

# Corporate Governance in an Era of Geoeconomics

Law Working Paper N° 790/2024

July 2024

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ECGI Working Paper Series in Law

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## Abstract

The “End of History” for corporate law and governance has come to a messy conclusion, marked by U.S.-China rivalry, economic sanctions, export controls, supply chain vulnerability, and resulting efforts by multinational enterprises and their governments to “derisk” in a global environment that has upended many assumptions on which the post-Cold War economic order operated. This new environment has ushered in an era of geoeconomics--the pursuit of power politics using economic means. The paper explores the potential implications of geoeconomics for corporate governance of U.S. firms. It first sketches the trajectory from globalization to weaponized interdependence that characterizes the past decade, with a focus on the “geopolitical chain reaction” underlying U.S.-China de-coupling, and documents the heightened perception of material risks to U.S. business the current era has engendered. It then examines how geoeconomics will affect the legal/policy environment for corporate governance, as well as the implications of geoeconomics for firm-level governance, focusing on (1) board and senior executive expertise, (2) governance of geopolitical risk, (3) compliance, (4) supply chain management, (5) litigation risk, and (6) investor/public and government relations.

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Keywords: Corporate Governance, Geoeconomics

JEL Classifications: F02, F23, F50, F60, N40

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# **Corporate Governance in an Era of Geoeconomics**

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## **Abstract**

The “End of History” for corporate law and governance has come to a messy conclusion, marked by U.S.-China rivalry, techno-nationalism, economic sanctions, export controls, supply chain vulnerability, and resulting efforts by multinational enterprises and their governments to “de-risk” in a global environment that has upended many assumptions on which the post-Cold War economic order operated. This new global environment has ushered in an era of geoeconomics – the pursuit of power politics using economic means. Because geoeconomics requires leveraging, curtailing or blocking the actions of profit-oriented commercial enterprises to increase state power vis-a-vis geopolitical rivals, it places corporations in a role for which they are unaccustomed and organizationally not well suited.

This article explores the potential implications of geoeconomics for corporate governance of U.S. corporations. Part I surveys major debates in the comparative corporate governance field circa the turn of the twenty-first century, highlighting the ways in which the literature was infused with optimism about globalization, and virtually devoid of geopolitical or national security considerations. Part II sketches the trajectory from globalization to weaponized interdependence that characterizes the past decade, with a focus on the “geopolitical chain reaction” underlying US-China de-coupling. It then analyzes the Risk Factors section of Forms 10-K over the past two decades to document the heightened perception of material risks to business the current era of geoeconomics has engendered in the U.S. corporate sector. Part III first examines how geoeconomics will affect the legal/policy environment for corporate governance by analyzing parallels and differences with the ESG movement. It then analyzes the implications for firm-level governance, focusing on (1) board and senior executive expertise, (2) governance of geopolitical risk, (3) compliance, (4) supply chain management, (5) litigation risk, and (6) investor/public and government relations.

# Corporate Governance in an Era of Geoeconomics

Curtis J. Milhaupt\*

July 8, 2024

*Economic warfare is becoming the norm.*  
--World Economic Forum, 2023

*Companies in the private sector are on the front lines of the geopolitical and national security challenges that mark today's global environment.*  
--Marshall Miller, Associate Deputy Attorney General  
U.S. Department of Justice, 2023

## Introduction

The “End of History” for corporate law and governance<sup>1</sup> has come to a messy conclusion, marked by U.S.-China rivalry, techno-nationalism, economic sanctions, export controls, supply chain vulnerability, and resulting efforts by multinational enterprises and their governments to “de-risk” in a global environment that has upended many assumptions on which the post-Cold War economic order operated.

This new global environment has ushered in the era of geoeconomics – “the pursuit of power politics using economic means.”<sup>2</sup> Although it has been called “the new form of statecraft,”<sup>3</sup> the attempt to use economic advantage to enhance state power dates as far back as seventeenth century European mercantilism. Whether it is novel or an age-old phenomenon, the World Economic Forum paints the present era of geoeconomics in starkly pessimistic terms: “Economic warfare is becoming the norm, with increasing clashes between global powers and state intervention in markets. . . . Intensive geoeconomics weaponization will highlight security vulnerabilities posed by trade, financial and technological interdependence between globally integrated economies, risking an escalating cycle of distrust and decoupling.”<sup>4</sup>

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\* William F. Baxter – Visa International Professor of Law, Stanford Law School and Senior Fellow, by courtesy, Freeman Spogli Institute for International Studies, Stanford University. Member ECGI. I am very grateful to Umesh Chandra Tiwari of ESGAUGE Intangibles AI for generously collecting and sharing the data used to produce Table 1 and Figures 2 and 3. Joe Grundfest, Ron Lee, Robert Madsen, William Simon, and Matthew Waxman provided very helpful feedback on an earlier draft. Sonnet Xu and William Weightman provided excellent research assistance. Any shortcomings are mine alone.

<sup>1</sup> Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

<sup>2</sup> Mikael Wigell et al., *Navigating Geoeconomic Risks*, Finnish Institution of International Affairs, Report No. 71, November 12 (2022). *See also* Christopher Clayton, Matteo Maggiore & Jesse Schreger, *A Framework for Geoeconomics*, NBER Working Paper (2024) (defining geoeconomics as “the use of a government’s economic strength from existing financial and trade relationships to achieve geopolitical and economic goals.”). Other names for this phenomenon include “economic statecraft,” and “strategic capitalism.”

<sup>3</sup> Aneela Shahzad, *Geoeconomics: The New Geopolitics*, 19 POLICY PERSPECTIVES 21, 37 (2022).

<sup>4</sup> WORLD ECONOMIC FORUM, *THE GLOBAL RISKS REPORT 7* (18<sup>th</sup> ed. 2023).

Because geoeconomics requires leveraging, curtailing or blocking the actions of profit-oriented commercial enterprises to increase state power vis-a-vis geopolitical rivals, it places corporations in a role for which they are unaccustomed and organizationally not well suited. As a result, the era of geoeconomics portends significant changes in the corporate governance environment, including the external rules and policies that shape relations among stakeholders, and affect mergers and acquisitions, financing options, etc. Particularly if investors begin to price in the effects of geoeconomics on individual firms in earnest,<sup>5</sup> it will also affect the internal “operating system”<sup>6</sup> for decision-making and compliance on which corporations run. From board composition and skills to risk analysis, and from compliance to securities listings and information disclosure, the corporate governance environment is being impacted by geopolitical rivalry and the efforts of national governments to contend with, and to influence, the shifting dynamics of the global order.

Corporate governance scholarship has yet to engage deeply with the era of geoeconomics. Turn of the century debates on comparative corporate governance and the regulation of capital markets reflected the buoyant spirit of *Pax Americana*. With relatively minor exceptions, every big theme in this literature in the 1990s to early 2000s was premised on the permanent existence of open, global markets for capital, harmonizing tendencies across national corporate and securities laws, and the “ideological hegemony” of shareholder wealth maximizing governance, unfettered by national security concerns or geopolitical rivalries. Today, globalization has been replaced by “weaponized interdependence,” but corporate governance scholarship has not grappled with the implications of this major development.<sup>7</sup>

In this article, I explore the potential implications of geoeconomics for corporate governance, with a focus on U.S. corporations.<sup>8</sup> As the era of geoeconomics is in its early stages and data on how corporations are adapting to being “on the front lines” of geopolitical rivalry is still very limited, the steps in this exploration are tentative, and the data I present are probative, not definitive. My objective is to introduce geoeconomics to the field of corporate governance, and to provide a framework for future research and data collection efforts.

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<sup>5</sup> This is still an open question, but “there are some signs beneath the surface that the [investment] industry is integrating geopolitics into more of its investment decisions.” Nicholas Megaw, et al., *How the Investment World is Trying to Navigate Geopolitics*, FINANCIAL TIMES, July 4, 2024, <https://www.ft.com/content/23ce295d-bf65-47fd-bebd-808b5a7bcab5>

<sup>6</sup> Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey Gordon & Georg Ringe eds., 2018).

<sup>7</sup> Among corporate governance scholars, Mariana Pargendler’s work comes closest to exploring issues relevant to an era of geoeconomics. See Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 INDIANA L.J. 533 (2020) (exploring the role of nationalism and protectionism in corporate law); Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953 (2019-2020) (noting that some early twenty-first century corporate law initiatives were based on faulty assumptions of continued economic integration). Of course, scholars outside the field of corporate governance have explored the implications of geopolitics on corporations. See, e.g., CONDOLEEZZA RICE & AMY ZEGART, *POLITICAL RISK: HOW BUSINESSES AND ORGANIZATIONS CAN ANTICIPATE GLOBAL INSECURITY* (2018). However, these analyses tend to focus on organizational behavior and internal risk management strategies, rather than the legal, regulatory, and corporate governance implications of geoeconomics explored here, although the boundary is admittedly blurry.

<sup>8</sup> The implications of geoeconomics extend, of course, to corporations worldwide. See, e.g., the dilemma confronting investors in TikTok in the wake of U.S. lawmakers’ efforts to force its Chinese parent company to sell the app. Andrew Ross Sorkin, *China’s Blockbuster Zombies*, N.Y. TIMES, March 16, 2024.

The article proceeds in three parts. Part I surveys major debates in the comparative corporate governance field circa the turn of the twenty-first century, highlighting how the literature was infused with optimism about globalization, and virtually devoid of geopolitical or national security considerations. sketches the trajectory from globalization to weaponized interdependence that characterizes the past decade, with a focus on the “geopolitical chain reaction” underlying US-China de-coupling. It then analyzes the Risk Factors section of Forms 10K over the past two decades to document the heightened perception of material risks to business the current era of geoeconomics has engendered in the U.S. corporate sector. Part III examines how geoeconomics is likely to affect both the legal/policy environment for corporate governance and firm-level governance.

## I. Field of Dreams

At the turn of the twenty-first century, global ideological and potential military conflict had seemingly receded. A market-oriented, rules-based international economic order largely shaped in the interests of the United States and other Western countries prevailed. Globalization was ascendant, and the prospects for expanding international economic cooperation appeared bright.

Scholarship in the fields of comparative corporate governance and internationally oriented securities law reflected the *fin de siecle* aura of *Pax Americana*. To illustrate, in this section I briefly consider three of the most important debates in the field at the time: Issuer Choice, Law and Finance, and Convergence. My point here is emphatically not to criticize this literature, or the scholars who contributed to it. Scholarship naturally draws upon and reflects the world in which it is produced, and it is easy to point out faulty assumptions and analytical blind spots with the benefit of hindsight.<sup>9</sup> I reflect on these debates here simply to highlight the (in hindsight, quite stark) absence of concern for the ways in which global rivalries or political risks could affect global corporate activity and undermine regulatory cooperation among nations.

*A. Issuer Choice:* In the internationally oriented securities law literature in the late 1990s and early 2000s, scholars quarreled over the relative merits of the U.S. mandatory information disclosure regime versus some form of “issuer choice” – the notion that companies issuing securities in the U.S. capital markets should be granted greater freedom in the selection of the governing regulatory regime.<sup>10</sup> Roberta Romano advocated a “market approach” to securities regulation, under which a foreign issuer of securities in the U.S. capital markets would have the ability to select either the regulatory regime of the U.S or its home country. Part of the attraction of this approach, Romano argued, was that it is “more respectful of other nation’s policy decisions.”<sup>11</sup> In her view, “[r]ather than harmonization of national securities regimes, the universal application of the market approach should be the goal of international securities regulation.”<sup>12</sup> Perhaps the most far-reaching of issuer choice proposals was put forward by Stephen Choi and

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<sup>9</sup> Corporate and securities law scholars were hardly the only sophisticated observers to misestimate the impact of globalization, and particularly, the rise of China, on economics and international relations. See, e.g., AARON L. FRIEDBERG, *GETTING CHINA WRONG* (2022).

<sup>10</sup> See, e.g., Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 *YALE L.J.* 2359 (1998); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of U.S. Securities Law*, 17 *Nw J. Int’l L. & Bus.* 207 (1996).

<sup>11</sup> Romano, *supra* note 10, at 2415.

<sup>12</sup> *Id.*

Andrew Guzman. Under their concept of “portable reciprocity,” “[r]ather than requiring that companies adhere to the regime of their home country, companies would be allowed to select the regime of any country of their choosing. To the extent that an issuer disliked the regulations of a particular regime, they could simply choose another country’s regime.”<sup>13</sup> On the other side of the debate, scholars such as Merritt Fox argued that, in comparison to the prevailing U.S. regulatory regime, information disclosures under a regime of issuer choice would be inadequate to protect U.S. investors.<sup>14</sup>

Two related aspects of this debate are revealing from my perspective. The first is how vividly the arguments of issuer choice advocates reflected sanguinity about the prospects for, and benefits of, international cooperation in the promotion of laissez faire capitalism. The capital markets will produce maximum social welfare, the proponents argued, if the content of securities regulation is a matter for capital raising firms themselves to select, as if from a menu. The second striking aspect is how narrowly the issuer choice debate revolved around its proponents’ and detractors’ notions of how to achieve the socially optimal level of investor protection, without regard to other interests that may be implicated by the capital market regulatory regime. Completely absent from the discussion was any notion that (1) the securities markets or stock exchanges could be a locus of geopolitical competition, (2) the U.S. capital markets could potentially be used to fund companies affiliated with, or technologies being developed by, the country’s adversaries, or more generally, (3) national security concerns merited any weight in the analysis of how to regulate foreign issuer access to the U.S capital markets.

*B. Law and Finance:* As the twenty-first century approached, prominent economists began to produce an influential, if highly controversial, body of empirical research known as the “law and finance” literature. Linked to the idea, dating back at least to Weber, that law is essential to economic development, and resting on the dichotomy between common law and civil law systems, this literature purported to demonstrate empirically that important differences in national economic outcomes, such as the size of a country’s stock market or the number of IPOs, are determined by the “quality” of shareholder protections provided by national legal systems.<sup>15</sup> The conclusion that appeared to emerge from the regression analyses was that the common law provides higher quality investor protections than the civil law – particularly the French civil law system – resulting in more dispersed share ownership patterns and larger stock markets in the common law countries. Extending the implications of this research, at least one scholar found evidence that in recent history, countries with common law systems experienced faster economic growth than those belonging to the civil law family.<sup>16</sup>

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<sup>13</sup> Choi & Guzman, *supra* note 10, at 231-2.

<sup>14</sup> See, e.g., Merritt Fox, *The Issuer Choice Debate*, 2 THEORETICAL INQ. L. 563 (2001).

<sup>15</sup> See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008) (summarizing insights from their series of law and finance articles).

<sup>16</sup> Paul Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEGAL STUD. 503 (2001). *But see* CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 17-25 & tbl 1.1 (2008) (critiquing the theoretical underpinnings of the law and finance literature, and providing empirical evidence indicating no systematic correlation between “legal origin” (common law versus civil law) and annual per capita growth rates in the period from 1870-2000).



Many countries facing serious institutional challenges around the turn of the century (e.g., former Eastern bloc states and countries swept up in the Asian financial crisis of 1997-98) turned, either voluntarily or under pressure from international organizations such as the IMF and World Bank, to a standard menu of legal reforms. The items on the menu, emphasizing investor and creditor protections drawn predominantly from the U.S. legal system, were heavily influenced by the law and finance literature. Some countries even revised their corporate law in the hopes of improving their score in the leading indices of investor protection that proliferated in this period, thereby demonstrating their policymakers' commitment to improved corporate governance, and their aspiration to achieve the economic benefits assumed to follow.

Legally empowering shareholders vis-à-vis managers in order to proliferate dispersed share ownership patterns became the magic sauce of Washington Consensus corporate governance reform. The policy role contemplated for national governments in the development of this idealized version of shareholder capitalism was the transplantation of “good law” from abroad in order to facilitate domestic stock market development, boost the number of IPOs, and generate other positive economic outcomes. With its considerable impact on policy, the law and finance literature was a striking natural experiment in the idea of law as politically neutral technology.<sup>17</sup> Implicit in the literature's real-world policy impact was the assumption that legal features of corporate governance infrastructure developed to serve in a particular domestic economic and institutional environment could be exported, and expected to function just as they had in the country of their invention. Harmonization of corporate law through the global export of U.S.-style corporate law could be expected to promote convergence of corporate governance practices, and thus served as a natural complement to the “convergence” literature, discussed next.

*C. Convergence:* The prevailing spirit of globalization was most evident in the “convergence” debate, whose most forceful proponents proclaimed the “End of History” for corporate law.<sup>18</sup> The histrionic title of the essay echoed political scientist Francis Fukuyama's prognostication that ideological debate over systems of political governance had been settled once and for all with the collapse of the Soviet Union and the fall of the Berlin Wall, with liberal democracy emerging as the victor.<sup>19</sup> Writing as corporate law scholars, Henry Hansmann and Reinier Kraakman confidently asserted that “the pressures for further convergence are now rapidly growing,” principally because there was “no longer any serious competitor” to the “shareholder-centered ideology of corporate law among the business, government, and legal elites in the key commercial jurisdictions.”<sup>20</sup> The resulting “ideological hegemony,” fueled by global competitive pressures, would lead to “convergence in most aspects of the law and practice of corporate governance.”<sup>21</sup> One indication of the strength of the authors' conviction is their prediction that Russia “will presumably evolve over time toward shareholdings typical of developed economies...”<sup>22</sup>

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<sup>17</sup> MILHAUPT & PISTOR, *supra* note 16.

<sup>18</sup> Hansmann & Kraakman, *supra* note 1.

<sup>19</sup> FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

<sup>20</sup> Hansman & Kraakman, *supra* note 1 at 439.

<sup>21</sup> *Id.* at 468.

<sup>22</sup> *Id.* at 465. In the ensuing decades, Russia has of course moved in the opposite direction. *See, e.g.,* Curtis J. Milhaupt, *The (Geo)Politics of Controlling Shareholders*, *THEORETICAL INQ. L.* (forthcoming 2024) (outlining steps in the creation of Russia's “klepto-oligarchic” form of controlling shareholder-oriented corporate capitalism in the first two decades of the twenty-first century).

Even corporate governance convergence pessimists, of which there were many,<sup>23</sup> based their skepticism toward the integrating, homogenizing power of global market forces and the ideological supremacy of shareholder capitalism on obstacles rooted in national institutions shaped by history and *domestic* politics, rather than on the effects of geopolitical rivalries or national security concerns. Mark Roe and an Italian coauthor gave geopolitics only a passing mention in an article on the political economy of corporate governance, and then only as it may have affected the politics of labor protection, the focus of the article.<sup>24</sup>

During this period, Jeff Gordon was a lone voice in the field seeking to insert an “international relations wedge in[to] the corporate governance debate.”<sup>25</sup> Gordon’s wedge was a thought experiment rooted in widely shared hopefulness about global convergence and economic integration. Instructively, he pointed to the WTO as emblematic of the quest for multilateral regimes based on “principles of mutuality and reciprocity.” He raised the possibility that convergence on shareholder capitalism (by which he meant the “Anglo-American model of public ownership and strong equity markets,” in which firm-level decisions are subjected to a “neutral, transnational standard of the share price”)<sup>26</sup> would diminish the threat of economic nationalism by minimizing the role of the state in the economy: “As the transnational project becomes more elaborated, the problem of economic nationalism arises at the level of the firm. Shareholder capitalism helps police economic nationalism by reducing the role of the state in economic decisionmaking. . .”<sup>27</sup>

Professor Gordon’s invocation of the WTO in his exploration of the potential for U.S.-style shareholder capitalism to foster economic integration is an apt symbol of the short-lived optimism reflected in this era of corporate governance scholarship. In the ensuing years, the WTO’s effectiveness as a mechanism for resolving trade disputes based on principles of mutuality and reciprocity has severely eroded.<sup>28</sup> So too, shareholder capitalism and its accouterments (stock exchange listings and cross-border acquisitions, to name two of the most important) have come to reflect, not the unifying power of global markets, but the splintering forces of geopolitics. Indeed, in the era of geoeconomics, shareholder capitalists are increasingly forced either to choose sides, for example by splitting their Chinese and U.S. operations,<sup>29</sup> or to straddle the divide awkwardly,

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<sup>23</sup> See, e.g., Lucien Arye Bebachuk & Mark J. Roe, *Path Dependence in Corporate Ownership and Governance*, 52 STANFORD L. REV. 127 (1999).

<sup>24</sup> Mark J. Roe & Massimiliano Vatiello, *Corporate Governance and its Political Economy*, in Gordon & Ringe eds., *supra* note 6, at 56, 77.

<sup>25</sup> Jeffrey N. Gordon, *The International Relations Wedge in the Corporate Convergence Debate*, in, CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 161 (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

<sup>26</sup> *Id.* at 162.

<sup>27</sup> *Id.*

<sup>28</sup> Philip Blenkinsop, *At WTO, Growing Disregard of Trade Rules Shows the World is Fragmenting*, REUTERS, Oct. 2, 2023, <https://www.reuters.com/business/wto-growing-disregard-trade-rules-shows-world-is-fragmenting-2023-10-02/> (noting that the WTO is “teetering on the abyss of irrelevance”).

<sup>29</sup> Juro Osawa & Kate Clark, *Another Major Venture Firm to Separate China Partners Following U.S. Pressure*, THE INFORMATION, Sept. 21, 2023, <https://www.theinformation.com/articles/another-major-venture-firm-to-separate-china-investment-partners-following-u-s-pressure> (reporting on decisions by GGV Capital and Sequoia Capital to separate their Chinese and U.S. operations).

such as in the “one company, two systems” approach of some U.S. companies in their dealings with China.<sup>30</sup>

## II. From Globalization to Weaponized Interdependence

The second decade of the twenty-first century revealed the limited shelf life of the End of History for corporate governance. Today, the unifying forces of global markets have been weakened by stress fractures along every major dimension of the world’s economic infrastructure – trade, investment, data privacy, technology transfer, and cross-border acquisitions.<sup>31</sup> Globalization and the rule structures underpinning it have come under great stress, as a result of the global financial crisis, rising inequality and populism, supply chain disruptions during the pandemic, Russia’s invasion of Ukraine, and China’s challenge to the established international order.

National economies are now far too interlinked for them to be completely “decoupled” from this infrastructure, but the front lines of geopolitics and national security have formed. Globalization has become weaponized interdependence. Of course, weaponized interdependence has been *facilitated* by states’ ability to leverage informational and financial networks of exchange that were formed in the process of globalization.<sup>32</sup>

As momentous as this rapid transformation in global geopolitical and economic relations is proving to be, it should not have been entirely surprising:

Ever since Norman Angell reflected upon the peace-promoting nature of economic interdependence [in his 1910 book, *The Great Illusion*], policy makers and entrepreneurs have developed a much more pronounced interest in the benefits rather than the dark sides of economic cooperation. The risks associated with economic dependence that comes with interdependence has always existed but has been grossly overlooked.<sup>33</sup>

More than any other recent development, China’s rise illustrates both the opportunities promised by Angell’s *Great Illusion* (and a much older version of the argument in Kant’s *Perpetual Peace*),<sup>34</sup> and its challenges. For decades, Western companies and governments acted with the comforting assurance that engagement with China was not just good for business, but that it would

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<sup>30</sup> Jacob Helberg, *Silicon Valley Can’t be Neutral in the U.S.-China Cold War*, FOREIGN POLICY, June 22, 2020, <https://foreignpolicy.com/2020/06/22/zoom-china-us-cold-war-unsafe/>.

<sup>31</sup> See White and Case, *A World of Clubs and Fences: Changing Regulation and the Remaking of Globalization* (March 2023), <https://www.whitecase.com/insight-our-thinking/global-clubsfences>.

<sup>32</sup> Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT’L SECURITY 42 (2019).

<sup>33</sup> Mikael Wigell et al., *Navigating Geoeconomic Risks*, FINNISH INSTITUTION OF INTERNATIONAL AFFAIRS, Report No. 71, November 11 (2022).

<sup>34</sup> IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 157 (1795) (translation by Mary Campbell Smith 2016), <https://www.gutenberg.org/files/50922/50922-h/50922-h.htm> (“The commercial spirit cannot coexist with war, and sooner or later it takes possession of every nation. For all the forces which lie at the command of a state, the power of money is probably the most reliable. Hence states find themselves compelled – not, it is true, exactly from motives of morality – to further the noble ends of peace and to avert war . . .”).

hasten enhanced personal freedom and political empowerment in that country,<sup>35</sup> while drawing China into global (i.e., Western) rule structures. Bill Clinton famously made the case on the eve of the congressional vote on China's WTO accession: "[W]e have a far greater chance of having a positive influence on China's actions if we welcome China into the world community instead of shutting it out."<sup>36</sup> But reality in the ensuing decades has been far more complex.

The dynamics unleashed in the intervening years by China's rise and U.S. responses to it have been aptly described as a "geoeconomic chain reaction."<sup>37</sup> Here, I briefly recount the steps in the chain reaction and the thicket of constraints on the business sector it has engendered on both sides of the Pacific. In recounting this capsule history, it is useful to draw on the concept of "securitization," a term used in international relations theory to describe the transformation of a perceived threat to the state into an existential problem.<sup>38</sup> The transformation, propelled by politicians and other state actors, justifies and enables the use of extraordinary measures beyond ordinary political processes to address the perceived danger.

The first step in the chain reaction was growing skepticism about China's anticipated transition toward a more open society and embrace of the Western international order. China's developmental model circa 1990-2010 – a massive, but gradually reforming state-owned sector coupled with a burgeoning private entrepreneurial class and increasing embeddedness in global markets – plausibly fit the *Great Illusion/Perpetual Peace* narrative. But under the regime of Xi Jinping (2012-?), Chinese "state capitalism," associated with the national interest in economic development, has given way to "party-state capitalism" closely linked to the authoritarian leadership of the Chinese Communist Party (CCP) in all elements of society, and its goal of rejuvenating China's great power status.<sup>39</sup>

In this sense, party-state capitalism is the product of Xi's securitization of Chinese economic success. Economic growth per se is no longer the paramount goal; rather, growth is to be marshalled in service of a paramount objective – China's ascendance to global technological and military superiority under the leadership of the CCP. The Mercator Institute for China Studies, a leading European research institute on China, notes that this represents a new era in which the quest for national security has redefined China's economic growth model.<sup>40</sup> The securitization of the economy has given Chinese state capitalism an increasingly ideological and techno-nationalist

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<sup>35</sup> This assumption was consistent with "modernization theory," which predicts that societies liberalize their political institutions as they become wealthier. Obviously, the "authoritarian resilience" of the Chinese Communist Party, notwithstanding the country's prolonged, high rates of economic growth, poses a major challenge to the theory.

<sup>36</sup> Full Text of Clinton's Speech on China Trade Bill, March 9, 2000, <https://archive.nytimes.com/www.nytimes.com/library/world/asia/030900clinton-china-text.html>. For more detail on the flawed assumptions regarding the impact of China's integration into the global economy, see FRIEDBERG, *supra* note 9; ROBERT D. BLACKWILL & ROBERT D. FONTAINE, *LOST DECADE: THE US PIVOT TO ASIA AND THE RISE OF CHINA POWER* (2024).

<sup>37</sup> Wigell et al., *supra* note 33, at 8.

<sup>38</sup> See, e.g., Richard J. Kilroy, Jr., *Securitization*, in *HANDBOOK OF SECURITY SCIENCE* (Anthony J. Masys ed., 2022).

<sup>39</sup> See, e.g., Margaret M. Pearson et al., *China's Party-State Capitalism and International Backlash: From Interdependence to Insecurity*, 47 *INT'L SECURITY* 135 (2022); Jude Blanchette, *From "China, Inc." to "CCP, Inc.": A New Paradigm for Chinese State Capitalism*, HINRICH FOUNDATION (2021).

<sup>40</sup> "Comprehensive National Security" Unleashed: How Xi's Approach Shapes China's Policies at Home and Abroad, MERICS, Sept. 15, 2022, <https://www.merics.org/en/report/comprehensive-national-security-unleashed-how-xis-approach-shapes-chinas-policies-home-and>.

cast. The business sector – state owned, private, and hybrid – has been taken up as an important mechanism of policy implementation in the name of protecting national security and projecting China’s influence globally.

Two central, related features of Xi’s party state capitalism are the continued blending of state and private economic interests pursuant to “mixed ownership” corporate reforms and a “military-civil fusion strategy.”<sup>41</sup> Mixed ownership is a plan to convert more state-owned enterprises (SOEs) into firms in which the state and private shareholders hold joint equity stakes, while expanding the role of state ownership in private firms. Closely related to mixed ownership reform is the investment by state organs and SOEs in “special management shares” (*teshu guanli gu*) in private companies. These shares carry veto rights over significant transactions, the right to board seats, and editorial/censorship rights with respect to the publishing content of the issuing firm. The military-civil fusion strategy is an effort to exploit the dual-use nature of many advanced technologies such as AI, semiconductors and quantum computing, and thereby “to reinforce the PRC’s ability to build the country into an economic, technological, and military superpower by fusing the country’s military and civilian industrial and S&T [science and technology] resources.”<sup>42</sup>

The second step in the geoeconomic chain reaction was growing counter-securitization of the “China Risk” by Western governments, as China’s rising economic strength and technological prowess has come to be perceived as a challenge to the existing global order rather than a harbinger of China’s embrace of its tenets. This movement has been led by the United States, but has increasingly, if reluctantly in some cases, been joined by the UK and European states, as well as Japan and South Korea.<sup>43</sup> Counter-securitization began in the Trump Administration and has continued under the Biden Administration, leading to the creation of a thicket of regulations directed at curtailing China’s technological and financial links with the United States and its allies.

The U.S. has long relied on the Committee on Foreign Investment in the United States (CFIUS) to screen inbound foreign investment for national security risks. However, the scale and intensity of CFIUS review increased significantly following passage of the Foreign Investment Risk Review Modernization Act of 2018.<sup>44</sup> The Trump Administration made active use of CFIUS’s expanded power, blocking investments and mandating divestment by Chinese firms in industries deemed essential to national competitiveness and national security.<sup>45</sup> Before 2012, only one

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<sup>41</sup> See, e.g., Curtis J. Milhaupt, *Party-State Inc. – Chinese State Capitalism 2.0*, in OXFORD HANDBOOK OF CORPORATE GOVERNANCE (Jeffrey Gordon & Georg Ringe eds., 2d ed., forthcoming).

<sup>42</sup> *China’s Evolving Conception of Civil-Military Collaboration*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, August 2, 2019, <https://www.csis.org/blogs/trustee-china-hand/chinas-evolving-conception-civil-military-collaboration>.

<sup>43</sup> See, e.g., Andrew Higgins & Christopher F. Schuetze, *Suddenly, Chinese Spies Seem to be Popping Up Everywhere*, N.Y. TIMES, April 27, 2024 (quoting an expert as describing Europe as having “lost patience with China” and noting that David Cameron, who as British prime minister sought close relations with China, now says that China has become “an epoch-defining challenge”).

<sup>44</sup> Subtitle A of Title XVII of Public Law 115-232, 132 Stat. 2173. FIRMMMA strengthened the Committee’s authority to review and potentially block a far wider range of transactions, including those involving designated non-controlling investments in U.S. entities and certain real estate transactions involving foreign persons. The law took effect in 2020.

<sup>45</sup> See Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation Limited, 82 Fed. Reg. 43665 (Sept. 13, 2017) (blocking a Chinese venture capital firm from acquiring a U.S. semiconductor company); Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information

transaction had been blocked by the president.<sup>46</sup> Since then, five transactions have been blocked and almost 400 transactions have been withdrawn after CFIUS commenced an investigation.<sup>47</sup> The Biden Administration continued to build on Trump Administration policies. The number of annual CFIUS investigations increased nearly four-fold between 2012 and 2022.<sup>48</sup> A Biden executive order to elucidate the factors that CFIUS considers when reviewing covered transactions suggests this trend is likely to continue.<sup>49</sup> One indication of the possible impact of increased CFIUS scrutiny is decreased investment from China, which fell to a 17-year low in 2023.<sup>50</sup>

In addition to greater scrutiny of Chinese inbound investment, the U.S. government has also begun to restrict outbound investment to China (a policy dubbed “reverse CFIUS”). The Trump Administration made its first foray into such restrictions by issuing an executive order prohibiting U.S. persons from engaging in any transaction in publicly traded securities of a “Communist Chinese Military Company.”<sup>51</sup> In response to President Trump’s executive order, the New York Stock Exchange delisted shares of China Mobile, China Unicom, and China Telecom.<sup>52</sup> Biden expanded the number of firms on the list by including subsidiaries and affiliates of other major Chinese state-owned enterprises.<sup>53</sup> In 2023, the Biden Administration issued an order targeting outbound U.S. investment in Chinese technology companies.<sup>54</sup> The order requires review

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Technology Co., Ltd., 85 Fed. Reg. 13719 (Mar. 6, 2020) (ordering the unwinding of a Chinese hospitality technology company’s 2018 acquisition of a Maryland-based hotel operations software company); Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297 (Aug. 14, 2020) (ordering the unwinding of a Chinese internet company’s \$1 billion acquisition of a lip-syncing videos app, which later merged to become TikTok). In addition to these three transactions involving China-based companies, President Trump also blocked a transaction by a Singaporean company attempting to acquire a U.S. chip maker. *See* Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11631 (Mar. 12, 2018).

<sup>46</sup> *See* Order on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated (Feb. 1, 1990), <https://www.presidency.ucsb.edu/documents/order-the-china-national-aero-technology-import-and-export-corporation-divestiture-mamco>.

<sup>47</sup> *See* COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 21 (2022).

<sup>48</sup> *Compare* COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 3 (2012) (45 CFIUS investigations in 2012), *with* COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 21 (2022) (162 investigations in 2022).

<sup>49</sup> *See* Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, Exec. Order 14,083, 87 Fed. Reg. 57369 (Sept. 15, 2022).

<sup>50</sup> *See* Thomas Hale, *Chinese Deal Activity in U.S. Slumps to Lowest Level in 17 Years*, FIN. TIMES (Aug. 3, 2023), <https://www.ft.com/content/42db9ff5-1589-416e-8337-601772af44c4>.

<sup>51</sup> Addressing the Threat from Securities Investments that Finance Chinese Military Companies, Exec. Order 13,959, 85 Fed. Reg. 73185 (Nov. 12, 2020). The list includes major Chinese technology firms such as Huawei and Hikvision, as well as prominent state-owned enterprises such as China Mobile and China Railway Construction Company.

<sup>52</sup> *See* Chong Koh Ping & Alexander Osipovich, *NYSE to Delist Chinese Telecom Carriers After Rejecting Appeals*, WALL ST. J. (May 7, 2021), <https://www.wsj.com/articles/nyse-to-delist-chinese-telecoms-carriers-after-rejecting-appeals-11620394719>.

<sup>53</sup> Addressing the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China, Exec. Order No. 14,032, 86 Fed. Reg. 30145 (June 3, 2021) (amending Donald Trump’s Exec. Order No. 13,959, 85 Fed. Reg. 73185 (Nov. 12, 2020)).

<sup>54</sup> *See* Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, Exec. Order 14,105, 88 Fed. Reg. 54867 (Aug. 9, 2023) (targeting outbound investments in cutting-edge technologies such as “semiconductors and microelectronics, quantum information technologies, and artificial intelligence” to China, Hong Kong, and Macau); *see also* Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern 88 Fed. Reg. 54961 (Aug. 14, 2023) (providing advance notice of proposed rulemaking).

of a wide range of outbound investments related to semiconductors and microelectronics, quantum information technologies, and artificial intelligence.<sup>55</sup>

Chinese companies listed on U.S. stock exchanges have also been targeted. In 2020, Congress enacted the Holding Foreign Companies Accountable Act (HFCAA), which requires the delisting of companies that fail to comply with mandatory audit inspections by the Public Company Accounting Oversight Board.<sup>56</sup> According to the Congressional Record, the HFCAA was “designed to prevent companies based in China and certain other jurisdictions from taking advantage of the deep and liquid [U.S.] capital markets while avoiding the scrutiny that comes with inspection of their financial statement audits.”<sup>57</sup> One Congressman declared the HFCAA to be part of a concerted effort “to fight against communism and the global threat the Chinese Government poses.”<sup>58</sup>

The U.S. has also taken steps to cut off China’s access to advanced technologies through sanctions and export controls.<sup>59</sup> The Trump Administration focused on telecom equipment maker Huawei. The Commerce Department’s Bureau of Industry and Security (BIS) placed Huawei and its affiliates on the Entity List, a designation of foreign persons subject to specific license requirements for export, reexport or within-foreign country transfers of specified items.<sup>60</sup> The Biden administration built on these restrictions in a more systematic way. In 2022, BIS amended the Export Administration Regulations to tighten export restrictions on advanced computing semiconductors, semiconductor manufacturing equipment, and supercomputing items to China.<sup>61</sup> Both administrations used targeted sanctions and export blacklists to curb Chinese acquisition of U.S. technologies. As of April 2024, there were 660 unique Chinese entities on the Commerce Department’s Entity List (24% of the total number).<sup>62</sup> In addition, there were 106 unique Chinese

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<sup>55</sup> 88 Fed. Reg. 54961, 54963 (Aug. 14, 2023).

<sup>56</sup> Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, 134 Stat. 1063 (2020) (codified at 15 U.S.C. §§ 7214, 7214a). The HFCAA was amended during the Biden administration to shorten the period of noncompliance triggering the trading prohibition from three years to two. *See Consolidated Appropriations Act of 2023*, Pub. L. No. 117-328 § 301, 136 Stat. 4459, 5536 (2022).

<sup>57</sup> 166 CONG. REC. H6033 (daily ed. Dec. 2, 2020) (statement of Rep. Anthony Gonzalez).

<sup>58</sup> 166 CONG. REC. H6033 (daily ed. Dec. 2, 2020) (statement of Rep. Anthony Gonzalez). As one member of the House put it: “Gone are the days when we can sit idly by and let Chinese firms, many with strong ties to the Chinese Communist Party, participate in our markets at the expense of protection for everyday investors . . . American savers are unwittingly funding efforts by Chinese SOEs to usurp America’s global supremacy and compromise U.S. national security.” 166 CONG. REC. H6034 (daily ed. Dec. 2, 2020) (statement of Rep. Andy Barr).

<sup>59</sup> *See generally* Emily Kilcrease & Michael Frazer, *Sanctions by the Numbers: SDN, CMIC, and Entity List Designations on China* (Mar. 2, 2023), <https://www.cnas.org/publications/reports/sanctions-by-the-numbers-sdn-cmic-and-entity-list-designations-on-china> (summarizing the growth and distribution of China-related designations on various U.S. sanctions lists).

<sup>60</sup> *See* Addition of Entities to the Entity List, 84 Fed. Reg. 22961 (May 21, 2019) (adding Huawei and 68 non-U.S. affiliates to the Entity List); Addition of Certain Entities to the Entity List and Revision of Entries on the Entity List, 84 Fed. Reg. 43493 (Aug. 19, 2019) (adding an additional 46 non-U.S. Huawei affiliates to the Entity List).

<sup>61</sup> Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use, 87 Fed. Reg. 62186 (Oct. 13, 2022). A year later, BIS revised these rules to close loopholes in the program. Export Controls on Semiconductor Manufacturing Items, 88 Fed. Reg. 73424 (Oct. 25, 2023).

<sup>62</sup> *See* Entity List, 15 C.F.R. § 744, Supplement No. 4. A year later, BIS revised these rules to close loopholes in the program. *See* Unverified List, 15 C.F.R. § 744, Supplement No. 6. Parties on the Unverified List are ineligible to obtain items subject to Export Administration Regulations by means of a license exception.

entities on the Commerce Department's Unverified List (over 55% of the total).<sup>63</sup> All 70 entities on the Commerce Department's Military End-User List as of that date were Chinese entities.<sup>64</sup>

The U.S. has also taken aim at supply chains. The Biden Administration launched a policy to strengthen supply chains, featuring the creation of a Council on Supply Chain Resilience co-chaired by the National Security Advisor and National Economic Advisor.<sup>65</sup> The Uyghur Forced Labor Prevention Act (UFLPA), enacted in 2022, targets both reliance on Chinese supply chains and human rights abuses. It bans the import of products made wholly or partially in Xinjiang unless U.S. Customs and Border Protection (CBP) certifies that the products are not made with forced labor.<sup>66</sup> Since the law took effect, CBP has detained over 8,000 shipments valued at over \$3 billion.<sup>67</sup> The law has wide ramifications, as many products produced in Xinjiang find their way into supply chains in the manufacturing, agriculture, apparel, energy, healthcare, and chemicals sectors.<sup>68</sup>

The third step in the geoeconomic chain reaction is a tit-for-tat strategy of sanctions and countersanctions employed by China. Since 2020, China has implemented sanctions against U.S. persons by denying entry into the country, freezing assets, and prohibiting PRC persons from dealing with sanctioned persons.<sup>69</sup> To strengthen its sanctions regime and retaliate against Western sanctions, in 2021 China adopted a counter-sanctions law<sup>70</sup> to allow the Chinese government and private citizens to take countermeasures against “discriminatory restrictive measures” and a blocking statute<sup>71</sup> to prevent compliance with specifically designated foreign sanctions.

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<sup>63</sup> See Unverified List, 15 C.F.R. § 744, Supplement No. 6. Parties on the Unverified List are ineligible to obtain items subject to Export Administration Regulations by means of a license exception.

<sup>64</sup> See ‘Military End-User’ (MEU) List, 15 C.F.R. § 744, Supplement No. 7. Parties on the Military End User List are prohibited from receiving items described in specific sections of the Export Administration Regulations unless the exporter secures a license.

<sup>65</sup> Fact Sheet: President Biden Announces New Actions to Strengthen America's Supply Chains, Lower Costs for Families and Secure Key Sectors, Nov. 27, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/11/27/fact-sheet-president-biden-announces-new-actions-to-strengthen-americas-supply-chains-lower-costs-for-families-and-secure-key-sectors/>.

<sup>66</sup> Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021).

<sup>67</sup> See *Uyghur Forced Labor Prevention Act Statistics*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics#:~:text=The%20Uyghur%20Forced%20Labor%20Prevention,produced%20by%20certain%20entities%2C%20is> (last updated Apr. 12, 2024).

<sup>68</sup> See Marti Flacks & Madeleine Songy, *The Uyghur Forced Labor Prevent Act Goes into Effect*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (June 27, 2022), <https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect>.

<sup>69</sup> Press Release, Ministry of Foreign Affairs, Foreign Ministry Spokesperson Announces Sanctions on Relevant US and Canadian Individuals and Entity (Mar. 27, 2021), [https://www.mfa.gov.cn/eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/202103/t20210327\\_9170817.html](https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/202103/t20210327_9170817.html).

<sup>70</sup> Zhonghua Renmin Gongheguo Fan Waiguo Zhicai Fa [中华人民共和国反外国制裁法] (Anti-Foreign Sanctions Law of the People's Republic of China) (promulgated by the Standing Comm. Nat'l People's Cong. June 10, 2021, effective June 10, 2021) [https://www.gov.cn/xinwen/2021-06/11/content\\_5616935.htm](https://www.gov.cn/xinwen/2021-06/11/content_5616935.htm).

<sup>71</sup> Zu Duan Waiguo Falü Yu Cuoshi Budang Yuwai Shiyong Banfa [阻断外国法律与措施不当域外适用办法] (Measures to Block the Improper Extraterritorial Application of Foreign Laws and Measures) (promulgated by the Ministry of Com., Jan. 9, 2021, effective Jan. 9, 2021), <http://www.mofcom.gov.cn/article/b/c/202101/20210103029710.shtml>.



China has also ratcheted up efforts to control the export of key technologies and materials. In 2019, China’s Ministry of Commerce announced an “unreliable entity list” under which non-Chinese entities that cut off supply to Chinese companies may be subject to government action.<sup>72</sup> Because many of the mechanisms for being named to the list, removed from the list, and enforcement remain ill-defined and unavailable to the public, the potential impact of the regulation is difficult to gauge. However, it has been used to place two U.S. defense companies—Lockheed Martin and Raytheon Missiles & Defense (a subsidiary of Raytheon Technologies)—on the list for supplying arms to Taiwan.<sup>73</sup> In 2023, China updated its Catalog of Prohibited and Restricted Technologies for Export.<sup>74</sup> Export controls have been placed on crucial raw materials, including gallium, germanium, and graphite, that may adversely impact U.S. businesses and their supply chains.<sup>75</sup>

As the geoeconomic chain reaction continues, companies may increasingly find themselves caught between diametrically opposing U.S. and Chinese rules. For example, the above-mentioned UFLPA creates a rebuttable presumption that imports produced in Xinjiang are prohibited because they were produced with forced labor. The presumption can be rebutted through supply chain tracing demonstrating to CBP by “clear and convincing evidence” that forced labor was not used anywhere in the production process. Yet as noted, China’s Counter-Sanctions Law (enacted in the wake of the UFLPA) prohibits compliance with U.S. sanctions, and China’s suite of data protection statutes would prohibit cross-border transfers of information produced in a supply chain audit. In many cases, this will make it virtually impossible for the U.S. importer to undertake the due diligence in China necessary to provide the certification.<sup>76</sup>

The impact of this chain reaction on corporate perceptions of the risk environment is neatly reflected in this (heavily edited) passage from the 2024 Annual Report on Form 10-K of MK Instruments Inc., whose technologies are used in semiconductor manufacturing, electronics, and specialty industrial applications:

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<sup>72</sup> Zhongguo Jiang Jianli Bu Kekao Shiti Qingdan Zhidu [中国将建立不可靠实体清单制度] (China Will Establish an Unreliable Entity List System) (promulgated by the Ministry of Com., May 31, 2019), <http://www.mofcom.gov.cn/article/i/jyj/e/201905/20190502868927.shtml>.

<sup>73</sup> See Bu Kekao Shiti Qingdan gongzuo Jizhi Guanyu Jiang Luoke Xi De Mading Gongsi, Leishen Daodan Yu Fangu Gongsi Lieru Bu Kekao Shiti Qingdan de Gonggao [不可靠实体清单工作机制关于将洛克希德·马丁公司、雷神导弹与防务公司列入不可靠实体清单的公告] (Announcement of the Unreliable Entity List Working Mechanism on Adding Lockheed Martin and Raytheon Missiles and Defense to the Unreliable Entity List) (promulgated by the Ministry of Com., Feb. 16, 2023, effective Feb. 16, 2023), <http://www.mofcom.gov.cn/article/zwgk/gkzcfb/202302/20230203391289.shtml>.

<sup>74</sup> <http://www.mofcom.gov.cn/zfxxgk/article/gkml/202312/20231203462079.shtml>

<sup>75</sup> Guanyu Dui Jia, Zhe Xiangguan Wuxiang Shishi Chukou Guanzhi de Gonggao [关于对镓、锗相关物项实施出口管制的公告] (Announcement on the Implementation of Export Controls on Gallium and Germanium Related Exports) (promulgated by the Ministry of Com., July 3, 2023, effective Aug. 1, 2023), <http://www.mofcom.gov.cn/article/zwgk/gkzcfb/202307/20230703419666.shtml>.

<sup>76</sup> Interview with Ashley Walter, Partner-in-Charge, ESG, Orrick, February 20, 2024. See also Bath & Body Works, Annual Report on Form 10-K, March 17, 2023, at 12 (“Although none of our Chinese suppliers are located in [Xinjiang], we do not currently have full visibility to the entirety of each supplier's separate sub-tier supply chains to be able to ensure that the raw materials or other inputs they use to manufacture their goods are not produced in [Xinjiang].”).

Trade tensions between the United States and China have increased substantially in recent years, resulting in significant trade restrictions that have significantly harmed our business. These regulations include tariff increases, additional sanctions against specified entities, and the broadening of restrictions and license requirements for specified end-uses of those of our products that are subject to these restrictions, including restrictions surrounding specific product groups, applications and/or end uses. The U.S. government concerns relate to, among other things, national security concerns and the concept of “military/civil fusion” in China, a national strategy in which military technologies are developed or produced alongside commercial, non-military items, often by private or quasi-government companies. In addition to targeted comprehensive sanctions against specific firms, in recent years, “Entity List” designations and “military end-user” controls have been significantly modified, as were some rules relating to items produced outside the United States that incorporate more than de minimis levels of U.S. controlled content or derived from ... U.S. origin technologies. ... The extraordinary complexity of [the Commerce Department’s Bureau of Industry and Security (BIS) regulations restricting end-uses related to semiconductors, supercomputing, etc.], combined with the likelihood of further amendments from BIS, significantly increases our risk of non-compliance, which could result in fines and other penalties, and could change how these rules impact us. ...

Since the beginning of 2019, regulatory changes have been implemented at an extraordinarily high pace, which increases the resources needed to monitor and comply with regulations, while heightening the risk of non-compliance. ...

Increased restrictions on China may lead to regulatory retaliation by the Chinese government and further escalate geopolitical tensions between China and Taiwan. ... <sup>77</sup>

Corporate perceptions of geopolitical risk are now widespread and acute. Geopolitical tensions are perceived by corporate respondents to a recent Oxford Economics survey as the main downside risk to the global economy.<sup>78</sup> A 2023 KPMG survey of CEOs ranked “geopolitics and political uncertainty” as the largest risks to economic growth over the next three years, up from seventh in 2022.<sup>79</sup> A survey of the global financial services industry listed geopolitical risk as the top risk for 2024, with 81 percent of respondents listing it as the top risk, up from 68 percent the previous year.<sup>80</sup> The vast majority of companies surveyed by Oxford Analytica in 2023 expected intensified trends toward economic nationalism and deglobalization, as well as increased

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<sup>77</sup> MK Instruments Inc. Annual Report on Form 10-K, Feb. 27, 2024, at 28-29.

<sup>78</sup> *Research Briefing--Global: Businesses Now See Geopolitical Tensions as Key Global Threat*, OXFORD ECONOMICS, Aug. 1, 2023 (on file with author). In the most recent World Economic Forum survey, geoeconomic confrontation ranked as the third most severe short-term global risk. WORLD ECONOMIC FORUM, THE GLOBAL RISKS REPORT 11 (2023).

<sup>79</sup> Erik Schatzker, *Nothing Worries CEOs Right Now as Much as Geopolitics*, BLOOMBERG, Nov. 1, 2023, <https://www.bloomberg.com/news/articles/2023-11-02/tumultuous-times-for-global-politics-scare-wall-street-business-leaders>.

<sup>80</sup> DTCC Press Release, *With 2024 In Sight, Geopolitical Risk and Inflation Dominate as Top Risks to Global Financial Services Industry*, Dec. 8, 2023, <https://www.dtcc.com/news/2023/december/06/2024-geopolitical-risk-and-inflation-dominate-as-top-risks-to-the-financial-services-industry>.

geostrategic competition between world powers.<sup>81</sup> Chief Audit Executives across Europe ranked macroeconomic and geopolitical uncertainty as the third biggest risk to their organizations, its highest position since the survey began in 2018, with a third of the respondents ranking it first.<sup>82</sup>

As a means of gauging perceptions of how various dimensions of geopolitical risk potentially affect corporate activity over time, I examined the Risk Factors section of annual reports on Form 10-K of all companies in the SEC’s EDGAR database from 2003 to 2023.<sup>83</sup> Because the materiality standard for disclosure of such risks required under the federal securities laws has not changed in this period,<sup>84</sup> the number of mentions of such risks in Forms 10-K should be a robust indicator of changes in the evaluation of the magnitude of such risks by publicly listed U.S. corporations. Figures 1-1 through 1-6 show the results and indicate a steep recent rise in the evaluation of several manifestations of geopolitical risk by U.S. companies in this period, including supply chain vulnerability and China-Taiwan tensions.

[insert Figures 1-1 through 1-6]

### III. Geoeconomics and Corporate Governance

Multinational firms are of course not simply passive “takers” of geopolitical risk. They also have significant agency as geopolitical actors.<sup>85</sup> As the epigraph to this article suggests, the transition from globalization to weaponized interdependence has placed private, profit-oriented commercial entities at the center of geopolitical rivalries and national security concerns to an extent that is arguably unparalleled in history. The principal reason may be summed up in a single word – technology: “Technology is the key enabler of political, military, and economic power.”<sup>86</sup> The U.S. government is increasingly reliant on private-sector innovation for the development of dual-use, civil-military technologies<sup>87</sup> such as AI, advanced materials, quantum technologies, robotics,

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<sup>81</sup> *How are Global Businesses Managing Today’s Political Risks*, OXFORD ANALYTICA, 15 (2023) (88% expected the trend toward economic nationalism and deglobalization to become stronger; 78% expected the trend toward geostrategic competition between world powers to strengthen).

<sup>82</sup> *Risk in Focus: Hot Topics for Internal Auditors*, EUROPEAN CONFEDERATION OF INSTITUTES OF INTERNAL AUDITING 7, 11 (2024), <https://www.eciia.eu/2023/09/risk-in-focus-2024-hot-topic-for-internal-auditors/>.

<sup>83</sup> The searches were conducted on EDGAR via the SEC’s Application Programming Interfaces. See <https://sec-api.io/>.

<sup>84</sup> The standard of materiality for disclosure purposes under the federal securities law was set by the U.S. Supreme Court decades ago in *TSC Industries v. Northway*, 426 U.S. 438 (1976) (holding that a fact is material if it would be “viewed by a reasonable investor as having significantly altered the ‘total mix’ of information available;” information a reasonable investor “would consider important”).

<sup>85</sup> For an early, influential exploration of the subject, see Joseph S. Nye Jr, *Multinationals: The Game and the Rules: Multinational Corporations in World Politics*, FOREIGN AFFAIRS (Oct. 1974), <https://www.foreignaffairs.com/articles/1974-10-01/multinationals-game-and-rules-multinational-corporations-world-politics>.

<sup>86</sup> Hannah Kelley, *Dual-Use Technology and U.S. Export Controls*, CENTER FOR A NEW AMERICAN SECURITY, June 15, 2023, <https://www.cnas.org/publications/reports/dual-use-technology-and-u-s-export-controls>. See also Philip Breedlove & Margaret E. Kosal, *Emerging Technologies and National Security: Russia, NATO, & The European Theater*, in GOVERNANCE IN AN EMERGING NEW WORLD: EMERGING TECHNOLOGY AND AMERICA’S NATIONAL SECURITY, HOOVER WINTER SERIES Issue 319, 2019 at 10. (“[T]he nexus between technology and military affairs . . . bears directly on the propensity for conflict and outcomes of war, as well as the efficacy of security cooperation and coercive statecraft.”).

<sup>87</sup> See, e.g., *The Rise in Dual-Use Technologies: A Paradigm Shift*, STARBURST, Oct. 23, 2023, <https://starburst.aero/news/the-rise-in-dual-use-technologies/>.

cryptographic equipment, lasers – the Commerce Department’s list goes on at great length.<sup>88</sup> At the same time, as international relations scholars have noted, “[g]lobalization has transformed the liberal order, by moving the action away from multilateral interstate negotiations toward networks of private actors.”<sup>89</sup> As a result, corporations well outside the proverbial “military-industrial complex” find themselves in a role to which they are unaccustomed: indispensable partners of government in the quest for geostrategic advantage.<sup>90</sup>

In this section, I take some tentative steps toward exploring how geoeconomics is affecting both the policy environment in which U.S. corporations are operating and firm-level corporate governance. I begin by exploring parallels and differences in how boards must grapple with geoeconomics at a time when they are facing another major change in the policy ecosystem over the past decade – rising concern for the way corporations respond to environmental, social and governance (ESG) considerations. Next, I examine firm-specific legal risks and governance challenges arising in the era of geoeconomics. Finally, to underscore how dramatically geoeconomics has altered the playing field for global corporate activity, I conclude by revisiting the three broad subjects that dominated turn-of-the-century academic attention discussed above: capital market competition, share ownership, and convergence.

#### A. *The New Policy Ecosystem: ESG + G*

Corporations are playing a more central role in the era of geoeconomics, just as they are being asked to play a more important (if highly controversial) socio-political role in the current era of concern for environmental, social and governance (ESG) issues. In geoeconomics as in ESG, corporations are being called to internalize the externalities of their operations and to partner with, or substitute for, the government in achieving objectives beyond the ordinary commercial remit of the private sector. At the same time, as the previous description of the regulatory byproducts of the geoeconomic chain reaction demonstrates, U.S. corporations are more reliant than ever on the government’s diplomatic and trade relations, military requirements, and national security policy in defining the terms on which they are permitted to engage in profit-seeking activities and investments that were largely left to the market during the heyday of *Pax Americana* and globalization.<sup>91</sup> In important respects, the current era harkens back to a much earlier period in which corporations were formed explicitly to partner with government in the production of public goods, the implementation of government policy, and the projection of state power.<sup>92</sup> Therefore,

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<sup>88</sup> See, e.g., Commerce Control List, Commerce Department, Bureau of Industry and Security, Export Administration Regulations, <https://www.bis.gov/ear> (lengthy list of items subject to export control in ten broad categories further subdivided into five product groups).

<sup>89</sup> Farrell & Newman, *supra* note 32, at 44.

<sup>90</sup> “The private sector is where the talent, ability, and resources are when it comes to next-generation technologies, and this means the government is now a security stakeholder [together with corporations] and not *the* stakeholder.” Klon Kitchen, *Why National Security is a Shared Burden Between the State and the Private Sectors*, THE DISPATCH, March 17, 2022, <https://www.aei.org/op-eds/why-national-security-is-a-shared-burden-between-the-state-and-the-private-sector/> (emphasis in the original).

<sup>91</sup> To the *Wall Street Journal*’s chief economics commentator, this suggests that “America is slouching toward state capitalism, in which government regularly intervenes in business to ensure it serves the national interest.” Greg Ip, *America is Sliding toward Chinese-Style Capitalism*, WALL ST. J., March 21, 2024.

<sup>92</sup> The British and Dutch East India Companies are obvious examples from a much earlier era. Perhaps technological capacity and the depth of global interconnectedness distinguish the current era of geoeconomics from past eras of mercantilism and colonialism, in which corporations were also used to amplify the hard and soft power of the state.

from the perspective of the policy environment for corporate activity, it is useful to consider this the era of ESG + G (for geopolitics or geoeconomics).

In a parallel to the complex cost-benefit considerations for corporations in this period of emphasis on ESG considerations, the government's status as a national security stakeholder creates a complex set of overlapping and conflicting interests with corporate shareholders and senior executives. The national security interests of the government and the profit-oriented interests of shareholders and executives overlap to the extent that complying with national security policy reduces commercial risks and expands market opportunities for the private sector by contributing to the maintenance of peace and a rules-based international economic order. (Whether current U.S. policy strengthens national security and contributes to a more stable world order is obviously a matter of considerable debate, one that is well beyond the scope of analysis here.)<sup>93</sup> There may be also be specific new business opportunities generated by geoeconomics, at least in part due to increased government investment in critical technologies. The ESG parallel is corporate actions taken to mitigate problematic environmental and/or social conditions that threaten the long-term economic outlook for business, as well the emergence of fresh revenue streams focused on sustainability. Yet simultaneously, the interests of the government versus shareholders and executives are in considerable tension, because internalizing national security risks is costly (just as it is often costly in the near term, for example, for firms to reduce their GHG emissions). These costs include restrictions on trade and investment deemed by the government (accurately or otherwise) to pose threats to national security, as well as the costs of compliance with the increasingly complex regulatory regime defining these restrictions.

There are substantive overlaps as well between ESG initiatives and responses to heightened geopolitical tension with China. For example, many companies are seeking to reduce reliance on far-flung supply chains, by moving them closer to home ("nearshoring" or "friendshoring") or by diversifying the supply chain in a "China Plus" strategy. These measures may have an added environmental benefit by reducing the carbon footprint of long-distance transportation and storage. Another example is UFLPA. The statute takes a strong stand against forced labor and promotes human rights-oriented supply chain due diligence consistent with ESG concerns, while simultaneously aiming to apply diplomatic and international pressure on China with respect to its treatment of the Uyghur minority,<sup>94</sup> consistent with the U.S. government's geopolitical strategy of highlighting threats to global governance norms posed by China's authoritarian regime. But nearshoring may also compromise ESG principles, for example if new supply chains are created in countries with poor labor protections or low environmental standards.

Notwithstanding these various parallels and overlapping interests between ESG and geoeconomics, there is an obvious and crucial difference in the respective policy environments associated with these two realms of concern. In contrast to the bitter partisan controversy over climate change and corporate diversity, equity and inclusion programs, there is widespread

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<sup>93</sup> Suffice it to say that while there is significant risk of counterproductivity in technological decoupling from China, policymakers cannot be complacent in the face of the strategic and global governance challenges posed by China today.

<sup>94</sup> Section 3(6) of the UFLPA states that "It is the policy of the United States . . . to address human rights abuses through bilateral diplomatic channels and multilateral institutions to which the United States and the Peoples Republic of China are members and with all of the authorities available to the United States Government, including visa and financial sanctions, export restrictions, and import controls."

bipartisan support in Washington for policies to address the perceived threat to global security and the rules-based international order posed by China. Three striking examples of bipartisanship (particularly during a period of near-complete paralysis in Congress) include the UFLPA (passed 428-1 in the House and 100-0 in the Senate in 2021), the Holding Foreign Companies Accountable Act of 2020<sup>95</sup> (passed unanimously by a voice vote in the House and unanimously in the Senate), and the vote to ban TikTok unless it is sold by its parent company to a non-Chinese buyer (passed initially 352-65 in the House; subsequently 360-58 in the House and 79-18 in the Senate).<sup>96</sup> Striking bipartisan support for U.S. policies to counter China suggests that, in considerable contrast to ESG, there will be no rollback of, or backlash against, geoeconomics in U.S. political or policy circles for the foreseeable future. This suggests, in turn, that U.S. corporations must learn to adapt to a long-term position on the front lines of geopolitics and national security.

### *B. Firm-level Governance Challenges*

Given the speed and magnitude with which the geopolitical chain reaction has progressed, there is reason to doubt that corporations are adequately prepared for the era of geoeconomics. Internal auditors across Europe, for example, reported a huge gap between macroeconomic and geopolitical uncertainty as a risk priority and the amount of time and effort devoted to it.<sup>97</sup> A Center for Strategic and International Studies report concludes that many global companies that thrived on business with China are simply “keeping their heads down” today and hoping for the best in regard to the prospect of a military crisis with or decoupling from China.<sup>98</sup> In this section, I consider how the era of geoeconomics will affect key aspects of the governance of globally active U.S. corporations and assess, with the limited available evidence, how companies are adapting thus far.

*1. Board and Senior Executive Expertise:* The Eurasia Group has argued that in global companies today, the CEO must play the role of Chief Geopolitical Officer.<sup>99</sup> One of the major questions corporations will need to address in the era of geoeconomics is a “make or buy” decision on geopolitical expertise. Companies worldwide are seeking to increase their geopolitical acumen, either by bringing former diplomats, government officials and military professionals onto their boards, or by retaining outside consultants.<sup>100</sup>

Proxy statements for U.S. companies only began to mention qualifications specifically suitable to the assessment of geopolitical risks in a small number of director nominee bios in the

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<sup>95</sup> The HFCAA provides for the de-listing from U.S. stock exchanges of companies (all of which are Chinese-affiliated) whose independent auditors cannot be inspected by the U.S. Public Accounting Oversight Board for two consecutive years. After a single year of non-compliance with the inspection requirement, a company must certify to the SEC that it is not owned or controlled by a foreign government.

<sup>96</sup> Yiwen Lu, *On TikTok, Resignation and Frustration After Potential Ban of App*, N.Y. TIMES (Apr. 24, 2024), <https://www.nytimes.com/2024/04/24/technology/tiktok-ban-bill-frustration.html>.

<sup>97</sup> EUROPEAN CONFEDERATION OF INSTITUTES OF INTERNAL AUDITING, *supra* note 82, at 7, 9.

<sup>98</sup> Michael J. Green & Scott Kennedy, *U.S. Business Leaders Not Ready for Next U.S.-China Crisis*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, May 16, 2022, <https://www.csis.org/analysis/us-business-leaders-not-ready-next-us-china-crisis>.

<sup>99</sup> EURASIA GROUP & KPMG, *THE CEO AS CHIEF GEOPOLITICAL OFFICER* (2019).

<sup>100</sup> Arjun Neil Alim et al., *Companies on the Hunt for Geopolitical Advice as Tensions Rise*, FINANCIAL TIMES, Oct. 16, 2023. (in Japan, some companies have created the role of chief geopolitical risk officer; Mitsubishi has established a global intelligence committee headed by the president).

mid-2010s,<sup>101</sup> and it is still not common. As Figures 2 and 3 indicate, while the number and percentage of independent directors with international experience is significant and increasing steadily, the number of independent directors with experience in government or the military – presumably valuable training ground for skills directly relevant to the oversight of geopolitical risk – is modest and declining.

[insert Figure 2-1, 2-2]

[insert Figure 3-1, 3-2]

2. *Governance of Geopolitical Risk* – A second key question is where within a firm, and by what means, geopolitical risk should be monitored. The first mention of oversight of geopolitical risk in a U.S. proxy statement that I could find appeared in 2010.<sup>102</sup> It is still uncommon for U.S. corporations to disclose whether and where within the firm geopolitical risk is assessed. A search of all public filings from 2018 to March 2024 revealed that only 110 Russell 3000 companies (3.6%) disclosed that one of its corporate governance organs or officers was responsible for oversight of geopolitical risk (excluding cybersecurity).<sup>103</sup> Separately, 24 companies reported that the geopolitical environment is considered in setting executive compensation or in otherwise evaluating senior management. Table 1 indicates the corporate governance organ or officer responsible for geopolitical risk oversight among disclosing companies.

[insert Table 1]

The extremely small number of public companies that have disclosed the corporate organ responsible for oversight of geopolitical risk is cause for concern if it means that over 95% of Russell 3000 companies have not formally assigned assessment of geopolitical risk to an internal organ or officer. A more benign (and perhaps likely) explanation is that many companies have made such an assignment (for example, as part of its enterprise risk management process) or dispersed oversight responsibility among multiple officers and functions, but not publicly disclosed the information.

Table 1 indicates that in most of the disclosing companies, the board, either alone or together with senior management, oversees geopolitical risk. A small number of companies have assigned the task to a specialized risk committee or risk officer. Assigning geopolitical risk oversight to the audit or compliance committee, as a small number of disclosing companies do, seems problematic if it indicates that such oversight is deemed to be “only” a matter of regulatory compliance, rather than a vehicle for whole-of-enterprise assessment of risks and opportunities.

Even where such disclosure is made in a company’s public securities filings, there is no discussion of either the methodologies by which those risks are assessed (for example, using data-

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<sup>101</sup> See, e.g., Talos Petroleum Proxy Statement dated April 10, 2014.

<sup>102</sup> Hawk Corp. 2021 Proxy Statement on Schedule 14A.

<sup>103</sup> ESGAUGE search results of 10-K, DEF14A, governance guidelines, and committee charters for all Russell 3000 companies for the years 2018 through March of 2024 (on file with author). The search included the following terms: geopolitical risk, national security risk, trade war risk, sanctions risk, military conflict risk, supply chain/geopolitical risk, and economic sanctions risk. I excluded companies that factored geopolitical risk into executive compensation decisions.

driven or AI-assisted metrics, scenario planning, or open-source intelligence collection), or the measures by which the risks are managed (for example, insurance, hedging, or diversification of supply). While there is a burgeoning market for the provision of geopolitical advice and/or risk management services to corporations, public disclosures of external services provided to boards of directors relating to geopolitics are still infrequent and thin.<sup>104</sup> The SEC now requires annual disclosure of a company's cybersecurity risk management, strategy, and governance.<sup>105</sup> It is reasonable to ask whether the SEC should also require reporting companies to make comprehensive disclosure of geopolitical risk, management and governance, as it has done specifically with respect to Russia's invasion of Ukraine.<sup>106</sup>

3. *Compliance*: U.S. corporations have had compliance risk regarding their international operations for decades, particularly in the form of the Foreign Corrupt Practices Act (FCPA), an anti-bribery statute dating to the 1970s. But it is now routinely said that “economic sanctions are the new FCPA,”<sup>107</sup> while others have remarked that “export controls are the new sanctions.”<sup>108</sup>

Corporate crime is now inextricably bound up with national security concerns. A senior DOJ official recently noted that over the period from late 2022 to the spring of 2023, roughly two-thirds of the department's major corporate criminal resolutions implicated U.S. national security.<sup>109</sup> Building on the theme, a second DOJ official stated, “Our message should be clear: the tectonic plates of corporate crime have shifted. National security compliance risks are widespread; they are here to stay; and they should be at the top of every company's compliance risk chart.”<sup>110</sup> In a client advisory, law firm Arnold & Porter warned, “Every business decision – from operations to employment, information and communications technologies and services sources, sales, distribution, merger and acquisitions, and more – now runs the risk of being scrutinized by the U.S. government under a powerful national security lens.”<sup>111</sup>

Heightened geopolitical risk to corporate strategy and operations appears to be altering the role of the general counsel in some firms, expanding their role in risk assessment, crisis management and strategic guidance.<sup>112</sup> In a 2023 survey, 40 percent of general counsel expressed

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<sup>104</sup> A rare example is APA Corporation 2024 Schedule 14A, at 5, (the board of directors “invites outside experts and advisors to present on current and future risks and trends that could impact the Company, our industry, or the broader business or geopolitical landscape”).

<sup>105</sup> See *SEC Adopts Rules on Cybersecurity, Risk Management, Strategy and Governance and Incident Disclosure by Public Companies*, July 26, 2023, <https://www.sec.gov/news/press-release/2023-139>

<sup>106</sup> Securities and Exchange Commission, Sample Letter to Companies Regarding Disclosures Related to Russia's Invasion of Ukraine and Related Supply Chain Issues, May 2022, <https://www.sec.gov/rules-regulations/staff-guidance/disclosure-guidance/sample-letter-companies-regarding-disclosures>.

<sup>107</sup> Deborah A. Curtis et al., *The Battle Lines are Drawn: What Industry Should Expect from New National Security-Premised Restrictions*, ARNOLD & PORTER, Sept. 13, 2023, <https://www.arnoldporter.com/en/perspectives/advisories/2023/09/the-battle-lines-are-drawn>.

<sup>108</sup> “Export Controls are the New Sanctions,” and Other Enforcement Trends for 2024, BRACEWELL, Jan. 11, 2024, <https://bracewell.com/insights/export-controls-are-new-sanctions-and-other-enforcement-trends-2024>.

<sup>109</sup> Principal Associate Deputy Attorney General Marshall Miller, Delivers Remarks at the Ethics and Compliance Initiative IMPACT Conference, Jersey City, NJ, May 3, 2023.

<sup>110</sup> Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions, Oct. 4, 2023.

<sup>111</sup> Curtis et al., *supra* note 107.

<sup>112</sup> *How Geopolitical Threats Reshape the Role of General Counsel*, LEGAL.IO (Jan. 26, 2024), <https://www.legal.io/articles/5462021/How-Geopolitical-Threats-Reshape-the-Role-of-General-Counsel>.



concern over geopolitical uncertainty and instability.<sup>113</sup> One respondent framed the general counsel today as a “secretary of state for the CEO,” ready to handle geopolitical crises that emerge unexpectedly.<sup>114</sup>

4. *Supply Chain Management*: Supply chains are where the rubber meets the road at the intersection of commercial activity and geopolitical considerations. As noted previously, the Biden administration has promoted U.S. supply chain resilience as a matter of national security and competitiveness.<sup>115</sup> The CHIPS for America Act sought to reduce reliance on Taiwan as the principal source of semiconductors by promoting U.S. capacity in advanced chip manufacturing. Another part of the strategy is to improve coordination and trust-building on supply chain issues by forming networks among U.S. allies. Treasury Secretary Janet Yellen has recommended moving supply chains to “trusted countries” as a means of maintaining secure market access and lowering risks to the economy.<sup>116</sup> One diplomatic example of this effort is the U.S.-EU Trade and Technology Council, whose mission includes “reduc[ing] dependencies on unreliable sources of strategic supply.”<sup>117</sup>

Reducing supply chain vulnerabilities to China is an unassailable policy objective. But successful friendshoring will be a complex, lengthy process requiring close collaboration between governments and corporations to evaluate and manage each stage of often lengthy supply chains. Operational functionality and strategic goals may not coincide. Moreover, it will require that production be “embedded in a more strongly political orientation on Western values and the corresponding behavioral norms, in order to reshape corporate behavior.”<sup>118</sup> In view of these realities, one commentator suggests that friendshoring “raises the prospect of a new trading bloc, composed of democratic states pursuing economic and regulatory convergence.”<sup>119</sup> As other commentators note,

The challenge will be encouraging multinational firms that seek to maintain their global character – and the returns that come with it – to undertake potentially costly changes while carefully navigating thorny geopolitical waters of cooperation and competition ... In a more turbulent world where disruptions could jeopardize the livelihood of billions, the opportunity costs of not rewiring supply chains to make them more resilient are high.<sup>120</sup>

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<sup>113</sup> FTI CONSULTING & RELATIVITY, *Global Legal Departments Alleviate and Respond to Critical Pressure Points*, THE GENERAL COUNSEL REPORT 20236 (2023).

<sup>114</sup> *Id.*

<sup>115</sup> See *Fact Sheet: President Biden Announces New Actions to Strengthen America’s Supply Chains, Lower Costs for Families, and Secure Key Sectors*, Nov. 27, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/11/27/fact-sheet-president-biden-announces-new-actions-to-strengthen-americas-supply-chains-lower-costs-for-families-and-secure-key-sectors/>. See also Sujai Shivakumar et al., *The Great Rewiring: How Global Supply Chains are Reacting to Today’s Geopolitics*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, July 25, 2022.

<sup>116</sup> Gunther Maihold, *A New Geopolitics of Supply Chains: The Rise of Friend-Shoring*, GERMAN INSTITUTE FOR INTERNATIONAL AND SECURITY AFFAIRS, SWP COMMENT No. 45, July 2022.

<sup>117</sup> Quoted in Shivakumar, *supra* note 115.

<sup>118</sup> Maihold, *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> Shivakumar, *supra* note 115.

5. *Litigation Risk*: The heightened compliance risks and supply chain rewiring challenges just discussed – and amply illustrated in the steeply rising Form 10-K risk factor counts reported in Section II of the article – implicate two major sources of litigation risk: the Delaware judiciary’s well-known *Caremark* doctrine on a board’s duty to monitor, and class action securities litigation for materially misleading statements and omissions in corporate communications.

a. *Caremark Duties*:

Under tightly circumscribed conditions, directors (and, following recent judicial decisions, officers) may be held personally liable for failure to monitor certain risks that cause damage to their company. In 1996, the Delaware Chancery Court’s *In re Caremark International* decision held that directors’ fiduciary duties include an obligation to implement and maintain an information and reporting system to detect and respond to wrongdoing or other serious legal risks facing the company. However, the bar for a finding of liability was set extremely high – essentially, directors must do nothing in the face of red flags indicating that the company is in legal jeopardy, such that bad faith can be inferred from their “utter failure” to act. This demanding standard resulted in the routine dismissal of *Caremark* claims brought by shareholder-plaintiffs in the two decades after the decision.

Recent cases, however, have suggested that the Delaware judiciary is softening application of the standard somewhat, particularly with respect to a board’s failure to monitor “mission critical” risks facing the company, where the corporation’s reporting system did not ensure that the board of directors (as opposed to officers or compliance personnel) would be apprised of those risks.<sup>121</sup> As compliance with national security regulations becomes an increasingly central task for many corporations, boards of directors will need to mitigate potential *Caremark* liability by establishing and maintaining reporting systems to identify red and yellow flags indicating lapses in national security compliance. Moreover, as just noted, recent case law indicates that companies will need to establish systems to ensure that information about such risks reaches the board rather than simply officer-level compliance personnel – with obvious implications for the assignment of oversight of national security risk within the corporation, a subject addressed above.

However, a current state of uncertainty about the contours of *Caremark* liability in the Delaware Chancery Court make it impossible to know the definitive scope of national security-related risks for which directors and officers may face liability. There is an ongoing debate within the Court of Chancery over whether *Caremark* liability is confined to losses caused by noncompliance with positive law (so-called *Massey* claims) of the sort discussed in the previous paragraph, or whether it can also be premised on a board’s or officer’s failure to oversee business risks.<sup>122</sup> In *SolarWinds*,<sup>123</sup> Vice Chancellor Sam Glasscock III noted that while no decision applying the *Caremark* doctrine to date has found directors liable solely for failure to oversee business risks, it is possible to imagine an “extreme hypothetical” leading to liability.<sup>124</sup> By

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<sup>121</sup> See, e.g., *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

<sup>122</sup> See, e.g., *In re Goldman Sachs Grp., Inc. S’holder Litig.* 2011 WL 4826104 at \*21 (Del. Ch. Oct. 21, 2011) (“As a preliminary matter, this Court has not definitively stated whether a board’s *Caremark* duties include a duty to monitor business risk.”).

<sup>123</sup> *Construction Industry Laborers Pension Fund on behalf of SolarWinds Corporation, et al., v. Mike Bingle, et al.*, 2022 WL 4102492 (Del. Ch. Sept. 6, 2022) (*SolarWinds*).

<sup>124</sup> *Id.* at \*7.

contrast, in *In re ProAssurance Corp. Shareholder Derivative Litigation*, Vice Chancellor Lori Will drew a distinction between unlawful conduct and business risk, remarking, “[s]o long as the conduct is lawful, directors have broad discretion to advance the corporation’s interests as they see fit.”<sup>125</sup>

Thus, the potential for *Caremark* liability plainly exists with respect to corporate losses incurred due to a board’s or an officer’s failure to monitor compliance with economic sanctions, export controls, and related national security regulations, since they constitute violations of positive law. There is nothing particularly novel about the application of *Caremark* to this facet of geoeconomics. But even assuming compliance with the law, interesting questions remain about potential *Caremark* liability for geopolitically induced corporate trauma, for example, losses stemming from supply chain vulnerabilities or poor estimation of geographical/political risk factors in capital allocation decisions. These are hardly “everyday business problems” of the sort rejected in a recent *Caremark* decision of the Delaware Chancery Court.<sup>126</sup>

*b. Securities Disclosures:*

A second form of heightened litigation risk in the era of geoeconomics arises out of securities disclosures. As noted above, under the federal securities laws, “material” risks to a corporation’s business and operations must be publicly disclosed for the protection of investors. As the magnitude and range of risks related to geopolitical tensions and events have steadily increased, it is likely that the specter of shareholder class action litigation for failure to disclose a material geopolitical risk has also grown.<sup>127</sup> At the same time, however, the era of geoeconomics poses challenges for companies in determining the risks that must be disclosed. The difficulty of assessing and thus disclosing such risks are perhaps most prominent in supply chain tracing. But geopolitical risks lurking in the background of joint ventures and other corporate transactions may also materialize in unexpected ways, potentially giving rise to securities fraud claims.<sup>128</sup>

*6. Investor/Public and Government Relations:* Geoeconomics is also confronting boards with new investor and public relations challenges, such as criticism of continued investment or operations in China. In 2023, for example, the Coalition for a Prosperous America released a “case study for Congress” entitled “How Wall Street Funds the CCP [Chinese Communist Party] & PLA [Peoples Liberation Army] with U.S. Investor Capital.”<sup>129</sup> The report identifies numerous Chinese

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<sup>125</sup> C.A. No. 2022-0034-LWW (Del. Ch. Oct. 22, 2023). *See also Segway Inc. v. Cai*, C.A. No. 2022-1100-LWW (Del. Ch. Dec. 14, 2023) (V.C. Will rejecting theory that “everyday business problems” can constitute a breach of fiduciary duty in the oversight context).

<sup>126</sup> *Id.*

<sup>127</sup> *Key Considerations for Upcoming 2023 Form 10-K and 20-F Filings*, SULLIVAN & CROMWELL, Dec. 14, 2023, [https://www.sullcrom.com/SullivanCromwell/\\_Assets/PDFs/Memos/Key-Considerations-Upcoming-2023-Form-10-K-20-F-Filings.pdf](https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Key-Considerations-Upcoming-2023-Form-10-K-20-F-Filings.pdf) (“companies should continue to evaluate, with a view towards potential disclosure, the direct and indirect impacts on their business and operations of geopolitical events and the related international responses.”)

<sup>128</sup> *See, e.g., Grossman v. David Sin et al.*, 2:23-cv-09501 (C.D. Cal. 2023) (securities class action alleging undisclosed facts relating to BIS Entity List designation of Chinese firm acquired by parent company of a de-SPAC merger target’s joint venture partner. Resulting “intense scrutiny” of the joint venture partner and its parent by the U.S. government and its allies allegedly caused revenues to decline, leading to bankruptcy of the de-SPAC merger target).

<sup>129</sup> *See, e.g., How Wall Street Funds the CCP and PLA with U.S. Investor Capital*, COALITION FOR PROSPEROUS AMERICA, (Oct. 2023) (detailing Vanguard’s FTSE Emerging Markets ETF investments in Chinese A share companies (1) affiliated with the Chinese military, (2) denied access to U.S. technology as “military end users,” (3) allegedly

companies on the U.S. government’s various sanctions lists that are included in Vanguard’s flagship emerging markets index fund with the assistance of FTSE Russell, its index provider. The report argues that “Vanguard investors are helping to fund a Chinese military build-up designed to challenge the United States.”<sup>130</sup> It concludes that Vanguard and FTSE Russell’s business model for the index “gets a failing grade on fundamental issues for the American people: investor protection, national security, and human rights.”<sup>131</sup>

Shareholder proposals provide another outlet for shareholders to voice objection to a board’s continued business relations with regimes adverse to U.S. interests. Although they have garnered low levels of support thus far, numerous U.S. corporations have been required to include proposals requesting the board to report on the nature and extent of the firm’s business in China.<sup>132</sup> After the publication of the report critical of Vanguard noted above, MSCI, another index provider, received a shareholder proposal recommending that the company conduct and publish a review of whether and to what extent its indices include companies (1) serving the Chinese military-industrial complex, (2) involved in the development of advanced technologies listed in a Biden executive order, or (3) that have been excluded from the U.S. for violating the UFLPA.<sup>133</sup> The National Legal and Policy Center, a conservative advocacy organization, has filed multiple shareholder proposals calling for the company to conduct a “Communist China Risk Audit”<sup>134</sup> or for the board to “analyze the congruency of the Company’s human rights policy positions with its actions, especially in countries in geopolitical conflicts or under oppressive regimes, as they impact how the Company maintains its reputation, viability and profitability.”<sup>135</sup>

These challenges amplify controversies that have arisen in connection with the interrelated “corporate purpose,” “stewardship” and “responsible capitalism” debates coinciding with the ESG movement. Companies will need to build reputational resilience by clarifying their stance on how their operations are connected to or affected by geopolitically sensitive issues and markets, and then by creating and communicating a coherent narrative, consistent with their corporations’ values, to key stakeholders about their interactions with these issues.<sup>136</sup>

A separate but related issue is the role of lobbying and corporate influence in the era of geoeconomics. As noted above, the government is a critical national security stakeholder, heavily reliant on the private sector to develop and safeguard the technologies that undergird military and economic strength. This places the government at a serious informational disadvantage vis-a-vis the private sector in the development and implementation of national security policy. Several

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using forced labor, or (4) specializing in advanced technologies that an Executive Order identified as an extraordinary threat to U.S. national security).

<sup>130</sup> *Id.* at 10.

<sup>131</sup> *Id.* at 22.

<sup>132</sup> See *Tech Giant Apple, Other Big firms Face Rising Shareholder Heat Over China Reliance*, CORPORATE COUNSEL, April 12, 2023, <https://www.law.com/corpcounsel/2023/04/12/tech-giant-apple-other-big-firms-face-rising-shareholder-heat-over-china-reliance/>.

<sup>133</sup> MSCI Inc. 2024 Schedule 14A, at 102. The board recommended against the proposal on the ground that the MSCI continuously monitors for investment sanctions that affect the investability of listed securities and removes from its indices Chinese companies impacted by investment sanctions.

<sup>134</sup> See, e.g., PX14A6G, filed April 10, 2024 (Berkshire Hathaway); PX14A6G, filed May 15, 2023 (Walmart).

<sup>135</sup> See, e.g., PX14A6G, filed February 9, 2024, (Apple); PX14A6G, filed April 29, 2024 (McDonalds).

<sup>136</sup> Andrew Grant et al., *How to Build Geopolitical Resilience Amid a Fragmenting Global Order*, MCKINSEY & COMPANY (Sept. 2022).

important questions emerge from the asymmetry: What role are profit-oriented corporations and the trade associations that represent their interests playing in the formulation of the law and regulation of de-coupling? How porous are the constraints imposed by the legal regime of decoupling,<sup>137</sup> and are there corporate fingerprints on the gaps?

### *C. Revisiting the Field of Dreams*

Recall that corporate and securities law scholarship at the turn of the twenty-first century was preoccupied by three broad subjects, each reflecting the then-prevailing spirit of globalization in its own way: capital market competition and investor protection (the issuer choice debate), corporate share ownership patterns (the law and finance literature) and ideological agreement and legal harmonization in global corporate governance (the convergence debate). Revisiting these subject areas today reveals the extent to which each of these subjects has become saturated with geopolitical and national security concerns.

*1. Capital Markets:* The debate about capital market competition two decades ago was infused with a deregulatory spirit and calls for freedom of choice for companies issuing securities to U.S. investors. Today, concerns over the impact of disclosure obligations and other regulatory requirements on the competitiveness of U.S. capital markets have given way to rising concerns over national security and geopolitical rivalry. This change is reflected most clearly in the passage of the HFCAA and related actions to cut off U.S. funding to Chinese companies deemed to pose risks to U.S. national security. Investors viewed as facilitating capital flows that support adversaries of the United States risk public scrutiny and shaming, as illustrated by the previously discussed criticism of Vanguard’s emerging markets index for including Chinese companies subject to various U.S. government sanctions.

The U.S. capital markets are not alone in being viewed through the prism of national interest and geopolitical significance. A minor illustration is a Singapore official admonishing locally founded technology firms that it is their “national duty” to list on the Singapore Stock Exchange.<sup>138</sup> A more significant example is a recent report on the longstanding but halting effort to create an EU-wide capital market union, linking its small, splintered national stock markets into a more competitive whole.<sup>139</sup> The report frames the project’s importance in explicitly geoeconomic terms:

The increasing geopolitical competition between economic blocs (USA, China) means that the EU must speak with one voice in international negotiations on financial issues. The logic of competition between economic blocs and the nexus of economic policies and global power dynamics were visible during the pandemic and since the full-scale Russian invasion of Ukraine in February 2022: Shortages

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<sup>137</sup> See, e.g., Tim Bradshaw and Ryan McMorro, *Nvidia to Make \$12 Billion from AI Chips in China this Year Despite US Controls*, FINANCIAL TIMES, July 4, 2024, <https://www.ft.com/content/b76ef55b-21cd-498b-ac16-5660908bb8d2>; Eduardo Baptista, *China’s Military and Government Acquire Nvidia Chips Despite US Ban*, REUTERS, Jan. 15, 2024, <https://www.reuters.com/technology/chinas-military-government-acquire-nvidia-chips-despite-us-ban-2024-01-14/>.

<sup>138</sup> Oliver Telling, *Singapore Courts Local Tech Giants over ‘National Duty to Relist,’* FINANCIAL TIMES, July 23, 2022.

<sup>139</sup> Florian Heider et al., *The Geopolitical Case for CMU and Two Different Pathways Toward Capital Market Integration*, SAFE White Paper No. 102, April 2024.

in critical materials and products and the disruption of energy supply underscore the importance for the EU to reassure and consolidate its role as a global economic powerhouse – capable of asserting its interests and values on the international stage. In overcoming the fragmentation of capital markets, the EU would reduce its vulnerabilities to external sources of funding and global disruptions while boosting its profile as a strong, stable, and secure union.<sup>140</sup>

As these examples illustrate, the policy environment around the capital markets is expanding well beyond the traditional concern for investor protection. Governments today view the development and maintenance of robust capital markets in competitive terms that appear to have as much to do with geopolitical rivalry as with funding domestic enterprises.

*2. Share Ownership and Corporate Identity:* During *Pax Americana*, the only implications of share ownership and the legal regimes that supported them were perceived to be economic, with dispersed share ownership, and the shareholder protections thought to foster it, associated with positive economic outcomes. The nationality or affiliations of a company’s founders or shareholders were rarely analyzed, and “corporate identity” was given little attention; what mattered for corporate governance analysts was the degree of concentration of a company’s shareholding and the “legal origin” (common law versus civil law) of the investor protections provided by the company’s home jurisdiction.

Today, complex issues relating to share ownership and corporate identity are fraught with national security and geoeconomics implications. The current poster child for this sea change is of course TikTok. TikTok, a Cayman Islands company, is controlled through a complex web of subsidiaries by its ultimate parent, ByteDance, a privately held, Cayman Islands company. ByteDance reports that globally active institutional investors such as the Carlyle Group own 60% of its shares; its founders own 20%; and its employees worldwide own 20% of its shares. Three of the five members of ByteDance’s board of directors are U.S. citizens and the CEO is Singaporean. But from a different perspective, one shared by many U.S. lawmakers, ByteDance is a “Chinese company” because its founders are Chinese, the company is headquartered in China, and as with all companies operating in China, it is required by law to facilitate the operation of an internal Chinese Communist Party committee.<sup>141</sup> Moreover, the Chinese government has taken a “special management share” (explained above) in one of ByteDance’s key subsidiaries called Douyin, a TikTok-like app exclusively for China’s domestic users.

The U.S. government has been pushing towards a ban on TikTok since the Trump Administration. In 2020, President Trump issued an executive order to restrict TikTok’s operations in the United States.<sup>142</sup> Trump, based on a recommendation from CFIUS, also ordered ByteDance to unwind its acquisition of Musical.ly, which later merged to become TikTok.<sup>143</sup> Both actions

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<sup>140</sup> *Id.* at 10.

<sup>141</sup> Company Law of the Peoples Republic of China, Art. 19.

<sup>142</sup> See Addressing the Threat Posed by TikTok, and Taking Additional Steps to Address the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain, Exec. Order 13,942, 85 Fed. Reg. 48637 (Aug. 6, 2020).

<sup>143</sup> Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297 (Aug. 14, 2020) (ordering the unwinding of a Chinese internet company’s \$1 billion acquisition of a lip-syncing videos app, which later merged to become TikTok).

were immediately challenged in court.<sup>144</sup> The Biden Administration revoked President Trump's TikTok ban, and instructed the Commerce Department to provide recommendations on how to proceed.<sup>145</sup> But there was not visible movement on the issue for the next several years.

In 2023, Congress broke the policy stasis and moved forward on requiring ByteDance to divest TikTok or face a nationwide ban.<sup>146</sup> As noted above, the bill that eventually emerged in the spring of 2024 received overwhelming bipartisan support, with the Senate passing the bill 79-18 and the House approving the measure 360-58.<sup>147</sup> The law expressly defines ByteDance, TikTok, and any of their subsidiaries or successors as “foreign adversary controlled applications,”<sup>148</sup> which are prohibited from operating within the United States.<sup>149</sup> In the absence of a “qualified divestiture,”<sup>150</sup> the TikTok ban will go into effect on January 15, 2025.<sup>151</sup>

The TikTok saga is but one example of the way in which share ownership and corporate identity have increasingly been *securitized* in an era of geoeconomics. This trend began with an explosion of concern over sovereign wealth fund investments in global capital markets in the mid-aughts.<sup>152</sup> The efforts to decouple/derisk from China have accelerated and deepened concerns over corporate identity.

3. *Convergence*: The fervor of the convergence debate among corporate governance scholars began to subside in the second decade of this century, as academic attention turned to stewardship codes, the corporate purpose debate, and ESG-related issues.

But the era of geoeconomics raises the specter of a new form of convergence – not one centered around U.S.-style dispersed share ownership patterns and the ideology of shareholder primacy, as narrated in *The End of History for Corporate Law*. Rather, there is potential for convergence on the shared political and geostrategic values of globally active companies' home governments – what might be called “Bloc Convergence.” In the era of geoeconomics, multilateral coordination of national security priorities may spur regulatory convergence among like-minded

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<sup>144</sup> See *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92 (D.D.C. 2020) (challenging Executive Order 13,942); *Marland v. Trump*, 498 F. Supp. 3d 624 (E.D. Pa. 2020) (same); Complaint for Injunctive and Declaratory Relief, *TikTok Inc. v. Trump*, No. 20-CV-07672, 2020 WL 4937435, (C.D. Cal. Aug. 24, 2020) (challenging the Musical.ly divestiture order). Some have observed that efforts to use IEEPA-based powers may not be legally sufficient to ban TikTok due to IEEPA's personal communications and informational materials exceptions. See 50 U.S.C. § 1702(b)(1), (3); see also STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10940, RESTRICTING TIKTOK (PART I): LEGAL HISTORY AND BACKGROUND 4 (2023); PETER J. BENSON, VALERIE C. BRANNON & JOANNA R. LAMPE, CONG. RSRCH. SERV., LSB10942, RESTRICTING TIKTOK (PART II): LEGISLATIVE PROPOSALS AND CONSIDERATIONS FOR CONGRESS (2024) (discussing legislative proposals to address this issue).

<sup>145</sup> See Protecting Americans' Sensitive Data from Foreign Adversaries, Exec. Order 14,034, 86 Fed. Reg. 31423, 31424 (June 9, 2021)

<sup>146</sup> Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2024, and for Other Purposes, H.R. 815, 118th Cong. (2023).

<sup>147</sup> Yiwen Lu, *On TikTok, Resignation and Frustration After Potential Ban of App*, N.Y. TIMES (Apr. 24, 2024), <https://www.nytimes.com/2024/04/24/technology/tiktok-ban-bill-frustration.html>.

<sup>148</sup> H.R. 815, 118th Cong. § 2(g)(3)(A).

<sup>149</sup> *Id.* § 2(a)(1)(A)-(B).

<sup>150</sup> See *id.* § 2(c)(1) (providing exemption); (6) (defining qualified divestiture).

<sup>151</sup> See *id.* § 2(a)(2).

<sup>152</sup> See, e.g., Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345 (2008).

countries.<sup>153</sup> Together with the near/friendshoring of supply chains to reduce vulnerability to China and other autocratic regimes, these developments may have a meaningful influence in cross-national alignment of “corporate purpose.” If Western governments continue to coalesce around a shared vision of threats to national security and the global economic order, their common interests as national security stakeholders in their nation’s most strategically significant companies could have homogenizing effects on the values and stakeholder hierarchies of Western corporations.

## Conclusion

The rise of China and a host of other challenges to the global order are shaking the foundation upon which two decades of corporate activity and corporate governance scholarship have rested. Corporations are now on the front lines of statecraft carried out via economic means. This article has taken a few tentative steps toward understanding how geoeconomics is affecting U.S. corporate perceptions of business risk, and the changes this new era may bring about in the legal and policy environment for corporate governance, as well as at the level of the individual firm. There is much to learn about how – and how effectively – corporations are adapting to a post-*Pax Americana* world. Scholars have a great deal of work ahead to make sense of corporate governance in an era of geoeconomics.

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<sup>153</sup> For example, the U.S. is endeavoring to reduce defense-related trade barriers to Australia and the UK, members of the AUKUS trilateral security partnership. Arnold & Porter Advisory, AUKUS at Last: Commerce and State Announce Rules to Reduce Export Barriers for Australia and the U.K., May 6, 2024, <https://www.arnoldporter.com/en/perspectives/advisories/2024/05/aukus-at-last>.



**Figure 1**

**10-K Risk Factor Mentions, 2003-2023**

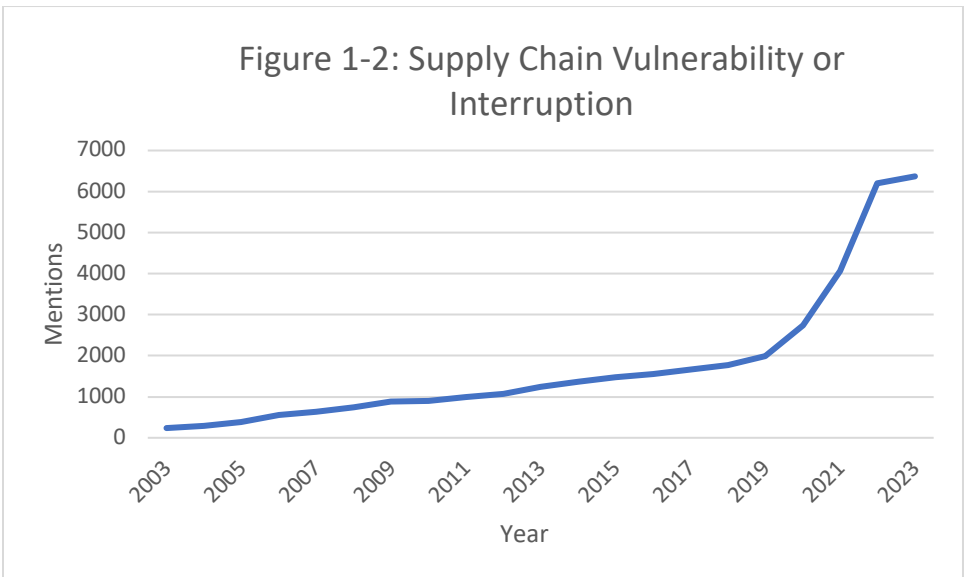
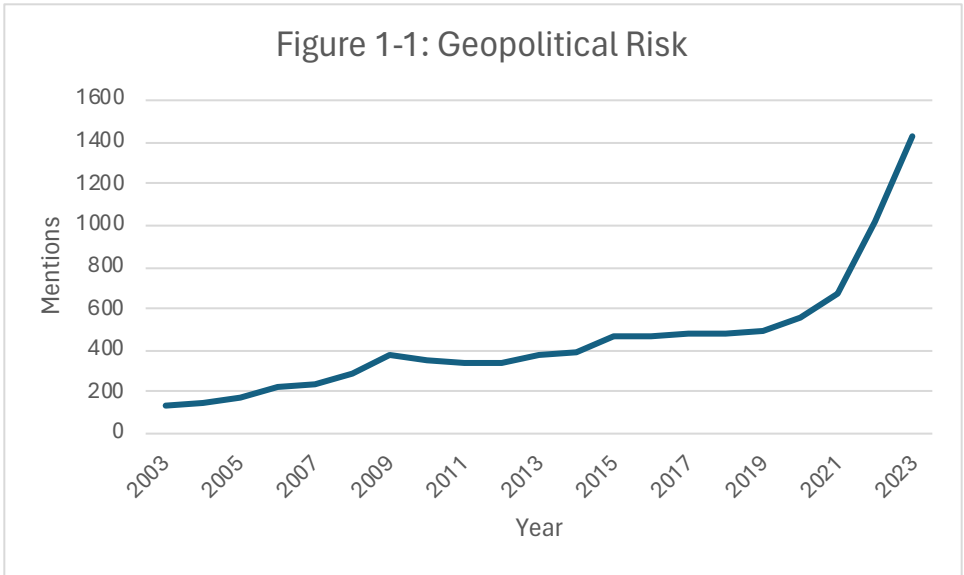


Figure 1-3: Bureau of Industry and Security Entity List

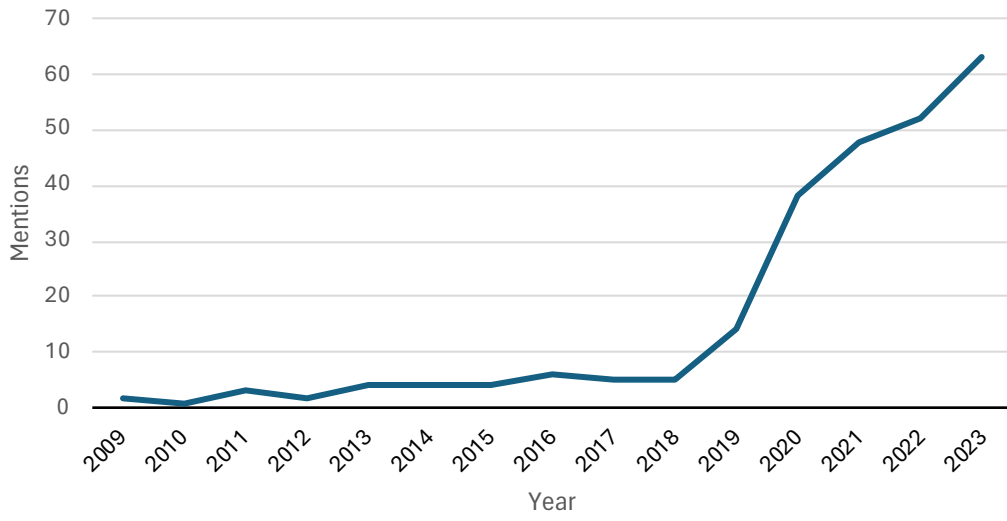
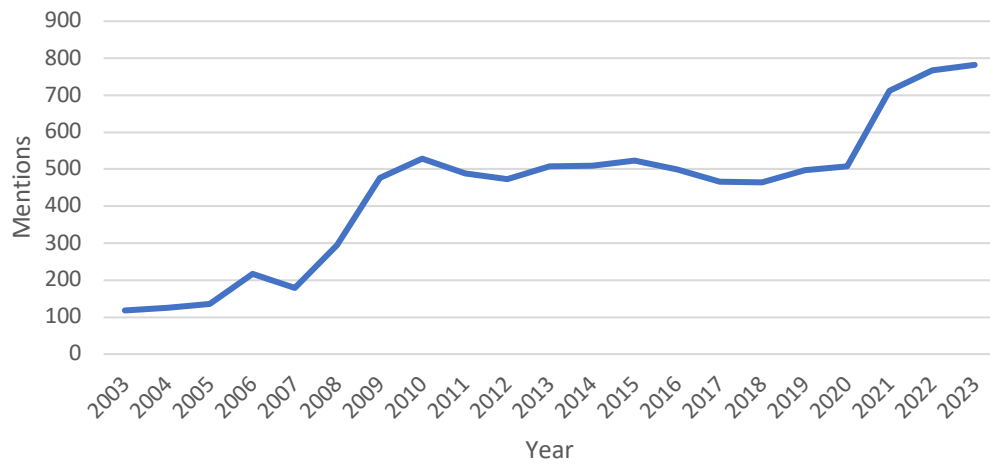
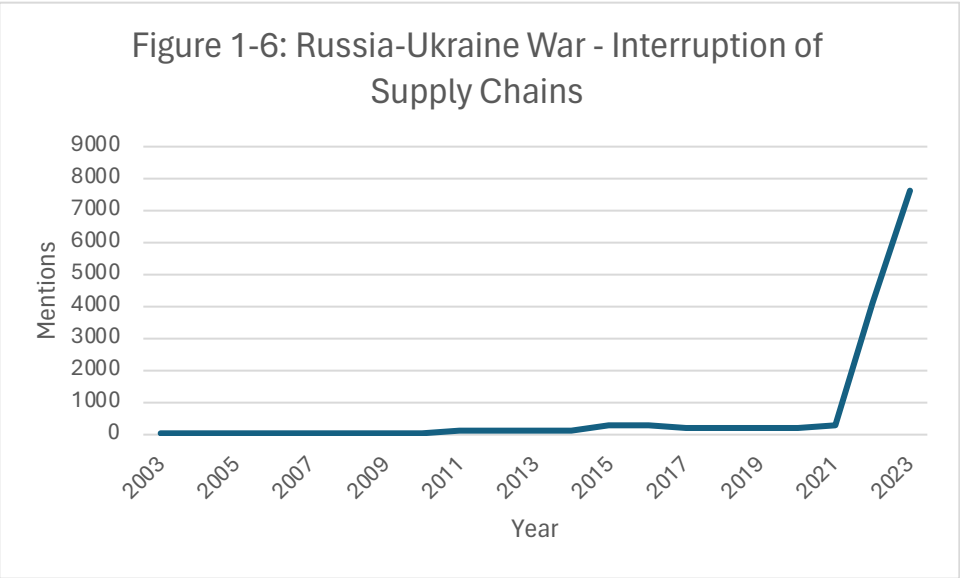
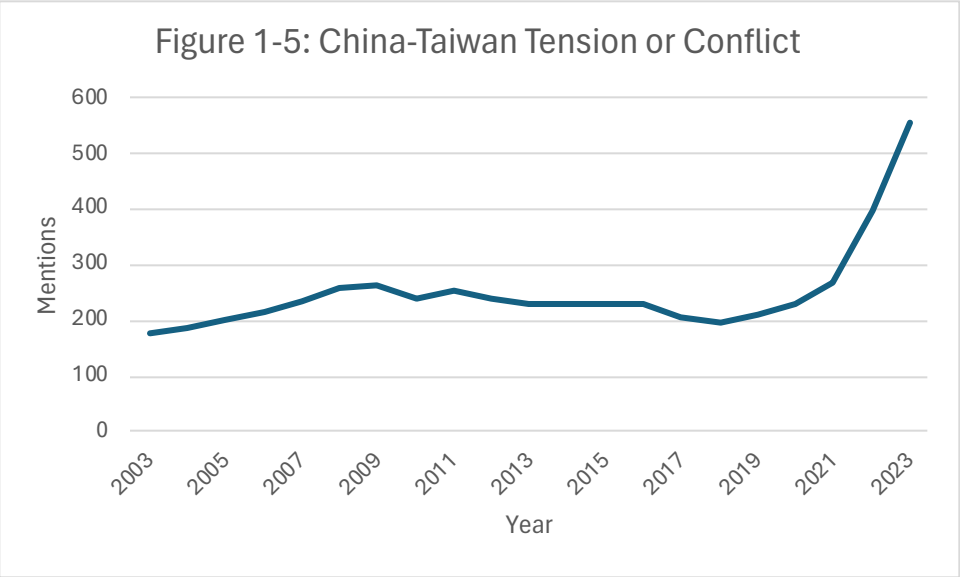
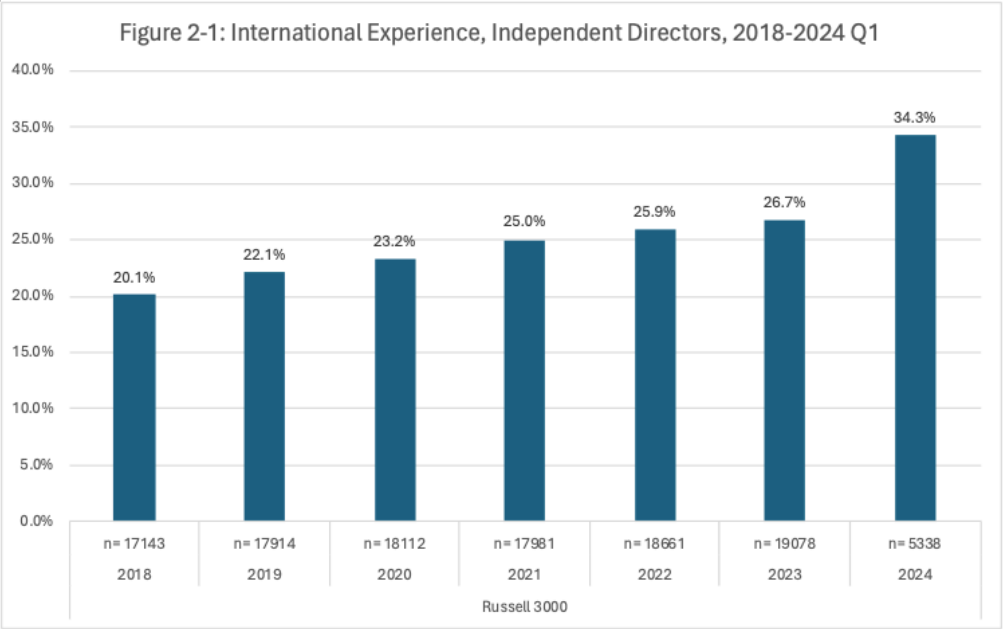


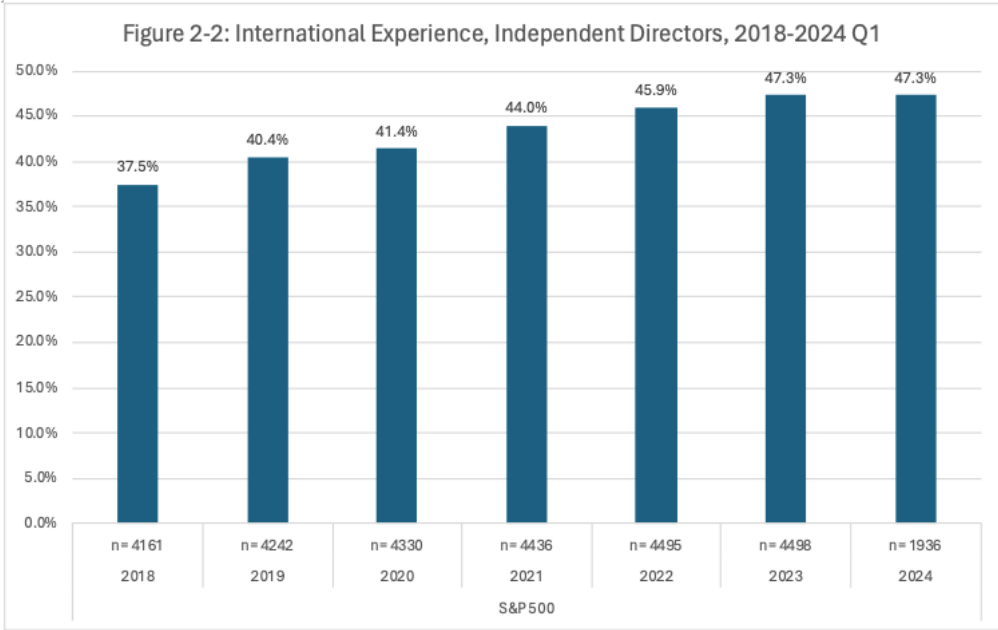
Figure 1-4: Compliance with Economic Sanctions



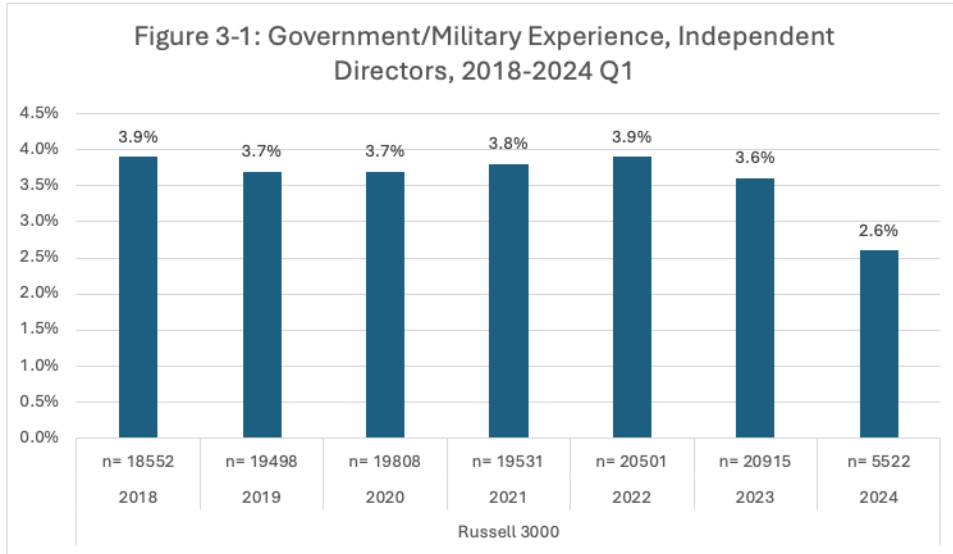




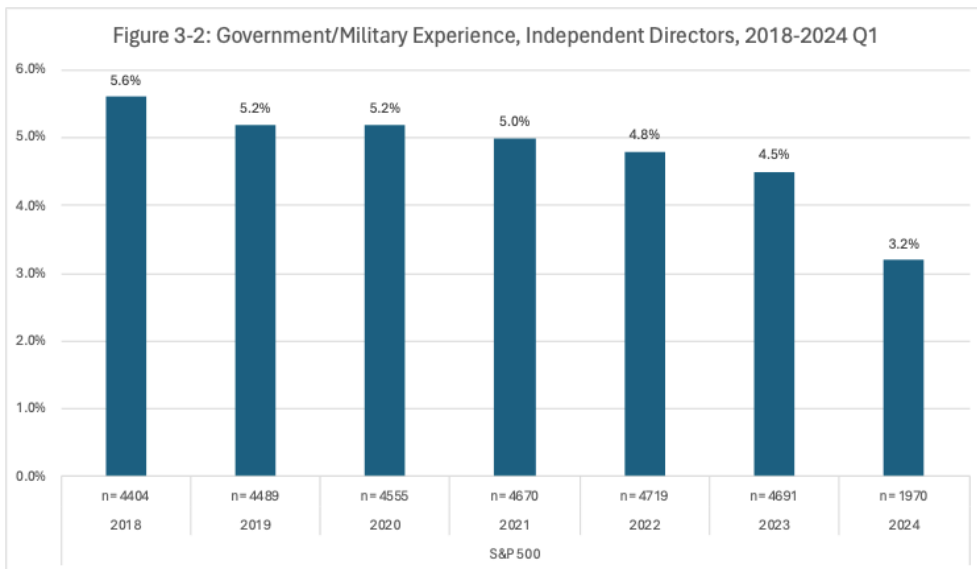
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**Table 1 Oversight of Geopolitical Risk**

<b>Corporate Governance Organ Responsible</b>	<b>Number of Companies</b>
Board of Directors*	68
Board and Management	12
Audit Committee**	13
Risk Committee+	8
Compliance Committee	2
Chief Risk Officer	1
Other++	6

Source: Author’s calculations from data provided by ESGAUGE Intangibles AI. Used with permission. Data based on all U.S. public company filings from 2018-2024 Q1.

Notes:

\* Includes Board and its Committees (6 companies), Board and Audit Committee (4 companies), Board and Risk Management Committee (1 company)

\*\* Includes Audit and Risk Committee, Sourcing Risk Council and Audit Committee (1 company each)

+ Includes Risk Management Committee, Risk Oversight Committee, Risk and Security Committee, Risk and Operations Committee, Compliance and Risk Committee (1 company each)

++ Corporate Governance and Responsibility Committee, Special Programs Oversight Committee, Classified Committee, Environmental, Social and Public Policy Committee, National Security Director and Management, Finance and Planning Committee (1 company each)

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