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# **THE U.S.CHINA TRADE WAR AND IP ENFORCEMENT AS ECONOMIC POLICY**

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## **1. INTRODUCTION**

The overlapping of trade, law and intellectual property characterises one of the most important developments in the architecture of modern global governance. The United States from its first experience with the design of its constitutional system understood innovation not as a product of creativity alone but as something of economic sovereignty and national development. Article I, Section 8, Clause 8 of the US Constitution explicitly allows Congress “to promote the Progress of Science and useful Arts.”<sup>1</sup>. This provision enshrines within the State’s broader economic powers the rights to intellectual property (IP), and thereby ties innovation with commerce, competition, and industrial policy<sup>2</sup>.

The statutory evolution of patent law in the US; the Patent Act of 1790 until the Patent Act of 1952, reflected this twofaced vision of consolidating private ingenuity and the best interests of the nation<sup>3</sup>. Through time, some of the notable judicial interpretations (including *Diamond v. Chakrabarty* and *Alice Corp. v. CLS Bank International*) fortified the economic instrumentalism of IP. The legal system increased the range of subject matter that was eligible to be patented.

The internationalization of the intellectual property standard in such tools as the Agreement on This nexus was institutionalized in Trade-Related Aspects of Intellectual Property Rights (TRIPS). between innovation and economic power on an international level. Through TRIPS, IP protection became a trade issue; a standard of compliance built into the global trading order. In the twenty-first century, this connection between law and trade had intensified, with the United States-China trade conflict as a new setting. The Trade Act of 1974, especially its

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>2</sup> Patent Act of 1790, ch. 7, 1 Stat. 109 (1790); Patent Act of 1952, Pub. L. No. 82-593, 66 Stat. 792 (1952).

<sup>3</sup> *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208 (2014).

Section 301, gave the statutory basis for the U.S. government to investigate and react to foreign practices that were deemed “unreasonable or discriminatory” and burdensome to U.S. commerce<sup>4</sup>.

Section 301, thus, made the United States Trade Representative (USTR) both an enforcer and a policy maker and blended trade diplomacy with administrative law.

In 2018, under Section 301, the USTR published its Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation ; an investigation report of 200 pages with allegations of systematic violation of IP by China <sup>5</sup>. These findings formed the basis under law to impose sweeping tariffs on more than \$360 billion worth of Chinese goods and the beginning of a new era under the banner of IP enforcement as an extension of trade policy.

The trade war was therefore not simply an economic battle but a legal battle for dominance of the norms and institutions of innovation. Law as opposed to force became the dominant language of coercion. The strategy pursued by the United States was one in a broader trend describing the merger of legality and power; where the enforcement of trade law is in the service of geopolitical objectives under the guise of juridical compliance.

## **2. HISTORICAL UNDERPINNINGS OF TRADE AND LEGAL POWER**

The conceptual roots of economic coercion through law run very deep in the structure of American constitutional and commercial government. Article I, Section 8, Clause 3 of the Constitution gives Congress the power “to regulate Commerce with foreign Nations”<sup>6</sup>. Together with the IP clause, this set up a double constitutional injunction with innovation, and trade as mutually reinforcing aspects of economic sovereignty.

From the early Tariff Act of 1930, to the Trade Expansion and Trade Acts of the mid twentieth century Congress developed a schema (framework, system, plan, arrangement) of regulations

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<sup>4</sup> Office of the U.S. Trade Representative, Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

<sup>5</sup> Id. at 10–11.

<sup>6</sup> U.S. CONST. art. I, § 8, cl. 3.

with the scope to translate domestic economic priorities into international legal instruments<sup>7</sup>. This infrastructure gave rise to a uniquely American form of legal mercantilism; a mode of governance in which statutory and administrative mechanisms substituted for direct political confrontation.

As the level of economic integration at the global level deepened after the World War II, the General Agreement on Tariffs and Trade (GATT) was established, which institutionalized the role of trade as a field of trade governed by legal commitment rather than diplomatic negotiation<sup>8</sup>. The GATT era fostered predictability and reciprocity while contributing at the same time to the perpetuation of the structural inequalities of the postwar industrial economies. By the late twentieth century developing nations saw the legal architecture of trade as a system designed to protect the technological supremacy of the advanced economies.

This legal ordering was expanded with the establishment of the World Trade Organization (WTO) in 1995. Through TRIPS it globalized intellectual property standards; it bundled them into trade law, effectively providing industrial powers with a new mechanism by which they could then implement their IP rights under the WTO's dispute settlement mechanism<sup>9</sup>. Thus, for the WTO members, the compulsory jurisdiction made the subject of IP protection not only a private right but a subject of international legal obligation.

However, as the world economy changed, this multilateral framework began to come under strain due to the pressure of geopolitics. The United States had accused China of not implementing TRIPS obligations in good faith, especially with regard to technology transfer, forced joint ventures and state subsidies. Reports from institutions including the Center for International Governance Innovation (CIGI) and the National Bureau of Asian Research (NBR) pointed out the existence of structural asymmetries in the enforcement systems in the United States and China<sup>10</sup>. As early as 2018, these perceived asymmetries had become a doctrinal battle: the United States defined its grievances in terms of law violations, while China defined the tariffs from the United States as unilateral and inconsistent with WTO law. The

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<sup>7</sup> Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. § 1337).

<sup>8</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>9</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 4.

<sup>10</sup> Center for International Governance Innovation, *Understanding Intellectual Property Disputes Between China and the United States* (2022), <https://www.cigionline.org/articles/understanding-intellectual-property-disputes-between-china-and-united-states>

battle lines were thus drawn in the very midst of law itself; between competing orders of law, each of which claimed to express true enforcement of legitimate law.

### **3. HOW SECTION 301 IS A LEGALIZATION OF ECONOMIC COERCION**

The invocation of Section 301 of the Trade Act of 1974 was a watershed in the juridification of the power of trade. Originally designed as a statutory program for addressing inquiries into compliance with trade agreements, Section 301 developed into a flexible legal instrument for unilateral enforcement<sup>11</sup>. Through it, the executive branch could investigate and determine, and respond, to foreign conduct that was deemed injurious to U.S. commerce.

By the late 1970s and 1980s the USTR used Section 301 more and more, not only to account for explicit violations of treaties, but also to coerce trading partners to adopt American style market reforms<sup>12</sup>. Scholars such as Alan O. Sykes presented this as the evolution of “constructive unilateral threats”, where the presence of just the possibility of sanctions became a bargaining tool in commercial international relations<sup>13</sup>. Section 301, therefore, was a unique American philosophy of legal coercion: power through procedural legality. The 2018 USTR report on China subsumed this logic. An investigation claimed that Chinese industrial policy; specifically China’s Original Technology initiative, Made in China 2025; was set up to steal from the USA technology and intellectual property through joint ventures and through mandates for licensing and state subsidies<sup>14</sup>. By using the language of what they called “unreasonable or discriminatory” practices, the report to base its critique not on political rhetoric, but on statutory language. The Section 301 was constructed in law to allow the U.S to graphically represent revenues in the name of retaliatory tariffs, as an exercise, rather than an act of protectionism of law enforcement at domestic level with international implications.

The legitimacy of this was made possible by the World Trade Organization (WTO) which was a critical forum. Strategy was challenged. China filed a complaint against the United States in

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<sup>11</sup> Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2411).

<sup>12</sup> Office of the U.S. Trade Representative, Findings of the Investigation into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

<sup>13</sup> Alan O. Sykes, Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301, 23 Law & Pol’y Int’l Bus. 263, 271–74 (1992).

<sup>14</sup> Office of the U.S. Trade Representative, *supra* note 14, at 14–16.

United States Tariff Measures on Certain Goods from China (WT/DS543), alleging that the tariffs were an infringement of key GATT principles of non-discrimination and tariff bindings<sup>15</sup>. In 2020 the WTO panel ruled yes, that the U.S. measures violated Articles I and II of the GATT. However, the U.S. rejected the panel's findings arguing that the WTO was inadequate to deal with "systemic" abuses of intellectual property rights.<sup>16</sup> This defiance was an example of the shifting balance between unilateralism and multilateralism of the trade regime. The United States reacted by laying its argument as justified under domestic laws and China reasserted the multilateral norms in its egotistic stance. The subject of contention was not simply tariffs, but the essence or power of law in the world economy.

At the back of the mechanism provided in the Section 301, there was a more fundamental jurisprudential argument: that the United States. Being the creator of the postwar order of trade, states still had a residual right to force compliance. where it failed in multilateral institutions. This is held and reminiscent of the old versions of theories. International legal pluralism made Section 301 a sign of sovereign self-enforcement.

As the U.S and China engage in trench warfare, something come up of the trade war is at the center of International economic law: the more the system became global, the more states had a likelihood to use unilateral enforcement of compliance.

#### **4. HOW IP ENFORCEMENT BECAME STRATEGIC POLICY**

The cycle of tariff measures of 2018-2020 demonstrated that the application of intellectual property was enforced. has since passed the theoretical boundaries of the law. Not limited to the courts or the administrative anymore. IP, agencies, IP had been incorporated as a strategic policy tool; a tool to regulate the industrial behaviour on a transboundary basis. The Special 301 Report in the United States and its enforcement. reflected this trend and recognized China, India, and others as priority watchlist countries on its part.

In so doing, the United States was technically forced to rethink compliance as geopolitics: countries were ranked based on their compliance to U.S. defined IP standards. This

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<sup>15</sup> Panel Report, United States – Tariff Measures on Certain Goods from China, WTO Doc. WT/DS543/R (Sept. 15, 2020).

<sup>16</sup> USTR Press Release, United States Disagrees with WTO Report on China Tariff Measures (Sept. 15, 2020), <https://ustr.gov/about/policy-offices/press-office>.

extraterritorial reach forgot the distinction between law and power and reevaluated intellectual property in a new way. legal commercial instrument to a measure of terrestrial sanity.

Under this situation, Section 301 served as less of a dispute resolution channel and rather a normative exportation instrument. It tried to find a reconciliation of the through the language of law. global IP laws to suit the American industrial interests. Yet such an approach also inflicted a mood of tension with the Dispute Settlement Understanding (DSU) of the WTO which more prefers to use multilateral adjudication than to use unilateral retaliation.

In keeping time with such moves in the European courts, there were movements in the domestic courts. even the courts of Europe are of the same strategic reason. HMTX industries LLC v. United States, the U.S court of international trade raised the question of whether there was or not. Under the statute, Section 301 tariffs were reasonably imposed. Although the court said some were upheld. the power of the USTR, it also elucidated how thin the boundary is between the discretion of the executive and judicial surveillance of such action.

Administrative, judicial, and international enforcement created an intersection that enhanced the formulation of what the. The instrumental scholars such as Adrian Vermeule and Charles Dunlap Jr. have terms such as lawfare; the instrumental weapon of statecraft: use of law. Within this framework, legal institutions have a function not so much of regulating, as it may be their function, but of projecting power under the guise of legitimacy.

This transformation was in keeping with general theoretical changes in international law. As argued by Martti Koskenniemi, often legal discourse can fluctuate between “apology” (law as justification for the power of the State) and “utopia” (law as universal constraint)<sup>17</sup>. The U.S. and China trade war reflected this conflict: each side presented itself as an upholder of the law while at the same time mitigating the universality of the law.

The consequence was a new form of hybrid legality; one in which coercion and compliance exist side by side. The U.S. relied on statutory and constitutional authority; China relied on administrative modification and strategic litigation. Together, they made it possible to see that

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<sup>17</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498– 503 (Cambridge Univ. Press 2005).

twenty first century trade enforcement takes place not through open conflict, but through competing conceptions of legal order.<sup>18</sup>

In this respect, the intellectual property enforcement in the midst of the U.S. and China trade war should not be viewed simply as a regulatory function, but a constitutive act of global legal politics. It showed how the states build, distort, and use legality in a distortion of the contours of economic sovereignty.

## **5. LAW AS ENFORCEMENT: THE STATUTORY ARCHITECTURE OF COERCION**

The statutory basis for economic coercion in the United States lies in the ability of domestic law to express outward force on the basis of legality. Beyond Section 301, there are provisions in the Tariff Act of 1930, which allows the U.S. International Trade Commission (USITC) to conduct an investigation and circumvent imports that infringe on intellectual property rights in America<sup>19</sup>. Section 337 of the Act essentially makes IP enforcement “domestic” by placing the prohibition of goods that “unfairly” take advantage of U.S. patents or trademarks, effectively global by addressing the importation of goods with infringed patents or trademarks. In so doing, it transforms the border into a juridical frontier; at which trade policy, national security and administrative law meet.

This legal structure reflects the greater philosophy of responsive regulation as stated by such scholars as John Braithwaite in which the power exercised by the state is calibrated to economic behavior by the graduated enforcement<sup>20</sup>. This principle was institutionalized in the US system, having trade enforcement as part of administration and not business-level diplomacy.

The Department of Justice, the U.S. Trade Representative and Department of Commerce. Thus they are observed to act as overlapping agencies of enforcement, via the coordination, made available by the space in terms of rules and regulation. Trade is placed in their interagency

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<sup>18</sup> National Bureau of Asian Research, U.S.–China Intellectual Property Issues in a Post–Phase One Era (2022), <https://www.nbr.org/publication/u-s-china-intellectual-property-issues-in-a-post-phase-oneera/>.

<sup>19</sup> Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. § 1337).

<sup>20</sup> John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 87–90 (Oxford Univ. Press 1992).

cooperation. law on a new level of transformation: on the transactional level to a governance network, that can be coercing without necessarily forfeiting the formality of.

As a matter of fact, it can be stated that such architecture has led to a hybrid type of enforcement. regime, which is governed by domestic statutes that are employing instruments of extraterritorial control. The Economic Espionage Act of 1996 (EEA) provided the extension of federal jurisdiction to trade secret theft (any act committed outside the USA but damaging U.S. corporations)<sup>21</sup>. This legal reach represents the logic of “territorial flexibility”: the power of law to travel anywhere in the world that American commercial interests are threatened. Through such statutes as the EEA, U.S. courts have heard cases such as *United States v. Zhang Xiaoping* where a Chinese engineer was convicted for trying to steal turbine technology from General Electric<sup>22</sup>. The fact that national innovation is related to national defense was emphasized in a press release by the Department of Justice on the occasion of his sentencing in 2021<sup>23</sup>.

These legal measures are good examples of the merging of economic and security reasoning. Intellectual property which used to be the purview of civil enforcement is now securitized; a process Ole Waever has called the “speech act” in which normal issues are turned into matters of existential threat<sup>24</sup>. When it is applied to IP, securitization redefines infringement as an attack on national power not private rights.

## **6. SECURITIZATION OF INTELLECTUAL PROPERTY**

The United States “China Initiative” initiated by the Department of Justice in 2018 made this shift towards securitization official. The initiative was targeted at alleged economic espionage and technology transfer activities involving China’s relative behavior, which was tied to national security and framed as a threat to the US strategic autonomy <sup>25</sup>.By placing IP enforcement in the field of national security, the U.S. defined legal compliance as part of state

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<sup>21</sup> Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (1996) (codified as amended at 18 U.S.C. §§ 1831–1839).

<sup>22</sup> *United States v. Zhang Xiaoping*, No. 3:19-cr-00030 (N.D.N.Y. 2020).

<sup>23</sup> U.S. Dep’t of Justice, *Chinese Engineer Sentenced for Stealing GE Aviation Technology* (Jan. 11, 2021), <https://www.justice.gov/opa/pr/chinese-engineer-sentenced-stealing-ge-aviation-technology>.

<sup>24</sup> Ole Wæver, *Securitization and Desecuritization*, in *On Security* 46–48 (Ronnie Lipschutz ed., Columbia Univ. Press 1995).

<sup>25</sup> U.S. Dep’t of Justice, *The China Initiative: Year-End Report 2020* (Dec. 2020), <https://www.justice.gov/nsd/documents>.

defense. Scholars like Peter K. Yu call this change the “securitization of intellectual property”; a change in doctrine in which IP law takes on the role of foreign policy<sup>26</sup>. Within this paradigm, patents and copyrights and trade secrets are geopolitical resources. Enforcement, therefore, is not one of remedy, but of prevention: it is aimed at a containment of the diffusion of enhancing technological capacity.

The merging together of legal and security frameworks produces enormous juridical implications. First, it changes the burden of legitimacy in international economic law. Traditional trade measures must be justified by exceptions under the WTO or under balance of payments conditions whereas securitized measures are based on self-defence or public order rationales that are not subject to conventional adjudication<sup>27</sup>.

Second, securitization renegotiates the point of administrative law. Agencies like the USTR and USPTO are more increasingly serving as instruments of strategic governance, making industrial policy under the cover of enforcement<sup>27</sup>. Reports as USPTO’s 2024 China Administrative Enforcement Brief reveals the use of IP procedures as a way of deterring “nonmarket” conduct abroad<sup>28</sup>.

Third, the process forms a new set of lexicon under the law in which the terms like innovation theft or New methods like technological coercion substitute old methods such as breaching treaties. This rhetoric trait is dimming the line. differentiating reparation by the law and vengeance by the polity. The outcome is a performative legality; a system of legality where compliance in the law is less compliance with the norms than. compliance with power.

This is a good example with the case between the U.S and China. Chinese with the impression that they are part of a wider containment policy, policymakers, repelled the insult by using their own weapons of law like the Export Control Law of. Untrustworthy Entity List Provisions and 2020. These laws are a representative of US paradigm of mixing. trade law and national security together with the indicator of plurality of hybrid enforcement as a global. practice.

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<sup>26</sup> Peter K. Yu, The Securitization of Intellectual Property, 15 Marq. Intell. Prop. L. Rev. 1, 5–8 (2011). <sup>27</sup> HMTX Indus. LLC v. United States, 525 F. Supp. 3d 1318, 1331–32 (Ct. Int’l Trade 2021).

<sup>27</sup> U.S. Patent & Trademark Office, China: Administrative Enforcement of Intellectual Property Rights (2024), <https://www.uspto.gov/sites/default/files/documents/china-admin-enforcement-2024.pdf>.

<sup>28</sup> Id.

## 7. LAWFARE AND THE GLOBAL TRADE ENFORCEMENT HYBRIDIZATION

The convergence of trade, IP and security policy takes form in what scholars called lawfare; the strategic use of legal means to obtain geopolitical ends<sup>29</sup>. In this context, law does not have a neutral position but an instrumental one, as a way of structuring the battlefield of international commerce.

In the United States as a whole, the Tariff Act of 1930, the Trade Act of 1974, and the Economic Espionage Act of 1996 all constitute a corpus of coercive legality. Together, they enable the U.S. government to regulate, retaliate, and sanction and have procedural legitimacy. As Adrian Vermeule points out, this is part of law's ability for abnegation; the devolution of political judgment to administrative forms that maintain the appearance of objectivity<sup>30</sup>.

The logical effect of lawfare is normalizing of coercion under the law of rules. The U.S. uses tariffs, export controls, and litigation as interchangeable means of power that are met with China's countervailing actions of imposing tariffs, complying with regulatory changes, and bringing international litigation to the WTO. Each action calls down legality even as it defies the universality of it. This dialectic is illustrated in the Panel Report in United States Tariff Measures on Certain Goods from China. While it condemned U.S. tariffs as inconsistent with GATT, the panel implicitly acknowledged the limits of adjudication when it confronted with claims that were based upon national security<sup>31</sup>. The resulting paralysis of the WTO Appellate Body reinforced the perception that the enforcement processes of international law rely ultimately on the political consent.

Within such an atmosphere, lawfare, it turns into a device and a message. It points to a world in which conformity not deciding is bargained; and is not restricted by the rules of the law like things. which are coerced, yet are used in a method of rulings as persuasion. The doctrinal differentiating between the trade enforcement and economic statecraft vanishes.

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<sup>29</sup> Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 *Yale J. Int'l Aff.* 146, 147–48 (2008).

<sup>30</sup> Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* 85–89 (Harvard Univ. Press 2016).

<sup>31</sup> Panel Report, *United States – Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (Sept. 15, 2020).

The intersection of these processes, of unilateral enforcement, securitization and lawfare. comprise the formation of a postliberal legal order. This order is not legal any more. universality as such, which has the capacity to ensure stability. but it is by establishment, by law. as a contest and not a cease fire.

This discussion forms the basis of the role of the United States, China and. India in this shifting paradigm of hybrid enforcement. Each state as the succeeding chapters representing the logic of coercive legality to its own constitutional and institutional custom can be seen as adapting it.

## **8. THE JUDICIALIZATION OF TRADE**

This is the introduction of trade enforcement into the judicial arena, which is a fundamental development to the same. economic governance in the US. What began as an administrative regime, which was under the control of the executive branch, the possession of which is anchored, has fallen under the eyes of an increasing number of courts. The Court of International Trade (CIT), the Federal Circuit, and even the Supreme Court have become arbiters of disputes not only about the legality of tariffs, but also about the extent of executive power in foreign commerce<sup>32</sup>.

Judicial intervention into trade was limited in the past. Courts deferred to the political branches under the old doctrine enunciated in *United States v. Curtiss and Wright Export Corp.*, which held that conduct of foreign affairs rested primarily in the hands of the President<sup>33</sup>. But with the rise of the modern administrative state, that insulation faded. The judiciary is now very important in reviewing trade measures in the context of statutory conformity and procedures in relation to fairness.

The Section 301 tariffs introduced during the U.S. and China conflict brought this conflict to the surface. Multiple importers led by HMTX Industries LLC contested the action of the USTR claiming that the agency had overstepped its delegated authority by extending tariffs beyond their statutory window for modification<sup>34</sup>. In the 2021 decision, the CIT upheld certain parts of the tariff regime, but said that further justification was needed for subsequent lists and that

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<sup>32</sup> *HMTX Indus. LLC v. United States*, 525 F. Supp. 3d 1318 (Ct. Int'l Trade 2021).

<sup>33</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

<sup>34</sup> *Id.*

the principle that even instruments of economic coercion must work within the procedural bounds of law was significant<sup>35</sup>.

This shift shows what could be termed the judicialization of trade; that is to say, the process whereby the executive trade policy becomes subject to administrative, as well as constitutional, review. As a result coercive economic instruments have to justify themselves not only in political or economic but juridical terms as well. This judicial oversight enforces the law's two faces; both as a limit on power and as that power's enabler.

At another level, the judicialization of trade reflects the interdependence between law and globalization. As trade disputes have become more complex, the judicial forums become transformed from national arbiters to nodes of global governance. U.S. courts interpreting the meaning of statutes such as the Trade Act, 1974 or the Economic Espionage Act of 1996 inevitably affect the conduct of multinational actors as well as foreign governments. Law territorial application hence generates extraterritoriality effects.<sup>36</sup>

Equally, judicial examination of trade measures confirms the vibrancy of rule of law debate within American Statecraft. In contrast to purely political sanctions, judicialized enforcement of sanctions legitimizes coercion in the form of embedding it in due process. The power to sue the legality of tariffs; even those with motives of strategic rivalry; gives them an air of procedural innocence. As Adrian Vermeule notes, the modern administrative state transforms jurisdictional discretion into "law saturated" government: power mingled with constraint, but also with support: power checked, but also perpetrated, by legality<sup>37</sup>.

This process is similar to the phenomenon of reflexive legality, according to which law accommodates itself to its own limitations through refinement of its procedure.<sup>38</sup> The CIT's review of Section 301 actions forced the executive to better document its thinking, and this now generated an iterative process of justifying action under the law.<sup>39</sup> Law becomes thus self

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<sup>35</sup> HMTX Indus. LLC, 525 F. Supp. 3d at 1331–32.

<sup>36</sup> Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 *Yale J. Int'l Aff.* 146, 147–48 (2008).

<sup>37</sup> *id.*

<sup>38</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498–503 (Cambridge Univ. Press 2005).

<sup>39</sup> Office of the U.S. Trade Representative, 2025 Special 301 Report 17–18 (Apr. 2025), <https://ustr.gov/issueareas/intellectual-property>.

correcting even though it makes coercion easier.

The judicialization trend has also impacted international law. The U.S. government's defence of unilateral measures in the leadup to the WTO has borrowed increasingly larger doses from the idiom of domestic administrative law; an emphasis on rational basis, proportionality, and procedural transparency. By seeking to universalize its internal legal logic by importing domestic legal concepts into multilateral fora, the United States also aims to "universalize" its approach to its development policy. This strategy has the effect of turning the WTO from a court of treaty interpretation to a transnational administrative court in which the principles of the American regulatory state are exported through litigation.

However, in projecting legality, there are also limits to the projection. The paralysis of the WTO Appellate Body since 2019 highlights the weakness of judicialization in a context where there is no political consensus. Without a working appellate mechanism, there is no distinction between adjudication and negotiation. What is left is law as rhetoric, legitimizing vocabulary, in a system which no longer ensures its enforcement.

The consequence is paradoxical in nature. On the one hand judicialization attests to the centrality of law and on the other it reveals law's vulnerability to political will. The U.S. and China trade war shows that of course (even when coercion is legalized), it is subject to sovereignty. The law might review, refine or restrain power; but it cannot replace it.<sup>40</sup>

This realization raises the next transformation: the administrative modification of trade law, through which states restructure their bureaucratic machinery to move through an increasingly legalistic but unstable global order.<sup>41</sup>

## **9. ADMINISTRATIVE ADAPTATION AND RECONFIGURATION OF ENFORCEMENT INSTITUTIONS**

In isolation did not take place the juridical confrontation of the U.S. and China trade war. It caused a parallel transformation in the administrative apparatus of both states. Law, which had been once reactive in response to the market's disputes, became constitutive, an organising

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<sup>40</sup> Clyde & Co., Impact of Tariffs to Charterparties (Oct. 2025), <https://www.clydeco.com/en/insights/2025/10/impact-of-tariffs-to-charterparties-1>.

<sup>41</sup> National Bureau of Asian Research, U.S.–China Intellectual Property Issues in a Post–Phase One Era (2022), <https://www.nbr.org/publication/u-s-china-intellectual-property-issues-in-a-post-phase-one-era/>

logic in which institutions recalibrated their functions so as to deal with the double imperatives imposed by the dual forces of economic globalisation and strategic competition.

In the United States, the main force of administrative adaptation was the realization that old multilateral modes of enforcement no longer sufficed to defend national industrial interests. It is represented by agencies like the U.S. Trade Representative (USTR), the Department of Commerce, the International Trade Commission (USITC), and the Patent and Trademark Office (USPTO). They modified their position and functions and focused on coordination and intelligence sharing and deterrence. Indicatively, the 2025 Special 301 Report clearly shows how the USTR changed to a quasi-regulatory body instead of an adjudicatory body in the reporting. The USTR has powers that it can use to manipulate the IP behavior around the world. This interagency synchronization is classic of what Jody Freeman and Jim Rossi have called “shared regulatory space”; a system where multiple agencies have overlapping authority and require negotiation and coordination in the state itself<sup>42</sup>. In this configuration, the boundaries between the law, policy and politics become unclear. Administrative action becomes a form of governance diplomacy: every single legal decision is a political statement.

The result of which is administration state of reactive reflex. Instead of reacting to violations in an ad hoc manner, it has a sense of foreseeing economic trends and finetuning legal tools. For example, the Department of Commerce’s Bureau of Industry and Security added to its list of exports that are subject to control after Section 301 sanctions have been imposed; proof enough of the adaptability of legal institutions to geopolitical changes ahead of time. A similar process played out in China albeit with the opposite ideological and constitutional structure. The Chinese state, long characterised in the West by its “party led legalism”; responded to U.S. measures by increasing institutional integration between the administrative, judicial and political organs of the state<sup>43</sup>. The creation of specialised IP courts/tribunals in Beijing, Shanghai and Guangzhou was a conscious attempt to portray procedural legitimacy and efficiency of IP adjudication<sup>44</sup>. These courts not only helped settle disputes, but they were a symbol of the Party’s ability to govern its state through law rather than outside of it.

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<sup>42</sup> Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1138 (2012).

<sup>43</sup> Zhu Suli, Political Constitutionalism and Legal Order in China, 30 Mod. L. Rev. 347, 352–54 (2018).

<sup>44</sup> Supreme People’s Court (SPC), Decision on the Establishment of IP Courts in Beijing, Shanghai, and Guangzhou (Aug. 31, 2014).

At the same time, administrative agencies, such as the China National Intellectual Property Administration (CNIPA) and the State Administration for Market Regulation (SAMR) increased their enforcement capabilities<sup>45</sup>. Their reports from 2022 and 2023 show a dramatic rise in administrative penalties for violations of IP, indicating the use of enforcement statistics as a measure of compliance and international reputation. This bureaucratic intensification is part of what Peter Drahos calls the “global governance of knowledge”; a process in which national bureaucracies take in global legal norms in order to assert their jurisdiction in transnational markets<sup>46</sup>. In the Chinese case, therefore, adaptation has double purposes of domestic consolidation and international signalling.

This duality is captured in China’s Outline for Building an Intellectual Property Strong Country (2019-2035). It envisioned the Party state’s goals to reform the governance of IP, aiming at building it into an engine of technological sovereignty, relating administrative enforcement with industrial policy<sup>47</sup>. This vision resembles the US amalgamation of legal and strategic goals yet is embedded within an explicitly developmentalist perspective; what Zhu Suli refers to as “political constitutionalism” in which legality is inextricably intertwined with governance<sup>48</sup>.

Consequently, administrative adaptation in both systems is the example of the pluralization of legality. Law ceased to be a stable system of norms clustered as a series of hierarchies and it became a dynamic regulatory ecosystem, continually reinvented through bureaucratic practice.<sup>49</sup>

Agencies legislate by way of interpretation, courts administer by way of discretion, and political powers legitimize legality by way of storytelling.

The comparative dimension is very important. While in the United States procedural autonomy and transparency are promoted as major attributes of legal legitimacy, in China, efficiency and political coherence are more important. Both systems the deployment of law as an instrument

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<sup>45</sup> China Nat’l Intellectual Prop. Admin. (CNIPA), Annual Report on IP Protection in China 2022 (May 2023).

<sup>46</sup> Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* 122–24 (Cambridge Univ. Press 2010).

<sup>47</sup> State Council of the People’s Republic of China, *Outline for Building an Intellectual Property Strong Country (2019–2035)*.

<sup>48</sup> Zhu Suli, *Political Constitutionalism and Legal Order in China*, 30 *Mod. L. Rev.* 347, 353–56 (2018).

<sup>49</sup> CNIPA, *supra* note 66, at 21–24.

of strategic responsiveness is different: the normative bases is in the American juridical, in the Chinese programmatic.<sup>50</sup>

Still, there are convergences in practice of these systems. The USTR and the CNIPA now have similar roles as coordinators of national compliance and innovation policy. Both rely upon metrics of enforcement in the form of reports, case statistics, and data on sanctions, to measure the “rule of law” in economic terms. This technocratic rationality of law converts law into a quantitative policy objectivity in the spirit of managerial inclinations of the global regulatory state<sup>51</sup>.

The administrative transformations on both sides indicate a new logic of power: legal capacity as strategic capability. In the twenty-first century, institutional success is measured, not by formal sovereignty, but by the agility with which States do law to make markets. The enforcement agencies were formerly neutral vehicles of the enforcement of laws, but have now become architects of national strategy.

This is a progression of the decades of evolving the law. Both countries have been transformed by the US Trade Act of 1974 to the post-WTO accession reforms by China. competition mechanisms into compliance mechanisms. The trade war was merely accelerating a course. already inherent in the international system, the bureaucratization of geopolitics by law.

## **10. INSTITUTIONAL LEARNING & NORMALISATION OF ECONOMIC COERCION**

The legal confrontation between United States and China in relation to trade and intellectual property has led to the long lasting transformation of the logic of global economic governance. What had started as a process of episodic tariff clashes and their subsequent retaliations had become a process of institutional learning whereby both the powers had internalized their own use of economic coercion as normal instrument of law and policy<sup>52</sup>. Each turn of judicial litigation, administrative reprimand, and bargaining locks the coercive techniques deeper in the workings of the machinery of legality.

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<sup>50</sup> Office of the U.S. Trade Representative, 2025 Special 301 Report, *supra* note 61.

<sup>51</sup> Peter K. Yu, The Comparative Dimensions of Intellectual Property Enforcement, 61 Am. J. Comp. L. 823, 829–31 (2013).

<sup>52</sup> Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975).

The American example is also an example of this normalization seen in the routines of bureaucracy that ensues. the cycles of tariffs of 2018 to 2020. The United States Trade Representative office (USTR), which was originally a negotiating organ, has so done and has become a quasi regulation. agency with respect to an existing system of tariff surveillance and intellectual property. enforcement. This is because the Special 301 Report, which is issued every year from now on, is a conglomeration of policy. document compliance audit where trading partners having domestic IP systems that do not succeed. possess up to U.S. expectations are identified .

Making it institutional to put up a rolling list of offenders, the United States did not consider enforcing its unilateral action to be an emergency but a continuing one. administrative practice. Such routinization is suggestive of an overall American propensity to equate law with strategy. The Trade Act of 1974 Section 301 provides the executive with considerable discretion on what is to be done. do have to do with unfair trade practices and subjects to which discretion is made procedural. formalities, notice, comment, and findings 77. This in itself is codification of coercion ensures that it is sustained. What had to be done by political, previously. Due process now becomes mobilized in the accustomed time of the administrative due process. Legal coercion is here to remain as a constant part of the way things are run. The judiciary imposes this normalization. There are also cases like the HMTX Industries LLC v. United States fixed this principle even of retaliatory tariffs have to be supported by. administrative record keeping.

The court demand of rational explanation is not so. moist blackmail but it makes it professional. The government is allowed to show that it made the as long as they can do that. decision on good reason, and then the majority of sanctions can resist scrutiny. Law thus gives the art of coercion the utmost excellence to speak the language of reason. The way of China is parallel to another ideological way. Faced with the American duties and exports. authorities, Chinese officials tried to have an exhaustive legal-bureaucratic counteraction, which proved to be a mixture of counterretaliation and system construction.

The China National Intellectual. Property Administration (CNIPA) intensified its control resources; each is implementing. rule, all indicators of performance and all the enforcement statistics had been established in writing. Virtual Torrent is being released. Outline on Building an Intellectual Property (2019-2035). The publication of Strong Country by the State Council

changed the concept of IP protection to a national one. security and sovereignty, and reduced the legal compliance to the responsibility of patriotism<sup>80</sup>. By such a means, external pressure was converted to internal reform by these mechanisms in China.

The learning in the institutions was conducted in the direction of selective appropriation: Global legal. retaining hierarchical supervision of the Party. Administrative enforcement, SAMR, and provincial IP office coordinated campaigns were regularized happenings. planned on the planning calendar of the land. The resulting pattern will be akin to what comparative scholars refer to as responsive regulation, a pattern whereby enforcement. evolves in certain gradual steps of persuasion, direction, and punishment. Yet in the Chinese context, responsiveness is not in pluralism, not in control, but in the process; it is not adversarial but a cyclic one.

These reformulations of the meaning of legality were brought about by such normalization of coercion of both these systems. The Legitimation of coercion by the use of the principle of legality is the practice of the United States. procedure neutrality, whereas China relies on legality as the means of justifying coercion based on the concept of political integration. All states transform imposed law of outward kind to functioning. system from within.

The resultant product is the common structural innovation: the permanent mobilization of law. On the global scale those local desired adaptations would be combined in a new. balance of confrontation managed. United States of America Tariff Measures WTO Panel Report. on Certain Goods aimed Beijing criticized Washington tariffs claiming they were not consistent with the GATT, but of a kind out of which it had no force of execution.

The lack of binding sanction permitted each party concerned to receive WTO determinations as rhetoric measures of triumph as opposed to adjudication. commands. Another stage on which the display of is provided is the dispute settling mechanism, legalized power. In this environment, lawfare (applying law as a weapon), is no longer. exceptional. It is made to be the default position of competition between states. Every reference, list of tariffs and one of a host of ongoing debates about legitimacy and leverage is panel submission.

As Charles J. Dunlap Jr observed, modern lawfare does not in the sense of blatant violation work, but rather through. It has been called weaponized compliance where these actors engage

the legal process to advance their own strategic goals and objectives.

To both sides of the bureaucracies, learning and institutional learning transcend the official law. At it is the development of professional field, data, as well as predictive modelling. One of USTR's new epochs is economic impact analyses and dashboards of CNIPA and of technocratic sovereignty, A presupposition and a fact that is the command of information is command of law. Here legality is measurable, in this data driven world and obedience, becomes quantifiable.

The normalisation of coercion has long term ramifications for the order in the world. As both the U.S. and China institutionalize instruments of coercion as a routine part of administration, this leaves other states with the choice between imitation and marginalization. Regional frameworks, like the RCEP and bilateral digital trade agreements increasingly include enforcement provisions patterned after the Section 301 process or the CNIPA system<sup>53</sup>. Thus, what started out as bilateral competition turns into a model for the worldwide regulatory competition.

Normalisation of coercion has far-reaching consequences to the order in the world. As both institutionalization of coercion instruments as a normal portion of the administration, by the U.S. and China, this results in imitation or marginalization as a decision of other states. Regional such frameworks as the RCEP and bilateral digital trade agreements are starting to incorporate enforcement-provisions that based pattern on the Section 301 process or the CNIPA system. Thereby, what began as two-way rivalry becomes a template of the global regulation. competition.

This trend, as it can be observed in theoretical terms, supports the argument of Dieter Grimm that modern. economies constitute the market itself . Even law as such, no longer is just about. regulating trade: it concerns the politics of globalization. The result is the trade war, which demonstrates that constitutionalism has shifted out of the polity to the marketplace and transforms. directive to an economic coercion into a constitutional mode. Learning, therefore, in institutions is strategic and paradigmatic. It teaches agencies how to cope with crises and at the same time conditions the societies to believe that coercion is normal.

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<sup>53</sup> Dieter Grimm, *The Constitution of the Market Economy* 45–47 (Oxford Univ. Press 2018).

## 11. LAWFARE AND CODIFYING THE STRATEGIC TRADE POWER

The normalisation of the use of coercion through process of institutional learning culminates in what may be termed strategic codification of trade power. Within both the U.S. and Chinese systems, law has evolved from a reactive tool of regulation into a proactive mechanism of influence referred to now also broadly as lawfare. In this context, the lawfare is not an abuse in the law, but its perfection through strategic practice: the exploitation of the legality itself as a means of geopolitical action<sup>54</sup>.

The US approach is a good example of this transformation. Section 301 of the Trade Act, which as originally designed was an exceptional instrument of retaliation, has been incorporated into the standing architecture of economic statecraft. Through repeated use, the USTR has created an informal common law of coercion; precedents and procedural templates that help decide on future sanctions. Each invocation of Section 301 now cites previous determinations, which means that there is now an evolving jurisprudence of enforcement. What used to take political initiative is now automatic through institutional memory<sup>55</sup>.

Simultaneously the Department of Justice and the Department of Commerce have adapted national security law to economic competition. The Economic Espionage Act of 1996 and prosecution of cases similar to *United States v. Zhang Xiaoqing*, translated trade secret protection into an aspect of the national defense<sup>56</sup>. These cases are an extension of the logic of Section 301 to the criminal context, branding theft of intellectual property as espionage instead of a criminal civil matter. The correspondence between trade, IP and security law shows how completely the legalization of coercion has been carried out. China's practice of lawfare acts in a different constitutional logic but is a similar practice. The Foreign Investment Law (2019), Export Control Law (2020) and the Unreliable Entity List Provisions (2020) combined form a defensive legal regime enabling retaliation under the pretence of formal legality<sup>57</sup>.

These instruments allow the state to calibrate its responses towards U.S. activities while projecting an image of rule based governance. As Peter K. Yu observes, Chinese lawfare

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<sup>54</sup> Ole Wæver, *Securitization and Desecuritization*, in *On Security* 46–48 (Ronnie Lipschutz ed., Columbia Univ. Press 1995).

<sup>55</sup> Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975).

<sup>56</sup> *United States v. Zhang Xiaoqing*, No. 3:19-cr-00030 (N.D.N.Y. 2020).

<sup>57</sup> *Export Control Law of the People's Republic of China* (2020); *Unreliable Entity List Provisions* (2020).

involves “the weaponization of intellectual property” not by evasion but by strategic overcompliance; making transparency a source of deterrence<sup>58</sup>.

Both states, therefore, use lawfare as a form of codified deterrence. Each tries to discipline the other by legally making its coercive behavior predictable, and thus maintaining the appearance of order within confrontation. This codification of power is fulfilling what Harold Koh called the “transnational legal process”: the constant interplay, interpretation, and internalization of norms across systems<sup>59</sup>. But in the existing trade regime, then, that process serves not to harmonise but to stabilise rivalry.

The doctrinal implication is immense. Lawfare takes the concept of the “rule of law” and turns it into a dialectical process: each claim of legality begs an answer in the form of its mirror image. The paralysed WTO since 2019 has not affected the influence of law so much as it has multiplied its forums. Quasi judicial functions previously reserved for Geneva are now carried out by national agencies and domestic courts and by regional agreements. The trade regime is therefore in a process of temporal jurisdictional proliferation, mere network of partial legalities instead of a universal legal order<sup>60</sup>.

This diffusion of authority, however, runs the risk of fragmenting the normative coherence. As Ernst Ulrich Petersmann has argued, pluralism in the absence of coordination compromises the provision of collective goods such as transparency and predictability<sup>61</sup>. But, in practice, fragmentation makes adaptability possible. Competing systems of law and up for grabs have become laboratories of enforcement for experiments involving new combinations of coercion and legitimacy.

Lawfare’s ascendancy is also an indicator of the reconfiguration of sovereignty. By enshrinement of coercion in the laws, states give themselves independence from economic dependency and institutional constraint. The U.S. justifies unilateral tariffs in terms of appeals to administrative regularity; and China holds up countermeasures as exercises in

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<sup>58</sup> Peter K. Yu, *Weaponizing Intellectual Property: The Trade War and China’s Legal Strategy*, 72 Am. L. Rev. 851, 856–58 (2022).

<sup>59</sup> Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 189–91 (1996).

<sup>60</sup> WTO, *Panel Report: United States – Tariff Measures on Certain Goods from China*, WT/DS543/R (Sept. 15, 2020).

<sup>61</sup> Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance* 98–101 (Hart Publ’g 2012).

developmental sovereignty. Each constructs a self referential legality which ensures its own conduct.

## 12. DOCTRINAL FEEDBACK LOOPS AND THE FUTURE OF ENFORCEMENT

The end result of these processes is the formation of doctrinal feedback loops, that is, cycles in which law not only constrains but produces power. New norms are created by each enforcement episode and these norms are internalized and used to justify following action. This recursive pattern is used to insure the trade conflict persists among the language of legality<sup>62</sup>.

Within the United States, one can see this loop at work between the three branches; the judiciary, executive and legislature. Judicial sanctioning of executive discretion under the Trade Act promotes Congress expanding that discretion, which in turn vouches for further judicial deference. Over time, the coercion and the legality buttress one another. As Adrian Vermeule puts it, modern administrative law moves towards “law’s abnegation”; the embrace of a doctrine that power must be exercised through law even when it transcends traditional boundaries<sup>63</sup>.

Feedback mechanism of China is carried out through bureaucratic integration. Positive results from enforcement campaigns; such as increased patent filings or compliance rates; are used to support policy documents of the effectiveness of the system and this justifies entrenching it further into institutions. The 14th Five Year Plan (2021) explicitly cites these achievements as justifications for further centralization of the governance of IP<sup>64</sup>. Legality thus becomes self legitimating: the success of enforcement is proof of the virtue of the enforcer. As a result internationally doctrinal feedback manifests itself in the process of multilateral norms being iteratively adapted. The U.S. and China dynamic has already altered understandings of the TRIPs agreement, the WTO’s Dispute Settlement Understanding and regional compacts such as RCEP<sup>66</sup>. Panels and states alike now take enforcement flexibility for granted as something

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<sup>62</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498– 503 (Cambridge Univ. Press 2005).

<sup>63</sup> Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* 120–24 (Harvard Univ. Press 2016).

<sup>64</sup> State Council, *14th Five-Year Plan for National Economic and Social Development* (2021). <sup>66</sup> WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994); RCEP Agreement (2020).

inherent to the trade regime. This pragmatic pluralism is converting international economic law from the status of a fixed code to a living constitution of managed rivalry.

The presence of the danger is the over normalization. If all coercive actions can be legitimated by some procedural narrative, legality runs the risk of turning into the next like and greater term, like strategy. The separation of law and power fades away and there are only competing forms of technocratic legitimacy. But in this dissolution is a paradoxical stability as by making conflict predictable, law guarantees the perpetuation of order.

The future of enforcement will therefore depend not on doing without coercion but on managing its expression. Both the U.S. and China are likely to further increase their dependence on administrative coordination, data driven oversight, and selective judicialization as a source of credibility in global markets. The next development in legal evolution may well be algorithmic; that is, the automation of compliance by digital reporting and risk assessment by AI. Such mechanisms will promote universalization of procedural form of law despite the elusiveness of substantive consensus<sup>65</sup>.

In doctrinal terms, then the trade war turns out to be an example of legal resilience. Institutions do not keep people alive by preventing conflict, but by absorbing conflict. The reciprocal shaping by the U.S. and Chinese of each other's institution indicates that the role of law in the twenty first century is not to enforce harmony, but to control discord. Through feedback loops of justification the trade regime continues to sustain itself through endless contestation.

Ultimately, the U.S. and China confrontation shows that legality is not a constraint on geopolitics; it is its preferred language. The ability to define, interpret and operationalize law becomes the ultimate measure of sovereignty. In that sense, the normalization of economic coercion, the codification of law fare; what marks not as the decline of legality, but its triumph: law has conquered politics by learning to speak in its idiom<sup>66</sup>.

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<sup>65</sup> Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1138 (2012).

<sup>66</sup> Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* 121–25 (Cambridge Univ. Press 2010).

### **13. THE MULTILATERAL RESPONSE: PARALYSIS OF THE WTO AND DISPERSION OF LEGALISM**

The clash between the US and China reverberated throughout the system of international trade exposing profound structural weaknesses in the World Trade Organisation (WTO) and its dispute settlement regime. The WTO was intended as a way to resolve disagreements within a common normative structure; in the case of the trade war between the U.S. and China, the dispute actually played itself out outside the framework of the main disciplines, which succeeded in being an example of the paralysis of multilateralism in the face of unilateral and retaliatory economic action<sup>67</sup>.

The WTO system of dispute settlement has long relied on the participation and compliance of the membership. Its legitimacy is derived not from its ability to enforce its rulings through force, but from the expectation that it will obtain voluntary adherence to its rulings. This cooperative premise began to fray in the mid-2010s as the United States began to feel increasingly unhappy with what it perceived to be judicial overreach by the Appellate Body. By 2019, Washington had blocked the appointment of new judges, making the system inoperative<sup>68</sup>. This institutional disintegration coincided with the ratcheting up of U.S. tariffs on Chinese goods under Section 301 of the Trade Act of 1974, and Beijing's retaliations. Both sides presented complaints to the WTO, and the paralysis of the Appellate Body made manifest the dispute settlement process ineffective. The consequence was dismembered legalism; the state of affairs in which some law still retained a rhetorical dominance but lacked practical power<sup>69</sup>. This Paradox was illustrated by the Panel Report in *United States Tariff Measures on Certain Goods from China* (2020). The Panel held that the U.S. tariffs were in violation of Articles I and II of the GATT 1994, but it was of no practical significance as the decision had been immediately appealed "into the void" of the defunct Appellate Body<sup>70</sup>. Beijing, in turn, used the decision as evidence of noncompliance by the U.S., and continued to enforce its own retaliatory tariffs. Law, in this configuration, became a vocabulary of justification and not an organization of enforcement.

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<sup>67</sup> WTO, *Panel Report: United States – Tariff Measures on Certain Goods from China*, WT/DS543/R (Sept. 15, 2020).

<sup>68</sup> Jennifer Hillman, *The WTO's Existential Crisis: The Appellate Body's Paralysis and Its Implications*, Council on Foreign Relations (2021).

<sup>69</sup> Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975).

<sup>70</sup> *United States – Tariff Measures on Certain Goods from China*, supra note 116.

This transformation captures what Jennifer Hillman has labeled the WTO's "existential crisis", a condition in which legal form continues despite institutional function collapse<sup>71</sup>. For decades the WTO was the flagship organization of the ideology of rules based globalization; the trade war showed how it relies on political will. Without the power to force people to comply, multilateral law once again became symbolic power.

Paradoxically, this crisis did not weaken the centrality of law but, on the contrary, diffused it. The vacuum caused by the paralysis of the Appellate Body was the stimulus for the proliferation of alternative legal forums. Regional trade agreements such as the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP) had dispute mechanisms based on, but separate from, the WTO system<sup>72</sup>. Bilateral arrangements, such as the U.S. and China Phase One Agreement (2020), also contained arrangements that were made specifically for enforcement purposes that allow the negotiation process back to legality. The result was patchwork multilateralism, in which legality was maintained through redundancy instead of unity.

From a doctrinal standpoint, this disintegration shows the lingering of what Martti Koskenniemi calls "the structure of international legal argument." Even when the institutional foundations of multilateralism weaken, states still use law's form to place legitimacy upon action<sup>73</sup>. Each new forum or agreement recreates the grammar of legality of procedural fairness, reciprocal and proportional outcomes, even when the outcomes are predetermined politically. This residual legalism serves a number of political purposes. First of all, it maintains legitimacy: for states, there is a reluctance to acknowledge pure power politics and coercion is instead wrapped in the narrative of legalism. Second, it creates a common language irrationality: Even adversaries communicate in terms of the idiom of legality. Third, it allows strategic flexibility: with a multiplication of venues states can decide where and how to pursue disputes, engage in forum shopping without abandoning the rule based order. For the United States there are tactical advantages of being fragmented legalism. The lack of a binding appellate procedure means that it is open to Washington to have unilateral actions, while it

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<sup>71</sup> Hillman, *supra* note 117.

<sup>72</sup> RCEP Agreement (2020); CPTPP Agreement (2018).

<sup>73</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498– 503 (Cambridge Univ. Press 2005).

claims to comply with the “spirit” of the WTO. This strategy represents a form of constructive unilateralism, a doctrine defined by Alan Sykes to justify threats and sanctions that put pressure on trading partners without breaching any formal obligations<sup>74</sup>. In reality, the United States still gives the appearance of being a guard of legality, all the time circumventing its multilateral restrictions.

China’s adaptation is more subtle but no less. Faced with a weakened WTO, Beijing has tried to present itself as a savior of multilateral order by contrast: its commitment to WTO rules with US unilateralism. Yet this posture is accompanied by the development of parallel institutions, such as the Digital Silk Road and related mechanisms of arbitration of the Belt and Road Initiative<sup>75</sup>. These initiatives export the Chinese administration models in the name of international cooperation in the process of pluralisation of global legal governance.

This new mosaic of overlapping regimes is the transition from the universal multilateralism to functional pluralism. Instead of having one coherent system, the global economy is now governed by a constellation of semi autonomous regimes; each of which retains procedural legitimacy whilst serving different strategic communities<sup>76</sup>. Law thus continues to organize global relations but its coherence has changed from hierarchical to network.

The experience of the WTO shows another, more general point: when the enforcement of law breaks down, then the expressive power of law expands. The invocation of WTO norms continues to condition state behaviour in terms of influencing domestic discussions on policy, media and expectations of investors and allies. Even in paralysis, there is a pedagogical role of the organization; they teach states to talk the language of legality.

In this sense, fragmented legalism can be seen not to be the end of international law but a transformation of international law. The undermining of centralized authority has produced a decentralized ecosystem in which law operates as common syntax of competition. As Ernst Ulrich Petersmann points out, this plurality of orders is a reflection of the fact that constitutional multilevel systems of governance are based on the reality of overlapping systems

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<sup>74</sup> Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 *Law & Pol’y Int’l Bus.* 263, 271–74 (1992).

<sup>75</sup> State Council, *Belt and Road Initiative: Digital Silk Road Cooperation Plan* (2020).

<sup>76</sup> Anthea Roberts, *Is International Law International?* 221–24 (Oxford Univ. Press 2017).

without full integration<sup>77</sup>.

The challenge for scholars and policymakers is the challenge to separate the distinction between rule based governance and law based legitimation. The former relies on a set of norms that are enforceable, the latter works on the basis of symbolic adherence. The U.S.China trade war shows that even if there is no compliance, legality maintains its performative strength. States disobey the law selectively, but they justify disobedience universally.

Thus, the paralysis of the WTO is symptomatic neither of the death of law nor the victory of anarchism. It speaks to the strength of legal form; its ability to persist, adapt and multiply despite the frailty of its institutions. The multilateral order has not gone away, it has simply become modular. The twenty first century trade system is not post legal, but hyper legal, loaded with rules that draw their power and legitimacy from repetition as opposed to enforcement.

#### **14. THE HYBRID ENFORCEMENT: BILATERALISM, REGIONALISM AND SOFT LAW MECHANISMS**

The paralysis of the WTO's adjudicatory machinery and the proliferation of regional alternates has spawned a distinct mode of hybrid enforcement, a regime where trade disputes are administered at the same time by formal treaty, informal understandings and by technocratic coordination. This development is not a contingency of the US China conflict but a structural evolution. It is the birth of a polycentric legal order, in which power is scattered and spread over overlapping legal and quasilegal nodes<sup>78</sup>.

The hybridization of enforcement first showed in Phase One Agreement (2020) between the United States and China. Although nominally a bilateral trade accord, it was a mixture of international law and domestic regulation. The intellectual property, technology transfer, and market access provisions of the Agreement were formulated not in the form of reciprocal commitments but as one way commitments subject to detailed reporting and review mechanisms<sup>79</sup>. Enforcement relied not so much upon sanctions as on the ongoing exchange of

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<sup>77</sup> Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* 98–101 (Hart Publ'g 2012).

<sup>78</sup> WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994).

<sup>79</sup> *Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China ("Phase One Agreement")*, Jan. 15, 2020, <https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement.pdf>.

information creation, which effectively reduced compliance to an administrative process.

This model of “contractual multilateralism” goes beyond the countries U.S. and China. It finds resonance in the RCEP Agreement (2020) and Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP) as both have embedded soft law features such as transparency mechanism, capacity development, consultation framework, etc. alongside traditional dispute settlement clauses<sup>80</sup>. The result of this is to spread the enforcement powers across a web of administrative committees and technical working groups. Law is a process and no longer a verdict.

In a theoretical sense, such an evolution is compatible with the conception of “global governance of knowledge” introduced by Peter Drahos. International trade law comes to function more in terms of the circulation of technical expertise and regulatory standards than in terms of coercive judgment<sup>81</sup>. Punishment is not how compliance is achieved, it is through participation. The proliferation of soft law instruments; guidelines, best practice frameworks and annual scorecards; reflect the growth of managerial rationality and regulation as a continual bargaining game among bureaucracies.

For the United States, hybrid enforcement is a pragmatic solution to the limitations of formal adjudication. By introducing mechanisms for review in trade agreements, Washington gets the trappings of legality and the freedom to wiggle at will. The enforcement structure of the Phase One Agreement, for example, gives the USTR the authority to make decisions regarding compliance on a unilateral basis, requiring only bilateral consultations<sup>82</sup>. This arrangement enables the United States to tailor coercion to governing political needs while preserving procedural legitimacy.

China, meanwhile, uses as a tool of normative engagement a technique of hybrid enforcement. Rather than refusing to accommodate to or adopt U.S.-led frameworks, it accommodates them to its model of governance. The institutional reforms enacted by the State Council (2018) and the creation of the National IP Tribunal (2019) indicate that Beijing’s approach aims to

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<sup>80</sup> RCEP Agreement (2020); CPTPP Agreement (2018).

<sup>81</sup> Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* 121–25 (Cambridge Univ. Press 2010).

<sup>82</sup> Phase One Agreement, *supra* note 132.

incorporate global standards in the domestic administrative framework<sup>83</sup>. These institutions internalize the external expectations and convert them into bureaucratic routines which reinforce the Party supervision.

At the same time, China pushes ahead with its own hybrid architecture with initiatives such as Digital Silk Road and Regional Comprehensive Economic Partnership. These frameworks copy the procedural aspects of WTO governance (notifications, transparency reports and technical assistance), but replace the soft consultation with binding adjudication. In effect, they universalize the form of legality and redefine its content. The new order is based on persuasion and measure as opposed to punishment.

Hybrid enforcement is also evident in the form of public and private coordination. Multinational corporations, arbitration centres and digital platforms become increasingly involved in the process of the creation of quasilegal norms. For example, the private IP complaint systems of ecommercials such as Alibaba and Amazon<sup>84</sup> are modelled after administrative enforcement mechanisms. Their databases of takedowns, as well as counternotices, are used in national courts, giving rise to feedback loops between the two modes of governance; private and public law. The limits of legality hence spill towards algorithmic and contractual space, where the compliance is automated.

From a doctrinal perspective, hybrid enforcement is the sign of the shift from sovereignty to governance pluralism. The state still remains central, but has no more monopoly on the means of legal coercion. Regulatory authority is spread out over networks of states, corporations, and intergovernmental organizations. This diffusion changes the character of obligation: States comply not because they are afraid to be punished, but because they know that noncompliance means exclusion from the flow of information, investment networks and data markets. Legitimacy in turn comes from participation rather than consent. The implications of this transformation are drastic. Traditional public international law was based on reciprocity and formal equality between states. Hybrid enforcement spoils both of these principles by institutionalising asymmetrical interdependence. Large economies like the U.S. and China

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<sup>83</sup> State Council of the People's Republic of China, *Institutional Reform Plan* (2018); Supreme People's Court (SPC), *Notice on the Establishment of the National IP Tribunal* (Jan. 1, 2019).

<sup>84</sup> Alibaba Group, *IP Protection Annual Report 2022*; Amazon, *Intellectual Property Policy and Enforcement Report* (2022).

have the power to influence compliance expectations by leveraging their markets; smaller states internalize these kinds of norms in order to access them. In this sense, the rule based order has developed into that of hierarchical legality, in which power determines whose norms of order become universal.

Nevertheless, there is stabilizing potential in hybrid enforcement. By spreading power across many levels (national, regional, corporate, technical), it is providing redundancy to buffer the shocks that may occur in the system. When one forum fails, another takes up the function. The paralysis of the WTO did not end dispute resolution but redistributed it. This resilience is an example of what Ernst Ulrich Petersmann has called “constitutional pluralism”; a system able to self repair thanks to institutional diversity<sup>85</sup>.

Thus, the emergence of the hybrid enforcement does not indicate the breakdown of the global trade law but rather its adaptation to the complexity. The law for the future may be less judicial and more administrative, less coercive and more coordinative. Legality is not surviving as an ideal of universality but as a pragmatic architecture of interaction.

## **15. TOWARDS A NEW LEGAL ORDER: SYSTEMIC LESSONS OF THE U.S.-CHINA CONFLICT**

The long-range importance of the trade war between the U.S. and China is not to be found in the tariffs or in the temporally negotiated agreements, but in the juridical novelties it has initiated. The conflict spurred a worldwide shift away from a hierarchical system of trade regulation to an adaptive, networked legal order of managed rivalry<sup>86</sup>. Within this order there are no longer rules of authority based on universal assent, but on their ability to achieve coordination of behavior in the face of disagreement.

At the doctrinal level three systemic lessons are realized. First, enforcement has taken on an inherent political character but is still phrased in legal vocabulary. Both Washington and Beijing use the rhetoric of legality to portray coercion as regulation. Each relies on statutory or administrative texts; the Trade Act of 1974, the Foreign Investment Law (2019), or the

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<sup>85</sup> Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance* 98–101 (Hart Publ'g 2012).

<sup>86</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498– 503 (Cambridge Univ. Press 2005).

Phase One Agreement (2020), for justification for taking actions which have as their true object a strategic one. It is Law's elasticity that allows it to have "the capacity to legitimize conflict by furnishing a grammar for contestation"<sup>87</sup>.

Second, the trade war proves that but it is no longer the case that sovereignty and interdependence are opposites. Through instruments such as Phase one implementation measures issued by the Chinese National Intellectual Property Administration and the monitoring reports by the USTR, domestic agencies internalize each other's expectations. Enforcement Becomes Reciprocal Observation. This process is akin to that transnational legal processes that Harold Koh referred to in terms of states following international norms because they have incorporated them into their bureaucratic routine<sup>88</sup>.

Third, the event of legality as such has turned performative. The measure of a rule's efficacy has less to do with the rule's ability to coerce as it does with the credibility of narratives of compliance around the rule. For both parties, the publicity of reports, white papers, and judicial rulings constitutes evidence of adherence even where the results in substance are far apart. The collapse of the WTO just transferred this performance to the bilateral and regional stage. In today's twenty-first century trade regime, to be lawful is to be effective.

These lessons tend to converge in what can be called pragmatic constitutionalism; a framework that sees the idea of law as a perpetual negotiation between authority and accommodation. The United States demonstrates this pragmatism in its multiagency networks for their enforcement integrating the trade, security, and antitrust laws; China demonstrates this pragmatism with the coordinated centralized organization of its Party led legal bureaucracy. Each state maintains the form of legality by redefining its content<sup>89</sup>.

This dual adaptation hints at the developing trend for constitutional pluralism in the international system, in which there are multiple normative orders which coexist and overlap. As Ernst Ulrich Petersmann and Martti Koskenniemi have argued, the role of law in such a

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<sup>87</sup> *Trade Act of 1974*, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975); *Foreign Investment Law of the People's Republic of China* (2019); *Phase One Agreement*, supra note 132.

<sup>88</sup> Harold Hongju Koh, *Transnational Legal Process*, 75 *Neb. L. Rev.* 181, 189-91 (1996).

<sup>89</sup> State Council, *Institutional Reform Plan* (2018); Supreme People's Court (SPC), *Work Report on the Implementation of Innovation-Driven Development Strategy* (2021).

system is not to remove conflict but to control it by means of inter-legitimization<sup>90</sup>. The U.S.-China confrontation, far from being a signal of the breakdown of legal order, represents a good example of a rebalancing of power and law: power and law are not in conflict but coproduce stability.

From an institutional perspective this coproduction is expressed in the resilience of legal powers. Every tariffs, retaliation, and arbitrations produce documentation; reports and hearings and findings of procedures that is feeding back into the global knowledge base of global trade law. The wealth of procedure replaces the lack of consensus. Even when rulings are not enforced, the reasons given are precedent for negotiation in the future. Legality is perpetuated through citation.

The future course of global trade legislation will therefore depend on how states figure out how to balance this tension between fragmentation and coordination. Total uniformity is not possible but nor is incoherence desirable; however, unbridled pluralism is at risk of incoherence. The difficulty is to maintain a kind of workable differentiation; to have the different regimes coexist without communicative incompatibility. This balance calls for what Peter Drahos calls “responsive regulation”: a dynamic interplay between persuasion and sanction<sup>91</sup>.

In this changing environment, the enforcement of intellectual property has taken a leading role. IP regimes are the embodiment of innovation, sovereignty, and global value chains. The experience of the U.S.-China relationship in particular demonstrates how IP law could become an area of cooperation and an instrument of coercion at the same time. The same rule that makes knowledge exchange more possible can make economic exclusion justifiable. Substantive powers and rights Future reform must therefore increasingly be about devising procedures that absorb asymmetry without devouring into conflict, and less about harmonizing substantive rights.<sup>92</sup>

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<sup>90</sup> Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance* 98–101 (Hart Publ’g 2012); Martti Koskenniemi, *From Apology to Utopia*, supra note 139, at 502–04.

<sup>91</sup> Peter Drahos, *Global Intellectual Property Governance: Regime Complex and Policy Coherence*, 18 *World Trade Rev.* 523 (2020).

<sup>92</sup> *Id.*

Ultimately, the trade war has not killed the rule based order, rather it has renegotiated its foundations. The judicial system of the world today is based on pluralistic pragmatism; a system of legality maintained by repetition, documentation, and performative legality. The fundamental question for scholars is no longer whether law restrains power, but how power reproduces law in his or her own image. The answer, as this chapter suggests, is to be found in an understanding that the institutional capacity to live with disputes is what modern legality flourishes upon, rather than the resolution of disputes.

