

Corporate Governance in an Era of Geoeconomics

Law Working Paper N° 790/2024

July 2025

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Abstract

The “End of History” for corporate law and governance has come to a messy conclusion, upending 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. Geoeconomics leverages, curtails or blocks the actions of profit-oriented commercial enterprises to increase state power vis-a-vis geopolitical rivals, placing private corporations in a role for which they are unaccustomed and organizationally not well suited. Focusing on U.S. firms, this article explores the potential implications of geoeconomics for corporate governance, including both potential ways in which geoeconomics may affect the policy environment for corporate governance, as well as the implications for firm-level governance, including (1) board and senior executive expertise, (2) oversight of geopolitical risk, (3) compliance, (4) supply chain management, (5) litigation risk, and (6) public and government relations. It also considers implications of the “return of history” in corporate governance for policy makers and scholars of corporate governance worldwide.

Keywords: Corporate Governance, Geoeconomics

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Corporate Governance in an Era of Geoeconomics

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Economic warfare is becoming the norm.

--World Economic Forum

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

Abstract: The ‘End of History’ for corporate law and governance has come to a messy conclusion, upending 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. Geoeconomics leverages, curtails or blocks the actions of profit-oriented commercial enterprises to increase state power vis-a-vis geopolitical rivals, placing private corporations in a role for which they are unaccustomed and organisationally not well suited. Focusing on U.S. firms, this article explores the potential implications of geoeconomics for corporate governance, including both potential ways in which geoeconomics may affect the policy environment for corporate governance, as well as the implications for firm-level governance, including (1) board and senior executive expertise, (2) oversight of geopolitical risk, (3) compliance, (4) supply chain management, (5) litigation risk, and (6) public and government relations. It also considers the implications of the ‘return of history’ for policy makers and scholars of corporate governance worldwide.

Keywords: Corporate Governance, Geoeconomics, National Security

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Introduction

The ‘End of History’ for corporate law and governance¹ 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.² This new global environment, born of U.S.-China rivalry, trade wars and significant military conflict, has ushered in the era of geoeconomics – ‘the pursuit of power politics using economic means’.³ Although it has been called ‘the new form of statecraft’,⁴ using 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 weaponisation will highlight security vulnerabilities posed by trade, financial and technological interdependence between globally integrated economies, risking an escalating cycle of distrust and decoupling’.⁵

Geoeconomics requires leveraging, curtailing or blocking the actions of private corporations to increase state power vis-a-vis geopolitical rivals.⁶ It thereby places profit-oriented commercial enterprises in a role for which they are unaccustomed and organisationally 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,⁷ it will also affect the internal ‘operating system’⁸ 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

¹ Henry Hansmann and Reinier Kraakman, ‘The End of History for Corporate Law’ (2001) 89 Geo L J 439.

² See *infra* Part II.

³ Mikael Wigell and others, ‘Navigating Geoeconomic Risks: Towards an International Business Risk and Resilience Monitor’ Finnish Institution of International Affairs, Report No. 71 (12 November 2022) <<https://fiia.fi/en/publication/navigating-geoeconomic-risks>> accessed 10 April 2025. See also Christopher Clayton, Matteo Maggiore and 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’).

⁴ Aneela Shahzad, ‘Geoeconomics: The New Geopolitics’ (2022) 19 Policy Perspectives 21, 37.

⁵ World Economic Forum, *The Global Risks Report 7* (18th edn, World Economic Forum 2023).

⁶ See *infra* Part II.

⁷ 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 and others, ‘How the Investment World is Trying to Navigate Geopolitics’ *Financial Times* (4 July 2024) <<https://www.ft.com/content/23ce295d-bf65-47fd-bebd-808b5a7bcab5>> accessed 10 April 2025.

⁸ Ronald J Gilson, ‘From Corporate Law to Corporate Governance’ - in Jeffrey Gordon and Georg Ringe (eds), *Oxford Handbook of Corporate Law and Governance* (OUP 2018).

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, harmonising tendencies across national corporate and securities laws, and the ‘ideological hegemony’ of shareholder wealth maximising governance, unfettered by national security concerns or geopolitical rivalries. Today, globalisation has been replaced by ‘weaponised interdependence’, but corporate governance scholarship has yet to grapple deeply with the implications of this major development.⁹

In this article, I explore the potential implications of geoeconomics for corporate governance, with a focus on U.S. corporations. The implications of geoeconomics obviously extend to corporations worldwide, including for European firms caught in the middle of tensions between the United States and China. I focus on U.S. firms given their position ‘on the front lines’ of geopolitical tension and the global influence of U.S. corporate governance policy. The era of geoeconomics is in its early stages and data on how corporations are adapting is still very limited. My objective is to introduce geoeconomics to the field of corporate governance and to provide a framework for understanding the potential implications of the new global environment for U.S. firms.

The article proceeds as follows. Part I surveys major debates in the comparative corporate governance field circa the turn of the twenty-first century, highlighting the literature’s optimism about globalisation and lack of geopolitical or national security considerations. Part II sketches the trajectory from globalisation to weaponised interdependence that characterises the past decade, with a focus on the ‘geopolitical chain reaction’ underlying US-China de-coupling. It also documents the heightened perception of geopolitical risks facing U.S. corporations reflected in the Risk Factors section of annual reports on Form 10-K¹⁰ over the past two decades. Part III examines the potential ways in which geoeconomics may affect both the policy environment for corporate governance and firm-level governance. Part IV considers potential implications of the ‘return of history’ in corporate governance for capital market competition, corporate identity, and convergence.

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

⁹ 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’ (2020) 95 *Indiana LJ* 533; Mariana Pargendler, ‘Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs’ (2019) 45 *J Corp L* 953.

¹⁰ Form 10-K is an annual report that publicly listed companies are required to file with the Securities and Exchange Commission under the U.S. federal securities laws. It contains extensive discussion of a company’s business, finances, risk factors, etc.

the interests of the United States and other Western countries prevailed. Globalisation 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 siècle* 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 is emphatically not to criticise 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.¹¹ 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 quarrelled 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.¹² 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.’¹³ In her view, ‘[r]ather than harmonisation of national securities regimes, the universal application of the market approach should be the goal of international securities regulation’.¹⁴ Perhaps the most far-reaching of issuer choice proposals was put forward by Stephen Choi and 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’.¹⁵ 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.¹⁶

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

¹¹ 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, eg, Aaron L Friedberg, *Getting China Wrong* (Wiley 2022).

¹² See, eg, Roberta Romano, ‘Empowering Investors: A Market Approach to Securities Regulation’ (1998) 107 Yale LJ 2359; Stephen J Choi and Andrew T Guzman, ‘The Dangerous Extraterritoriality of U.S. Securities Law’ (1996) 17 Northwest J Int’l L & Bus 207.

¹³ Romano (n 12) 2415.

¹⁴ *ibid.*

¹⁵ Choi and Guzman (n 12) 231-2.

¹⁶ See, eg, Merritt Fox, ‘The Issuer Choice Debate’ (2001) 2 Theo Inq L 563.

regulation is a matter for capital raising firms themselves to select, as if from a menu. The deregulatory spirit of the market approach complements the contemporaneous argument, discussed below, that the power of market forces and widespread philosophical and policy agreement on the primacy of shareholder interests will lead to global convergence in corporate governance. 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 public capital 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. In short, the issuer choice debate rested on the implicit assumption that the capital markets are politically neutral financing technology – consonant with their perceived role in driving corporate governance systems around the world toward convergence on a single model.

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.¹⁷ 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.¹⁸

Many countries facing serious institutional challenges around the turn of the century (eg, former Eastern bloc states and countries swept up in the Asian financial crisis of 1997-98) opted, either voluntarily or under pressure from international organisations such as the IMF and World Bank, for a standard menu of legal reforms. The items on the menu, emphasising 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,

¹⁷ See, eg, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *J Econ Lit.* 285 (summarising insights from their series of law and finance articles).

¹⁸ Paul Mahoney, 'The Common Law and Economic Growth: Hayek Might be Right' (2001) 30 *J Legal Stud* 503. But see Curtis J Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development Around the World* (UCP 2008) 17-25 and tbl 1.1 (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).

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 idealised 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.¹⁹ 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. Harmonisation 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 globalisation was most evident in the 'convergence' debate, whose most forceful proponents proclaimed the 'End of History' for corporate law.²⁰ 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.²¹ 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.'²² The resulting 'ideological hegemony', fuelled by global competitive pressures, would lead to 'convergence in most aspects of the law and practice of corporate governance'.²³ 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...'²⁴

Even corporate governance convergence pessimists, of which there were many,²⁵ based their scepticism toward the integrating, homogenising power of global market forces and the ideological supremacy of shareholder capitalism on obstacles rooted in national institutions shaped

¹⁹ Milhaupt and Pistor (n 18).

²⁰ Hansmann and Kraakman (n 1).

²¹ Francis Fukuyama, *The End of History and the Last Man* (The Free Press 1992).

²² Hansmann and Kraakman (n 1) 439.

²³ *ibid* 468.

²⁴ *ibid* 465. In the ensuing decades, Russia has moved in the opposite direction. See, eg, Curtis J Milhaupt, 'The (Geo)Politics of Controlling Shareholders' (2024) 25 *Theoretical Inq L* 161 (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).

²⁵ See, eg, Lucien Arye Bebchuk and Mark J Roe, 'Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford L Rev* 127.

by history and *domestic* politics, rather than on the effects of geopolitical rivalries or national security concerns. Mark Roe and an Italian co-author 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 labour protection, the focus of the article.²⁶

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’.²⁷ 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’²⁸) would diminish the threat of economic nationalism by minimising 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. . .’.²⁹

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. Today, the WTO is greatly diminished as the world’s arbiter of trade disputes due to the ongoing paralysis of its Appellate Body.³⁰ So too, shareholder capitalism and its accoutrements (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. operations³¹ or to straddle the divide awkwardly, as in the ‘one company, two systems’ approach of some U.S. companies in their dealings with China.³² Many European

²⁶ Mark J Roe and Massimiliano Vatiere, ‘Corporate Governance and its Political Economy’ in Jeffrey Gordon and Georg Ringe (eds), *Oxford Handbook of Corporate Law and Governance* (OUP 2018) 56, 77.

²⁷ Jeffrey N Gordon, ‘The International Relations Wedge in the Corporate Convergence Debate’ in Jeffrey N Gordon and Mark J Roe (eds), *Convergence and Persistence in Corporate Governance* (CUP 2004)161.

²⁸ *ibid* 162.

²⁹ *ibid*

³⁰ The WTO’s period of limbo began when the Trump administration blocked appointments to the appellate body. Bryce Baschuk, ‘How Trump Could Deal Another Blow to Already Hobbled WTO’ (*Bloomberg* 3 September 2023) <<https://www.bloomberg.com/news/articles/2023-09-04/how-trump-could-deal-blow-to-trade-beyond-wto-appellate-body>> accessed 10 April 2025. See also Philip Blenkinsop, ‘At WTO, Growing Disregard of Trade Rules Shows the World is Fragmenting’ (*Reuters* 2 October 2023) <<https://www.reuters.com/business/wto-growing-disregard-trade-rules-shows-world-is-fragmenting-2023-10-02/>> accessed 10 April 2025 (noting that the WTO is ‘teetering on the abyss of irrelevance’).

³¹ Juro Osawa and Kate Clark, ‘Another Major Venture Firm to Separate China Partners Following U.S. Pressure’ (*The Information* 21 September 2023) <<https://www.theinformation.com/articles/another-major-venture-firm-to-separate-china-investment-partners-following-u-s-pressure>> accessed 10 April 2025 (reporting on decisions by GGV Capital and Sequoia Capital to separate their Chinese and U.S. operations).

³² Jacob Helberg, ‘Silicon Valley Can’t be Neutral in the U.S.-China Cold War’ (*Foreign Policy* 22 June 2020) <<https://foreignpolicy.com/2020/06/22/zoom-china-us-cold-war-unsafe/>> accessed 10 April 2025.

companies are confronting dilemmas posed by the benefits and risks of continued engagement with China's innovation ecosystem while navigating U.S trade and technology restrictions.³³

II. From Globalisation to Weaponised 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.³⁴ Globalisation 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. Globalisation has become weaponised interdependence. Of course, weaponised interdependence has been *facilitated* by states' ability to leverage informational and financial networks of exchange that were formed in the process of globalisation.³⁵

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.³⁶

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*),³⁷ 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 hasten enhanced personal freedom and political empowerment in that country, while drawing

³³ See, eg, MERICS, 'The Trade-offs of Innovating in China in Times of Global Technology Rivalry' (MERICS Report 24 June 2025) <<https://merics.org/en/report/trade-offs-innovating-china-times-global-technology-rivalry>> accessed 30 June 2025.

³⁴ 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-clubs-fences>> accessed 10 April 2025.

³⁵ Henry Farrell and Abraham L Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) 44 Int'l Security 42.

³⁶ Wigell and others (n 3) 11.

³⁷ Immanuel Kant, *Perpetual Peace: A Philosophical Essay* 157 (1795) (Mary Campbell Smith tr, Macmillan 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 . . .').

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'.³⁸ 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'.³⁹ 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 'securitisation', a term used in international relations theory to describe the transformation of a perceived threat to the state into an existential problem.⁴⁰ 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 scepticism 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.⁴¹

In this sense, party-state capitalism is the product of Xi's securitisation 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.⁴² The securitisation of the economy has given Chinese state capitalism an increasingly ideological and techno-nationalist 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.

³⁸ Full Text of Clinton's Speech on China Trade Bill (*New York Times* 9 March 2000) <<https://archive.nytimes.com/www.nytimes.com/library/world/asia/030900clinton-china-text.html>> accessed 10 April 2025. For more detail on the flawed assumptions regarding the impact of China's integration into the global economy, see Friedberg (n 11); Robert D Blackwill and Robert D Fontaine, *Lost Decade: The US Pivot to Asia and the Rise of China Power* (OUP 2024).

³⁹ Wigell and others (n 3) 8.

⁴⁰ See, eg, Richard J Kilroy Jr, 'Securitization' in Anthony J Masys (ed), *Handbook of Security Science* (Springer 2022).

⁴¹ See, eg, Margaret M Pearson and others, 'China's Party-State Capitalism and International Backlash: From Interdependence to Insecurity' (2022) 47 *Int'l Security* 135; Jude Blanchette, *From 'China, Inc.' to 'CCP, Inc.': A New Paradigm for Chinese State Capitalism* (Hinrich Foundation 2021).

⁴² MERICS, "'Comprehensive National Security' Unleashed: How Xi's Approach Shapes China's Policies at Home and Abroad' (MERICS Report 15 September 2022) <<https://www.merics.org/en/report/comprehensive-national-security-unleashed-how-xis-approach-shapes-chinas-policies-home-and>> accessed 10 April 2025.

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'.⁴³ 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 of '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 commercial-military use 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'.⁴⁴

The second step in the geoeconomic chain reaction was growing counter-securitisation 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.⁴⁵ Counter-securitisation began in the first Trump Administration and was 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 Modernisation Act of 2018.⁴⁶ The first 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.⁴⁷ Before 2012, only one transaction had been blocked by the president.⁴⁸ Since then, five transactions have been

⁴³ See, eg, Curtis J Milhaupt, 'Party-State Inc. – Chinese State Capitalism 2.0' in Jeffrey Gordon and Georg Ringe (eds), *Oxford Handbook of Corporate Governance* (2d ed., forthcoming 2025).

⁴⁴ Audrey Fritz, 'China's Evolving Conception of Civil-Military Collaboration' Center for Strategic and International Studies (2 August 2019) <<https://www.csis.org/blogs/trustee-china-hand/chinas-evolving-conception-civil-military-collaboration>> accessed 10 April 2025.

⁴⁵ See, eg, Andrew Higgins and Christopher F Schuetze, 'Suddenly, Chinese Spies Seem to be Popping Up Everywhere' (*New York Times* 27 April 2024) (quoting an expert 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').

⁴⁶ Subtitle A of Title XVII of Public Law 115-232, 132 Stat. 2173. FIRMMA strengthened the Committee's authority to review and potentially block a far wider range of transactions.

⁴⁷ Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation Limited, see 82 Fed. Reg. 43665 (Sept. 13, 2017); Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information Technology Co. Ltd, see 85 Fed. Reg. 13719 (Mar. 6, 2020); Regarding the Acquisition of Musical.ly by ByteDance Ltd., see 85 Fed. Reg. 51297 (Aug. 14, 2020); Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11631 (Mar. 12, 2018).

⁴⁸ 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>> accessed 10 April 2025.

blocked and almost 400 transactions have been withdrawn after CFIUS commenced an investigation.⁴⁹ The Biden Administration continued to build on Trump Administration policies. The number of annual CFIUS investigations increased nearly four-fold between 2012 and 2022.⁵⁰ A Biden executive order to elucidate the factors that CFIUS considers when reviewing covered transactions suggests this trend is likely to continue.⁵¹ One indication of the possible impact of increased CFIUS scrutiny is decreased investment from China, which fell to a 17-year low in 2023.⁵²

In addition to greater scrutiny of Chinese inbound investment, the U.S. government is also restricting outbound investment to China (a policy dubbed ‘reverse CFIUS’). The first Trump Administration made its initial 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’.⁵³ In response to President Trump’s executive order, the New York Stock Exchange delisted shares of China Mobile, China Unicom, and China Telecom.⁵⁴ Biden expanded the number of firms on the list by including subsidiaries and affiliates of other major Chinese state-owned enterprises.⁵⁵ In 2023, the Biden Administration issued an order targeting outbound U.S. investment in Chinese technology companies.⁵⁶ The order required review of a wide range of outbound investments related to semiconductors and microelectronics, quantum information technologies, and artificial intelligence.⁵⁷ This policy was reviewed under a Notice of Proposed Rulemaking in 2024 and a final order took effect in January 2025. The second Trump Administration seems predisposed to expand on existing technology transfer restrictions.

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

⁴⁹ See Comm. on Foreign Inv. in the U.S., Annual Report to Congress 21 (2022).

⁵⁰ Cf 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).

⁵¹ 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).

⁵² See Thomas Hale, ‘Chinese Deal Activity in U.S. Slumps to Lowest Level in 17 Years’ (*Financial Times* 3 August 2023) <<https://www.ft.com/content/42db9ff5-1589-416e-8337-601772af44c4>> accessed 10 April 2025.

⁵³ 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.

⁵⁴ See Chong Koh Ping and Alexander Osipovich, ‘NYSE to Delist Chinese Telecom Carriers After Rejecting Appeals’ (*Wall Street Journal* 7 May 2021) <<https://www.wsj.com/articles/nyse-to-delist-chinese-telecoms-carriers-after-rejecting-appeals-11620394719>> accessed 10 April 2025.

⁵⁵ 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)).

⁵⁶ 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).

⁵⁷ 88 Fed. Reg. 54961, 54963 (Aug. 14, 2023).

Company Accounting Oversight Board.⁵⁸ 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’.⁵⁹ One Congressman declared the HFCAA to be part of a concerted effort ‘to fight against communism and the global threat the Chinese Government poses’.⁶⁰

The U.S. has also taken steps to cut off China’s access to advanced technologies through sanctions and export controls.⁶¹ The first 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.⁶² 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.⁶³ Both administrations used targeted sanctions and export blacklists to curb Chinese acquisition of U.S. technologies. As of January 2025, there were approximately 700 Chinese entities on the Commerce Department’s Entity List (25 percent of the total number).⁶⁴ In addition, there were almost 100 Chinese entities on the Commerce Department’s Unverified List (60 percent of the total).⁶⁵ All of the entities on the Commerce Department’s Military End-User List as of that date were Chinese entities.⁶⁶

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-

⁵⁸ 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).

⁵⁹ 166 Cong. Rec. H6033 (daily ed. Dec. 2, 2020) (statement of Rep. Anthony Gonzalez).

⁶⁰ *ibid*

⁶¹ See generally Emily Kilcrease and Michael Frazer, ‘Sanctions by the Numbers: SDN, CMIC, and Entity List Designations on China’ Center for New American Security (2 March 2023) <<https://www.cnas.org/publications/reports/sanctions-by-the-numbers-sdn-cmic-and-entity-list-designations-on-china>> accessed 10 April 2025 (summarising the growth and distribution of China-related designations on various U.S. sanctions lists).

⁶² 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).

⁶³ 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).

⁶⁴ See Entity List, 15 C.F.R. § 744, Supplement No. 4.

⁶⁵ 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.

⁶⁶ 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.

chaired by the National Security Advisor and National Economic Advisor.⁶⁷ The Uyghur Forced Labour 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 the importer certifies to U.S. Customs and Border Protection (CBP) that the products are not made with forced labour.⁶⁸ Since the law took effect, CBP has denied entry to over 5,400 shipments valued at over \$3.6 billion.⁶⁹ 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.⁷⁰

The third step in the geoeconomic chain reaction is a tit-for-tat strategy of sanctions and countersanctions employed by China. In response to the U.S. Entity List, 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.⁷¹ 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. defence companies—Lockheed Martin and Raytheon Missiles & Defence (a subsidiary of Raytheon Technologies)—on the list for supplying arms to Taiwan.⁷² 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.⁷³ To strengthen its sanctions regime and retaliate against Western sanctions, in 2021 China adopted a counter-sanctions law⁷⁴ allowing the Chinese government and private citizens to take

⁶⁷ Fact Sheet: President Biden Announces New Actions to Strengthen America's Supply Chains, Lower Costs for Families and Secure Key Sectors, 27 November 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/> >accessed 10 April 2025.

⁶⁸ Uyghur Forced Labour Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021).

⁶⁹ See U.S. Customs and Border Protection, Uyghur Forced Labour Prevention Act Statistics (21 January 2025) <<https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics>> accessed 10 April 2025.

⁷⁰ See Marti Flacks and Madeleine Songy, 'The Uyghur Forced Labour Prevention Act Goes into Effect' Center for Strategic and International Studies (27 June 2022) <<https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect>> accessed 10 April 2025.

⁷¹ 'China Will Establish an Unreliable Entity List System' [中国将建立不可靠实体清单制度] (promulgated by the Ministry of Commerce 31 May 2019) [in Chinese] <http://www.mofcom.gov.cn/article/i/jyj/e/201905/20190502868927.shtml> accessed 2 July 2025.

⁷² See Announcement of the Unreliable Entity List Working Mechanism on Adding Lockheed Martin and Raytheon Missiles and Defence to the Unreliable Entity List [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] (promulgated by the Ministry of Commerce 16 February 2023, effective 16 February 2023) [in Chinese] <<http://www.mofcom.gov.cn/article/zw/gk/gkzcfb/202302/20230203391289.shtml>> accessed 2 July 2025.

⁷³ Ministry of Foreign Affairs, 'Foreign Ministry Spokesperson Announces Sanctions on Relevant US and Canadian Individuals and Entity' (Press release 27 March 2021) <https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/202103/t20210327_9170817.html> accessed 2 July 2025.

⁷⁴ Anti-Foreign Sanctions Law of the People's Republic of China [中华人民共和国反外国制裁法] (promulgated by the Standing Committee of the National People's Congress 10 June 2021, effective 10 June 2021) [in Chinese] <https://www.gov.cn/xinwen/2021-06/11/content_5616935.htm> accessed 2 July 2025.

countermeasures against ‘discriminatory restrictive measures’ and a blocking statute⁷⁵ to prevent compliance with specifically designated foreign sanctions.

China has also ratcheted up efforts to control the export of key technologies and materials. In 2023, China updated its Catalogue of Prohibited and Restricted Technologies for Export.⁷⁶ Export controls have been placed on crucial raw materials, including gallium, germanium, and graphite, which may adversely impact U.S. businesses and their supply chains.⁷⁷ Reacting to the Biden Administration’s strengthening of export controls on advanced semiconductors for military applications in December 2024, China immediately revised its own export controls to further restrict export of critical materials, specifically targeting exports to the United States rather than all countries.⁷⁸ In response to Trump’s trade war, China imposed restrictions on the export of rare earth metals to the United States.⁷⁹

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 labour. The presumption can be rebutted through supply chain tracing demonstrating to CBP by ‘clear and convincing evidence’ that forced labour 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.⁸⁰

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:

⁷⁵ Measures to Block the Improper Extraterritorial Application of Foreign Laws and Measures [阻断外国法律与措施不当域外适用办法] (promulgated by the Ministry of Commerce, 9 January 2021, effective 9 January 2021) [in Chinese] < <http://www.mofcom.gov.cn/article/b/c/202101/20210103029710.shtml> > accessed 2 July 2025.

⁷⁶ An English translation is available at <https://cset.georgetown.edu/publication/china-export-control-catalog-2023/>.

⁷⁷ Announcement on the Implementation of Export Controls on Gallium and Germanium Related Exports [关于对镓、锗相关物项实施出口管制的公告] (promulgated by the Ministry of Commerce 3 July 2023, effective 1 August 2023) [in Chinese] <http://www.mofcom.gov.cn/article/zwgk/gkzcfb/202307/20230703419666.shtml> accessed 2 July 2025.

⁷⁸ Gracelin Baskaran and Meredith Schwartz, ‘China Imposes its Most Stringent Critical Materials Yet Amidst Escalating U.S.-China Trade War’ Center for Strategic and International Studies (4 December 2024) <<https://www.csis.org/analysis/china-imposes-its-most-stringent-critical-minerals-export-restrictions-yet-amidst>> accessed 10 April 2025.

⁷⁹ See Jon Emont, ‘China is Still Choking Exports of Rare Earths Despite Pact with U.S.’ (*Wall Street Journal* 26 June 2025) < <https://www.wsj.com/world/china/china-rare-earths-exports-2fd0dab4?> > accessed 2 July 2025.

⁸⁰ Author interview with Ashley Walter, Partner-in-Charge, ESG, Orrick, (20 February 2024). See also Bath & Body Works, Annual Report on Form 10-K (17 March 2023) p 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 extraordinary complexity of [the Commerce Department's Bureau of Industry and Security (BIS) regulations restricting end-uses related to semiconductors, supercomputing, etc.] ... significantly increases our risk of non-compliance. ...

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. ... ⁸¹

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.⁸² 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 2022.⁸³ 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.⁸⁴ The vast majority of companies surveyed by Oxford Analytica in 2023 expected intensified trends toward economic nationalism and deglobalisation, as well as increased geostrategic competition between world powers.⁸⁵ Chief Audit Executives across Europe ranked macroeconomic and geopolitical uncertainty as the third biggest risk to their organisations, its highest position since the survey began in 2018, with a third of the respondents ranking it first.⁸⁶

⁸¹ MK Instruments Inc. Annual Report on Form 10-K, 27 February 2024, pp 28-29.

⁸² 'Research Briefing--Global: Businesses Now See Geopolitical Tensions as Key Global Threat' Oxford Economics 1 August 2023 (on file with author). In the 2023 World Economic Forum survey, geoeconomic confrontation ranked as the third most severe short-term global risk. World Economic Forum, *The Global Risks Report 11* (World Economic Forum 2023).

⁸³ Erik Schatzker, 'Nothing Worries CEOs Right Now as Much as Geopolitics' (*Bloomberg* 1 November 2023) <<https://www.bloomberg.com/news/articles/2023-11-02/tumultuous-times-for-global-politics-scare-wall-street-business-leaders>> accessed 10 April 2025.

⁸⁴ DTCC, 'With 2024 In Sight, Geopolitical Risk and Inflation Dominate as Top Risks to Global Financial Services Industry' (Press release 8 December 2023) <<https://www.dtcc.com/news/2023/december/06/2024-geopolitical-risk-and-inflation-dominate-as-top-risks-to-the-financial-services-industry>> accessed 10 April 2025.

⁸⁵ Oxford Analytica, 'How are Global Businesses Managing Today's Political Risks?' 2023 Survey and Report, 15 <<https://pages.oxan.com/rs/109-ILL-989/images/2023-political-risk-survey-report.pdf>> 10 April 2025 (88% expected the trend toward economic nationalism and deglobalisation to become stronger; 78% expected the trend toward geostrategic competition between world powers to intensify).

⁸⁶ European Confederation of Institutes of Internal Auditing, 'Risk in Focus: Hot Topics for Internal Auditors' (2024) 7, 11 <<https://www.eciia.eu/2023/09/risk-in-focus-2024-hot-topic-for-internal-auditors/>> accessed 10 April 2025.

As a means of documenting changing perceptions of geopolitical risks facing U.S. corporations over time, I examined the Risk Factors section of annual reports on Form 10-K of all companies in the SEC's EDGAR Company Database from 2003 to 2024.⁸⁷ Because the materiality standard for disclosure of such risks required under the federal securities laws has not changed in this period,⁸⁸ the number of mentions of such risks in Forms 10-K should be a robust indicator of changes in the evaluation of the type and magnitude of such risks by publicly listed U.S. corporations. Of course, there is significant copying of risk disclosures by lawyers drafting these documents, and in recent years the SEC has issued notices encouraging companies to disclose geopolitical risks, such as those related to China and Russia's invasion of Ukraine.⁸⁹ Nonetheless, consistent with the survey evidence discussed above, Figures 1-1 through 1-5 suggest a steep increase in perceptions of geopolitical risk over this period, including specific manifestations of this risk in compliance functions, supply chain vulnerabilities, and potential fallout from China-Taiwan tensions.

[insert Figures 1-1 through 1-5]

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.⁹⁰ As the epigraph to this article suggests, the transition from globalisation to weaponised interdependence has placed private, profit-oriented commercial entities at the centre 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'.⁹¹ Governments worldwide are increasingly reliant on private-sector innovation for the development

⁸⁷ The searches were conducted on the EDGAR Company Database via the SEC's Application Programming Interfaces. See the SEC's data portal at <https://sec-api.io/>. The database contains over 500,000 public filings for listed companies over a period of more than twenty years.

⁸⁸ 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').

⁸⁹ See, eg, Securities and Exchange Commission, 'Sample Letter to Companies Regarding China-Specific Disclosures' (July 2023) <<https://www.sec.gov/rules-regulations/staff-guidance/disclosure-guidance/sample-letter-companies-regarding-china>> accessed 10 April 2025; Securities and Exchange Commission, 'Sample Letter to Companies Regarding Disclosures Pertaining 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>> accessed 10 April 2025.

⁹⁰ 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* 1 October 1974) <<https://www.foreignaffairs.com/articles/1974-10-01/multinationals-game-and-rules-multinational-corporations-world-politics>> accessed 10 April 2025.

⁹¹ Hannah Kelley, 'Dual-Use Technology and U.S. Export Controls' Center for a New American Security (15 June 2023) <<https://www.cnas.org/publications/reports/dual-use-technology-and-u-s-export-controls>> accessed 10 April 2025. See also Philip Breedlove and Margaret E Kosal, 'Emerging Technologies and National Security: Russia, NATO, & The European Theater' (2019) 319 Hoover Winter Series 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'.).

of dual-use, civil-military technologies⁹² such as AI, advanced materials, quantum technologies, robotics, cryptographic equipment, lasers – the U.S. Commerce Department’s list of such technologies goes on at great length.⁹³ At the same time, as international relations scholars have noted, ‘[g]lobalisation has transformed the liberal order, by moving the action away from multilateral interstate negotiations toward networks of private actors’.⁹⁴ 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.⁹⁵

In this section, I explore the potential for geoeconomics to affect 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.

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 ESG issues. In geoeconomics as in ESG, corporations are being called to internalise 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 by-products 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 globalisation. 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.⁹⁶ Therefore, from the perspective of the policy

⁹² See, eg, Starburst, ‘The Rise in Dual-Use Technologies: A Paradigm Shift’ (Starburst 23 October 2023) <<https://starburst.aero/news/the-rise-in-dual-use-technologies/>> accessed 10 April 2025.

⁹³ See, eg, U.S. Bureau of Industry and Security, Export Administration Regulations Commerce Control List <<https://www.bis.gov/ear>> accessed 10 April 2025.

⁹⁴ Farrell and Newman (n 35) 44.

⁹⁵ ‘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’ (emphasis in the original). Klou Kitchen, ‘Why National Security is a Shared Burden Between the State and the Private Sector’ (*The Dispatch*, 17 March 2022) <<https://www.aei.org/op-eds/why-national-security-is-a-shared-burden-between-the-state-and-the-private-sector/>> accessed 10 April 2025.

⁹⁶ 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.

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.⁹⁷) There may 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 internalising 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 One' 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 labour 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,⁹⁸ 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 labour 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

⁹⁷ 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.

⁹⁸ 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 2020⁹⁹ (passed unanimously by a voice vote in the House and unanimously in the Senate), and the Protecting Americans from Foreign Adversary Controlled Applications Act, banning the TikTok platform in the U.S. 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).¹⁰⁰ 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.¹⁰¹ 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.¹⁰² In this section, I consider how the era of geoeconomics may implicate 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.¹⁰³ 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,

⁹⁹ 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.

¹⁰⁰ Yiwen Lu, ‘On TikTok, Resignation and Frustration After Potential Ban of App’ (*New York Times*, 24 April 2024) <<https://www.nytimes.com/2024/04/24/technology/tiktok-ban-bill-frustration.html>> accessed 10 April 2025. The constitutionality of the Act was upheld by the U.S. Supreme Court in January 2025.

¹⁰¹ European Confederation of Institutes of Internal Auditing (n 86) 7, 9.

¹⁰² Michael J Green and Scott Kennedy, ‘U.S. Business Leaders Not Ready for Next U.S.-China Crisis’ Center for Strategic and International Studies (16 May 2022) <<https://www.csis.org/analysis/us-business-leaders-not-ready-next-us-china-crisis>> accessed 10 April 2025.

¹⁰³ Rohitesh Dhawan and Sean West, ‘The CEO as Chief Geopolitical Officer’ (Eurasia Group and KPMG 2019) <<https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2018/03/the-ceo-as-chief-geopolitical-officer.pdf>> accessed 10 April 2025.

either by bringing former diplomats, government officials and military professionals onto their boards, or by retaining outside consultants.¹⁰⁴

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 mid-2010s,¹⁰⁵ 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 relatively modest and declining slightly. This mismatch could indicate that while it is relatively easy to claim that an independent director has ‘international experience’ in an era where such experience is considered valuable by investors, an independent director’s prior professional background is not subject to interpretation.

[insert Figures 2-1, 2-2]

[insert Figures 3-1, 3-2]

2. *Governance of Geopolitical Risk* – A second key question is where within a firm, and by what means, is geopolitical risk assessed and managed. The first mention of oversight of geopolitical risk in a U.S. proxy statement that I could find appeared in 2010.¹⁰⁶ 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 through 2024 revealed that only 154 Russell 3000 companies (5.1 percent) disclosed that one of its corporate governance organs or officers was responsible for oversight of geopolitical risk (excluding cybersecurity and intellectual property theft).¹⁰⁷ Separately, 30 companies reported that the geopolitical environment is considered in setting executive compensation or in otherwise evaluating senior management, although no detail is provided on precisely how it is considered. 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 95 percent 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 their enterprise risk management process) or

¹⁰⁴ Arjun Neil Alim, Michael O’Dwyer and Leo Lewis, ‘Companies on the Hunt for Geopolitical Advice as Tensions Rise’ (*Financial Times* 17 October 2023) <<https://www.ft.com/content/608a43e2-710c-4918-84d6-e0d75511918e>> accessed 10 April 2025.

¹⁰⁵ See, eg, Talos Petroleum Proxy Statement on Schedule 14A dated 10 April 2014.

¹⁰⁶ Hawk Corporation Proxy Statement on Schedule 14A dated 16 April 2010.

¹⁰⁷ ESGAUGE search results of 10-K, DEF14A, governance guidelines, and committee charters for all Russell 3000 companies for the years 2018 through 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 but did not discuss evaluation of geopolitical risk oversight as a function of any internal governance organ.

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 its committees or senior management, oversees geopolitical risk. A small number of companies have assigned the task to a specialised risk committee or risk officer. Assigning geopolitical risk oversight to the audit committee seems problematic, given the heavy responsibilities such committees already bear. Assigning such oversight to the compliance committee, as a few disclosing companies do, also seems problematic if it indicates that the task 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-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.¹⁰⁸ The SEC now requires annual disclosure of a company’s cybersecurity risk management, strategy, and governance.¹⁰⁹ 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.¹¹⁰

3. Compliance and the Role of the General Counsel: 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 the current geopolitical environment has heightened the complexity and pervasiveness of compliance issues. It is now routinely said, for example, that ‘economic sanctions are the new FCPA’,¹¹¹ while others have remarked that ‘export controls are the new sanctions’.¹¹²

¹⁰⁸ A rare example is APA Corporation Proxy Statement on Schedule 14A dated May 2023 p 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’).

¹⁰⁹ See Securities and Exchange Commission, ‘SEC Adopts Rules on Cybersecurity, Risk Management, Strategy and Governance and Incident Disclosure by Public Companies’ (Press Release 26 July 2023) <<https://www.sec.gov/news/press-release/2023-139>> accessed 10 April 2025.

¹¹⁰ 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>> accessed 10 April 2025.

¹¹¹ Deborah A Curtis and Kerry Walsh, ‘The Battle Lines are Drawn: What Industry Should Expect from New National Security-Premised Restrictions’ (Arnold & Porter 13 September 2023) <<https://www.arnoldporter.com/en/perspectives/advisories/2023/09/the-battle-lines-are-drawn>> accessed 10 April 2025.

¹¹² Seth DuCharme and Margaret B Beasley, ‘“Export Controls are the New Sanctions,” and Other Enforcement Trends for 2024’ (Bracewell 11 January 2024) <<https://bracewell.com/insights/export-controls-are-new-sanctions-and-other-enforcement-trends-2024>> accessed 10 April 2025.

In addition, corporate crime is now inextricably bound up with national security concerns. A senior DOJ official 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.¹¹³ 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'.¹¹⁴ 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 scrutinised by the U.S. government under a powerful national security lens'.¹¹⁵

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.¹¹⁶ In a 2023 survey, 40 percent of general counsel expressed concern over geopolitical uncertainty and instability.¹¹⁷ One respondent framed the general counsel today as a 'secretary of state for the CEO', ready to handle geopolitical crises that emerge unexpectedly.¹¹⁸

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 promoted U.S. supply chain resilience as a matter of national security and competitiveness.¹¹⁹ 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 was to improve coordination and trust-building on supply chain issues by forming networks among U.S. allies. Former Treasury Secretary Janet Yellen recommended moving supply chains to 'trusted countries' as a means of maintaining secure market access and lowering risks to the economy.¹²⁰ 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

¹¹³ Principal Associate Deputy Attorney General Marshall Miller, Delivers Remarks at the Ethics and Compliance Initiative IMPACT Conference, Jersey City NJ 3 May 2023.

¹¹⁴ Deputy Attorney General Lisa O Monaco Announces New Safe Harbour Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (4 October 2023).

¹¹⁵ Curtis and Walsh (n 111).

¹¹⁶ Legal.io, 'How Geopolitical Threats Reshape the Role of General Counsel' (Legal.io 26 January 2024) <<https://www.legal.io/articles/5462021/How-Geopolitical-Threats-Reshape-the-Role-of-General-Counsel>> accessed 10 April 2025.

¹¹⁷ FTI Consulting and Relativity, 'Global Legal Departments Alleviate and Respond to Critical Pressure Points' (General Counsel Report 2023) <<https://resources.relativity.com/2023-FTI-GC-Report-Part-1.html>> accessed 10 April 2025.

¹¹⁸ *ibid*

¹¹⁹ See White House, 'Fact Sheet: President Biden Announces New Actions to Strengthen America's Supply Chains, Lower Costs for Families, and Secure Key Sectors' (27 November 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/>> accessed 10 April 2025. See also Sujai Shivakumar, Gregory Arcuri and Charles Wessner, 'The Great Rewiring: How Global Supply Chains are Reacting to Today's Geopolitics' Center for Strategic and International Studies (25 July 2022) <<https://www.csis.org/analysis/great-rewiring-how-global-supply-chains-are-reacting-todays-geopolitics>> accessed 10 April 2025.

¹²⁰ 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).

strategic supply'.¹²¹ While supply chain resilience is not an explicit policy priority of the second Trump Administration, reducing reliance on China for critical materials and bringing supply chains closer to home is an element of the administration's 'America First' agenda.¹²²

Reducing supply chain vulnerabilities stemming from dependency on China is an unassailable policy objective. But successful friendshoring will be a lengthy process requiring close collaboration between governments and corporations to evaluate and manage each stage of often complex supply chains. Operational functionality and strategic goals may not coincide in attempts to make supply chains more resilient. Moreover, reducing vulnerabilities may require that production be 'embedded in a more strongly political orientation on Western values and the corresponding behavioural norms, in order to reshape corporate behaviour'.¹²³ 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'.¹²⁴ However, a collaborative international approach to supply chain management may face obstacles in the medium term, given the second Trump Administration's scepticism toward alliances.

All of this is to underscore the magnitude of the task facing corporations in building supply chain resilience. As commentators have noted,

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 jeopardise the livelihood of billions, the opportunity costs of not rewiring supply chains to make them more resilient are high.¹²⁵

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 noted previously – 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,

¹²¹ Quoted in Shivakumar, Arcuri and Wessner (n 119).

¹²² See Patricia Zengerle and others, 'Trump State Pick Rubio Praised in Senate, Warns Against China Reliance' (*Reuters* 15 January 15 2025) <<https://www.reuters.com/world/us/china-hawk-rubio-set-smooth-confirmation-trumps-state-dept-nominee-2025-01-15/>> accessed 10 April 2025.

¹²³ Maihold (n 120).

¹²⁴ *ibid*

¹²⁵ Shivakumar, Arcuri and Wessner (n 119).

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.¹²⁶ 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 makes it difficult to determine the 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 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.¹²⁷ In *SolarWinds*,¹²⁸ 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.¹²⁹ By 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’.¹³⁰

Thus, the potential for *Caremark* liability plainly exists with respect to corporate losses incurred due to a failure by the board or an officer to monitor compliance with economic sanctions, export controls, and related national security regulations,¹³¹ 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

¹²⁶ See, eg, *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

¹²⁷ See, eg, *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’.).

¹²⁸ *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*).

¹²⁹ *ibid* *7.

¹³⁰ 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 the theory that ‘everyday business problems’ can constitute a breach of fiduciary duty in the oversight context).

¹³¹ Liability also plainly exists if a board of directors or an officer were to purposely disregard compliance obligations relating to national security or economic sanctions in the pursuit of greater profits, a so-called ‘*Massey* claim’ under the *Caremark* line of jurisprudence.

potential *Caremark* liability for geopolitically induced corporate trauma, for example, losses stemming from reasonably foreseeable 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.¹³²

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 spectre of shareholder class action litigation for failure to disclose a material geopolitical risk has also grown.¹³³ At the same time, however, the geopolitical environment poses challenges for companies in determining the risks that must be disclosed. The difficulty of assessing and thus disclosing such risks is perhaps most prominent in supply chain tracing. But geopolitical risks lurking in the background of joint ventures and other corporate transactions may also materialise in unexpected ways, potentially giving rise to securities fraud claims.

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’.¹³⁴ The report identifies numerous Chinese 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’.¹³⁵ 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’.¹³⁶

Shareholder proposals provide another outlet for shareholders to voice objections 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

¹³² See *Segway* (n 130).

¹³³ Sullivan & Cromwell, ‘Key Considerations for Upcoming 2023 Form 10-K and 20-F Filings’ (Memorandum 14 December 2023) <https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Key-Considerations-Upcoming-2023-Form-10-K-20-F-Filings.pdf> accessed 10 April 2025.

¹³⁴ See, eg, Coalition for Prosperous America, ‘How Wall Street Funds the CCP and PLA with U.S. Investor Capital’ (October 2023) <<https://prosperousamerica.org/cpa-report-details-how-vanguard-and-ftse-russell-funnel-billions-of-u-s-investor-capital-to-the-ccp-and-pla-linked-companies/>> accessed 10 April 2025 (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 using forced labour, or (4) specialising in advanced technologies that an Executive Order identified as an extraordinary threat to U.S. national security).

¹³⁵ *ibid* 10.

¹³⁶ *ibid* 22.

proposals requesting the board to report on the nature and extent of the firm's business in China.¹³⁷ 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.¹³⁸ The National Legal and Policy Centre, a conservative advocacy organisation, has filed multiple shareholder proposals calling for various companies to conduct a 'Communist China Risk Audit'¹³⁹ or for the board to 'analyse 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'.¹⁴⁰

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.¹⁴¹

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 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,¹⁴² and are there corporate fingerprints on the gaps? How extensive is lobbying by former government and military personnel on boards of private companies?

¹³⁷ See Chris O'Malley, 'Tech Giant Apple, Other Big firms Face Rising Shareholder Heat Over China Reliance' (Corporate Counsel 12 April 2023) <<https://www.law.com/corpocounsel/2023/04/12/tech-giant-apple-other-big-firms-face-rising-shareholder-heat-over-china-reliance/>> accessed 10 April 2025.

¹³⁸ MSCI Inc. Proxy Statement on Schedule 14A dated 13 March 2024, pp 102-103. 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.

¹³⁹ See, eg, PX14A6G, filed 10 April 2024 (Berkshire Hathaway); PX14A6G, filed 15 May 2023 (Walmart).

¹⁴⁰ See, eg, PX14A6G, filed 9 February 2024 (Apple); PX14A6G, filed 29 April 2024 (McDonalds).

¹⁴¹ Andrew Grant, Ziad Haider and Jean-Christophe Mieszala, 'How to Build Geopolitical Resilience Amid a Fragmenting Global Order' (McKinsey & Company 8 September 2022) <[mckinsey.com/capabilities/risk-and-resilience/our-insights/how-to-build-geopolitical-resilience-amid-a-fragmenting-global-order](https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/how-to-build-geopolitical-resilience-amid-a-fragmenting-global-order)> accessed 10 April 2025.

¹⁴² See, eg, Tim Bradshaw and Ryan McMorow, 'Nvidia to Make \$12 Billion from AI Chips in China this Year Despite US Controls', (*Financial Times* 4 July 2024) <<https://www.ft.com/content/b76ef55b-21cd-498b-ac16-5660908bb8d2>> accessed 10 April 2025; Eduardo Baptista, 'China's Military and Government Acquire Nvidia Chips Despite US Ban' (*Reuters* 15 January 2024) <<https://www.reuters.com/technology/chinas-military-government-acquire-nvidia-chips-despite-us-ban-2024-01-14/>> accessed 10 April 2025.

As this analysis of the current policy environment and firm-level issues indicates, the era of geoeconomics has brought new challenges, risks, and uncertainties to corporate governance. At this early stage, it is difficult to assess precisely how this development will change the governance of U.S. corporations. Perhaps there is something fundamentally different about managing a global business in a de-globalising world that will require significant adjustments in the governance of private, profit-oriented corporations partnering with governments to pursue national goals and interests. Or perhaps geopolitical risk will turn out to be simply another of the many complex challenges that boards and their advisers already manage.

It is already apparent, however, that ‘history has returned’ to corporate governance, with potentially far-reaching global implications for the field. I turn to these implications next.

IV. The Return of History in Corporate Governance

The ‘return of history’ to corporate governance has reopened several questions whose answers were long thought to be settled. What are the drivers and implications of global capital market competition? How is corporate identity determined? And is it possible to reimagine the dimensions of national convergence and divergence in corporate governance, based on shared democratic or authoritarian political values rather than the degree of devotion to shareholder versus stakeholder interests? In this Part, I briefly explore these questions to sketch a roadmap for future research.

A. Capital Market Competition

As previously noted, the debate about capital market competition two decades ago was infused with a deregulatory spirit, aimed at preserving investor protection while giving issuers of securities in the U.S. capital markets broad freedom of choice with respect to applicable law. 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. U.S. financial institutions 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 U.S. government sanctions.

The U.S. capital markets are not alone in being viewed by governments 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.¹⁴³ 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

¹⁴³ Oliver Telling, ‘Singapore Courts Local Tech Giants over “National Duty to Relist”’ (*Financial Times* 23 July 2022) <<https://www.ft.com/content/4723e543-5219-4122-b838-f91646865820>> accessed 10 April 2025.

markets into a more competitive whole.¹⁴⁴ 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 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.¹⁴⁵

As these examples illustrate, the policy environment around the capital markets is expanding well beyond the traditional focus on investor protection and liquidity. Given the tight linkages between the financing of innovation and technological prowess, economic resilience and military strength, governments today view the development and maintenance of robust capital markets in competitive terms directly related to the advancement of national (or regional) interests and power projection.¹⁴⁶

B. Corporate Identity and Share Ownership

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 political affiliations of a company's founders, board members, or shareholders were rarely analysed, 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 geoeconomic implications. The current poster child for this sea change is, of course, TikTok.¹⁴⁷ TikTok Inc., which operates the video sharing platform in the United States, is controlled by TikTok Ltd., a Cayman Islands company wholly owned by its parent, ByteDance

¹⁴⁴ Florian Heider and others, 'The Geopolitical Case for CMU and Two Different Pathways Toward Capital Market Integration' SAFE White Paper No. 102 (April 2024) <<https://www.econstor.eu/bitstream/10419/294828/1/1887864512.pdf>> accessed 10 April 2025.

¹⁴⁵ *ibid* 10.

¹⁴⁶ See Curtis J. Milhaupt and Georg Ringe, *The Political Economy of Stock Exchange Competition* (Stanford Law School Working Paper, 2025).

¹⁴⁷ See Curtis J Milhaupt and Dan W Puchniak, 'TikTok's Identity Crisis: Corporate Personality in a De-Globalizing World' Harvard Law School Forum on Corporate Governance (3 January 2025) <<https://corpgov.law.harvard.edu/2025/01/03/tiktoks-identity-crisis-corporate-personality-in-a-de-globalizing-world/>> accessed 10 April 2025.

Ltd., a privately held Cayman Islands company. About 60 percent of the shares of ByteDance Ltd. are held by globally active institutional investors such as KKR and the Carlyle Group; its employees worldwide hold 20 percent of the shares, and one of its founders holds 21 percent of the equity but maintains voting control via dual class shares.¹⁴⁸ Three of the five members of ByteDance's board of directors are U.S. citizens and the CEO is Singaporean. From the perspective of standard tests of corporate identity and separate corporate personality, TikTok is plainly not 'Chinese'. But from the perspective of U.S. lawmakers, TikTok is the alter ego of the Chinese Communist Party and government, because the party-state could potentially order ByteDance to manipulate the algorithm for propaganda purposes and use data generated by the platform's 170 million users in the United States for malign purposes.

The U.S. government moved to ban TikTok in the first Trump Administration. In 2020, President Trump issued an executive order to restrict TikTok's operations in the United States.¹⁴⁹ Trump, based on a recommendation from CFIUS, also ordered ByteDance to unwind its acquisition of Musical.ly, which later merged to become TikTok.¹⁵⁰ Both actions were immediately challenged in court.¹⁵¹ The Biden Administration revoked President Trump's TikTok ban and instructed the Commerce Department to provide recommendations on how to proceed.¹⁵² But there was no 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.¹⁵³ As noted above, the bill that eventually emerged in the spring of 2024 received overwhelming bipartisan support. As enacted, the statute expressly defines ByteDance and TikTok as 'foreign adversary controlled',¹⁵⁴ and prohibits their platforms from operating within the United States.¹⁵⁵ In the absence of a 'qualified divestiture',¹⁵⁶ the TikTok ban was statutorily required to go into effect on January 19, 2025, subject only to a 90-day extension by the President under strict circumstances that were not met.¹⁵⁷ As of this writing, although the deadline for divestiture has long passed, TikTok's status in the United States is still uncertain. The application's future in the United States likely depends on the ability of Presidents Trump and Xi to reach an agreement on TikTok Inc.'s complete or partial divestiture from Chinese control.

¹⁴⁸ *ibid*

¹⁴⁹ 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 (6 August 2020).

¹⁵⁰ *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).

¹⁵¹ 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).

¹⁵² See *Protecting Americans' Sensitive Data from Foreign Adversaries*, Exec. Order 14,034, 86 Fed. Reg. 31423, 31424 (June 9, 2021).

¹⁵³ *Making Emergency Supplemental Appropriations for the Fiscal Year Ending September 30, 2024, and for Other Purposes*, H.R. 815, 118th Cong. (2023).

¹⁵⁴ H.R. 815, 118th Cong. § 2(g)(3)(A).

¹⁵⁵ *ibid* § 2(a)(1)(A)-(B).

¹⁵⁶ *ibid* § 2(c)(1) (providing exemption); (6) (defining qualified divestiture).

¹⁵⁷ See *ibid* § 2(a)(2).

This saga is but one example of the way in which corporate identity is now being scrutinised and redefined. The phenomenon initially emerged with an explosion of concern over the portfolio investments of sovereign wealth funds in global capital markets in the mid-aughts.¹⁵⁸ Efforts to decouple/derisk from China and compliance with economic sanctions on Russia have accelerated scrutiny of corporate identity. The years-long, ultimately failed quest of fast fashion retailer Shein to find a western securities exchange to host its IPO highlights the risks to any company, regardless of its jurisdiction of incorporation or the location of its headquarters, of being associated with a government that abuses human rights.¹⁵⁹ The emergence of other authoritarian states as global market players, such as Saudi Arabia, is likely to intensify the focus on the comingling of national strategy, economic influence, human rights considerations, and corporate identity.

Notwithstanding the current contestation over issues of corporate identity and control, however, it appears doubtful that geoeconomics will prompt doctrinal evolution on the separate legal personality of corporate entities or measures of corporate control. But in the absence of such evolution, expect governments to increasingly ignore the legal tests and define foreign corporations as they see fit in their own national interest.

C. Convergence

As narrated in *The End of History for Corporate Law*, the ideology of shareholder primacy was the focal point for global convergence in corporate governance in the era of *Pax Americana*. The era of geoeconomics raises the spectre of a new form of convergence centred around the shared political values and strategic interests of globally active companies' home governments – what might be called 'Bloc Convergence'.

As noted above in the context of supply chain resilience, the current geopolitical environment has the potential to foster multilateral coordination of national security priorities and to spur regulatory convergence among like-minded countries. Led by the near/friendshoring movement, the policy goal of reducing dependency on China and other autocratic regimes may have a meaningful influence on cross-national alignment of 'corporate purpose'. If Western governments 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 homogenising effects on the values and stakeholder hierarchies of Western corporations. Meanwhile, China's influence as an alternative model of development and the government's overtures to the Global South could solidify into a competing bloc characterised by extensive state ownership and state influence in corporate governance and

¹⁵⁸ See, eg, Ronald J Gilson and Curtis J Milhaupt, 'Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism' (2008) 60 *Stan L Rev* 1345.

¹⁵⁹ Shein's ultimate corporate parent is incorporated in the Cayman Islands; it is headquartered in Singapore. Shein's initial plan to IPO on the New York Stock Exchange was rebuffed following allegations by U.S. lawmakers that it uses forced labor in its supply chain. Shein next attempted to list in London, but the controversy followed it. UK regulators, under considerable pressure to end a drought of high-profile listings on the London Stock Exchange, eventually gave preliminary approval for Shein's IPO. However, the Chinese securities regulator denied the company permission to list in London, possibly fearing the scrutiny a public listing in the UK would bring to Shein's supply chain. As of this writing, Shein is expected to IPO in Hong Kong, where the Chinese government is encouraging listings and re-listings of companies that have encountered political obstacles on global capital markets. See Milhaupt and Ringe (n 146).

finance. Past dichotomies used to distinguish between major prevailing corporate governance regimes globally (stock market versus bank-oriented systems; shareholder primacy versus stakeholderism) may be replaced by a divide between corporate blocs identified with democratic versus authoritarian regimes.

Once again, however, significant questions remain. The dawning of the second Trump Administration raises doubts about how much collaboration and regulatory convergence between the United States and ‘like-minded countries’ can be expected. It is possible that, as with ESG policy and regulation, the United States and Europe will diverge in their approaches to China and other authoritarian regimes in the realms of technology transfer, economic sanctions, and supply chain management. At the same time, China’s continued attractiveness as an alternative model of economic success and its potential to achieve major changes in the international order are far from assured.

Conclusion

The era of geoeconomics has ruptured the assumptions that undergirded two decades of corporate governance theory and practice. No longer insulated from the realm of statecraft, corporations have been thrust onto the front lines of geopolitical rivalry, national security policy, and economic statecraft. This article has introduced geoeconomics as an important, underexplored lens through which to examine both the external policy environment and internal governance structures of globally active firms.

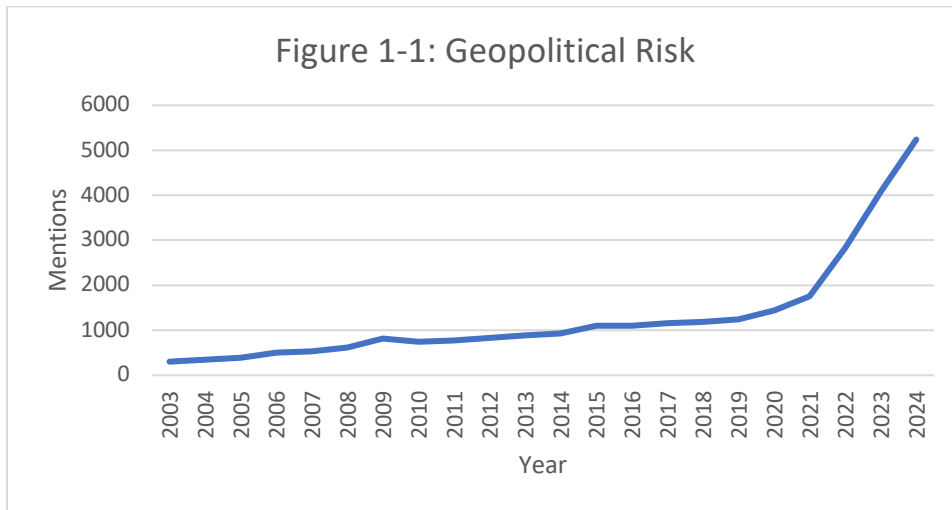
Three principal insights emerge from this analysis. First, the liberal vision of convergence around shareholder primacy and harmonized capital markets now competes with a return to national interest, strategic rivalry, and divergent governance paths rooted in political regime type. Second, corporate governance must adapt to a new policy ecosystem – what might be termed ESG + G, where geopolitical alignment, like environmental and social responsibility, becomes both a boardroom issue and a source of reputational and legal risk. Third, firm-level governance, from board expertise to risk oversight and compliance, is under pressure to evolve in the face of an increasingly complex landscape. The implications range from potentially new bases of director liability and securities litigation to public mistrust and impediments to global capital flows.

This analysis opens the door to further questions with high academic and policy salience for the field: How will corporations recalibrate their identity amid rising demands for political alignment? Will forms of governance converge among democratic states, or fragment under nationalist pressures? And can corporate law and governance scholarship rise to the challenge of theorizing the firm not simply as a vehicle for private ordering and agency cost minimization, but as partner of the state amidst geopolitical rivalry?

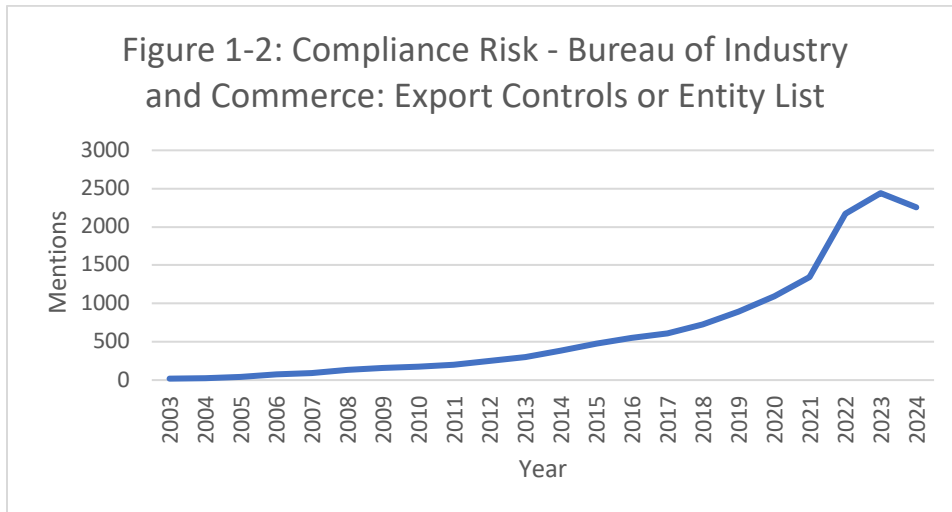
History has returned to corporate law and governance. Responding to this development is a pressing challenge for firms, policymakers, and scholars worldwide.

Figure 1

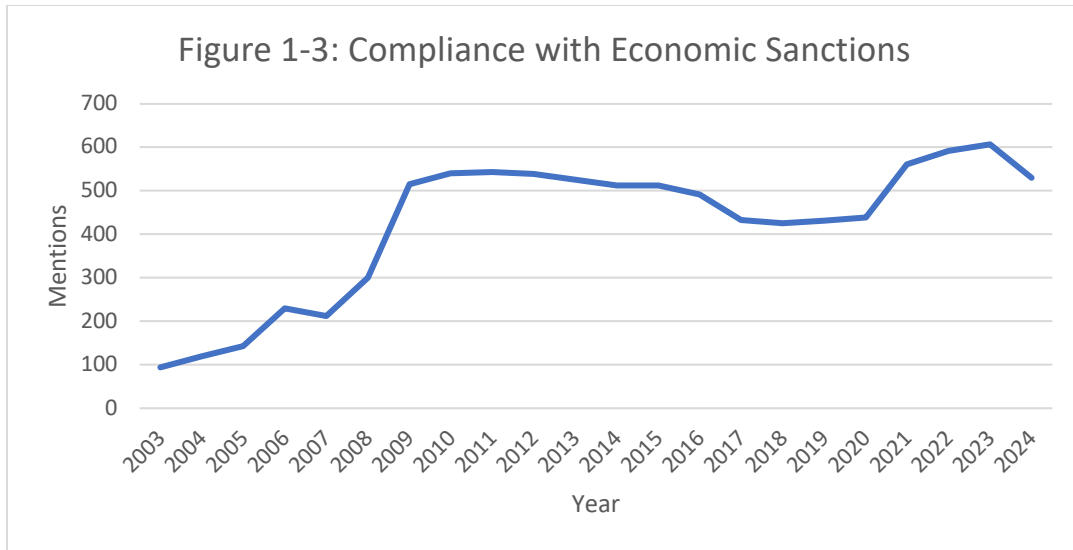
10-K Risk Factor Mentions, 2003-2023



Source: SEC EDGAR Company Database



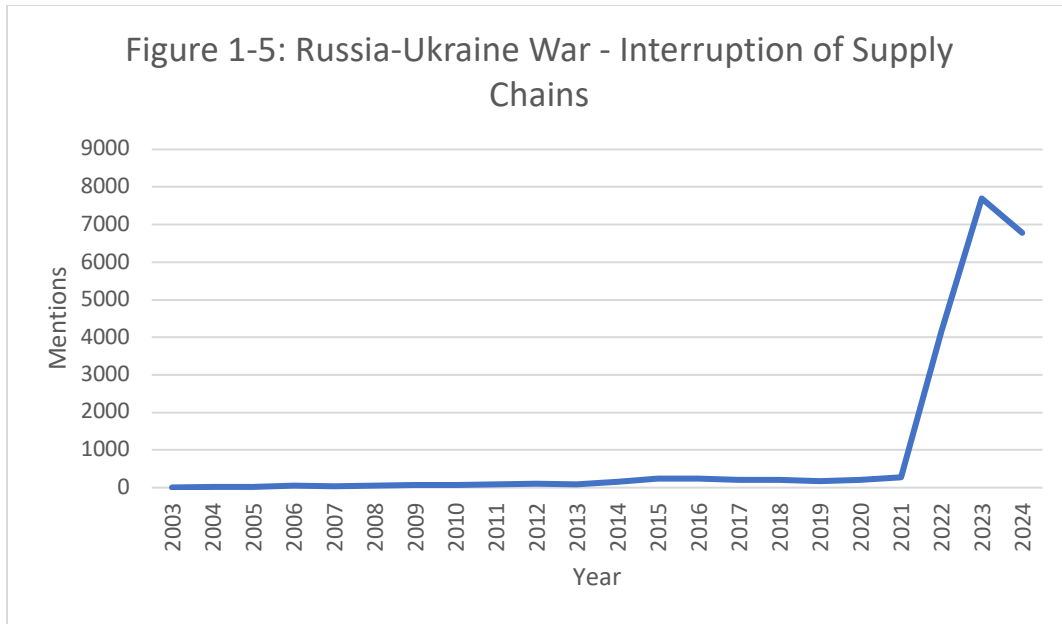
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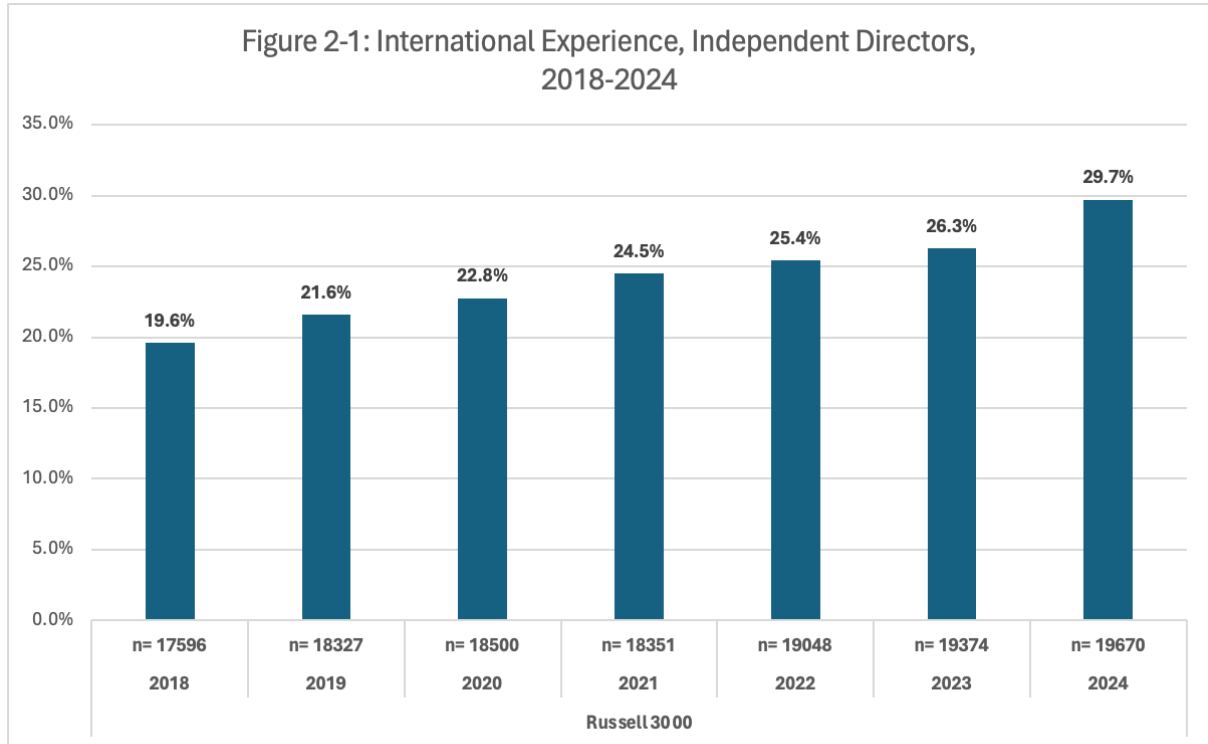
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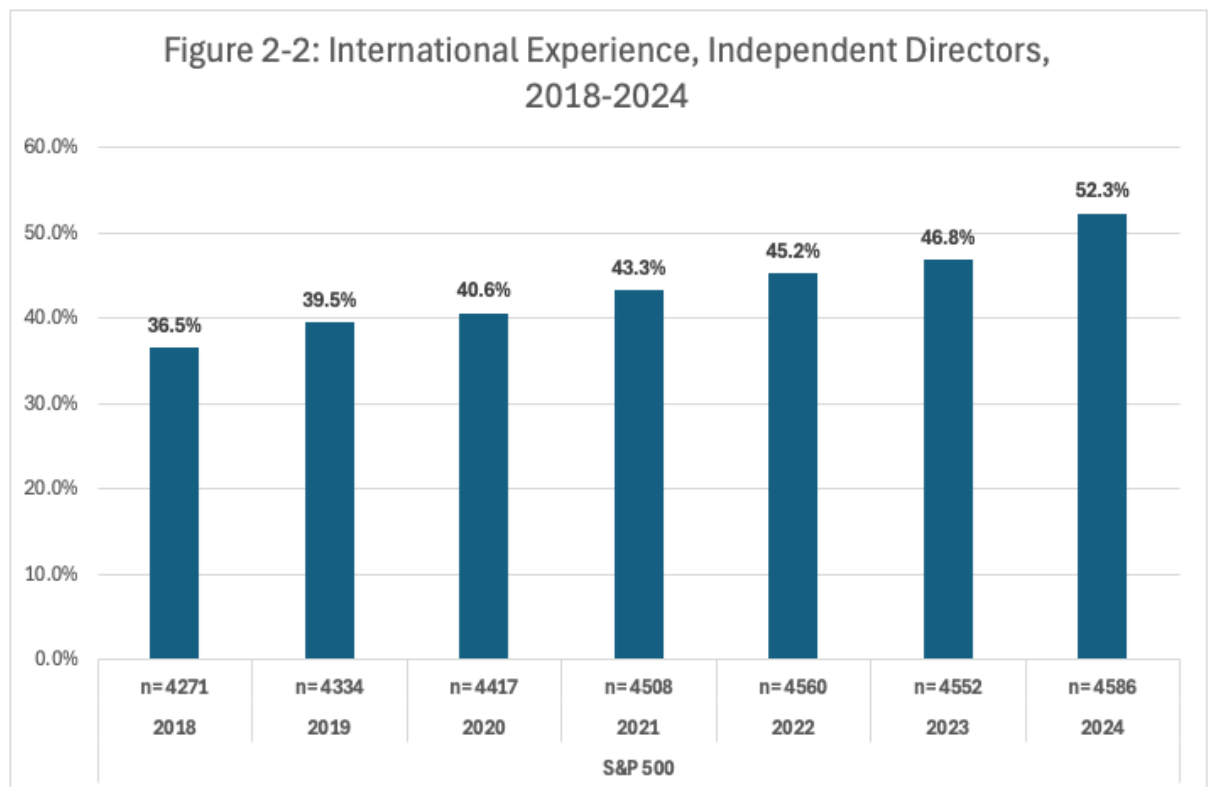
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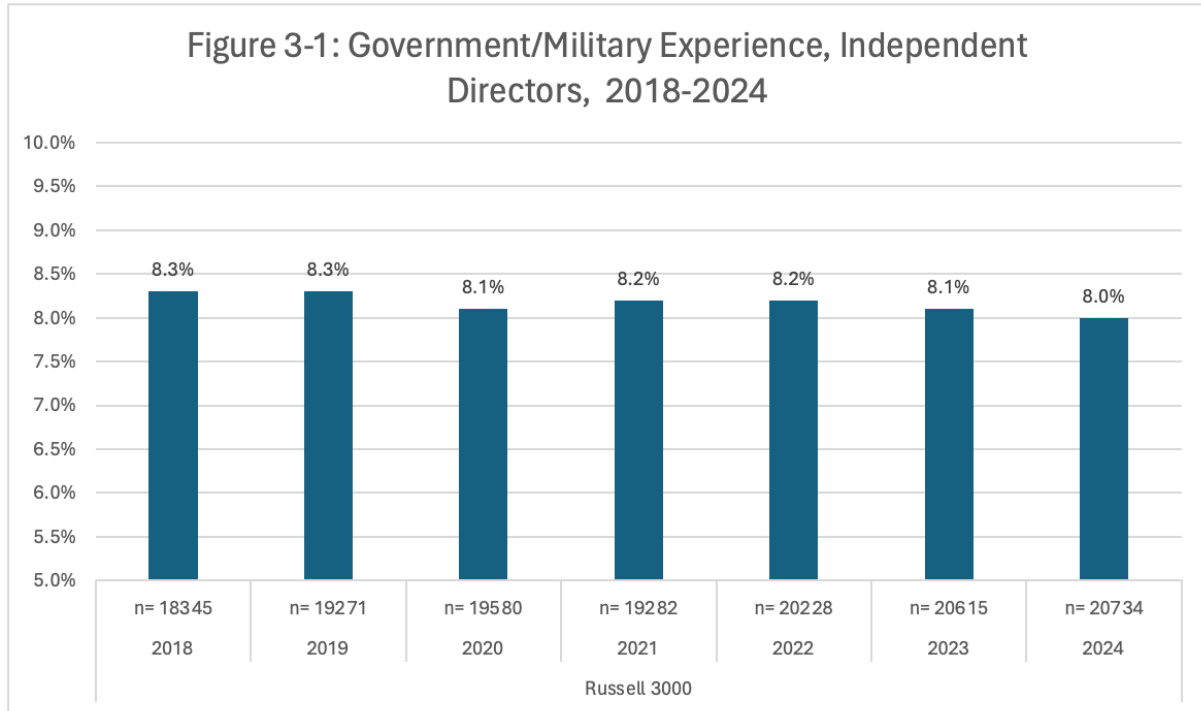
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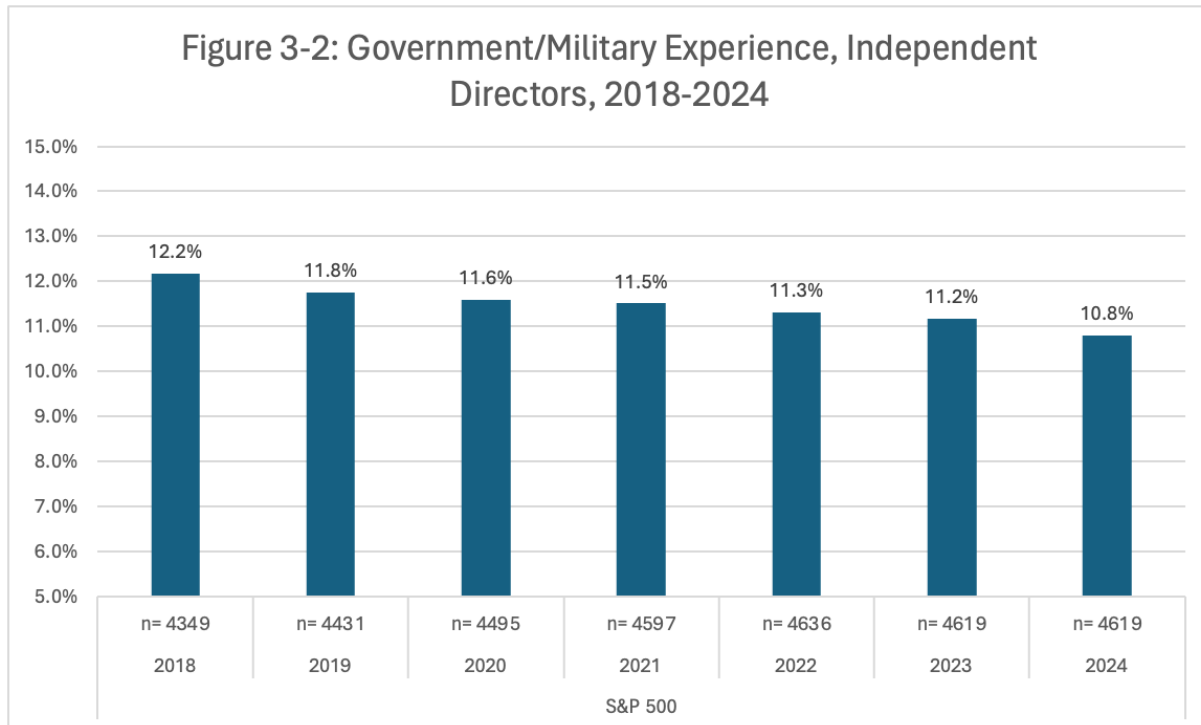
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Table 1 Oversight of Geopolitical Risk**Corporate Governance Organ Responsible Number of Companies**

Board of Directors	71
Board and its Committees	10
Board and a Specific Committee*	12
Board and Management	16
Audit Committee**	17
Risk Oversight/Management Committee	14
Compliance Committee	2
Other+	20

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. Total number of companies in Table 1 (161) exceeds number of reporting companies (154) because several companies disclosed more than one responsible organ across different reporting years.

Notes:

* Includes Board and Audit Committee, Board and Nomination and Corporate Governance Committee, Board and Risk Management Committee, Board and ERM Management Committee, Board and Geopolitical, Strategic and Organizational Committee.

** Includes Audit and Risk Committee, Audit and Finance Committee.

+ Includes, for example, Chief Risk Officer, Public Policy and Sustainability Committee, Corporate Governance and Responsibility Committee, External Affairs and Political Risk Committee, Policy Committee, National Security Director and Management.

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