The Changing Logic of International Economic Law

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Abstract

Economic policies are increasingly guided by a whole set of different concerns from those that inspired International Economic Law (IEL). Instead of interdependence, trade liberalization, and market-orientation, rules and government decisions are increasingly directed to pursue goals such as reduction of dependence, resilience, autonomy, and even self-reliance. A geoeconomic logic is gradually replacing the liberal rationale that underpinned IEL for the past decades. Understanding where IEL might be headed requires an appraisal of this changing logic. This Article makes the following contributions to this effort. First, it proposes a conceptual framework centered around the notion of "geoeconomics," which provides a coherent meaning to many developments that are transforming economic relations. The framework is unique in that it clearly outlines what is considered under the concept of geoeconomics, particularly by distinguishing it from other potentially misleading notions. This Article describes the assumptions that back the geoeconomic framework and show how they play out in practice. Thus, it sheds light on the factors driving many recent developments in the global economy which are difficult to explain from a liberal logic. Second, it contributes to sophisticate the terms of the debates among international economic lawyers that seek to address the transformations impacting IEL. These debates have neglected elements that are brought to light by the geoeconomic framework. This Article presents the insights arising from the geoeconomic framework and how they offer directions for future debates on the evolution of IEL.

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Introduction

The establishment of the World Trade Organization (WTO) in 1994 showed the global commitment to a trade regime "based upon open, market-oriented policies."[1] The political context of the time was filled with the expectation that trade liberalization would "lead to a progressively more open world trading environment."[2] The enthusiasm with the gains associated with a liberal trade order was echoed in the worldview depicted by the leadership of the then new organization. Renato Ruggiero, the WTO's second director-general, announced in 1996 that "[o]ne by one, trade and investment barriers will continue to be swept away by globalization, like leaves on an autumn day"[3] while Mike Moore, his successor, praised the benefits arising from market-led comprehensive economic integration: "[o]ur independence is best guaranteed by interdependence."[4]

There is no doubt the legal regimes comprising International Economic Law (IEL) enabled significant wealth creation and distribution on a global scale over the past years—and this is due in no small part to their liberal *rationale* and market-orientation.

Yet economic policies are increasingly guided by a whole set of different concerns. Instead of interdependence, trade liberalization, and market-orientation, more and more rules and government decisions are

1. Marrakesh Declaration Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement], fifth preambular paragraph.

2. *Id.* ¶ 2.

3. Press Release, WTO, Managing a World of Free Trade and Deep Interdependence, Mr. Renato Ruggiero to the Argentinian Council on Foreign Relations (Sept. 10, 1996), https://www.wto.org/english/news_e/pres96_e/pr055_e.htm [https://perma.cc/8YU6-ZXFU].

4. Mike Moore, The WTO: The Challenge Ahead – Address to the New Zealand Institute of International Affairs (July 1, 1999), https://www.wto.org/english/news_e/spmm_e/spmm01_e.htm [https://perma.cc/KN4Q-S69Z].

pursuing goals such as "reduction of dependence," resilience, autonomy, and even self-reliance, as illustrated by recent policies implemented in the United States, China, and the European Union (EU). As argued in this Article, a geoeconomic logic is gradually replacing the liberal *rationale* that underpinned IEL for the past decades. This Article lays out the elements that comprise this geoeconomic logic and discusses how its emergence is likely to shape debates on economic regulation going forward.

Major economies, led by China and the United States, are increasingly embracing this new logic. From the "indigenous innovation" set of policies launched in 2006[5] to "Made in China 2025,"[6] China has been actively promoting the build-up of domestic capabilities to decrease its dependence on foreign suppliers. "We are witnessing major changes never seen in a century, and we need to take the path of indigenous innovation through self-reliance," said president Xi Jinping in 2020.[7] For its part, the United States under the Biden administration rolled out a series of measures to increase domestic production in strategic products such as semiconductors,[8] solar panels,[9] and electric batteries.[10] According to President Biden "[t]here's no reason the blades for wind turbines can't be built in Pittsburgh instead of Beijing."[11]

Even the EU, a champion of the market-led regimes that give shape to IEL, is refashioning itself to become a geoeconomic actor

5. The State Council of the People's Republic of China [hereinafter P.R.C. State Council], The National Medium- and Long-Term Program for Science and Technology Development (2006–2020) – An Outline II.1 ("Indigenous innovation refers to enhancing original innovation, integrated innovation, and re-innovation based on assimilation and absorption of imported technology, in order improve our national innovation capability.").

6. Center for Security and Emerging Tech., *Notice of the State Council on the Publication of "Made in China 2025"* (Feb. 11, 2023, 11:00am), https://cset.georgetown.edu/publication/notice-of-the-state-council-on-the-publication-of-made-in-china-2025/ [https://perma.cc/TQJ4-LQXT].

7. CGTN, *President Xi Jinping Calls for Self-reliance in Guangdong Inspection* (Oct. 13, 2020), *https://news.cgtn.com/news/2020–10–13/President-Xi-Jinping-calls-for-self-reliance-in-Guangdong-inspection-Uy43r9wWyI/index.html [https://perma.cc/K9XP-D45D\].*

8. *See* CHIPS and Science Act, Pub. L. No. 117–167, § 103, 126 Stat. 1366, 1379 (2022).

9. *See* US 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 [https://perma.cc/5W3B-GE3X].*

10. *See* Inflation Reduction Act, Pub. L. No. 117–169, § 13401, 136 Stat. 1818, 1954 (2022).

11. Nick Wadhams, *What Biden Said About China in His First Speech to Congress*, Bloomberg, (Apr. 29, 2021), *https://www.bloomberg.com/news/articles/2021–04–29/human-rights-defense-and-turbines-what-biden-said-about-china [https://perma.cc/7CU7-GK46].*

under a suite of policies aimed at safeguarding its "strategic autonomy."[12] For instance, the "New Industrial Strategy for Europe" states that "Europe's strategic autonomy is about reducing dependence on others for things we need the most."[13] A look at sectoral initiatives adopted by the EU reveals that Brussels is pursuing the geoeconomic goal of "reducing dependence" essentially by means of building-up local capabilities; protecting existing local capabilities from being transferred to foreign actors; and by diversifying suppliers of strategic goods, so as to increase the share sourced from allies and reliable partners. Equally relevant, the "things we need the most" are proving to be an expanding list of areas that far exceeds sectors associated with the traditional concept of "national security," instead also covering sectors ranging from media[14] to pharmaceuticals.[15]

What accounts for these shifts in economic policies? And what implications can they have on economic regulation going forward?

To make sense of what drives these measures, it is necessary to leave aside the lenses we have been using for the past decades to describe the functioning of IEL regimes. These lenses were premised on the understanding that global economic interdependence led by market actors in search of economic efficiency was a source of welfare for all states, firms, and peoples. The rules of IEL gave concrete expression to such understanding, offering market-actors the conditions to compete on global markets with limited state interference. Examples of these rules include provisions on non-discrimination (the most-favored nation

12. "Strategic autonomy" is a conceptual guideline inspiring a number of recent legal measures adopted by the European Union seeking to increase "the capacity of the EU to act autonomously – that is, without being dependent on other countries – in strategically important policy areas." European Parliament Briefing, EU Strategic Autonomy 2013–2023 From Concept to Capacity (July 2022).

13. *Commission Communication on a New industrial Strategy for Europe*, at 13, COM (2020) 102 final (March 10, 2020) [hereinafter "New Industrial Strategy for Europe"].

14. *See* Commission Regulation 2019/452 of March 19, 2019, Establishing a Framework for the Screening of Foreign Direct Investments into the Union, 2019 O.J. (L 79I) 1, art. 4 (1)(a) (includes the media as a critical infrastructure subject to the EU investment screening mechanism).

15. *See* New Industrial Strategy for Europe, *supra* note 13, at 14 (stating that access to pharmaceuticals is crucial to Europe's security and autonomy).

and the national treatment clauses),[16] disciplines on state subsidies,[17] as well as the national security exception.[18]

In contrast, the new geoeconomic measures show states actively trying to shape markets in different sectors, with the purpose of safeguarding access to capabilities they consider strategic or important to national security, such as the manufacturing of semiconductors or medical equipment. A geoeconomic logic challenges the operation of IEL rules, among other reasons because states actively intervene in the economic domain to advance their strategic and security interests to an extent not foreseen in the existing rules. The dissemination of geoeconomic policies also suggests it will be difficult to agree on multilateral rules pertaining to areas that will shape the future of global economic relations, such as data governance, investment flows, and the role of states in the economy.

Understanding where IEL might be headed requires an appraisal of this change in the logic underlying economic relations. This Article makes the following contributions to this effort. First, it proposes a conceptual framework centered around the notion of "geoeconomics." The geoeconomic framework offers a coherent explanation to seemingly unrelated policy developments that have been increasingly used by major economies—examples include investment screening mechanisms, trade regulations that discriminate between allies and adversaries, and industrial policies that seek to promote domestic manufacturing. The framework builds on the International Political Economy (IPE) literature, which offers insights to make sense of the broader transformation taking place at the global economy. The Article's second contribution looks at the terms with which international lawyers have debated these transformations in economic relations. It is argued that insights emerging from the geoeconomic framework make salient a number of elements that have been so far overlooked by debates on the evolution of IEL.

Part I of this Article looks at recent examples of geoeconomic measures in order to concretely illustrate how governments are seeking to reshape economic relations. Part II lays out the geoeconomic

16. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994], Articles I and III.

17. *See generally* 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] (laying down the main disciplines constraining state economic support for market players).

18. *See* GATT 1994, *supra* note 16, Article XXI.

framework by putting forward its key notions and core assumptions. It also breaks down how the geoeconomic dynamic unfolds in practice in order to explain why states are turning to geoeconomic measures. Part III surveys current debates among international economic lawyers in order to reveal the extent to which these debates neglect the insights offered by the geoeconomic framework. Based on this survey, Part IV spells out the contributions brought to light by the geoeconomic framework. These contributions should be factored into debates aimed at understanding the future direction of IEL. Part VI presents concluding remarks.

I. The Increasing Expansion of Geoeconomic Measures

This is not the first time IEL and geoeconomics meet. In the opening article of the very first edition of the *Journal of International Economic Law*, published in 1998, John Jackson made the case for the recognition of IEL as an autonomous field of Public International Law, with its own research agenda as well as its challenges.[19] Among the challenges, Jackson warned the "careful [legal] scholar" not to fall prey to the increasing "politicization" of international economic policy issues.[20] His message was for students of the new discipline to remain faithful to its *legal* nature.

One of the drivers of the "politicization" documented by Jackson was "the shifting emphasis from 'geo-politics' to 'geoeconomics,'" a narrative which gained traction at that time "as the Cold War and its threat of major disaster seem[ed] to have receded . . . ."[21]

The years following Jackson's article illustrated how successfully IEL thrived as a legal field. It was certainly not as affected by threats of "politicization" as other areas of international law. This is arguably because of the significant level of "legalization"[22] of the trade, investment and finance rules, and institutions. The high level of legalization of IEL regimes have provided a good amount of predictability and rule of law that enabled the global economy to reach the level of integration it now displays.

Perhaps no other field of IEL demonstrates this as well as the trade regime structured around the WTO. Trade rules enshrine states'

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19. *See generally*, John H. Jackson, *Global Economics and International Economic Law*, 1J. Int'l Econ. L. 1 (1998).

20. *Id.* at 11.

21. *Id.* at 2.

22. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 Int'l Org. 401(2000) (presenting the elements considered as metrics for the level of legalization of international regimes).

commitment to, under certain conditions, restrain the use of powers to affect the structure and functioning of markets. Thus, while trade rules do not enforce unfettered free trade,[23] they focus on giving effect to the "principle of liberalization of trade flows,"[24] whose consequence is to constrain states to make good on the trade liberalization commitments they signed onto.

By placing states at the backseat, the trade regime enables market-led economic interdependence by laying down the conditions for competition between domestic and foreign market actors with minimal distortion caused by state action. This liberal goal is advanced by a number of rules such as WTO agreements' provisions preventing states from discriminating in favor of domestic producers (national treatment) or to benefit some foreign market actors (most favored nation). Anti-discrimination rules disavow governments that upset the "equality of competitive conditions for imported products in relation to domestic products"[25] as well as the equality of competitive opportunities among foreign suppliers in a given market.[26] Through existing rules, states also agree to limit their capacity to distort trade by accepting restraints on the use of subsidies.

Of course, trade rules are designed in such a way that nontrade legitimate interests are also protected.[27] In the GATT 1994,[28] for example, states are excused to contradict trade rules if it is demonstrated that the inconsistent measures were adopted with the purpose of advancing one of the nontrade legitimate interests listed in Article XX, such as the protection of public morals and of human, animal, or plant life or health.

One evidence of how successfully the trade regime has been able to safeguard the rule of law against "politicization" can be seen in the management of the interface between nontrade concerns and the trade system.[29] Measures to protect the environment, for example, might

23. Bernard Hoekman & Douglas Nelson, *Subsidies and SOEs – Specific vs. Systemic Spillovers*, *in* A New Global Economic Order – New Challenges to International Trade Law 179 (Chia-Jui Cheng ed., 2021).

24. Panel Report, *United States—Tariff Measures on Certain Goods From China*, WTO Doc. WT/DS543/R (not yet adopted), ¶ 7.160.

25. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (adopted Nov. 1, 1996), at 16.

26. Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R and WT/DS401/AB/R (adopted June 18, 2014), at 120 ¶ 5.87.

27. *See* Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted December 17, 2007), ¶ 215.

28. *See* GATT 1994, *supra* note 16.

29. Robert Howse, *From Politics to Technocracy—and Back Again: the Fate of the Multilateral Trading Regime*, 96 Am. J. Int'l L. 94, 111 (2002) (examining how WTO case

have trade restrictive effects as a consequence. Which goal should prevail in these cases: the nontrade concern with environment protection or the commitment to liberalize trade? Over the years, WTO adjudicators skillfully charted a path that both respected WTO members' policy space to protect nontrade concerns and constrained the wiggle room for domestic regulation that contravened WTO commitments.[30]

The challenge posed by the simultaneous applicability of trade rules and those from other (nontrade) international regimes was one of the first major legal debates that attracted the attention of trade lawyers. It was the "Trade and . . . " debate of the late 1990s.[31] Interestingly, the relation between trade and security or strategic concerns was largely overlooked in this debate, which focused heavily on the interactions between trade and environment and human rights issues. More than two decades on, though, this is a key question to be confronted by international economic lawyers. Geoeconomics is back in a new iteration,[32] and the challenge to "politicize" IEL is at least as valid as when Jackson cautioned against it.

In recent years governments have been adopting measures that defy the logic underpinning the IEL regimes. In particular, such measures see governments taking an active role in shaping economic sectors, thereby encroaching upon a space left largely to the free interplay of market forces.

Firstly, investment screening mechanisms have seen a global expansion in the past years. Until recently, national economies would go to great lengths to attract foreign direct investments (FDI), to the point that states would not hesitate to grant foreign investors the right

law developed standards to accommodate the relation of non-trade concerns into the trade regime).

30. For a comprehensive account of the evolution of the Appellate Body jurisprudence in dealing with nontrade concerns, see generally Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 Eur. J. Int'l L. 9 (2016).

31. *See* José E. Alvarez, *Symposium: The boundaries of the WTO. Foreword*, 96 am. j. int'l l. 1–2 (2002) (offering an outlook of the discussions at that time on the interactions between the WTO law and rules from environment, human rights, public health and other "nontrade" fields). The tools deployed by the WTO jurisprudence to reconcile WTO obligations with rules and principles from other regimes also featured also in the International Law Commission's report on the "fragmentation of International Law". *See generally* Int'l L. Comm'n, Report of the Study Group on Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702 (April 13, 2006).

32. Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. Int'l Econ. L. 655, 657 (2019) (introducing the debate on how security concerns are increasingly encroaching upon the trade and investment regimes).

to challenge national policies before international private arbitrators.[33] Now, a growing number of restrictions prevent certain foreign investors from acquiring even minority stakes in domestic assets of strategic nature. UNCTAD reports that, from January 2011 to September 2019, at least 13 countries introduced new investment screening legislation while at least 45 "significant amendments" to existing mechanisms were enacted.[34] In countries such as the United States, Australia, and Canada, the number of foreign investment transactions blocked in recent years on national security grounds has equated or exceeded that of the past decades.[35]

Second, governments are actively attempting to redesign supply chains. IEL regimes provided the conditions for corporations to define how to organize their production geographically, based on cost-effectiveness criteria—hence the global value chains sprawling across the world. Now, states are invoking strategic reasons to dent this liberty enjoyed by companies. For instance, Japan announced subsidies to stimulate Japanese firms to shift manufacturing outside of China to Southeast Asia or Japan.[36] The French government is reported to be considering financial support for the reshoring of the production of paracetamol.[37] And the US government is going out of its way to prevent Chinese companies from catching up with American and Taiwanese companies that lead in the production of semiconductors.[38]

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33. The number of investor-state dispute settlement cases reached 1,190 by December 31, 2021. United National Conference on Trade and Development [hereinafter UNCTAD], *Investment Policy Hub*, *https://investmentpolicy.unctad.org/news/hub/1688/20220426-isds-navigator-update-1190-known-investment-treaty-cases-by-31-december-2021* [https://perma.cc/52YK-VP2S]. In comparison, the number of disputes initiated at the WTO (which involve only states) was 608 until the end of 2021. *See* WTO, Chronological List of Disputes Cases, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm [https://perma.cc/9QJB-3SBG].

34. UNCTAD, United Nations, National security-related screening mechanisms for foreign investment: An analysis of recent policy developments 1 (December 2019).

35. Lizzie Knight & Tania Voon, *The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China*, 21 J. World Investment. & Trade 104, 114–15 (2020).

36. *Japan Reveals 87 Projects Eligible for 'China Exit' Subsidies*, Nikkei Asia (July 18, 2020, 1:15 AM), https://asia.nikkei.com/Economy/Japan-reveals-87-projects-eligible-for-China-exit-subsidies [https://perma.cc/94UL-LAHM].

37. Leila Abboud & Michael Peel, *Covid-19 hastens French push to bring home medicines manufacture*, Fin. Times (July 29, 2020), https://www.ft.com/content/80a4836b-ca25–48e0–996d-458186e968dc [https://perma.cc/4NVZ-HHBU].

38. Steve Blank, *The Chip Wars of the 21st Century*, War on the Rocks (June 11, 2020), https://warontherocks.com/2020/06/the-chip-wars-of-the-21st-century [https://perma.cc/H8KW-FM8V].

Third, states are also seeking to rebuild or to create local capabilities and diversify supply sources. In the United States, proposals for a robust industrial policy are touted as a response to "Made in China 2025,"[39] China's very own package of geoeconomic policies.[40] On August 9th, 2022, President Joe Biden signed into law the Chips and Science Act,[41] which offers subsidies for semiconductor manufacturing in the United States to domestic and some foreign companies—but likely not to Chinese companies.[42]

These concerns also inspire the set of policies the EU is pushing forward in the context of its quest for "strategic autonomy." Faced with the present moment of "[g]lobal uncertainty . . . fueled by political and geoeconomic tensions,"[43] Brussels has launched a series of initiatives of a geoeconomic nature.

In a push to boost Europe's "technological sovereignty,"[44] the European Commission is proposing measures to foster a European cloud service industry with a view to reducing Europe's "technological dependencies in . . . strategic infrastructures . . . at the center of the data economy."[45] Furthermore, the EU's policy for critical raw materials advocates "*diversifying* and strengthening global supply chains including by continuing to work with partners around the world, *reducing* excessive import *dependence*, enhancing circularity and resource efficiency, and, in strategic areas, by *increasing supply capacity* within the EU."[46] Europe is also discussing legislation to discipline subsidized

39. *See* Center for Security and Emerging Tech., *supra* note 6.

40. Comm. on Small Business & Entrepreneurship , U.S. Senate, Made in China 2025 and the Future of American Industry (February 12, 2019) (examining a number of cutting-edge economic sectors and arguing that in a world of state competition for valuable industries, the United States cannot escape decisions on industrial policy).

41. *See* Pub. L. No. 117–167 § 103, 126 Stat. 1366, 1379.

42. Some of the government subsidies available under the Chips and Science Act are conditioned upon beneficiaries committing not to build certain semiconductor manufacturing facilities in China. *See Fact Sheet: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*, The White House (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/. [https://perma.cc/ZTL3-S6R7] Foreign companies are entitled to subsidies authorized by the Chips and Science Act, unless they are considered "foreign entities of concern." *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, § 9902 (a)(2)(C)(iii), 15 U.S.C. 4652.

43. *Trade Policy Review: An Open, Sustainable and Assertive Trade Policy*, at 1, COM (2021) 66 final (Feb. 18, 2021).

44. *A European Strategy for Data*, at 5, COM (2020) 66 final (Feb. 19, 2020) [hereinafter "European strategy for data"].

45. *Id.* at 9.

46. *Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability*, at 6, COM (2020) 474 final (Sept. 9, 2020) [hereinafter "Communication on

foreign acquisitions with the objective of leveling the playing field between internal and foreign investors. But this initiative is also directed to address cases in which "the granting of foreign subsidies can . . . be driven by a strategic objective to . . . promote an acquisition and later transfer technologies to other production sites, possibly outside of the EU."[47]

From an economic standpoint, many—if not all—of the measures above hardly make sense. As Kristen Hopewell correctly argues, "[f]rom the perspective of liberalism, it is simply illogical that states would willingly take actions that would damage their own economic welfare."[48] While these developments seem counter-intuitive when approached from the liberal-economic perspective that has prevailed over the course of the past decades, and which underpins IEL, they gain coherence when seen from a geoeconomic perspective. "Geoeconomics" provides an analytic framework with explanatory power to understand many of the fundamental shifts unfolding in the global economy.

II. GEOECONOMICS: A FRAMEWORK TO UNDERSTAND THE TRANSFORMATIONS AFFECTING INTERNATIONAL ECONOMIC LAW

This Part describes the geoeconomic framework. It begins by laying out what is understood by "geoeconomics" and by subsequently distinguishing this definition from other notions with which it has been bundled together over the past years. The purpose of this outline is to disentangle the conceptual confusion that has prevented analysts from pinning down the magnitude of the geoeconomic challenge to IEL. This is followed by a presentation of the assumptions underlying the geoeconomic framework. This Part concludes by examining how the geoeconomic framework operates in practice, thus highlighting the aspects that have been overlooked so far by debates among international economic lawyers, which is the object of the Part III.

A. Defining "Geoeconomics"

The examples presented in Part I show how much governments have been actively trying to shape economic relations in recent years. They do so by promoting domestic manufacturing or the build-up of

raw materials"].

47. *Commission White Paper on levelling the playing field as regards foreign subsidies*, at 7, COM (2020) 253 final (June 17, 2020) [hereinafter "White Paper on foreign subsidies"].

48. Kristen Hopewell, *Trump and Trade: The Crisis in the Multilateral Trading System*, 26 NEW POL. ECON. 271, 275 (2021).

domestic industries, by blocking foreign acquisition of assets, and by incentivizing companies to redesign their supply chains. These measures see states—not companies—taking a key role in the geographical allocation of economic activity in the world. States are doing so to attain strategic or security goals—not for profits. For these reasons, they are geoeconomic measures. As discussed in this article, the increasing resort to geoeconomics by governments presents a challenge to IEL rules, which are premised on limited state interference in economic relations.

The notion of "geoeconomics" gained prominence after an article by American strategist Edward Luttwak published in 1990.[49] Under this term, the author articulated together a number of elements that were already present in different parts of the literature, mainly that of the realist tradition of international relations as well as in the field of IPE. But the combination of these elements under the unifying concept of "geoeconomics" is in itself a contribution that offers a novel conceptual focal point shedding light on a specific type of state behavior in the economic realm. This Article builds upon Luttwak's original notion and updates it to take into account the particularities of the current strategic context, especially the economic and security competition with China.

Writing in the immediate aftermath of the Cold War, Luttwak argued that the reduced role of military power in world affairs shifted competition between states to the economic realm.[50] The "logic of conflict" that guided states' geopolitical competition was gradually being applied to the economic domain as the world moved past the Cold War.[51] When applied to the economic context, the "logic of conflict" expresses the idea that states will pursue the "outdoing of others in the realm of commerce."[52]

In Luttwak's conceptualization, geoeconomics is the application of the "logic of conflict" to international economic relations. In a geoeconomic context states continue to act as they have always done, only now in the economic realm.[53] States will seek to strengthen the national economic power by developing or retaining capabilities that provide a state "the conquest or protection of desirable roles in the world economy."[54]

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49. *See generally* Edward N. Luttwak, *From Geopolitics to Geo-economics: Logic of Conflict, Grammar of Commerce*, 20 NAT'L INT. 17 (1990).

50. *Id.* at 17.

51. *Id.*

52. *Id.* at 20.

53. *Id.* at 19.

54. EDWARD N. LUTTWAK, THE ENDANGERED AMERICAN DREAM 309, 310 (1993).

States that act with a geoeconomic orientation actively try to shape global economic activity—e.g., where will high-technology products be developed and manufactured or where will critical inputs be supplied from. This action translates into a number of proactive and defensive measures aimed at attaining the goal of strengthening the national economy vis-à-vis other economies. This entails both fostering national capabilities—e.g., technological expertise—as well as protecting strategic assets from being acquired by foreign actors.[55] Luttwak's definition of "geoeconomics" is thus more focused on the goals pursued, and not so much the means employed.[56]

The geoeconomic perspective contrasts with the liberal view, also influential at the time of Luttwak's writings, which suggested the inevitable rise of market-led, transnational economic actors whose interactions would gradually erode states' authority.[57] This liberal view posited that, in the aftermath of the Cold War, the international economy would become a borderless arena where companies would struggle for global markets. Unlike the geoeconomic (and interventionist) state, the liberal view argued that states were expected to take a backseat and limit their role to providing the conditions for fair competition among market actors. The best states could do was try to shape the competitiveness of their national economies to attract private investment.[58] In opposition to the "logic of conflict," the liberal view was guided by the "logic of commerce"[59]—for example, the pursuit of cost-effective allocation of resources by market players, not by states.

The current global context differs in three important ways from the one in which the concept of geoeconomics gained prominence three decades ago. First, it is an environment of significant economic interdependence. Second, this level of interdependence has been attained thanks to market actors, which in turn have been enabled by IEL rules

55. A recent working document by the European Commission defined "strategic capacity" in a similar manner: "a certain level of *capabilities held within the EU* allowing to produce, provide or rely on strategic goods, services, data, infrastructures, skills, industrial know-how and technologies." *Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery*, at 8, COM (2021) 350 final (May 5, 2021) (emphasis added).

56. Dong Jung Kim, *The Perils of Geoeconomics*, 42 Washington Q. 153, 155 (2019) (arguing that geoeconomics is distinct from other economic policies because of the goals it pursues, not by the measures it employs).

57. Luttwak, *supra* note 49, at 17.

58. For an influential example of this thinking, *see* Michael Porter, The competitive advantage of nations 680–82 (1990) (arguing that government's proper economic role lies in challenging domestic actors to become competitive, while "easy roles", such as the granting of subsidies, are either insufficient or counterproductive).

59. Luttwak, *supra* note 49, at 17.

such as the WTO agreements—most of which were agreed a few years after Luttwak's concept came to light. In other words, in the post-Cold War period, the liberal view prevailed over the expectation that governments would become more geoeconomic. Third, the current international context is marked by a security and economic competition opposing China and particularly developed economies led by the United States. This circumstance is radically different from when Luttwak proposed the concept of geoeconomics, since at that time competition between states took place predominantly in the economic arena. The current context also starkly contrasts with the previous three decades in which the global economy was ruled by IEL regimes, which are premised on a liberal separation of the economic and security domains.

These circumstances require an update of the original concept of geoeconomics. Accordingly, whereas geoeconomics posits that states will seek to strengthen the national economy by securing access to strategic capabilities, this should not necessarily mean that states will prefer to live in autarky or necessarily seek self-sufficiency in all sectors—a goal hardly attainable in a context of deep economic interdependence. It is more likely that governments seeking to exert more control over access to capabilities will try to increase diversification of partners—in order to avoid excessive dependence on certain suppliers—or will privilege economic relations with partners considered more reliable.

Furthermore, considering the strategic competition gradually consolidating between China and the United States and some of its allies, it is likely that governments seek some level of economic decoupling. This insight, in turn, suggests that geoeconomic measures meant to limit the exposure to a strategic rival might usher in some level of fragmentation of economic relations along allies and adversary lines.

A byproduct of this likely fragmentation is that strategic competition will affect economic relations between companies, particularly those headquartered in rival economies.[60] This insight is borne out by current developments in the management of the United States-China trade relations. For example, a total of 493 Chinese persons are currently in the Entity List administered by the Bureau of Industry and Security of the Department of Commerce.[61] This number was 130 in 2018.[62] Foreign persons included in the Entity List are those considered

60. Luttwak, *supra* note 49, at 22.

61. U.S. Int'l Trade Admin., consolidated screening list search engine (Oct. 26, 2022), https://www.trade.gov/data-visualization/csl-search [https://perma.cc/3G4U-J7AV] (criteria employed were "Entity List" for "sources", and "China" for "country").

62. Jon Bateman, *Biden Is Now All-In on Taking Out China*, Foreign Policy (Oct.

to be engaged in "activities contrary to U.S. national security and/or foreign policy interests."[63] For that reason, exports to these entities are subject to licensing requirements—and ultimately to the risk of not being authorized by government agencies. While initially these trade restrictions were focused on exports involving equipment with direct military use, more recently the Entity List has also expanded its scope to also affect trade in dual-use goods with China, such as in the area of semiconductors.[64]

Luttwak's depiction of the competing frameworks organizing global economic relations could be represented by the following comparative table:

Table 1. Liberal and Geoeconomic Frameworks of the Global Economy

Framework	*Main actors*	*Goal*	*Logic*	*Setting*
New global interdependence	Economic entities	Profit	Logic of commerce (transnational)	World market without political frontiers
Geoeconomics	States	Relative advantage compared to other states	Logic of conflict (territorial)	World fragmented by political borders

Discussing Luttwak's definition of geoeconomics, Barry Buzan and George Lawson rightly capture its core element in the "zero-sum *developmental competition* in an economic-political mode of relations among states where Great Power war is largely ruled out."[65] This idea of geoeconomics as the state-led struggle for economic primacy has also been captured in the French geoeconomic tradition, where states are also depicted as seeking to secure privileged positions in certain economic sectors because this objective translates into an element of power.[66]

In sum, the concept of geoeconomics emphasizes states actively intervening in the economic domain in order to strengthen national economic capabilities and preserving other strategic assets, even if state action requires subversion of market rules. Geoeconomics in Luttwak's

12, 2022, 4:30 pm), https://foreignpolicy.com/2022/10/12/biden-china-semiconductor-chips-exports-decouple/ [https://perma.cc/3M8B-CBP8].

63. Bureau of Indus. and Sec., U.S. Dept. of Com., Supplement No. 4 to Part 744 - Entity List (2023).

64. Bureau Of Indus. And Sec., U.S. Dept. of Com., Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC) (Oct. 7, 2022).

65. Barry Buzan & George Lawson, *Capitalism and the Emergent World Order*, 90 Int'l Aff. 71, 86 (2014).

66. Pascal Lorot, *La Géoéconomie, Nouvelle Grammaire des Rivalités Internationales*, 65 L'Information Géographique 43 (1999).

thinking is a concept that expresses the realist imperative of competition among states but applied to the economic realm. By implication, it posits a cautious approach on the benefits of market-led economic interdependence, thus challenging a premise of the political consensus which underpins the rules and institutions of IEL. An escalation towards a geoeconomic order, in which major powers more actively interfere in their national economies in order to guarantee their resilience and/or self-reliance, leads to a reversal of the level and nature of interdependence we have known for the past decades.

B. Distinguishing Geoeconomics From the "Economic Statecraft Framework"

The conceptualization of geoeconomics put forward in this Article has a predominantly *inward-looking* approach in the sense that it focuses on the capabilities and assets at the disposal of each state. This is a different angle from that adopted by the majority of the literature that has examined the intersection of economic policies and security and strategic interests. This literature is heavily focused on studying mechanisms designed to change other states' behavior through economic sanctions or other economic inducements aimed at attaining geopolitical goals. This latter approach displays an *outward-looking* perspective.

In contrast to sanctions, possible changes in the behavior of third states are at best indirect effects of geoeconomic measures. The inward-looking perspective inherent to geoeconomic measures is reflected in the examples offered by Luttwak, namely "the competitive development of commercially important new technologies," "the predatory financing of . . . sales during their embryonic stage,"[67] "the more or less concealed subsidization of exports," and "the support of selected forms of education."[68]

It is crucial to distinguish these different perspectives when one looks to geoeconomics as a framework to understand the reshaping of IEL. Geoeconomic measures understood in the sense proposed in this Article present a structural challenge to IEL. These measures defy the market-orientation that underpins IEL rules by introducing (state-directed) strategic and security elements into the operation of economic relations. While IEL rules place limits on state interference over the allocation of economic resources (e.g., where to build a manufacturing plant), geoeconomic measures seek to actively shape the incentive structure of market actors in order to attain goals of strategic or security

67. Luttwak, *supra* note 49, at 23.
68. *Id.* at 21.

interest for the state. While IEL rules often welcome foreign investment with few constraints, geoeconomic measures are increasingly carving out assets from the interplay of market forces to safeguard access to existing capabilities.

But not all economic policies fall under the scope of geoeconomics as understood here. There are instances when states resort to economic tools as means to attain foreign policy goals, in contrast to building up or protecting state capabilities. As elaborated below, IEL does not seem to be so much affected by the former measures, however great their political impact might be. These measures are examples of neighboring concepts.

One of these concepts is that of *economic statecraft*, which David Baldwin examined in detail in his seminal work. A central element in the measures studied by Baldwin is the objective of trying to "influence other international actors" with the use of economic regulation.[69] It is thus an *outward-facing* concept. Baldwin's attention is directed at describing the economic toolbox that states can deploy in order to boost their foreign policy goals. The emphasis is on the influence exerted on others, not on the building up of national economic power.

Baldwin's contribution inspired a literature on economic statecraft that has mostly focused on sanctions.[70] Given the emphasis placed on the goal of influencing other states through the resort to economic means, this should not come as a surprise. Nor should the fact that "sanctions" came to be approached both in negative as well as positive terms: "economic sanctions are actions taken by one state—the sender—to interfere with the economy of another state—the target—for the purpose of coercing its compliance with the sender's wishes. Economic inducements, or incentives, are rewards that a sender extends to a target to secure the target's compliance or alter its interests."[71] This dichotomy centered around the notion of sanctions evidently simplified what is

69. David A. Baldwin, Economic Statecraft 40 (1985); William Norris recently proposed an update on Baldwin's definition in which the element of "influence" remains central (although targeted at commercial actors), but with the intent of managing "strategic externalities." William J. Norris, Chinese Economic Statecraft: Commercial Actors, Grand Strategy, and State Control at 13–14 (2016). Norris' definition is closer to the one the present work offers for geoeconomics in the sense that both take into account the "security externalities" stemming from economic relations. Still, the need to emphasize the "influence" aspect of the concept does not seem very useful for a conceptual framework aiming at shedding light on the transformations impacting international economic law.

70. Jean-Marc F. Blanchard, Edward D. Mansfield & Norrin M. Ripsman, *The Political Economy of National Security: Economic Statecraft, Interdependence, and International Conflict*, 9 Sec. Studies 1–2, 3 (1999).

71. *Id.*

in fact a complex reality—Baldwin categorizes antidumping measures, for example, as a "negative sanction",[72] something difficult to understand from an international trade law perspective, where these measures are seen as remedies against unfair trade practices, instead of sanctions.

The notion of economic statecraft posited by David Baldwin draws in part on Albert Hirschman's insight that foreign trade is an arena where power is present, in particular because the gains stemming from commercial transactions are often unevenly distributed. This situation thereby generates asymmetries that can be leveraged by one state to influence the behavior of another. Hirschman called this the "influence effect" of foreign trade: "commerce can become an alternative to war also . . . by providing a method of coercion of its own in the relations between sovereign nations . . . . [E]ven if war could be eliminated, foreign trade would lead to relations of dependence and influence between nations."[73]

Hirschman's insightful analysis was also recognized as an inspiration by Robert Keohane and Joseph Nye when they cautioned that interdependence should not be seen necessarily as "creating a brave new world of cooperation to replace the bad world of international conflict."[74] While the two authors acknowledged that interdependence imposes constraints on states' behaviors—hence their important contribution to qualify realist thinking—they do not neglect that asymmetries in interdependence provide sources of influence by one state over another.

More recently, the analysis of power relations generated by a world of intense interdependence has been taken to a more sophisticated level by Henry Farrell and Abraham Newman. In their article "Weaponized Interdependence,"[75] the authors revealed how structures of globalized interdependence, such as the Internet, also generate asymmetries.[76] These asymmetries, similar to those that can emerge in bilateral interdependent relations, can be used as means of influence by states holding a controlling position in such networks: "Asymmetric network structures create the potential for 'weaponized interdependence', in which some states are able to leverage interdependent relations to coerce others."[77]

72. Baldwin, *supra* note 69, at 41.

73. Albert O. Hirschman, National Power and the Structure of Foreign Trade 15 (1945).

74. Robert O. Keohane & Joseph S. Nye, Jr., Power and Interdependence 9, 263 (4th ed. 2012).

75. Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 int'l sec. 42 (2019).

76. *Id.* at 45.

77. *Id.*

Farrell and Newman are of course not addressing the same type of asymmetries studied by Hirschman. Their perceptive contribution lies in showing that the "plumbing" of globalization possesses built-in structural asymmetries.[78] Their work, though, is part of the literature on economic statecraft, not on geoeconomics as understood here. It should thus not be surprising that Farrell and Newman look at such forms of influence as coercion and sanctions, typical features of the economic statecraft scholarship.

The notion of economic statecraft as articulated by David Baldwin is also present in the definition of "geoeconomics" proposed by Robert Blackwill and Jennifer Harris, namely the "use of economic instruments to accomplish geopolitical objectives."[79]

Blackwill and Harris' definition is circumscribed to economic mechanisms of influence over the behavior of third parties—another way of expressing the concept proposed by David Baldwin. Thus, their comprehensive analysis is heavy on topics such as sanctions, aid, finance, and energy policies.[80] Conversely, it is relatively silent on topics pertaining to geoeconomics as understood here, such as investment screening mechanisms, subsidies and industrial policies. A look at the chapters on China's geoeconomic practices[81] makes clear their affiliation with the economic statecraft tradition. They cover only cases of economic measures adopted by China to leverage its position in the relations with Taiwan, North Korea, Japan, and others. And while the authors rightly point out that China is often described as the leading practitioner of geoeconomics,[82] the authors make no mention of the many policies rolled out by China with the goal of increasing its reliance on domestic manufacture—such as China's long-standing objective of "indigenous innovation,"[83] a clear example of geoeconomic policy.

The literature described above—which could be described as "the economic statecraft framework"—focuses on economic mechanisms that enable a state to exert influence over others, especially in the pursuit of foreign policy goals. These works deal with a different topic

78. *Id.*

79. Robert D. Blackwill & Jennifer M. Harris, War by Other Means: Geoeconomics and Statecraft 1 (2016). Interestingly, the article in Foreign Affairs in which Blackwill and Harris presented the argument elaborated in their book is titled "The lost art of economic statecraft: restoring an American tradition" (Robert D. Blackwill & Jennifer M. Harris, *The Lost Art of Ecnomic Statecraft- Restoring an American Tradition*, 95 Foreign Affs. 99 (2016).

80. Blackwill & Harris, war by other means, *supra* note 79, at 49-ff.

81. *Id.* at 93.

82. *Id.*

83. *See* P.R.C. State Council, *supra* note 5.

from the one addressed by the concept of geoeconomics presented here. While the former look at the role of economic measures as *instruments* of *power relations* among states, geoeconomics sheds light on the *build-up and preservation of economic power* within each state, with power understood as the capabilities needed to provide goods and services considered strategic or of national security.

It is geoeconomic measures as understood here which are fundamentally redefining the logic of economic relations, and IEL by implication. China's economic statecraft applied in the shape of "informal sanctions"[84] imposed on Australia, Korea, or Japan produces negligible impact on the current operation and future evolution of IEL. In fact, it could be legitimately argued that it is precisely the existence of IEL regimes that enable and magnify the leverage of states' economic statecraft. As IEL regimes foster economic openness, they are also likely to expand the asymmetries in such interdependence, thereby enlarging the effectiveness of influence exerted by economic means.[85] In contrast, the many policies adopted over the years in China to localize the production of goods and services in its territory have implications for IEL rules on areas as diverse as subsidies, state-owned enterprises, data flows, intellectual property, and investment regulation—as these cases point to a more (state-led) managed interdependence, rather than the market-led economic interdependence fostered by IEL.

This does not mean that geoeconomics and economic statecraft do not intersect at all. In some instances, the two concepts are facing the same object, but from distinct angles. Some geoeconomic measures adopted by state actors can be explained as responses to previous cases whereby an actor leveraged interdependence to its advantage. For example, the 2020 European Commission communication on raw materials can be seen as a preemptive response to protect the EU from export controls that have been imposed by third countries. This goal emerges clearly when the communication advocates "*diversifying* and strengthening global supply chains including by continuing to work with partners around the world [and] *reducing* excessive import *dependence* . . . ."[86]

Furthermore, it cannot be neglected that the build-up of capabilities might encourage states with more resilience (and even self-sufficiency)

84. Darren J. Lim & Victor A. Ferguson, *Informal economic sanctions: the political economy of Chinese coercion during the THAAD dispute*, 29 Rev. Int'l Pol. Econ 1525, (2021).

85. The author is indebted to Harlan Cohen for this remark.

86. Communication on raw materials, *supra* note 46, at 6.

to leverage their position of economic strength in order to extract concessions from more vulnerable states.

Still, the economic statecraft framework does not offer accurate nor suffiicent elements to make sense of the transformations that are pushing states to be more active in the economic domain. All is not about creating dependencies to be leveraged against other states. States are not increasingly adopting or reinforcing investment screening legislations because they want to "weaponize" their investment policies. They do it because they want to protect assets considered strategic or of national security,[87] instead of leaving the control of such assets to the free interplay of market forces.

The recent shortage of face masks, personal protective equipment, and vaccines in the context of the COVID-19 pandemic is another example not satisfactorily explained by an economic statecraft framework. In fact, barring a few specific instances, the lack of supply of these goods has not resulted from the deliberate intent to instrumentalize interdependence by any state actor. Instead, it was a consequence of the concentration of manufacturing capacity in a handful of countries—a situation that makes little sense from a geoeconomic perspective, even if it is easily explained by the liberal postulate that production should be made in the most efficient manner.

Table 2. Geoeconomic and Economic Statecraft Frameworks

	Geoeconomics	*Economic statecraft*
Approach	*Inward-looking* – reinforce/protect national economic autonomy/resilience/self-sufficiency	*Outward-looking* - influence behavior of third parties to attain geopolitical/foreign policy goals
Examples	*Developing capabilities (spurring)* Supply-chain interference Industrial policies on R&D Infrastructure investment *Retaining existing capabilities (shielding)* Curbs on foreign investment State-induced decoupling of economic sectors to prevent leaks in capabilities Data localization Export controls aimed at preventing transfer of technologies *Securing relative position (stifling)* Curbs on access to critical inputs by rival states	*Leveraging asymmetries in interdependent relations* "Informal" sanctions Instrumentalizing supply of inputs Human rights sanctions *Leveraging asymmetric networks* "Weaponization of interdependence" *Providing conditions for markets to operate* Free trade and investment agreements

87. Sarah Bauerle Danzman, Weaponized Interdependence, 258 (Daniel Drezner et al. eds., 2021) (examining whether investment screening legislations could be explained as tools of weaponization).

	Geoeconomics	*Economic statecraft*
Impact on IEL	Affects IEL because geoeconomic measures change the signals sent to the markets regarding where to produce/source/sell products globally	Some economic statecraft measures might take the shape of (alleged) violations of IEL rules, such as abusive antidumping ("informal sanctions")

Both geoeconomics and economic statecraft are occurring today. Yet, while it is true that economic statecraft measures are arguably increasing, they have co-existed all along with the IEL regimes—such as the SWIFT sanctions, among others. Geoeconomics, in contrast, is only new re-emerging as an orienting logic to economic relations.

C. The Assumptions of the Geoeconomic Framework

This Section introduces the assumptions of the conceptual framework centered around the notion of geoeconomics.

Luttwak's geoeconomics depicted the strategic world of the immediate aftermath of the Cold War, a period in which the economic competition between the United States, Japan, and Europe came into sharp focus once the Soviet security threat receded. However, paradoxical it may seem, the victorious end of the Cold War was accompanied in the United States by a perception at some quarters that the American economic predominance was in decline.

During the Cold War, economic policies were put at the service of the strategic imperative of maintaining US leadership of the non-Communist world.[88] With the demise of the Soviet threat, and the consequent diminishing preeminence of military strategy in states' foreign policies, analysts expected competition between states to turn to the economic domain and to involve the main economic powers of the day—the United States, Europe, and Japan. Luttwak's conceptualization of geoeconomics is thus the product of a moment in which pundits anticipated a world order defined by a contest between major economies—not anymore by geopolitical rivalry between the Western and Eastern blocs.[89] For example, the United States saw Japan increasingly as an unfair trader. Therefore, it is no surprise that at that time the

88. The subordination of economic policies to security/strategic priorities of the U.S. during the Cold War is widely acknowledged in the literature. *See*, *e.g.*, Robert Gilpin, Global Political Economy—Understanding the International Economic Order (2001); Michael Mastanduno, *Economics and Security in Statecraft and Scholarship*, 52 Int'l Org. 825, 832 (1998); Klaus Knorr, Economic Issues and National Security (Klaus Knorr & Frank N. Trager eds., 1977).

89. An influential representative of this view is Lester Thurow, Head to Head: The Coming Economic Battle Among Japan, Europe, and America (2012).

United States felt more at ease with threatening economic sanctions on countries such as Japan.[90]

Where the Cold War context subjected economic concerns—the pursuit of "plenty"—to the geopolitical imperative of keeping a coherent bloc against the Soviets—a struggle for "power"—the post-Cold War environment altered this correlation. The fall of the Soviet bloc removed a geopolitical element that had defined relations among states across all areas of international politics, including economic relations. The end of the Cold War allowed disentangling economic relations from geopolitical considerations—economic and security agendas would thenceforth follow separate tracks.[91] It was possible to establish economic regimes free from "politicization," as advocated by John Jackson.[92] IEL rules such as those prescribed by the WTO agreements thus emerged in a context where the pursuit of "plenty" was made possible without the constraints of geopolitical (or "power") considerations. This is what enabled market players—not states—to lead the way in deepening global economic integration.

Although Luttwak's description of the evolution of the global economy did not materialize in the years following the introduction of the term geoeconomics, it proves very apt to understand the recent economic transformations stemming from the rise of China. On the one hand, China benefited from the liberal IEL regimes to the extent they opened global markets to products originating in China—the guarantee of foreign markets generated the investments that turned China into the powerful exporting economy it has become.[93] On the other hand, China's integration to the global economy has followed a geoeconomic logic in that it is based on "a sense of economic insecurity and the ambition to remedy this."[94] China's policies over the past years have consistently sought to reduce its dependence on foreign actors while building its own capabilities. While other countries were comfortable co-existing in a liberal environment of economic interdependence, China sought to integrate into the global economy preserving a high level of "autonomy." China adopted policies that increased the dependence of other

90. Benjamin J. Cohen, *Toward a Mosaic Economy: Economic Relations in the Post-Cold War Era*, 15 Fletcher F. World Affs. 39, 42 (1991).

91. *See* Roberts, Moraes & Ferguson, *supra* note 32, at 657.

92. Jackson, *supra* note 19, at 11 (referring to "the 'politization' of international economic policy issues, and therefore of legal issues related to them").

93. Rush Doshi, The Long Game: China's Grand Strategy to Displace American Order 156 (2021).

94. Jonathan Holslag, *Geoeconomics in a globalized world: the case of China's export policy*, 14 Asia Eur. J. 173, 181 (2016).

countries on its economy, while at the same time kept a lid on how much it relied on foreign economies. As a direct result of the successful implementation of these policies, China now exerts "economic primacy" in a number of sectors and technologies.

Unlike the 1990s, though, states are increasingly competing simultaneously on the economic and security realms. As discussed above, the Cold War subsumed plenty to power, while the post-Cold War period placed plenty and power on individual tracks. Now, the rise of China brings together power and plenty since China is increasingly perceived by other major economies as both an economic *and* security competitor. Economic relations are increasingly scrutinized by governments for the potential security risks they might entail.

The liberal paradigm that inspired the creation of IEL regimes does not offer a convincing explanation to account for the increased state intervention in the economy to pursue strategic and security goals. This paradigm is premised on the predominance of market-led economic relations, with limited state intervention in the economic domain. Here is where the geoeconomic framework offers a contribution to make sense of the transformations in the global economy.

This framework is based on assumptions that combine Luttwak's elements laid out in the previous Section with realist insights that incorporate the security concerns that mark the current global context.[95] The geoeconomic framework gives coherence to many developments taking place in the global economy, from the dissemination of investment screening legislations to governmental efforts to bring supply chains back home. While these developments defy the logic of the liberal economic order that gave shape to IEL, they make sense when approached from a geoeconomic angle. In order to understand the current challenges to IEL, it is first necessary to grasp the *rationale* of a geoeconomic logic—and this is what the framework aims to do.

The assumptions supporting the geoeconomic framework are the following: (1) states are interested in the global distribution of economic capabilities, which implies "power" and "plenty" are objectives pursued simultaneously; (2) major powers struggle for "economic primacy" while other states seek to safeguard their "autonomy"; and (3) when economic competition takes place among states which are also security rivals, economic relations are elevated to the level of a strategic or security issue. These assumptions are addressed individually below.

95. Hopewell, *supra* note 48, at 272 (arguing that the current context of international trade can benefit from the integration of realist insights into IPE analysis).

1. States Are Interested in the Global Distribution of Economic Capabilities. "Power" and "Plenty" Are Objectives Pursued Simultaneously.

One of the principles of the existing liberal economic order is that market forces should determine where economic activities take place. Rules on areas such as subsidies constrain state action that could subvert the operation of this principle.

The market-led pursuit of efficient allocation of resources has in turn generated the level of economic interdependence witnessed today, when production of goods as varied as iPhones and cars is the result of interventions of supply chains sprawling across the globe.

This situation is approached differently from a geoeconomic perspective, in which the capabilities at the disposal of the state (e.g., the means and technologies to manufacture vaccines or electric vehicle batteries) are relevant to policymakers.[96] Under a geoeconomic framework the allocation of strategic or national security capabilities should not be entirely left to the free interplay of market forces. Rather, states should more actively induce the localization of these capabilities under their jurisdictions (e.g., data localization regulations or subsidies to bring home supply chains) or under the jurisdictions of allies (e.g., the subsidies to Swedish Ericsson or Finnish Nokia that were considered by the US Trump administration in the race for the 5G technologies[97]). As expressed by US President Joe Biden in the February 2021 Executive Order on America's Supply Chains, "[m]ore resilient supply chains are secure and diverse—facilitating greater domestic production, a range of supply, built-in redundancies, adequate stockpiles, safe and secure digital networks, and a world-class American manufacturing base and workforce."[98]

From the perspective of the geoeconomic framework, the distribution of capabilities among states is not only an economic matter (the pursuit of "plenty"). It is also an element of power[99] and, as such,

96. Rana Foroohar, *Of Computer Chips and Potato Chips - In Today's World, It Matters What a Country Makes at Home*, Financial Times (Oct. 24, 2022), https://www.ft.com/content/70577a5f-b231–44ba-866d-8ffc36d3c8fc [https://perma.cc/8JW8-ZR5U].

97. Drew FitzGerald & Sarah Krouse, *White House Considers Broad Federal Intervention to Secure 5G Future*, Wall St. J. (June 25, 2020, 11:34 AM), https://www.wsj.com/articles/white-house-federal-intervention-5g-huawei-china-nokia-trump-cisco-11593099054 *[https://perma.cc/UZ78-LCNW]*.

98. Exec. Order No. 14,017, 86 Fed. Reg. 11,849 (Feb. 24, 2021).

99. Benjamin J. Cohen, International Political Economy: An Intellectual History 148–149 (2008) (describing how realists tend to see economic prowess as more than the pursuit of wealth).

subject to a "logic of the state" whose goal is "to capture and control the process of economic growth and capital accumulation in order to increase the power and economic welfare of the nation."[100] In what is a similarity to the mercantilist tradition,[101] "power and plenty" are objectives governments should pursue in tandem and in their own merits—instead of one being inevitably subordinated to the other or having the two objectives following separate tracks.

A number of implications follow when states pay more attention to their relative position in the global distribution of capabilities. It should be expected that states:

1. *shield* the capabilities they already possess (e.g., by restricting foreign investments that might lead to the transfer of control over these capabilities; or by imposing export controls);
2. *spur* the development of capabilities they do not possess (e.g., through industrial policies);
3. *stifle* the efforts of competitors to acquire capabilities that would improve the latter's relative position. But this movement of stifling competitors is not pursued as a sanction to punish or as an inducement to incentivize a certain behavior from competitors. It is not a measure of economic statecraft; rather, it is meant to retain an existing level of capabilities—and it is for this reason that it constitutes a geoeconomic measure;
4. *balance* their dependence on foreign suppliers. States are likely to take an interest in monitoring the level of dependence on other states for the provision of certain goods and services, in an exercise that could be called "balancing dependence"[102]; monitoring dependence is a necessary step for strategies whereby states actively try to increase their resilience.[103]

100. Gilpin, *supra* note 88, at 81.

101. Jacob Viner, *Power Versus Plenty as Objectives of Foreign Policy in the Seventeenth and Eighteenth Centuries*, 1 World Pol. 1, 10 (1948).

102. Henrique Choer Moraes & Mikael Wigell, *The Emergence of Strategic Capitalism: Geoeconomics, Corporate Statecraft and the Repurposing of the global Economy*, Finnish Inst. Int'l Affs. 117, 9 (2020).

103. US President Joe Biden commissioned government agencies to prepare a "supply-chain review" in order to meet "the policy of my Administration to strengthen the resilience of America's supply chains" (Exec. Order No. 14,017, *supra* note 98). In Europe, aside from the EU strategy on raw materials (*supra*, note 48), a number of non-official documents have attempted recently to shed light on where Europe depends on other for products considered strategic. *See*, *e.g.*, Daniel Fiott & Vassilis Theodosopoulos, *Sovereignty Over Supply? The EU's ability to manage critical dependences while engaging with the world*, European Union Inst. for Sec. Stud. Dec. 2020 at 4.; Max J. Zenglein, *Mapping and recalibrating Europe's economic interdependence with China*, Merics China Monitor

A context as described above is one in which market-led interdependence is seen with a heightened level of caution. States become more mindful that market decisions on the allocation of capabilities can generate vulnerabilities that affect the resilience of the national economy.

2. Major Powers Struggle for "Economic Primacy" while Other State-Actors Seek "Autonomy"

In an ideal interdependent world, states are exposed to the economies of other states in a mutually relevant extent, in such a way that none would be incentivized to do harm to others for fear of being inflicted harm in return—this is, in fact, one of the claims underlying the argument that a liberal economic order begets peaceful relations among states.[104]

The real world is distant from this ideal, of course, and interdependence has often led to asymmetries which can be used to the advantage of those states which are more resilient. But the point could be made that the existing liberal economic order is sustained by a social contract that enshrined—in the shape of the IEL rules—a level of asymmetries deemed acceptable by enough states to keep this order afloat.

It could be argued that this social contract is in peril as a result of the process of accommodation of China's economic presence. China is perceived to be seeking to rearrange its exposure to interdependence by augmenting its self-reliance, while at the same time increasing how much other economies depend on it. In so doing, China is seen as trying to alter the "equilibrium" underpinning the existing liberal economic order, thereby paving the way to a phenomenon that realists are very familiar with: a great power conflict emerging from changes in relative power.[105]

Irrespective of whether China is entitled to do so,[106] or whether the perceptions by other state actors are correct, China's behavior and

(Nov. 17, 2020), https://merics.org/en/report/mapping-and-recalibrating-europes-economic-interdependence-china; Vasileios Theodosopoulos, *The Geopolitics of Supply: Towards a New EU Approach to the Security of Supply of Critical Raw Materials?,* VUB Inst. for European Stud. Brussels School of Governance (July 2020).

104. Barry Buzan, *Economic Structure and International Security: The Limits of the Liberal Case*, 38 Int'l Org. 597, 603 (1984).

105. Jonathan Kirshner, Routledge Handbook of International Political Economy (IPE) 36–48 (Mark Blyth ed., 1st ed. 2009).

106. A question which remains valid irrespective of whether China is pursuing such policies of increased self-reliance for strategic reasons or to please domestic rent-seeking sectors, as posited by David Lake (David A. Lake, *Economic Openness and Great Power Competition: Lessons for China and the United States*, 11 Chinese J. of Int'l Pol. 237, 262 (2018)).

the reaction of other major powers to such perception are driving the shift from liberal policies to an increasing embrace of geoeconomics. Essentially, the reaction by other states is expressing itself on attempts to preserve the level of independence for decision-making these states currently enjoy: the United States, in particular, is engaged in a struggle to keep its "primacy" while the governments of other major states attempt to retain their "autonomy."

The notion of "primacy" employed here was articulated by Samuel Huntington in the same strategic context that led Luttwak to propose the concept of geoeconomics, namely the United States-Japan competition. Huntington argued that major powers pursue primacy "in order to be able to insure their security, promote their interests, and shape the international environment in ways that will reflect their interests and values."[107]

Huntington's analysis provides important insights that reinforce Luttwak's points about how geoeconomics manifests itself, but it also expands it by framing the economic competition within a security context (which was not as central at that time as it is now). Japan became a challenge to the United States leading position, according to Huntington, because it did not limit itself to promoting "Japanese economic welfare"—it also pursued the maximization of "Japanese economic power."[108] The shift in the intention of a state, from pursuing "plenty" to also pursuing "power," is central to understand the change in nature of the competition among states, transforming what would otherwise be an economic competition into a strategic and possibly security rivalry. Japan's strategy of leveraging its economic growth to expand its power led Huntington to conclude that "Japan has accepted all the assumptions of realism but applied them purely in the economic realm."[109]

While Huntington conceptualized the goal of "economic primacy," which by definition benefits only one state, other realist writers focused on extending a relatively similar concern to all other states. For example, Robert Gilpin spoke of states' permanent goal of "economic

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107. Samuel P. Huntington, *Why International Primacy Matters*, 17 Int'l Sec. 68, 72 (1993). A term which conveys a similar meaning is that of "supremacy", used by the US government to describe "the contest for supremacy launched by the CCP [Chinese Communist Party]" (The Policy Planning Staff, Off. of the Sec'y of State, *The Elements of the China Challenge* (revised Dec. 2020).

108. Huntington, *supra* note 107, at 72.

109. *Id.*.

independence"[110] and "national autonomy"[111] in the context of increasing interdependence of the international economy.

The "strategic autonomy" approach of the EU is a textbook example of this behavior, going as far as borrowing its denomination of origin. It could be seen as Europe's attempt to rearrange its level of exposure to interdependence in a context in which China, followed by the United States and others, seeks to become more resilient and self-reliant in some cases. It should not come as a surprise then that references to "naïveté" or similar terms have become more frequent in statements by the leadership of the EU and its Member states.[112] "Naïveté" became the term of choice to label what it would mean for Europe to continue to play the liberal game in the present context where actors such as China had shifted to a geoeconomic game. It implies that being liberal and keeping markets as open as before represents an own goal, when actors such as China are interested in catching-up and actively securing strategic supplies.

In an environment where major economies allow market forces to drive the distribution of economic capabilities, states feel more comfortable to accept a certain loss of autonomy (within the limits of the accepted rules). Yet, the logic changes when the interdependence arrangement starts to unravel as one or more major powers interferes in the balance underpinning this arrangement—such as when one or more powers pursues not only "plenty," but also "power." A geoeconomic, or realist logic sets in whereby states "worry that a decrease in their power capabilities relative to those of other nation-states will compromise their political autonomy, expose them to the influence attempts of others, or lessen their ability to prevail in political disputes with allies and adversaries."[113]

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110. Gilpin, *supra* note 88, at 19.

111. *Id.* at 21.

112. During the 2017 State of the Union address, then Commission President Jean-Claude Juncker stated: "Let me say once and for all: we are not naïve free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening" (President Jean-Claude Juncker, *President Jean-Claude Junker's State of the Union Address 2017*, Eur. Comm'n (Sept. 13, 2017); *see also* Michael Peel *et al.*, *Macron Hails 'End of Europe Naïveté' Towards China*, Fin. Times (Mar. 23, 2019), https://www.ft.com/content/ec9671ae-4cbb-11e9-bbc9–6917dce3dc62 *[https://perma.cc/D36K-UDWN]*; Louise Guillot, *Europe Has Been 'Naive' About China, EU Official Says*, Politico (May 3, 2020, 7:27 AM), https://www.politico.com/news/2020/05/03/europe-has-been-naive-about-china-eu-official-says-230593 *[https://perma.cc/9YHP-MS2L]*.

113. Michael Mastanduno, *Do Relative Gains Matter? America's Response to Japanese Industrial Policy*, 16 Int'l Sec. 73, 78 (1991).

As a consequence, states step in to shape economic relations in such a way that benefits the national interest, displacing the market and the pursuit of efficiency—in so doing, affecting the liberal *rationale* that supports IEL.

3. When Economic Competition Takes Place among States which Are Also Security Rivals, Economic Relations are Elevated to a Strategic or Security Issue

One of the defining features of the current political context is that economic and security competition are intertwined, involving similar players on both fields. This is a key difference from the Cold War period (when economic and security competition ran in parallel) and from the immediate aftermath of the Cold War (when security competition lost ground).

The United States and the EU have redefined in the past years their approaches to China, in both cases increasing the level of the security challenge attributed to China. While the United States makes a clear link between the economic and security dimensions of its relation with China, the EU suggests a fragmentation of its stance between the two aspects, in an attempt to calibrate its approach according to whether it is dealing with economic or security issue-areas.

Accordingly, the "United States now acknowledges and accepts the relationship with the PRC [People's Republic of China] as the CCP [Chinese Communist Party] has always framed it internally: one of great power competition."[114] The mutual imbrication between economic and security challenges presented by China now provides the background to the geoeconomic policies that the United States has been gradually putting in place. President Biden's chief strategist for Asia contended that "[t]he period that was broadly described as engagement has come to an end," being replaced by a paradigm premised on competition.[115] The EU, in its turn, recognizes that China is simultaneously "an economic *competitor*" and "a systemic *rival*."[116] High-level officials of the United States and the EU in May 2021 acknowledged that "EU's and

114. The White House, *United States Strategic Approach to the People's Republic of China,* Trump White House Archives (May 20, 2020), https://trumpwhitehouse.archives.gov/articles/united-states-strategic-approach-to-the-peoples-republic-of-china/ *[https://perma.cc/C3P7–4Z4W]*.

115. Peter Martin, *Biden's Asia Czar Says Era of Engagement with China Is Over*, Bloomberg (May 27, 2021, 1:17 AM) https://www.bloomberg.com/news/articles/2021–05–26/biden-s-asia-czar-says-era-of-engagement-with-xi-s-china-is-over *[https://perma.cc/AEK2–8Y84]*.

116. *Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy on EU-China – A strategic outlook*, at 1, COM (2019) 5 final (Mar. 12, 2019) [hereinafter "EU-China—strategic outlook"].

the United States' relations with China are multifaceted and comprise elements of cooperation, competition, and systemic rivalry."[117]

Given that China is perceived as posing a security threat to the United States, the EU, and others, this should inevitably contaminate their economic relations. It is a manifestation of the realist postulate that, in the long run, economic and security interests of states cannot be seen separately.[118] In part, the transformation in the nature of China's challenge is a result of the perception that China is not only pursuing plenty but also power by taking advantage of its economic relations with the global economy. As the 2017 National Security Strategy of the United Sates claimed, "[p]art of China's military modernization and economic expansion is due to its access to the U.S. innovation economy, including America's world-class universities."[119]

The existence of a security dimension to the economic competition among states brings an additional layer to the geoeconomic framework, whose implications include the following:

i. States are expected to vigorously retain existing capabilities and develop new ones, since the stakes are more significant if critical capabilities spill-over to a security rival or if a security rival acquires a first-mover advantage in certain areas. This is the backdrop for proposals occasionally raised to "decouple" relations in critical economic sectors, such as semiconductor manufacturing;

ii. The scope of areas considered as legitimately covered by the "national security exceptions" under IEL tends to see an expansion, given that states will prefer not to let transactions dealing with such assets take place under market rules;

iii. A fundamental element bearing repercussions for the future of IEL and global economic governance is that the

117. Joint Press Release, Eur. Union External Action Serv. and U.S. Dep't of State, United States: Consultations between Secretary General Stefano Sannino and Deputy Secretary Wendy Sherman (May 26, 2021), https://eeas.europa.eu/headquarters/headquarters-homepage_en/99053/United%20States:%20Consultations%20between%20Secretary%20General%20Stefano%20Sannino%20and%20Deputy%20Secretary%20Wendy%20Sherman *[https://perma.cc/QYR9-Q4CQ]*.

118. Robert Gilpin, U.S. power & the multinational corporation – The political economy of foreign direct investment 103 (1975); *see also* Theodore H. Moran, *Grand Strategy: The Pursuit of Power and the Pursuit of Plenty*, 50 Int'l Org. 175 (1996).

119. National Security Strategy of the United States of America 25 (Dec. 2017) [hereinafter "Nat'l Sec. Strat. of the U.S. 2017"], https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12–18–2017–0905.pdf *[https://perma.cc/2QL6-URVX]*.

contamination of economic relations by security threats leads to a fragmentation of the market along an ally/adversary divide. Concretely, this divide might open the way for economic policies that discriminate among trade and investment partners, which might contravene IEL rules on non-discrimination;

iv. Economic interdependence becomes increasingly seen as a potential source of security vulnerabilities—economic transactions conducted by market actors may be seen as producing "security externalities," as illustrated in Part II.D.2.

The three main assumptions above show that, unlike the liberal *rationale* that shaped IEL, the geoeconomic framework is premised on elements that point to a global economy driven by a different set of concerns, likely less market-driven and less interdependent.

D. The Geoeconomic Dynamic

Why are governments increasingly intervening in the economic domain, and challenging the premises that sustain the IEL regime in their wake? The assumptions spelled out above do not by themselves explain why a geoeconomic turn is underway, nor the attendant effects of their interaction in practice. This is examined below, where those assumptions are put to work in what can be called a geoeconomic dynamic. It reveals how the framework proposed here sheds light on the transformation reshaping the global economy. This dynamic is structured along the following 4 stages:

1. Over Time, Free Market Enables the Dissemination of Economic Power from Incumbent to Potential Competitors

China's successful economic trajectory has challenged many assumptions held by different analysts and policymakers. To mainstream economists, China's impact on jobs in developed countries has "toppled much of the received empirical wisdom about the impact of trade on labor markets."[120] For their part, policymakers who urged China to become a "responsible stakeholder"[121] have had to do an

120. David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21906, 2016).

121. U.S. Dep't. of State, Whither China: From Membership to Responsibility? (Sept. 21, 2005), https://2001–2009.state.gov/s/d/former/zoellick/rem/53682.htm *[https://perma.cc/3CEN-T5T6]*.

about-face[122] as China frustrated those who expected it would open up, politically and economically, as it grew wealthier. The 2017 US National Defense Strategy expresses this perception when it states that "[f]or decades, U.S. policy was rooted in the belief that support for China's rise and for its integration into the post-war international order would liberalize China. Contrary to our hopes, China expanded its power at the expense of the sovereignty of others."[123]

Realists are in a different position. They can claim to be vindicated. As Robert Gilpin noted, the global expansion of free trade and investment is expected to lead to the dissemination of technology, thereby enabling a power shift:

> Through the spread of technology and know-how, the industrial leader, over a period of time, loses more and more of its initial comparative advantages relative to its rising competitors. As a result, a gradual shift takes place in the locus of industrial and other economic activities from the core to the periphery of the international economy.[124]

Thus, on top of the debate on manufacturing job losses in developed countries attributed to globalization, one should also be mindful of the transfer of capabilities that has taken place over the past decades, in particular to China—a development of geoeconomic significance. The magnitude of such transfer of capabilities has been captured in a report by the McKinsey Global Institute, which identified "180 products across value chains for which one country accounts for 70 percent or more of exports, creating the potential for bottlenecks." The same report observed that "[m]any low-value or basic ingredients in pharmaceuticals are predominantly produced in China and India."[125]

Market-led economic interdependence ushered in a shift in the localization of global production that involved many countries, but there is no doubt that China stands as a main beneficiary of this process. And the key position now occupied by China in global supply chains is a result of the successful geoeconomic policies its government put in place. China not only mastered the capabilities its economy absorbed, but it also built on these capabilities to move up the technological ladder to the point where it now became a competitor to incumbent powers.[126]

122. Kurt M. Campbell & Ely Ratner, *The China Reckoning - How Beijing Defied American Expectations*, 97 Foreign Aff. 60 (2018).

123. Nat'l Sec. Strat. of the U.S. 2017, *supra* note 119, at 25.

124. Gilpin, *supra* note 118, at 44.

125. McKinsey Global Institute, Risk, Resilience, and Rebalancing in Global Value Chains 11 (2020).

126. To be sure, whatever transfer of capabilities has occurred to the benefit of China and to the detriment of other economies was the result of decisions by market actors in

The magnitude of reliance of the global economy on China became clear with the advent of COVID-19.[127] At the outbreak of the pandemic, countries all over the world scrambled for medical equipment and face masks to respond to the challenge imposed by the virus—only to realize that a large portion of manufacturing of these goods had relocated to China over the years for cost-effectiveness reasons. What was witnessed with medical products was already being detected with respect to high-technology standards of 5G networks, a sector in which Chinese companies were leaders.[128] Both cases illustrate that concentration of economic activity in China might make sense from an economic perspective, but it generated vulnerabilities to states that relied on China for the provision of these goods and services. This vulnerability could constrain these states' margin of autonomy to make decisions. In the EU, for example, analysts argue that years of economic interdependence have led to "manufacturing and skills gaps in key sectors."[129] For this reason, Europe is now looking to "bring more manufacturing back to the EU in some sectors."[130]

China's rise is evidence of how much the liberal economic order can enable a transfer of capabilities between states. This situation, in turn, can reveal that states' strategic interests (securing capabilities) might diverge from market preferences (efficiency and profits), thus challenging a key assumption of the liberal economic order, where these elements are often seen as convergent. This is particularly true if the state benefitting from such transfer of capabilities is perceived as a security rival, instead of only an economic competitor—which is

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these latter economies, with the tacit or explicit support from the leaders of these same countries (*see* Doshi, *supra* note 93, at 144, referring to the lobby of the American Chamber of Commerce in China for the approval by the US Congress of the Permanent Normal Trade Relations status with China). Additionally, from an economic perspective, China's growing integration into the global economy has turned profits to stockholders of non-Chinese companies and low prices that allowed non-Chinese consumers—especially in developed countries—to benefit from affordable products (Nigel Pain, Isabell Koske and Marte Sollie, *Globalisation and OECD Consumer Price Inflation* 6, OECD ECONOMIC STUDIES No. 44, 2008/1). And this is without mentioning the impressive economic gains to the Chinese population (The World Bank Development Research Center of the State Council & the People's Republic of China, FOUR DECADES OF POVERTY REDUCTION IN CHINA - DRIVERS, INSIGHTS FOR THE WORLD, AND THE WAY AHEAD 16, 2022 (arguing that China's industrialization was key to the country's long-term success in growth and poverty reduction)).

127. CONG. RSCH. SERV., R46304, COVID-19: CHINA MEDICAL SUPPLY CHAINS AND BROADER TRADE ISSUES 11 (Dec. 23, 2020) (discussing, in particular, the reliance of the US on the supply of health care and medical products from China).

128. EURASIA GROUP, THE GEOPOLITICS OF 5G (2018).

129. Fiott & Theodosopoulos, *supra* note 103.

130. New Industrial Strategy for Europe, *supra* note 13, at 2.

increasingly the case for economic relations between China and particularly major economies such as the United States and Europe.

2. The Nature of Economic Relations Changes When a State Is Perceived as Pursuing "Power," not only "Plenty"

China has successfully deployed several geoeconomic policies that helped its phenomenal development from a provider of low-skilled labor to a significant player in many industries, and ultimately to become a serious contender for leadership in sectors of sophisticated innovation. Among others, through a number of state-supported geoeconomic policies, China is displacing incumbents in the dredging industry, shipping companies, ports, shipbuilding and maritime components, railways and rail supply industry, steel, construction and engineering, and energy networks.[131]

These are concrete expressions of the transfer of capabilities. For actors such as the United States and Europe, they show that China is taking advantage of the open access to global markets without reciprocating to the same extent in its domestic market. Chinese policies whose goal is to promote local production—and sometimes self-reliance—only reinforce the perception that foreign companies are welcome for as long as they can provide local firms access to needed technologies: "If you are an American business leader, appeasing the PRC may bring short-term rewards. But in the end, the PRC's goal is to replace you," asserted then-US Attorney General Barr in 2020.[132]

This state of things leads to the perception that China is seen not only as an economic competitor, whose relations should be left to market forces. Instead, and borrowing Albert Hirschman's language, China is increasingly regarded as seeking "to maximize national power" and not only "national income"[133]—power, not only plenty. Many states are coming to the conclusion that liberal economic rules are dangerously ill-suited to deal with this type of behavior.

Economic relations are approached differently when states frame them under a strategic or security prism. A central concept that captures this shift is "security externalities," which gained prominence with the work of Joanne Gowa, for whom "[t]rade with an adversary

131. JONATHAN HOLSLAG, THE SILK ROAD TRAP: HOW CHINA'S TRADE AMBITIONS CHALLENGE EUROPE 97–136 (2019).

132. Attorney General William P. Barr, Remarks on China Policy at the Gerald R. Ford Presidential Museum (July 17, 2020) (transcript available online) [https://perma.cc/R7QX-V7WV] [hereinafter "Barr remarks on China policy"].

133. Hirschman, *supra* note 73, at 20.

produces a security diseconomy; trade with an ally produces a positive externality."[134]

In a recent study of Chinese economic statecraft, William Norris offered a definition of "security externalities" that is closer to the view of geoeconomics adopted in this Article. Norris argued that "[s]ecurity externalities may be (inadvertently) generated by commercial actors engaging in various types of economic interaction simply for their narrow commercial reasons."[135] The examples of market transactions listed by Norris as raising security externalities confirm the geoeconomic assumption that states will seek to preserve strategic capabilities from being transferred to rivals, in order to retain their relative position.[136]

The concept of "security externalities" is useful to a geoeconomic framework for many reasons. Firstly, it brings to the fore the increasingly contrasting logics of the state—a "macro-logic," concerned with the spill-over of capabilities to security or strategic rivals emerging from individual economic transactions; and the logic of the market—a "micro-logic" of sorts, interested in the profits generated by discrete transactions.

Additionally, the concept of "security externalities" sheds light on the fact that economic interactions will be more or less inhibited by the state depending on the character of the counterpart, whether a security rival or an ally. Finally, when states abandon the "benign permissiveness regarding . . . the forces of globalization"[137] and start to approach economic relations as sources of "security externalities," this implies the gradual abandonment of the liberal logic that supports the functioning of the global economy. As examined next, when this stage is reached a "geoeconomic chain reaction" is underway.

3. A "Geoeconomic Chain Reaction:" Putting the Shift to Geoeconomics in Context

Most of the geoeconomic measures recently adopted by the United States, the EU, Japan, and other states are essentially reactions to two interrelated events: (1) the impact of China's development model in the global economy and, to a lesser extent, (2) the perception that market-driven globalization excessively based on interdependent,

134. Joanne Gowa, Allies, Adversaries and International Trade 38 (1994).

135. Norris, *supra* note 69, at 14.

136. *Id.* at 13 (listing, as examples of transactions which elicit security externalities, the transfer of sensitive technology, loss of strategic industries, and concentrated supply or demand dependence).

137. Jonathan Kirshner, *Globalization and National Security in* Globalization and National Security 4 (Jonathan Kirschner ed., 2006).

fragmented production poses risks that were disregarded until recently—as demonstrated by the shortages of medical supplies in the wake of the COVID-19 outbreak.

China's economic development is the product of its geoeconomic orientation. Unlike many liberal democracies, China (but not only China) amalgamates economic issues into a complex of other policy areas. As David Shambaugh noted, China "better balance[s] national security and normative interests with the commercial dimension. For China, all instruments of the state are to serve the overriding goal of strengthening China's national economic power."[138]

The interesting fact is that the reaction to China's geoeconomic policies is itself translating into geoeconomic measures by the states affected by China's actions, regardless of the commitment by the former to the liberal economic order. This dynamic is what accounts for the change in the logic underlying the functioning of the global economy depicted in this Article.

In order to address potential security externalities, states are adopting measures to retain capabilities, develop new capabilities and secure provision of strategic supplies—measures described in more detail below as "shielding, spurring and stifling".[139] Among the many geoeconomic measures rolled out by the Biden administration, the US government is appealing to the Defense Production Act 1950 to support local production of solar panels, as well as to strengthen the US industrial base for large-capacity batteries.[140] 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."[141] Europe's recent initiative to curb foreign subsidized investments, for example, aims at preventing "state sponsored unfair trading practices, which disregard market forces and abuse existing international rules, with a view to building up dominance across various sectors of economic activity."[142]

This result is expected by the geoeconomic framework. Edward Luttwak argued that other states would react to China's geoeconomic measures "by strategically motivated as opposed to merely protectionist

138. David Shambaugh, China Goes Global: The Partial Power 55–56 (2013).

139. See *infra*, Part IV.

140. 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).

141. Memorandum from the White House on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, Presidential Determination No. 2022–11 (Mar. 31, 2022).

142. White Paper on foreign subsidies, *supra* note 47, at 4.

trade barriers, investment prohibitions, more extensive technology denials, and even restrictions on raw material exports to China . . . ."[143] Also, Robert Gilpin, writing in the 1970s already alerted 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."[144]

A point left open is how much, if at all, relations between states which are not strategic or security rivals will also be determined by geoeconomics. Part.II.D.4 argues that the turn to geoeconomics might be present only—or predominantly—in economic relations involving strategic and security rivals, such as China, and not necessarily with states considered allies or partners, as the global economy risks fracturing along an ally/adversary divide.

4. When Economic and Security/Strategic Interests Become More Entangled, a Distinction between Allies and Adversaries in Economic Relations Is Expected to Emerge

Geoeconomics is not necessarily equivalent to autarky, especially in the context of a highly interdependent global economy. But it is likely to be a more selective type of interdependence, one which is divided along ally/adversary lines, at least for strategic assets.

When economic relations become potential sources of security externalities, the nature of the economic partner becomes relevant. This understanding applies to both the identity of the market actors participating in economic relations as well as, crucially, to the respective states of origin. It is likely that states allow more freedom of action to market actors when economic transactions involve allies and friends; conversely, states might be more active in the management of economic relations involving rivals.

Political scientists have addressed the effect of security concerns on the functioning of economic relations. For example, Michael Mastanduno, studying the hypotheses in which "relative gains mater" (in contradistinction to absolute gains emerging from economic relations), argued that "[i]n general, the extent to which state behavior exhibits a concern for relative gains will vary, depending upon whether

143. Edward N. Luttwak, The Rise of China vs. The Logic of Strategy 42 (2012).

144. Robert Gilpin, *Economic Interdependence and National Security in Historical Perspective in* Economic issues and national security 62 (Klaus Knorr & Frank N. Trager eds., 1978). *See* also Holslag, *supra* note 94, at 178 (arguing that, deliberate or not, from a geoeconomics viewpoint, China's industrial and trade strategies are expected to lead to a profound revision of the regional and global order).

interaction involves allies or adversaries, and economic or military relationships."[145] A number of recent developments reveal that government policies are seeking to stimulate economic relations with partners considered reliable—and not necessarily where it makes more sense from an efficiency perspective.

For instance, the Biden administration proclaims that tools such as "ally and friend-shoring" are part of a strategy to strengthen supply chain resilience.[146] Furthermore, the February 2021 Executive Order on America's Supply Chains recognizes that "close cooperation on resilient supply chains with allies and partners who share our values will foster collective economic and national security and strengthen the capacity to respond to international disasters and emergencies."[147]

For its part, the EU announced that "[i]n the areas of common dependencies 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."[148] Also in the EU, the Guidelines for 5G risk assessment proposed by the European Commission is also inspired by the concern with the nature of the economic counterpart. In seeking to assess the risk profiles of equipment suppliers for 5G networks, the EU recommends member states take into consideration "[t]he likelihood of the supplier being subject to interference from a non-EU country."[149] This marker can be assessed by the presence of, among others, "a strong link between the supplier and a government of a given third country," "the characteristics of the supplier's corporate ownership" and "the ability for the third country to exercise any form of pressure . . . ."[150]

145. Mastanduno, *supra* note 113, at 79. In a similar way, *see* Benjamin Cohen, *supra* note 99, at 149 (who argued, drawing on Joanne Gowa's work, that market openness is a function of the nature of the economic partner).

146. WHITE HOUSE, BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH: 100-DAY REVIEWS UNDER EXECUTIVE ORDER 14017 (June 2021), at 8.

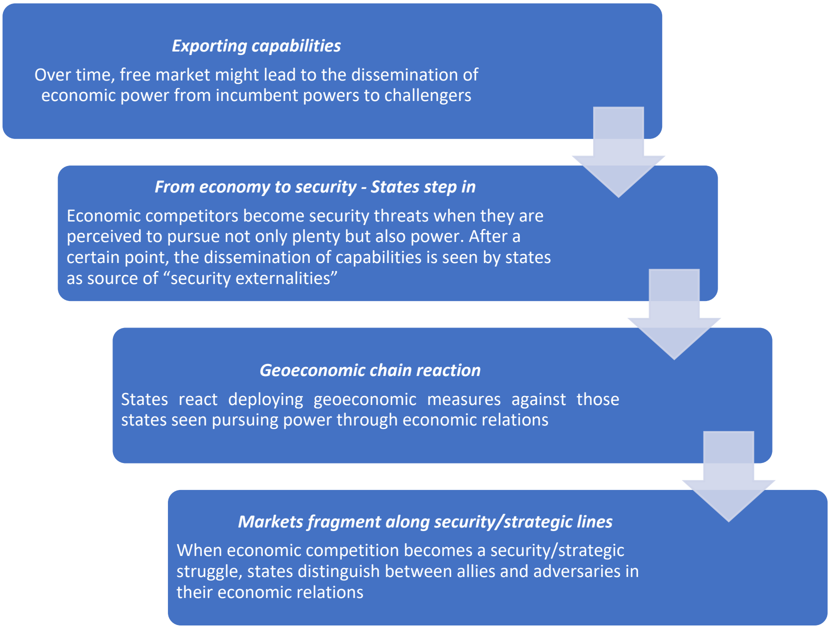
147. Exec. Order No. 14,017, *supra* note 98.

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

149. Network and Information Systems Cooperation Group, *EU Coordinated Risk Assessment on Cybersecurity in Fifth Generation (5G) Networks* (Oct. , 2020), at 22, ¶ 2.37, https://www.eeas.europa.eu/delegations/united-states-america/eu-coordinated-risk-assessment-5g-network-security_en *[https://perma.cc/WWG3-JYFP]*.

150. *Id.* ¶ 2.37.

Figure 1. The Geoeconomic Dynamic



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By drawing on Edward Luttwak's original idea complemented by insights from the realist and IPE literature, the framework described above seeks to give the notion of "geoeconomics" a useful and practical conceptualization for IEL, one that is centered around the notions of "capabilities" and "autonomy." Using this framework, the next Part focuses on the debates among international economic lawyers to argue that they largely overlook elements brought to light by the geoeconomic framework. The Article then proceeds to identify these blind spots in order to spell out the contribution of geoeconomics as a framework to make sense of the transformations affecting the global economy and IEL as a consequence.

III. A Blind Spot in International Economic Law Debates

When the current stage of IEL was in its beginnings, John Jackson cautioned against the "politicization" of the field by the looming threat of "geoeconomics," as noted earlier.[151] Nearly three decades later, geoeconomics is re-emerging in a more challenging guise. The

151. Jackson, *supra* note 19, at 11.

geoeconomic threat that, in Jackson's view, could endanger IEL in the 1990s was triggered by the state manipulation of the economic competition between the United States, Japan, and the EU. Unlike this competition, which took place exclusively in the economic domain, the current iteration of geoeconomics is centered on the rivalry between the United States (and increasingly its allies) and China, a rival not only in the economic, but also in the political and military realms as well. As seen above, when competition opposes states that are economic *and* security rivals, states will fear that market-led economic interdependence might strengthen the strategic and security capabilities of its rivals (by generating "security externalities").[152] For this reason, economic relations involving rivals are more likely to be subject to restrictions imposed by governments.

The United States and Europe recently changed their official approaches to China. While the United States sees Beijing as a "revisionist power,"[153] the EU considers it "a systemic rival promoting alternative models of governance."[154] These labels can have material implications, among others because they might subject China to different sorts of regulations that discriminate against foreign actors perceived as threatening. But what does it mean concretely for IEL that a key economic counterpart is simultaneously a strategic and security competitor? This is precisely what is lacking so far in debates on the evolution of IEL. The geoeconomic framework laid out above offers insights to respond to this question.

Legal scholarship has sought to address specific angles of this question over the past years. They all bring to light some aspect of this reality in flux. For example, a part of the recent IEL literature highlighted the risks to the rule of law presented by such shifts, in particular, the threat to the predictability of IEL.[155] Furthermore, a number of studies focused on identifying particular aspects that could characterize a Chinese approach to economic policies, in order to better understand

152. *See* Part II.D.2, *supra*. This point was also raised by Benjamin Cohen with respect to the monetary regime, but it is equally valid for IEL as a whole. *See* Benjamin J. Cohen, *The China Question: Can Its Rise Be Accommodated?, in* The Great Wall of Money: Power and Politics in China's International Monetary Relations 44 (Eric Helleiner & Jonathan Kirshner eds., 2014).

153. Nat'l Sec. Strat. Of the U.S. 2017, *supra* note 119, at 25.

154. *EU-China—strategic outlook*, *supra* note 116, at 1.

155. Vineet Hegde, Jan Wouters & Akhil Raina, *The Demise of the Rules-Based International Economic Order?* (Leuven Ctr. for Glob. Governance Stud., Working Paper No. 224, Nov. 2020); Roberts, Moraes & Ferguson, *supra* note 32, at 673; Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 Yale J. of Int'l L. Online 5 (2019).

how IEL might need to adapt going forward.[156] Finally, other analyses have looked at different regulatory approaches in areas where a strategic rivalry is already visible, such as data regulation. [157]

These works help explain how specific areas or aspects of IEL are being impacted or reshaped, but they stop short of establishing a cohesive framework for the nature of the challenge posed to IEL. Failure to grasp the broader phenomenon that is transforming the field complicates the necessary task of discussing viable solutions.

This Part addresses the most salient sets of debates in which international economic lawyers have sought to bring clarity to the transformations described in this Article. First, Part III.A looks at studies that attempted to explain the reasons behind the increased invocations of national security exceptions to excuse violations of IEL rules. Part III.B then turns the attention to debates which have focused on the flexibility of IEL to accommodate different economic models, particularly that of a rising China. In examining these debates, this Article highlights the aspects they illuminate and, most importantly, argues that they overlook relevant elements that are brought to light by the geoeconomic framework.

A. National Security between Protectionism and New Legitimate Claims – or "National Security Is What States Make of It"

Arguably, the Trump administration marks the moment when strategic competition with China entered its current stage. When confronted with the flurry of regulatory activity witnessed since the first days of the then US government, most of the initial thinking by international trade lawyers was not directed to identifying the structural changes that were being triggered at that moment.[158] Not much attention was devoted to

156. *See generally* Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?,* 23 J. of Int'l Econ. L. 607 (2020); Heng Weng, *Selective Reshaping: China's Paradigm Shift in International Economic Governance*, 23 J. of Int'l Econ. L. 583 (2020); Julien Chaisse & Mitsuo Matsushita, *China's 'Belt And Road' Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 J. of World Trade 163 (2018).

157. Susan Ariel Aaronson & Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and its Implications for the WTO*, 21 J. Int'l Econ. L. 245 (2018); Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 J. Int'l Econ. L. 297 (2018); Henrique Choer Moraes, *The Geoeconomic Challenge to International Economic Law: Lessons from the Regulation of Data in China* (Leuven Ctr. For Glob. Governance Stud. Working Paper No. 218, 2020).

158. *See e.g., Featured Symposium: International Trade in the Trump Era*, Yale J. Int'l L. (Nov. 25, 2018), https://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era/ [https://perma.cc/AG2F-TJTJ]; *Can International Trade Law Recover?*, 113 Am. J. Int'l L. Unbound (2019), https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/

the fact that some measures aimed at pushing back against Chinese geo-economic measures passed with unprecedented bipartisan support in the United States. Also, few noticed that a similar regulatory trend was emerging across the Atlantic, such as the swift enactment of the EU's first-ever investment screening regulation, motivated to a large extent by the growing Chinese acquisitions of European companies.[159]

Yet, as David Grewal correctly noted, while it might be straightforward to dismiss the Trump administration's contentious invocation of the GATT national security exception, a "renewed attention to the relationship between international trade and national security is overdue, and should be part of a new research agenda on trade going forward."[160]

This alert came at a time when the WTO was expected to deliver its first ruling ever on the justiciability and scope of GATT's national security exception, Article XXI.[161] And although the panel ultimately placed conditions on the resort to the national security exception, the question raised by Grewal remains valid.[162] After all, the traditionally narrow interpretation of the national security exception had been under strain by events that predate the Trump administration.

Benton Heath took on the challenge proposed by Grewal and examined the forces that have been pushing for an extensive interpretation of the national security exception, in both the trade and investment regimes. His analysis looked at how the exception was being challenged by threats stemming from great power rivalry, as well as infectious diseases, climate change, and cybersecurity, among others.[163] Heath compellingly argues that, different from abusive claims of national security used as a justification for protectionist economic measures, there has been an expansion of good-faith invocations of national

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CAN-INTERNATIONAL-TRADE-LAW-RECOVER [https://perma.cc/H4T9-MP5H]; *see also* Geraldo Vidigal, *The Return of Voluntary Export Restraints? How WTO Law Regulates (And Doesn't Regulate) Bilateral Trade-Restrictive Agreements*, 53 J. OF WORLD TRADE 187 (2019).

159. Henrique Choer Moraes, *The Turn to Managed Interdependence: A Glimpse into the Future of International Economic Law?*, EJIL:TALK! (Aug. 14, 2018), *https://www.ejiltalk.org/the-turn-to-managed-interdependence-a-glimpse-into-the-future-of-international-economic-law/* [https://perma.cc/JX8N-PFXN].

160. David Singh Grewal, *A Research Agenda for Trade Policy Under the Trump Administration,* 44 YALE J. INT'L L. ONLINE 69, 75 (2019).

161. Panel Report, *Russia–Measures Concerning Traffic in Transit*, WTO DOC. WT/DS512/R (adopted Apr. 5, 2019).

162. Geraldo Vidigal, *WTO Adjudication and the Security Exception: Something Old, Something New, Something Borrowed – Something Blue?*, 46 LEGAL ISSUES ECON. INTEGRATION *203 (2019)*.

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

security, which exceed the confines of military threats.[164] In his view, these novel and good faith claims represent a significant threat to IEL.

Heath conceded that geoeconomic measures by major powers are an element in the new invocations of national security, but argued that geoeconomics "alone does not capture the full effect that transformations in national security have on the economic order."[165] This assessment is correct,[166] although for a reason *not* articulated by Heath: indeed, not all geoeconomic measures are backed by national security exceptions. Just as national security claims have been raised to address myriads of threats—from pandemics to cybersecurity—geoeconomic measures can and have been supported by *strategic* claims that stop short of being considered matters of national security.

Possibly because of this reason, in a subsequent article Heath seems to find some difficulty in trying to fit industrial policies under national security exceptions.[167] Looking at the Democrats' green policies, he notes that "unlike the Trump administration's steel and aluminum tariffs, progressive industrial policy has yet to be justified by reference to 'essential security' concerns before an international tribunal, though that could change."[168]

One indication pointing to the change in the logic behind IEL is that the national security frame does not capture all cases in which states interfere in the economic domain. States' geoeconomic measures also advance strategic interests that might not be justified by national security reasons. Examples include cases in which governments enact policies to reduce dependence on a predominant supplier of solar panels[169] or of energy.[170] These are not necessarily protectionist measures, because sometimes there is no domestic sector to be protected; and they are not necessarily questions of national security either (even if national security might be subject to a legitimately expansive interpretation).

Invocations of national security might provide a clear justification when it comes to measures directed to prevent the acquisition of capabilities by foreign actors. Examples of these "defensive" geoeconomic

164. *Id.*

165. *Id.* at 1049.

166. *Id.,* although his view seems to be informed by more than one definition of geoeconomics, including what is considered in the present chapter as "economic statecraft."

167. J. Benton Heath, *Trade and Security Among the Ruins*, 30 Duke J. Compar. & Int'l L. 223, 233–34 (2020).

168. *Id.*, at 234.

169. Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/R (adopted Feb. 24, 2016).

170. Panel report, *European Union and its Member States – Certain Measures Relating to the Energy Sector*, WTO Doc. WT/DS476/R (adopted Aug. 10, 2018).

measures include investment screening mechanisms and export controls. Conversely, the national security justification does not always fit as a plausible legal ground for measures which seek to develop or reinforce domestic economic capabilities. Some examples of such "proactive" geoeconomic measures are industrial policies which pursue the (strategic, but not necessarily national security) goal of ensuring national capability to manufacture face masks or solar panels.

The resort to the national security frame to justify each and every policy to protect or promote economic capabilities blindfolds the analyst to the changing logic in the global economy. It is correct that "an increasing range of regulatory techniques designed to support domestic industry are being tied to national security, and not just in the United States"[171]—but this is part of a broader story, which is not entirely captured by this statement. Europe's quest for *strategic autonomy,* for example, is not designed exclusively to defend its security. It is also driven by the pursuit of *strategic* interests, such as stimulating the establishment of a European data space that can "increase Europe's technological sovereignty."[172]

In sum, the debate on the "new" national security proposes a very welcome framing to many recent government measures that restrict trade and investment, certainly one updated to today's needs. Furthermore, it advances many useful insights to better understand the expansion of the national security scope. Yet it also reveals that national security and geoeconomics are at best circles that touch on some points but do not entirely overlap.

The increasingly frequent claims of national security to excuse trade and investment restrictions have also been approached from a more discursive perspective. Harlan Cohen has framed the question as one in which national security (nations) and economics (markets) are presented as "claims"—instead of "subjects"—designed to battle for control over the "proper location of policymaking."[173]

In a perceptive insight, Cohen remarks that "[i]t is 'national' rather than 'security' that seems to be doing much of the work"[174]—it is the national as the *locus* of power that seeks to establish its prevalence as an organizing principle, to the detriment of markets. In his view, what matters is what is being "secured." Cohen concludes that "the national security frame is fundamentally about the interests of the nation rath-

171. Benton Heath, *supra* note 167, at 234.
172. European strategy for data, *supra* note 44, at 5.
173. Harlan Grant Cohen, *Nations and Markets*, 23 J. Int'l Econ. L. 793, 794 (2020).
174. *Id.* at 806.

er than any particular threat."[175] And it is from this angle that he sees with little surprise that the invocations of national security have recently expanded to encompass not only the scramble for medical supplies in the context of COVID-19, but also other economic interests.[176] Ultimately, Cohen's point seems to suggest that the definition of what falls under "national security" or "strategic" interests are a matter for domestic political decision-making, and this is a very valid point.

Cohen's analysis brings to mind the "national security symbolism" of which spoke Keohane and Nye, referring to the "slogan American political leaders used to generate support for their policies" in the Cold War years. This "symbol" was later superseded by the discursive appeal gained by "interdependence" in the post-Cold War period—only to lose ground in recent years, and ironically, to "national security."[177]

There is no doubt that a power struggle between opposing constituencies stands behind both the invocations of national security (or geoeconomics, more broadly) and free trade. It is also indisputable that the national security claim is indeed about defending what is considered at a given moment as in the national interest. In this respect, Cohen is one of the scholars whose analysis comes the closest to identifying that what is at stake is a scramble for capabilities. Still, the frame he puts forward begs the question of why this "battle for control" is taking place now and what interests are at play. The geoeconomic framework can provide an answer. After all, when leaders realize that market-led economic interdependence has gradually depleted the capability to provide national populations with medical equipment there is a concrete problem to be solved—and not only an argumentative dispute to fight.

Jonathan Bonnitcha also has approached the invocations of national security from a discursive perspective, but looking at what he called the "investment wars." With this term, the author describes the "diverse and partially inconsistent objectives" the US Trump administration pursued in the area of investment liberalization.[178]

In this account, US diplomacy in the early Trump years was simultaneously pursuing market access for American investments (such as with the Section 301 investigation on China's practices) as well as discouraging outward American investment (as in the proposals to inhibit

175. *Id.* at 810.

176. *Id.* at 809.

177. Keohane & Nye, Jr., *supra* note 74, at 5–7.

178. Jonathan Bonnitcha, *Investment Wars: Contestation and Confusion in Debate about Investment Liberalization*, 22 J. Int'l Econ. L. 629, 630 (2019).

offshoring of production in the USMCA negotiations).[179] The contradictory character of these positions led the author to dismiss that they could be justified by "underlying material interests" of the United States.[180] Instead, they would find meaning, in his view, in the way "particular issues of investment liberalization are framed in relation to wider problems":[181] investment liberalization is subject to being framed both as a threat (when approached from the angle of the competition with China) and an opportunity (when seen from the perspective of domestic jobs creation).

It is a valid point that in the first years of the Trump administration, the United States was voicing positions with respect to investment liberalization that were difficult to tie together under a coherent explanation. Still, it is not clear how much the constructivist claim advanced by Bonnitcha sheds light on the underlying problem driving the transformations in US investment policies. Indeed, any object of the study reveals different aspects (and hides others) depending on how they are framed and approached.

Most fundamentally, though, the experience of recent years casts doubt on the alleged incoherence in the US approach to investment liberalization. The US government support for American investments going to China is certainly more modest than before—if not openly discouraging of investments in sectors of the Chinese economy that pose a threat to the US relative position. In March 2021, Jake Sullivan, national security adviser to US President Biden, stated that "our priority is not to get access for Goldman Sachs in China," making clear that the concern for market access in China was not a priority.[182] The position expressed by Sullivan makes sense from a geoeconomic perspective: it is not in the United States' interest to provide China with funds and expertise in the financial sector, even if American companies might stand to make profits from an increased presence in the Chinese economy.

179. *Id.* at 643.

180. *Id.* at 630.

181. *Id.* at 652.

182. David J. Lynch, *Wall Street's March into China Increasingly at Odds with Biden's Tough Stance*, Washington Post, March 23, 2021, https://www.washingtonpost.com/business/2021/03/23/goldman-sachs-china-biden/ [https://perma.cc/6LH2-BKXH]. This position is consistent with that voiced by senior officials of the Trump administration in 2020, in a number of coordinated speeches that alerted to the risk posed to the US democracy by American companies accused of kowtowing to Beijing. Among other political goals, these speeches can be seen as a manifestation that the US government did not consider a priority to advance their market access in China. *See* Barr's remarks on China, *supra* note 132.

If the constructivist framework could have claimed any explanatory power during the first years of the Trump presidency—a debatable proposition—it now certainly falls short of accounting for a development that was expected from the perspective of the geoeconomic framework. There certainly is a discursive dimension to the transformations reshaping the global economy, and IEL by implication. But constructivism does not provide a satisfactory comprehensive explanation for these transformations, which are ultimately driven by a reappraisal of states' "material interests."

B. Is IEL Flexible Enough to Address the Geoeconomic Challenge?

A second set of debates prompted by the re-emergence of geoeconomics discusses whether IEL as it stands is flexible enough to accommodate economies of different models. In particular, these debates sought to discuss the possibility of preserving the liberal orientation of the IEL regimes in view of the state-centric Chinese economic model.

The discussion regarding the flexibility of IEL is, in turn, a reflection of the broader debate, emerging in the 2000s, regarding the nature of China's rise,[183] namely, whether China is a reformist, a revolutionary, or a status quo power. The experience of over a decade has contributed to sophisticating this debate and introducing a number of nuances that show it is an over-simplification to seek to neatly categorize China under any one of those categories. The Western expectation that China's integration into international institutions would transform it into something resembling a liberal democracy proved greatly exaggerated. At the same time, China's rise is not leading to the wholesale dismantling of the international order structured around principles such as sovereignty and non-interference.[184] What lies in between these two extremes is precisely what needs to be spelled out in order to make sense of how regimes such as IEL will evolve.

The challenges inherent in the incorporation of an actor with such a distinct economic model pervaded the entire period around the negotiations for China's accession to the WTO. There has never been any illusion that China's accession to the WTO would lead to transformational impacts on the trade regime: "the WTO, its rules, institutions,

183. At the time, this debate was focused on emerging economies (not only on China), particularly the BRICS countries. For a summary of the terms of these debates, see Andreas Buser, Emerging Powers, Global Justice and International Economic Law—Reformers of an Unjust Order? (2021).

184. Jessica Chen Weiss & Jeremy L. Wallace, *Domestic Politics, China's Rise, and the Future of the Liberal International Order*, 75 Int'l Org. 635, 657 (2021).

policies and processes, will be modified by China's accession," acknowledged Cass, Williams, and Barker in 2003.[185] The question then became how to shape this impact in a direction that would cater to the interests of the incumbent powers whose preferences were reflected in the WTO rules.

Some commentators have expressed skepticism about the ability to "shape" China's behavior. In an often-quoted reference, Gary Hufbauer stated in 1998 that "[e]ither China commits to privatize its SOEs [(state-owned enterprises)] over the next decade, or the fabric of the WTO will be ripped."[186] By contrast, President Bush's approach was that "China is most free where it is most in contact with the world economy" and that "trade with China serves the economic interests of America."[187]

China's WTO accession talks were in no way made easier by Bush's expression of American interest. The United States would claim to have achieved most of its goals in the negotiation: "[United States Trade Representative Charlene] Barshefsky was able to have a negotiation in which she demanded a lot and gave up nothing, and what a wonderful success that was."[188] China had to commit to obligations imposed on no other countries but itself.[189] At the same time, it is recognized that the Chinese leadership at that time was willing to leverage the WTO accession to push for domestic reforms, among others in the SOE sector.[190]

Despite the 15 years it took to negotiate China's WTO Accession Protocol, and the strict obligations accepted by China at the time,

185. Deborah Z. Cass, Brett G. Williams & George Barker, *Introduction—China and the Reshaping of the World Trade Organization*, *in* China and the World Trading System – Entering the New Millennium 5 (Deborah Z. Cass et al. eds., 2003).

186. Gary Hufbauer, *China as an Economic Actor on the World Stage: an Overview*, *in* China in the World Trading System: Defining the principles of engagement 50 (Frederick Abbott ed., 1998).

187. *In Bush's Words: 'Join Together in Making China a Normal Trading Partner'*, N. Y. Times, May 18, 2000, *https://www.nytimes.com/2000/05/18/world/in-bush-s-words-join-together-in-making-china-a-normal-trading-partner.html*.

188. Quoted in John Jackson, *The impact of China's accession on the WTO*, in Cass *et al.*, *supra* note 185, at 25. For a recent recount of China's accession negotiations with the United States followed by a present-day assessment by the leading actors of the concrete results of the obligations China committed to, *see* Paul Blustein, Schism – China, America and the fracturing of the global trading system 28–70 (2019).

189. Julia Ya Qin, *WTO Regulation of Subsidies to State-owned Enterprises (SOEs) – a Critical Appraisal of the China Accession Protocol*, 7 J. Int'l Econ. L. 863, 913 (2004).

190. Nicholas R. Lardy, *Issues in China's WTO accession*, Testimony of Nicholas R. Lardy (May 9, 2001), https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/ [https://perma.cc/3WQT-PZ6C]; Hongyi Harry Lai, *Behind China's World Trade Organization Agreement with the USA*, 22 Third World Q. 237, 250 (2001).

analysts today evaluate that key areas such as the treatment of Chinese SOEs were "not handled particularly well" in the Protocol.[191] Analysts also express some disbelief in the face of the comparatively low number of instances in which WTO members sought enforcement of these obligations. As Petros Mavroidis and André Sapir argue, "it is practically impossible to know the reasons for non-enforcement. The reasons lie in the realm of private information . . . some companies might feel that by alerting their sovereigns to infractions, they risk their places on the lucrative Chinese market . . . ."[192]

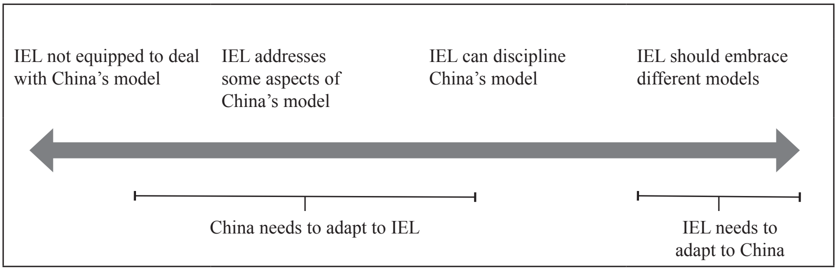
These questions come to a head at the present moment when China's geoeconomic policies have placed it in a position where other major economies perceive it as more than an economic competitor. In what could be seen as a conclusion of sorts to the debate on the nature of China's rise, China is not approached anymore by these major economies exclusively as a possible source of anti-competitive practices, where the emphasis is on leveling the *economic* playing field; rather, it is increasingly seen as an actor that seeks to displace the incumbent powers in a wide-ranging number of economic areas—and this brings to the fore concerns of a strategic (or security) nature that extend beyond the economic realm.

Scholars have different views regarding the flexibility of IEL to accommodate China's model. They can be subsumed under the following two categories. First, according to one perspective, China needs to adapt to the IEL regimes. For some authors, this might demand adjustments in IEL rules to make sure it constrains China's state-centric model. For others, the existing rules can discipline China without further amendments. Either way, such adaptation ultimately depends on the political will of the main actors, and in particular on China's buy-in. Second, the view from the other extreme of the spectrum advocates that it is IEL that needs to adapt to embrace China's model, since the system stands to gain from a diversity of economic models. These views are depicted in Figure 2 and discussed in more detail below.

191. Philip I. Levy, *The Treatment of Chinese SOEs in China's WTO Protocol of Accession*, 16 World Trade Rev. 635, 636 (2017).

192. Petros C. Mavroidis & André Sapir, *China and the World Trade Organisation: Towards a Better Fit* 31 (Jun. 11, 2019) (working paper), *https://www.bruegel.org/sites/default/files/wp_attachments/WP-2019–06–110619_.pdf* [*https://perma.cc/9BEW-P9JZ*].

Figure 2 - IEL and China's economic model – spectrum of positions



1. China Needs to Change in Order to Remain in the System

For some authors, existing rules are flexible to address concerns expressed with respect to China's state capitalism,[193] state-owned enterprises[194] and forced transfers of technologies.[195] Ming Du, for instance, shows optimism with the ability of WTO rules to respond to the Chinese state's interference in the economic domain: "WTO Agreements are remarkably flexible" and "many key features of China's state capitalism could easily be challenged by its trading partners in a WTO-consistent manner."[196] Still, one point that cuts across the positions of these scholars and arguably limits their concrete feasibility is that the interpretations of the WTO rules they propose require states to challenge the legality of China's policies—and this has been a significant hurdle, as noted above.

Others are less sanguine, but recognize that the existing rules could at least be used to constrain China to take a stance on its commitment to the market orientation of the trade and investment regimes. This is the view of Jennifer Hillman, for example, who proposed that a coalition of states should file a case at the WTO challenging the consistency of China's practices with the multilateral rules.[197] The case would force a decision by the dispute settlement mechanisms of the WTO, which would reveal where existing WTO rules "are failing and need to

193. Ming Du, *China's State Capitalism and World Trade Law*, 63 Int'l & Compar. L. Q. 409, 448 (2014).

194. *See* Weihuan Zhou, Henry Gao & Xue Bai, *Building a Market Economy through WTO-inspired Reform of State-owned Enterprises in China*, 68 Int'l & Compar. L. Q. 977 (2019).

195. *See* Weihuan Zhou, Huiqin Jiang & Qingjiang Kong, *Technology Transfer under China's Foreign Investment Regime: Does the WTO Provide a Solution?,* 54 J. of World Trade 455 (2020).

196. Du, *supra* note 193, at 448.

197. *Hearing on U.S. Tools to Address Chinese Market Distortions Before the U.S.-China Economic and Review Security Commission*, 115th Cong. 76–93 (2018) (testimony of Jennifer Hillman).

be changed." The goal of such an exercise is ultimately to let China decide "whether it wants to change its system to one that fits within the parameters of the WTO or not."[198]

Hillman was aware that the existing body of WTO rules is insufficient to address the challenges posed by China's state capitalism. Along with Chad Bown, Hillman also offered suggestions for the negotiations on subsidies disciplines among the trade ministers of the United States, EU, and Japan (the Trilateral group) which seek to plug perceived gaps in the multilateral subsidies regime.[199] Their proposals are submitted as a contribution to a possible update of the existing rulebook in order to retain its liberal orientation—although they admit the significant challenge of bringing all relevant parties to the table, not least China.[200]

Petros Mavroidis and André Sapir approached the reform of trade law from a broader perspective than Bown and Hillman, but their conclusions are not so dissimilar in arguing that the WTO rules need to be adapted so as to better deal with China. Their approach is premised on the assumption that China needs to be socialized, or else it would risk being left out of future arrangements.[201] They argue that "there is a need to translate the liberal understanding of the law . . . into operational rules to ensure that China and WTO members that belong to a different tradition of the law fit better with the WTO than currently."[202]

Proposals such as these are arguably unidimensional in the sense that they assume the existing rules need to retain their market orientation in order for a trade regime to exist. The assumption is that without liberal inspiration there is no IEL. Therefore, what needs to be done is to plug those gaps that have enabled countries such as China to maintain its state-led economic model and offer China the possibility of remaining in the club. It is a proposition as valid as it is difficult to see implemented in a context in which major economies fight to retain or develop capabilities. The assumption supporting these proposals is that only China is using its deep-pocketed state to change the geography of global economic activity. But, as described throughout this Article, the reality has moved to a different stage, as major economies react to China's geoeconomic measures by also deploying geoeconomic measures themselves (in a "geoeconomic chain reaction"). Aside from China, the

198. *Id.* at 89.

199. *See* Chad P. Bown & Jennifer A. Hillman, *WTO'ing a Resolution to the China Subsidy Problem*, 22 J. of Int'l Econ. L. 557 (2019).

200. *Id.* at 578.

201. Mavroidis & Sapir, *supra* note 192, at 43.

202. *Id.* at 42–43.

United States, the EU, and a number of other (mostly developed) economies are also resorting to state-led economic policies—and this new reality is likely to have an impact on how discussions on topics such as subsidies will play out.

The proposals and legal analyses above have largely approached the China challenge from the perspective of IEL, that is, of the existing rules. In contrast, Mark Wu offered an important contribution to this debate by addressing this question from the angle of the uniqueness of the Chinese economic model, which he dubbed "China, Inc."[203]

Unlike the debates above, though, Wu's argument is premised on the view that law-making fix-ups or lawsuits will prove insufficient to address the "China, Inc." problem: "It is a mistake to believe that the solution to resolving [the] 'laundry list' of issues is as simple as creating a 'laundry list' of new legally-binding commitments to address each of the concerns, to be captured in a bilateral agreement or new WTO rules."[204]

For him, China's model of capitalism is distinct from traditional variants of state capitalism. Wu recognized that both GATT and WTO negotiators crafted these regimes in a way that accommodated differences across economic models.[205] In his view, though, the Chinese model does not conform to any of the alternative economic forms to market capitalism.[206] He points to six elements that render China's economic structure distinct from traditional examples of state capitalism: (1) the fact that key Chinese SOEs are controlled by a single governmental agency; (2) state control of key financial institutions; (3) state control over planning and control over inputs to implement multiannual plans; (4) networks of state-controlled entities connecting with both state organs and other entities; (5) communist party control; and (6) the intertwined nature of private enterprises and the Party-state.[207]

Wu's claim is that the *structure* of China's economic model is the "root cause" of the challenge China presents to the WTO rules:[208] "[p]roblems arise because of China's unique economic structure."[209]

203. *See* Mark Wu, *'The China, Inc.' challenge to global trade governance*, 57 Harvard International Law Journal 269 (2016).

204. *Hearing on Risks, Rewards, and Results: U.S. Companies in China and Chinese Companies in the United States Before the U.S.-China Economic and Security Review Commission,* 116th Cong. 124 (2019) (testimony of Mark Wu).

205. Wu, *supra* note 20, at 285–87.

206. *Id.* at 287.

207. *Id.* at 269–84.

208. *Id.* at 269.

209. *Id.* at 127.

Wu's framework is very helpful in shedding light on the undeniable uniqueness of the Chinese model, but it overlooks the fact that this model is deployed to attain the geoeconomic goal of building up China's capabilities—and this is what is impacting IEL, not China's structure *per se*. By focusing on the structure of the Chinese model, Wu leaves unaddressed the key element to understand the current transformations in the global economy, something that is revealed by the geoeconomic framework, as discussed in more detail below.

2. The System Needs to Adapt in Order to Embrace the Diversity of Economic/Institutional Models

An alternative approach to the ones above frames the diversity of economic models either as a positive element of the trade and investment regimes or, at least, as a fact that cannot be worked around and thus needs to be accepted.

The co-existence of different varieties of capitalism is a topic that has gained prominence in political science[210] and economic literature,[211] particularly in the context of the shades of state capitalism that characterize many emerging economies. These analyses seek to make sense of what the world economy would look like when major economies do not share the basic (liberal) principles that inspire the major developed economies.

Such a variety of economic models "is efficiency-enhancing at the systemic level" from a legal perspective, argued Andrew Lang.[212] In fact, the "preservation of institutional diversity and the capacity for institutional innovation" has been an important objective of the GATT/WTO regimes.[213] The Chinese economic model is the most acute and recent manifestation of this question. Thus, what Wu sees as a threat to the continuity of the WTO regime (and of IEL more broadly), Lang sees as a sign of the system's vitality.

The embrace of diverse economic models is the starting point for a number of policy proposals that have recently been offered by legal and economic scholars. Gathered in the U.S.-China Trade Policy Working

210. For recent examples, *see, e.g.*, Buzan & Lawson, *supra* note 95, at 91; Joshua Kurlantzick, State Capitalism: How the Return of Statism is Transforming the World (2016) (ebook); Ian Bremmer, The end of the free market – Who wins the war between states and corporations? (2010).

211. Branko Milanovic, *The Clash of Capitalisms – The Real Fight for the Global Economy's Future*, 99 Foreign Aff. 10, 10 (2020).

212. Andrew Lang, *Heterodox Markets and 'Market Distortions' in the Global Trading System*, 22 J. of Int'l Econ. L. 677, 680 (2019).

213. *Id.* at 687.

Group, a number of US and Chinese academics presented in 2019 a joint statement laying out what they perceive as a framework "to move away from the current intellectual approach that frames the U.S.-China economic relationship as a choice between economic decoupling, on the one hand, and deeper economic integration on the other."[214] According to the scholars endorsing this initiative, there is no alternative but to embrace different economic models.

Their core proposition is that states should be allowed the "policy space" to pursue their domestic regulatory preferences. The approach adopted by the Working Group seeks to "prioritize policy space for the U.S. and China," in such a way that would allow "China to conduct its industrial and growth policies and . . . the U.S. to safeguard its labor markets and technological systems."[215] States that felt affected by any measures would be authorized to respond, but in a proportionate manner.

To make their proposition operational, the framework put forward by the Working Group is divided into four categories of policies, or "buckets:"[216] bucket oneone comprises "prohibited" measures, such as "beggar-thy-neighbor" policies; bucket two incorporates policies subject to bilateral negotiations to remedy possible damages; bucket threethree measures allow the possibility of unilateral reactions to harmful policies adopted by other states; and bucket four contains policies that should be disciplined at the multilateral level, because of their potential to affect not only the US-China relations, but also to generate negative consequences for third parties.

The framework reveals a limitation in its design due to its heavy economic focus on a problem—the US-China tensions—which is multifaceted and not circumscribed to the economic domain. For example, bucket one (disciplining "prohibited" policies) is emblematic of this shortcoming because it implies that, despite the strategic competition between major powers, harms or gains can only be measured by economic metrics: "in this bucket, Country A's actions or policies are likely to create significant distortions in global markets and can be presumed to *entail global economic losses*" (emphasis added).[217] It overlooks the fact that, in a geoeconomic context, states are guided not only by an economic metric, but also by other considerations that might ultimately

214. US – CHINA TRADE POLICY WORKING GROUP, US – CHINA TRADE RELATIONS: A WAY FORWARD, 7 (2019).

215. *Id.*, respectively at 2 and 7.

216. *Id.* at 4.

217. *Id.* at 4.

prove more costly, such as when states seek to reinforce the resilience of their economies.

Members of the Working Group have subsequently attempted to expand and elaborate on the framework. Harvard economist Dani Rodrik, one of the leading authors of the framework, partnered with his Harvard colleague, political scientist Stephen Walt, to formulate a version of the framework that would address not only the economic but also the political competition between the United States and China. In an article titled no less than "How To Construct A New Global Order," the authors proposed a "meta-regime" which would provide a way for major powers such as the United States and China to "structure their communications with each other and to achieve the best possible outcome within the constraints of a fragmented and competitive system where states are still dominant and differences in power and status loom large."[218]

Rodrik and Walt see modest possibilities for a future global order. They envisage an order that is relatively thin at the global level—implying reduced institutionalization—and complemented by spheres of influence which the United States and China will attempt to cultivate.[219]

A particular case in point is where they briefly address a topic related to the geoeconomic framework presented above in this Article. Rodrik and Walt rightly recognized that "states will sometimes adopt policies with the express purpose of weakening a rival or gaining an enduring advantage over it. This feature of international politics does not disappear under our approach, either for the major powers or for many others."[220] Although they admit that states will compete for economic capabilities, they decry the US measures that blocked American companies from selling inputs to foreign companies which are themselves Huawei suppliers. These US. measures, for Rodrik and Walt, seem aimed at delivering "a fatal blow to the company by starving it of essential inputs," something difficult to justify by a national security concern, in their view.[221]

Interestingly, despite admitting that states might pursue "advantage over rivals," their frame seems constrained by a dichotomy whereby government measures restricting economic transactions can

218. Dani Rodrick & Stephen Walt, How to Construct a New Global Order, 34 (2021) *https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/how_to_construct_a_new_global_order_may_2021.pdf.*

219. *Id.* at 12.

220. *Id.* at 12.

221. *Id.* at 23.

only either qualify as a national security exception or an illegal case of protectionism. They overlook the fact that states might want to interfere in the market in order to pursue the strategic (and not necessarily national security) goal of preserving, developing, or retaining capabilities. In this sense, the framework proposed by Rodrik and Walt is limited by the constraints of the logic underpinning IEL: a restrictive economic measure might be excused if it meets the requirement of the national security exception; otherwise, it can only be a case of protectionism and therefore inconsistent with the rules. There does not seem to be space for state measures that aim to reshape economic activity by, for example, stimulating the reshoring of manufacturing activity—something very likely to be inconsistent with the existing trade rules, yet justified under a geoeconomic framework.

Gregory Shaffer, another signatory of the WG statement, engaged in an analysis more directly centered on IEL.[222] Shaffer sophisticates the approach of the joint statement by giving its framework a multidimensional shape. Accordingly, he put forward a three-level framework to "govern the interface of U.S.-China trade relations," namely the economic, geopolitical/national security, and social interfaces. His point of departure is also the acceptance of diverse economic models, but he incorporates nuances neglected by the Working Group report.

The framing of the "geopolitical interface" rightly recognizes that different metrics are employed to perform economic and geopolitical (or geoeconomic) assessments: "National security measures often involve beggar-thy-neighbor and discrimination policies and yet are viewed as legitimate measures of self-protection."[223] In what could be seen as a realist reading of the prospects for the U.S.-China relations, Shaffer also expects that some level of decoupling could ultimately take place in critical sectors of their respective economies.[224]

Shaffer hints at the recognition that the United States and China might be engaging in a conflict that comes down to capabilities that are relevant to the economic autonomy of each of them. He argues that it remains unclear whether the United States "will take a narrower or broader approach to addressing national security concerns in trade policy."[225] The "broader" approach would roughly correspond to the geoeconomic framework laid out above in the sense that the United

222. *See generally* Gregory Shaffer, *Governing the Interface of US-China Trade Relations*, 115 Am. J. Int'l L. 622 (2021).

223. *Id.* at 650.

224. *Id.*

225. *Id.*

States would push back on China's development as an economic leader; conversely, the "narrower" approach considers national security measures as those more directly related to defense and security issues in the traditional understanding of the term.[226] Shaffer shows a preference for the more limited encroachment of national security concerns into US trade policy[227] in view of the risks that the "broader" stance might understandably trigger.

Shaffer's analysis is very accurate in identifying the dilemma currently affecting the scope of the national security exception, in a way not dissimilar to the work by Benton Heath. Yet, while it should be reasonable to expect most to share the preference for a "narrower" approach to the national security exception (in view of the benefits it brings to the rule of law), it does not seem clear why the United States or other state actors would choose this option instead of the "broader" approach—particularly in light of the broad conception of economic power adopted by China, in which the economy is approached as part of national security.[228]

Although the idea of a struggle for capabilities is present in Shaffer's narrative, this possibility seems to be abandoned in the concrete examination of the model he offers. In fact, he concurs with the view on the Huawei case defended by Rodrik and Walt, which was also used to demonstrate the operation of his framework. Shaffer considers the extraterritorial application of US technology control to be disproportionate, given that it escalates "conflict with China, as the apparent aim is to undermine or destroy a major Chinese company . . . ."[229] Yet, for all the disruptive impact it entails, the extraterritorial reach of the US measure is precisely what would be expected by the geoeconomic framework. From this angle, it makes sense that the United States tries to prevent the Chinese company from gaining market share using American technologies.

The next Part discusses in more detail what the analyses inspired by the Working Group proposal leave unaddressed—and how the geoeconomic framework sheds light on these overlooked aspects.

226. *Id.*
227. *Id.* at 652.
228. Shambaugh, *supra* note 138.
229. Shaffer, *supra* note 222, at 653.

IV. The Contribution of the Geoeconomic Framework to the Debates on the Evolution of IEL

What is the contribution of the geoeconomic framework to IEL debates that try to make sense of what is happening in the field—and, more importantly, to understand how the field might evolve? This Part begins by describing how the geoeconomic framework laid out throughout this Article offers a coherent explanation to a set of apparently disparate policy developments related to the increased state intervention in the economic domain. The second section of this Part focuses on the contribution of the geoeconomic framework to the debates on the evolution of IEL. Discussion of a particular set of IEL rules and principles is called for when events taking place in the global economy are approached from the geoeconomic framework. Yet, as discussed below, current debates among international lawyers by and large neglect these discussions—which are nonetheless necessary if we want to understand how IEL might evolve.

A. The Geoeconomic Framework Offers Coherent Meaning to Instances of Increased State Intervention in the Economic Domain

By placing the emphasis on the *scramble for capabilities* being driven by major economies, the geoeconomic framework presented in this Article offers a coherent explanation to the increasing instances of state intervention in the economic domain that challenge the liberal rules that have regulated trade, investment, and finance in the past decades. These interventions take different shapes—industrial policies to promote domestic production, curbs on foreign investments, bans on exports, as well as trade preferences to allies and friends.

Although these are disparate policy instruments, the geoeconomic framework gives them a coherent meaning: they are part of larger government strategies to guarantee access to technologies, products, skills, and other assets they consider in their strategic interest or necessary to safeguard their national security.

But why are governments gradually abandoning the market oriented IEL rules that have prevailed until recently and instead opting to reshape global economic relations? The geoeconomic framework also offers insights to make sense of the reasons motivating this shift at this point in time. As described above,[230] China's accession to the WTO incentivized companies to place the Chinese economy as an

230. *See supra* Part II.D.

important node in their supply chain networks. Relocation of production from different parts of the world towards China was enabled by IEL rules such as the trade liberalization commitments enshrined in the WTO agreements.

China benefited from liberal trade rules when it came to attracting foreign companies, but this does not mean it embraced full-blown economic liberalism. Instead, it managed its level of opening to the global economy. Throughout this period, the Chinese government adopted in parallel a series of geoeconomic policies that allowed its companies to absorb the capabilities that were being brought to its territory by foreign market players. These policies were successful in many areas. Over the years, a number of Chinese companies emerged in sectors where few or none previously existed—some of these companies now dispute global markets with firms that had relocated to China, as illustrated by the development of the Chinese speed train industry.[231]

Until this moment, China was perceived predominantly as an *economic competitor* by other major economies. Accordingly, the reaction of these latter countries to Chinese geoeconomic measures was by and large circumscribed to the tools offered by the trade regime: essentially antidumping remedies (to redress low-priced Chinese imports) and countervailing measures (to react to subsidized Chinese goods).

This context began to change when China came to be seen as a *strategic and security competitor*, a shift which took place when the United States altered its official position towards China to label it a "revisionist power"[232] capable of eroding "American security and prosperity."[233] It is at this point in time that the United States—followed by the EU and other developed economies such as Japan—changed tack and triggered a reaction to China based on geoeconomic measures. Therefore, as a response to China's geoeconomic policies, major economies such as the United States and the EU are also resorting to geoeconomic policies—the "geoeconomic chain reaction" alluded to above.[234]

This competitive dynamic takes the form of geoeconomic measures aimed at "shielding, spurring and stifling" capabilities,[235] that is:

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231. Norihiko Shirouzu, *Train Makers Rail Against China's High-Speed Designs*, Wall Street Journal (Nov. 17, 2010), *https://www.wsj.com/articles/SB10001424052748704814204575507353221141616* [https://perma.cc/UT8V-UZFK].

232. Nat'l Sec. Strat. of the U.S. 2017, *supra* note 119, at 25.

233. *Id.* at 2.

234. *See supra* Part II.D.

235. Roberts, Moraes & Ferguson, *supra* note 32, at 667–68.

i. "Shielding" includes geoeconomic measures and policies whose goal is to keep under the jurisdiction of a state existing capabilities, such as the technologies to design semiconductors, the know-how to produce life-saving pharmaceuticals, or even the pool of personal data that is generated by local users of apps. Regulations such as investment screening mechanisms work as tools to pursue this objective of "shielding" these capabilities from being accessed or controlled by foreign actors. Export controls are also an example of "shielding" to the extent that they operate as instruments that prevent technology spill-over to rivals;

ii. "Spurring" refers to measures aimed at promoting the development of capabilities considered strategic or of national security importance. The "Made in China 2025" plan is one such example, with its ambition to "transform China from a manufacturing giant into a world manufacturing power" in a number of strategic industries.[236] The European Union new industrial strategy[237] also aims at providing funds to domestic manufacturing in certain industries. Meanwhile, the US Chips and Science Act, adopted in August 2022,[238] offers subsidies for companies to manufacture semiconductors in the United States, with the very likely exception of Chinese companies;

iii. "Stifling" encompasses measures that seek to prevent other states from scaling up their range of capabilities. The US extraterritorial legislation that prevented companies from supplying the Chinese Huawei with inputs is a clear example. More recently, the United States took export controls one level further by severely hampering access by Chinese actors to semiconductor technology and manufacturing equipment.[239]

The measures above sound foreign to IEL rules. Yet they are justified by the concern for security externalities, that is, the risk that economic transactions undertaken by market actors might lead to a transfer of capabilities considered strategic or of security importance.

236. Xinhua News Agency, *"Made in China 2025" plan unveiled*, China Daily (May 19, 2015), *http://www.chinadaily.com.cn/business/2015–05/19/content_20760528.htm* [https://perma.cc/WJ9L-SK2R].

237. *Supra* note 13.

238. *Supra* notes 9 and 42.

239. *Supra* note 64. *See* also Gregory C. Allen, *Choking off China's Access to the Future of AI*, Center for Strategic & International Studies (Oct. 11, 2022), *https://www.csis.org/analysis/choking-chinas-access-future-ai* [*https://perma.cc/7EWV-A7SN*].

It is for this reason that states are stepping in to manage more directly a number of economic relations which were normally conducted exclusively by market players.

As also revealed by the geoeconomic framework, the concern for security externalities injects a new element into economic relations, as the identity of the counterpart in an economic transaction becomes relevant. Liberal, market-oriented economic relations are largely dictated by efficiency considerations—it is often irrelevant who the trade partner is. Instead, in a geoeconomic environment economic relations risk fragmenting into a divide separating allies/friends from adversaries—at least for those transactions involving strategic or national security sectors.

Therefore, while geoeconomics does not necessarily lead to autarky, it points to a global economy shaped by strategic relations, and not only by efficiency considerations. States that share values or that trust each other (something that can be measured, *inter alia*, by the reciprocity each accords to the other) might create arrangements where interdependence continues to apply. Conversely, economic relations involving states that are considered adversaries (or companies possessing some connection with these countries) are likely to be subject to some restrictions.

B. The Geoeconomic Framework Redirects the Attention of IEL Debates

The fundamental point emerging from the geoeconomic dynamic described in this Article is to bring to light what actors such as the United States are reacting to: they are reacting to geoeconomic policies that ultimately seek to radically redefine the global distribution of capabilities that have been enshrined in IEL rules and regimes. Viewed from a broad perspective, then, China's geoeconomic policies are perceived as threatening the interdependence arrangement that underpins the current structure of the global economy—and IEL as a consequence. Incumbent leaders such as the United States, Europe, and Japan are reacting to it.

The points raised above have repercussions for debates on the evolution of IEL, in particular for the following discussions:

i. Negotiations on subsidies disciplines: until recently, China has been criticized for subverting the WTO disciplines on subsidies. One concrete expression of the concern raised by some countries regarding the Chinese economic model is the extensive state support for its companies. In the view of the United States and the EU, state subsidies offered by China distort global competition.[240] To offer possible new regulations directed to address this point, the United States, the EU, and Japan gathered in the "Trilateral" group to draft what could eventually become multilateral disciplines to plug gaps in the existing WTO disciplines on subsidies.[241] What the geoeconomic framework brings to light, though, is that strategic competition with China is inducing also the United States and the EU to themselves enlarge their subsidies programs, very likely in ways that might contravene the applicable WTO rules on this subject. And this development is likely to affect discussions on the future of subsidies regulation;

ii. Justifications for geoeconomic measures (national security vs. strategic reasons falling short of national security): as discussed above, not all geoeconomic measures are adopted for national security reasons. Even if it is accepted that the scope of the concept of national security is undergoing a legitimate expansion, there are still measures which are adopted based on concerns that are strategic, but that does not raise to the level of national security. This difference matters for IEL debates: trade agreements, for example, have different provisions disciplining the national security exception and the general exceptions. For example, the conditions imposed under Article XXI of the GATT 1994 (national security) are very different from those of Article XX (general exceptions)—and there are even different conditions that apply according to each of the varied hypotheses of general exceptions. Given the fact that not all geoeconomic measures are justifiable by the national security exception, debates on these measures

240. *See, e.g.*, World Trade Organization, China's Trade-Disruptive Economic Model – Communication from the United States, WT/GC/W/745 (2018); European Commission, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations*, *https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf [https://perma.cc/JC3F-3BSR]* (putting forward a range of political and economic elements that give the Chinese authorities decisive influence on the allocation of resources and their prices).

241. Office of the United States Trade Representative, Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union [*https://perma.cc/A3J5-BQSU*].

must address the feasibility of accommodating them under provisions on general exceptions, such as Article XX of GATT 1994;

iii. Discriminatory regulations (allies/friends vs. adversaries): the contamination of economic relations by strategic and security considerations opens the way to policies that are likely to discriminate according to the identity of the trade or investment partner. This is already visible, for example, in export controls that restrict the sale of goods to buyers in certain countries. But it is also emerging in industrial policies that offer incentives for domestic and to some foreign actors, but not others—the example of the U.S. Chips and Science Act is a case in point.[242] This type of discrimination is justifiable from a geoeconomic perspective: it makes sense for a government to discriminate against companies originating in a rival state by excluding them from a subsidy program (it would amount to a strategy of "stifling" to the extent that cuts these companies from tapping into funds that are likely to be useful). At the same time, these discriminatory measures are very likely to contravene rules such as the GATT 1994 general exceptions. Debates on the interaction between IELA and geoeconomic measures should take into account this emerging clash.

The points above are brought to light by the geoeconomic framework, but they are not present in the ongoing debates that seek to understand the transformations underway in the global economy. Without a clear idea of the nature of these transformations, it is not only difficult to grasp their impact on existing IEL rules—but it is also hard to work on possible solutions.

First, debates that highlight the expansion of legitimate invocations of the national security exception rightly argue that governments are expanding the scope of circumstances to which this exception applies. But they fail to see that many geoeconomic measures do not necessarily qualify as national security, especially those that do not possess a "proactive" character, such as the many industrial policies gradually being adopted in major developed economies such as the United States and the EU. The concrete implication is that these debates tend to focus

242. *Supra* notes 9 and 42.

exclusively on the national security exception when many other policies are more likely to be couched in terms of general exceptions.

It was mentioned above that not only China, but now also the United States and the EU are more actively resorting to subsidies programs. This point is correctly picked up by the U.S.-China Working Group, under the proposal to enlarge the state's "policy space," which seeks to legitimize what seems to be a policy trend in developed states.[243]

Conversely, the Working Group's framework seems to be heavily shaped by economic considerations, suggesting a disregard for strategic concerns that might affect economic relations. This limitation in their framework is brought to light in the analysis of the US export controls targeting non-American companies that supply Huawei, the Chinese telecom manufacturer. This is, of course, an extraterritorial measure that can generate significant trade restrictions. It is also a clear case of discriminatory regulation (against the Chinese company). For these reasons, in the Working Group's view, a measure of this nature is condemned as a "beggar-thy-neighbor" policy—and, therefore, should not be allowed. What is not seriously considered is that this measure can have a strategic justification—to prevent a competitor from acquiring technology. And one is led to believe that this possibility has not been entertained by the Working Group because their framework is exclusively an economic one, that is, it lacks enough space to accommodate non-economic concerns.

The economic straitjacket that prevents the Working Group from incorporating geoeconomic concerns is also revealed in the work by Rodrik and Walt. When the authors look at the same example, they express doubts as to the national security reasons justifying the US blocking foreign companies from supplying the Chinese company. Because of this apparent lack of justification, the U.S.-imposed restriction could only be an effort to "cripple Huawei in third markets . . . which our framework explicitly bars."[244]

Rodrik and Walt are right in pointing out that the extraterritorial application of US export bans might be hard to justify as a national security measure. But this does not necessarily make it a case of protectionism, as they imply. Their analysis neglects that a trade-restrictive

243. This seems to be the essence of the argument formulated recently by Robert Howse, also drawing on the WG joint statement. *See generally,* Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. of Int'l Econ. L. 371 (2020).

244. Rodrik & Walt, *supra* note 218, at 24.

measure can find a strategic justification that does not fit neither under national security nor under protectionism—in this case, the justification of stifling the development of technology by a strategic competitor.

Finally, the debates on the uniqueness of the Chinese model and on the merits or otherwise of the co-existence of different varieties of capitalism have offered very relevant inputs to understand the transformations in the global economy. But they overlook a critical element which is brought to light by the geoeconomic framework.

The turn to geoeconomics by actors such as the United States and the EU is not driven by frustration with China's different economic model. It is not only a question of institutional diversity and what to do about it. More important than the difference between the Chinese and other economic models—which certainly exists—are the concrete consequences stemming from this fact. What are the goals that China seeks using its economic model?

Table 3. IEL Debates and Geoeconomic Insights

Current terms of IEL debates	*Geoeconomic insight*
New legitimate national security claims	Not only about national security – strategic considerations are also driving the transformations repurposing the global economy
Different economic models	Challenge is not the different models in themselves, but what China is using its model for, which is to rearrange interdependence by building up its capabilities
Either national security or protectionism	There is a third option: the defense/development of national capabilities (or autonomy)

In order to better understand the implications of this insight regarding China's intentions with its model, it helps to take a step back to look at how other disciplines face this same problem.

A similar way of framing China's challenge to the current international order is put forward by Benjamin Cohen when he investigated whether China can be "smoothly absorbed" into the global system—what he called the "China question."[245] Although Cohen is looking at how this question plays out in financial governance, his framework provides useful elements for a broader analysis. According to him, the answer to the China question depends on two factors: (1) the flexibility of the system to accommodate China (something he understands is present); and, more crucially, (2) China's intentions (which remain uncertain, in his view).

These two factors are valid also to make sense of the impact to IEL of China's geoeconomic model of governance. The second factor in special—China's intentions—is particularly relevant to highlight that

245. Cohen, *supra* note 152, at 23–44.

the challenge presented by China stems not from its different economic model, but from the purposes this model serves—a point addressed shortly below.

When studying state capitalism, and how developed economies should position with respect to state capitalists, Joshua Kurlantzick equally draws attention not to China's model, but to the intentions it pursues with its model. In his view, "it is the nature of the government engaged in state capitalism, not the state capitalism itself, which should worry Western states."[246] According to him, "even if other countries adopt some of China's economic strategies, this shift would not necessarily make these countries more challenging to US strategic interests or to democratic rights and freedoms."[247]

And here the geoeconomic framework offers a key contribution to the debates on the evolution of IEL. If the current international context is approached as one in which states are scrambling to secure capabilities and their levels of autonomy, the crucial challenge to IEL posed by China's rise lies *not in its model*, but in the *objectives it pursues with its model*. And the objectives it pursues (or, more relevant, the objective it is seen by others as pursuing) amount to the reorganization of capabilities across the global economy, to the possible detriment of the incumbent major economies—which would need to make room for another competitor.

The geoeconomic framework thus makes clear that the key question is: Can IEL accommodate an actor that wants to reshape the interdependence arrangement? Are the current incumbents of the liberal order underpinning IEL willing to enshrine in legal rules what is increasingly a fact, namely China's control of a substantial range of capabilities as well as the other states' relatively more diminished position in the global distribution of capabilities?

This question goes to the core of IEL. To some extent, it has been asked in a different, and insightful, formulation, by Andrew Lang:

> [O]ne of the fundamental issues of global economic order . . . concerns the legitimate or 'fair' range of institutional diversity permitted in conditions of global competition. At what point do new or heterodox market forms cease to constitute legitimate experimentation, or the legitimate expression of local values and choices, and become a form of 'cheating' on the terms of fair competition in international trade?[248]

246. Kurlantzick, *supra* note 210, at 3811.
247. *Id.* at 4454.
248. Lang, *supra* note 213, at 681.

This remains an open question which will certainly continue to chase analysts in the coming years.

Conclusions

In order to make sense of the transformations taking place in the global economy, which are by implication challenging the tenets of IEL, this Article introduced a geoeconomic framework premised on the notion that states are scrambling for capabilities. This framework offers analytical tools to give coherent meaning to a series of developments that have been unfolding in recent years.

Just as the framework provides elements to make sense of the current international context, it also represents a useful compass to guide efforts meant to preserve, to the extent possible, the level of predictability and stability accorded by IEL.

Will IEL as we have known it for the past decades survive a geoeconomic turn? Just how much will geoeconomics impact the operation of the global economy? The framework does not have the ambition to respond to such questions. In this sense, the framework is descriptive, not deterministic. And this is for an undeniable reason. Even realist thinking cannot neglect the role of politics in shaping the future: "politics matters."[249]

Specifically in the area of trade, it is easy to forget that the mood in the years immediately preceding the end of the Uruguay Round was not upbeat. Many commentators at the time shared the perception that the world economy would fragment into a competition between the major economies of the United States, Europe, and Japan. For this reason, a prevailing expectation was that trade negotiations at the multilateral level would only produce administered trade, not trade liberalization.[250]

Over the years, the balance between the two logics alluded to by Luttwak—the "logic of commerce" and the "logic of conflict"—has tilted in different directions.[251] The push toward economic liberalization

249. Jonathan Kirschner, *The Tragedy of Offensive Realism: Classical Realism and the Rise of China* 66, 18 Eur. J. of Int'l Rel. 53, 54 (2010) (rejecting the deterministic premises of offensive realism by claiming that realists recognize that policies are influenced by domestic and international politics).

250. Thomas R. Howell & Alan W. Wolff, *Introduction*, *in* Conflict Among Nations—Trade Policies in the 1990s 2 (Thomas R. Howell et al. eds. 1992); Robert Baldwin, *The New Protectionism: A Response to Shifts in National Economic Power, in* International Political Economy – Perspectives on Global Power and Wealth 351 (Jeffry A. Frieden & David A. Lake eds., 3d ed. 1995).

251. *See supra*, Part II. A.

of the 1990s ushered in very legalized regimes in the trade, investment, and finance areas, thereby expressing the preeminence of the logic of commerce. In contrast, in the present we see the pendulum swinging back, closer to the imperatives of the logic of conflict. Just how much is still not clear, but adopting the right lenses to approach the current context is a necessary first step to providing adequate answers.