

The Rise of China, the United States, and the Limits of International Law

Julian G. Ku†

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I. Introduction

The rise of China to global preeminence is one of the most important events affecting international relations in the 21st century. As former top U.S. diplomat Robert Zoellick noted in 2005, “How we deal with China’s rising power is a central question in American

† Maurice A. Deane Distinguished Professor of Constitutional Law and Interim Dean, Maurice A. Deane School of Law at Hofstra University.

foreign policy.”¹ The centrality of this question has only become more obvious in the intervening two decades as China’s relative economic and military power has continued to grow.

Until recently, U.S. strategy toward a rising China has remained consistent. In the early years following China’s opening to the world economy in 1978, the U.S. sought to encourage China’s integration into the international system through trade, investment, and entry into international institutions such as the World Trade Organization. As China’s rise continued, the U.S. called on China to become a “responsible stakeholder” in the international system.² For the U.S., this meant actively welcoming China into international institutions and seeking to make China a supporter of a “rules-based” order that relies largely on international law. During his presidency, Barack Obama personally endorsed this idea of accommodating China’s rise through international institutions and international law.³

Although Obama’s policy of seeking to embed China into a liberal internationalist legal order followed decades of U.S. policy and was supported by academic work on China, the accommodationist policy has lost favor in recent years. Critics of the accommodationist approach argue that China, like other rising powers, will inevitably come into conflict with existing dominant powers like the United States.⁴ Such “confrontationist” critics have argued that these kinds of conflicts are especially difficult to avoid when those powers have ideological conflicts.⁵ Moreover, confrontationists argue that accommodating China overlooks the

¹ Robert B. Zoellick, Deputy Sec’y of State, *Whither China: From Membership to Responsibility?*, U.S. DEP’T OF STATE ARCHIVE (Sept. 21, 2005), <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm> [<https://perma.cc/BY2S-5YNS>].

² *Id.*

³ See Remarks Following a Meeting With Prime Minister Anthony J. Abbott of Australia and an Exchange With Reporters, 2014 DAILY COMP. PRES. DOC. 20140045 (June 12, 2014) (“[I]t’s important to continue to see China prosper and rise. But what’s also important is that as China emerges as this great world power that it also is helping to reinforce and abide by basic international law and norms.”).

⁴ See GRAHAM T. ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES’S TRAP? vii (2017) (“As rapidly ascending China challenges America’s accustomed pre-dominance, these two nations risk falling into a deadly trap first identified by ancient Greek historian Thucydides . . . ‘It was the *rise* of Athens and the *fear* that this instilled in Sparta that made war *inevitable*.’”).

⁵ See AARON L. FRIEDBERG, A CONTEST FOR SUPREMACY: CHINA, AMERICA, AND THE STRUGGLE FOR MASTERY IN ASIA 1–2 (2011) (“Ideological differences add a crucial extra measure of mistrust and volatility . . .”).

growing danger China poses to the national security interests of the U.S. and its allies.⁶ Rather than continue trying to accommodate and integrate China by strengthening existing international legal institutions, these critics suggest, the U.S. should prepare to confront China along military, economic, and ideological lines.⁷ It is fair to say that the “confrontationists” began to dominate U.S. policies toward China during the Trump Administration and that this approach has continued into the Biden Administration. Some observers are now calling the U.S.-China relationship a new “Cold War”.⁸

This more confrontational approach to China, however, still relies heavily on the idea that international law and institutions are supportive of U.S. competition with China. Under one version of the confrontationist approach, China’s rise can be managed by building strong relations with “allies” in support and defense of a “rules-based order” (RBO) that China is alleged to be threatening.⁹ In this formulation, international law and the “rules-based order” can be a focal point for the U.S. to build alliances and support among other countries to contain any threats arising out of China’s rise.¹⁰

Under either the accommodationist or confrontationist formulation, therefore, international law is seen to serve U.S. interests by either helping to integrate China or to build alliances

⁶ See *id.* at 5–6 (“Downplaying or denying the competitive aspects of Chinese behavior will not make them disappear, but could make it much harder to respond to them And failure to acknowledge potential future dangers could leave us ill-prepared to deal with them should they eventually emerge.”).

⁷ See e.g., Senator Marco Rubio, *ICYMI: Rubio Speaks on the Threat of Communist China at the Heritage Foundation*, RUBIO.SENATE.GOV (Mar. 29, 2022), <https://www.rubio.senate.gov/icymi-rubio-speaks-on-the-threat-of-communist-china-at-the-heritage-foundation/> [<https://perma.cc/53W8-5836>] (denouncing accommodating China as “the biggest geopolitical blunder of the last quarter century . . .”).

⁸ See Hal Brands & John Lewis Gaddis, *The New Cold War: America, China, and the Echoes of History*, FOREIGN AFFS., Nov./Dec. 2021, at 10, 10; see, e.g., Niall Ferguson, *The New Cold War? It’s with China, and it has Already Begun*, N.Y. TIMES (Dec. 2, 2019), <https://www.nytimes.com/2019/12/02/opinion/china-cold-war.html> [<https://perma.cc/4RU6-LQSL>] (“When did Cold War II begin? Future historians will say it was in 2019.”).

⁹ See, e.g., Kurt M. Campbell & Jake Sullivan, *Competition Without Catastrophe*, FOREIGN AFFS., Sept./Oct. 2019, at 96, 110 (“The combined weight of U.S. allies and partners can shape China’s choices across all domains - but only if Washington deepens all those relationships and works to tie them together.”).

¹⁰ *Id.*

that could constrain China. This Article argues that both policy approaches lack a nuanced understanding of the doctrinal and conceptual differences China brings to its analysis of what international law requires as compared to the U.S. This gap in the analysis leads both scholars and policymakers to understate the challenges of using international law as a tool to either accommodate China's rise or to use international law to confront China by building an alliance around a "rules-based order".

For instance, Chinese leader Xi Jinping recently issued a joint statement with Russia's leader Vladimir Putin "reaffirm[ing] their commitment to firmly safeguarding the international system with the United Nations at its core, the international order based on international law."¹¹ This is consistent with China's prior statements repeatedly calling for "international law with the U.N. at its core." Meanwhile, the U.S. has criticized China for challenging the "rules-based order." Both the Chinese "international law with the United Nations at its core" and the "rules-based order" can find some support in international law. This suggests "complying" with international law will not help resolve U.S.-China disputes nor advance US interests in its "strategic competition" with China.

The existence of two "competing" conceptions of international law may also herald an important shift in the development of international law itself. If, as seems likely, the U.S.-China competition will be the largest driving force of international relations, the bifurcation of international law into at least two competing camps is a challenge which scholars of international law have yet to fully grapple with.

This article, the first in a planned series, seeks to lay the intellectual groundwork for examining the role of international law in relations by delineating competing American and Chinese conceptions of international law. In Part II, it reviews those characteristics of China's rise that make its study so crucial and important today. It then explains in Part III that though the U.S.

¹¹ See *Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development*, PRESIDENT OF RUSS. (Feb. 4, 2022), <http://www.en.kremlin.ru/supplement/5770> [<https://perma.cc/3L3D-VASR>] ("Russia and China, as world powers and permanent members of the United Nations Security Council, intend to firmly adhere to moral principles and accept their responsibility, strongly advocate the international system with the central coordinating role of the United Nations in international affairs, defend the world order based on international law . . .").

government has shifted from an accommodationist to a confrontational approach, both approaches rely on the idea that international law can bolster the effectiveness of the U.S. strategy toward China. In Part IV, the Article sets out the key characteristics of China's distinct conception of international law. Those characteristics, the Article concludes, are grounded in a narrow but reasonable understanding of the U.N. Charter that is nonetheless at odds with certain U.S. policies and interests. China's willingness to defend its own views on international law, and portray itself as the defender of the "real" international law, means U.S. policymakers cannot rely heavily on appeals to international law to advance their preferred China policy. Instead, international law in the era of a U.S.-China Cold War will likely become a field of competition between superpowers.

II. Unpacking the Rise of China

The "rise of China" has become such a cliché that it is difficult to read any study on modern China without encountering this phrase. Yet the phrase's popularity is not surprising. The importance of China's "rise" to global prominence today is hard to overstate. On almost every dimension, China has "risen" in ways that will impact the rest of the world, and the United States in particular.

A. The Rise of China's Economy

The most common way to understand the "rise of China" is in economic terms. Since it began reforms and opening to the world economy in 1978, China has enjoyed remarkable and unprecedented economic growth. Thus, while China's GDP per capita was lower than half of the Asian average in 1978, consistently robust economic growth averaging about 9% a year brought China from a low-income country to a middle-income country.¹² In GDP terms, China's economy is now the second largest in the world, behind only that of the United States.¹³ While its growth has slowed in

¹² See *Country Comparisons - Real GDP (Purchasing Power Parity)*, CENTRAL INTELLIGENCE AGENCY: WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/real-gdp-purchasing-power-parity/country-comparison/> (last visited Sept. 11, 2023) [<https://perma.cc/6PJG-Q62T>] [hereinafter *Country Comparisons*] (China ranked number one for highest purchasing power parity).

¹³ See *id.* ("GDP (purchasing power parity) compares the gross domestic product (GDP) or value of all final goods and services produced within a nation in a given year. A

recent years and is currently facing serious headwinds, its economy is still hugely significant. By other measurements, such as purchasing power parity, China's economy has already surpassed the United States.¹⁴

Much of China's economic growth can be tied to China's integration into the world economy. China is the world's largest exporter and the second largest importer of goods, and it is the world's fifth largest exporter and third largest importer of services.¹⁵ In other words, for many countries, China is a top, if not dominant, trading partner for goods and services.¹⁶

China's economic power has also grown dramatically in the areas of finance and investment. China has been one of the world's most popular targets for foreign direct investment, and it has also been one of the world's largest sources of foreign direct investment.¹⁷ Thus, while foreign capital continues to flow into China to build and acquire new businesses, Chinese investors have increasingly sought to purchase foreign businesses and properties. The various forms of Chinese foreign investment have culminated in the ambitious Belt and Road Initiative that has resulted in loans to infrastructure projects in over 147 countries amounting by some estimates to over \$8 trillion. The enormous growth in China's trade and investment activities has also resulted in China's accruing trillions in foreign exchange reserves, one of the largest such reserves in the world. The bulk of those reserves are denominated in U.S. Treasury bills, which explains why China is often referred to as the U.S. government's largest lender. As of August 2022, it held 13 percent of the U.S. national debt.¹⁸ While the significance of this status is often overstated since it does not necessarily give

nation's GDP at purchasing power parity (PPP) exchange rates is the sum value of all goods and services produced in the country valued at prices prevailing in the United States.").

¹⁴ See *Country Comparisons*, *supra* note 12.

¹⁵ *The World Bank in China: Overview*, WORLD BANK (Sept. 29, 2022), <https://www.worldbank.org/en/country/china/overview#1> [<https://perma.cc/7H85-NLJB>].

¹⁶ *Id.*

¹⁷ See UNCTAD, *Foreign Direct Investment 2022*, <https://hbs.unctad.org/foreign-direct-investment/> [<https://perma.cc/24GT-3HBL>] (ranking China second as recipient of investment and fourth as a source of outgoing investment).

¹⁸ Shobhit Seth, *Why China Buys U.S. Debt With Treasury Bonds*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/040115/reasons-why-china-buys-us-treasury-bonds.asp> [<https://perma.cc/MF7L-739Y>] (last visited Mar. 25, 2023).

China “leverage” to shape U.S. policy,¹⁹ it remains a remarkable and significant sign of China’s contemporary economic strength.

To be sure, recent years have seen a marked slowdown in China’s economic miracle as structural factors such as a declining working age population and pandemic-related policies had their effect. GDP growth in 2022 slowed to 3 percent, which reflects a significant decline from its heady growth rates of 14.2 percent in 2007.²⁰ Although affected by the COVID-19 pandemic, growth for 2023 is targeted to be around 5 percent.²¹ Analysts have typically blamed the decline on manufacturing and construction output. But, more significantly, many analysts have also pointed to a decline in the size of China’s labor force and a natural reduction in its productivity growth. Analysts have also worried about the long-term effects of the explosive growth of Chinese debt, which has grown to over 275% of GDP in 2022 from a mere 148% of GDP as recently as 2007. Such debt will limit China’s ability in the future to benefit from investment-led growth, which currently amounts to almost 50% of GDP. Still, though many economists now project much lower growth for China in the future, most projections still expect China’s economy to continue growing in the near term and maintain China’s position as one of the two largest economies in the world.²² Thus, even if China does not experience the same kinds of growth it has enjoyed since 1978, China is likely to maintain its role as one of the world’s most important economies for the foreseeable future.

¹⁹ *Is it a Risk for America that China Holds over \$1 Trillion in U.S. Debt?*, CHINAPOWER PROJECT (2016), <https://chinapower.csis.org/us-debt/> [<https://perma.cc/C3R6-84XF>].

²⁰ Dominik Peschel & Wenyu Liu, *The Long-Term Growth Prospects of the People’s Republic of China 3*, (Asian Dev. Bank, ADB East Asia Working Paper No. 54, 2022).

²¹ *China sets 2023 target for economic growth at “around 5 percent”*, PBS NEWSHOUR (2023), <https://www.pbs.org/newshour/world/china-sets-2023-target-for-economic-growth-at-around-5-percent> [<https://perma.cc/2RAF-KNK4>].

²² See Peschel & Liu, *supra* note 20 (summarizing different growth projections). Such growth projections have declined significantly in recent years; see, e.g., Jeanna Smialek, *These Will Be the World’s 20 Largest Economies in 2030*, BLOOMBERG (Apr. 10, 2015, 10:01 AM), <https://www.bloomberg.com/news/articles/2015-04-10/the-world-s-20-largest-economies-in-2030> [<https://perma.cc/KZG5-43JM>] (citing study by U.S. Department of Agriculture stating that China would be second largest economy in 2030).

B. Military Spending and Capacity

In addition to its economic growth, China has also transformed from a large but poorly-equipped and resourced military to one of the world's most formidable armed forces. The new strength of China's military is a result of large and dramatic increases in military spending over the past 30 years. According to its own estimates, the Chinese government spent approximately \$229 billion on its military in 2022.²³ This placed Chinese military spending second only to the United States and more than the combined spending of its neighboring countries Japan, South Korea, the Philippines, and India. U.S. Department of Defense analysts believe official Chinese data understates the amount of spending by as much as half.²⁴

In any event, the overall amount of Chinese military expenditures is not as remarkable as its growth. Such expenditures have grown in both relative and absolute amounts every year from 2008 to 2022 and there is no sign from the current leadership that military spending will be significantly reduced in the near future.²⁵

As a military power, China has focused on developing the capabilities needed to deter or defeat adversaries in areas of China's core interests including Taiwan, Korea, and the East and South China Seas. But China has also invested in capabilities that would allow it to project power outside of its periphery, including the creation of its first overseas military support facility in the African nation of Djibouti.²⁶

China has also focused its substantial expenditures on modernizing its military capabilities. For example, China has invested heavily in modern technologies across the board to improve its "extended range power projection, anti-access/area

²³ Amrita Jash, *China's 2022 Defense Budget: Behind the Numbers*, JAMESTOWN, <https://jamestown.org/program/chinas-2022-defense-budget-behind-the-numbers/> [<https://perma.cc/QAG9-WSLF>] (last visited Mar. 25, 2023).

²⁴ OFFICE OF THE SECRETARY OF DEFENSE, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 142 (2021); see also *What Does China Really Spend on its Military?*, CHINAPOWER PROJECT, <https://chinapower.csis.org/military-spending/> [<https://perma.cc/N8XE-7H69>] (last visited Mar. 25, 2023) (stating that "In 2021, the DoD noted that China's real military spending may now be around 1.1 to 2 times higher than stated in its official budget.").

²⁵ See U.S. DEP'T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, 147–48 (2022).

²⁶ See *id.* at 57.

denial, and operations in emerging domains such as cyberspace, space, and the electromagnetic spectrum.” China has also invested heavily in its navy. With more than 350 vessels, China now possesses the largest navy in the world based on the number of ships.²⁷ That navy is also equipped with high-profile assets such as its first operational aircraft carrier and new long-range ballistic missile submarines.

Though China remains a distant second to the United States in terms of military spending,²⁸ its willingness to invest heavily in modernizing its military forces has also vaulted China into the top two military powers in the world and made it one of the few to have sizeable capabilities in all possible theatres of war including land, sea, air, space, and cyber-space. As the U.S. Defense Department has repeatedly stated, China’s military is its “pacing” challenge.

C. *Global Politics*

Even before its dramatic rise in economic and military power, China was an important player in world politics. China has long associated itself with the Non-Aligned Movement of developing nations suspicious of both the United States and the Soviet Union during the Cold War.²⁹ After taking its seat in the United Nations in 1971, China affiliated itself with former colonial states in Asia, Africa, and South America on issues of global concern.

China also laid claims to “great power” status by virtue of its being one of only five permanent members of the U.N. Security Council with the power to veto. China’s rising economy and wealth opened the door to greater power in global financial institutions such as the International Monetary Fund, the World Bank, and the World Trade Organization. For instance, China now has the third

²⁷ See Brad Lendon, *China has built the world’s largest navy. Now what’s Beijing going to do with it?*, CNN (Mar. 5, 2021), <https://edition.cnn.com/2021/03/05/china/china-world-biggest-navy-intl-hnk-ml-dst/index.html> [<https://perma.cc/LG57-Z7RR>].

²⁸ *Military Spending by Country 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/military-spending-by-country> [<https://perma.cc/8FU8-F93X>] (last visited Sept. 11, 2023).

²⁹ See Stewart Patrick, *The Nonaligned Movement’s Crisis*, COUNCIL ON FOREIGN RELS. (Aug. 30, 2012), <https://www.cfr.org/blog/nonaligned-movements-crisis> [<https://perma.cc/UE5J-QEGD>].

largest voting share in both the IMF³⁰ and the World Bank.³¹

Indeed, as China's economic power has grown, it has increased the frequency and intensity of its participation in a diverse set of international organizations. As one observer has noted, "[b]y any objective measure or criteria, China has evolved into a highly effective player in" contemporary international gatherings like the G-20 and the Paris Climate Change Conference.³² China's effectiveness in an ever-widening number of international institutions has been attributed to various factors, including its effort to send as many of its brightest and most talented nationals to staff these institutions. China has also wielded its financial power to win goodwill within such institutions by making large financial pledges of institutional support. In 2015, for instance, President Xi Jinping of China pledged to establish a 10-year \$1 billion China- U.N. peace and development fund to support the U.N.'s work.³³ Such financial clout has gained China goodwill within existing international organizations, as well as with other nations.

China's rise as an economic and military power has been accompanied by a rise in its presence in international institutions. Buttressed by its status in the U.N., China has invested heavily to strengthen and expand its role in existing international institutions and structures. At the same time, China has been willing to launch its own international organizations, like the Asian Infrastructure Bank and the Shanghai Cooperative Organization. The rise of China is not just economic and military, it is also political.

In sum, China's rise should not be limited to a single dimension. To be sure, the story of the rise of China begins with its stunning economic growth. But understanding China's role in world politics

³⁰ *IMF Executive Directors and Voting Power*, INT'L MONETARY FUND (Sept. 11, 2023), <https://www.imf.org/en/About/executive-board/eds-voting-power> [<https://perma.cc/S9WC-TZ3J>].

³¹ *International Bank for Reconstruction And Development Subscriptions And Voting Power Of Member Countries*, INT'L BANK FOR RECONSTRUCTION AND DEV., <https://thedocs.worldbank.org/en/doc/a16374a6cee037e274c5e932bf9f88c6-0330032021/original/IBRDCountryVotingTable.pdf> [<https://perma.cc/UN43-TLA2>] (last visited Sept. 11, 2023).

³² See STEPHEN OLSON & CLYDE PRESTOWITZ, *THE EVOLVING ROLE OF CHINA IN INTERNATIONAL INSTITUTIONS*, THE ECON. STRATEGY INST., 9 (2011).

³³ *China takes first step in \$1 billion pledge to U.N. to fund peace, development*, THOMSON REUTERS (May 6, 2016), <https://www.reuters.com/article/us-china-un-idUSKCN0XX1YI> [<https://perma.cc/9VDJ-XPk8>].

today requires a clear-eyed assessment of China's substantial and growing military strength and its ambitious efforts to bolster its political influence through international organizations and entities.

III. Responding to the Rise of China

A. Engagement and Accommodation

Few countries have been more important in facilitating the rise of China than the United States. President Richard Nixon's historic visit to China in 1972 is seen by many Chinese as a turning point in contemporary China's role in the world. China's economic rise could not have occurred without the type of domestic reforms launched by Deng Xiaoping in 1978, but it also depended on the willingness of foreign countries to open their markets to China's exports.³⁴ The largest of these markets for Chinese exports was the United States, which facilitated this economic growth by offering China "most favored nation" trade status for many years before eventually supporting China's accession to the World Trade Organization in 2001.

The United States' support of China's rise was driven, not by charity toward China, but by an assessment that its strategic and economic interests would benefit from a stronger China. Nixon justified his overtures to China in strategic terms because it would help the U.S. balance the then-threat of an expansionist Soviet Union.³⁵ Eventually, China also became a leading target for U.S. trade and investment. U.S. and other foreign investors brought important knowledge, expertise, and technology to China as it grew into a manufacturing hub in the 1980s and 1990s.³⁶

³⁴ See Alessandro Nicita & Carlos Razo, China: The Rise of a Trade Titan, U.N. CONFERENCE ON TRADE & DEV. (Apr. 27, 2021) <https://unctad.org/news/china-rise-trade-titan> [<https://perma.cc/2YMD-76AX>] (noting China's share of world trade grew dramatically from 1970s to become world's largest exporter by 2010); Anshu Siripurapu & Noah Berman, The Contentious U.S.-China Trade Relationship, COUNCIL OF FOREIGN RELS., (last updated Sept. 26, 2023) <https://www.cfr.org/background/contentious-us-china-trade-relationship> [<https://perma.cc/U6GM-3X3H>] (noting that U.S.-China trade grew from \$100 billion in 2001 to \$500 billion in 2022 after China joined WTO).

³⁵ Winston Lord, et al., President Nixon's Trip to China: Fifty Years Later, (Feb. 25, 2022) <https://www.cfr.org/event/president-nixons-trip-china-fifty-years-later> [<https://perma.cc/4Z7X-4BY5>] (noting that Cold War relations and Vietnam war led "both Nixon and Kissinger came into office wanting to open up relations with China").

³⁶ For a short background on the history of U.S.-China economic relations since 1979, see Anshu Siripurapu, *supra* note 34.

But U.S. support for China's rise has always been ambivalent because China has also increasingly been seen as an economic, military, and strategic competitor. The U.S. Congress, for instance, has required the U.S. Department of Defense to send it an annual report assessing China's military growth and developments since 2000.³⁷ The longstanding U.S. relationship with Taiwan has continued to raise tensions, including in 1996, when the U.S. sent two aircraft carriers to the Taiwan Straits after China had conducted provocative missile tests near Taiwan during the island's presidential election. The U.S. has also objected to China's domestic human rights practices, especially after the 1989 Tiananmen crackdown on student protests and, most recently, China's mass detention and abuse of the Muslim Uighur minority population in Xinjiang. Despite this ambivalence, U.S.-China policy remained broadly consistent across administrations of both parties: China's rise should be welcomed rather than feared because a stronger China remained in the long-term interests of the United States.

One of the most serious challenges to this consensus in the United States occurred after the June 4, 1989 crackdown and massacre of Chinese student protesters in Beijing's Tiananmen Square. In the wake of the killings, the U.S. imposed economic sanctions on China that limited (but did not eliminate) U.S. trade and investment.³⁸ After a period of uncertainty, the U.S. lifted most of its economic sanctions and decided to extend China's most-favored-nation trading status under U.S. law.³⁹ The justification behind continued engagement and trade relations with China were best articulated by then-President George H.W. Bush in a 1991 speech.⁴⁰

Bush's address to Yale graduates that year recognized that China's actions after Tiananmen deserved condemnation, but also

³⁷ See e.g. U.S. DEP'T OF DEF., MILITARY AND SECURITY DEVS. INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, 147–48 (2022) (noting that report required by Section 1202 of the National Defense Authorization Act of for Fiscal Year 2000).

³⁸ See Richard C. Bush, *30 years after Tiananmen Square, a look back on Congress' forceful response*, BROOKINGS (May 29, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/05/29/30-years-after-tiananmen-square-a-look-back-on-congress-forceful-response/> [https://perma.cc/2X8S-KELH].

³⁹ *Id.*

⁴⁰ Remarks at the Yale University Commencement Ceremony in New Haven, Connecticut, 27 1 PUB. PAPERS 566 (May 27, 1991).

emphasized the importance of China as a force for global stability.⁴¹ He emphasized China's role in "working to resolve" the conflict in Cambodia and to "relax tensions" with North Korea.⁴² He pointed out that China "has a voice now in the multinational organizations."⁴³ He also highlighted China's support for the U.N. Security Council resolution authorizing the 1991 Persian Gulf war.⁴⁴ As became even more apparent in the years since 1991, China's global influence required U.S. respect, but it could also be used to benefit U.S. interests.⁴⁵

Bush's speech also emphasized that the U.S. should stay true to its values and seek to support democratization, privatization, and the protection of human rights in China. But reflecting the U.S. policy of integrating China rather than isolating it, he nonetheless proposed extending MFN trading status to China. Granting MFN, Bush argued, would encourage further market reforms in China. It "is a means to bring the influence of the outside world to bear on China."⁴⁶

The idea that the U.S. should not try to isolate China from the world community, even in the face of human rights abuses, remained a fundamental policy throughout subsequent U.S. administrations until 2016. As Deputy Secretary of State Robert Zoellick explained in an influential 2005 speech, "[s]even U.S. presidents of both parties . . . worked to integrate China as a full member of the international system."⁴⁷ He went on to note that this U.S. "policy has succeeded remarkably well: the dragon emerged and joined the world. Today, from the United Nations to the World Trade Organization, from agreements on ozone depletion to pacts on nuclear weapons, China is a player at the table."⁴⁸

Zoellick's speech marked a natural evolution in U.S. government policies from welcoming China's integration into the

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Robert B. Zoellick, Deputy Sec'y of State, *Whither China: From Membership to Resp.?*, U.S. DEP'T OF STATE ARCHIVE (Sept. 21, 2005), <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm> [<https://perma.cc/BY2S-5YNS>].

⁴⁸ *Id.*

international system to encouraging an integrated China to become a “responsible stakeholder” in that system. As a beneficiary of the liberal international system., the U.S. naturally sought to encourage China to take actions to help sustain that system. Such actions could be as simple as contributing more to the U.N. or as complicated as supporting international efforts to limit North Korea’s nuclear program. Later U.S. administrations, such as the Obama administration, continued this policy. For instance, the Obama administration was able to reach an agreement with China to reduce its production of greenhouse gases to combat climate change.⁴⁹ Such an agreement symbolized how China could become the “responsible stakeholder” Zoellick called for. To be sure, China and the U.S. continued to disagree on key issues such as the South China Sea and cyber-warfare during the Obama administration, but no shift away from the integrationist strategy occurred during this period.

B. Supporting China’s Integration

This policy of seeking to integrate China received broad academic support. In a representative 1999 publication, political scientists Elizabeth Economy and Michael Oksenberg collected studies from other leading China scholars of China’s integration with different types of “international regimes” including the United Nations, arms control, the international trading system, the international human rights system, and the network of international environmental treaties.⁵⁰ Although the contributors identified numerous problems with China’s integration with particular international regimes of cooperation—such as human rights—the contributors nonetheless concluded that the evidence also showed that integration was successful in at least certain kinds of international regimes.⁵¹ Surveying these studies, Economy and Oksenberg recommended that the U.S. try as much as possible to integrate China into multilateral mechanisms while continuing to

⁴⁹ Press Release, U.S.-China Joint Announcement on Climate Change, 2014 DAILY COMP. PRES. DOC. 201400852 (Nov. 12, 2014).

⁵⁰ See generally, CHINA JOINS THE WORLD (Michel Oksenberg & Elizabeth Economy eds., 1999).

⁵¹ Michel Oksenberg & Elizabeth Economy, *Introduction: China Joins the World*, in CHINA JOINS THE WORLD 1, 16–17 (Michel Oksenberg & Elizabeth Economy eds., 1999); Andrew J. Nathan, *China and the International Human Rights Regime*, in CHINA JOINS THE WORLD 136, 159 (Michel Oksenberg & Elizabeth Economy eds., 1999).

invoke continued U.S. support for Chinese integration. The U.S. should also continue to engage in dialogue with Chinese government leaders and promote domestic Chinese institutions that would better facilitate Chinese integration.

While noting skepticism of their views and recommendations, Economy and Oksenberg offered a firm defense of accommodationism. Treating China as a “potential enemy” would create an isolated, divided, or weakened China inimical to U.S. interests. They conclude therefore that, “There is no real alternative to the course we recommend and that every president since Richard Nixon has adopted.”⁵²

Economy and Oksenberg were focused on U.S.-China policy and sought to provide evidence and understanding of the effect of the accommodationist approach. Their work did not seek to place U.S.-China policy in a broader context of theories about the future of global governance and general international relations. The link between U.S.-China policy and future global governance received its most articulate academic explication in the work of Princeton professor John Ikenberry. His work laid out a theory for how the U.S. should accommodate a “rising” China, especially in the context of the U.S.’s relative decline.⁵³

In Ikenberry’s view, the rise of China presents U.S. policymakers with an important decision point. Traditional realist analysts would predict that the rise of China would inevitably lead to rivalry and conflict with the United States and its allies. Thus, as Ikenberry puts it, the rise of China leads realists to predict “an increasingly powerful China and a declining United States locked in an epic battle over the rules and leadership of the international system.”⁵⁴ Such a rivalry could lead to military conflict.

Ikenberry, however, suggests that the U.S. can avoid this future conflict by working now to embed China into the current international “rules-based liberal order.”⁵⁵ Indeed, he noted that longstanding U.S. policy had already created a “strong framework

⁵² See Oksenberg & Elizabeth Economy, *supra* note 51, at 40.

⁵³ See, e.g., G. JOHN IKENBERRY, JISI WANG & FENG ZHU, AMERICA, CHINA, AND THE STRUGGLE FOR WORLD ORDER 43 (G. John Ikenberry et al. eds., 2015); see also C. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, FOREIGN AFFS., Jan./Feb. 2008, at 24.

⁵⁴ See Ikenberry, *supra* note 53, at 24.

⁵⁵ See *id.*

of rules and institutions [that] is already starting to facilitate Chinese integration.”⁵⁶ This is particularly true of institutions such as the U.N. and the WTO. The U.S. could boost this process by investing in multilateral institutions that avoid regional fragmentation. Regional fragmentation is more prone to result in competing U.S. and Chinese spheres. This strategy conforms to the general U.S. policy of calling on China to become a “responsible stakeholder” in the international order, which would mean Chinese support and participation in many leading international institutions.

C. The Shift to Confrontationism

None of this is meant to suggest that the U.S. scholars or policymakers are unanimously in favor of the longstanding U.S. policy of accommodationism. In recent years, this accommodationist policy of supporting and then integrating China into the international system has come under severe criticism by numerous scholars and policymakers.⁵⁷ The critics of the U.S. accommodationist policy base their skepticism on a number of grounds.

First, as Ikenberry noted, scholars drawing upon a realist analysis of international relations doubt that a rising power like China and “status quo” powers like the United States can easily avoid conflict, if at all.⁵⁸ Status quo powers like the U.S. have occasionally tried to attack a rising power before it establishes itself, while sometimes they “appease” such powers by trying to incorporate them into the established international order.

China-skeptics, however, doubt that appeasement or accommodation will work with China since, in their view, China seeks to establish itself as the dominant power in East Asia or Asia overall. As Professor Aaron Friedberg has argued, these Chinese ambitions will make U.S. accommodation of China difficult, if not impossible.⁵⁹ This conflict of interests is further exacerbated by ideological differences between the U.S. and Chinese governments.

⁵⁶ *Id.* at 31.

⁵⁷ *See supra* Section B.

⁵⁸ *See* Ikenberry, *supra* note 53, at 24.

⁵⁹ *See generally*, AARON L. FRIEDBERG, *A CONTEST FOR SUPREMACY: CHINA, AMERICA, AND THE STRUGGLE FOR MASTERY IN ASIA* (W.W. Norton & Company 2011) (discussing how China desires to displace the United States as the dominant power in East Asia, leading to tense relations between the two countries).

The authoritarian nature of the current Chinese government, these analysts argue, make it more likely that China will seek to bolster its domestic standing through aggressive actions abroad.⁶⁰

Other analysts have echoed Friedberg's China-skepticism and directly criticized the "integration" and accommodation strategies. Instead of becoming integrated into a "liberal order" led by the United States, China analysts Robert Blackwell and Ashley Tellis have concluded that China has simply taken advantage of U.S. policy to bolster its own strengths at the U.S.'s expense.⁶¹ As they put it, accommodating China has simply given China "the wherewithal to challenge the United States, endangering the security of its allies and others in Asia, and to slowly chip away at the foundations of the liberal international order globally."⁶² Put another way, they declared that "China has not evolved into a responsible stakeholder."⁶³ Instead, China has bolstered the party's control of domestic politics while growing its economic and military power."⁶⁴ The voices of these China-skeptics have grown within the U.S. in recent years, putting pressure on the longstanding U.S. China policy approach. Indeed, some of the most adamant accommodationists have reconsidered their views. For instance, in 1999, Economy flatly ruled out any alternative to the policy of accommodation and engagement. In 2022, she abandoned her earlier position writing that "[e]ngagement is no longer a credible, much less the best, U.S. policy for China."⁶⁵

D. The Triumph of the Confrontationists

The skeptics of the U.S.'s traditional approach to China, who had long been a minority within the academic and policy debate,

⁶⁰ *Id.*

⁶¹ Robert D. Blackwell & Ashley J. Tellis, *Revising U.S. Grand Strategy Towards China*, 4 COUNCIL ON FOREIGN RELS. (Mar. 2015), https://cdn.cfr.org/sites/default/files/pdf/2015/04/China_CSR72.pdf [<https://perma.cc/DR54-CVPU>].

⁶² *Id.* at 20.

⁶³ Robert B. Zoellick, Deputy Sec'y of State, *Whither China: From Membership to Responsibility?*, U.S. DEP'T OF STATE ARCHIVE (Sept. 21, 2005), <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm> [<https://perma.cc/BY2S-5YNS>].

⁶⁴ *Id.*

⁶⁵ Elizabeth Economy, *Is Engagement Still the Best Strategy for China?*, in *THE CHINA QUESTIONS 2: CRITICAL INSIGHTS INTO U.S. CHINA RELATIONS*, 31, 31 (Maria Carrai, et. al eds., 2022).

appear to have prevailed in redirecting the U.S. policy. Beginning in 2017, the U.S. government has shifted both the tone and substance of its China policy toward a much more confrontational China policy. Indeed, US policy has shifted so far and so fast that one is hard pressed to find leading policymakers, or even academic voices, arguing for a return to the traditional accommodationist approach.

The first major intellectual shift in tone was signaled in the Trump Administration's December 2017 National Security Strategy.⁶⁶ Such documents are important because they reflect the internal strategic thinking of the administration, and in this case, it heralded a historic shift. It declared that growing competition in political, economic, and military spheres will require the U.S. to "rethink the policies of the past two decades." While not naming China, the document criticized the accommodationist policies that were "based on the assumption that engagement with rivals and their inclusion in international institutions and global commerce would turn them into benign actors and trustworthy partners." For the most part, this premise, the document continued, "turned out to be false."⁶⁷

In a major speech, then Vice President Michael Pence made clear that China policy had shifted in a significant way to seeing China as a strategic competitor. The administration's new approach sought "a relationship grounded in fairness, reciprocity, and respect for sovereignty, and we have taken strong and swift action to achieve that goal."⁶⁸ Those actions included imposing tariffs on certain Chinese imports⁶⁹ and export controls on U.S. technology to

⁶⁶ See John M. Weaver, *The National Security Strategy of the United States*, 11 J. STRATEGIC SEC., no. 1, Spring 2008 at 62, 64–66.

⁶⁷ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, 4 (2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [https://perma.cc/Z7FR-5XUD].

⁶⁸ Mike Pence, Vice President, Remarks by Vice President Pence on the Administration's Policy Toward China (Oct. 4, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china> [https://perma.cc/WTV2-LKQU].

⁶⁹ See Erica York, *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUND., (July 7, 2023), <https://taxfoundation.org/research/all/federal/tariffs-trump-trade-war/#:~:text=The%20Trump%20administration%20imposed%20stage,into%20effect%2>

China,⁷⁰ and a much more rhetorically confrontational approach.⁷¹

The election of Joe Biden in 2020 did not fundamentally shift this U.S. approach to China, although U.S. tactics for competing with China had a different emphasis. Embracing the reality that “a competition is underway between the major powers,” President Biden’s National Security Strategy positioned the U.S. as a defender of “free, open, prosperous, and secure international order.”⁷² It then named China as the greatest challenge because it is the “only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to advance that objective.”⁷³

IV. The Significance of International Law in Responding to the Rise of China

This debate among international relations scholars and policymakers on how to manage a rising China has increasingly referenced and relied upon international law. For accommodationists, international law has been a crucial yardstick for assessing China’s behavior, and a China that “abides by international law” has become an explicit goal of U.S. policy. As this section will explain, however, U.S. policy has shifted from trying to encourage China to “abide by international law” to framing China as a threat to international law as represented in a “rules-based order.” In both situations, however, U.S. policy assumes that U.S. interests, and not China’s, are served by a stronger international law system.

0in%20May%202019./ [https://perma.cc/G2MV-RDQ5].

⁷⁰ See, e.g., Press Release, U.S. Dept. of Commerce, Commerce Tightens Restrictions on Technology Exports to Combat Chinese, Russian, and Venezuelan Military Circumvention Efforts (Apr. 27, 2020), <https://2017-2021.commerce.gov/news/press-releases/2020/04/commerce-tightens-restrictions-technology-exports-combat-chinese-0.html> [https://perma.cc/GK6F-PTY5].

⁷¹ Ben Wescott, *Pompeo Says Chinese Communist Party Wants ‘International Domination’*, CNN, (Oct. 31, 2019), <https://www.cnn.com/2019/10/31/politics/pompeo-china-communist-party-domination-intl-hnk/index.html> [https://perma.cc/8HT4-FQYD].

⁷² THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY, 6, 10 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/11/8-November-Combined-PDF-for-Upload.pdf> [https://perma.cc/9A5B-F2UK].

⁷³ *Id.* at 8.

A. U.S. Policy and International Law

As discussed earlier, U.S. presidents since Nixon have maintained a policy of supporting China's further integration into the world community and international institutions.⁷⁴ This bipartisan policy survived various crises, including the 1989 Tiananmen massacre, as explained by President George H.W. Bush.⁷⁵ By 2005, the U.S. policy had evolved into a call on China to do more than merely integrate, but to further become a "responsible stakeholder" in supporting international institutions and relations.

During the Obama Administration, the U.S. shifted to explicitly calling on China to "reinforce" international law, and also to "abide" by international law. Unlike Zoellick's oblique references to an "international system," the Obama Administration began to use the language of international law to describe an ideal China interacting with the world. Thus, President Obama personally adapted the "responsible stakeholder" terminology to explicitly call on China to follow international law and made China's compliance with international law an important feature in his China policy.

For instance, in 2011, President Obama explicitly linked the idea of China as a rising power to its compliance with international law. In remarks at a press conference with Australia's Prime Minister, he stated:

Obviously, both the United States and Australia have enormous trade relationships with China, and we both agree that it's important to continue to see China prosper and rise. But what's also important is that as China emerges as this great world power that it also is helping to reinforce and abide by basic international law and norms.⁷⁶

This statement thus rephrased Zoellick's "responsible stakeholder" language by setting "reinforcing and abiding by

⁷⁴ See *supra*, Section II.A.

⁷⁵ See OFFICE OF THE HISTORIAN, *Tiananmen Square, 1989*, MILESTONES: 1989–1992, <https://history.state.gov/milestones/1989-1992/tiananmen-square> [<https://perma.cc/XB39-Y2KY>].

⁷⁶ Press Release, Barack Obama, President, Remarks by President Obama and Prime Minister Abbott of Australia After Bilateral Meeting (June 12, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/12/remarks-president-obama-and-prime-minister-abbott-australia-after-bilate> [<https://perma.cc/UN9A-7GBZ>].

international law” as a yardstick for measuring China’s behavior. It is possible that this evolution in U.S. policy was driven by China’s refusal to participate in, or comply with, an arbitral tribunal proceeding convened under the U.N. Convention for the Law of the Sea. That arbitral proceeding related to China’s activities and claims in the South China Sea, including large scale land reclamation to build artificial islands in disputed waters.⁷⁷ Both Obama and lower-level U.S. government officials repeatedly called on China to “abide by international laws and rules” and encouraged neighboring countries and allies to do the same.⁷⁸

Indeed, then-President Obama repeated his call for China to comply with international law in various public fora as well as during bilateral meetings with the President of China. For instance, a day prior to a visit to China for a G-20 summit, Obama reiterated the “responsible stakeholder” approach but also amplified the importance of China’s compliance with international law by linking it to U.S. cooperation.⁷⁹

After saying China has “got to abide by international law,” Obama noted that where China “is working within international rules and international norms,” the U.S. and China “should be

⁷⁷ See generally Julian G. Ku, *The Significance of China’s Rejection of the South China Sea Arbitration for Its Approach to International Dispute Settlement and International Law*, in 34 CHINESE (TAIWAN) YEARBOOK INT’L L. & AFFS. 74 (Ying-jeou Ma ed., 2016).

⁷⁸ See *Decision, Maybe Momentous, Nears in Case China has Tried to Ignore*, MANILA BULLETIN (Jul. 10, 2016) (“When President Park Geun-hye of South Korea visited Washington in October, President Barack Obama said he expected Seoul to speak out on the need for China to “abide by international laws and rules.””); *Assistant Secretary of State Danny Russel’s Testimony Before Congress*, U.S. EMBASSY & CONSULATES IN INDON. (Feb. 6, 2014), <https://id.usembassy.gov/assistant-secretary-of-state-danny-russels-testimony-before-congress/> [<https://perma.cc/4E5N-EPD9>] (statement of Daniel Russel) (“Any use of the “nine dash line” by China to claim maritime rights not based on claimed land features would be inconsistent with international law. The international community would welcome China to clarify or adjust its nine-dash line claim to bring it in accordance with the international law of the sea.”); Carla Babb, *US Weighs Right-of-Passage Display in South China Sea*, VOICE OF AMERICA (May 13, 2015, 7:59 PM), <https://www.voanews.com/a/united-states-weighs-right-of-passage-display-south-china-sea/2766911.html> [<https://perma.cc/25ZA-7RZP>] (discussing Daniel Russel’s comment to the Senate Foreign Relations Committee that a U.S. presence is needed in the region to ensure everyone with a stake in the sea follows international law, “No matter how much sand you pile on a reef in the South China Sea, you can’t manufacture sovereignty[.]”).

⁷⁹ See *Interview by Fareed Zakaria with President Barack Obama*, CNN (Sept. 4, 2016), <http://www.cnn.com/TRANSCRIPTS/1609/04/fzgps.01.html> [<https://perma.cc/KJL2-JHPP>].

partners.”⁸⁰ But he went on to warn that “where we see them violating international rules and norms, as we have seen in some cases in the South China Sea or in some of their behavior when it comes to economic policy, we’ve been very firm. And we’ve indicated to them that there will be consequences.”⁸¹

The recent emphasis on calling on China to follow international law, however, does not investigate particular doctrines, treaties, or legal principles. It is a general call upon China to follow international law with the implicit assumption that “international law” has a common, shared meaning. Thus, if China abides by international law, China will be better integrated into the type of liberal international legal order the U.S. seeks to promote and uphold.

As described above, the Trump administration shifted U.S. China policy toward an explicit competition frame which emphasized reciprocity and U.S. sovereignty.⁸² This shift toward a more confrontational stance did not include Obama’s broader calls for China to abide by international law. Some elements of this international law emphasis remained, however, in certain areas of U.S.-China competition.

For instance, in 2020, the U.S. government explicitly aligned its position on legal rights in the South China Sea with the 2016 arbitral decision issued pursuant to the United Nations Convention on the Law of the Sea.⁸³ That arbitration had been initiated by the Philippines against China, but China had rejected the tribunal’s jurisdiction and had refused to either participate in the proceeding or abide by the tribunal’s decision. While the U.S. had previously called on all parties to comply with the ruling, it had never before explicitly criticized China’s substantive claims in the South China Sea as “illegal.”⁸⁴ Nor had the U.S. ever endorsed the tribunal’s

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See supra*, Section II.D.

⁸³ Press Release, Michael R. Pompeo, Secretary of State, Statement on U.S. Position on Maritime Claims in the South China Sea (July 21, 2020) <https://la.usembassy.gov/statement-by-secretary-michael-r-pompeo-u-s-position-on-maritime-claims-in-the-south-china-sea/> [<https://perma.cc/9V7F-4P5X>].

⁸⁴ Gregory B. Poling, *How Significant Is the New U.S. South China Sea Policy*, CT. FOR STRATEGIC & INT’L STUD., (July 14, 2020) (noting “that neither [Secretary of State Kerry] nor any other U.S. official, either in the previous administration or the first three years of this one, explicitly endorsed the substance of the ruling. It was a subtle but

substantive claims before. The statement exemplifies how the U.S. government saw endorsing international law (and an international institution) as a way to criticize China and Chinese policies.

This shift during the last year of the Trump administration foreshadowed the Biden administration's more aggressive embrace of international law as a tool to counter China. In Blinken's major China policy speech,⁸⁵ he placed defending and reforming the "rules-based international order" at the center of U.S. foreign policy and its main tool for competing with China.

Blinken's speech further explained that the rules-based international order included as its founding documents "the U.N. Charter and the Universal Declaration of Human Rights, which enshrined concepts like self-determination, sovereignty, the peaceful settlement of disputes."⁸⁶ All of these concepts are foundational principles of postwar international law.

While positioning the U.S. as a defender of international law and the rules-based international order, Blinken accused China of undermining this same system. Thus, "Beijing's vision would move us away from the universal values that have sustained so much of the world's progress over the past 75 years."⁸⁷ Indeed, according to Blinken, China's "ruling Chinese Communist Party has become more repressive at home and more aggressive abroad."⁸⁸ Since in Blinken's view, Beijing cannot be relied upon to change its behavior, the U.S. will focus on working with other like-minded countries "to advance our vision for an open, inclusive international system."⁸⁹ After detailing various agreements with the European Union, the G20, and key U.N. agencies, Blinken explained that "[t]hese actions are all aimed at defending and, as necessary, reforming the rules-based order . . ."⁹⁰

deliberate choice.") <https://www.csis.org/analysis/how-significant-new-us-south-china-sea-policy> [<https://perma.cc/GMY8-YD2S>].

⁸⁵ Press Release, Anthony J. Blinken, Secretary of State, The Administration's Approach to the People's Republic of China, (May 26, 2022) <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/> [<https://perma.cc/3CVR-R8J6>].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

Seen in this light, the current U.S. government has framed the U.S. strategy toward China as preserving a liberal international order against a China “that would move us away from the universal values that have sustained so much of the world’s progress over the past 75 years.”⁹¹ In this framing, therefore, the U.S. competition with China requires it to defend the existing system of international law that supports the liberal U.S. vision of world order. In this way, international law has become a crucial element in the U.S. toolbox for competing with and confronting China.

B. Scholarly Analysis of China and International Law

While U.S. government policymakers have increasingly cited international law as a way to draw a favorable comparison with China, they have not drawn sufficiently on the substantial academic literature assessing and analyzing China’s use and treatment of international law. Such work falls into two categories. Some scholars have sought to measure and assess China’s integration and compliance with international law and its engagement with international organizations.⁹² This strand of political science scholarship offers useful insights, but does not fully isolate those distinctive aspects of China’s approach to international law that is likely to exacerbate conflicts with the United States.

Some of the most impressive and detailed studies of China’s engagement with international law have been conducted by scholars applying methodologies drawn from political science and sociology. Such studies have typically analyzed China’s interaction with a particular international legal regime such as arms control, environmental cooperation, trade, or human rights. The main purpose of such analyses is to both document and analyze the nature of China’s interaction with a particular and discrete area of international cooperation.⁹³

Meanwhile, traditional international law scholarship has sought to compile, review, and analyze the Chinese government’s statements and actions with respect to international law doctrines and issues. This first kind of scholarship has a long pedigree in the U.S., but has become rarer in recent years as U.S. legal scholars have focused more on China’s domestic legal reform. Only in recent

⁹¹ *Id.*

⁹² *See infra* Section III.B.1.

⁹³ *Id.*

years has such scholarship tried to offer a theoretical account to classify and explain China's views on the substance of international law.⁹⁴

1. Compliance and Socialization

Professor Ann Kent's works are both the most ambitious and comprehensive efforts along this political science line. For example, in her 2007 monograph, Professor Kent carefully reviewed China's engagement with four discrete international legal regimes: arms control, environmental cooperation, trade and investment, and human rights.⁹⁵ She concluded that, "in general, China complies with the rules of international organizations and treaties and its compliance has usually improved over time."⁹⁶ While conceding that China's compliance is different across and within legal regimes, she nonetheless argues that China's record of engagement shows meaningful compliance that reflects real internalization of international legal norms. Given China's pre-1971 image as a rogue state outside of the international legal system, Kent suggests that China's relatively deep contemporary engagement with international law reflects the impact of repeated engagement with international law and organizations over a sustained period of time.⁹⁷ On this front, her work supports the broader literature on how states can be socialized into habits of complying with international legal norms through repeated engagement with international legal processes.

Kent's general conclusions are echoed in other similar scholarly work conducted by political scientists with expertise in Chinese society and politics. A 1999 edited volume published by the Council on Foreign Relations contained contributions from many of the U.S.'s top China scholars on China's engagement with many of the same international legal regimes discussed by Kent.⁹⁸ Like Kent, most of the CFR experts concluded that China's level of engagement with international regimes was deeper and more

⁹⁴ See generally Ku, *supra* note 77.

⁹⁵ See generally ANNE KENT, *BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS AND GLOBAL SECURITY* (2007).

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 12.

⁹⁸ See generally, *CHINA JOINS THE WORLD* (Michel Oksenberg & Elizabeth Economy eds., 1999).

sophisticated than in the past. Moreover, there was strong evidence in certain regimes, such as arms control, that the Chinese government was complying, or at least not openly violating, international legal obligations it had undertaken.⁹⁹

China's 2001 entry into the World Trade Organization has also been a fruitful area for studying China's engagement and compliance with international law. Even putting aside official government studies mandated by the U.S. Congress,¹⁰⁰ scholars have analyzed China's substantial efforts to modify its domestic laws and regulations to comply with its initial WTO accession requirements, but also in response to decisions of the WTO Dispute Settlement Body¹⁰¹. While China's level of compliance with WTO obligations has drawn criticism, other scholars analyzing China's interaction with the WTO have concluded its engagement is real and its effort at ensuring compliance is substantial.¹⁰² This hardly means China's compliance with the WTO is perfect, but it does mean that there is evidence that China's interaction with the WTO has spurred a meaningful effort to both cooperate and comply.

Most of this work is both careful and nuanced, but it all supports a similar overall assessment of China's interaction with international law. China's engagement with international legal regimes is much deeper and more meaningful than in its past. Moreover, while its level of compliance is uneven or non-existent in some difficult areas, such as human rights, China has also shown a willingness to abide by international law in many important areas. Evidence of socialization buttresses the accommodationist U.S. policy of seeking to strengthen international institutions and to encourage China to abide by international law. Such evidence,

⁹⁹ *Id.*

¹⁰⁰ Section 421 of the U.S.-China Relations Act of 2000 (Pub. L. No. 106-286) requires the United States Trade Representative (USTR) to report annually to Congress on compliance by the People's Republic of China (China) with commitments made in connection with its accession to the World Trade Organization. 22 U.S.C. § 6951(a).

¹⁰¹ See, e.g., Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525, 548-49 (2014); Julia Ya Qin, *Trade, Investment and Beyond: the Impact of WTO Accession on China's Legal System*, 191 CHINA Q. 720, 724-29 (2007); Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOB. STUD. L. REV. 97, 111-17 (2003).

¹⁰² See e.g., Gerald Chan, *Responsibility and Compliance in China's WTO Policy: Implications for Sino-U.S. Relations*, in RETURN OF THE DRAGON: U.S.-CHINA RELATIONS IN THE 21ST CENTURY 85 (Danny Paau & Herbert Yee eds., 2005).

however, would undermine U.S. attempts to cast China as a threat to the international legal order.

Much of this work, however, treats international legal norms as exogenous and stable. These studies acknowledge that the substance of international law can be contested, but usually does not sufficiently grapple with this reality. International law scholars, especially a new wave of comparativist scholars, have begun to study and classify distinctive interpretations and understandings of international law.¹⁰³ The key to this approach is to be willing to accept the existence of more than one reasonable and good faith interpretation of key international legal norms. While international law, like all law, needs consistency and stability in its interpretation, comparative international lawyers do not rule out divergent interpretations, especially if they can detect a pattern in how one nation or group of nation applies international law versus another.

Thus, any study of China's compliance and engagement of international law needs to begin with ascertaining what China actually thinks international law requires of it. Moreover, as China's strength and global influence grows, its ability to shape future international legal developments will likely grow as well. If China has its distinct view of international law, then it might seek to shape international law along its preferred views. Thus, any serious consideration of a U.S. policy to encourage China to abide by international law and become a responsible stakeholder must consider the content of international law as well as a state's level of compliance.

2. *Traditional International Law Scholarship*

International legal scholarship has begun this process of better understanding China's views on the substance and content of international law. The formal study of China's treatment of international law outside of China did not begin until the late 1960s and early 1970s. Foreign legal scholars were hampered by China's relative isolation during the Cultural Revolution and the lack of access to primary sources. Moreover, as many Chinese universities were closed and Chinese legal scholars were prohibited from working, Chinese scholarship on international law also fell into desuetude during that time.

¹⁰³ See generally *COMPARATIVE INTERNATIONAL LAW* (Anthea Roberts et al. eds., 2018).

However, Hungdah Chiu and Jerome Cohen revived the study of China's treatment of international law with a series of articles and then an ambitious three-volume study on "The People's China and International Law" published in 1974.¹⁰⁴ This work set the standard for U.S. academic studies of China's practice of international law, but it necessarily focused on China's activities during the 1950s and 1960s. Chiu and other scholars continued to publish studies as China became further accessible during the 1980s but the focus on China's international law practice fell off as other areas of the Chinese legal system became open for foreign academic study.

Within China, the return of international law as an academic discipline began in 1980 when classes were again offered on the subject and the first new Chinese textbook on international law was published. Chinese scholars in this period largely eschewed earlier theoretical debates about the class nature of international law in favor of practical works documenting and compiling international law materials and sources for use by the Chinese government, scholars, and students. While international law advanced as a discipline within China, the focus of the field has remained practical and largely uninterested in legal theory. As China's engagement with a wide variety of international legal regimes grew, this practical focus was understandable.

In more recent years, however, scholars both inside and outside of China have tried to offer a broader overview of China's international law approach that isolates its distinctive attributes and considers its impact on future global affairs. Eric Posner and John Yoo have argued that China's rise to great power status will likely weaken support for certain international norms such as human rights.¹⁰⁵ In China, scholars have noted China's particular emphasis in its official rhetoric on doctrines such as state sovereignty and non-interference.¹⁰⁶ Such works have begun, but have hardly completed, the ongoing work to understand and describe a particular Chinese approach to international law. But scholars increasingly

¹⁰⁴ See generally, JEROME A. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW*, 1 (Jerome A. Cohen & Hungdah Chiu eds., 2017) (discussing the Chinese government's views on public international law).

¹⁰⁵ Eric Posner & John C. Yoo, *International Law and the Rise of China*, 7 *CHI. J. INT'L L.* 1, 10–12 (2000).

¹⁰⁶ See e.g., Xue Hanqin, *Chinese Observations on International Law*, 6 *CHINESE J. INT'L L.* 83, 85–86 (2007).

agree that China's approach is both distinct from other countries, and more ambitious to correspond better with China's role in the world has changed.

The most ambitious effort in recent years comes from Professor Cai Congyan. In his monograph subtitled: "Taking Chinese Exceptionalism Seriously," Professor Cai argues that China has subtly altered its approach to international law and relations to promote a global order characterized by a "partnership based on state sovereignty, pacifism based on common security, and inclusionism based on national diversities."¹⁰⁷ Cai offers relatively little evidence of this exceptionalist approach, however, although he does cite China's efforts to promote norms of international law favorable to its interests in areas such as limited jurisdiction for international courts¹⁰⁸ or economic rights in human rights law.¹⁰⁹

Other scholars have noted that China's attempt to use international law to advance its interests, but have eschewed claims that China seeks a wholesale revision of international legal rules. As Robert Williams observes, China's flexible approach "enables it to benefit from and exploit the international order without the need to advocate fundamental changes to the letter of the law in most areas."¹¹⁰ In some areas, such as international trade law, China makes little effort to reform what has largely been a favorable system. In others, such as the law of the sea, China has pressed barely credible interpretations that could fundamentally change widely held understandings of those areas of law. But there is no evidence, in Williams' view, of a wholesale challenge to the international legal order that Blinken's rhetoric assumes.

Nonetheless, scholarship on China's treatment of international law has shifted away from its earlier optimism about the ability of the international legal system to socialize China into different behaviors. The failure of international law to change China's behavior can be most easily observed in international human rights

¹⁰⁷ CONGYAN CAI, *THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY* 326 (2019).

¹⁰⁸ *See id.* at 285–86.

¹⁰⁹ *Id.* at 143–45.

¹¹⁰ Robert D. Williams, *International Law with Chinese Characteristics: Beijing and the "Rules-Based" Global Order*, *Brookings Ins.* 1, 10 (2020), <https://www.brookings.edu/research/international-law-with-chinese-characteristics-beijing-and-the-rules-based-global-order/> [<https://perma.cc/9FVB-8HL4>].

law. As Professor Bjorn Ahl notes, “China’s behavior toward the international human rights system has been described in terms of “tactical learning” rather than socialization into international standards.”¹¹¹ Ahl does not find any evidence China has changed the international law of human rights, but he finds little evidence international law has changed China either.¹¹²

This growing body of legal scholarship has thus only suggested areas of Chinese exceptionalism in international law but have not found evidence of either wholesale rejection of international law as a concept or of the existing international legal system. As the next section argues, China’s approach to international law does differ in meaningful and substantial ways from that of the United States. But these differences do not support the view that China has a revisionist view of international law that is sometimes suggested in U.S. government statements. Rather, both countries have distinct and often competing approaches to international law, and the U.S. may have difficulty defending its “rules-based order” approach against China’s more traditional conception.

V. International Law with the U.N. at its Core versus the Rules-Based Order

In this concluding section, the Article identifies the key distinct characteristics of China’s approach to contemporary international law and examines how China has used international law to challenge the U.S. conception of a “rules-based international order.” As this section will explain, because China’s conception is grounded in formal international law to at least the same degree as the U.S. “rules-based order,” it will be difficult the U.S. to use international law to advance its policy goals of competing and containing China.

A. “International System with the United Nations at Its Core”

The Chinese government’s public statements outline a clear conception of how international law should be interpreted and understood within the larger international system. Chinese President Xi Jinping’s 2021 address to the United Nations General

¹¹¹ Björn Ahl, *The Rise of China and International Human Rights Law*, 37 HUM. RTS. Q. 637, 638-39 (2015).

¹¹² *Id.*

Assembly encapsulated this vision in a single paragraph:

In the world, there is only one international system, i.e. the international system with the United Nations at its core. There is only one international order, i.e. the international order underpinned by international law. And there is only one set of rules, i.e. the basic norms governing international relations underpinned by the purposes and principles of the U.N. Charter.¹¹³

This formulation, which is repeated almost word-for-word in numerous official Chinese government statements,¹¹⁴ emphasizes two characteristics of China's preferred international system. First, the Chinese view denies any multiplicity of international legal "regimes" based on the different subject matters or different national situations. International law, which is composed of a single set of rules, underpins the "one international order" and the "one international system." Second, the formulation highlights that the United Nations is the "core" of the single international order and that "the purposes and principles of the U.N. Charter" set out the rules for this single international order.

Highlighting that the United Nations is the "core" of the international system confirms that China sees the United Nations as a positive force in global affairs and for its own national interests.

¹¹³ H.E. Xi Jinping, President, People's Republic of China, Statement at the General Debate of the 76th Session of The United Nations General Assembly (Sept. 21, 2021).

¹¹⁴ See, e.g., *Xi Jinping Meets with Secretary-General of the United Nations (UN) António Guterres, THE SECOND BELT AND RD. F. FOR INT'L COOP.* (Apr. 27, 2019, 7:50 AM), <http://www.beltandroadforum.org/english/n100/2019/0429/c22-1385.html> [<https://perma.cc/WZF4-Z7BD>]; *Wang Yi Meets with President of the 77th Session of the United Nations General Assembly Csaba Kőrösi*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 3, 2023, 10:20 AM), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/wshd_665389/202302/t20230203_11019070.html [<https://perma.cc/BUT7-UPRT>] ("China is ready to work with all other countries to firmly safeguard the international system with the UN at its core and firmly safeguard the international order based on the purposes and principles of the UN Charter."); *Qin Gang Holds Talks with President of the 77th Session of the United Nations General Assembly Csaba Kőrösi*, MINISTRY OF FOREIGN AFFS. OF CHINA (Feb. 2, 2022, 10:50 PM), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/wshd_665389/202302/t20230204_11019708.html [<https://perma.cc/5JF5-XQTZ>] ("Qin Gang stressed that China firmly upholds the international system with the UN at its core, the international order underpinned by international law, and the basic norms governing international relations based on the purposes and principles of the UN Charter. China's development adds to the force for peace and justice.").

This positive attitude toward the U.N. is longstanding, although somewhat ironic since the People's Republic of China was not admitted to the U.N. until 1971, decades after it had taken control of China.

Not only is the U.N. the core international institution, but the U.N. Charter “establishes the basic principles of international law and the basic norms of international relations, whereby an international order of multilateralism with the United Nations at the core was created.”¹¹⁵ For the Chinese government, the foundation of international law is the United Nation Charter. Indeed, it has also defended the Charter from criticisms that it is outdated. As China's U.N. Ambassador Zhang Jun argued, challenges have arisen “not because the purposes and principles of the U.N. Charter are outdated . . . but because the essence of multilateralism has not been truly practiced.”¹¹⁶

While the U.S. has positioned itself as the defender of the “rules-based international order,” China has publicly and repeatedly positioned itself as the defender of the U.N. system and the Charter as a monopoly on international order and international law. It even enlisted Russia to affirm this view of international law in a recent joint statement issued by leaders of the two countries.¹¹⁷ This suggests that China has determined that the U.N. Charter fits within China's conception of global governance and foreign policy, and it can serve as useful tool to build alliances with countries such as Russia. It also serves to rebut U.S. government claims that China is seeking to “challenge the international order.”

The U.N. Charter is compelling for China because it reinforces two key foundational principles of international law. As President

¹¹⁵ Statement by Mr. SHI Xiaobin, Chinese Delegate at the 2017 Session of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (Feb. 21, 2017), <https://legal.un.org/committees/charter/docs/english/2017/china.pdf> [<https://perma.cc/Z9FP-JJFE>].DGD4-WFL7].

¹¹⁶ Minlu Zhang, *China UN Envoy: Uphold True Multilateralism*, CHINA DAILY (Dec. 15, 2022), <https://www.chinadaily.com.cn/a/202212/15/WS639a9bf1a31057c47eba4919.html> [<https://perma.cc/G28R-DEXV>].

¹¹⁷ See generally, *Joint Statement of the People's Republic of China and the Russian Federation on Deepening the Comprehensive Strategic Partnership in the New Era*, MINISTRY OF FOREIGN AFFS. OF THE PEOPLE'S REPUBLIC OF CHINA (Mar. 23, 2023), https://www.fmprc.gov.cn/zyxw/202303/t20230322_11046188.shtml [<https://perma.cc/BVR7-PWYP>].

Xi has elaborated in a separate speech, China's policy is to

[u]phold the purposes and principles of the Charter of the United Nations, safeguard the international system with the U.N. at its core, uphold the international order underpinned by international law and adhere to the principles of sovereign equality and non-interference in other countries' internal affairs.¹¹⁸

This statement associates the U.N. and the U.N. Charter with the principles of sovereign equality and non-interference in internal affairs found in Article II.¹¹⁹ While both principles can be derived from the U.N. Charter, there are other key concepts in the Charter that China rarely emphasizes. For instance, the U.N. Charter also declares that the purposes of the U.N. include "the principle of equal rights and self-determination of peoples" and the promotion of "human rights."¹²⁰

But for China, sovereign equality and non-interference represent the main principles of the U.N. Charter, and this emphasis helps to explain China's willingness to commit to the Charter as the foundation of international law. As China's then-prime minister explained in a 2008 U.N. General Assembly speech, China's focus on these concepts stems from its own history of humiliation at the hands of foreign invaders.¹²¹ For this reason, "China is firm in upholding its hard-won sovereignty and territorial integrity and will never tolerate any external interference."¹²² Sound state-to-state relations thus require, in China's view, "[r]espect for sovereignty and non-interference in the internal affairs of other countries."¹²³ This is why China goes out of its way to respect the sovereignty of other states and the social systems and development paths chosen

¹¹⁸ Chair's Statement of the High-level Dialogue on Global Development, MINISTRY OF FOREIGN AFFS. OF THE PEOPLE'S REPUBLIC OF CHINA (June 24, 2022), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/202206/t20220624_10709812.html [<https://perma.cc/3YXH-8XVA>].

¹¹⁹ See U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members"); U.N. Charter art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state").

¹²⁰ *Id.*

¹²¹ Statement by H.E. Wen Jiabao, Premier of the State Council of the People's Republic of China, at the General Debate of the Sixty-Third Session of the U.N. General Assembly (Sept. 24, 2008), https://www.un.org/en/ga/63/generaldebate/pdf/china_en.pdf [<https://perma.cc/WPL6-4SFX>].

¹²² *Id.*

¹²³ *Id.*

by their peoples.

China's emphasis on sovereign equality and non-interference also allows China to seek common cause with other non-European countries that have been victims of imperialism. As leading Chinese international lawyer and sitting ICJ judge Xue Hanqin has explained, newly independent post-colonial states like China accepted the U.N. Charter's Westphalian framework because this conception of international law "entitled [such post-colonial states] to maintain political independence and territorial integrity, and empowered them to establish the political system of their own choice[.]"¹²⁴

Many of China's doctrinal positions on international law can be derived from this sovereignty/non-interference-centered approach. Thus, China has made state consent the foundational principle for international adjudication, and fiercely rejected any efforts to force it to submit to international adjudication based upon prior consent. It has opposed the principle of "responsibility to protect" as justifying the use of force for humanitarian interventions absent explicit authorization from the U.N. Security Council. Most recently, it has rejected the legality of "unilateral" economic sanctions by countries like the United States absent U.N. Security Council authorization.¹²⁵

The Chinese opposition to the legality of what it calls "unilateral coercive measures" neatly summarizes how its U.N.-centered sovereignty conception of international law differs from that of the United States. In the past decade, the United States has ramped up its use of economic sanctions against individual countries or groups of countries for national security, foreign policy, or human rights

¹²⁴ Xue Hanqin, Judge, Int'l Ct. of Just., Fall Lecture by the International Criminal Law Network at the Grotius Centre (Nov. 1, 2006).

¹²⁵ See *Joint Statement on Unilateral Coercive Measures at the Third Committee of the General Assembly at its Seventy-Seventh Session*, MINISTRY OF FOREIGN AFFS. OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 19, 2022), http://un.china-mission.gov.cn/eng/hyyfy/202210/t20221019_10786144.htm [<https://perma.cc/LTR3-STDJ>] (joining other states to "call on States to avoid imposing future unilateral sanctions not in accordance with international law and the Charter of the United Nations"); *China accuses US of 'bullying' with new 'illegal' sanctions*, THE ASSOCIATED PRESS (Feb. 27, 2023), <https://apnews.com/article/politics-china-bd45b29ce3431b4ccb18b044e8a34bc6> [<https://perma.cc/VLQ6-BN9E>] ("The sanctions 'have no basis in international law or authorization from the Security Council, and are typical illegal unilateral sanctions and long-arm jurisdiction,' Foreign Ministry spokesperson Mao Ning said at a daily briefing").

reasons. Although some of the sanctions imposed by the United States are taken to carry out U.N. Security Council resolutions against North Korea or Syria, many U.S. sanctions are not explicitly authorized by any U.N. body.¹²⁶ While the frequency of such U.S. sanctions is relatively recent, the U.S. has imposed such unilateral sanctions for decades, including against China and most recently against Russia over its invasion of Ukraine. The U.S. government not only believes such sanctions are consistent with international law, but it has made such sanctions a centerpiece of its foreign policy.

Referring to its favored international law principles, China has stated such actions “seriously violate the purposes and principles of the U.N. Charter, the fundamental principle of sovereign equality in international law, and the basic norm of non-interference in international relations.”¹²⁷ China has not only called any such unilateral sanctions illegal under the U.N. Charter, but it has rallied countries at the United Nations to repeatedly call for the end to such actions. Most recently, China submitted a joint statement on behalf of 30 countries declaring that unilateral economic sanctions “run counter to the purposes and principles of the Charter of the United Nations and International Law, multilateralism and the basic norms of international relations.”¹²⁸ In this way, China sees international law as a way to build alliances with other countries to criticize and push back against U.S. policies.

¹²⁶ See, e.g., Press Release, UN Special Rapporteur Alena Douhan, United States: Efforts to Use Sanctions to Expand Jurisdiction Abroad Violate Human Rights says UN Expert, U.N. (Mar. 9, 2023), <https://www.ohchr.org/en/press-releases/2023/03/united-states-efforts-use-sanctions-expand-jurisdiction-abroad-violate-human> [https://perma.cc/FB44-2KCL].

¹²⁷ *Remarks by Ambassador Dai Bing at the Side Event of the Group of Friends in Defense of the Charter of the United Nations on the Negative Impact of Unilateral Coercive Measures on Human Rights*, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE UN (Oct. 12, 2022, 4:45 PM), http://un.china-mission.gov.cn/eng/hyyfy/202210/t20221013_10782627.htm [https://perma.cc/72G3-4RV9].

¹²⁸ *Joint Statement on Unilateral Coercive Measures at the Third Committee of the General Assembly at its Seventy-Seven Session*, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE UN (Oct. 19, 2022, 11:20 AM), http://un.china-mission.gov.cn/eng/hyyfy/202210/t20221019_10786144.htm [https://perma.cc/FWJ5-FY8T].

B. The Rules-Based Order

As some commentators have complained, the phrase “rules-based order” is among the current U.S. administration’s favorite terms, and “it has become what ‘free world’ was during the Cold War.”¹²⁹ The phrase appears six times in the 2022 National Security Strategy and is defined in Blinken’s 2021 China speech as the “system of laws, agreements, principles, and institutions that the world came together to build after two world wars to manage relations between states, to prevent conflict, to uphold the rights of all people.”¹³⁰ The challenge, according to the Blinken speech, is to defend this rules-based order against Chinese efforts to undermine or overturn this order.¹³¹

Critics have argued that the idea of a rules-based order is relatively new, and has only been used by the U.S. government in recent decades, in part to elide questions about the legality of the U.S. invasion of Iraq.¹³² Moreover, the concept suggests that there is a single “international order” that the U.S. helped build and is now defending. But there are reasons to think, as Professor Alastair Johnston argues, that there is no single monolithic international order that the U.S. is either defending or opposing.¹³³ Rather, different areas of global cooperation have different mechanisms for cooperation, and different levels of legal obligation.

The Chinese government has also begun to directly challenge the concept of the rules-based order and has drawn favorable contrasts with its own approach to international law. As China’s U.N. Ambassador Zhang Jun noted during a debate on the international rule of law,

¹²⁹ Peter Beinart, *The Vacuous Phrase at the Core of Biden’s Foreign Policy*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/opinion/biden-foreign-policy.html> [<https://perma.cc/4T3W-CKUY>].

¹³⁰ Antony J. Blinken, Sec’y of State, U.S. Dep’t of State, *The Administration’s Approach to the People’s Republic of China* at The George Washington University (May 26, 2022), <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/> [<https://perma.cc/6YC4-UCZZ>].

¹³¹ *Id.*

¹³² @ProfPaulPoast, X (May 4, 2021, 8:20 AM) <https://twitter.com/ProfPaulPoast/status/1389555517874376705?s=20> [<https://perma.cc/L2MC-25CZ>].

¹³³ Alastair Iain Johnston, *Is China Trying to Undermine the Liberal International Order?* in *THE CHINA QUESTIONS 2: CRITICAL INSIGHTS INTO US-CHINA RELATIONS* 81, 82 (Maria Adele Carrai et al. eds., 2022).

There is a phrase that we often hear these days, that is, the rules-based international order. It is an ambiguous formulation that is not found in the U.N. Charter, not in any of the leaders' declarations adopted by the U.N., and not in any of the General Assembly or Security Council resolutions.¹³⁴

The Ambassador then criticized the vagueness of the rules-based order concept if it refers to rules that “are the universally recognized international law.”¹³⁵ If it is not China’s “international law with the U.N. at its core,” then the U.S. and other countries’ true intention “is to create an alternative to the existing system of international law, to impose their own standards and will on others by putting their own narrow interests at the center of the universe, and to open the back door to double standards and exceptionalism.”¹³⁶

Put another way, the Chinese government has already begun to attack the rules-based order as a clever phrase to justify U.S. policy preferences that might not be fully grounded in formal international law. Meanwhile, it can wear the mantle of the U.N. Charter and position itself as the true defender of the only international order that matters, the “international system with the U.N. at its core.”¹³⁷ International law could thus be a key instrument in the U.S.-China competition, but it could just as easily be used by China against the U.S. than vice versa.

VI. Conclusion

China’s attitude and behavior with respect to international law has drawn the attention of many generations of U.S. policymakers and scholars. During the period of U.S. accommodation of China’s rise, U.S. scholars sought to measure levels of China’s increased compliance with international law, and to seek ways to socialize and accommodate China into the international legal system. The shift toward confronting and competing with China has led the U.S. to

¹³⁴ *Remarks by Ambassador Zhang Jun at the UN Security Council Open Debate on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security*, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE UN (Jan. 12, 2023, 9:30 PM), http://un.china-mission.gov.cn/eng/dbttx/czdbzjds/zjdshd/202301/t20230113_11006774.htm [<https://perma.cc/K233-Y5HV>].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

position itself as the defender of international law against Chinese challenges.

As this Article has argued, both U.S. strategies were based on a misconception about China's relationship and attitude toward international law. Rather than positioning itself as a revisionist seeking to remake the international legal system, China has continued to ground its approach in a narrow but formally defensible understanding of the U.N. Charter. The emphasis on sovereign equality and non-interference overlooks many other aspects of the international legal system. But China can plausibly claim the mantle of international law and even invoke international law to rally opposition to U.S. policies such as economic sanctions.

Of course, the U.S. can offer credible rebuttals to China's interpretation of the U.N. Charter grounded in liberal values that can be found in the charter and other foundational sources of international law. The U.S. can also offer effective critiques of China's failure to adhere to its own commitments to the U.N. system when it ignores a legally binding arbitration award or fails to oppose Russia's blatant violation of Ukraine's sovereignty and territorial integrity. My future projects will examine China's application of its commitments to international law in particular areas of contention such as Taiwan, human rights, or the South China Sea, and compare them to U.S. legal positions in those areas.

This goal of this Article, however, is to remind scholars and policymakers that invoking international law or the rules-based order is hardly the magic weapon to rally opposition to China's global threats to U.S. interests. Nor will it necessarily help mediate or resolve U.S.-China disputes when neither side can agree on the substantive content of the legal rules. If the U.S.-China engage in a Cold War, international law is more likely to become a field of competition instead of a tool for cooperation.