The critical issues are how the principle is applied and who applies it. The determination of what is proportionate could be reviewed under multilateral rules, a bilateral or plurilateral agreement, or under a less formal arrangement.[49]

[46] The Princeton Encyclopedia of the World Economy 126 (Kenneth A. Reinert, Ramkishen S. Rajan, Amy Joycelyn Glass & Lewis S. Davis eds., 2009). A classic example is an "optimal tariff" where a country exercising market power can raise its tariff to induce exporters to lower their prices to sell in its market, thus adversely affecting the terms of trade. Christian Broda, Nuno Limão & David E. Weinstein, *Optimal Tariffs and Market Power: The Evidence*, 98 Am. Econ. Rev. 2032 (2008).

[47] The United States, European Union, and Japan successfully challenged these measures before the WTO in two cases, and China complied with the rulings. Appellate Body Reports, China–Measures Related to the Exportation of Various Raw Materials, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Jan. 30, 2012); Appellate Body Reports, China–Measures Relating to the Exportation of Rare Earths, Tungsten, and Molybdenum, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS/433/AB/R (adopted Aug. 7, 2014). *Cf.* Richard Altieri & Benjamin Della Rocca, *U.S. Further Tightens Huawei Blacklist, Putting a "Blanket Ban" on the Company*, Lawfare (Aug. 28, 2020), *at* https://www.lawfareblog.com/us-further-tightens-huawei-blacklist-putting-blanket-ban-company.

[48] Thomas M. Franck, *Proportionality in International Law*, 4 L. & Eth. Hum. Rts. 230 (2010) (including sections on "*Jus ad Bellum*," "*Jus in Bello*," "Individual Criminal Conduct," "Non-Military Countermeasures," "Trade Disputes," and "Human Rights"); Thomas Cottier, Roberto Echandi, Rachel Liechti-McKee, Tetyana Payosova & Charlotte Sieber, *The Principle of Proportionality in International Law: Foundations and Variations*, 18 J. World Inv. & Trade 628 (2017).

[49] For example, the United States signed an agreement with China in 2019 (colloquially known in the United States as the "phase 1" agreement), which requires the application of the proportionality principle to maintain orderly trade relations. Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, Art. 7.4(4)(b), Jan. 15, 2020, *available at* https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf ("adopting a remedial measure in a proportionate way with the purpose of preventing the escalation of the situation and maintain the normal bilateral trade relationship").

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Examples of potential unilateral adjustments include tariffs or product bans applied on national security or labor rights grounds, and border tax adjustments applied to carbon-intensive imports as part of a non-discriminatory climate change policy.[50] WTO rules already implement the principle of proportionality regarding remedies—a WTO member may be authorized to withdraw concessions in an "equivalent" amount to any "nullification or impairment" of benefits under a WTO agreement.[51]

Under Category 4, policies agreed to bilaterally (falling within Category 2) and applied unilaterally (under Category 3) must be disciplined, especially where they adversely affect third parties. Multilateral rules can help to address these spillover effects. Under the most-favored-nation clause in Article I of the General Agreement on Tariffs and Trade (GATT), any bilateral agreement falling within Category 2 may not discriminate against other WTO Members, such as by requiring the discriminatory purchase of one country's products over those of another.[52]

Critically, this Article adjusts and expands Categories 1 and 4 to cover not only multilateral rules that prescribe "beggar-thy-neighbor" policies and protect third-party interests, but also those that require non-discrimination and transparency, require proportionate unilateral responses, and otherwise facilitate international coordination and cooperation. This Article's adaptation of the framework's guiding principles thus preserves a much greater role for existing multilateral rules, and, in particular, the fundamental principles of non-discrimination and transparency.[53] Yet, in doing so, this Article nonetheless aims to implement the Joint Statement's spirit and core principle that multilateral rules must provide policy space for countries to govern themselves, including by protecting their constituents through unilateral measures, and by accommodating bilateral and plurilateral bargains, subject to the proportionality principle and protection of third parties.

[50] *See, e.g.*, Isabelle Icso, *Biden Transition Adviser Suggests Carbon Deal with EU Could Be on Horizon*, WORLD TRADE ONLINE (Mar. 9, 2021), *at* https://insidetrade.com/daily-news/biden-transition-adviser-suggests-carbon-deal-eu-could-be-horizon; Brad Plummer, *Europe Is Proposing a Border Carbon Tax. What Is It and How Will It Work*, N.Y. TIMES (July 14, 2021), *at* https://www.nytimes.com/2021/07/14/climate/carbon-border-tax.html.

[51] Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 22.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401 [hereinafter DSU]. Under GATT Article XXIII, this includes responses to "any other situation," "whether or not [a measure] conflicts with the provisions of this Agreement." General Agreement on Tariffs and Trade, Art. XXIII.1(b)–(c), Oct. 30, 1947, 55 UNTS 194 [hereinafter GATT].

[52] GATT, *supra* note 51, Art. I. Thus, when China agreed to purchase U.S. goods in vastly greater quantities under the Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, other members have a potential claim against China for discriminating in favor of U.S. products. James Politi, *EU Trade Commissioner Criticizes US-China Trade Deal*, FIN. TIMES (Jan. 16, 2020), *at* https://www.ft.com/content/6a6b5548-3877-11ea-a6d3-9a26f8c3cba4. In the 1980s, the European Communities successfully challenged Japan after it resolved a trade dispute with the United States in a manner that adversely affected the European Communities. Report of the Panel, Japan—Trade in Semi-Conductors, L/6309 (adopted May 4, 1988), GATT BISD 35S/116, *available at* https://www.wto.org/english/tratop_e/dispu_e/gatt_e/87semcdr.pdf.

[53] See Articles I (the most-favored-nation clause), III (the national treatment clause), and X (Publication and Administration of Trade Regulations) of the GATT, among other provisions in WTO agreements in this vein. In practice, new rules generally build on existing structures—what political scientists refer to as "layering"—which gives rise to institutional change. Jeroen van der Heijden, *Institutional Layering: A Review of the Use of the Concept*, 31 POL. 9 (2011).

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B. Implementing the Framework Across Three Dimensions

Implementing these guiding principles through multilateral trade rules has two main components. On the one hand, countries should have the right "to design a wide variety of industrial policies, technological systems, and social standards."[54] On the other, they should have the right to use tariffs and non-tariff measures "to protect their industrial, technological, and social policy choices" in a manner that does not impose unnecessary or disproportionate impacts on foreign countries.[55] Both prongs are about balancing policy space with the need for multilateral rules and oversight.

Under this approach, China and other emerging economies would have the choice to organize their economies in different ways. However, China would recognize that those choices can affect constituencies in other countries. Countries would have the right to take proportionate measures to protect themselves and their domestic social bargains, in particular through discrete safeguard measures. Multilateral rules, in parallel, would prohibit discriminatory trade policies, and they would be backed by binding dispute settlement. This approach would not require a major renegotiation of multilateral rules, but it would demand adjustments, including in the interpretation of existing rules in dispute settlement, as well as through bilateral, plurilateral, and multilateral negotiations, as Parts IV–VI address.

This Article creates a typology of the interface of U.S.-China trade relations across the three dimensions of the economy, national security, and social policy. It does so primarily for expository purposes to demonstrate how the framework applies in each dimension. The Working Group framework, in particular, elided its application to national security concerns and did not explicitly address the social policy dimension. In practice, however, it is also important for purposes of legal interpretation and application.

Analytically, it often is difficult to discern whether a trade measure involves only one dimension compared to others because, in practice, a single trade measure may not only intersect with multiple dimensions of the interface, but a party may defend its measure under multiple or alternative frames. For example, measures to ban Chinese technology products can be viewed as a national security policy (to protect from Chinese espionage), an economic policy (to protect the U.S. lead in advanced technology), and a social policy (to protect Americans from Chinese surveillance and manipulation). Similarly, climate change mitigation measures can be viewed as a social/environmental policy, an industrial policy (as under a New Green Deal), and a national security policy. China could advance analogous arguments.

A particular challenge is that the Working Group's concept of "beggar-thy-neighbor" policies is an economic one that applies less well within a security frame since the goal of a security measure is to constrain an opponent. Countries, for example, aim to obstruct their rival's ability to obtain and develop advanced technology that can be used for weapons systems or otherwise can be weaponized economically.[56] The Working Group's concept of "beggar-thy-neighbor" policies also does not apply well to the social policy dimension because human and labor rights violations target a country's own nationals, not those of a third country.

[54] US-China Trade Policy Working Group, *supra* note 3, at 1.

[55] *Id.*

[56] Henry Farrell & Abraham L. Newman, *Weaponized Independence: How Global Economic Networks Shape State Coercion*, 44 INT'L SEC. 42 (2019).

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Moreover, legal exceptions to tariff bindings and product bans are worded differently in WTO agreements regarding economic, social policy, and national security defenses, creating incentives for a respondent to choose a defense that grants it relatively more discretion. It is thus important to draw boundaries to determine the applicable rules and exceptions. This boundary work can be developed through negotiation, judicial interpretation, and practice, as Parts V and VI address.

WTO negotiations are stalemated, and existing WTO rules are outdated as regards new technologies that shape the digital economy and help drive U.S.-China trade conflicts. As a result, bilateral negotiations and unilateral action will be of growing salience. This framework thus applies both to the WTO and beyond it. For the WTO multilateral system to remain resilient, WTO decisionmakers must acknowledge the shift toward a pluralist approach to trade governance, especially in light of technological changes in geopolitically charged times. Most importantly, the principles set forth in this framework could help temper the trade war between the United States and China and its spillover effects on the rest of the world, leading both to greater accommodation and cooperative relations.

In practice, countries inevitably will disagree about the framework's application, even if they agree on the general principles. The United States, for example, may argue that China's industrial policies are predatory, and China may contend that U.S. technology policy aims to stem China's rise and trap its economy in lower value production. A critical question thus arises regarding the role of a third party in assessing the framework's application in light of applicable rules governing these three dimensions, especially given current blockages in the WTO dispute settlement system. The remainder of this Article first assesses current WTO rules under the framework, as developed in this Article, explicating how the rules might be applied and adapted (whether through modification or interpretation) to address each of the three dimensions of the interface. It then turns to the critical question of dispute resolution in Part VII. Table 2 summarizes the issues.

IV. Governing the Economic Dimension

The economies of the United States and China present very different capitalist models.[57] The state and Communist Party play central coordinating roles within China, although the private sector remains the most vibrant part of its economic success.[58] The United States, in contrast, proclaims its model to be "free-market capitalism," although the U.S. economy is often dominated by huge, oligopolistic companies and "big money" plays an outsized role in U.S. politics, which, in turn, affects U.S. economic regulation and the state's role.[59]

The key question for trade law is whether the WTO order provides—or can provide—a common set of principles, rules, and institutions to govern the interface between these heterogenous economic systems.[60] Many commentators in the United States contend that

[57] Branko Milanović, Capitalism Alone: The Future of the System that Rules the World (2019).

[58] Nicholas R. Lardy, The State Strikes Back: The End of Economic Reform in China? (2019).

[59] Milanović, *supra* note 57, ch. 2. This being said, neither U.S. nor European policy regarding the state has remained constant, and they could revert toward greater state involvement in the economy, such as regarding technological development. *Cf.* Varieties of Capitalism, *supra* note 42; Mariana Mazzucato, Mission Economy: A Moonshot Guide to Changing Capitalism (2021).

[60] *Cf.* Andrew Lang, *Heterodox Markets and "Market Distortion" in the Global Trading System*, 22 J. Int'l Econ. L. 677 (2019).

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TABLE 2:
GOVERNING THE INTERFACE OF U.S.-CHINA TRADE RELATIONS

	The Concern	Self-Protection	Existing Rules	New Rules
Economic Dimension	Unfair competition	Import relief regulations	Anti-dumping, countervailing duty, and safeguards law	Clarifications of WTO import relief law; complemented by bilateral & plurilateral negotiations
National Security Dimension	Security risks; geopolitical rivalry	Revised national security regulations	GATT Art. XXI; GATS Art. XIV *bis*; TRIPS Art. 73	Revise rules to address cybersecurity, including in bilateral and plurilateral agreements
Social Policy Dimension	Risks to workers, social bargain, and complicity	Social dumping measures; trade adjustment assistance	GATT Articles XX(a) and XX(e)	New rules on labor rights and mechanisms to counter abuse through plurilateral and bilateral agreements

China's model of state capitalism violates the "spirit" of the WTO's legal order.[61] Others maintain that a key role for the GATT was always providing an "interface" between different economic systems, including between the United States, Europe, and (later) Japan.[62] It thereby can support trade liberalization and its benefits, while permitting countries to protect their constituents from what they view as "unfair" foreign trade-related policies.

China's economic model and the U.S. response to China's rise pose severe challenges for the multilateral system. Under a "power-based bargaining" model, the United States must respond to China's threat to U.S. economic welfare by enacting high tariffs and export restrictions in order to bring China to the bargaining table and thereby constrain the Chinese state. The Trump administration's trade war exemplified this approach. Under a "rule-based neoliberal" model, new rules are needed to constrain China's use of state-owned enterprises and state subsidies and thus "reduce or remove state involvement in the Chinese internal market" such that all decisions are "made in response to market signals."[63] If China does not conform, it is maintained, then the WTO will become irrelevant and "power-based bargaining" be inevitable.[64]

In contrast, this Article proposes a pragmatic "rebalancing" of the trade relationship under a multilateral framework, which will facilitate economic cooperation and trade while permitting greater policy space for calibrated responses to economic externalities. It contends that the United States is right to be concerned about the impact of China's economic rise on U.S. domestic policy. The enmeshment of the U.S. and Chinese economies through global value chains supported by trade law benefited U.S. capital, U.S. technology companies, some U.S. manufacturers (because of low-cost Chinese inputs), and U.S. consumers. However, most Americans' wages stagnated, their jobs became more precarious, and many communities were devastated.[65] Nonetheless, multilateral rules can accommodate legitimate U.S. responses to the impact of China's policies within it, particularly as regards U.S. workers.[66]

[61] MAVROIDIS & SAPIR, *supra* note 6, at viii ("China clearly violates the spirit of the WTO"), 172 (need to "translate" the WTO's spirit "into contractual, legal language"); Wu, *supra* note 15, at 350. An extensive literature on the history of the GATT, however, calls into question this claim regarding the GATT and WTO's spirit, given variation in national systems, going back to the negotiation of the GATT and Havana Charter. *Cf.* Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time* 7, 13, 25 (CSGR Working Paper No. 62/00 2000), *available at* http://www2.warwick.ac.uk/fac/soc/csgr/research/workingpapers/2000/wp6200.pdf; Robert Howse, *Official Business: International Trade Law and the Resurgence (or Resilience) of the State as an Economic Actor* (2021) (on file). This history provides caution regarding WTO overreach.

[62] JACKSON, *supra* note 40, at 248.

[63] MAVROIDIS & SAPIR, *supra* note 6, at 155 (quoting at length U.S. statements before the WTO General Council in 2020 and concluding "We agree").

[64] U.S. Trade Rep., *2017 USTR Report to Congress on China's WTO Compliance* 2 (Jan. 2018), https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf; U.S. Trade Rep., *2019 Report to Congress on China's WTO Compliance* 6 (March 2020), https://ustr.gov/sites/default/files/2019_Report_on_China%E2%80%99s_WTO_Compliance.pdf; Center for Strategic & International Studies, *supra* note 11. *Cf.* Xie Feng, *US Attacks on China's Economy Reflect a Double Standard*, FIN. TIMES (June 23, 2019) (critiquing the "hegemonic logic" of such proposals).

[65] Autor, Dorn & Hanson, *supra* note 29. As captured in Mathew Klein and Michael Pettis's title, today "trade wars are class wars." KLEIN & PETTIS, *supra* note 28.

[66] The Biden administration calls its trade policy "worker-centered." United States Trade Representative (USTR) Katherine Tai worked closely with organized labor when she served as chief trade counsel for the House Committee on Ways and Means. Yuka Hayashi, *Biden Trade Policy to Center on Workers, USTR Nominee Says*, WALL ST. J. (Jan. 12, 2021), *at* https://www.wsj.com/articles/biden-trade-policy-to-center-on-workers-ustr-nominee-says-11610471141.

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A. Subsidies

President Xi's policies of strengthening China's state-owned enterprises and bolstering the party-state's commanding role in the economy exacerbated concerns that China's economic model violates the "spirit" of "WTO norms." In response, the United States, European Union, and Japan joined forces to press for new multilateral rules that will constrain state intervention in the economy and the operation of state-owned enterprises, per a neoliberal rule-based model. In 2018, they launched a "trilateral initiative" to modify WTO rules under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[67] In a statement on January 14, 2020, they proposed to ban a broad range of subsidies under the WTO and add other constraints on state policy, in addition to existing WTO obligations.[68] Their proposal contains four main components.

First, they seek to expand the list of prohibited subsidies to include the following: "unlimited guarantees; subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan; subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity; [and] certain direct forgiveness of debt," while noting that they "continue working on identifying . . . additional categories."[69] Second, they shift the burden of proof for a series of other subsidies onto the subsidizing member to show that "there are no serious negative trade or capacity effects," which could approximate a ban given the difficulty of proving a negative.[70] Third, they expand the definition of "serious prejudice" to "include situations where the subsidy in question distorts capacity."[71] Fourth, they create rules for using benchmark prices outside of the market of the subsidizing member where it is a "non-market economy."[72]

Although U.S. concerns over China's economic rise are understandable, there are multiple problems with further constraining industrial policy options under multilateral rules.[73] To start, governments provide subsidies for good policy reasons to support their economies from market failures. The reasons are multiple, and they include the role of subsidies in increasing returns to scale, learning by doing, enhancing other positive externalities and countering negative ones (such as environmental harm from carbon-intensive industries). Demand for governmental support becomes particularly acute when private markets collapse in times of financial stress. The U.S. government's huge bailouts and support programs during the

[67] Office of the U.S. Trade Rep. Press Release, Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (Sept. 25, 2018), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-trilateral.

[68] Office of the U.S. Trade Rep. Press Release, Join Statement of the Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (Jan. 14, 2020), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union.

[69] *Id.*, para. 1.

[70] *Id.*, para. 2.

[71] *Id.*, para. 3.

[72] *Id.*, para. 5.

[73] Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. Int'l Econ. L. 371 (2020) (critiquing the trilateral initiative proposals on WTO subsidy reform).

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COVID pandemic—the largest government intervention in the world[74]—is one example, and the U.S. bailout of the automobile industry during the 2007–2008 financial crisis is another.[75] Economic theory does not support placing such straitjackets on government industrial policy, especially for economic development. And the United States would not want WTO dispute settlement panels to constrain its policy responses.

More generally, the idea that a WTO dispute settlement body, which the United States already criticizes for being too activist, can differentiate between a "credible" and "non-credible" restructuring plan seems fanciful. As law-and-economics scholar Alan Sykes writes, "subsidies may create negative international externalities and distort global resource allocation," "but they may also represent sensible policy responses to a range of market failures" and play other useful roles.[76] Moreover, as Sykes stresses, subsidies represent government funds from citizens of one country that reduce prices for citizens in another, thus benefitting the latter country and its citizens.[77] Although constraining subsidies can help preserve market access bargains for exporters, countries might be wary of entering trade agreements in the first place if they are so constrained.[78]

From the perspective of the different categories discussed in Part III, domestic subsidies generally are not "beggar-thy-neighbor" policies harming global welfare, and thus generally do not fall within Category 1.[79] Rather, by reducing prices in the importing country, the subsidizing country shifts the "terms of trade" in that other country's favor, actually benefitting that country from a welfare perspective.[80] One country's subsidies can adversely affect foreign producer groups, but they generally increase the importing country's national welfare because of the reduced prices subsidized by foreign governments and taxpayers.[81] Where the impact

[74] Niall McCarthy, *How Global Coronavirus Stimulus Packages Compare*, FORBES (May 11, 2020), *at* https://www.forbes.com/sites/niallmccarthy/2020/05/11/how-global-coronavirus-stimulus-packages-compare-infographic/?sh=f18239fca52c ("The U.S. has committed to the largest rescue package of any country by far with the three phases of congressional stimulus working out at $8.3 billion, $192 billion and $2.5 trillion.").

[75] Mitchell Hartman, *What Did America Buy with the Auto Bailout and Was It Worth It*, MARKETPLACE (Nov. 13, 2018), *at* https://www.marketplace.org/2018/11/13/what-did-america-buy-auto-bailout-and-was-it-worth-it.

[76] Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 J. LEGAL ANALYSIS 473 (2010).

[77] Alan O. Sykes, *The Limited Economic Case for Subsidies Regulation*, E15 INITIATIVE (2015), *at* https://e15initiative.org/publications/the-limited-economic-case-for-subsidies-regulation.

[78] Kyle Bagwell & Robert W. Staiger, *Will International Rules on Subsidies Disrupt the World Trading System*, 96 AM. ECON. REV. 877, 879, 891 (2006) ("The WTO subsidy rules interfere with the ability of governments to structure their tariff negotiations so as to achieve efficient policy combinations. . . . Our results indicate that the new WTO subsidy rules may ultimately do more harm than good to the multilateral trading system, including by having a 'chilling' effect on the desire of governments to take on market access commitments through WTO negotiations.").

[79] Exceptions exist, as when subsidies are predatory in imperfectly competitive markets. PETROS MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE: THE WTO AGREEMENTS ON TRADE IN GOODS, VOL. 2, at 193 (2016). There is nonetheless need for empirical study of particular problems to foster deliberation and potential resolution. Bernard M. Hoekman & Douglas Nelson, *Rethinking International Subsidy Rules*, 43 WORLD ECON. 3104 (2020) (citing OECD studies).

[80] Kyle Bagwell & Robert Staiger, *The Design of Trade Agreements*, *in* HANDBOOK OF COMMERCIAL POLICY 436, 447 (Kyle Bagwell & Robert Staiger eds., 2016) ("Increase in an export subsidy generates a positive terms-of-trade externality for the importing country, by enabling this country to import at a lower world price.").

[81] Trebilcock, Howse, and Eliason thus write, "[t]his analysis suggests that rather than condemning foreign subsidies, importing countries should send expressions of gratitude to the subsidizing country, noting only their regret that subsidies are not larger and timeless." MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE 390 (4th ed. 2013). They note that "in almost every

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on producer groups raises political concerns, countries can bargain with each other to remove the subsidy's adverse effects (as captured in Category 2).[82] Otherwise, countries retain the discretion to take proportionate action to remove the subsidy's impact (under Category 3).

WTO rules already exist to implement these principles (Category 4). On the one hand, they permit countries to take unilateral action and raise countervailing duties in a proportionate manner against subsidized imports where they result in material injury to a domestic industry.[83] These duties, or the threat of imposing them, can trigger negotiations that result in the subsidies' revision or removal. In practice, the United States, European Union, and Japan could coordinate the imposition of countervailing duties on Chinese products where the relevant criteria are met, thereby enhancing their leverage on China to remove the subsidies.

In addition, existing WTO rules create limits on industrial policy, which many economists maintain already go too far.[84] In particular, WTO rules "prohibit" export subsidies and subsides conditioned on the use of domestic products,[85] and they make actionable any subsidies to "specific" industries that cause "adverse effects" on another WTO member, including for that member's exports to third-country markets.[86] Brazil, for example, successfully challenged the United States regarding U.S. agricultural subsidies in ways that caused "serious prejudice" for Brazilian producers on global markets.[87] WTO rules also provide a mechanism that enables countries to preserve reciprocal market access bargains through "non-violation nullification and impairment" complaints on the grounds that the subsidy nullifies the

conceivable set of circumstances, countervailing duties reduce domestic social welfare in the importing country, where social welfare is defined as the maximization of producer, consumer and government surplus." *Id.*

[82] Such bargaining can include plurilateral initiatives, such as the trilateral initiative addressing Chinese subsidies.

[83] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, pt. V, 1869 UNTS 14 [hereinafter SCM Agreement]. The countervailing duties reduce a country's national welfare (as tariffs do generally), but GATT and WTO rules have long permitted such duties. Countries can impose them on imports to offset the benefit from a specific subsidy, thus effectively transferring government revenue from the subsidizing country to the government collecting the additional duties.

[84] Dani Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy 238, 277 (2011); Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective (2002); Bagwell & Staiger, *supra* note 78, at 877 ("When viewed in the light shed by the existing theoretical literature, international agreements that seek to limit subsidies look immediately suspect."), 879 ("The key changes introduced by the WTO subsidy rules may ultimately do more harm than good to the multilateral trading system."); Mavroidis, *supra* note 79, at 312, 732 (n. 26) ("The [SCM] Agreement as it now stands is, in many respects, in stark contrast with prevailing economic theory. . . . This agreement is in dire need of redrafting."). In parallel, TWAIL scholars have long argued that international trade rules can disempower more vulnerable WTO members. *See, e.g.*, James Thuo Gathii, *Third World Approaches to International Economic Governance*, *in* International Law and the Third World: Reshaping Justice 255 (Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens eds., 2008). Article 27.1 of the SCM Agreement provides, "Members recognize that subsidies may play an important role in economic development programmes of developing country Members." However, the special and differential treatment actually provided for developing countries is limited.

[85] SCM Agreement, *supra* note 83, pt. II.

[86] The terms "adverse effects" and serious prejudice" are respectively defined in Articles 5 and 6.3 of the SCM Agreement. *Id.*

[87] Appellate Body Report, United States–Subsidies on Upland Cotton, WTO Doc. WT/DS267/AB/RW (adopted June 2, 2008).

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benefits of a market access commitment.[88] In theory, WTO legal constraints could be expanded, but achieving consensus on such an expansion is unlikely, and, even if it were reached, it could constrain government policy space in unjustified ways.[89]

The primary problem with the application of existing WTO rules is not that they fail to sufficiently constrain China's and other emerging economies' use of industrial policy for development purposes, which would be inappropriate. Rather, the problem is that they can place too many constraints on countries seeking to protect their key industries and broader social bargains from the impact of foreign trade, including foreign subsidized products. Existing rules could be applied, reinterpreted, or revised to permit greater protection against the impacts of third-country subsidies in three ways: (1) through further clarifying the definition of the term "public body" for purposes of subsidies and countervailing duty law, implicating the transparency of subsidies channeled through state-owned and state-connected enterprises; (2) through easing the application of safeguard rules to permit for economic adjustment, so that safeguards can be applied where subsidies create overcapacity, and thus counter the risks of trade diversion from third countries not covered by countervailing duties; and (3) through creating and applying existing rules that incentivize making the subsidies more transparent, which represents good domestic as well as external policy.

First, the WTO Appellate Body interpreted existing WTO rules under the SCM Agreement that could make it more difficult to establish a subsidy where the subsidy is provided through a state-owned enterprise, which practices raise transparency issues, as further developed below. Under the agreement, a "subsidy" is defined in terms of "a financial contribution by a government or any *public body* within the territory of a Member."[90] On the question of whether a state-owned enterprise is a "public body," the Appellate Body found that it may be deemed one only if it is vested with "governmental authority" and performs a "governmental function," citing public international law texts on state responsibility in support.[91] Many commentators severely criticized the Appellate Body decision, in large part because Chinese state-owned enterprises without explicit governmental authority are often

[88] General Agreement on Tariffs and Trade, Art. XXIII, Oct. 30, 1947, 55 UNTS 194 [hereinafter GATT]; Nicolas Lamp, *At the Vanishing Point of Law: Rebalancing, Non-violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars*, 22 J. INT'L ECON. L. 721 (2019).

[89] Economic and Commercial Office of the Embassy of the People's Republic of China in the Republic of Lithuania, China's Position Paper on WTO Reform (Dec. 20, 2018), *at* http://lt.china-embassy.org/eng/xwdt/t1616985.htm (China "opposes special and discriminatory disciplines against state-owned enterprises in the name of WTO reform."). For the original Chinese version, see Department of WTO Affairs, MOFCOM, *at* http://sms.mofcom.gov.cn/article/cbw/201812/20181202817611.shtml. The party-state uses these enterprises for broader reasons than financial profit, which concern the provision of not only social services, but also economic and social stability, security, and technological advancement, which are critical for the party-state's political authority and control. Margaret Pearson, Meg Rithmire, & Kellee Tsai, *Party-State Capitalism in China* (Harv. Bus. Sch. Working Paper, No. 21-065, 2020), *at* https://hbswk.hbs.edu/item/party-state-capitalism-in-china; Jaya Y. Wen, *The Political Economy of State Employment and Instability in China* (Harv. Bus. Sch. Working Paper, 2020), *at* https://www.hbs.edu/faculty/Pages//item.aspx?num=58850.

[90] The WTO Agreement on Subsidies and Countervailing Measures provides, in Article 1, that the agreement applies to "a financial contribution by a government or any public body," without defining what is a "public body," and, in particular, whether the term encompasses a state-owned enterprise. SCM Agreement, *supra* note 83, Art. 1.1 (emphasis added).

[91] The United States lost the interpretative contest before the Appellate Body. Appellate Body Report, United States–Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011); Appellate Body Report, United States–Countervailing Duty Measures on Certain Products from China, WTO Doc. WT/DS437/AB/R (adopted Dec. 18 2014); Appellate

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required to provide loans and promote the development of particular economic sectors, and the government often is not transparent, making it difficult to prove particular state-owned enterprises are acting with government authority.[92]

However, in 2019, the WTO Appellate Body clarified its approach in a way that reduced the burden on investigating authorities. In particular, the Appellate Body found in favor of the United States that an investigating authority does not need to establish a connection between a state-owned enterprise and the government in terms of "conduct" related to a specific transaction, but only generally as an "entity."[93] It also noted that even private entities can operate as public bodies where the entity has close links with the government involving particular conduct.[94] Many commentators thus contend that existing WTO provisions may be sufficient to challenge such Chinese policies,[95] including Chinese scholars.[96] In particular, some note how investigating authorities can use provisions of China's Protocol of Accession, together with the Working Party Report to its accession, to support import relief measures against China's subsidies.[97]

Moreover, norm clarification and development are occurring not only through jurisprudence, but in parallel through the negotiation of bilateral and plurilateral agreements. The United States successfully pressed to define the term "public body" in terms of ownership in the TransPacific Partnership (TPP) (under the Obama administration) and the United

Body Report, United States–Countervailing and Anti-Dumping Measures on Certain Products from China, WT/DS449/AB/R /Corr.1 (adopted July 17, 2014).

[92] For criticism, see, for example, Michel Cartland, Gérard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, 46 J. World Trade 979 (2012); Mavroidis & Sapir, *supra* note 6, at 183. Howse develops a proposal to set up a presumption of government involvement where a company is state-owned or controlled in light of mangers incentives, thus incentivizing greater transparency, which is in line with this Article's approach. Howse, *supra* note 61.

[93] It found that "the central focus of a public body inquiry under Article1.1(a)(1) is not, as China contends, whether the *conduct* that is alleged to give rise to a financial contribution under subparagraphs (i)–(iii) or the first clause of subparagraph (iv)—i.e. the particular transaction at issue—is logically connected to an identified 'government function.' Rather, the relevant inquiry hinges on the *entity* engaging in that conduct, its core characteristics, and its relationship with government." Appellate Body Report, United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China, para. 5.100, WT/DS437/AB/RW and Add.1 (adopted Aug. 15, 2019) (emphasis added).

[94] *Id.*, para. 5.103.

[95] Jennifer Hillman, The Best Way to Address China's Unfair Policies and Practices Is Through a Big, Bold Multilateral Case at the WTO, Testimony at Hearing on U.S. Tools to Address Chinese Market Distortions, U.S.-China Economic and Review Security Commission (June 8, 2018), *available at* https://www.uscc.gov/sites/default/files/Hillman%20Testimony%20US%20China%20Comm%20w%20Appendix%20A.pdf. The Obama administration prepared a claim on Chinese subsidies, but the Trump administration did not pursue it. Request for Consultations – Communication from the United States, China–Subsidies to Producers of Primary Aluminium, WTO Doc. WT/DS519/1; DS519: China — Subsidies to Producers of Primary Aluminium, *at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds519_e.htm (indicating that the United States has not taken any actions on the claim since the claim was brought on January 12, 2017).

[96] *See, e.g.*, Weihuan Zhou, Henry Gao & Xue Bai, *China's SOE Reform: Using WTO Rules to Build a Market Economy*, 68 Int'l & Comp. L. Q. 977 (2019); Henry Gao, *Rethinking China Trade Policy: Lessons Learned and Options Ahead*, Nat'l Found. Am. Pol'y (Jan. 1, 2021). China's 2015 Guiding Opinions on Deepening SOE Reform stipulates that state-owned enterprises shall "serve the national strategy and implement national industrial policy." This could make it easier to establish that SOEs serve as public bodies. Central Committee of the Communist Party of China, State Council, *Guiding Opinions on Deepening SOE Reform*, China Gov't Network (Aug. 24, 2015), *at* http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm.

[97] Zhou, Gao & Bai, *supra* note 96 (citing Article 15(b) of China's Protocol of Accession).

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States-Mexico-Canada Agreement (USMCA) (under the Trump administration).[98] China has applied to join the CPTPP, suggesting that this issue could be successfully negotiated, especially given the evolution of Appellate Body jurisprudence.[99] In its Comprehensive Agreement on Investment with the European Union, concluded on December 30, 2020, China also agreed to a more expansive definition of a "covered entity" that is required to "act in accordance with commercial considerations." The substantive commitments cover any "enterprise in which a Party has the power to legally direct the actions or otherwise exercise an equivalent level of control," as well as any "public or private" enterprises that are "designated by a Party, formally or in effect, as the only suppliers or purchasers of a particular good or service in a relevant market."[100]

Second, countervailing duty rules arguably fail to provide protection where China's practices lead to trade diversion from third countries. As Chad Bown and Jennifer Hillman explain, China's subsidies can lead to severe overcapacity in production affecting industries around the world. Applying tariffs to imports from China can divert Chinese products to third countries, placing downward pressure on prices that, in turn, generates exports from these countries to the United States. These exports can simply displace those earlier coming from China—which were subject to U.S. import relief measures—so that affected U.S. companies and their workers continue to be harmed. Bown and Hillman show how this dynamic has occurred in the steel, aluminum, and solar panel sectors.[101]

Broader safeguards are thus a better option to provide industry time to adjust, as trade negotiators address the overcapacity problem.[102] A significant challenge, however, is that the WTO Agreement on Safeguards, as interpreted in Appellate Body jurisprudence, severely limits when safeguards can be applied. Under the Safeguards Agreement, a WTO member must show that "increased imports" "have caused" or "are threatening to cause" "serious injury" to a "domestic industry."[103] As Sykes notes, it is "incoherent" to require a showing of causation of increased imports since the imports are a function of supply and demand as a whole.[104] In addition, for a safeguard to be legal, the Appellate Body has required a showing of "unforeseen developments" since "the obligations incurred," as provided under Article XIX

[98] The United States withdrew its signature from the TPP after President Trump assumed office, which became the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) with the remaining parties. Article 17.1 of the CPTPP (just as the TPP) defines a state-owned enterprise in terms of its ownership, rather its "exercise of government functions." This definition also appears in Article 22.1 of the USMCA.

[99] Eleanor Olcott, *China Seeks to Join Transpacific Trade Pact*, FIN. TIMES (Sept. 16, 2021), *at* https://www.ft.com/content/df94b345-8fb9-473f-8e58-0cb230c0a1fa. Marco Bronckers notes how such provisions could be included in a revision to China's Accession Protocol to the WTO. Marco Bronckers, *Trade Conflicts: Whither the WTO?*, 47 LEGAL ISSUES ECON. INTEGRATION 221 (2020).

[100] EU-China investment negotiations, EU-China Comprehensive Investment Agreement, Sec. III, Subsec. 2, Art. 8 ("Transparency of Subsidies") (unscrubbed text, Jan. 22, 2021), *available at* https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159344.pdf; *id.*, Sec. II, Arts. 3 ("Performance Requirements"), 3*bis* ("Covered Entities").

[101] Chad P. Bown & Jennifer A. Hilmann, *WTO'ing a Resolution to the China Subsidy Problem*, 22 J. INT'L ECON. L. 557, 564 (2019).

[102] *Id.* at 559, 563, 566, 572 (noting the role that the OECD can play on industrial policies, such as regards the overcapacity problem).

[103] Agreement on Safeguards, Arts. 2, 4.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14.

[104] Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 WORLD TRADE REV. 261 (2003).

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of the GATT, but absent from the detailed 1994 WTO Agreement on Safeguards.[105] In practice, the WTO Appellate Body has never found a safeguard to be compliant under its interpretation of WTO requirements.[106]

A better approach is to interpret and apply the Safeguards Agreement in light of its object and purpose to provide certain flexibility to governments when a domestic industry is seriously harmed while imports rise so that industry can adjust and governments can respond to broader social and political challenges.[107] A more deferential approach would provide greater policy space for governments where they can show increased imports and serious injury, or a threat thereof, to a domestic industry. The safeguard measures, when proportionate to address adjustment, would relieve pressure on officials to take more drastic measures, such as to forego trade liberalization, including on "national security" grounds.[108] The resulting measures will raise some trade tensions, but they also can trigger negotiations to adjust to the situation, such as to reduce underlying overcapacity problems (Category 2). Revised rules or a revised interpretation of existing rules can thus help maintain relatively more harmonious and mutually beneficial trade relations in the current context. Negotiations over the relationship of binding WTO dispute settlement between the United States and other WTO members provides an opportunity to clarify these rules or develop more general guidelines for future panels to interpret existing safeguards rules in light of their underlying purpose. Such an amendment or guidance would not single out any particular WTO member, while providing all members with greater policy space to respond to trade shocks.

From a traditional law-and-economics perspective, the appropriate response to economic dislocations caused by trade lies in domestic redistributive and adjustment policies.[109] However, in practice, buffers to trade may be needed, and safeguards provide a targeted means of providing them. Unlike WTO countervailing duty and anti-dumping law, safeguards also permit for the rebalancing of trade concessions.

Third, the United States finds that China's regulatory practices are non-transparent so that it is extremely costly, if not impossible, to build a factual case for WTO complaints. The transparency issue has two main aspects when applied to China. The first aspect concerns the role of state-owned, state-invested, and state-connected enterprises in engaging in non-market-oriented behavior, such that China's industrial policy is much less transparent than when subsidies are provided directly by the government as part of a published regulatory policy.[110] The second aspect concerns the role of formal notifications of subsidies to the WTO.

[105] Appellate Body Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, para. 80, WTO Doc. WT/DS98/AB/R (adopted Dec. 14, 1999).

[106] The Appellate Body did, however, uphold a U.S. China-specific safeguard on tire imports which was permitted during a transition period under China's Protocol of Accession.

[107] Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987).

[108] Instead of applying safeguards to protect the steel and aluminum industries, the Trump administration dusted off a statute that had not been used since the 1980s and the Cold War—Section 232 of the 1962 Trade Expansion Act—which permits the raising of tariffs on "national security" grounds. Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020).

[109] *See, e.g.*, Michael Trebilcock & Sally Wong, *Trade, Technology, and Transitions: Trampolines or Safety Nets for Displaced Workers*, 21 J. INT'L ECON. L. 509 (2018).

[110] The terms "state-owned" and "state-invested" enterprises are used in the Working Group Report linked to China's Protocol of Accession, and in U.S. countervailing duty regulatory practice. *See* Rep. of the Working Party on the Accession of China, paras. 43–49, WT/ACC/CHN/49 (Oct. 1, 2001). It is also applied in U.S. investigations. Appellate Body Report, United States – Countervailing Duty Measures on Certain Products from China

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In both instances, there are strong arguments for requiring greater transparency as a public good that is important not only for trade relations, but also for domestic governance to limit rent-seeking, reduce information asymmetries, and enable firms, citizens, and trading partners to know what governments are doing.[111]

The first aspect, and a significant challenge for the U.S.-China trade relationship, is the lack of transparency of China's industrial policy when conducted through state-owned and state-connected enterprises. The problem, however, is generally not with existing WTO rules pertaining to China. China agreed in its Accession Protocol that its state-owned enterprises will make purchases and sales on a commercial basis. In particular, paragraph 46 of the Report of the Working Party on the Accession of China is a binding "commitment" under its Accession Protocol.[112] This paragraph provides:

> The representative of China further confirmed that China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions.

Thus, under China's Accession Protocol, it agreed that its state-owned and state-invested enterprises would operate as commercial enterprises, such that any industrial policy measures aimed at benefitting upstream or downstream firms would have to be provided by the government itself.

Some commentators contend that such a provision on state-invested enterprises should be placed in the WTO covered agreements and applied to all WTO members.[113] Such a commitment would supplement existing WTO legal constraints on any "specific" subsidy—one that "limits access to a subsidy to certain enterprises."[114] However, since the WTO does not impose competition law obligations regarding private enterprises, it seems unfair—and indeed discriminatory—to single out the economic behavior of state-owned enterprises, especially given the dominance of oligopolistic U.S. companies in information technology sectors. Moreover, there are serious reasons to pause before extending more WTO constraints regarding the state's role in the economy for the policy reasons earlier noted.[115]

– Recourse to Article 21.5 of the DSU by China, *supra* note 93, paras. 5.55, 5.2.4 et seq. (discussing definitions in U.S. Department of Commerce memoranda).

[111] Gregory Shaffer, Robert Wolfe & Vinhcent Le, *Can Informal Law Discipline Subsidies?*, 18 J. INT'L ECON. L. 711, 716 (2015).

[112] Paragraph 342 of the Working Party Report provides that paragraph 46, among a long list of other "specific matters" in the report are "commitments" that "are incorporated in paragraph 1.2 of the Draft Protocol." Report of the Working Party on the Accession of China, para. 342, WT/ACC/CHN/49 (Oct. 1, 2001). Paragraph 1.2 of the Accession Protocol, in turn, provides: "This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001).

[113] MAVROIDIS & SAPIR, *supra* note 6, at 184–85 (advocating that the rules of the TPP and USMCA be incorporated into the WTO).

[114] In contrast, "horizontal" subsidies provided under "objective criteria" "which do not favour certain enterprises over others, and which are economic in nature and horizontal in application" are not specific and consequently not actionable or countervailable. SCM Agreement, *supra* note 83, Arts. 1.2, 2.

[115] *See* notes 73–78 *supra* and accompanying text.

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Nonetheless, even if one contends that such constraints should be added to a WTO covered agreement, the fact remains that China already has made this commitment in its Accession Protocol and that has been insufficient to assuage economic tensions with the United States. It is for this reason that this Article focuses on policy space for defensive measures combined with bilateral and plurilateral negotiations over conflicts. WTO rules must permit the United States and other countries to protect themselves from non-transparent subsidies provided through state-owned and state-connected enterprises that advantage Chinese producers. If the United States, European Union, and others coordinate their investigations and responses to non-transparent Chinese practices, they will increase their leverage on China to enhance the transparency of the practices of state-connected enterprises. Indeed, China's Accession Protocol already provides discretion for investigating authorities to use external benchmarks when calculating subsidies if there are "special difficulties," such as distortions caused by government interventions in China's internal market, including through state-connected enterprises.[116] To the extent that China wishes to pursue industrial policies in a manner not subject to countervailing duties, coordinated measures could press it to do so in a more transparent way.

The second transparency challenge is that of formal notifications of subsidies. The SCM Agreement requires that members report their subsidies each year to the WTO Committee on Subsidies and Countervailing Measures,[117] but the record of industrial subsidies notification is poor, with over half of WTO members not notifying the WTO committee.[118] To enhance transparency, the United States and others have proposed sanctions against countries that fail to notify their subsidies, such as a suspension of particular WTO benefits.[119] One option is to modify WTO rules so that specific categories of subsides are affirmatively permitted under WTO rules, as originally provided under Article 8 of the SCM Agreement but which expired under that agreement's terms without being renewed. A country's failure to meet its reporting obligations could trigger a suspension of the ability to benefit from the exempted category.[120] Such a sanction could incentivize reporting in ways that the current SCM Agreement does not. Although a renewed Article 8 might not be feasible at this time, bilateral and plurilateral negotiations with China also can address transparency concerns. For example, the EU-China Comprehensive Agreement on Investment includes new transparency requirements regarding subsidies, coupled with consultation mechanisms.[121]

[116] Accession Protocol of the People's Republic of China, *supra* note 112, para. 15(b); Zhou, Gao & Bai, supra note 96 (discussing application of this provision).

[117] SCM Agreement, *supra* note 83, Arts. 24–26.

[118] Shaffer, Wolfe & Le, *supra* note 111, at 716.

[119] Communication from the United States, Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements, 1–2, WTO Doc. JOB/GC/148 (adopted Oct. 30, 2017) (the proposed suspension of benefits includes the right to receive WTO documentation, have access to the WTO website, and have personnel preside over WTO bodies. If non-reporting continues, then it also includes receipt of any WTO training and technical assistance, among other matters); General Council & Council for Trade in Goods, Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements, 12(a)(iii), JOB/GC/204/Rev.3, JOB/CTG/14/Rev.3 (Mar. 5, 2020)(proposing designating a member as "a Member with notification delay," curtailing its right to chair WTO bodies and participate in WTO meetings, coupled, in phase 2, with a fine).

[120] Shaffer, *supra* note 27.

[121] EU-China Comprehensive Investment Agreement, *supra* note 100, Sec. III, Subsec. 2, Art. 8 ("Transparency of Subsidies"); *id.*, Sec. III, Subsec. 2, Art. 8 Annex; *id.*, Sec. II, Art. 3*bis*, para. 4.

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There are multiple explanations for attacks on China's economic model. Some critiques reflect justifiable concerns about a lack of transparency, which unfairly affects foreign traders and can nullify market access commitments that China made. Others simply reflect a political shift in the United States where attacking China has become a political benefit, one which deflects from U.S. policy failures. And others reflect neoliberal prejudice against the role of government in economic policy.

Yet, if commentators believe that industrial policy is the wrong approach because government decision making is less efficient than the market, then they should let the United States and China compete, ideologically assured that the U.S. approach will triumph. Indeed, there is significant tension, if not contradiction, in the arguments of those advocating that new rules should be added to the WTO to constrain Chinese state-owned enterprises, while at the same time contending that China's economy would be more productive if it privatized them so that they operated freely on a market-oriented basis.[122] In contrast, if China's industrial policies indeed help spur development in new sectors, then the United States might learn and engage in its own targeted industrial policies, as reflected in calls for a "Green New Deal" advanced in the United States and to support technology development in Europe.[123] A better approach than adding further WTO constraints on state industrial policy is to ensure that WTO rules permit members to protect themselves from the externalities of state subsidies in a proportionate manner, which, in turn, can facilitate bilateral and plurilateral bargaining and settlements.

B. Forced Technology Transfers

Developing countries have long passed laws that tie investment approvals to technology transfer as part of their development strategy. Multinational companies, backed by their national governments, have opposed these requirements. They generally managed these situations by either refusing to transfer technology such that developing countries in need of capital investment backed down, or by transferring older technology for foreign operations. China poses greater challenges for two reasons. First, China exercises greater leverage to induce U.S. companies to transfer frontier technology because of the size of China's internal market. Second, China's rise as a technological power poses a greater risk that Chinese companies will become competitors, even when U.S. companies aim to deny access to their newest generation technologies.[124]

[122] MAVROIDIS & SAPIR, *supra* note 6, at 186, 201.

[123] Dan Ciuriak, *World Trade Organization 2.0: Reforming Multilateral Trade Rules for the Digital Age*, CIGI Policy Brief No. 152 (July 11, 2019) ("The issue for the West, therefore, is not to rein in China's investment support for technology development but to recognize that technological conditions have shifted investment opportunities into a space that suits China's governance model—and to follow it."); Bjarke Smith-Meyer, Lili Bayer, Jakob Hanke & Ryan Heath, *European Officials Draft Radical Plan to Take on Trump and U.S. Tech Companies*, POLITICO (Aug. 22, 2019), *at* https://www.politico.com/story/2019/08/22/europe-plan-trump-tech-companies-1472326; Todd N. Tucker, *Industrial Policy and Planning: What It Is and How to Do It Better*, ROOSEVELT INST. (July 2019) (report), *available at* https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Industrial-Policy-and-Planning-201707.pdf. On the tradeoffs of public versus private ownership, see JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION (1993).

[124] Dan Prud'homme & Max von Zedtwitz, *Managing "Forced" Technology Transfer in Emerging Markets: The Case of China*, 25 J. INT'L MGMT. 1 (2019); U.S.-China Business Council, *Best Practices: Intellectual Property Protection in China* (2015) *available at* https://www.uschina.org/sites/default/files/USCBC%20Best%20Practices%20for%20Intellectual%20Property%20Protection.pdf (best practices include keeping vital

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The United States has legitimate concerns regarding China wielding leverage over access to its markets to obtain U.S. technology, although business surveys show that the problems are not as severe as presented in much "trade war" rhetoric.[125] China's Accession Protocol to the WTO prohibits "forced technology transfers" through government licensing, but most technology transfers occur in the context of joint venture negotiations required for a foreign company to operate in many economic sectors. Chinese government incentives can shape the bargaining leverage of the parties in these negotiations by setting conditions for tax benefits, other subsidies, and government procurement contracts.

Even where the government itself does not impose a technology transfer requirement (and China insists it does not do so),[126] the mere requirement of operating only through a joint venture arrangement creates structural conditions that facilitate technology transfers, which is why China and many developing countries require them. First, the Chinese government creates economic incentives for investment in China in technology sectors. Second, the government does not permit a foreign company to operate in China except through a joint venture. The quickest way for a Chinese company to enter such sectors, and thus benefit from government incentives, is to form a joint venture with a foreign company that already has technology and have it transferred to the joint venture. Foreign companies agree to such transfers in order to gain access to China's market and benefit from tax and other incentives. They, in effect, trade technology for market access and other benefits.

These private negotiations are not subject to WTO rules, unless the United States can prove that the Chinese government incentivized the transfers such that the transfers were "essentially dependent on Government action."[127] The Obama administration worked to resolve these concerns through bilateral and plurilateral agreements, including through the negotiation of the TransPacific Partnership[128] and a U.S.-China bilateral investment treaty, both of which the Trump administration abandoned.[129] The Trump administration, in contrast, aimed to address them by unilaterally raising tariffs and then using the threat of further tariffs as leverage to press for an agreement, which culminated in the agreement it signed with China in January 2020 that bans "forced" technology transfers.[130] The European Union subsequently also concluded a Comprehensive Agreement on Investment with China in December 2020, which again prohibits forced technology transfers, while slightly expanding key areas where EU companies do not need to form joint ventures to enter the Chinese

designs/latest-generation technologies overseas and compartmentalizing design/production processes); U.S. Patent Trademark Office, *China IPR Toolkit* (Oct. 2019), *at* https://www.stopfakes.gov/servlet/servlet.FileDownload?file=015t00000005ppG (tips include compartmentalizing the production process, and "keeping vital designs/latest generation technology in the United States").

[125] Dan Prud'homme, *3 Myths About China's IP Regime*, HARV. BUS. REV. (Oct. 24, 2019), *at* https://hbr.org/2019/10/3-myths-about-chinas-ip-regime.

[126] THE STATE COUNCIL INFO. OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA'S POSITION ON THE CHINA-US ECONOMICS AND TRADE CONSULTATIONS 4, 6 (2019).

[127] A GATT case involving Japan in the 1980s created this doctrine. Panel Report, Japan—Trade in Semi-Conductors, *supra* note 52, paras. 109–17.

[128] The rules, for example, prohibited transfers of source code and forced localization of data. Office of the U.S. Trade Rep., *Trans-Pacific Partnership Full Text*, Art. 14.13, 14.17, *available at* https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf.

[129] Alan O. Sykes, *The Law and Economics of "Forced" Technology Transfer (FTT) and its Implications for Trade and Investment Policy (and the U.S.-China Trade War)*, 13 J. LEGAL ANALYSIS 127 (2021).

[130] Economic and Trade Agreement, China-U.S., *supra* note 49, ch. 2.

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market.[131] The agreement with the European Union requires China not to "directly or indirectly require, force, pressure or otherwise interfere with the transfer or licensing of technology between natural persons and enterprises."[132]

The problem, however, is not with the legal texts, which already existed as part of China's Protocol of Accession and are reflected in Chinese law.[133] The challenge is to induce China to remove joint venture requirements in more sectors through negotiation, and thus eliminate this form of leverage. If an agreement is reached, new Chinese commitments could be incorporated under the General Agreement on Trade in Services (GATS) for services sectors, or under new investment agreements covering both goods and services sectors.[134]

Applying the framework set forth in Part III, there is a strong argument not to cover these types of technology transfer under multilateral rules given developing countries' long-standing need for technology and companies' ability to bargain with them. From this perspective, it is best for developing countries to retain policy space and handle technology transfers on a case-by-case, country-by-country basis. However, it is legitimate for the United States to address these issues bilaterally and plurilaterally with China (Category 2), particularly given their economic rivalry and the economic and national security stakes. Where negotiations fail, it likewise is legitimate for the United States to take unilateral measures to protect itself (as well as plurilateral measures coordinated with third parties), provided in each case that they are proportionate (Category 3). Already the United States has, in turn, heightened restrictions on Chinese investments in the United States under the Foreign Investment Risk Review Modernization Act (FIRRMA), under which the interagency Committee on Foreign Investment in the United States (CFIUS) operates.[135]

The Obama administration might have prepared claims challenging China's alleged practices before the WTO under China's Accession Protocol and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It declined to do so, possibly because it lacked confidence in this approach, including because of the risk of Chinese retaliation against firms that provide supporting evidence. Instead, the Trump administration imposed unilateral sanctions against China following an investigation under Section 301 of the U.S. 1974 Trade Act regarding China's alleged theft, subsidized purchases, and "forced" transfers of U.S. technology.[136] The U.S. unilateral tariff measures violated WTO law, which China

[131] EU-China Comprehensive Investment Agreement, *supra* note 100, Sec. II, Art. 3.

[132] *Id.* Art. 3(3).

[133] Report of the Working Party on the Accession of China, *supra* note 112, para. 49; Weihuan Zhou, Huiqin Jiang & Qingjiang Kong, *Technology Transfer Under China's Foreign Investment Regime: Does the WTO Provide a Solution?*, 54 J. WORLD TRADE 455 (2020) (analyzing China's Foreign Investment Law, Order No. 26 of the President, effective on Jan. 1, 2020).

[134] Under GATS Article XVI.2(e), China can commit to remove "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service," provided it lists the sector in its schedule of commitments. Investment agreements can include commitments not to require a joint venture, as China agreed for some sectors under its Comprehensive Agreement on Investment with the European Union.

[135] Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, 132 Stat. 1636, § 1703(a)(5); 31 CFR § 800.214 [hereinafter FIRRMA]; Sarah Bauerle Danzman, *Investment Screening in the Shadow of Weaponized Interdependence*, *in* THE USES AND ABUSES OF WEAPONIZED INTERDEPENDENCE 257 (Daniel W. Drezner, Henry Farrell & Abraham L. Newman eds., 2021).

[136] The USTR also filed a WTO complaint against China in October 2018 under Article 3 (national treatment) and Article 28 (patent rights) of the TRIPS Agreement, but it suspended the panel as part of settlement negotiations with China, since June 2019. DS542: China — Certain Measures Concerning the Protection of Intellectual

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successfully challenged before the WTO.[137] However, China also retaliated immediately—before the WTO case was decided—which again violated WTO requirements.[138]

In the end, China's sanctions were arguably parallel to what WTO authorized remedies would have been, subject to the time delay of bringing the case and the fact that WTO remedies are not retrospective.[139] Under WTO law, the remedy for a violation is that the prevailing member in a WTO claim may take measures "equivalent" to the amount that its benefits (under the WTO agreement) have been nullified or impaired, unless the respondent complies with the ruling.[140] In practice, China raised tariffs in a roughly equivalent amount to the U.S. tariffs. These U.S. and Chinese unilateral measures (Category 3) spurred the United States and China to negotiate bilaterally to address and manage this issue (Category 2). To the extent the bilateral arrangement has adverse effects on third parties, WTO rules create constraints. Indeed, when the United States settled its trade dispute with Japan during the GATT era, it negotiated a settlement that triggered a successful GATT challenge by the European Communities against Japan under the GATT most-favored-nations clause (Category 4).[141]

However, if the United States had brought and prevailed in a WTO challenge against China's practices, China would have had no right to raise tariffs following a WTO-authorized withdrawal of concessions by the United States. Because the United States acted unilaterally, China had a right to withdraw an equivalent amount of trade concessions, with the result of high tariffs on both sides, suggesting that the United States could have been better served had it first brought a WTO case. Under this Article's framework, the parties may rebalance tariffs as they have done, but they also have incentives to comply with multilateral rules and use dispute settlement in light of the reciprocal costs of tit-for-tat retaliation.

V. Governing the Geopolitical/National Security Dimension

The most serious challenge to the U.S.-China relationship is geopolitical, especially at the technological frontier. China is a rival economic power globally and a rival military one in Asia. Because the national security concerns include China's subsidies to high-tech industry, this dimension overlaps with the first. The extent of the overlap is a function of one's conceptualization of national security, a contested concept whose meaning changes over time and

Property Rights, *at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm. Mark Cohen notes claims under other TRIPS provisions that also could have been used, such as Articles 39 and 40 respectively regarding trade secrets and anti-competitive practices. Mark Cohen, *The WTO IP Cases That Weren't*, China IPR (Dec. 11, 2020).

[137] Panel Report, United States–Tariff Measures on Certain Goods from China, WTO Doc. WT/DS543/R (adopted Sept. 15, 2020).

[138] Chad P. Bown, Euijin Jung & Zhiyao Lu, *China's Retaliation to Trump's Tariffs*, Peterson Inst. for Int'l Econ. (June 22, 2018) (China's list of retaliatory tariffs released hours after the Trump administration released its list of tariffs).

[139] Although WTO rules do not formally prescribe retrospective remedies, they are not used in practice. The United States earlier insisted upon non-retroactivity even after prevailing in a subsidies case against Australia because of the implications for U.S. subsidy programs, including massive U.S. tax subsidies. Gregory Shaffer, Defending Interests: Public-Private Partnerships in WTO Litigation 61–62 (2003) (discussing the *Australia-Automotive Leather* case).

[140] GATT, *supra* note 88, Art. XXIII; DSU, *supra* note 51, Art. 22.4.

[141] GATT Panel Report, Japan—Trade in Semi-conductors, *supra* note 52 At the time, the EU was named the European Community.

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situational contexts, but which generally signifies a demand of deference toward nation-state policy decisions.[142]

Measures adopted to protect national security should be assessed differently than economic ones. National security measures often involve "beggar-thy-neighbor" and discriminatory policies and yet are viewed as legitimate measures of self-protection. Exceptions on national security grounds, when applicable, provide greater discretion to the implementing country, and countries are wary of third-party judicial review of such measures. For example, take national bans on trade in "fissionable materials" or other "implements of war." They expressly fall within the GATT exception clause for national security (Article XXI). However, with China's economic and technological rise and the decline of U.S. hegemony, the scope of issues involving national security concerns has expanded, posing new challenges for a rules-based trading system.

Both China and the United States have raised new security concerns regarding trade, especially as regards reliance on the other for key technology and components.[143] Their respective trade and investment policy responses could lead to the decoupling of their economies in critical sectors. This Article focuses on internal U.S. debates regarding security issues involving trade because of the recent central role they have played in justifying U.S. restrictive trade and investment measures. Yet, it is important to recognize the reciprocal nature of these concerns, since reciprocity offers prospects for negotiated understandings and settlements.

It remains unclear whether the United States will take a narrower or broader approach to addressing national security concerns in trade policy. Under a broader, "geoeconomic" approach, the United States would adopt policies aimed at stemming China's economic rise,[144] which by definition includes China's development of "smart" manufacturing and products incorporating advanced technologies, sometimes referred to as Industry 4.0.[145] It thus might adopt more coercive policies aimed at curbing Chinese companies in key sectors, including through pressuring companies in third countries not to sell key inputs to them (as it has already done in some cases).[146] This broader approach risks responses that could lead to a more conflictual world order.

Under a narrower approach, the United States would focus on national security concerns involving particular technologies, although applied in the new situational context posed by technological developments and China's rise. Under this approach, the United States would wish to thwart China's obtaining advanced technology that it could use for military or other

[142] Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793 (2020).

[143] For China, see, e.g., *China Issues National Security Rules on Foreign Investmen*t, REUTERS (Dec. 19, 2020), *at* https://www.reuters.com/article/china-investment/china-issues-national-security-rules-on-foreign-investment-idUSKBN28T0FS.

[144] On "geoeconomics," cf. Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in Trade and Investment*, 22 J. INT'L ECON. L. 655, 657 (2019) (using the term "to describe a macro level change in the relationship between economics and security in the regime governing international trade and investment").

[145] "Smart" manufacturing self-automates, trumpeted in Germany as "Industry 4.0" and in the United States as the "Industrial Internet." Linking big data, cloud computing, wireless sensor networks, and automated analytic tools with industrial equipment, it makes manufacturing more efficient, more precise, and more responsive. McKinsey Glob. Inst., *The Age of Analytics: Competing in a Data-Driven World* (Dec. 7, 2016), *at* https://www.mckinsey.com/business-functions/mckinsey-analytics/our-insights/the-age-of-analytics-competing-in-a-data-driven-world#.

[146] *See* note 48 *supra*.

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coercive purposes and to prevent China's gathering of intelligence and data that it could use to advance its international strategies and interfere in U.S. politics, including through blackmailing and manipulating U.S. officials and citizens.

In practice, there will be a spectrum of national security issues to which this Article's framework applies. First, from an expository perspective, irrespective of the conceptualization's scope, national security issues can be addressed under the general principles set forth in Part III, albeit with greater challenges in differentiating illegitimate economic predatory policies (Category 1) from legitimate national security ones. Existing multilateral trade rules already accommodate national security issues through exception clauses, although they would benefit from updating to address cybersecurity and critical infrastructure concerns, in particular (Category 4). These exceptions can and should accommodate unilateral adjustments (Category 3) that can spur bilateral negotiations and (potentially) lead to new bilateral and plurilateral settlements (Category 2).

The broader approach to national security in terms of geopolitical rivalry is expressly confrontational and more likely would lead to open conflict. The argument for adopting it is that the United States and China are already in a strategic rivalry, that China's economic power easily translates into military power, and so U.S.-China trade relations are by definition strategic in nature. From this perspective, then the United States should work to decouple its economy from China's, except where net benefits are balanced or accrue more to the United States from the relationship. The U.S. contestation of China's 2025 indigenous innovation initiative, in part, is because China threatens to take the lead in "smart manufacturing" at the cutting edge of technology.[147] In parallel, China's Belt & Road Initiative has a geopolitical dimension in forging economic ties (and dependence) through Chinese trade, investment, and finance.[148] In this vein, the 2017 U.S. national security plan declared that "economic security is national security."[149]

Conceptually, the position that all trade relations are also strategic ones may be true, but this truism does not inform policy choices over tradeoffs in different contexts. The main arguments cautioning against aggressive application of the broader approach are that China's rise is a reality that needs to be managed and that a broad, coercive approach to defending national security could backfire on the United States. Aggressive, uncalibrated attempts to block China's rise will most likely fail, exacerbate conflict, and impede collaboration in policy domains where it is critically needed. They not only would increase the risk of conflict (and thus reduce security),[150] but also could reduce U.S. competitiveness by cutting off U.S. industry from lower cost Chinese inputs, create conflict with other countries that trade with China and thus undercut alliances, and further incentivize Chinese companies, as well as companies in third countries, to develop technologies that replace U.S. ones and

[147] Dan Ciuriak, *A Trade War Fueled by Technology*, CTR. INT'L GOVERNANCE INNOVATION (Jan. 11, 2019), *at* https://www.cigionline.org/articles/trade-war-fuelled-technology.

[148] Gregory Shaffer & Henry S. Gao, *A New Chinese Economic Order?*, 23 J. INT'L ECON. L. 607 (2020).

[149] NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (Dec. 2017), *available at* https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf (citing Donald Trump, "Economic security is national security" as epigraph).

[150] Indeed, trade liberalization was viewed as consonant with U.S. national security in the twentieth century. DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY (2017); Edward D. Mansfield & Jon C. Pevehouse, *Trade Blocs, Trade Flows, and International Conflict*, 54 INT'L ORG. 775, 775–76 (2000); Claussen, *supra* note 108, at 1139–40.

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thus avoid U.S. sanctions.[151] Moreover, China and the United States must cooperate to address global challenges, such as climate change, pandemics, and financial crises, in which their fates are linked. Trade measures that are uncalibrated and disproportionate to the risks at stake will erode trust and undermine global cooperation in areas that are critical for U.S. national security.

This Article thus favors a less expansive, more calibrated approach to managing the interface of the U.S. and Chinese economies from the perspective of national security. It contends that the United States and China legitimately can ban each other's products, investments, and exports of sensitive technology, but that, under the framework set forth in Part III, they should do so in a manner proportionate to the security risk in question. Under this approach, each country can take targeted action that is proportionate to the national security concern, while maintaining cooperation and reducing the risk of downward spiraling, tit-for-tat escalations of conflict that undermine the security of both countries and their citizens.

This distinction between national security conceived more narrowly or broadly currently centers on the regulation of information and communication technologies. Rivalry in this area will be a precursor of issues affecting other high-tech domains, such as biotechnology and fintech, where the United States and China will promote rival products and systems.[152] Managing this competition in light of the conceptualization of security risks and proportionate responses to those risks will be central to the national security dimension of U.S.-China trade relations going forward.

In practice, states will differ in their assessments of the proportionality principle. The difficult issue is not the principle as such, which is critical for governing the interface of the U.S.-China trade relationship, but the amount of deference to be shown to domestic decisionmakers in applying it, and the role of international judicial and non-judicial mechanisms in assessing the legality of these domestic decisions. The next Section illustrates the application of the proportionality principle by considering U.S. treatment of Huawei and TikTok. The ensuing Section addresses dispute settlement mechanisms to govern national security defenses, and the analytic boundary between national security and economic measures.

1. Illustration Through Huawei and TikTok

A calibrated approach to national security requires differentiating the challenges posed by Huawei and TikTok. Huawei provides fifth generation (5G) network infrastructure for data transmissions central to the data-driven economy, including the internet-of-things. Sales of Huawei 5G infrastructure become security concerns not only because the infrastructure could facilitate espionage, but also because it could be "weaponized" by compromising system integrity and availability in response to a trade or actual military conflict, such as in the South China Sea, a conflict that could escalate into a cyberwar at immense costs to both

[151] Huawei, for example, is a major purchaser of U.S. technology and thus there are costs to U.S. companies. To the extent that Huawei develops alternative sources for such technology, the measures will result in a clear net loss for the United States. Chad P. Bown, *How Trump's Export Curbs on Semiconductors and Equipment Hurt the US Technology Sector*, PETERSON INST. INT'L ECON. (Sept. 28, 2020), *at* https://www.piie.com/blogs/trade-and-investment-policy-watch/how-trumps-export-curbs-semiconductors-and-equipment-hurt-us.

[152] I thank Anthea Roberts for stressing this point.

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sides.[153] For example, if a 5G network—which forms part of a country's critical infrastructure—were to be interrupted without an adequate backup system, social chaos could spread. The popular app TikTok, in contrast, primarily raises security concerns regarding the ability of China's government to obtain data on TikTok's users and potentially use it for blackmail and social influence over time.

As a general principle, trade measures should be proportionate to the security concern at issue. Their justification should depend on traditional factors in proportionality analysis—in this case, a balancing of the national security risk, the relation of the trade measure to the risk, the impact of the measure on third parties, and any alternative ways to address the risk that would have a less adverse impact on third parties while accomplishing the policy objective. National officials should review the risks and, if they determine that the risks are too high, bans on national security grounds are a legitimate response.

The U.S. banning of the use of Huawei's 5G technology for wireless networks in the United States exemplify trade-related national security concerns involving critical infrastructure.[154] Similar actions have been taken by Australia, Japan, New Zealand, and the United Kingdom, and spurred ongoing internal debates within the European Union regarding the use of Huawei equipment. The risk of compromised critical infrastructure, including of a sudden breakdown at a time of conflict, is simply too great. Similarly, under a proportionality analysis, it would be legitimate to ban exports of U.S. technology to Huawei where it is believed that Huawei products can be used to gather information on U.S. strategy through global communications networks and to coerce U.S. allies, not to mention their deployment for military purposes.

In contrast, the U.S. ban on the export of equipment and technology to companies in third countries that use them in the production of products that they sell to Huawei raises more challenging questions. For example, the United States has banned the selling of equipment needed for the production of silicon chips to companies in third countries that make and sell chips to Huawei.[155] Here the U.S. ban is extraterritorial in its reach, and it is no longer linked to U.S. critical infrastructure. It thus raises greater proportionality concerns. It escalates conflict with China, as the apparent aim is to undermine or destroy a major Chinese company, one employing almost two hundred thousand Chinese workers. It also raises conflicts with third countries affected by the ban, since they too have major companies employing tens of

[153] Farrell & Newman, *supra* note 56. Engineers refer to three types of risks known as CIA: confidentiality, integrity, and availability. Confidentiality refers to data privacy and security. Integrity refers to the ability of a third party to enter and compromise a program or device. Availability refers to the ability to shut down a device or system Yulia Cherdantseva & Jeremy Hilton, *A Reference Model of Information Assurance & Security*, 2013 INT'L CONF. AVAILABILITY, RELIABILITY & SECURITY 546–55 (2013).

[154] "Critical infrastructure" is a defined term applied by the Committee on Foreign Investment in the United States (CFIUS) under the Defense Production Act, which covers "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." FIRRMA, *supra* note 135; James K. Jackson, *The Committee on Foreign Investment in the United States*, CONG. RESEARCH SERV., RL33388 (Feb. 14, 2020), *at* https://crsreports.congress.gov/product/pdf/RL/RL33388/91.

[155] Altieri & Della Rocca, *supra* note 47. The United States intensively lobbied other countries to ban the use of Huawei equipment, and in particular the United Kingdom, threatening to withhold access to security analysis as part of the "Five Eyes" intelligence network. Sam Byford, *US Sanctions Make Huawei More of a Security Risk, Says Leaked UK Report*, VERGE (July 6, 2020), *at* https://www.theverge.com/2020/7/6/21314340/huawei-5g-networks-security-risk-us-uk.

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thousands of workers that will be harmed. In addition, developing countries depend on Huawei technology, which is much more affordable.

On the one hand, this approach could be viewed as a "beggar-thy-neighbor policy," falling under Category 1, and thus be prohibited. On the other hand, the United States could contend that Huawei's development of critical infrastructure around the world carrying U.S. transmissions constitutes a national security risk. Analytically, because of the extraterritorial nature of the measures, the issue of their proportionality (under Category 3) becomes more salient. Such extraterritorial measures also will entail significant costs that, on balance, risk exacerbating conflicts in a manner contrary to U.S. interests, as noted above.[156]

Turning to TikTok, a U.S. ban and coerced sale appears excessive.[157] A more proportionate measure is to ban use of TikTok by U.S. government officials, including military personnel, to the extent that such use could provide valuable data to China, including location data that might be used during a conflict. China, for example, adopted this approach by banning the use of Tesla vehicles by government officials and military personnel.[158] If the United States is concerned about the collection of data, it also can regulate how the data is collected through a comprehensive data privacy regime, as the European Union and many other countries do.[159] It likewise could require that any data collected be stored in the United States and not transferred to China, although the United States has opposed data localization requirements, and the effectiveness of such localization is questionable.[160] Overall, the national security risks in the TikTok case are much lower than regarding Huawei's construction of critical infrastructure. Such a ban, moreover, could spur tit-for-tat responses that disconnect U.S. and Chinese citizens and thus potentially exacerbate divisions that ultimately would reduce security. Thus, a general ban on the use of the popular app seems disproportionate from a policy perspective.

2. Boundary Work: Updating Existing National Security Exceptions and Mechanisms to Oversee their Application

A major challenge in this context will be drawing boundaries between national security and economic measures that are subject to different exceptions clauses in trade agreements. For

[156] *See* notes 150–51 *supra* and accompanying text. For a parallel approach, Dani Rodrik & Stephen Walt, *How to Construct a New Global Order*, HARV. KENNEDY SCH. (Mar. 2021), *available at* https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/new_global_order.pdf.

[157] Nicole Sperling, *Trump Officially Orders TikTok's Chinese Owner to Divest*, N.Y. TIMES (Aug. 14, 2020), *at* https://www.nytimes.com/2020/08/14/business/tiktok-trump-bytedance-order.html; James Andrew Lewis, *How Scary Is TikTok?*, CTR. STRATEGIC & INT'L STUD. (July 14, 2020), *at* https://www.csis.org/analysis/how-scary-tiktok. The Trump administration's ban and coerced sale were challenged in U.S. courts, and then the Biden administration revoked the order. Katie Rogers & Cecilia Kang, *Biden Revokes and Replaces Trump Order that Banned TikTok*, N.Y. TIMES (June 9, 2021). FIRRMA nonetheless expanded the coverage of CFIUS to include investments involving "sensitive data on United States citizens" where the investor "may exploit that information in a manner that threatens national security." FIRRMA, *supra* note 135, §§ 1702(c)(5), 1703(a)(4)(B)(iii)(III); 31 CFR § 800.248(c).

[158] Keith Zhai & Yoko Kubota, *China to Restrict Tesla Use by Military and State Employees*, WALL ST. J. (Mar. 19, 2021).

[159] *See, e.g.*, BRUCE SCHNEIER, DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND YOUR WORLD (2015); Gregory Shaffer, *Trade Law in a Data-Driven Economy: The Need for Modesty and Resilience*, 20 WORLD TRADE REV. 259 (2021).

[160] Anupam Chander, *Is Data Localization a Solution for* Schrems II*?*, 23 J. INT'L ECON. L. 771 (2020).

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example, economic safeguards can be applied under the WTO Agreement on Safeguards, but these measures must be temporary and, if they are not withdrawn after three years, affected WTO members may withdraw an equivalent amount of trade concessions. National security measures, in contrast, can be invoked so long as the national security concern remains, and the affected party arguably may have no right to withdraw concessions in an equivalent amount.

The trading system traditionally relied on members exercising constraint both in invoking the national security exception and in challenging such invocation. They acted under common norms regarding boundaries as to when it is appropriate (or not) to invoke national security. These common norms eroded over the last years.[161]

One response is to update national security clauses to address new contexts while creating institutional processes to develop and oversee the application of soft law norms and understandings. This would encourage parties to use exceptions reciprocally to permit a proportionate rebalancing of concessions, which could give rise to a partial decoupling of U.S.-China trade relations in certain sectors. This rebalancing could relieve some pressure on Members resorting to the national security exception, as addressed further below. Where disputes nonetheless arise, the relative role and relationship of domestic and international political and judicial processes could be clarified as follows.

WTO rules contain national security exceptions, most notably Article XXI of the GATT (which was later replicated in Article XIV of the GATS and Article 73 of the TRIPS Agreement). The exception was not drafted with cybersecurity concerns at stake and should be updated through negotiations or interpretation. Article XXI provides that "nothing in this Agreement shall be construed . . . to require any contracting party from taking any action which it considers necessary for the protection of its essential security interests."[162] It then follows this statement with a closed list of reasons, most notably: "action . . . taken at time of war or other emergency in international relations."

The exception has been subject to WTO review over the last two years, and panels have found that invocation of the exception is justiciable, most notably in cases brought by the Ukraine against Russia, and Qatar against Saudi Arabia.[163] The challenge is that the rationale of "war or other emergency" arguably does not cover national cybersecurity precautions taken in time of peace. The exception should therefore be expanded to grant governments greater flexibility to define their security policies in relation to new threats, while remaining subject to oversight through peer-review mechanisms and judicial application of proportionality analysis on a deferential basis.

[161] Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE 1, 9–10 (2018) (Trump administration use of national security rational unprecedented, and its unilateralism "represents a full-throated rejection of the WTO's rule of law norms.").

[162] For excellent analyses of this exception, see J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 924, 1020 (2020); Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109 (2020).

[163] Panel Report, Russia—Measures Concerning Traffic in Transit, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) (defining "essential security interests"). In the case between Qatar and Saudi Arabia, the panel found that Saudi interference in the ability of a Qatar company to seek civil enforcement measures fell within the national security exception under Article 73 of the TRIPS Agreement, while its non-application of criminal procedures and penalties against an infringer did not. Panel Report, Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights, paras. 7.294, 8.1, WTO Doc. WT/DS567/R (adopted June 16, 2020), *at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/567R.pdf&Open=True.

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Recent agreements involving China and the United States suggest that such a clarification is feasible. For example, Article 17.13 of the Regional Comprehensive Economic Partnership, which China concluded in 2020, includes measures "taken so as to protect critical public infrastructure, including communications, power, and water infrastructures," under the national security exception.[164] The United States-Mexico-Canada Agreement goes further in constraining judicial review, providing that "nothing in this Agreement shall be construed to . . . preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests."[165] Unlike under the GATT, this text is not followed by a closed list of situations. If this latter approach is adopted, then the development of soft law norms and processes to define the boundary between "economic" and "national security" measures becomes even more critical.

There are multiple institutional design options for addressing trade disputes over a national security measure in ways that provide appropriate discretion to the imposing state, while providing for institutional review to check against abuse. For example, rules could require transparency and due process at the national level, including a risk assessment, the giving of reasons, and an opportunity to be heard before domestic administrative processes.[166] International review, in turn, could be procedurally oriented, with the aim of enhancing domestic deliberation, transparency, and fairness. The requirement of reason-giving can operate as a form of political check when both sides want the other not to abuse the exception against it. A specialized, peer review process could be developed before a new WTO committee on national security,[167] possibly complemented by some form of mediation.[168] In turn, the fulfillment of these requirements could be subject to some form of minimal, process-oriented judicial review at the WTO.[169] This process would enable affected third parties to

[164] Regional Comprehensive Economic Partnership (RCEP), Art. 17.13 (signed Nov. 15, 2020), *available at* https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf.

[165] Agreement Between the United States of America, the United Mexican States, and Canada, Art. 32.2 (July 1, 2020), *available at* https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf [hereinafter USMCA].

[166] Rodrik and Walt compare the much more transparent UK decision regarding risks with the less transparent U.S. approach under CFIUS. Rodrik & Walt, *supra* note 156, at 24 (citing Annual Report, Huawei Cyber Security Evaluation Centre Oversight Board (Sept. 2020), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923309/Huawei_Cyber_Security_Evaluation_Centre__HCSEC__Oversight_Board-_annual_report_2020.pdf).

[167] Simon Lester & Inu Manak, *A Proposal for Committee on National Security at the WTO*, 30 DUKE J. COMP. & INT'L L. 267 (2020); Heath, *supra* note 162, at 1066–80 (providing an overview of alternative institutional mechanisms, including the above).

[168] Article 5 of the WTO Dispute Settlement Understanding provides for "good offices, conciliation and mediation." DSU, *supra* note 51.

[169] Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 1 (2011). *See, e.g.*, Appellate Body Report, United States–Continued Suspension of Obligations in the EC–Hormones Dispute, para. 590, WTO Doc. WT/DS320/AB/R (adopted Oct. 16, 2008) ("The review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable."); Appellate Body Report, United States – Countervailing Duties on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, para. 186, WTO Doc. WT/DS296/AB/R (adopted June 27, 2005) ("We are of the view that the 'objective assessment' to be made by a panel reviewing an investigating authority's subsidy determination will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.").

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engage with the party imposing the measure, and it could facilitate more calibrated responses, leading to bilateral settlements.

A further option is to provide that national security measures that extend beyond a closed list of exceptions—such as "implements of war," critical infrastructure, cybersecurity, or actions taken "at time of war or other emergency in international relations"—will be treated analogously to the way safeguards were under the GATT, permitting for a withdrawal of an equivalent amount of concessions by the affected country.[170] The Trump administration clearly aimed to stretch the understanding of the national security exception, first with its broad tariffs on steel and aluminum products, and then with its threat of tariffs on automobiles and automobile parts. A safeguard measure involving rebalancing seems particularly appropriate in such situations. Relatedly, a country adversely affected by the national security measures could bring a non-violation nullification and impairment complaint in these cases, following which it would be authorized to withdraw an equivalent amount of concessions, thus reaching a similarly balanced outcome.[171] In sum, these issues can be channeled to review mechanisms outside of adjudication, or as complements to it, which can facilitate bargaining while helping prevent trade conflicts from further escalating.

The examples of Huawei and Chinese apps like TikTok and WeChat illustrate how these scenarios might be handled bilaterally. China adopted a blocking statute in 2021 aimed at countering U.S. "unjustified extraterritorial" sanctions against Chinese companies,[172] such as Huawei, analogous to what the European Union already had adopted in response to previous U.S. extraterritorial measures, including those targeting Iran.[173] Pursuant to this framework law, China aims to create a regulatory mechanism where its Ministry of Commerce will issue orders that prohibit Chinese companies and individuals from complying with such foreign sanctions.[174] The regulation additionally will subject any person (including foreign companies) that comply with such sanctions to potential lawsuits in China unless they receive an exemption.[175] The combination of the U.S. and Chinese measures could force companies to decouple either from China or the United States, with the choice not being obvious given the size of China's economy and the importance of its trade. These dueling national measures, in turn, potentially, could incentivize China and the United States to settle the dispute, including through calibrating measures in a narrower, more proportionate manner.

[170] Simon Lester & Huan Zhu, *A Proposal for "Rebalancing" to Deal with "National Security" Trade Restrictions*, 42 FORDHAM INT'L L.J. 1451 (2019). Another option is that non-traditional national security concerns could be addressed by other GATT exceptions that provide for greater judicial oversight, such as GATT Article XX(b) regarding the protection of human life and health, instead of GATT Article XXI. Heath, *supra* note 162 (noting the EU's position in this respect).

[171] Lamp, *supra* note 88, at 723 (noting U.S. apparent acceptance of this alternative).

[172] Ministry Of Commerce People's Republic of China, Order No.1 of 2021 on Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (Jan. 9, 2021), *at* http://www.mofcom.gov.cn/article/b/c/202101/20210103029710.shtml (Chinese), http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml (English) [hereinafter Chinese Blocking Statute].

[173] See the EU Blocking Statute, Supplemented by the Re-imposed Iran Sanctions Blocking Regulation. Council Regulation 2271/96, 1996 OJ (L 309) 1 (EC); Commission Delegated Regulation 2018/1100, 2018 OJ (L 1991) 1 (EU).

[174] Chinese Blocking Statute, *supra* note 172, Art. 7.

[175] *Id.* Art. 9.

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Relatedly, U.S. measures against Chinese apps in practice could trigger reciprocal measures by China against U.S. firms. Given existing Chinese restrictions on U.S. digital companies, some commentators justify new U.S. measures on reciprocity grounds.[176] Reciprocal measures involve a form of rebalancing of market access, and they could trigger bilateral negotiations over new rules and safeguards to govern this issue (Category 2). Under this Article's framework, if the parties fail to settle the matter, the affected party could impose comparable measures and suspend market access in an equivalent (and thus proportionate) amount (Category 3).

VI. Governing the Normative/Social Policy Dimension

Central to the U.S.-China rivalry are normative conflicts over values that trade policy implicates. China's authoritarian mode of government raises numerous human rights and social policy concerns, which have spurred domestic protests and strikes, such as over labor rights. China's government contends that Western powers have used the international human rights regime to place it on the defensive externally and to bolster dissent internally, in both cases to threaten the regime's legitimacy and security.[177] Given the priority that authoritarian governments place on their survival,[178] China has worked to reframe the international human rights regime away from civil and political rights and toward social and developmental rights, where its governance model fares better.[179] U.S. protection of social and labor rights, in turn, is subject to significant internal political contestation, including as regards the right to strike, employer anti-union campaigns, and "right to work" laws.[180] It too implicates trade and is implicated by trade, affecting social bargains.

There is significant debate regarding whether labor rights should be viewed as human rights or in separate social policy terms. Labor rights are distinct from human rights in their focus on collective mobilization of workers in relation to employers on the market, as opposed to an individual's relation to the state.[181] Some labor advocates use human rights terminology to

[176] Tim Wu, *A TikTok Ban is Overdue*, N.Y. Times (Aug. 18, 2020), *at* https://www.nytimes.com/2020/08/18/opinion/tiktok-wechat-ban-trump.html.

[177] Nadège Rolland, China's Eurasian Century? Political and Strategic Implications of the Belt and Road Initiative 5–6 (2017); *cf.* Wang Yi, State Councilor, Righting the Wrongs and Committing to Mutual Respect and Win-Win Cooperation (Feb. 22, 2021), *at* https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1855510.shtml (accusing the United States of "smearing the CPC and China's political system"); Rodrik & Walt, *supra* note 156, at 20 ("Alternative political systems can pose a threat merely by existing, because their presence offer an alternative model that might inspire reformers or rebels inside the rival society. This problem will be especially challenging when a political order is based on universalist principles.").

[178] Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020).

[179] China aims to "break the Western moral advantage" and to focus on "development rights," which implicitly takes account of its successful developmental model. Rolland, *supra* note 177, at 35 (citing Li Ziguo).

[180] On U.S. law in relation to international labor rights, see Lance A. Compa, *Trump, Trade and Trabajo: Renegotiating NAFTA's Labor Accord in a Fraught Political Climate*, 26 Ind. J. Glob. Legal Stud. 263, 287–89 (2019). On the decline of U.S. labor law protections, see Cynthia L. Estlund, *The Death of Labor Law?*, 2 Ann. Rev. L. Soc. Sci. 105 (2006); Katherine V.W. Stone, *A Labor Law for the Digital Era: The Future of Labor and Employment Law in the United States*, *in* Encyclopedia of Labor and Employment Law and Economics 689 (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly Lobel eds., 2008); Harris Freeman, *In the Shadow of Anti-Labor Law: Organizing and Collective Bargaining 60 Years After Taft-Hartley*, 11 Working USA: J. Labor & Soc'y 1 (2008).

[181] Kevin Kolben, *Labor Rights as Human Rights?*, 50 Va. J. Int'l L. 449 (2010).

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enhance their leverage, while others stress the tradeoffs of doing so.[182] This Section focuses on labor rights, although it at times references human rights given the use of human rights discourse, including in relation to the WTO exception clause regarding "public morals."

The trade regime long avoided becoming enmeshed in the internal affairs of foreign countries regarding human rights, although it has been pressed to address labor rights concerns. Two years after the WTO's founding, at its December 1996 Ministerial Meeting in Singapore, WTO members expressed their "commitment to the observance of internationally recognized core labour standards," while "reject[ing] the use of labour standards for protectionist purposes," and stressing that "the International Labour Organization is the competent body to set and deal with these standards."[183] In 1998 the ILO annual conference then issued a *Declaration on Fundamental Principles and Rights at Work and its Follow-up* that recognized the following core labor rights binding on all ILO members, which includes almost all WTO members: "(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation."[184] Although WTO rules generally do not address human and labor rights directly, they contain exceptions clauses that could permit trade restrictions implemented on rights grounds, just as there are exceptions for national security measures and environmental ones.[185]

The logic behind trade measures addressing human and labor rights can be viewed in two ways. One is to require rights protections outside of the importing country on cosmopolitan grounds. A second logic is to protect the social bargain in the importing country and the importing country's values so as not to be complicit in rights abuses. Although the two logics have some overlap when applied, this Article's guiding principles and framework advance the second logic for governing the interface of U.S.-China trade relations. The first logic aims at changing China. The second one is more modest, focusing on measures that protect one's own social bargain and avoid complicity with foreign human rights abuses.

Where labor rights violations within another country affect domestic industries and domestic workers because of trade, governments are pressed to protect these industries, their workers, and the country's broader social bargain. To do so, they might raise tariffs or ban particular imports, thus countering pressure to reduce labor protections in their

[182] *Id. Cf.* Michael J. Trebilcock & Robert Howse, *Trade Policy & (and) Labor Standards*, 14 MINN. J. GLOB. TRADE 261, 300 (2005) (attempt to ensure respect for core labor standards conceived of as universal human rights)

[183] Singapore Ministerial Declaration, par. 4, WTO Doc. WT/MIN(96)/DEC (Dec. 13, 1996), *at* https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standards.

[184] Int'l Labor Org. [ILO], *Declaration on Fundamental Principles and Rights at Work* (June 15, 2010), *at* https://www.ilo.org/declaration/lang–en/index.htm (for text, background, and annual follow up); Philip Alston, *"Core Labour Standards" and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457, 521 (2004) (stressing what must be done for the regime not to be a "façade"). Taiwan, Hong Kong, Macao, and the European Union are WTO members but not members of the ILO.

[185] The exceptions applying to environmental concerns, such as GATT Articles XX(b) and XX(g), are more specific and have generated considerable jurisprudence, as well as scholarly commentary. Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9 (2016). In particular, scholars have assessed their application to trade measures, such as border tax adjustments, that form part of a comprehensive policy to reduce global warming. *See, e.g.*, Joost Pauwelyn, *Carbon Leakage Measures and Border Tax Adjustments Under WTO Law*, *in* RESEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO 448 (Geert Van Calster & Denise Prévost eds., 2013).

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own countries. The difficulty is determining when countries should be permitted to raise tariffs on labor rights grounds because countries pretextually can invoke social policy exceptions to undo market access commitments. Given asymmetric power, developing countries and their workers could be adversely affected in particular, potentially pitting the interests of developing country workers against those in developed countries. Once again, these concerns raise the analytic issue of the boundary between the three interfaces, in this case between measures taken on economic grounds and measures taken on social policy ones, which again involve different exception clauses in trade agreements.

Applying the framework set forth in Part III to this dimension is not simple. Human rights violations do not constitute "beggar-thy-neighbor" policies that aim to harm other countries, and thus they do not fall within the Working Group's definition of Category 1 measures. In theory, one could include human and labor rights commitments in a trade agreement such that their violation could be deemed to fall under Category 1 as a prohibited measure. International law already includes *jus cogens* norms that apply *erga omnes*, such as the prohibitions of genocide, slavery, apartheid, and racial discrimination.[186] In this way, the trade agreement would reflect the first cosmopolitan logic of enforcing international human rights law abroad on behalf of foreign citizens.

However, it is generally recognized that a trade organization, composed of trade officials, is not well suited to enforce human and labor rights matters. Thus, WTO rules focus on the rights of countries to apply trade-related measures to protect their own workers from competition from products produced in violation of particular norms, and to protect their own "public morals" by not being complicit in such violations. GATT Article XX(e) permits countries to block imports of products produced with "prison labor," and thus protect domestic workers from competition from such products. GATT Article XX(a) permits trade measures "necessary to protect public morals." This latter provision has generated jurisprudence over the last decade that provides guidance for handling these issues, although trade law should be further elaborated in this area.

To return to this Article's framework, countries should be able to apply proportionate trade measures to protect their workers and domestic social bargains from traded goods produced in violation of labor rights that adversely affect a domestic industry and its workers (Category 3). In response to such measures, countries could enter into bilateral negotiations that might lead to settlements (under Category 2). These negotiations and proportionate measures could take place within the umbrella of multilateral rules (Category 4). We start with an assessment of GATT Article XX and its limits before elaborating an approach in line with the general framework set forth in Part III, which has begun to be applied under bilateral and plurilateral trade agreements.

GATT Article XX(a) permits countries to take defensive measures "necessary to protect public morals," provided that the measures do not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction of international trade." Article XX(a) has yet to be applied to measures imposed

[186] Dire Tladi, Fourth Report on Peremptory Norms of General International Law (Jus Cogens), 42–46, UN Doc. A/CN.4/727 (Jan. 31, 2019); Barcelona Traction, Light and Power Company, Limited, Judgment (Belg. v. Spain), Second Phase, Judgment,1970 ICJ Rep. 3, para. 34 (Feb. 5) (*erga omnes* obligations include "protection from slavery and racial discrimination").

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on labor rights grounds, but it has been applied to a ban imposed because of animal welfare concerns. In the case *EC-Seal Products*, the WTO Appellate Body recognized the legitimacy of the EU's invocation of the public morals defense when the European Union banned imports of seal products because of citizen concerns over the killing methods used in seal hunts.[187]

Restrictions on imports produced in violation of human and labor rights should likewise be permitted under the exception, such as restrictions on imports linked to rights violations in Xinjiang.[188] The application of this defense only indirectly addresses labor rights. Its rationale is tied to the public morals of domestic citizens that do not wish the country to be complicit in consuming products produced in violation of human rights. Article XX(a), however, lacks detailed procedural, substantive, and injury criteria and thus its invocation easily can be abused. Given this risk, provisions to safeguard against social dumping should be subject to strict procedural, substantive, and injury requirements, which can be elaborated under new trade rules.

A growing number of bilateral and plurilateral agreements include labor clauses pursuant to which countries agree not to obtain a trade advantage by failing to uphold national labor laws, as well as (in some cases) a set of minimum labor standards. For example, the United States-Mexico-Canada Agreement, building from the earlier TransPacific Partnership and other trade agreements, includes provisions regarding freedom of association, collective bargaining, forced labor, protection of migrant workers, sex-based discrimination in the workplace, occupational health and safety, minimum wages, hours of work, and violence to workers for exercising their rights.[189] In parallel, the European Union is concluding a "new generation" of trade agreements with a sustainable development chapter that incorporates binding commitments on core labor rights. Those with Canada, Japan, Singapore, South Korea, and Vietnam are in force, and those with Mexico, Mercosur, the United Kingdom, and China await ratification.[190] These provisions generally provide only for international dispute settlement, with the exception of a new USMCA rapid response mechanism addressed below. They

[187] Gregory Shaffer & David Pabian, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 109 AJIL 154 (2015).

[188] U.S. Customs & Border Prot. Press Release, CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021), *at* https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave. In the case of prison labor, GATT Article XX(e) would apply as well. This provision also potentially could be invoked against U.S. practices. *Cf.* Beth Van Schaack, *Policy Options in Response to Crimes Against Humanity and Potential Genocide in Xinjiang*, JUST SECURITY (Aug. 25, 2020), *at* https://www.justsecurity.org/72168/policy-options-in-response-to-crimes-against-humanity-and-potential-genocide-in-xinjiang; Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 6–7 (2019).

[189] USMCA, *supra* note 165; *cf.* Alvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreements*, *in* MEGAREGULATION CONTESTED: GLOBAL ECONOMIC ORDERING AFTER TPP 140 (Benedict Kingsbury, et al. eds., 2019) (noting how the TransPacific Partnership built from earlier agreements, adding commitments regarding minimum wages, hours of work, occupational health and safety, forced labor, and corporate social responsibility).

[190] Under the agreement with South Korea, the European Union successfully challenged South Korea's labor laws and practices regarding the freedom of association and right to collective bargaining. Report of the Panel of Experts Proceeding Constituted Under Article 13.5 of the EU-Korea Free Trade Agreement (Jan. 20, 2021), *available at* https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf; Eur. Comm'n Press Release, Panel of Experts Confirms Repub. of Kor. is in Breach of Labour Commitments Under Our Trade Agreement (Jan. 25. 2021), *at* https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238.

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can be complemented by affirmative provisions permitting countries to take unilateral action to protect themselves from social dumping, subject to procedural and substantive constraints.

Earlier I elaborated such a framework for countries to protect their industries, workers, and social bargains from traded products produced in violation of labor rights.[191] Under that framework, trade agreements would specify the conditions under which a country may impose tariffs to protect its industry and workers from competition from goods produced in violation of fundamental labor rights. The criteria would build from experience with labor chapters in existing trade agreements. The substantive norms would address labor rights violations, and they would not include matters that would undercut developing countries' comparative advantage in producing goods with lower skilled labor in reflection of differences in productivity.[192] A country deciding to impose duties would need to show sustained violations and broad domestic support pursuant to a transparent investigative process.[193] Governments can work with labor and civil society organizations to collect evidence of labor rights violations, and also can incorporate evidence from reports of the ILO on country practices. The United States prevailed on this issue in its challenge to Guatemala's labor practices under the U.S.-Central America Free Trade Agreement (CAFTA) by using evidence gathered in these ways.[194]

As for the remedy, duties should be limited to the amount that would offset injury to the domestic industry. The amount could be calculated in a manner analogous to a safeguard under the WTO Agreement on Safeguards, except that the petitioner would not need to prove that the labor rights violations "caused" the injury (which is difficult to show in the affirmative). Rather, the petitioner would need to show a correlation between the labor rights violations, increased imports, and harm to the domestic industry, as provided under the USMCA.[195] The government then could impose a safeguard duty against imports by the violating company from the country in question, which would be proportionate to the harm (Category 3). In trade terms, it would constitute a company-specific, country-specific safeguard.[196]

[191] Shaffer, *supra* note 27 (developing a more detailed proposal); *see also* Mark Barenberg, *Sustaining Workers' Bargaining Power in an Age of Globalization* (Econ. Pol'y Inst., Briefing Paper No. 246, Oct. 9, 2009), *available at* https://files.epi.org/page/-/pdf/bp246.pdf.

[192] A minimum wage, for example, would have to be set near the market clearing rate, which will vary not only by country, but also within countries. Countries should thus have discretion in setting a minimum wage, which may vary within them in light of differing labor market conditions.

[193] *Cf.* Agreement on Implementation of Article VI of GATT 1994, Art. 5.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 201 [hereinafter Anti-Dumping Agreement] (setting criteria for assessing support of the domestic industry producing a like product).

[194] Discussion with former official at USTR who worked on the case where the United States challenged Guatemala under the U.S.-Central America Free Trade Agreement (CAFTA), Mar. 1, 2018; Final Panel Report, In the Matter of Guatemala – Issues Relating to Obligations under Article 16.2.1(a) of CAFTA-DR (June 14, 2017), *available at* https://legacy.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf.

[195] Article 23.5. of the USMCA, for example, provides: "For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise." USMCA, *supra* note 165. The focus thus would be on the existence of labor rights violations, coupled with a rise in imports relative to domestic production, and injury to a domestic industry.

[196] A form of special safeguard was included in China's Accession Protocol, but that provision expired in December 2013. Accession of the People's Republic of China; Decision of 10 November 2001, para. 16,

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The initiation of the investigation could trigger negotiations with the party subject to it, which could lead to a settlement, one that might include new review and enforcement mechanisms (Category 2). Negotiations would focus on enhancing compliance with labor rights, and labor and civil society organizations would be granted access to the process. "Constructive remedies" could be explored that focus on enhancing labor rights protections in light of their trade implications.[197] This approach thus could benefit the exporting country's workers, in contrast to existing import relief laws.

Because such a social dumping agreement may be subject to abuse, it should be disciplined by law. One option is to include an analogue to USMCA Chapter 10 (formerly Chapter 19 of the North American Free Trade Agreement (NAFTA)) so that an exporter could request the establishment of a binational panel to review the national authority's determination,[198] although this may be politically infeasible at this time. Alternatively, the targeted country could bring a claim of non-compliance before an international dispute settlement panel, such as under the WTO dispute settlement system or the bilateral or plurilateral trade agreement in question.[199] Finally, compliance could be overseen by a political body, such as a WTO committee under the WTO system or a comparable body under a bilateral or plurilateral agreement. Representatives of the ILO could be granted official or observer status to such a committee, which can help spur greater coordination of international labor rights monitoring mechanisms across webs of bilateral and plurilateral agreements. Labor and business representatives could be granted participatory rights under these agreements, as under the ILO and OECD systems.[200]

The USMCA has instituted a novel process in this vein to address claims of denial of workers' collective bargaining rights that affect trade.[201] Under its Rapid Response Mechanism, a

WTO Doc. WT/L/432 (adopted Nov. 23, 2001) ("Transitional Product-Specific Safeguard Provision"), *at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/L/432.pdf&Open=True.

[197] Compare "constructive remedies" made pursuant to Article 15 of the WTO Anti-Dumping Agreement ("It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.") with Article 8 of that agreement (which permits for the suspension or termination of measures "upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices. . . so that the authorities are satisfied that the injurious effect of the dumping is eliminated"). Anti-Dumping Agreement, *supra* note 193.

[198] *Compare* USMCA, *supra* note 165, *with* North American Free Trade Agreement, Can.-Mex.-U.S., Art. 1904.5, Dec. 17, 1992, 32 ILM 289 [hereinafter NAFTA], *and* David A. Gantz, *Resolution of Trade Disputes Under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 L. & POL'Y INT'L BUS. 297, 298 (1998).

[199] USMCA Article 31-B.11 provides for such a right under the USMCA, *supra* note 165. ("If one Party considers that the other has not acted in good faith in its use of this Mechanism, either with regard to an invocation of the Mechanism itself or an imposition of remedies that are excessive in light of the severity of the Denial of Rights found by the panel, that Party may have recourse to the dispute settlement mechanism under Chapter 31.").

[200] *See* Int'l Labor Org [ILO], *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (Mar. 2017), *available at* https://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf; John West, *Multistakeholder Diplomacy at the OECD*, *in* MULTISTAKEHOLDER DIPLOMACY: CHALLENGES AND OPPORTUNITIES 149 (Kishan S. Rana, et al. eds., 2006), *at* https://www.diplomacy.edu/sites/default/files/Multistakeholder+Diplomacy_Part10.pdf.

[201] USMCA, *supra* note 165, Art. 31, Annex 31-A; Kathleen Claussen, *Trade's Experimental Compliance Mechanisms*, *in* INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OR TRANSFORMATION? (Manfred Elsig, Rodrigo Polanco & Peter van den Bossche eds., 2021). The process, however, is asymmetric, favoring the United States. For a "claim" to be brought against the United States, there must be an alleged denial of workers' rights

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petitioner, such as a labor union, can submit a complaint to the U.S. Department of Labor that a factory in Mexico has blocked unionizing efforts.[202] The department, in turn, can ask Mexico to investigate. U.S. customs officials may then suspend liquidation of customs accounts for the goods in question from the date of the request. The suspension remains in effect until either the two countries settle the matter, or a binational panel of labor experts assesses the claim under a streamlined process of about four months. The remedy for a violation must be proportionate and may include a fine.[203]

Among the different interface mechanisms that this Article discusses, the issue of labor rights will be the most politically challenging to address between the United States and China. The sustainable development chapter in the EU-China Comprehensive Agreement on Investment demonstrates that China is willing to engage over these issues, but its actual commitments remain limited.[204] Thus, where a country imposes social dumping measures against imports from a WTO member, it will have to defend them under GATT Article XX(a) (regarding "public morals") and Article XX(e) (regarding "prison labor"). This Article's framework nonetheless provides guidance regarding how existing and new norms and oversight mechanisms can be developed, interpreted, and applied.

Trade agreements should accommodate domestic trade measures applied to protect social bargains and a country's values. Otherwise, the legitimacy of the trading system rightly will be challenged. Existing anti-dumping rules have not upended the multilateral trading system, despite their common protectionist intent. There is no reason to believe that a labor rights mechanism would do so. The ongoing development of norms and mechanisms governing this interface through bilateral and plurilateral trade agreements and jurisprudence rather can help stabilize a trading system that otherwise risks imploding because of the rise of inequality and social polarization within countries, and particularly in the United States. Were the United States, European Union, and others to coordinate in advancing and implementing such initiatives, the prospects for agreement among a broader number of countries would increase.

VII. Dispute Resolution

In their proposed application of the Working Group's framework, Rodrik and Walt predict that "the future world order will be a thin, 'realist' order at the global level," without disputes being "adjudicated by international institutions or outside enforcers."[205] In that case, there would be just the principles—and perhaps rules resulting from bilateral or plurilateral negotiations—under which the parties could frame their interactions. Discursive

"under an enforced order" of the National Labor Relations Board, while a claim can be brought against Mexico in the event of any alleged denial of workers' rights "under legislation that complies with Annex 23-A" (i.e., Mexico's commitment to revise its labor law to protect collective bargaining rights). Nonetheless, Mexican migrant women filed the first complaint filed under the USMCA for sex-based discrimination by the United States. *Mexican Migrant Women File First USMCA Labor Complaint Against the U.S.*, World Trade Online (Mar. 24, 2021), *at* https://insidetrade.com/daily-news/mexican-migrant-women-file-first-usmca-labor-complaint-against-us.

[202] The first U.S. challenge involved a union vote at a General Motors plant in Mexico. Madeleine Ngo, *Mexico to Allow Union Vote at G.M. Plant After U.S. Complaint*, N.Y. Times (July 10, 2021), *at* https://www.nytimes.com/2021/07/08/us/politics/mexico-to-allow-union-vote-at-gm-plant-after-us-complaint.html.

[203] USMCA, *supra* note 165, Art. 31-A.10.1 ("remedy . . . that is proportional to the severity of the Denial of Rights").

[204] EU-China Comprehensive Investment Agreement, *supra* note 100, Sec. IV.

[205] Rodrik & Walt, *supra* note 156, at 13.

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TABLE 3:
THREE OPTIONS FOR WTO DISPUTE SETTLEMENT

Option 1	Return to WTO DSU	Could be contingent on new procedural and substantive rules and clarifications
Option 2	Enhance use of non-adjudicatory mechanisms	Could apply especially for national security issues
Option 3	Variable geometry for dispute settlement	Variation could be based on reciprocity

references to the principles would constitute either "cheap talk" to legitimate unilateral action deemed in the national interest, or a normative resource that potentially can discipline unilateral measures in parties' mutual interest.[206] From this vantage, and because security concerns are now central to the U.S.-China trade relationship, international economic law becomes more like other traditional areas of international law, such as *jus ad bellum*, which remain much less institutionalized, without being governed by binding, compulsory, third-party dispute settlement.[207] Trade policy would become like arms control.

Although this Article concurs with Rodrik and Walt regarding the substantive principles and their application, innovative thinking also is needed regarding how third-party institutions can guide and incentivize the principles' application through dispute resolution mechanisms.[208] Great powers like the United States and China will always feel free to ignore third-party institutions where they believe key national interests are at stake. Thus, the bilateral relationship between the United States and China will remain central to the framework's implementation. Depending on their national leaderships, the United States and China may predominantly manage their relationship outside the WTO framework, but third-party dispute settlement institutions still can be in their mutual interest to help them manage the interface of their systems, including the domestic politics surrounding trade enforcement.[209] Although the authority of WTO rules has suffered, neither side has left the WTO and both sides still reference WTO rules in support of their positions, even while the United States contends that the WTO must be significantly reformed.[210]

There are at least three options that could be considered for dispute settlement among WTO members, including between the United States and China, in application of this Article's framework. First, the United States could agree to relaunch binding WTO dispute settlement under some form of revised dispute settlement procedures, as well as (possibly)

[206] *Cf.* JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (Chapter 6 on the role of "talk" in different contexts); IAN HURD, HOW TO DO THINGS WITH INTERNATIONAL LAW 11 (2017) ("lawfare is better seen as the typical condition of international law"); INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS 37 (2012) ("semantic struggles").

[207] The UN Security Council does have institutional authority in the area of *jus ad bellum*, but both the United States and China hold veto rights over proposed resolutions.

[208] Shaffer & Trachtman, *supra* note 169 (laying out a range of institutional options).

[209] CHRISTINA LYNN DAVIS, WHY ADJUDICATE? ENFORCING TRADE RULES IN THE WTO (2012).

[210] The Trump administration forced the WTO trade dispute settlement system to revert to its less judicialized roots under the GATT by blocking the selection of new Appellate Body members after each one's term expired. Since then, many WTO members, including the United States, have effectively exercised veto rights by appealing any adverse panel decision to a non-existent appellate process, and thus "into the void." Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?*, 22 J. INT'L ECON. L. 297 (2019).

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some revised substantive rules. Second, and possibly complementarily, non-adjudicatory dispute settlement mechanisms could be enhanced, such as for the review of measures defended on national security grounds. Third, some form of variable geometry of WTO dispute settlement could be adopted so that members may choose to resolve disputes in different ways with different members (see summary in Table 3).

As for the first option, there is an inverse relationship between the intrusiveness of agreed rules and the acceptability of binding, compulsory, third-party dispute settlement. The less policy space that the rules provide for unilateral self-protection (whether on economic, national security, or social policy grounds), the more likely countries will refuse binding dispute settlement. In contrast, the more policy space accommodated, the more likely they will accept it. Where rules are ambiguous, panels could apply the interpretive tool *in dubio mitius*, thus favoring the respondent and its "sovereign" policy choices.[211] For the United States, this would be critical, particularly as regards import relief law.

The interpretive principle of *in dubio mitius* is consonant with international and some WTO practice, and it could be critical for facilitating the reinstatement of binding WTO dispute settlement.[212] It reflects this Article's contention that the WTO system needs to accommodate greater policy space for countries to respond to the externalities of each other's policies in a proportionate manner (Category 3). The proportionality of such measures, and any ensuing bilateral settlement (Category 2), would be subject to multilateral oversight, including as regards the settlement's impact on third parties (Category 4). This interpretive principle could be combined with other procedural revisions offered by WTO members in response to U.S. concerns.[213] Were the United States to pursue this option and yet still find that it cannot comply with a panel or Appellate Body decision for domestic political reasons, it would retain the option of not adhering to such a decision.[214] In that case, the successful

[211] The interpretive principle instructs panels to decide "more leniently in case of doubt." Luigi Crema, *In Dubio Mitius*, OXFORD PUBLIC INTERNATIONAL LAW (2019), *at* https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2678.013.2678/law-mpeipro-e2678.

[212] The Appellate Body noted the principle of *in dubio mitius* in the *EC-Hormones* case. Appellate Body Report, EC Measures Concerning Meat and Meat Products, para. 165, n. 154, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted 16 January 1998).

[213] Informal Process on Matters Related to the Functioning of the Appellate Body—Report by the Facilitator, H.E. Dr. David Walker (New Zealand), WTO Doc. JOB/GC/222 (Oct. 15, 2019), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=257689; Draft Decision, Functioning of the Appellate Body, WTO Doc. WT/GC/W/791 (Nov. 28, 2019), *available at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W791.pdf; Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WTO Doc. WT/GC/W/752 (Nov. 26, 2018), *at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249918&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (proposal of amendments to the DSU in response to U.S. concerns in order to relaunch the process of filling vacancies in the Appellate Body).

[214] Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AJIL 416, 417 (1996) ("The WTO substantially improved the GATT rules for settling disputes but did not alter the fundamental nature of the negotiated bargain among sovereign member states. . . . [A member] may choose to make no change in its law or measures and decline to provide compensation, and, instead, suffer likely retaliation against its exports authorized by the WTO for the purpose of restoring the balance of negotiated concessions."); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System*, 31 J. LEGAL STUD. 179 (2002) (on concept of "efficient breach"). Where there is disagreement, the amount of retaliation is determined by arbitration under DSU Articles 21 and 22. This legal process helps to constrain the amount of tit-for-tat retaliation.

complainant would be entitled to withdraw an equivalent amount of concessions against the United States as a proportionate remedy.

In theory, WTO members could add a political check to the adoption of a panel or Appellate Body report.[215] Under current rules, these reports are adopted by "reverse consensus," such that they are adopted automatically unless no WTO member supports adoption, including the prevailing party.[216] In contrast, official "interpretations" of the agreement are to be adopted by the WTO General Council "by a three-fourths majority of the Members."[217] In practice, the General Council has not deployed this mechanism since voting has been viewed as too controversial in the WTO system.[218] However, the rules could be modified so that Members could vote to block adoption of all or part of a report.[219]

Since the majority of WTO members are small countries that do not participate in the WTO dispute settlement system, a blocking supermajority could require the inclusion of members representing a certain threshold of global trade. For example, the rule could provide that adoption of all or part of a WTO panel or Appellate Body report may be blocked by a vote of three-quarters of the membership, provided such members, in aggregate, constitute at least three-quarters of global trade according to data compiled by an official body, such as the WTO, the World Bank, or the International Monetary Fund. As a result, controversial interpretations that the vast majority of affected WTO members oppose would not be adopted. Given the current stalemate in WTO negotiations, this alternative may not be politically feasible at this time. Nonetheless, it accords with the interpretive tools just noted, since it should reduce the relative authority of an international judicial process in constraining policy space in relation to a political process. Adding this political check, in combination with the interpretive principle, especially as applied to import relief cases, may be the best way to induce the United States to reengage with the Appellate Body selection process.

Second, non-adjudicatory mechanisms could play an enhanced role, as addressed in Part V regarding national security measures.[220] Where national security defenses are raised, the system could combine domestic due process requirements, international political oversight through non-adjudicatory mechanisms, and some minimal international judicial review to oversee that due process is followed and that parties' rebalancing of trade concessions is proportionate. In this way, international rules and mechanisms could support and shape bilateral

[215] The appropriate balance in the roles of international and domestic political and judicial processes in trade relations has long been subject to debate. Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article XI:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. Int'l Econ. L. 803 (2005); Joost Pauwelyn, *The Transformation of World Trade*, 104 Mich. L. Rev. 1 (2005); Shaffer, *A Tragedy*, *supra* note 35, at 45 ("only alternative for rebalancing is thus some retrenchment of judicial authority"). For a broader argument regarding the "tradeoffs between form and substance," see Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581, 614 (2005).

[216] DSU, *supra* note 51, Arts. 16.4 (for panel reports), 17.14 (for Appellate Body reports).

[217] Marrakesh Agreement Establishing the World Trade Organization, Art. IX, para. 2, Apr. 15, 1994, 1867 UNTS 154.

[218] Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AJIL 421, 429 (2008) ("Although this option has never been used, the WTO membership can, by virtue of Article IX:2 of the WTO Agreement, adopt interpretations of that Agreement—primary law—by a three-fourths majority, assuming no consensus has been reached.").

[219] For an early proposal in this vein, see Claude Barfield, Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization (2001); see also Robert McDougall, Crisis in the WTO: Restoring the WTO Dispute Settlement Function 20 (2018).

[220] *See* Part V.2 *supra*.

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bargaining and dispute resolution, while monitoring and helping to discipline unilateral decision making. They thus could reduce the scope of tit-for-tat escalations.

A third (less attractive, but pragmatic) approach would be a variable geometry for WTO dispute settlement. For example, WTO members could commit *ex ante* to recognize panel reports as binding (possibly subject to appeal before a reinstated Appellate Body), but subject to the other member's reciprocal commitment. The Statute of the International Court of Justice applies this approach.[221] Under this scenario, the United States could support a return to binding, compulsory WTO dispute settlement, subject to exceptions, such as for its disputes with China.

Alternatively, one could imagine a system of binding dispute settlement for all members, but an appellate mechanism applying only to those members that agree to it. The European Union, China, and twenty-two other WTO members already have committed to a binding ad hoc system of appeals between them through resorting to arbitration under Article 25 of the WTO Dispute Settlement Understanding, until the Appellate Body is again operational.[222] In this sense, a system of variable geometry for WTO dispute settlement currently exists. Other members could agree to be bound by a single stage dispute settlement system, possibly with a permanent, standing body of panelists from which panels would be drawn.[223] This proposal might assuage some U.S. concerns over a too powerful Appellate Body. If some (or most) WTO members preferred to retain an appellate mechanism, the Appellate Body could continue to be available for disputes between them.

Going further in instituting a variable geometry of trade governance, WTO dispute settlement could be adapted to apply to plurilateral and bilateral agreements as well, subjecting them to greater multilateral oversight and dispute resolution. In this case, the WTO dispute settlement system could be used to enforce these agreements, subject to the parties covering the costs. This latter option is politically unlikely at this stage, but once more concords with a move toward pluralistic governance in the trading system, while incorporating these developments under a multilateral umbrella.

The above options would provide different balances between law and politics at the international level, as well as between the national and international levels. Compared to the current situation, they still could provide a system of impartial, compulsory, and binding dispute settlement, one that likely would be more deferential to national policy space under the principles and framework that this Article advances. The options would retain a key role for multilateral dispute settlement, providing a focal point to help facilitate bilateral negotiated settlements (Category 2), while overseeing unilateral responses and bilateral agreements so that they remain proportionate (Category 3) and non-discriminatory (Category 4), thus helping to prevent trade conflicts from escalating.

[221] Statute of the International Court of Justice, Art. 36(2), 33 UNTS 993 (adopted June 26, 1945), *at* https://www.icj-cij.org/en/statute (compulsory jurisdiction by deposited state declaration "in relation to any other state accepting the same obligation").

[222] *The WTO Multi-party Interim Appeal Arrangement Gets Operational*, EUR. COMM'N (Aug. 3, 2020), *at* https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176#:~:text=The%20WTO%20multi%2Dparty%20interim%20appeal%20arrangement%20gets%20operational,-On%2031%20July&text=It%20shows%20that%20participating%20WTO,system%20with%20an%20appeal%20function.

[223] Bernard M. Hoekman & Petros C. Mavroidis, *To AB or Not to AB: Dispute Settlement in WTO Reform*, 23 J. INT'L ECON. L. 1, 7–9 (2020).

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VIII. Conclusion

WTO members confront an era of rising nationalism, geopolitical rivalry, and economic dystopia plagued by inequality that is ripping apart the international economic law order. Domestic political processes play off of each other in a negative cycle that is undermining international cooperation to meet global challenges such as the COVID-19 pandemic and climate change. A global recession and potential depression could spiral into further conflict, undermining cooperation needed to stabilize the global economy.

In the United States and Europe, there is a proliferation of work proposing how to address the China challenge. Much of that work addresses how China must change and how trade rules must be tightened to rein in China. It is highly unlikely, however, that China will agree to change an economic model that has been highly successful for it. Moreover, as this Article argues, China does not need to change and become more like the United States in order to maintain a multilateral trade order grounded in law. Some clarification of rules is needed, particularly regarding policy space for the United States to address the China challenge, but that can be done largely within the existing WTO system through interpretation and some adaptation of the rules.

A central question is how great powers with heterogenous systems can get along while protecting themselves from the adverse impacts of each other's policies. The response to this question will implicate all countries, large and small, rich and poor. This Article combines a general framework and principles set forth in Part III with a series of concrete proposals. In particular, it maintains that a revamped multilateral trade law system should provide:

(1) More economic policy space through the interpretation of import relief laws, and in particular those governing safeguards and countervailing duties, coupled with transparency requirements;
(2) More national security policy space, including through adaptation of rules being developed in bilateral and plurilateral agreements regarding critical infrastructure and cybersecurity concerns; and
(3) Elaboration of mechanisms to protect policy space regarding social policy choices, building from WTO jurisprudence and bilateral and plurilateral agreements.

These proposals will facilitate management of the U.S.-China trade relationship, accommodating some decoupling of their economies while enhancing their economies' resilience, as well as the resilience of the multilateral trading system.

This Article is written by a U.S. scholar and is informed significantly by a U.S. perspective given where the author lives and works. This social fact raises a key question—why would China agree with this framework and its application? First, the Article grounds the application of its framework in WTO rules to which China already has agreed, which should facilitate deliberation. Second, the framework's underlying principles were developed in coordination with leading U.S. and Chinese scholars in the context of the U.S.-China trade war, and the Article references and addresses the arguments of Chinese as well as U.S. and European scholars and policymakers. Third, for China (as for the United States), it is a much better alternative than the current erosion of the multilateral trade law order. Fourth, the United States will work with other countries to advance its aims, so that China will assess alternative institutional choices in that context. Finally, and critically, this Article does not invoke the

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"West" as a model, with China having to conform to "Western" norms, but rather provides a balanced framework with common principles, on which all parties can agree.[224]

As regards the three dimensions, China should have the least objection to this Article's proposals for governing the economic interface because the Article does not advocate new multilateral rules on industrial policy to discipline China's economic model. Rather, it focuses on mechanisms of self-protection through import relief laws, combined with transparency requirements, which can incentivize bilateral, plurilateral, and multilateral bargaining that can lead to normative settlement. Similarly, as regards the geopolitical/national security dimension, China and the United States have reciprocal concerns and have taken reciprocal measures, so that China should not have an issue with the governing principles and their proposed application. Finally, as regards the social policy dimension, although this Article calls for new rules and procedural mechanisms, it again focuses on defensive measures that the GATT exceptions clause (Article XX) arguably already permits, for which there is considerable WTO jurisprudence as regards environmental and animal welfare measures. The Article proposes means to implement procedural, due process mechanisms already addressed in WTO jurisprudence that can discipline protectionist abuse of invocations of GATT exceptions on social policy grounds.

It is naïve to think that China will change its economic model through coercion. Coercive policies tend to rally populist, nationalist responses in support of authoritarian leaders. Thus, it is best to the see the U.S.-China trade relationship in terms of a long game in which transnational forces are also at play.[225] China is not monolithic.[226] The application of the framework of principles and rules that this Article supports will more likely support reform within China than the alternative of China-bashing unilateralism and economic decoupling.

The risk is that the two countries could move toward a permanent invocation of a "state of exception" to multilateral rules, such as on the grounds of national security.[227] This Article provides a framework of principles and rules that can generate greater trust in an ongoing conflictual and rivalrous relationship that will facilitate the ability of the United States and China to defuse disagreements when they inevitably arise without exacerbating them through tit-for-tat reprisals to neither side's benefit. Through tailoring multilateral rules, their interpretation, and application to expand policy space for countries to protect themselves along the three dimensions of the economy, national security, and social policy, the multilateral system can help the United States and China manage the interface between their different economic and governance systems. It is a delicate balance. Rules should raise the cost of exceptions so that they remain "exceptions," but not raise them so high so that they are unusable, and the system becomes unstable and implodes.

[224] *Cf.* MAVROIDIS & SAPIR, *supra* note 6, at 153 (need to bring China "closer to 'Western' habits"); Henry Gao, *Rethinking China Trade Policy: Lessons Learned and Options Ahead* (Nat'l Found. for Am. Pol'y Brief, Jan. 2021), *at* https://www.wita.org/atp-research/rethinking-china-trade-policy ("The proposed rules should be neutral" and the negotiations should "not be one-sided with a long list of demands on China," but they should be reciprocal. They also should show a clear understanding of "China's own reform goals and policy movements" to see what is feasible.).

[225] SHAFFER, *supra* note 20.

[226] *See, e.g.*, Yeling Tan, Disaggregating "China, Inc.": The Hierarchical Politics of WTO Entry, 53 COMP. POL. STUD. 2118 (2020).

[227] That would be a Schmittian world, in reference to the work of the Nazi legal theorist Carl Schmitt. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., 2005; 1922). Ironically, Schmitt has become popular among "new left," Maoist-oriented, authoritarian/statist scholars within China. Sebastian Veg, *The Rise of China's Statist Intellectuals: Law, Sovereignty, and "Repoliticization,"* 82 CHINA J. 23 (2019). The parallels reflect a new form of transnational legal ordering.

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