

DECOUPLING BY DISCRIMINATION? STRATEGIC COMPETITION AND THE LIMITS OF TRADE LAW

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I. INTRODUCTION

Writing in 1978, Robert Gilpin cautioned that “[t]he ironic consequence of the reintegration of the major communist economies into the world economy may well be greater state intervention in the market economies rather than the lessening of state intervention in the communist economies.”¹ This alert proved prescient as governments in developed economies, led by the United States (U.S.) and the European Union (EU), increasingly react to strategic competition with China by resorting to economic interventionism seeking to reshape the geographical distribution of global economic activity. These policies are efforts to maintain or recover autonomy, and sometimes leadership, in economic sectors the U.S. and the EU consider strategic or critical to their security. For these reasons, these are policies with a geoeconomic orientation which challenge the trade liberalization rationale that inspires the existing trade regime.

In a belated vindication of Gilpin’s claim, developed economies now take a page out of the playbook used by China, whose rise has itself been supported by policies of a geoeconomic nature. The present Article examines measures by the U.S. and the EU that seek to induce market actors to rethink their exposure to the Chinese economy, in such a way that supply chains become less reliant on China. Many such policies encourage firms to decouple from China by means of provisions that discriminate against Chinese competitors, either in the form of proactive incentives—such as subsidies to domestic actors and certain foreign producers—or defensive measures in the shape of, for instance, curbs on exports to Chinese companies.

On August 9, 2022, President Joe Biden signed into law the CHIPS and Science Act, which offers subsidies for semiconductor manufacturing in the United States to domestic and some foreign companies—but likely not to Chinese companies.² Other sectors are also being incentivized to increase local production in the United States, such as the solar panel industry,³ a sector where China currently leads. While the United States might be pioneering the response to China, it is not the only developed economy treading this path. As

¹ Robert Gilpin, *Economic Interdependence and National Security in Historical Perspective*, in *ECONOMIC ISSUES AND NATIONAL SECURITY* 19, 62 (Klaus Knorr & Frank N. Trager, eds., 1978).

² CHIPS Act of 2022, Pub. L. No. 117–167, 136 Stat. 1372; *see also* Press Release, White House, Fact Sheet: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China (Aug. 9, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china>.

³ Press Release, U.S. Dep’t of Energy, President Biden Invokes Defense Production Act to Accelerate Domestic Manufacturing of Clean Energy (June 6, 2022), <https://www.energy.gov/articles/president-biden-invokes-defense-production-act-accelerate-domestic-manufacturing-clean>.

a component of its policy to attain “strategic autonomy,”⁴ the EU’s 2020 industrial strategy states that Brussels will look into “reducing dependence on others for things we need the most.”⁵ Furthermore, as a byproduct of its repositioning in the wake of the conflict in Ukraine, the EU vows to become firmer in doing the “home work” of strengthening its internal resilience with respect to China.⁶

By resorting to such actions, governments in developed countries intervene in the economic domain to spur domestic production, diversify supply chains, and preserve domestic capabilities from being acquired by certain foreign actors, Chinese actors in particular. These policies suggest not a world of autarky, but a state-induced redistribution of global economic activity in which China loses part of the centrality it achieved following more than three decades of market-led economic interdependence enabled by the current trade regime.⁷ This does not necessarily imply a trade-restrictive environment but instead one of trade-distortion where governments intervene to disadvantage a strategic competitor while favoring like-minded economies, in a context of potential club regimes.⁸ While the U.S. administration proclaims that tools such as “ally and friend-shoring” are part of a strategy to strengthen supply chain resilience,⁹ Brussels advocates that in “areas of common dependencies

⁴ President Charles Michel, Eur. Council, Strategic Autonomy for Europe: The Aim of Our Generation, Remarks to the Bruegel Think Tank (Sept. 28, 2020), <https://www.consilium.europa.eu/de/press/press-releases/2020/09/28/1-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel>.

⁵ *Commission Communication on a New Industrial Strategy for Europe*, at 13, COM (2020) 102 final (Mar. 10, 2020). While this Article focuses on the recent policies of the U.S. and the EU, other developed countries are also starting to adopt measures of a similar nature, such as Japan and Australia.

⁶ Josep Borrell, *On China’s Choices and Responsibilities*, EUROPEAN UNION EXTERNAL ACTION: A WINDOW ON THE WORLD - BLOG BY HR/VP JOSEP BORRELL (Apr. 6, 2022), https://www.eeas.europa.eu/eeas/china%E2%80%99s-choices-and-responsibilities_en.

⁷ China is currently the largest trade partner of over 120 countries. See Wang Xiaolong, *China: A Development Partner to the Pacific Region*, MINISTRY OF FOREIGN AFFS. OF CHINA (Mar. 11, 2022), www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/202203/t20220311_10650946.html.

⁸ Such as “a common market among democracies.” Adam Posen, *The End of Globalization? What Russia’s War in Ukraine Means for the World Economy*, FOREIGN AFFS. (Mar. 17, 2022), <https://www.foreignaffairs.com/articles/world/2022-03-17/end-globalization>; see also Michael Beckley, *Enemies of My Enemy: How Fear of China Is Forging a New World Order*, FOREIGN AFFS., March/April 2022, at 68; Heather Scoffield, *Chrystia Freeland Has a Plan to Promote Democracy — And It Won’t Be Cheap*, TORONTO STAR (Oct. 12, 2022), <https://www.thestar.com/politics/political-opinion/2022/10/12/chrystia-freeland-has-a-plan-to-promote-democracy-and-it-wont-be-cheap.html>.

⁹ WHITE HOUSE, BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH - 100-DAY REVIEWS UNDER EXECUTIVE ORDER 14017 JUNE 2021 - A REPORT BY THE WHITE HOUSE 8 (2021).

with its partners, the EU may choose to pool resources and build stronger and more diverse alternative supply chains with our closest allies and partners.”¹⁰

Measures by governments in the U.S. and the EU that discriminate against Chinese products and producers are consistent with a geoeconomic logic, and this Article offers an analytical framework around the concept of geoeconomics that gives coherent meaning to these trade policies. But to what extent do existing trade rules allow space to adopt such discriminatory policies? What should be expected when all major economies—not only China, but now also the U.S. and the EU—resort to policies of a geoeconomic orientation?

The present Article addresses these questions as a contribution to understand how the trade regime can be impacted by the consolidation of strategic competition with China.

The Article argues that the growing number of measures of geoeconomic orientation by the U.S. and the EU points to a solid trend where discrimination, particularly to the detriment of China, is often present. Yet, as discussed in the Article, the space to accommodate these policies within the trade regime is limited. Among other reasons, discriminatory policies of a geoeconomic orientation are hard to fit into the existing trade exceptions.¹¹ This dynamic, in turn, brings about a dilemma that tests the limits of trade law: although the geoeconomic policies by developed economies are likely to clash against the existing trade rules, they are expected not only to persist but to expand as well, since they are consistent with a geoeconomic rationale.¹²

This dilemma can affect the trade regime going forward. The Article points out that the embrace of geoeconomic policies by the major global traders might impact discussions on both substantive trade rules and institutional aspects of the WTO reform.¹³ Debates on substantive rules such as those on subsidies have focused largely on the capacity of the trade regime to accommodate China’s state-centric economic model.¹⁴ Yet, recent developments in

¹⁰ *Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe’s Recovery*, at 13, COM (2021) 350 final (May 5, 2021).

¹¹ See Julian Arato et al., *The Perils of Pandemic Exceptionalism*, 114 AM. J. INT’L L. 627 (2020).

¹² This Article does not disregard that, aside from geoeconomic factors, other concerns are also pushing for changes in trade regulation, among other factors the transition to cleaner energy sources and the reversal of job losses in developed economies. For the multiplicity of narratives underpinning debates and policies in this area, see ANTHEA ROBERTS & NICOLAS LAMP, *SIX FACES OF GLOBALIZATION: WHO WINS, WHO LOSES AND WHY IT MATTERS* (2021).

¹³ World Trade Organization, MC12 Outcome Document, ¶ 3, WTO Doc. WT/MIN(22)/24 (June 22, 2022).

¹⁴ For an overview of the different perspectives regarding the capacity of the existing trade rules to accommodate China’s economic model, see Mark Wu, *‘The China, Inc.’ Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 269 (2016); Petros C. Mavroidis & André Sapir, *China and the World Trade Organisation: Towards a Better Fit* 31 (Bruegel, Working Paper No. 6, 2019), https://www.bruegel.org/sites/default/files/wp_attachments/WP-2019-06-110619_.pdf; U.S. *Tools to Address Chinese Market*

the U.S. and the EU introduce a situation in which, to different degrees, the largest trading actors resort to policies marked by discrimination and increased state activism—and this is likely to alter the terms of the debates on these rules. On the institutional side, the increased use of geoeconomic policies—by the United States in particular—has the potential to bifurcate trade dispute settlement. Disputes that China might want to initiate challenging U.S. geoeconomic measures are likely to remain formally unsolved: in view of the current paralysis of the WTO Appellate Body (AB),¹⁵ a WTO Member that decides to appeal a panel decision is virtually “appealing into the void,” due to the current lack of a functioning instance to rule on the appeal. The United States is very likely to “appeal into the void” panel reports that rule in favor of China, thus depriving panel decisions of multilateral enforceability under the WTO agreements. Conversely, potential disputes involving the United States and friendly countries are likely to be managed through informal mechanisms of negotiation, as suggested by consultations established between Washington and the EU, Korea, and Japan to deal with recent U.S. geoeconomic measures on semiconductors and batteries for electric vehicles.

Following this introduction, Part II lays out a geoeconomic conceptual framework that gives meaning to U.S. and EU reactions to strategic competition with China. Part III closes in on how this reaction takes shape, describing a number of recent geoeconomic policies in the U.S. and the EU. This overview is meant to show that the embrace of policies with a geoeconomic orientation by the U.S. and the EU points to an actual trend driving regulation of some economic sectors away from the market-orientation that has prevailed until recently. Part IV then looks at these policies from the perspective of the trade rules to highlight the challenges of reconciling the former within the limits of the latter. This section also shows that a trade law analysis of geoeconomic policies cannot be circumscribed to the interpretation of the national

Distortions: Hearing on U.S. Tools to Address Chinese Market Distortions Before the U.S.-China Econ. & Rev. Sec. Comm'n, 115th Cong. (2018) (testimony of Jennifer Hillman); Chad P. Bown & Jennifer A. Hillman, *WTO'ing a Resolution to the China Subsidy Problem*, 22 J. INT'L ECON. L. 557 (2019).

¹⁵ The AB has not been in operation since December 10, 2019, when it was reduced to one member only, thereby deprived of the minimum three members needed to hear new appeals. Press Release, World Trade Organization, Members Urge Continued Engagement on Resolving Appellate Body Issues (Dec. 18, 2019), https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm. This situation comes as a result of the resistance by the United States to agree on launching selection processes to recruit new adjudicators. According to the WTO Dispute Settlement Understanding, if a disputing party decides to file an appeal the panel report is not adopted until “after completion of the appeal.” Understanding on Rules and Procedures Governing the Settlement of Disputes art. 16(4), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 [hereinafter DSU]. In view of the paralysis of the AB, a request for appeal amounts to a suspension of the adoption of panel reports for indefinite time.

security exceptions, as has so often been the case in literature. Rather, international trade lawyers need to also look to the application of general exceptions as well as substantive trade rules that might be relevant to make sense of geoeconomic policies, such as the disciplines on subsidies. Part V draws attention to the ways in which this context might impact the debate on WTO reform, while the last section concludes.

II. GEOECONOMICS AS AN ANALYTICAL FRAMEWORK:
ADDRESSING SECURITY EXTERNALITIES EMERGING FROM MARKET-LED
ECONOMIC INTERDEPENDENCE

The existing trade regime can be characterized by its unprecedented levels of “trade liberalization and strengthened rules.”¹⁶ Trade rules, particularly those comprising the WTO covered agreements, enshrine legal commitments whereby states limit trade-distorting government intervention in the economic domain. Limited state interference in trade relations, in turn, provides market actors with the conditions to allocate economic resources following efficiency considerations—for example, by enabling businesses to locate manufacturing where it is more cost-efficient and not where there are more government incentives.

Trade liberalization is arguably more visible in rules that reduce import tariffs. But it is also present in subsidies’ disciplines, under which states agree to limit their capacity to financially support local producers. Non-discrimination commitments, such as the national treatment and the “most favoured nation” rules, also support liberalization because they ensure equality of “competitive conditions for imported products in relation to domestic products”¹⁷ as well as the equality of competitive opportunities among foreign suppliers in a given market.¹⁸

Current trade rules such as these are inspired by a liberal logic¹⁹ for two reasons: first, their premise is that market actors should decide where economic activity takes place according to efficiency considerations; second, by keeping states at arms’ length, trade rules comprise a “de-politicized”²⁰

¹⁶ World Trade Organization, Marrakesh Ministerial Declaration of 15 April 1994, 33 I.L.M. 1263 (1994).

¹⁷ Appellate Body Report, *Japan – Alcoholic Beverages*, at 16, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Oct. 4, 1994).

¹⁸ Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.87, WTO Docs. WT/DS400/AB/R & WT/DS401/AB/R (adopted June 18, 2014).

¹⁹ Anthea Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT’L ECON. L. 655 (2019).

²⁰ John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT’L ECON. L. 1 (1998).

regulatory space where security and strategic considerations are relegated to exceptions. The rule is the “principle of liberalization of trade flows.”²¹

Conversely, the trade policy developments described in this Article are driven by a different logic,²² one that challenges the liberal orientation shaping trade relations for the past decades. This Article argues that these developments make sense from a geoeconomic perspective, and the present section proposes a geoeconomic analytical framework that gives meaning to this approach to trade regulation.

The geoeconomic framework assumes that the economic realm is an arena where states compete. This contrasts with the liberal paradigm underlying the trade regime, which ascribes economic competition predominantly to market actors.²³ From a geoeconomic perspective, it matters for states which economies detain which technologies, where products are manufactured, or from where inputs are sourced.²⁴

Economic competition among states is driven by strategic or security considerations, and not necessarily by profit-seeking. States consider in their strategic or security interest that certain capabilities are available under their jurisdiction (e.g., the know-how and the infrastructure required to manufacture semiconductors or pharmaceuticals) or whether they are able to access certain capabilities from reliable sources (e.g., to import raw materials from trade partners that will not “weaponize” the dependence on the supply of such inputs). Evidence of the geoeconomic attitude towards trade includes recent official surveys in which states seek to have a better grasp on how dependent they are on trade with foreign partners.²⁵ Additional examples are discussed in Part III, which presents recent policies adopted by the U.S. and the EU with the purpose of attaining geoeconomic goals such as local manufacturing.

Therefore, from a geoeconomic perspective, trade is not approached nor assessed purely from its economic aspects. Instead, it is viewed as a potential source of vulnerability, since commercial transactions might ultimately lead to the transfer of capabilities to trade partners. For instance, relocation of manufacturing from one economy to another (for cost-efficiency reasons) might

²¹ Panel Report, *United States — Tariff Measures On Certain Goods From China*, ¶ 7.160 WTO Doc. WT/DS543/R (not yet adopted) [hereinafter *U.S. — Tariff Measures*].

²² Henrique Choer Moraes, *The Changing Logic of International Economic Law*, 27 *UCLA J. INT'L L. & FOREIGN AFFS.* (forthcoming 2023).

²³ Edward Luttwak, *From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce*, 20 *NAT'L INT.* 17, 22–23 (1990); Barry Buzan & George Lawson, *Capitalism and the Emergent World Order*, 90 *INT'L AFFS.* 1, 86 (2014); Samuel Huntington, *Why International Primacy Matters*, 17 *INT'L SEC.* 4, 70 (1993).

²⁴ Rana Foroohar, *Of Computer Chips and Potato Chips - In Today's World, It Matters What a Country Makes at Home*, *FIN. TIMES* (Oct. 24, 2022), <https://www.ft.com/content/70577a5f-b231-44ba-866d-8ffc36d3c8fc>.

²⁵ See WHITE HOUSE, *supra* note 9; see also *Commission Staff Working Document: EU Strategic Dependencies and Capacities: Second Stage of In-Depth Reviews*, SWD (2022) 41 final (Feb. 22, 2022).

ultimately transfer manufacturing capability to the latter country. This phenomenon was brought home recently by the global shortage of face masks and COVID-19 protection equipment, whose production was concentrated in a small number of countries. When the trade partner benefitting from this transfer of capabilities is a strategic or security competitor, trade becomes the source of “security externalities”²⁶—that is, there are “security consequences arising as a by-product of economic interaction.”²⁷

From a geoeconomic point of view, trade becomes more or less a source of vulnerability “depending upon whether interaction involves allies or adversaries.”²⁸ The identity of trade partners might matter. This explains the context behind the introduction of vocabulary such as “allies” and “adversaries” into trade relations, as witnessed by recent U.S. and EU policy statements presented in the introduction to this Article. Regulations that discriminate against strategic or security competitors—but favor allies or partners considered reliable—are consistent with the geoeconomic framework.

For the reasons laid out above, viewed from a geoeconomic framework, states are expected to actively seek to influence trade relations to pursue goals such as local manufacturing (“reshoring”). Yet, when attempting to influence the location of economic activity, states do not necessarily pursue autarky, but instead try to shape the allocation of resources in such a way that they preserve a desired level of policy autonomy. Geoeconomic measures do not equate to “de-globalization,” but to some level of “re-globalization,” ideally to favor trade with reliable partners.

The elements laid out above make clear how much the geoeconomic framework departs from the liberal logic inspiring the current trade regime. But why are the U.S. and the EU abandoning the liberal approach to trade policy and instead embracing geoeconomic policies, particularly with China in mind?

To understand how this dynamic came about, the starting point is the realization that trade and investment liberalization might ultimately lead to the relocation of economic capabilities towards economies where production is more efficient.²⁹ China has been successful in taking advantage of this dynamic. Its ascent to a central position in the global economy results in large

²⁶ JOANNE GOWA, *ALLIES, ADVERSARIES AND INTERNATIONAL TRADE* 38 (1994).

²⁷ WILLIAM J. NORRIS, *CHINESE ECONOMIC STATECRAFT: COMMERCIAL ACTORS, GRAND STRATEGY, AND STATE CONTROL* 13 (2016).

²⁸ Michael Mastanduno, *Do Relative Gains Matter? America's Response to Japanese Industrial Policy*, 16 INT'L SEC. 73, 79 (1991).

²⁹ ROBERT GILPIN, *U.S. POWER & THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* 44–45 (1975). One evidence that trade-enabled transfer of capabilities is likely to occur is the fact that, during the negotiation of the Uruguay Round of trade liberalization, businesses in the U.S., EU, and Japan lobbied their governments to incorporate strict disciplines on intellectual property protection, which became the WTO TRIPS Agreement. See PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM* 119 (2002).

part from the combination of two factors: (a) the trade liberalization enabled by legal commitments such as those found in the WTO rules, which provided the underlying conditions for a significant relocation of economic activity to China,³⁰ and (b) active government intervention which enabled China to absorb economic capabilities over the years from the many market actors which outsourced production to its territory.³¹

China adopted a range of geoeconomic measures to turn the relocation of production into a process of indigenous development of economic capabilities. From a legal perspective, such measures took the shape, among others, of discriminatory regulations against foreign competitors³² and by the embrace of an expanded notion of national security, which kept certain economic sectors in China outside the reach and control of foreign companies.³³ More recently, China's current leadership hints at policies that might also entail some level of decoupling from foreign economies.³⁴

As a consequence of its geoeconomic strategy, over the years Chinese companies have been able to displace incumbents and become leaders in a wide range of economic sectors, from pharmaceuticals and medical products to solar panels and high-speed rail.³⁵

³⁰ Linda Weiss, *Re-Emergence of Great Power Conflict and US Economic Statecraft*, 20 *WORLD TRADE REV.* 152, 159 (2021).

³¹ The U.S.-China Security Review Commission alerted already, in 2002, that "China has well-established policies and broad-based program (including both legal to illegal methods) to acquire advanced Western technologies for its industrial development, military programs, espionage capability and intelligence gathering and surveillance." See U.S.-China Sec. Rev. Comm'n, Report to Congress: The National Security Implications of the Economic Relationship Between the United States and China 179 (2002). Neither of the two factors listed deny the reality that moving production to China resulted in significant benefits for foreign companies nor that increased Chinese presence in world trade contributed to social and economic gains for the world economy.

³² For examples in the automotive sector, see Seung-Youn Oh, *China's Race to the Top: Regional and Global Implications of China's Industrial Policy*, 20 *WORLD TRADE REV.* 169 (2021).

³³ Katja Drinhausen & Helena Legarda, "Comprehensive National Security" *Unleashed*, *MERICCS CHINA MONITOR* 14 (Sept. 15, 2022), https://mericcs.org/sites/default/files/2022-09/Merics%20China%20Monitor%2075%20National%20Security_final.pdf; Weihuan Zhou et al., *Trade vs. Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses from Defensive to Proactive*, *WORLD TRADE REV.: FIRSTVIEW* 1, 12–13 (2022). As pointed out by Rush Doshi, accession to the WTO was hailed by Chinese leadership as a win for national security. RUSH DOSHI, *THE LONG GAME: CHINA'S GRAND STRATEGY TO DISPLACE AMERICAN ORDER* 148 (2021).

³⁴ Julian Gewirtz, *The Chinese Reassessment of Interdependence*, *CHINA LEADERSHIP MONITOR* (June 1, 2020), <https://www.prcleader.org/gewirtz>; James Kynge et al., *Fortress China: Xi Jinping's Plan for Economic Independence*, *FIN. TIMES* (Sept. 15, 2022), <https://www.ft.com/content/0496b125-7760-41ba-8895-8358a7f24685>.

³⁵ JONATHAN HOLSLAG, *THE SILK ROAD TRAP: HOW CHINA'S TRADE AMBITIONS CHALLENGE EUROPE* 97–136 (2019). The transfer of capabilities—and the security externalities emerging therefrom—has been detected even in the evolution of the Chinese

Initially, China was perceived predominantly as an economic competitor, to which developed economies could respond by resorting to existing trade rules. This reaction manifested itself, for example, in the consideration of China as a “non-market economy” for the purposes of trade defense remedies.³⁶ Developed countries also sought to persuade China to agree to common parameters for trade-distorting state subsidies, launching initiatives in the areas of steel excess capacity³⁷ and export credit,³⁸ both of which, though, resulted in disagreements among the participant states. These efforts were also frustrated by the narrow interpretation adopted by the WTO Appellate Body on the concept of “public body” set out in the Agreement on Subsidies and Countervailing Measures,³⁹ which largely excluded Chinese state-owned enterprises from the scope of subsidies’ regulations.⁴⁰ According to Katherine Tai, United States Trade Representative (USTR), “the multilateral trading system failed to address these distortions [emerging from China’s policies], and markets even rewarded them.”⁴¹

venture capital ecosystem, which was largely built with American capital. On a study on this topic, Sebastian Mallaby concludes that while “the U.S. investors earned money . . . China gained strategic industries,” an outcome which, in his view, benefitted more China than the United States. SEBASTIAN MALLABY, *THE POWER LAW: VENTURE CAPITAL AND THE ART OF DISRUPTION* 393 (2022).

³⁶ For some examples, see Communication from the United States, *China’s Trade-Disruptive Economic Model*, ¶¶ 1.3–1.4, WTO Doc. WT/GC/W/745 (July 16, 2018); *Commission Staff Working Document on Significant Distortions in the Economy of the People’s Republic of China for the Purposes of Trade Defence Investigations*, SWD (2017) 483 final (Dec. 20, 2017).

³⁷ The Global Forum on Steel Excess Capacity (GFSEC) was established in December 2016 encompassing the G-20 countries plus interested OECD members. GLOB. F. ON STEEL EXCESS CAPACITY, <http://www.steelforum.org> (last visited Apr. 3, 2023). In 2019, members could not agree on whether the Forum had fulfilled its mandate. Global Forum on Steel Excess Capacity [GFSEC], *Ministerial Statement: Joint Call to G20 Leaders*, ¶ 2 (Oct. 26, 2020), <https://www.steelforum.org/events/gfsec-ministerial-statement-october-2020.pdf>. While thirty-one members understood the GFSEC needed to continue its work and took it further until the present moment, China and Saudi Arabia decided to leave. *Id.*

³⁸ See *Joint Statement on the Temporary Suspension of Technical Negotiations in the International Working Group on Export Credits*, N.Z. TREASURY (Nov. 20, 2020), <https://exportcredit.treasury.govt.nz/news/joint-statement-temporary-suspension-technical-negotiations-international-working-group-export>.

³⁹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter ASCM].

⁴⁰ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 317, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011).

⁴¹ Ambassador Katherine Tai, Off. of the U.S. Trade Representative, Remarks at the Roosevelt Institute’s Progressive Industrial Policy Conference (Oct. 7, 2022), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/october/remarks-ambassador-katherine-tai-roosevelt-institutes-progressive-industrial-policy-conference>.

As China's political, military, and economic global heft increased, economic competition gave way to strategic and security rivalry, with the 2017 U.S. National Security Strategy labelling China a "revisionist power,"⁴² and the EU considering it, in 2019, "a systemic rival promoting alternative models of governance."⁴³ Trade relations increasingly became entangled in strategic and security framings.

As the examples in Part III show, the U.S. and the EU are now reorienting their policies using a geoeconomic logic—like China, they are also adopting policies that expand the notion of national security and which increasingly discriminate in favor of local and certain foreign market players, with the aim of addressing security externalities. Difficulties to curb China's geoeconomic practices, associated with the new characterization of China as a strategic and security competitor have led these actors to shift their focus—the goal now is to "shape the strategic environment around Beijing to advance our vision for an open, inclusive international system" according to Antony Blinken, U.S. Secretary of State.⁴⁴

III. *DESIGNED IN CALIFORNIA, MANUFACTURED IN ARIZONA BY TAIWAN
SEMICONDUCTOR MANUFACTURING COMPANY:
GEOECONOMIC POLICIES ADOPTED BY DEVELOPED ECONOMIES IN
RESPONSE TO CHINA*

The present section looks at examples of policies with a geoeconomic orientation through which the U.S. and the EU promote the development of domestic capabilities;⁴⁵ the diversification of foreign suppliers, with an avowed preference for relying on friendly countries;⁴⁶ the imposition of restrictions on access to existing domestic capabilities;⁴⁷ and the coordination of geoeconomic policies.⁴⁸

The government measures discussed in this section interfere in an increasing number of economic sectors. For instance, some of them seek to induce local manufacturing of goods currently imported, while others prevent exports of certain goods to China, among other markets. In this sense, these measures represent a break from the recent past, when key decisions regarding economic activities—for example, where to manufacture certain goods or where

⁴² DONALD J. TRUMP, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (2017).

⁴³ *Joint Communication to the European Parliament, the European Council and the Council: EU-China – A Strategic Outlook*, at 1, JOIN (2019) 5 final (Mar. 12, 2019).

⁴⁴ Anthony Blinken, U.S. Sec'y of State, *The Administration's Approach to the People's Republic of China*, Speech at The George Washington University (May 26, 2022), <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china>.

⁴⁵ *See infra* Part III(A).

⁴⁶ *See infra* Part III(B).

⁴⁷ *See infra* Part III(C).

⁴⁸ *See infra* Part III(D).

to source product inputs from—belonged almost exclusively to market actors. Yet, since governments in economies such as the U.S. and the EU perceive reliance on China as a strategic and security vulnerability,⁴⁹ they now attempt to reshape the geographic distribution of global production. It is for this reason that the measures discussed below are of a geoeconomic nature.

Of course, state intervention in the economy is not unprecedented. Most recently, especially in the aftermath of the Global Financial Crisis, many governments sought to protect local industries and jobs from the fallout of the collapse in global markets.⁵⁰ Yet the measures described in this section are of a different nature: they do not necessarily restrict trade—instead, they divert it following strategic and security considerations. Equally important, while the different range of measures described below have a discriminatory component, this discrimination does not oppose domestic producers to foreign ones—rather, they discriminate against *certain* foreign competitors, particularly Chinese competitors.

A. “Reducing Dependence”⁵¹: Government Efforts to Build Up Domestic Capabilities

Both the Biden administration and the current European Commission acknowledge the need to promote local manufacturing in at least certain economic sectors, as described below. While the United States seeks to “build[] back domestic capability”⁵² outsourced during the heyday of globalization, the EU aims at “reducing dependence on others for things we need the most.”⁵³

Industrial policies are being rolled out in Washington and Brussels to offer subsidies and other incentives for companies to set up shop within their territories. The Biden administration is appealing to the Defense Production Act of 1950 to support local production of solar panels, as well as “to

⁴⁹ This perception is a result of the policy approaches of the U.S. and the EU towards China. See Simon J. Evenett, *Protectionism, State Discrimination, and International Business Since the Onset of the Global Financial Crisis*, 2 J. INT’L BUS. POL’Y 9 (2019); Brian Deese, Dir., Nat’l Econ. Council, Remarks at the Atlantic Council Front Page Online Event (June 23, 2021), in *Brian Deese on Biden’s Vision for ‘A Twenty-First-Century American Industrial Strategy’*, ATLANTIC COUNCIL, <https://www.atlanticcouncil.org/commentary/transcript/brian-deese-on-bidens-vision-for-a-twenty-first-century-american-industrial-strategy>.

⁵⁰ Evenett, *supra* note 49, at 28–29.

⁵¹ *Commission Communication on a New Industrial Strategy for Europe*, *supra* note 5, at 13.

⁵² Deese, *supra* note 49.

⁵³ *Commission Communication on a New Industrial Strategy for Europe*, *supra* note 5, at 13.

strengthen the U.S. industrial base for large-capacity batteries.”⁵⁴ This last measure is premised on the realization that the “United States depends on unreliable foreign sources for many of the strategic and critical materials necessary for the clean energy transition.”⁵⁵

In August 2022, the United States adopted the CHIPS and Science Act,⁵⁶ which, among many responses to challenges presented by China, allocates funds to finance semiconductor manufacturing in the United States territory, including to foreign companies such as Taiwan Semiconductor Manufacturing Company,⁵⁷ but very likely not to Chinese companies (as discussed in Part IV). Subsidies to foreign investors in the United States are also being offered for local processing of rare earths, with the Pentagon reportedly extending funds to an Australian plant being built in the United States.⁵⁸

Brussels is also supporting industry’s efforts to “strengthen the EU’s own capacity in areas that create vulnerability of the EU economy.”⁵⁹ The EU Chips Act should ultimately allow member states to offer subsidies to manufacturers willing to build large scale plants (mega-fabs) in Europe. The level of support envisaged by this measure is of such magnitude that its adoption might require waiving the strict EU state aid regime⁶⁰—which goes some way to show Brussels’ commitment to promote local manufacturing in this sector. Another sector of interest is pharmaceuticals, with the Pharmaceutical Strategy for Europe⁶¹ opening the door to the possibility—still under discussion within the EU—of financial support to stimulate onshoring the manufacturing

⁵⁴ Press Release, U.S. Dep’t of Def., Defense Production Act Title III Presidential Determination for Critical Materials in Large-Capacity Batteries (Apr. 5, 2022), <https://www.defense.gov/News/Releases/Release/Article/2989973/defense-production-act-title-iii-presidential-determination-for-critical-materials>.

⁵⁵ Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, DAILY COMP. PRES. DOC., DCPD 202200232 (Mar. 31, 2022).

⁵⁶ White House, *supra* note 2.

⁵⁷ Stephen Nellis, *TSMC Says Has Begun Construction at Its Arizona Chip Factory Site*, REUTERS (June 2, 2021), <https://www.reuters.com/technology/tsmc-says-construction-has-started-arizona-chip-factory-2021-06-01>.

⁵⁸ James Fernyhough, *Pentagon Bankrolls Rare Earths Plant as US Plays Catch-Up to China*, FIN. TIMES (June 14, 2022), <https://www.ft.com/content/5a974ea5-c863-406f-bab1-3cc6fe8d6ad2>.

⁵⁹ *Commission Staff Working Document: EU Strategic Dependencies and Capacities*, *supra* note 25, at 6.

⁶⁰ Niclas Poitiers & Pauline Weil, *Is the EU Chips Act the Right Approach?*, BRUEGEL: BLOG (June 2, 2022), <https://www.bruegel.org/blog-post/eu-chips-act-right-approach>; see also Chris Nuttall, *EU Orders Subsidies and Chips*, FIN. TIMES (Feb. 10, 2022), <https://www.ft.com/content/d15b8ab2-597c-427d-a49c-8a39fe4d3854>.

⁶¹ *Pharmaceutical Strategy for Europe*, COM (2020) 761 final (Nov. 25, 2020).

of certain medicines or their components.⁶² Brussels is also mobilizing public and private investment under the European Battery Alliance to significantly increase local capacity to meet Europe's demand for lithium as early as 2025.⁶³

B. State-Led Reshaping of Supply Chains

In spite of efforts to promote domestic manufacturing, governments in major developed economies seem to be aware that, in an interdependent global market, attempts to reshore production wholesale are far-fetched. Recent developments make clear that governments are instead exploring the intermediate path of reshaping supply chains in strategic areas.⁶⁴ Whether driven by the intention to strengthen allies and friends (to the detriment of those who do not fit within these categories) or to simply expand the range of possible suppliers, state-led measures to reshape supply chains predominantly seek to affect the central position occupied in many cases by China in the current global distribution of production.⁶⁵

Since the beginning of the Biden administration, the U.S. government has invoked the policy of “ally and friend-shoring.”⁶⁶ This concept involves “deliberately sourcing essential materials, goods, and services with countries who share our democratic values . . . while reducing dependence on China and other state actors who will seek to continue to use that dependence to undermine the U.S.”⁶⁷

Europe displays a more nuanced approach in its policy discourse, taking a more agnostic stance on the values embraced by its trading partners. Europe

⁶² Carlo Martuscelli & Helen Collis, *EU Efforts to 'Reshore' Drug Production Trip Over Subsidy Rules*, POLITICO (Oct. 14, 2021), <https://www.politico.eu/article/pharmaceutical-industry-drug-production-eu-subsidy-european-commission>.

⁶³ *Critical Raw Materials Resilience: Charting a Path Towards Greater Security and Sustainability*, at 7, COM (2020) 474 final (Sept. 3, 2020).

⁶⁴ Stefano Elia et al., *Post-Pandemic Reconfiguration from Global to Domestic and Regional Value Chains: The Role of Industrial Policies*, 28 TRANSNAT'L CORP. 67, 71, 87 (2021).

⁶⁵ The first report on EU strategic dependencies surveyed 5,000 products and concluded that Europe was highly dependent on imports of 137 of these. *Commission Staff Working Document: Strategic Dependencies and Capabilities Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and Committee of the Regions*, at 23, SWD (2021) 352 final (May 5, 2021). China accounted for 52% of their import value, followed by Vietnam (11%) and Brazil (5%). *Id.*

⁶⁶ WHITE HOUSE, *supra* note 9, at 8.

⁶⁷ See Elaine Dezenski & John C. Austin, *Rebuilding America's Economy and Foreign Policy with 'Ally-Shoring'*, BROOKINGS INST. (June 8, 2021), <https://www.brookings.edu/blog/the-avenue/2021/06/08/rebuilding-americas-economy-and-foreign-policy-with-ally-shoring>.

seems to consider trade agreements as more of a tool of diversification⁶⁸ than as a source of vulnerabilities. In this sense, the EU is “negotiating Free Trade Agreements with a number of important countries from a raw materials perspective”⁶⁹ and is also involved in managing the diversification of its supply chains through sectoral initiatives with other partners.⁷⁰

Despite possibly different approaches, the U.S. and the EU are seeking to actively shape trade partnerships. They are also exploring possible coordination of the geoeconomic policies they are putting in place.⁷¹ Such efforts suggest that the notion of “allies and friends” might be relevant not only to describe the sources of inputs and final products, but also as a potential indication that trade governance—at least in certain sectors—might evolve to establish a divide between friendly and unfriendly economies.

C. Curbing Access to Key Technologies with Reinforced Export Controls

Export controls imposed by the United States are another set of measures designed to generate some level of decoupling with the Chinese economy. The U.S. export control regime has reflected over the years where Washington struck the balance between trade and security concerns, particularly when it comes to dual-use high technologies. Throughout the past decades, the prevailing U.S. approach to export controls for dual-use goods to China has leaned towards trade liberalization. This policy was premised on the understanding that overly broad export controls risked being ineffective as China was likely to find equivalent technologies in third markets. Such situation would not only allow China to catch up but would also deprive U.S. companies from extracting revenue from the promising Chinese market—thereby undermining the ability to fund innovation in the United States, with potential damage to its continued technological leadership. For this reason, the United States has traditionally focused on controlling exports of “chokepoints of technologies,”⁷² in particular to keep China a couple of generations of technological development behind the United States.

This liberal approach began to change with the adoption of the bipartisan Export Control Reform Act (ECRA) in 2018.⁷³ ECRA codified the previous practice of the U.S. government in the management of export controls and

⁶⁸ *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, at 8, COM (2021) 66 final (Feb. 18, 2021).

⁶⁹ See *Critical Raw Materials Resilience: Charting a Path Towards Greater Security and Sustainability*, *supra* note 63, at 15.

⁷⁰ See *Commission Staff Working Document: EU Strategic Dependencies and Capacities*, *supra* note 25, at 6.

⁷¹ See *supra* Part III(D).

⁷² HUGO MEIJER, *TRADING WITH THE ENEMY – THE MAKING OF THE US EXPORT CONTROL POLICY TOWARD THE PEOPLE’S REPUBLIC OF CHINA* 263, 267 (2016).

⁷³ Export Control Reform Act, 50 U.S.C. §§ 4801–4852 (2018).

pointed to a new political importance of this tool—as evidenced by the fact that ECRA was adopted alongside the new legislation on foreign investment screening, the Foreign Investment Risk Review Modernization Act (FIRRMA).⁷⁴ Among others, ECRA tied U.S. national security to the leadership and competitiveness “in the science, technology, engineering, and manufacturing sectors, including foundational technology that is essential to innovation.”⁷⁵ This broad framing of national security led analysts and market players to label the new export control regime as geoeconomic and a tool to support Washington’s industrial policies.⁷⁶

The Biden administration has introduced the most profound change so far in the export control policy with respect to China, decisively tilting the balance away from the traditional trade liberalization approach and towards a geoeconomic orientation. National Security Advisor Jake Sullivan clearly expressed this shift in the U.S. position: “we have to revisit the longstanding premise of maintaining ‘relative’ advantages over competitors in certain key technologies. . . . Given the foundational nature of certain technologies, . . . we must maintain as large of a lead as possible.”⁷⁷

In October 2022, the U.S. government imposed an unprecedented suite of export controls over semiconductor trade with China.⁷⁸ The measures—“a significant departure from the paradigm that has guided U.S. export controls for the last two and a half decades”⁷⁹—are likely to delay China’s ambition to catch up with the United States in a number of advanced technologies, including artificial intelligence.

⁷⁴ Foreign Investment Risk Review Modernization Act (FIRRMA), 50 U.S.C. § 4565 (2018).

⁷⁵ Export Control Reform Act, 50 U.S.C. § 4811(3) (2018).

⁷⁶ See *Tightening of US-Export Controls*, FED’N OF GER. INDUS. (BDI) (Dec. 16, 2020), <https://english.bdi.eu/article/news/strengthening-us-export-controls>; Cindy Whang, *Trade and Emerging Technologies – A Comparative Analysis of the United States and the European Union Dual-Use Export Control Regulations*, 31 SEC. & HUM. RTS. 1, 15 (2020).

⁷⁷ Jake Sullivan, Advisor, Nat’l Sec. Council, Remarks at the Special Competitive Studies Project Global Emerging Technologies Summit (Sept. 16, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit>.

⁷⁸ See Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62186 (Oct. 13, 2022) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 744, 762, 772, 774).

⁷⁹ Matthew Reynolds, *Assessing the New Semiconductor Export Controls*, CTR. FOR STRATEGIC & INT’L STUD. (Nov. 3, 2022), <https://www.csis.org/analysis/assessing-new-semiconductor-export-controls>.

The export controls limit access by Chinese actors to high-technology semiconductors as well as to semiconductor design software.⁸⁰ The U.S. government frames the measures as a national security approach, stating that the technologies and equipment targeted are being used by China “to produce advanced military systems including weapons of mass destruction; improve the speed and accuracy of its military decision making, planning, and logistics, as well as of its autonomous military systems; and commit human rights abuses.”⁸¹

It is also relevant to note that the semiconductor export controls invoke the “foreign direct product rule.”⁸² Pursuant to this rule, which accords extra-territorial effect to the U.S. legislation, the export of certain items—even if not produced in the United States—is subject to a license from the U.S. authorities when the goods exported involve U.S.-made technology or equipment.⁸³

Unlike most export controls, which are applied within multilateral regimes in coordination with relevant countries, the curbs imposed by the United States in the semiconductor sector are unilateral measures adopted without explicit buy-in from other concerned countries.⁸⁴ Given the global fragmentation of the semiconductor supply chains,⁸⁵ the effectiveness of the U.S. trade measures depends in part on the collaboration of countries such as Japan, Korea, the Netherlands, and Taiwan. But this will require the United States to persuade its partners that the restrictions on semiconductor exports are designed to safeguard a genuine national security concern,⁸⁶ as opposed to being no more than a hurdle to hobble China’s economic rise. In other words, the United States will need to make the case that exports of the affected

⁸⁰ Gregory C. Allen, *Choking Off China’s Access to the Future of AI*, CTR. FOR STRATEGIC & INT’L STUD. (Oct. 11, 2022), <https://www.csis.org/analysis/choking-chinas-access-future-ai>.

⁸¹ Press Release, Bureau of Indus. & Sec., Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China (PRC) (Oct. 7, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file>.

⁸² See Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62186, 62189 (Oct. 13, 2022) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 744, 762, 772, 774).

⁸³ Allen, *supra* note 80.

⁸⁴ Ana Swanson & Edward Wong, *With New Crackdown, Biden Wages Global Campaign on Chinese Technology*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/us/politics/biden-china-technology-semiconductors.html>.

⁸⁵ ANTONIO VARAS ET AL., BOS. CONSULTING GRP. & SEMICONDUCTOR INDUS. ASS’N, STRENGTHENING THE GLOBAL SEMICONDUCTOR SUPPLY CHAIN IN AN UNCERTAIN ERA 23 (2021).

⁸⁶ Chad P. Bown, *Export Controls: America’s Other National Security Threat*, 30 DUKE J. COMPAR. & INT’L L. 283, 300 (2020).

semiconductor products raise “security externalities,”⁸⁷ something that makes sense from a geoeconomic logic, but not necessarily when viewed from a market perspective. This challenge increases the importance of coordination in the application of geoeconomic measures.

D. Avoiding Subsidy Races: Coordinating the Redistribution of Global Economic Activity

Recent activist economic policies by the U.S. and the EU speak to domestic political considerations. Still, it is possible to identify initial attempts by these and other economies to coordinate the application of such measures. This coordination is directed to maximize the impact of the geoeconomic measures while avoiding negative spillovers on friendly countries.

Coordination regarding proactive geoeconomic measures, such as industrial policies, can be identified in the U.S.-EU discussions on semiconductors taking place within the Trade and Technology Council (TTC).⁸⁸ Since both the U.S. and the EU are offering financial incentives for local production of chips, the two sides agreed that “subsidy races must be avoided” and “to provide any support for this sector in line with WTO rules.”⁸⁹ To address possible concerns any side might have, a mechanism is to be set up for “reciprocal consultation at principals’ level . . . in case of alerts to subsidy races.”⁹⁰

Aside from the possibility of consultations regarding subsidies for the semiconductor industry, both sides agreed to hold conversations on another recent piece of U.S. legislation, the Inflation Reduction Act (IRA),⁹¹ adopted in August 2022. The IRA provides financial incentives for electric vehicles sold in the United States which have been produced with certain components originating in countries with which the United States has trade agreements.⁹² Brussels raised a number of concerns with the legislation, one of them being the possible discrimination against European interests⁹³ since there is no U.S.-EU free trade agreement.⁹⁴

⁸⁷ See *supra* Part II.

⁸⁸ European Commission Press Release IP/21/2990, EU-U.S. Launch Trade and Technology Council to Lead Values-Based Global Digital Transformation (June 15, 2021).

⁸⁹ EU-U.S. Joint Statement of the Trade & Tech. Council, Trade and Technology Council Statement on Semiconductors, annex III at 20, ¶ 14, (May 16, 2022).

⁹⁰ *Id.* ¶ 17.

⁹¹ Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

⁹² *Id.* § 13401(e)(1).

⁹³ Eur. Union, Comment Submission by the European Union on the Inflation Reduction Act (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0774>.

⁹⁴ See *infra* Part IV for an examination of these concerns from the perspective of the WTO case law.

Washington and Brussels launched a task force to address the points raised by the EU,⁹⁵ which suggests the United States is willing to consider a coordinated solution that addresses the spillover effects of the IRA on its allies. A similar consultation process has been launched to hear concerns raised by Korea regarding the IRA.⁹⁶ The United States has also engaged with its partners to ensure the effectiveness of its regulations on export controls and investment screening. Particularly with respect to the export controls imposed on trade in the semiconductor sector, U.S. officials are trying to bring on board the main actors that could guarantee the restrictions are not bypassed, such as semiconductor companies in Japan and the Netherlands, as mentioned earlier.⁹⁷

There are evidently no guarantees that these informal consultations between the United States and its allies will lead to satisfactory results in addressing the concerns raised by the EU and Korea. But the examples of geoeconomic measures discussed in this section reveal possible paths for the evolution of trade regulation. Looking to the recent geoeconomic practice of the United States,⁹⁸ two levels of action seem to emerge—one regarding the management of U.S.-China relations and the other involving the relations between the U.S. and its other trade partners (especially “allies and friends”). Both levels have substantive and institutional dimensions.

At the U.S.-China level, the United States is trying to “shape the strategic environment around Beijing”⁹⁹ by diminishing the centrality of China in key supply chains. This goal is pursued—at the substantive dimension—by legislation that fosters decoupling with China by means of discriminatory rules, such as those discussed above in this section. Given the current deadlock in the WTO dispute settlement regarding challenging U.S. policies (which can “appeal into the void” to block adoption of unsatisfactory panel rulings),¹⁰⁰ Beijing is deprived—at the institutional dimension of the relations—of an international path to address grievances caused by U.S. discriminatory measures.¹⁰¹

The relations between the United States and its allies and friends might also witness frictions from side effects produced by geoeconomic policies adopted by Washington. But while these frictions stand a hard chance to be

⁹⁵ European Commission Press Release IP/22/6402, Launch of the US-EU Task Force on the Inflation Reduction Act Brussels (Oct. 26, 2022).

⁹⁶ Kang Gahui, *President Yoon Gets Letter from US Leader on Inflation Reduction Act*, KOREA.NET (Oct. 6, 2022), <https://www.korea.net/NewsFocus/policies/view?articleId=222240>.

⁹⁷ *Biden's Chip Curbs Outdo Trump in Forcing World to Align on China*, THE JAPAN TIMES (Nov. 14, 2022), <https://www.japantimes.co.jp/news/2022/11/14/business/biden-chips-global-reaction>; see also *supra* Part III(C).

⁹⁸ See *infra* Table 1.

⁹⁹ Blinken, *supra* note 44.

¹⁰⁰ See *supra* note 15 and accompanying text.

¹⁰¹ *Id.*

scrutinized by the WTO dispute settlement mechanism, they could be managed by informal coordination efforts between the United States and the aggrieved partner.

International trade lawyers should pay attention to initiatives by developed economies to coordinate the application of geoeconomic policies that discriminate against China. If these efforts are successful—still an open question¹⁰²—they are likely to influence future governance of trade at least in the areas directly affected by such measures.

Table 1. U.S. Geoeconomic Policies Towards China and Trade Partners

Level	Objective	<i>Substantive</i> (Geoeconomic Measures)	<i>Institutional</i> (Dispute Settlement)
U.S. → China	<ul style="list-style-type: none"> • Shape the strategic environment around Beijing 	<ul style="list-style-type: none"> • Measures that discriminate against China 	<ul style="list-style-type: none"> • WTO path (temporarily) closed • Flexibility for negotiated solutions unlikely
U.S. → Partners	<ul style="list-style-type: none"> • Ally and friend-shoring • Build back domestic capability • Coordination to avoid security externalities (acquisition of critical capabilities) 	<ul style="list-style-type: none"> • Advantages (e.g., subsidies) to manufacture in U.S. or provide inputs to the U.S. 	<ul style="list-style-type: none"> • WTO path (temporarily) closed • Avoid subsidy races: possible space for negotiated solutions

IV. THE INTERSECTION BETWEEN GEOECONOMIC MEASURES AND TRADE LAW

As the examples in Part III reveal, governments in the U.S. and the EU are actively trying to influence trade relations, among others by increasing subsidy programs across a number of sectors, adopting discriminatory provisions—particularly to disadvantage Chinese producers—and expanding the reach of policies invoked for national security reasons.

¹⁰² Halit Harput, *The Hidden Costs of Friend-Shoring*, HINRICH FOUND.: BLOG (Nov. 15, 2022), <https://www.hinrichfoundation.com/research/article/us-china/the-hidden-costs-of-friend-shoring>.

These policies are consistent with the geoeconomic framework. But can these policies be accommodated by the existing trade rules? This section offers elements to respond to this question by examining the WTO case law dealing with subsidies¹⁰³ as well as with the provisions that stipulate general¹⁰⁴ and security exceptions.¹⁰⁵

In general, while it should be assumed that there is a role for regulation design in adapting geoeconomic goals to trade rules, this reconciliation is likely to be often challenging given the divergence between the geoeconomic logic and the “principle of liberalization of trade flows”¹⁰⁶ underpinning the trade regime.

A. Subsidies and Selective Discrimination Against Foreign Recipients

Subsidies recently enacted in the United States reveal how geoeconomics interact with trade rules. They highlight the extent to which discrimination chiefly targeted at China plays an important role in the design of geoeconomic measures. Although such discrimination is consistent with a geoeconomic rationale, it raises questions from the perspective of trade rules. The discussion below zooms in on selected aspects of the U.S. CHIPS and Science Act (CSA) and the Inflation Reduction Act (IRA) with the exclusive purpose of discussing the complex interaction between specific provisions of a geoeconomic nature and existing trade rules.¹⁰⁷

i. Subsidies to Build Up Domestic Capabilities: Financing Local Companies and Firms from Friendly Countries

The CSA, signed into law in August 2022, provides subsidies for domestic semiconductor manufacturing in the United States, including \$39 billion for “investment in facilities and equipment in the United States for semiconductor fabrication, assembly, testing, advanced packaging, or research and development.”¹⁰⁸ No funds will be made available to “construct, modify, or improve a facility outside of the United States.”¹⁰⁹

The eligibility for the financial assistance seems open to all firms that meet the criteria of a “covered entity,” a category which includes companies

¹⁰³ See *infra* Part IV(A).

¹⁰⁴ See *infra* Part IV(B).

¹⁰⁵ See *infra* Part IV(C).

¹⁰⁶ U.S. – *Tariff Measures*, *supra* note 21, ¶ 7.160.

¹⁰⁷ The analysis in this section is not directed to offer an exhaustive legal analysis of the aforementioned U.S. statutes.

¹⁰⁸ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, § 9902(a)(1), Pub. L. No. 116-283, 134 Stat. 4846 (codified as amended by the CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1372).

¹⁰⁹ CHIPS Act of 2022, § 103(i), Pub. L. No. 117-167, 136 Stat. 1372, 1388.

with the capacity to develop and manufacture semiconductors.¹¹⁰ Despite this apparently broad range of potential applicants, in reviewing requests for financial support the U.S. government may reject applications if it is determined that “the covered entity is a foreign entity of concern.”¹¹¹ By its turn, a “foreign entity of concern” means an actor which has been considered by U.S. authorities to be “engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States.”¹¹²

Chinese companies are not explicitly excluded from the scope of eligibility of the subsidy program set up by the CSA. But one indication that suggests they might be considered as “foreign entities of concern”—and come across difficulties in successfully applying for grants—can be found in another provision, which governs the terms under which funding will be offered by the U.S. government. Beneficiaries of the funding are requested to agree that for 10 years after receiving the subsidies they “may not engage in any significant transaction . . . involving the material expansion of semiconductor manufacturing capacity in the People’s Republic of China or any other foreign country of concern.”¹¹³

To what extent do these provisions test the limits of trade law? This question can be addressed from the perspective of rules on subsidies and those that seek to curb discrimination.

When approached from the perspective of subsidies’ regulation, funding provided by the CSA seems to meet the criteria of a subsidy according to the ASCM: it is a financial contribution offered by a government which confers a benefit.¹¹⁴ Moreover, it can be considered a “specific” benefit¹¹⁵ because it is not “sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products.”¹¹⁶ On the contrary, it benefits a particular industry, namely the semiconductor sector. In this sense, the support offered by the United States could be challenged as an actionable subsidy if it causes “adverse effects to the interests of other [WTO]

¹¹⁰ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, § 9901(2), Pub. L. No. 116-283, 134 Stat. 4846 (codified as amended by the CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1372) (“The term ‘covered entity’ means a private entity, a consortium of private entities, or a consortium of public and private entities with a demonstrated ability to substantially finance, construct, expand, or modernize a facility relating to fabrication, assembly, testing, advanced packaging, or research and development of semiconductors.”).

¹¹¹ *Id.* § 9902(a)(2)(C)(iii).

¹¹² *Id.* § 9901(6)(E).

¹¹³ CHIPS Act of 2022, § 9902(b)(6)(C)(i), Pub. L. No. 117-167, 136 Stat. 1372, 1383.

¹¹⁴ ASCM, *supra* note 39, at art. 1.1(b) (“For the purpose of this Agreement, a subsidy shall be deemed to exist if . . . (b) a benefit is thereby conferred.”).

¹¹⁵ *Id.* at art. 1.2 (“A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.”).

¹¹⁶ Panel Report, *United States – Subsidies on Upland Cotton*, ¶ 7.1142, WTO Doc. WT/DS267/R (adopted Mar. 21, 2005).

Members,” in the language of Article 5 of the ASCM.¹¹⁷ And this might be what China hints at when its officials claim that the CHIPS Act distorts competition on semiconductors.¹¹⁸

A second angle from which to approach the CSA is that of the discrimination potentially caused to China, which brings to the fore the potential inconsistency with GATT Article I.1 (“most favoured nation”).¹¹⁹

Discrimination in the concession of subsidies is arguably the key geo-economic element in the CSA; while funding is in principle offered to American and foreign companies, it is arguably not accessible to Chinese companies. Such element distinguishes the subsidy program from more traditional industrial policies for three reasons: the program does not favor “national champions” because foreign companies are also eligible to access the subsidies; still, subsidies are arguably not available to companies from a strategic competitor, as Chinese firms are likely excluded from tapping into the subsidies; and finally, access to subsidies is contingent upon the beneficiary not engaging in transactions that can increase the manufacturing capacity of China.

While the ASCM does not discipline discrimination in the granting of subsidies, WTO jurisprudence considers that rules on subsidies and on discrimination can be simultaneously applicable in a given case. In *Indonesia-Autos*, the panel discussed the application of GATT Articles I and III in the context of subsidies and concluded that these rules are complementary because they “have different purposes and different coverage.”¹²⁰

The CSA seems to distinguish among foreign companies, thereby possibly pointing to a violation of Article I. It refers to “foreign entities of concern” as not eligible for the subsidies, which, by implication, admits the existence of foreign entities that do not raise concern—and which are thus eligible to receive subsidies. The question then becomes whether the subsidies fit the criteria of the most favored nation clause, in particular: are the subsidies “advantages” relating to “all matters referred to in paragraphs 2 and 4 of [GATT]

¹¹⁷ ASCM, *supra* note 39, at art. 5 (“No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members . . .”).

¹¹⁸ Meg Shen & Twinnie Siu, *China Says U.S. Chip Act Will Distort Global Semiconductor Supply Chain*, REUTERS (July 29, 2022), <https://www.reuters.com/technology/china-says-us-chip-act-will-distort-global-semiconductor-supply-chain-2022-07-29>.

¹¹⁹ General Agreement on Tariffs and Trade 1994 art. I.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT] (“1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . and with respect to all matters referred to in paragraphs 2 and 4 of Article III,[] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”).

¹²⁰ Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, ¶ 14.39, WTO Docs. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted July 23, 1998).

Article III”¹²¹ affecting “any product originating in or destined for any other country”?¹²²

As stated by the panel in *Brazil – Taxation*, “an ‘advantage’ within the meaning of Article I:1 of the GATT 1994 exists when a measure alters the conditions of competition for certain *imported* products relative to other like *imported* products.”¹²³ While the subsidies seem to alter the conditions of competition between Chinese and other domestic and foreign products, the link between the subsidies of the CSA and “importation” would need to be established in a concrete case. Given the design of the CSA, this link might prove challenging considering that the subsidies in question are directed to support the construction, expansion, or modernization, in the United States, of facilities dedicated to, among others, the fabrication of semiconductors.¹²⁴ If such a link can be made, this specific subsidy program stipulated by the CSA could be subject to challenge under GATT Article I.

Finally, it could be questioned whether the United States would be able to invoke the national security exception of GATT Article XXI to justify discrimination against Chinese companies in granting the subsidies. But the interface of Article XXI and the ASCM seems to be an open question: in a recent dispute involving the United States and Hong Kong over origin marking requirement, the United States claimed that Article XXI “applies to multilateral agreements on trade in goods”¹²⁵—in that case to the WTO Agreement on Rules of Origin—and not only to the provisions of GATT 1994 (the panel that ruled on the case ultimately decided to exercise judicial economy and did not address the claim raised by the United States).¹²⁶ A similar argument could be raised about the possibility of invoking Article XXI regarding the ASCM (which would, in turn, open a number of other related questions, whose discussion does not belong here, such as the possibility of invoking the exceptions of GATT Article XX to the ASCM). Yet, even admitting that Article XXI could apply to the provisions of the ASCM, it would be also necessary to determine whether the subsidy in question offered under the CSA meets the

¹²¹ Paragraphs 2 and 4 of GATT Article III deal respectively with discriminatory treatment through “internal taxes or other internal charges” and “laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

¹²² See *supra* note 119 for the wording of GATT, Article I.1.

¹²³ Panel Reports, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 7.1041, WTO Docs. WT/DS472/R, WT/DS497/R (adopted Jan. 11, 2019) (emphasis added) [hereinafter *Brazil—Taxation*].

¹²⁴ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, § 9901(2)–(3), Pub. L. No. 116-283, 134 Stat. 4846 (codified as amended by the CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1372).

¹²⁵ First Written Submission of the United States of America, *United States – Origin Marking Requirements*, ¶ 266, WTO Doc. WT/DS597/2 (July 2, 2021).

¹²⁶ Panel Report, *United States – Origin Marking Requirement*, ¶ 7.368, WTO Doc. WT/DS597/R (not adopted).

national security criteria of Article XXI, a question discussed in more detail below.¹²⁷

ii. *Giving Substance to “Ally and Friend-Shoring”*¹²⁸

Although there has been some discussion as to the concrete meaning of a trade policy of “ally and friend-shoring,” the Inflation Reduction Act provides an example of what this approach might mean in practice.¹²⁹ One of the many provisions of the Act, the “clean vehicle credit,” offers a subsidy if certain requirements are met regarding the origin of critical materials utilized in vehicles’ batteries.¹³⁰

According to one of the requirements that unlocks the credit, the battery that powers the vehicle must have a defined percentage of critical minerals “extracted or processed in any country with which the United States has a free trade agreement in effect.”¹³¹ This percentage increases over the years, from 40 to 80 percent between 2024 and 2026.

Often the origin of inputs is relevant in the determination of which products benefit from preferential tariffs agreed under free trade agreements (FTAs)—this is done by rules of origin adopted under an FTA.¹³² In the IRA, origin plays a different role: the “clean vehicle credit” is designed in such a way that the existence of an FTA with the United States is an eligibility criterion for the subsidy. Not all vehicles will allow the consumer to claim the credit, only those whose batteries contain the determined percentage of minerals sourced from U.S. FTA partners.

Is it possible to discriminate among products using this criterion, which arguably works as a proxy for “allies and friends”? While GATT Article XXIV allows preferential treatment to partners in a free trade area or a customs union, it is not clear whether the allocation of a subsidy can discriminate between FTA partners and others. In *Brazil—Retreaded Tyres*, the Appellate Body did not agree that Brazil was authorized to accept imports from the MERCOSUR countries while it simultaneously maintained an import ban on tyres imported from third countries.¹³³ For the AB, the “MERCOSUR exemption” invoked to justify the discriminatory implementation of the import ban constituted arbitrary and unjustifiable discrimination because its underlying

¹²⁷ See *supra* Part IV(B)(iii).

¹²⁸ See WHITE HOUSE, *supra* note 9.

¹²⁹ Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

¹³⁰ *Id.* § 13401(a).

¹³¹ *Id.* § 13401(e)(1).

¹³² *Rules of Origin for FTAs: Qualifying Products for Preferential Tariff Treatment*, INT’L TRADE COMM’N, <https://www.trade.gov/identify-and-apply-rules-origin> (last visited Apr. 5, 2023).

¹³³ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 228, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).

reason—compliance with a ruling of the MERCOSUR arbitral tribunal—“bears no relationship to the legitimate objective pursued by the Import Ban,”¹³⁴ namely the protection of human, animal, or plant life or health.¹³⁵

Applying the same reasoning to the IRA would require identifying a link between the discrimination in favor of U.S. FTA partners and one of the exceptions stipulated under provisions such as GATT Articles XX (general exceptions) or XXI (security exception). Otherwise, the measure would need to be in line with the non-discrimination clauses of GATT Articles I and III. As discussed in the next Part, the room to accommodate discriminatory clauses such as the “clean vehicle credit” under the general exceptions set out by the GATT, Article XX is limited.

B. Can the Exceptions of GATT Articles XX and XXI Offer Support for Geoeconomic Policies?

Over the years,¹³⁶ the case law of GATT Article XX¹³⁷ sought to safeguard the states’ right to define the desired level of protection for non-trade interests they consider legitimate.¹³⁸ Because the interests enshrined in Article

¹³⁴ *Id.*

¹³⁵ See GATT, *supra* note 119, at art. XX(b).

¹³⁶ Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 76 (2016).

¹³⁷ In relevant part, GATT Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

....

- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

....

- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. . . .

GATT, *supra* note 119, at art. XX.

¹³⁸ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

XX are situated “outside the realm of trade liberalization,”¹³⁹ the legal consistency of each concrete measure in light of substantive trade rules is a delicate task of identifying “a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions.”¹⁴⁰

When assessing whether a measure falls under one of the items set out in Article XX, adjudicators engage in “a process of weighing and balancing a series of factors.”¹⁴¹ This exercise will gauge the connection between the challenged measure and the legitimate interest in question. In particular, it involves evaluating (i) the relative importance of the societal interest or value at stake, (ii) the degree of contribution of the measure to protect the legitimate interest in question, and (iii) the degree of trade-restrictiveness of the measure.¹⁴²

As discussed below, WTO case law as it stands points to a difficult reconciliation of geoeconomic goals, such as the promotion of domestic manufacturing and diversification of trade partnerships with the exceptions laid out in the hypotheses of Article XX.

i. Promotion of Domestic Capabilities Seen from the Perspective of GATT Article XX

One of the legitimate interests raised during trade disputes examined by the WTO dispute settlement mechanisms was mentioned by Article XX(j), which, in relevant part, recognizes that WTO members may adopt measures “essential to the acquisition or distribution of products in general or local short supply.”¹⁴³

In *India–Solar Cells*, India claimed that it depended predominantly on foreign solar cells and modules for domestic supply of clean energy generated from solar power. According to India, “dependence on imports of foreign solar cells and modules creates a risk of disruption in continuous and affordable

¹³⁹ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 17, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

¹⁴⁰ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 159, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

¹⁴¹ Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Docs. WT/DS161/AB/R & WT/DS169/AB/R (adopted Jan. 10, 2001).

¹⁴² Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.77, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016); Appellate Body Report, *China – Publications and Audiovisual Products*, ¶¶ 239, 242, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) (providing a summary of previous decisions on the steps to assess the necessity of a measure).

¹⁴³ GATT, *supra* note 119, at art. XX(j).

supply of solar cells and modules.”¹⁴⁴ For this reason, India argued that it was necessary to ensure “an adequate reserve of domestic manufacturing capacity . . . in case there is a disruption in supply of foreign” goods.¹⁴⁵

The Appellate Body disagreed. It understood that GATT Article XX(j) does not limit “the scope of potential sources of supply to ‘domestic’ products manufactured in a particular country.”¹⁴⁶ When assessing the existence of supply shortage, as stipulated in that provision, the focus should not be placed “exclusively on availability of supply from ‘domestic’, as opposed to foreign or ‘international’ sources.”¹⁴⁷ The AB, thus, rejected what it saw as India’s view that “all imports, in and of themselves, entail supply-related risks and, in that sense, are not ‘available’ to meet demand.”¹⁴⁸ Ultimately, the party invoking the exception of Article XX(j) has the burden of demonstrating the existence of supply shortage “from both domestic and international sources.”¹⁴⁹ If domestic demand can be supplied by imports, there is no space for promoting local capabilities by invoking the exception of Article XX(j).

In *Brazil—Taxation*,¹⁵⁰ a Brazilian program to support local manufacturing of digital television equipment was challenged by the EU and Japan. Brazil argued that the discriminatory measures in favor of domestic suppliers of TV equipment contributed to “the objective of bridging the digital divide and promoting social inclusion, by ensuring continuity of supply of digital television equipment meeting the requirements of the [Brazilian system of digital TV].”¹⁵¹

The Panel’s assessment differed from that offered by Brazil. It considered that “the motivation to implement the programme was precisely because there were concerns that the market *could be supplied* by imported products, ‘to the detriment of the creation of an industrial park for the sector.’”¹⁵² In order to attain the goal of bridging the digital divide, according to the Panel, less trade-restrictive measures were available, such as incentivizing more imported equipment.¹⁵³ As in *India—Solar Cells*, the possibility of supplying the domestic market by imports removes the justification, under Article XX(j), to support local manufacturing.

¹⁴⁴ Panel Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 7.189, WTO Doc. WT/DS456/R (adopted Oct. 14, 2016).

¹⁴⁵ *Id.*

¹⁴⁶ Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.68, WTO Doc. WT/DS456/AB/R (adopted Sept. 16, 2016).

¹⁴⁷ *Id.* ¶ 5.69.

¹⁴⁸ *Id.* ¶ 5.77.

¹⁴⁹ *Id.* ¶ 6.4.

¹⁵⁰ *Brazil—Taxation*, *supra* note 123, ¶ 7.601.

¹⁵¹ *Id.* ¶ 7.611.

¹⁵² *Id.* ¶ 7.574.

¹⁵³ *Id.* ¶ 7.621.

On a case involving the application of Article XX(g), *China – Rare Earths*,¹⁵⁴ China claimed that its regime to restrict the export of certain materials was part of a broader policy aimed at the conservation of exhaustible natural resources, thereby supported by the general exception clause of the GATT. This was all the more so given that domestic producers were also affected by the reduction in the local supply of such materials.

After having concluded that exports were more negatively affected than domestic producers, the panel found that the measure in question “seem[ed] designed to reserve amounts of rare earth products for domestic consumption,”¹⁵⁵ instead of being related to the legitimate interest of the conservation of exhaustible resources.

More recently, in a case adjudicated already within the context of the COVID-19 pandemic, a panel was set up at the request of the EU to decide on the consistency of a program adopted in Turkey to increase local manufacturing of pharmaceuticals.¹⁵⁶ One element of this policy was the “localization requirement” according to which foreign producers should commit to produce in Turkey certain pharmaceutical products. Medicines not meeting this requirement would not be eligible for refund from the public social security system.¹⁵⁷

Turkey asserted that the localization requirement addressed the “risk of long-term shortage of supply of safe, effective and affordable pharmaceutical products” emerging from “its over-reliance on imported pharmaceutical products.”¹⁵⁸ Yet unlike the previous examples from WTO case law, Turkey argued that its policy was supported by GATT Article XX(b), which allows an exception for measures “necessary to protect human, animal or plant life or health.”¹⁵⁹

The panel did not endorse Turkey’s view. Going through the statements and documents giving shape to the policy in question, the panel concluded that the “localisation requirement was not conceived to pursue a public health objective . . . but rather appears to pursue an industrial policy objective.”¹⁶⁰ The adjudicators failed to see a causal link between “the target of meeting 60% of domestic demand by domestic production,” one of the objectives of the localization requirement, and the goal of “ensuring continuous supply of

¹⁵⁴ Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS431/R (adopted Aug. 29, 2014).

¹⁵⁵ *Id.* ¶ 7.601.

¹⁵⁶ Panel Report, *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/12, (adopted Apr. 28, 2022) [hereinafter *Turkey – Pharmaceutical Products (EU)*].

¹⁵⁷ *Id.* ¶ 2.20.

¹⁵⁸ *Id.* ¶ 7.170.

¹⁵⁹ GATT, *supra* note 119, at art. XX.

¹⁶⁰ *Turkey – Pharmaceutical Products (EU)*, *supra* note 156, ¶ 7.191.

safe, effective and affordable pharmaceutical products” raised by Turkey before the panel.¹⁶¹

This decision is particularly interesting on at least two counts: it has been the first case appealed under the Multi-Party Interim Appeal Arbitration Arrangement (MPIA),¹⁶² with the panel report being upheld in the findings above. Second, the panel report was drafted during the COVID-19 context, which offers clues on the flexibility (or lack thereof) of WTO rules to account for the increasing interest for policies that strengthen the resilience of national economies—in the pharmaceutical sector, in this case.

Accordingly, while the panel did not agree with Turkey’s characterization of the localization requirement, it offered a potential pathway to accommodate future policies aimed at building up local capacity in the pharmaceutical industry. The panel recognized in principle that a WTO member could adopt policies to develop its pharmaceutical sector. But this would only be acceptable “if there is a rational relationship between the objective set by that WTO Member for developing its pharmaceutical sector and the specific public health objective invoked.”¹⁶³ Crucially, the panel opined that not “any measure taken by a WTO Member to increase its local production of pharmaceutical products must be deemed to have been taken for the purpose of protecting human life or health.”¹⁶⁴

Conversely, this reasoning seems to suggest that some measures to promote domestic manufacturing might be consistent with Article XX(b). Yet, it seems unclear whether a policy of domestic manufacturing could be adopted with the “purpose of protecting human life or health”¹⁶⁵ while at the same time eschewing the labelling of industrial policy. In this sense, it remains an open question whether and to what extent the panel offers a practical solution to reconcile a geoeconomic policy under the existing exceptions to trade rules.

For the time being, the examples above signal that as the case law stands, it is difficult to find support under GATT Article XX for geoeconomic policies that seek to promote domestic capabilities. The jurisprudence indicates that the protection or promotion of domestic capabilities is admitted only in the instances where there are no market solutions to the underlying problems addressed by the policy in question. If imports can respond to the challenge motivating the disputed measure, it is likely that policies meant to support the development of domestic capabilities will be found inconsistent with trade rules.

¹⁶¹ *Id.* ¶ 7.204.

¹⁶² Arbitration Under Article 25 of the DSU, Award of the Arbitrators, *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/ARB25 (July 25, 2022).

¹⁶³ *Turkey — Pharmaceutical Products (EU)*, *supra* note 156, ¶ 7.203.

¹⁶⁴ *Id.* ¶ 7.210.

¹⁶⁵ *Id.*

ii. *Limits to Diversification of Supply Sources*

Similar difficulties as the ones above are identified in justifying measures directed to diversify supply sources. In another dispute in which GATT Article XX(j) was raised, *EU – Energy Package*,¹⁶⁶ Russia challenged measures by the EU and its Member States to diversify sources and routes of natural gas supply. The EU argued that natural gas was a product in “short supply” because of its heavy reliance on a few supply sources.¹⁶⁷

Unlike the case with India, the EU was able to concretely identify the risks emerging from the shortage of natural gas supply. Agreeing with the EU, the panel stated that “such disruptions may compromise the reliability of the local or transnational chains of natural gas supply to the European Union.”¹⁶⁸ Despite this understanding, the panel was of the view that this situation was not enough to meet the criteria set out by Article XX(j). In a strict interpretation of the language of that provision, it found that the possibility of risks of disruption does not satisfy the requirement that the products in question are in “short supply,” as prescribed by Article XX(j). It considered that “Article XX(j) does not cover products that are currently not in short supply but that may become . . . in the future.”¹⁶⁹

The panel also examined the EU’s claim that foreign control of certain elements in the supply chain “poses a genuine and sufficiently serious threat to its security of energy supply.”¹⁷⁰ This claim was based on GATS Article XIV(a), which stipulates an exception for measures “necessary to protect public morals or to maintain public order.”¹⁷¹

Although the panel agreed that foreign control of such elements in the supply chain pose “a genuine and sufficiently serious threat to a fundamental interest of the EU society,”¹⁷² it rejected the EU’s claim for understanding that it had been imposed on foreign actors in an arbitrary and unjustifiably

¹⁶⁶ Panel Report, *European Union and its Member States – Certain Measures Relating to the Energy Sector*, WTO Doc. WT/DS476/R (adopted Aug. 10, 2018) [hereinafter *EU – Energy Package*].

¹⁶⁷ *Id.* ¶ 7.1337.

¹⁶⁸ *Id.* ¶ 7.1346.

¹⁶⁹ *Id.* ¶ 7.1348.

¹⁷⁰ *Id.* ¶ 7.1143 n.1900.

¹⁷¹ General Agreement on Trade in Services art XIV(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS] (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order . . .”).

¹⁷² *EU – Energy Package*, *supra* note 166, ¶ 7.1202.

discriminatory manner.¹⁷³ According to the panel, domestically controlled operators in the supply chain also might pose risks to the security of supply to the EU market, and these operators had not been subject to the measure at issue¹⁷⁴— an argument which brings to mind the point articulated in *India–Solar Cells* that the existence of domestic manufacturing is no guarantee that supply risks are eliminated, just as the reliance on imports is not necessarily a vulnerability to supply.

Despite the conclusion reached by the panel, it is interesting to note that the panel in *EU – Energy Package* accepted, under the public morals exception, the EU’s assertion that dependence on one or a few suppliers can pose a risk worthy of protection. This understanding dovetails with the panel in *U.S. – Tariff Measures* which acknowledged, in the context of the corresponding clause of GATT Article XX(a), that “public morals objectives may frequently have inseparable economic aspects.”¹⁷⁵ The U.S. claim in that case was ultimately rejected because the panel could not see the contribution that the tariffs imposed on Chinese products would make to address the public moral concerns raised by the United States. But it is an open question whether future panels will have the flexibility to recognize that in the context of strategic competition measures to diversify suppliers could fit under Article XX(a).

Still, so far, WTO case law suggests a disconnect between the logic that inspired trade rules and that which stands behind geoeconomic measures. As examined above, it is difficult to justify measures that foster local production or the diversification of suppliers if the market offers suppliers that might satisfy domestic demand. There is little room to accommodate policies whose purpose is to rearrange the global distribution of economic activity for strategic reasons if the market can provide solutions.

One set of provisions that might be raised as a possible support for such measures are security exceptions. Yet, these are also subject to a number of conditions, as seen below.

iii. Resorting to Security Exceptions to Accommodate Geoeconomic Policies

The WTO panel report on *Russia-Traffic in Transit*¹⁷⁶ clarified a number of questions regarding the operation and scope of the GATT national security exception,¹⁷⁷ in particular those pertaining to the interpretation of Article

¹⁷³ *Id.* ¶ 7.1253.

¹⁷⁴ *Id.* ¶ 7.1251.

¹⁷⁵ *U.S. – Tariff Measures*, *supra* note 21, at ¶ 7.137.

¹⁷⁶ Panel Report, *Russia - Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia-Traffic in Transit*].

¹⁷⁷ In relevant part, the national security exception provides:

Nothing in this Agreement shall be construed . . .

XXI(b)(iii), which covers action “taken in time of war or other emergency in international relations.”

The panel struck a delicate balance between what it considered under its mandate and what it saw as belonging to the sovereign assessment of each state. It considered that the determination of the existence of an “emergency in international relations” is an “objective fact, subject to objective determination.”¹⁷⁸ In fact, it adopted a rather narrow understanding of the scope of this expression, to encompass “a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.”¹⁷⁹

Conversely, interpreting the chapeau of Article XXI(b), the panel acknowledged that “it is left, in general, to every Member to define what it considers to be its essential security interests.”¹⁸⁰ But the panel suggested that the notion of “essential security interests” may generally refer to “interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.”¹⁸¹

The panel noted that the underlying situation that gave rise to *Russia-Traffic in Transit* was “very close to the ‘hard core’ of war or armed conflict.”¹⁸² Still, it opined that the national security exception should not be read as affording protection for “political or economic conflicts” with other states, unless they “give rise to defence and military interests, or maintenance of law and public order interests.”¹⁸³

Therefore, at least as far as Article XXI(b)(iii) is concerned, the panel approach leaves narrow space to invoke the security exception in connection with geoeconomic measures where the link to defense and military interests can be elusive, if at all present.

The subsidies offered by the United States in the framework of the CHIPS and Science Act, for example, pose the question of the interface between subsidies’ disciplines, discrimination, and the national security exception. As

b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

....

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations

....

GATT, *supra* note 119, at art. XXI

¹⁷⁸ *Russia-Traffic in Transit*, *supra* note 176, ¶ 7.77.

¹⁷⁹ *Id.* ¶ 7.76.

¹⁸⁰ *Id.* ¶ 7.131.

¹⁸¹ *Id.* ¶ 7.130.

¹⁸² *Id.* ¶ 7.136.

¹⁸³ *Id.* ¶ 7.75.

seen above, the CSA excludes “foreign entities of concern” from its benefits.¹⁸⁴ The question that emerges in this regard is whether the concern underlying this category “give[s] rise to defence and military interests,” as determined by the panel in *Russia-Traffic in Transit*.¹⁸⁵ A similar question could be asked with respect to the discriminatory provisions of the Inflation Reduction Act, which afford privileges to U.S. free trade agreement partners. Would it be possible to favor these partners under a national security justification? Based on the reasoning by the panel, it is unlikely.

In turn, the expanding scope of the U.S. export controls—such as the curbs on exports in the semiconductor sector—shifts the discussion to Article XXI(b)(ii).¹⁸⁶ This is a scarcely discussed provision¹⁸⁷ which was not directly addressed by *Russia-Traffic in Transit*.

It might be straightforward to claim the provision of subparagraph (ii) offers legal support to export controls.¹⁸⁸ Still, having the U.S. semiconductor export controls in mind, a connection would need to substantiate how semiconductors amount to materials directed to “supplying a military establishment.”¹⁸⁹

Additionally, because of the “foreign direct product” rule, the U.S. semiconductor export controls also beg the question of the legal consistency of its extraterritorial effects. This brings to the table the debate on the legality of secondary sanctions—does the GATT national security exception excuse the trade restrictions imposed on third parties not directly targeted by sanctions?

While there is no authoritative opinion about the consistency of secondary sanctions with WTO law,¹⁹⁰ arguably one standard of review of such measures is the “necessity test” which is stipulated in the chapeau of Article XXI(b).¹⁹¹ According to this provision, nothing in GATT shall be construed “to prevent any contracting party from taking any action which *it considers necessary* for the protection of its essential security interests.”¹⁹²

Are the extraterritorial effects of the semiconductor export controls “necessary for the protection” of the “essential security interests” of the United States? This would need to be assessed on a case-by-case basis. The panel in *Russia-Traffic in Transit* opted to allow unlimited discretion to the party

¹⁸⁴ See *supra* note 111 and accompanying text.

¹⁸⁵ See *supra* note 183 and accompanying text.

¹⁸⁶ See GATT, *supra* note 119, at XXI(b)(ii).

¹⁸⁷ Kentaro Ikeda, A Proposed Interpretation of GATT Article XXI(b)(ii) in Light of Its Implications for Export Controls, (Feb. 1, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3815334.

¹⁸⁸ DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 138 (2009).

¹⁸⁹ See GATT, *supra* note 119, at XXI(b)(ii).

¹⁹⁰ IRYNA BOGDANOVA, UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS 155 (2022).

¹⁹¹ *Id.* at 261.

¹⁹² *Id.* (emphasis added).

invoking the necessity of the measure supported by the national security exception.¹⁹³ At the same time, it should be borne in mind that the panel did not address a case of secondary sanction. For such cases, some analysts consider it advisable to establish a “plausible link between the sanctions adopted and the security interests” to be protected.¹⁹⁴ But it remains an undefined question.

V. WHAT SPACE FOR MEASURES OF A GEOECONOMIC NATURE WITHIN THE TRADE REGIME?

Any workable solution for trade regulation going forward—and the reform of the WTO system in particular—requires bringing the U.S., China, and the EU on board.¹⁹⁵ What kind of solution might work when these major economies all resort to policies of a geoeconomic nature that challenge key tenets of the current trade regime, such as the rules curbing unjustified discrimination and those imposing limits on trade-distorting state subsidies?

Increasing deployment of geoeconomic measures adds a new level of challenges to what is already a difficult reform agenda of the WTO. It suggests a change in the terms of the debates in the negotiation and the dispute settlement pillars—it also highlights that discussions on both pillars are interlinked.

Regarding the negotiation pillar, widespread resort to geoeconomic measures has the potential to change the nature of the discussions on industrial subsidies. Until now, a large part of the focus on this issue has been on China’s industrial policies, particularly on the trade-distorting impacts of excess capacity generated by Chinese subsidies.

A recent EU policy paper on WTO reform advocated that “[n]ew rules on industrial subsidies are essential to counter the negative effects of heavy subsidisation on international trade.”¹⁹⁶ For its part, the USTR claimed it is necessary to “find global solutions to the many serious problems posed by China’s state-led, non-market approach to the economy and trade.”¹⁹⁷ China, on the other hand, defends its approach to subsidies asserting that “[i]t is

¹⁹³ Pramila Crivelli & Mona Pinchis-Paulsen, *Separating the Political from the Economic: The Russia–Traffic in Transit Panel Report*, 20 WORLD TRADE REV. 582, 592 (2021).

¹⁹⁴ Tom Ruys & Cedric Rygaert, *Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 89 BRIT. Y.B. INT’L L. 1, 63 (2020).

¹⁹⁵ Bernard Hoekman et al., *China and WTO Reform 7* (Eur. Univ. Inst., Robert Schuman Ctr. for Advanced Stud., Working Paper RSC 2022/59, 2022).

¹⁹⁶ Eur. Comm’n, *Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System*, at 10 (2021), https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159544.1329_EN_02.pdf.

¹⁹⁷ U.S. TRADE REPRESENTATIVE, 2021 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 23 (2022).

imperative to respect the diversity of development models among Members and promote fair competition in the fields of trade and investment.”¹⁹⁸

As these references show, the U.S. and EU have acted to curb China’s trade-distorting support to its economic actors. But what the examples in Part III reveal, though, is that the U.S. and EU are also embracing geoeconomic policies with trade-distorting effects. How might one reconcile the recent U.S. and EU (trade-distorting) subsidy programs with their complaints that China distorts trade using heavy state aid programs? Similarly, is China willing to consider the U.S. and EU subsidies as part of what would amount to a new geoeconomic “development model” of these latter actors? Increasing use of geoeconomic measures by all major economies blurs the divide—that arguably existed until recently—between governments that are generous in their state support and those that by and large restrained themselves from intervening in the economic domain. Future debates on industrial subsidies are likely to be shaped by this policy shift.

Another key tenet of the trade regime directly affected by some of the recent geoeconomic measures, particularly in the United States, is the curb on unjustified discrimination. Adoption of legislation such as the CSA and the IRA suggests that measures that discriminate against China enjoy strong political support in Washington. This implies that the United States might have limited space to change these programs to remedy possible WTO inconsistencies, in particular when it comes to revert discrimination to the disadvantage of China. While the United States signals some level of flexibility to address the concerns raised by its allies with respect to these statutes,¹⁹⁹ the same openness has not been displayed with respect to China. In fact, in November 2022, China requested to add to the agenda of the WTO Council for Trade in Goods discussion of its concerns with respect to both the CSA and the IRA.²⁰⁰ It is worth noting that the EU and Korea have not yet formally raised such concern at the WTO, which seems to be due to the consultations established by each of these actors with Washington.

This last point indicates how much the debate on substantive issues is linked to the discussion on the reform of the WTO dispute settlement pillar. Until recently, the connection between the dispute settlement standoff and substantive rules focused predominantly on the need to renegotiate disciplines on trade remedies.²⁰¹ Yet, when dispute settlement debates are approached

¹⁹⁸ Communication from China, *China’s Proposal on WTO Reform*, ¶ 2.36, WTO Doc. WT/GC/W/773 (May 13, 2019).

¹⁹⁹ Doug Palmer, *Biden ‘Confident’ U.S. Can Address EU Concerns About IRA Subsidies*, POLITICO (Dec. 1, 2022), <https://www.politico.com/news/2022/12/01/biden-eu-ira-subsidies-00071645>.

²⁰⁰ World Trade Org., Council for Trade in Goods, Proposed Agenda of 24 November 2022, ¶¶ 9 - 10, WTO Doc. G/C/W/823.

²⁰¹ Chad P. Bown, *Trump Ended WTO Dispute Settlement. Trade Remedies Are Needed to Fix It* (Peterson Inst. for Int’l Econ. Working Paper No. 22-1, 2022).

with the geoeconomic measures in mind, it becomes clear that other substantive rules might also be of relevance. In fact, from this angle the Appellate Body paralysis can be seen as a source of policy space which allows the United States to experiment with regulations such as the CSA and the IRA without facing the risk of being effectively challenged at the WTO. Since it can “appeal into the void” in case of a dissatisfactory panel report, there are no multilateral remedies to adjudicate whether the U.S. geoeconomic measures are WTO-compliant, let alone to determine compensation in case they fall foul of the applicable rules.

This situation raises the question whether the U.S. position regarding dispute settlement reform will be affected by its geoeconomic policies: is the United States willing to subject measures such as the CSA and the IRA to the scrutiny of third-party dispute settlement, particularly considering the case law discussed in Part IV above? Or will it prefer to politically manage concerns raised by its trade partners? The USTR recently stated that “dispute settlement was never intended to supplant negotiations,”²⁰² which suggests a preference for negotiated—rather than adjudicated—solutions to trade disputes. Moreover, the USTR reportedly argued that WTO reform should be holistic, tying progress on dispute settlement to talks on reforms on the body’s negotiating pillar.²⁰³ Whether this statement relates only to reform substantive rules on trade remedies or also on other disciplines remains to be seen.

But it seems clear that the widespread use of geoeconomic measures by all the major economies will have an influence on discussions on the future of trade regulation, and on WTO reform in particular.

Any solution to the challenges raised above will require serious high-level political efforts by all parties. In the meantime, management of the increasing tension triggered by the interplay of geoeconomic policies and trade rules will be influenced by developments at three levels: political, bureaucratic, and judicial.

At the *political* level, the context described in this article points to a mutual entanglement of substantive and institutional elements at the WTO, suggesting that a compromise to unlock the Appellate Body might require some level of flexibility on the use of subsidies and of discriminatory policies. Unless an understanding in this regard is reached, many geoeconomic policies—which, in the United States, enjoy unprecedented level of bipartisan support—would be challenged in Geneva, an outcome that is likely not to generate willingness on the U.S. side to revive the AB. At the same time, confidence building measures such as some level of institutionalization of the trade-security

²⁰² Ambassador Katherine Tai, Off. of the U.S. Trade Representative, Remarks as Prepared for Delivery on the World Trade Organization (Oct. 2021), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tais-remarks-prepared-delivery-world-trade-organization>.

²⁰³ Brett Fortnam, *WTO Director-General: U.S. Initiating Discussions on Dispute Settlement Reform*, INSIDE US TRADE, Apr. 29, 2022.

nexus within the WTO²⁰⁴ might be helpful to generate the conditions necessary to factor in geoeconomic considerations into the workstream of the organization.

At the *bureaucratic* level, national regulators might try to design geoeconomic measures in ways which are consistent with the WTO. There is no guarantee this will always be possible nor politically feasible. But it is worth pointing out that, for example, the U.S. Inflation Reduction Act gave expression to the strategy of “ally and friend-shoring” by giving preference to FTA partners, instead of opting for a national security-grounded excuse to grant such privileges. Other measures might prefer to use rules of origin as a means to favor FTA partners. This option is likely not to spare the United States from accusations of WTO inconsistency, as seen above, but it is an ingenious way to avoid resorting to the contentious security exception—and shows there might occasionally exist space to explore WTO-consistent design of geoeconomic measures.

Finally, developments at the *judicial* level could lead to some accommodation between geoeconomic concerns and the existing trade rules. This would, of course, require adjudicators to take decisions that would possibly depart from the liberal inspiration of the current trade regime. Some of these decisions could include a more flexible interpretation of GATT Article XX exceptions—such as to consider that “public morals” could justify measures whose purpose is to diversify supply sources or to accept policies to increase local manufacturing of pharmaceuticals as a measure necessary to protect human health. It could also involve interpreting the security exception of Article XXI more broadly to also cover cases that fall short of an armed conflict. Admittedly, these would be bold decisions for adjudicators to make—although one possibility that could be explored is an interpretation of the rules by WTO members, following the example of the Doha Declaration on TRIPS and Public Health,²⁰⁵ which clarified the scope of a number of provisions of the TRIPS Agreement on access to medicines.

VI. CONCLUSION

Strategic competition is consolidating as developed major powers, led by the United States and the EU, respond to the rise of China with measures of a geoeconomic reorientation seeking to influence the location of global economic production.

The consolidation of strategic competition exposes the limits of trade law in two ways: first, it challenges the existing substantive trade rules, in particular those disciplining discrimination (including the general and security

²⁰⁴ Mona Pinchis-Paulsen, *Let's Agree to Disagree: A Strategy for Trade-Security*, 24 J. INT'L ECON. L. 527 (2022).

²⁰⁵ World Trade Org., Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, (2002).

exceptions) and trade-distorting subsidies; second, given the dysfunctional status of the WTO dispute settlement mechanism, it also puts pressure on the institutional aspects of the trade regime, which is unable to offer multilateral remedies to grievances caused by the adoption of geoeconomic measures, particularly those enacted in Washington.

Finding an acceptable balance between geoeconomic policies and trade rules hinges on the existence of political will. The Biden administration might be trying to stimulate political conditions that are more favorable to Washington by “shap[ing] the strategic environment around Beijing”²⁰⁶ outside the WTO, before negotiations can gain traction in earnest. Recent geoeconomic policies—such as the CSA and the IRA, as well as the export controls in the semiconductor sector—gain a different meaning when approached from this perspective: they emerge as measures which seek to strengthen the negotiating position of the United States (at least in the economic sectors in question) in the future definition of the regulation and governance of trade. And this situation is enabled by the policy space offered by the WTO dispute settlement dysfunction.

Whether the resort to geoeconomic policies will be able to redesign global supply chains remains to be seen. Economic decoupling does not depend entirely on the governments—market actors have an important level of influence.

But it is unrealistic to expect that the trade regime, whether in the framework of the WTO or elsewhere, will continue to operate the same way it has in past decades in a context where structural changes, such as the embrace of geoeconomic by major economies, are reshaping the global economy.

There is no doubt the trade regime is undergoing a period of experimentalism²⁰⁷ marked, among others, by pressure being offered by the unilateral or unilateral implementation of geoeconomic policies. The search for realistic solutions to preserve some level of rule of law in trade relations requires understanding where it is possible to manage the test to which geoeconomic policies subject the existing trade rules.

²⁰⁶ Blinken, *supra* note 44.

²⁰⁷ Kathleen Claussen, *The Experimental Evolution of Trade Law, in IS THE INTERNATIONAL LEGAL ORDER UNRAVELING?* 285 (David Sloss ed., 2022).