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Friendshoring, Nearshoring, Greenshoring and Resshoring: Changing Faces of Global Supply Chains and its Impact on International Economic Law Introduction to the Special Issue

I INTRODUCTION

In an era where businesses are increasingly interconnected, one would expect that globalization would ensure greater integration and coordination across sectors and countries of the global economy. Globalization is mostly about living and working together in an interdependent world, where goods, services, technology and capital can cross borders with seamless ease and support economic activities in distant locations and variegated sectors. In such a world, open trade, harmonized processes, and regulatory standards would ensure that gains from open trade and transnational networks would work to the benefit of all. In such a world, a country does not have to be self-sufficient to meet its own needs. In an open world, there is no need to engage in protective measures to ensure steady supply of goods because every country has the unfettered right to seek open flow of commonly traded goods and essential supplies. The very objective of establishing the World Trade Organization (WTO) was to allow for the optimal use of the world's resources to create an integrated and durable economic order.¹

The developments in the world economy in recent times have cast certain doubts on the merits of interdependence. Interdependence in normal and peaceful times is nothing extraordinary. However, in turbulent times, in the midst of growing economic tensions, rising transportation and logistics costs, and the race to secure essential resources, interdependence is a fanciful or risky proposition. In simple terms, interdependence will not work, if nations act in self-interest or for pure strategic interests. In this context, it is necessary to understand how global businesses and firms must adapt to address the external challenges and geopolitical considerations.

Initially, the focus was on reshoring. The objective was to claim back some of the industries that had left shores of their territory to more competitive markets. The focus was to encourage these industries and firms to relocate to their primary markets and home locations in the wake of continued supply chain pressures. It is reported that reshoring has seen moderate success in recent times.²

Friendshoring, in its literal sense, is a strategy that is intended to create a robust and more resilient supply chain to encourage trade and commerce within a group of friendly or trusted nations. The concept gained currency when the United States (US) Treasury Secretary Jannet Yellen coined the term in her Atlantic Council speech.³ In Yellen's words, '[f]avoring friend-shoring of supply chains to a large number of trusted countries so we can continue to securely extend market access, will lower the risks to our economy as well as to our trusted trade partners'.⁴ While the Treasury Secretary acknowledged the economic benefits of sourcing based on the world's network of supply chains, she highlighted the associated risk of reliance on adversaries.

2 INTERNATIONAL TRADE AND GLOBAL INTERCONNECTEDNESS

The concept of friendshoring or nearshoring emerged from the fault lines of the ongoing political and trade tensions. The Sino-US political tensions – which aggravated during the Trump Presidency – led to measures on both sides to impose import curbs on each other's products and technologies. There was a strong push in the US to reduce dependency on Chinese supplies and imports and preempt transfer of certain cutting edge technologies. While some of the US domestic concerns were linked to

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¹ Preamble, Marrakesh Agreement Establishing the World Trade Organization (1995).

² Albachiaras Boffeli, Luciano Fratocchi, Matteo Kalchsmidt & Susana Silva, *Doing the Right Thing or Doing Things Right: What is Better for a Successful Manufacturing Reshoring?*, 14 Operations Mgmt. Res. 1, at 1–16 (2021), doi: 10.1007/s12063-021-00183-2.

³ US Department of Treasury, *Remarks by Secretary of the Treasury Janet L. Yellen on Way Forward for the Global Economy* (13 Apr. 2022), <https://home.treasury.gov/news/press-releases/jy0714>. (accessed Jan. 12, 2024).

⁴ *Ibid.*

the US losing competitive advantage vis-à-vis China in a range of manufacturing sectors, China's rising prowess in key technologies and new-age industries led to a genuine fear and concern in several Western powers about living in a China dominated world. In addition, China's hegemonic aspirations, its unique socialist system driven by capitalist considerations, the spread of its economic hegemony built on the planks of the Belt and Road Initiative (BRI), and such other factors, led to a strong feeling that businesses should decouple from China. The call for friendshoring or sourcing from trusted partners accentuated in the context of the supply chain disruptions that happened during the COVID-19 pandemic and recent geopolitical crises, especially the war in Ukraine. The global market prices for food and essential agricultural products such as rice, wheat and edible oils soared during this period. So did the price for agricultural inputs such as fertilizers. In addition, the energy prices were badly affected. In other words, businesses were concerned about focusing their production or supply only from a particular country or region. Businesses wanted to lessen their dependence on selected sources or, more importantly, reconsider and reassess various geo-security considerations in light of the new global developments. The governments too encouraged their businesses to look at alternative locations.

Friendshoring entails that countries trade or make investments in countries that share similar values or institutions. What these values are, or what type of institutions that share, are not clearly understood. But at a broad level, it could be inferred that some of these values are rooted in promoting and protecting human rights, ensuring worker protection, achieving environmental sustainability, and ensuring a corruption-free society. In other words, friendshoring signifies the desire to transact with business in countries that share common values and do not pose threat to the other partners in terms of ideological or geopolitical differences.

Some of the recent initiatives especially the various pillars of the Indo-Pacific Economic Framework (IPEF), the Quadrilateral Security Dialogue (QUAD) and I2U2 (India, Israel, United Arab Emirates and US), seek to bolster resilience against various types of evolving challenges, including geopolitical instability. The purpose of the above initiatives is not necessarily to promote free trade. Importantly, initiatives including the so-called trade Pillar of IPEF (Pillar 1) do not seek to enhance market access in goods or services and instead seek to cooperate on new age issues. The objective is to ensure that investment and cooperative initiatives around green and sustainable policies are promoted within the IPEF region. In other words, friendshoring will also acquire other connotations depending on the particular interests

or values it would like to advance. For example, the IPEF Pillar III on clean economy is encouraging 'greenshoring' in the sense that it seeks to promote climate-smart technologies and processes keeping in mind the goals and objectives of the Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCCC). In addition, such clubs can be used by countries that are considering the adoption of mechanisms such as carbon tax or carbon border adjustment mechanisms not to apply such measures to members or partners of such clubs. To take another example, as explained by Devon Whittle in this Journal, cross-border data flows can be facilitated in such clubs which are operated on the basis of trust. In other words, clubs based on friendshoring can seek regulatory harmonization in a more effective manner.

3 FRIENDSHORING OR FUTURE PROOFING?

In today's world, more than 80% of the globally traded goods and services are fragmented and dispersed across jurisdictions. The economic case for fragmentation is built on the availability of skilled work force, time-zone differences, macro-economic stability, and the access to raw materials and inputs. In many ways, the pre-pandemic period highlighted the advantages of focusing on value chains irrespective of their geographical locations. In that period, the global value chains were dominated by China and certain other countries which posed its own risk. In that context, friendshoring, nearshoring or reshoring is mostly also about future proofing their supply chains from potential risks, especially political and national security related risks. For example, several countries including Japan, Netherlands and the United States have imposed sanctions on exports of high-tech chipmaking equipment to Chinese groups.⁵ On the other hand, some Chinese companies are keen to source products without foreign-made components in order to future-proof themselves against possible retaliatory measures. These examples illustrate how friendshoring can potentially create a wedge within the global supply chains, and ultimately affect the patterns of trade.

4 FRIENDSHORING, AND ACCESS TO CRITICAL MINERALS AND RAW MATERIALS

These new patterns in global value chains gained prominence in the context of securing access to critical minerals and key goods. Critical minerals and key goods, are expected to fuel the transition to green economy. However, not all countries are equally endowed in the presence and processing of these minerals and inputs. In

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⁵ Demetri Sevastopulo & Sam Fleming, *Netherlands and Japan Join US in Restricting Chip Exports to China* Financial Times (28 Jan. 2023), <https://www.ft.com/content/baa27f42-0557-4377-839b-a4f4524cfa20> (accessed Jan. 12, 2024).

addition, critical minerals have highly complex supply chains. Finally, the recent geo-political conflicts and tensions have prompted countries to form clubs to expand trade and investment activities. Clubs including the climate club, sustainability club, or critical minerals club may have the effect of fragmenting the multilateral trade or economic order by ensuring that only a few countries have either the technologies, raw materials or the mass production facilities to meet the demands of the future.

As of writing this piece, countries are using a slew of measures to enable access the critical minerals and raw materials of the future. Some countries use economic frameworks such as the IPEF, or mineral security partnership agreements, and a host of countries are including *Energy and Raw Materials* chapters in their free trade agreements.

At the same time, there are challenges to the long-term sustainability of friendshoring, nearshoring or reshoring. These concepts go against the grain of free trade advocated by the WTO. Free trade, in its undiluted form, encourages sourcing from the most efficient or competitive producers. Free trade principles also reject preferential or special treatment for allies. Moreover, it is acknowledged that in order to effectively implement friendshoring, it should be built on the strengths of certain economic or trade agreement that is big or large enough to avoid amplifying inflation. It is also worth considering that most of the friendshoring concepts currently in vogue are not based on reciprocal tariff concessions or market access opportunities. Some US legislations such as the Inflation Reduction Act and the CHIPS and Science Act provide financial incentives, which in themselves can be contrary to the principles of free and fair trade. It is reported that the CHIPS and Science Act alone provides a financial support of USD 52 billion to the semiconductor industry.⁶ However, these incentives cannot last for long or will not get extension. If these incentives disappear or become difficult to claim, the economic case for friendshoring or nearshoring could be affected.

However, in the current geopolitical environment, the push for friendshoring, nearshoring or reshoring appears rational and logical. At least in the short run, these concepts have the potential or the effect of redrawing the landscape of globalization or in other words, reglobalization. The notions of reglobalization is based on the elements of de-risking and decoupling, which have been necessitated by some of the developments in the recent past. Unless carefully managed, reglobalization can lead to marginalization of certain economies and deepen economic exclusion and poverty within the excluded regions or countries. These policies can also impair the ground rules of international trading system, if they seek to be exclusionary.

5 SYNOPSIS VIEW OF THE ARTICLES

The articles selected in the Special Issue address a range of topics relating to friendshoring, nearshoring or reshoring. Krishna Bhattacharya and Advait Rao in their article explore how Indo-Pacific countries, particularly India, UAE, Japan, Australia, and the United States can use friendshoring to restructure global supply chains and collaborate on new and emerging areas of trade.

Jamshed Siddiqui in his article examines the legal and policy measures adopted by the US, EU and India to promote friendshoring and onshoring and notes that a one-size-fits-all approach need not be a sound strategy for countries exploring diversification of supply chains. Based on this analysis Siddiqui recommends how India should diverge from these approaches to better align with its specific needs.

Sparsha Janardhan and Aparna Bhattacharya in their article recommend the policy approach that should be taken by India to protect its interest in critical minerals in the context of ensuring security to its supply, international trade rules and other commercial considerations.

Devon Whittle's article sets out the connections between the idea of friendshoring and data flow restrictions. The article highlights the uncertainty of the application of current rules to data flow restrictions as well as the spillover effects of such policies for other policy interests (including in relation to internet governance and the strength of the rules-based trading system).

Some of the recent US legislations including the Inflation Reduction Act and the CHIPS and Science Act have raised significant interest among the international trade law community. Manya Gupta and Arnav Sharma in their article examine the complexities of onshoring and friendshoring semiconductor supply chains in the context of the US CHIPS and Science Act and how these legislations can potentially create the necessary ecosystem. Gupta and Sharma also examine the impact of this legislation and its conformity with international trade rules, especially the WTO rules. Rishabha Meena and Apoorva Vishnoi have provided a similar analysis with respect to the Inflation Reduction Act and its friendshoring perspective.

There have been significant discussions around the IPEF as a mechanism for implementing the Biden Administrations' friend shoring agenda. Three Pillars of the IPEF (Pillar II, III & IV) have already been concluded. Pushkar Reddy and Ridhish Rajvanshi in their article examine the geopolitical significance of IPEF in advancing friendshoring in the Indo-Pacific and the unique characteristics of the initiative in heralding a new area of rulemaking in international trade, particularly through standard

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⁶ Emily Benson, Japhet Quitzon & William Reinsch, *Securing semiconductor supply chains in the Indo-Pacific Economic Framework for Prosperity* (30 May 2023), <https://www.csis.org/analysis/securing-semiconductor-supply-chains-indo-pacific-economic-framework-prosperity>. (accessed Jan. 12, 2024).

setting. Ashutosh Kashyap in his article analyses Pillar II of IPEF (Supply Chain) in the context of labour rights and supply chain resilience, and predicts a possible shift in the sourcing of inputs and raw materials from the Asia-Pacific to the Indo-Pacific with a possible consolidation of the regional supply chain among trusted trade partners (friendshoring), and its potential benefits for India.

6 FRIENDSHORING, NEARSHORING AND THE SPECIAL GTCJ ISSUE

In conclusion, as we reflect on some of the important developments in a special issue of Global Trade and Customs Journal, I am grateful to Mr Jeff Snyder,

General Editor, Global Trade and Customs Journal for accepting the proposal to offer a special issue on this emerging theme. I would also like to thank the professional staff at the Centre for Trade and Investment Law (CTIL) for their enthusiasm for contributing to this special issue. I hope the readers would find these discussions contemporary, stimulating and insightful.

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Friends and Free Trade: How Indo-Pacific Countries Can Leverage the QUAD and I2U2 in Friendshoring

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Recent disruptions in international relations and the international trading order have given rise to new innovations in the ways countries trade. In this regard, friend-shoring is emerging as a means to recast entrenched global supply chains in a manner that favours friends and allies. Through this paper, we seek to explore how Indo-Pacific countries particularly India, United Arab Emirates (UAE), Japan, Australia and the United States (US) can use friendshoring to integrate itself into global supply chains. Particularly, we focus on how these countries can leverage multilaterals such as the Quadrilateral Security Dialogue (QUAD) and I2U2 (India, Israel, United Arab Emirates, US) to collaborate on traditional as well as emerging areas of trade and gain from the strengths of these trading partners. In doing so, we look at free trade agreements (FTA) and regional agreements that exist between these countries, to examine if the same may be channelized to further friendshoring. We also study major collaborations that are taking shape amongst these countries.

Keywords: friend-shoring, QUAD, I2U2, IMEEC, multilaterals

I INTRODUCTION

International trade and international relations have been going through a tumultuous phase, to say the least. The Covid-19 pandemic exposed and exacerbated the inequities and fault lines between countries of the so called 'global north' and 'global south'.¹ The TRIPS vaccine waiver at the Ministerial Council 12 (MC12)² which came towards the end of the pandemic was of little utility. At the same time, this churn in international relations and the multilateral trading system has also given rise to new ideas and experiments to bring about stability and greater prosperity. For instance, the idea of *friend-shoring* has captured popular imagination. Friend-shoring refers to a strategic partnership among countries that have similar geopolitical interests or are allies of each other.³ More plainly speaking, it is 'the act of moving parts of manufacturing from geopolitically risky

countries to friendlier ones'.⁴ It is used as a means to diffuse geopolitical shocks. As a result of friend-shoring has led countries to shift their supply chains and trade with countries who share the same value. While reallocating the supply chains, friend-shoring also opens up the scope for new and innovative trading strategies.

Across the Atlantic Ocean, the European Union has adopted a cautious and nuanced approach to friendshoring. Their stance is still evolving, reflecting an awareness of both the potential benefits and concerns associated with this strategy. While the EU's new economic security strategy does not explicitly endorse friend-shoring, it does highlight the importance of diversifying and bolstering supply chains with reliable partners, particularly in crucial areas like critical raw materials and green technologies. This aligns with the core principles of

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¹ Rosa Balfour, Lizza Bomassi & Marta Martinelli, *Coronavirus and the Widening Global North-South Gap* (Carnegie Europe, 2022), <https://carnegieeurope.eu/2022/04/25/coronavirus-and-widening-global-north-south-gap-pub-86891> (accessed 21 Dec. 2023).

² WTO | Ministerial Conferences – Twelfth WTO Ministerial Conference – Geneva Switzerland (2022), https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (accessed 10 May 2022); WT/L/1135, MC12 Outcome Document, (2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf&Open=True>; WT/L/1142, Ministerial Declaration on the WTO Response to the Covid-19 Pandemic and Preparedness for Future Pandemics, (2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/31.pdf&Open=True>.

³ Sarah Kessler, *What Is 'Friend-Shoring'?*, The New York Times (18 Nov. 2022), <https://www.nytimes.com/2022/11/18/business/friend-shoring-jargon-business.html> (accessed 20 May 2023).

⁴ Elisabeth Braw, *How to 'Friendsore'* (American Enterprise Institute 2023), <https://www.jstor.org/stable/resrep49333> (accessed 21 Dec. 2023).

friendshoring, but it is important to emphasize that the EU's primary objective lies in broader economic security goals.⁵

The Indo-Pacific region is broadly understood to be the interconnected space between the Indian ocean and the Pacific ocean.⁶ The region of Indo-Pacific constitutes about two-thirds of the global economy and is home to more than half of the world's population.⁷ Therefore, the ties among the Indo-Pacific countries has a huge potential for prosperity in terms of trade. Since the scope of the Indo-Pacific countries is vast, the paper is limited to assessing and analysing friend-shoring among India, United Arab Emirates (UAE), Japan, Australia and the United States (US). If these countries were to leverage this current trend in favour of friend-shoring, two groupings of particular interest which may be considered are the QUAD and I2U2. The QUAD and I2U2 were not originally conceived or structured with trade as the primary purpose. The QUAD is primarily a forum for military cooperation while I2U2 was formed to further technological cooperation and private sector involvement. In the countries represented in both groupings, India already has Free Trade Agreements (FTA) with Japan, Australia and the UAE, while preliminary discussions are also being held for an FTA with Israel. Similarly Australia and Japan has FTA with all the QUAD countries. The US does not have an FTA with India, but the bilateral trade among both the countries is substantial. India, Japan, Australia and the US are further engaging at the Indo-Pacific Economic Forum (IPEF). It is therefore natural for these countries to take the lead and push for QUAD and I2U2 to have a more progressive and holistic trade agenda. While traditional FTAs usually deal with market access for goods and services, the strategic partnerships enjoyed by these countries may be leveraged to collaborate in new sectors such as clean energy, critical minerals, space cooperation, among other sectors.

In order to explore this idea, we have divided this paper into four sections – Part I of the paper provides an introduction to the concept of friend-shoring as well as the circumstances that led to its current importance. Part II of the paper sheds light on the formation of the QUAD,

the activities being undertaken through the QUAD and how the framework can be channelized for trade purposes. Part III of the paper explains the working of the I2U2 and the initiatives which can position Indo-Pacific Countries (India, Australia, Japan, UAE and the US) as a serious trade player in West Asia. Part IV of the paper contains the conclusion and possible ways forward.

2 THE QUADRILATERAL SECURITY DIALOGUE (THE QUAD)

The QUAD or the Quadrilateral Security Dialogue is a coalition of four countries namely the US, Japan, Australia and India. The aim of the QUAD is to protect freedom of navigation, undertake cooperation activities and promote democratic values.⁸ The first seed of QUAD was sown during the 2004 earthquake and tsunami, where these countries came together to provide humanitarian assistance. Thereafter, in 2007 Japan made reference to strategic space in the Indo-Pacific which led to the formation of the QUAD.⁹ However, the QUAD had remained dormant since then but off-late it has again gained traction due to a change in the geopolitical scenario in the Indo-Pacific region. The QUAD has a vested interest in upholding international order in the Indo-Pacific region, promoting economic development, connectivity, security and keeping in check China's activity in the region. The new QUAD or QUAD 2.0 was revived in 2017, with the first official level talks taking place in Manila, Philippines.¹⁰ The meeting was then escalated to the level of foreign ministers in September 2019, and thereafter, the QUAD advanced to a leaders' level conference in March 2021.¹¹

The QUAD has had three summits up until now. The 2021 summit led to an ambitious plan of cooperation among QUAD members, which included vaccine production and distribution; climate change mitigation efforts and clean energy development; promotion of transparency and high-standard governance in the field of critical and emerging technologies; and development of a regional infrastructure partnership.¹² Climate change mitigation remained a focus, with the four countries announcing

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⁵ Alberto Rizzi, *Give and Take: How the EU's Friend-Shoring Can Improve Its Relations with the Global South* (ECFR 3 Aug. 2023), <https://ecfr.eu/article/give-and-take-how-the-eu-friend-shoring-can-improve-its-relations-with-the-global-south/> (accessed 21 Dec. 2023). Ruben Heusel, *Are We Still Friends? The U.S. and EU Approach to 'Friend-Shoring' of Supply Chains* (EJIL: Talk! 31 Oct. 2023), <https://www.ejiltalk.org/are-we-still-friends-the-u-s-and-eu-approach-to-friend-shoring-of-supply-chains/> (accessed 21 Dec. 2023).

⁶ Udayan Das, *What is Indo-Pacific?*, *The Diplomat* (13 Jul. 2019), <https://thediplomat.com/2019/07/what-is-the-indo-pacific/> (accessed 22 Dec. 2023).

⁷ The White House, *Indo-Pacific Strategy of the United States* (22 Feb. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/US-Indo-Pacific-Strategy.pdf> (accessed 22 Dec. 2023).

⁸ Congressional Research Service, *The QUAD: Cooperation Among the United States, Japan, India and Australia* 1 (30 Jan. 2023), <https://crsreports.congress.gov/product/pdf/IF/IF11678>.

⁹ *Ibid.*

¹⁰ Yang Rui & Wang Shida, *India and the Indo-Pacific Strategy Vision: Orientation, Involvement and Limits*, 28(3) *Contemp. Int'l Rel.* (May–Jun. 2018).

¹¹ Congressional Research Service, *supra* n. 8.

¹² The White House, *Fact Sheet: Quad Leader's Summit* (24 Sep. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/24/fact-sheet-quad-leaders-summit/> (accessed 20 May 2023).

a QUAD Climate Change and Mitigation Package (Q-CHAMP) to address mitigation and resilience in the Indo-Pacific region. Another area of cooperation is green shipping and clean energy supply chains.¹³ The members of QUAD are also committed to additional cooperation in the areas of research and development.¹⁴ The positive effect of QUAD grouping was most prominent during the COVID-19 crisis where QUAD members collectively donated almost eight million doses of vaccines to countries in need as well as provided aid to the tune of USD 900 million.¹⁵

The subsequent meetings of the QUAD have been even more ambitious. For instance, at the 2023 QUAD annual meeting, the QUAD members launched the QUAD Health Security Partnership, QUAD Infrastructure Fellowships Program, QUAD Partnership for Cable Connectivity and Resilience, deployment of Open Radio Access Networks, launch of QUAD Investors network and many more.¹⁶ This year's meeting specifically focused on clean energy supply chains.¹⁷

One route to increase engagement with QUAD members might be through FTAs. For instance, the India-Japan Comprehensive Economic Partnership Agreement (CEPA) has a dedicated chapter on economic cooperation (Chapter 13), prioritizing sectors like energy, environment, and infrastructure. Notably, the Agreement emphasize expanding cooperation scope, ensuring equitable participation, and implementing oversight through dedicated committees (sub-committee in India-Japan CEPA). This framework has nurtured initiatives like the India-Japan dialogue on decarbonization, the industrial competitiveness partnership, and joint railway projects, showcasing the dynamism of the partnership.¹⁸ Mirroring the India-Japan CEPA, the India-Australia Economic and Cooperation Trade Agreement (ECTA) acknowledges through Article 11.7 the importance of cooperation in implementing the ECTA and enhancing its benefits through cooperation activities.

In the context of trade agreements, it is also pertinent to note that the 2023 meeting summit of the QUAD stressed on the countries willingness to work together

under the IPEF Agreement. The IPEF has fourteen members (which includes all the QUAD Members) and has four trade pillars namely Trade, Supply chains, Clean Economy and Fair Economy.¹⁹ The threats of global warming and climate change have made countries incline towards renewable energy, clean energy and the promotion of sustainability. The Agreement on Clean Economy under IPEF has various cooperation activities such as²⁰:

- accelerate the research, development, commercialization, availability, accessibility, affordability, and deployment of a diverse set of clean energy and climate-friendly technologies;
- reduce global anthropogenic methane emissions by 2030, particularly through cost-effective measures in the energy sector;
- decarbonize and otherwise reduce the climate impact of the transportation sector, including through efforts related to the establishment of green shipping corridors, increasing the production and availability of sustainable aviation fuels, and decarbonizing the road sector, including by scaling up infrastructure and a vehicle fleet that supports zero emission transport (e.g., zero-emission vehicles and their associated infrastructure, and sustainable carbon-neutral fuels) while noting the range of pathways that the partners are adopting; and many more.

Along with supporting the region's transition to clean economies, the IPEF partners aim to expand investment flows in order to address the critical demand for funding for climate-related technology, infrastructure, and projects.

This emphasis on decarbonization and clean energy aligns with Indo-Pacific countries' COP26 objectives and its attempts to move towards a net-zero economy.²¹ This will help the Indo-Pacific region and especially India in particular with its efforts to become a global centre for the production of electric vehicles and to shift its energy consumption pattern to one that depends more on clean renewable energy sources. With the EU coming up with

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¹³ Manjari Chatterjee Miller, *The QUAD, AUKUS and India's Dilemmas*, Council on Foreign Relations (13 Oct. 2021), <https://www.cfr.org/article/quad-aukus-and-indias-dilemmas> (accessed on 20 May 2023).

¹⁴ The White House, *supra* n. 12.

¹⁵ *Workbook: QUAD Country COVID-19 Response Dashboard*, https://share.usaid.gov/views/QUADCOUNTRYCOVID-19ResponseDashboard/Indo-PacificRegionOverview?%3AshowAppBanner=false&%3Adisplay_count=n&%3AshowVizHome=n&%3Aorigin=viz_share_link&%3AisGuestRedirectFromVizportal=y&%3Aembed=y (accessed 20 May 2023).

¹⁶ *QUAD Leader's Joint Statement 2023* (20 May 2023), <https://www.pm.gov.au/media/quad-leaders-joint-statement> (accessed 19 Dec. 2023).

¹⁷ *Ibid.*

¹⁸ India-Briefing, *India-Japan Economic Partnership: Bilateral Trade, Infrastructure Projects, and Semiconductor Collaboration*, (27 July 2023) <https://www.india-briefing.com/news/india-japan-trade-investment-data-fy2023-new-frontier-areas-cooperation-29096.html> (accessed 21 Dec. 2023).

¹⁹ US Department of Commerce, *Joint Statement from Indo-Pacific Economic Framework for Prosperity Partner Nations* (16 Nov. 2023) <https://www.commerce.gov/news/press-releases/2023/11/joint-statement-indo-pacific-economic-framework-prosperity-partner-nations> (accessed 19 December 2023).

²⁰ *Ibid.*

²¹ *Net Zero Emissions Target*, (3 Aug. 2023) <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1945472> (accessed 21 Dec. 2023).

measures to advance clean and renewable energy, Indo-Pacific region might manoeuvre to get the first mover advantage to tap the markets of the EU and other countries. It is to be noted that even though the IPEF does not contain hard obligations or be subjected to any dispute settlement mechanism as in a typical FTA, but the initiatives under IPEF might actually turn out to be material benefit for countries.

Geopolitically IPEF has also helped in building stronger and friendlier relations among countries. The US and India are not members of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). The IPEF signifies the countries willingness for economic cooperation in the Indo-Pacific region.

Apart from these FTAs and IPEF, we see value in Indo-Pacific countries using the QUAD as an anchor to collaborate on critical minerals and create a 'QUAD supply chain on critical minerals'. In this regard, the US and Japan have entered into an ambitious Critical Minerals Agreement.²² This Agreement goes beyond mere trade, pledging joint efforts on multiple fronts. Firstly, both nations vow to keep export duties off these vital resources, ensuring smooth flow. Secondly, they commit to tackling unfair global practices that disrupt mineral trade. Thirdly, they establish best practices for assessing foreign investments in their critical minerals sectors, safeguarding national interests. Furthermore, the Agreement promotes sustainable practices by encouraging resource efficiency and circular economy approaches to minimize extraction needs and environmental impact. Importantly, it emphasizes upholding labour rights, with joint efforts on engagement, information sharing, and enforcement actions to address violations and promote worker wellbeing. Lastly, the pact champions employer neutrality, fostering fairer unionization and worker representation within the critical minerals sector. This comprehensive Agreement marks a significant step towards a more secure and ethical future for electric vehicle battery production, with both nations working hand-in-hand to build a resilient and sustainable supply chain.²³ We posit that

Australia, with its rich reserve of raw materials including these critical minerals²⁴ and India with its comparative labour advantage can be roped in through the QUAD framework in a win-win for these four countries in securing supply chains for critical minerals.

3 INDIA, ISRAEL, USA AND UAE (THE I2U2)

The I2U2 (which stands for India, Israel, USA and UAE) took form in 2021, with an aim 'to encourage joint investments in six mutually identified areas such as water, energy, transportation, space, health, and food security'.²⁵ This grouping intends to mobilize private sector capital and expertise to help modernize infrastructure, low carbon development pathways for industries, improve public health, and promote the development of critical emerging and green technologies.²⁶

The beginnings of the I2U2 can be traced to a piece authored by Mohammed Soliman, a thought leader in foreign policy, where he outlined a compelling case in his Middle East Institute essay for an expansive 'Indo-Abrahamic Alliance' encompassing India, Israel, the UAE, and the US, with room for future inclusion of Egypt and Saudi Arabia. This ambitious proposition sought to establish a favourable balance of power within West Asia, thereby bolstering regional peace and security.²⁷

For US and India the I2U2 and broader Middle Eastern engagement offer multifaceted benefits. It has allowed India to intensify partnerships with regional players like the UAE and the US, fostering broader strategic alignment.

In the context of I2U2, India's economic and strategic ties with the Middle East particularly with Israel and UAE and the US, especially the robust trade, defence, and diaspora relations shared among the three countries, establish a solid foundation for the I2U2 collaboration in the geopolitical realm. From a geo-commerce perspective, the UAE holds the position of being India's second-largest export market, with approximately USD twenty-five billion worth of goods being exported to the Gulf nation.²⁸ Israel on the other hand, has been a reliant supplier of defence equipment, as well as a reliant collaborator in

Notes

²² United States and Japan Sign Critical Minerals Agreement (United States Trade Representative), (28 March 2023) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/march/united-states-and-japan-sign-critical-minerals-agreement> (accessed 22 Dec. 2023).

²³ *Ibid.*

²⁴ Geoscience Australia, *Critical Minerals at Geoscience Australia* (Geoscience Australia 19 Dec. 2023), <https://www.ga.gov.au/scientific-topics/minerals/critical-minerals> (accessed 22 Dec. 2023).

²⁵ The White House, *Joint Statement of the Leaders of India, Israel, United Arab Emirates, and the United States (I2U2)* (The White House 14 Jul. 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/joint-statement-of-the-leaders-of-india-israel-united-arab-emirates-and-the-united-states-i2u2/> (accessed 20 May 2023).

²⁶ *Ibid.*


²⁷ *An Indo-Abrahamic Alliance on the Rise: How India, Israel, and the UAE Are Creating a New Transregional Order* (Middle East Institute), (28 July, 2021) <https://www.mei.edu/publications/indo-abrahamic-alliance-rise-how-india-israel-and-uae-are-creating-new-transregional> (accessed 21 Dec. 2023).

²⁸ Ebtesam al-Ketbi, *Bridging Geoeconomics and Geopolitics: An Emirati Strategic Vision of I2U2 Complementarity*, in *I2U2: Pathways for a New Multilateral* (Observer Research Foundation, 2023) https://www.orfonline.org/wp-content/uploads/2023/03/ORF_Monograph_I2U2.pdf (accessed 21 Dec. 2023).

pharmaceuticals, software technologies, agriculture, and homeland security.²⁹

Under the framework of the I2U2, the UAE is investing in the agricultural sector of India with the aim of bolstering its own food security measures, all the while aiming to forge a cohesive and strategic link between the regions of West Asia and South Asia. The US, recognizing the potential implicit in uniting three partners (India, UAE and Israel), views this collaboration as a possible alternative to counter the incursions made by China in the region, while simultaneously urging American companies to adopt a policy of friend-shoring in these regions.³⁰

The cooperation on clean energy is not only among the QUAD members but also among the members of the I2U2 grouping. I2U2 has undertaken many initiatives and projects on clean energy. In Gujarat, India the I2U2 members are cooperating on a hybrid renewable energy project that combines solar and wind power with a battery energy storage technology. For the project, a feasibility study was funded by the US Trade and Development Agency. Companies in the United Arab Emirates are looking for ways to collaborate on important knowledge projects. Together with the UAE and India, Israel and the US are highlighting prospects in the private sector. These kinds of projects could turn the I2U2 into a global centre for alternative supply chains in the field of renewable energy.

Apart from this, in a historic collaboration, the I2U2 nations leveraged their Artemis Accords commitment and space expertise to unveil  initiative at the United Nations General Assembly (UNGA). This joint venture aims to harness their combined space observation data to develop a unique tool empowering policymakers, institutions, and entrepreneurs to tackle environmental and climate challenges, solidifying their dedication to harnessing space for the benefit of humankind.³¹

I2U2 places significant emphasis on leveraging private capital investment and technical expertise to address challenges pertaining to waste management, healthcare accessibility, and fostering entrepreneurial networks.

Like the India-Japan CEPA and the India-Australia ECTA, India and the UAE has also explored building ties within the I2U2 through the India-UAE CEPA. The India-UAE CEPA contains a dedicated chapter on

Economic Cooperation (Chapter 14), where both nations have prioritized collaboration in key sectors like energy, environmental goods and services, and manufacturing. This dynamic partnership extends beyond mere Agreements, fuelled by the Economic Committee on Cooperation envisaged under the FTA that diligently monitors progress under the FTA. Furthermore, the Comprehensive Strategic Partnership has fostered a fertile ground for significant investment opportunities. Recognizing India's growing energy needs, the UAE stands as a prominent supplier, taking pride in its pioneering role as the first foreign partner to contribute to India's Strategic Petroleum Reserves Programme. Indian businesses, meanwhile, have carved a niche as key concession and exploration partners in Abu Dhabi's energy sector, witnessing steady growth in their involvement.³²

Recently, in a significant step towards intercontinental connectivity, India, Israel, the US, Saudi Arabia, the UAE, EU nations, and others signed an agreement to establish the India-Middle East-Europe Economic Corridor (IMEEC) at the side-lines of the G20. This ambitious project aims to propel economic growth and integration across Asia and Europe by forging a multi-faceted connection.³³ The IMEEC envisions a robust rail network interwoven with strategically linked ports, bridging the gap between Europe, the Middle East, and Asia.

The IMEEC comprises two corridors: one linking India to the Arabian Gulf and another connecting the Gulf to Europe. This infrastructure aims to bolster regional supply chains, enhance trade accessibility, and improve trade facilitation practices. The MoU emphasizes environmental, social, and governance considerations. This includes laying cables for both electricity and digital connectivity, as well as facilitating clean hydrogen export alongside the railway route.³⁴ IMEEC marks a pivotal moment in forging closer economic ties and fostering sustainable development across continents. It remains to be seen how this ambitious project unfolds, but its potential to reshape global trade and connectivity is undeniable.

4 CONCLUSION

In summary, the idea of friend-shoring for nations has enormous potential to promote global solidarity, understanding, and collaboration. Through proactive efforts to

Notes

²⁹ *India-Israel Bilateral Relations*, Ministry of External Affairs, https://www.mea.gov.in/Portal/ForeignRelation/India-Israel_relations.pdf.

³⁰ Navdeep Suri, *I2U2 and the Case for Minilaterals*, (2023) in *I2U2: Pathways for a New Minilateral* (Observer Research Foundation).

³¹ *The I2U2 Group Announces Joint Space Venture* (United States Department of State) (22 Sept. 2023), <https://www.state.gov/the-i2u2-group-announces-joint-space-venture/> (accessed 21 Dec. 2023).

³² Ministry of External Affairs, *Joint India-UAE Vision Statement – Advancing the India-UAE Comprehensive Strategic Partnership: New Frontiers, New Milestones* (18 Feb. 2022), https://www.mea.gov.in/bilateral-documents.htm?dtl/34877/Joint_IndiaUAE_Vision_Statement__Advancing_the_IndiaUAE_Comprehensive_Strategic_Partnership__New_Frontiers_New_milestones (accessed 21 Dec. 2023).

³³ *New Economic Corridor to Connect Asia, Europe & US* (The New Indian Express) (10 Sept. 2023), <https://www.newindianexpress.com/thesundaystandard/2023/sep/10/new-economic-corridor-to-connect-asia-europe-us-2613322.html> (accessed 19 Dec. 2023).

³⁴ *Ibid.*

establish friendships and alliances, countries can dismantle obstacles, encourage intercultural communication, and work together towards common objectives. Friend-shoring is a shift away from conventional geopolitical divisions and towards a more harmonious and integrated global community. When countries consciously work to foster friendships, they create opportunities for information sharing, cooperation in solving problems, and support for one another. Friend-shoring is a useful tactic to

forge diplomatic connections, develop bridges, and forge a more cohesive and resilient international community in a time when global issues need cooperative answers. As shown in the paper friend-shoring has shown a new pathway for countries to explore new opportunities and innovate. In increasing such engagement, grouping such as the QUAD and I2U2 can serve as effective *minilateral* forums to increase trade amongst participants in addition to military, technological and aid cooperation.

Reshaping Global Supply Chain and India: A Quest for Friend-Shoring and On-Shoring

Jamshed Ahmad Siddiqui*

Geopolitical considerations are playing an increasingly dominant role in countries' trade policies over recent years. In the context of geopolitical tension and economic fragmentation, countries are reshaping their global value chains (GVCs) to address their economic security from possible future disruption of supply Chains. In recent years, countries, particularly, the United States (US) and the European Union have taken several legal measures and adopted various policy tools either unilaterally or through bilateral and plurilateral alliances that further the idea of friend-shoring and on-shoring. This paper intends to map those legal and policy tools adopted by the United States and the European Union that further the idea of friend-shoring and on-shoring and analyses those tools in the Indian context. The paper argues that though the EU and the US are the largest trading partners of India and their strategies will likely have an impact on India. Nonetheless, India need to look beyond these strategies pioneered by the US and EU to cater for the needs of its specific industry concern.

Keywords: Global Value Chain, Supply Chain, Friend-shoring, Nearshoring, Reshoring, Asia-Pacific

I INTRODUCTION

The global pandemic, conflict in Ukraine, trade war between the United States (US) and China, tech war, sanctions and countersanctions, etc., are some instances that have led the countries and their policy makers to re-evaluate and reshape their approach to globalization. To minimise the exposure of potential supply chain disruption governments are shaping their trade strategies to group together to build more resilient and shock-absorbent policies for the future. To ensure a resilient supply chain, particularly in times of crisis, some countries are resorting to adjusting their economic activities with trusted countries. The propagation of a friend-shoring or onshoring strategy can be seen as an effort to secure a sustainable and resilient supply chain to avoid potential major shock.

Friend-shoring is a strategy that is intended to create a more robust supply chain to confine commerce to a circle of trusted nations. The new supply chain

politics depicts a significant departure from the well-established rules-based system and warns that weaponization of supply chains is likely a transient advantage in developing the new foundational technologies raising much larger risks in driving confrontation in the longer term.¹ The debate about the policy shift gained momentum when the US Treasury Secretary Jannet Yallen used the term in her Atlantic Council speech – ‘favouring the “friend-shoring” of supply chains to a large number of trusted countries, so we can continue to securely extend market access, will lower the risks to our economy, as well as to our trusted trade partners’.² While there is no official definition of ‘friends’, they often can be understood as the US and its allies, such as the EU, the UK, Japan, South Korea, etc.³ The US also seeks to expand friend-shoring policy through regional initiatives, such as the Indo-Pacific Economic Framework (IPEF) and the very recent US-Africa Summit.⁴

So, what do buzzwords like friend-shoring, and reshoring implied for? ‘Friend-shoring’, a contraction of ‘friends’

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¹ Dan Ciuriak, *The Economic of Supply Chain Politics: Dual Circulation, De-risking and Sullivan Doctrine* Verbatim, C.D. Howe Institute (2023).

² US Department of Treasury, *Remarks by Secretary of the Treasury Janet L. Yellen on Way Forward for the Global Economy* (13 Apr. 2022), <https://home.treasury.gov/news/press-releases/jy0714> (accessed 10 Dec. 2023).

³ Gyani Zhang, *Transatlantic Relation in the Era of Friend-shoring* (market-insights.upply.com), <https://market-insights.upply.com/en/the-transatlantic-relation-in-the-era-of-friend-shoring> (accessed 20 Dec. 2023).

⁴ *Ibid.*

and 'offshoring', suggests developing partnerships with close friend countries, stopping the relocation of industrial activities to the other side of the planet based solely on the criterion of low labour costs.⁵ Friend-shoring leads to a group of countries with shared values to deploy policies encouraging companies to spread manufacturing within that group. The strategy of 'friend-shoring' is a departure from the economic globalization of recent decades, when businesses bought and made products where costs were low and free-trade policies made moving goods around the world cheaper and faster.⁶ Friend-shoring is more focused and intended to rely upon trusted trade partners to avoid any disruption to the value supply chain of critical material, irrespective of economic considerations. On-shoring implies the process of moving the supply chain back to the country's shore while nearshoring means locating the supply chain somewhere near to other than one's own country's shore. In other words, it refers to the practice of relocating production facilities closer to home in order to reduce shipping distance, time costs, and logistics complexity.⁷

The countries are shaping their trade strategies to deal with any potential supply chain bottlenecks in their respective markets. In this context, the US and the European Union are pioneering their trade strategies with friend-shoring and onshoring flavour. Table 1 depicts some of the important initiatives that the US and EU have taken below:

Table 1 *Initiatives by the US and the EU*

Country/Region	Unilateral Initiatives	Bilateral/plurilateral initiatives
The United States	CHIPS and Science Act, Inflation Reduction Act (IRA), Defence Production Act.	Indo-Pacific Economic Framework for Prosperity, EU-US Trade and Technology Council, Chip 4 Alliance.
The European Union	European Chips Act, EU Critical Raw Material Act, Important Project of Common European Union Interest (IPCEIs).	EU-US Trade and Technology Council, The Mineral Security Partnership.

The next section has briefly mapped out these unilateral and bilateral or plurilateral initiatives and how these initiatives further the friend-shoring and onshoring strategies.

2 LEGAL AND POLICIES RESPONSES TO FRIEND-SHORING AND RE-SHORING

To avoid supply chain vulnerability, countries like the US, the European Union, and China, are shaping their policy to secure a resilient supply chain either through domestic policy intervention or by making regional alliances like the IPEF, the Mineral Security Partnership, etc. The shift can be attributed to weaponizing economic relationships in the service of national security and geopolitical goals.⁸ This section tries to map the legal policies and responses that tend to further the idea of friend-shoring.

2.1 Unilateral Initiatives

2.1.1 The United States

The term 'Friend-shoring' has found ample space in the US trade policy lexicon. As the US Commerce Secretary has noted the US has been taking 'a dual policy approach' in tackling supply chain disruptions and strengthening economic resilience – 'investing in domestic manufacturing, as well as pursuing "friend-shoring" like-minded partners fully integrated to our supply chain'.⁹ Recently, the US has taken or announced various measures, as listed below, to further those objectives.

2.1.1.1 The CHIPS and Science Act

After two years of discussion, the American Congress passed the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act 2022 (widely called as CHIPS and Science Act) to address a variety of concerns including a decline in the US position in semiconductor manufacturing and technology and inadequate domestic manufacturing capabilities.¹⁰ The CHIPS Act can be viewed as a part of the Biden-Harris administration's industrial strategy to revitalize domestic manufacturing,

Notes

⁵ Gilles Paché, *Friend-Shoring: A Major Turning Point Towards More Sustainable Value Chains?*, 13 IJMVSC 01 (2022), doi: 10.5121/ijmvsc.2022.13401.

⁶ Yuka Hayashi, *Nations Aim to Secure Supply Chains by Turning Offshoring Into 'Friend-Shoring'*, WALL STREET JOURNAL (15 May 2022), <https://www.wsj.com/articles/nations-aim-to-secure-supply-chains-by-turning-offshoring-into-friend-shoring-11652612580> (accessed 22 May 2023).

⁷ Ciuriak, *supra* n. 1, at 4.

⁸ Hung Tran, *Our Guide to Friend-shoring: Sector to Watch* (www.atlanticcouncil.org (27 Oct. 2022)), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/our-guide-to-friend-shoring-sectors-to-watch/> (accessed 16 Dec. 2022).

⁹ Halit Harput, *What Policy Initiatives Advance Friend-Shoring?* (wita.org (24 Aug. 2022)) <https://www.wita.org/atp-research/initiatives-advance-friend-shoring/> (accessed 21 Nov. 2023).

¹⁰ Congress Research Service, *Frequently Asked Questions: CHIPS Act of 2022 Provisions and Implementation* 2,3 (Apr. 2022), <https://crsreports.congress.gov/product/pdf/R/R47523>.

create good-paying American jobs, strengthen American supply chains, and accelerate the industries of the future.¹¹ The Act intended to provide more than 50 billion for American semiconductor research development manufacturing and workforce development.¹² The US Department of Commerce will oversee the corpus of the fund for various purposes (see Figure 1) under the CHIPS Act.^{13,14}

Though the CHIPS Act has provisions for prioritizing partnerships with allies and coordinating with foreign governments to secure cooperation, it can be seen as an effort to promote the onshoring of manufacturing of semiconductors in the US to address semiconductors vulnerabilities to protect its economic and security interests.

2.1.1.2 The Inflation Reduction (IR) Act

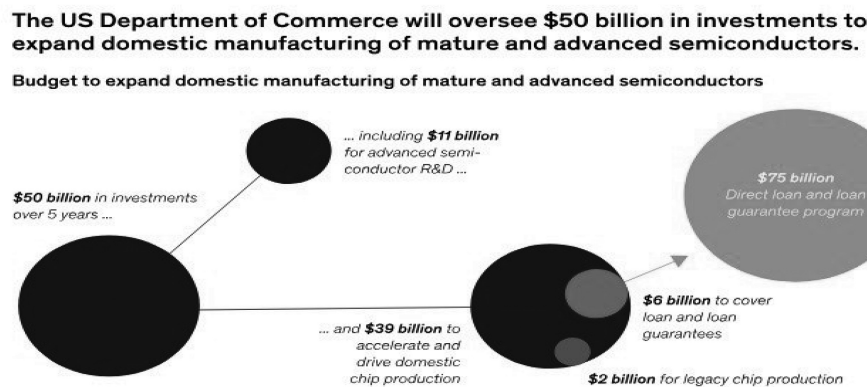
The Inflation Reduction (IR) Act – the largest federal response to climate change to date has been passed¹⁵ into law on 16 August 2022 with the objective of taming inflation. The IR Act has been called as largest federal

investment in clean energy in US history and provides USD 3.3 billion for a climate-ready nation.¹⁶ The IR Act imbibes on-shoring or friend-shoring tendencies. The IR Act imposes obligations on manufacturers in order to secure tax credits. Manufacturers can claim the tax credit if 40% of critical minerals contained in the battery ‘(i) extracted or processed; (a) in the United States, or (b) in any country with which the United States has a free trade agreement in effect; or (ii) recycled in North America.’¹⁷ The legislation is supposed to incentivise the US electric vehicles (EVs) industry and is meant to onshore and friend-shore the EV supply chain, to capture the benefits of a new supply chain and reduce entanglement with China.¹⁸

2.1.1.3 Defence Production Act

To address critical minerals and materials vulnerabilities, President Biden has invoked the Korean War-era Defence Procurement Act (DPA).¹⁹ The DPA is intended to strengthen the US domestic industrial base for large-

Figure 1 (www.mckinsey.com)¹⁴



Notes

¹¹ The White House, *Fact Sheet: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China* (www.whitehouse.gov (9 Aug. 2022)), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/> (accessed 3 Dec. 2023).

¹² *Ibid.*

¹³ McKinsey & Company, *The CHIPS and Science Act: Here's What's in It* (www.mckinsey.com (4 Oct. 2022)), <https://www.mckinsey.com/industries/public-sector/our-insights/the-chips-and-science-act-heres-whats-in-it> (accessed 3 Dec. 2023).

¹⁴ *Ibid.*

¹⁵ John Bistline, Neil Mehrotra & Catherine Wolfram, *Economic Implication of the Climate Provisions of Climate Reduction Act*, National Bureau of Economic Research (2023).

¹⁶ US Department of Commerce, *U.S. Secretary of Commerce Gina Raimondo Statement on Signing of Inflation Reduction Act*, (www.commerce.gov (16 Aug. 2022)), <https://www.commerce.gov/news/press-releases/2022/08/us-secretary-commerce-gina-raimondo-statement-signing-inflation> (accessed 3 Dec. 2023).

¹⁷ Harput, *supra* n. 9.

¹⁸ Joseph Majkut, Ilaria Mazzocco & Jane Nakano, *Onshoring and Friend-Shoring in U.S. EV Supply Chains: What are the Boundaries?* (5 Apr. 2023), (www.csis.org) (accessed 3 Dec. 2023).

¹⁹ Federal Register, *Presidential Determination Pursuant to Section 303 of the Defense Procurement Act 1950, as Amended*, 87 FR 19775 vol. 87, No. 66.

capacity batteries used in the automotive, e-mobility and stationary storage sectors.²⁰ The DPA to help boost domestic supply chains and production of five renewable technologies: solar; transformers and electric grid components; heat pumps; insulation; and electrolyzers, fuel cells, and platinum group metals.²¹ The DPA will potentially strengthen on-shoring production of these products. Moreover, the Biden administration is asking the US Congress to declare the United Kingdom and Australia as 'domestic sources' under the DPA act to make their industrial bases eligible for loans and grants under the DPA.²² The request to declare the UK and Australia as 'domestic sources' will further friend-shoring as it is intended to 'streamline technological and industrial base collaboration, accelerate, and strengthen AUKUS implementation'²³ to build trust in the regional allies.

2.1.2 The European Union (EU)

To avoid its dependence on key raw materials and to achieve self-sufficiency, the EU has furthered its legislative and policy tools to cater for its energy and other needs. The EU's new economic security strategy recognizes these external vulnerabilities and, despite not explicitly arguing for friend-shoring.²⁴ However, its trade strategy reflects to bolster the idea of friend-shoring and onshoring.

2.1.2.1 The European Chips Act

The European Chips Act is a new policy instrument that aims to increase the EU's autonomy in the area of microchips and includes funding for research and development, investment in chip production and to monitoring of the chips market to anticipate supply shortages.²⁵ The

Regulation intends to reinforce the EU's semiconductor ecosystem by reducing dependencies, enhancing digital sovereignty, stimulating investment, strengthening the capabilities, security etc.²⁶ The Regulation also stressed on 'increasing cooperation among the Member States, the Commission and international strategic partners'.²⁷

The European Chips Act will mobilize more than forty-three billion euros of public-private investment to address various measures including any future supply chain disruptions together with other international players.²⁸ The collaboration with other international partners potentially including like-minded partners that can ensure a resilient supply chain in future will further the friend-shoring strategy in the sector.

2.1.2.2 EU Critical Raw Material Act (CMRA)

To tackle the expectedly increasing demand for rare earth minerals and other raw minerals, the EU introduced the Critical Mineral Act (CMRA) in November 2023. The CMRA aims, among others, to increase and diversify the EU's critical raw material supply chain, strengthening circularity.²⁹ The CMRA consist of Regulation and Communication. The Regulation that is intended to develop domestic capacity and sustainability set objectives to achieve domestic capacity of at least 10% of domestic demand for mining and extraction and at least 40% for processing and refining by 2030.³⁰

Through the CMRA, the EU seeks to achieve a secure and sustainable supply of critical raw materials using internal and international engagements.³¹ Partnerships with like-minded countries intend to strengthen international partnerships to safeguard CRM supply security and facilitate sustainable investment in resource-rich nations.³²

Notes

²⁰ Heidi Peters, Erica Lee, Nina Hart & Brandon Tracy, *Invocation of the Defense Production Act for Large-Capacity Batteries: In Brief*, US Congressional Research Service (2022).

²¹ Joshua Busby, Emily Holland, Morgan Bazilian & Paul Orszag, *The Defense Production Act's Role in the Clean Energy Transition*, (www.lawfaremedia.org (17 Jul. 2023)), <https://www.lawfaremedia.org/article/the-defense-production-act-s-role-in-the-clean-energy> (accessed 5 Dec. 2023).

²² Federal Times, *Biden Seeks Legislation to Invest in Australia, UK Defence Industries*, (25 May 2023) <, <https://www.federaltimes.com/federal-oversight/2023/05/25/biden-seeks-legislation-to-invest-in-australia-uk-defence-industries/> (accessed 5 Dec. 2023).

²³ *Ibid.*

²⁴ European Council on Foreign Relation, *Give and Take: How the EU's Friend-Shoring Can Improve Its Relations With the Global South* (ecfr.eu (3 Aug. 2023)), <https://ecfr.eu/article/give-and-take-how-the-eus-friend-shoring-can-improve-its-relations-with-the-global-south/> (accessed 21 Dec. 2023).

²⁵ Bernhard Dachs, *The European Chips Act*, FIW-Kurzbericht, No. 58, FIW – Research Centre International Economics (2023).

²⁶ The European Parliament and the Council, establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 OJ L229/1 (2023).

²⁷ The European Parliament and the Council, establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 OJ L229/1 (2023).

²⁸ European Commission, *European Chips Act* (commission.europa.eu), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-chips-act_en (accessed 18 Dec. 2023).

²⁹ Dentons, *EU Critical Raw Material Act – What Does It Mean for Business*, (dentons.com (7 Dec. 2023)), <https://www.dentons.com/en/insights/alerts/2023/december/7/eu-critical-raw-materials-act-what-does-it-mean-for-business> (accessed 18 Dec. 2023).

³⁰ Regulation of European Parliament and of the Council, establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020 (Brussels 16 Mar. 2023).

³¹ European Commission, *Critical Raw Material: Ensuring Secure and Sustainable Supply Chains for EU's Green and Digital Future* (ec.europa.eu (16 Mar. 2023)), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1661 (accessed 19 Dec. 2023).

³² Alessandra Hool, Christoph Helbig & Gijsbert Wierink, *Challenges and Opportunities of European Critical Raw Minerals Act*, Mineral Economics (2023).

EU's International engagement with like-minded countries will essentially entail friend-shoring at least with resource-rich nations.

2.1.2.3 Important Project of Common European Union Interest (IPCEIs)

Article 107(3)(b) of the Treaty on the Functioning of the European Union provides for the possibility of approving state aid for 'important projects of common European interest' (IPCEIs).³³ IPCEI is seen as a strategic instrument regarding the implementation of the European Union Industrial Strategy.³⁴ IPCEI are large-scale European consortia in key strategic value chains featuring tightly connected company projects³⁵ to cater to achieve the EU's objectives of a greener, digital, more secure, resilient and sovereign economy³⁶

Recently, the European Commission has approved a project of common interest to support research, innovation and the first industrial deployment of microelectronics and communication technologies across the value chain within the Member State.³⁷ The EU is utilizing the programme to strengthen its strategic autonomy and to pursue the goal of a resilient supply chain.³⁸

2.2 Bilateral/Plurilateral Initiatives

2.2.1 The Mineral Security Partnership (MSP) and Chip for Alliance

The MSP is a collaboration of thirteen countries and the European Union that intends to catalyse public and private investment in responsible critical mineral supply chains globally.³⁹ The MSP aims to address four major critical mineral challenges namely, diversifying and

stabilizing the global supply chain, investing in those supply chains, promoting high environmental, social and governance standards in the mining processing and recycling and increasing recycling of critical minerals.⁴⁰ The MSP is a step toward securitization of critical minerals and can be viewed as the first institutionalized practical application of new US policy focus on 'friend-shoring'.⁴¹

Another step to tackle supply chain vulnerabilities is the alliance of global chips-making countries called as *Chip 4* alliance. The US has proposed a strategic alliance of four global chip powerhouses consisting of South Korea, Japan, and Taiwan to counter Beijing's dominance in the global supply chain.⁴² The *Chip 4* alliance aims to reimagine supply chains of chips among friendly nations – a friend-shoring strategy – as chips are considered as crucial security assets.⁴³ Leveraging funding provisions from IRA, CHIPS, and DPA the US appears committed to building a resilient supply chain to ensure America meets its economic and climate goals equitably.⁴⁴

2.2.2 US-EU Trade and Technology Council

To strengthen economic ties and ensure greater cooperation on emerging policy areas, the EU and the US have announced the formation of the EU-US Trade and Technology Council (TTC). At its inaugural meeting in 2021, the TTC agreed on five key areas of cooperation namely, export control, foreign direct investment screening, secure supply chain, technology standard and global trade challenges.⁴⁵ The objective of this endeavour is not to stress outstanding issues among them but to discuss and address emerging policy areas where parties can make progress.⁴⁶ The TTC is already being called 'the new "friend-shoring" vehicle'.⁴⁷

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³³ Marcin Szczepański, *Important Project of Common European Union Interest: Boosting EU Strategic Value Chain*, European Parliamentary Research Service (2020).

³⁴ Important Project of Common European Union Interest, *About the IPCEI*, (ipcei-me.eu), <https://www.ipcei-me.eu/what-is/> (accessed 20 Dec. 2023).

³⁵ *Ibid.*

³⁶ European Commission, *State Aid: Commission Approves Up to €8.1 Billion of Public Support by Fourteen Member States for an Important Project of Common European Interest in Microelectronics and Communication Technologies* (ec.europa.eu), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3087 (accessed 20 Dec. 2023).

³⁷ *Ibid.*

³⁸ Harput, *supra* n. 9.

³⁹ US Department of State, *Mineral Security Partnership*, (www.state.gov), <https://www.state.gov/minerals-security-partnership/> (accessed 11 Dec. 2023).

⁴⁰ *Ibid.*

⁴¹ Dr Vlado Vivoda, *Friend-Shoring and Critical Minerals: Exploring the Role of the Mineral Security Partnership*, 100 Energy Res. & Soc. Sci. (2023), doi: 10.1016/j.erss.2023.103085.

⁴² Dashveenjit kaur, *Chip 4 Alliance: Will South Korea pick the US or Remain an Ally to China?*, (techwireasia.com (21 Jul. 2022)), <https://techwireasia.com/07/2022/chip-4-alliance-will-south-korea-pick-the-us-or-remain-an-ally-to-china/> (accessed 18 Dec. 2023).

⁴³ *Ibid.*

⁴⁴ US Department of Energy, *Supply Chain Progress Report* (US Department of Energy Aug. 2023).

⁴⁵ European Commission, *EU-US Trade and Technology Council*, (commission.europa.eu), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/eu-us-trade-and-technology-council_en (accessed 20 Dec. 2023).

⁴⁶ Emily Benson & Ethan B. Kapstein, *The Limit of Friend-Shoring*, Centre for Strategic and International Studies 1, 2 (2023).

⁴⁷ *Ibid.*

One of the areas of cooperation is dedicated to a secure supply chain. The joint statement of the TTC of December has expressly recognized the need to address supply chain vulnerabilities, concentration of key resources and coordination to foster diversification to make the supply chain more reliable.⁴⁸

2.2.3 The Indo-Pacific Economic Framework for Prosperity (IPEF)

The IPEF is the US-led group of fourteen nations including India that represent 40% of global gross domestic products (GDP) and 28% of global goods and service trade. The IPEF has four pillars – Trade, Supply Chain, Clean Energy and Fair Economy. It presents a cooperative forum with the potential of rulemaking and norm-setting in the future-shaping areas of digital trade, carbon pricing and border adjustment measures, and critical minerals governance.⁴⁹

The IPEF has a dedicated agreement for the supply chain known as the IPEF Agreement related to the Resilience Supply Chain.⁵⁰ The Supply Chain Agreement seeks to build a collective understanding of significant supply chain risks in the IPEF partner's critical sector and key goods and to coordinate and respond to supply chain disruptions.⁵¹ The agreement is expected to present a unique bottom-up approach with each IPEF partner engaging with businesses and utilizing technical assistance and capacity building to increase investment in critical sectors, key goods, physical and digital infrastructure, transportation and workforce projects.⁵² The IPEF Supply Chain Agreement may be considered one of the unique frameworks that is expected to further the friend-shoring strategy between the US and its allies across the Indo-Pacific.

The recent trade strategies of the US and the EU depict their trend where it directed toward the friend-shoring or onshoring approach. These strategies are pursued at both unilateral and bilateral or multilateral forums. The

underlying logic in these initiatives is 'to collaborate to reduce dependencies on unreliable sources of strategic supply, promote reliable sources in our supply chain cooperation, and engage with trusted partners'.⁵³

Since India shares tied trade relations with these countries, their trade strategies have the potential to impact Indian trade discourse. The next section will narrate possible opportunities and potential dilemmas associated with the friend-shoring strategy.

3 RESHAPING GLOBAL SUPPLY CHAIN AND INDIAN DILEMMA

India is one of the fastest growing economies of the world and is poised to continue this path and is expected to reach high middle-income status by 2047.⁵⁴ Export promotion and facilitation of ease of doing business are, among the others, main components of India's Foreign Trade policy (FTP).⁵⁵ India shares very healthy trade relations with both the US and the EU. The EU is India's third largest trading partner, accounting for EUR eighty-eight billion worth of trade in goods in 2021 or 10.8% of total Indian trade.⁵⁶ The US is India's largest trading partner with trade of over 190 billion USD in 2022. A strategy like friend-shoring in either the EU or the US potentially impacts India. India is also looking at the IPEF partnership very positively. The government is looking for some key benefits through the IPEF including potential shift of production centres in key goods/critical sectors to India, mobilization of investment boost to Production Linked Incentives (PLI) Schemes, enhanced exports from India, upward mobility in the value chains etc.⁵⁷

Moreover, there is one view that suggests that the friend-shoring strategy could potentially create a social network of low and medium-tech friends.⁵⁸ India, along with some other developing countries, is said to be a strong contender to take some of China's low-tech and medium-tech manufacturing jobs because of its vast labour and cheap labour force.⁵⁹ Another view is not so

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⁴⁸ White House, *U.S.-EU Joint Statement of the Trade and Technology Council*, (whitehouse.gov), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/05/u-s-eu-joint-statement-of-the-trade-and-technology-council/> (accessed 20 Dec. 2023).

⁴⁹ Mia Mikic, *Prospective on IPEF from Aotearoa New Zealand*, *The Making of Indo-Pacific Economic Framework*, NUS (2023).

⁵⁰ The Indo-Pacific Economic Framework Agreement related to Resilience Supply Chain.

⁵¹ *Ibid.*

⁵² R. V. Anuradha, *The Making of Indo-Pacific Agreement for Prosperity: An Indian Perspective*, *The Making of Indo-Pacific Economic Framework*, NUS (2023).

⁵³ Harput, *supra* n. 9.

⁵⁴ The World Bank, *The World Bank and India*, (worldbank.org (27 Sep. 2023)), <https://www.worldbank.org/en/country/india/overview> (accessed 20 Dec 2023).

⁵⁵ Director General of Foreign Trade, *Foreign trade policy* (2023).

⁵⁶ European Commission, *EU Trade Relations With India. Facts, Figures and Latest Development* (policy.trade.ec.europa.eu), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india_en (accessed 20 Dec. 2020).

⁵⁷ Press Information Bureau, *Negotiations for the Supply Chains (Pillar-II) Agreement Substantially Concluded During 2nd IPEF Ministerial Meeting* (Jun. 2023), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1929184> (accessed 20 Dec. 2023).

⁵⁸ Michel Every & Erik-Van Jan Harn, *Friendsoring: Who Will Benefit?*, 417 *SUERF Pol'y Br.* 1,7 (2022).


⁵⁹ *Ibid.*

appreciative as it looks at friend-shoring as a potential policy constraint that may limit the choices for firms that will lead to the fragmentation of global trade and increase the cost of firms, in turn, the cost of goods and services.⁶⁰ Though the real outcome of the friend-shoring strategy for India is yet to be realized, however, there are certain industries where India needs to develop its own friend-shoring or onshoring strength as the trade strategies by the US or EU may not fully cater to Indian needs.

For instance, India's pharmaceutical industry. India is one of the leading suppliers of generic drugs however, this dominance has a Chinese source.⁶¹ India imports around 50% of its pharmaceutical sector's annual demand from abroad, and, of that, 68% is from China,⁶² which may not be essentially a friend. At the time of COVID and China's response thereto, the Indian pharma industry was concerned about the vulnerability of the pharmaceutical supply chain. India has some schemes for the pharma sector like the Production Linked Scheme (PLI) for Bulk Drugs, the Production Linked Scheme for pharmaceuticals etc. However, the data shows that till August 2022 more than fifty companies had received approval Under the PLI scheme to make active pharmaceutical ingredients (APIs) but only 20–30% of companies have begun manufacturing.⁶³

Another area of concern is related to India's reliance on China for key critical minerals. India views those minerals as critical ones that are essential for economic development and national security, and lack of availability of these minerals or even concertation of existence, extraction or processing of these materials in a few geographical locations may lead to supply chain vulnerability and disruption.⁶⁴ China and Russia control the reserve and production of a number of minerals critical for manufacturing key strategic products like automobiles and military hardware etc.⁶⁵ India heavily relies on China for some critical minerals like lithium, cobalt, silicon, germanium etc. A resilient supply chain in critical minerals in growing geopolitical tension and geo-economic fragmentation

is providing solid impetus for friend-sharing with like-minded countries. The IPEF may play an important role for India in diversifying its critical mineral needs with IPEF partners. Australia is said to be one of the strongest contenders for friend-shoring of critical minerals. Australia possesses expertise in mining not just hydrocarbon but also critical minerals such as lithium, nickel, and cobalt as well.⁶⁶

 green energy transition, India needs to diversify India's its energy sector. India is the world's third largest producer of renewable energy, with 40% of its installed electricity capacity coming from non-fossil fuel sources.⁶⁷ Solar energy is one of the largest sources of India's renewable energy source.⁶⁸ But India's solar industry still heavily relied on China⁶⁹ particularly procurement of photovoltaic cells. India is making an effort to onshoring manufacturing capacity to lessen the reliance on China through the PLI Scheme. The Ministry of New and Renewable Energy (MNRE) has made the Approved List of Models and Manufacturers (ALMM) compulsory and rules mandate government or government-backed projects to use only these models and manufacturers of solar panel modules to cut imports from China.

Apart from solar, wind energy can be a major source that helps India to diversify its renewable energy industry. India has an installed capacity of more than forty gigawatts of wind energy. To cater for the needs of the wind energy industry India has entered an alliance with Denmark on wind energy known as Wind Alliance India (WIA).⁷⁰ WIA is a strategic initiative that aims to drive innovation, knowledge exchange, and investments to propel the growth of wind energy in India, promoting clean and renewable energy sources.⁷¹

4 CONCLUSION

In shifting trade strategies across the sectors where trade policy is shaped by security concerns, India needs to carefully craft its friend-shoring and onshoring requirements

Notes

⁶⁰ Paul Fraioli, *The 'Friend-Shoring' of Supply Chains*, 28 Int'l Inst. Strategic Stud. Strategic Comments vi–vii (2022), doi: 10.1080/13567888.2022.2159551.

⁶¹ Akhil Ramesh & Rob York, *Friend-Shoring Pharmaceutical Supply Chains: The Road to India*, 23 P. F. Int'l 4,6 (2023).

⁶² *Ibid.*

⁶³ Times of India, API crisis, again: PLI in Key Pharma Ingredients was Supposed to Reduce Dependence on China. But the job's only partly done (21 Dec. 2022), <https://timesofindia.indiatimes.com/blogs/toi-editorials/api-crisis-again-pli-in-key-pharma-ingredients-was-supposed-to-reduce-dependence-on-china-but-the-jobs-only-partly-done/> (accessed 20. Dec. 2023).

⁶⁴ Ministry of Mines, *Critical Minerals for India: Report of Committee on Identification of Critical Minerals* (Jun. 2023).

⁶⁵ Tran, *supra* n. 8.

⁶⁶ Ramesh & York, *supra* n. 61, at 16, 21.

⁶⁷ Press Information Bureau, *Renewable Energy in India* (9 Sep. 2022), <https://pib.gov.in/FeaturesDeatils.aspx?NoteId=151141&ModuleId%20=%202> (accessed 20 Dec. 2023).

⁶⁸ Energy Statistics India-2023, *Ministry of Statistics and Programme Implementation*, Government of India (2023).

⁶⁹ Economic Times Energy World, *India Solar Industry Still Heavily Reliant on Chinese Import* (15 Dec. 2023), <https://energy.economictimes.indiatimes.com/news/renewable/indian-solar-industry-still-heavily-reliant-on-chinese-imports/106021347> (accessed 21 Dec. 2023).

⁷⁰ Wind Energy, *Denmark Announces Alliance on Wind Energy in India* (5 Oct. 2023) <https://windergy.in/pdf/press-release/2023/05-oct-2023/press-release-denmark-05-oct-2023.pdf>.

⁷¹ *Ibid.*

according to the needs of its industry. The initiatives taken by India's largest trading partners like the US and the EU will potentially impact India's trade strategy. In light of the changing trade strategy, India needs to push for deeper cooperation with the EU or the US for its specific industry. For instance, India -EU has a working group on pharmaceuticals under the India -EU strategic partnership. To avoid any potential onshoring of pharmaceutical industry on the grounds of quality standards, a deeper cooperation may help the pharmaceutical industry to produce standard drugs while keeping the cost of production affordable. At the same time, those initiatives may not be sufficient for

India to cater for the needs of its specific industry. India might need to look at each initiative as to how it is going to serve its domestic industry to cater to export-oriented growth while maintaining resilient supply chains. There is not one size-fit approach or initiative that may cater to India's industrial independence. Though the initiatives either unilateral or bilateral and plurilateral taken by the US and the EU potentially shape India's trade strategy, nonetheless, India must look beyond these initiatives and if required, form alliances or partnerships with other countries to further the objectives the industry concern like India is doing with Denmark in the wind energy sector.

Critical Allies and Core Geopolitics in Minerals Trade: Devising a Strategy for India

Sparsha Janardhan* & Aparna Bhattacharya**

The shifting geopolitical landscape and the increased demand for critical minerals in the efforts towards green transition have underscored the need to build predictable and resilient mineral supply chains. With the fundamental idea of strengthening economic resilience and ensuring security of supply, countries are increasingly resorting to reshoring, friend-shoring and nearshoring policies in critical minerals trade. Against this backdrop, this article summarizes WTO rules governing international trade in critical minerals and examines emerging international legal trends shaping trade and supply chains in critical minerals. It offers recommendations for devising India's strategy for critical minerals taking into account the security of supply, international trade rules and other commercial considerations.

Keywords: critical minerals, supply chains, international trade, WTO, India

I INTRODUCTION

In today's highly interdependent world economy, geo-politics and geo-economics have become increasingly intertwined. A series of crises including the COVID-19 pandemic, conflict in Ukraine, intensification of rivalry between the United States (US) and China, have caused disruptions in global supply chains. In response, reshoring, nearshoring and friend-shoring policies designed to increase economic resilience have become popular policy prescriptions. These policies are driving the relation between states in several sectors today. One such sector is that of critical minerals, also termed as critical raw materials generally, which is the focus of this present article.

Achieving net zero carbon emissions as part of the green transition will require countries to sustainably use critical raw materials necessary for the production of renewable technologies. The International Energy Agency has estimated that the demand for lithium will rise by forty-two times, graphite by twenty-five times, cobalt by twenty-five times, magnesium by twenty-one times, and nickel by nineteen times by the end of the next decade.¹ Critical raw materials form key

inputs in a wide range of commercial and industrial products such as electric vehicles, military technology and green energy infrastructure. Their availability and affordability will determine the pace of energy transition.

The production and processing of critical raw materials is highly concentrated in a handful of countries, particularly China. Refining capacity for rare earths is also heavily concentrated in China.² In order to diversify and secure their sources of supply, a number of countries are taking proactive measures in the form of delineating national strategies and forming partnerships with like-minded countries.

The specific raw materials that are regarded as 'critical' differ from country to country, reflecting differences in industrial and development needs and national priorities. For instance, the United Kingdom has identified eighteen minerals as critical based on the likelihood and economic vulnerability to supply chain disruption.³ On the basis of economic importance and supply risk, the European Union (EU) has identified thirty-four critical raw materials that it considers indispensable for a wide range of strategic sectors.⁴ Similarly, Canada has identified thirty-

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¹ International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions* (IEA, Paris 2021), <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions> (accessed 9 Dec. 2023).

² *China targets Rare Earth Export Curbs to Hobble US Defence Industry* (Financial Times 15 Feb. 2021).

³ P. A. J. Lusty, R. A. Shaw, A. G. Gunn & N. E. Idoine, UK criticality assessment of technology critical minerals and metals. *British Geological Survey Commissioned Report*, CR/21/120 (2021).

⁴ See European Commission, *Internal Market, Industry, Entrepreneurship and SMEs, Critical Raw Materials*, https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials_en (accessed 9 Dec. 2023).

one minerals and metals in its list, Australia has identified thirty, and the US has identified fifty, in the past few years.⁵

India finds itself in the midst of this race for key minerals and the attempt to reshape global supply chains through friend-shoring and nearshoring. As of 2020, India was completely reliant on imports for lithium, cobalt, nickel, vanadium and other minerals from countries including China, Russia, Chile, Netherlands and Indonesia.⁶ In a report published in 2023, India identified as 'critical' those minerals which are 'essential for economic development and national security' and whose lack of availability or concentration of existence, extraction or processing in few geographical locations may lead to supply chain vulnerability and disruption.⁷ Based on this, India has identified a total of thirty minerals to be most critical. While this is a welcome step, there is a need for developing a comprehensive, holistic, modern and forward looking long-term strategy for India in this sector.

In light of this background, this article aims to recommend ways in which India could calibrate its approach towards critical minerals by taking into account the security of supply, international trade rules and other commercial considerations. Following this brief introduction, part 2 examines the treatment of critical minerals under multilateral trading rules. This is followed by an overview of the emerging international legal trends in the critical minerals sector in part 3. Drawing lessons from these different approaches and taking into consideration India's interests, part 4 recommends ways in which India could develop its policy on critical minerals. Part 5 concludes.

2 WTO RULES RELEVANT TO CRITICAL MINERALS

Under the multilateral trading system, all products including critical raw materials are subject to the rules and disciplines of the WTO covered agreements. The elimination of discriminatory treatment in international trade relations is one of the core values of the WTO. In this regard, the Most Favoured Nation clause (MFN) embodied in Article I of the General Agreement on Tariffs and Trade 1994 (GATT 1994) outlaws

discrimination among like products originating in or destined for different countries. The National Treatment obligation in Article III of the GATT 1994 prohibits discriminatory treatment of imported products as compared to 'like' domestic products. Trade in critical minerals is subject to these provisions.

Most of the trade interventions with respect to critical raw materials are in the form of export restrictions and prohibitions. According to the OECD, in the last decade, the global incidence of export restrictions on critical raw materials has increased more than five-fold.⁸ In fact, around 30% of global exports of critical raw materials by value were subject to restrictions in 2022, up from just 5% in 2019.⁹

In general, quantitative export restrictions are banned by Article XI of the GATT 1994, although there are a number of exceptions within this and other provisions of the GATT. Article XI further clarifies that a restriction can be 'made effective through quotas, import or export licences or other measures'. This wide ambit ensures that an export restriction cannot be used to affect trade flows indiscriminately.

An exception to the general prohibition on export restrictions is the ability to temporarily impose such restrictions in case a WTO Member experiences critical shortage of a foodstuff or any other essential product.¹⁰ Members can also resort to the General Exceptions in Article XX of the GATT 1994 to apply export prohibitions where it is necessary to protect human, animal or plant life or health, or where it relates to conservation of exhaustible natural resources, or where necessary to secure compliance with laws that are otherwise not inconsistent with WTO norms, among others.¹¹ These exceptions have often been invoked in cases of export restrictions on critical raw materials.

Apart from export prohibitions and restrictions, WTO Members have commonly resorted to export taxes to indirectly restrict exports of critical minerals.¹² The growing use of export taxes indicates the conscious desire of Members to exploit the lacuna in WTO law on this issue. Export taxes are not directly regulated by the GATT 1994. Article XI of the GATT 1994 entitled 'General Elimination of Quantitative Restrictions' exempts 'duties, taxes, or other charges' from its coverage. Cognizant of

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⁵ See The Government of Canada, The Canadian Critical Minerals Strategy, 2022; Department of Industry, Science and Resources, Australian Government, Updates to Australia's Critical Minerals List (16 Dec. 2023); U.S., Geological Survey, Department of the Interior, 2022 Final List of Critical Minerals.

⁶ Australian Trade and Investment Commission, 'Unlocking Australia – India Critical Minerals Partnership Potential' (Jul. 2021).

⁷ Critical Minerals for India, *Report of the Committee on Identification of Critical Minerals* Ministry of Mines (Jun. 2023).

⁸ Przemyslaw Kowalski & Clarisse Legendre, *Raw materials critical for the green transition: Production, International Trade and Export Restrictions* OECD Trade Policy Papers (Apr. 2023) (hereinafter "OECD Trade Policy Paper").

⁹ S.J. Evenett & J. Fritz, *The Global Trade Alert database handbook* (2020), manuscript, version dated 26 Oct. 2022, www.globaltradealert.org/data_extraction (accessed 8 Dec. 2023).

¹⁰ Article XI:2(a), General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994").

¹¹ Article XX, GATT 1994.

¹² OECD Trade Policy Paper, at 43–45.

this gap, WTO Members negotiated a specific clause with China in its Protocol of Accession whereby China agreed to eliminate 'all taxes and charges applied to exports unless specifically provided for in Annex 6' of the Protocol – which contains the maximum export duties applicable on eighty products.¹³

Using the above-mentioned flexibilities, WTO Members can and have attempted to justify discriminatory (and more favourable) treatment of critical raw materials, but they have largely been unsuccessful. For instance, the *China-Raw Materials* dispute sheds light on the extent to which a WTO Member, when exploiting their natural resources, can give priority to the needs of their domestic markets. In 2009, the US, Mexico and the EU claimed that China's export restrictions on key natural resources were diminishing the access of foreign downstream firms and customers.¹⁴ China claimed that the measures relieved critical shortages of products that were essential to it. In this regard, both the panel and the Appellate Body found that the relevant raw materials were 'essential' to China but the export restrictions were neither 'temporary' nor did they prevent or relieve a 'critical shortage' within the meaning of Article XI of the GATT 1994.¹⁵

Following the Appellate Body ruling in this case, the EU, Japan and the United States launched a new dispute (*China – Rare Earths*) against China's export quotas on rare earths, tungsten and molybdenum. China sought to defend these measures under Article XX(g) of the GATT 1994. However, China's measure were found to be violative of Article XI of the GATT 1994, and could not be justified as relating to the conservation of exhaustible natural resources.¹⁶

A more recent example of a WTO dispute relating to raw materials is the challenge by the EU against Indonesia's measures prohibiting the export of nickel ore and requiring domestic processing of nickel ore.¹⁷ Similar to the earlier disputes, Indonesia was unable to convince the panel that its measures were temporary in nature and used to relieve critical shortages in nickel ore, and that the measures were in furtherance of environmental laws that were themselves not inconsistent with the GATT 1994.¹⁸

Overall, the experience of WTO dispute settlement shows that attempts to accord special treatment to critical

raw materials on account of their significance to national interests and priorities have been largely unsuccessful. Panels and the Appellate Body have treated disputes relating to critical raw materials like any other. Interestingly, in the past, GATT Contracting Parties and subsequently the WTO Members have resisted negotiating an agreement on export licensing, fearing the potential repercussions on their sovereignty over natural resources.¹⁹ Today, major trading powers are pursuing critical minerals policy through bilateral and plurilateral arrangements, outside the WTO framework. Given the indispensable nature of critical raw materials, countries are looking to build 'resilience' and 'economic security' through friend-shoring and nearshoring policies highlighting the growing importance of diplomatic relations over trade and economic considerations.

3 EMERGING INTERNATIONAL LEGAL TRENDS GOVERNING CRITICAL MINERALS TRADE

Countries are using various fora to address issues related to critical minerals supply and long term access. In particular, there is a rise in friend-shoring and nearshoring trends through instruments such as Free Trade Agreements (FTAs), bilateral agreements on specific sectors, plurilateral arrangements, memorandums of understanding, among others. This part of the article highlights some of the emerging legal trends in the critical minerals space through the use of these instruments to provide a holistic understanding of the various approaches adopted by countries today.

3.1 Free Trade Agreements

Although the international engagement and collaboration in the critical minerals sector has increased in the past few years, certain countries had anticipated the criticality of access to and supply of essential industrial raw materials, including minerals, as far back as late-2000s.

In 2008, the EU Commission introduced a 'Raw Materials Initiative' which noted that the EU was highly dependent on imports of, inter alia, 'high-tech' metals

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¹³ See Protocol on the Accession of the People's Republic of China, WTO Doc. WT/L/432, 23 Nov. 2001; Also see Panel Reports, *China-Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted 22 Feb. 2012, para. 7.105 (hereinafter "*China-Raw Materials*"), where the panel held that China's use of export taxes on raw materials was inconsistent with its commitments under its Protocol of Accession.

¹⁴ The commodities subject to restraint were certain forms of bauxite, coke, fluorspar, magnesium, manganese, phosphate (yellow phosphorus), silicon metal, silicon carbide, and zinc.

¹⁵ Panel Report, *China-Raw Materials*, paras 7.340–7.346 and 7.351; Appellate Body Report, *China-Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 Feb. 2012, para. 344.

¹⁶ See generally Panel Report and Appellate Body Reports, *China-Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431; WT/DS432; WT/DS433, adopted 29 Aug. 2014. See also L. Choukroune & J. J. Nedumpara, *International Economic Law* 386–388 (1st edn., Cambridge University Press 2021).

¹⁷ See Panel Report, *Indonesia – Measures relating to Raw Materials*, WT/DS592/R, circulated 30 Nov. 2022 (hereinafter "*Indonesia-Raw Materials*").

¹⁸ Panel Report, *Indonesia-Raw Materials*, paras 8.1–8.4. The panel report in this dispute is currently under appeal.

¹⁹ See P. C. Mavroidis, *Trade in Goods* 388 (2d edn., Oxford University Press 2012).

such as cobalt, platinum, rare earths, and titanium which were increasingly essential to the development of technologically sophisticated products.²⁰ Securing reliable and undistorted access to raw materials was recognized as an important factor for the EU's competitiveness.²¹ The Commission then recommended promoting enhanced international cooperation with the view to prioritizing the access to primary and secondary raw materials through trade and investment policy. A range of actions were recommended including promoting new rules and agreements on sustainable access to raw materials; working towards the elimination of trade distorting measures taken by third countries in all areas relevant to the access to raw material and acting against the protectionist use of export restrictions by third countries; addressing and offsetting effects of dual-pricing policies in these products and applying the EU's competition rules in cases of anti-competitive agreements or market concentration, etc.²²

The Raw Materials Initiative was the first indication of the EU's long-term strategy for critical minerals which provided an important insight into the approach that the EU was going to adopt for trade and investment in critical raw materials in the future. This approach was subsequently crystalized in a 2015 Communication of the EU Commission regarding the EU's strategy for FTAs, wherein the Commission recognized the importance of 'securing access to energy and raw materials' as a trade policy objective.²³ As a result of this, all of the EU's FTAs negotiations post 2015 include a chapter on 'Energy and Raw Materials' (ERM).²⁴

The 'raw materials' in the EU's ERM chapter refers to a wide range of industrial inputs, including minerals under HS Chapters 25 and 26.²⁵ The focus of ERM chapters in EU's FTAs is to facilitate trade and investment in the area of raw materials and improve environmental sustainability in these areas. The EU's FTA approach is ambitious and entails legally binding obligations that aim to: (1) remove barriers to trade in raw materials; (2) facilitate investment in the exploration and production of raw materials; (3) ensure a

level playing field in the access to raw materials; and (4) improve environmental sustainability. These FTAs ensure access to raw materials by developing rules such as prohibition of import and export monopolies and export pricing (or dual pricing) policies for raw materials.²⁶ This is in addition to the EU's longstanding policy of prohibiting the use of export taxes and controlling exports.²⁷ On the investment facilitation side, the ERM chapter provides for non-discriminatory and objective-criteria based grant of authorization for exploration or production of raw materials.

The ERM chapter presents an interesting template for bilateral engagement in this sector. It addresses issues specific to the ERM sector in a vertical chapter that covers all key trade and investment facilitation matters. The proposed commitments appear to be aimed at filling the gaps in multilateral trading rules, in a bid to build a critical mass of like-minded partners that agree to a higher standard of trade disciplines in this sector.

Australia – a global leader in the supply of critical minerals – has also opted to utilize FTAs to set bilateral disciplines on critical minerals trade. It has concluded FTAs with Japan and Korea with a dedicated chapter on mineral resources.²⁸ In the FTA with Japan, the chapter on 'Energy and Mineral Resources' recognizes the importance of strengthening their stable and mutually beneficial relationship in the energy and mineral resources sector.²⁹ It contains provisions aimed at ensuring stable supply of energy and mineral resources; discouraging the use of quantitative import or export restrictions; enhancing transparency with respect to export licensing procedures and administrations; and providing a mechanism for consultations to address any severe and sustained disruption to supply of energy and mineral resource goods. The agreement with Korea contains a largely non-binding section on energy and mineral resources that aims to provide a mechanism for cooperation in energy and mineral resource sectors. It envisages information exchange,³⁰ cooperative activities,³¹ establishment of

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²⁰ See the Raw Materials Initiative – meeting our critical needs for growth and jobs in Europe, Communication from the Commission to the European Parliament and the Council, COM(2008) 699 dated 4 Nov. 2008, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0699:FIN:en:PDF> (accessed 3 Dec. 2023).

²¹ *Ibid.*

²² *Ibid.*, at 7.

²³ See Trade for All – Towards a More Responsible Trade and Investment Policy, EU Commission (Oct. 2015), <https://docs.google.com/document/d/1PWlhnNabOaXY6bp9zrwPcHsV0PUa5eSb/edit> (accessed 5 Dec. 2023).

²⁴ See EU – India FTA, Initial Text Proposal by the EU on Energy and Raw Materials; EU – Australia FTA, Initial Text Proposal by the EU on Energy and Raw Materials; EU – Chile FTA, concluded chapter on Energy and Raw Materials; EU – Mexico FTA, concluded chapter on Energy and Raw Materials; EU – New Zealand FTA, concluded Ch. 13 on Energy and Raw Materials.

²⁵ *Ibid.*, EU – India FTA, Initial Text Proposal by the EU on Energy and Raw Materials, Annex I; EU – Australia FTA, Initial Text Proposal by the EU on Energy and Raw Materials, Annex I; EU – Chile FTA, Chapter on Energy and Raw Materials, Annex I; EU – Mexico FTA, concluded chapter on Energy and Raw Materials, Art. 2(b); EU – New Zealand FTA, concluded Ch. 13 on Energy and Raw Materials, Annex 13.

²⁶ *Ibid.*; See provisions on 'Import and Export Monopolies' and 'Export Pricing'.

²⁷ Article 2.6, EU Canada FTA, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114\(01\)#d1e873-23-1](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)#d1e873-23-1) (accessed 5 Dec. 2023).

²⁸ See Japan – Australia FTA, Ch. 8; See also Korea – Australia FTA, Ch. 16 Section B.

²⁹ Japan – Australia FTA, Art. 8.1.

³⁰ See Korea – Australia FTA, Art. 16.16.

³¹ *Ibid.*, Art. 16.14.

contact points,³² etc. Similar to the mechanism under the Japan – Australia FTA, it also provides a mechanism for consultations on severe and sustained disruption to supply of a major energy and mineral resource.³³ Australia's trade commitments do not introduce legal innovations to address concerns relating to critical minerals supply chains. Unlike the ambitious obligations proposed in the EU's ERM chapters, Australia has elected to use a more cooperative approach to critical minerals with its trading partners.

3.2 Bilateral Initiatives

Aside from the use of FTAs, there are other instances wherein mineral resources have been the subject matter of bilateral commitments at an international level. In March 2023, the US and Japan signed an agreement focused on strengthening and diversifying critical minerals supply chains and promoting the adoption of EV battery technologies (also known as critical minerals partnership agreement or CMPA).³⁴ It envisages cooperation in the area of critical minerals supply chains.³⁵ On the trade side, it facilitates trade in critical minerals and iterates the shared commitment to not impose export duties or quantitative restrictions on the import or export of critical minerals in accordance with Article XI:1 of GATT 1994 and accord national treatment to the critical minerals of the other Party in accordance with Article III of GATT 1994.³⁶ The CMPA also contains provisions that promote sustainable supply chains in critical minerals – maintaining and enforcing labour rights as well as promoting environmental protection.³⁷

Further, the CMPA contains a framework for cooperating, both bilaterally and in plurilateral fora, to ensure

secure, sustainable, and equitable critical minerals supply chains.³⁸ It stresses the importance of consulting on trade policy related to critical minerals supply chains with a wide range of stakeholders.³⁹ It also contains a provision on security exceptions.⁴⁰

The US had launched discussions for a similar deal with the EU in early March of 2023.⁴¹ The discussions aimed to help the EU and the US build secure supply chains for critical minerals for EV batteries.⁴² The proposed agreement would help the EU qualify for tax credit and other subsidies under the US' Inflation Reduction Act which are offered to buyers whose vehicles contain minerals and materials sourced from countries which have an FTA with the US.⁴³ According to reports, the agreement between the EU and the US will likely be similar to the US – Japan CMPA.⁴⁴

3.3 Plurilateral Initiatives

In addition to bilateral engagements, several plurilateral initiatives on critical minerals supply chains and trade have emerged. In May 2023, 14 countries concluded a first-of-its-kind supply chain agreement under the Indo-Pacific Economic Framework for Prosperity (IPEF).⁴⁵ The agreement strives to increase the resilience, efficiency, productivity, sustainability, transparency, diversification, security, fairness, and inclusivity of the supply chains of critical sectors and key goods in the partner countries.⁴⁶ It builds a framework for cooperation and collaboration between partner countries to improve the crisis response capabilities for supply chain disruptions, sharing information and best practices on supply chain opportunities and vulnerabilities, facilitating business matching and investments to strengthen supply chains, promoting supply

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³² *Ibid.*, Art. 16.18.

³³ *Ibid.*, Art. 16.17.

³⁴ See Agreement between the Government of the United States of America and the Government of Japan on Strengthening Critical Minerals Supply Chains, <https://ustr.gov/sites/default/files/2023-03/US%20Japan%20Critical%20Minerals%20Agreement%202023%2003%2028.pdf> (accessed 7 Dec. 2023). It builds on the US – Japan Trade Agreement of 2019, the US – Japan Partnership on Trade formed in 2021 and the Mineral Security Partnership established in 2022 to facilitate trade, promote fair competition and market-oriented conditions for trade in critical minerals.

³⁵ *Ibid.*, Art. 5.9.

³⁶ *Ibid.*, Art. 3.

³⁷ *Ibid.*, Arts 4–5.

³⁸ *Ibid.*, Art. 7.

³⁹ *Ibid.*, Art. 6.

⁴⁰ *Ibid.*, Art. 8.

⁴¹ See *US and EU Launch new talks on Critical Minerals trade in Green tech Race*, Financial Times (11 Mar. 2023), <https://www.ft.com/content/257f7d0d-cf9d-472b-9c49-e9aafa7977de> (accessed 19 Sept. 2023).

⁴² *Ibid.*

⁴³ See Congressional Research Service Insight, *Clean Vehicle Tax Credit in the Inflation Reduction Act of 24 Aug. 2022* (2022).

⁴⁴ See 'US and EU Near Critical Minerals Accord to Unlock US Subsidies', Bloomberg (29 Mar. 2023), <https://www.bloomberg.com/news/articles/2023-03-29/us-and-eu-near-critical-minerals-accord-to-unlock-us-subsidies#xj4y7vzkg> (accessed 3 Dec. 2023).

⁴⁵ Pillar II – Supply Chains, US Department of Commerce, <https://www.commerce.gov/ipef/pillar-ii> (accessed 19 Oct. 2023). The initiative includes Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, the United States, and Viet Nam.

⁴⁶ *Ibid.*

chain resilience in critical sectors and key goods, and promoting labour rights and workforce development across IPEF supply chains.⁴⁷

The Mineral Security Partnership (MSP) is another US-led plurilateral initiative that extends diplomatic and financial support for developing critical mineral supply chains in a manner that promotes high environmental, social, and governance (ESG) standards in the mineral sector.⁴⁸ Direct and project-focused partnerships and support would address a key challenge in critical minerals supply chains, that is, increasing investments to accelerate diversification of supply chains. The MSP support for minerals projects will be guided by certain principles for responsible critical minerals supply chains such as responsible stewardship of natural environment, consultative and participatory process for acquisition of land, meaningful engagement and transparent communication with communities and safe, fair, inclusive and ethical conditions at workplace.⁴⁹

In November 2023, the EU reached a provisional agreement on a Critical Raw Materials Act aimed at increasing and diversifying the EU's critical raw material supply.⁵⁰ As a part of this effort, the EU is expected to launch a 'Critical Raw Materials Club' to bring together resource-rich and resource-consuming countries to cooperate on strengthening global supply chains. It will promote sustainable investments across the critical raw materials value chain and support local economic development.⁵¹ Another initiative involves the Quad countries – the US, Australia, Japan and India – who are mapping critical minerals capacity and vulnerabilities in global semiconductor supply chains as part of the recently established Critical and Emerging Technologies Working Group.⁵² Yet another collaborative effort is the Supply Chain Resilience Initiative by Australia, India and Japan which aims to promote measures such as trade and investment diversification, and may also extend to the critical raw materials sector.⁵³

The developing bilateral and plurilateral trends indicate a clear shift away from comprehensive FTAs as understood under Article XXIV of the GATT 1994 and an increasing recourse to standalone sectoral agreements and

arrangements. These address standards and regulations in the critical minerals or raw materials sector and do not pursue market access or tariff liberalization. In fact, the trend indicates an interest in facilitating investments and addressing concerns pertaining to environmental sustainability and labour standards. These agreements admittedly look to reorganize supply chains and trade channels in a bid to ensure security, predictability and resilience in critical minerals trade. In practice, these developments are prompting friend-shoring and nearshoring of supply chains.

4 DEVISING A POLICY STRATEGY FOR INDIA ON CRITICAL MINERALS

The mining industry forms one of the core sectors of the Indian economy. India has vast resources of numerous metallic and non-metallic minerals, such as iron ore, bauxite, chromium, manganese ore, rare earths and mineral salts.⁵⁴ Yet India has a critical dependence on imports for a range of key minerals⁵⁵:

Table 1 The Net Import Reliance for Critical Minerals of India (2020)

Sl. No.	Critical Minerals	Percentage (2020)	Major Import Source (2020)
1.	Lithium	100%	Chile, Russia, China, Ireland, Belgium
2.	Cobalt	100%	China, Belgium, Netherlands, US, Japan
3.	Nickel	100%	Sweden, China, Indonesia, Japan, Philippines
4.	Vanadium	100%	Kuwait, Germany, South Africa, Brazil, Thailand

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⁴⁷ Press Statement on Indo-Pacific Economic Framework for Prosperity Meetings in San Francisco, Press Information Bureau (16 Nov. 2023), <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2023/nov/doc20231117271001.pdf> (accessed 29 Nov. 2023).

⁴⁸ Mineral Security Partnership, U.S. Department of State, <https://www.state.gov/minerals-security-partnership/> (accessed 4 Dec. 2023).

⁴⁹ Minerals Security Partnership (MSP) Principles for Responsible Critical Mineral Supply Chains, U.S. Department of State, <https://www.state.gov/wp-content/uploads/2023/02/MSP-Principles-for-Responsible-Critical-Mineral-Supply-Chains-Accessible.pdf> (accessed 4 Dec. 2023).

⁵⁰ See Infographic – An EU Critical Raw Materials Act for the future of EU supply chains, EU Council, <https://www.consilium.europa.eu/en/infographics/critical-raw-materials/> (accessed 13 Dec. 2023).

⁵¹ Théo Bourgerie-Gonse, *EU unveils Critical Raw Materials Act, aiming to lessen dependence on China*, Euractiv (16 Mar. 2023), <https://www.euractiv.com/section/economy-jobs/news/eu-unveils-critical-raw-materials-act-aiming-to-lessen-dependence-on-china/> (accessed 5 Dec. 2023).

⁵² See 'Fact Sheet: Quad Summit', White House, 12 Mar. 2021; Also see Denham Sadler, *Quad Countries Finish Mapping Critical Minerals Vulnerabilities*, InnovationAus.com (25 May 2022).

⁵³ Australian Government, *Joint Statement on the Supply Chain Resilience Initiative by Australian, Indian and Japanese Trade Ministers* (15 Mar. 2022).

⁵⁴ National Mineral Scenario, Ministry of Mines, Government of India, available at, <https://mines.gov.in/webportal/nationalmineralsscenario> (accessed 17 October 2023).

⁵⁵ Critical Minerals for India – Report of the Committee on Identification of Critical Minerals, Jun. 2023, Ministry of Mines, Government of India available at, <https://mines.gov.in/admin/storage/app/uploads/649d4212cceb01688027666.pdf> (accessed 8 Nov. 2023).

Sl. No.	Critical Minerals	Percentage (2020)	Major Import Source (2020)
5.	Niobium	100%	Brazil, Australia, Canada, South Africa, Indonesia
6.	Germanium	100%	China, South Africa, Australia, France, US
7.	Rhenium	100%	Russia, UK, Netherlands, South Africa, China
8.	Beryllium	100%	Russia, UK, Netherlands, South Africa, China
9.	Tantalum	100%	Australia, Indonesia, South Africa, Malaysia, US
10.	Strontium	100%	China, US, Russia, Estonia, Slovenia
11.	Zirconium (zircon)	80%	Australia, Indonesia, South Africa, Malaysia, US
12.	Graphite (natural)	60%	China, Madagascar, Mozambique, Vietnam, Tanzania
13.	Manganese	50%	South Africa, Gabon, Australia, Brazil, China
14.	Chromium	2.5%	South Africa, Mozambique, Oman, Switzerland, Turkey
15.	Silicon	<1%	China, Malaysia, Norway, Bhutan, Netherlands

Source: A report on 'Unlocking Australia-India Critical Minerals Partnership Potential' by Australian Trade and Investment Commission (Jul. 2021).

The estimated value of mineral production for the period 2022–2023 was INR 100,709 crore.⁵⁶ Mining and quarrying sector contributes around 2.5% of India's Gross Domestic Product (GDP) and hence is critical to India's economic and developmental aspirations.⁵⁷

India's internal policy on minerals has traditionally only focused on maximizing the extraction and

beneficiation of mineral resources and scaling up exploration and prospecting through environmentally sustainable mining practices and modern mining technologies.⁵⁸ Inward investment and technology flows were encouraged and were to be facilitated through an improved regulatory environment.⁵⁹ The strategy prioritized fundamentals such as the development of proper inventory of resources and reserves, mining tenement registry and mineral atlas. Securing access to critical minerals did not feature prominently in the strategy.

India's latest mineral policy also focuses on conservation and environmentally sustainable mineral development, improving efficiency and productivity of mining operations through technological upgradation.⁶⁰ This 2019 policy focus is circumscribed by the objective to promote domestic industry, reduce import dependence and feed into the 'Make in India' initiative. There is a special thrust on infrastructure development through financial incentives. Importantly, it introduces 'mineral security' as a strategic issue and gives attention to the need for ensuring long-term mineral security through securing access to sufficient, reliable, affordable, and sustainable supplies of minerals.⁶¹

The COVID-19 pandemic and geopolitical conflicts in Europe and the Middle East have severely disrupted important supply chains and revealed key vulnerabilities. India has taken an important first step in 2023 by identifying a list of minerals that it considers 'critical' and amending domestic legislations to facilitate the auction of mining leases to increase exploration and mining of critical minerals.⁶² However, the broader existing national policy on mineral security is no longer sufficient. The rapidly shifting geopolitical landscape and heightened concerns regarding resilient and stable supply of these essential resources warrants a much more comprehensive and far-sighted vision and strategy. It is critical to not only identify short-term, medium-term and long-term interests in this sector but also map supply chain risks.

While developing a policy on critical minerals, India should be mindful of global developments in this sector, some of which are highlighted in part 3 of this article. A coherent strategy that addresses both domestic concerns and improves international engagement is essential.

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⁵⁶ See Monthly Summary On Minerals & Non-Ferrous Metals Feb. 2023, Ministry of Mines, Government of India, https://mines.gov.in/admin/storage/ckeditor/_for_the_Month_of_February_2023_1685539801.pdf (accessed 29 Nov. 2023).

⁵⁷ Mary Abraham, *India's Mining Sector: Towards a Sustainable and Equitable Future* (21 Feb. 2022), <https://www.teriin.org/article/indias-mining-sector-towards-sustainable-and-equitable-future> (accessed 2 Dec. 2023).

⁵⁸ National Mineral Policy, Ministry of Mines, Government of India (2008), <https://mines.gov.in/admin/storage/app/uploads/6435293eb55611681205566.pdf> (last accessed 14 Dec. 2023); National Mineral Policy, 1993, Ministry of Mines, Government of India, <https://ibm.gov.in/writereaddata/files/09232015122549Mineral%20Policy%20and%20Legislation.pdf> (accessed 14 Dec. 2023).

⁵⁹ *Ibid.*

⁶⁰ National Mineral Policy, Ministry of Mines, Government of India (2019), <https://mines.gov.in/admin/storage/app/uploads/64352887bcfa41681205383.pdf> (hereinafter "National Mineral Policy, 2019") (accessed 14 Dec. 2023).

⁶¹ *Ibid.*, para. 6.15.

⁶² Ministry of Mines, *Measures Initiated to Attain Self-reliance in Critical Minerals*, Press Information Bureau (13 Dec. 2023).

First, India's national strategy on critical minerals must primarily focus on securing reliable long-term access to key mineral resources. India is progressively moving away from greenhouse gas intensive production processes towards greener and cleaner energy sources and technologies. It has set ambitious targets for emission reductions. For instance, India plans to increase renewables capacity to 500 GW by 2030 and achieve Net Zero Emissions by 2070.⁶³ Critical minerals demand in India is expected to rise significantly as India accelerates its transition to green energy.

Countries like China, Russia, Australia, African and Latin American countries are leading producers and exporters of these critical minerals. It is vital to pursue external policies, including through trade and investment policies, that aid in obtaining access to these essential resources. Policy tools available for this purpose include investments in upstream mineral assets in partner countries to develop commercially robust supply chains, reduction in import and export duties, negotiating trade terms with improved market access opportunities, easing regulatory burden for businesses in this sector etc.

As a first step, in 2019 the Government of India created Khanij Bidesh India Ltd. (KABIL), a joint venture of three public sector enterprises namely, National Aluminium Company Ltd., Hindustan Copper Ltd. and Mineral Exploration and Consultancy Ltd.⁶⁴ KABIL was tasked with identifying, acquiring, developing, processing, and making commercial use of key minerals in overseas locations for use in India.⁶⁵ Since its establishment, KABIL has focused on identifying opportunities for acquisition of battery minerals like Lithium and Cobalt through project engagements in Australia and Argentina for securing long term supply of these minerals from these countries.⁶⁶

Second, India must collaborate with like-minded trade partners to work towards building and strengthening critical minerals supply chains in a manner that serves its national objectives and priorities for economic resilience. It is important to utilize the opportunity presented by the growing use of friend-shoring and nearshoring policies to integrate into reliable value chains and strengthen trade and investment networks in this sector.

To ensure resilience and minimize the effects of disruptions, crisis preparedness must be prioritized. In this context, identifying areas of dependencies and mapping risks or vulnerabilities in global value chains is important. India can harness the network of key players under the MSP and the IPEF framework to exchange information and best practices in supply chain crisis preparedness, mitigation and management.

Third, India should bolster its domestic capacity in all segments of mineral exploration and production in order to cultivate strategic self-reliance in a sustainable manner.⁶⁷ India should pay focused attention to improving geological mapping of resources and identifying resource endowments within its territory. Investments in research, development and innovation in mining technologies must be encouraged to improve mineral processing and beneficiation capacity. India must also continue streamlining and simplifying the regulatory framework to promote greater exploration and extraction activities.

This would require appropriate government intervention through the provision of subsidies and easing the administrative requirements for conducting business in India. The Minerals Policy of 2019 identifies the need to invest in the research of mining methods, mineral processing and beneficiation, development of automated equipment, deep sea mining, among others.⁶⁸ Further, the Report on Identification of Critical Minerals recommends the Centre to support the building up of new research and analytical infrastructure and administrative support to accelerate the development of critical mineral mining, processing, manufacturing, and recycling.⁶⁹ Building on these, India should devise support measures to enhance the domestic production and regulatory systems. Countries such as the EU, US, Japan and Australia are providing subsidies to local firms for the domestic production of critical minerals, development of commercially scalable technology, subsidies for investment abroad, among others.⁷⁰

Fourth, a recalibration of trade and investment policies can play a crucial role in helping India diversify its sources and achieve security of supply of critical minerals. In the past few years, India has been a part of FTA negotiations with developed and other developing

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⁶³ Cabinet approves India's Updated Nationally Determined Contribution to be communicated to the United Nations Framework Convention on Climate Change, Press Information Bureau (3 Aug. 2022), <https://pib.gov.in/PressReleaseframePage.aspx?PRID=1847812> (accessed 7 Oct. 2023).

⁶⁴ Khanij Bidesh India Limited, Ministry of Mines, Government of India, <https://mines.gov.in/webportal/content/kabil> (accessed 17 Dec. 2023).

⁶⁵ *Ibid.*

⁶⁶ Efforts for Uninterrupted Supply of Critical Minerals Enhanced Focus By GSI For Critical Mineral Exploration, Press Information Bureau (31 Jul. 2023), <https://pib.gov.in/PressReleaseframePage.aspx?PRID=1944303> (accessed 21 Nov. 2023).

⁶⁷ See generally Ram Singh, *Critical Minerals: India eyes Sustainable Self-reliance, Policy Circle* (21 Aug. 2023), <https://www.policycircle.org/opinion/critical-minerals-india-eyes-sustainable-self-reliance/> (accessed 11 Dec. 2023).

⁶⁸ National Mineral Policy, 2019.

⁶⁹ Critical Minerals for India, *Report of the Committee on Identification of Critical Minerals*, Ministry of Mines (Jun. 2023).

⁷⁰ See generally, Office of Energy Efficiency and Renewable Energy, DOE Announces Funding Opportunity for Critical Materials Accelerator Projects to Advance Critical Materials Supply Chains Solutions (27 Nov. 2023).

countries such as the UK, EU, Australia, Sri Lanka, Oman and UAE. Given that India's focus is on increased integration into global value chains, India should consider a holistic trade and investment strategy in its FTA negotiations.

Taking cue from the EU – which has tailored investment access obligations in the form of positive commitments schedules and specific provisions in a dedicated chapter in its recent FTAs – India could also include investment-specific provisions for critical minerals in its FTAs.⁷¹ Inclusion of investment protection-related provisions such as those that constrain expropriation and provide for fair and equitable treatment would also provide additional security to investors from India, and potentially facilitate substantial investment within India. India has an open and facilitative FDI policy in the mining sector which permits 100% foreign investment through the automatic route, without the need for government approval.⁷² Signing investment facilitation agreements and memorandums of understanding with countries could further aid in streamlining investment procedures and create mechanisms for further cooperation.

As noted in part 3, India has already entered into multiple initiatives with countries such as Australia, US, Quad countries, and others. Future negotiations for any bilateral or plurilateral agreement should be pursued with countries that are reliable and trusted trading partners of India. In particular, India should identify countries that are rich in mineral resources, and those that are technologically advanced to pursue negotiations to further enhance critical mineral supply.

In achieving the above objectives and devising the necessary policies and measures, India should be cognizant of international trade rules. In providing support to the critical minerals sector, India should be mindful of applicable WTO disciplines such as the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Subsidies that are contingent on the use of domestic goods over imported goods, for instance, are expressly prohibited by the SCM Agreement.⁷³ In pursuing policies to secure access to mineral resources and increasing investments through bilateral and plurilateral initiatives, it is important to be mindful of other key WTO obligations. This includes the MFN treatment as well as National Treatment obligations that proscribe differential treatment between WTO Members and between a domestic and foreign good. For instance, an initiative that includes within its ambit discriminatory market access-related obligations may result in violation

of the MFN principle. In any event, trade restrictive measures such as export prohibitions should not be adopted.

5 CONCLUSION

India finds itself in the midst of a global polycrisis characterized by events such as the climate emergency, COVID-19 pandemic, war in Ukraine, among others, which is further complicated by changing geopolitics. The transition to a low-emission and sustainable economy has accelerated the race for access to critical minerals. The complex nature of critical mineral supply chains and concentration of resource and technology in the hands of a few key players further compounds the problem of access.

WTO principles do not constrain Members' sovereign right to decide whether to mine their natural resources, and the extent to which they wish to do so. Yet, whenever they mine, measures that impact the trade of these resources are subject to WTO norms. These norms, however, are deficient in some areas as they do not regulate measures which are majorly used in the critical minerals sector such as export taxes. Further, WTO rules do not contain strong sustainability-related norms.

To address these gaps, countries are increasingly looking beyond the multilateral trade rules towards bilateral and plurilateral arrangements and agreements. The emphasis and move towards friend-shoring is clearly visible in initiatives, such as, the MSP, IPEF, and others. While these arrangements not only address aspects such as increasing investment for mining and processing and improving coordination and crisis response among partners, they also signify conscious efforts by countries to diversify their supply chains.

Against this backdrop, India must develop a holistic strategy towards critical minerals – addressing both domestic policies and international trade. On the domestic front, India should devise a critical minerals strategy that improves domestic regulatory systems and results in improving investments for exploration and processing. While prioritizing domestic capacity and strategic self-reliance in mineral resource production, India should also work together with like-minded and reliable trading partners through FTAs and other plurilateral initiatives. The trend towards friend-shoring and nearshoring presents an opportunity for India to integrate into global value chains. Such a strategy should also respect applicable international trade rules that ensure security and predictability.

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⁷¹ Victor Crochet & Weihuan Zhou, *Critical Insecurities? The European Union's Trade and Investment Strategy for a Stable Supply of Minerals for the green Transition*, Blog of the European Journal of International Law (23 Feb. 2023).

⁷² See Consolidated FDI Policy, Department of Promotion of Industry and Internal Trade, Government of India (effective from 15 Oct. 2020), <https://static.investindia.gov.in/2020-10/FDI-PolicyCircular-2020.pdf> (accessed 12 Dec. 2023); While 100% FDI is permitted in Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities, Government approval is required.

⁷³ Article 3.1(b), Agreement on Subsidies and Countervailing Measures.

The Data Is In The Details: Friendshoring, Data Flows and the Role of Digital Trade Rules

Devon Whittle*

The label 'friendshoring' has recently emerged to describe an approach to supply chains that focuses on ensuring they can be relied upon, trusted and secured as opposed to just maximising their economic efficiency. Aspects of friendshoring have a longer history in the context of cross-border data flows, which have been and are increasingly subject to restrictions aimed at protecting privacy, cyber-security and national security interests. Data flows are critical to the functioning of modern supply chains and are themselves important sources of value. While the goals of data flow restrictions are often laudable, data friendshoring is not without risks and costs. It can have an uneasy relationship with existing trade rules, and spillover effects for other policy interests (including in relation to internet governance and the strength of the rules-based trading system). This article sets out the connections between friendshoring and data flow restrictions. It then examines the role that trade rules play in relation to data friendshoring, including the uncertainty of the application of certain current trade rules to data friendshoring and the benefits that digital trade rules can contribute in relation to data friendshoring. This includes ameliorating the risks associated with data friendshoring, providing greater certainty for those involved in these arrangements, and enabling on-going discussions between potentially fragmented regimes to help rebuild trust over the longer term.

Keywords: digital trade, friendshoring, data flows

I INTRODUCTION

Friendshoring – that is, attempts to restructure supply chains through trusted countries¹ – has emerged as a contentious strategy in response to the fragility and vulnerability of supply chains that was highlighted by COVID-19, incidents such as the Ever Given Suez Canal blockage, and the effects on trade of geopolitical tensions. Built for economic efficiency, some supply chains were unable to quickly or effectively respond to external shocks, resulting in shortages and price increases and exacerbating the impact of crises.² As a result, governments and firms are becoming increasingly focused on supply chain resilience as opposed to efficiency, and are seeking to ensure that critical nodes in their supply chains are not at risk of being weaponized for geopolitical purposes. As described by

US Secretary of Treasury Janet Yellen this policy shift emphasizes 'trust' and 'security' instead of purely economic factors.³ Friendshoring is one prominent description of the implementation of this policy shift.⁴ It involves the reorganization of supply chains to avoid reliance on untrusted or potentially unreliable jurisdictions and instead structuring supply chains through allied and like-minded economies.⁵ While discussions of friendshoring often focus on the flows of goods, services and investment, cross-border data flows are a key component of modern supply chains. Data flows are themselves also an independent source of value, vulnerability and risk for governments and economies. Thus, friendshoring will also impact data flows, and data flow regulation itself can be seen as an early form of friendshoring. Indeed, in Secretary Yellen's articulation of friendshoring she

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¹ Atlantic Council, *Transcript: US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and 'Friend-shoring' Supply Chains* New Atlanticist (13 Apr. 2022), <https://www.atlanticcouncil.org/news/transcripts/transcript-us-treasury-secretary-janet-yellen-on-the-next-steps-for-russia-sanctions-and-friend-shoring-supply-chains/> (accessed 9 Jan. 2024).

² See generally Richard Baldwin & Rebecca Freeman, *Risks and Global Supply Chains: What We Know and What We Need to Know*, 14 Annual Rev. Econ. 153 (2022), doi: 10.1146/annurev-economics-051420-113737.

³ Atlantic Council, *supra* n. 1.

⁴ Baldwin & Freeman, *supra* n. 2, at 153, 158; Sebastien Miroudot, *Resilience Versus Robustness in Global Value Chains: Some Policy Implications*, in *COVID-19 and Trade Policy: Why Turning Inward Won't Work* 117, 122 (Richard Baldwin & Simon Evenett eds 2020), https://www.ceris.be/wp-content/uploads/2021/10/Covid-19_and_Trade_Policy.pdf (accessed 9 Jan. 2024).

⁵ Beata Javorcik et al., *Economic Costs of Friend-Shoring* CID Faculty Working Paper Series 2022.422 at 2 (Sep. 2022), <https://nrs.harvard.edu/URN-3:HUL.INSTREPOS:37374853> (accessed 9 Jan. 2024); and Atlantic Council, *supra* n. 1.

highlighted that it would also entail harmonizing 'approaches to protecting the privacy of data'.⁶

This article provides an introduction to the relevance of data flow regulations to friendshoring and the role digital trade rules can play to hamper or support data friendshoring. It does so by introducing the concept of friendshoring and how it is relevant to historic and current moves to regulate cross-border data flows; examining some key rules under the World Trade Organization's (WTO) *General Agreement on Trade in Services* (GATS) that may restrict the ability of governments to friendshore data; and then considering ways in which digital trade rules can help mitigate the risks associated with such measures.

Data friendshoring has a detailed history, stemming from concerns regarding privacy and security that pre-date more recent discussions around supply chains.⁷ It also has real economic costs given its impact on trade, as well as the potential for inadvertent effects in other policy domains such as encouraging a fragmentation of the internet and decreasing global interconnectedness. The trends driving data friendshoring are only intensifying and thus a retreat in the use of such measures is unlikely. While digital trade rules create some legal risks to these policies, they also present opportunities to ameliorate their worst excesses and retain options for dialogue between governments to aim for less fragmentation, increased interoperability of their regulatory regimes, and (in the longer term) rebuilt trust.

2 FRIENDSHORING OF SUPPLY CHAINS & DATA FLOWS

Friendshoring can be understood as a policy and business strategy aimed at securing supply chains and making them more resilient.⁸ It can take a variety of forms, but for governments at its heart friendshoring involves

creating, encouraging or mandating that certain supply chains avoid sourcing from or involving potentially adversarial or unreliable sources.⁹ This has had particular relevance for supply chains involved in critical goods and services, where governments seek to avoid being reliant on sources that could benefit adversarial governments or be used by them during times of tension or as leverage for other geopolitical goals.¹⁰ Instead, businesses are expected to seek out and establish stronger ties with economies that are 'trusted', politically aligned and/or are more likely to allow for continued open trade even during disruptions. Friendshoring is in sharp distinction to traditional trade policies aimed at enabling supply chain efficiencies and flexibilities. Those approaches emphasized comparative advantage and enabling companies to seek cost advantages and efficiencies regardless of the political alignment of potential sources in their supply chain.¹¹ In comparison, friendshoring can make supply chains more time-consuming to create and less efficient; it can also create redundancies and higher costs, leading to higher final prices and reduced economic outputs.¹² Thus friendshoring can be considered as attempting to buy supply chain security, resilience and reliability at the cost of efficiency.

Much of the friendshoring literature focuses on the flow of goods and potential restrictions on goods trade.¹³ However, the reorganisation of supply chains will also necessarily impact upon the flows of data across borders.¹⁴ Data flows play a critical role in ensuring the smooth functioning of the supply chains.¹⁵ Indeed, cross-border data flows have been described as a 'driving force' behind global supply chains, given that the dispersal of business operations across borders necessitates fast and effective transfer of information between nodes of a supply chain.¹⁶ Supply chains are often complex arrangements spanning multiple jurisdictions, each part of which may work on a small part of the final product. This can mean that a production process for a single product can be dispersed

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⁶ Atlantic Council, *supra* n. 1.

⁷ See e.g., Felicity Deane et al., *Trade in the Digital Age: Agreements to Mitigate Fragmentation*, Asian J. Int'l L. 1, 7 and 54 (2023), doi: 10.1017/S204425132300036X; and Joshua Meltzer, *The Internet, Cross-Border Data Flows and International Trade*, 2(1) Asia & The Pacific Pol'y Stud. 90, 94 (2014), doi: 10.2139/ssrn.2292477.

⁸ See e.g., Andrew Dowse & John Blackburn, *Improving Supply Chain Resilience Through Preparedness*, 16 Security Challenges 90 (2020).

⁹ Javorcik et al., *supra* n. 5, at 2; and Atlantic Council, *supra* n. 1.

¹⁰ See e.g., Naoise McDonagh, 'Friend-Shoring': From Rhetoric to Reality and Options for Australia Australian Outlook (31 Mar. 2023), <https://www.internationalaffairs.org.au/australianoutlook/friend-shoring-from-rhetoric-to-reality-and-options-for-australia/> (accessed 9 Jan. 2024); and Juan Ortiz Freuler, *The Weaponization of Private Corporate Infrastructure: Internet Fragmentation and Coercive Diplomacy in the 21st Century*, 8(1) Global Media & China 6, 8 (2023), doi: 10.1177/20594364221139729.

¹¹ See e.g., William Alan Reinsch, *Resilience vs. Efficiency* Center for Strategic & International Studies (14 Jun. 2021), <https://www.csis.org/analysis/resilience-vs-efficiency> (accessed 9 Jan. 2024).

¹² See e.g., Mia Mikic et al., *Supply Chain Resilience, Friend-Shoring, and the Pursuit of Non-Economic Objectives* T20 Policy Brief (Jun. 2023), https://www.orfonline.org/wp-content/uploads/2023/06/T20_PolicyBrief_TF1_Friend-shoring.pdf (accessed 9 Jan. 2024); Javorcik et al., *supra* 5.

¹³ See e.g., Gunther Maihold, *A New Geopolitics of Supply Chains: The Rise of Friend-shoring* SWP Comment 45/2022 (2022), doi: 10.18449/2022C45; Mikic et al., *supra* n. 12; Oxford Analytica *Near- and Friend-shoring Markedly Alter Trade Flows* Expert Briefings (2023), doi: 10.1108/OXAN-GA281409; and Emily Benson & Ethan B. Kapstein, *The Limits of 'Friend-Shoring'* Center for Strategic & International Studies (1 Feb. 2023), <https://www.jstor.org/stable/resrep47343> (accessed 9 Jan. 2024).

¹⁴ See e.g., Hector Torres, *Advocates of Friendshoring Have Not Reckoned with Digital Trade* Centre for International Governance Innovation (2 Feb. 2023), <https://www.cigionline.org/articles/advocates-of-friendshoring-have-not-reckoned-with-digital-trade> (accessed 9 Jan. 2024).

¹⁵ Magnus Rentzhog, *No Transfer, No Production – a Report on Cross-Border Data Transfers, Global Value Chains, and the Production of Goods* Sweden National Board of Trade, *Kommerskollegium* 2 (Mar. 2015) https://unctad.org/system/files/non-official-document/dtl_ict4d2016c02_Kommerskollegium_en.pdf (accessed 9 Jan. 2024).

¹⁶ *Ibid.*, at 9.

geographically among many jurisdictions and facilities. The sharing of data is critical to coordinate this process and ensure it can function as a single production line.¹⁷ Outside of the production process, data flows are also what enables the transmission of information on, and completion of the feedback loop regarding, design, production, delivery and use.¹⁸ This reliance by supply chains on data is also only expected to increase with the wider adoption of technologies such as the Internet of Things or large language model artificial intelligence systems.¹⁹

In addition to the consequential impact that friendshoring policies can have on data flow regulations, there is also a history of data itself being subject to measures that can be considered to be a form of friendshoring. Whether it is for reasons of privacy protection, data and cyber-security concerns, or national security,²⁰ many governments have taken steps to monitor and regulate where data from their jurisdictions and about their citizens can flow. In particular:

- (1) The European Union's (EU) General Data Protection Regulation (GDPR) is one of the most prominent forms of cross-border data flow regulations. It was implemented in May 2018 with the objective of protecting the privacy of individuals and enabling data to flow freely within the countries that form the EU.²¹ Central to its operation is a prohibition on transfers of data outside of the EU unless there is an 'adequacy mechanism' in place with the receiving

jurisdiction.²² Through the adequacy mechanism, the EU assesses whether data in other jurisdictions is provided with a sufficient level of protection (one that is "essentially equivalent" to that in place within the EU) prior to allowing EU-originating data to flow there.²³ In the absence of such a determination there are only limited exceptions that allow the relevant data to be transferred.²⁴ Currently only fourteen jurisdictions have received a positive determination in relation to adequacy under the GDPR.²⁵ The EU has also negotiated specific arrangements for the United States,²⁶ however, these have twice been overturned by EU judicial institutions and the latest iteration has also been subject to legal challenge²⁷;

- (2) More recently, there have also been trends elsewhere towards closer scrutiny of cross-border data flows and reconsidering of traditionally liberal approaches to regulation. For example, in November 2023, the United States reversed its support for data flow rules in trade agreements to provide 'policy space' for potentially increased domestic regulation.²⁸ This has particularly impacted the WTO's Joint Initiative on Electronic Commerce (E-Commerce JI) negotiations²⁹ and the Indo-Pacific Economic Framework negotiations,³⁰ where the United States was expected to be a key proponent of these rules.³¹ The change in the United

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¹⁷ Javier Lopez-Gonzalez et al., *Mapping Approaches to Cross-Border Data Flows*, in *Addressing Impediments to Digital Trade* 45, 48 (Ingo Borchert & L. Alan Winters eds 2021).

¹⁸ *Ibid.*, at 50.

¹⁹ *Ibid.*

²⁰ See e.g., Deane et al, *supra* n. 7, at 1, 7 and 54; and Meltzer, *supra* n. 7, at 90, 94.

²¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 ('GDPR'), Preamble, [2] and [7].

²² *Ibid.*, Art. 45.

²³ *Ibid.*, Preamble [104] and Art. 45(1).

²⁴ These include putting in place 'appropriate safeguards' under the GDPR or obtaining explicit consent from users after informing them of all associated risks, see GDPR, Arts 7(1), 46 and 47. Generally these requirements are too expensive or complicated to implement making them not feasible for most businesses, particularly smaller ones, see Hannah Kuchler, *US Small Businesses Drop EU Customers Over New Data Rule*, The Financial Times (online) (24 May 2018). See generally Laurits Christensen et al., *The Impact of the Data Protection Regulation in the E.U.* The European Financial Review (19 Jun. 2013), <https://www.europeanfinancialreview.com/the-impact-of-the-data-protection-regulation-in-the-e-u/> (accessed 9 Jan. 2024).

²⁵ See European Commission, *Adequacy Decisions*, https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en (accessed 9 Jan. 2024), which lists Andorra, Argentina, Canada (limited to commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Korea, Switzerland, the United Kingdom, and Uruguay.

²⁶ European Commission, *EU-US Data Transfers* (10 Jul. 2023), https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en (accessed 9 Jan. 2024).

²⁷ See e.g., Guy Cartwright & Jessica Gregson, *Deja-Vu? A Challenge to the EU-US Data Privacy Framework* Stevens & Bolton (19 Sep. 2023), <https://www.stevens-bolton.com/site/insights/articles/djvu-a-challenge-to-the-eu-us-data-privacy-framework> (accessed 9 Jan. 2024); Miriam Everett et al., *A Cautious Approach: What does the EU-US Adequacy Decision Actually Mean for International Data Transfers?* Herbert Smith Freehills Data Notes (14 Aug. 2023), <https://hsfnnotes.com/data/2023/08/14/a-cautious-approach-what-does-the-eu-us-adequacy-decision-actually-mean-for-international-data-transfers/> (accessed 9 Jan. 2024); and Aidan Arasasingham & Matthew Goodman, *Operationalizing Data Free Flow with Trust (DFFT)* Center for Strategic & International Studies (13 Apr. 2023), <https://www.csis.org/analysis/operationalizing-data-free-flow-trust-dfft> (accessed 9 Jan. 2024).

²⁸ United States Trade Representative, *USTR Statement on WTO E-Commerce Negotiations* (24 Oct. 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/october/ustr-statement-wto-e-commerce-negotiations> (accessed 9 Jan. 2024).

²⁹ *Ibid.*

³⁰ See generally Arasasingham & Goodman, *supra* n. 27 and Meredith Broadbent, *USTR Upends U.S. Negotiating Position on Cross-Border Data Flows* Center for Strategic & International Studies (12 Dec. 2023) <https://www.csis.org/analysis/ustr-upends-us-negotiating-position-cross-border-data-flows> (accessed 9 Jan. 2024).

³¹ See e.g., White House, *Fact Sheet: Indo-Pacific Strategy of the United States* (11 Feb. 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/11/fact-sheet-indo-pacific-strategy-of-the-united-states/> (accessed 9 Jan. 2024) which articulates the United States' policy to use IPEF to 'govern our digital economies and cross-border data flows according to open principles'.

States' position followed intense domestic political debate regarding the appropriateness of these rules and the strictures they placed on the ability of government to regulate in the public interest;³² and

- (3) Plurilateral initiatives have also been launched in recognition of the trend to emphasizing privacy and security when regulating data flows. Japan has been at the forefront of this with its Data Free Flow with Trust (DFFT) initiative.³³ DFFT was launched in 2019 and is aimed at promoting and enabling cross-border data flows, while still protecting privacy, security and intellectual property.³⁴ It was launched to try and head off the worst potential impacts of data flow restrictions, such as the fragmentation of data governance, by building trust and interoperability between different domestic regulatory systems.³⁵ G7 leaders have referred to their desire to “counter unjustified obstacles to the free flow of data, [which are] lacking transparency, and arbitrarily operated” but at the same distinguish their own “measures implemented to achieve the legitimate public policy interests of each country”.³⁶ Finding a common understanding of ‘trust’ and what is ‘legitimate’ will be key to realizing the aspirations of DFFT.³⁷

Each of these examples show the different ways in which the concept of friendshoring is relevant to and impacting upon data flows. These measures, developments, and initiatives, each prioritise privacy, security and other values in relation to data flows, seeking out ways to ensure that governments can protect data as it flows across borders. While the policy aims of much of these trends are largely laudable, similar to friendshoring of other aspects of trade, they are also associated with significant costs and risks. This includes:

- (a) Creating uncertainty for business, increased compliance costs and reduced productivity, as they seek to navigate a diversity of regulatory regimes that may also conflict with each other;³⁸
- (b) Hampering of technological progress, reducing competition, decreasing business opportunities and holding back economic development;³⁹
- (c) Balkanizing internet governance and information networks, undermining a key benefit of the global internet as a free, decentralized and open network;⁴⁰
- (d) Enabling the use of illiberal measures imposing unwarranted state control over information systems by authoritarian regimes;⁴¹ and
- (e) Imposing costs on developing and more isolated countries, who stand to particularly benefit from open data flows to enable their economic development and participation in the global economy.⁴²

3 DATA FRIENDSHORING & DIGITAL TRADE RULES

The use of certain data friendshoring strategies also pushes against some of the assumptions underpinning global trade rules, such as those in the WTO. The implementation of such policies, and attempts to justify some forms of restrictions by reference to existing rules and exceptions, can thus be ‘counterproductive to the stability of the multilateral system’.⁴³ This section uses the obligations and exceptions found in the GATS to illustrate the ways in which data flow restrictions can conflict with existing

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³² See e.g., David Lawder, *US Drops Digital Trade Demands at WTO to Allow Room for Stronger Tech Regulation* Reuters (26 Oct. 2023), <https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25> (accessed 9 Jan. 2024); Devon Whittle *WTO: E-Commerce JSI News – One New Participant and US Drops Support for Data Rules*, Trade Notes (25 Oct. 2023), <https://tradenotes.substack.com/p/wto-e-commerce-jsi-news-one-new-participant>, (accessed 9 Jan. 2024).

³³ Digital Agency (Japan), *Data Free Flow with Trust (DFFT)*, <https://www.digital.go.jp/en/dfft-en>, (accessed 9 Jan. 2024).

³⁴ World Economic Forum, *DEFT: Paths Towards Free and Trusted Data Flows* 2–3 (2019), https://www.meti.go.jp/meti_lib/report/2019FY/000659.pdf (accessed 9 Jan. 2024).

³⁵ Arasasingham & Goodman, *supra* n. 27.

³⁶ *G7 Hiroshima Leaders' Communique* (20 May 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communique/>, (accessed 9 Jan. 2024).

³⁷ Li Xirui, *Data Free Flow with Trust – and How That Trust Should Be Built* Asia Global Online (8 Sep. 2022), <https://www.asiaglobalonline.hku.hk/data-free-flow-trust-and-how-trust-should-be-built> (accessed 9 Jan. 2024).

³⁸ IMF, OECD, UNCTAD, World Bank and WTO, *Digital Trade for Development* 37 (2023), https://www.wto.org/english/res_e/booksp_e/dtd2023_e.pdf (accessed 9 Jan. 2024).

³⁹ *Ibid*; David Nguyen & Marta Paczos, *Measuring the Economic Value of Data and Cross-Border Data Flows* OECD Digital Economy Papers, No. 297 at 28 (26 Aug. 2020), <https://doi.org/10.1787/6345995e-en> (accessed 9 Jan. 2024).

⁴⁰ IMF, OECD, UNCTAD, World Bank and WTO, *supra* n. 39; and Susan Aaronson, *What are We Talking About When We Talk About Digital Protectionism?*, World Trade Rev. 1, 26 (2018), doi: 10.2307/j.ctv8bt3h9.2.

⁴¹ Shekhar Aiyar et al., *Geoeconomic Fragmentation and the Future of Multilateralism* IMF Staff Discussion Notes, SDN/2023/001, at 16 (Jan. 2023) <https://hlpf.un.org/sites/default/files/vnrs/2023/Geoeconomic%20Fragmentation%20and%20the%20Future%20of%20Multilateralism.pdf> (accessed 9 Jan. 2024); and Cathryn Ashbrook, *Tech Diplomacy and Tech Governance* IE Center for the Governance of Change 12 (2023), <https://doi.org/10.5281/zenodo.8169612> (accessed 9 Jan. 2024).

⁴² Aiyar et al., *supra* n. 42, at 23; and Susan Aaronson, *'Data Is Different: Why the World Needs a New Approach to Governing Cross-border Data Flows* CIGI Papers No. 197, at 11 (Nov. 2018), https://www.cigionline.org/sites/default/files/documents/paper%20no.197_0.pdf (accessed 9 Jan. 2024).

⁴³ Neha Mishra, *The Trade – (Cyber)Security Dilemma and Its Impact on Global Cybersecurity Governance*, 54(4) J. World Trade 567, 590 (2020), doi: 10.54648/TRAD2020025.

trade rules and have a potentially unclear relationship with available exceptions. It then sets out the ways in which trade rules also provide opportunities to improve the use of data friendshoring measures.

3.1 Legal Risks for Data Friendshoring

The GATS applies to measures that affect the cross-border trade in services between WTO Members.⁴⁴ It thus covers data flow restrictions to the extent that they affect services trade. This is particularly relevant to so-called Mode 1 or cross-border supply of services,⁴⁵ given the dependence that such trade has on cross-border data flows.⁴⁶ There are a number of GATS provisions that can restrict the use of cross-border data flow restrictions, including:

- (1) **The Most-Favoured-Nation obligation found in GATS Article II (MFN).** The MFN obligation essentially requires WTO Members to not discriminate between like services and services suppliers on the basis that they are from different countries. It applies in relation to both explicitly discriminatory laws and regulations; and also to facially neutral measures that are in effect discriminatory.⁴⁷ Discriminatory treatment of services suppliers from different countries by not allowing their data to flow to or from certain countries would prima facie be inconsistent with the MFN obligation.⁴⁸ As such, they would need to be covered by a relevant legal justification for the differential treatment – for example, on the basis that the regulatory regime governing data in the foreign jurisdiction makes the services and service suppliers not ‘like’ for the purposes of MFN (a possible argument but one that would be subject to some uncertainty),⁴⁹ or through the use of a relevant exception (explained further below);

- (2) **Members’ scheduled market access and national treatment commitments,** which prohibit the use of certain quantitative restrictions on committed services and requires Members to not discriminate against foreign suppliers as compared to their like domestic counterparts (in the sectors a Member schedules and subject to any limitations they may list).⁵⁰ Given that data flow restrictions may result in the inability of certain services to be supplied across the border, or discrimination of foreign services suppliers as compared to domestic service suppliers, they may breach certain kinds of scheduled GATS commitments⁵¹; and

- (3) **The GATS Telecommunications Annex,** paragraph 5(c) of which requires WTO Members to allow service suppliers of other WTO Members to “use public telecommunication networks and services for the movement of information within and across borders ... and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member”.⁵² However, the precise scope of this obligation is not clear and, some argue, may be limited by the overall scope of the Annex which obliges Members to “ensure that [the Annex’s] obligations ... are applied with respect to suppliers” of telecommunication networks and services.⁵³

The GATS also includes certain exceptions that may be available to allow a Member to apply measures that are inconsistent with these obligations. These include:

- (1) **An exception in Article V allowing for preferential treatment to be provided pursuant to an economic integration agreement that liberalizes trade in services** (i.e. a preferential trade agreement).⁵⁴ For this exception to apply, the trade

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⁴⁴ *General Agreement on Trade in Services* (15 Apr. 1994), *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B (‘GATS’), Article I(1).

⁴⁵ GATS, Article I(2)(a).

⁴⁶ See Aaditya Mattoo & Joshua Meltzer, *International Data Flows and Privacy: The Conflict and Its Resolution* World Bank Policy Research Working Paper 8431, at 16ff (May 2018), <https://www.sipotra.it/wp-content/uploads/2018/05/International-Data-Flows-and-Privacy.-The-Conflict-and-Its-Resolution.pdf> (accessed 9 Jan. 2024) on the application of the GATS to digital trade measures.

⁴⁷ WTO Appellate Body Report, *Argentina – Financial Services*, DS453 (14 Apr. 2016) para. 6.105.

⁴⁸ S. Yakovleva & K. Irion, *The Best of Both Worlds? Free Trade in Services and EU Law on Privacy and Data Protection*, 2(2) Eur. Data Protection L. Rev. 191, 204 (2016), doi: 10.21552/EDPL/2016/2/9; and Federica Velli, *The Issue of Data Protection in EU Trade Commitments: Cross-Border Data Transfers in GATS and Bilateral Free Trade Agreements*, 4(3) European Papers 881, at 885 (2019), https://www.europeanpapers.eu/it/system/files/pdf_version/EP_EF_2019_I_022_Federica_Velli_00325.pdf (accessed 9 Jan. 2024).

⁴⁹ Petros Mavroidis, *And You Put the Load Right on Me: Digital Taxes, Tax Discrimination and Trade in Services*, 12(1) Trade, L. & Development 75, 92 (2020); Yi-Hsuan Chen, *The EU Data Protection Law Form: Challenges for Services Trade Liberalization and Possible Approaches for Harmonizing Privacy Standards into the Context of GATS*, 19 The Spanish Y.B. Int’l L. 211, 216 (2015), doi: 10.17103/sybil.19.13; Tobias Naef, *Data Protection without Data Protectionism* 247 (2023).

⁵⁰ GATS, Arts XVI and XVII.

⁵¹ Mira Burri, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, 51 UC Davis L. Rev. 65, 96 (2017); Naef, *supra* n. 50, at 310; Carla L. Reyes, *WTO-Compliance Protection of Fundamental Rights: Lessons from the EU Privacy Directive*, 12 Melbourne J. Int’l L. 1, 22 (2011).

⁵² GATS, Telecommunications Annex, para. 5(c).

⁵³ *Ibid.*, fn 14. See also Javier Lopez Gonzalez & Francesca Casalini, *Trade and Cross-Border Data Flows* OECD, Working Party of the Trade Committee, TAD/TC/WP(2018)19/FINAL 29 (21 Dec. 2018), [https://one.oecd.org/document/TAD/TC/WP\(2018\)19/FINAL/En/pdf](https://one.oecd.org/document/TAD/TC/WP(2018)19/FINAL/En/pdf) (accessed 9 Jan. 2024); and Naef, *supra* n. 50, at 264.

⁵⁴ See generally, Aaditya Mattoo & Pierre Sauve, *Regionalism in Services Trade*, in *A Handbook of International Trade in Services* 221, 262 (Aaditya Mattoo et al., eds 2008).

agreement must have substantial coverage of services sectors across all modes of supply and eliminate substantially all discrimination in the covered sectors.⁵⁵ It also cannot be used to raise new barriers to trade in services with other WTO Members.⁵⁶ Thus where a preferential data arrangement is covered by a trade agreement containing comprehensive services commitments, it would thereby be able to benefit from the GATS Article V exception.⁵⁷ The situation is less clear for standalone digital economy agreements, given their focus is largely on measures relating to Mode 1 supply⁵⁸ and on digital trade measures, leaving other forms of discrimination unaffected;⁵⁹

- (2) **Allowances for mutual recognition arrangements.** GATS Article VII allows WTO Members to put in place preferential arrangements if done by way of recognition of “education or experience obtained, requirements met, or licenses or certifications granted in a particular country.”⁶⁰ Such recognition may be done through an agreement or arrangement or provided autonomously.⁶¹ However, where such an agreement or arrangement is established, the Member concerned must “afford adequate opportunity for other interested Members to negotiate their accession ... or to negotiate comparable” agreements or arrangements.⁶² Similarly, where recognition is afforded autonomously, other Members must be given “adequate opportunity” to demonstrate that education, experience, licenses, or certifications obtained or requirements met in their territory should be similarly recognized.⁶³ This provides a potential avenue for governments to harmonize and enable interoperability between their data protection and privacy regimes.⁶⁴ However, Article VII has

been “used only scarcely”, with most Members opting instead to incorporate mutual recognition into their Article V trade agreement negotiations;⁶⁵

- (3) **The GATS’s General Exceptions.** GATS Article XIV sets out a range of public policy reasons that can be used to justify measures that are inconsistent with the GATS’s specific obligations – for example, measures necessary to protect public morals or public order, human life or health, or to secure compliance with other laws such as laws relating to privacy, which are not otherwise inconsistent with the GATS.⁶⁶ For a measure to be justified under Article XIV it must fall within one of the listed categories and also satisfy the requirements of the chapeau of Article XIV.⁶⁷ The chapeau of Article XIV requires that the measure not be applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade in services.⁶⁸ While the general exceptions are potentially a way to justify preferential data flow measures that would breach the GATS, it can be difficult for measures to meet the requirements imposed by the “necessity”⁶⁹ test contained within many of the Article XIV categories and also the chapeau test.⁷⁰ This would likely require that alternative measures must not have been available that could have protected the policy interest to the same extent as the selected approach, and the demonstration of a rational relationship between the discrimination created by the measure and the policy objective to be achieved.⁷¹ This requires careful formulation of any measure for which the exception will be

Notes

⁵⁵ GATS, Article V(1)(a) and (b). See also WTO Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, DS139 (11 Feb. 2000), paras 10.269–10.270.

⁵⁶ GATS, Article V(4).

⁵⁷ Mira Burri et al., *The Evolution of Digital Trade Law: Insights from TAPED Trade Law 4.0 Working Paper Series*, Working Paper No. 04/2023 16ff (2 Nov. 2023).

⁵⁸ *Ibid.*, at 17.

⁵⁹ Marta Soprana, *The Digital Economy Partnership Agreement (DEPA): Assessing the Significant of the New Trade Agreement on the Block*, 13(1) Trade, L. & Development 143, 167 (2021).

⁶⁰ GATS, Article VII(1). See also Aaditya Mattoo, *MFN and the GATS* (Jan. 1999), https://www.iatp.org/sites/default/files/MFN_and_the_GATS.htm, (accessed 9 Jan. 2024), s. 3.3; and Bernard Hoekman & Aaditya Mattoo, *International Trade: Trade in Services*, in *Research Handbook in International Economic Law* 113, at 126ff (Andrew Guzman and Alan Sykes 2007).

⁶¹ GATS, Article VII(1).

⁶² GATS, Article VII(2).

⁶³ *Ibid.*

⁶⁴ See Mattoo & Meltzer, *supra* n. 47, at 18.

⁶⁵ Rudolf Adlung & Antonia Carzaniga, *MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?*, 12(2) J. Int’l Econ. L. 357, 361 (2009), doi: 10.1093/jiel/jgp011.

⁶⁶ GATS, Art. XIV.

⁶⁷ WTO Appellate Body Report, *US–Gambling*, DS285 (7 Apr. 2005), para. 292.

⁶⁸ Mattoo & Meltzer, *supra* n. 47, at 17–18.

⁶⁹ *Ibid.*, at 18.

⁷⁰ *Ibid.*

⁷¹ Naef, *supra* n. 50, at 260.

relied upon, and its consistent application and enforcement;⁷² and

- (4) **The GATS's Security Exceptions.** Article XIVbis (b) of the GATS allows for measures to be taken that a Member considers necessary for the protection of its essential security interests where the measure is one:

(a) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(b) relating to fissionable and fusionable materials or the materials from which they are derived;

(c) taken in time of war or other emergency in international relations; ...⁷³

(d) Recent use of this exception has been highly controversial. Although some WTO Members (most notably the United States) have argued that the exception is self-judging and non-justiciable,⁷⁴ this argument has not yet been accepted in any WTO panel proceeding.⁷⁵ Instead, WTO Panels have found that this exception can only be invoked where the matters in sub-paragraphs (1)–(3) have been objectively made out.⁷⁶ Further, none of these categories seem directly applicable to many of the driving forces behind most data flow restrictions – for example, to protect privacy or even cyber-security concerns.⁷⁷

Thus under the GATS there is a mix of rules that may apply to different degrees to data flow friendshoring measures. However, there is a lack of clarity regarding the extent to which they apply, and also the availability of many of the GATS's exceptions.⁷⁸ Thus, designing data friendshoring measures that comply with the existing rules can be difficult, and requires careful consideration of a range of factual and legal matters. Conversely,

failure to comply with these rules (or uncertainty regarding compliance) not only exposes a government to potential legal risks; but can also undermine their broader policy interests such as upholding and being seen to uphold a rules-based approach to international trade.⁷⁹

3.2 Opportunities from International Digital Trade Rules

The increased use of friendshoring measures, including in relation to data flows, is likely inevitable given recent trends. However, international rules around digital trade can help to ameliorate the worst excesses associated with such measures and help to mitigate the risks identified earlier in this article.⁸⁰ In particular:

- (1) Bilateral and plurilateral comprehensive trade agreements can provide certainty and durability to friendshoring initiatives, thereby limiting potential arbitrary imposition of restrictions as between their parties and helping to improve the investment and trading environment between countries seeking to friendshore their supply chains and data flows.⁸¹ They also have the added benefit of providing legal certainty as compared to certain GATS obligations.⁸²
- (2) Multilateral trade rules and negotiations can establish 'guardrails' and baseline norms regarding data flow regulations, limiting their potential abuse and regulating their application.⁸³ This can include notification and consultation requirements, particularly to address unintended impacts or consequences for third-parties, or agreements on data flows in certain sectors or for critical goods and services.⁸⁴ Provisions such as the GATS Article VII on mutual recognition agreement can also reduce discrimination by

Notes

⁷² Yakovleva & Irion, *supra* n. 49, at 191, 199; and Velli, *supra* n. 49, at 889.

⁷³ GATS, Article XIVbis(1)(b).

⁷⁴ See generally Wesley A. Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26(2) Yale J. Int'l L. 413 (2001); Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception*, 41(109) Michigan J. Int'l L. 109 (2020), doi: 10.36642/mjil.41.1.trade; Roger Alford, *The Self-Judging WTO Security Exception*, 3 Utah L. Rev. 697, 705–706 (2011); Timileyin Oyewo, *The National Security Exception of the World Trade Organization: An Entirely Self-Judging Provision or Not?*, 31 Hague Y.B. Int'l L. 171 (2018), doi: 10.1163/9789004453739_009; and Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18(2) J. Int'l Econ. L. 449 (2015), doi: 10.1093/jiel/jgv025.

⁷⁵ See e.g., WTO Panel Report, *US – Steel and Aluminium Products*, DS564 (9 Dec. 2022), paras 7.121–7.137, while dealing with the equivalent exception in the *General Agreement on Tariffs and Trade* ("GATT") the reasoning is likely also applicable to GATS Article XIVbis.

⁷⁶ See e.g., WTO Panel Report, *Russia–Traffic in Transit*, DS512 (5 Apr. 2019), paras 7.65–7.82; and WTO Panel Report, *US – Origin Marking Requirement*, DS597 (9 Dec. 2022), paras 7.88–7.89, again focusing on the GATT, but with reasoning likely applicable to GATS Article XIVbis.

⁷⁷ Joshua Meltzer, *Cybersecurity, Digital Trade, and Data Flows* Brookings Global Economy & Development Working Paper 132, 26ff (May 2020), <https://www.brookings.edu/wp-content/uploads/2019/11/Cybersecurity-digital-trade-data-flows.pdf> (accessed 9 Jan. 2024).

⁷⁸ See e.g., Aaronson, *supra* n. 43, at 15; and Mavroidis, *supra* n. 50, at 75, 102.

⁷⁹ See Aaronson, *supra* n. 41.

⁸⁰ See s. II above.

⁸¹ See e.g., Mattoo & Meltzer, *supra* n. 47, at 24.

⁸² See the discussion of GATS Art. V above in Section III(A).

⁸³ Aiyar et al., *supra* n. 42, at 23, 27.

⁸⁴ *Ibid.*, at 23.

requiring objective assessment of other jurisdictions ability or willingness to meet certain policy objectives, thereby making arbitrary discrimination less likely;⁸⁵ and

- (3) More generally, work on harmonisation and interoperability, for example under the auspices of specific agreements or in their committees, can help reduce divergence and conflict between regulatory systems. This can avoid unnecessary fragmentation between jurisdictions and rules domestically and internationally,⁸⁶ which could undermine the unity of the global internet.⁸⁷ Efforts to harmonize approaches and ensure that regulatory systems are interoperable can reduce this risk and also help to better achieve specific policy goals in more jurisdictions – such as the protection of privacy.⁸⁸ In the longer term these forums and discussions can also help to rebuild trust between countries as areas of common interest and technical solutions to concerns can be negotiated.⁸⁹

To realize the benefits of these potential opportunities, engagement in multilateral, plurilateral and bilateral initiatives will be key. For example, the WTO's E-Commerce II negotiations represent an opportunity to clarify baseline rules regarding data flows and establish common norms for all WTO Members. Similarly, work under the auspices of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Regional Comprehensive Economic Partnership Agreement, or the Indo-Pacific Economic Framework for Prosperity can help to put in place specific regimes to provide certainty for their parties that data flows will not be inappropriately impeded between their jurisdictions. The committees and meetings under these agreements also present opportunities

for increased regulatory cooperation and collaboration on issues such as interoperability and harmonisation. This will – though – require considered *domestic* policy formulation to determine the specific interests that friendshoring data seeks to address, and how best to scope rules and initiatives in a way that protects or achieves those interests without unnecessarily impeding data flows and digital trade.⁹⁰

4 CONCLUSION

Geopolitical and supply chain concerns continue to drive governments to policy measures to increase the resilience of their economies, reduce risks to critical inputs, and minimize their vulnerabilities to potentially 'unfriendly' jurisdictions – this includes in relation to data flows and digital trade. Data flows are critical to supply chains and are already the subject of a range of measures akin to friendshoring across multiple jurisdictions.⁹¹ These measures can have an uneasy relationship with existing trade rules,⁹² creating legal risks for governments and potentially undermining broader efforts to reinforce and uphold a rules-based trading system. However, trade rules can also help to improve the implementation of data friendshoring measures and guard against their worst forms. This creates an opportunity for governments to utilize existing trade agreements and negotiations to limit the economic impact of data friendshoring, provide certainty for businesses operating within friendshored supply chains, and work on harmonisation and interoperability issues to minimize splintering of networks and information flows to the detriment of the economy and indeed a free and open global online society.

Notes

⁸⁵ Mattoo & Meltzer, *supra* n. 47, at 28.

⁸⁶ Aaronson, *supra* n. 43, at 11.

⁸⁷ Jonah Hill, *Internet Fragmentation: Highlighting the Major Technical, Governance and Diplomatic Challenges for U.S. Policy Makers*, Harvard Kennedy School, Belfer Center for Science and International Affairs 43 (2012), https://www.belfercenter.org/sites/default/files/files/publication/internet_fragmentation_jonah_hill.pdf (accessed 9 Jan. 2024).

⁸⁸ Joshua Meltzer, *A WTO Reform Agenda* Brookings Global Economy & Development Working Paper 130, 12 (Sep. 2019), <https://www.brookings.edu/wp-content/uploads/2019/09/WTO-Reform-Agenda.pdf>.

⁸⁹ Aiyar et al., *supra* n. 42, at 23.

⁹⁰ See e.g., Aaronson, *supra* n. 43; and Susan Aaronson, *Building Trust in Digital Trade Will Require a Rethink of Trade Policy-Making*, 39 Oxford Rev. Econ. Pol'y 98 (2023), doi: 10.1093/oxrep/grac046.

⁹¹ See s. II above.

⁹² See s. III above.

ARTICLE

Friendshoring and Reshoring Semiconductor Supply Chains: US CHIPS Act and the Multilateral Trading System

Manya Gupta* & Arnav Sharma*

The United States' Creating Helpful incentives to Produce Semiconductors and Sciences Act (CHIPS) Act, introduced in 2022, is a part of the package of new legislations aimed at reindustrialization of the United States (US) and maintaining its position as a hegemon across advanced technology verticals including semiconductors. The Act provides multiple fiscal incentives to entities that wish to set up, modernize or expand facilities engaged in semiconductor production related activities in the US. The Act intends to curb any nexus of beneficiaries with 'a country of concern' such as China and it blocks benefits for an entity dealing with such countries. Apart from reshoring capacities the Act also frontlines US strategy to friendshoring semiconductor supply chains. Measures like the CHIPS Act may clash with an international rules-based trading system. Parallely, the innovative ways to bypass the trade rules may come with their own consequences. They highlight the weakness of the rule-based trading system in providing effective remedies for supply chain issues.). In this regard, the paper briefly discusses the semiconductor supply chain and traces its sophisticated nature in the context of localization/ally-shoring/onsourcing policies.

Keywords: CHIPS Act, Semiconductors, Supply Chains, Friendshoring, Nearshoring, Reshoring, Industrial Policy, International Trade Law, WTO, Supply chain disruption, United States

I INTRODUCTION

Semiconductors have become a ubiquitous aspect of modern life. They have significantly reduced in size¹ and expanded from their initial use in computing for security and research related operations, to almost every electronic device including smart phones, watches, cameras, home appliances, automobiles and healthcare products.² On account of its wide usage across sectors, any ripples emerging from disruptions in semiconductors supply chains exert an adverse impact on other sectors, including those of strategic relevance to national security. A pertinent example is the automobile industry which experienced

manufacturing and delivery issues on account of a short semiconductors supply in 2020.³ This was attributed to restrictions emerging in response to the COVID 19 lockdown and heightened geopolitical tensions as witnessed by the conflict in Ukraine and the US-China trade war which induced closures and disruptions, especially in the manufacturing, and Assembly, Testing, Marking and Packaging (ATMP) of semiconductors.⁴

In an era crippled by supply-chain disruptions, retreating multilateralism and race for critical technologies as a part of great power politics,⁵ legislations like the CHIPS Act⁶ signal the emergence of a future marked by reshoring and friendshoring of supply chains.

Notes

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¹ Moore's Law is an observation made by Intel Co-founder Gordon Moore which states that the number of transistors in a dense integrated circuit (IC) doubles about every two years.

² Douglas Heaven, *Made On Earth: The Humble Mineral that Transformed the world* BBC (2023), <https://www.bbc.com/future/feature/made-on-earth/how-the-chip-changed-everything/> (accessed 1 Dec. 2023).

³ *Supply Chain Issues and Autos: How Long Will the Chip Shortage Last?*, J.P. Morgan Research (18 Apr. 2023), <https://www.jpmorgan.com/insights/research/supply-chain-chip-shortage> (accessed 1 Dec. 2023).

⁴ Wassen Mohammad, Adel Elomri & Laoucine Kerbache, *The Global Semiconductor Chip Shortage: Causes, Implications, and Potential Remedies*, 55(10) IFAC-PapersOnLine 476–477(2022), <https://doi.org/10.1016/j.ifacol.2022.09.439> (accessed 1 Dec. 2023); See also H. Casper, A. Rexford, D. Riegel, A. Robinson, E. Martin, Awwad M. *The Impact of the Computer chip Supply Shortage*. In Proceedings of the international conference on industrial engineering and operations management, Bangalore, India 2021 Aug 16 at 236–245.

⁵ John J. Mearsheimer, *The Inevitable Rivalry: America, China, and the Tragedy of Great-Power Politics*, Foreign Affairs (19 Oct. 2021), <https://www.foreignaffairs.com/articles/china/2021-10-19/inevitable-rivalry-cold-war> (accessed 1 Dec. 2023).

⁶ H.R. 4346, 117th Cong (2022), <https://www.congress.gov/bills/117th-congress/house-bill/4346>, (accessed 1 Dec. 2023)(hereafter 'CHIPS Act').

Overall, the CHIPS Act focuses on incentivizing, and to some extent regulating various domains of advanced technology. The technology segments covered by the CHIPS Act include semiconductors, artificial intelligence, telecommunications, quantum computing, nanotechnology, *inter alia*. The Act seeks to bolster domestic capacity, ensure self-reliance and boost research and development as well as workforce training in these domains. With a budget allocation of USD 280 billion spread across a decade, the CHIPS Act commits substantial resources to accomplish its objectives.⁷

The article focuses on studying the delicate nature of the semiconductor supply chains and other geopolitical measures surrounding the CHIPS Act. It elaborates on the incentives provided in the CHIPS Act and the conditions attached to these incentives. It places the act in the context of the US strategy to manage semiconductor supply chains away from adversaries and also appraise the global responses to the act. The authors also analyse the consistency of the CHIPS Act against US' WTO obligations. In this attempt the article extends particular focus on provisions in the WTO agreements which can provide remedies against supply chain disruptions and the provisions which are often (mis)used by the WTO members to safeguard such measures.

2 NATURE AND GENESIS OF SEMICONDUCTOR SUPPLY CHAINS

The semiconductor industry owes its origins to the US-based initiatives, right from the Nobel prize winning invention of the Transistor in 1947,⁸ to the creation of the integrated circuit (IC).⁹ The US expansion in the sector was followed by Japan and Korea in the seventies

and the eighties respectively. A more recent entrant in the mix is Taiwan which has now occupied a very important role in the semiconductors sector, especially with the prevalence of the fabless model.¹⁰

The US semiconductor industry makes up around 50% of the semiconductor revenues worldwide.¹¹ But in the last twenty years, the US share of the world's semiconductor manufacturing capacity has decreased from 37% to 12%.¹² That said, the US is still at the forefront of semiconductor manufacturing equipment production and the R&D-intensive aspects such as chip architecture and design. However, lately the US has witnessed dependency on foreign suppliers in the semiconductor fabrication, as well as assembly, testing, marking and packaging (ATMP) segments. The raw materials side of the semiconductor supply chain is likewise dominated by foreign manufacturers especially China, particularly in silicon wafers, photomasks, and photoresists.¹³ In addition, Chinese capacities in critical technologies segments such as semiconductors have been catching up with the US.¹⁴ The CHIPS Act emerges as one of the US responses to the ongoing great power politics in crucial and strategic technology segments. In this regard, the US's strategy on what is often dubbed as a trade war with China (2018–2020) initially relied on imposing supply side restrictions through strict export controls affecting the sale of semiconductors and semiconductor equipment to China.¹⁵ The US gave primacy to targeting semiconductors and implemented a 25 % tariff on imported semiconductors from China.¹⁶ Despite US measures targeting the Chinese semiconductors industry, China did not impose any restrictions on imports from the US till 2020. This was primarily resulting from the deep dependency of the participants of the semiconductor supply chain on each other.

Notes

⁷ *The CHIPS and Science Act: Here's what's in it*, McKinsey and Company (4 October 2022), <https://www.mckinsey.com/industries/public-sector/our-insights/the-chips-and-science-act-heres-whats-in-it> (accessed 1 Dec. 2023).

⁸ They were awarded the Nobel Prize in Physics, 1956. For more information see: *The Nobel Prize in Physics 1956*, NobelPrize.org. Nobel Prize Outreach AB (2023), <https://www.nobelprize.org/prizes/physics/1956/summary/>, (accessed 1 Dec. 2023).

⁹ Tom Wolfe, *The Tinkerings of Robert Noyce: How the Sun Rose on the Silicon Valley*, First published in Esquire Magazine (Dec. 1983), https://web.stanford.edu/class/e145/2007_fall/materials/noyce.html (accessed 1 Dec. 2023).

¹⁰ Gregory Arcuri & Samantha Lu, *Taiwan's Semiconductor Dominance: Implications for Cross-Strait Relations and the Prospect of Forceful Unification*, Centre for Strategic and International Studies (22 Mar. 2022), <https://www.csis.org/blogs/perspectives-innovation/taiwans-semiconductor-dominance-implications-cross-strait-relations> (accessed 1 Dec. 2023); See also Benjamin Eyal, *Semiconductors And Taiwanese Security: A Blessing or A Curse?* Columbia Political review (26 Mar. 2021), <https://www.cpreview.org/blog/2021/3/semiconductors-and-taiwanese-security-a-blessing-or-a-curse> (accessed 1 Dec. 2023).

¹¹ *Ibid.*

¹² Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022, Section by section summary, US Department of Commerce(2022), https://www.bennet.senate.gov/public/_cache/files/4/0/40919cb4-ff63-4434-8ae2-897a4a026b30/7BCDD84F555A6B85BEC800514F1D3AFD.chips-and-science-act-of-2022-section-by-section.pdf (accessed 1 Dec. 2023); See also *The CHIPS and Science Act: Here's what's in it*, McKinsey and Company (4 Oct. 2022), <https://www.mckinsey.com/industries/public-sector/our-insights/the-chips-and-science-act-heres-whats-in-it> (accessed 1 Dec. 2023).

¹³ *Ibid.*

¹⁴ Graham Allison, Kevin Klyman, Karina Barbesino & Hugo Yen, *Avoiding Great Power War Project The Great Tech Rivalry: China vs the U.S.*, Belfer Centre for Science and International Affairs, Harvard Kennedy School (Dec. 2021), https://www.belfercenter.org/sites/default/files/GreatTechRivalry_ChinavsUS_211207.pdf (accessed 1 Dec. 2023); See also Varda He & Jennifer Roberts, *Clash of the Chips: A comparison of US China Semiconductor Capacities*, The SAIS Review of International Affairs (7 May 2022), <https://saireview.sais.jhu.edu/us-china-semiconductor-production-capacities/> (accessed 1 Dec. 2023).

¹⁵ Chad P. Bown, *How the United States Marched Its Semiconductor Industry in a Trade War with China*, Peterson International Institute for Economics at 2 (December 2020), <https://www.piie.com/sites/default/files/documents/wp20-16.pdf> (accessed 1 Dec. 2023); Y. Xiao, *The Impact of the US-China Trade War on China's Semiconductor Industry*, 2nd International Conference on Financial Management and Economic Transition, Atlantis Press at 667–668 (2022).

¹⁶ *Ibid.*

2.1 Offshoring in Semiconductors and Early Trade Conflicts

the semiconductor industry's globalizing tryst with offshoring begins in the sixties with the US-based Fairchild semiconductor starting limited operations in Hong Kong to cater to ATMP operations.¹⁷ The semiconductor operations expanded in Asian states like Japan on account of their rising consumer electronics industry, expanding government support in the form of subsidies as well the large interconnected business relationships and shareholdings amongst private organizations (keiretsu).¹⁸ The Japanese semiconductor industry soon found itself in a trade dispute with the US which launched multiple antidumping investigations into Japanese semiconductor imports to the US, the US semiconductor industry also expressed concerns about their inability to make inroads into Japanese markets on account of Japanese protectionism. The dispute finally led to a bilateral agreement which retained some restrictions on imports from Japan while allowing for some market access for US firms into Japan. The EC took note of these developments and fearing a rise in prices of DRAMs initiated a WTO dispute against Japan on the imports of erasable programmable Dynamic Random Access Memories. Semiconductor industries in South Korea and Taiwan respectively took shape in the background of these disputes in the late 60s.¹⁹ The US later also had trade disputes and escalations with South Korea pertaining to the semi-

conductors sector in third countries as well as the US markets.²⁰

2.2 Understanding Semiconductor Supply Chains and the Complexities of Friendshoring Capacities

Semiconductors serve multiple purposes across various sectors. Modern semiconductors can be classified across various lines, such as their functions, technology nodes and manufacturing processes involved in their making as well as their processing capabilities. For the sake of brevity, the processes involved in the making of semiconductors have been divided into three parts namely design, fabrication and ATMP. Each component contains multiple subcomponents which allude to their own specific inputs.

Semiconductor supply chains are highly complex and rely on multiple inputs across different stages. Some studies claim that a basic IC chip from start to finish crosses at least seventy international borders.²¹ One of the most momentous developments in the semiconductor industry has been the development of the fabless model post-1980s and the industry is characterized by ever-evolving specialization.²² Increased specialization and research and development have indeed concentrated firms specializing in design and fabrication in limited geographies and to a limited number of firms globally on account of high costs and long turnaround times on investment.²³

Processes involved in production of a semiconductor chip



Source: Authors' Own

Notes

¹⁷ David B. Yoffie, *Foreign Direct Investment in Semiconductors 200–201*, (Kenneth A. Froot ed., University of Chicago Press 1992); See also Chad P. Bown, *How the United States Marched Its Semiconductor Industry in a Trade war with China*, Peterson International Institute for Economics (Dec. 2020), <https://www.piie.com/sites/default/files/documents/wp20-16.pdf> (accessed 1 Dec. 2023).

¹⁸ See Chad P. Bown, *supra* n. 15, at 2–3.

¹⁹ *Ibid.*

²⁰ See for example, Panel Report in DS296 United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea.

²¹ Akhil Thadani and Gregory C. Allen, Mapping the Semiconductor Supply Chain: The Critical Role of the Indo-Pacific Region, Center for Strategic and International Studies at 2 (30 May 2023), <<https://www.csis.org/analysis/mapping-semiconductor-supply-chain-critical-role-indo-pacific-region>> (accessed 2 Dec. 2023).

²² See e.g., Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/R.

²³ Of Swans and Rhinos: Building Resilience in the Semiconductor Supply Chain, Wilson Center' at 8 and 12 (2022) <https://www.wilsoncenter.org/publication/swans-and-rhinos-building-resilience-semiconductor-supply-chain>, (accessed 2 Dec. 2023) (hereafter 'of swans and Rhinos'); 'Government Incentives and US Competitiveness in Semiconductor Manufacturing,' Boston Consulting Group & Semiconductor Industry Association, at 5–8 <https://www.semiconductors.org/wp-content/uploads/2020/09/Government-Incentives-and-US-Competitiveness-in-Semiconductor-Manufacturing-Sep-2020.pdf> (accessed 19 Dec. 2023).

A highly specialized industry with a dedicated and complex supply chain also implies that supply chain constraints have the potential to exert devastating cascading effects on downstream users. According to some studies, there are instances of ten-day disruptions at one end of the semiconductor supply chain that can lead to a year-long disruption downstream.²⁴ The semiconductor shortages of the recent past and the resultant impact on the automobile industry is a pertinent example of the same.²⁵

The industry has also benefited from specialization by operating in clusters of specialized units scattered across the globe. This has manifested in geographic concentrations which in a supply chain context have the potential to negatively affect resilience and security of supply.²⁶ An important trend that has developed in response to this aspect on account of supply chain disruptions is the promotion of friendshoring and reshoring based incentive measures in order to reduce reliance on imports, decrease incidence of bottlenecks, control cascading effects and promote access to essential goods during crises. The semiconductor sector is not alien to this phenomenon and has witnessed a string of measures in countries like China, Korea and the US aimed at securing and fostering development and production of semiconductors in their territories.²⁷ Global trade allows specialized clusters to develop in areas that offer better conditions for the development of a particular capacity. In the context of semiconductors, this comes through high Research and Design costs in developed countries such as the United States, Japan and Korea while labour intensive processes such as ATMP are based in countries such as China, Malaysia, Vietnam inter alia.²⁸

At the same time, there are certain corporations that enjoy a de facto monopoly in certain semiconductor components/operations, ASML's EUV machines and Tokyo Electron are pertinent examples of this phenomenon.²⁹

CHIPS Act is an attempt to reduce dependency on imported semiconductors and ensure that the production base is shifted back to the US. It provides hefty incentives to increase the resilience of semiconductor production in the country and to boycott products from the countries where a security concern is involved. In essence, it is an

attempt to reshore the previously offshored factories with the help of allies.

3 THE CHIPS ACT AND THE BEGINNING OF THE BATTLE FOR CRITICAL TECHNOLOGIES

Concerning semiconductors, the CHIPS Act designates a substantial investment of USD 52.7 billion over a five-year span to enhance domestic manufacturing capabilities, support research and development endeavours, and cultivate a skilled workforce in the semiconductor industry.³⁰ Furthermore, the Act addresses the importance of maintaining a reliable supply chain for the inputs required in semiconductor manufacturing, emphasizing the need for a robust global supply chain consisting of states allied with the US. In this regard, the CHIPS Act can be viewed as a part and parcel of recent larger subsidies/incentives schemes aimed at reindustrialization of the United States and maintaining its position as a global hegemon in the context of its ongoing geopolitical rivalry with China.³¹

S No	Funds under the CHIPS act	Allocated funds
1.	CHIPS for America Fund	USD 50 Billion
2.	CHIPS for America Defense Fund	USD 2 Billion
3.	CHIPS for America International Technology Security and Innovation Fund	USD 500 Million
4.	CHIPS for America Workforce and Education Fund	USD 200 Million

Source: Author's Own

3.1 History/Background of the Act

The CHIPS Act is in context of a decline in US semiconductor production and market share in the recent past coupled with the growth of semiconductor industries in East Asian states such as Japan, Korea and later

Notes

²⁴ See Chad P. Bown, *supra* n 15, at 28.

²⁵ See Of Swans and Rhinos, *supra* n 23, at 12–15.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ See Mearsheimer, *supra* n. 5.

²⁹ See Of Swans and Rhinos, *supra* n 23.

³⁰ Hyung Gon Jeong, *The U.S.-China Battle for Semiconductor Supremacy and Reshaping the Global Supply Chain* 12 (44) KIEP Research Paper World Economy Brief (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4273356 (accessed 5 Dec. 2023).

³¹ *The destructive new logic that threatens globalization: America is leading a dangerous global slide towards subsidies, export controls and protectionism* The Economist (12 Jan. 2023), <https://www.economist.com/leaders/2023/01/12/the-destructive-new-logic-that-threatens-globalisation> (accessed Dec. 2023); See also Gon Jeong, *supra* n. 30.; Craig McClure, *Hot Topics in International Trade – October 2022 – What is the CHIPS Act, and Will it Fix the Semiconductor Supply Chain Issues?* (Mraumiller Law Group PLLC 10 Oct. 2022), <https://www.jdsupra.com/legalnews/hot-topics-in-international-trade-2100337/> (accessed 2 Dec. 2023).

Taiwan.³² This can be viewed in conjunction with recent escalation in trade tensions with China and supply chain issues encountered by US industries during the pandemic and emerging tech rivalry with China.³³ The CHIPS Act amends its eponymous predecessor i.e the CHIPS Act 2021 which was a part of the William M Thornberry National Defence Authorisation Act 2021 (NDAA).³⁴ The CHIPS Act also draws on the US Secretary of Commerce's (Secretary) attempts to identify risks in the semiconductor industry and supply chains. The resultant CHIPS Act, in summary was passed to ensure the existence of a viable semiconductor industry in the US and also meet its economic and security needs.³⁵

3.2 Scope and Important Definitions

The CHIPS Act expands the scope of Section 9902 of the NDAA from semiconductors to elements that are relevant for semiconductors supply chains. The initial provision only covered financial incentives in the form of direct loans, grants and tax credits to incentivise investment in facilities and equipment for 'semiconductor fabrication, assembly, advanced packaging, or research and development'.³⁶ The amendment also provides financial incentives to the production, research and development of semiconductor manufacturing equipment and materials used to manufacture semiconductors in the US.³⁷

The Act covers a wide range of entities ('covered entities') including a nonprofit entity, a private entity, a consortium of private entities, or a consortium of nonprofit, public, and private entities.³⁸ Covered entities may also include entities from other states as long as they are not associated with a foreign country of concern or engaged in conduct detrimental to the national security and foreign policy of the United States.³⁹

The Act envisages restrictions on access to advanced semiconductors, and semiconductors technologies as well as their manufacturing equipment coupled with curtailment on expansion of operations in countries deemed to be 'foreign country of concern'.⁴⁰ The term includes both statutorily determined and discretionary elements, i.e (i) countries under *Section 4872 (d) of 10 U.S.C.*, namely Russia, China, North Korea and Iran, or (ii) any entity engaged in conduct that is detrimental to the national security or foreign policy of the United States.⁴¹ Further, the covered entities under the act have to refrain from expanding semiconductor manufacturing capacity in foreign countries of concern for ten years after receiving an award, or else they must forfeit the 'full amount' of the award.⁴² The only exception to this situation pertains to the operation of existing facilities and initiating expansion or novel operations in the domain of older generation 'legacy semiconductors'.⁴³

3.3 Operation of the Act

The CHIPS act can be understood in a three-step process which involves application, review and grant of incentives.

3.3.1 Application

Any 'covered entity' can apply for financial incentives through an application to the Secretary demonstrating an interest in construction, modernization or expansion of a facility as described in the previous paragraph. At the application stage, the applicants also need to undertake an executable plan which addresses and mitigates supply chain security risks.⁴⁴ The Act illustrates that these risks may include issues related to access, availability, confidentiality, integrity, and lack of geographic diversification in the entity's supply chain.⁴⁵

Notes

³² *Vision for Success, Chips for America: CHIPS Incentive Program*, National Institute of Standards and Technology (28 Feb. 2023), https://www.nist.gov/system/files/documents/2023/02/28/Vision_for_Success-Commercial_Fabrication_Facilities.pdf (accessed 6 Dec. 2023); *The White House, 'Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100- Day Reviews under Executive Order 14017* (Jun. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chainreview-report.pdf> (accessed 6 Dec. 2023).

³³ Vishnu Kannan & Jacob Feldgoise, *After the CHIPS Act: The Limits of Reshoring and Next Steps for U.S. Semiconductor Policy*, Carnegie Endowment for International Peace (22 Nov. 2022), <https://carnegieendowment.org/2022/11/22/after-chips-act-limits-of-reshoring-and-next-steps-for-u.s.-semiconductor-policy-pub-88439#:~:text=The%20CHIPS%20Act's%20%2452.7%20billion,domestic%20jobs%2C%20and%203> (accessed 2 Dec. 2023).

³⁴ CHIPS Act, *supra* n. 6, Section 102; H.R. 6395, 116th Congress (2020) (hereafter 'NDAA').

³⁵ *U.S. Secretary of Commerce Gina M. Raimondo Statement on Biden-Harris Administration 100 Day Supply Chain Review*, US Department of Commerce, Press Release (8 Jun. 2021), <https://www.commerce.gov/news/press-releases/2021/06/us-secretary-commerce-gina-m-raimondo-statement-biden-harris> (accessed 2 Dec. 2023).

³⁶ NDAA, *supra* n. 34, Section 9902 (A)(2)(b).

³⁷ CHIPS Act, *supra* n. 6, Section 103(a)(1)(C).

³⁸ CHIPS Act, *supra* n. 6, Section 103(a)(1)(A) read with NDAA, *supra* n. 34, Section 9901.

³⁹ *Ibid.*

⁴⁰ CHIPS Act, *supra* n. 6, Section 103(a)(4) read with NDAA, *supra* n. 34, Section 9901(6).

⁴¹ CHIPS Act, *supra* n. 6, Section 103(7)(A) and (B).

⁴² CHIPS Act, *supra* n. 6, Section 103(a)(5).

⁴³ *Ibid.*

⁴⁴ CHIPS Act, *supra* n. 6, Section 103(b)(2)(C).

⁴⁵ *Ibid.*

3.3.2 Review

At the review stage the Secretary while considering the applications peruses multiple factors which include: the exclusion of applicants from a ‘foreign country of concern’;⁴⁶ close relationship of the application to the economic and national security interests of the United States;⁴⁷ demonstration of social welfare/security strategies in the application in terms of providing workforce training and employment opportunities to disadvantaged groups, among others.⁴⁸

The Secretary also may (emphasis added) consider the following factors like type of semiconductors and responsiveness of the covered entity to the national security needs or requirements while approving an application.⁴⁹ This may have implications for the intermingling of national security and economic interests as discussed in the subsequent section. As is evident and discussed by various scholars, the application procedure is a textbook case of increasing securitization of economic policy in the domain of geoeconomics.⁵⁰

In addition, the CHIPS Act also contains a prioritization measure wherein the Secretary of Commerce shall give priority in awarding financial assistance to covered entities that ‘manufacture semiconductors necessary to address gaps and vulnerabilities’ in US domestic supply chain across various range of technologies and process nodes; and provide a secure supply of semiconductors necessary for national security, manufacturing, critical infrastructure and technology leadership of the US, as well as other ‘essential elements’ of the US economy.⁵¹

3.3.3 Grant of Award

Once a covered entity is awarded financial assistance, it enters into a ten-year agreement with the Secretary where the entity or its affiliates cannot not engage in any significant transaction that expands semiconductor manufacturing capacity in China and other foreign countries of concern across the agreement time period.⁵² The provision only makes an exception for existing facilities dealing with legacy

semiconductors⁵³ which predominantly serve the market of a ‘foreign country of concern’. The agreement also extends to the affiliates of the covered entity receiving an award.⁵⁴

In line with the expansion clawback, the Act also prohibits joint research and licensing efforts with foreign countries of concern. In such instances, the secretary may recover the entire grant if an entity or its affiliates are found to indulge in such activities that relate to a technology or product which raises national security concerns.

4 IMPACT ON RULES-BASED TRADING SYSTEM

The increasing volume of policies and measures by states based on onshoring or reshoring of production from ‘foundry countries’ is supposedly backed by inviolable policy objectives including environmental conservation and national security. Interestingly, these policy objectives have infinitely opened up, for instance, the US explains its export control measures as ‘maintaining a technology edge’ over other countries. Different forms of measures are emerging as a preferred choice because of their effectiveness, the fragmented nature of the semiconductor supply chain and the critical role of the countries which are a part of this supply chain. For semiconductors, most of these measures take the form of export controls or export licensing. Recently, we have seen a growing trend of increasing subsidies in many countries which has resulted in a domino effect of allies strategically trying to boycott China out of the process. China has already started consultations with the US using the WTO Dispute Settlement Body (WTO DSB).⁵⁵ However, a conspicuous challenge since the last decade has been the inability of the existing rule-based trading system and especially WTO in addressing supply chain disruption-related issues.

This Part explores the possibilities to address supply chain issues in the WTO framework. On the flipside it also focuses on the recent utilization of security exceptions to justify onshoring and friendshoring measures.

Notes

⁴⁶ *Supra* n. 40.

⁴⁷ CHIPS Act, *supra* n. 6, Section 103(b)(2)(D)(iv).

⁴⁸ CHIPS Act, *supra* n. 6 Section 103(c)(1) and (2) read with NDAA, *supra* n. 34, Section 9906.

⁴⁹ CHIPS Act, *supra* n. 6, Section 103(b)(2)(D) read with NDAA, *supra* n. 34, Section 9902(a)(2)(C).

⁵⁰ Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order I*, J. Int'l Econ. L. 00, at 1–22 (2019), <https://doi.org/10.2139/ssrn.3389163> (accessed 7 Dec. 2023); See also *Geoeconomics Explained*, Chatham House – International Affairs Think Tank (2016), <https://www.chathamhouse.org/2016/12/geoeconomics-explained> (accessed 2 Dec. 2023).

⁵¹ CHIPS Act, *supra* n. 6, Section 103(b)(2)(F) read with NDAA, *supra* n. 34, Section 9902.

⁵² CHIPS Act, *supra* n. 6, Section 103(b)(6)(D) read with NDAA, *supra* n. 34, Section 9902.

⁵³ *Ibid*; Legacy semiconductors are defined in CHIPS Act, *supra* n. 6, Section 103(b)(5).

⁵⁴ *Ibid*.

⁵⁵ WTO, Request for Consultations by China, United States – Measures on certain semiconductors and other products and related services and technologies, WT/DS615/1, G/L/1471 S/L/438, G/TRIMS/D/46 IP/D/44 (15 December 2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/615-1.pdf&Open=True> (accessed 7 Dec. 2023).

4.1 Provisions Relating to Supply Chain Disruptions in the WTO Framework

The WTO and its predecessor GATT were perceived in a time when the impact and importance of global supply chains were undervalued. As a result, these instruments mostly focus on the traditional trade where a good or service is mostly made in one country.⁵⁶ Modern trade is characterized by many countries making links to a supply chain and contributing to the production of a good or supply of a service. A supply chain mostly comprises high-tech firms coordinating with low-wage labour abundant developing countries and least developed countries which attracted investment from these firms by reducing tariffs, entering into bilateral investment treaties, and joining a web of regional and bilateral trade agreements.⁵⁷ The WTO and its covered agreements are the birthplace of many provisions which have been used as a tool to react or to justify the reaction to a supply chain disruption and to cause or to justify the cause of a supply chain disruption. Often, the ally-shoring and reshoring strategies take the form of export and import controls by the supply chain participating Members, either as raw material suppliers, intermediate goods suppliers, or as the consumer base. Since ally-shoring and reshoring strategies are mostly aimed at achieving a policy objective of strategic importance, such measures also rely on policy justifications embedded in the WTO agreements as exceptions or derogations. Despite the traditional outlook, the WTO agreements including Information Technology Agreements, Trade Facilitation Agreement, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) have enabled reduction in cost of trade, access to productivity and technology, increasing free flow of goods, and global sales increasing the innovation and technological development.⁵⁸ Even though the existing rules regime of the WTO takes traditional trade as the foundation, it can help in addressing the reactions of the Members to most supply chain disruptions and to some extent the ongoing attempts of reshoring and

friend-shoring. Some of these agreements and provisions are discussed in the following sub-sections.

4.1.1 Prohibition or Restriction of Export Through Export Bans or Controls

Article XI of the General Agreement on Tariff and Trade (GATT) broadly bars Members from maintaining any prohibitions or restrictions on the import or export of goods except in the form of duties, taxes, or other charges.⁵⁹ It also allows flexibility for Members to deviate from this obligation in instances like critical shortages of foodstuff or other products essential to the exporting Member.⁶⁰ As specified, export and import controls are the usual retaliatory steps by the Members who are participating in a supply chain. Export prohibitions or controls can be used to ensure domestic sufficiency and stabilizing domestic prices.⁶¹ Import prohibitions or controls can manage concerns like overcapacity and excessive supply of goods for a consumer Member. In the semiconductor supply chain, many examples of export control/licenses have emerged recently. For instance, the US Bureau of Industry and Security announced an interim final rule which amends the Export Administration Regulations to restrict China's access to US' most advanced chips, design software, and manufacturing equipment by either completely prohibiting exports or by imposing licensing requirements.^{62,63} It essentially bars China's access to any US chips or chip making equipment using US technology and software to ensure that China is prevented from using, manufacturing or developing such chips.⁶⁴ The Bureau cites national security and foreign policy as the basis for the additional export controls,⁶⁵ and is also seen as an attempt to control China's attempt of access the semiconductor manufacturing equipment⁶⁶ and software to ensure that the US is always ahead of China, at least technologically. It also allows a temporary general license to minimize the short-term impact on the semiconductor

Notes

⁵⁶ Richard Baldwin, *WTO 2.0: Global Governance of Supply Chain Trade*, Centre for Economic Policy Research, Policy Insight No. 63 (Dec. 2012), at 1, Graduate Institute Geneva, University of Oxford, and CEPR, https://cepr.org/system/files/publication-files/103080-policy_insight_64_wto_2_0_global_governance_of_supply_chain_trade.pdf (accessed 9 Jun. 2023).

⁵⁷ *Ibid.*, at 7.

⁵⁸ *Semiconductors and the World Trade Organization, How Global Trade Rules Have Spurred Semiconductor Growth and Innovation* 2 (Nov. 2020), <https://www.semiconductors.org/wp-content/uploads/2020/11/The-WTO-and-the-Semiconductor-Industry-Nov-2020.pdf> (accessed 2 Dec. 2023).

⁵⁹ WTO General Agreement on Tariff and Trade, Article XI:1.

⁶⁰ WTO General Agreement on Tariff and Trade, Article XI:2.

⁶¹ World Trade Organization, *Export Prohibitions and Restrictions, Information Note* (23 Apr. 2020), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf (accessed 11 Jul. 2023).

⁶² The United States announces export controls to restrict China's ability to Purchase and Manufacture High-End Chips, *AJIL* (2023), at 145.

⁶³ Federal Register, *Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification*, Bureau of Industry and Security (13 October 2022), <https://www.federalregister.gov/documents/2022/10/13/2022-21658/implementation-of-additional-export-controls-certain-advanced-computing-and-semiconductor> (accessed 11 Jun. 2023).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

supply chain by allowing specific manufacturing activities for items to be used outside China.⁶⁷ As noted above, China has already started consultations with the US at the WTO. The major grounds for its challenge under GATT are Article I:1 of GATT (Most-favoured Nation obligation) and Article XI:1 of the GATT since the Bureau's amendment to the EAR constitute restrictions made by the United States through export licenses on the exportation or sales for export of products destined for China.⁶⁸ Similarly, back in 2019, Japan imposed export control in the form of individual licenses for exports of chemical inputs, namely hydrogen fluoride, photoresist, and fluorinated polyimide, which are essential to South Korea's semiconductor production.⁶⁹ South Korea also initiated a dispute with a request for consultations with Japan at the WTO DSB for this issue.⁷⁰ Later, the dispute did not proceed as the parties arrived at an understanding removing export restrictions and the dispute was withdrawn.⁷¹ Ally-shoring or friend-shoring is an important strategy which countries use to complement their policy objectives behind export controls. A significant example is the coordination between US and its allies to keep the Soviets away from the new military technology that was emerging during the Cold War through the Coordinating Committee or COCOM in around 1949–50.⁷² Similarly, the US, Japan, and the Netherlands have finalized a deal to impose export controls on semiconductor production tools and raw materials.⁷³ In line with this deal, the Dutch Government has announced its intention to extend export licensing on intermediate goods and tools required for chipmaking.⁷⁴ Notably, back in 2019, the Dutch Government has already imposed export

licensing requirements for extreme ultra-violet (EUV) lithography for exports to China.⁷⁵ Japan has also started an internal process and is going to announce export licences on twenty-three equipment used in chip manufacturing, including cleaning, lithography, and etching.⁷⁶

4.1.2 Non-discrimination Rules in the WTO Agreements

Non-discrimination rules under the WTO regime discipline measures aimed at reshoring or onshoring by providing preference to goods from specific countries or from the domestic producers. The former can be easily challenged as a violation of the most-favoured nation treatment under Article I:1 of the GATT and depending on the form of the measure. Similar claims can be brought under Article II of General Agreement on Trade in Services (GATS), Article 2.1 of Agreement on Technical Barriers to Trade (TBT Agreement), Article 4 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).

The operative part of the CHIPS Act which goes against this fundamental principle of non-discrimination is that any covered entity is only eligible for incentives if it completely decouples from foreign entities of concerns which belong to select Members.⁷⁷ This decoupling results in discrimination between Members these foreign entities of concerns belong to and other WTO Members. Restrictions on expansion of investment or research and development in China under clawback provisions⁷⁸ also violates the MFN obligation, which is imbibed in Article

Notes

⁶⁷ A Special Report by the FP Analytics, Semiconductors and the U.S.- China Innovation Race, Foreign Policy Magazine (16 Feb. 2021), <https://foreignpolicy.com/2021/02/16/semiconductors-us-china-taiwan-technology-innovation-competition/> (accessed 2 Dec. 2023).

⁶⁸ World Trade Organization, Request for Consultations by China, *United States – Measures on Certain Semiconductors and other products and related services and technologies*, WT/DS615/1, G/L/1471 S/L/438, G/TRIMS/D/46, IP/D/44 dated 15 Dec. 2022, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/615-1.pdf&Open=True> (accessed 8 Dec. 2023).

⁶⁹ Ryo Makioka & Hongyong Zhang, *The impact of export controls on international trade: Evidence from the Japan – Korea trade: Evidence from the Japan – Korea trade dispute in the semiconductor industry*, Research Institute of Economy, Trade, and Industry (23 Mar. 2023), <https://www.rieti.go.jp/en/publications/summary/23030011.html> (accessed 11 Jun. 2023).

⁷⁰ World Trade Organization, Japan – Measures related to the Exportation of Products and Technology to Korea, Request for Consultations by the Republic of Korea, WT/DS590/1, G/L/13, G/TFA/D/3/1, G/TRIMS/D/45, S/L/431, IP/D/42 dated 16 Sep. 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/590-1.pdf&Open=True> (accessed 8 Dec. 2023).

⁷¹ Communication from Korea, Japan – Measure related to the exportation of products and technology to Korea, WT/DS590/5 dated 24 Mar. 2023, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/590-5.pdf&Open=True> (accessed 8 Dec. 2023).

⁷² Trade Talks, The Cold War Scandal over Export Control, Transcript of Episode 176 (29 Jan. 2023), <https://live-tradetalkspodcast.panthonsite.io/wp-content/uploads/2023/02/Episode-176-Transcript-Complete.pdf> (accessed 2 Dec. 2023).

⁷³ Gregory C. Allen and Emily Benson, Clues to the U.S. – Dutch – Japanese Semiconductor Export Controls Deal are Hiding in Plain Sight, Centre for Strategic and International Studies (Mar. 2023), https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-03/230302_Allen_Semiconductor_Export.pdf?VersionId=oexps_BsMKBg_8yrGxUA8QFJ5PSA42MK (accessed 2 Dec. 2023).

⁷⁴ Nir Kshetri, The Economics of Chip war: China's struggle to develop the semiconductor industry, Computing's economics, the IEEE Computer Society 102 (Jun. 2023), <https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=10132020> (accessed 2 Dec. 2023).

⁷⁵ Tim Kelly & Miho Uranaka, *Japan restricts chipmaking equipment exports as it aligns with US China curbs* Reuters (31 Mar. 2023), <https://www.reuters.com/technology/japan-restrict-chipmaking-equipment-exports-aligning-it-with-us-china-curbs-2023-03-31/>; The Japan Times, Japan to tighten controls on semiconductor exports to China (22 May 2023), <https://www.japantimes.co.jp/news/2023/05/22/business/semiconductor-exports-china/> (accessed 2 Dec. 2023).

⁷⁶ Toby Sterling, Karen Freifeld & Alexandra Alper, *Dutch to Restrict Semiconductor tech Exports to China, Joining US effort*, Reuters (9 Mar. 2023), <https://www.reuters.com/technology/dutch-responds-us-china-policy-with-plan-curb-semiconductor-tech-exports-2023-03-08/> (accessed 2 Dec. 2023).

⁷⁷ *Ibid.*

⁷⁸ CHIPS Act, *supra* n. 6, Section 103(b)(5) read with NDAA, *supra* n. 34, Section 9902(a)(5).

I:1, against China. China has already raised questions at the WTO on the clawback provision of the CHIPS Act over the likely violation of MFN under Article 1 of GATT.⁷⁹

Subsidies and other measures with a local content requirement can often lead to a violation of the national treatment obligation entrenched in various WTO agreements like Article III:4 of GATT and consequently Article 2.1 of the TRIMS Agreement or Article XVII of GATS. With respect to the CHIPS Act, restrictions on ‘covered entities’ can be argued to be prohibited. These restrictions are in the nature of the export restrictions of certain semiconductors by ‘covered entities’ to foreign entities of concern in order to receive the incentive available under the Act. Further, if determined to be a quantitative restriction in prohibition of Article XI of GATT, these restrictions can also be considered as a prohibited trade related investment measure under Article 2.1 of TRIMS Agreement.

4.1.3 Subsidies or other Measures Characterized by Local Content Requirement

To build resilience, especially as an implication of the ongoing *polycrises*, many countries are moving towards providing extensive production subsidies. Some examples are the US’ CHIPS Act, EU’s Chips Act, India’s production linked incentives, multiple horizontal and sector specific subsidies in China,⁸⁰ among others.⁸¹ Often, these subsidies are characterized by local content requirements including a mandate of procurement from domestic producers of intermediate goods or raw material, avail supply of local services, or employ local population.⁸² Local content requirements are used as a method of reshoring or onshoring in a global supply chain and are mostly accompanied by an advantage or

incentive to fulfil this mandate. For instance, Indonesia provides multiple tax incentives based on local content requirements on the downstream products embedding semiconductors.⁸³ These measures are a method to build an industry in a country by forcing the foreign companies to cooperate with local industries, buy from them or invest in them.⁸⁴ Since such measures provide domestic resources an advantage over the imported resources, the trading principles imbibed in WTO agreements work towards straightening this discriminatory behaviour. Further, as discussed above, local content measures requiring procurement of domestically produced intermediates or raw material are considered to be prohibited subsidies under Article 3.1(b) of the SCM Agreement.⁸⁵

In assessing the incentives under CHIPS Act against the SCM Agreement, these incentives discussed in previous sections will have to qualify as ‘subsidy’ under Article 1. The financial incentives in the form of grants, loans, etc. provided for production of semiconductors constitute a financial contribution conferring benefit on semiconductor producers under Article 1.1(a)(1)(i) and Article 1.2 of the SCM Agreement. Certain elements of the CHIPS Act and their implementation can result in implied contingency of the grant of subsidies on use of US made products for further production of semiconductors. For instance, the prioritization provision in the CHIPS Act requires the Secretary to give priority to applicants that address the vulnerability and gaps in the US semiconductor supply chain.⁸⁶ This may give rise to a claim of de facto contingency which may require continuous monitoring and comes with a higher threshold for burden of proof. Other Provisions of the CHIPS Act which highlight taking into account the ‘economic interest’ of the US and contribution of the beneficiary semiconductor producers in resilience of supply chain in the US can supplement a claim of de facto contingency on use of domestically produced inputs.⁸⁷

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⁷⁹ Committee on Subsidies and Countervailing Measures, Questions from China to the United States pursuant to Article 25.8 of the SCM Agreement, G/SCM/Q2/USA/88, dated 20 Oct. 2022, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/SCM/Q2/USA88.pdf&Open=True> (accessed 9 Dec. 2023).

⁸⁰ OECD, Measuring distortions in international markets, TAD/TC(2020)5/FINAL 54 (5 May 2021), [https://one.oecd.org/document/TAD/TC\(2020\)5/FINAL/En/pdf](https://one.oecd.org/document/TAD/TC(2020)5/FINAL/En/pdf) (accessed 2 Dec. 2023).

⁸¹ Congressional Research Service, Semiconductors and the CHIPS Act: Global Context (28 Sep. 2023), <https://crsreports.congress.gov/product/pdf/R/R47558> (accessed 2 Dec. 2023).

⁸² Olle Ostensson, *Local Content, Supply Chains, and Shared Infrastructure*, Chapter 24 in *Extractive Industries: the Management of Resources as a Driver of Sustainable Development* 502 (Tony Addison & Alan Roe eds Oxford University Press Sep. 2018).

⁸³ Emily Benson, Japhet Quitzon & William A. Reinsch, *Securing Semiconductor Supply Chains in the Indo-Pacific Economic Framework for Prosperity: Squaring the circle on deeper cooperation*, Centre for Strategic and International Studies (May 2023) https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-05/230530_Benson_SemiconductorSupplyChains.pdf?VersionId=S1bU7F4LQk82X5EH1x1Ffjr7j.3nbfiuf (accessed 2 Dec. 2023).

⁸⁴ Holger P. Hestermeyer & Laura Nielsen, *The Legality of Local Content Measures under WTO Law*, 48(3) J. World Trade 553–592 at 554 (2014), <https://doi.org/10.54648/TRAD2014019> (accessed 8 Dec. 2023).

⁸⁵ Article 3.1(b) of the SCM Agreement.

⁸⁶ CHIPS Act, *supra* n. 6, Section 103(b)(2)(F) read with NDAA, *supra* n. 34, Section 9902.

⁸⁷ CHIPS Act, *supra* n. 6, Section 103(b)(2)(F) read with NDAA, *supra* n. 34, Section 9902.

4.2 Bandwagoning on Security Exceptions to Justify Onshoring or Friendshoring Measures

After the Appellate Body impasse at WTO in 2019,⁸⁸ another constant obstacle to WTO's predictable trading order is (ab)use of the national security exception to justify trade restrictions. What was considered to be non-reviewable by the WTO dispute settlement system was used by Russia against the measures imposed against Ukraine. It was then that the use of security exceptions under Article XXI of GATT was brought to scrutiny.⁸⁹ Article XXI of GATT which is similarly worded as Article XIV *Bis* of GATS allows Members to take actions for the protection of essential security interests taken in the time of war or other emergency in international relations. The operative part of this provision which is also the genesis of the controversy behind it is that a Member itself decides the necessity of such a measure.⁹⁰ The provisions of the Act refer and orient themselves around the US' national security interests and the term 'security' features 374 times in the entire Act. In its past WTO disputes, the US has firmly taken up a position that holds Article XXI of the GATT 1994, a provision which deals with national security exceptions as 'self-judging' based on the provision's grammatical structure.⁹¹

On the other hand, the evolving jurisprudence on Article XXI is moving towards making this exception more and more reviewable.⁹² Specifically, the WTO panels endorse the view that whether the requirements under subparagraphs under Article XXI(b) are fulfilled or not is a question to be determined by the adjudication process. Further, the Panels also have the power to adjudicate on the nexus and contribution of the challenged measures to the national security interests.⁹³ The responses that the US has provided in the context of the questions raised by China on the CHIPS Act puts forward a lose-lose argument promoting protectionism. It is also interesting to note that by the logic followed by the Panel in *US – Origin Marking Requirements*,⁹⁴ US is not in a state

of conflict with any of the countries it has identified as 'foreign countries of concern' i.e. (Iran, Russia, China and North Korea).

4.3 Other Carve outs and Derogations

Given the crucial nature of dual technology goods such as semiconductors and their equal importance in defence purposes, these goods are often procured by the government for military related uses. Any discriminatory measures which are applied on the procurement undertaken by the government and for its own use i.e. not for commercial sale or resale can be allowed under Article III:8(a) of the GATT. Article III:8(a) provides a derogation from the national treatment obligation present in Article III of GATT. However, the countries that are party to the plurilateral WTO Agreement on Government Procurement (WTO GPA) are prohibited from discriminating between the foreign suppliers, goods and services belonging to the Members which are a part of the WTO GPA.

Further, another exception against the rule to eliminate all quantitative restrictions is present in Article XI:2(a) of the GATT. It allows for imposition of temporary export prohibitions or restrictions to prevent or relieve the critical shortage of products essential to the exporting Member.

5 CONCLUSION

The CHIPS Act exhibits the characteristics of a strictly regulated industrial subsidy that attempts to not just reshoring capacities but also recalibrate the semiconductor supply chain away from 'foreign countries of concern'. It seems that the act operates in cognizance of the complexity of semiconductor supply chains and makes room for provisions that are designed to maintain US dominance while restricting access for its adversaries.

Notes

⁸⁸ This is on account of the WTO Appellate Body being in a non-functional state. The term of the last sitting Appellate Body member expired on 30 November 2020. For more information see: Appellate Body (WTO), https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (accessed 7 Feb. 2023); Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, J. Int'l Econ. L. 297 (2019), <https://doi.org/10.2139/ssrn.3415964> (accessed 12 Dec. 2023).

⁸⁹ Panel report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (Apr. 5 2019).

⁹⁰ Article XXI(1)(b)(iii), GATT.

⁹¹ US has consistently taken a 'self-judging' position with respect to article XXI of GATT 1994 in the following cases: WTO, *United States – Origin Marking Requirement – Report by the Panel* (21 December 2022) WT/DS597/R https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm (accessed 6 Feb. 2023); WTO, *United States – Certain Measures on Steel and Aluminium Products – Report of the Panel* (9 Dec. 2022) WT/DS556/R https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds556_e.htm (accessed 6 Feb. 2023); WTO *United States – Certain Measures on Steel and Aluminium Products – Report of the Panel* (9 Dec. 2022) WT/DS544/R https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm (accessed 6 Feb. 2023); WTO, *United States – Certain Measures on Steel and Aluminium Products – Report of the Panel* (9 Dec. 2022) WT/DS552/R https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds552_e.htm (accessed 6 Feb. 2023).

⁹² *Ibid*; Paulson Mona, *Curious Case of US Self Judging Part 2*, (International Law and Policy Blog 23 Jan. 2023), <https://ielp.worldtradelaw.net/2023/01/the-curious-case-of-us-self-judging-part-2.html> (accessed 6 Feb. 2023).

⁹³ WTO, *Russia – Measures Concerning Traffic in Transit – Report of the Panel* (5 Apr. 2019), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True> (accessed 6 Feb. 2023).

⁹⁴ WTO, *United States – Origin Marking Requirement – Report by the Panel* (21 Dec. 2022) WT/DS597/R <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm (accessed 6 Feb. 2023).

In addition to revitalizing the US domestic industry, the Act navigates through building new international partnerships that help the US diversify and secure its semiconductor supply chains and reduce risks faced during shortages. A pertinent example is the CHIPS for America International Technology Security and Innovation Fund.⁹⁵ The said measure focuses on coordination and collaboration with foreign government partners to secure supply chains and development of semiconductors and related technologies. The initiative has generated particular interest in countries where the industry is still fledgling, such as: India, Indonesia and Costa Rica, which do not, at present, boast of a developed semiconductor ecosystem and thus have sought greater cooperation with the United States.⁹⁶ Such moves may stem from apprehensions of future restrictions in access to semiconductors, semiconductor equipment, raw materials and essential technology, which may exert cascading effects on other industries.

The US has also sought partnerships with its allies and their leading companies that exercise control over semiconductor technology and manufacturing equipment to impose restrictions on China.⁹⁷ Pertinent examples include European entities such as ASML Kempf and Zeiss, Nikon and Tokyo Electron of Japan, which specialize in essential equipment for advanced semiconductors.⁹⁸

Using Allies and companies based on their soil as a proxy to enforce export controls and cut off access to technology for a particular state(s) may seem like a tense

affair as it may hamper the commercial operations of entities with important partners/clients. It may also invite reprisals from the state in question.

The US CHIPS has been successful in generating reprisals across the world. In response to the US restrictions, China has announced and put in place plans to de-Americanize its semiconductor supply chains. Efforts include a 143-billion-dollar package focusing on semiconductors, semiconductor manufacturing equipment, research and development as well as workforce training.⁹⁹ According to multiple reports, China is also planning to put in place restrictions on the exports of essential rare earth minerals which are used as essential raw materials for semiconductors and emerging technologies.¹⁰⁰ Similarly, major US allies have also established their own semiconductors incentive programmes.¹⁰¹ This includes the EU, which had expressed fears of its own firms moving to the US, Japan as well as South Korea.¹⁰² South Korea is even attempting to negotiate some relaxations for its companies running semiconductor operations in China.¹⁰³

While the WTO framework is alleged to be traditional in its outlook, the policy tools that are being used in the semiconductor supply chain to manage it can be very well regulated by the existing disciplines under different WTO agreements. However, like the nature of such sensitive products and their supply chains, the use of security exception to justify measures leading to trade distortion cannot be fully controlled. To that effect, these supply chains will continue to be corrected by the geo-political

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⁹⁵ CHIPS Act, *supra* n. 6, Section 102(c).

⁹⁶ New Partnership with Costa Rica to Explore Semiconductor Supply Chain Opportunities, US Department of State, Media Note (14 Jul. 2023), <https://www.state.gov/new-partnership-with-costa-rica-to-explore-semiconductor-supply-chain-opportunities/> (accessed 10 Dec. 2023); MoU on semiconductor Supply Chain and Innovation Partnership between India and US signed following the Commercial Dialogue 202, Ministry of Commerce and industry, Press Release (10 Mar. 2023); Rina Pal-Goetzen, New Assessment Identifies Opportunities for Strengthening India's Role in Semiconductor Ecosystem, Semiconductor Industry Association Blog (22 Jun. 2023), <https://www.semiconductors.org/new-assessment-identifies-opportunities-for-strengthening-indias-role-in-semiconductor-ecosystem/> (accessed 10 Dec. 2023); New Partnership with Indonesia to Explore Semiconductor Supply Chain Opportunities, US Department of State, Media Note (18 Nov. 2023), <https://www.state.gov/new-partnership-with-indonesia-to-explore-semiconductor-supply-chain-opportunities/> (accessed 2 Dec. 2023).

⁹⁷ Dutch set to agree to US-led chip controls to China. EU observer (Jan. 27 2023), <https://euobserver.com/digital/156650> (accessed 2 Dec. 2023); *See also* Powers-Riggs, *Taipei Fears Washington Is Weakening Its Silicon Shield*, Foreign Policy (17 Feb. 2023) <https://foreignpolicy.com/2023/02/17/united-states-taiwan-china-semiconductors-silicon-shield-chips-act-biden/> (accessed 2 Dec. 2023); 'U.S. secures deal with Netherlands, Japan on China chip export limit' Bloomberg – Nikkei Asia (28 Jan. 2023), <https://asia.nikkei.com/Business/Tech/Semiconductors/U.S.-secures-deal-with-Netherlands-Japan-on-China-chip-export-limit-Bloomberg> (accessed 2 Dec. 2023).

⁹⁸ J. Porter, *Dutch bolster US fight with China by announcing export restrictions on chip tech*. *The Verge* (9 Mar. 2023), <https://www.theverge.com/2023/3/9/23631968/netherlands-china-chip-exports-asml-ultraviolet-lithography> (accessed 2 Dec. 2023); Reuters, *Breakingviews – US threat gives ASML new Headache on China Exports*, Reuters (30 Jun. 2023), <https://www.reuters.com/breakingviews/us-threat-gives-asml-new-headache-china-exports-2023-06-30/> (accessed 5 Dec. 2023); Japan restricts chipmaking equipment exports as it aligns with US China curbs | Reuters. (n.d.). (11 Jul. 2023), <https://www.reuters.com/technology/japan-restrict-chipmaking-equipment-exports-aligning-it-with-us-china-curbs-2023-03-31/> (accessed 2 Dec. 2023); K. Inagaki, A. Gross & Q. Liu, China fears Japan's chipmaking curbs go further than US restrictions. *Financial Times* (23 May 2023), <https://www.ft.com/content/aad4f7b3-0a0f-46ca-9449-14fedce0e730> (accessed 2 Dec. 2023).

⁹⁹ Julie Zhu, *Exclusive: China readying \$143 billion package for its chip firms in face of U.S. curbs* <https://www.reuters.com/technology/china-plans-over-143-bln-push-boost-domestic-chips-compete-with-us-sources-2022-12-13/> (accessed 2 Dec. 2023).

¹⁰⁰ China export curbs choke off shipments of gallium, germanium for second month, Reuters (20 Oct. 2023), <https://www.reuters.com/world/china/china-export-curbs-choke-off-shipments-gallium-germanium-second-month-2023-10-20/#:~:text=In%20July%2C%20China%20unveiled%20restrictions,in%20making%20high%2Dtech%20microchips> (accessed 2 Dec. 2023).

¹⁰¹ *See* European Chips Act, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-chips-act_en (accessed 2 Dec. 2023); Japan to subsidize domestic chipmaking beyond the cutting edge, Nikkei Asia, <https://asia.nikkei.com/Business/Tech/Semiconductors/Japan-to-subsidize-domestic-chipmaking-beyond-the-cutting-edge> (accessed 2 Dec. 2023); South Korea Passes Its 'Chips Act' Amid US-China Friction, Bloomberg <https://www.bloomberg.com/news/articles/2023-03-29/south-korea-to-pass-its-own-chips-act-amid-us-china-friction> (accessed 2 Dec. 2023).

¹⁰² *Ibid.*

¹⁰³ South Korea welcomes new rules easing chip tool shipments to China, Nikkei Asia (27 Nov. 2023), <https://asia.nikkei.com/Business/Tech/Semiconductors/South-Korea-welcomes-new-rules-easing-chip-tool-shipments-to-China#:~:text=South%20Korea%20welcomes%20new%20rules%20easing%20chip%20tool%20shipments%20to%20China,Updates%20to%20U.S.&text=SEOUL%20%2D%2D%20New%20U.S.%20trade,Nikkei%20Asia%20in%20an%20interview> (accessed 2 Dec. 2023).

context attached to the measures and countermeasures introduced by different participating countries.

6 WAY FORWARD

In the context of friendshoring and the principles underlining free trade at the WTO there are clear possibilities for the development of friendshoring regimes that are antithetical to the contemporary rules-based trading system. These developments may signal the emergence of a new normal wherein dominant states in the sector in an attempt to diversify and secure supply chains, end up dividing the world through onshoring and friend/ally-shoring of supply chains. These tendencies may work in consonance with the proliferation of plurilateral and regional/mega-regional trade agreements that bring allies in close collaboration and are supported by mutually agreed

normative frameworks. At the same time, even in this scenario the scope of transactional relationships with adversaries undertaken in pursuit of furthering strategic objectives cannot be ruled out.

Another option to facilitate the conversation between participants of a supply chain which are standing at extreme poles at the moment is to negotiate sector-specific plurilateral agreements for crucial dual technology goods. For semiconductors, such agreement must build consensus on the sequestration of military and commercial use of such goods for import or export restrictions, contingencies and conditionalities related to subsidies, among others.

That said, both developments (development of dedicated international legal regimes for semiconductors or normative frameworks within plurilateral/regional agreements) are symptomatic of the fragmentation of international law.

A Friend-Shoring Perspective of the Inflation Reduction Act

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The COVID-19 pandemic disrupted supply chains around the world and uncovered the dangers of having a concentrated supply chain. With the geopolitical tensions between the US and China and the invasion of Ukraine, the need for friendshoring supply chains in critical green sectors like electric vehicles (EVs) has become a top concern for the US and other countries in the West. The US is adopting measures to support the production and adoption of EVs with the objective of not just ensuring a low carbon footprint, but purportedly to reduce dependency on 'countries of concern', revive its manufacturing sector, and make the supply chain resilient. This has eventually led to a race among the US and other countries to augment the production of EVs. The Inflation Reduction Act (IRA) is the culmination of the efforts to support green transportation of the future while supporting domestic production, deepening economic ties with friends and reducing overreliance on potentially hostile countries. Against this background, the authors attempt to analyse the IRA from the perspective of 'friendshoring'.

Keywords: Friendshoring, supply chain, Inflation Reduction Act, nearshoring, US-China trade relations

I INTRODUCTION

The adoption of the friendshoring policy and the birth of the Inflation Reduction Act (IRA) are not the results of a single event. The tension between the US and China that had been building up for many years finally erupted into a fierce trade war during the Trump presidency.¹ Then came COVID-19 pandemic and the complete disruption of supply chain and manufacturing around the world,² including in the Electric Vehicles (EVs) sector.³ In the post-pandemic era, the demand for EVs has increased,⁴ and so has the concern about carbon emissions. The International Energy Agency indicated

that carbon emissions from the transportation sector need to be reduced by 3% each year in order to achieve net zero emissions by 2050.⁵

Another related issue that gained momentum in policy circles is the supply of critical minerals such as cobalt, nickel and lithium which are critical to the manufacturing of batteries for electric vehicles and their longevity, energy density, and performance.⁶ The supply of critical minerals faces various challenges like restricted and concentrated availability, high cost of production, political factors, and lack of adequate technologies for exploration, production, and processing.⁷ It is important to note that critical minerals are important, not only for EVs or

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¹ Willy C. Shih, *Global Supply Chains in a Post-Pandemic World* (Harvard Business Review Sep.-Oct. 2020), <https://hbr.org/2020/09/global-supply-chains-in-a-post-pandemic-world> (accessed on 21 Nov. 2023).

² Emily Harding, et. al., *Innovation for Resilience: A Focused Study on Workforce, Climate, Supply Chain, and Cyber Resilience* 16-21 (Center for Strategic and International Studies 2023); Hiroyuki Suzuki, *Building Resilient Global Supply Chains: The Geopolitics of the Indo-Pacific Region* (Center for Strategic and International Studies 2021).

³ W. Wen, et. al., *Impacts of COVID-19 on the Electric Vehicle Industry: Evidence from China* 144 *Renewable & Sustainable Energy Rev.* (2021), doi: 10.1016/j.rser.2021.111024; Pedro Correa, *Building a Resilient Global EV Supply Chain Amid Uncertainty* (Bain & Co. 18 Oct. 2023), <https://www.bain.com/insights/building-a-resilient-global-ev-supply-chain-amid-uncertainty/> (accessed on 19 Nov. 2023).

⁴ *Trends in Electric Light-Duty Vehicles* (Global EV Outlook 2023, International Energy Agency), <https://www.iea.org/reports/global-ev-outlook-2023/trends-in-electric-light-duty-vehicles> (accessed on 19 Nov. 2023).

⁵ *Transport* (International Energy Agency), <https://www.iea.org/energy-system/transport> (accessed on 11 Nov. 2023).

⁶ *The Role of Critical World Energy Outlook Special Report Minerals in Clean Energy Transitions* (International Energy Agency), <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/executive-summary> (accessed on 19 Nov. 2023).

⁷ Vlado Vivoda, *Friend-Shoring and Critical Minerals: Exploring the Role of the Minerals Security Partnership* 100 *Energy Res. & Soc. Sci.* (2023), doi: 10.1016/j.erss.2023.103085 (accessed on 19 Nov. 2023).

renewable energy, but also for national security. They are not substitutable, and as China controls 60% of global production and 85% of processing capacity in the global supply chain for critical minerals, the supply chains are prone to disruption and economic coercion.⁸ This has led the US to ramp up its efforts to diversify its supply chain from China to other 'friendlier' countries, and consequently change the supply chain network of EVs.⁹

Against this chain of events, in an Atlantic Council meeting in April 2023, the US Secretary of Treasury *Janet Yellen* stated that friendshoring of supply chains to trusted countries would reduce the risks to the US economy as well as the economies of its trusted trading partners. *Yellen* defined friendshoring as an economic policy to 'achieve free but secure trade' by favouring the friendshoring of supply chains to its trusted trading partners.¹⁰ The term 'friendshoring' has become a major talking point in the policy and academic spheres, largely because of the speech by *Yellen*,¹¹ and the subsequent endorsement and adoption of the concept in public statements and policies by the US government. The US is not the only country adopting this policy. Other countries have also shown support for friendshoring or similar concepts. Some examples include the statement by *Chrystia Freeland*, the Deputy Prime Minister of Canada and Minister of Finance, declaring friendshoring as a 'historic opportunity' for Canadian workers and communities¹²; China's 'dual circulation' strategy,¹³ and the EU's 'open strategic autonomy' and 'critical minerals club'. The primary purpose of rerouting the supply chain to such select countries is to avoid disruption in the flow of disruption as it is economically safe and less risky.¹⁴ In effect, friendshoring means 'the spatial reordering of supply chains under the criterion of political convergence'.¹⁵ Friendshoring is a part of the larger shift in the international relations arena where countries are trying to reorganize the global supply chains due to worsening relations between China and the West,

the impact of the COVID-19 pandemic, Russia's invasion of Ukraine, and so on.¹⁶

In light of such geo-political disorder, 'friendshoring' becomes indispensable despite the fact that it is extremely difficult to implement, and, sometimes, may not make economic sense. Further, during the initial phase, it might lead to a disruption in the supply chain that has been established over a long period of time. Specifically, in the context of China, it is pertinent to note that China controls 58% of lithium compounds, 69% of nickel sulfate, 69% of synthetic graphite, 75% of cobalt, 95% of manganese, and 100% of the spherical graphite. It is primarily evidence of the fact that the global supply of various critical minerals is controlled by China, some of which are primary components in the production of lithium-ion batteries. Interestingly, China itself does not have a large reserve of such minerals. It has invested in other countries that have reserves of such critical minerals, and then they are processed by Chinese-owned refineries into higher-grade minerals which are further used in the manufacturing of EV batteries.¹⁷

In light of the current geopolitical instability, many countries realized the advantage of diversifying the sources of suppliers. In order to avoid excessive reliance on a single country, countries with shared values can facilitate trade through multiple sources of supply. For example, the US has invested in rare earth mining and processing facilities in the US and Australia to reduce its reliance on China. In the process, they have reduced China's global market share in these critical minerals from 80% to 60%.¹⁸

The current US administration's industrial policy plans are based on four major legislations – the IRA, the American Rescue Plan Act, the Infrastructure Investment and Jobs Act, and the CHIPS here stands for 'Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act. Among these, the IRA was signed into

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⁸ Christina Lu, *The US Strategic Minerals Situation Is Critical* (Foreign Policy 30 Jun. 2023), <https://foreignpolicy.com/2023/06/30/us-china-critical-minerals-supply-chain-mining/> (accessed on 18 Nov. 2023).

⁹ Niels Graham & Mondrita Rashid, *Is 'friendshoring' really Working?* (Atlantic Council 25 Jul. 2023), <https://www.atlanticcouncil.org/blogs/new-atlanticist/is-friendshoring-really-working/> (accessed on 14 Nov. 2023).

¹⁰ *Remarks by Secretary of the Treasury Janet L. Yellen on way Forward for the Global Economy* (US Department of the Treasury Press Releases 13 Apr. 2022), <https://home.treasury.gov/news/press-releases/jy0714> (hereinafter 'Press Release') (accessed on 19 Nov. 2023).

¹¹ *Ibid.*

¹² Matthew Stephenson, *G20 Multilateral Cooperation in a Multipolar World: What Can We Learn from Investment?* (T20 Policy Brief Jun. 2023), https://www.orfonline.org/wp-content/uploads/2023/06/T20_PolicyBrief_TF7_724_Multilateralism-Investment.pdf (accessed on 9 Nov. 2023).

¹³ Maria-Grazia Attinasi, et al., *Friend-Shoring Global Value Chains: A Modelbased Assessment* (European Central Bank Economic Bulletin, Issue 2/2023).

¹⁴ Stefan Ellerbeck, *What's the Difference Between 'Friendshoring' and other Global Trade Buzzwords?* (World Economic Forum 17 Feb. 2023), <https://www.weforum.org/agenda/2023/02/friendshoring-global-trade-buzzwords/> (accessed on 1 Nov. 2023).

¹⁵ G. Maihold, *A New Geopolitics of Supply Chains: The Rise of Friend-Shoring* (Stiftung Wissenschaft und Politik Comment, 45/2022), <https://doi.org/10.18449/2022C45> (accessed on 17 Nov. 2023).

¹⁶ *Ibid.*

¹⁷ Rodrigo Castillo & Caitlin Purdy, *China's Role in Supplying Critical Minerals for the Global Energy Transition: What Could the Future Hold?* (Brookings 1 Aug. 2022), <https://www.brookings.edu/articles/chinas-role-in-supplying-critical-minerals-for-the-global-energy-transition-what-could-the-future-hold/> (accessed on 19 Nov. 2023).

¹⁸ Rick Mills, *Critical Minerals take Central Stage in US-China Rivalry* (Mining.com 14 Apr. 2023), <https://www.mining.com/web/critical-minerals-take-central-stage-in-us-china-rivalry/> (accessed on 19 Nov. 2023).

law on 16 August 2022. The IRA, *inter alia*, focuses on energy and climate change. James M. Turner, a professor of environmental studies at Wellesley College, noted that China's hold over large reserves of critical minerals unfolds the importance of the IRA. He highlights that it seems to drive domestic manufacturing through various incentives, and 'do[es] an end run around China'.¹⁹

While the IRA aims to boost domestic manufacturing of EVs and increase domestic procurement of critical minerals such as aluminium, barite, cobalt, and graphite used in such manufacturing of such EVs,²⁰ it also has friend-shoring and nearshoring elements as part of the incentives within the statute that can be availed of if certain conditions are complied with. Against this background, Part I of the Article provides the necessary context leading to 'friendshoring' being adopted as a policy through a measure like the IRA; Part II of the Article undertakes a review of the concept of 'friendshoring' and then provides a critique of it; Part III provides a detailed analysis of the IRA focusing on the provisions concerning incentives for purchasing EVs; and Part IV of the article provides 'friendshoring' and 'nearshoring' perspectives of the IRA *vis-à-vis* changes in the global supply chain. While doing so, Part V, the scope of this article, looks into a US perspective on what is friendshoring, who is a friend, how is it being pursued by the US, and what the term implies for the rest of the world. Part VI concludes the article.

2 THE ERA OF FRIEND-SHORING: DEFINING FRIEND-SHORING AND FRIENDS

While the term friendshoring may have a generally accepted meaning, it has not universally adopted a definition. Here, we provide a small sample set of how different people have defined the term. As noted above, Yellen defines friend-shoring as deepening ties with 'a group of countries that have a strong adherence to a set of norms and values about how to operate in the global economy and about how to run the global economic system'.²¹ University of Chicago Professor Raghuram Rajan looks upon 'friendshoring' as limiting the trade

of key inputs to *trusted countries* in order to reduce risks to the supply chains on which the United States and *its partners* rely.²² American diplomat Bonnie Glick called the concept of making products in *countries aligned with the US interests* as allied shoring, a synonym for friendshoring.²³ Economists Maria Attinasi, Lukas Boeckelmann and Baptiste Meunier view friendshoring as 'sourcing inputs from suppliers in allied countries'.²⁴ A *New York Times* report viewed friendshoring as a shorthand for the practice of relocating supply chains to countries where the risk of disruption from political chaos is low.²⁵ Though these definitions cover similar concepts, they do not outline precisely when to call a country a friend or an ally. Is an ally merely a military ally for the US, like NATO members? Or does it go beyond just a military ally? In such a case, countries like India or Vietnam are excluded as destinations for friendshoring. But there is evidence to suggest they may be considered friends or allies for the purpose of deepening economic ties.²⁶ In other words, the primary questions are, *first*, who are the 'trusted partners'? *Second*, who are the countries aligned with the US interests? The definitions also do not expound on the degree of trust and alignment required, nor on what matters such trust and alignment are required for. Moreover, the definitions focusing on political stability and freedom from political chaos are not free from problems. *First*, there is no clarification on whether the political stability is about domestic political stability or stability in their political relations with the US. It is likely that the second type of international political stability from the US point of view was meant as the UK is seen as more of a candidate for friendshoring despite its post-Brexit chaos than China with its relatively stable political order. *Second*, in addition to the first problem, a critique for this category that could be offered is that this does not talk about the quality of relationships in terms of closeness. A country could have a stable but distant relationship with the US, which could not automatically mean that the country is a 'friend' for the purpose of friendshoring.

While there is no official adoption by the US government or its Western partners of any specific definition of 'friendshoring' and 'friends', there are hints. For example,

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¹⁹ James Morton Turner, *The U.S. Can Counter China's Control of Minerals for the Energy Transition* (New York Times 6 Nov. 2023), <https://www.nytimes.com/2023/11/06/opinion/electric-battery-energy-china.html> (accessed on 1 Nov. 2023).

²⁰ Cameron Cavanagh, *The United States Rights a Wrong with Critical Minerals Agreements* (Georgetown Security Studies Review 26 Apr. 2023), <https://georgetownsecuritystudiesreview.org/2023/04/26/the-united-states-rights-a-wrong-with-critical-minerals-agreements/> (accessed on 19 Nov. 2023).

²¹ Press Release, *supra* n. 10.

²² Raghuram G. Rajan, *Just Say No to 'Friend-Shoring'* (Project Syndicate 3 Jun. 2022), <https://www.project-syndicate.org/commentary/friend-shoring-higher-costs-and-more-conflict-without-resilience-by-raghuram-raj-2022-06> (accessed on 19 Nov. 2023).

²³ Sarah Kessler, *What Is 'Friendshoring'?* (The New York Times 18 Nov. 2022), <https://www.nytimes.com/2022/11/18/business/friendshoring-jargon-business.html> (accessed on 18 Nov. 2023).

²⁴ Attinasi, et al., *supra* n. 13.

²⁵ Kessler, *supra* n. 23.

²⁶ Graham & Rashid, *supra* n. 9.

Yellen in her speech on friendshoring employs terms like ‘trusted trade partners’, ‘partners that are committed to a set of core values and principles’ and ‘countries we know we can count on’ to describe friends.²⁷ Here, Yellen seeks to divorce the concept of friends from their relations *vis-à-vis* the US but instead provides an untethered list of ‘core values and principles’ and a ‘set of norms and values’.

However, this approach also can be questioned on many aspects. What are these values and principles specifically? Is ‘democracy’ one of these values? But that would rule out all non-democratic countries from having close economic relationships with the US. Is ‘free and open economy’ one of these values? But then that would rule out countries with extensive government intervention in the market. Is ‘military non-aggression’ also one of these values? But it would mean a country will cease to be a ‘friend’ if a country is engaged in any war or military conflict.

Clearly, these statements about a vague set of values are also not helpful in determining precisely who will qualify as ‘friends’. Yet, the US government is hardly likely to come out with a list of concrete values and norms as it may alienate countries whom the US may view as ‘friends’. Also, different countries will perform differently in these metrics, and a country’s adherence to these values may change over time, sometimes very rapidly or unpredictably. A US investor or manufacturer investing or building a factory in another country would not be able to make any long-term investment in most nations if the list of these values and principles is too long or strictly observed by the US government. Overall, these policy statements also do not get us closer to definite limits of who is a friend and who is not.

Next, the Article looks at one of the most concrete examples of friendshoring pursued by the US through the IRA and how it implements the policy as well as how it defines friends.

3 IRA: WHAT DOES IT ENCOMPASS?

The IRA stems from President Biden’s Build Back Better Plan²⁸ which encompassed three parts – the American Rescue Plan which is a pandemic relief plan²⁹; the American Jobs Plan which addresses infrastructure and industrial policy to lessen the effects of climate change while generating sustainable employment;³⁰ and the American Families Plan aimed at funding social policy initiatives.³¹ The plan failed to become law in its original form but a slimmed-down version of it came to pass in the form of IRA.³²

The IRA covers a broad range of policy issues, such as housing, tax reform, government budget deficit, health-care, and pharmaceuticals.³³ The overall budget of the IRA is USD 739 billion.³⁴ *Inter alia*, IRA introduces 15% corporate minimum tax, and prescription drug pricing reform. IRA invests close to USD 435 billion in Energy Security and Climate Change and the Affordable Care Act Extension. It aims to reduce the deficit by over USD 300 billion, thus attempting to curb inflation.³⁵

But the most relevant part for the purpose of the IRA is the grant of incentives for EVs. The provisions on clean vehicle credit under Title V of the IRA (Committee on Energy and Natural Resources) have attracted concerns from various countries due to their discriminatory nature.³⁶ This part will elaborate on the nature and design of the incentives and how they materialize the friendshoring, nearshoring, and onshoring policies.

The IRA focuses on shifting to a clean energy economy by incentivizing renewable energy production rather than penalizing fossil fuels. Unlike most environmental legislations, which rely on ‘sticks’ in the form of mandates and penalties, the IRA relies instead on ‘carrots’ in the form of offering financial incentives for investing in clean energy technologies.³⁷ While doing so, the IRA focuses on incentivizing American entrepreneurs, the labour force, and domestic manufacturers.³⁸

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²⁷ Press Release, *supra* n. 10.

²⁸ *The Build Back Better Framework* (The White House), <https://www.whitehouse.gov/build-back-better/> (accessed on 21 Nov. 2023).

²⁹ *American Rescue Plan* (The White House), <https://www.whitehouse.gov/american-rescue-plan/> (accessed on 19 Nov. 2023).

³⁰ *FACT SHEET: The American Jobs Plan* (The White House 31 Mar. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/> (accessed on 1 Nov. 2023).

³¹ *FACT SHEET: The American Families Plan* (The White House, 28 Apr. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/> (accessed on 15 Nov. 2023).

³² Li Zhou, *How Democrats plan to Overhaul Taxes, Climate Spending, and Health Care Before the Midterms* (Vox 28 Jul. 2023), <https://www.vox.com/23281547/build-back-better-joe-manchin-inflation-reduction-act> (accessed on 19 Nov. 2023).

³³ *Ibid.*

³⁴ Summary: The Inflation Reduction Act of 2022, https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf (accessed on 19 Nov. 2023).

³⁵ *BY THE NUMBERS: The Inflation Reduction Act* (The White House 15 Aug. 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/15/by-the-numbers-the-inflation-reduction-act/> (accessed on 17 Nov. 2023).

³⁶ Spencer Feingold, *What the World Thinks about the new US Electric Vehicle Tax Plan* (GreenBiz 29 Nov. 2022), <https://www.greenbiz.com/article/what-world-thinks-about-new-us-electric-vehicle-tax-plan> (accessed on 22 Nov. 2023).

³⁷ Robinson Meyer, *The EPA Just Quietly Got Stronger* (The Atlantic 24 Aug. 2022), <https://www.theatlantic.com/science/archive/2022/08/inflation-reduction-act-epa-carrots-sticks/671218/> (accessed on 1 Nov. 2023).

³⁸ *Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act’s Investments in Clean Energy and Climate Action* (The White House Jan. 2023).

The IRA amended existing tax credits for EVs and fuel cell vehicles and introduced additional requirements for claiming those credits. Under these provisions, a purchaser is provided with clean vehicle credit upon compliance with certain import substitution requirements. The *first* condition favours assembly in North America and purchased after 16 August 2022, i.e., when it was signed into law. Section 30D of the IRA provides clean vehicle credit for clean vehicles with final assembly in North America. The *second* condition favours critical minerals extracted or processed in the US or its Free Trade Agreement (FTA) partners or recycled in North America. At least 40% of the critical mineral component of the vehicle's battery must fall under this category from 2023 to claim the credit. The minimum percentage increases to 50% in 2024, 60% in 2025, 70% in 2026, and finally 80% in 2027. The *third* condition favours battery components manufactured or assembled in North America. At least 50% of the value of the battery component must observe this condition and the minimum percentage keeps on increasing every year until it reaches 100% in 2029.³⁹ The *fourth* condition disqualifies credit claims for vehicles with battery components manufactured or assembled by a foreign entity of concern from 2024 onwards and with critical minerals extracted, processed, or recycled by a foreign entity of concern from 2025 onwards.⁴⁰ On 1 December 2023, the Treasury Department released guidance on the IRA's foreign entity of concern requirements.⁴¹ A foreign entity which is 'owned by, controlled by, or subject to the jurisdiction or direction of a government' of a covered nation would fall within this provision, and the covered nations were designated to be – China, Russia, North Korea and Iran.⁴²

4 FRIENDSHORING AND NEARSHORING PERSPECTIVES OF THE IRA

The above-mentioned conditions for claiming incentives for the purchase of EVs are evidence of friend-shoring, nearshoring, and onshoring. The requirement that the

critical minerals used in the battery must be extracted or processed in the FTA partners is an example of 'friend-shoring'. The requirements for the final assembly of clean vehicles or recycling of critical minerals or manufacturing/assembly of battery components in North America form part of 'nearshoring'.⁴³ The requirement for critical minerals extracted or processed in the US is an example of 'onshoring'. The implication of the nearshoring aspect of the IRA would be that the foreign EV brands dependent on the US market would shift their supply chain to North America in order to take benefit of the incentives provided under the IRA and hence expand their sales. This section will focus on the implementation challenges and response to the friendshoring aspect of the IRA.

The conditional grant of incentives for FTA partners and North American countries was one of the most controversial parts of the IRA. China and Russia raised concerns regarding the IRA before the Council of Trade in Goods of the World Trade Organization (WTO). Russia highlighted that with the IRA, the US seeks to choose with whom to trade. It also highlighted that the IRA will 'exclude products from certain WTO Members from participation in supply chains, provoke international trade fragmentation, as well as destabilize trade and investment flows'.⁴⁴ China stated that IRA 'will disrupt the supply chain and negatively impact developing Members' green development'.⁴⁵ But the response of countries who would generally be considered as 'friends' or 'allies' of the US was also quite critical. The UK, South Korea, and Canada also expressed concern about consistency with WTO agreements, particularly, Most Favoured Nation Treatment and National Treatment obligations under Articles I and III of the General Agreement on Tariffs and Trade 1994, and the Agreement on Subsidies and Countervailing Measures.

The heaviest objection came from the EU and its Member States. The EU perceived it as discrimination against its industries.⁴⁶ Germany's finance minister, *Christian Lindner* openly questioned whether the 'American side has completely grasped how great our concerns about the consequences are'.⁴⁷ French President

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³⁹ Section 13401, Inflation Reduction Act, 2022.

⁴⁰ *Clean Vehicle Tax Credits in the Inflation Reduction Act of 2022* (Congressional Research Service 24 Aug. 2022), <https://crsreports.congress.gov/product/pdf/IN/IN11996> (accessed on 14 Nov. 2023).

⁴¹ Late Magill, *New IRA Guidance Limits Battery Components made in China* (Automotive Dive 1 Dec. 2023), <https://www.automotivedive.com/news/ira-guidance-foreign-entity-of-concern-automakers-evs-batteries-china/701365/#> (accessed on 13 Nov. 2023).

⁴² Section 30D, The Internal Revenue Code.

⁴³ *Ibid.*

⁴⁴ Minutes of the Meeting of the Council for Trade in Goods, 6 and 7 Jul. 2023, G/C/M/146 (Council for Trade in Goods, 27 Sep. 2023), para. 19.8.

⁴⁵ *Ibid.*, para. 19.5.

⁴⁶ *Speech by Executive Vice-President Valdis Dombrovskis at the Trade FAC Meeting* (European Commission 25 Nov. 2022), https://ec.europa.eu/commission/presscorner/detail/en/speech_22_7181 (accessed on 19 Nov. 2023).

⁴⁷ Dairy Dunne, *Media Reaction: US Inflation Reduction Act and the Global/Clean-Energy Arms Race* (Carbon Brief 3 Feb. 2023), <https://www.carbonbrief.org/media-reaction-us-inflation-reduction-act-and-the-global-clean-energy-arms-race/#us> (last accessed on 14 Nov. 2023).

Macron warned that the subsidies could fragment the West.⁴⁸ The EU concern led to the formation of the US-EU Task Force on the IRA.⁴⁹ President *Biden* also promised ‘tweaks’ in order to not anger the friends excluded from the initial interpretation of friend-shoring provisions of the IRA. Korea and the United States have agreed to continue close consultations to seek solutions regarding the IRA that excludes EVs assembled outside of North America from tax incentives.⁵⁰ Treasury Department’s implementing regulations then ensured that the Korean export of EVs continued to flow smoothly in order to assuage Korean concerns.

Then, the term ‘free trade agreement’, which had not been defined anywhere in the IRA, was clarified by the US government in a more expansive way. The US Internal Revenue Service issued a Guidance that, *inter alia*, defined a free trade agreement as an agreement that (1) reduces or eliminates trade barriers or preferential basis; (2) commits the parties to refrain from imposing new trade barriers; (3) establishes high-standard disciplines in key areas affecting trade (such as core labour and environmental protections), and/or (4) reduces or eliminates restrictions on exports or commits the parties to refrain from imposing such restrictions on exports. In this way, Critical Minerals Agreements were also declared as falling under the FTA category. Japan signed a Critical Minerals Agreement with the US, hence, becoming an FTA partner. Japan expected the agreement to fulfil the criterion of ‘FTA’ for the purpose of the IRA and the Treasury confirmed their expectations.⁵¹ The EU has also begun negotiations for a similar agreement, and the UK, Indonesia, and the Philippines also expressed their desire to enter into a Critical Minerals Agreement.⁵² Recently, the US has concluded the Indo-Pacific Economic Framework (IPEF). Particularly, the Trade pillar encompasses environmental and labour standards.⁵³ Application of the definition of an FTA pursuant to the IRS’ clarification indicates that an agreement like IPEF which does not deal with market access through trade tariff concessions, but rather focuses on, *inter alia*, disciplining labour and environmental standards would be an FTA.

This clarification by the IRS throws light on what friend-shoring actually means in the context of the IRA, in the sense that the term does not limit an ally or friend to be a mere military ally, but the focus is rather on alignment in matters of trade in order to be considered a friend or an ally. However, it becomes important to note here that it is not necessary to fulfil all of the above-mentioned aspects in order to be considered an FTA under the IRA. Since it contains ‘or’, fulfilment of any one condition would suffice to classify an agreement as an FTA. Interestingly, the IRS’ clarification mentions that FTAs would also include agreements that establish ‘high-standard disciplines’ in key areas affecting trade such as labour and environment.⁵⁴ In light of the clarification issued, the above definitions of ‘friend-shoring’ that focus on ‘political stability’ in Part I and Part II do not fit into the perspective of the IRA.

5 PROBLEMS WITH FRIEND-SHORING

The sections above have focused on the essence and the limits of friendshoring, and its manifestation in the most ambitious form, i.e., the IRA. The section here will explore the problems or consequences of this approach, particularly as provided for by the IRA, that need to be paid more attention by both the supporters and the critics of friendshoring.

5.1 Friendshoring needs to be Clear, Unambiguous, and Uncomplicated

Some of the points raised in this Article point out the underlying complications and layers of subtleties involved in friendshoring. This web of complexities will be difficult enough to navigate for politicians and experts but as German political scientist *Günther Maibold* puts it, ‘How can political convergence be handled as a manageable criterion?’⁵⁵ Or in simpler words, how do laymen and businesses, especially SMEs, figure out the scope and limits of friendshoring? How do they figure out if they can treat Taiwan, the UK, the EU, Japan, Vietnam, Indonesia and India as ‘friends’ for the next twenty years

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⁴⁸ *Ibid.*

⁴⁹ *Launch of the US-EU Task Force on the Inflation Reduction Act* (26 Oct. 2022), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_6402 (accessed on 19 Nov. 2023); *See also* Questions from China to the United States pursuant to Art. 25.8 of the Agreement, G/SCM/Q2/USA/89 (Committee on Subsidies and Countervailing Measures 20 Oct. 2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/SCM/Q2/USA/89.pdf&Open=True> (accessed on 18 Nov. 2023).

⁵⁰ Oh Seok-min, *S. Korea, U.S. to Continue Consultations over Inflation Reduction Act* (Korea JoongAng Daily 21 Nov. 2022), <https://en.yna.co.kr/view/AEN20221120001851320> (accessed on 13 Nov. 2023).

⁵¹ *US and Japan Enter into Critical Minerals Trade Deal* (Mayer Brown 29 Mar. 2023), <https://www.mayerbrown.com/en/perspectives-events/publications/2023/03/working-together-us-and-japan-enter-into-critical-minerals-trade-deal#> (accessed on 10 Nov. 2023).

⁵² Chad P. Bown, *How the United States solved South Korea’s Problems with Electric Vehicle Subsidies under the Inflation Reduction Act* (Peterson Institute for International Economics Working Paper Jul. 2023), <https://www.piie.com/sites/default/files/2023-07/wp23-6.pdf> (accessed on 19 Nov. 2023).

⁵³ Darren Cheong, *Environmental and Labour Standards in IPEF: Tough Pill to Swallow for Southeast Asia* (Washington International Trade Association 14 Sep. 2022), <https://www.wita.org/blogs/ipef-tough-for-southeast-asia/> (accessed on 19 Nov. 2023).

⁵⁴ *Section 30D New Clean Vehicle Credit* (Federal Register 17 Apr. 2023), <https://www.federalregister.gov/documents/2023/04/17/2023-06822/section-30d-new-clean-vehicle-credit> (accessed on 19 Nov. 2023).

⁵⁵ Maibold, *supra* n. 15.

in various sectors, including the EV sector or not? The ambiguities surrounding the concept could lead to uncertainties which may lead to less cross-border trade and investment with any country which is not a 'close' ally or friend of the US. Take, for instance, the months of confusion following the enactment of the IRA, in understanding who is an FTA partner and who is not, before the term was defined and a key ally like Japan could avail the benefits offered by the IRA.⁵⁶ To avoid uncertainty, the friendshoring policy, whatever its final shape may be, must be adopted and implemented in a clear, uncomplicated, comprehensive and uncontradictory manner. This will allow the businesses and other stakeholders to know exactly where they stand.

5.2 Friendshoring is not the same as Supply Chain Resilience or Diversification

Some supporters of friendshoring talk about it in the same breath as supply chain resilience and diversification. However, while there are points of similarity between friendshoring and the two concepts, they are not the same and there are points of differences between them. One, the US defines the term 'friend' to mean only a handful of countries, which runs contrary to supply chain diversification. Supply chain diversification would imply building relationships with suppliers and customers in various regions, and not just a few chosen ones.⁵⁷ Second, where the supply chain is concentrated in one of the 'friendly' countries, diversification of the supply chain may still be needed. Third, when looking into strengthening the supply chain resilience, the vulnerability of a country to natural disasters and climate change may be a factor that needs to be considered, but for friendshoring, a 'friend' remains a 'friend' irrespective of their vulnerability to earthquakes or typhoons. These differences are something that should be taken into consideration to avoid interchanging the concept of 'friendshoring' with the concepts of 'supply chain resilience' and 'supply chain diversification'.

One example of friendshoring in recent times is the Minerals Security Partnership (MSP). The partnership seeks to enable the extraction, processing, and recycling of critical minerals like cobalt, lithium, and nickel among friendly countries of Australia, Canada, Finland, France, Germany, Japan, South Korea, Sweden, the UK

and the US. However, limiting the supply chain bloc to a handful of developed countries cannot and should not be the same as supply chain diversification. This is without considering the economic costs on businesses and consumers imposed by excluding the majority of the countries in this world from the concept of 'friend'.⁵⁸ Supply chain resilience and diversification should be considered as separate, more universally sound, and preferably higher concepts than the narrower, political concept of friendshoring.

5.3 A Narrow View of Friendshoring and 'Friends' will be Economically Harmful to the Majority of the Developing World and the Developed World

A narrow interpretation of who is a friend and who shares values and principles with the US can lead to detrimental ramifications for many developing countries. As Rajan points out, 'friendshoring' will typically mean trading with countries that have similar values and institutions; and that, in practice, will mean transacting only with countries at similar levels of development.⁵⁹ In the MSP example above, all the countries are developed and many of the mineral suppliers or manufacturing hubs from the developing world are excluded. The WTO has predicted that if the world splits into Western and Eastern trading blocs, global GDP could drop by 5% and the emerging economies would bear most of the cost.⁶⁰ The IMF has also predicted that in case of geoeconomic fragmentation, in the beginning, some of the non-aligned countries such as Brazil, India, and Indonesia may slightly benefit from the diversion of foreign investment from the 'China bloc' to their economies. However, in the long term, these benefits would disappear due to the 'greater uncertainty in the system and the chilling effect this has on cross-border investment and thus its development benefits'.⁶¹

This fragmentation from restrictive friendshoring concepts spells economic harm for the developed world too. An IMF study has found that friendshoring would damage the real GDP in America and Europe by 0.1–1%.⁶² Another study by the European Central Bank declared that global gross national expenditure would in case of fragmentation fall by 5.3%.⁶³

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⁵⁶ *New U.S.–Japan Critical Minerals Trade Deal Opens the Door to Inflation Reduction Act EV Tax Credit for Japanese Companies* (Kilpatrick 31 Mar. 2023), <https://ktslaw.com/en/Insights/Alert/2023/3/New-US-Japan-Critical-Minerals-Trade-Deal-Opens-the-Door-to-Inflation-Reduction-Act> (accessed on 12 Nov. 2023).

⁵⁷ *Economic Development in Africa Report 2023* (UNCTAD Aug. 2023), https://unctad.org/system/files/official-document/aldcafrica2023_en.pdf (accessed on 19 Nov. 2023).

⁵⁸ Maihold, *supra* n. 15.

⁵⁹ Rajan, *supra* n. 22.

⁶⁰ Kessler, *supra* n. 23.

⁶¹ Stephenson, *supra* n. 12.

⁶² *What is 'Friendshoring'?* (The Economist 30 Aug. 2023), <https://www.economist.com/the-economist-explains/2023/08/30/what-is-friendshoring> (accessed on 14 Nov. 2023).

⁶³ *Ibid.*

5.4 *There are no Permanent Friends in International Relations so Friendshoring is Unstable*

Another deep flaw that the discussions on friend-shoring need to focus on is the impermanence of the concept of 'friends' or 'enemies' in international relations. As *Maihold* points out, 'a classification of particular states as "trusted" cannot be expected to remain constant over time'.⁶⁴ This is evident from the very fact that in the early 2000s, though the US was not a friend of China, its close economic and trade partnership was certainly not viewed as a grave economic risk. However, in a short time, the nature of the US-China relations has become pointedly less friendly. The US-China trade war began less than twenty years after US President Bill Clinton had signed the US-China Relations Act of 2000, normalizing trade relations with China.⁶⁵ On the other hand, the relations between the US and Vietnam have continued to become friendlier. The trade embargo against Vietnam, put in 1975 in the aftermath of the Vietnam War, was lifted in 1994 and diplomatic relations were established in the following year.⁶⁶ Today, it is a 'key partner' for friendshoring.⁶⁷ Therefore, 'friendshoring' would involve an element of risk and require foresightedness as countries that are counted as 'friends' today may not be counted as 'friends' tomorrow.

5.5 *Policy Implications of Friendshoring for Political Sovereignty and Independence of Countries*

One argument offered in favour of friendshoring is that it will shield countries from the dangers of political blackmail and economic coercion. While the argument may have its merits, one should also look at the consequences of limiting friends to those who share the same values. There are two points to be considered here. *First*, if the list of these values or principles is strictly enforced, it will appear as a form of economic coercion for other countries. They will have to choose between pursuing their own values and principles independently from the ones dictated by the US or pursuing closer economic partnerships with the US at the cost of their sovereignty. *Second*, the values of countries change over time and this is true for the US too. Their attitude

towards issues may not be fixed at all times. The linking of economic relations with political or other values can lead to countries being locked and frozen in their values, at least as long as the US values remain the same. This can create a risk that they may only be allowed to change their values if the US values change. The potential consequences of friendshoring on the political sovereignty of the countries is an aspect that should bear closer scrutiny.

5.6 *Are Friends Friendly Towards each other?*

While exploring the concept of 'friends' from a US perspective, it needs to be questioned whether the relations among 'friends' are also being considered. For example, among the MSP, the US may have 'friendly' and 'stable' relationships with the UK, France, Germany, South Korea and Japan. However, the trade relationships among countries like the EU, Japan, and South Korea have been marked by their own independent share of troubles. So, one potential consequence could be that a US investor may set up a supply chain concentrated on the US, South Korea, and Japan but may still face supply chain disruptions when these friends of the US fight with each other. While this may not be a major point of concern, it does warrant more discussion and exploration.

5.7 *All Friends are not equal*

Depending on what criteria the US government or the supporters of 'friendshoring' choose to define 'friends', all 'friends' may not be equal. Generally, the relations the US has with other countries cannot be viewed in a binary of 'friendly' or 'unfriendly'. The 'friends' may share certain values with the US on a spectrum. And even then, irrespective of any defining criteria, the US government has certain preferences for one country over the others. For example, another example in pursuit of friend-shoring is the US-EU Trade and Technology Council (TTC) where the US and its 'friend' EU cooperate in trade and technology matters. But the UK was not allowed to be part of it.⁶⁸ IRA is another example showing unequal hierarchy among friends from the developing world. As per terms of IRA, countries like India, Vietnam and Indonesia are not 'friends' due to the lack of an FTA with the US while

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⁶⁴ Maihold, *supra* n. 15; See also Emily Benson and Ethan B. Kapstein, *The Limits of 'Friend-Shoring'*, Center for Strategic and International Studies (1 Feb. 2023), <https://www.csis.org/analysis/limits-friend-shoring> (accessed on 16 Nov. 2023).

⁶⁵ *U.S.-China Relations* (Council on Foreign Relations 2023), <https://www.cfr.org/timeline/us-china-relations> (accessed on 19 Nov. 2023).

⁶⁶ *Viet Nam – US Relations*, <https://vietnamembassy-usa.org/vietnam-us-relations/timeline> (accessed on 13 Nov. 2023).

⁶⁷ Andrea Shalal, *US Treasury's Yellen sees Vietnam as key Partner in 'Friendshoring' Supply Chains* (Reuters 21 Jul. 2023), <https://www.reuters.com/markets/asia/us-treasury-yellen-sees-vietnam-key-partner-friendshoring-supply-chains-2023-07-21/> (accessed on 17 Nov. 2023).

⁶⁸ Graham Lanktree, *Biden Rebuffs UK bid for Closer Cooperation on tech* (Politico 5 Mar. 2023), <https://www.politico.eu/article/biden-united-kingdom-technology-rishi-sunak-cooperation-trade/> (accessed on 19 Nov. 2023).

Mexico and Colombia are.⁶⁹ Among the developed world, Canada as a North American country is above Japan, an 'FTA partner' and above the UK, not an 'FTA partner'. This leads to the creation of a hierarchy of North American countries, those falling in the 'FTA partner' category, those with whom a critical mineral supply agreement or some other FTA could be concluded and those who could not even hope to negotiate an agreement. So, this inequality and graded hierarchy of friends need to be discussed more openly and it should also be questioned whether this hierarchy is intentional or needed.

5.8 There Exists a Contradiction Between Friend-Shoring and Onshoring

The US government in the 'White House, Building Resilient Supply Chains' document has used 'friendshoring' and 'onshoring' interchangeably. Yet, emphasis on onshoring through 'building back better' and massive subsidies can and has led to tension with friends. The threat of a subsidy race between the US and the EU is also playing out,⁷⁰ despite their 'friendship'. The US may wish to pursue onshoring to have more jobs and manufacturing at home, while friendshoring may be pursued for reasons of foreign policy. But the inherent contradiction between onshoring and friendshoring will be hard to overcome.

6 CONCLUSION

As the US and its key partners are making an effort to diversify and friendshore clean energy supply chains in the wake of the Russian invasion of Ukraine and heightened tensions with China, the increase in global partnerships marks the emergence of a 'joint industrial policy'. This entails countries collaborating and working together to create supply chains and coordinate their industrial strategies at an international level.⁷¹ It has also been noted that friendshoring may be used as an offensive policy tool where the US is taking an aggressive approach to exclude

China from essential supply chains. The US and China have been involved in strategic competition, which has also been labelled as a 'high-tech war'. Not only does the US want to take the lead over China, but it also wants to ensure that in doing so, China's economic and military modernization efforts suffer greatly.

When exploring the practical implementation of the policy of 'friendshoring', there exists a diversity in approaches. For instance, 'friendshoring' under the IRA is limited only to FTA partners, and the EU in the TTC. However, these approaches exclude the majority of the nations, particularly the developing countries. However, developing countries like India, Thailand and Indonesia who are parties to the IPEF may be considered as 'friends' under the first category, as IPEF may potentially be an FTA pursuant to the IRS' clarification. The US should pursue a more inclusive and open definition of who is a 'friend' or it can lead to a multitude of negative consequences which may affect US investors, businesses, and consumers. For instance, the 'FTA partner' approach to 'friends' is exclusive as the US is not likely to negotiate one-on-one agreements with more than a hundred nations. Its impact would be that the diversification of supply chain demands will be concentrated in a few countries.

The term friendshoring cannot be treated the same as onshoring or as a shield for domestic protectionism. The term friendshoring is a wider and different concept from onshoring and domestic protectionism. If pursued in a broad, level-headed manner, it can ensure that businesses give due respect to political realities and not just manufacture goods where it is cheapest to do so.⁷² However, it needs to be pursued in a liberal, fair, and economically sensible manner. If it is interpreted to push the supply chain for a large number of goods to a handful of countries, it will create havoc for the world economy. This could be the case with the IRA as the US' design would inevitably lead to the concentration of the EV supply chain in a handful of countries.

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⁶⁹ *Trade Agreement* (US Department of State), <https://www.state.gov/trade-agreements/> (accessed on 19 Nov. 2023).

⁷⁰ L. Lydgate et al., *The US-EU Green Subsidies Race one year in: Some Perspectives from the Rest of the World* (CITP Briefing Paper 7 2023).

⁷¹ Bentley Allan et al., *Friendshoring Critical Minerals: What Could the US and Its Partners Produce?* (Carnegie Endowment for International Peace 3 May 2023).

⁷² Rajan, *supra* n. 22.

Indo-Pacific Economic Framework for Prosperity: Redefining Friendshoring or a New Form of Standard Setting

Pushkar Reddy* & Ridhish Rajvanshi**

The Indo-Pacific Economic Framework for Prosperity (IPEF) signifies an important attempt by the United States of America (US) to establish a strategic presence in the Indo-Pacific region, following its setback in the Trans-Pacific Partnership (TPP). The Biden administration actively promotes IPEF as an economic initiative aimed at countering Chinese hegemony in the region, exemplifying the push for friendshoring. Nevertheless, the distinctive architecture of IPEF demands attention, the non-binding commitments not only makes it an appealing initiative for heterogeneous interests in the Indo-Pacific region but also herald a new era of rulemaking in international trade.

The article attempts to undertake a nuanced exploration of the growth of friendshoring in the wake of global supply chain disruptions with the examination of IPEF in the Indo-Pacific Region. It further examines the political and economic strategies employed to rebuild trust with Indo-Pacific nations and finally integrate India and US into the network of economic partnerships in the region. Such an exploration facilitates a deeper appreciation of how the non-binding commitments within IPEF usher in a new era of rulemaking in international trade through standard setting, reminiscent of the 'Brussels Effect' and 'California Effect'.

Keywords: friendshoring, IPEF, US, India, supply chains, Indo-Pacific, ESG, standards

I INTRODUCTION

The frequent occurrences of disruptions in the global supply chains due to external events such as COVID 19 and the Russia – Ukraine conflict, has made supply chain resilience a topic of utmost concern for countries.

The current global commodities price surge, barriers to trade and unjustified trade restrictions have a negative impact on trade and investment by increasing markets' volatility and reducing the availability of much needed commodities on global markets. This has led to shift of focus from global value chains (GVCs) to regional value chains (RVCs), or what otherwise is being regarded as a shift towards friendshoring.

This article is divided into five parts. *First*, it introduces the concepts of friendshoring, and nearshoring, and explores reasons for its increasing importance, concluding with how the Indo-Pacific Economic Framework for Prosperity (IPEF) is a quintessential example of friendshoring. *Second*, the article focuses on the geo-political consideration behind the IPEF grouping as a tool to counter the growing significance of China in the region. *Third*, the article discusses the rise of non-binding arrangements and its role in international law. *Fourth*,

the article discusses how non-mandatory commitments in IPEF may lead to a new era of globalizing standard and regulations.

2 IPEF AND THE RISE OF FRIENDSHORING

2.1 Friendshoring as a Tool for Supply Chain Diversification

Friendshoring may be preferable wherein there is proximity and time zone compatibility between the countries, cultural alignment, and intention for enhanced collaboration. Some of the benefits include resilient RVCs, cost efficiency, risk mitigation, cost efficiency, and adoption of better sustainable practices, for instance reduction on carbon footprint associated with long-distance logistics and transport arrangements.

Keeping the above factors into consideration, friendshoring may positively assist in diversifying supply chains from countries that present geopolitical risk, and can be done with the intention to minimize the supply chain vulnerabilities and create a resilient network with trusted or allied partners. Such actions can

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lead to diversifying sourcing and manufacturing operations towards nations that share similar values, reducing dependence on countries deemed as threats to supply chain stability.

However, there have been arguments against using friendshoring as a tool for diversification, which includes fragmentation of the GVCs, overreliance on trusted or allied partners that can lead to dependency and vulnerability to external shocks, protectionist approach or policies such as imposition of tariffs or quotas on goods and services from other regions, and neglected development opportunities due to hinderance in the potential for trade expansion and limiting the access to diverse markets and opportunities. Thus, friendshoring elevates the primacy of politics over that of comparative advantage and results in fragmentation of the global economy along lines that are politically drawn rather than economically derived.¹

2.2 Contemporary Concerns of Friendshoring

In the wake of Brexit, it has become evident that friendships may not be sustainable, and trading partnerships frequently shift based on evolving needs. Consequently, heavily relying on friendship-based trade as a long-term strategy could yield adverse effects, particularly for developing countries fostering overdependence. Hence, it is imperative to approach such relationships with caution and maintain a balance. Altering such alignments based on criteria detached from economic fundamentals risks perpetually disrupting private sector actors and undermines the predictability and stability of their planning horizon, thereby escalating adjustment costs.

Brexit serves as a stark illustration of how a country's individual interests can outgrow collective interests. Beyond Brexit, the overhaul of the North America Free Trade Agreement into the United States-Mexico-Canada Free Trade Agreement exemplifies a transformation driven by the individual interests of one nation. Similarly, apprehensions arise regarding China's Belt and Road Initiative (BRI) aimed at fostering regional connectivity and economic development, which recently witnessed the withdrawal of Italy and Argentina. Instances such as India's withdrawal from the Regional Comprehensive Economic Agreement (RCEP) and the United States' exit from the Trans-Pacific Partnership (TPP) underscore how a country's individual interests can reshape global trade dynamics.

2.3 IPEF as a tool to Achieve Economic Integration with Trusted Allies

As observed, countries are focusing more on regionalism and bilateral agreements and cooperation memorandums, which has significantly grown in the last five years. One prime example of such an agreement is IPEF. At the QUAD grouping meeting in Tokyo, Japan in May 2021, an initiative led by the United States of America (US) was announced to establish a strategic presence in the Indo-Pacific region and to counter the growing Chinese hegemony in the region, therefore exemplifying the push for friendshoring.

The IPEF structure grants considerable flexibility to members to choose which Pillars they wish to be a party to. This allowed India to only be a party to Pillar II (Supply Chain Resilience), Pillar III (Clean Economy) and Pillar IV (Fair Economy) which are being led by US Department of Commerce (USDOC). With Pillar I (Trade) led by US Trade Representative (USTR), containing strong commitments in sensitive areas such as labor, environment, digital economy, and agriculture, there were hesitations from India to join the Pillar given the concern that it may cede its policy space in these areas, however, India is still considering whether it should join Pillar I.² Such an approach allows countries to trade with countries that do not necessarily share similar values and institutions, which in practice implies transacting with countries that do not share similar levels of development.

It is imperative to note here that IPEF is an economic integration agreement without any market access, and with detailed focus on integration of businesses and private sector in ensuring success and effective implementation of it. IPEF also ensures that appropriate assistance is made available to enterprises, especially micro-, small-, and medium-sized enterprises (MSMEs), in addressing commitments and obligations under IPEF and ensure their deeper integration in the region.

In the face of multilateral forums faltering to yield tangible outcomes on trade-related matters and exhibiting limited responsiveness during periods of crisis and disruptions, strategic engagements with allied partners via a flexible arrangement present an approach. This approach ensures that politically aligned nations collaborate with the shared goal of attaining collective interests, all the while safeguarding their respective domestic interests.

Hence, to forge a successful path forward for resilient friendshoring initiatives, countries can consider a flexible arrangement or agreement. This framework should permit countries to embrace obligations that align with shared

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¹ Mia Mikic, Biswajit Nag & Sherry Stephenson, *Supply Chain Resilience, Friend-Shoring, and the Pursuit of Non-Economic Objectives* T20 Policy Brief (accessed 6 Dec., 2023), https://t20ind.org/wp-content/uploads/2023/06/T20_PolicyBrief_TF1_Friend-shoring.pdf.

² Ravi Dutta Mishra, *Benefits of Joining IPEF's Trade Pillar Unclear: Official* The Hindu (accessed 15 Dec. 2023), <https://indianexpress.com/article/business/benefits-of-joining-ipefs-trade-pillar-unclear-official-9038522/>.

collective interests. Simultaneously, it should ensure the availability of multilateral or plurilateral forums in the region for discussions that encompass new initiatives. For instance, the IPEF Leaders' in their joint statement on 16 November 2023 announced the launch of IPEF Critical Minerals Dialogue, IPEF Investment Accelerator, IPEF Project Preparation Facility, IPEF Catalytic Capital Fund, and IPEF Networks.³

2.4 IPEF in Context of Multilateral Institutions

IPEF, conceived as a comprehensive entity, is launched with the primary objective of addressing the evolving trade concerns at a more advanced level. Despite the fact that most of the advanced economies within IPEF have achieved liberalization in their tariff structures and market access, they now grapple with unforeseen challenges stemming from GVCs. These challenges arise from outsourcing to other economies, resulting in adverse effects on their own economies due to excessive reliance and dependence on such exporting nations. This has, in turn, led to a decline in skills, education, and learning.

In response, IPEF endeavors to establish new rules of engagement designed to ensure a balanced playing field among economies that may enjoy comparative advantages. The overarching goal is to facilitate ease of doing business and align with the targets set by these economies under multilateral frameworks, such as the Paris Agreement.

The IPEF Pillar agreements are expected to be intricately linked with investments, and donor countries will likely seek assurance that investments flow only to those economies that meet the standards outlined in IPEF. As articulated in the Pillar II text, it is noteworthy that the IPEF primarily comprises non-binding commitments and lacks recourse to arbitral dispute resolution or third-party dispute settlement mechanisms.

Nevertheless, the enforceability of IPEF is evident from the following statements and reports: *'(IPEF) is enforceable because countries that don't follow the rules or live up to their commitments don't receive the benefits' and cautioned that non-compliant parties could be "kicked out of the club"*.⁴

However, the process of expelling non-compliant countries from the agreement remains ambiguous, as Pillar II lacks any provision empowering members to vote a

country out of the agreement. Additionally, the US in the recent 2023 Trade Policy Agenda and 2022 Annual Report noted that:

'In the coming decades, we believe that competitiveness will largely be defined by how well countries are able to harness technology and digital sectors of our economies and the coming energy and climate transition to promote inclusive growth – and working with our partners and allies in the Indo-Pacific will be critical to achieving these goals.'

*'The Indo-Pacific is one of the most dynamic regions in the world, and it is one of strategic importance to the United States. ... we can establish a new path forward that supports the global competitiveness of American workers and businesses and furthers the shared interests of our allies in the years to come.'*⁵

The recent pandemic and armed conflicts have prompted economies, such as the US, to recognize the impracticality of self-sufficiency and multilateralism in the face of global disruptions to supply chains. This realization has catalysed initiatives toward a new world order, characterized by the cultivation of stronger ties with allies and economies that contribute significantly to exports to the US. These initiatives manifest through agreements wherein these economies commit to a new set of rules, ensuring a level playing field.

This agreement, in turn, serves as a conduit for exporting normative values, including climate initiatives, workers' rights, and ensuring consistent attention to tax and anti-corruption issues throughout the region. The aim is to establish a framework that provides certainty and facilitates ease of doing business. Subsequently, this framework can be leveraged to set the terms for the entry of other countries into the established agreement.

3 THE GEO-POLITICAL IMPORTANCE

This section discusses the geopolitical situation in the Indo-Pacific region, with India and US returning to the economic frameworks of the region through IPEF. Further, the section discusses the political and economic consideration behind IPEF and friendshoring in this region.

3.1 Second Coming of India and US into Indo-Pacific Region

The economic significance of the Indo-Pacific region is of paramount importance. IPEF is currently the largest

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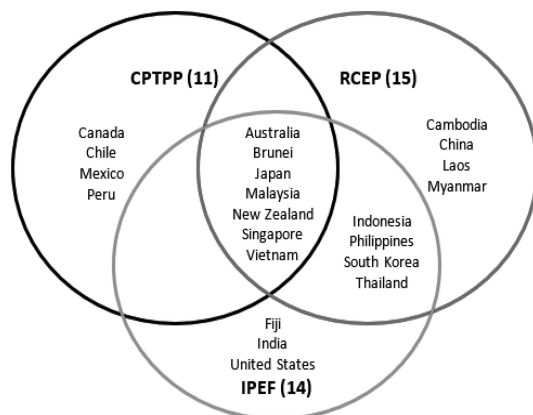
³ The White House, *Leaders' Statement on Indo-Pacific Economic Framework for Prosperity* (16 Nov. 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/11/16/leaders-statement-on-indo-pacific-economic-framework-for-prosperity/?utm_source=link; The White House, *FACT SHEET: Partnership for Global Infrastructure and Investment (PGI) Indo-Pacific Economic Framework for Prosperity (IPEF) Investor Forum* (accessed 1 Dec., 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/11/16/fact-sheet-partnership-for-global-infrastructure-and-investment-pgi-indo-pacific-economic-framework-for-prosperity-ipef-investor-forum/?utm_source=link.

⁴ Devon Whittle, *IPEF Supply Chain Agreement Released* East Asia Forum (accessed 8 Dec. 2023), <https://www.eastasiaforum.org/2023/10/16/ipef-supply-chain-agreement-released/#:~:text=US%20Secretary%20of%20Commerce%20Gina,kicked%20out%20of%20the%20club>.

⁵ United States Trade Representative, *2023 Trade Policy Agenda and 2022 Annual Report* 12 (accessed 9 Dec. 2023), [https://ustr.gov/sites/default/files/2023-02/2023%20Trade%20Policy%20Agenda%20and%202022%20Annual%20Report%20FINAL%20\(1\).pdf](https://ustr.gov/sites/default/files/2023-02/2023%20Trade%20Policy%20Agenda%20and%202022%20Annual%20Report%20FINAL%20(1).pdf).

economic bloc globally, surpassing even the recently finalized RCEP. Nonetheless, the significance of the IPEF is not solely derived from its economic scale; rather, it lies in its political symbolism, notably in the deliberate exclusion of China, the most influential economy in the region. Furthermore, the IPEF is poised to facilitate the integration of the United States, India, and Fiji into the economic framework of Indo-Pacific region.

Figure 1 Venn Diagram of IPEF Parties Memberships in RCEP and CPTPP



Source: *Surveying the Economic Agreements in the Asia-Pacific Region: Implications for the Philippines*, 21 December 2023, <https://fsi.gov.ph/2023/06/05/surveying-the-economic-agreements-in-the-asia-pacific-region-implications-for-the-philippines/>

As delineated in previous section, the fundamental aim of IPEF is to establish an economic bloc in the region, strategically positioned to counterbalance China's escalating hegemony. This objective assumes heightened significance, particularly in the aftermath of the RCEP on 1 January 2022.

While RCEP originated as an Association of Southeast Asian Nation (ASEAN)-led initiative, apprehensions emerged regarding its potential deployment as a mechanism to curtail safeguards and protectionist measures against the surge of Chinese products.⁶ This concern materialized in India's withdrawal from RCEP in November 2019, following seven years of negotiations.⁷ India's primary rationale for abstaining from RCEP was

rooted in its trade imbalance with China, exacerbated by the ambitious liberalization commitments in RCEP.⁸ Further, by opting out of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), India limited its avenues for integration in the Indo-Pacific region. RCEP stood out as India's sole opportunity to align itself, under a unified economic arrangement, with the ASEAN and other crucial nations in the region. This marked a significant departure from India's Act-East Policy, a framework aimed at fostering economic cooperation, nurturing cultural ties, and cultivating strategic relationships with nations in the Indo-Pacific region.⁹

While India has effectively advanced its Act-East Policy by forging bilateral trade agreements with nations in the Indo-Pacific region, with India's most recent trade agreement being the India-Australia Economic Cooperation and Trade Agreement signed on 29 December 2022. The IPEF emerges as a convenient conduit for the complete realization of India's Act-East Policy. This is achieved by establishing an economic arrangement with key nations outlined in the policy. However, the US must approach the IPEF with caution, ensuring that it is enticing enough for India's active participation. Simultaneously, the framework should serve as a foundation for exporting normative values pertaining to labor and the environment, aligning with recent trends observed in US' recent trade agreements.

3.2 Political and Textual Maneuvering

The fear of a worsening trade imbalance with China did not shy India away from participating for nearly all of the negotiation process of RCEP. However, reservations regarding ambitious contemporary non-trade related commitments and pronounced TRIPS-plus commitments deterred India from even partaking in discussions within the CPTPP. This contradicted the intended focus of the IPEF, which sought to be 'worker-centric' and prioritize the establishment of environmental standards.¹⁰ Simultaneously, IPEF member countries that are part of the Organisation for Economic Co-operation and Development (OECD) and the CPTPP have collectively embraced stringent labor and environmental standards, indicating a predisposition toward supporting similar

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⁶ Chao Wang & Vinay Sharma, *India's RCEP Dilemma With China*, 36 *Pacific Focus* 40, at 40–45 (2021).

⁷ Asha Sundaram, *India's RCEP Exit and Its Regional Future* East Asia Forum (accessed 6 Dec 2023), <https://www.eastasiaforum.org/2022/04/13/indias-rcep-exit-and-its-regional-future/#:~:text=India%27s%20exit%20in%20November%202019,proponents%20of%20regional%20economic%20integration.>

⁸ *Ibid.*

⁹ *Lok Sabha Question No-1456 India's Act-East Policy* Ministry of External Affairs (accessed 2 Dec. 2023), <https://www.mea.gov.in/lok-sabha.htm?dtl/36927/QUESTION+NO1456+INDIAS+ACTEAST+POLICY#:~:text=The%20objective%20of%20Act%20East,in%20its%20broadest%20sense%2C%20including> (The Act-East Policy is the successor to India's Look-East policy which began in 1991 by Narasimha Rao to increase economic integration and security cooperation with South East Asia and which was later expanded in 2003 to also include Australia and East Asia with ASEAN as its core).

¹⁰ Amitendu Palit, Kunthavi Kalachelvam & Namrata Yadav, *IPEF and India: Identifying the Prospects* Institute of South Asian Studies (accessed 7 Dec. 2023), <https://www.isas.nus.edu.sg/papers/the-ipef-and-india-identifying-the-prospects/#:~:text=India%20should%20look%20forward%20to,markets%20of%20the%20Indo%2DPacific.>

commitments within the IPEF framework. In this context, the US ensured that IPEF possessed a distinctive architecture that allowed for selective participation while also potentially tying IPEF to benefits in the Inflation Reduction Act (IRA) and unique funding opportunities.¹¹

The structural framework of IPEF provides significant flexibility to its members, allowing them to selectively participate in specific Pillars. In this context, India has opted to engage only in Pillar II, Pillar III, and Pillar IV, all of which are led by the USDOC. Pillar I which is focused on trade and led by the USTR, encompasses robust commitments in critical areas such as labor, environment, digital economy, and agriculture. It is unsurprising that India chose not to partake in Pillar I, as it has a history of actively objecting to non-trade commitments. This strategic decision also served as an elegant solution, as India's involvement in Pillar I could have potentially impeded negotiations and may have forced India to abandon its participation in IPEF. However, despite India's absence in Pillar I, the members of IPEF failed to achieve significant progress by the APEC Summit in November 2023.¹²

While India and other members of IPEF express a keen interest in re-engaging with the US in the Indo-Pacific region to counteract China's escalating influence, the US is actively working to incentivize participation in the IPEF. One potential inducement for countries to join the IPEF is the possible designation as an 'FTA partner country', enabling them to avail themselves of tax credits for electric vehicles and batteries under the IRA.¹³

In addition to the advantages offered under the IRA, the US has unveiled two distinctive investment programs for IPEF members, particularly emphasizing Pillar III (Clean Economy) for climate-friendly initiatives. These programs are the IPEF Catalytic Capital Fund and the fund launched by the US International Development Finance Corporation (DFC) in collaboration with I Squared Capital. The IPEF Catalytic Capital Fund, backed by a USD thirty million contribution from the US, Japan, and Australia, is designed to foster the development of viable clean energy products and provide technical assistance.¹⁴ Simultaneously, the US has announced that the DFC will allocate USD 300 million for financing sustainable infrastructure projects in 'emerging markets',

encompassing IPEF countries. The DFC financing will be supplemented by additional funding from I Squared Capital, a global infrastructure investment manager, committing USD 3 for every dollar provided by the DFC, resulting USD 900 million being provided by I Squared Capital.¹⁵ Consequently, the overall funds allocated by the DFC and I Squared Capital along with the IPEF Catalytic Capital Fund, amounts to USD 1.23 billion.

4 NON-BINDING ARRANGEMENTS: THE NEW-AGE INTERNATIONAL AGREEMENT

In this section, we discuss the trend of new-kinds of non-binding arrangements, possible set of obligations therein and how these international treaties are regarded as non-binding under the realm of international law.

A recent trend involves the emergence of non-binding arrangements that surpass mere cooperation but fall short of meeting the criteria for a standard trade agreement or a comparable arrangement. An illustrative example is the growing prevalence of forums and agreements between countries pertaining to critical minerals or essential goods. In these arrangements, there are 'shall' obligations imposed on the parties, albeit accompanied by necessary caveats or provisions ensuring that such agreements do not establish any legal obligations on the involved parties. Another manifestation of this trend involves the establishment of ministerial-level councils between countries for regular exchanges and discussions related to such non-binding arrangements.

One key innovative development in this area can be seen in the Pillar II Agreement, and likely in the Pillar III and IV agreements as well. The Pillar II text includes obligations which are mostly on 'intend to' basis, i.e., reflect what Parties intend to do or engage in and cooperate on. However, the institutional framework developed in this Agreement contains mandatory commitments for the parties.¹⁶ This raises a concern for the parties as to whether such an agreement should be treated as having binding obligations or not.

One key observation to be made here is that 'intend to' is generally considered a hortatory clause, which does not impart binding legal character to the provision in

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¹¹ Arrizal Jaknanihan & Bappenas, *Keeping the IPEF afloat is in Indonesia's Interest*, East Asia Forum (accessed 16 Dec. 2023), <https://www.eastasiaforum.org/2023/12/09/keeping-the-ipef-afloat-is-in-indonesias-interest/>.

¹² David Lawder, *Race to Finish Indo-Pacific Trade Deal Hit Snags Ahead of APEC Summit*, Reuters (4 Dec. 2023), <https://www.reuters.com/world/race-finish-indo-pacific-trade-deals-hit-snags-ahead-apec-summit-2023-11-09/>.

¹³ Lorena Montes, Kimberly Breier & Bart Szewczyk, *Global Spotlight: The IRA's Implication for Key U.S. Allies* Global Policy Watch (accessed 6 Dec. 2023), <https://www.globalpolicywatch.com/2023/04/global-spotlight-the-iras-implications-for-key-u-s-allies/>.

¹⁴ David Lawder, *US, Indo-Pacific Partners Agree on Clean Energy, Anti-Graft Pillars* Reuters (accessed 5 Dec. 2023), <https://www.reuters.com/sustainability/us-ipef-partners-agree-clean-energy-anti-graft-pillars-2023-11-16/#:~:text=Raimondo%20said%20the%20clean%20energy,products%20and%20provide%20countries%20technical> (US and Japan provided USD 10 million while Australia provided USD 8 million).

¹⁵ *DFC's Approval of \$300 Million Financing for Sustainable Infrastructure Projects to Include Countries Party to IPEF* DFC (accessed 1 Dec. 2023), <https://www.dfc.gov/media/press-releases/dfcs-approval-300-million-financing-sustainable-infrastructure-projects>.

¹⁶ For instance, see Article 6 (IPEF Supply Chain Council) of IPEF Pillar II (Supply Chain Resilience)

question. According to the US' Office of the Legal Advisor's note on *Guidance on Non-Binding Documents*, treaty negotiators may use 'should', 'intend to' or 'expect to' to denote the non-binding nature of a document.¹⁷

International agreements that lack binding commitments often allow the executive authority of the parties to enter into such formal non-binding arrangements without going through their respective burdensome legislative approval or procedure. For instance, in US, the ambiguous nature of the commitments in IPEF allows the US Executive to bypass the procedure in Article II, section 2 of the US Constitution and thereby permitting them to continue entering into such trade related arrangements without renewing the Trade Promotion Authority.¹⁸

Additionally, such formal non-binding arrangements provides flexibility for parties to undertake ambitious and substantial commitments on new-era trade-related issues such as sustainability, gender, labor, environment, anti-corruption, subsidies and SOEs disciplines, etc. in a formal treaty arrangement to meet their SDG goals and other international agreement goals and commitments, such as under the Paris Agreement. However, these forms of formal non-binding arrangements ensure that these commitments are non-binding in nature compared to substantially equivalent commitments found in a trade or investment agreement, thereby providing necessary policy space and right to regulate in these areas without the fear of retaliation.

5 STANDARD AND REGULATION SETTING – 'WASHINGTON EFFECT'

While the IPEF refrains from imposing mandatory commitments, its emphasis on addressing new-age issues, accommodating a diverse membership, and wielding economic influence suggests the potential for ushering in a new era of standard setting and regulations with ramifications for international trade. Standards and technical regulations, when intricate, rigorous, or divergent from measures in the exporter's domestic market, can emerge as significant non-tariff barriers. The World Trade Organization (WTO) has established comprehensive rules aimed at mitigating the potential of standards and regulations to function as non-tariff barriers by fostering

harmonization and consistency with international standards. However, the deliberation of standards and regulations in relevant international forums, especially in novel or contentious domains, often leads to extended timelines, incentivizing the unilateral imposition of standards and regulations. This dynamic has resulted in the establishment of some unilateral standards and regulations as global norms, exemplified by phenomena such as the 'Brussels Effect' and the 'California Effect'.

5.1 Unilateral Regulatory Globalization

The Brussels Effect and California Effect exemplify instances of 'unilateral regulatory globalization', wherein a single state extends its laws and regulations beyond its borders through market mechanisms, contributing to the broader process of globalization.¹⁹ These phenomena both emerged as observations of the imposition of rigorous standards concerning consumer welfare, human rights, and environmental protection in jurisdictions outside the originating state's boundaries. Both underscore the ability of a singular regulatory entity to shape international standards and practices.

Coined in the 1990s, the term 'California Effect' denotes a distinctive phenomenon that challenged the prevailing economic theory of the time, countering the apprehension associated with 'race to the bottom'.²⁰ In stark contrast, the California Effect illustrates the inclination of standards and regulations, particularly environmental product standards, to progressively elevate towards higher levels of protection, ultimately leading to harmonization.²¹ The influence of the California Effect is rationalized by two key factors: the size and impact of the market where the standard or regulation is imposed and the regulatory influence and capability of the conformity assessment bodies within that market.²²

Much like the California Effect, the Brussels Effect delineates a comparable phenomenon, but within the framework of the European Union's (EU's) impact on global standards and regulatory frameworks. Anu Bradford takes an additional stride, offering a comprehensive understanding of the predominance of the Brussels Effect by pinpointing five criteria embedded in the EU: (1) with a market size representing the largest importer of

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¹⁷ US Department of State, *Guidance on Non-Binding Documents* (accessed Dec. 2023), <https://2009-2017.state.gov/l/treaty/guidance/index.htm>.

¹⁸ Congressional and Executive Authority over Foreign Trade Agreements, Congressional Research Service (10 Jan. 2024, 4:10 PM), <https://crsreports.congress.gov/product/pdf/R/R47679> (Free Trade Agreements entered into by US require approval through a congress-executive approval process through the trade promotion authority (TPA). Through the TPA, Congress retains the authority to review and decide whether the trade agreement will be implemented. However, the TPA authorization mechanism expired in 2021. Additionally, the US Executive has entered into 'hybrid trade arrangements' which deviate from traditional trade agreements and allow the Executive to enter into such agreements without Congress approval).

¹⁹ Anu Bradford, *The Brussels Effect*, 107 N.W. U. L. Rev. 1, at 5–10 (2016).

²⁰ David Vogel, *Environmental Regulation and Economic Integration*, Workshop on Regulatory Competition and Economic Integration: Comparative Perspective for Yale Centre for Environment Law and Policy (Oct. 1999).

²¹ *Ibid.*

²² Bradford, *supra* n. 17.

goods and services and contributing to a quarter of the global GDP, the incentive for market access in this expansive consumer landscape far outweighs any associated adjustment costs; (2) regulatory expertise and institutional capacity to effectively enforce standard; (3) the political willingness to implement stringent standards, due to the similar positions held by the political elite; (4) standards related to inelastic consumer markets, such as product safety, hold particular significance, unlike the regulation of capital, consumers are unlikely to relocate to other jurisdictions solely due to variations in standards or regulations; and (5) non-divisibility of standards allows for standardizations, often achieved by establishing more stringent standards that can meet the requirements of other markets.²³

5.2 'Washington Effect' through IPEF

As previously mentioned, the US had to temper the commitments within the IPEF to secure agreement among the diverse interests of its members. Even before IPEF was officially introduced at the QUAD Summit, the Biden administration proactively 'water(ed) down' the commitments, aiming to enhance its appeal and encourage broader participation.²⁴ The US's readiness to dilute commitments to such an extent, a departure from the more stringent USMCA, signifies a novel approach emphasizing cooperation and capacity building for the development and implementation of standards and regulations.²⁵

US representatives have explicitly stated that the purpose of the commitments across the four pillars of IPEF is to establish elevated standards, unintentionally giving rise to a 'Washington Effect' on standards and regulations, bearing a notable resemblance to the Brussels Effect.²⁶ While the US market alone could potentially satisfy the five criteria identified by Anu Bradford, the IPEF region benefits from two additional factors that may heighten the likelihood of regulatory harmonization: the diversity of interests, which increases the potential for more uniform compliance, and the advantage of being a first mover in this context.

The IPEF membership encompasses a distinctive blend of countries, ranging from OECD nations widely recognized for their stringent labor and environmental commitments to those with lower per capita income and a historical hesitancy towards international labor and environmental obligations, particularly in trade agreements.

By fostering collaboration among this diverse membership, any standard or regulation developed within the IPEF framework must align with the domestic regulatory capacities and resource availability of all its members. This approach ensures the formulation of standards and regulations that can be embraced by countries endowed with abundant resources and a commitment to higher compliance standards, as well as by nations aspiring to achieve elevated levels of development. Consequently, the standards and regulations devised within the IPEF structure are more adaptable for adoption by a broad spectrum of countries.

Katherine Tai characterizes IPEF as specifically designed to address '21st-century' issues, a proposition evident in the thematic scope covered by its four pillars. While there are commonalities between IPEF and the US-EU Transatlantic Trade and Investment Partnership (TTC), the formal international agreement status and ministerial-level council overseeing IPEF set the stage for heightened compliance and streamlined decision-making and implementation, differentiating it significantly. Notably, the inclusion of commitments within IPEF for a plurilateral arrangement is ground-breaking. In particular, IPEF Pillar II represents the inaugural instance of plurilateral supply chain agreements, featuring detailed monitoring, transparency requirements, and collaborative efforts to fortify and create resilient supply chains. IPEF Pillar III amalgamates diverse elements such as reducing greenhouse gases, developing clean energy sources, establishing a regional carbon market, and climate financing within a single agreement, providing a comprehensive structure to facilitate a smoother transition to a clean economy. Finally, IPEF Pillar IV stands out as the first plurilateral international agreement aimed at reinforcing measures against anti-corruption and tax evasion.

Given the cooperative commitments within IPEF for the formulation of standards and regulations addressing contemporary issues, and the probable adoption of these standards within the IPEF region, early adopters are likely to gain a competitive advantage. Any prospective exporter would be compelled to adhere to IPEF standards and regulations to gain access to markets within the IPEF region. This scenario is anticipated to result in an informal harmonization of standards and regulations among exporters. Subsequently, these exporters may actively lobby their respective governments to domestically adopt similar standards, further contributing to the harmonization of regulations on a broader scale.

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²³ *Ibid.*, see also Elisabeth Christen, Birgit Meyer, Harald Oberhofer, Julian Hinz, Katrin Kamin & Joschka Wanner, *Brussels Effect 2.0 How the EU Sets Global Standards With Its Trade Policy*, IIFW Research Report No. 2022-07 (2022).

²⁴ Demetri Sevastopulo & Kana Inagaki, *Joe Biden Waters Down Indo-Pacific Economic Framework to Win More Support* Financial Times (accessed 5 Dec. 2023), <https://www.ft.com/content/91207c37-c9bd-4737-abf5-afc71200f8a1>.

²⁵ Peter Draper, *Much Ado About Something? Australia's Views on IPEF's Prospects* Institute of South Asian Studies (accessed 10 Dec. 2023), <https://kas-japan.or.jp/en/pub/the-indo-pacific-economic-framework-for-prosperity-ipef-approach-challenges-and-prospects/>.

²⁶ *Ibid.*

6 CONCLUSION

Friendshoring or nearshoring can result in the fragmentation of global value chains. When production processes are dispersed across multiple countries, it can lead to increased complexity and logistical challenges. Further, the economic integration through friendshoring is contingent on the political inclinations of the involved countries, introducing a vulnerability to the initiative's stability. However, as we observed in this article, framework similar to IPEF, which provide greater flexibility to parties may serve as an alternative to traditional trade agreements by providing a template for friendshoring arrangements.

Similarly, other Republican candidates too, strongly oppose initiatives addressing climate change, which may lead to US withdraw from Pillar III (Clean Economy).²⁷ Hence, the same foundation that facilitated the creation and potential success of IPEF may also become its downfall.

This would allow countries to pursue more aggressive non-trade objectives that are important in their respective domestic political environment. This transition could pave the way for IPEF to emerge as the new global body for trade rules. It would place equal emphasis not only on issues related to border entry but also on the broader spectrum of trade and investment regimes, environment, social and governance standards, and the harmonization of rules, consolidating them into a unified set of economic regulations. While the impetus behind IPEF is to actively foster friendshoring in the Indo-Pacific region and counter Chinese economic influence, there are concerns regarding the potential withdrawal of the United States from IPEF, mirroring the precedent set by its withdrawal from CPTPP. The leading figure in the Republican Party, Donald Trump, has declared his intention to 'kill off' any Pacific pacts established by the Biden administration.²⁸

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²⁷ Jeff Stein, *Vivek Ramaswamy's Policy Proposal and they Would Transform the US* Washington Post (accessed 4 Dec. 2023), <https://www.washingtonpost.com/business/2023/08/24/vivek-ramaswamy-policy-gop-candidate/>.

²⁸ Nathan Laybe, *Trump Vows to Kill Asia Trade Deal Being Pursued by Biden if Elected* Reuters (3 Dec. 2023, 4:10 PM), <https://www.reuters.com/world/us/trump-vows-kill-asia-trade-deal-being-pursued-by-biden-if-elected-2023-11-19/>.

Building a Prosperous Future: Unveiling the Benefits of IPEF Supply Chain Agreement (Pillar II)

Ashutosh Kashyap*

The Indo-Pacific Economic Framework for Prosperity (IPEF) is yet to be explored in terms of a new turn in the Indo-Pacific Strategy, and also in terms of benefit to various member countries. The United States (US) launched the IPEF with thirteen initial partners: Australia, Brunei, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and Vietnam.

The IPEF Supply Chain agreement is novel, and through various bodies such as the Supply Chain Council, Labour Rights Advisory Board and Crisis Response Network, seek to (1) build a collective understanding of supply chain risks; (2) improve crisis coordination and response to supply chain disruption; (3) ensure that workers and businesses, especially Micro Small and Medium Enterprises in the economies of IPEF members, benefit from the resilient, robust and efficient supply chain; (4) ensure a sufficient number of skilled workers in critical sectors and key goods; and (5) create/provide opportunities for technical assistance and capacity building.

The IPEF Supply Chain agreement also builds on a partnership model among selected countries based on a shared understanding of the supply chain, associated risk, priority etc. This short article attempts to analyse the IPEF Supply Chain Agreement, labour rights and supply chain resilience, and a possible shift from the Asia-Pacific to the Indo-Pacific with the regional supply chain and trusted trade partners (friendshoring). The article, among other matters, explores the potential benefits for India.

KeyWords: IPEF, Supply Chain, Asia-Pacific, Indo-Pacific, Labour Rights, trusted trade partners, friendshoring

I BACKGROUND

Indo-Pacific Economic Framework for Prosperity (IPEF) was launched by the United States (US) in Tokyo, Japan on 23 May 2022, with thirteen initial partners: Australia, Brunei, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and Vietnam.¹ The IPEF Partners together represent 40% of the world's GDP and 28% of the world's trade in goods and services.² The IPEF framework focuses on Trade (Pillar I), Supply Chains (Pillar II), Clean Economy (Pillar III),

and Fair Economy (Pillar IV).³ Launch of IPEF aimed at expanding US economic leadership in the region, tackling inflation by making supply chains more resilient, and harnessing innovation, especially in areas related to clean energy, digital and technology sectors.⁴ Through this initiative, the IPEF partners aim to contribute to cooperation, stability, prosperity, development, and peace within the region.⁵ This framework aims to fuel economic activity and investment, promote sustainable and inclusive economic growth, and benefit workers and consumers across the region.⁶

Notes

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¹ The White House, *FACT SHEET: In Asia, President Biden and a Dozen Indo-Pacific Partners Launch the Indo-Pacific Economic Framework for Prosperity* (23 May 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-in-asia-president-biden-and-a-dozen-indo-pacific-partners-launch-the-indo-pacific-economic-framework-for-prosperity/> (accessed 28 May 2023).

² The Times of India, *US May Ask India to Join Trade Pillar under IPEF Talks During PM Modi's Visit* (19 Jun. 2023) (23:25), http://timesofindia.indiatimes.com/articleshow/101115827.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (accessed 4 Jul. 2023).

³ Press Information Bureau, Government of India, *Indo-Pacific Economic Framework for Prosperity (IPEF) Supply Chain Agreement Signed by the 14 IPEF Partners* (17 Nov. 2023), <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1977529> (accessed 4 Dec. 2023).

⁴ FACT SHEET: IPEF, *supra* n. 1.

⁵ Indo-Pacific Economic Framework for Prosperity (IPEF), <https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef> (accessed 4 Jul. 2023).

⁶ *Ibid.*

IPEF represents a shift in the Indo-Pacific strategy of the US,⁷ apart from the aim of creating a normative framework by development of shared objective around trade facilitation, standards for digital economy, supply chain resilience, clean economy transition etc.⁸ IPEF is aligned with the US's vision for a 'free, open, connected, prosperous, resilient, and secure Indo-Pacific region'.⁹ The US has defined 'Indo-Pacific' as the region stretching from the Pacific coastline to the Indian Ocean.¹⁰ The Indo-Pacific has been defined differently by other countries e.g., Canada has listed forty countries to be part of the Indo-Pacific.¹¹ Also, the objective of the Indo-Pacific alliance is not the same for all countries. For e.g., while US Policy underlines issues with China by highlighting 'bullying of neighbours in the east and south China sea',¹² Australia's Indo-Pacific white paper specifically mentions threats posed by North Korea and not China¹³ as opposed to US's view.

India, like the US, also stands for a free, open and rules-based Indo-Pacific.¹⁴ Indo-Pacific has emerged as a new geo-political space representing the new strategic reality of this century.¹⁵ India's crucial role in this region is backed by various countries such as Australia, Japan and the US.¹⁶ This article aims to highlight the key features of IPEF Supply Chain Agreement, along with highlighting the shift from Asia-Pacific to Indo-Pacific and the potential benefits for India. This article, however, does not trace in detail the potential benefits that may arise on account of the IPEF Supply Chain Agreement or shift from Asia Pacific to Indo-Pacific.

2 IPEF SUPPLY CHAIN AGREEMENT

The proposed IPEF Supply Chain Agreement¹⁷ (Pillar II) seeks to ensure resilient, reliable, and efficient supply chains. The Agreement intends to undertake efforts to facilitate a steady supply of materials, components, and inputs. The Agreement also aims to foster coordination to identify potential supply chain challenges prior to these becoming widespread disruptions. The Agreement also provides for the group of fourteen countries to work in collaboration to increase the resilience, efficiency, productivity, sustainability, transparency, diversification, security, fairness, and inclusivity of their supply chains. The IPEF Supply Chain Agreement would create (1) the IPEF Supply Chain Council, (2) the IPEF Supply Chain Crisis Response Network, and (3) the IPEF Labour Rights Advisory Board. The functioning of these bodies is briefly explained below.

IPEF Supply Chain Council: The intention behind creation of this Council is to oversee the development of sector-specific action plans aimed at building resilience and competitiveness in critical sectors.¹⁸ Such an action may also include assisting companies to identify and address supply chain vulnerabilities before these concerns become significant bottlenecks. Further, such action plans may also include diversification of sources, infrastructure and workforce development, enhanced logistics connectivity, business matchmaking, trade facilitation etc.¹⁹

IPEF Supply Chain Crisis Response Network²⁰: The supply chain disruptions may not always be predictable. With the view to dealing with emergencies, the IPEF Supply Chain Agreement also aims to create an IPEF

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- ⁷ Indo Pacific Strategy of the United States (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf> (accessed 15 Nov. 2023).
- ⁸ The White House, *Readout of President Biden's Participation in the East Asia Summit* (27 Oct. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/27/readout-of-president-bidens-participation-in-the-east-asia-summit/> (accessed 18 Dec. 2023).
- ⁹ US Agency for International Development, *Indo-Pacific*, <https://www.usaid.gov/indo-pacific> (accessed 15 Nov. 2023); C. Yamahata & S. Sudo, *Pressing Challenges to New Relevance of the Indo-Pacific: Significance, Continuity, and Connectivity*, in *ASEAN and Regional Actors in the Indo-Pacific* (S. Sudo & C. Yamahata eds Springer, Singapore 2023), https://doi.org/10.1007/978-981-99-4020-2_1 (accessed 18 Dec. 2023); Prabir De, *Emerging Global Order and ASEAN-India in Indo-Pacific* (1st ed., Routledge).
- ¹⁰ Indo Pacific Strategy of the United States, *supra* n. 7.
- ¹¹ Global Affairs Canada, *Canada's Indo-Pacific Strategy* (2022), <https://www.international.gc.ca/transparency-transparence/indo-pacific-indo-pacifique/index.aspx?lang=eng> (accessed 15 Nov. 2023).
- ¹² Indo Pacific Strategy of the United States, *supra* n. 7.
- ¹³ Australia Government, 2017 Foreign Policy White Paper, *Chapter Three: A Stable and Prosperous Indo-Pacific*, <https://www.dfat.gov.au/sites/default/files/minisite/static/4ca0813c-585e-4fe1-86eb-de665e65001a/fpwhitepaper/foreign-policy-white-paper/..foreign-policy-white-paper/chapter-three-stable-and-prosperous-indo-pacific.html> (accessed 28 Nov. 2023).
- ¹⁴ Press Information Bureau, *India Stands for Free & Rules-Based Indo-Pacific Crucial for Economic Development of the Region & Wider Global Community* (25 Nov. 2022), <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1878750> (accessed 28 Nov. 2023).
- ¹⁵ Darshana M. Baruah, *India in the Indo-Pacific: New Delhi's Theater of Opportunity* – Carnegie Endowment for International Peace (30 Jun. 2020), <https://carnegieendowment.org/2020/06/30/india-in-indo-pacific-new-delhi-s-theater-of-opportunity-pub-82205> (accessed 15 Nov. 2023).
- ¹⁶ Sujan R. Chinoy, *India and the Changing Dynamics of the Indo-Pacific*, 15 *Asia Pol'y* 21 (2020), doi: 10.1353/asp.2020.0049.
- ¹⁷ Press Release, *Substantial Conclusion of Negotiations on Landmark IPEF Supply Chain Agreement* (27 May 2023), <https://www.commerce.gov/news/press-releases/2023/05/substantial-conclusion-negotiations-landmark-ipef-supply-chain> (accessed 28 May 2023).
- ¹⁸ US Department of Commerce, *Text of Indo-Pacific Economic Framework for Prosperity (IPEF) Supply Chain Agreement [Article 6]* (07 Sept. 2023), <https://www.commerce.gov/news/press-releases/2023/09/us-department-commerce-publishes-text-landmark-indo-pacific-economic> (accessed 4 Dec. 2023).
- ¹⁹ *Press Statement on the Substantial Conclusion of IPEF Supply Chain Agreement Negotiations* (27 May 2023), <https://www.commerce.gov/news/press-releases/2023/05/press-statement-substantial-conclusion-ipef-supply-chain-agreement> (accessed 28 May 2023).
- ²⁰ IPEF Supply Chain Agreement, *supra* n. 19, Art. 7.

Supply Chain Crisis Response Network which can serve as an emergency communication channel for member countries facing acute supply chain crisis. Such a network will facilitate a more effective response by facilitating information sharing and collaboration among the IPEF member countries during a crisis, enabling a faster and more effective response that minimizes negative effects on their economies.

IPEF Labour Rights Advisory Board²¹: The Agreement aims to establish a tripartite IPEF Labour Rights Advisory Board consisting of government, worker, and employer representatives, as well as a sub-committee composed of government representatives. The IPEF Labour Rights Advisory body seems to be inspired by the tripartite structure of the International Labour Organization (ILO). The ILO's tripartite structure²² gives equal voice to workers, employers, and governments in order to ensure that the views of all stakeholders are closely reflected in labour standards and policies. The Labour Rights Advisory Board is intended to help identify areas where labour rights concerns pose a risk to the resilience of the supply chain, and also to create a mechanism to address facility-specific allegations of labour rights inconsistency on a cooperation basis.

3 COMPONENTS OF THE IPEF SUPPLY CHAIN AGREEMENT (PILLAR II)

The IPEF Supply Chain Agreement aims to create a robust and resilient supply chain network among IPEF partner countries.²³ The IPEF Supply Chain Agreement focuses on (1) building stronger IPEF Supply Chains by collaborative actions such as exploration of new ways, enhancing existing efforts, fostering improvement in logistics services and logistic infrastructure, aligning guidance, procedures, and policies related to trade facilitation, sharing information, best practices etc.²⁴; (2) individual actions²⁵ to strengthen IPEF supply chains such as minimizing unnecessary restrictions to trade

affecting resilience, establishing one or more focal points to facilitate foreign direct investment, adopt or maintain procedure for release of perishable goods, investment in long-term and cold-chain warehousing, facilitating transport of authorized workers, increased consultation with private sector; (3) promoting regulatory transparency²⁶ by recognition of the importance, and committing to publish domestic laws and regulation related to IPEF supply chains; (4) enhancing the role of workers by collaborating to ensure availability of sufficient number of skilled workers, efforts to promote the inclusivity of IPEF supply chains, increased consultation with private sector, efforts to increase understanding and comparability of skills credentials etc.²⁷; (5) creation of IPEF Supply Chain Council and IPEF Supply Chain Crisis Response Network²⁸ wherein IPEF Supply Chain Council can create action plan teams to improve supply chains for the focussed sector and later, function as an emergency response network among IPEF partner countries; (6) identification of Critical Sectors or Key Goods with the aim to develop shared understanding of global supply chain risks²⁹; (7) monitoring and addressing supply chain vulnerabilities through evidence-based and data-informed approach, exchange information on enterprises supplying key goods or falling within critical sectors, and enhance business to business coordination and collaboration.³⁰

The IPEF Supply Chain agreement has attempted to address supply chain issues by focusing on the friend-shoring of capacities. The genesis of the concept of friend-shoring is linked to the concept of on-shoring and near-shoring which highlights the efforts to shift the supply chain closer to a country.³¹ Friend-shoring allows diversification beyond one country's own or nearby territories by extending it to trusted allies or friends.³² US Treasury Secretary Janet Yellen in one of her recent speeches highlighted the need to modernize the multi-lateral trade approach by setting the objective of 'free but secure trade'.³³ She also emphasized the need to favour friend-shoring of supply chains to numerous trusted

Notes

²¹ *Ibid.*, Art. 8.

²² About the ILO, <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm#:~:text=How%20we%20work,in%20shaping%20policies%20and%20programmes> (accessed 28 May 2023).

²³ IPEF Supply Chain Agreement, *supra* n. 19, at Art. 1.

²⁴ *Ibid.*, Art. 2.

²⁵ *Ibid.*, Art. 3.

²⁶ *Ibid.*, Art. 4.

²⁷ *Ibid.*, Art. 5.

²⁸ *Ibid.*, Arts 6, 7 and 12.

²⁹ *Ibid.*, Art. 10.

³⁰ *Ibid.*, Art. 11.

³¹ Rahul Guhathakurta, *Friendsboring: Logic, Focused Sectors and Skepticism* (19 Nov. 2022), <https://papers.ssrn.com/abstract=4281545> (accessed 18 Dec. 2023).

³² *Ibid.*

³³ Atlantic Council, *Transcript: US Treasury Secretary Janet Yellen on the next Steps for Russia sanctions and 'Friend-Shoring' Supply Chains* (13 April 2022), <https://www.atlanticcouncil.org/news/transcripts/transcript-us-treasury-secretary-janet-yellen-on-the-next-steps-for-russia-sanctions-and-friend-shoring-supply-chains/> (accessed 18 Dec. 2023).

countries to counter countries' potential use of their key position in supplying raw materials or technology to disrupt other country's economy.³⁴ IPEF Supply Chain agreement goes beyond the approach of friend-shoring of supply chain by introduction of efforts by IPEF partner countries to maintain transparency in policy formulation and implementation.³⁵ Reimagination of supply chains through reshoring, friend-shoring and nearshoring will require significant expenditure and dedicated political will.

3.1 Labour Rights and Supply Chain Resilience

ILO is the only United Nations (UN) agency with a tripartite structure; it brings together governments, employers, and workers of 187 Member States (including all IPEF members) for the development of labour standards.³⁶ The ILO Declaration on Fundamental Principles and Rights at Work³⁷ is a non-binding³⁸ instrument adopted at the 86th session of the International Labour Conference in 1998 and recently amended at the 110th session in 2022.³⁹

The workers' rights have always been an important issue in the free trade agreement (FTA) negotiations of the US, with a focus on promoting core internationally recognized workers' rights.⁴⁰ The US Congress has also included 'workers' rights' as one of the principal negotiating objectives in the Trade Promotion Authority (TPA).⁴¹ The US has twenty FTAs currently in force, out of which eighteen have labour commitments.⁴² This indicates that US has almost always kept labour commitments in its FTAs or other trade agreements.⁴³ Labour commitments in The North American Free Trade Agreement (NAFTA) (1994) was a result of a side agreement, with emphasis on Parties enforcing their own laws, and a separate dispute resolution process. The Trade Act of 2002, similar to

NAFTA, provides for a separate dispute settlement process, and further provides for enforcement of the respective Party's laws in a manner as not to affect trade or investment. TPA 2015 is a body of statutes which provides for adopting, maintaining and effective enforcement of laws consistent with ILO fundamental principles. TPA 2015 also provides for an integral dispute settlement process. The United States-Mexico-Canada Agreement (USMCA) has introduced several new labour commitments such as (1) extension of the principle of non-derogation of rights to export processing zones, (2) prohibiting imports produced by forced labour along with cooperation on identifying such goods, (3) commitments on violence against workers, and migrant workers' protection, (4) workplace discrimination, and (5) alternatives to formal labour consultations. The USMCA also has a provision for independent panel investigation of covered facilities suspected of denying rights such as freedom of association and collective bargaining."

The most recent US initiative of IPEF also includes a separate agreement on trade issues with labour as a core component.⁴⁴ Further, another agreement on supply chains also emphasizes labour commitments with a reverberation of ILO commitments and ILO-like structure as well. The ministerial statement on IPEF trade agreement lays out potential labour provisions that largely reflect recent US practice in its past FTAs.

The global supply chain is laden with the 'sustainability' aspect of the supply chain, which also has 'social sustainability aspects'⁴⁵ such as labour rights issues. This section explores the labour rights obligations in various international agreements, the IPEF supply chain agreement and its relationship with building global resilient supply chains.

The IPEF supply chain agreement follows ILO's tripartite structure, with emphasis on supply chain benefitting from markets that respect labour rights.⁴⁶ The labour rights have

Notes

³⁴ *Ibid.*

³⁵ IPEF Supply Chain Agreement, *supra* n. 19, Art. 4.

³⁶ About the ILO, *supra* n. 22.

³⁷ ILO Declaration on Fundamental Principles and Rights at Work (DECLARATION), <https://www.ilo.org/declaration/lang-en/index.htm> (accessed 25 Oct. 2023).

³⁸ Erika de Wet, *Governance Through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work*, 9 Ger. L. J. 1429 (2008), <https://www.cambridge.org/core/journals/german-law-journal/article/governance-through-promotion-and-persuasion-the-1998-ilo-declaration-on-fundamental-principles-and-rights-at-work/B821F95E510CD8446EFDDECEA2A060F5>, doi: 10.1017/S2071832200000535 (accessed 19 Dec. 2023).

³⁹ ILO Declaration on Fundamental Principles and Rights at Work, *supra* n. 37.

⁴⁰ US Congressional Research Service, *Worker Rights Provisions in Free Trade Agreements (FTAs)* (25 Oct. 2023), <https://crsreports.congress.gov/product/pdf/IF/IF10046> (accessed 26 Oct. 2023).

⁴¹ *Ibid.*

⁴² United States Trade Representative, *Free Trade Agreement*, <https://ustr.gov/trade-agreements/free-trade-agreements> (accessed 19 Dec. 2023).

⁴³ Jonathan Soleimani, *United States Trade and Foreign Labor Interests: The Effects on Foreign Labor of Linking Trade With Labor Provisions in Bilateral U.S. Free Trade Agreements*, 20 Berkeley Undergraduate J. (2008), <https://escholarship.org/uc/item/9hh8n3d3>, doi: 10.5070/B3201007654, (accessed 19 Dec. 2023).

⁴⁴ *Ministerial Text For Trade Pillar of the Indo-Pacific Economic Framework For Prosperity*, [https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20\(Trade%20Pillar\)_FOR%20PUBLIC%20RELEASE%20\(1\).pdf](https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf) (accessed 19 Dec. 2023).

⁴⁵ Tina Sendlhofer & Clara My Lernborg, *Labour Rights Training 2.0: The Digitalisation of Knowledge for Workers in Global Supply Chains*, 179 J. Cleaner Production 616 (2018), <https://www.sciencedirect.com/science/article/pii/S095965261733144X>, doi: 10.1016/j.jclepro.2017.12.173 (accessed 23 Oct. 2023).

⁴⁶ IPEF Supply Chain Agreement, *supra* n. 19, at Recital 4, Preamble.

been defined as rights set out in the ILO declaration and interpretations to be consistent with the ILO declaration.⁴⁷ This ILO declaration reference is to the “ILO Declaration on Fundamental principles and Rights at Work and its Follow-up (1998), as amended in 2022”.⁴⁸ The parameters covered under the definitions are (1) freedom of association and the effective recognition of collective bargaining, (2) elimination of all forms of forced labour, (3) effective abolition of child labour, (4) elimination of discrimination in respect of employment and occupation, (5) safe and healthy work environment, and (6) acceptable conditions of work with respect to minimum wages and hours of work.

In terms of institutional structure, as mentioned earlier, the IPEF Supply Chain agreement follows ILO’s tripartite structure and envisages establishing the ‘IPEF Labour Rights Advisory Board’.⁴⁹ The ‘IPEF Labour Rights Advisory Board’ comprises a government representative, a worker representative, and an employer representative.⁵⁰ The participation of worker and employer representatives has been made subject to the confidentiality requirement of the agreement. This provision declares the critical role played by labour rights in increasing resilience, efficiency, productivity, sustainability, transparency, diversification, security, fairness and inclusivity of IPEF supply chains. It goes further to list Parties’ intention to (1) respect, promote and realize labour rights, (2) create an environment that facilitates a greater opportunity for investments in enterprises with high standards of labour rights, (3) identify opportunities for technical assistance and capacity building, and (4) highlights practices which improves conditions of workers. Apart from the ‘IPEF Labour Rights Advisory Board’, a sub-committee of government representatives has been envisaged.⁵¹ This sub-committee is empowered to make various decisions based on votes. Further, another provision deals with ‘facility-specific labour rights inconsistencies’ excluding microenterprises with a firm employing twenty or fewer workers.⁵² This provision requires establishing a reporting mechanism for facility-specific complaints and a time-bound mechanism

to resolve the issue. The sub-committee comprised of government representatives will also maintain a public list of unresolved issues. The IPEF Labour Rights Advisory Board is also empowered to develop two sector-specific reports on labour rights in IPEF Supply Chains in consultation with ILO.⁵³ These reports may help address labour rights inconsistency by providing a study of labour laws, labour practices, and business practices affecting labour rights for a given sector and economy. Further, these reports are also envisaged to comprise the description of practices in an economy that lead to improvement in the condition of workers.⁵⁴ The report will be initially submitted to the IPEF Supply Chain Council and may be made public following approval by two-thirds of the representatives except for sensitive information.⁵⁵

IPEF Supply Chain Agreement has envisaged engagement with ILO, at a later stage during the implementation of the agreement, to slowly move in the direction of attaining labour standards. At the same time, there are views that the incorporation of ILO standards in trade agreements has led to difficulty in introducing new standards at the ILO, and also in furthering decoupling of trade and labour issues.⁵⁶

4 ASIA-PACIFIC TO INDO-PACIFIC: SHIFTING SUPPLY CHAIN AND THE POTENTIAL BENEFITS FOR INDIA

Indo-Pacific is now a commonly used construct to identify regional connection between US and east Asian countries,⁵⁷ and with this construct, various countries such as the US, Australia, UK, France, India, Indonesia, Japan etc. have adopted the Indo-Pacific strategy.⁵⁸ The meaning differs on account of geopolitics, however, the term refers to the region between the Indian and Pacific oceans.⁵⁹ In one of the most notable events in the year 2007, erstwhile Japanese Prime Minister Shinzo Abe’s speech on the ‘confluence of two seas’ in the Indian Parliament highlighted the dynamic coupling by the Pacific and Indian oceans as

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⁴⁷ *Ibid.*, Art. 1.

⁴⁸ *Ibid.*

⁴⁹ IPEF Supply Chain Agreement, *supra* n. 19, Art. 8.

⁵⁰ *Ibid.*, para. 2.

⁵¹ *Ibid.*, para. 4.

⁵² IPEF Supply Chain Agreement, *supra* n. 19, at Art. 9.

⁵³ *Ibid.*, Art. 8.

⁵⁴ *Ibid.*, para. 8.

⁵⁵ *Ibid.*

⁵⁶ Desirée LeClercq, *Integrating Non-Binding Labour Standards in Binding Trade Agreements: The ILO’s Feedback Loop*, 26 J. Int’l Econ. L. 542 (2023), <https://academic.oup.com/jiel/article/26/3/542/7246507>, doi: 10.1093/jiel/jgad026 (accessed 25 Oct. 2023).

⁵⁷ Sarori N. Katada, *How Can the Indo-Pacific Structure Keep the United States Engaged and China Compliant?: Japan’s Geoeconomic Challenges With the CPTPP and IPEF*, 14 East Asia Pol’y 5 (2022), doi: 10.1142/S1793930522000253 (accessed 18 Dec. 2023).

⁵⁸ The Economist, *Reinventing the Indo-Pacific* (04 Jan. 2023), <https://www.economist.com/asia/2023/01/04/reinventing-the-indo-pacific> (accessed 22 Nov. 2023).

⁵⁹ Indo Pacific Strategy of the United States, *supra* n. 7.

seas of freedom and prosperity.⁶⁰ The same year also witnessed the first discussion of the Quadrilateral Security Dialogue (QUAD), a group of four countries viz., India, Australia, the US and Japan, to work as a force for global good and to support an open, free and inclusive Indo-Pacific.⁶¹ Subsequently, former Indian Prime Minister Manmohan Singh also adopted the term 'Indo-Pacific' to define this region in a public speech in Japan in 2013.⁶² The US in the leadership of former President Trump as well as in the current Biden administration has endorsed the term 'Indo-Pacific' as well as called for a 'free and open Indo-Pacific'.^{63, 64}

For the Indo-Pacific to replace the Asia-Pacific as a 'political geography' and define strategic relations relies heavily on two aspects (1) the willingness of countries of this political group to create meaningful multilateral institutions, and (2) that such institutions be based on the Indo-Pacific concept.⁶⁵ At the same time, it requires a common construct of the Indo-Pacific concept.

The Asia-Pacific region is part of various mega-regional trade agreements (PTAs) such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Association of Southeast Asian Nations (ASEAN), the Asia-Pacific Economic Cooperation (APEC), the Regional Economic Comprehensive Partnership (RCEP), Trade in Services Agreements (TiSA) etc. Apart from these mega-regional trade agreements, there are various other initiatives such as the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), the East Asia Summit (EAS), the Mekong Ganga Cooperation (MGC) etc. The Asia-Pacific region is also the region with the largest integration via preferential trade agreements.⁶⁶ The Economic and Social Commission for

Asia and Pacific (ESCAP) of the UN has mapped 333 PTAs wherein at least one of the Parties is from the Asia-Pacific. Further, trade among PTA partners in Asia-Pacific accounts for half of all trade by Asia-Pacific economies.

ASEAN's inception was also centred around security concerns to maintain regional peace and security, and not economic concerns.⁶⁷ ASEAN resurfaced as an institution representing regional economic grouping only after the end of the Cold War, and the conclusion of the ASEAN FTA in 1992.⁶⁸ Few commentators also argue that the potential drive for various ASEAN nations to participate in RCEP, CPTPP and other agreements is on account of maintaining ASEAN centrality.⁶⁹ The inception of APEC, proposed by Australia in 1989, constituted a threat to some of the ASEAN countries.⁷⁰ The response to APEC was the Malaysian proposal for the 'East Asia Economic Caucus (EAEC)' to establish a free trade area between ASEAN, Japan and South Korea, which was declined by Japan on account of the exclusion of Western countries.⁷¹ The participation of various Indo-Pacific countries in these mega-regional trade agreements is claimed to be tied to a variety of reasons for example (1) Vietnam was a peculiar case in Trans-Pacific Partnership (TPP) negotiations because Vietnam was a transitional economy, shifting from state control to progressive liberalization,⁷² however, Vietnam joined the World Trade Organization (WTO) and also used the momentum to enter into various FTAs; (2) Japan entered TPP with the view to take a 'leading role' in the development of negotiation agenda.⁷³ The RCEP negotiation was launched in 2012 with ASEAN and six more partner countries.⁷⁴ The joint declaration of the launch of the agreement noted the importance of ASEAN centrality in the regional integration process.⁷⁵ Japan assumed leadership after US's withdrawal due

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⁶⁰ MOFA, Speech by H. E. Mr Shinzo Abe, Prime Minister of Japan, at the Parliament of the Republic of India 'Confluence of the Two Seas' (22 Aug. 2007), <https://www.mofa.go.jp/region/asia-paci/pmv0708/speech-2.html> (accessed 4 Dec. 2023).

⁶¹ Ministry of External Affairs, Government of India, *QUAD Brief*, https://www.mea.gov.in/Portal/ForeignRelation/Quad_brief_October_2023.pdf (accessed 4 Dec. 2023).

⁶² Garima Mohan, *The Evolution of Indian Foreign Policy Towards Europe*, 78 *India Q.* 248 (2022), doi: 10.1177/09749284221091869 (accessed 4 Dec. 2023).

⁶³ Kai He & Huiyun Feng, *The Institutionalization of the Indo-Pacific: Problems and Prospects*, 96 *Int'l Aff.* 149 (2020), <https://academic.oup.com/ia/article/96/1/149/5697495>, doi: 10.1093/ia/iiz194 (accessed 5 Oct. 2023).

⁶⁴ Indo Pacific Strategy of the United States, *supra* n. 7.

⁶⁵ He & Feng, *supra* n. 64.

⁶⁶ ESCAP, *Trade Agreements in Asia and the Pacific: Bigger, Deeper, Digital and More Supportive of Sustainable Development?* (10 Nov. 2022), <https://www.unescap.org/kp/2022/trade-agreements-asia-and-pacific-bigger-deeper-digital-and-more-supportive-sustainable-20222023> (accessed 5 Oct. 2023).

⁶⁷ Chien-Huei Wu, *ASEAN at the Crossroads: Trap and Track Between CPTPP and RCEP*, 23 *J. Int'l Econ. L.* 97 (2020), doi: 10.1093/jiel/jgz032 (accessed 5 Oct. 2023).

⁶⁸ *Ibid.*

⁶⁹ Kazushi Shimizu, *The ASEAN Economic Community and the RCEP in the World Economy*, 10 *J. Contemp. East Asia Stud.* 1–23 (2021), doi: 10.1080/24761028.2021.1907881; Wu, *supra* n. 67; Fukunari Kimura, *RCEP from the Middle Powers' Perspective*, 14 *China Econ. J.* 162–170 (2021), doi: 10.1080/17538963.2021.1933059; I. Venzke & L-ann Thio, *Agreements of ASEAN as an International Organization, in The Internal Effects of ASEAN External Relations. Integration Through Law The Role of Law and the Rule of Law in ASEAN Integration* 36–70 (Cambridge University Press 2016).

⁷⁰ Wu, *supra* n. 67.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Jeffrey D. Wilson, *Mega-Regional Trade Deals in the Asia-Pacific*, 45 *J. Contemp. Asia* 345–353 (2015), doi: 10.1080/00472336.2014.956138.

⁷⁴ Department of commerce, Government of India, *Brief on Regional Comprehensive Economic Partnership (RCEP)*, <https://commerce.gov.in/international-trade-trade-agreements-indias-current-engagements-in-rtas/brief-on-regional-comprehensive-economic-partnership-rcep/> (accessed 4 Dec. 2023).

⁷⁵ Department of Foreign Affairs and Trade (DFAT), *Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership*, <https://www.dfat.gov.au/sites/default/files/joint-declaration-on-the-launch-of-negotiations-for-the-regional-comprehensive-economic-partnership.pdf> (accessed 4 Dec. 2023).

to the need for foreign markets, domestic reforms and counterbalancing China, transforming TPP into CPTPP.⁷⁶ This resulted in enhanced Chinese influence in RCEP negotiations.⁷⁷

IPEF also has thirteen Indo-Pacific countries and the US. IPEF is the first exclusive Indo-Pacific initiative. Before IPEF, these Indo-Pacific countries were part of various mega-regional trade involving Asia-Pacific. Various Indo-Pacific countries such as Australia, Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam, New Zealand, Thailand, Japan, and South Korea are also part of various other agreements such as ASEAN,⁷⁸ APEC,⁷⁹ CPTPP,⁸⁰ RCEP,⁸¹ TiSA,⁸² BIMSTEC,⁸³ EAS⁸⁴ and MGC.⁸⁵

ASEAN	APEC	CPTPP	RCEP	TiSA	BIMSTEC	EAS	MGC
Brunei- ndon- esia- Mal- aysia- Phili- ppin- esSin- gapo- reTh- ailan- dVie- tnam	Australi- aBrunei- ndonesia- JapanM- alaysiaN- ew Zealand- Philippi- nesSinga- poreSouth KoreaTh- ailandU- SAVietn- am	Australi- aBrunei- JapanM- alaysia- New Zealand- Singapo- reVietnam	Australi- aIndia (not joined) JapanN- ew Zealand- South Korea	Australi- aJapan- New Zealand- South Korea	IndiaThai- land	Australi- aIndiaJa- panNew Zealand- South Korea	Indi- aThai- land- Viet- nam

Source: Authors' own compilation

4.1 Shifting Supply Chain and Benefits for India

The above shift in geo-political concept also underlines an important shift which is currently underway

in the global economy including relocation, diversification, and reshoring of supply chains.⁸⁶ The recent supply chain disruption echoed globally in the wake of the COVID-19 pandemic as well as the conflict in Ukraine.⁸⁷ All countries, including India, had enforced certain forms of lockdown or containment of movement.⁸⁸ The closing of borders and restrictions imposed on trade and other containment measures resulted in a supply chain disruption of a magnitude never seen before.⁸⁹ Some of the issues faced by companies were lack of demand, difficulties in sourcing raw materials, and labour shortages. One of the studies lists various sectors which were affected during COVID-19, such as chemicals, real estate, banking, software, building material, food and beverage, automobile, broadcaster, hospitality, financial services, healthcare/pharmaceutical, interior design and build, construction, military/defense etc.⁹⁰ The primary reasons, in view of COVID-19, leading to sector-specific supply chain disruption were difficulty in sourcing raw material and unavailability of raw materials, absence of infrastructure, unavailability of labour, sudden surge in demand for some sectors, logistical challenges etc. This shows the unprecedented supply chain disruptions faced by various sectors in India. The COVID 19 pandemic caused the entire world to rethink its supply chain management, including by reshoring and diversifying supply chains in a post pandemic world.⁹¹ There is also increased investment in digital infrastructure, because of the trade becoming more digital,⁹² and to enhance visibility and transparency across supply chains.⁹³

Notes

⁷⁶ Mireya Solís, Jennifer Mason, *As the TPP Lives on, the U.S. Abdicates Trade Leadership* (09 Mar. 2018), <https://www.brookings.edu/articles/as-the-tpp-lives-on-the-u-s-abdicates-trade-leadership/> (accessed 4 Dec. 2023).

⁷⁷ Wu, *supra* n. 67.

⁷⁸ ASEAN Free Trade Area Agreements, <https://asean.org/free-trade-agreements-with-dialogue-partners/> (accessed 13 Oct. 2023).

⁷⁹ History APEC, <https://www.apec.org/about-us/about-apec/history> (accessed 13 Oct. 2023).

⁸⁰ Global Affairs Canada, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng> (accessed 12 Oct. 2023).

⁸¹ Brief on RCEP, *supra* n. 74.

⁸² United States Trade Representative, *Trade in Services Agreement*, <http://ustr.gov/TiSA> (accessed 13 Oct. 2023).

⁸³ History – Home-The Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), <https://bimstec.org/bimstec-history/> (accessed 13 Oct. 2023).

⁸⁴ East Asia Summit, <https://eastasiasummit.asean.org/about-east-asia-summit> (accessed 13 Oct. 2023).

⁸⁵ Mekong-Ganga Cooperation (MGC), <https://mgc.gov.in/service/view/11> (accessed 13 Oct. 2023).

⁸⁶ Asia Society, *Supply Chains: A Shifting Indo-Pacific*, <https://asiasociety.org/policy-institute/supply-chains-shifting-indo-pacific> (accessed 4 Dec. 2023).

⁸⁷ World Trade Report 2023 – Re-Globalization for a Secure, Inclusive and Sustainable Future, https://www.wto.org/english/res_e/publications_e/wtr23_e.htm (accessed 30 Nov. 2023).

⁸⁸ BBC News, *Coronavirus: The World in Lockdown in Maps and Charts* (07 April 2020), <https://www.bbc.com/news/world-52103747> (accessed 4 Dec. 2023).

⁸⁹ Ghazi M. Magableh, *Supply Chains and the COVID-19 Pandemic: A Comprehensive Framework*, 18 Eur. Mgmt. Rev. 363 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8014293/>, doi: 10.1111/emre.12449 (accessed 4 Dec. 2023).

⁹⁰ Shrey Apurva, Dutt Avi & Roy Debjit, *Impact of COVID-19 Disruptions on the Supply Chain: Insights from India* (2022), <https://www.iima.ac.in/sites/default/files/rnpfiles/98524442182022-06-01.pdf> (accessed 28 May 2023).

⁹¹ Nada R. Sanders, *Reshoring & Diversifying Supply Chains Post-Pandemic* (04 April 2023), <https://damore-mckim.northeastern.edu/news/reshoring-and-diversifying-supply-chains-post-pandemic/> (accessed 4 Dec. 2023).

⁹² World Trade Report 2023, *supra* n. 87.

⁹³ *Ibid.*

The reshoring and diversification of supply chains coupled with the Indo-Pacific strategy has put India in a unique spotlight. Three things putting India in spotlight are significant domestic demand, government's drive to encourage manufacturing and demographic edge.⁹⁴ India being part of IPEF is of strategic importance to India on account of various reasons. The first reason is that IPEF opens an opportunity for India's deeper economic integration and engagement with IPEF member countries, most of which are also part of the RCEP agreement.⁹⁵ Secondly, India needs to diversify its sourcing of raw materials from a particular country or dependence on a particular region/country. These diversification should include reducing dependency on China for active pharmaceutical ingredients (APIs) supply⁹⁶; reducing import dependency⁹⁷ on certain critical minerals such as lithium, cobalt nickel etc; and developing an indigenous semiconductor industry.⁹⁸ Third, IPEF may help India counter China's disproportionate influence over several Asian countries through China's Belt and Road Initiative.⁹⁹ India given its geographical position and capacity may emerge as an alternate trusted supplier¹⁰⁰ e.g., in the API sector. Such a step will not only reduce the dependence of Indian companies on China for the supply of various raw materials but also boost Indian manufacturing from key starting materials.

As noted above, one of the primary reasons for the supply chain disruption faced by Indian companies during the COVID-19 pandemic included difficulty in sourcing raw materials and non-availability of raw materials. One way to deal with this issue is diversification and development of manufacturing capacity within the country. The Indian government has also undertaken various initiatives to boost manufacturing in India, and these initiatives include Make in India, Industrial Corridor Development Programme, Ease of Doing Business, National Single Window System, PM Gati Shakti National Master Plan,

National Logistics Policy, Production Linked Incentive Schemes, North East Industrial Investment Promotion Policy, North East Industrial Development Scheme, Udyami Bharat Scheme etc.¹⁰¹

The focus areas identified under the IPEF Supply Chain agreement such as diversification of sources, infrastructure development, ensuring availability of a sufficient number of skilled workers, technical assistance etc., will help Indian companies build upon supply chain resilience by early identification of risks and diversification of sources which will be facilitated by a collaborative framework of 14 IPEF member countries.

Being a part of the IPEF Supply Chain agreement provides India with an added benefit because India emerges as an alternative to diversify its procurement of raw materials or various key goods. India is also uniquely positioned, not just in terms of demography, but also the growth potential. India is expected to become the world's third-largest economy by 2023.¹⁰² This growth projection coupled with numerous initiatives by the government of India, the huge labour force and the sheer market size owing to population has the potential to attract various multinational corporations to invest in India. Such investments may potentially be in critical sectors or key goods in line with IPEF Supply Chain agreement objectives. This will benefit India and other IPEF members by preparing an alternate value chain. Further, IPEF has the potential to boost existing ties with partner countries, such as Japan and Australia, with whom India has agreed to launch a supply chain resilience initiative.¹⁰³ Being a part of the IPEF agreement will also help India build stronger ties with the US.¹⁰⁴

5 CONCLUSION

India's recent policies seem to be focusing on boosting manufacturing capacity in the country. The COVID-19

Notes

⁹⁴ World Economic Forum, *Shifting Global Value Chains: The India Opportunity* (2021), https://www3.weforum.org/docs/WEF_Shifting_Global_Value_Chains_2021.pdf (accessed 18 Dec. 2023).

⁹⁵ Brief on RCEP, *supra* n. 74.

⁹⁶ Surabhi Sarda, *The Economic Times, India: India Still Heavily Reliant on China for Life Saving Drugs despite PLI Booster: Report* (04 Aug. 2023), <https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/india-still-heavily-reliant-on-china-for-life-saving-drugs-despite-pli-booster-report/articleshow/102425869.cms> (accessed 4 Dec. 2023).

⁹⁷ Ministry of Mines, *Critical Minerals for India* (2023), <https://mines.gov.in/admin/storage/app/uploads/649d4212cceb01688027666.pdf> (accessed 20 Dec. 2023).

⁹⁸ India Semiconductor Mission, <https://ism.gov.in> (accessed 20 Dec. 2023).

⁹⁹ James McBride, Noah Berman & Andrew Chatzk, Council on Foreign Relations, *China's Massive Belt and Road Initiative* (2023), <https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative> (accessed 4 Dec. 2023).

¹⁰⁰ Rajagoal Divya, *Indian API Makers Benefit as Global Buyers Ditch China*, *The Economic Times* (2020), https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/indian-api-makers-benefit-as-global-buyers-ditch-china/articleshow/77228150.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (accessed 28 May 2023).

¹⁰¹ Press Information Bureau, *Initiatives Taken by the Government to Boost Manufacturing* (2022), <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1882145> (accessed 4 Dec. 2023).

¹⁰² *Shifting Global Value Chains: The India Opportunity*, *supra* n. 94.

¹⁰³ *The Economic Times, India's Indo-Pacific Economic Framework Membership Will Strengthen Region – Yellen* (2022), https://economictimes.indiatimes.com/small-biz/trade/exports/insights/indias-indo-pacific-economic-framework-membership-will-strengthen-region-yellen/articleshow/95465598.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (accessed 20 Dec. 2023).

¹⁰⁴ Wang Shida, *The Current State, Dynamics and Future Trajectory of India's Relations With the US-Led Western Countries*, 100 *China International Studies* 60 (2023), <https://heinonline.org/HOL/Page?handle=hein.journals/chintersd100&id=62&div=&collection=> (accessed 20 Dec. 2023).

pandemic has also thrown light on the need to reimagine the supply chain. Further, the shift from Asia-Pacific to Indo-Pacific has India at the centre, and the emerging geo-economic and geo-political order will have India at its centre. India needs to utilize this opportunity to its fullest and should contribute to the formation of a wider geo-political consensus on defining the 'Indo-Pacific' as a political geography. IPEF has the potential to establish itself as a cornerstone in providing a solid structure to the

Indo-Pacific construct through the creation of regional institutions. However, at the same time, there is a need for abundant caution. The Treaty of Versailles after World War I failed because it tried to block an emerging power, Germany. The same mistake need not be made with China "new powers must be accommodated, not contained".¹⁰⁵ IPEF, to counter China and its Belt & Road initiative, requires significant monetary commitments apart from the political commitments.

Notes

¹⁰⁵ Kishore Mahbubani, *An Asia-Pacific Consensus*, 76 Foreign Aff. 149 (1997), <https://www.jstor.org/stable/20048205> (accessed 2 Dec. 2023).

Fragmentation of Community Consent Standard in the Ear of Friendshoring and Nearshoring

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Recent developments in clean energy supply chain amidst the geopolitical crisis have resulted in the friend shoring and nearshoring measures in the clean energy supply chain. Clean energy supply chain is susceptible to Environment, Social and Governance (ESG) risks, particularly resistance from the local communities against the critical minerals mining/exploration projects, due to policy gaps in the legislative framework regarding the community engagement standard and procedures. In context of friend shoring and nearshoring measures, indigenous communities in the States with critical mineral resources may get widened. The article will track the development of the ESG standards pertaining to definition of indigenous communities and community engagement at the multilateral forums and the multilateral stakeholder initiative forums. Moreover, the article will analyse the gaps in ESG performance of the mining sector, particularly parameters of the community engagement. Further, the article will identify issues with the current initiatives under trade and economic cooperation agreements and bilateral investment treaties toward ensuring the community consent standards by extractive industry, specifically the mining of critical minerals for clean energy development. The article will conclude that fragmentation of the community consent standard has resulted in widening of ESG risks for investors and host states in the critical mineral sector. Accordingly, the article recommends that host states frame legislative framework for this sector by balancing interest of local communities with sound business environment for the investors.

Keywords: Friendshoring, Nearshoring, Electric Vehicle, Critical Minerals, Community Consent, Indigenous Communities, self-determination, Environment, Social and Governance, Trade Agreements,

I INTRODUCTION

Geopolitical tensions in recent times have propelled State's efforts of friend shoring/nearshoring across the industries, specifically the clean or green energy sector. Although there are multiple sources of producing green energy, the state has exponentially increased the flow of funds toward expansion of Electric Vehicle (EV) equipment production within its territory or that of allied states. Specifically, United States (US) has devised policies under Inflation Reduction Act to incentivize shifting of EV value chain and semiconductor value chain within the territory of US or its allied territories, which will have trade distortionary effect on the EV value chain including critical minerals production. This becomes even all the more critical considering the production and processing of the critical minerals

required as input within the supply chain is highly concentrated in China.¹

Moreover, trade distorting measures are justified based on the national security concerns regarding vulnerability of supply chain due to over-dependence on supply chain based in China, which is known for its uncertain policies. Thus, these measures are targeted to drive the industry towards de-risking their EV value chain from China amidst rising focus on the emission reduction targets.² However, the industry response to these measures has been mixed, as most of the players have raised the concerns about implementation of said policies and high transaction costs involved in shifting the supply chains.³ Moreover, the de-risking efforts pertaining to sourcing of the critical minerals may require exploring and extracting minerals from mines in new regions, which will lead to conflict with local communities, specifically the

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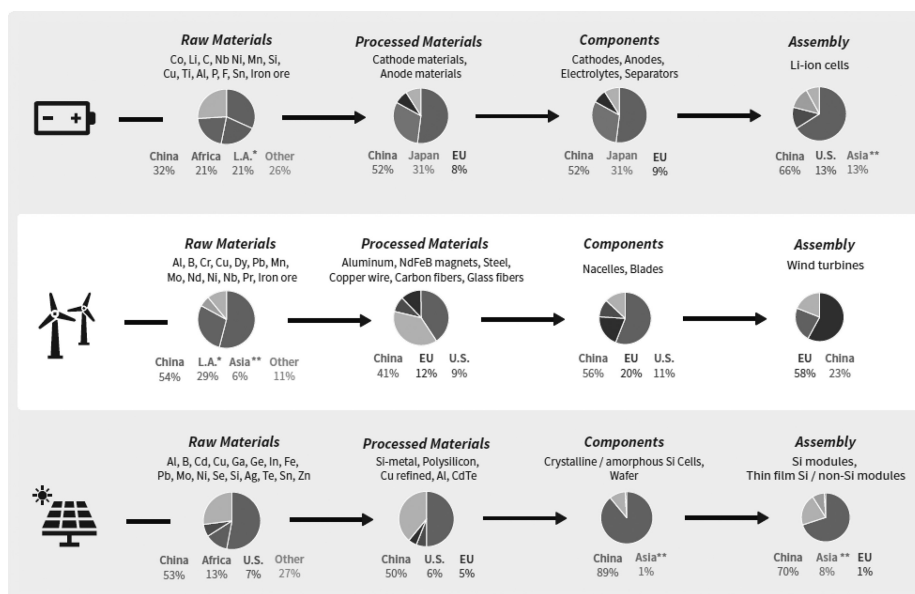
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¹ Figure 1, See Jane Nakano, The Chinese Dominance of the Global Critical Minerals Supply Chains, in *The Geopolitics of Critical Minerals Supply Chains* (Research Report Center for Strategic and International Studies (CSIS) 2021).

² Elaine Buckberg, *Clean Vehicle Tax Credit: The New Industrial Policy and Its Impact* (Stanford Institute for Economic Policy Research, Policy Brief 2023); Chad P. Bown, *Industrial Policy for Electric Vehicle Supply Chains and the US-EU Fight Over the Inflation Reduction Act*, Peterson Institute for International Economics, Working Paper 23-1 (May 2023).

³ Bentley Allan et al., *Friendshoring Critical Minerals: What Could the U.S. and Its Partners Produce?*, Carnegie Endowment for International Peace (3 May 2023), <https://carnegieendowment.org/2023/05/03/friendshoring-critical-minerals-what-could-u.s.-and-its-partners-produce-pub-89659> (accessed 14 Dec. 2023).

Figure 1 Clean Energy Mineral Supply Chains and Top Global Suppliers



* Latin America

** Excluding China and Japan

Source: Created by Ian Barlow based on data from European Commission, *Critical materials for strategic technologies and sectors in the EU – a foresight study*, 2020 (Brussels: European Commission, 2020).

indigenous communities.⁴ Conflicts get augmented due to location of critical mineral resources within the region occupied by indigenous communities and resistance faced by the mining projects due to impact of such projects on the natural resources and local communities.

This is evident from the fact that extractives industry lag behind in the Environment, Social and Governance (ESG) performance, probably due to the risk factor involved in disputes with local communities and discrepancies in maintaining environmental and labour standards while operations in mining assets. Moreover, private entities are not subjected to binding obligations under the international law when it comes to respecting the community rights and ensuring Free Prior and Informed Consent of local communities for mining activities, which is further complicated where these entities are not directly involved in the mining activities.

Although the UN Guiding Principles on Business and Human Rights does create soft obligation on States to ensure community consent standards are followed by the private entities, the States have failed to engage indigenous communities in development of National Action Plan on Business and Human Rights.⁵ Thus, local communities are

merely left with inefficient domestic remedies of the host countries in absence of clear incorporation of self-determination right and enforcement of community consent or consultancy standard which vary with jurisdictions.

This article will track development of standards pertaining to definition of indigenous communities and community engagement for approval of development projects and (Part I). The article will discuss the Environment Social and Governance gap in the critical mining sector which might get widened due to the friend shoring and nearshoring measures (Part II). Further, the article will explore initiatives under trade and economic cooperation agreements and bilateral investment treaties toward ensuring community consent standards by extractive industry, specifically mining of critical minerals for clean energy development (Part III).

2 INTERNATIONAL STANDARDS FOR RESPECTING THE INDIGENOUS COMMUNITIES

For longer part of history, indigenous communities were unfortunately kept out of discussions at international forums that developed environment and labour standards. Indigenous

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⁴ Heather Exner-Pirot, 'Social License for Mining in the North American Arctic. 'Overcoming Remoteness, Innovation to Support Economic Development, Critical Minerals, and Security in the Arctic, Macdonald-Laurier Institute (2023) 22 at 23, <https://www.jstor.org/stable/resrep52112.9> (accessed 12 Dec. 2023).

⁵ José Aylwin, Johannes Rohr *The UN Guiding Principles on Business & Human Rights and Indigenous Peoples Progress Achieved, The Implementation Gap and Challenges for the Next Decade* (International Work Group for Indigenous Affairs and Indigenous Peoples Rights International, Editor - Lola García-Alix, July 2021); H. Cantu Rivera, 'National Action Plans on Business and Human Rights: Progress or Mirage (2019) 4 (2) Business and Human Rights Journal 213–237', doi: 10.1017/bhj.2018.33 (accessed 25 Dec. 2023).

people's rights were recognized by States under International Labour Organization Convention with limited participation of indigenous communities as stakeholders. Subsequently, there was recommendation made to increase participation of indigenous communities on issues affecting them.⁶

Moreover, UN Human Rights Treaty and respective bodies have addressed issues faced by the indigenous communities. International Covenant on Civil and Political Rights provides under its Article 1 for right to self-determination, however said provision did not include the indigenous communities within its broader definition of people.⁷ The self-determination right was balanced with right of minority to enjoy their culture and profess and practice their religion.⁸

Human Rights Committee have determined that Right to Culture of persons belonging to minorities also include indigenous peoples' rights in relation to their customary activities, their lands, territories and resources, and their right to participate in political decisions that affect their cultural rights.⁹ Moreover, Human Rights Committee applied Article 1 in relation to aboriginal rights, requiring the State concerned to give indigenous people 'greater influence in decision making affecting their natural environment and their means of subsistence as well as their own culture'.¹⁰ This becomes relevant in current era of diversification of supply chains in the clean energy sector, which will require exploration and mining operations in the region inhabited by indigenous communities.

Human Rights Committee has also analysed Article 15 in light of Right to self-determination under Article 1, thus emphasizing communal aspects of indigenous peoples' cultural lives, specifically highlighting importance of their ancestral lands and nature to indigenous cultures.¹¹ Moreover, the Committee had referred to core obligation of States to obtain free, prior, and informed consent (FPIC) of indigenous communities while dealing with policies that put at risk preservation of their cultural resources including land.¹² Thus, concerns of encroachment of indigenous communities right over their ancestral lands has been well recognized by the human right bodies.¹³

2.1 Definition of Indigenous People

International Labour Organization Convention provides for guidelines for identification of indigenous communities and scope of their right over ancestral land and cultural identity associated with such land. Definition within the Convention had loosely referred to characteristics of indigenous community being descendants of populations 'which inhabited a country or geographical region during its conquest or colonization or establishment of present state boundaries' and 'retain some or all of their own social, economic, cultural and political institutions'. Moreover, indigenous communities have resisted the idea of defining them and pushed for flexible approach by providing right to define themselves.¹⁴

2.2 UN Declaration on Rights of Indigenous People (UNDRIP)

Main goal of Declaration is to establish improved relationship between indigenous people and States based on principles of justice, democracy, respect for human rights, non-discrimination, and good faith.¹⁵ Declaration stresses that its recognition of rights of indigenous people enhances harmonious and cooperative relations between the State and indigenous people and affirms that treaties, agreements and other constructive arrangements are the basis for a strengthened partnership between indigenous peoples and States.¹⁶

2.3 Recognized Rights under International Law and Treaties

2.3.1 Self-Determination

Rights of indigenous people have been recognized in international instruments and treaties between nations with indigenous populations even before the establishment of UN bodies. Moreover, these treaties have clearly guaranteed the right of indigenous people to the

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⁶ The Human Rights Council requested the Secretary-General in 2011 to prepare a document 'on ways and means of promoting participation at the United Nations of recognized indigenous peoples' representatives on issues affecting them, given that they are not always organized as non-governmental organizations, and on how such participation might be structured' (resolution 18/8).

⁷ Ian Brownlie, 'The Rights of Peoples in Modern International Law', in James Crawford ed., *The Rights of Peoples* (Clarendon Press 1988).

⁸ The International Covenant on Civil and Political Rights, Article 27; Communication No. 549/1993, Hopu and Bessert v. France, views of 29 July 1997, para. 10.3.

⁹ United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, *Poma Poma v. Peru*, Comm. No. 1457/2006, 27 March 2009 (CCPR/C/95/D/1457/2006), paras. 7.6 and 7.7.

¹⁰ HUMAN RIGHTS COMMITTEE Eighty-seventh session Consideration Of Reports Submitted By States Parties Under Article 40 of The Covenant 10-28 July 2006 CCPR/C/USA/CO/3 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf> (accessed 9 Jan. 2024).

¹¹ general comment No. 21: Right of everyone to take part in cultural life Article 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights (2009).

¹² *Ibid.*

¹³ Indigenous Peoples and the United Nations Human Rights System Fact Sheet No. 9/Rev.2, UN Human Rights Office of High Commissioner, 2013.

¹⁴ The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institution, Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights Aug. 2013, at 6.

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), eighteenth preambular para.

¹⁶ UNDRIP, fifteenth and eighteenth preambular paras.

recognition and enforcement of treaties.¹⁷ Furthermore, international norms have clearly developed norms relevant to indigenous peoples that are crucial for reversing historical discrimination against them under international law.¹⁸

UNDRIP has affirmed the right of indigenous people for equal treatment and entitled to rights under international law including right to self-determination.¹⁹ Moreover, the said right has been invoked by indigenous communities as part of norms forming basis of their relationship with States.²⁰ Particularly, framework of UNDRIP recognizes their Right to Negotiate as distinct peoples and as legitimate parties for entering into agreements under international law.²¹ However, the said Right to self-determination is limited to internal aspect and restricted to extent that they can exercise autonomy or self-governance in their local matters without causing any prejudice to its host nation.²²

2.3.2 Free Prior and Informed Consent

International legal instruments also recognize the right of indigenous peoples to free prior and informed consent in policy matters, commercial or legislative decisions affecting their interests.²³ Moreover, community consent standards are diluted to fast track development needs, specifically the recent friend shoring/nearshoring efforts of the western countries. Free prior and informed consent standard acts as a key guideline for State and non-state actors to engage in the process of dialogue and negotiation of agreements.²⁴

Unfortunately, constitution of countries with rich resources in critical minerals do not incorporate the Right to self-determination for indigenous communities. However, the recent constitutional amendment by Chile

has expanded their protected lands through incorporation of new articles recognizing right of indigenous peoples.²⁵ Part III of this article will discuss in detail these developments and internalization of indigenous community issues within broader international economic law discipline.

3 FRIEND SHORING AND WIDENING OF ESG GAP

In context of friend shoring of clean energy supply chain, ESG performance of the entities engaged in supply chain pose a risk factor for resilience of the supply chain. Although ESG performance of most enterprises has improved in recent years, leading companies have shown little momentum in improving their ESG performance. Specifically, the mining sector has scope for improvement in ensuring engagement with host communities and workers on basic risk factors such as environmental impacts, safety issues or grievances.²⁶ According to the responsible mining index, major mining companies have failed to incorporate the FPIC standard,²⁷ which suggest that surge in critical minerals production through expansion of mining will result in poor ESG performance on human rights compliance pertaining to indigenous communities and other vulnerable groups. Interestingly, few of the mining companies have pledged to the responsible business code of conduct.

3.1 Voluntary ESG Standards

Recently, the mining sector has initiated development of ESG standards through Multi-Stakeholders Initiative including Extractive Industries Transparency Initiative,

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¹⁷ Treaty No. 6 between the Cree and other Nations with the British Crown, in 1876, made reference to the requirement for 'consent' in para. 3, as did Art. 16 of the 1868 Treaty of Fort Laramie between the United States of America and the Oceti Sakowin States.

¹⁸ S. James Anaya, *International Human Rights and Indigenous Peoples* (Aspen, United States of America 2010); Claire Charters, 'Multi-Sourced Equivalent Norms and the Legitimacy of Indigenous Peoples' Rights under International Law', in Tomer Broude & Yuval Shany eds *Multi-Sourced Equivalent Norms in International Law*, *Studies in International Law* (Oxford, Hart Publishing 2011).

¹⁹ UNDRIP, second preambular para, Art. 3.

²⁰ The right to self-determination is recognized in the Charter of the United Nations and in common Art. 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

²¹ UNDRIP, Articles 3, 5, 9 and 33.

²² UNDRIP, Article 46.

²³ United Nations Declaration on the Rights of Indigenous Peoples, Arts 10, 11, 19, 18, 28, 29 and 32; International Labour Organization (ILO) *Indigenous and Tribal Peoples Convention*, 1989 (No. 169); Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997), para. 4 (d); Human Rights Council Eighteenth Session, Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples A/HRC/18/42 17 August 2011 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/154/84/PDF/G1115484.pdf> (accessed 1 Nov. 2023); Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples Third session 12–16 July 2010 A/HRC/EMRIP/2010/2 para. 8 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/154/84/PDF/G1115484.pdf> (accessed 1 Dec. 2023).

²⁴ James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples July 2013, A/HRC/24/41, para. 30 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/152/49/PDF/G1315249.pdf> (accessed 1 Dec. 2023); Miguel Alfonso Martínez, Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations June 1999 E/CN.4/Sub.2/1999/20, para. 263; Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council Sep. 2018 A/HRC/39/62, para. 45 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf> (accessed 10 Dec. 2023).

²⁵ *Chile's Constitutional Assembly Rejects Plans to Nationalise Parts of Mining Sector*, *The Guardian* (15 May 2022).

²⁶ RMI Report 2022, Responsible Mining Foundation, at 6.

²⁷ *Ibid.*, at 32.

the Initiative for Responsible Mining Assurance, Global Battery Alliance, International Council on Mining & Metals. These initiatives are binding on only participants of the networks. Moreover, participants incorporate these standards into their supply chain agreements, which mean any mining company supplying critical minerals need to ensure compliance of ESG standards which will include the community consent standards (FPIC). However, enforcement of such contracts requires understanding of the complex system of investor state dispute settlement and commercial arbitration, which acts as a barrier for indigenous communities to access these forums for resolving disputes with investors.

3.2 Lack of Clarity on Domestic and International Community Consent Standard

The ESG gap is augmented by unclear domestic policies on the right of indigenous people in developing countries (host countries). Most of critical mineral's production required for clean energy supply chain is dominated by major players which source these critical minerals from the mines based in the developing countries. Moreover, the network of international treaties between States and indigenous communities makes identification of proper remedies for indigenous communities a herculean task.

Although some of developing countries have framed policies providing remedies against failure of the businesses to comply with community consent standard, many developing countries have merely incorporated right to self-determination and right to free, prior and informed consent in their Constitution without formulating policies and guidelines to determine the scope of right of indigenous communities.²⁸

Furthermore, rising ESG reporting requirements by the developed countries may create opportunity for States to build their competitive advantage in ESG compliance, specifically in community consent parameters.²⁹ Moreover, economic partnerships among States are essential to ensure conducive business environment for facilitating the community engagement in approval of mining projects and enforcement of community consent standard during the initiation of such projects. The next chapter will analyse provisions with trade and investment agreements and

recent cooperation agreements dealing with commercial utilization of critical minerals and related community consent flowing from such activities.

4 COMMUNITY CONSENT STANDARD UNDER INTERNATIONAL ECONOMIC LAW

Recently, there has been surge in partnerships between States to increase cooperation in critical mineral sector. The US and Canada has already agreed to strengthen ESG standards and share best practices for engagement with indigenous communities:

Finally, Canada and the United States plan to build on our collaboration with our allies and international partners to promote and further strengthen ESG standards and practices, as well as share best practices for ensuring meaningful consultation and engagement with Indigenous peoples and timely permitting of critical minerals projects.³⁰

Moreover, Mineral Security Partnership (MSP) initiated by the US has framed Principles for Responsible Critical Mineral Supply Chains that committed to support the principles of sustainable development including indigenous consultation and stakeholder engagement. Moreover, MSP intends to facilitate strategic partnerships in critical minerals sphere and support socially responsible projects meeting internationally recognized ESG standards which will be reviewed periodically.³¹ This is evident from the fact that India has also entered into MSP partnership, increasing the tally of members to 14.³² However, policy gaps pertaining to the rights of indigenous people in States with critical mineral resources creates uncertainty for the sustained growth of friendshoring clean energy supply chain.

4.1 EU Canada Comprehensive Economic and Trade Agreement (CETA)

Trade and Sustainable Development chapter of EU-Canada Agreement did incorporate the intent towards promoting ESG standards by 'encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and

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²⁸ Chile's constitutional assembly, *supra* n. 25.

²⁹ 17 C.F.R. § 240.13p-1 (2020): SEC Conflict Minerals Disclosure Rule – This rule requires companies that file reports with the SEC under Exchange Act s. 13(a) or s. 15(d) to file a Form SD if they manufacture or contract to have manufactured products that contain conflict minerals (e.g., tin, tantalum, tungsten, gold) necessary to the functionality or production of those products.¹⁶⁵ A company must '(1) determine whether it manufactures or contracts to have manufactured products with "necessary" conflict minerals; (2) conduct a reasonable country-of-origin inquiry (RCOI) concerning the origin of conflict minerals used[, if any, and file a Form SD]; and (3) exercise due diligence, if appropriate, to determine the source and chain of custody of conflict minerals used'.

³⁰ Canada – US Supply Chains Progress Report 2022.

³¹ Minerals Security Partnership (MSP), Principles for Responsible Critical Mineral Supply Chains, at 3.

³² India-USA Joint Statement during the Official State visit of Prime Minister, Shri Narendra Modi to USA.

environmental objectives'.³³ However, trade and labour chapter of the same agreement has excluded applicability of the International Labor Organization (ILO) Convention 169 by incorporating only those ILO conventions that were ratified by Canada and EU where Canada has not ratified Convention 169. With limited enforceability of UNDRIP as it does not qualify as binding treaty and non-ratification of ILO Convention, indigenous communities are left with limited remedies to enforce their rights against investors.

4.2 United States Mexico Canada Agreement (USMCA)

Moreover, USMCA has clearly incorporated a general exception that allows the government to adopt or maintain measures which is deemed necessary to fulfil its obligations in treatment of indigenous peoples. Even in other chapters including services and investment, environment and state-owned enterprises, Canada was able to limit its obligation to preserve the rights of indigenous communities. However, the Agreement is silent on role of responsible business conduct of multinational enterprises.

Thus, there is no substantial obligation on Canada to ensure compliance of community consent standard, instead of merely community consultation requirement mentioned under the MSP. Moreover, Canada critical mineral mining sector has faced decline in growth due to local resistance, delay in approvals and price feasibility.³⁴ Meanwhile, Canada's mining companies have expanded their presence in multiple regions which have resulted in investor state disputes. This holds significance considering the recent reforms by Chile government to amend the Constitution incorporating articles that guarantee rights of indigenous people.³⁵ Moreover, the mining entities face resistance in approval process, specifically in scenarios where mining activity cause environment harm to the indigenous land and resources.

4.3 Bear Creek Mining Corporation v. Republic of Peru

In Bear Creek Mining Corporation case, the Tribunal while deciding whether the measure of revoking mining contract based on the ground of social unrest would be covered under Article 2201 General Exception Clause of the free trade agreement (FTA) ruled that the interpretation of

expropriation clause and General Exception Clause of FTA suggest that general international law or other norm will not be applicable in invoking the exception against the expropriation claims.³⁶ The major issue of contention in this case was Respondent's claim of contributory negligence of the Claimant due to lack of community engagement by the investors to spread awareness among indigenous communities about the impact of mining project, which led to unrest in the region due to dissatisfaction of the indigenous communities.

Tribunal in its majority decision held that considering there was no concern raised by authorities that approved of Claimant's conduct and support, Respondent cannot claim that the Claimant's conduct was contrary to ILO Convention 169 or was cause of unrest.³⁷ However, minority decision by Prof. Sands ruled that the '*Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation*'.³⁸ Moreover, Prof. Sands also disagreed with majority opinion on the issue of non-applicability of Article 25 of ILC Articles on State Responsibility in the presence of exhaustive list of exceptions in BIT as *lex specialis*.

Thus, absence of proper guidelines for the stakeholder engagement, specifically dealing with indigenous communities, in the domestic law can accumulate risk both for state and investors. Further, discrepancies in the environment impact assessment by Peruvian authorities in communication regarding lapses in terms of consultation process by investors created complexities for the states' counter claim. Thus, lack of clarity in the mining project approval guidelines can affect business environment and lead to higher transaction cost in implementation of mining project hence reduce competitive advantage of the States as destination for extracting natural resources, particularly the critical minerals. Moreover, the variation in domestic policies and investor protection standards under investment treaties has led to fragmentation of the community consent standards, which dilutes the effectiveness of international norms dealing with right of indigenous peoples.

5 CONCLUSION

Efforts toward friendshoring the clean energy supply chain may face bottlenecks due to limited promulgation of

Notes

³³ EU Canada Agreement, Art. 22.3, para. 2(b).

³⁴ Exner-Pirot, *supra* n. 4.

³⁵ Chile's constitutional assembly, *supra* n. 25.

³⁶ Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Majority Decision, para. 473.

³⁷ *Ibid.*, para. 666.

³⁸ Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Minority decision by Professor Philippe Sands, para. 11.

community standards in the legal framework of the States with dominant share of critical mineral reserves. Although the international organizations have made effort to build consensus on the substantive and related procedures for consensus building in the projects impacting indigenous communities, there is still divergences in government policy and ESG standards in this area. Due to such policy gap and lack of clarity on the community consent standard, extractive industries are lagging behind in the ESG performance. Further, there is invariable effect of poor ESG performance on the stock market performance that suggest lack of awareness about the risk factors dealing with non-compliance of community consent standards among retail investors.

Furthermore, the limited obligation on States in terms of conformity with community consent standard has led to fragmentation of these standard. This is evident from the fact that the states have failed to recognize the mere incorporation of right of indigenous communities with little efforts to define the legal framework to govern the process of attaining consent from the indigenous communities,

except for the South Africa.³⁹ Moreover, Chile government has also amended the Constitution to incorporate the right of indigenous communities, however there are no guidelines on the community consent standards for businesses that can provide certainty for critical mineral mining projects. Therefore, the gap in consensus on the right of indigenous communities at multilateral or bilateral level has resulted in fragmentation of community consent standards.

Moreover, varied community consent standards will clearly impact ESG performance of the mining sector, specifically the critical mineral mining projects and clean energy supply chain. Such factors will lead to contentious issues while framing measures for regulating the critical minerals that may raise risk for the investors and states based on the commitment taken in investment treaties, trade agreements and other economic partnership agreements. In this light, the host states must ensure that the legal framework does not leave gap in the stakeholder engagement of the indigenous communities and balance the domestic regulatory interest with sound business environment for investment.

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³⁹ The Financial Sector Conduct Authority (FSCA), a regulator, has issued guidance on Regulation 28 of the Pension Funds Act, 1956 that makes the consideration of ESG factors integral to evaluating the sustainability of an asset.

INTERVIEW

Interview of Dr Edwin Vermulst, Partner, VVGB Advocaten

Biographical Sketch: Dr Edwin Vermulst, a founding partner of VVGB Advocaten, has worked in Brussels and Washington, D.C., specializing in international trade law and policy. In addition to earning his LLM and SJD from the University of Michigan Law School in 1984 and 1986 respectively, Dr Vermulst graduated from the University of Utrecht in 1983. Dr Vermulst has participated in numerous WTO dispute resolution proceedings and has served as a WTO panellist in the *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States* dispute (DS101). Along with numerous articles, he has co-authored nine books, including seminal works on rules of origin with Jacques Bourgeois and Paul Waer in 1994, and comparative studies of anti-dumping laws in Australia, Canada, the EU, and the US with Professor John Jackson in 1989. Dr Vermulst is a guest professor at the European Public Law Organization programme in Athens and the World Trade Institute in Bern and serves as the Editor in Chief for the Journal of World Trade.

Question 1: Given the changing geopolitical scenario, how can developing countries leverage the concept of ‘friendshoring and nearshoring’ to integrate further into global supply chains?

Dr Vermulst: In the context of ‘friendshoring and nearshoring’, there is no distinction between developed countries and developing countries. The primary idea behind ‘friendshoring and nearshoring’ is to diversify the supply chain. For instance, the United States (US) and the European Union (EU) are using these principles to reduce their dependence on China. Other countries may take benefit from such arrangements. Mr Narendra Modi, the Indian Prime Minister’s recent visit to the US is an important indication that the US is seeking to develop a deeper relationship with India. It is important to note that the US policy towards ‘friendshoring and nearshoring’ *vis-à-vis* developing relations with India is regarding its concerns about curtailing China in the long run. With regard to the EU, while the European Commission seeks to take a harder line *vis-à-vis* China, some Member States of the EU want to stay neutral. The idea is that China too can be a friend of Europe. I believe that ‘friendshoring and nearshoring’ should not be confused with the idea of choosing sides. With the

Russia-Ukraine conflict, many countries like India, Indonesia, Thailand, and Brazil are neutral. In a nutshell, the idea of ‘friend-shoring and nearshoring’ is about whom you choose as friends, and not whom you exclude.

Question 2: What do you think about the current challenges posed due to the fragmentation of the supply chain on friendshoring, nearshoring, and homeshoring?

Dr Vermulst: Indeed, there is a fragmentation. As a result of globalization, companies are seeking to be part of the supply chain where it makes more sense, and which is economically efficient. For instance, with the CHIPS and the Science Act, the US is seeking to set up local production units. In this regard, it may be noted for example that due to the economics of labour, the supply chain for labour-intensive industries is also now being shifted from China to Vietnam. The fragmentation is also product-specific. For instance, the clothing and footwear industry, Bangladesh, Cambodia, and India are considered to be important for similar reasons. Fragmentation and nearshoring also apply to products like critical minerals and information technology. However, for critical minerals, through the US policy, it appears that the shift in the supply chain is not due to the fact that it makes more economic sense, but it is due to the fact that it makes more sense politically, i.e., shifting away from China. India can be a huge beneficiary of this fragmentation. Due to the fragmentation of friendshoring, nearshoring, and homeshoring, the EU might be more inclined to make concessions to India in ongoing trade negotiations with India that it otherwise would not make.

Question 3: Given the current geopolitical tensions, changes in technology, and rise in renewable energy and its alternate resources from future materials, what do you think is the future of industrialization of critical minerals?

Dr Vermulst: For a long time in the EU, people did not want to undertake mining activities due to its polluting nature. Mining is in the low-value chain, and that is why the EU prefers mining to take place in other countries. However, now the EU is providing subsidies to mine critical minerals present in the EU to stimulate

mining activity in the EU. The idea is to become more self-reliant as regards the supply of critical raw materials. Since the US and the EU are trying to source such critical minerals from countries other than China, the effect is increased industrialization.

Question 4: Do you think that de-globalization is the consequence of hyper-globalization?

Dr Vermulst: De-globalization, in my opinion, is temporary and phenomenal. First globalization began around 1995. Now, its notion has changed because of China and Brexit. It is important to note that the creation of the EU is also the result of globalization. For instance, a worker registered in any Member country of the EU can work in any other Member country. Tourists and business people do not need to exchange currency when travelling to each Eurozone Member due to the recognition of the 'Euro' as a currency. However, when globalization is taken for granted, the fact which is ignored is that it is a result of a long process. Now, Americans are pushing for de-globalization. The result of the same will be that the cost of living will become more expensive. For example, the more China is being pushed away in favour of local production, the cost of living will increase. Once it is realized that living is expensive, there will be a pushback and there will be ultimately a re-globalization. That is why, de-globalization is temporary, and then we move back to globalization.

Question 5: How can green energy subsidies be structured in a manner so that they provide the best support to the industry, and do you think this green/renewable energy sector actually needs support from the government?

Dr Vermulst: To begin with, the crucial point to note is that governments do not need to give subsidies. What is happening currently is competition among countries to stimulate their expansion in renewable energy, and consequentially, many countries are subsidizing it. Such subsidies can be provided to both consumers and producers of green energy products e.g., electric vehicles. Due to the US' Inflation Reduction Act (IRA), the manufacturers of automobiles may shift production from the EU to the US, and hence the EU considers that there is a need for subsidization. The provision of subsidies is easier in developed countries having an effective taxation system where revenue collection works better and where governments have more money to spend on subsidies. Therefore, the provision of subsidies is the result of competition among countries to lead in the green energy market.

Question 6: How do anti-dumping actions appear in nearshoring and friendshoring parlance and if these actions can create complications within the context of strategic alliances?

Dr Vermulst: Among all the trade remedy measures, unlike safeguards which apply in a non-discriminatory manner, anti-dumping and subsidies are exporter-specific or country-specific, as the case may be. With the conclusion of bilateral trade negotiations, the number of trade remedies investigations against partners of a Free Trade

Agreement (FTA) tends to reduce. For instance, after the EU-Korea FTA and the EU-Japan Economic Partnership Agreement, there have been hardly any anti-dumping or countervailing duty investigations against Korea and Japan. In the case of dumping, the government theoretically does not play any role and consequentially, 'friendshoring and nearshoring' also should not play much of a role. However, in practice, administering authorities have significant discretion in calculating anti-dumping duties and, therefore, might take a more lenient approach towards companies exporting from 'friendly-shores'.

Question 7: What do you think about the alignment of the concept of friendshoring and nearshoring with homeshoring? In this context, what do you think about the competitive conditions between the domestic product and imported products?

Dr Vermulst: In the case of friendshoring and nearshoring, the focus is to procure the materials from another country (either a neighboring country or a country with which it has friendly ties). However, in the case of homeshoring, the primary focus is on production in your own country. Now, in the case of the IRA, for example, the benefit under section 30D of the IRA is provided to the manufacturers who source critical minerals from the US or its FTA partners. However, all three concepts have in common that they limit consumers' choices. Therefore, to the extent that they are combined, they make economic sense because they expand the base from which consumers can choose. Competition between domestic producers and producers from 'friendly' and neighboring countries will improve to the benefit of consumers and therefore makes sense from a consumers' welfare perspective.

Question 8: Do you think that the product involved guides a country's approach about which policy to adopt among friendshoring, nearshoring and homeshoring?

Dr Vermulst: Yes, this is definitely the case. For certain supposedly strategic products such as computer chips, both the US and the EU have made homeshoring a priority, spending billions of taxpayers' money in subsidies in the process because they no longer have a competitive advantage in the production of these products. With respect to other products, such as electric vehicles and batteries for example, friendshoring and nearshoring are considered more acceptable alternatives to homeshoring, although there appears to be an unspoken preference for homeshoring.

Question 9: Is it the availability of resources and other aspects such as cost of production that guide the friendshoring or nearshoring policy of a particular product? And how can countries balance the need to secure their own resources of supply and ensure access to affordable goods at the same time?

Dr Vermulst: Friendshoring and nearshoring are based on a mix of political and economic considerations. At the same time, entities such as the EU, under the influence of domestic and international lobbying groups, are under

pressure to adopt measures such as Carbon Border Adjustment Mechanism, Deforestation Regulation, Renewable Energy–Recast to 2030, and Environmental, Social, and Governance reporting. These measures clearly pose compliance problems for producers from developing countries. It is important to note that because of the WTO rules, such initiatives have to be applied on a most-favored nation basis and therefore will have to be complied with, no matter the source of supply.

Question 10: The ultimate objective for any country is to make the supply chains more resilient, where complete self-reliance is not the solution, so the developing countries should focus on friendshoring only or diversify?

Dr Vermulst: In my opinion economics and politics should ideally be kept separate, and economics should

not be weaponized (with the possible exception of economic sanctions in extreme cases). From this perspective, the very concept of friendshoring is anathema to me. People in the West also tend to forget that political or military conflicts that they consider important are not necessarily considered (as) important in the rest of the world. The Russia-Ukraine war is a good example of the latter, with many countries such as China, India, and Brazil adopting a neutral position. The competition between the US and China is a good example of the former. For most third countries, including developing countries, the best strategy seems to be to remain neutral unless ‘they have a dog in the fight’ and to source from whichever countries make the most sense economically.

Interview by Ms Mahima Abuja & Mr Rishabha Meena