

ACADEMIC ESPIONAGE: HOW INTERNATIONAL TRADE LAW CAN PROTECT HIGHER EDUCATION

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I. INTRODUCTION

A. The Story of Li Xiao-Jiang

In Atlanta, Georgia, neuroscientist Li Xiao-Jiang was at the peak of his professional career when his employment with Emory University was unexpectedly terminated in the summer of 2019.¹ Before Xiao-Jiang's employment was terminated, he worked with his wife and lab co-leader at Emory University for twenty-three years, conducting research related to Huntington disease.² Xiao-Jiang, a tenured professor known nationally for his research and leadership within his lab, worked alongside committed postdoctoral students engaged in creating pig and mouse models to study Huntington disease.³ In May 2019, however, Xiao-Jiang's career came to a sudden halt when the school notified him of his termination of employment.⁴ According to Xiao-Jiang's fellow researchers, university officials seized Xiao-Jiang's lab and confiscated computer files and documents while Xiao-Jiang was on leave in China.⁵ Xiao-Jiang was stunned. In a statement following his termination, Xiao-Jiang exclaimed, he "was shocked that Emory University would terminate a tenured professor in such an unusual and abrupt fashion and close [their] combined lab consisting of a number of graduates and postdoctoral trainees without giving [him] specific details for the reasons behind [his] termination."⁶ Emory claims it followed the direction given by the National Institutes of Health (NIH) in a statement aimed at combating the "unacceptable breaches of trust and confidentiality that undermine the integrity of U.S. biomedical research."⁷

Emory University justified its actions by claiming it found evidence that Xiao-Jiang failed to make necessary disclosures related to his ties to China.⁸ Emory's

¹ Jon Cohen, *Terminated Emory Researcher Disputes University's Allegations About China Ties*, SCIENCEMAG (May 24, 2019, 1: 55 PM), <https://www.sciencemag.org/news/2019/05/terminated-emory-researcher-disputes-university-s-allegations>.

² *Id.*

³ *Id.*

⁴ Zhenhua Lu, *Emory University in U.S. Fires Scientists Over Undisclosed Funding Ties to China*, S. CHINA MORNING POST (May 24, 2019, 8:00 PM), <https://www.scmp.com/news/china/diplomacy/article/3011732/us-emory-university-fires-scientists-over-undisclosed-funding>.

⁵ *Id.*

⁶ Cohen, *supra* note 1.

⁷ Cohen, *supra* note 1. See also Jon Cohen, *Terminated Emory Researcher Disputes University's Allegations About China Ties*, ScienceMag (May 24, 2019, 1: 55 PM), <https://www.sciencemag.org/news/2019/05/terminated-emory-researcher-disputes-university-s-allegations>; Francis S. Collins, *Statement on Protecting the Integrity of U.S. Biomedical Research*, 2018 NAT'L INST. OF HEALTH.

⁸ Ariel Hart, *New Findings: Two Emory Researches Didn't Disclose Chinese Funding, Ties*, ATLANTA J. CONST. (May 24, 2019), <https://www.ajc.com/news/state-regional-govt-politics/two-emory-researchers-failed-disclose-chinese-funding-and-ties/QQ58XznS11TLY>

statement regarding the termination of Xiao-Jiang's employment defended its actions, stating:

[t]hrough an internal investigation prompted by a letter that the NIH sent to many academic research universities, Emory discovered that two of its faculty members named as key personnel on NIH grant awards to Emory University had failed to fully disclose foreign sources of research funding and the extent of their work for research institutions and universities in China.⁹

Xiao-Jiang participated in the Thousand Talents Programme, a controversial program backed by the Chinese government that intends to attract acclaimed experts to work in China.¹⁰

Xiao-Jiang says he worries for his lab workers directed to leave the United States (one of which was pregnant at the time of Xiao-Jiang's sudden termination), and he also fears for the future of the hundreds of mice that were indispensable to his Huntington disease research.¹¹ The story of Xiao-Jiang, while certainly not the norm, reflects an increasingly common narrative of Chinese researchers across the United States.¹² Xiao-Jiang's story illustrates the narrative of academic espionage: the practice of stealing information related to research, national intelligence, or security under the guise of academic activity.¹³ College campuses have increasingly become primary targets for espionage. Researchers and government leaders are becoming more creative in their pursuits to steal information in the academic environment. As the threat of academic espionage rises, universities and U.S. lawmakers will continue to propose policies and legislation aimed at protecting the universities' intellectual property interests and national security.¹⁴ Despite these efforts, foreign operatives will continue to seek new ways to obtain information and surpass the United States in areas of technology and science.

v5rARfjL/.

⁹ *Id.*

¹⁰ Lu, *supra* note 4.

¹¹ Cohen, *supra* note 1.

¹² Ben Wolfgang, 'Academic Espionage': China Suspected of Flooding U.S. with Students to Access Sensitive Programs, WASH. TIMES (Aug. 22, 2019), <https://www.washingtontimes.com/news/2019/aug/22/china-academic-espionage-deploys-students-us-access/>.

¹³ *Id.*

¹⁴ Ted Mitchell, *Memorandum by ACE on Foreign and Academic Espionage*, AM. COUNCIL ON EDUC. (May 10, 2019), https://www.nacua.org/docs/default-source/new-cases-and-developments/2019/acemembershipmemo_foreignespionagemay2019.pdf.

B. Academic Espionage: An Overview

Academic espionage poses a growing security threat that pervades research communities throughout the state of Georgia and the United States as a whole.¹⁵ China and other foreign countries exploit university campuses across the United States by soliciting intelligence and information related to technological advancements under the guise of academic research.¹⁶ The practice impacts U.S. relations with China as the U.S. government continues to navigate through a trade war created in large part by U.S. actions and spending behaviors.¹⁷ Chinese efforts to accelerate in the fields of manufacturing, science, and research have thwarted the U.S. desire to remain the dominant global power in the realm of technology and trade.¹⁸ Further, Chinese and U.S. desires to dominate emerging technologies in the international arena increase the complexity of this issue.

The United States passed legislation related to academic espionage, and newer proposals were discussed by members of Congress as recently as 2019.¹⁹ While passing legislation has the power to combat the threat of academic espionage, current and proposed laws fail to attack the problem in a comprehensive manner.²⁰ International law on espionage is complex, and scholars remain divided on how best to regulate spying, if regulations on spying should exist at all.²¹

This Note will first provide a background of the issue of academic espionage and describe efforts—current and proposed—by U.S. lawmakers. The background section will provide an overview of the threat of academic espionage while noting specific instances and schemes used by individuals involved in the practice. The background section will also provide a brief foundation of the current state of the relationship between the United States and China, the current

¹⁵ Elizabeth Redden, *Scientist Fired From Emory Disputes Charges*, INSIDE HIGHER ED (May 28, 2019), <https://www.insidehighered.com/quicktakes/2019/05/28/scientist-fired-emory-disputes-charges>.

¹⁶ See Karin Fischer, *Defense Bill Focuses on Academic Espionage*, CHRON. OF HIGHER EDUC. (July 17, 2019), <https://www.chronicle.com/article/Defense-Bill-Focuses-on/246713> (discussing a bill and provision that works towards this goal).

¹⁷ Weijian Shan, *The Unwinnable Trade War*, FOREIGN AFF. (Nov./Dec. 2019), <https://www.foreignaffairs.com/articles/asia/2019-10-08/unwinnable-trade-war>.

¹⁸ Elsa B. Kania, *Made in China 2025, Explained*, DIPLOMAT (Feb. 1, 2019), <https://thediplomat.com/2019/02/made-in-china-2025-explained/>.

¹⁹ Elizabeth Redden, *Bills Target Academic Espionage*, INSIDE HIGHER ED (June 19, 2019), <https://www.insidehighered.com/news/2019/06/19/two-new-bills-take-different-approach-protecting-us-research-foreign-threats>.

²⁰ Andrew Hamilton, *The State Department Wants to Limit Chinese Student Visas. Its Plan Goes Too Far*, WASH. POST (June 22, 2018, 7:43 PM), https://www.washingtonpost.com/opinions/the-state-department-wants-to-limit-chinese-student-visas-its-plan-goes-too-far/2018/06/22/c66f4238-74aa-11e8-805c-4b67019fcfe4_story.html.

²¹ See A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595 (2007) (discussing the legality of espionage and difficulties with gaining a consensus on categorizing or regulating the practice).

trade war between the two countries, and how current discussions and negotiations may impact the desires of both countries to advance in technology and science.

Next, the Note will highlight the flaws within U.S. legislation related to academic espionage. Here, the Note will explain why international law and regulations must be implemented by the U.S. government to effectively combat the threat of espionage to U.S. institutions. This analysis will include viewing the issue of academic espionage through the lens of international trade law. Finally, this Note will conclude by advocating that states should create and enforce international trade laws to effectively solve the issues raised by academic espionage.

II. BACKGROUND

Foreign operatives, located primarily in China, have increased efforts to steal information related to technology, research, and national security through academic exchanges.²² This practice, otherwise known as “academic espionage,” continues to threaten U.S. academia.²³ The threat of academic espionage looms larger each day, and U.S. researchers and lawmakers have yet to determine an appropriate response to this unique threat.²⁴

A. Techniques Used: Confucius Institutes and the Thousand Talents Plan

Foreign operatives have found new techniques to steal information through academic activities—like the Confucius Institutes or the Thousand Talents Plan—even though specific information sought through these activities remains relatively unclear.²⁵ In an attempt to establish global dominance in technology and research, Beijing uses United States universities as virtual breeding grounds for spying and espionage.²⁶ According to the U.S. Defense Department, “nearly

²² Wolfgang, *supra* note 12.

²³ *Id.*

²⁴ Patricia Zengerle & Matt Spetalnick, *Fearing Espionage, U.S. Weighs Tighter Rules on Chinese Students*, REUTERS (Nov. 29, 2018, 7:07 AM), <https://www.reuters.com/article/us-usa-china-students-exclusive/exclusive-fearing-espionage-us-weighs-tighter-rules-on-chinese-students-idUSKCN1NY1HE>.

²⁵ Zachary Cohen & Alex Marquardt, *U.S. Intelligence Warns China is Using Student Spies to Steal Secrets*, CNN POL. (Feb. 1, 2019, 9:22 PM), <https://www.cnn.com/2019/02/01/politics/us-intelligence-chinese-student-espionage/index.html>.

²⁶ Ana Swanson & Keith Bradsher, *White House Considers Restricting Chinese Researchers Over Espionage Fears*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/us/politics/trump-china-researchers-espionage.html?module=inline>.

a quarter of all foreign efforts to obtain sensitive or classified information in 2014 were routed through academic institutions.”²⁷

The installation of Confucius Institutes on university campuses nationwide exemplifies how foreign researchers presumably steal information from U.S. researchers.²⁸ Confucius Institutes function as schools funded by the Chinese government and are placed on college campuses in the United States.²⁹ Most Confucius Institutes teach classes in Mandarin, provide cultural education, and seek community involvement, though the purpose of the school varies from campus to campus.³⁰ The first Confucius Institute was implemented on a college campus in 2004, and at its peak, more than ninety Confucius Institutes existed in the United States.³¹

Although campuses are allowing more Confucius Institutes to set up throughout the United States, foreign intelligence experts warn of the dangers and risks associated with the programs.³² The concerns over Confucius Institutes intertwine with larger considerations regarding Chinese efforts to surpass U.S. strides in technology and security.³³ Christopher Wray, Director of the Federal Bureau of Investigation (FBI), addressed intelligence concerns related to Chinese information-gathering efforts in a Senate Intelligence Committee hearing in February 2018.³⁴ Addressing the academic response to foreign espionage threats, Wray exclaimed, “[a]nd I think the level of naïveté on the part of the academic sector about this creates its own issues. [Chinese researchers are] exploiting the very open research and development environment that we have, which we all revere, but they’re taking advantage of it.”³⁵

Other public figures, like politicians, warn of the dangers of academic espionage. Marco Rubio, a Republican Senator from Florida, especially fears threats posed by Confucius Institutes and Chinese espionage in general.³⁶ During the

²⁷ *Id.*

²⁸ Ted Mitchell, *Letter on Confucius Institutes*, AM. COUNCIL ON EDUC. (July 27, 2018), <https://www.acenet.edu/Documents/Letter-on-Confucius-Institutes.pdf>.

²⁹ Elizabeth Redden, *Closing Confucius Institutes*, INSIDE HIGHER ED (Jan. 9, 2019), <https://www.insidehighered.com/news/2019/01/09/colleges-move-close-chinese-government-funded-confucius-institutes-amid-increasing>.

³⁰ *Id.*

³¹ *Id.*

³² Amy Gunia, *A Senate Report Has Slammed the Chinese Learning Centers Operating at Over 100 U.S. Universities*, TIME (Feb. 28, 2019, 1:53 AM), <https://time.com/5540703/senate-report-confucius-institute-us-universities-chinese/>.

³³ Mitchell, *supra* note 14, at 1.

³⁴ *Global Threats and National Security: Hearing Before the S. Intelligence Comm.*, 115th Cong. (2018) (statement of Christopher Wray, Director, Federal Bureau of Investigation).

³⁵ *Id.*

³⁶ Elizabeth Redden, *The Chinese Student Threat?*, INSIDER HIGHER ED (Feb. 15, 2018), <https://www.insidehighered.com/news/2018/02/15/fbi-director-testifies-chinese-students-and-intelligence-threats>.

same hearing in which Wray spoke, Rubio commented that he believes Confucius Institutes are “complicit in these efforts to covertly influence public opinion and to teach half-truths designed to present Chinese history, government or official policy in the most favorable light.”³⁷ Senator Rubio joined with Senator Cruz, another senator who is vocal about combatting the threats posed by academic espionage, to explore legislation that uses a hardline approach against various research activities conducted in China.³⁸ According to a statement made by Senator Cruz, “[t]he Confucius Institutes are the velvet glove around the iron fist of their campaigns on our campuses. The American government needs new tools to protect the integrity of our universities and research, and to block academic espionage.”³⁹ The legislation passed by Cruz followed the public warnings related to academic espionage given by FBI director Christopher Wray.⁴⁰

Confucius Institutes, while one example of academic espionage, exist among other mediums through which Chinese operatives and researchers seek to steal U.S. information through academic engagement.⁴¹ U.S. lawmakers fear China’s “Thousand Talents Plan,” one of the Chinese Communist Party’s many recruitment programs aimed at obtaining U.S. “scientific and technological expertise,” will subject the United States to security threats and intellectual property theft.⁴² Although the Thousand Talents Plan is the most known recruitment program conducted by the Chinese Communist Party, it is one of over two hundred recruitment programs intended “[t]o gain technology from abroad through illegal or non-transparent means.”⁴³ The Thousand Talents Plan gives applicants options for participating, such as a “short-term” option which allows participants “[t]o spend only two months in China each year.”⁴⁴ The recruitment programs conducted by the Chinese government has reportedly recruited “60,000 overseas scientists and entrepreneurs between 2008 and 2016.”⁴⁵ The United States intelligence community warns that the efforts of the Thousand Talents Plan emanate

³⁷ *Id.*

³⁸ Josh Rogin, *Preventing Chinese Espionage at America’s Universities*, WASH. POST (May 22, 2018, 2:46 PM), <https://www.washingtonpost.com/news/josh-rogin/wp/2018/05/22/preventing-chinese-espionage-at-americas-universities/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Aruna Viswanatha & Kate O’Keeffe, *Chinese Official Charged in Alleged Visa Scheme to Recruit U.S. Science Talent*, WALL ST. J. (Sept. 24, 2019, 9:47 AM), <https://www.wsj.com/articles/chinese-official-charged-in-alleged-visa-scheme-to-recruit-u-s-science-talent-11569332862>.

⁴² Kate O’Keeffe & Aruna Viswanatha, *How China Targets Scientists via Global Network of Recruiting Stations*, WALL ST. J. (Aug. 20, 2020, 5:30 AM), <https://www.wsj.com/articles/how-china-targets-scientists-via-global-network-of-recruiting-stations-11597915803>.

⁴³ Alex Joske, *Hunting the Phoenix*, AUSTRALIAN STRATEGIC POLICY INSTITUTE (Aug. 20, 2020), <https://www.aspi.org.au/report/hunting-phoenix>.

⁴⁴ *Id.*

⁴⁵ *Id.*

from a desire to steal intellectual property and information related to U.S. advancements in technology and research.⁴⁶

The U.S. government has investigated several researchers as a result of connections with the Thousand Talents Program.⁴⁷ Yiheng Percival Zhang, a professor at Virginia Tech, was found guilty of conspiracy to commit fraud after filing to receive grants for research he already completed in China.⁴⁸ Zhang's behavior was suspected of being connected to China's Thousand Talents Plan.⁴⁹ In addressing China's Thousand Talents Plan, FBI Director Wray stated:

[t]he irony is that the U.S. is essentially funding that economic resurgence through various money it provides through grants, etc. . . . I think we need to be a little bit careful that we don't find ourselves in a situation where U.S. taxpayer money is being misappropriated for the advancement of China's economic dominance over us.⁵⁰

Confucius Institutes, China's Thousand Talents Plan, and other espionage efforts—formalized and informalized alike—cause American lawmakers to target individual researchers and, in particular, researchers from China.⁵¹ As a result of mounting fears related to academic espionage, the U.S. State Department proposed limiting visas for Chinese students.⁵² Within the past year and a half, the U.S. government has revoked visas from at least thirty Chinese professors conducting research in the United States.⁵³ One example occurred in Atlanta, Georgia, where the FBI interviewed a social sciences researcher who attended an event at the Carter Center. The U.S. government subsequently cancelled his visa.⁵⁴ Much of the U.S. government's approach links to FBI Director Wray's

⁴⁶ Jeff Mordock, *Feds Step Up Probe on China's "Thousand Talents Plan" After Convictions*, WASH. TIMES (Aug. 25, 2019), <https://www.washingtontimes.com/news/2019/aug/25/china-thousand-talents-plan-funnels-us-intellectua/>.

⁴⁷ *Id.*

⁴⁸ *Virginia Tech Professor Yiheng Percival Zhang Convicted of Swindling U.S. Grants for Research He'd Already Done in China*, ASSOCIATED PRESS (Feb. 27, 2019, 1:29 AM), <https://www.scmp.com/news/world/united-states-canada/article/2187817/virginia-tech-professor-yiheng-percival-zhang>.

⁴⁹ Mordock, *supra* note 46.

⁵⁰ *Id.*

⁵¹ Hamilton, *supra* note 20.

⁵² *Id.*

⁵³ Jane Perlez, *F.B.I. Bars Some China Scholars From Visiting U.S. Over Spying Fears*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/world/asia/china-academics-fbi-visa-bans.html>.

⁵⁴ *Id.* (The case of Wu Baiyi, mentioned here, is evidence of the suspicion that the United States government is particularly focused on interrogating the actions of researchers involved with the Chinese Academy of Social Sciences. One researcher involved with the Chinese

reasoning that academic espionage threatens the “whole of society” and therefore warrants a “whole of society response.”⁵⁵ The “whole of society response” mentality fuels American lawmakers to assess this threat from a variety of angles, including higher education, international relations, and technological competition.⁵⁶

Although academic espionage gives rise to valid fears, battling these complex fears leads to unfair prosecutions and firings of scholars. Several stories of students are rich with allegations but fail to assert concrete evidence.⁵⁷ In deciding how to best address academic espionage in specific cases, colleges and government officials should first ask if academic espionage is occurring at all. Senseless firings and investigations have increased stigmas against Chinese professors and hindered the process toward developing meaningful solutions.⁵⁸

B. United States Relations with China

To fully understand the efforts made by China to gather intel into U.S. advancements in science and technology and, on the other hand, to understand U.S. legislation proposed to combat the threat of academic espionage, one must analyze the current state of the relationship between China and the United States. Since 1979, when President Jimmy Carter recognized China as a nation-state for the first time, the United States has had a storied trade relationship with the country.⁵⁹ In 2000, President Bill Clinton signed the U.S.-China Relations Act of 2000, which led to China becoming the United States’ second-biggest trade partner by 2006.⁶⁰ In 2011, Secretary of State Hillary Clinton announced that the United States would “pivot” to Asia to increase investment in the Asia-Pacific

Academy of Social Sciences, in addressing United States action directed towards individuals at the academy, believed “[t]hey may feel we know too much about the United States.”).

⁵⁵ *Hearings*, *supra* note 34 (statement of FBI Director Wray).

⁵⁶ Perlez, *supra* note 53.

⁵⁷ See Ben Wolfgang, ‘Academic Espionage’: China Suspected of Flooding U.S. with Students to Access Sensitive Programs, WASH. TIMES (Aug. 22, 2019), <https://www.washingtontimes.com/news/2019/aug/22/china-academic-espionage-deploys-students-us-access/>.

⁵⁸ See Matt Apuzzo, *Former Espionage Suspect Sues, Accusing F.B.I. of Falsifying Evidence*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/us/politics/fbi-xixiaoxing.html> (discussing the case of a professor who was wrongly accused of academic espionage); see also Emily Feng, *FBI Urges Universities to Monitor Some Chinese Students and Scholars in the U.S.*, NPR (June 28, 2019, 10:36 AM), <https://www.npr.org/2019/06/28/728659124/fbi-urges-universities-to-monitor-some-chinese-students-and-scholars-in-the-u-s> (explaining that universities are wary of the U.S. government’s approach “because of skepticism of the threat level and because the FBI requests lack specificity in implementation”).

⁵⁹ *U.S. Relations with China*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/timeline/us-relations-china> (last visited Aug. 28, 2020).

⁶⁰ *Id.*

region.⁶¹ In 2011 and 2012, trade-based tensions between the United States and China rose as the United States trade deficit grew to a record-breaking \$295.5 billion.⁶²

During his administration, President Obama stated that “[t]he relationship between the United States and China is the most important bilateral relationship of the 21st century.”⁶³ Obama made evident his efforts to establish trade policy aimed at protecting the United States while engaging the country in globalized trade by forging the Trans-Pacific Partnership (TPP).⁶⁴ At the time, the TPP stood as the world’s most significant trade deal, including commitments and activities comprising forty percent of the world’s economy.⁶⁵ In keeping with his administration’s “pivot” towards Asia, the TPP was Obama’s solution to growing trade tensions between the United States and China and his administration’s international strategy to advance economically while incorporating the participation of other countries.⁶⁶ The TPP was considered a “hallmark achievement” for President Obama.⁶⁷ However, despite Obama’s enthusiasm in creating and implementing the TPP, the plan quickly divided policymakers.⁶⁸ When many members of Congress in President Obama’s own party viewed the TPP with skepticism, President Obama continued to advocate for the vital partnership he positioned as foundational to his foreign policy agenda.⁶⁹ In May 2015, President Obama traveled to Nike World Headquarters to give a speech on the importance of TPP membership.⁷⁰ “If we don’t write the rules for trade around the world,

⁶¹ Kenneth Lieberthal, *The American Pivot to Asia*, BROOKINGS (Dec. 21, 2011), <https://www.brookings.edu/articles/the-american-pivot-to-asia/>.

⁶² COUNCIL ON FOREIGN REL., *supra* note 59.

⁶³ Cheng Li, *Assessing U.S.-China Relations Under the Obama Administration*, BROOKINGS (Aug. 30, 2016), <https://www.brookings.edu/opinions/assessing-u-s-china-relations-under-the-obama-administration/>. See also David E. Sanger & Edward Wong, *As Obama Plays China Card on Trade, Chinese Pursue Their Own Deals*, N.Y. TIMES (May 12, 2015), <https://www.nytimes.com/2015/05/13/us/politics/as-obama-plays-china-card-on-trade-chinese-pursue-their-own-deals.html> (stating that the U.S. and China’s competitive relationship is seen by “many in the Obama administration . . . as the most important geopolitical power struggle in the world today.”).

⁶⁴ Kevin Granville, *What Is TPP? Behind the Trade Deal That Died*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html>.

⁶⁵ James McBride & Andrew Chatzky, *What Is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN REL. (Jan. 4, 2019), <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp>.

⁶⁶ Granville, *supra* note 64.

⁶⁷ *Id.*

⁶⁸ See *id.* (discussing opposition to the TPP by many Democratic organizations, including unions, environmental, and consumer groups).

⁶⁹ Siri Srinivas, *Trans Pacific Partnership: Obama Ready to Defy Democrats to Push Secretive Trade Deal*, THE GUARDIAN (Jan. 20, 2015, 11:38 PM), <https://www.theguardian.com/business/2015/jan/20/barack-obama-trans-pacific-partnership-republicans>.

⁷⁰ Sanger & Wong, *supra* note 63.

guess what?” President Obama asked the crowd during his speech aimed at garnering support for American manufacturers, “China will.”⁷¹ The United States joined the TPP Trans-Pacific Partnership in February 2016.⁷²

Until the election of Donald Trump, the TPP continued to create divisions along party lines.⁷³ During the first week of Donald Trump’s presidency, he withdrew the United States from the TPP.⁷⁴ Despite President Trump’s hinting at rejoining the TPP, the partnership has proven to be one of many complexities defining the trade relationship between the United States and China.⁷⁵

Under the Trump administration, the United States became entrenched in a trade war with China.⁷⁶ In July 2018, President Trump imposed tariffs on Chinese goods worth \$34 billion.⁷⁷ Threats and actions taken by President Trump against China are not only rooted in what he claims to be unfair trade policy, but the tariffs are also a result of what the United States government views as Chinese threats to steal national intellectual property.⁷⁸

In addition to imposing aggressive tariffs against China, the Trump administration first considered proposals to prohibit Chinese researchers from engaging in academic activity on U.S. university campuses.⁷⁹ Efforts to combat the threat of academic espionage undoubtedly relate to safety and protecting the research conducted by U.S. faculty. However, the United States’ insatiable desire to maintain power and dominance stands as the driving force behind efforts to

⁷¹ *Id.*

⁷² Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS (Feb. 3, 2016), <https://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S>.

⁷³ *Id.*

⁷⁴ Adam Taylor, *A Timeline of Trump’s Complicated Relationship with the TPP*, WASH. POST (April 13, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/04/13/a-timeline-of-trumps-complicated-relationship-with-the-tpp/>; *see also* Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, THE WHITE HOUSE (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/> (explaining why President Trump chose to withdraw from the TPP).

⁷⁵ Ana Swanson, *Trump Proposes Rejoining Trans-Pacific Partnership*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/politics/trump-trans-pacific-partnership.html>.

⁷⁶ Dorcas Wong & Alexander Koty, *The U.S.-China Trade War: A Timeline*, CHINA BRIEFING (Oct. 12, 2019), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/>.

⁷⁷ Ana Swanson, *Trump’s Trade War with China is Officially Underway*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html>.

⁷⁸ *Id.*

⁷⁹ Swanson & Bradsher, *supra* note 26.

block and prohibit Chinese efforts to spy and steal U.S. intellectual property.⁸⁰ In addition to the current practice of revoking visas for Chinese researchers, the White House initially considered implementing restrictions on certain projects performed by Chinese researchers.⁸¹ Proposed projects to be restricted included activities related to China's potential scheme to dominate in the technological arenas of "advanced microchips, artificial intelligence[,] and electric cars."⁸²

C. United States Law: Past and Present Measures Taken to Combat Academic Espionage

The United States has grappled with how to best address the threat of academic espionage by passing various laws aimed at combatting the unique threat. Proposed legislation that would focus on academic espionage comes in various forms. Many communities, particularly those in the higher education profession, conclude that current proposals aimed at curbing academic espionage unfairly prejudice and hinder the open and collaborative academic environments that the United States prides itself in creating.⁸³ Others claim that the aggressive, unified actions taken by U.S. lawmakers are beneficial and necessary to protecting national security.⁸⁴ The challenge of finding appropriate measures to address the threat of academic espionage will increase as the threat continues to grow and garner attention within the United States. The challenge of finding a solution by using United States law alone will perhaps be insurmountable.

The discussions on academic espionage occurring in the halls of congressional office buildings depend on how members of Congress define the threat in the first place. Many government officials believe Chinese researchers "are

⁸⁰ See Lawrence Lau, *Behind the U.S.-China Trade War Lies a Competition for Dominance and a Rising Ride of Protectionism*, S. CHINA MORNING POST (Aug. 17, 2018, 5:00 AM), <https://www.scmp.com/comment/insight-opinion/united-states/article/2160041/behind-us-china-trade-war-lies-competition> (explaining the trade war and competition between the United States and China).

⁸¹ See Ana Swanson, *Trump's Trade War with China is Officially Underway*, N.Y. TIMES (July 5, 2018) (<https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html>) (explaining the U.S. plan to revoke visas); see also Lawrence Lau, *Behind the U.S.-China Trade War Lies a Competition for Dominance and a Rising Ride of Protectionism*, S. CHINA MORNING POST (Aug. 17, 2018, 5:00 AM), <https://www.scmp.com/comment/insight-opinion/united-states/article/2160041/behind-us-china-trade-war-lies-competition> (explaining U.S. attempts to limit Chinese involvement related to innovation and technology).

⁸² *Id.*

⁸³ Erin N. Grubbs, *Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security*, 20 N.C.J.L. & TECH. ON. 235, 259 (2019).

⁸⁴ Owen Churchill, *FBI Counter-intelligence Official Warns U.S. to Unite Against Chinese Espionage Threats*, S. CHINA MORNING POST (Dec. 13, 2018, 6:28 AM), <https://www.scmp.com/news/china/diplomacy/article/2177727/fbi-counter-intelligence-official-warns-us-response-chinese>.

responsible for a great deal of intellectual-property theft.”⁸⁵ Members of the Trump administration fear new initiatives made by Chinese corporations to finance research conducted at universities in the United States, an activity the Department of Justice labeled a “roadmap to [intellectual-property] theft.”⁸⁶ However, beyond stating broad concerns related to protecting intellectual property, government officials have rarely described their concerns with specificity. One university administrator, after receiving warnings from FBI Director Christopher Wray concerning academic espionage, complained:

What exactly Mr. Wray has in mind, where precisely he sees the threat—this is all left frustratingly vague. Some of the guidance has been, “[b]e careful about anything to do with biotech.” Well biotech is huge; I don’t even know which faculty to talk to if you don’t tell me more.⁸⁷

As lawmakers continue to try to pass legislation aimed at curbing academic espionage, members of Congress must answer their opponents who demand an explanation for what they perceive to be nebulous fears.

Within the past year, Congress implemented two measures in hopes of effectively targeting academic espionage.⁸⁸ Proposed on June 18, 2019, the Protect Our Universities Act, if passed, would require Chinese, Iranian, and Russian students to participate in background checks before engaging in certain research projects.⁸⁹ The Protect Our Universities Act is sponsored by Senator Josh Hawley, who claims:

For too long, these countries have sent students to our universities to collect sensitive research that they can later use to develop capabilities that threaten our national security . . . [t]his bill takes much-needed steps to ensure our research stays out of the hands of foreign adversaries who are proactively rooting for our failure.⁹⁰

The U.S. government introduced the Protect Our Universities Act just one month after Emory University fired Dr. Li Xiao-Jiang without notice after allegedly failing to disclose relationships and funding with China.⁹¹ Many individuals

⁸⁵ Nathalie Lees, *The New Red Scare on American Campuses*, *ECONOMIST* (Jan. 2, 2020), <https://www.economist.com/briefing/2020/01/02/the-new-red-scare-on-american-campuses>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Redden, *supra* note 19.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Cohen, *supra* note 1.

within the academic community oppose the bill and believe the approach could lead to profiling and stereotyping.⁹²

One alternative approach to the Protect Our Universities Act is the Securing American Science and Technology Act (SASTA).⁹³ The SASTA, if enacted, would mandate the National Science and Technology Council (NSTC) and the United States National Security Advisor to “establish an interagency working group to coordinate activities to protect federally funded research and development from foreign interference, cyberattacks, theft, or espionage.”⁹⁴ The SASTA takes a softer approach in combating the threat of academic espionage, as it strives to maintain the open and collegial environment of the American academic community.⁹⁵ Representative Mikie Sherril, a New Jersey Democrat and sponsor of the bill, stated, “We have to get this right. We must protect our innovation and research while maintaining the international engagement and demonstrated value foreign students bring to our institutions of higher learning.”⁹⁶ The contrasting approaches taken by the Protect Our University Act and the SASTA demonstrate the disagreements within both higher education and national security communities. Neither approach will combat the threat of espionage in its entirety, and as Congress continues to brainstorm ways to protect academic communities from foreign spies, the threat continues to mount.⁹⁷

Many academics and U.S. citizens alike favor the softer approach in combating the deleterious effects of academic espionage.⁹⁸ According to the BBC, over 360,000 Chinese students received an education in the United States during the 2017–2018 academic year.⁹⁹ However, many scholars believe applications from international students are decreasing because of the recruitment programs’ discriminatory effects, similar to laws passed with the goal of combatting academic

⁹² See Redden, *supra* note 19 (highlighting concerns about profiling on the basis of race caused by the “increased scrutiny” of Chinese students).

⁹³ Securing American Science and Technology Act of 2019, H.R. 3038, 116th Cong. § 1 (2019).

⁹⁴ *Id.* at § 2(a).

⁹⁵ Redden, *supra* note 19.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *Statement in Response to Report the FBI is Urging Universities to Monitor Chinese Students and Scholars*, PEN AM. (Aug. 12, 2019), <https://pen.org/fbi-universities-monitoring-chinese-students/> (explaining how many academics are urging their colleagues “to maintain their commitment to academic freedom, to uphold the principle of due process, and to respect the privacy rights of students and faculty, no matter their national origins,” rejecting an approach that results in racial profiling).

⁹⁹ *Trade War: How Reliant are U.S. Colleges on Chinese Students?*, BBC NEWS (June 12, 2019), <https://www.bbc.com/news/world-asia-48542913>. See also Lees, *supra* note 85 (stating that “[f]ully a third [of all students at universities in the United States] are Chinese—a much larger fraction than from anywhere else, and more students than China sends to all the other countries in the world put together”).

espionage.¹⁰⁰ American Council on Education Senior Vice President Terry Hartle expressed concern over declining international college applications as a result of state action against espionage.¹⁰¹ “Campus officials are worried that international students could become pawns in a trade war,” Hartle commented.¹⁰² Former Citizenship and Immigration Services Director Leon Rodriguez testified in front of the U.S. Senate Judiciary Committee and gave a direct response to the warnings given by FBI Director Christopher Wray.¹⁰³ Rodriguez gave a warning of his own: “The warnings given by Director Wray about possible use of the Confucius Institutes as vehicles for non-traditional intelligence gathering and other activities which may undermine open academic discourse deserve to be taken very seriously and appropriate government action taken in response.”¹⁰⁴

Fears over academic espionage are fueling congressional conversations related to allocations and funding. In July of 2019, the House of Representatives passed a \$733 billion defense bill containing language aimed at combatting the effects of academic espionage.¹⁰⁵ Along with the SASTA, the defense bill includes a provision that increases funding for the National Security Education Program’s Chinese language classes, as well as programming to train participants to recognize and report individuals suspected of spying.¹⁰⁶ The defense bill passed in the House of Representatives and awaits passage in the Senate.¹⁰⁷ The National Defense Authorization Act (NDAA) is significant legislation that Congress passes each year, and partisan tensions increased complications and adjustments to the bill before it reached President Trump’s desk.¹⁰⁸

¹⁰⁰ Nick Anderson & Susan Svrluga, *Universities Worry About Potential Loss of Chinese Students*, WASH. POST (June 3, 2019, 7:39 PM), https://www.washingtonpost.com/local/education/universities-worry-about-potential-loss-of-chinese-students/2019/06/03/567044ea-861b-11e9-98c1-e945ae5db8fb_story.html.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Student Visa Integrity: Protecting Educational Opportunity and National Security Before the Subcomm. on Border Sec. and Immigration of the S. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Leon Rodriguez, Partner, Seyfarth Shaw, LLP).

¹⁰⁴ *Id.*

¹⁰⁵ *House Defense Bill Includes Provisions on Academic Espionage, For-Profit Oversight*, AM. COUNCIL ON EDUC. (July 15, 2019), <https://www.acenet.edu/News-Room/Pages/House-Defense-Bill-Includes-Provisions-on-Academic-Espionage-For-Profit-Oversight.aspx>.

¹⁰⁶ *Id.*

¹⁰⁷ National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong. (2019).

¹⁰⁸ Mike Stone, *U.S. House Passes \$733 Billion Defense Policy Bill After Trump Threatens Veto*, REUTERS (July 12, 2019, 1:41 PM), <https://www.reuters.com/article/us-usa-house-defense/us-house-passes-733-billion-defense-policy-bill-after-trump-threatens-veto-idUSKCN1U72BA>.

III. ANALYSIS

A. Categorizing Academic Espionage Within International Law

Academic espionage is regulated at the margins of international law. International regulation of academic espionage is difficult to conceptualize and enforce, and academic espionage is itself difficult to categorize.¹⁰⁹ Interstate relationships and agreements create the legality of academic espionage, and shifting administrations alter levels of discussion on the topic.¹¹⁰ Academic espionage is best compartmentalized under international trade law because the services and benefits created by educational institutions affect the economic, transnational relationships between the United States, China, and other countries.¹¹¹ Aspects of international immigration law apply to academic espionage as well. Questions related to visas, global exchanges, and human relations all supplement the discussion regarding solving international academic espionage.¹¹²

United States law faces the arduous task of sorting out the disparities in international law on the regulation of academic espionage. The legislative actions taken by the United States are in many ways harmful and inadequate in regulating academic espionage and monitoring its effects.¹¹³ To the extent that United States law lacks comprehensive regulation for academic espionage, creating a framework to regulate academic espionage through international trade law is a noble and necessary endeavor.

¹⁰⁹ See Radsan, *supra* note 21, at 599 (discussing the complexities of categorizing covert action).

¹¹⁰ See Mike Giglio, *China's Spies Are on the Offensive*, ATLANTIC (Aug. 26, 2019), <https://www.theatlantic.com/politics/archive/2019/08/inside-us-china-espionage-war/595747/> (discussing how trade discussions between the United States and China impact policy decisions related to espionage).

¹¹¹ Brook Larmer, *One of America's Most Vital Exports, Education, Never Goes Abroad, but It Still Faces Threats*, N.Y. TIMES (Jan. 3, 2019), <https://www.nytimes.com/2019/01/03/magazine/one-of-americas-most-vital-exports-education-never-goes-abroad-but-it-still-faces-threats.html>.

¹¹² Patricia Zengerle & Matt Spetalnick, *Fearing Espionage, U.S. Weighs Tighter Rules on Chinese Students*, REUTERS (Nov. 29, 2018), <https://www.reuters.com/article/us-usa-china-students-exclusive/exclusive-fearing-espionage-u-s-weighs-tighter-rules-on-chinese-students-idUSKCN1NY1HE>.

¹¹³ See Redden, *supra* note 19 (discussing how two United States bills proposed to combat academic espionage have variant approaches and policies).

B. General Espionage in International Law

Academic espionage is a new phenomenon, and campuses across the United States face puzzling challenges in combatting the emerging threat.¹¹⁴ Espionage, on the other hand, has existed in nations across the globe for centuries.¹¹⁵ Espionage is often unregulated within the realm of international law.¹¹⁶ The practice of international espionage “consists of the access, on behalf of a state, to information that is held by another state and considered as confidential or strategic, in the military, security, or economic field.”¹¹⁷ Today, many international leaders and theorists struggle to determine how far to go in regulating espionage, while many others believe that regulation should not exist at all.¹¹⁸

The legality of espionage is viewed differently in contexts of war than in the contexts of peace in subsets of the international community.¹¹⁹ Espionage during times of war is often permissible in the view of most countries, and many countries appreciate the opportunity to gain information through spying in times of war.¹²⁰ International law does not expressly encourage wartime espionage, however, at the very least, captured spies receive certain protections during times of war.¹²¹ The 1907 Hague Regulations state: “A spy taken in the act shall not be punished without previous trial.”¹²² Further, the absence of explicit international

¹¹⁴ See Erica L. Green, *Universities Face Federal Crackdown Over Foreign Financial Influence*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/us/politics/universities-foreign-donations.html> (explaining how colleges are grappling with pressures from government entities to further investigate foreign activity as well as difficulties colleges are having in maintaining transparency in the relationships researchers have with other countries).

¹¹⁵ Sir Francis Walsingham, the sixteenth century secretary under Queen Elizabeth I, is often credited with creating espionage practices still used today. See generally STEPHEN BUDIANSKY, *HER MAJESTY’S SPYMASTER: ELIZABETH I, SIR FRANCIS WALSINGHAM, AND THE BIRTH OF MODERN ESPIONAGE* (2005) (explaining how Sir Francis Walsingham used agents, unraveled codes, and used various tools to further international espionage, paving the way for espionage tactics still used in modern foreign affairs).

¹¹⁶ See generally Christopher D. Baker, Essay, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT’L L. REV. 1091, 1094–95 (2004) (describing the lack of definition in international law on espionage).

¹¹⁷ François Dubuisson & Agatha Verdebout, *Espionage in International Law*, OXFORD BIBLIOGRAPHIES (Sept. 25, 2018), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0173.xml#firstMatch>.

¹¹⁸ See *id.*

¹¹⁹ Iñaki Navarrete & Russell Buchan, *Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions*, 51 CORNELL INT’L L.J. 897, 898 (2019).

¹²⁰ Jared Beim, *Enforcing a Prohibition on International Espionage*, 18 CHICAGO J. INT’L L. 647, 651 (2018).

¹²¹ *Id.*

¹²² Convention for the Laws and Customs of War on Land art. 30–31, Oct. 18, 1907, 33 Stat. 2277, T.S. No. 539. See Convention Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 (explaining that “[w]here

regulation on espionage supports the theory adopted by many state actors that espionage is not illegal.¹²³ This principle laid the foundation of the Permanent Court of International Justice's decision in *France v. Turkey*, or, *The Lotus Case*, which held that states have discretion in participating in certain behavior as long as the state conduct does not violate explicit law or prohibitions.¹²⁴

Despite international law's obscurity on the topic, countless nations behave as though espionage is legal.¹²⁵ The United States justifies spying as a necessary practice in furthering safety for its citizens.¹²⁶ In 2006, Director of National Intelligence John Negroponte reported that the United States had approximately 100,000 spies conducting espionage-related activities around the globe.¹²⁷ The U.S. government has become increasingly aware of spy-related activities directed against the nation, but tracking down spies and combatting their efforts is a difficult task to perform.¹²⁸ Advancements in communications and technology have only facilitated the art of espionage.¹²⁹

In conclusion, international law regarding general espionage is, in large part, unsettled.¹³⁰ However, individual interstate agreements and international principles inform the legal analysis of spying.¹³¹ While many state actors view international espionage as invasive and contrary to ideals of individual state

in occupied territory an individual protected person is detained as a spy . . . such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention").

¹²³ Darien Pun, Note, *Rethinking Espionage in the Modern Era*, 18 CHICAGO J. INT'L L. 353, 361 (2017).

¹²⁴ S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 45 (Sept. 7).

¹²⁵ See Darien Pun, *Rethinking Espionage in the Modern Era*, 18 CHI. J. INT'L L. 353, 360 (2017) (explaining how "[e]spionage's permissibility under international law remains largely unsettled" and that "[t]he lack of explicit historical prohibition of peacetime espionage in international law has created a customary norm for its permissibility").

¹²⁶ See Ellen Nakashima, *Verizon Providing All Call Records to U.S. Under Court Order*, WASH. POST (June 6, 2013), https://www.washingtonpost.com/world/national-security/verizon-providing-all-call-records-to-us-under-court-order/2013/06/05/98656606-ce47-11e2-8845-d970ccb04497_story.html (reporting the statement of an Obama administration official on how information seized by spying on telephone calls "has been a critical tool in protecting the nation from terrorist threats to the United States").

¹²⁷ *Just How Many U.S. Spies? Try 100,000*, N.Y. TIMES (Apr. 21, 2006), <https://www.nytimes.com/2006/04/21/world/americas/21iht-spy.html>.

¹²⁸ Warren Strobel & John Walcott, *Fewer Russian Spies in U.S. But Getting Harder to Track*, REUTERS (Mar. 28, 2018, 1:20 AM), <https://www.reuters.com/article/us-usa-russia-spies/fewer-russian-spies-in-u-s-but-getting-harder-to-track-idUSKBN1H40JW>.

¹²⁹ Bill Priestap, *The Spy Business Is Booming and We Should Be Worried*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/07/20/opinion/sunday/the-spy-business-is-booming-and-we-should-be-worried.html>.

¹³⁰ Pun, *supra* note 125, at 360.

¹³¹ *U.S.-China Cyber Deal Takes Norm Against Economic Espionage Global*, COUNCIL ON FOREIGN REL. (Sept. 28, 2015), <https://www.cfr.org/blog/us-china-cyber-deal-takes-norm-against-economic-espionage-global>.

sovereignty, many others believe the practice should exist as an unregulated activity.¹³²

C. Academic Espionage Under International Trade Law

Academic espionage is best regulated under international trade law. The services and exchanges created in the realm of higher education position academic espionage as a practice that affects trade relations.¹³³ Academic research is vast and ever-expanding, and the international aspect of research is implicated and expressed in many areas of international trade.

D. International Trade Law: A Brief Overview

International trade encompasses customs, rules, and agreements formed between countries intending to govern trade interactions.¹³⁴ Numerous trade agreements govern the international interplay of exports, goods, and information technology. A trade agreement is “[a]n agreement—such as the North American Free Trade Agreement—between two or more countries concerning the buying and selling of each country’s goods.”¹³⁵ A multilateral trade agreement most often includes more than two regional countries, and is defined as “[a] treaty that regulates international commerce, such as TRIPs, GATT, or GATS.”¹³⁶ The United States is a member to several multilateral trade agreements, including the World Trade Organization¹³⁷ and the North American Free Trade Agreement (NAFTA).¹³⁸

¹³² Russell Buchan, *The International Legal Regulation of State-Sponsored Cyber Espionage*, in INTERNATIONAL CYBER NORMS: LEGAL, POLICY & INDUSTRY PERSPECTIVES (Anna-Maria Osula and Henry Rõigas eds., NATO CCD COE Publications, Tallinn, 2016).

¹³³ Beverly Barrett, *International Trade and Higher Education Services: The TTIP, the EHEA, and Beyond*, in EUROPEAN CONSORTIUM FOR POLITICAL RESEARCH, PANEL: TRADE AGREEMENTS, INTERNATIONAL ORGANISATIONS AND THE SUPRANATIONAL SHAPING OF KNOWLEDGE POLICIES (2019).

¹³⁴ *International Trade Law*, GEO. L., <https://www.law.georgetown.edu/your-life-career/career-exploration-professional-development/for-jd-students/explore-legal-careers/practice-areas/international-trade-law/> (last visited Aug. 28, 2020).

¹³⁵ *Trade Agreement*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹³⁶ *Multilateral Trade Agreement*, BLACK’S LAW DICTIONARY (10th ed. 2014). For reference, TRIPs stands for The Agreement on Trade-Related Aspects of Intellectual Property Rights, GATT stands for the General Agreement on Tariffs and Trade, and GATS stands for General Agreement on Trade in Services.

¹³⁷ *United States of America and the WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/usa_e.htm (last visited Aug. 28, 2020).

¹³⁸ Ann K. Wootser & Jason Binimow, Annotation, *Validity, Construction, and Application of North American Free Trade Agreement and Implementing Statutes and Regulations—Cases and Materials from Canada, Mexico, and the United States*, 6 A.L.R. Fed. 2d 1 (2005).

The United States focuses much of its administrative and government involvement with international trade on trade remedy actions and export control work.¹³⁹ Trade remedy actions regulate and monitor unfair pricing actions, distortions of a healthy flow of goods internationally, and unfair government subsidies that may hinder United States business endeavors internationally.¹⁴⁰ An example of a trade remedy action is a regulation aimed at dumping.¹⁴¹ An antidumping law is “a statute designed to protect domestic companies by preventing the sale of foreign goods at less than fair value, as defined in the statute (for example, at a price below that of the domestic market).”¹⁴² The United States International Trade Commission also outlines antidumping laws.¹⁴³ The International Trade Commission is “an independent, nonpartisan, quasi-judicial federal agency that fulfills a range of trade-related mandates.”¹⁴⁴ The International Trade Commission, along with other government agencies, demonstrate the significance of United States law related to controlling fairness and protecting the national market.¹⁴⁵

United States export law is expansive. Export laws govern not only the shipment of fungible goods but also the distribution of surreptitious technology and information.¹⁴⁶ The Bureau of Industry and Security, a division of the U.S. Department of Commerce, promulgated ten categories of information and goods to describe types of exports.¹⁴⁷ The Commerce Control List (CCL) denotes the following relevant categories as exports subject to particular regulation: electronics, computers, telecommunications, and information security.¹⁴⁸ The CCL acts

¹³⁹ See Jane M. Smith, Cong. Research Serv., RL33976, U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview (2013) (outlining United States law related to trade remedies and exports).

¹⁴⁰ *An Introduction to U.S. Trade Remedies*, INT’L TRADE ADMIN.: ENFORCEMENT & COMPLIANCE, <https://enforcement.trade.gov/intro/index.html> (last visited Aug. 28, 2020).

¹⁴¹ *Anti-dumping, Subsidies, Safeguards: Contingencies, Etc.*, WORLD TRADE ORG. (last visited Aug. 28, 2020), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

¹⁴² *Antidumping Law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁴³ Robert Mordhorst, *International Trade Administration v. International Trade Commission: The Scope of Antidumping/Countervailing Duty Investigations Issue*, 9 GEO. MASON U. L. REV. 147, 147-48 (1986).

¹⁴⁴ *About the USITC*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/about_usitc.htm (last visited Aug. 28, 2020).

¹⁴⁵ See Marguerite Trossevin and Reza Karamloom, *Judicial Review of Antidumping and Countervailing Duty Determinations by the Department of Commerce: Noteworthy Cases in 2009*, 42 GEO. J. INT’L L. 35 (2010) (discussing the evolution of U.S. law on countervailing duties, antidumping, and decisions made by the Department of Commerce).

¹⁴⁶ *International Trade Law*, *supra* note 134.

¹⁴⁷ Stanley Keller, *U.S. Export Laws and Related Trade Sanctions*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Nov. 17, 2012), <https://corpgov.law.harvard.edu/2012/11/17/u-s-export-laws-and-related-trade-sanctions/>.

¹⁴⁸ *Commerce Control List (CCL)*, BUREAU OF INDUS. & SEC. (2019), <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>.

among other regulations, collectively known as the Export Administration Regulations, as an extensive regulatory mechanism enforced by the Bureau of Industry and Security.¹⁴⁹

The discussions and relationships expressed through bilateral trade agreements illuminate international trade law.¹⁵⁰ The United States maintains free trade agreements with twenty different countries.¹⁵¹ Their interest in joining free trade agreements increased under President George W. Bush's administration, and executive support for such agreements emerged after the enactment of the Trade Promotion Authority in 2002.¹⁵² President Obama demonstrated his willingness to join the United States in free trade agreements with the creation of the Trans-Pacific Partnership.¹⁵³

Policymakers and citizens alike voiced varying views on the effectiveness and necessity of free trade agreements. In 2014, the Congressional Research Service categorized these views on free trade agreements into three groups.¹⁵⁴ The first group opposed free trade agreements and viewed them as “stumbling block[s]” to achieving liberalized global trade.¹⁵⁵ The second group supported free trade agreements and viewed them as “building block[s]” to producing liberalized multilateral trade.¹⁵⁶ The third group disliked international trade agreements generally, stating that free trade agreements undermined the sovereignty of the U.S. economy and negatively impacted works in import-sensitive sectors.¹⁵⁷ President Trump took a different approach than both President Bush and President Obama did on free trade agreements.¹⁵⁸ Nonetheless, free trade agreements will continue

¹⁴⁹ Stanley Keller, *U.S. Export Laws and Related Trade Sanctions*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Nov. 17, 2012), <https://corpgov.law.harvard.edu/2012/11/17/u-s-export-laws-and-related-trade-sanctions/>.

¹⁵⁰ See Robert McMahon, *The Rise in Bilateral Free Trade Agreements*, COUNCIL ON FOREIGN REL. (June 13, 2016), <https://www.cfr.org/background/rise-bilateral-free-trade-agreements> (describing the discrepant thoughts among scholars, stating, “[s]ome economists praise the trend as contributing to trade liberalization and market reforms while others scorn the practice as skewing trade norms”).

¹⁵¹ *Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE: EXEC. OFF. PRESIDENT, <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Aug. 27, 2020).

¹⁵² WILLIAM H. COOPER, CONG. RESEARCH SERV., RL7-5700, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 1 (2014).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 11.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Jim Tankersley, *Trump Signs Revised Korean Trade Deal*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/us/politics/south-korea-trump-trade-deal.html> (explaining that “[t]he revised United States-Korea Trade Agreement includes steps to open up the Korean market to increased American exports”). *But see* Keith Johnson, *While Trump Isolates the U.S., It's 'Let's Make a Deal' for the Rest of the World* (July 3, 2019), <https://foreignpolicy.com/2019/07/03/while-trump-isolates-u-s-its-lets-make-a-deal-for-the-rest-of-the-wo>

to operate as one of the many moving factors within the international trade framework.¹⁵⁹

The United States currently addresses international trade by participating as a member to several international agreements and consulting various forums for information related to trade regulation.¹⁶⁰ Most importantly, however, the United States is a member of the World Trade Organization (WTO).¹⁶¹ The WTO serves as “the principal forum for setting the rules of international trade. In its two and a half decades, it has helped reduce barriers to trade of both goods and services and created a dispute resolution system that supporters say reduced the threat of trade wars.”¹⁶² The WTO built upon the General Agreement on Tariffs and Trade (GATT).¹⁶³ As the foremost administrative body that creates the legislation, policy, and rules for international trade, members of the WTO should prioritize the regulation of academic espionage by engaging the members of the international body. United States involvement with the WTO has been tense, and President Trump’s desire to out-manuever China in the trade war led to many controversial conversations.¹⁶⁴ In July of 2019, President Trump tweeted, “[t]he WTO is

rld-trade-fta-mercotur-eu/ (rejecting the idea that Trump is furthering free trade agreements and stating: “Since Trump took office, the United States has managed to secure only some minor revisions to the existing trade deal with South Korea and update the existing trade pact with Canada and Mexico, which still must be approved by Congress”).

¹⁵⁹ See David A. Gantz, *The “Bipartisan Trade Deal,” Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 115, 153 (2008) (explaining that U.S. international economic policy significantly affects broader U.S. world interests, such as “maintenance of world peace and security, strengthening of democratic institutions and support of economic development and the rule of law”).

¹⁶⁰ See James McBride, *The State of U.S. Trade Policy*, COUNCIL ON FOREIGN REL. (last updated Jan. 31, 2017), <https://www.cfr.org/background/state-us-trade-policy> (discussing U.S. trade agreements and policy); see also *Trade Organizations*, OFF. OF THE U.S. TRADE REPRESENTATIVE: EXEC. OFF. OF THE PRESIDENT, <https://ustr.gov/issue-areas/trade-organizations> (last visited Aug. 27, 2020) (discussing various trade forums the United States participates in).

¹⁶¹ See Keith Johnson, *U.S. Effort to Depart WTO Gathers Momentum*, FOREIGN POLICY (May 27, 2020, 2:31 PM), <https://foreignpolicy.com/2020/05/27/world-trade-organization-united-states-departure-china/> (explaining how the United States is a member to the WTO, although several members of Congress are urging President Trump to withdraw from the organization).

¹⁶² James McBride & Andrew Chatzky, *What’s Next for the WTO?*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/whats-next-wto> (last updated Dec. 10, 2019).

¹⁶³ *Id.*

¹⁶⁴ See CHAD P. BOWN & DOUGLAS A. IRWIN, PETERSON INST. FOR INT’L ECON., WHAT MIGHT A TRUMP WITHDRAWAL FROM THE WORLD TRADE ORGANIZATION MEAN FOR U.S. TARIFFS? 1 (2018), <https://www.piie.com/publications/policy-briefs/what-might-trump-withdrawal-world-trade-organization-mean-us-tariffs> (explaining the potential effects of a U.S. withdrawal from the WTO); see also Adam Behsudi, *Trump Ramps up Attack Against WTO*, POLITICO (July 26, 2019, 4:07 PM), <https://www.politico.com/story/2019/07/26/trump-world-trade-organization-1623192> (discussing President Trump’s disdain with the WTO).

BROKEN when the world's RICHEST countries claim to be developing countries to avoid WTO rules and get special treatment. NO more!!! Today I directed the U.S. Trade Representative to take action so that countries stop CHEATING the system at the expense of the USA!"¹⁶⁵ The future of United States involvement in the WTO may continue to be complex, and predicting the future United States involvement in any type of international trade agreement will be difficult.¹⁶⁶

E. Academic Espionage as Trade in Services: GATS, TRIPS, and the New WTO

The nature of trade has globalized and advanced significantly throughout history. For most of history, the focus of international trade has been on tangible goods instead of intangible products and services.¹⁶⁷ However, in the 1980s, the international community developed an increased desire to liberalize trade in services.¹⁶⁸ This interest in viewing trade with a more expansive mindset led to the creation of the General Agreement on Trade in Services (GATS), a centerpiece of the WTO Uruguay Round in 1995.¹⁶⁹ The GATS, along with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), created a new framework for international trade.¹⁷⁰ Instead of viewing trade through the lens of goods alone, the new WTO framework categorizes trade into three distinct categories: goods, services, and intellectual property.¹⁷¹

To understand trade in services, one must assess the four modes of supply created by GATS, a framework created to categorize different types of services.¹⁷² The first mode, *cross-border*, consists of "services supplied from the territory of one Member into the territory of another."¹⁷³ *Consumption abroad* includes "services supplied in the territory of one Member to the consumers of another."¹⁷⁴ *Commercial pressure*, the third mode of supply created by GATS,

¹⁶⁵ Donald Trump (@realDonaldTrump), TWITTER (July 26, 2019, 11:29 AM), <https://twitter.com/realdonaldtrump/status/1154821023197474817?lang=en>.

¹⁶⁶ McBride & Chatzky, *supra* note 162.

¹⁶⁷ JOOST H.B. PAUWELYN, ANDREW T. GUZMAN & JENNIFER A. HILLMAN, INTERNATIONAL TRADE LAW 661 (3d ed. 2016).

¹⁶⁸ *See id.* at 661 (explaining how "[i]nterest in liberalizing trade in services (think of, for example, banking, telecommunication, or insurance services) began to grow in the late 1980s."); Jack W. Flader, Jr., *A Call for a General Agreement on Trade in Services*, 3 TRANSNAT'L LAW 661, 664–66 (1990).

¹⁶⁹ Muhammad Ijaz Latif, *Uruguay Round of GATT and Establishment of the WTO*, 65, no. 1 PAK. HORIZON 53, 54 (2012).

¹⁷⁰ PAUWELYN, GUZMAN & HILLMAN, *supra* note 167, at 661.

¹⁷¹ *Id.*

¹⁷² Philip Chang, Guy Karsenty, Aaditya Mattoo & Jürgen Richtering, *GATS, the Modes of Supply and Statistics on Trade in Services*, 33(3) J. WORLD TRADE 93, 96 (1999).

¹⁷³ PAUWELYN, GUZMAN & HILLMAN, *supra* note 167, at 666.

¹⁷⁴ *Id.*

involves “services supplied through any type of business or professional establishment of one Member in the territory of another.”¹⁷⁵ Finally, the fourth mode, *presence of natural persons*, regards “services supplied by nationals of one Member in the territory of another.”¹⁷⁶

Academic espionage falls into the fourth mode of presence of natural persons established by GATS. The presence of natural persons “could involve persons who are themselves service suppliers, and present on a temporary basis in foreign markets for the supply of their services, such as foreign consultants or the employees of foreign services suppliers sent abroad to fulfil a service contract.”¹⁷⁷ The work product of faculty and researchers involves services of many types. From research conducted in labs—like the work done by neuroscientist Li Xiao-Jiang—to developments in technology and advancements made in medicine, the services produced by researchers within academia are numerous.¹⁷⁸

Academic espionage is most accurately categorized as trade in services; therefore, the practice should be governed by GATS law through the WTO. However, as academic espionage continues to evolve as an emerging threat in U.S. academia, and as members of Congress continue to highlight intellectual property concerns related to the phenomenon, the practice of academic espionage should be regulated through law on intellectual property rights. In addition to GATS, the WTO 1994 Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) was created to address the intellectual property nature of globalized trade.¹⁷⁹ The TRIPS Agreement addresses trademarks, copyright issues, patents, and other issues related to intellectual property rights.¹⁸⁰ The TRIPS agreement specifically created a framework for dealing with intellectual property and designated a dispute resolution system within the WTO.¹⁸¹

F. Applying International Trade Law to Academic Espionage

State actors should regulate academic espionage using international trade law. Institutions of higher learning produce sensitive data, participate in global research projects, engage students from around the world, and operate in conjunction with government officials and intelligence officers.¹⁸² The services produced

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Chang, Karsenty, Mattoo & Richter, *supra* note 172, at 96.

¹⁷⁸ Cohen, *supra* note 1.

¹⁷⁹ Donald P. Harris, *The Power of Ideas: The Declaration of Patent Protection and New Approaches to International Intellectual Property Lawmaking*, 6 U.C. IRVINE L. REV. 343, 344 (2016).

¹⁸⁰ PAUWELYN, GUZMAN & HILLMAN, *supra* note 167, at 661.

¹⁸¹ *Id.*

¹⁸² Mack DeGeurin, *Hackers Targeted the Admissions and Enrollment Departments at 62 Universities and Created Thousands of Fake Student Accounts*, INSIDER (July 18, 2019, 1:24 PM), <https://www.insider.com/hackers-target-62-us-universities-through-flaw-in-enrollment->

by colleges and universities bring the work product of institutions of higher learning within the broad definition of trade created by international law.¹⁸³

A need for clear regulation of academic espionage exists on college campuses and within Congress. The livelihoods of researchers and the protection of U.S. universities depend on it. With little guidance given by Congress or the executive branch, university administrators and researchers have difficulty approaching the perplexing issue of academic espionage.¹⁸⁴ The current state of the law is the reason behind sudden firings of researchers like Li Xiao-Jiang on campuses like Emory University in Atlanta.¹⁸⁵ Current legislative proposals either stymie university efforts to create diverse campuses, or prove to be underinclusive in combatting the complexities posed by academic espionage.¹⁸⁶ International trade law would provide clarity and useful enforcement mechanisms to bolster efforts to keep campuses safe.

Academic espionage can only be regulated at the fringes of international trade law, for no unified doctrine, treaty, or agreement exists to readily monitor the threat. To effectively regulate academic espionage, Congress must assess the many angles of the threat and survey relevant international agreements and laws. First, it is worth noting that college campuses produce many of the products and activities deemed as exports by the Commerce Control List. The Commerce Control List (CCL) denotes the following relevant categories as constituting an export subject to particular regulation: electronics, computers, telecommunications, and information security.¹⁸⁷ The United States higher education community stands at the forefront of the production, creation, and design of materials related to electronics and computers.¹⁸⁸ Further, and perhaps most importantly, college campuses are also encompassed by telecommunications activities and pursuits entrenched in information security. American institutions function as gateways to information on national security, and the products and services created by

software-2019-7 (noting that “the Department of Justice indicted nine Iranian nationals after it was revealed that they had launched a state sponsored cyberattack against universities aimed at stealing sensitive research”).

¹⁸³ See *generally Compliance Matrix*, HIGHER EDUC. COMPLIANCE ALL. (Oct. 22, 2019), <https://www.higheredcompliance.org/compliance-matrix/> (noting the many services and activities conducted by U.S. universities).

¹⁸⁴ Lees, *supra* note 85.

¹⁸⁵ See Cohen, *supra* note 1 (discussing the firing of a Chinese researcher, Li Xiao-Jiang, from Emory University in Atlanta).

¹⁸⁶ See Redden, *supra* note 19 (discussing the firing of Dr. Li Xiao-Jiang and other actions taken by universities against researchers); Hamilton, *supra* note 20 (explaining concerns related to racial profiling caused by efforts to limit academic espionage).

¹⁸⁷ BUREAU OF INDUS. AND SEC., *supra* note 148.

¹⁸⁸ *The Best Engineering Technology Programs in the World Today*, BEST SCH. (July 27, 2019), <https://thebestschools.org/features/best-engineering-technology-computer-sciences-programs-in-world-today/>.

United States institutions allow the activities to be pulled under export law.¹⁸⁹ Exports are no longer limited to tangible goods, food, and products for mass production.¹⁹⁰ Today, abstract activities and even information are viewed as exports.¹⁹¹ Viewing academic espionage through the lens of an export will allow the United States to narrow the definition of the activity and further regulate the practice.

In addition to viewing the practice of academic espionage through the lens of export law, relying on the treaties, international agreements, and partnerships the United States is already member to will bolster efforts to combat threats posed by academic espionage. Despite President Trump's recent disdain towards the WTO and its rules related to China (or perhaps because of them), the WTO should prioritize finding effective solutions to issues raised by academic espionage through its membership and unique position to create rules on international trade.¹⁹² The WTO emphasizes the regulation of various goods, continues to drive significant conversations on agriculture, regulates services, prioritizes issues related to intellectual property, and more. If the WTO approached the issue of academic espionage, it would not only assist the member countries interested in sovereignty and security, but it would further the purpose of the organization.¹⁹³ Since the 1940s, the WTO has negotiated agreements and policies related to trade barriers.¹⁹⁴ The United States and the WTO alike should value free sharing of information, furthering the marketplace of ideas, and promoting free trade

¹⁸⁹ U. S. DEP'T OF JUST.: FED. BUREAU OF INVESTIGATION, HIGHER EDUCATION AND NATIONAL SECURITY: THE TARGETING OF SENSITIVE, PROPRIETARY AND CLASSIFIED INFORMATION ON CAMPUSES OF HIGHER EDUCATION 3–4 (2011), <https://www.fbi.gov/file-repository/higher-education-national-security.pdf>.

¹⁹⁰ *U.S. Export Controls on Transferring Technology, Commodities and Software*, COLUM. UNIV. (2019), <https://finance.columbia.edu/content/us-export-controls-transferring-technology-commodities-and-software-gs>.

¹⁹¹ *Id.*

¹⁹² Ana Swanson, *Trump Presses World Trade Organization on China*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/us/politics/trump-wto-china.html>.

¹⁹³ *See Overview*, WORLD TRADE ORG., <https://www.wto.org/english/thewto/whatis/wtosta.htm> (last visited Aug. 27, 2020) (explaining that, “[t]he WTO’s founding and guiding principles remain the pursuit of open borders, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities.” Prioritizing academic espionage would further the WTO’s transparency and non-discriminatory mission.).

¹⁹⁴ *Doha Round: What are They Negotiating?*, WORLD TRADE ORG., <https://www.wto.org/english/tratop/dda/update.htm> (last visited Aug. 27, 2020). The Doha Development Agenda (Doha) was launched in 2001. Despite struggles to reach a finalized deal on controversial issues such as agriculture, Doha stands as an additional forum which could provide an environment for discussion related to international regulation of academic espionage. *See also* James McBride, *The State of U.S. Trade Policy*, COUNCIL ON FOREIGN REL. (Jan. 31, 2017), <https://www.cfr.org/background/state-us-trade-policy> (explaining the history of U.S. trade policy).

across international borders. Were the United States to spearhead an international effort to combat threats posed by academic espionage through the effective medium of the WTO, trade would flourish in academic communities in a manner unrestricted by spying. The trade and services produced by United States institutions must be regulated and protected, and the free flow of information and goods will occur more effectively with international monitoring of espionage in academic settings.

Of course, international regulation of academic espionage will need to draw strength upon individual, state-to-state relationships. The state of relations between the United States and China is ever-changing, and new developments in the U.S.-China trade war arise virtually every week.¹⁹⁵ As stated earlier, the practice of espionage is least restricted, and almost encouraged, during times of war.¹⁹⁶ Although the current trade war does not include weapons and soldiers, convincing the United States and China to completely eliminate actions related to academic espionage will inevitably prove to be an arduous task. However, the challenge does not mean the two countries should not try. Academic pursuits encompass the livelihood of researchers and the activities and dreams of students. Universities often serve as the bedrock of the communities in which they reside, and the discoveries and work produced by colleges impact the lives of virtually every citizen around the globe. Protecting the freedom and environments of open institutions is a noble effort that should be prioritized over ambitions to out-manuever other countries in the pursuit of economic dominance.

G. Why United States Law is Underinclusive and Ineffective in Solving Issues Raised by Academic Espionage

Current United States law is inadequate to solve the issues created by the practice of academic espionage. Bills discussed on the House floor today are either unduly aggressive, stymying open and collaborative campuses, or lacking in enforcement mechanisms to eradicate the threats posed by academic espionage in a comprehensive manner.¹⁹⁷ Neither a defensive domestic approach that responds to new threats daily nor an offensive approach that offends American values of free and open learning environments will best address the complex challenges raised by academic espionage. Further, international regulation can serve as a beneficial source of information and medium of enforcement on

¹⁹⁵ Shi Jiangtao & Nectar Gan, *Hands Tied by Hong Kong Democracy Act, Donald Trump Sends Signal to Beijing on Trade*, S. CHINA MORNING POST (Nov. 28, 2019, 11:30 PM), <https://www.scmp.com/news/china/diplomacy/article/3039826/hands-tied-hong-kong-democracy-act-donald-trump-sends-signal> (commenting on the often unstable relationship between the United States and China regarding conversations on trade).

¹⁹⁶ Neil J. Beck, *Espionage and the Law of War*, 29 AM. INTEL. J. 126, 126 (2011).

¹⁹⁷ Fischer, *supra* note 16; Hamilton, *supra* note 20.

matters of international trade and other contexts where transnational interactions abound.

The Supreme Court of the United States stated,

[i]nternational law is part of American law, and must be ascertained and administered by the courts of justice For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.¹⁹⁸

Academic espionage is intrinsically international in nature. To the extent that United States law will inevitably miss certain risks posed by academic espionage in efforts to curb threats posed by the practice, international law is capable of filling in the gaps. Current United States legislation only focuses on internal practices.¹⁹⁹ Producing an international framework to address international espionage is not only beneficial, it is necessary to address the issue with the level of collaboration and specificity it warrants.

Regardless of the specifics or the medium through which an international agreement is achieved, an agreement of some sort is needed. Implementing United States law alone will create an exclusively reactionary model of legislation. Current legislation produced by the United States either punishes researchers for certain activities, limits visas for students from other countries seeking to gain an education and produce research in the United States or pursues a variety of other measures that seek to punish instead of preemptively protect. Further, by relying on U.S. data and sentiment alone, the United States places itself in a position where the country must play catch-up in discovering new methods, both technological and administrative, to best combat threats posed by academic espionage.

IV. CONCLUSION

The United States will face tough policy choices as more professors, researchers, students, and individuals like Li Xiao-Jiang are brought under increased scrutiny for espionage-related activities they may not even be participating in.²⁰⁰ Academic espionage is a pervasive activity, yet an activity that is hard to define,

¹⁹⁸ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁹⁹ *Scholars or Spies: Foreign Plots Targeting America's Research and Development: Joint Hearing Before the Subcomm. on Oversight and the H. Comm. on Science, Space, and Technology*, 115th Cong. 3 (2018).

²⁰⁰ Lu, *supra* note 4.

monitor, and combat.²⁰¹ Regardless of academic espionage's definition, its international regulation is of utmost importance. As the trade war between China and the United States continues to persist, both countries are likely to engage in any practice that could provide a competitive edge in economics or academia.²⁰² The two countries are in an all-out battle to achieve dominance, and either country would welcome an opportunity to garner inside information related to national security.²⁰³ Legislatively, members of the United States House of Representatives will continue to face challenges in drafting solutions that are encompassing enough to thwart real threats posed by academic espionage-related activities, while also finding a solution that does not limit the free and open environments that the United States prides itself in creating throughout the nation's campuses.²⁰⁴

In many ways, the United States alone cannot tackle the complex challenges posed by academic espionage. Regardless of the approach various pieces of legislation may take, purely domestic law will allow certain outcomes of the complex problem to pervade throughout academia unregulated. By monitoring and regulating academic espionage through international regulation, the United States, along with countries around the globe, will know how to address the problem in a balanced, intelligent, and comprehensive manner. In doing so, the best way to address issues created by academic espionage is to view the issue through the lens of international trade. Academic institutions are living, breathing communities where faculty and students conduct activities that span every topical area available for study. Campuses send researchers around the globe to gather information related to science, technology, communication, and more.²⁰⁵ College campuses provide services and produce work products for the communities in which they reside as well as communities around the world. Trade-based activities conducted on college campuses warrant a trade-based regulatory approach.

A variety of international institutions and agreements stand ready to assist in the international regulation of academic espionage. However, international regulation of academic espionage is difficult due to the fact that the practice is regulated at the fringes of international law. Simply asking which mode of regulation is best may be a tough question to answer. A better question, perhaps, is whether academic espionage should be regulated through international trade law at all. After answering that question in the affirmative, it is important to construct a regulatory framework that is flexible enough to continue to regulate the complex issue of academic espionage, and strict enough to provide enforceable

²⁰¹ Mitchell, *supra* note 14.

²⁰² Shan, *supra* note 17.

²⁰³ *Id.*

²⁰⁴ Redden, *supra* note 19; Grubbs, *supra* note 83, at 236–37.

²⁰⁵ Barrett, *supra* note 133, at 4.

weight behind the laws seeking to thwart the dangerous outcomes the practice creates.

Regulating academic espionage is no easy task, nor is defining or even detecting the practice. While espionage itself has existed for centuries, espionage on college campus is a practice that researchers and lawmakers are only beginning to track.²⁰⁶ Agents of academic espionage seek more than mere academic information. Because U.S. universities encompass large amounts of information related to economics, trade, and national security, they are appealing targets for anyone seeking to advance in the global trade competition. Public universities are instruments of state government themselves, and the global community could benefit from a collective, international approach to this emerging threat. Although regulating threats posed by academic espionage will not be easy, resorting to international trade law is necessary for any country interested in maintaining security within higher education.

²⁰⁶ BUDIANSKY, *supra* note 115; *Hearings, supra* note 34 (statement of FBI Director Wray).