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**THE INTERNATIONAL GOVERNANCE CRISIS
AND POST-WTO ORDER: A CHINA-US G2 FTA
AS A SOLUTION?**

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The International Governance Crisis and Post-WTO Order: A China-US G2 FTA as a Solution? *

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Abstract: The World Trade Organization deadlock, US-China trade war, and the Belt and Road Initiative are having a profound effect on global economic governance. This paper examines several questions: what are the systematic conflicts that have triggered this crisis of WTO deadlock and trade war? What might be the structure of the new order which is emerging? How should norms and institutions be designed to best address the crisis in the long-term, to produce desirable global and extra-regional governance outcomes? The paper argues that the US-China consensus gap is at the heart of the crisis. The potential multilateralism disintegration will likely lead to an increasingly important role for regionalism, while regionalism will likely further marginalise the WTO. An open G2 (US-China) Free Trade Agreement that promotes international rule of law, termed “treaty stability” here, could be a possible solution to this crisis. However, the considerable uncertainty around such a G2 trade pact indicates the difficulties in developing a rule-based system.

Key words: trade war, WTO, crisis, the Belt and Road Initiative, US-China FTA

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1. Introduction

The World Trade Organization (WTO) faces deadlock in the appointment of Appellate Body members. The US has increased tariffs on imports from China and other countries, with tariffs raised on US products in retaliation, flouting WTO rules.¹ The China-US trade war has led to a wide range of tariff increases and other unilateral trade restrictive measures, affecting the world economy. The WTO deadlock and trade war together constitute an unprecedented global economic order crisis (the crisis) that demonstrates the continuing erosion of the multilateral rule-based system. This differs from the previous trade practice. For instance, “new protectionism”, a concept advanced by John Ruggie to refer to a similar period of trade protectionism in the 1970s and 1980s,² brought a transformation of trade shape, content, and governing dynamics instead of the disintegration of globalisation and free trade.³ The current trade war is much more complicated and wide-ranging than previous trade war and its solutions (like the Plaza Accord). The current crisis requires new thinking as existing institutions can hardly address present problems.

This article is one of a few papers to examine, from a law and international relations (IR) perspective, the crisis of the US-China trade war and WTO deadlock. It examines several crucial questions: what systematic conflicts triggered this crisis of trade war and the WTO deadlock? What might be the structure of the new order which is emerging? How should norms and institutions be designed to address the crisis in the long term, such that desirable global and extra-regional governance outcomes are achieved?

The paper argues, first, that the US-China consensus gap is at the heart of the unprecedented crisis. Second, multilateralism is interacting with regionalism with new effects, with the rise of regionalism as a possible structure for the new order. On the one hand, the potential multilateralism disintegration will likely lead to an increasingly important role for regional governance. In particular, the Belt and Road Initiative (BRI) should not be ignored, and is likely among one of the most influential initiatives that will affect the future of world economic governance. The BRI is profoundly effecting extra-regional governance in terms of rules (seen particularly in an emerging network of soft law on the BRI) and institutions (such as the Asian Infrastructure Investment Bank (AIIB)).⁴ On the other hand, the WTO is likely to be marginalized with the rise of regionalism. Arguably, the current trade war reflects the underlying issues and the widening gap between the Beijing Consensus and Washington Consensus or the new Washington Consensus under Trump Administration, if any. Moreover, the trade war is likely to speed up the review or reshaping of the BRI, encouraging China to further engage the outside world under the BRI, respond to some concerns and enhance its role in global governance. Finally, an open G2 (US-China) Free Trade Agreement that promotes a rule-based system and good governance could be a possible idealist solution to this crisis. If properly

¹ Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE 37, 42 (2018).

² John Gerard Ruggie, *International regimes, transactions, and change: embedded liberalism in the postwar economic order*, 36 INTERNATIONAL ORGANIZATION 379, 379-415 (1982).

³ Andrew Lang, *Protectionism's Many Faces*, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE 54, 54, 56 (2018).

⁴ For the analysis of the BRI, see, e.g., Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 JOURNAL OF INTERNATIONAL ECONOMIC LAW 29, 29-55 (2019).

managed, a G2 free trade agreement (FTA) may bring treaty stability. However, the considerable uncertainty around a G2 FTA indicates the difficulties in developing a rule-based system. The reason why the paper proposes the G2 FTA while also indicates its uncertainties is that one needs to seek ideas (like a properly designed G2 FTA) for what international economic law should look like looking ahead and lay a foundation for the WTO reinvigoration while evaluate its feasibility.

In Part II, the system conflicts triggering the crisis will be explored. Part III discusses the emerging new order, exploring particularly the relationship between the BRI, trade war and the potential multilateral system disintegration. In Part IV, the paper argues for treaty stability as a possible solution to the crisis, while assessing the considerable uncertainties associated with such a proposal. Part V concludes with a reflection on the possible directions forward for the world order.

2. The systematic conflicts triggering the crisis

Both the China-US trade war and WTO deadlock reflect the deep divergence between China and the US, while other countries also play a role.⁵ The core of the current crisis is US-China relations,⁶ although there are many factors behind the current global economic order crisis, ranging from populist and nationalist upheavals, normative conflict, and regulatory and tax arbitrage. For the first time in the post-war era, China's rise reveals a state-led economic model fundamentally different from the traditional liberal and market-oriented model, and from past economic competitors of the US (like Japan).⁷ It is observed that “[t]he greatest challenge for the maintenance of the WTO dispute settlement system is the growing political and economic competition between the United States and China.”⁸ The trade war also reflects the profound difference in the US and China trade approaches.

The US-China consensus gap, or a “clash between the Chinese state-dominated economic model and the US-led free-market economy system”,⁹ is at the heart of the current crisis. On the one hand, the Washington Consensus, which promotes free market economics, has changed. The Trump Administration highlights an America First policy and prefers unilateralism and bilateralism, often meaning managed trade over free trade.

On the other hand, the Beijing Consensus is being strengthened and expanded by the BRI, and soft law instruments are increasingly often used. It is not surprising as the BRI is a China-led initiative and often reflects China's development model. China aims to reshape global governance through the BRI. One may argue that the BRI is a response to US trade practices including the “Pivot to Asia”,¹⁰ and deep US-style new rules (like the TPP). Alongside its rise, China has been transforming from a rule-follower to a leader in reshaping supranational institutions (e.g., the AIIB) and rules (seen in the unprecedented number of soft-law instruments under the BRI). China's rise in trade is part of the new multipolarity.¹¹

⁵ With the tension of the major economies and the US stepping back in regionalism, other countries may play an increasingly important role. This is case with Japan for the CPTPP.

⁶ Lang, *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE*, 57 (2018).

⁷ Mark Wu, *China's Rise and the Growing Doubts over Trade Multilateralism*, in *TRADE WAR: THE CLASH OF ECONOMIC SYSTEMS ENDANGERING GLOBAL PROSPERITY* 101, 104, 105, (Meredith A. Crowley ed. 2019).

⁸ Shaffer, *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE*, 42 (2018).

⁹ Alex He, *Trump's Trade War Is an Unintentional Attack on China's Economic Model*(2018), available at <https://www.cigionline.org/articles/trumps-trade-war-unintentional-attack-chinas-economic-model>.

¹⁰ Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*(2019), available at <https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative>.

¹¹ Chantal Thomas, *Trade and Development in an Era of Multipolarity and Reterritorialization*, 44 *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE* 77, 80 (2018).

There is a limit to the capacity of WTO norms to address the huge differences between Beijing and Washington. This is due both to the limits of WTO rules themselves and the dysfunction in the WTO dispute settlement system. The WTO is part of “a Western-oriented, liberal international system, organized around openness, rules, and multilateral cooperation.”¹² The current multilateral system seems unprepared for the changing distribution of power and competition for global (economic) leadership. Current rules are “not up to the challenge of accommodating countries like China, where economic practices are very different from those of the US or Europe.”¹³ This may explain why President Trump does not think WTO rules can address the trade issues with China and instead resorts to unilateral tariffs.¹⁴ According to Mark Wu, the WTO norms face the serious problems of rule incompleteness (largely failing to be upgraded since 1994), being designed to target measures taken by governments or actors directed by governments instead of measures taken out of an informal undertaking not captured in written and other forms, and the lack of retrospective remedies for past harm.¹⁵ It is observed that “the WTO presumes market economies, but China is—and seems likely to remain for some time—out of step with strong versions of that presumption and thus ill-equipped to achieve full compliance with some WTO norms or rules.”¹⁶ This is a key challenge faced by global governance.

3. The emerging new order: the rise of regionalism and the marginalisation of the multilateralism?

The WTO deadlock, trade war and BRI will have a profound effect on the future of the global economic order. The major challenge they bring is the reduced predictability of the world trading system. They are a trigger for the shaping of a new global and regional order. Several observations can be made here. The multilateralism disintegration promotes regionalism, while the WTO may be marginalized. Outside the WTO, the trade war is likely to affect the BRI.

3.1 The rise of regionalism

The disintegration of the multilateralism and trade war will likely reinvigorate regionalism, which includes mega FTAs and the BRI. WTO negotiation has not provided for new issues in international business such as data, digital trade, environment and labour, or provided substantial new market access, with some exceptions. Many countries instead resort to FTAs. The WTO deadlock helps to explain the rise of FTAs, such as the recent negotiation of the Regional Comprehensive Economic Partnership (RCEP), the United States-Mexico-Canada Agreement (USMCA), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Mega FTAs will provide predictability and enhanced market access beyond that of the WTO given the WTO negotiation deadlock. In particular, mega FTAs provide broader member coverage and benefits than bilateral FTAs and is likely to develop. There is also a call for the a

¹² G. John Ikenberry, *Why the Liberal World Order Will Survive*, 32 ETHICS & INTERNATIONAL AFFAIRS 17, 17 (2018).

¹³ Dani Rodrik, *Donald Trump's Trade Game*(2019), available at <https://www.livemint.com/Opinion/zArWi2li0Qh9yCFyBLVQyl/Opinion--Donald-Trumps-trade-game.html>.

¹⁴ Wu, 102. 2019.

¹⁵ Id. at, 106-107.

¹⁶ Jacques deLisle, *China's Rise, the U.S., and the WTO: Perspectives from International Relations Theory*, UNIVERSITY OF ILLINOIS LAW REVIEW ONLINE 57, 65 (2018).

Euro-Pacific partnership agreement between the EU and the CPTPP countries to increase predictability and respond to the challenges of multilateralism and trade war.¹⁷

The multilateralism disintegration and trade war may lead China to increasingly resort to the BRI. If the crisis cannot be properly addressed, the BRI is likely to be a Plan B for China. First, the BRI is a hub-and-spoke system led by China. If properly managed, the BRI will enhance China's role in extra-regional governance.

Second, the BRI may help to provide an (alternative) trade and investment export market for China that do not rely much on the US market, although substantial risks exist in many BRI states (like the weak legal systems in various BRI states). The difficulties of WTO negotiation and potential risk of disintegration place pressure on China to ensure its benefits under the existing system regarding other WTO members, particularly the US. The trade war reveals that China may lose some of the benefits under the WTO system (due to, for instance, the increased costs for Chinese goods to enter the US market due to increased tariffs). Furthermore, China's products and services do not enjoy preferential treatment under FTAs regarding export to the major markets like the US, EU and Japan, since there is no FTA between China and these partners. The WTO deadlock and the trade war will likely provide incentives for China to speed up the FTA negotiations which is related to its BRI strategy. This partially explains why China has recently proposed an ASEAN + 3 (China, Japan and South Korea) FTA at the East Asia Summit, which is intended to "counter the challenge posed by the US with which it is engaged in a trade war."¹⁸

Third, the BRI could help address issues that cannot be solved in the WTO, like the promotion of China's standards and practice. The deadlock in the WTO and the difficulty in negotiating with the over 160 WTO members are roadblocks to substantial WTO reform. Soft law could affect regulatory practices. Insurance is a good illustration here. China seeks to promote the "export" of its insurance regulatory standards and techniques to other BRI countries.¹⁹ Such standards include the promotion of the internationalization of the China Risk Oriented Solvency System to become the representative solvency regulatory system in emerging markets and Asia, and its equivalence assessment with BRI states.²⁰ China has also concluded standardization cooperation agreements with at least 21 BRI states.²¹ For digital issues, "full respect" for sovereignty in cyberspace is called for.²² China may promote its "domestic law-based governance" under the BRI to foster new international governance.²³

¹⁷ Zaki Laïdi, et al., *Toward a Euro-Pacific Partnership*(2019), available at <https://www.project-syndicate.org/commentary/euro-pacific-partnership-support-for-multilateralism-by-zaki-laidi-et-al-2019-07>.

¹⁸ Amiti Sen, *China Proposes ASEAN+3 Mega Free Trade Agreement Sans India, Australia and NZ*(2019), available at <https://www.thehindubusinessline.com/economy/china-proposes-asean3-mega-free-trade-agreement-sans-india-australia-and-nz/article27255349.ece>.

¹⁹ China Insurance Regulatory Commission, *Guidance on Insurance Industry Serving the Belt and Road Initiative* Paragraph 12 (2017).

²⁰ *Id.* at.

²¹ Hui Shen, *China Have Concluded Standardization Cooperation Agreements with 21 BRI States*(2016), available at http://paper.ce.cn/jjrb/html/2016-09/13/content_311605.htm.

²² *"The Belt and Road" Digital Economy International Cooperation Initiative*(2017), available at <http://finance.jrj.com.cn/tech/2017/12/04073823734129.shtml>.

²³ Jingxia Shi, *The Belt and Road Initiative and International Law: An International Public Goods Perspective*, in *INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE* 31, (Yun Zhao ed. 2018).

3.2 The possible marginalisation of the multilateral trading system

The role of the WTO system will in all likelihood decline in the future unless there is widespread political willingness to salvage it. The level of political willingness appears insufficient at the time of writing. One possibility is that multilateralism is in the way for the US, and it is likely to be abandoned. There is a likelihood of moving towards bilateralism. Another possibility is that the US trade policy under President Trump could aim to “rewrite global trade rules” in a bilateral way given the rise of China instead of abandoning international openness.²⁴ The US may consider that multilateralism limits its room for manoeuvring, and that China free-rides the WTO pathway. It remains to be seen what is the true intention of the US and whether the US will take “the risk of threatening to abandon trade multilateralism” in an attempt to save multilateralism.²⁵ Under these possibilities, the WTO is likely to be marginalised.

On the one hand, WTO rules will likely remain relevant. For instance, China supports the multilateral trading system as China is a major beneficiary of the market access and non-discrimination treatment under the WTO system. Other examples include the WTO Agreement on Trade Facilitation (TFA) that helps to drive down trading costs along the BRI region. The BRI will benefit from the WTO rules given the lack of a BRI-wide treaty. This partially explains why China has repeatedly called for support of the WTO system and promotion of the TFA. The support towards the WTO also helps the BRI in terms of international legitimacy. Looking into the future, the new rule negotiation under the WTO, such as on e-commerce, will be important for the BRI. China is a leading state in e-commerce and is promoting a digital Silk Road. This is likely a major reason why China joined the WTO e-commerce negotiation. In addition, the US-style FTAs, like the USMCA, often refer to or incorporate WTO rules.

On the other hand, the role of the WTO will likely be reduced in the future. The reinvigorated regionalism will further marginalise the WTO. Regional trade agreements (e.g., the USMCA, RECP, CPTPP) in turn contribute to the marginalization of the WTO as more resources are devoted to mega FTAs than the WTO. Multilateral liberalisation could be undermined by regional arrangements as supply chains spread among signatories of these arrangements.²⁶ The stronger regional arrangements, according to recent evidence, may undercut shallow multilateral integration that lacks deep behind-the-border protections.²⁷

The rules and adjudication of the WTO can hardly keep up with the practice due to the WTO deadlock and the trade war. The confidence in the role of the WTO is being negatively affected by unilateral measures in the trade war. The WTO law plays a limited role in the trade war given the WTO crisis regarding the Appellate Body member (re)appointment, which mean that the WTO can hardly address the issues in regionalism like the BRI and US-style deep FTAs.²⁸ Many of the BRI issues fall outside the scope of the WTO rules, like those related to investment and funding. Similarly, many issues under US-style FTAs (including competition, data, and SOEs) are not addressed by existing WTO norms.

Crucially, the sharp contrast between the US and Chinese practices may make WTO negotiations difficult. The BRI and the USMCA are typical examples of these two different

²⁴ Lang, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE, 57 (2018).

²⁵ Wu, 102. 2019.

²⁶ Emily J. Blanchard, *A Shifting Mandate: International Ownership, Global Fragmentation, and a Case for Deeper Integration under the WTO*, 14 WORLD TRADE REVIEW 87, 96 (2015).

²⁷ Id. at, 97.

²⁸ For the analysis of deep FTAs concluded by the US and other economies, see, e.g., Heng Wang, *The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?*, 53 JOURNAL OF WORLD TRADE 317, 317-342 (2019).

approaches. It remains to be seen whether the WTO e-commerce negotiation can be successful and if so in which forms (soft law and/or hard law). A sharp contrast exists between China-style maximized flexibility under the BRI (lacking stringent regulatory disciplines) and the US-style rule rigidity (emphasizing stringent regulatory rules targeting at behind-the-border measures). The BRI soft law instruments consist of bilateral MOUs along with plurilateral ones like the joint communiques of two Belt and Road Forums for International Cooperation (BRF). The BRI is implemented via investment projects, among others, instead of setting new rules to address regulatory issues. The BRI soft law is flexible and is concluded on a case-by-case basis, through which China appears to engage with as many stakeholders as possible in a less time-consuming way. The BRI soft law instruments prefer consultation over a panel to adjudicate disputes. In contrast, the USMCA overall provides for stringent US-style regulatory disciplines (like environmental, labour standards, data protection regarding biologics, prohibition of data localisation requirements) with enhanced enforcement mechanisms and few exceptions (eg, the limit on investors' standing to sue host governments).²⁹ As an illustration, the USMCA is said to have the “[m]ost [c]omprehensive [e]nforcement [p]rovisions” of any trade pact, and “[m]ost [c]omprehensive [s]et of [e]nforceable [e]nvironmental [o]bligations.”³⁰ It is not easy to bridge such a wide gap on complex issues. All these differences will limit the role of the WTO in the long run. The multilateral WTO rules may become “out of order”, and thus in need of WTO reorganisation.

Additionally, one may argue that the marginalization of the WTO is also attributable to the lack of leadership in the WTO, and the fact that the US is no longer as supportive towards trade multilateralism as before (at least in terms of the WTO Appellate Body). The rise of regionalism may also contribute to the marginalisation of the WTO.

If the WTO deadlock and trade war cannot be solved in time, global governance may move closer to a state of “orderlessness”. It is likely that neither China nor the US will lead global governance for many reasons. The US is much less interested in taking on a global leadership position.³¹ In respect of the BRI, it can hardly address the problems faced by the WTO system and still has limited coverage. If no agreement is reached to address the crisis, essentially, history indicates that “in trade, as in other areas of international law, unilateralism does not breed enhanced cooperation, only reciprocal unilateralism and the erosion of collective norms.”³²

If the trade war can be solved and a proper agreement is reached to address the fundamental consensus gap, this may bring stability at least in the short term. If there is political willingness, a US-China trade agreement can form the critical mass regarding the WTO reform.

3.3 The possible reshaping or adjustment of the BRI

The trade war will likely speed up the reshaping or adjustment of the BRI at least to some extent. In the absence of a US-China trade agreement, the BRI will likely be promoted and gain momentum. If a trade agreement is reached between the US and China, the standards incorporated in the US-China trade agreement may affect trade and investment related to the BRI. These disciplines may involve issues such as data flow and intellectual property.

²⁹ Rodrik. 2019.

³⁰ USTR, *United States–Mexico Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement*(2018), available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/august/united-states-mexico-trade-fact-sheet-1>.

³¹ Harold Hongju Koh, *Trump Change: Unilateralism and the “Disruption Myth” in International Trade*, 44 THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE 96, 97 (2018).

³² *Id.* at, 102.

The effect of the trade war on the BRI can be seen in the recent Second BRF, during which China appeared to respond to certain concerns in the trade war (such as the indication of future structural arrangement in China).³³ China's 2019 position paper on the trade war also referred to its statement in the Second BRF regarding the promotion of a future structural arrangement.³⁴

International legitimacy is likely to be a crucial issue for the BRI, particularly given the impact of the trade war. China will likely gain speed in seeking the participation of more states, international organizations and other stakeholders in the BRI. This is the case with the BRI's recent expansion to Italy and Luxemburg. It remains to be seen whether the BRI will become more rule-based and align with international standards and practice.

That said, the BRI faces various challenges. For instance, in the context of a possible "orderless" result in global governance, the BRI states could be subject to different commitments under multilateral and regional rules and concerning different areas (e.g., trade, investment, and finance). Countries may face inconsistency regarding different regional arrangements to which they are a part (such as the BRI soft law obligations, the obligations under FTAs and investment treaties with non-BRI states).³⁵ It remains open as to how to address the possible conflict or tension among different commitments. In addition, the BRI may bring with it new trade issues that cannot be addressed by the WTO, like those related to infrastructure and investment.

4. US-China FTA as a solution to the crisis: Treaty stability?

What should be the way forward? This paper argues that an open and properly designed US-China FTA (G2 FTA) that develop and promote a rule-based system is a possible idealist solution. It would produce desirable global and extra-regional governance outcomes, and possible help reinvigorate the WTO. However, a lot of uncertainties exist on the likelihood of reaching any agreement on such an FTA.

The crisis of the WTO deadlock and trade war is both a challenge and an opportunity. The key to resolving the crisis is to start to bridge the gap between China and the US through negotiations for an open G2 FTA, based on good governance and a rule-based system. This is termed "treaty stability" in the paper. Hegemonic stability has arguably allowed for the WTO and other major components of the existing international economic regime (including the US previously permitting asymmetric rules that benefitted other states given its central role in designing the system).³⁶ With US hegemonic power falling and China's rise, the stability brought by a hegemonic power faces challenges. The paper argues that the G2 FTA, if properly managed, could bring stability. The treaty may address the thorny and fundamental issues that reflect the consensus gap (like competition, SOEs, transparency, and data flow) and identify common ground. The negotiation of a new treaty could also be a corrective mechanism. Treaties can be regarded as "purposive acts akin to legislation", and states will make commitments through the formalities of treaties and their ratification processes.³⁷ This section will first discuss why a US-

³³ Jane Cai, *Xi Jinping sends message to US and West that 'China is committed to opening up' at Belt and Road Forum* (2019), available at <https://www.scmp.com/print/news/china/diplomacy/article/3007885/xi-jinping-sends-message-us-and-west-china-committed-opening>.

³⁴ The State Council Information Office of the People's Republic of China, *White Paper: China's Position on the China-US Economic and Trade Consultations*, paragraph 3.4 (2019).

³⁵ Guiguo Wang, *Legal Challenges to the Belt and Road Initiative*, 4 JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 309, 327 (2017).

³⁶ deLisle, UNIVERSITY OF ILLINOIS LAW REVIEW ONLINE, 67-68 (2018).

³⁷ Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 361, 366, 374 (1999).

China FTA is a good choice from an IR theory perspective, then explore how to develop such an FTA from a legal perspective, and finally discuss the uncertainties it faces.

4.1 The international relations theory perspective

WTO norms do not function well, particularly in addressing thorny issues in trade war (e.g., competition, SOEs, and data flow). There is a clear need to develop new rules. Exactly what these norms should look like falls outside the scope of this paper and would be fertile ground for another research paper. This paper addresses *how* China and the US could go about setting up the right framework for this normative development to occur – i.e., through creating a framework (the G2 or US-China FTA) for the parties to develop rules collaboratively.

4.1.1 Four scenarios

There are at least four major potential paths ahead for US-China trade frictions. Except for the first scenario of no institution, these four scenarios are not necessarily exclusive to each other. For instance, one state may pursue a solution through multilateral and regional institutions at the same time.

(i) No institution: This may lead to a law of the jungle situation with the current trade war escalating into different areas. This is largely the case at the time of writing as the trade war increasingly deals with currency issues;

(ii) Existing multilateral institution (trade disputes under the WTO): This is unlikely to work in the short term given the lack of Appellate Body members and the limited coverage of WTO rules, particularly regarding sensitive issues. Even if the WTO is to be maintained, Mark Wu has identified several major roadblocks against maintaining a rule-based system due to the defects of the WTO system: ossified WTO negotiating process; weak remedies against repeat violations; excessive leeway for members to utilize developing country status or national security to escape their obligations; and the unlikelihood of addressing issues through bolder use of WTO disputes;³⁸

(iii) A new multilateral or plurilateral institution (like the CPTPP and the BRI): Theoretically the US and China could both join the CPTPP. Alternatively, the parties may reshape the regional block to further reflect their views like in the North American Free Trade Agreement (NAFTA) renegotiations. It would be a time-consuming process and involve a lot of hard law and uncertainties. The negotiation would require agreement among a large number of parties and may not work efficiently (e.g., collective action problems). Currently it is not easy for the US to maintain its hegemony. China seems to be responding to the impact of the US and increasing its role in global governance (including improving the legitimacy of the BRI through, inter alia, an increasing number of BRI states). Presuming the mega FTAs are feasible, there are still difficulties in shaping new global rules through FTAs due to the loopholes in origin rules and the possible China-led competing FTAs to mitigate trade diversion.³⁹ Moreover, the direction of new institutions could be different; or

(iv) A bilateral institution (G2 or US-China FTA): This is a one-to-one solution. It appears the US-China FTA is a good although not optimal option for exploring new rules. This is a more desirable option since the current trade war may escalate and spill over into different areas (like the Huawei case). A G2 FTA is a middle ground, which could ensure the implementation of the trade disciplines and also serve as a stepping stone towards the future of global governance. The

³⁸ Wu, 108-109. 2019.

³⁹ Id. at, 109.

bilateral institution would help directly address the underlying and fundamental problems between the US and China.

4.1.2 International relations perspective: Power-based interaction v. rule-based interaction

To seek solutions to the crisis, this part draws on three IR theories: realism, liberalism (or liberal institutionalism), and constructivism. Given the space constraint, these schools are selected as arguably the most prominent theories in the IR discipline, but this paper acknowledges that they are not the only IR theoretical schools that one could draw on.

It should be recognized at the outset that IR theory has its limits. For instance, constructivism was developed primarily to explain how states come to understand their interests and why international institutions matter.⁴⁰ Whilst it can easily identify consensus around certain weak normative claims (e.g., catastrophic military conflict between the US and China would be bad), the challenge is that there is no consensus beyond this about what objectives are desirable. In the complex and fast-changing world economy, the US and China do not necessarily have clear or stable understandings of their own interests.

That said, IR theory helps diagnose the challenges and explore legal solutions,⁴¹ including shaping institutional design, and understanding the functions of legal rules and institutions to improve global governance.⁴² More than one IR theory is needed to understand the practice as one IR theory can hardly explain all the trade practice. Different IR theories may “in some sense [be] correct, at least to the extent that they identify causal mechanisms that are actually at work.”⁴³

4.1.2.1 Realist idea of power-based interaction

Highlighting state power, realists argue that the international order is “a by-product of the concentration of power.”⁴⁴ For the international relations realist, a state’s behaviour can be both predicted and explained by that state’s power and the distribution of power among states, including its level of conformity to, support for or investment in international institutions.⁴⁵ The aim of statecraft, under the realist paradigm, is “national survival in a hostile environment.”⁴⁶ The acquisition of power and self-help are crucial, while state sovereignty gives states the freedom to take whatever measures to advance state interests.⁴⁷ In the trade war, notions of sovereignty and self-help, for instance, have been often raised. Also, it appears the Trump Administration is turning away from efforts to regulate international behaviour through global governance, which reflects an assumption within the realist paradigm.⁴⁸

Realism does not reject institutions but deems them solely a tool for powerful countries to pursue their preferred scenario. For instance, the US will use the WTO if it favours its interests,

⁴⁰ For the analysis of constructivism and international law, see, e.g., Jutta Brunne´e & Stephen J. Toope, *Constructivism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS : THE STATE OF THE ART 119-140, (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

⁴¹ Anne-Marie Slaughter, et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 369 (1998).

⁴² Abbott, AMERICAN JOURNAL OF INTERNATIONAL LAW, 362-364 (1999).

⁴³ Aaron L. Friedberg, *The Future of U.S.-China Relations: Is Conflict Inevitable?*, 30 INTERNATIONAL SECURITY 7, 10 (2005).

⁴⁴ Ikenberry, ETHICS & INTERNATIONAL AFFAIRS, 19 (2018).

⁴⁵ deLisle, UNIVERSITY OF ILLINOIS LAW REVIEW ONLINE, 66 (2018).

⁴⁶ JR. CHARLES W. KEGLEY & EUGENE R. WITTKOPF, WORLD POLITICS: TREND AND TRANSFORMATION 37 (Peking University Press and Thomas Learning 9th ed. 2004).

⁴⁷ Id. at.

⁴⁸ Id. at.

but the US could adopt a bilateral approach towards issues like anti-dumping duties and countervailing duties (e.g., the US disagreeing with the WTO jurisprudence on zeroing). Realists argue that the US should not be concerned with the world trading system since WTO adjudication would “heed the interests of powerful States”, and the US played a crucial role in shaping WTO norms.⁴⁹ Meanwhile, the US may prefer a bilateral FTA with China given its leverage in bilateral negotiations in seeking new rules and “favorably settle outstanding disputes”, and the difficulties for the US to dictate new multilateral trade rules at the WTO (due to its declined relative economic power).⁵⁰ However, power politics could exist within institutions. The states can trump or manipulate institutions.

Power-based interaction is problematic. First, the key question is always: who is winning in more effectively directing the discourse and wielding more economic power? For a US-China FTA, realists consider that the result depends on who is winning in this FTA. One party may not move forward if it thinks the other side will win. Second, power dynamics are not always predictable. The realist idea of power-based interaction easily escalates into different types of wars, and spills over into various other types of conflict (e.g., the high-technology sector).

4.1.2.2 Liberalist and constructivist ideas of a rule-based interaction

Recognising that institutions are relevant and are controlled by powerful states (like the US), liberalists and constructivists argue that institutions require powerful states to abide by agreed-upon rules, and institutions possess power independent from states. Liberal IR scholars (and indeed constructivists) also see states as disaggregated – comprised of multiple agents with (often) divergent interests and perspectives. It is observed that “[m]ore recent strands of constructivism have shown that norms emerge, change or fade through processes of social learning and contestation.”⁵¹ Constructivism would emphasise the constructed nature of interests, meaning that interests might never be “fixed”. In other words, they reject the realist idea of the state as unitary.

Foremost, rules-oriented or rules-based interaction, such as trade pacts, can be a way of “escaping from a prisoner’s dilemma in which each country acting rationally is stuck doing something that is bad for it individually, but they can’t get out of it without a collective agreement.”⁵² Institutions have functions that make interaction more regularised and pattern-based. Liberalism argues that states interact with institutions, and institutions constrain their behaviour. A US-China FTA could thus be apolitical.

Second, institutions provide predictability and transparency. Under a G2 FTA, China and the US would set rules, but would also be constrained by these rules. This is crucial to enhancing predictability, which is lacking in the current crisis. Institutions (including rules and organisations), in IR theory, may reduce the transaction costs of negotiation and supply unbiased information.⁵³ Kenneth W. Abbott has observed that “[l]egally binding commitments raise the political costs of violation, even for powerful states; careful drafting creates common conjectures; independent organizations provide unbiased monitoring; and courts resolve

⁴⁹ Shaffer, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE, 38-39 (2018).

⁵⁰ Id. at, 46.

⁵¹ Jutta Brunnée & Stephen J Toope, *International Law and the Practice of Legality: Stability and Change*, 49 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 429, 432 (2018).

⁵² Peter Coy, et al., *Using Game Theory to Explain the U.S.-China Spat*(2018), available at <https://www.bloomberg.com/news/articles/2018-06-21/game-theory-explains-why-the-u-s-china-trade-spat-is-worsening>.

⁵³ Abbott, AMERICAN JOURNAL OF INTERNATIONAL LAW, 366 (1999).

ambiguity and fill gaps.”⁵⁴ In a G2 FTA, gap-filling needs special attention and to be addressed carefully.

Third, the US-China FTA would provide a venue for both countries to influence each other’s perspectives, gradually find common ground, and manage undesirable confrontation. The US and China have shared interests that could be embodied in the FTA (e.g., avoidance of confrontation). As major powers, both nations also work towards greater global public goods (like enhanced predictability for the global economy, international security, and possibly climate change in the future⁵⁵). Here, the US-China FTA provides a kind of institutionalism. The US-China FTA should work well for the probable hybrid scenario of coexistence (China “partially adapting to the rules of the game of the liberal order”) rather than conflict or co-optation (under which China is to “let itself be incorporated into the liberal order”).⁵⁶ The US will face regrets if the current international economic legal order implodes,⁵⁷ and a US-China FTA would help to maintain at least some of the system while developing new norms.

Finally, among these IR theories, one may argue that the realist perspective is of limited help here, since realism assumes an absence of independent causal salience of law, and thus does not always consider legality as part of a solution. The legal perspective often assumes a causal approach such as liberalism or constructivism. From the analysis above, the paper argues that the liberalist and constructivist ideas of a rule-based interaction are more suited than a realist idea of power-based interaction. However, the G2 FTA also requires a legal analysis focusing on its norms and institutions, which would inform and support the use of tools from IR theory.

4.2 The legal perspective

This section employs legal scholarship and focuses on a rule-based system. Currently, there is “dynamic interplay between actors pursuing their ends and legal norms enabling, guiding or constraining them in these pursuits.”⁵⁸ One may view international law “as too malleable, as available to justify virtually any change powerful actors demand.”⁵⁹ These challenges may be more serious in this crisis. President Trump’s approach to trade war, if not properly managed, will likely lead to “persistent undermining of the long-term framework for the trade rule of law.”⁶⁰

The US-China FTA could be the basis for a new generation of international rule of law and serve as a way to address the issues underlying the trade war. It may even help reinvigorate the WTO, although the operation of the multilateral trading system needs further rebalancing in terms of interests and political willingness.

Given the increasingly complex trade practice and its implications, rules and institutions need to be resilient and responsive, and to accommodate various trade policy needs.⁶¹ The rule-based system involves a series of new hard law, soft law and institutional developments. This part will first discuss major aspects of rules and institutions that should be considered to address the crisis, and then explore what uncertainties such an FTA faces. These factors help inform how likely the two states are to work together to establish a rule-based system. Notably, this part is not

⁵⁴ *Id.* at, 374.

⁵⁵ Shaffer, *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE*, 53 (2018).

⁵⁶ Naná De Graaff & Bastiaan Van Apeldoorn, *US-China Relations and the Liberal World Order: Contending Elites, Colliding Visions?*, 94 *INTERNATIONAL AFFAIRS* 113, 114-115 (2018).

⁵⁷ Shaffer, *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE*, 53 (2018).

⁵⁸ Brunnée & Toope, *VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW*, 434 (2018).

⁵⁹ *Id.* at, 430.

⁶⁰ Koh, *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE*, 102-103 (2018).

⁶¹ Kathleen Claussen, *Old Wine in New Bottles? The Trade Rule of Law*, see *id.* at 61, 68.

predicting what is likely to be addressed, but making recommendations as to what should be addressed.

4.2.1 Institutions

Institutional arrangements are needed to cover the whole range from the G2 FTA negotiation to its implementation and upgrade.⁶² First, at the negotiation level, institutional design should facilitate the process of engagement with a broad range of stakeholders and address the possible legitimacy deficit. The negotiation process is crucial since a poor negotiation process reduces the likelihood of a mutually beneficial agreement.⁶³ The transparency of the current US-China negotiation process needs to be improved, and it is difficult for all the stakeholders to become involved. As such, the parties to a G2 FTA could provide a forum to welcome outsiders (like third countries and other stakeholders) to participate in policy debates to create the critical mass for new rules. This is because that the new trade rules would likely deal with fair institutional competition between different market orders (the state-led economy vis-à-vis free market neoliberal model), involving global markets instead of the traditionally domestic market.⁶⁴ In other words, one country will be profoundly affected by the exercise of sovereign autonomy by another state.⁶⁵ To ensure a balanced trade rule system, the negotiations should attach more importance to the interests of all stakeholders and the society. It may help to respond to “the rise of anti-liberal and anti-elite populist movements such as led to the vote for Brexit and the election of Trump”.⁶⁶ In particular, the institutions and rules of a G2 FTA should address the “politically and ethically unattractive distributive consequences” of trade liberalization, through which regulatory regimes should compensate the “losers” in trade liberalism and market produce.⁶⁷ In this way, institutions (including negotiation processes) and rules can enhance legitimacy. In other words, the rules should be perceived to be legitimate internally and externally to ensure sustainable trade rule of law.⁶⁸ To realize such effect, a proper institutional arrangement to engage stakeholders is needed. Moreover, other jurisdictions may accede to the G2 FTA.

Second, at the implementation level, de novo agencies and structures (e.g. an independent organisation to monitor the implementation of this large trade agreement, as NAFTA has) may be established to ensure enforceability and provide support to those negatively affected by trade liberalism. At the external level, it could include a secretariat under the FTA. Given a wide range of new systemic issues covered in a G2 FTA, more institutions would be needed to ensure the implementation and development of the treaty. Such mechanisms would provide incentives to promote implementation.

At the national level, a mechanism should be established or enhanced in each country to offer domestic support (like effective training) to those adversely affected by trade liberalism and even

⁶² Since institutions are closely related to rules, the rule issues that are closely connected to institutions will also be discussed in this part.

⁶³ Slaughter, et al., *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, 387 (1998).

⁶⁴ Lang, *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE*, 60 (2018).

⁶⁵ *Id.* at, 59.

⁶⁶ De Graaff & Van Apeldoorn, *INTERNATIONAL AFFAIRS*, 129 (2018).

⁶⁷ Joel P. Trachtman, *A World Trade Organization for Workers?*, 44 *THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE* 28, 33 (2018).

⁶⁸ Kathleen Claussen, *Old Wine in New Bottles? The Trade Rule of Law*, see *id.* at 61, 65.

by technical change to address economic inequality problems.⁶⁹ Trade rules are often biased towards business interests like in the case of the US (e.g., through revolving door and policy planning process).⁷⁰ Current protectionist measures could be “a response to demands for increased assistance from those who have been hurt by social dislocation caused by globalization.”⁷¹ However, these protectionist measures cause challenges in the world economy like the dysfunction of a multilateral rule-based trading system. To establish a sustainable rule-based system, the inequality problem and a lack of social protection need to be addressed. The G2 FTA should include trade and development rules and mechanisms⁷² to address thorny fundamental problems in existing trade rules and domestic governance (like inequality, the weak social safety net in countries like the US, labour market dislocation). Timothy Meyer, for instance, has argued that a development chapter in FTAs that are implemented by the executive branch would “provide both reassurance to those disaffected with our current trade policies and a concrete set of policy tools for the government to help those individuals”.⁷³ Collective bargaining and social safety net requirements may be added to trade pacts to advance workers’ interests.⁷⁴ Effective trade adjustment assistance should be provided as a commitment in the FTA. Reflecting social protection without protectionism, the FTA could “condition trade liberalization on implementation of satisfactory adequate trade adjustment assistance, or an expansion of the social safety net.”⁷⁵ The commitments to address labour market dislocation in trade pacts, although not being the optimal solution, help to ensure the stability of trade agreements.⁷⁶

Last but not least, the institutional arrangement should be able to upgrade the trade agreement from time to time. It would be necessary to regularly review any G2 FTA to ensure the agreement meet the needs of the latest practice. This is also a lesson from the WTO crisis as the WTO norms generally have not been updated since its establishment. If properly managed, the upgrade of the G2 FTA would help to address the inherit problem of hard law which “presupposes a fixed condition when situations of uncertainty demand constant experimentation and adjustment,” and “where it is difficult to change when frequent change may be essential.”⁷⁷

4.2.2 Rules

The current crisis, and particularly the trade war, is likely to continue or re-surface if an agreement reached between the US and China fails to address the fundamental issues and the clash of economic systems,⁷⁸ including industrial policies. Therefore, the rules of a G2 FTA should be designed to ensure a rule-based system, which increases economic efficiency and social benefits instead of zero-sum competition. Procedural and substantive rules that reflect credible commitments are crucial. Under game theory (for situations modelled by games like Assurance, Chicken, or Prisoners’ Dilemma), credible commitments “are essential whenever

⁶⁹ Joseph S. Nye Jr, *Will the Liberal Order Survive?*, 96 FOREIGN AFFAIRS 10, 15 (2017).

⁷⁰ De Graaff & Van Apeldoorn, INTERNATIONAL AFFAIRS, 116 (2018).

⁷¹ Lang, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE, 57 (2018).

⁷² Since it is not easy to completely separate institutions and rules, rules are also discussed here.

⁷³ Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE 16, 27 (2018).

⁷⁴ Joel P. Trachtman, *A World Trade Organization for Workers?*, see id. at 28, 28.

⁷⁵ Id. at 33.

⁷⁶ Id. at.

⁷⁷ Shaffer & Pollack, MINNESOTA LAW REVIEW, 719 (2010).

⁷⁸ Wu, 109. 2019.

some parties to a strategic interaction demand ‘assurance’ from others...when parties seek to ensure that they arrive at the same coordination point”.⁷⁹ If properly managed, rules may reduce transactions costs.⁸⁰

First, good governance, including transparency and accountability, should be highlighted. The incorporation of detailed disciplinary norms in a treaty serve certain markers of legality (such as promulgation and clarity).⁸¹ It is observed that “the criteria of legality that promote stability... require transparency and accountability.”⁸² Jutta Brunnée and Stephen J Toope have argued that “[t]he criteria of legality, precisely because they are largely neutral in substantive terms, enable parties with very different priorities and values to interact on the basis of legality.”⁸³ Crucially, good governance helps to promote the predictability of the trade environment.

Second, the G2 FTA requires a multilayer of soft and hard law (or a proper “hardness” of legalization).⁸⁴ Hard law will be needed in a G2 FTA to incorporate and enforce the commitments. It is argued that “states will be more likely to seek hard legalization when the political strategies it offers are advantageous to them”, which is the case with the US given its strong resources and legal capacity.⁸⁵

Meanwhile, soft law can provide opportunities for consultations with stakeholders (including businesses and non-corporate stakeholders) and help engage with developing countries. Soft law serves to engage with “an ever-wider range of” stakeholders, promoting international interaction and “provide stability in the absence of alternatives in formal law”.⁸⁶ Soft law may be used for regulatory coherence and cooperation, and in respect of nascent issues (like labour, SOEs) to promote good governance and fair competition. More broadly, soft legalization can reduce security and distributional concerns through “escape clauses..., imprecise commitments, or ‘political’ forms of delegation that allow them [states] to maintain future control if adverse circumstances arises.”⁸⁷ It is argued that “[s]ofter regimes often include nonjudicial procedures for filling out incomplete contracts, though these normally require state consent.”⁸⁸ While it is not easy to agree on hard law on every issue (although hard law reduces the costs of operating by strengthened commitments and decreased transaction costs), soft law reduces the costs of achieving certain legalization although it cannot bring all these benefits of hard law.⁸⁹

Third, the credible enforcement of this FTA is key. Although affected by political factors, international law, as “a distinctive language of justification and contestation,” may enable and constrain state actions if properly managed.⁹⁰ It is observed that “law application, interpretation and enforcement are all part of a continuum that either supports and subtly adjusts, or

⁷⁹ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421, 426 (2000).

⁸⁰ *Id.* at, 430.

⁸¹ Brunnée & Toope, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW, 437 (2018).

⁸² *Id.* at, 438.

⁸³ *Id.* at, 442.

⁸⁴ For the analysis on multi-layered approaches in international governance, see, e.g., Doron Goldbarsht, *Multi-Layered Approaches to Counter Terrorist Financing: Norm Development and Compliance* (2017) The University of New South Wales, Sydney).

⁸⁵ Abbott & Snidal, INTERNATIONAL ORGANIZATION, 432 (2000).

⁸⁶ Brunnée & Toope, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW, 433, 444 (2018).

⁸⁷ Abbott & Snidal, INTERNATIONAL ORGANIZATION, 435 (2000).

⁸⁸ *Id.* at, 433.

⁸⁹ *Id.* at, 436.

⁹⁰ Brunnée & Toope, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW, 433 (2018).

undermines, legal norms.”⁹¹ In other words, the G2 FTA should not be a dead letter in practice or be broken. Both the parties and adjudicators should work together to ensure rule enforcement. For the parties, rules on regular and robust review of the FTA are needed to address issues in enforcement. For adjudicators under the FTA, the G2 FTA should learn from the WTO Appellate Body crisis and carefully strike a balance between providing the authority of the adjudicators and avoiding political issues. The G2 FTA would face challenges as to how to grant interpretive authority to adjudicators under the FTA, which would constrain auto-interpretation.⁹² The G2 FTA may require the adjudicators to comply with mutually agreed principles and to act “only on specific disputes and requests.”⁹³

4.3 Considerable uncertainties

There are considerable uncertainties regarding how China and the US would develop a G2 FTA that they could sign onto and that would permit third party enforcement. A number of major uncertainties can be observed here: the lack of trust, the high demand of the FTA “lifecycle”, the novelty or sensitivity of issues, and the parties’ practice. Foremost, the trade war reveals a lack of trust between the US and China, which makes any negotiation difficult.

Second, the G2 FTA faces serious, if not insurmountable, challenges in terms of its lifecycle (negotiation, implementation and future upgrade). Even if a G2 FTA is reached, it would not alone guarantee stability. For years down the track, the monitoring of implementation, dispute prevention, and the timely rule and institutional upgrade are crucial. A treaty cannot guarantee the stability of law,⁹⁴ as evidenced in the NAFTA renegotiation. With treaty law being more dynamic than one may assume, the conclusion of a treaty is usually “just the beginning of a long law-building process.”⁹⁵

Third, the issues in the current crisis are increasingly complex and sensitive, which entails high negotiating costs (such as learning about the issues and bargaining costs) and sovereignty costs (constraining states’ capacity to govern issues like industrial policy or mandating the change of domestic laws or governance structures).⁹⁶ Differing from previous wars that often highlighted tariff issues, the current trade war is heavily intertwined with arguments surrounding a wide range of thorny issues like technology, national security and even currency. Technology also unsettles production practices.⁹⁷ The present crisis deals with new and systematic issues (like competition, data flow), when compared with previous trade wars. Rules may be increasingly related to geopolitical and geoeconomic factors. This helps to explain why national security is often invoked. The situation is much more complicated than before. All these factors make it more challenging for states to understand the rules and predict the consequences of rules. Examples here include fair competition. Regarding fair competition as a core issue in trade war, Andrew Lang has observed that “it would be naïve to imagine that a single, shared conception of what constitutes ‘fair’ competition is achievable.”⁹⁸

Last but not least, there are uncertainties stemming from the parties’ policy and practice. The policies of the US towards China and China’s response appear to be in flux. The interests in

⁹¹ Id. at, 436.

⁹² Abbott & Snidal, INTERNATIONAL ORGANIZATION, 427 (2000).

⁹³ Id. at, 433.

⁹⁴ Brunnée & Toope, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW, 437 (2018).

⁹⁵ Id. at, 433, 444.

⁹⁶ Abbott & Snidal, INTERNATIONAL ORGANIZATION, 434, 437 (2000).

⁹⁷ Koh, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE, 101 (2018).

⁹⁸ Andrew Lang, *Protectionism’s Many Faces*, see id. at 54.

different contexts are not always consistent with each other. For instance, one may support inbound investment review and data flow restriction in terms of inbound investment, but may find such measures problematic in the context of outbound investment.

Rules are also affected by the actors' practice.⁹⁹ Harold Hongju Koh has observed that the US "eschew cooperative diplomatic approaches that can leverage a blend of hard and soft power tools into enduring legal mechanisms for global governance", and the practice "toward 'disengage – power politics – unilateralism.'"¹⁰⁰ If so, this pathway will bring a lot of uncertainties to the rule-based system. Also, China's FTAs do not contain many good governance provisions compared with the FTAs concluded by developed countries. It remains to be seen whether a rule-based system will be established. In addition, the shape of the international economic legal order will be profoundly and increasingly affected by internal structure and processes of major economies. Trade law is profoundly affected by domestic factors. Kathleen Claussen, for instance, has observed that "competitiveness among U.S. executive branch agencies and seemingly pretextual policymaking have impeded any coherent commitment to a rule-based trade law system."¹⁰¹ Chantal Thomas has pointed out that "the current order has pivoted towards economic nationalism as a basis for shaping trade policy."¹⁰² Meanwhile, it is not also easy for China to change its economic pathway and overall economic structure.¹⁰³ The fate of future rules hinges on shared understanding within domestic jurisdictions (like inequality and adverse distributional effects of trade liberalization which angers middle class,¹⁰⁴ sovereignty, and the economic pathway).

These thorny issues can hardly be addressed through delegating authority to a traditional central party (like an existing international organization) to implement and interpret rules, or by resorting to soft law alone (like reducing the precision of the commitments).¹⁰⁵ The existing international organization can hardly help to address disagreements between the US and China rising from any G2 FTA. The WTO is in unprecedented crisis, and the US and China often claim that the other is failing to comply with WTO commitments. Soft legalization can hardly work and faces substantial challenges in respect of a G2 FTA. Due to the lack of trust between the US and China, the US will likely require hard law in most issues and emphasize rule enforcement. The US wants binding commitments to realize its goals including the reduction of the trade deficit, while China intends to preserve flexibility as is the case with the BRI.

5. Concluding remarks

The current crisis of the WTO deadlock and trade war is unprecedented. In this crisis of WTO deadlock and trade war, the governments exercises its powers and the consequences of their strategies have profound consequences for the future governance at the regional and multilateral level.

The systematic conflict triggering the crisis is the gap between the Beijing Consensus and the Washington Consensus (and its new version under the Trump Administration, if any). The new order emerging out of the crisis appears to be a reinvigorated regionalism, which will likely marginalise the WTO.

⁹⁹ Brunnée & Toope, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW, 432 (2018).

¹⁰⁰ Koh, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE, 97 (2018).

¹⁰¹ Kathleen Claussen, *Old Wine in New Bottles? The Trade Rule of Law*, see id. at 61, 65.

¹⁰² Chantal Thomas, *Trade and Development in an Era of Multipolarity and Reterritorialization*, see id. at 77, 83.

¹⁰³ Wu, 104. 2019.

¹⁰⁴ Koh, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE, 102 (2018).

¹⁰⁵ Abbott & Snidal, INTERNATIONAL ORGANIZATION, 441, 442 (2000).

From an IR perspective, a rule-based interaction is better than a power-based one. A poorly designed solution, even if reached, may be dismantled or face challenges in the future. Ideally a properly designed US-China FTA could provide treaty stability for the trading system that will be crucial to businesses and the broader community.¹⁰⁶ Generally, trade agreements are valuable to businesses because of commitments to stable, predictable trade policy that “encourage export investment and trade participation” and insure against protectionism.¹⁰⁷ It would be wise to develop “a rule of law [that may] both facilitates and constrains change.”¹⁰⁸ To address the crisis, a US-China FTA is needed to address key issues (like data, competition, SOEs) underlying the crisis, which could promote the rule of law and help to create critical mass to reinvigorate the WTO.

However, it remains to be seen whether and how the US and China could reach a stable agreement and outcome like a US-China FTA. There are a lot of uncertainties for any US-China FTA. Trust between the US and China is lacking. Essentially, a US-China FTA needs to work out how to deal with the issues of relative independence (like national security) and the issues of relative economic interdependence between the two states (like reciprocal market opening). There is also tension between the higher demand for a US-China FTA to address thornier issues and the limited availability of tools (like the delegation and soft law) compared with previous trade wars. When one deals with issues thornier than those seen in trade wars before, uncertainty stems from the need to balance predictability and certainty on the one hand, and dynamism and responsiveness on the other hand.¹⁰⁹ In any case, the considerable uncertainties around any G2 FTA indicate the difficulties in developing a rule-based system, which may reduce trade and investment.¹¹⁰

Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINNESOTA LAW REVIEW 706(2010).

Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE 37(2018).

John Gerard Ruggie, *International regimes, transactions, and change: embedded liberalism in the postwar economic order*, 36 INTERNATIONAL ORGANIZATION 379(1982).

Andrew Lang, *Protectionism’s Many Faces*, THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE 54(2018).

Heng Wang, *China’s Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 JOURNAL OF INTERNATIONAL ECONOMIC LAW 29(2019).

Mark Wu, *China’s Rise and the Growing Doubts over Trade Multilateralism*, in TRADE WAR: THE CLASH OF ECONOMIC SYSTEMS ENDANGERING GLOBAL PROSPERITY (Meredith A. Crowley ed. 2019).

¹⁰⁶ Martin Wolf, *The US-China conflict challenges the world*(2019), available at <http://www.ftchinese.com/story/001082870/ce?ccode=LanguageSwitch&exclusive>.

¹⁰⁷ Kyle Handley & Nuno Limão, *The Policy Uncertainty Aftershocks of Trade Wars and Trade Tensions*, in TRADE WAR: THE CLASH OF ECONOMIC SYSTEMS ENDANGERING GLOBAL PROSPERITY 96, (Meredith A. Crowley ed. 2019).

¹⁰⁸ Brunnée & Toope, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW, 445 (2018).

¹⁰⁹ Id. at.

¹¹⁰ Handley & Limão, 96. 2019.

Alex He, *Trump's Trade War Is an Unintentional Attack on China's Economic Model*(2018), available at <https://www.cigionline.org/articles/trumps-trade-war-unintentional-attack-chinas-economic-model>.

Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*(2019), available at <https://www.cfr.org/backgroundunder/chinas-massive-belt-and-road-initiative>.

Chantal Thomas, *Trade and Development in an Era of Multipolarity and Reterritorialization*, 44 THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE 77(2018).

G. John Ikenberry, *Why the Liberal World Order Will Survive*, 32 ETHICS & INTERNATIONAL AFFAIRS 17(2018).

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