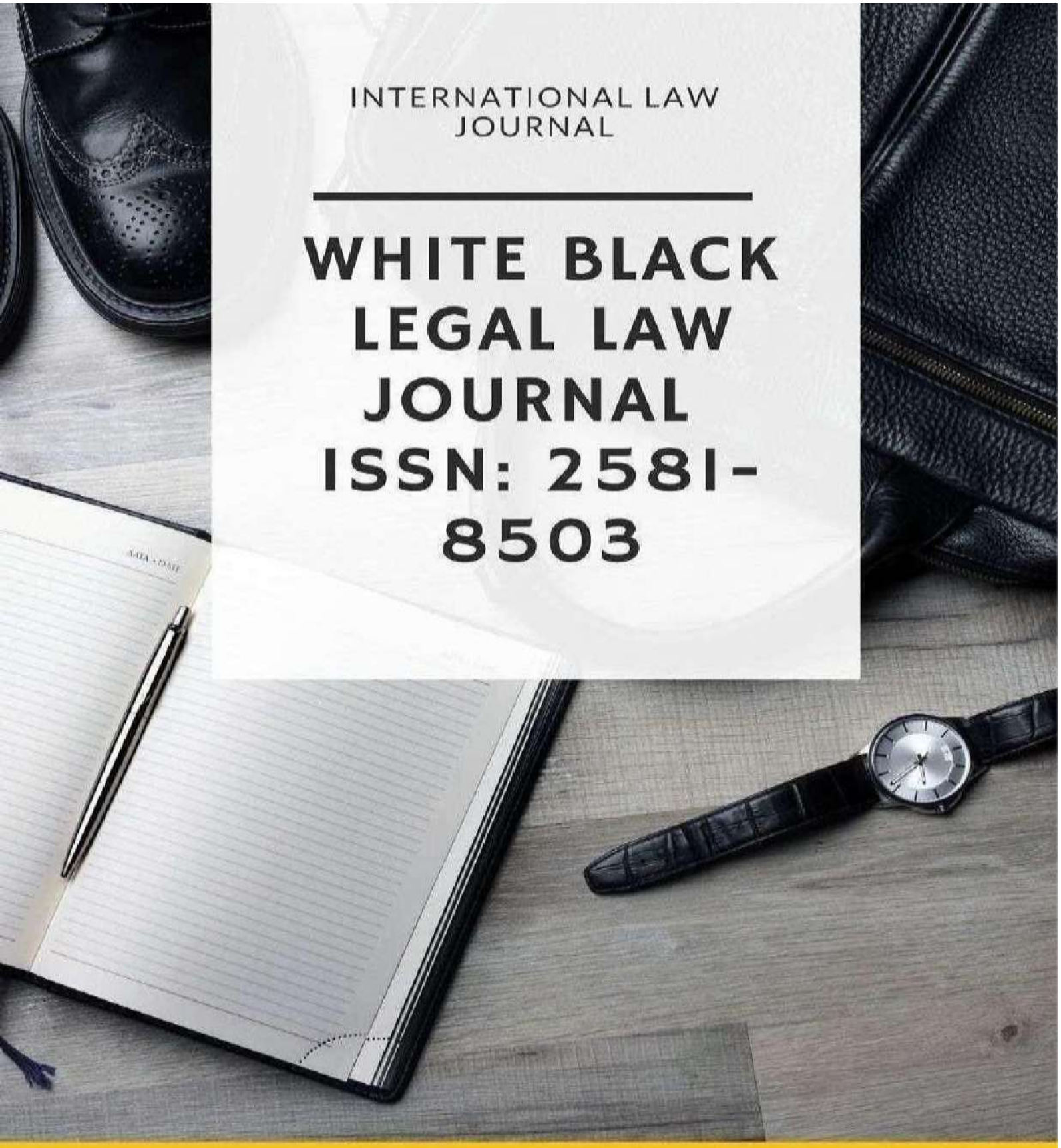

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THE U.S.CHINA TRADE WAR AND IP ENFORCEMENT AS ECONOMIC POLICY

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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."[1]. 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[2].

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 [3]. Over time, landmark judicial interpretations (such as Diamond v. Chakrabarty and Alice Corp. v. CLS Bank International, strengthened the economic instrumentalism of IP rights in the legal system, further refined the scope of patentable subject matter [4].

The globalization of the intellectual property norms in such instruments as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) institutionalized this nexus between innovation and economic power at an international level [5]. Through TRIPS, IP protection became a trade issue; a standard of compliance built into the global trading order.
In the twentyfirst century this connection between law and trade had intensified, with the United States and China trade conflict as a new setting. The Trade Act of 1974, especially its Section 301, gave the statutory basis for the U.S. government to investigate and react to foreign

[1] U.S. CONST. art. I, § 8, cl. 8.
[2] Patent Act of 1790, ch. 7, 1 Stat. 109 (1790); Patent Act of 1952, Pub. L. No. 82-593, 66 Stat. 792 (1952).
[3] Diamond v. Chakrabarty, 447 U.S. 303 (1980); Alice Corp. v. CLS Bank Int'l, 573 U.S. 208 (2014).
[4] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
[5] Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2411).

practices that were deemed "unreasonable or discriminatory" and burdensome to U.S. commerce [6]. 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 [7]. 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.

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"[8]. 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 midtwentieth century Congress developed a schema (framework, system, plan, arrangement) of regulations with the scope to translate domestic economic priorities into international legal instruments [9]. 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

[6] 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.
[7] Id. at 10–11.
[8] U.S. CONST. art. I, § 8, cl. 3.
[9] Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. § 1337).

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 [10]. 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 [11]. 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 [12].

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 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.

[10] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
[11] Agreement on Trade-Related Aspects of Intellectual Property Rights, supra note 4.
[12] Center for International Governance Innovation, Understanding Intellectual Property Disputes Between China and the United States (2022), https://www.cigionline.org/articles/understanding-intellectual-property-disputesbetween-china-and-united-states

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 [13]. 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 [14].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 [15]. 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 [16]. 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 legal construction of Section 301 enabled the U.S. to portray revenues in the form of retaliatory tariffs not as acts of protectionism, but as an exercise of law enforcement on a domestic level with international impact.

The World Trade Organization (WTO) became the key venue in which the legitimacy of this strategy was challenged. China filed a complaint against the United States in United States Tariff Measures on Certain Goods from China (WT/DS543), alleging that the tariffs were an infringement of key GATT principles of nondiscrimination and tariff bindings [17]. In 2020 the

[13] Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2411).
[14] 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.
[15] Alan O. Sykes, Constructive Unilateraal Threats in International Commercial Relations: The Limited Case for Section 301, 23 Law &Pol'y Int'l Bus. 263, 271–74 (1992).
[16] Office of the U.S. Trade Representative, supra note 14, at 14–16.
[17] Panel Report, United States – Tariff Measures on Certain Goods from China, WTO Doc. WT/DS543/R (Sept. 15, 2020).

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[18].

This defiance was an example of the shifting balance between unilateralism and multilateralism of the trade regime. The United States responded by presenting its case as legitimate under domestic laws and China appealed to multilateral norms to counter its position. The subject matter of the contest was not just tariffs, but the very source of the power of law in the world economy.

Underlying the Section 301 mechanism was a deeper jurisprudential claim: that the United States, as architect of the postwar trade order, retained a residual right to enforce compliance where multilateral institutions failed. This belief and reminiscent of classic theories of international legal pluralism turned Section 301 into a symbol of sovereign selfenforcement. As the U.S. and China dug in, something emerged from the trade war that is central to international economic law: the more global the system became, the more states were likely to rely on unilateral measures to ensure compliance. So Law's expansion created its fragmentation.

How IP Enforcement Became Strategic Policy

The 2018 to 2020 cycle of tariff measures showed that enforcement of intellectual property had gone beyond the legal limits of enforcement. No longer restricted to courts or administrative agencies, IP became a strategic policy tool; a tool for controlling industrial behaviour on a transboundary basis. The U.S. Special 301 Report and associated enforcement measures reflected this shift and identified China, India and others as "priority watch list" countries for poor IP Protection[19].

By so doing, the United States effectively had to reframe compliance as geopolitics: countries were ranked according to their adherence to U.S.defined IP standards. This extraterritorial

[18] USTR Press Release, United States Disagrees with WTO Report on China Tariff Measures (Sept. 15, 2020), https://ustr.gov/about/policy-offices/press-office.
[19] Office of the U.S. Trade Representative, 2025 Special 301 Report 17–18 (Apr. 2025), https://ustr.gov/issueareas/intellectual-property.

reach blurred the line between law and power and reappraised intellectual property from an instrument of commercial law to a gauge of worldly order.

In this circumstances, Section 301 acted as a less a dispute resolution mechanism and more an instrument of normative exportation. Through the language of law, it attempted to reconcile the global IP regulations to match American industrial interests. Yet such an approach also provoked tensions with the Dispute Settlement Understanding (DSU) of the WTO, which favors multilateral adjudication, not unilateral retaliation.

Parallel to these maneuvers in the courts of Europe, there were movements in the domestic courts of Europe itself of the same strategic logic. In cases, such as HMTX Industries LLC v. United States, the U.S. Court of International Trade discussed the issue of whether or not Section 301 tariffs were justifiably imposed under statute. [20]While the court upheld some of the USTR's power, it also made clear how fragile the balance is between executive discretion and judicial oversight for such action.

The intersection of administrative, judicial, and international enforcement produced what the scholars like Adrian Vermeule and Charles Dunlap Jr., have called "lawfare";the instrumental use of law as a weapon of statecraft [21]. 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) [22]. 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

[20] HMTX Indus. LLC v. United States, 525 F. Supp. 3d 1318 (Ct. Int'l Trade 2021).
[21] Charles J. Dunlap Jr., Lawfare Today: A Perspective, 3 Yale J. Int'l Aff. 146, 147–48 (2008).
[22] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 498–503 (Cambridge Univ. Press 2005).

administrative modification and strategic litigation. Together, they made it possible to see that twentyfirstcentury trade enforcement takes place not through open conflict, but through competing conceptions of legal order.[23]

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.

Law as Enforcement: The Statutory Architecture of Coercion

The statutory basis for economic coercion in the United States likes 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[24]. 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[25]. The US system institutionalized this principle by embedding trade enforcement in administrative process and not in straight diplomacy.

The U.S. Trade Representative, the Department of Commerce and the Department of Justice therefore are seen to function as overlapping organs of enforcement, through the coordination provided by the space for rules and regulation[26]. Their interagency collaboration puts trade

[23] 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/.
[24] Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. § 1337).
[25] John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 87–90 (Oxford Univ. Press 1992).
[26] Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1138 (2012).

law at a new plane of transformation: from a transactional sphere to a governance network, which can exert coercive pressure without having to abandon the formal legality of.

In practice, it can be said that this architecture has resulted in a hybrid form of enforcement regime, under which domestic statutes serve as tools of extraterritorial regulation. 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) [27]. 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 Xiaoqing where a Chinese engineer was convicted for trying to steal turbine technology from General Electric[28]. 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[29].

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 [30]. When it is applied to IP, securitization redefines infringement as an attack on national power not private rights.

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[31].By placing IP

[27] Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (1996) (codified as amended at 18 U.S.C. §§ 1831–1839).
[28] United States v. Zhang Xiaoqing, No. 3:19-cr-00030 (N.D.N.Y. 2020).
[29] 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.
[30] Ole Wæver, Securitization and Desecuritization, in On Security 46–48 (Ronnie Lipschutz ed., Columbia Univ. Press 1995).
[31] U.S. Dep't of Justice, The China Initiative: Year-End Report 2020 (Dec. 2020), https://www.justice.gov/nsd/documents.

enforcement in the field of national security, the U.S. defined legal compliance as part of state 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 [32]. 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 selfdefense or public order rationales that are not subject to conventional adjudication[33].

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[34]. Reports as USPTO's 2024 China Administrative Enforcement Brief reveals the use of IP procedures as a way of deterring "nonmarket" conduct abroad[35].

Third, the process constructs a new legal lexicon in which such terms as "innovation theft" or "technological coercion" replace traditional treaty breaches. This rhetorical shift blurs the distinction between legal redress and political revenge. The result is a performative legality; a system of legality in which compliance in the law is less about compliance with norms than compliance with power.

The situation between the U.S. and China is a good example of this phenomenon. Chinese policymakers, with the impression that these were part of a broader containment strategy, retaliated against them with their own legal instruments such as the Export Control Law of

[32] Peter K. Yu, The Securitization of Intellectual Property, 15 Marq. Intell. Prop. L. Rev. 1, 5–8 (2011).
[33] HMTX Indus. LLC v. United States, 525 F. Supp. 3d 1318, 1331–32 (Ct. Int'l Trade 2021).
[34] 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.
[35] Id.

2020 and Unreliable Entity List Provisions [36]. These statutes reflect the US model of blending trade law and national security with the signal of diffusion of hybrid enforcement as a global practice.

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[37]. 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 [38].

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[38]. The resulting paralysis of the WTO Appellate Body reinforced the perception that the enforcement processes of international law rely ultimately on the political consent.

[36] Export Control Law of the People's Republic of China (2020); Unreliable Entity List Provisions (2020).
[37] Charles J. Dunlap Jr., Lawfare Today: A Perspective, 3 Yale J. Int'l Aff. 146, 147–48 (2008). [38]Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State 85–89 (Harvard Univ. Press 2016).
[38] Panel Report, United States – Tariff Measures on Certain Goods from China, WTO Doc. WT/DS543/R (Sept. 15, 2020).

In this environment, lawfare, it becomes a method and a message. It points to a world in which compliance rather than adjudication is negotiated; not constrained by legal rules as things which are imposed, but employed by persuasion as a way of governing. The doctrinal distinction between "trade enforcement" and "economic statecraft" disappears.

The convergence of these dynamics, of unilateral enforcement, securitization and lawfare constitute the emergence of a postliberal legal order. This order no longer takes legal universality as a given, which is able to guarantee stability. Instead it is through setup, by law as competition rather than peace.[39]

This analysis sets the foundation for understanding the place of the United States, China and India in this evolving framework of hybrid enforcement. Each state, as the following chapters show, adapts the logic of coercive legality to its own constitutional and institutional traditions.

The Judicialization of Trade

The extension of trade enforcement into the judicial arena is a fundamental development in the architecture of US economic governance. What started as an administrative regime, which was anchored in the command of the executive branch, has come under the gaze of more and more 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[40].

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[41]. 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

[39] 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/.
[40] HMTX Indus. LLC v. United States, 525 F. Supp. 3d 1318 (Ct. Int'l Trade 2021).
[41] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

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[42]. 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 the principle that even instruments of economic coercion must work within the procedural bounds of law was significant[43].

This shifts 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.[44]

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 "lawsaturated" government: power mingled with constraint, but also with support: power checked, but also perpetrated, by legality[45].

This process is similar to the phenomenon of reflexive legality, according to which law

[42] Id.
[43] HMTX Indus. LLC, 525 F. Supp. 3d at 1331–32.
[44] Charles J. Dunlap Jr., Lawfare Today: A Perspective, 3 Yale J. Int'l Aff. 146, 147–48 (2008).
[45] id.

accommodates itself to its own limitations through refinement of its procedure. [46]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.[47] Law becomes thus selfcorrecting 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.[48]

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.[49]

[46] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 498–503 (Cambridge Univ. Press 2005).
[47] Office of the U.S. Trade Representative, 2025 Special 301 Report 17–18 (Apr. 2025), https://ustr.gov/issueareas/intellectual-property.
[48] Clyde & Co., Impact of Tariffs to Charterparties (Oct. 2025), https://www.clydeco.com/en/insights/2025/10/impact-of-tariffs-to-charterparties-1.
[49] 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/

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 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. Agencies such as the U.S. Trade Representative (USTR), the Department of Commerce, the International Trade Commission (USITC), and the Patent and Trademark Office (USPTO) changed their roles and responsibilities with an emphasis on coordination, intelligencesharing and deterrence[50]. The 2025 Special 301 Report, for instance, demonstrates how the USTR moved from being an adjudicatory body to being a quasiregulatory one where the reporting powers of the USTR are used to influence global IP behavior[51].

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 [52]. 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.

[50] Office of the U.S. Trade Representative, 2025 Special 301 Report 17–18 (Apr. 2025), https://ustr.gov/issueareas/intellectual-property.
[51] Id.
[52] Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1138 (2012).

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 "partyled legalism"; responded to U.S. measures by increasing institutional integration between the administrative, judicial and political organs of the state[53]. 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[55]. 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.

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[54]. 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[55]. In the Chinese case, therefore, adaptation has double purposes of domestic consolidation and international signaling.

This duality is captured in China's Outline for Building an Intellectual Property Strong Country (2019-2035). It envisioned the Partystate's goals to reform the governance of IP, aiming at building it into an engine of technological sovereignty, relating administrative enforcement with industrial policy[56]. 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 [57].

[53] Zhu Suli, Political Constitutionalism and Legal Order in China, 30 Mod. L. Rev. 347, 352–54 (2018). [55]Supreme People's Court (SPC), Decision on the Establishment of IP Courts in Beijing, Shanghai, and Guangzhou (Aug. 31, 2014).
[54] China Nat'l Intellectual Prop. Admin. (CNIPA), Annual Report on IP Protection in China 2022 (May 2023).
[55] Peter Drahos, The Global Governance of Knowledge: Patent Offices and Their Clients 122–24 (Cambridge Univ. Press 2010).
[56] State Council of the People's Republic of China, Outline for Building an Intellectual Property Strong Country (2019–2035).
[57] Zhu Suli, Political Constitutionalism and Legal Order in China, 30 Mod. L. Rev. 347, 353–56 (2018).

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.[58] 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 of strategic responsiveness is different: the normative bases is in the American juridical, in the Chinese programmatic.[59]

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[60].

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. Enforcement agencies used to be neutral instruments of enforcement of laws, but have become architects of national strategy.

This evolution is the culmination of decades of evolutionary adaptation of the law. From the US Trade Act of 1974 to China's post WTO accession reforms, both countries have turned compliance mechanisms into competition mechanisms. The trade war simply sped up a path already latent in the international system, the bureaucratization of geopolitics through law.

[58] CNIPA, supra note 66, at 21–24.
[59] Office of the U.S. Trade Representative, 2025 Special 301 Report, supra note 61.
[60] Peter K. Yu, The Comparative Dimensions of Intellectual Property Enforcement, 61 Am. J. Comp. L. 823, 829–31 (2013).

Comparative Doctrinal Thoughts: Law, Power and U.S. China Enforcement Divide

The administrative evolution described above finds its analytical perfection in the comparison of the doctrinal split between the United States and China. Both states use legality as a basis for claims to legitimacy, but the conceptual framework supporting their respective legal orders are strikingly different. The American tradition has been to think of law as a constraint on the action of the state; the Chinese tradition had law as an instrument of coordinated governance. These conflicting premises spawn different cultures of enforcement which interact in the same global trading system[61].

In the United States, the way in which trade and intellectual property law is policed involves an inheritance of liberal legalism ; that is, the belief that legitimate coercion should only be channelled through rulebound institutions. The Trade Act of 1974 and the Tariff Act of 1930 are glaring examples of this paradigm, which gives the president significant power but holds presidential actions to statutory and judicial check[62]. Within this system, law is the vocabulary of restraining but not just command. Each administrative action; each selection of a tariff, each Section 301 investigation or any other administrative process, must be justified in procedural and evidentiary terms; that is, it must be transformed from political intention and legal reasoning.

China's strategy is based on a different jurisprudence. Since the late 1990s, the objective of Chinese legal reform has been to create an order (a "ruleby law") that promotes Party priorities as embodied in codified instruments. The Patent Law (2020 amendments) and the Trademark Law (2019) show this harmony between and administrative guidance and normative formality[63]. Here, legality and legitimacy are merged: the state does not go into hiding behind rules but gets exposed by them. The courts, agencies and Party organs are functioning as interconnected nodes within a single circuit of government and are not separated powers.

This distinction does not mean opposition between legality and politics. Rather, it shows the coexistence of two modalities of legal rationality. The U.S. system refers to constraint in terms of compliance; Chinese refers to unity in terms of compliance. The first uses independence

[61] Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975).
[62] Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930).
[63] Patent Law of the People's Republic of China (as amended 2020); Trademark Law (as amended 2019).

and the second uses coordination as sources of legitimacy. Both lead to what ErnstUlrich Petersmann calls "constitutional pluralism", the coexistence of several normative hierarchies in the global economic order[64].

Doctrinally, the difference lies in methods of enforcement. U.S. aging agencies count on adversarial processes, together these are called notice and comment rulemaking, judicial review, and Congressional supervision, for mediating power. Chinese authorities turn to planbased legality which coordinates enforcement campaigns with national strategies, such as Made in China 2025 and the Fourteenth Five Year Plan[65]. Each of the frameworks constructs legality as part of its political logic, which generates two parallel but interacting systems of economic governance.

At the level of international adjudication, those differences cause friction. The U.S. defense of Section 301 measurements before the WTO Panel in the United States Tariff Measures on Certain Goods from China drew on doctrines familiar to domestic administrative law, rationality basis, proportionality and procedural fairness[66]. China's submissions focused on giving deference to national development goals and the sovereign right to regulate trade. The Panel's 2020 Report enforced the criterion of the failure of the possibility of reconciling these approaches within one or another interpretive grammar.

This friction follows more general theoretization. As Anthea Roberts argues, international law is not monolithic, but "comparatively embedded"; that is, each state translates it through its own constitutional and cultural lens [67]. Thus, what the US sees as an enforcement responsibility, China sees as a developmental right. The trade war, then, viewed at the do ctrinal level, is more of a clash of interpretive communities than a clash over specific rules. Despite this divergence, it is the place of convergence at the level of operations. Both states apply the metricbased governance, the US through the quantitative impact assessments and the compliance audits, and China through the yearly performance indicators in CNIPA and

[64] Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* 92–95 (Hart Publ'g 2012).
[65] Nat'l Dev. & Reform Comm'n (NDRC), *Made in China 2025 Strategic Plan* (2015); State Council, *14th FiveYear Plan for National Economic and Social Development* (2021).
[66] Panel Report, *United States – Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (Sept. 15, 2020).
[67] Anthea Roberts, *Is International Law International?* 221–24 (Oxford Univ. Press 2017).

SAMR reports[68]. This technocratic orientation reflects some global turn back to managerial legality where compliance is measured, reported and optimizing rather than debated. It provides a remarkable example of what Richard Posner called the "economic analysis of law";the diminution of normative conflict to calculable efficiency[69].

Yet, here again the implications vary if legality is confronted with sovereignnty. In the U.S., judicial scrutiny and public challenge help to maintain the autonomy of law, at the expense of policy delay. In China centralized supervision ensures speedy implementation, but compresses procedural pluralism. Both systems therefore have a balance between legitimacy and efficacy, but one is based on openness and the other is orchestration.

The comparative understanding to be drawn is that law's globalization does not drive away difference, but codifies it. The more the set of standards are imposed by the WTO, the WIPO, bilateral trade agreements are reinterpreted by national states through their own national doctrines. The U.S. dependence on adjudicatory enforcement, and China's dependence on administrative integration, are two faces of the same phenomenon, that of the localization of global legality.

From the functional perspective, both models are successful precisely because they are consistent internally. The US system uses fragmentation, i.e., competition between agencies and even courts, in order to generate accountability. The Chinese system draws on unityinstitutions being linked and under Party supervision to generate decisiveness. Each model in this way turns its constitutional design into an enforcement philosophy.

Still, these philosophies have dynamic interaction. American measures to trade result in Chinese tightening of regulations that trigger more U.S. scrutiny. The feedback loop produces what Peter Yu has called the 'weaponization of intellectual property' because IP law becomes the battleground as well as the weapon[70]. In this cyclic and recursive process, enforcement has ceased to be a neutral mechanism and is instead an extension of strategic communication.

[68] CNIPA, *Annual Report on IP Protection in China 2022* (May 2023); SAMR, *Annual Report 2023*.
[69] Richard Posner, *Economic Analysis of Law* 34–36 (9th ed. 2014).
[70] Peter K. Yu, *Weaponizing Intellectual Property: The Trade War and China's Legal Strategy*, 72 Am. L. Rev. 851, 856–58 (2022).

The doctrinal comparison therefore brings out a more profound, theoretical understanding: the breakdown of the distinction between law and strategy. In the modern structure of trade, legal argumentation itself constitutes a type of power politics. Judicial reasoning, administrative rulemaking, and international litigation are all processes of persuasion in a permanent battle of negotia over whose authority.

This anonymity of categories allows rethinking of the meaning "rule of law" in international trade. Rather than a universal norm it manifested itself as a family of practices reflecting the constitutional identity of a state. The U.S.and China enforcement impasse exemplifies not a failure of the international law system but rather its plural vitality; an international law system that can contain competing doctrines without melting down into anarchy.[71]

In sum, comparing doctrinal reflection can be seen to show that enforcement is not about compliance, but it is about the performance of legitimacy. Whether through the transparency of judicial activities or the bureaucratic coordination, both powers implement the legality as spectacle as well as discipline. Their interaction trend towards the development of the lex mercatoria of the twentyfirst century: a hybrid order between legalization of coercion and politicization of legality.[72]

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 longlasting 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 [73]. Each turn of judicial litigation, administrative reprimand, and bargaining locks the coercive techniques deeper in the workings of the machinery of legality.

In the American case, one can see this normalization in the bureaucratic routines that followed the cycles of tariffs of 2018 to 2020. The Office of the U.S. Trade Representative (USTR),

[71] WTO, *Panel Report: United States – Tariff Measures on Certain Goods from China*, WT/DS543/R (Sept. 15, 2020).
[72] Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 189–91 (1996).
[73] Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975).

originally conceived as a negotiating body, has done so and has turned into a quasi regulatory agency overseeing a standing system of tariff surveillance and intellectual property enforcement. The annual Special 301 Report is now made up of a combination of policy document and compliance audit in which trading partners with domestic IP systems that fail to measure up to U.S. expectations are identified[74]. Institutionalizing a rolling list of offenders, the United States made unilateral enforcement not an emergency measure but an ongoing administrative practice.

This routinization is indicative of a general American tendency to conflate law with strategy. Section 301 of the Trade Act of 1974 gives the executive branch broad discretion over what to do in connection with unfair trade practices but subjects that discretion to procedural formalities ; notice, comment, and findings [75]. The very fact that there is codification of coercion guarantees its perpetuation. What once had to be accomplished by political mobilization is now to be done in the familiar cadence of the administrative due process.

Economic coercion in legal garb is there to stay as a stable feature of governance.

This normalization is enforced by judicial oversight. Cases such as HMTX Industries LLC v. United States established the principle even of retaliatory tariffs must be justified through administrative recordkeeping[76]. The insistence of the court for rational explanation does not damp coercion but it professionalizes it. As long as the government can prove that it made the decision for good reason, then most any sanctions can survive review. Law thus gives the art of coercion the highest perfection of being obliged to speak the language of reason.

China's path is parallel to a different ideological path. Confronted by the U.S. tariffs and export controls, Chinese authorities attempted a thoroughgoing legalbureaucratic response, which was a combination of counterretaliation and system building. The China National Intellectual Property Administration (CNIPA), increased its regulatory power; every implementing guideline, every performance metric and every enforcement statistic was set on paper, with a

[74] Office of the U.S. Trade Representative, *2025 Special 301 Report* 17–18 (Apr. 2025), https://ustr.gov/issueareas/intellectual-property.
[75] Id. § 301(b)(1).
[76] *HMTX Indus. LLC v. United States*, 525 F. Supp. 3d 1318, 1331–32 (Ct. Int'l Trade 2021).

virtual torrent being released[77]. The 2019 to 2035 Outline for Building an Intellectual Property Strong Country published by the State Council redefined IP protection as a matter of national security and sovereignty and made legal compliance into patriotic duty[80].

This way, through these mechanisms, China transformed external pressure into internal reform. Institutional learning took place along the lines of selective appropriation: Global legal vocabulary with retaining hierarchical Party supervision. Administrative enforcement campaigns, coordinated by SAMR and provincial IP offices were made regularized occurrences scheduled in the planning calendar of the country[78]. The resultant pattern is reminiscent of what comparative scholars call "responsive regulation"; a pattern in which enforcement progresses in predictable stages of persuasion, warning, and punishment[79]. Yet in the Chinese context responsiveness is not for pluralism but control; the process is cyclic, not an adversarial one.

Such normalization of coercion for both systems reconfigured the meaning of legality. The United States uses the principle of legality to legitimize coercion through the principle of procedure neutrality, while China uses legality to justify coercion through the principle of political integration. Every state changes from law imposed from without to an operating system from within. The end result is the shared structural innovation: the permanent mobilization of law.

At the international level these domestically wanted adaptations come together in a new balance of managed confrontation. The WTO Panel Report in United States Tariff Measures on Certain Goods from China condemned Washington's tariffs as not in line with the GATT, but of a nature from which it had no power of enforcement[80]. The lack of binding sanction allowed both sides to accept WTO findings as rhetorical acts of victory as opposed to judicial commands. The disputesettling mechanism is therefore another scene for the display of legalized power.

[77] China Nat'l Intellectual Prop. Admin. (CNIPA), *Annual Report on IP Protection in China 2022* (May 2023).
[80]State Council of the People's Republic of China, *Outline for Building an Intellectual Property Strong Country (2019–2035).*
[78] State Admin. for Market Regulation (SAMR), *Annual Report 2023.*
[79] John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 87–90 (Oxford Univ. Press 1992).
[80] Panel Report, *United States – Tariff Measures on Certain Goods from China,* WTO Doc. WT/DS543/R (Sept. 15, 2020).

Within this context, the use of lawfare (the strategic use of law as a weapon) is no longer exceptional. It becomes the default mode of interstate competition. Each citation, tariff list and panel submission is a piece of a continuing conversation on legitimacy and leverage. As Charles J. Dunlap Jr noted, modern lawfare works not so much through blatant violation as through "weaponized compliance," in which these actors use legal procedures to further their strategic objectives[81].

For bureaucracies on both the sides, learning and institutional learning go beyond the formal law. At it is the cultivation of expertise, data, along with predictive modeling. The USTR's economicimpact analyses and CNIPA's enforcement dashboards are examples of the new epoch of technocratic sovereignty the assumption and reality that command of information is command of law. In this data driven environment legality becomes quantifiable & compliance 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[82].Thus, what started out as bilateral competition turns into a model for the worldwide regulatory competition.

As seen in theoretical terms, this trajectory lends support to Dieter Grimm's point that modern economies constitutionalize the market itself[83]. Law in turn is no longer about simply regulating commerce: it is about globalization's political economy. The result is the trade war, which shows constitutionalism has moved from the polity to the marketplace, changing coercion to a mode of economic coercion into a constitutional expression.

Institutional learning is, therefore, pragmatic as well as paradigmatic. It teaches agencies how to manage crises and at the same time teaches societies to accept that coercion is normal. The

[81] Charles J. Dunlap Jr., *Lawfare Today: A Perspective,* 3 Yale J. Int'l Aff. 146, 147–48 (2008).
[82] Dieter Grimm, *The Constitution of the Market Economy* 45–47 (Oxford Univ. Press 2018).
[83] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 499–501 (Cambridge Univ. Press 2005).

great irony here is that the more coercion is regulated by law, the more legitimate is coercion. The normalization process does not extinguish conflict, it stabilizes it, entrenching antagonism in the routines of governance.

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[84].

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[85].

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[86]. 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

[84] Ole Wæver, *Securitization and Desecuritization,* in *On Security* 46–48 (Ronnie Lipschutz ed., Columbia Univ. Press 1995).
[85] Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975).
[86] *United States v. Zhang Xiaoqing,* No. 3:19-cr-00030 (N.D.N.Y. 2020).

Provisions (2020) combined form a defensive legal regime enabling retaliation under the pretence of formal legality[87]. These instruments allow the state to calibrate its responses towards U.S. activities while projecting an image of rulebased governance. As Peter K. Yu observes, Chinese lawfare involves "the weaponization of intellectual property" not by evasion but by strategic overcompliance; making transparency a source of deterrence[88].

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[89]. 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. Quasijudicial 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[90].

This diffusion of authority, however, runs the risk of fragmenting the normative coherence. As ErnstUlrich Petersmann has argued, pluralism in the absence of coordination compromises the provision of collective goods such as transparency and predictability[91]. 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.

[87] *Export Control Law of the People's Republic of China* (2020); *Unreliable Entity List Provisions* (2020).
[88] Peter K. Yu, *Weaponizing Intellectual Property: The Trade War and China's Legal Strategy,* 72 Am. L. Rev. 851, 856–58 (2022).
[89] Harold Hongju Koh, *Transnational Legal Process,* 75 Neb. L. Rev. 181, 189–91 (1996).
[90] WTO, *Panel Report: United States – Tariff Measures on Certain Goods from China,* WT/DS543/R (Sept. 15, 2020).
[91] Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance* 98–101 (Hart Publ'g 2012).

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

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[92].

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[93].

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 FiveYear Plan (2021) explicitly cites these achievements as justifications for further centralization of the governance of IP[94]. 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

[92] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498–503 (Cambridge Univ. Press 2005).
[93] Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* 120–24 (Harvard Univ. Press 2016).
[94] State Council, *14th Five-Year Plan for National Economic and Social Development* (2021).

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[95]. Panels and states alike now take enforcement flexibility for granted as something 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 overnormalization. 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, datadriven 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[96].

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 twentyfirst 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 lawfare; what marks not as the decline of legality, but its triumph:

[95] WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994); RCEP Agreement (2020).
[96] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space,* 125 Harv. L. Rev. 1131, 1138 (2012).

law has conquered politics by learning to speak in its idiom[97].

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[98].

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 mid2010s 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[99][100].

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 disputesettlement process ineffective. The consequence was dismembered legalism; thestate of affairs in which some law still retained a rhetorical dominants but lacked practical power 103.

This Paradox was illustrated by the Panel Report in United States Tariff Measures on Certain

[97] Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* 121–25 (Cambridge Univ. Press 2010).
[98] WTO, *Panel Report: United States – Tariff Measures on Certain Goods from China,* WT/DS543/R (Sept. 15, 2020).
[99] Jennifer Hillman, *The WTO's Existential Crisis: The Appellate Body's Paralysis and Its Implications,* Council on Foreign Relations (2021).
[100] Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975).

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 [101]. 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.

This transformation captures what Jennifer Hillman has labeled the WTO's "existential crisis", a condition in which legal form continues despite institutional function collapse[102]. For decades the WTO was the flagship organization of the ideology of rulesbased 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[103]. 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[104]. Each new forum or agreement recreates the grammar of legality of procedural fairness, reciprocal and proportional outcomes, even when the outcomes are predetermined politically.

[101] *United States – Tariff Measures on Certain Goods from China,* supra note 116.
[102] Hillman, supra note 117.
[103] RCEP Agreement (2020); CPTPP Agreement (2018).
[104] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498–503 (Cambridge Univ. Press 2005).

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 rulebased 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 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[105]. 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[106]. 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 semiautonomousregimes; each of which retains procedural legitimacy whilst serving different strategic communities[107]. 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

[105] 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).
[106] State Council, *Belt and Road Initiative: Digital Silk Road Cooperation Plan* (2020).
[107] Anthea Roberts, *Is International Law International?* 221–24 (Oxford Univ. Press 2017).

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 without full integration[108].

The challenge for scholars and policymakers is the challenge to separate the distinction between rulebased governance and lawbased 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 twentyfirst century trade system is not postlegal, but hyperlegal, loaded with rules that draw their power and legitimacy from repetition as opposed to enforcement.

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[109].

[108] 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).
[109] WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994).

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 oneway commitments subject to detailed reporting and review mechanisms[110]. Enforcement relied not so much upon sanctions as on the ongoing exchange of 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 TransPacific Partnership (CPTPP) as both have embedded softlaw features such as transparency mechanism, capacity development, consultation framework, etc. alongside traditional dispute settlement clauses[111]. 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[112]. Punishment is not how compliance is achieved, it is through participation. The proliferation of softlaw instruments; guidelines, bestpractice 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[113]. This arrangement

[110] *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.
[111] RCEP Agreement (2020); CPTPP Agreement (2018).
[112] Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* 121–25 (Cambridge Univ. Press 2010).
[113] Phase One Agreement, supra note 132.

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 incorporate global standards in the domestic administrative framework[114]. 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 [115] are modeled 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

[114] 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).
[115] Alibaba Group, *IP Protection Annual Report 2022*; Amazon, *Intellectual Property Policy and Enforcement Report* (2022).

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 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 redidributed it. This resilience is an example of what ErnstUlrich Petersmann has called “constitutional pluralism”;a system able to selfrepair thanks to institutional diversity [116].

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.

Towards a New Legal Order: Systemic Lessons of the U.S.China Conflict

The longrange 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 [117]. Within this order there

[116] Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance* 98–101 (Hart Publ’g 2012).
[117] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 498–503 (Cambridge Univ. Press 2005).

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 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"[118].

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[119].

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 twentyfirst 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 Partyled legal bureaucracy. Each state maintains

[118] *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.
[119] Harold Hongju Koh, *Transnational Legal Process,* 75 Neb. L. Rev. 181, 189–91 (1996).

the form of legality by redefining its content[120].

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 system is not to remove conflict but to control it by means of interlegitimization [121]. 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[122].

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

[120] State Council, *Institutional Reform Plan* (2018); Supreme People's Court (SPC), *Work Report on the Implementation of Innovation-Driven Development Strategy* (2021).
[121] 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.
[122] Peter Drahos, *Global Intellectual Property Governance: Regime Complex and Policy Coherence,* 18 World Trade Rev. 523 (2020).

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.[123]

Ultimately, the trade war has not killed the rulebased 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.

[123] Id.