
GOODS' NATIONALITIES

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ABSTRACT

Products' nationalities are at the frontier of our rapidly evolving geoeconomic order. Trade measures, import and export controls, sanctions, and a wide array of other foreign policy instruments often hinge on where a product is deemed "from." In today's global economy, however, determining whether a product is "American," "Chinese," or of any other nationality presents a complex and often contested question. Trade law's traditional frameworks for resolving this inquiry are already under significant strain. As trade becomes increasingly entwined with national security and human rights imperatives, the designation of product nationality carries even higher stakes.

This Article reexamines how goods acquire their designated nationalities at a time when such designation matters well beyond traditional commerce. It advances two main arguments. First, a product's nationality is not fixed; rather, it is malleable and can vary depending on the substantive

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legal regime under which the good is regulated—once predominantly trade law but now increasingly through a trade–security nexus and a trade–human rights nexus. Second, such malleability occurs through what I call an “attribute selection” process. In effect, each legal regime pivots the nationality analysis on certain “attributes” of a product, swapping and switching them to suit underlying interests and policy goals. The construction of product nationality thus occurs through mapping two separate sets of variables: first, the bundle of attributes of a product, and second, the “prisms” through which laws place significance on these attributes.

This Article makes several contributions. First, descriptively, it charts an updated account of product nationality’s expanded use, particularly in trade law’s nexus with national security and human rights. Second, conceptually, building on this updated descriptive account, it advances a novel framework to unpack the making of product nationality. Third, normatively, it underscores how the need to use product nationality as a proxy fits uneasily with the reality of global production, and how efforts to move away from nationality-based rules are likely vulnerable to similar challenges. Ultimately, the Article makes clear that the concept of nationality is doing heavy lifting across various legal fields. It reflects on the risk that using nationality as a proxy may inflame geopolitical anxieties and invites a more comparative and holistic approach.

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INTRODUCTION

Like humans, physical products can have a complex relationship with their origins.¹ Amid looming trade wars, restructured supply chains, and the return of geopolitics, a product's designated nationality carries weighty implications. President Trump's unprecedented use of tariff measures, including the reciprocal tariffs since struck down by the U.S. Supreme Court, hinges entirely on where a product is deemed "from."² Other trade tools, including sanctions, export-import controls, antidumping, and countervailing duties, likewise key on a product's designated homeland. In today's global economy, however, determining whether a product is "American," "Chinese," or of any other nationality presents a complex and often contested question.

This Article reexamines how goods acquire their designated nationalities at a time when such designation matters well beyond traditional commerce.³ It makes two main arguments. First, a product's nationality is not fixed; rather, it is malleable and can vary depending on the legal regime

1. This Article uses *origin* as a term of art when referring to extant standards such as the rules of origin (law) and country-of-origin effects (business). It uses *nationality* to refer to the broader regime of how goods come to acquire the legal status of belonging to any particular nation-state. For a fuller explanation of these terminologies, see *infra* notes 30–31 and accompanying text.

2. See *generally* *Learning Resources, Inc. v. Trump*, 146 S. Ct. 628 (2026) (holding that the International Emergency Economic Powers Act does not empower the president with the unilateral power to impose tariffs).

3. This Article is occupied only with trade in goods and does not address trade in services. Though the concept of nationality is pertinent to both—indeed, rules of origin for services initially drew on analogous principles developed for goods—the two diverge in key aspects. Importantly, services are intangible and need not cross any physical border to be consumed. As such, the regime governing service nationality is distinct from the regime governing goods. See DUY DINH, *RULES OF ORIGIN FOR SERVICES: FROM THE EARLY DAYS OF GATS TO THE ERA OF SERVICIFICATION* 125–35 (2020) (documenting these distinctions).

under which the good is regulated—once predominantly trade law but now intersecting with other fields, most notably national security and human rights. Second, such malleability occurs because each legal regime targets selective “attributes” of the concerned product, swapping in and out features that it deems relevant to advance certain underlying interests and policy goals.

To understand products’ nationalities thus requires mapping two separate sets of variables: first, the ecosystem of relevant attributes of a product, and second, the “prisms” through which laws place significance on these attributes.⁴ In today’s U.S. trade regime, at least three prisms are prominent: *commerce*, *rights*, and *security*.⁵ A “commerce prism” views a product largely for its commercial value; a “rights prism” focuses primarily on the socioeconomic and sustainability impacts of trade; and a “security prism” scrutinizes how a product may affect, promote, or undermine national security interests. In optical physics, a physical prism receives a ray of sunlight and, depending on its angle of tilt, refracts the light into a different visible spectrum of a rainbow.⁶ Analogously, depending on the prism and the angle from which one chooses to view the good, the nationality of the concerned product can project differently to befit underlying goals.⁷

To see how the concepts of policy prisms and product attributes interact, consider a hypothetical example of an electric vehicle (“EV”) made by Build Your Dreams Company Limited (“BYD”). A prominent Chinese automobile manufacturer, BYD is the world’s largest producer of electric cars.⁸ Suppose that BYD has manufacturing plants in Mexico.⁹ Under the current United States-Mexico-Canada trade agreement (“USMCA”), a BYD sedan made in

4. See *infra* Sections III.A–B (exploring each set, respectively).

5. While these three prisms reflect prevailing concerns in U.S. trade law, they constitute neither an exhaustive nor determinative list. See *infra* Part V (contemplating other possibilities).

6. See *infra* notes 180–82 and accompanying text (on the science of rainbows). In leaning into the analogy of an optical prism, I drew inspiration from legal scholars such as Anthea Roberts and Nicolas Lamp. See, e.g., Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45 (2013) (analogizing international investment law as a chimerical platypus); ANTHEA ROBERTS & NICOLAS LAMP, SIX FACES OF GLOBALIZATION: WHO WINS, WHO LOSES, AND WHY IT MATTERS 12–17 (2021) (analogizing multi-perspective thinking as seeing through a dragonfly’s eyes).

7. See *infra* Part III (explaining the attribute-selection process).

8. See Tim Levin, *China’s BYD Was the Top EV Maker in 2024, Beating Tesla*, INSIDE EVS (Jan. 2, 2025), <https://insideevs.com/news/746064/byd-beats-tesla-ev-production> [https://perma.cc/HW58-489R].

9. Build Your Dreams Company Limited (“BYD”) was indeed in negotiations to open factories in Mexico, though Chinese regulators reportedly delayed approval out of concerns for potential technology leakage to the United States. See *China Delays Approval of BYD’s Mexico Plant amid Fears Tech Could Leak to US*, FIN. TIMES (Mar. 18, 2025), <https://www.ft.com/content/36ae6f78-aadb-47bb-a5cd-ec69b420cbe1> [https://perma.cc/EKQ7-Z9EE].

Guadalajara would qualify as “made in Mexico” or “made in North America” for preferential tariffs so long as it meets a legal standard called the rules of origin.¹⁰ The USMCA’s automotive rule of origin requires that a certain percentage of the car’s value and other important inputs must come from North America.¹¹ The agreement further imposes a wage requirement for a portion of labor in the car’s supply chain.¹² If we were to think about this EV as not a fully formed product but as a bundle of attributes and features that led to the car’s creation, the attributes that matter for the USMCA are several. Chief among them are the car’s inputs and component parts, specifically how much value they contribute to the final product. Uniquely, the USMCA also regulates wages—a policy designed to eliminate Mexico’s low-wage advantage and return jobs to the United States.¹³ The USMCA operates under what I call a commerce prism: it evaluates a product primarily for its commercial value and impact, whether positive (e.g., economic gains associated with trade liberalization) or negative (e.g., effect on domestic jobs and industries). The EV’s designated nationality—whether it should qualify as “North American-made” and therefore qualify for more favorable import duties—thus turns on the balance of these commerce-focused goals: free trade and its virtues on the one hand, protectionist inclines on the other.

The analysis takes a different turn if one evaluates the BYD car not for its commercial value but for its potential threat. Under the final rule promulgated by the U.S. Department of Commerce, vehicles with integrated software and hardware systems “designed, developed, manufactured, or supplied by” Chinese entities are prohibited for sale or import into the United States without prior authorization.¹⁴ To U.S. regulators concerned with risks

10. See *infra* Part I (explaining the history and development of the rules of origin for goods).

11. See *Agreement Between the United States of America, the United Mexican States, and Canada 7/1/20 Text, Appendix to Annex 4-B (Product-Specific Rules of Origin)*, OFF. OF THE U.S. TRADE REPRESENTATIVE [hereinafter USMCA], <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/04%20Rules%20of%20Origin.pdf> [<https://perma.cc/2NSQ-V725>] (requiring, for passenger vehicles, 75% regional value content and 70% value of North American-originated steel and aluminum inputs).

12. See *id.* (requiring that 40% to 45% of the vehicle’s value come from manufacturing facilities where workers earn at least \$16 per hour).

13. See *United States–Mexico–Canada Trade Fact Sheet Modernizing NAFTA into a 21st Century Trade Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> [<https://perma.cc/RR2A-HTYK>] (noting that the United States–Mexico–Canada agreement’s (“USMCA”) wage requirement would support returning jobs to North America).

14. Securing the Information and Communications Technology and Services Supply Chain: Connected Vehicles, 90 Fed. Reg. 5360 (Jan. 16, 2025) [hereinafter Connected Vehicles Final Rule] (codified at 15 C.F.R. § 791.300 *et seq.*). The final rule, effective March 17, 2025, applies to automobile hardware and software products made in, or incorporating parts or technology sourced from, China as

posed by Chinese firms and the Chinese government,¹⁵ the percentage of local parts and wage levels are not the point. Under a security prism, which evaluates a product on how it may affect national security interests, it is the nationality of the technology and, more broadly, of control and ownership that matters.

As a result, the same BYD car may be “North American-made” for commercial purposes and “China-made” for national security purposes. This multi-identity occurs through what I call the “attribute selection” process, whereby different prisms pick and choose pertinent attributes out of the product’s bundle.¹⁶ A commerce prism, due to its trade-value focus, tends to select for “supply-side attributes”—that is, the inputs and processes necessary to produce goods. For the BYD car, these attributes are reflected in the USMCA’s selection of critical inputs (steel and aluminum), labor, and overall component values. A security prism, by contrast, seeks to identify security vulnerabilities. Such vulnerabilities can occur in the supply chains as well as in how a product is used and by whom. It thus scrutinizes certain supply-side attributes—for example, the technology and the brand, as noted in the BYD example above. It also scrutinizes what I call a product’s “demand-side attributes”—that is, who can potentially use the product and for what purposes.¹⁷ For BYD cars, as highlighted above, U.S. regulators are concerned with the risk of data breach and remote manipulation by the People’s Republic of China (China or “PRC”).¹⁸ Finally, a rights prism is concerned with how a product or its production may advance or impede certain values such as labor rights, human rights, and sustainability. It thus selects for attributes that tend to affect those rights, including labor, inputs, and production processes (supply side), as well as socially conscious end users (demand side). To complete the example, if the battery within a BYD electric car contains critical minerals extracted from the Xinjiang Autonomous region of China,¹⁹ a rights prism such as the Uyghur Forced

well as Russia. It also requires affected companies to file annual declarations of conformity on relevant component parts involving foreign interests, even if not a Chinese or Russian interest. *See id.* at 5382 (noting that foreign interest includes, but is not limited to, ownership, contractual right and obligation, intellectual property right, profit sharing, and fee arrangement).

15. *See id.* at 5361 (noting the risks of “exfiltration of data and remote manipulation of connected vehicles” by the Chinese government).

16. *See infra* Figures 1–2.

17. While demand-side attributes are prominent for the security prism, the commerce and rights prisms contain important demand-side dimensions as well. *See infra* Section III.B (discussing the various prisms). I thank Greg Shaffer for highlighting this important point.

18. *See* Connected Vehicles Final Rule, *supra* note 14, at 5360–61.

19. *See Asleep at the Wheel: Car Companies’ Complicity in Forced Labor in China*, HUM. RTS. WATCH (Feb. 1, 2024), <https://www.hrw.org/report/2024/02/01/asleep-wheel/car-companies-complicity-forced-labor-china> [<https://perma.cc/D2V6-4GWW>].

Labor Prevention Act would focus on those inputs and the labor attribute of the car's supply chain, as opposed to its many other attributes.²⁰

In sum, depending on the angle and prism one chooses, the nationality of goods projects differently—a North American car for commerce, a Chinese car for national security threats. As with a physical prism, tilting a policy prism can produce a different product nationality that, in turn, affects the legal treatment for the same good.

Several important notes are due. First, laws and policies often seek to advance multiple goals and thus can operate through multiple prisms. Separating these lenses, however, helps disentangle why a legal regime may target certain attributes of a product and not others. This, in turn, can assist in the evaluation of whether such decisions are analytically sound and whether they effectively advance the stated policy goals.

Second, that a product may have multiple nationalities depending on what it is being judged for may complicate trade regimes but, in my view, is not a normative bug. After all, each of the many legal regimes governing foreign products can have distinct, legitimate policy goals that drive the nationality analysis. The question, then, is twofold: (1) For what goals is product nationality used? And (2) Are these legitimate goals?

Finally, this Article is limited by its lack of comparative perspectives. The bulk of the analysis focuses on the United States' approach to product nationality. The commerce-rights-security prisms are inductive patterns that reflect the United States' pressing concerns with the rise of China.²¹ Other countries and regions may, and do, adopt different approaches.²² Though a more extensive comparative study lies beyond the scope of this Article, I note, for now, some alternate prisms that may offer a more holistic perspective on foreign products, including cultural, historical, and socioeconomic prisms, to name just a few.²³ A, let's say, hexagonal prism with more perspectives may help move our collective thinking beyond the

20. See *infra* Section II.B (discussing trade and human rights).

21. I thank Guy Mundlak for this perceptive point. For an inquiry into other possibilities, see Trang (Mae) Nguyen, *Alternate Prisms of Product Nationality*, 27 THEORETICAL INQUIRIES L. 111 (forthcoming) [hereinafter Nguyen, *Alternate Prisms*].

22. See, e.g., Henry Gao & Gregory Shaffer, *The RCEP - Great Power Competition and Cooperation over Trade*, AFRONOMICS L. (Feb. 10, 2021), <https://www.afronomicslaw.org/category/analysis/rcep-great-power-competition-and-cooperation-over-trade> [<https://perma.cc/KTU8-5LMJ>] (noting that the Regional Comprehensive Economic Partnership, or "RCEP," deliberately created highly liberalized rules of origin to bolster regional supply chains, effectively cementing China as a trade rule maker). See generally RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY (Edwin Vermulst, Paul Waer & Jacques Bourgeois eds., 1994) (surveying rules of origin regulations from other jurisdictions).

23. Nguyen, *Alternate Prisms*, *supra* note 21, at 128–32 (case study on the cultural prism).

current moment, so heavily affected by a backlash to globalization and great power rivalries.²⁴

This Article contributes to literatures at the intersection of international economic law, business law, and national security. The expanding scope of product nationality regulations dovetails with a burgeoning scholarship at the intersection of trade and security²⁵ and, more recently, on the impact of security and geopolitics on business law and corporate governance.²⁶ On the international economic law side, this Article adds to the robust literature on rules of origin but moves beyond the deadlock in existing debates about the pressing need to reform these rules,²⁷ instead zooming out to provide a macro framework. On the national security side, the Article contextualizes some of the recent legislative responses on national security in supply chains, including the Entity Lists (import control), Foreign Entity of Concern (federal incentives), and Foreign Direct Product Rule (sanctions). It demonstrates how they, too, operate under the prism-attribute selection framework and are faced with some of the difficulties identified under the framework.²⁸ On the corporate and business law side, the Article highlights the limits of corporate law standards such as corporate personhood in seeking to pinpoint the nationality of highly mobile attributes such as control and investment.²⁹

This Article proceeds in five parts. Part I outlines how goods' nationalities have traditionally been used and constructed—mostly in trade law through a legal device called the rules of origin. Part II lays out the Article's descriptive contribution by substantiating the claim that goods' nationalities now matter well beyond trade. This occurs partly because of the

24. See *infra* Part V.

25. See, e.g., Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1106 (2020) (highlighting the Trump administration's expansive use of the national security exception in trade law); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1034 (2020) (describing how growing national security concerns disrupt trade and investment rules).

26. See generally Kristen E. Eichenschr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549 (2023) (documenting the phenomenon of national security expansion into inbound and outbound investment practices); Curtis J. Milhaupt, Mariana Pargendler & Dan W. Puchniak, *Corporate National Identity* (Eur. Corp. Governance Inst., Working Paper No. 930/2026, 2026) (examining how existing frameworks to determine corporate nationality no longer suffice in a fractured global economy).

27. See, e.g., Christian Delev, *Straining the Spaghetti Bowl: Re-Evaluating the Regulation of Preferential Rules of Origin*, 25 J. INT'L ECON. L. 25 (2022); Dylan Geraets, Colleen Carroll & Arnoud R. Willems, *Reconciling Rules of Origin and Global Value Chains: The Case for Reform*, 18 J. INT'L ECON. L. 287 (2015).

28. See *infra* Part II, Section IV.B (addressing the expanding roles of product nationality and alternatives to nationality-based regulations).

29. See *infra* Section III.A (addressing the challenges in pinpointing a provenance for corporate-related attributes).

expansive nature of global supply chains and partly because trade itself has become entwined in other substantive issues, most prominently security and human rights. Part III is the Article's core conceptual contribution. It offers a novel framework on the construction of product nationality, explaining the two sets of variables that drive the nationality analysis: product attributes (supply-side and demand-side) and the policy prisms that pick and choose these attributes (commerce, rights, and security). Part IV turns to a normative evaluation, underlining the difficulty in assigning any particular nationality or origin to many attributes (for example, capital or ownership) and how the need to use nationality as a proxy fits uneasily with the reality of the modern global economy. It then investigates a shift from product-based to entity- and geography-based regulations, often used in combination, to allow for a broader reach. Part V reflects on the danger of weaponizing product nationality, highlighting the racialized animosity that can accompany economic nationalism, and invites a more holistic approach that moves beyond the current moment of intensifying geopolitical rivalries.

I. TRADITIONAL PRISM: GOODS' NATIONALITIES IN TRADE

This Part sets the stage by providing a brief historical and political backdrop on how the concept of product nationality emerged. It starts with an examination of how rules of origin were first a "dual use" legal tool for both mercantilist and protectionist policies, then tracks their rise from domestic laws to a linchpin of multilateral trade frameworks. It ends by probing the challenges of determining product origins in an era of complex supply chains.

Before proceeding further, a note on terminology is due. This Article uses the terms *nationality* and *origin* to refer to a product's designated home country, though the terms differ analytically in their usage. *Origin* is the preferred technical term in law and business literature (for example, the rules of origin in trade law and the "country-of-origin effect" in business scholarship). It denotes a *geographical* location from which a product is deemed to originate thanks to certain business or economic arrangements.³⁰ *Nationality*, by contrast, indicates the *legal status* of belonging to a nation-state.³¹ When it comes to products, while *origin* is the more familiar

30. See *Origin*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/origin> [<https://perma.cc/YG8G-TLQX>] ("[T]he point at which something begins or from which it derives"). For explanations on the rules of origin (law) and the country-of-origin effect (business), see *infra* notes 32–35, 148–57 and accompanying text.

31. See *Nationality*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("[M]embership in a country."). For humans, *nationality* is often used synonymously with another term—*citizenship*—in that they both underscore the idea of being part of a legal, political community. Citizenship, however, goes beyond legal status to also emphasize individual rights, obligations, and a sense of civic belonging. See, e.g., PETER J.

technical term, *nationality* captures the tenuous bond between the notion of nation-state and global production that strikes at the core arguments of this Article. Thus, throughout the text, I use *origin* as a legal term of art when referring to extant legal standards such as the rules of origin, but I use *nationality* to refer to the broader regime of how goods come to acquire the legal status of belonging to any particular nation-state.

A. RULES OF ORIGIN: LOCAL LAWS, INTERNATIONAL SIGNIFICANCE

Rules of origin (“RoOs”) are a system of rules and standards commonly found in trade agreements that determine the “economic nationality” or the “economic passport” of foreign goods.³² Just as with humans, such nationality determines how a good is treated once it crosses borders. Most relevant to commercial parties, such nationality determines which tariff applies.³³ This important function aside, RoOs also play key roles in other areas of trade law, such as antidumping duties and safeguard measures,³⁴ and in domestic regulations, such as labeling and marking laws.³⁵ Beyond commerce-related issues, RoOs feature in other important governance uses. Governments need to know where goods come from to gather statistics, calculate revenues, balance budgets, craft foreign partnerships, and gauge outside states’ relative powers.³⁶ Because RoOs impact economic calculations and what “made in” labels can be put on foreign products, these rules also profoundly affect business and consumer decision-making. For manufacturers and industries, RoOs can shape supply chain architecture and production decisions.³⁷ For consumers, RoOs function as a disclosure tool,

SPIRO, CITIZENSHIP: WHAT EVERYONE NEEDS TO KNOW 61–87 (2020) (summarizing the legal entitlements and duties of citizens).

32. See *Rules of Origin*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/roi_e/roi_e.htm [<https://perma.cc/WFW6-69HV>] (defining rules of origin); *Certificates of Origin*, INT’L CHAMBER OF COM., <https://iccwbo.org/resources-for-business/certificates-of-origin> [<https://perma.cc/W8GR-5LAK>] (noting that certificates of origin “declare the ‘nationality’ of the product and also serve as a declaration by the exporter to satisfy customs or trade requirements”).

33. See *infra* notes 57–75 and accompanying text (describing how tariffs can vary drastically depending on product origins).

34. *Id.*

35. See, e.g., Tariff Act of 1930, 19 U.S.C. § 1304 (2000) (requiring that, unless excepted, every article of foreign origin imported into the United States be marked with its country of origin).

36. See E. Ivan Kingston, *The Economics of Rules of Origin*, in RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY 7, 8–9 (Edwin Vermulst et al. eds., 1994) (noting the various needs to document goods’ origins); Moshe Hirsch, *The Politics of Rules of Origin*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 317 (Tomer Broude, Marc Busch & Amelia Porges eds., 2011) (same).

37. See, e.g., WILLIAM ALAN REINSCH, JACK CAPORAL, MADELEINE WADDOUPS & NADIR TEKARLI, THE IMPACT OF RULES OF ORIGIN ON SUPPLY CHAINS: USMCA’S AUTO RULES AS A CASE STUDY, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES 1–3 (2019) (noting how automobile rules

providing information about a product's origin to support informed purchase decisions, whether nationalistic, moral, or otherwise.³⁸ Indeed, marks of origin can have a powerful effect on consumption choices—a phenomenon well documented in business literature as the “country-of-origin effect.”³⁹

Rules of origin historically surfaced in two strands—origin marking and trade differentiation, the latter of which encompassed both trade preference and restriction. During the time of empires, trade preference was a way for the mother state to boost her own economy and strengthen economic integration with her colonies, while raising market access costs for the rest.⁴⁰ Britain, for example, had long maintained a system of preferences for empire trade, eventually formalizing it into the British Imperial Preferences in the interwar period as a response to the United States' enactment of the highly protectionist Smoot-Hawley Bill.⁴¹ Touting the slogan, “Home producers first, empire producers second, and foreign producers last,” the preference system culminated in a series of bilateral agreements with colonies that privileged British- and Commonwealth-produced goods over those originating elsewhere.⁴² With the creation of the General Agreement on Tariffs and Trade (“GATT”) and decolonization movements, imperial preferences slowly lost their relevance and were eventually eliminated.⁴³ But preferential trade policies—and the accompanying importance of distinguishing trade origins—lived on through the GATT and the proliferation of free trade agreements that would come decades later.⁴⁴

of origin (“RoOs”) in the USMCA were crafted to motivate manufacturing and investments in the United States); Trang (Mae) Nguyen, *Hidden Power in Global Supply Chains*, 64 HARV. INT'L L.J. 35, 76–77 (2023) [hereinafter Nguyen, *Hidden Power*] (noting businesses' efforts to restructure their supplier networks in response to U.S. trade restrictions against China).

38. See Country-of-Origin Marking: Review of Laws, Regulations, and Practices, Inv. No. 332-366, USITC Pub. 2975 (July 1996) (Final) (“Existing U.S. country-of-origin marking requirements were enacted for the purpose of providing information to the consumer.”).

39. The country-of-origin effect refers to how consumers' perceptions of a country can shape their views of the product. See *infra* notes 148–57 and accompanying text.

40. See, e.g., David L. Glickman, *The British Imperial Preference System*, 61 Q.J. ECON. 439 (1947) (describing the motivations for the trade preference system maintained under the British Crown in the eighteenth and nineteenth centuries).

41. *Id.*; see also Herbert Feis, *The Future of British Imperial Preferences*, 24 FOREIGN AFFS. 661, 661–62 (1946).

42. See John Linarelli, *How Trade Law Changed: Why It Should Change Again*, 65 MERCER L. REV. 621, 640 (2014); José De Sousa & Julie Lochard, *Trade and Colonial Status*, 21 J. AFR. ECON. 409, 412 (2012) (noting the unequal treatment within British colonies accorded by the British Imperial Preferences, which largely excluded African colonies).

43. See Linarelli, *supra* note 42, at 640.

44. See *infra* notes 54–59 (summarizing the development of preferential trade within the General Agreement on Tariffs and Trade (“GATT”) and World Trade Organization (“WTO”) frameworks).

RoOs' second strand, origin marking, was rooted in similar concerns regarding foreign goods. During a period known as the first wave of globalization, from about 1870 up to World War I, a boom in cross-border trade among industrialized nations spurred concerns over fraud and competition.⁴⁵ The United Kingdom's Merchandise Marks Act of 1887, often cited as the first law to require an indication of a country of origin, imposed fines, jail time, and hard labor for falsely marking lower-cost foreign goods (primarily from Germany at the time) as British-made products.⁴⁶ The policy quickly spread: France, Germany, and Spain followed suit,⁴⁷ and British colonies around the world, from Australia to India to Myanmar (then Burma), were urged to, and did, adopt harmonizing laws.⁴⁸ In the United States, the McKinley Tariff Act of 1890, known for its protectionist measures, was the first to require that goods destined for the United States be "plainly marked" with their countries of origin, or otherwise risk inadmissibility.⁴⁹ Because slavery had been abolished, U.S. domestic manufacturers were concerned about goods made with cheap labor from abroad.⁵⁰ Another provision of the Act thus prohibited the import of

45. See Paul Bairoch & Susan Burke, *European Trade Policy, 1815–1914*, in THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE VOL. VIII: THE INDUSTRIAL ECONOMIES 1, 1–25 (Peter Mathias & Sidney Pollard eds., 2008) (documenting the growth of intercontinental trade within Europe during this period); DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY 176–329 (2017) (tracing U.S. trade policy from the antebellum South era to World War I).

46. See Merchandise Marks Act, 1887, 50 & 51 Vict., c 28 (U.K.); *Merchandise Marks Act, 1887—Labels on Goods—“Foreign Make”*, UK PARLIAMENT, <https://api.parliament.uk/historic-hansard/commons/1888/feb/28/merchandise-marks-act-1887-labels-on> [<https://perma.cc/4KE7-SHL7>]; DAVID M. HIGGINS, BRANDS, GEOGRAPHICAL ORIGIN, AND THE GLOBAL ECONOMY: A HISTORY FROM THE NINETEENTH CENTURY TO THE PRESENT 19 (2018) (noting that laws to tighten “made in” label requirements were part of campaigns to rally for national economic prosperity).

47. See HIGGINS, *supra* note 46, at 19 (noting similar legislation across Europe).

48. See *Merchandise Marks Act, 1887—Action of Colonial Governments*, HANSARD, <https://hansard.parliament.uk/commons/1888-02-28/debates/ffecbac1-9e60-4a63-bbf0-6c1f4c2a1a95/MerchandiseMarksAct1887—ActionOfColonialGovernments> [<https://perma.cc/ZNW7-MV3D>] (directing Britain’s colonial governments to adopt harmonizing laws); *The Indian Merchandise Marks Act, 1889 (Act No. IV of 1889)*, INDIA, WIPO, <https://www.wipo.int/wipolex/en/legislation/details/15866> [<https://perma.cc/DFK3-BAA5>]; *The Merchandise Marks Act 1889*, VICTORIAN HIST. ACTS, https://classic.austlii.edu.au/au/legis/vic/hist_act/tmma1889196 [<https://perma.cc/CP5P-9WC4>]; *The Burma Merchandise Marks Act*, MYAN. L. LIBRARY, https://myanmar-law-library.org/IMG/pdf/the_myanmar_merchandise_marks_act_1889_eng_.pdf [<https://perma.cc/MF84-5PAD>].

49. See Tariff Act of 1890, ch. 1244, § 6, 26 Stat. 567, 613 (1890) (“[A]ll articles of foreign manufacture . . . [shall] . . . be plainly marked, stamped, branded, or labeled in legible English words, so as to indicate the country of their origin; and unless so marked, stamped, branded or labeled they shall not be admitted to entry.”).

50. See CATHLEEN D. CIMINO-ISAACS, CHRISTOPHER A. CASEY & MICHAEL A. WEBER, CONG. RSCH. SERV., R46631, SECTION 307 AND U.S. IMPORTS OF PRODUCTS OF FORCED LABOR: OVERVIEW AND ISSUES FOR CONGRESS 3 (May 21, 2021) (quoting the then-Chair of the House Committee on Ways and Means that a purpose of the Tariff Act of 1890 was to prevent the admission of “convict-made products of the world to free competition with our free labor”).

“merchandise manufactured wholly or in part in any foreign country by convict labor.”⁵¹ As we shall see later on, this provision, later expanded on in the Tariff Act of 1930,⁵² became the genesis for U.S. laws against forced labor in supply chains today.⁵³

After World War II, as countries convened at Bretton Woods to rebuild the world's economy, RoOs were incorporated into multilateral frameworks. In the early days of the GATT, perhaps somewhat shadowed by lively debates around the novel most-favored nation (“MFN”) principle,⁵⁴ countries mainly discussed RoOs in connection with the Generalized System of Preferences—a regime in which developed countries agreed to eliminate tariffs for certain goods originating from developing and least-developed nations in order to accelerate industrialization and economic growth in the Global South.⁵⁵ Similar to the British Imperial Preferences regime, because preferences are granted only to beneficiary countries, RoOs acted as a differentiation mechanism to determine which products qualify for benefits and to prevent trade deflection.⁵⁶

RoOs' function as a differentiation and enforcement mechanism became even more relevant as preferential trade agreements proliferated, slowly at first, then quickly at the end of the Cold War.⁵⁷ Today, there are

51. Tariff Act of 1890, ch. 1244, § 51, 26 Stat. 567, 624 (1890).

52. Tariff Act of 1930, 19 U.S.C. § 1307 (2000) (“All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States.”).

53. See *infra* notes 115–22 (explaining current regulations against forced labor in supply chains).

54. See STEFANO INAMA, RULES OF ORIGIN IN INTERNATIONAL TRADE 2–3 (2009). Most-favored nation (“MFN”) is a cornerstone antidiscrimination principle in trade law that requires WTO members to treat one another equally, such that extending a trade benefit to one requires extending the same benefits to all. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (setting out the most-favored nation principle).

55. See INAMA, *supra* note 54, at 2–3 (noting that the discussion centered on RoOs harmonization). The Generalized System of Preferences (“GSP”) was authorized by the 1979 Enabling Clause under GATT, which allowed contravention of the MFN principle. See *Differential and More Favourable Treatment: Reciprocity and Fuller Participation of Developing Countries*, WTO Doc. L/4903 (Nov. 28, 1979). But see Gene M. Grossman & Alan O. Sykes, *A Preference for Development: The Law and Economics of GSP*, 4 WORLD TRADE REV. 41, 57–66 (2005) (questioning the effectiveness of the GSP scheme from a law and economics perspective).

56. See Paul Brenton & Miriam Manchin, *Making EU Trade Agreements Work: The Role of Rules of Origin*, 26 WORLD ECON. 755, 760 (2003) (noting RoOs' key function to “define the conditions that a product must satisfy to be deemed as originating in the country from which preferential access . . . is being sought.”). Trade deflection refers to a business practice of redirecting trade flows from one country to another, usually through undertaking minimal processing or assembly, to take advantage of lower tariffs. *Id.*

57. See *About Deep Trade Agreements: Data, Analysis, and Toolkits*, WORLD BANK, <https://data.tips.worldbank.org/dta/about-the-project.html> [<https://perma.cc/J8JQ-SWNB>].

over 350 preferential trade agreements in force, each with its own RoOs regime.⁵⁸ Despite decades-long efforts, no uniform or harmonized system of RoOs exists.⁵⁹ As such, parties to trade agreements negotiate bespoke RoOs regimes, and each country is free to apply its own RoOs. These webs of individualized RoOs suffer from what critics term the “spaghetti bowl” effect: confusing, hard-to-disentangle rules that are problematic at both practical and normative levels.⁶⁰ At the implementation level, this leads to confusion and inconsistencies, high implementation costs, low utilization rates, and exposure to manipulation.⁶¹ At the normative level, RoOs’ technical complexity can mask protectionist motivations that would otherwise violate the importing state’s World Trade Organization (“WTO”) commitments.⁶² Indeed, RoOs, while critical for the functioning of free trade

58. *Id.* (“The number of PTAs has increased from 50 in the early 1990s to more than 350 in 2023.”).

59. The WTO’s efforts to harmonize RoOs have concentrated on nonpreferential rules, as opposed to preferential ones used in free trade agreements. *See* INAMA, *supra* note 54, at 4–16 (documenting efforts to create multilateral rules of origin at the WTO). Harmonization attempts proved challenging, and no agreement on nonpreferential RoOs has been reached. *See* Philippe G. Nell, *WTO Negotiations on the Harmonization of Rules of Origin*, 33 J. WORLD TRADE 45 (1999) (detailing difficulties in negotiating for common rules of origin due to the overwhelming number of issues involved, the technical complexity of production rules, and states’ diverse interests).

Even for a single country like the United States, efforts to harmonize RoOs across trade agreements proved difficult. *See* Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 43385 (July 25, 2008) (aiming to establish uniform rules governing origin determinations of imported merchandise proposed by U.S. Customs and Border Protection); LIANA WONG, CONG. RSCH. SERV., RL34524, INTERNATIONAL TRADE: RULES OF ORIGIN 4–5 (2020) (noting opposition to such a proposal due to concerns over costs and undue burdens on businesses).

60. *See* Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne Krueger eds., 1995) (critiquing the inefficiencies and arbitrariness of RoOs in free trade agreements).

61. *See, e.g.*, U.N. Conf. on Trade & Dev., *Rules of Origin and Origin Procedures Applicable to Exports from Least Developed Countries*, UNCTAD/DITC/TNCD/2009/4, 19–29 (2011) (noting the high costs and practical challenges faced by businesses and importers regarding origin determinations, especially small and medium-size businesses); Geraets et al., *supra* note 27, at 293–95, 299–302 (arguing that the system of rules of origin under international trade law is cumbersome and ill-suited for the reality of global value chains and proposing a more flexible rule).

62. *See, e.g.*, Delev, *supra* note 27, at 25–26; N. David Palmeter, *Rules of Origin or Rules of Restriction? A Commentary on a New Form of Protectionism*, 11 FORDHAM INT’L L.J. 1, 49–50 (1987).

agreements, are widely known for their proxy use as protectionist instruments (as well as other less well-known objectives).⁶³ Untangling these motives is no small task.

This Article does not rehash the above critiques. Rather, the goal is to recognize that while RoOs are critical for global trade, the current methodology has been under stress both in concept and implementation. The next Section zooms in on how RoOs operate to concretize why they struggle to reconcile with the transnational reality of global production.

B. REGULATING ORIGINS IN THE AGE OF SUPPLY CHAINS

Given the vast difference in tariffs that can result based solely on product origins, it comes as no surprise that trade actors want to obtain the most advantageous nationality for their products. This business imperative dovetails with the reality of dispersed production propelled by the internationalization of economic activities, outsourcing trends, and the rise of multinational corporations.⁶⁴ As supply chains have grown in sophistication and complexity, the majority of final products in modern-day commerce are now made not in one country, but around the world.⁶⁵ Thus, for the majority of products, there exists no single correct nationality but many possibilities.

To appreciate why product nationality matters a great deal for trade, it first helps to understand how RoOs operate. Consider the fact that the same *exact* product heading to the United States can be subject to three different customs duties depending solely on its designated nationality.⁶⁶ These three

63. See Joseph A. LaNasa III, *Rules of Origin Under the North American Free Trade Agreement: A Substantial Transformation into Objectively Transparent Protectionism*, 34 HARV. INT'L L.J. 381, 389–99 (1993) (noting that RoOs' seemingly neutral, technical rules can effectuate protectionism by "creating a sophisticated, unregulated barrier to free trade"); Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 FORDHAM INT'L L.J. 572, 572–73 (2002) (noting RoOs' roles as foreign policy on disputed territories); John Coyle, *Rules of Origin As Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement*, 29 YALE J. INT'L L. 545, 554–60 (2004) (analyzing RoO designs as a way to incentivize a third party).

64. See Nguyen, *Hidden Power*, *supra* note 37, at 45–50 (summarizing the evolution of global production from nation-based comparative advantage to competition defined by production networks).

65. See POL ANTRÀS, *GLOBAL PRODUCTION: FIRMS, CONTRACTS, AND TRADE STRUCTURE* 4–5 (2016) (arguing that the "made in" label now belongs not to a single country but rather is a global effort); U.N. Conf. on Trade & Dev., *Key Statistics and Trends in International Trade*, UNCTAD/DITC/TAB/2022/3, 13 (2022) (noting that, in 2019, intermediate products represented almost half of world trade in goods).

66. A regime of reciprocal tariffs would effectively dismantle this status-quo system, subjecting foreign products to country-specific tariff rates rather than three different rate categories. See *supra* note 2 and accompanying text.

tariff treatments, from lowest to highest, are preferential, non-preferential, and statutory rates.⁶⁷ A preferential rate, which is highly favorable and often zero, applies to products deemed originating from a preferred trade partner.⁶⁸ Qualified fabrics from Mexico and Canada heading to the United States, for example, would benefit from zero tariff thanks to the USMCA (at least for now).⁶⁹ A non-preferential rate, also called a most-favored nation rate, applies to trade with WTO members and with countries who have MFN status with the United States.⁷⁰ Most-favored nation is an antidiscrimination principle in trade law that requires WTO members to treat one another equally, such that extending a trade benefit to one, say, lowering tariffs, thus requires extending the same benefits to all.⁷¹ The term “most favored” is somewhat misleading, as MFN rates (for “common” trade partners, if you will) are generally higher than preferential rates (for “preferred” trade partners). To continue with the previous example, without a trade agreement like the USMCA, the same exact fabrics from Mexico would be taxed at an MFN rate of 16.5%—one of the more restrictive rates that the United States imposes on fellow WTO states.⁷² While MFN is an integral principle of the WTO, trading nations can also grant MFN status to non-WTO states (as the United States did with a post-Soviet Russia in 1992) or revoke MFN status despite WTO membership (as the United States did with Russia in 2022 following its invasion of Ukraine).⁷³ Thus, today, Russian goods that were

67. Under U.S. law, tariffs are determined by U.S. Customs and Border Protection based on the U.S. Harmonized Tariff Schedule, maintained by the U.S. International Trade Commission. *See* Omnibus Trade and Competitiveness Act of 1988 § 1207, 19 U.S.C. § 3007 (2024). Preferential and non-preferential rates are set out in “special” and “general” lists under Column 1 of the tariff table, whereas statutory rates are set out in Column 2. *See About Harmonized Tariff Schedule (HTS)*, U.S. INT’L TRADE COMM., https://www.usitc.gov/tariff_affairs/about_hts.htm [<https://perma.cc/L6HZ-JY35>].

68. *See, e.g.*, USMCA, *supra* note 11, art. 5.2 (“Each Party shall provide that an importer may make a claim for preferential tariff treatment, based on a certification of origin completed by the exporter, producer, or importer for the purpose of certifying that a good being exported from the territory of a Party into the territory of another Party qualifies as an originating good.”).

69. For example, certain dyed cotton (Subheading 5212.13) can be imported duty-free under a free trade agreement; otherwise, it receives a non-preferential rate of 16.5% and a statutory rate of 68.5%. *See Harmonized Tariff Schedule: 2026 HTS Revision 12*, USITC, <https://hts.usitc.gov> [<https://perma.cc/44TB-HZ8B>].

70. *See About Harmonized Tariff Schedule*, *supra* note 67.

71. *See* General Agreement on Tariffs and Trade, *supra* note 54 (setting out the most-favored nation principle).

72. *See supra* note 69 (noting a non-preferential rate of 16.5% for certain dyed cotton). Indeed, the textile industry was historically among the most fiercely protected industries in the United States. *See* Oona A. Hathaway, *Positive Feedback: The Impact of Trade Liberalization on Industry Demands for Protection*, 52 INT’L ORG. 575, 596–604 (1998) (documenting the impact of industry lobbying on the architecture of the WTO); U.S. INT’L TRADE COMM’N, *THE HISTORY AND CURRENT STATUS OF THE MULTI-FIBER ARRANGEMENT* (1978).

73. *See* Exec. Order No. 12802, 3 C.F.R. 295 (1993) (waiving the application of Section 402 of the Trade Act of 1974 with respect to Russia, which otherwise prohibits normal trade relations with

not already sanctioned would fall under the third category—a statutory rate reserved for non-WTO members and countries without MFN status.⁷⁴ To complete the example, fabrics heading to the United States that would be taxed at 0% if from Mexico (or other preferred trade partners) and 16.5% if from other WTO members (or other countries with MFN status), would otherwise generate a statutory rate of nearly 70%.⁷⁵

The ability to distinguish among product origins is thus key to implement both positive trade treatments (e.g., preferential tariffs) and negative ones (e.g., heightened tariffs or sanctions).⁷⁶ That insight, in turn, begs the question of how to acquire an advantageous economic passport for one's products (and, by extension, avoid a bad one). For goods that are wholly made within a single location, the answer is straightforward: to be certified as, say, of Mexican origin, the good must be grown, harvested, extracted, or manufactured wholly within that territory.⁷⁷ The answer is more complicated for a good manufactured or assembled in multiple countries or made with materials originating in more than one country—as is the case with most modern products. At least four different methods exist: (1) the “substantial transformation” test, (2) the value-added test, (3) a specified process test, and (4) a change in tariff classification test.⁷⁸ Each method aims at preventing simple assembly and packaging operations from achieving an origin—a practice known as trade deflection.⁷⁹ Drawing from a robust

communist states); Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, 136 Stat. 1159 (2022).

74. See *supra* note 67; Exec. Order No. 14066, 3 C.F.R. 344 (2023) (banning imports of Russian oil, liquefied natural gas, and coal).

75. See *supra* note 69 (comparing the preferential, non-preferential, and statutory rates for dyed cotton).

76. Other negative treatments include trade remedies such as antidumping, countervailing or safeguard duties, quotas, and sanitary restrictions. Their treatments of origin, however, are beyond the scope of this Article.

77. See Agreement on Rules of Origin art. 9(1), Apr. 15, 1994, 1868 U.N.T.S. 397 (stipulating that the country of origin of a particular good should be, among other criteria, “the country where the good has been wholly obtained”).

78. See Edwin A. Vermulst, *Rules of Origin as Commercial Policy Instruments—Revisited*, 26 J. WORLD TRADE 61, 63 (1992) [hereinafter Vermulst, *Rules of Origin as Commercial Policy Instruments*] (detailing the four tests); WONG, *supra* note 59, at 4–9 (laying out the various RoOs tests in U.S. practice); Lan Cao, *Corporate and Products Identity in the Post-National Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401, 470–75 (2002) (summarizing and critiquing RoOs).

79. See Vermulst, *Rules of Origin as Commercial Policy Instruments*, *supra* note 78, at 63. Another form of trade deflection is through illegal transshipment, by routing products through a third country to achieve origin. See U.S. GEN. ACCT. OFF., GAO-04-345, U.S. CUSTOMS AND BORDER PROTECTION FACES CHALLENGES IN ADDRESSING ILLEGAL TEXTILE TRANSSHIPMENT 5 (2004) (noting the illicit use of transshipment to circumvent trade quotas).

literature,⁸⁰ this Article briefly canvases each test to highlight the challenges of designing origin rules within the context of dynamic global supply chains.

Of the four methods, the substantial transformation test, unlike the others, is a standard rather than a bright-line rule. Under this standard, a good is deemed to originate in the last country where substantial transformation occurred.⁸¹ This requires more than just a cursory change; instead, the product must be transformed into a “new and different article” with a “distinctive name, character, or use.”⁸² The standard reflects the essence of what RoOs strive to achieve—that is, to be “of” any particular place, the product must have a meaningful connection and presence there. The substantial transformation standard offers flexibility, allowing it to be applied across products and industries while adapting to technological and manufacturing advancements. But as with any standard, this flexibility can lead to uncertainty in interpretation and inconsistency in application.⁸³ Among the more infamous examples, processing whole fish into fish fillets qualified as substantial transformation because changing the fish’s shape and size altered its “character,” whereas peeling, deveining, cooking, and freezing shrimp did not because the process did not alter the size, quality, or

80. See generally Cao, *supra* note 78, at 470–75 (critiquing the use of the substantial transformation test and proposing alternatives); Thomas P. Cutler, *The United States Generalized System of Preferences: The Problem of Substantial Transformation*, 5 N.C. J. INT’L L. 393 (1980) (critiquing the substantial transformation test in the context of preference-giving to developing countries); John M. Peterson, *Substantial Transformation: The Worst Rule for Determining Origin of Goods—Except for All the Rest*, 56 VAND. J. TRANSNAT’L L. 1065 (2023) (critiquing the ill-defined nature of the substantial transformation test but finding it necessary and superior to other methods).

81. See 19 C.F.R. § 134.1(b) (1990) (explaining that Customs Service regulations governing the marking of imported merchandise provide that “further work or material added to an article in another country must effect a substantial transformation in order to render such other country the ‘country of origin’ ”); *id.* § 10.14(b) (addressing substantial transformation that occurs in the United States).

82. See *Anheuser-Busch Brewing Ass’n v. United States*, 207 U.S. 556, 562 (1907) (“There must be transformation; a new and different article must emerge, ‘having a distinctive name, character or use.’ ”). The Anheuser-Busch test later evolved into the substantial transformation test, and the “name, character, or use” analysis continues to be the benchmark for substantial transformation. See U.S. CUSTOMS AND BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT U.S. RULES OF ORIGIN 9 (May 2004) (“[T]he substantial transformation criterion is applied on a case-by-case basis, and it is based on a change in name/character/use method . . .”).

83. See Peterson, *supra* note 80, at 1068–69 (noting that some courts not only applied substantial transformation to the final product, but also to individual components (citing *Energizer Battery Inc. v. United States*, 190 F. Supp. 3d 1308, 1320 (Ct. Int’l Trade 2016))); Mark K. Neville, Jr., *CBP’s Hammer: Misuse of Energizer Battery*, 30 J. INT’L TAX’N 30, 30–33 (2019) (criticizing the *Energizer Battery* decision for misconstruing the substantial transformation standard, and critiquing U.S. Customs and Border Protection for expanding this rationale into a range of customs rulings). Later cases have rejected the *Energizer Battery*’s component-based approach. See, e.g., *Cyber Power Sys. (USA) Inc. v. United States*, 471 F. Supp. 3d 1371, 1377–78 (Ct. Int’l Trade 2020).

use of the shrimp.⁸⁴ The lack of clarity and consistency can lead to increased compliance costs as well as the potential for exploitation, as firms may structure their processing to meet existing rulings that otherwise add little value.

The other three tests—value-added, specified process, and change in tariff classification—are bright-line rules. First, the value-added test defines the degree of transformation required based on a minimum percentage of value, whether overall or of certain inputs, that must come from the originating country or trade region.⁸⁵ The USMCA's automotive RoOs, for example, require that 75% of the car's value originate from the region (up from the North American Free Trade Agreement's ("NAFTA") 62.5%), as must 70% of the car's steel and aluminum inputs.⁸⁶ The stringent (i.e., higher) value requirements incentivize the reshoring of supply chains to USMCA countries, while a separate wage requirement seeks to eliminate Mexico's low-wage advantage and drive jobs back to the United States.⁸⁷ The value-added test, while adding clarity, can generate substantial compliance costs as it requires extensive inventory and tracking of input values—a challenge especially in complex manufacturing. It is also not immune to manipulation, as firms and suppliers can attempt to artificially inflate local costs of components, labor, and processing to meet the value-added threshold (or, on the flip side, undervalue the cost of foreign components). This practice is particularly feasible in non-arm's-length transactions or intrafirm trade involving transfer pricing—for example, a parent company may set different internal prices for the transfer of assets to its subsidiaries.⁸⁸

Second, the specified process tests of origin, also referred to as technical tests, prescribe certain production or sourcing processes that may confer originating status.⁸⁹ These rules can be highly idiosyncratic. For example, textiles and apparel products typically follow a "yarn forward" origin rule.⁹⁰

84. *Compare* *Koru N. Am. v. United States*, 701 F. Supp. 229, 235 (Ct. Int'l Trade 1988) (fish processing), *aff'd*, *Betz v. United States*, 155 F.3d 568 (Fed. Cir. 1998), *with* U.S. Customs & Border Prot., Headquarters Ruling Letter 731763 (May 17, 1989), <https://rulings.cbp.gov/ruling/731763> [<https://perma.cc/CN46-M79K>] (shrimp processing).

85. *See* Vermulst, *Rules of Origin as Commercial Policy Instruments*, *supra* note 78, at 63.

86. *See supra* notes 11–12 and accompanying text (USMCA's automotive RoOs).

87. *See supra* note 13 and accompanying text (on the USMCA's labor-value-content rule).

88. *See* Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passé?*, 53 VA. J. INT'L L. 623, 656–60 (2013) (noting the coalescence of "transfer pricing networks").

89. *See Identify and Apply Rules of Origin*, INT'L TRADE ADMIN., <https://www.trade.gov/identify-and-apply-rules-of-origin> [<https://perma.cc/NUR3-VXM2>].

90. *See* LIANA WONG, CONG. RSCH. SERV., IF10754, RULES OF ORIGIN 2 (2021) ("Most bilateral and regional FTAs negotiated by the United States over the past two decades, beginning with the North

This means that for a product to be considered originating from a specific country or region, the yarn used to create the fabric must be produced within that geography, and all subsequent manufacturing processes like weaving, knitting, dyeing, and sewing must also occur there.⁹¹ The yarn forward rule first emerged in NAFTA as a way to ensure preference for North American yarn and protect U.S. domestic textile industries against cheaper imports.⁹² Indeed, the technical tests, purportedly to ensure substantial transformation through certain manufacturing processes, have a history of acting as protectionist policies by creating a “cut-off” point in supply chains.⁹³ If the origin creation point is yarn forward in textiles, it becomes “upper closed” in footwear and “melted and poured” for steel and metal products, to name just a few examples.⁹⁴

Finally, the change in tariff classification method, also called tariff shift, determines origin by specifying a tariff change based on a system called the Harmonized System of Tariff Nomenclature.⁹⁵ An internationally standardized system to classify products, the Harmonized System has been adopted by over 200 countries and serves as the foundation for the United States’ Harmonized Tariff Schedule.⁹⁶ While it plays a cornerstone role in determining tariffs, the Harmonized System was not designed to detect meaningful manufacturing transformation. As a general rule, the tariff-shift test states that a change in the product’s origin will take place in the country where, because of manufacturing or other processing, the tariff classification of the article changes from one category of the Harmonized System to another.⁹⁷ Under the Harmonized System, minor processing, such as simple

America Free Trade Agreement (NAFTA), have included the ‘yarn forward rule’ for most textile and apparel products.”).

91. *Id.*

92. *See* LaNasa, *supra* note 63, at 398–99 (noting that the yarn forward rule “provides an example of how rules of origin are used to sacrifice consumer interests to protect domestic industries, endangering the benefits which accrue from free trade and comparative advantage”).

93. Unsurprisingly, U.S. textile manufacturers generally support the yarn forward rule, while the U.S. apparel industry opposes it, arguing instead for a later-in-production point of “cut and sew,” which would allow for more sourcing flexibility. *See* MICHAELA PLATZER, CONG. RSCH. SERV., IF11124, TEXTILE AND APPAREL SECTORS DISAGREE ON CERTAIN PROVISIONS OF THE PROPOSED U.S.-MEXICO-CANADA (USMCA) AGREEMENT 2 (2019).

94. *See* LaNasa, *supra* note 63, at 389–99.

95. The Harmonized System, developed by the World Customs Organization, creates an internationally standardized system to classify products by assigning specific six-digit codes for various commodities. International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, pmbl., 1989 U.K.T.S. 15; *see also* Edwin A. Vermulst, *EC Customs Classification Rules: Should Ice Cream Melt?*, 15 MICH. J. INT’L L. 1241, 1244–45 (1994) [hereinafter Vermulst, *EC Customs*] (providing a historical overview of the Harmonized System).

96. *See* Vermulst, *EC Customs*, *supra* note 95, at 1244–45.

97. *Id.* at 1245–46.

assembly, can at times bring about a change in the tariff category. In such a case, a change of origin should not be acknowledged, but that would require substantial resources from customs agencies to scrutinize and detect.⁹⁸

In sum, globalization and complex supply chains continue to pose significant challenges for regulating product origins. The substantial transformation rule, while flexible and adaptive, can lead to lack of clarity and inconsistent application. Bright-line tests such as the value-added, specified process, and tariff shift tests are often praised for precision but can incur high costs, both in compliance and in enforcement. Furthermore, each test presents strategic opportunities for shaping product nationality, as enterprising firms and logistics professionals can structure product pricing, processes, and, in some cases, entire supply chains to meet the rule's prerequisites.⁹⁹

II. GOODS' NATIONALITIES IN THE NEW GEOPOLITICS

This Part canvases the expanded use of goods' nationalities in today's new geopolitics, characterized in large part by several intertwined forces: a backlash against globalization, rising economic nationalism, increased securitization of trade and economic issues, and sustained tensions between the United States and the PRC. Whereas product nationality remains a staple concept in trade policies, today its use has expanded considerably as trade increasingly intersects with two areas: national security and human rights.

A. TRADE AND NATIONAL SECURITY

Trade law, including RoOs, now squarely intersects with national security, particularly in the context of geopolitical rivalries, economic security, and supply chain resiliency.¹⁰⁰ Both the Trump and Biden

98. *Id.*

99. There is, indeed, an industry of supply chain logistics professionals dedicated to these tasks. See ANNE VAN DE HEETKAMP & RUUD TUSVELD, ORIGIN MANAGEMENT 157–76 (2011) (detailing the tasks of “origin management” professionals, which range from gathering trade intelligence to sourcing decisions to mapping tariff possibilities); Nguyen, *Hidden Power*, *supra* note 37, at 50 (noting the rise of transnational suppliers with logistics capabilities to strategically map complex supply chains).

100. These concerns are not unique to the United States. See, e.g., Román Arjona & Debora Revoltella, *Enhancing the Resilience and Security of EU Supply Chains*, CTR. FOR ECON. POL’Y RSCH. (Nov. 12, 2024), <https://cepr.org/voxeu/columns/enhancing-resilience-and-security-eu-supply-chains> [https://perma.cc/LYQ4-53HS] (noting vulnerabilities due to EU supply chains’ dependence on imports); ASEAN Leaders’ Declaration on Enhancing Supply Chain Connectivity, ASS’N OF SE. ASIAN NATIONS (Oct. 9, 2024), <https://asean.org/asean-leaders-declaration-on-enhancing-supply-chain-connectivity> [https://perma.cc/9ABJ-KR37] (pledging to enhance supply chain connectivity and resilience within the region to withstand external risks, including geopolitical risks); Mzukisi Qobo & Mjumo Mzyece, *Geopolitics, Technology Wars and Global Supply Chains: Implications for Africa*, 30 S. AFR. J. INT’L

administrations have declared that trade is vital to U.S. national security.¹⁰¹ As a result, RoOs are increasingly seen not just as technical rules, but as strategic tools for advancing national interests.¹⁰²

The fusion of trade and security is evident in critical supply chains. Efforts to “de-risk” from China’s dominance have spurred a host of laws and regulations to restructure critical industries, from import and export controls to tariffs and sanctions. In semiconductors, for example, the United States imposed export controls on advanced nanochips and chipmaking equipment in an effort to curb the PRC’s access.¹⁰³ Notably, these rules target not only the end products (i.e., advanced chips) but also the commercial items in these products’ supply chains (e.g., lithography equipment), thus creating a more comprehensive export control regime than previously utilized.¹⁰⁴ In response, China enacted retaliatory laws banning U.S. chip companies from its market and imposing export controls on critical minerals, among other measures.¹⁰⁵

Tariffs likewise have become a centerpiece geopolitical tool under the second Trump administration. President Trump’s “Liberation Day” reciprocal tariffs imposed country-specific duty rates on foreign products, effectively rejecting the WTO’s bedrock principle of nondiscrimination.¹⁰⁶ The USMCA notwithstanding, the current administration also announced additional tariffs on Canada and Mexico (together with China) on the ground that these countries undermined U.S. national security by failing to deter illegal immigration and opioid flows into the United States.¹⁰⁷ By now, the

AFF. 29, 29–46 (2023) (assessing options for African agencies in response to geopolitical rivalries and changing global supply chains).

101. See Memorandum from White House to Sec’y of State et al., *America First Trade Policy* (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy> [<https://web.archive.org/web/20260723102038/https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy>]; THE WHITE HOUSE, *BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH* 4–21 (2021).

102. Some early literature identified the geopolitical use of RoOs, but mainly in the context of foreign policy vis-à-vis disputed territories. See, e.g., Hirsch, *supra* note 63, at 572–73; Daniel J. Knudsen & William J. Moon, *North Korea and the Politics of International Trade Law: The Kaesong Industrial Complex and WTO Rules of Origin*, 35 YALE J. INT’L L. 251, 251–53 (2010).

103. See Weijia Rao, *Signaling through National Security Lawmaking*, 59 U.C. DAVIS L. REV. 797, 808–10 (2025) (summarizing the U.S. export control regime against China).

104. See Brian Egan, *New US Semiconductor Export Controls Signify Dramatic Shift in Tech Relations with China*, JUST SEC. (Oct. 24, 2022), <https://www.justsecurity.org/83744> [<https://perma.cc/RFZ2-WBW7>].

105. See Rao, *supra* note 103, at 810–17 (providing a comprehensive overview of China’s response).

106. See *supra* notes 2, 66–75 and accompanying text.

107. See *Fact Sheet: President Donald J. Trump Imposes Tariffs on Imports from Canada, Mexico and China*, WHITE HOUSE (Feb. 1, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet>

two most powerful countries are entrenched in a standoff, while tariff rates remain highly uncertain.¹⁰⁸ More drastically, the U.S. House Select Committee on the Chinese Communist Party—a bipartisan committee set up to coordinate U.S. policies on China—has proposed legislation to revoke altogether China's most-favored nation status.¹⁰⁹ If passed, this would relegate China to Russia's current non-MFN status and carry significant economic, legal, and geopolitical consequences.¹¹⁰

These measures have accelerated the restructuring of global supply chains. In the semiconductor industry, incentives from the United States as well as Europe and Australia have motivated companies to open fabrication plants in these jurisdictions.¹¹¹ By the end of the Biden administration, the Commerce Department had awarded \$33 billion out of the \$39 billion earmarked for CHIPS Act funding.¹¹² By early 2025, the Taiwan Semiconductor Manufacturing Company had broken ground on its third plant in Arizona alone, signaling its commitment to significantly ramping up production in the United States.¹¹³ To hedge against unstable geopolitics and legal uncertainties, other industries and manufacturing segments are also actively seeking contingencies. Apple, for example, has announced plans to diversify some of its core production away from China, triggering its "Big

president-donald-j-trump-imposes-tariffs-on-imports-from-canada-mexico-and-china [https://perma.cc/58XG-LMBF].

108. See Chad P. Bown, *U.S.-China Trade War Tariffs: An Up-to-Date Chart*, PIIE (Nov. 14, 2025), <https://www.piie.com/research/piie-charts/2019/us-china-trade-war-tariffs-date-chart> [https://perma.cc/PQ2-4HN8].

109. See Restoring Trade Fairness Act, H.R. 10127, 118th Cong. (2024); Press Release, U.S. House of Representatives, Select Committee on the Chinese Communist Party, Moolenaar Introduces First Bipartisan Bill to Revoke China's Permanent Normal Trade Relations (Jan. 23, 2025), <https://selectcommitteeontheccp.house.gov/media/press-releases/moolenaar-introduces-first-bipartisan-bill-revoke-chinas-permanent-normal> [https://perma.cc/Q66P-79Y6].

110. See KAREN M. SUTTER & MICHAEL D. SUTHERLAND, CONG. RSCH. SERV., IF12980, PERMANENT NORMAL TRADE RELATIONS AND U.S.-CHINA TARIFFS 2 (2025) (noting consequences including WTO noncompliance, potentially even higher tariffs, and increased uncertainties); Deborah Elms, *Least Favored Nation: What It Means If the US Revokes PNTR with China*, HINRICH FOUND. (Feb. 27, 2024), <https://www.hinrichfoundation.com/research/article/us-china/what-it-means-if-the-us-revokes-pntr-with-china> [https://perma.cc/PV2A-QHFR] (warning of reverberating consequences for other countries and companies operating in global supply chains).

111. See Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act, Pub. L. No. 117-167, 136 Stat. 1366 (2022).

112. See *Biden-Harris Administration Announces CHIPS Incentives Award with HP to Support Domestic Manufacturing of Next-Generation Technologies and "Lab-to-Fab" Ecosystem*, U.S. DEP'T COM. (Jan. 13, 2025), <https://www.commerce.gov/news/press-releases/2025/01/biden-harris-administration-announces-chips-incentives-award-hp-support> [https://perma.cc/N5RK-F524].

113. See *TSMC Starts Building Third Arizona Plant as U.S. Tariffs Loom*, BLOOMBERG (Apr. 30, 2025), <https://www.bloomberg.com/news/articles/2025-04-30/tsmc-starts-building-third-arizona-fab-to-ramp-up-us-expansion> [https://web.archive.org/web/20250826152334/https://www.bloomberg.com/news/articles/2025-04-30/tsmc-starts-building-third-arizona-fab-to-ramp-up-us-expansion].

Three” suppliers—Foxconn, LuxShare, and Goertek—to set up subsidiaries, secure land leases, and announce construction plans in alternate destinations.¹¹⁴

In sum, trade is increasingly wielded in the service of security, through measures such as tariffs, export controls, and import restrictions. The credibility and effectiveness of these policies rest on the ability to accurately determine the origin of goods—further underscoring the importance of product nationality.

B. TRADE AND HUMAN RIGHTS

Human rights and labor rights issues are likewise deeply entangled with trade, even as they sometimes overlap with security interests. Consider, for example, the PRC’s Xinjiang issue. Concerns about the Chinese government’s modern slavery and human rights abuse against the Uyghur ethnic minorities in the region prompted the United States to enact import sanctions on Xinjiang-originating products. Significantly, the Uyghur Forced Labor Prevention Act (“UFLPA”) creates a rebuttable presumption that imports from Xinjiang are made with forced labor unless importers can produce “clear and convincing” evidence demonstrating otherwise.¹¹⁵ U.S. Customs and Border Protection implements this Act by issuing “withhold release orders” to detain products suspected of being “tainted” with Xinjiang labor, including major inputs such as cotton and solar components.¹¹⁶ Anchored through these sanctions is the importance of supply chain traceability and transparency, governed by a system of origin certifications that track and document product nationalities.¹¹⁷ Both the Xinjiang withhold release orders and the UFLPA hinge on U.S. importers’ ability to produce

114. See, e.g., *Foxconn, Maker of Apple’s iPhones, Invests US \$1.6 Billion in India Expansion Plan amid Diversification from China*, S. CHINA MORNING POST (Nov. 28, 2023), <https://www.scmp.com/tech/big-tech/article/3243027/foxconn-maker-apples-iphones-invests-us16-billion-india-expansion-plan-amid-diversification-china> [https://perma.cc/U36Q-5T66]; Chi Trung, *Apple’s Deepening Roots and Flourishing Partnerships*, VIETNAM INV. REV. (May 9, 2024), <https://vir.com.vn/apples-deepening-roots-and-flourishing-partnerships-110987.html> [https://perma.cc/6Y2M-VCBM].

115. See Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 3(a), (b)(2), 135 Stat. 1525 (2021).

116. See, e.g., Press Release, U.S. Customs and Border Protection, CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave> [https://perma.cc/T3SL-J5M7] (citing Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307, which prohibits the import of any product that was “mined, produced, or manufactured wholly or in part” by forced labor, and which delegates enforcement authority to United States Customs and Border Protection).

117. See *supra* notes 32–33 and accompanying text.

evidence demonstrating the products' origins.¹¹⁸ At a minimum, this complex documentation regime necessarily involves cooperation from suppliers, whose control over and proximity to the production process reasonably enable a firmer grasp on supply chain traceability.¹¹⁹

In response to the uncertainties created by a plethora of trade restrictions from the United States, China, and elsewhere, companies have sought to mitigate risks through supply chain reconfiguration. This development, however, does not necessarily lead to better human rights and labor rights practices. One reason often spotlighted is deliberate trade diversion. That is, firms can circumvent these regulations by routing the "tainted" materials to a different region or factory outpost to gain a Xinjiang-free certification or even a different product nationality altogether.¹²⁰ The UFLPA's rebuttable presumption mechanism was designed precisely to shift compliance costs to importers and to incentivize careful supply chain due diligence.¹²¹ Furthermore, the elimination of the de minimis exception means that a good with Xinjiang-origin inputs, no matter how minimal, can be denied entry into the United States, even if routed through another country.¹²² These safeguards act together to curb trade diversion and preempt efforts to "manufacture" a Xinjiang-tainted product's origin. But even assuming the Act's successful implementation, the economic organization of supply chains can still challenge its effectiveness for two reasons, outlined below.

First, firms can adopt a strategy of "regulatory fragmentation" to split production lines in order to selectively comply with stringent standards only when required. This strategy of "supply chain splitting" hinges on a

118. See Nguyen, *Hidden Power*, *supra* note 37, at 75–76 (noting CBP processes).

119. See, e.g., *Certificates of Origin*, *supra* note 32 (noting that certificates of origin are usually filled out by the exporters; however, because the producer "is in the best position to have the necessary knowledge" about a product's origin, a producer may also be asked to fill out a declaration); Nguyen, *Hidden Power*, *supra* note 37, at 45–54 (documenting the roles of transnational suppliers over supply chain designs and country selection processes).

120. See *The Evolution of Forced Labour in Xinjiang*, *ECONOMIST* (May 30, 2024), <https://www.economist.com/china/2024/05/30/the-evolution-of-forced-labour-in-xinjiang> [<https://web.archive.org/web/20250920045254/https://www.economist.com/china/2024/05/30/the-evolution-of-forced-labour-in-xinjiang>] (noting efforts to circumvent U.S. trade restrictions); Eliot Chen, *Date Deception*, *WIRE CHINA* (Aug. 28, 2022), <https://www.thewirechina.com/2022/08/28/xinjiang-date-deception> [<https://perma.cc/R83B-QFH5>] (documenting how complex supply chains and supplier networks can bypass U.S. regulations, here, on the import of Xinjiang-grown red dates).

121. See OFF. OF STRATEGY, POL'Y & PLANS, U.S. DEP'T OF HOMELAND SECURITY, STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE'S REPUBLIC OF CHINA 49 (2022), https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf [<https://perma.cc/U2MH-P7RR>].

122. *Id.*

supplier's ability to control manufacturing sites and has been well documented in the footwear and solar industries.¹²³ In footwear, Yue Yuen (a major supplier to Nike and other brands) organizes its production lines based on specific merchandisers, such that Nike's comparatively more stringent labor standards were effectively "quarantined" within its own production line.¹²⁴ In solar, Jinko Solar (a manufacturer of solar panel components) established dedicated "clean" production lines at its Vietnam factories—that is, lines clearly free of Xinjiang inputs—slated for export to the United States, while maintaining its other production lines unchanged.¹²⁵ Meeting the more stringent requirements, whether required by a private customer like Nike or incentivized by a government entity like the United States, does not necessarily result in positive spillover effects on a supplier's other operations. This strategy of "regulatory fragmentation" thus enables selective compliance and helps explain some of the persistent challenges to the limited reach of law in global supply chains. Suppliers' ability to separate production based on legal standards can curb a law's effectiveness and limit its impact—a counter story to the "race to the top" phenomenon of the "Brussels effect" and "California effect."¹²⁶

Second, without deliberate and careful design, supply chain restructuring can itself create human and labor rights issues. Take, for example, the textile and apparel industries. Because Xinjiang accounts for about 85% of China's cotton production and 20% of cotton production globally, Xinjiang-related trade restrictions have prompted brands to seek out an alternative cotton source.¹²⁷ This effectively spurred demand for labor

123. See Nguyen, *Hidden Power*, *supra* note 37, at 62–64 (footwear); Trang (Mae) Nguyen, *Global Company Towns*, 96 U. COLO. L. REV. 75, 116–19 (2025) [hereinafter Nguyen, *Global Company Towns*] (solar).

124. See Nguyen, *Hidden Power*, *supra* note 37, at 62–64 (on Yue Yuen's customer-specific production lines).

125. See Nguyen, *Global Company Towns*, *supra* note 123, at 116–19 (discussing Jinko Solar's supply chain splitting strategies); ALAN CRAWFORD & LAURA MURPHY, SHEFFIELD HALLAM U., OVER-EXPOSED: UYGHUR REGION EXPOSURE ASSESSMENT FOR SOLAR INDUSTRY SOURCING 1–5 (2023), <https://www.shu.ac.uk/helena-kennedy-centre-international-justice/research-and-projects/all-projects/over-exposed> [https://perma.cc/38NL-YQYX] (noting that solar manufacturers have implemented "bifurcated" production to address U.S. regulations).

126. See DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5–8 (1995) (explaining the "California effect" on the U.S. automobile industry, which has gravitated toward the more stringent emission standards set by California); ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 1–5 (2020) (extending this concept to the global economy, using case studies from the European Union).

127. See Ji Siqi, Kandy Wong & Ananta Agarwal, *Beyond China: US' Xinjiang Cotton Ban Has Far-Reaching Implications, Even for Asian Alternatives*, S. CHINA MORNING POST (July 27, 2022), <https://www.scmp.com/economy/china-economy/article/3186664/beyond-china-us-xinjiang-cotton-ban-has-far-reaching> [https://perma.cc/7CTZ-ERPG].

and plantations in other cotton-producing countries such as Pakistan, Bangladesh, and India.¹²⁸ This shift can create new economic opportunities but also risks replicating and amplifying problematic labor practices already present in those countries' supply chains.¹²⁹

As with the trade–national security nexus, the trade–human rights nexus also hinges on U.S. customs' ability to accurately determine the origin of goods, highlighting yet again the linchpin role of product nationality.

III. CONSTRUCTING GOODS' NATIONALITIES

This Part unpacks the Article's conceptual arguments—first, that a product's nationality is malleable, and second, that such malleability occurs through an attribute selection process. The first point has long existed as a phenomenon in trade.¹³⁰ But the expanded relevance of product nationality, as detailed in Part II,¹³¹ means that the traditional levers to tinker with (for example, components and parts) now make up just a subset of a broader selection of what I call a product's "attributes." Nationality malleability occurs because each legal regime targets selective attributes of a product through its own prism in order to advance certain underlying interests and policy goals. I first explain the concepts of attributes and prisms, then turn to the attribute-selection process.

A. GOODS' ATTRIBUTES

The conceptualization of product attributes draws initial inspiration from economic scholarship on factors of production—that is, the resources needed to produce goods.¹³² Economist David Ricardo's theory of comparative advantage famously started with a single production factor: labor.¹³³ Labor, indeed, is just one attribute related to one facet of a product's

128. *Id.*

129. See, e.g., TRANSPARENTEM, OPPORTUNITIES AND CHALLENGES IN INDIA'S COTTON SECTOR: DUE DILIGENCE IN RAW MATERIALS 5–6 (June 2024), https://transparentem.org/wp-content/uploads/2024/07/Transparentem-Interim-report_Opportunities-and-Challenges-in-Indias-Cotton-Sector.pdf [<https://perma.cc/6CL6-JR4M>] (noting evidence of child labor and economic coercion in India's cotton farms); INT'L LABOR ORG., MAPPING OF THE COTTON SUPPLY CHAIN AT THE COMMUNITY LEVEL IN PAKISTAN 68–71 (2024), <https://www.ilo.org/sites/default/files/2025-02/Mapping%20Cotton%20Supply%20Chain%20at%20the%20community%20level%20in%20Pakistan.pdf> [<https://perma.cc/X8B3-UKKQ>] (noting the working conditions of cotton farm workers).

130. See *supra* Section I.B (outlining the various rules of origin tests).

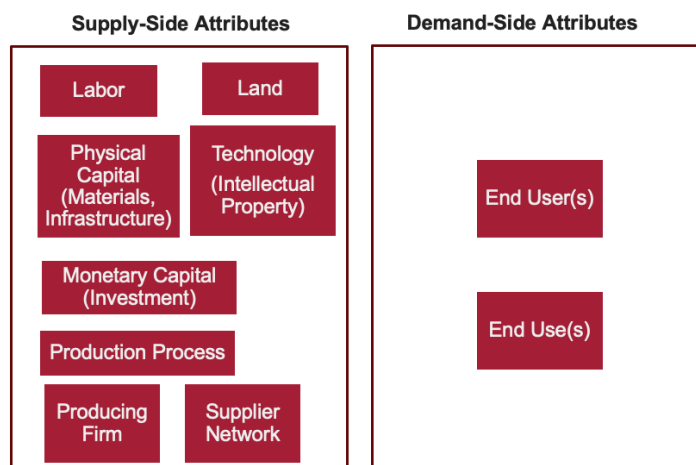
131. See *supra* Part II (documenting the use of product nationality in the new geopolitics).

132. See HENRY WILLIAM SPIEGEL, THE GROWTH OF ECONOMIC THOUGHT 259, 307–38 (1971) (tracing economic schools of thought on production factors and identifying the threefold division of the factors of production in land, labor, and capital).

133. Ricardo's theory of comparative advantage, in a nutshell, posits that countries gain from trade by specializing in goods that they can produce at a lower opportunity cost. In his famous example, if

life cycle (production). This Article defines *attributes* as features of a product that are relevant to its two major life “events”: production and consumption. These two life events, in turn, serve to organize product attributes into two categories: supply-side and demand-side (see Figure 1).

FIGURE 1. Products’ Attributes



1. Supply Side

A product’s supply-side attributes pertain to the inputs, resources, and entities involved in its creation. The mapping of these attributes must necessarily be industry sensitive, but in broad strokes includes the following categories: (1) the material aspects of production: raw materials, equipment, labor, and physical infrastructure; (2) the intangible aspects of production: technology, know-how, funding, and investment; and (3) the business actors involved in the production scheme: the main producing firm, its first-tier suppliers, and other firms in the supplying networks.

In classical economic theories, the traditional three factors of production are material: land, labor, and (physical) capital.¹³⁴ Land

English workers are relatively better at producing cloth than wine compared with Portuguese workers, England should specialize in cloth production and Portugal in wine, even if one country may be more productive in both goods. See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 134–35 (1817).

134. In particular, economists were concerned with productivity—that is, how an increase in a factor of production can influence outputs. This relationship between inputs and outputs, also known as the

represents the land itself, as well as raw materials extracted from the earth such as oil, critical minerals, and other natural resources.¹³⁵ Labor represents human efforts.¹³⁶ Capital (here, physical capital) denotes the physical assets used in the production process such as tools, equipment, buildings, and infrastructure.¹³⁷ A fourth factor—entrepreneurship—was later added to recognize the importance of technology, innovation, know-how (and relatedly, intellectual property rights) in their ability to organize and transform the other factors to achieve increased productivity.¹³⁸

Globalization and global supply chains have changed the factors of production analysis in several notable ways. First, thanks to an ecosystem of dispersed manufacturing, each production factor can be optimized at the global level—not only components and parts, but also people, investment, and firms—each of which can originate from different parts of the world.¹³⁹ Second, a new crop of corporate powers—first-tier transnational suppliers—have emerged as the true quarterbacks of global supply chains, coordinating and overseeing a global supply base.¹⁴⁰ The cast of business actors who participate in global production has thus expanded considerably, not only in the number of entities but also in their size and scale, geography, and specialized functions across supply chains. Finally, the nature of the goods

production function, thus influences how firms and governments should allocate resources to optimize productivity. See SPIEGEL, *supra* note 132, at 307–38; Charles Cobb & Paul Douglas, *A Theory of Production*, 18 AM. ECON. REV. 139, 139 (1928) (building a two-factor production function).

135. See SPIEGEL, *supra* note 132, at 259–60.

136. *Id.* But see Jennifer Gordon, *In the Zone: Work at the Intersection of Trade and Migration*, 23 THEORETICAL INQUIRIES L. 147, 169–72 (2022) (describing a phenomenon of “double labor arbitrage,” whereby foreign migrant labor is imported to a special economic zone of another outsourced country to work in textile and other supply chains).

137. This focus on the physical aspect of capital was driven by an emphasis on tangible assets, though neoclassical economic theories later relaxed this requirement to include intangible knowledge and know-how. See Gary Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. 9, 9–12 (1962); Joan Robinson, *The Production Function and the Theory of Capital*, 21 REV. ECON. STUD. 81, 81–83 (1953).

138. See Hans Binswanger, *The Measurement of Technical Change Biases with Many Factors of Production*, 64 AM. ECON. REV. 964, 964–65 (1974) (querying technology as a production factor). The process of turning know-how into intellectual property rights echoes Katharina Pistor’s concept of legal coding, on how law can create value by assigning legal protection and entitlement to something. See KATHARINA PISTOR, *THE CODE OF CAPITAL* xi (2019); Alison Dean & Martin Kretschmer, *Can Ideas Be Capital? Factors of Production in the Postindustrial Economy: A Review and Critique*, 32 ACAD. MGMT. REV. 573, 576 (2007) (registering concerns that the costs to codify human capital into intellectual property rights might outweigh its benefits).

139. See Nguyen, *Hidden Power*, *supra* note 37, at 36–45 (describing the development of dispersed production); Gordon, *supra* note 136, at 147 (describing the mobile yet confined nature of imported labor in special economic zones).

140. Nguyen, *Hidden Power*, *supra* note 37, at 50–58, 60–68 (documenting the reconsolidation of the global supply base at the level of first-tier suppliers across industry and function).

that move across supply chains themselves has changed. By a recent estimate, almost half of global trade is now in intermediate goods rather than final goods.¹⁴¹ The exercise of origin determination now involves not only discrete production factors but also intermediate products and their relative contributions to the final commodities.¹⁴²

As a result, the supply-side attributes of any given product, while drawing inspiration from the classic production factors, now account for many more features beyond material inputs. Notably, these attributes also include the specific firms and business networks involved in production and the manufacturing processes that relate intermediate goods to the final products.

2. Demand Side

Demand-side attributes comprise a shorter list: a product's end user(s) and its purported end use(s)—though this short list is certainly not short on complexity. While supply-side attributes focus on the “who, what, where, and how” of manufacturing, demand-side attributes pertain to how a product is consumed—who its end users are and how it is ultimately used. These attributes can shape, and sometimes alter, a product's nationality.

First, consider two potential end users—the U.S. federal government and a socially conscious consumer. Product nationality matters a great deal for both. For the U.S. government, federal laws impose specific restrictions on the origin of products in procurement. The Buy American Act of 1933, for example, requires that items acquired for public use be manufactured in the United States and comprise “substantially all [] articles, materials, or supplies mined, produced, or manufactured in the United States.”¹⁴³ The “substantially all” standard, in turn, mandates a threshold of 65% of component costs—meaning that at least 65% of the purchasing or manufacturing costs have to come from materials and inputs originating from the United States.¹⁴⁴ As a result, a product that may qualify as “made

141. See *supra* note 65 and accompanying text.

142. See *supra* Section I.B (outlining the various rules of origin tests).

143. See Buy American Act of 1933, 41 U.S.C. § 8302(a)(1). This mandate is coupled with a number of exceptions, for example, if its implementation is “inconsistent with the public interest” or if the required product is not reasonably commercially available. *Id.*; 48 C.F.R. § 25.103(b) (2009). Another exception authorizes the president to waive this requirement for certain designated countries with reciprocal government-procurement trade agreements with the United States. See Trade Agreements Act of 1979, 19 U.S.C. § 2511(b)(1).

144. See 48 C.F.R. § 25.003 (2005) (defining *component* as any “article, material, or supply incorporated directly into an end product or construction material”). This threshold is slated to increase to 75% in 2029. See Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12780 (Mar. 7, 2022).

in America” for private consumption might not qualify as American-made when the end consumer is the federal government. Businesses seeking public procurement contracts must thus separately ensure compliance with Buy American Act rules, even if the product may qualify as U.S.-originating under customs determination or can be marketed with a “Made in USA” label pursuant to Federal Trade Commission regulations.¹⁴⁵

For the socially conscious consumer (in fact, for all consumers), product nationality can significantly shape purchasing decisions. Historically, product origin, much like the brand, served as a marker of quality and a means of differentiation from competitors.¹⁴⁶ Geographical associations such as Swiss watches, German cars, Thai silk, or Ethiopian coffee evoke perceptions of quality and craftsmanship, thus acting to confer commercial advantage on such products.¹⁴⁷ Business and marketing literature has long recognized this phenomenon as the country-of-origin effect—how consumers’ perceptions of a country can influence their assessment of product quality, which, in turn, can shape purchasing decisions and price sensitivity.¹⁴⁸ Known also as “product country image,” the country-of-origin effect acts through at least three venues: cognitive, affective, and normative processing.¹⁴⁹ Cognitive effects emphasize the role of general impressions and perceived matching strengths (or weaknesses) between the country of production and certain aspects of the product—for example, Germany for high-quality engineering; Scandinavia for

145. See Made in USA Labeling Rule, 16 C.F.R. pt. 323 (2021) (codifying the “all or virtually all” standard for labels on products); *Complying with the Made in USA Standard*, FED. TRADE COMM’N (July 2024), <https://www.ftc.gov/business-guidance/resources/complying-made-usa-standard> [<https://perma.cc/SZ9V-XJ9Q>].

146. See ANDY PIKE, ORIGINATION: THE GEOGRAPHIES OF BRANDS AND BRANDING 1–23 (2015); JAN LINDEMANN, THE ECONOMY OF BRANDS 9–17 (2010) (noting that ancient artisanal producers knew to mark their potteries with distinctive signs to signal superior artisanal skills and quality).

147. LINDEMANN, *supra* note 146, at 9.

148. See Ernest Dichter, *The World Customer*, 40 HARV. BUS. REV. 113, 116 (1962) (coining the term “country-of-origin effect” and noting its potential for “tremendous influence on the acceptance and success of products”); Aby Abraham & Sanjay Patro, ‘Country-of-Origin’ Effect and Consumer Decision-making, 39 MGMT. & LAB. STUD. 309, 309 (2015) (“[W]ith distributed locations of production, it has become more complicated with differences in brand/country of the brand, country of design, country of parts and country of assembly and so on. However, the importance of the country-of-origin effect is still a reality as the consumer uses these cues in product differentiation.”).

149. See Carl Obermiller & Eric Spangenberg, *Exploring the Effects of Country-of-Origin Labels: An Information Processing Framework*, 16 ADVANCES CONSUMER IN RSCH. 454, 454–59 (1989) (theorizing the effect of country-of-origin knowledge on consumers’ cognitive, affective, and normative values); Peeter Verlegh & Jan-Benedict Steenkamp, *A Review and Meta-Analysis of Country-of-Origin Research*, 20 J. ECON. PSYCH. 521, 523, 524–25 (1999).

sustainability; South and Southeast Asia for poor labor conditions.¹⁵⁰ Perhaps unsurprisingly, these cognitive effects often reflect widely shared cultural stereotypes.¹⁵¹ Once formed, such reputational associations tend to be sticky, persisting even after consumers learn contrary facts or have experiences at odds with the initial expectations.¹⁵²

Affective and normative cues operate at an even deeper level, impacting consumers' emotional attachments and moral impulses.¹⁵³ Affective effects refer to a product's ability to evoke emotions, identity, and pride in buyers, thus conferring symbolic and emotive meanings on their purchasing decisions.¹⁵⁴ Normative effects reflect consumers' beliefs about the moral responsibilities associated with their consumption choices.¹⁵⁵ Consumer boycotts are among the clearest examples of such an effect. Recent and distant examples include consumer protests urging U.S. brands such as Walmart to stop buying apparel made in Bangladesh after the Rana Plaza garment factory tragedy,¹⁵⁶ and a global call to reject Russian goods in protest of Russia's invasion of Ukraine.¹⁵⁷

Like end users, a product's end use can similarly impact its nationality analysis. Consider, for example, the Foreign Direct Product Rule ("FDPR"), a sanctions rule that subjects foreign-produced items to U.S. jurisdiction if U.S.-origin technology, plants, or equipment were used in their production.¹⁵⁸ Enacted during the Cold War, the FDPR was aimed at preventing the Soviet Union and other communist countries from obtaining U.S. technology and know-how, particularly those with dual uses—that is, can be used for both civilian and military ends.¹⁵⁹ After a relatively dormant

150. See Verlegh & Steenkamp, *supra* note 149, at 522–25; Martin S. Roth & Jean B. Romeo, *Matching Product Category and Country Image Perceptions: A Framework for Managing Country-of-Origin Effects*, 23 J. INT'L BUS. STUD. 477, 497 (1992).

151. See Verlegh & Steenkamp, *supra* note 149, at 523.

152. *Id.*

153. *Id.* at 522–23.

154. *Id.*

155. *Id.*

156. See Jason Motlagh & Suez Taylor, *From the Ashes of Rana Plaza: 'Consumers Want to Know How Their Clothes Are Made'*, MS. MAGAZINE (Apr. 24, 2023), <https://msmagazine.com/2023/04/24/rana-plaza-garment-worker-rights> [<https://perma.cc/R7UH-KDD5>].

157. See Kishanthi Parella, *Corporate Foreign Policy in War*, 64 B.C. L. REV. 1981, 2005–09 (2023) (noting pressure from consumers and investors as a motivation for corporate “self sanction” from the Russian markets).

158. See 15 C.F.R. § 736.2(b)(3) (2024); PAUL K. KERR & CHRISTOPHER A. CASEY, CONG. RSCH. SERV., R46814, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM ACT OF 2018, at 28 (2021).

159. See KERR & CASEY, *supra* note 158, at 29; Theodore L. Thau, *Control of Exports from the U.S.A.*, 19 BUS. LAW. 845, 854–57 (1964) (tracing the regulatory history of export controls on “technical data” and cautioning businesses to exercise careful due diligence).

period, the FDPR was revived in the 2020 to 2022 period to target Chinese tech giant Huawei Technologies and its affiliates on the U.S. Department of Commerce's Entity List.¹⁶⁰ In effect, the FDPR extends the extraterritorial reach of U.S. export controls by banning the sale of products to Huawei, regardless of where they were produced and by what firm, so long as these products utilized U.S.-origin equipment or technology. The products that U.S. regulators had in mind were of course microchips.¹⁶¹ While East Asia dominates in microchip fabrication, the United States leads in microchip design thanks to established names like Broadcom, Qualcomm, and NVIDIA.¹⁶² As a result, the most advanced microchips likely contain, in some way or another, U.S.-origin design, technology, or know-how.¹⁶³ The FDPR effectively blocks firms around the world, including non-U.S. firms, from supplying chips to Huawei, or else face hefty fines, market restrictions, and even criminal prosecution.¹⁶⁴ A microchip can thus be fabricated wholly in Taiwan, yet still deemed to be of U.S. origin for the purposes of the FDPR based on its purported end user, here a U.S.-sanctioned entity such as Huawei.

B. LAWS' PRISMS

This Section explains how the foregoing discussion on product attributes relates to the concept of prisms and the attribute-selection process that underpins the construction of product nationality. As developed above, I focus on three primary prisms—commerce, security, and rights—reflecting trade's traditional aim as well as its increasing overlaps with the latter two

160. See Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List, 85 Fed. Reg. 29849 (May 19, 2020) (to be codified at 15 C.F.R. pts. 730, 732, 736, 744). The Entity List, in a nutshell, "identifies entities reasonably believed to be involved, or pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States." Addition of Entities to the Entity List, 84 Fed. Reg. 22961 (May 21, 2019) (codified at 15 C.F.R. pt. 744) [hereinafter Commerce Entity List].

161. See Gregory C. Allen, *In Chip Race, China Gives Huawei the Steering Wheel: Huawei's New Smartphone and the Future of Semiconductor Export Controls*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 6, 2023), <https://www.csis.org/analysis/chip-race-china-gives-huawei-steering-wheel-huaweis-new-smartphone-and-future> [https://perma.cc/S4XM-257Q].

162. See ANTONIO VARAS, RAJ VARADARAJAN, JIMMY GOODRICH & FALAN YINUG, *STRENGTHENING THE GLOBAL SEMICONDUCTOR SUPPLY CHAIN IN AN UNCERTAIN ERA* 9–13 (2021), <https://web-assets.bcg.com/9d/64/367c63094411b6e9e1407bec0dcc/bcgxsia-strengthening-the-global-semiconductor-value-chain-april-2021.pdf> [https://perma.cc/6454-Y9UB].

163. *Id.*

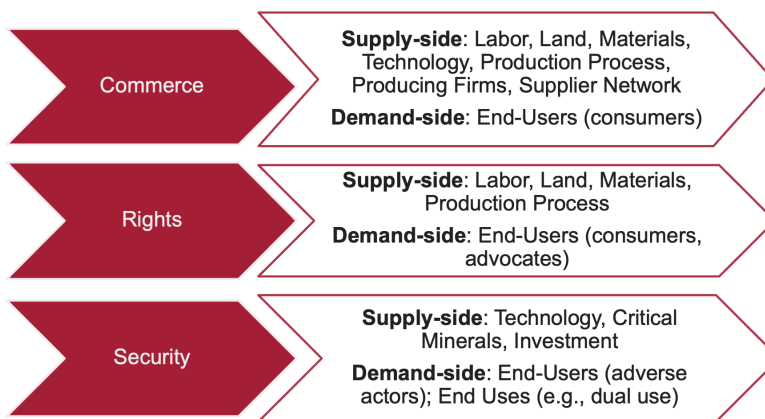
164. See 15 C.F.R. § 734.9 (2024). In 2023, the Department of Commerce investigated and subjected Singapore-based Seagate and its California subsidiary to a hefty fine for supplying to Huawei in violation of the Foreign Direct Product Rule. See *BIS Imposes \$300 Million Penalty Against Seagate Technology LLC Related to Shipments to Huawei*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM. (Apr. 19, 2023), <https://www.bis.gov/node/20250> [https://perma.cc/2GWZ-A4RN].

domains.¹⁶⁵ These prisms mirror the current preoccupation of U.S. trade law, though they need not be exhaustive or determinative.¹⁶⁶

1. Commerce

A commerce prism views a product largely for its commercial value. As such, its selection of attributes closely reflects the standards articulated in trade agreements. The attributes that matter include the traditional factors of production (land, labor, physical capital, and technology), as well as supply chain–induced factors such as the production process, the identity of the producing firm, and the supplier networks (see Figure 2). To return to the BYD hypothetical that opens this Article, the USMCA’s automotive origin rule hinges on the value of the car’s several inputs, from critical materials to overall content to wage requirements.¹⁶⁷ This automotive rule reflects the rules of origin value-added test, here in the context of a preferential trade agreement.¹⁶⁸ The other three tests—substantial transformation, tariff shift, and technical test—likewise all hinge on supply-side attributes, with particular emphasis on the manufacturing process.¹⁶⁹

FIGURE 2. Prisms’ Selection of Attributes



165. See *supra* Part II (discussing trade–security and trade–human rights nexus).

166. See *infra* Part V (proposing the possibility of other prisms).

167. See *supra* notes 8–13 and accompanying text (discussing BYD through the commerce prism).

168. See *supra* notes 85–88 and accompanying text (explaining the value-added test).

169. See *supra* notes 89–98 and accompanying text (explaining these tests).

One of the purposes of rules of origin is to provide consumers with information to support informed consumption choices.¹⁷⁰ As detailed above, geographical associations have long served as signals to potential buyers to convey information about a product's quality and workmanship.¹⁷¹ The disclosure function of RoOs can thus be seen as a demand side of the commerce prism.

2. Rights

A rights prism focuses primarily on the socioeconomic and sustainability impacts of trade. It emphasizes how a product or its production process may advance or impede values such as labor and human rights, corporate accountability, and sustainability, whether at home or abroad.¹⁷² Accordingly, it tends to select for supply-side attributes such as inputs, labor, and production process (see Figure 2). A rights prism concerned with labor and human rights would scrutinize the labor attribute to query whether goods are produced using exploitative labor practices, such as forced or child labor.¹⁷³ A rights prism concerned with corporate accountability would evaluate labor as well as inputs and production processes to examine whether the manufacturing corporation and its suppliers act responsibly along supply chains.¹⁷⁴ Likewise, concerns with sustainability would lead to focusing on attributes such as the production processes and the firms involved, to the extent that either might impact sustainability issues, such as environmental externalities.¹⁷⁵

170. See Country-of-Origin Marking, *supra* note 38, at 5-1 (noting the disclosure role of U.S. country-of-origin marking requirements).

171. See *supra* notes 148–57 and accompanying text (explaining the country-of-origin effect).

172. See generally Gregory Shaffer, *Retooling Trade for Social Inclusion*, 2019 U. ILL. L. REV. 1 (positing that the fundamental purposes of trade agreements are broader than trade liberalization and calling for the redesign of trade agreements to facilitate social policies); Gregory Shaffer, *Addressing the Negative Externalities of Trade: Flanking Policies and the Role of Package Treaties*, 23 WORLD TRADE REV. 621 (2024) (studying the use of “flanking policies” in trade agreements to address trade’s negative externalities, including labor and environmental issues); Timothy Meyer, *Second-Generation Flanking Policies: Addressing Extraterritorial and Non-Economic Costs of Trade Liberalization*, 23 WORLD TRADE REV. 601 (2024) (noting shifts in the focus of flanking policies from domestic concerns to foreign activities).

173. See *supra* Section II.B (discussing the Uyghur Forced Labor Prevention Act).

174. The leading jurisdictions on corporate accountability practices in supply chains are not the United States but European countries. See Roza Nurgozayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?*, 57 VAND. J. TRANSNAT’L L. 1339, 1354–69 (2024) (summarizing three major EU corporate sustainability initiatives notable for their extraterritorial effect: the Corporate Sustainability Reporting Directive, the Corporate Sustainability Due Diligence Directive, and the Carbon Border Adjustment Mechanism).

175. *Id.* (noting corporate environmental externalities).

On the demand side, a rights prism can target both end users and end uses. A socially conscious end user, as detailed above, may care deeply about where the product originates, thanks to what business scholars call the affective and normative effects—how the country of origin can evoke emotions and beliefs about the moral responsibilities associated with consumption choices.¹⁷⁶ Governments, too, can be socially conscious, or at least socially aware, consumers. The European Union’s (“EU”) Green Deal, for example, encourages EU member states to set sustainability and environmentally conscious criteria in public purchases.¹⁷⁷ While this framework is nonbinding, a number of EU member states have incorporated mandatory sustainability criteria into domestic law.¹⁷⁸

3. Security

Finally, as extensively explored above, a security prism scrutinizes how a product may affect, promote, or undermine national security interests.¹⁷⁹ It thus seeks to identify security vulnerabilities. Such vulnerabilities can occur in the supply chains—for example, dependence on certain critical minerals, technology, or foreign control. Equally relevant are a product’s demand-side attributes: who can potentially use the product and for what purposes.

C. THE ATTRIBUTE-SELECTION FRAMEWORK

In optical physics, a prism disperses light through a process called refraction, whereby a ray of light enters the prism’s transparent surface and exits as an array of colors.¹⁸⁰ This phenomenon occurs because of a change in medium. As light passes from air (a low-density medium) into glass or another transparent material (a high-density medium), its traveling speed

176. See *supra* notes 146–57 and accompanying text (discussing the country-of-origin effect).

177. See Directive 2014/24, of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, art. 67(2), 2014 O.J. (L 94) 65, 134 (noting that contract award criteria can take into account “environmental and/or social aspects”).

178. See *Green Public Procurement Advisory Group & National Action Plans*, EUR. COMM’N, https://green-forum.ec.europa.eu/green-public-procurement/advisory-group-national-action-plans_en [https://perma.cc/DR35-9MB2] (surveying the current procurement laws of EU member states).

179. See *supra* notes 14–20 and accompanying text (discussing the BYD example as applied to the security prism).

180. See H. Moyses Nussenzveig, *The Theory of the Rainbow*, 236 SCI. AM. 116, 116–28 (1977).

changes, causing it to bend.¹⁸¹ As a result, depending on the angle of the prism, different projections of colors can result.

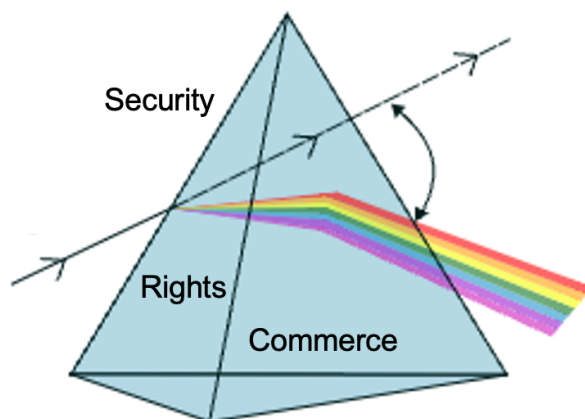
The attribute-selection process operates in a somewhat analogous manner (see Figure 3). Imagine a triangular prism with each side representing the commerce, rights, and security perspectives. Depending on the prism and the angle from which one chooses to view the good, the nationality of the concerned good projects differently. This occurs through the selection of specific attributes of the good, as conceptualized above.¹⁸²

It is important to note here that laws and policies often seek to advance multiple goals and thus can operate through multiple prisms (or policy directives). As a result, as the examples above demonstrate, the same product can be tagged for different nationalities, or more than one nationality, depending on the prism through which it is viewed. Separating the relevant prisms, however, helps disentangle why a legal regime may target certain attributes of a product and not others. This, in turn, can assist in the evaluation of whether such decisions are analytically sound and whether they effectively advance the stated policy goals.

181. Experimentation with light and prisms dates to a long line of celebrated scientists, including Isaac Newton and Johann Wolfgang von Goethe. It was Newton's famous experiment with a prism that led to modern understanding of the visible color spectrum. See *The Science of Color*, SMITHSONIAN: LIBRS., <https://library.si.edu/exhibition/color-in-a-new-light/science> [<https://perma.cc/7F9J-ZRXH>]. See generally ISAAC NEWTON, *OPTICKS, OR A TREATISE OF THE REFLECTIONS, REFRACTIONS, INFLECTIONS, AND COLORS OF LIGHT* (1704) (documenting these experiments).

182. See *supra* Sections III.A–B (discussing prisms and goods' attributes).

FIGURE 3. Prisms of Product Nationality



A separate question remains as to whether viewing (and regulating) products through a particular prism violates international trade rules, including a state's WTO obligations, and whether states' increased use of WTO exceptions to justify such restrictions is legitimate. After all, trade restrictions imposed in the name of nontrade issues, whether national security, the environment, or human rights, often coincide with the interests of domestic groups who stand to benefit from these restrictions. Legal scholar Tim Meyer called this issue "mixed motives" in trade law's policymaking.¹⁸³ Similar to the challenges posed in domestic law (e.g., employment), trying to figure out which motive principally animated the conduct at play requires a contextual, fact-intensive inquiry.¹⁸⁴ At the ex-post stage of adjudication, Meyer proposed a "predominant motive" test to detect whether the concerned policy was dominated by an impermissible motive.¹⁸⁵ While this Article is primarily concerned with the ex-ante stage of regulation and supply chain design, disentangling a product into attributes and homing in on the relevant attributes can potentially be helpful in the ex-post stage as well.

183. See Timothy Meyer, *The Political Economy of WTO Exceptions*, 99 WASH. U. L. REV. 1299, 1302, 1308–09 (2022) (arguing that many public policy exceptions in trade law are created with "mixed motives," that is, "both serve a legitimate public policy objective and also benefit a domestic economic constituency").

184. See generally Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018) (canvassing mixed motive jurisprudence).

185. See Meyer, *supra* note 183, at 1353–67.

IV. THE LIMITS OF NATIONALITY

A. NATIONALITY AS A PROXY

So far, I have argued for the utility of seeing product nationality through the prism framework. Such utility has purchase only so far as the concept of nationality itself remains useful. This Section contemplates this very question. It starts with an evaluation of product nationality's use as a proxy to advance policy goals, ultimately highlighting the limits of nationality-based regulations when applied to a product's highly mobile attributes such as capital or ownership.¹⁸⁶ As detailed below, such limits are particularly salient when regulating through the trade–security or trade–human rights nexus.

For an illustrative example, consider the saga of TikTok. Although TikTok is not a physical product, U.S. regulators' characterization of the platform as Chinese, and therefore justifying its use as a national security risk, bears directly on this Article's argument. Many of the debates around TikTok's divest-or-ban regulation and subsequent lawsuits have centered on the tension between the state's national security interests and individuals' First Amendment rights.¹⁸⁷ The state's security stake, in turn, fixated on TikTok's Chinese-ness.¹⁸⁸ But as legal scholars Curtis Milhaupt, Mariana Pargendler, and Dan Puchniak astutely question: What exactly makes TikTok “Chinese”?¹⁸⁹ As they meticulously point out, TikTok Inc., its parent company, TikTok Ltd., and that company's parent company, ByteDance Ltd., are all incorporated in either California or the Cayman Islands.¹⁹⁰ ByteDance, the ultimate parent company, is controlled by its founder, Zhang Yiming (20% equity), while the other 80% of shares are owned by employees and global institutional investors, including well-known U.S.

186. Even a more grounded attribute like labor can pose complex nationality issues. *See, e.g.*, Gordon, *supra* note 136, at 169–72 (documenting a phenomenon of “double labor arbitrage” whereby firms located in special economic zones in Jordan, Thailand, and elsewhere employed foreign labor from nearby countries to work in textile and manufacturing factories).

187. For a summary of the discourse around TikTok and its implications on U.S. executive and judicial functions, see Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT'L L. 1145, 1145 (2022).

188. *See TikTok Inc. v. Garland*, 145 S. Ct. 57, 62 (2025) (upholding a statute that bans services to distribute, maintain, or update the social media platform TikTok, unless U.S. operation of the platform is severed from Chinese control).

189. *See* Milhaupt, Pargendler & Puchniak, *supra* note 26, at 12–15 (questioning the corporate identity of TikTok Inc.); Laura He, *Wait, Is TikTok Really Chinese?*, CNN (Mar. 18, 2024), <https://www.cnn.com/2024/03/18/tech/tiktok-bytedance-china-ownership-intl-hnk/index.html> [https://perma.cc/869U-7A2Q].

190. *See* Milhaupt, Pargendler & Puchniak, *supra* note 26, at 12–15 (mapping TikTok's ownership).

firms such as Sequoia and KKR.¹⁹¹ Data generated by TikTok Inc. is stored in the United States, Singapore, and Malaysia; none of its senior executives are Chinese nationals, and neither TikTok Inc. nor its parent company operates in China.¹⁹² In other words, the only link that TikTok Inc. has to the PRC is the nationality of the controlling shareholder of its ultimate parent company, ByteDance. From a corporate law perspective, such a tenuous connection would not have been enough to confer corporate nationality, whether under common law or civil law traditions.¹⁹³

But of course, such a connection, while inapposite to corporate law, is highly relevant for the security prism. ByteDance Ltd.—TikTok Inc.’s ultimate parent company—also owns Douyin, a video streaming platform that is TikTok’s analog for the China market.¹⁹⁴ Unlike TikTok, Douyin has extensive links with Chinese investors and state actors, including the presence of an internal Chinese Communist Party committee, as required under China’s Company Law.¹⁹⁵ While TikTok, by virtue of being a foreign company in China, is governed under a separate body of law and is not subject to the same requirement, its common lineage with Douyin raises enough risk from a security perspective.¹⁹⁶ To put this within the attribute-selection framework, U.S. regulators viewed TikTok through the security prism and, in that process, selected ownership and control as the key attributes by which to determine its corporate nationality (and, by inference, its allegiance).¹⁹⁷

Consider a similar challenge in tracing the nationality of ownership and

191. *Id.*

192. *Id.*

193. *Id.* (noting the internal affairs doctrine in U.S. corporate law and the real seat doctrine in continental Europe’s corporate law). The internal affairs doctrine states that the identity of a corporation is determined by the jurisdiction of incorporation (which, in the United States, is often Delaware). The real seat doctrine determines corporate identity based on its principal place of business. *See* Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL’Y REV. 381, 408–09 (2005).

194. *See* Milhaupt, Pargendler & Puchniak, *supra* note 26, at 12–15 (noting TikTok and Douyin’s corporate structure).

195. On the Chinese government’s participation in corporate governance, *see* Lauren Yu-Hsin Lin & Curtis J. Milhaupt, *Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance*, 50 J. LEGAL STUD. 187 (2021).

196. *See Bill to Protect Americans from Foreign Adversary Controlled Applications, Including TikTok*, U.S. SELECT COMM. ON THE CHINESE COMMUNIST PARTY (Mar. 5, 2024), <https://selectcommitteeontheccp.house.gov/media/bills/bill-protect-americans-foreign-adversary-controlled-applications-including-tiktok> [<https://perma.cc/B6C9-EX3W>] (questioning the ability of ByteDance employees to access U.S. user data).

197. *See* 170 CONG. REC. H1165 (daily ed. Mar. 13, 2024) (statement of Rep. Mike Gallagher) (“TikTok is a threat to our national security because it is owned by ByteDance, which does the bidding of the Chinese Communist Party.”).

control through supply chains. Recall that the UFLPA, enacted in 2021, imposes a ban on the import of products originating from the PRC's Xinjiang region.¹⁹⁸ After the UFLPA went into effect, investigative reports discovered that Xinjiang-made red dates, also known as jujube, were widely available at markets and retailers nationwide.¹⁹⁹ Red dates, the third major export from Xinjiang (behind cotton and tomatoes), are often intercropped with cotton, thus increasing the likelihood that, like cotton, these crops are also tainted with forced labor.²⁰⁰ It was, however, no easy task to trace the red dates on American grocers' shelves back to the region, thanks to their supply chains' opaque corporate and contract networks. On the contract side, a Xinjiang-based company can simply contract with a middleman, a non-Xinjiang shipper, to mask the products' origin.²⁰¹ This type of origin masking is precisely what the UFLPA targets with its burden-shifting framework. By shifting the burden of proof to importers to show by "clear and convincing evidence" that the imported products are not tainted with Xinjiang labor, the Act incentivizes importers to demand transparency and careful documentation from producers and suppliers.²⁰²

While the UFLPA is carefully designed to preempt manipulations through contracting networks, it is less clear how the Act can detect manipulations through corporate maneuvers. The entity responsible for the majority of production in Xinjiang—and its labor problems—is the Xinjiang Production and Construction Corps ("XPCC"), a unique part-military, part-corporation, part-bureaucracy entity squarely under the control of the PRC's party-state.²⁰³ It has 14 divisions and, by one estimate, is the majority owner of close to 3,000 subsidiaries, both local (that is, outside of Xinjiang) and foreign.²⁰⁴ Routing products through an out-of-province subsidiary would likewise have the effect of masking the Xinjiang origin, though, here, done

198. See *supra* notes 115–19 and accompanying text (explaining the UFLPA's rebuttable presumption that Xinjiang products contain forced labor).

199. See NUZIGUM SETIWALDI, FRUITS OF UYGHUR FORCED LABOR: SANCTIONED PRODUCTS ON AMERICAN GROCERY STORE SHELVES, UYGHUR HUMAN RIGHTS PROJECT 2–3 (2022); Chen, *supra* note 120.

200. See SETIWALDI, *supra* note 199, at 7–8.

201. See Chen, *supra* note 120 (noting the role of the "do-nothing" shipper).

202. See *supra* notes 115–19 and accompanying text (noting implications of the UFLPA's burden-shifting framework).

203. See Bao Yajun, *The Xinjiang Production and Construction Corps: An Insider's Perspective*, 18 CHINA: INT'L J. 161, 164–67 (2020) (detailing the structure of the Xinjiang Production and Construction Corps).

204. See CTR. FOR ADVANCED DEF. STUD., LONG SHADOWS: HOW THE GLOBAL ECONOMY SUPPORTS OPPRESSION IN XINJIANG 12–13 (2021) (mining official corporate data from Chinese sources to arrive at this estimate).

through an in-house mechanism.²⁰⁵ Not only that, the Xinjiang-based parent company may later transfer its shares of ownership to a third, unrelated company located outside of Xinjiang, and this subsidiary may also change its name.²⁰⁶ In fact, these tactics—using a “do-nothing” shipper, routing through a subsidiary, ownership divestment, and name change—can be used together to create layers of opaqueness, exactly what happened in the red dates case.²⁰⁷

In a world of nimble corporate forms and complex supply chains, the limits of product nationality are apparent. In particular, corporate law doctrines such as corporate personhood and corporate identity, developed to solve very different problems,²⁰⁸ are ill-equipped to deal with policymakers’ current focus on national security, human rights, and geopolitics. As the target of regulation shifts, the means of regulation likewise have to change. Indeed, U.S. laws have now paired product-based regulations with at least two other vehicles: entity-based and geography-based restrictions. The next Section turns to these developments.

B. FROM PRODUCTS TO ENTITY- AND GEOGRAPHY-BASED REGULATIONS

The limits of product nationality as a regulatory tool—its complexities, imperfect fit with corporate practice and manufacturing reality, and susceptibility to manipulation—have prompted policymakers to experiment with alternative approaches. Two options are prominent: entity-based regulations and geography-based restrictions. This Section examines these alternatives through two recent developments in U.S. law: the Entity Lists (relating to trade restrictions) and the designation of Foreign Entities of Concern (relating to federal funding). As we will see below, each combines the nationality approach with both entity- and geography-based regulations for a more comprehensive reach.

1. The Entity Lists

Consider first the Entity Lists, which come in at least two versions: a general Entity List maintained by the U.S. Department of Commerce’s Bureau of Industry and Security, and a UFLPA Entity List maintained by the

205. See Chen, *supra* note 120 (quoting experts on the common occurrence of Xinjiang companies having out-of-region subsidiaries).

206. *Id.* (documenting these methods).

207. *Id.*

208. Traditional corporate law’s personhood and identity jurisprudence was developed primarily to deal with the agency problem within corporate governance, that is, the separation of ownership (by shareholders) and control (by management). For an overview of this jurisprudence, see Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1629–46.

Department of Homeland Security—targeting national security and human rights concerns, respectively.²⁰⁹ The former “identifies entities reasonably believed to be involved, or pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States” and imposes license requirements for “exports, reexports, and transfers (in-country)” to listed entities.²¹⁰ In effect, U.S. actors cannot sell to firms on the Entity List unless they first obtain a license to do so. The Commerce Department added Huawei and its worldwide affiliates to the list in 2019; it has since expanded it to cover entities deemed acting at the behest of Russia, Egypt, and other countries.²¹¹

The UFLPA Entity List operates in an analogous manner, in the context of enforcing the UFLPA. It attempts to capture the Xinjiang Production and Construction Corps’ economic reach by identifying its extensive network of subsidiaries and partners along Xinjiang-origin supply chains. Blacklisted entities include those “in Xinjiang that mine, produce, or manufacture wholly or in part any goods, wares, articles, and merchandise with forced labor,” “entities working with the government of Xinjiang to recruit, transport, transfer, harbor or receive forced labor,” as well as entities that assist in the export of Xinjiang products or source materials from the region.²¹²

One way to think about the two Entity Lists is that they, in essence, formalize the selection of entity-based product attributes: on the supply side, manufacturing firms and supplier networks; on the demand side, the product’s end user. The UFLPA Entity List, consistent with the rights prism, targets entities that manufacture or are otherwise involved in the distribution and export of Xinjiang products. The Commerce Entity List, as we see above in the analysis of the security prism, targets a product’s end user—whether corporate entities (such as Huawei or its affiliates) or the ultimate state actors who stand to benefit (China, Russia, and Egypt, among other countries named on the list).

In broadening the target of regulations from product attributes to entities, this approach minimizes the ability to evade regulations by covering

209. See Commerce Entity List, *supra* note 160; Notice Regarding the Uyghur Forced Labor Prevention Act Entity List, 88 Fed. Reg. 38080 (June 12, 2023) [hereinafter UFLPA Entity List].

210. Commerce Entity List, *supra* note 160.

211. See *Commerce Adds 26 Entities to the Entity List for Actions Contrary to U.S. National Security Interests*, BUREAU OF INDUS. & SEC., U.S. DEP’T OF COM. (Oct. 21, 2024), <https://www.bis.gov/press-release/commerce-adds-26-entities-entity-list-actions-contrary-u.s.-national-security-interests> [https://perma.cc/LW4Q-GMWH].

212. UFLPA Entity List, *supra* note 209; see also *supra* notes 203–07 and accompanying text (discussing strategies to bypass U.S. sanctions of Xinjiang products).

the corporate and contracting networks themselves. Yet, this approach is not without flaws. From an implementation perspective, it requires constantly keeping up with the target entity's economic networks and changing corporate forms, including sometimes thousands of subsidiaries (as with the XPCC). Because these firms are often foreign companies, acquiring this kind of information requires intelligence that may be unavailable, difficult to obtain, or difficult to verify. From a regulatory perspective, the Entity Lists can lead to overreach by including companies or individuals with only a tenuous connection to problematic activities and products, potentially harming legitimate businesses and broader commerce flows. This, together with a lack of transparency on how to get on and off the lists, has led to ongoing lawsuits challenging Entity List inclusions.²¹³ Finally, from a trade perspective, the Entity Lists have the effect of hastening a regulatory race. The PRC, for example, enacted a law called the "Unreliable Entity List," among a host of other retaliatory measures, that targets U.S. companies deemed to be engaged in discriminatory business practices in China.²¹⁴

2. Foreign Entities of Concern

If the Entity Lists operate by "blacklisting" firms to block their access to U.S. markets, the designation of a "foreign entity of concern" ("FEOC") provides a broad definition keyed on control and ownership. The FEOC designation emerged as part of U.S. regulators' turn to industrial policy and appears across all three of the Biden administration's major laws in this area: the Infrastructure Investment and Jobs Act (regarding battery grant programs);²¹⁵ the CHIPS and Science Act (relating to semiconductor funding);²¹⁶ and the Inflation Reduction Act (as applied to clean vehicle tax credit).²¹⁷ FEOC is broadly defined as a foreign entity "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign

213. See, e.g., *Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716 (D.C. Cir. 2022); *Fed. Express Corp. v. U.S. Dep't of Com.*, 486 F. Supp. 3d 69, 73 (D.D.C. 2020); Jacob Aaron Pagano, *Contrary to National Security: The Rise of the Entity List in U.S. Policy Towards China and Its Role in the National Security Administrative State*, 61 COLUM. J. TRANSNAT'L L. 453, 491–97 (2023) (detailing several litigations relating to the general Entity List).

214. See Rao, *supra* note 103, at 804–23 (describing China's retaliatory responses). PVH Corporation—Tommy Hilfiger and Calvin Klein's parent company—was among the first U.S. companies to be investigated pursuant to China's Unreliable Entity List. See *China Puts PVH Corp, Illumina on Its Unreliable Entity List*, REUTERS (Feb. 4, 2025), <https://www.reuters.com/world/china/china-puts-pvh-corp-illumina-its-unreliable-entity-list-2025-02-04> [<https://perma.cc/7Y24-922W>].

215. See Infrastructure Investment and Jobs Act, 42 U.S.C. §§ 18741(b)(3), (c)(3) (2021).

216. See Creating Helpful Incentives to Produce Semiconductors and Science Act, 15 U.S.C. §§ 4651–52 (2022).

217. See Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 13401(e)(2), 136 Stat. 1818, 1957 (2022).

country that is a covered nation.”²¹⁸ Covered nations, in turn, include the PRC, Russia, North Korea, and Iran.²¹⁹

Under each of the three laws, a potential recipient is disqualified from receiving benefits if the qualifying act involves an FEOC. Specifically, the Infrastructure Investment and Jobs Act provides funding to support domestic battery processing and manufacturing and directs its implementing agency, the Department of Energy, to prioritize applicants who (1) will not use material supplied by or originating from an FEOC or (2) will not export critical materials to an FEOC.²²⁰ The Inflation Reduction Act similarly targets FEOCs in the context of the critical mineral supply chains. It provides businesses and consumers with a clean vehicle tax credit for new EV purchases provided that a certain percentage of the critical minerals contained in the EV's battery were “extracted or processed . . . in the United States” or its free trade partners.²²¹ Such a credit is eliminated, however, if the EV's battery contains any critical minerals “extracted, processed, or recycled” by an FEOC.²²² Considering that the global EV industry is dominated by Chinese firms, this provision thus raises the price of EVs that contain Chinese component parts or critical mineral inputs, thereby incentivizing brands to switch to U.S. or allied products.²²³ The CHIPS and Science Act, on the other hand, is designed to prevent the transfer of U.S. technology to suspicious foreign entities. It excludes FEOCs from receiving CHIPS funding, whether directly as an applicant or indirectly through collaboration or technology licensing with another firm.²²⁴ A “technology clawback” provision further allows for the recovery of funds if the recipient is found to engage in joint research or technology licensing with an FEOC during the term of the award.²²⁵

218. 42 U.S.C. § 18741(a)(5)(C). Foreign entity of concern (“FEOC”) also includes foreign terrorist organizations, sanctioned persons and entities on the Specially Designated Nationals and Blocked Persons List, among others. *Id.* This definition appears in the Infrastructure Investment and Jobs Act and is cross-referenced in the other two Acts. *See supra* notes 216–17.

219. 42 U.S.C. § 18741(a)(5)(C).

220. *See id.* § 18741(b)(3)(C) (material processing applicants); *id.* § 18741(c)(3)(C) (manufacturing and recycling applicants).

221. *See* Inflation Reduction Act § 13401(e)(2), 136 Stat. at 1957.

222. *Id.*; *see also* Interpretation of Foreign Entity of Concern, 89 Fed. Reg. 37079 (May 6, 2024) [hereinafter DOE Final Guidance] (final interpretive rule by the Department of Energy); Clean Vehicle Credits Under Sections 25E and 30D; Transfer of Credits; Critical Minerals and Battery Components; Foreign Entities of Concern, 89 Fed. Reg. 37706, 37769 (May 6, 2024) (final regulations issued by the Internal Revenue Service).

223. *See The United States Takes Actions to Secure Supply Chains for Critical Minerals*, 119 AM. J. INT'L L. 168, 168–72 (2025) (documenting the effects of U.S. laws on the EV industries).

224. *See* 15 U.S.C. §§ 4651–52.

225. *See id.* § 4652(a)(5)(C) (Technology Clawback provision).

Unlike the Entity Lists, which rely on the positive identification of companies and individuals of concern, the FEOC regime uses a broad definition, allowing for flexibility and wide coverage. But, like the Entity Lists, this can lead to over-inclusiveness, here due to the broad definition of ownership, control, and influence. Control, for example, is set at a relatively low threshold of 25% and applies to equity interests, voting rights, and board seats.²²⁶ Effective control also counts, though the term is not well defined in the various Acts or in subsequent guidance from the respective implementing agencies.²²⁷ The implementing agencies themselves—the Department of Energy for the battery and critical minerals supply chains, and the Department of Commerce for semiconductors—have issued diverging guidelines on what needs to be established for control, justified by the different purposes of the statutes.²²⁸

Like the Entity Lists, the FEOC standard incentivizes companies to inspect their supply chains and business partners closely. But the FEOC's complex requirements mean that a great deal of information gathering and tracking is needed, likely inducing high compliance costs and legal uncertainty.

These examples illustrate a broader trend: entity- and geography-based regulations seek to transcend the limitations of product nationality by targeting firms or territories directly, often in combination. The Entity Lists and the FEOC designation pivot to firms' identities or affiliations, aiming at firms' relations with nation-states or subnational foreign entities that are deemed concerning to U.S. national security or human rights interests. In doing so, they address some of the shortcomings of product nationality regulations, in particular the latter's susceptibility to supply chain manipulation and failure to capture intangible and tenuous attributes like control.

Yet, as we see above, these innovations are not panaceas. They inherit familiar challenges, such as high compliance costs and enforcement complexity, and introduce new ones, such as cross-agency inconsistency and overreach. The Entity Lists' focus on specific firms requires constant

226. Control, for example, is set at 25% of equity interests, voting rights, or board seats. *See* DOE Final Guidance, *supra* note 222, at 37082.

227. *See, e.g., id.* at 37083 (noting that effective control may be implicated if an FEOC is given the right to “determine the quantity or timing of production,” “determine which entities may purchase or use the output of production,” “restrict access to the site of production,” etc.).

228. In its final guidance issued in May 2024, the Department of Energy explicitly stated that its criteria for determining whether an entity is an FEOC do not need to match the criteria promulgated by the Department of Commerce. *See id.* at 37082.

updating as entities adapt, while FEOC's broad brush may deter legitimate investment. Moreover, these approaches are often layered atop nationality-based rules rather than replacing them, as seen in the interplay between tariffs and export controls. This further amplifies regulatory complexity and legal uncertainties, leaving it to businesses to navigate and courts to reconcile these overlapping frameworks.

V. CONCERNS AND POSSIBILITIES

A. CONCERNS

If one thing is clear, it is that differentiation lies at the heart of trade. Even as the WTO was founded on the principle of nondiscrimination, our modern international economic order cannot function without effective ways to distinguish products by nationality.

But even though nationality differentiation has always mattered, there is something disquieting about the current heightened scrutiny. Nationality-based rules, even if for inanimate products and for legitimate reasons, risk being co-opted into a larger narrative that can perpetuate stereotypes, exacerbate discriminatory practices, or even incite violence against certain national and ethnic groups.²²⁹ As history has shown, economic nationalism, if left unchecked, can quickly morph into dangerous racialized animosity. During the 1980s, as the United States and Japan were embroiled in trade wars over automobiles and steel, anti-Japanese sentiment surged in the United States.²³⁰ Japanese Americans faced increased hostility and harassment.²³¹ To the dismay of a congressional caucus, one congressman was quoted as referring to Honda executives as “little yellow people”;²³² another congressman, even more shockingly, opined that the United States should have dropped four bombs.²³³ In 1982, Vincent Chin, a Chinese American man, was brutally killed when his attackers mistakenly believed he was Japanese and blamed him for the decline of the American auto

229. See, e.g., Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145, 145–53, 171 (2021) (sounding grave concerns about the Department of Justice's China Initiative and arguing that its use of “China” created “an overinclusive conception of . . . threat” to people deemed possessing “China-ness”).

230. See Robert Lindsey, *Resentment of Japanese is Growing, Poll Shows*, N.Y. TIMES, Apr. 6, 1982, at B12 (noting poll results); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989) (studying how U.S.-Japan economic friction fueled xenophobia and anti-Asian sentiment in the 1980s).

231. See TAKAKI, *supra* note 230, at 179–230.

232. Kenneth B. Noble, *Tough-Nosed and Enigmatic*, N.Y. TIMES, July 11, 1982 (§3), at 9.

233. Peter Tasker, *Trade Wars — Lessons from the 1980s*, NIKKEI ASIA (Mar. 30, 2018), <https://asia.nikkei.com/opinion/trade-wars-lessons-from-the-1980s> [<https://archive.ph/QrZ2k>].

industry.²³⁴ Chin's murder and the subsequent disappointing legal process sparked outrage and galvanized a pan-Asian civil rights movement, uniting previously fragmented Asian communities.²³⁵

This historical backdrop offers a cautionary note on the growing scope of "adverse nationality"—which, as outlined above, can span from product attributes to business entities to entire nations. Current U.S.-China tensions have already begun to replicate some of the pathologies of past economic nationalism.²³⁶ Balancing national security imperatives while setting up guardrails against these dangerous tendencies is a thorny but critical task for the preservation of American democratic values. As legal scholar Mark Jia astutely warned, "[e]fforts to compete with China may unwittingly lead us to emulate it."²³⁷

B. POSSIBILITIES

This Article's focus on the United States invites reflection on other possibilities. Here, the commerce-rights-security prisms are inductive patterns that prominently reflect the United States' pressing concerns with the rise of China. They reveal the current preoccupations of U.S. trade law, though they need not be exhaustive or determinative.

Imagine, for example, a hexagonal prism with more sides than a triangular one. One may consider prisms relating to a product's cultural heritage, socioeconomic issues, historical developments, and regionalism, to name just a few.²³⁸ A cultural prism, for example, might investigate the importance placed on "made in" labels and certifications that has become a global trend. A socioeconomic prism may be concerned with the distributive effects of attributes such as intellectual property, the reshuffling of labor, and dispossession of land for industrial zones. A prism trained on regionalism and historical context may help illuminate some of the diverging rules of origin in Europe, Asia, and Africa.

234. WHO KILLED VINCENT CHIN? (Films News Now Foundation, released 1987) (a documentary on Vincent Chin's case).

235. *Id.*

236. See generally Mark Jia, *American Law in the New Global Conflict*, 99 N.Y.U. L. REV. 636 (2024) (positing that U.S.-China conflict has led to a diminishment of rights for certain groups in the United States); Matthew S. Erie, *Property as National Security*, 2024 WIS. L. REV. 255 (2024) (documenting recent U.S. state laws imposing restrictions on Chinese nationals' ability to buy homes).

237. See Jia, *supra* note 236, at 710.

238. For one such example, see Nguyen, *Alternate Prisms*, *supra* note 21 (investigating an alternate cultural prism through the case of rooibos tea).

Having these kinds of additional perspectives may help move our collective thinking beyond the currents of the present moment, so heavily pulled by a backlash to globalization and great power rivalries.²³⁹

CONCLUSION

In an era of unstable U.S. trade policy, product nationality bears an ever-heavier legal load. This Article's main contributions are both descriptive and conceptual. Descriptively, it charts the transformation of product nationality from a trade law instrument to a critical lever across broader domains, in particular the trade–security and trade–human rights nexus. Conceptually, it offers a novel attribute selection framework to unpack how this transformation occurred. This framework operates by disaggregating a product into discrete supply-side and demand-side attributes and investigates how different legal prisms select for these attributes.

At the heart of these dynamics lies a paradox. While globalization purports to erase national economic boundaries, it simultaneously sharpens their significance, amplified by the proliferation of origin rules and fierce competition among states and firms vying for a position within global supply chains. For physical goods, product nationality is where the proverbial rubber hits the road. The regulatory frameworks governing product nationality and its underlying attributes are in a state of considerable flux and innovation. Existing legal standards such as rules of origin, the Entity Lists, and the foreign direct product rule are being retooled to address new geopolitical developments, while new ones such as the foreign entity of concern designation are still being developed and refined.

For businesses navigating an intricate maze of regulations, this Article underscores the need for heightened supply chain due diligence and compliance foresight. As the stakes get higher—penalties for violations range from hefty fines to the revocation of market access²⁴⁰—firms that invest in transparency and build flexible, resilient supply chains will be better positioned to navigate today's complex trade environment. Beyond the ongoing shifts toward onshoring and friend-shoring, high-cost, high-reward regulations may further splinter global supply chains into networks of “trusted business partnerships,” especially in lucrative yet heavily scrutinized sectors such as defense, critical minerals, semiconductors, and electric vehicles.

239. See *supra* Section V.A.

240. See *supra* note 164 and accompanying text (noting the consequences of violating the foreign direct product rule).

For policymakers, regulatory underreach poses a serious problem, but so can regulatory overreach. As well documented elsewhere, vague and expansive rules leave room for arbitrary interpretation and enforcement, creating legal uncertainty for businesses and discouraging legitimate economic cooperation.²⁴¹ Even more concerning, as the experience of the U.S.-Japan trade wars showed, judgments based on the nationality of products can spill over to people, resulting in racialized violence and backlash against hard-won rights and liberties.²⁴²

Finally, as scholars of globalization well recognize, complex challenges demand informed, nuanced, and multifaceted approaches.²⁴³ This Article pulls together threads from trade, security, and human rights in one such effort, but the analysis here is limited in its focus on the United States. The commerce-rights-security prisms examined here reflect the preoccupations of the United States in a moment defined by domestic backlash and the rise of China. Other countries and regions, informed by different priorities and historical experiences, are likely to adopt different approaches. Alternate prisms—cultural, historical, socioeconomic, and many more—may offer more holistic perspectives on foreign products and, in turn, help move our collective imagination beyond the contours of the present moment.

241. See, e.g., Eichensehr & Hwang, *supra* note 26, at 612–13 (urging the executive branch to exercise its authority judiciously and with transparency, in the context of CFIUS’s expanding reach).

242. See *supra* Section V.A.

243. See, e.g., ROBERTS & LAMP, *supra* note 6, at 12–17 (explaining the advantages of multiperspective thinking).