مجلة جامعة الشارقة للعلوم القانونية

اسم المقال: الحرب التجارية بين الولايات المتحدة والصين: الأزمة غير المسبوقة لمنظمة التجارة العالمية
اسم الكاتب: صالح عدنان الشريده
رابط ثابت: https://political-encyclopedia.org/index.php/library/8583
تاريخ الاسترداد: 2026/11/02 02:47 +03

الموسوعة السياسيّة هي مبادرة أكاديمية غير هادفة للربح، تساعد الباحثين والطلاب على الوصول واستخدام وبناء مجموعات أوسع من المحتوى العلمي العربي في مجال علم السياسة واستخدامها في الأرشيف الرقمي الموثوق به لإغناء المحتوى العربي على الإنترنت.
لمزيد من المعلومات حول الموسوعة السياسيّة - Encyclopedia Political، يرجى التواصل على info@political-encyclopedia.org

استخدامكم لأرشيف مكتبة الموسوعة السياسيّة - Encyclopedia Political يعني موافقتك على شروط وأحكام الاستخدام المتاحة على الموقع https://political-encyclopedia.org/terms-of-use

تم الحصول على هذا المقال من موقع مجلة جامعة الشارقة للعلوم القانونية ورفده في مكتبة الموسوعة السياسيّة مستوفياً شروط حقوق الملكية الفكريّة ومتطلبات رخصة المشاع الإبداعي التي ينضوي المقال تحتها.

جـامعـة الشـارقـة
UNIVERSITY OF SHARJAH

University of Sharjah Journal

A Refereed Scientific journal

of

Law Sciences



Vol. 20, No. 2
Dhu al-Qadah1444 A.H. / June 2023 A.D.

ISSN : 2616-6526

University of Sharjah Journal for Law Sciences, Volume 20, No. 2 June 2023

https//:doi.org/10.36394/jls.v20.2.7

The US-China trade war: The unprecedented crisis of the World Trade Organization

Saleh Adnan Al Shraideh(1)

Received on: 2021-03-10 **Accepted on: 2021-05-4**

Abstract:

The US-China trade war has caused a great deal of disturbance to the international trading system. It has involved the largest two economic powers in the world with a substantial increase in trade barriers that has affected most of the trading exchange between the two countries. What is more concerning, however, is that such reciprocal trade barriers of retaliatory and counter-retaliatory measures were imposed outside the scope of the WTO and its dispute settlement mechanism. The US-China trade war has sidelined the WTO, exposing defects and weaknesses in its ability to deal with such situations.

This article seeks to understand the causes of the US-China trade war and the WTO's failure to prevent it, and explore options to improve the WTO system's ability to deal with similar conflicts to maintain the efficiency of its role as the main international body governing global trade and its position as a guarantor of the rules and principles of the freedom of international trade.

Keywords: Trade War, United States, China, WTO, Dispute Settlement

(1) College of Law – University of Sharjah (Sharjah – United Arab Emirates)
salshraideh@sharjah.ac.ae

Introduction

The international trading system has been undergoing what could be considered by many as the largest trade war in history between two of the largest economies in the world, the United States (US) and China. Even though the escalation of the war was put on hold in January 2020 through a Phase-One Deal between the two countries, the unilaterally imposed tariffs remain escalated and extensive, affecting most products in the bilateral trade between the US and China in an environment of continuing distrust and increasing tension that has been aggravated by the COVID-19 Pandemic, leaving the fragile deal with a great potential of collapse.(1)

Although avoiding trade wars is one of the key functions of the WTO trading system, the US-China trade war has been carried out outside the legal framework of the WTO and its dispute settlement system. The reciprocal retaliations and counterretaliations, which were conducted fully based on unauthorized and unilateral measures by both countries have pushed the WTO dispute settlement system to a state of deficiency added to the crisis it is already dealing with as a result of the absence of a functioning Appellate Body. This has prevented the system from stopping the conflict, and struggling to reinstate the shaken trust in its role as the protector of the credibility of the international trading system.(2)

Regardless to whether the intensity of the tit-for-tat US-China trade war would be eased as a result of the change of the US administration after the recent election, such a war could be argued to have negatively affected trade stability not only between the two major economic powers, but also the stability of the whole international trading system, represented by its governing body, the WTO.

---

(1) Julia Qin, *WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons From the US-China Trade War*, Wayne State University Law School Legal Studies Research Paper Series No. 2020-73 (2020), p. 3.

(2) Arvind Panagariya, *The Trade War Has Claimed its First Victim*, Foreign Policy, (October 19, 2018). https://foreignpolicy.com/2018/10/19/the-trade-war-has-claimed-its-first-victim/ , Last accessed, 15/ 1/ 2021.

Background to the US-China trade war:

Throughout recent history, trade wars have been a common practice between states, when a substantial case of conflicting trade interests arises. Before the current US-China trade war, the US was engaged in a trade war with Japan and the EU that affected various sectors, such as textiles, automobiles, and steel.(1) During the US-Japan automobile trade war in the 1980s, the US initiated 24 'Section 301 investigations' against Japan. Under such a procedure, the President is authorized by Section 301 of the US Trade Act of 1974 to conduct suitable measures against any international trade arrangement that is considered unfair to the interests of the US.(2)

As a result, Japan was forced to voluntarily restrict its exports of automobiles to the US, which led to a sharp increase for US customers in automobile prices, with a significant decrease in revenue for Japanese car producers. The decline in automobile production and sales led to a sharp rise of unemployment in the automobile industry.(3)

China was also the subject of 'Section 301 investigations' since 1991 against areas of intellectual property and unfair trade barriers. Such friction witnessed the threat of tariff retaliation by both parties, which was never used as a result of negotiated settlements.(4)

The current US-China trade war outbroke implicitly in 2017, when the US administration initiated 'Section 232 investigation' on imports of steel and aluminum on national security grounds. Even though such a decision was not directed explicitly against China, the fact that China is one of the biggest exporters of steel and aluminum indicates that China was the main

(1) Terence Chong & Xiaoyang Li, *Understanding China-US trade War: Causes, Economic Impact, and the Worst-Case Scenario*, Working Paper No. 71, Lau Chor Tak Institute of Global Economics and Finance, The Chinese University of Hong Kong, (Feb. 2019) , p. 5.

(2) The Trade Act of 1974, 19 U.S.C., 2411(b).

(3) Chong & Li, supra note 3, p. 6.

(4) Ibid, p. 5.

target of the decision.(1)

The beginning of an all-out war was clear by March of 2018, when 'Section 301 investigation' was initiated against Chinese practices relating to intellectual property and licensing.(2) The Section 301 Report made four findings: (a) US firms were forced by China's administrative processes and equity restrictions to transfer technologies to Chinese entities; (b) foreign firms are discriminated against by China's technology licensing requirements; (c) China systematically acquired businesses in the US to obtain cutting-edge technologies; and (d) China was involved in cyber theft of American IP that costs between $225 billion and $ 600 billion annually.(3)

As a result, a list of 1333 Chinese products with a value of US$ 50 billion was announced by the US to be subject to a 25% tariff increase. This decision was reciprocated by China with an immediate 25% tariff increase on US products valued at US$ 50 billion.(4)

The months that followed have witnessed several tit-for-tat trade-restrictive measures, and several failed trade war-on-hold periods.(5) This situation continued until January 2020, when a phase one trade deal was signed between the two countries under which the US will cut tariffs in

(1) Ibid, p. 7.

(2) Qin, supra note 1, p. 6.

(3) Office of the U.S. Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (March 22, 2018) [hereinafter Section 301 Report].

(4) Qin, supra note 1, p. 8.

(5) Chad Bown, *US-China Trade War Tariffs: An Up-to-Date Chart*, Perterson Institute for International Economics: Charts, (Feb. 14, 2020), http://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart , Last accessed 20/12/2020.

return for a boost in China's purchases of US products.(1)

The relationship between the two countries is still fragile with trade deal review postponed several times amid a continued atmosphere of distrust surrounding their interactions. The trade war between the two major economies has resulted in US$ 550 billion worth of tariffs applied exclusively to Chinese products, and US$ 185 billion of Chinese tariffs imposed on US products.(2)

The contributing factors behind the US-China trade war

China has managed to transform itself to become a major manufacturing state, and main trade partner of a considerable number of countries, including the United States.(3) In fact, the US has contributed to China's internationalization process through an increased presence of American companies, which encouraged US manufacturing and trade with China.(4)

China has utilized its cheap labor force and large production capacity to achieve a record trade surplus of US$ 275 billion with the US.(5) In

(1) *United States and China Reach Phase One Trade Agreement*, Office of the US Trade Representative (Dec. 13, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach. Last accessed 20/ 12/ 2020.

(2) Dorcas Wong and Alexander Koty, *The US-China Trade War: A Timeline*, China Briefing, (Aug. 25, 2020), https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/ , last accessed 22/12/2020.

(3) Renata Thiebaut, *An Analysis of the US-China Trade War: How the Section 301 China Intellectual Property Case May Impact New Directives to Promote the 'Made in China 2025'*, SSRN Electronic Journal, (Oct., 2018), p. 15, https://www.researchgate.net/publication/328392038_An_Analysis_of_the_US-China_Trade_War_How_the_Section_301_China_Intellectual_Property_Case_May_Impact_New_Directives_to_Promote_the_'Made_in_China_2025. Last accessed 24/12/2020.

(4) Ibid.

(5) Wang Xiaonan, *Analysis: Is the Trade War Spelling the End of the WTO*, China Daily, (Aug 28, 2018), https://www.chinadaily.com.cn/a/201808/28/WS5b8491eca310add14f3880fc.html , Last accessed 26/ 12/ 2020.

this regard, the US trade deficit with China has been growing rapidly to a level where it was accounting to 46% of the US total trade deficit by 2017, contributing to escalating the US national debt crisis.(1)

The US has long claimed that such an imbalanced trade relationship was a result of China's unfair trade practices, especially in relation to the protection of intellectual property rights.(2) In this context, the (2018 Special 301 Report) claims that an evaluation of China's IP legal system shows that in addition to violating the TRIPS agreement, China engages its companies in malpractices like "IP theft" to consolidate its goal of developing its own innovative industry.(3)

To follow up on such claims, the US filed consultations in the WTO in relation to China's IP infringement and IP theft. In the China – Certain Measures Concerning the Protection of Intellectual Property Rights, the US, as a complainant, claimed China's unauthorized patent usage, through cyber theft of trade secrets, and breach of the National Treatment Principle through China's legal benefits provided to its local firms, citing inconsistencies with the TRIPS Arts. 3, 28.1(a), 28.1(b), and 28.2.(4)

The Chinese IP policies were also targeted by the European Union in the China – Certain Measures on the Transfer of Technology, where it was claimed that China has practiced discriminatory policies against foreign firms forcing them to transfer proprietary technology through the formation of joint ventures with Chinese firms.(5)

Although unfair and unlawful practices by China, as claimed by the US, are presented as the main cause for the trade war between the two

(1) Chong & Li, supra note 3, p. 14.

(2) M. Morison, *China-US Trade Issues*, Congressional Research Report No. 7-5700, (July 30, 2018), https://fas.org/sgp/crs/row/RL33536.pdf , last accessed 28/12/2020.

(3) Section 301 Report, supra note 9, p. 5.

(4) *China-Certain Measures Concerning the Protection of Intellectual Property Rights*, World Trade Organization (WTO), WTO/DS542, (2018).

(5) *China-Certain Measures on the Transfer of Technology*, World Trade Organization, WTO/DS549, (2018).

countries, the battle for global economic dominance is argued to be the real motivating factor behind this war.(1)

China has experienced rapid growth and become a major economic power. It ranks second in the world in terms of its production volume. Also, its declared strategic plans, such as the Belt and Road Initiative, Asian Infrastructure Investment Bank, and 'Made in China 2025', are all clear indications of an increasing economic influence that threatens US dominance.(2)

The US administration has felt the significance of the threat to its economic leadership and decided to review its international trading status and reduce its deficit with strategic partners by adopting different measures to achieve such outcome under the slogan "America First", which has become the main policy of the Trump administration.(3)

Such a notion has resulted in an increased tendency for protectionism, which is largely condemned by the WTO, as it breaches the basic principle of the international trading system that is based on free, fair and reciprocal trade.(4) In fact, the US-China trade war has created an unprecedented paralysis in the role of the WTO as the main global trading regime to a degree that the current situation of international trade could be viewed as a simulation of what global trade is like in the absence of the WTO.(5)

The impact of the US-China trade war on the WTO

The WTO is facing an unprecedented existential crisis. The nationalistic approach of the Trump administration was clear in the very tough stand such administration took against the WTO, being described by the US

(1) Chong & Li, supra note 3, p. 15.

(2) Ibid.

(3) Thiebaut, supra note 14, p. 15.

(4) Ibid.

(5) Karen Alter, *Time for a World Trade Organization 2.0*, *Wall Street Journal*, (Sep. 15, 2019), https://www.wsj.com/articles/time-for-a-world-trade-organization-2-0-11568577021 , Last accessed 28/12/2020.

president as the "single worst trade deal ever made" amid several threats of the US withdrawal from the organization.

Such a stand was translated into attempts to marginalize the WTO's role as a guarantor of international free and fair trade under the claim that "WTO members are not playing fair with America" and that "China receives special treatment from the WTO".(1) In this regard, the US has obstructed for the last four years the appointment of new members in the WTO Appellate Body, resulting in creating a dysfunctional body after the last serving member has recently finished his term in the board.(2) As the Appellate Body plays an integral role in the dispute settlement system of the WTO, paralyzing the Appellate Body significantly affects the ability of the WTO to maintain the integrity of its legal framework.

The Appellate Body serves as an appeal stage that follows the initial panel stage of the dispute settlement process, and every dispute adjudicated by the panel has the potential to be appealed before the Appellate Body. The absence of a functioning Appellate Body leaves appealed disputes in the no-action status, leading to either the continuation of the inconsistent practices subject of the dispute, or retaliatory actions by the negatively affected member without a WTO authorization that satisfies all requirements for a final decision in this regard. Both scenarios have negative ramifications on the efficiency of the WTO, pushing the organization to the brink.(3)

Regardless to the legitimacy of the US claims of unfair practices by China, and whether such practices are consistent with the legal framework

(1) Xiaonan, supra note 16, p. 2.

(2) Stephan Becker, Sahar Hafeez, Moushami Joshi , & Stephanie Rosenberg, *World Trade Organization Panel Finds Section 301 Tariffs on Chinese Products Violate WTO Rules, but Decision Unlikely to Have Impact on Tariffs*, Pillsbury Global Trade and Sanctions Law, (Oct. 6, 2020), https://www.jdsupra.com/legalnews/world-trade-organization-panel-finds-32031/ Last accessed 2/1/2021.

(3) Ibid. See also, Finbarr Bermingham, *US Lodges Appeal Against WTO Ruling in China's Favor Over Trade War Tariffs, South China Morning Post,* (Oct. 26, 2020), https://www.scmp.com/economy/china-economy/article/3107147/us-lodges-appeal-against-wto-ruling-chinas-favour-over-trade , Last accessed 3/1/2021.

of the WTO or not; the fact that the US retaliated against another WTO member without going first through the formal dispute resolution process sets a damaging precedent in the international trading system, and opens the door for tit-for-tat measures between WTO members to the detriment of the international body responsible for the integrity of such system. The ground for the US retaliation was merely based on an internal review conducted under the authorization of a domestic US law, whereas the rules of the WTO require the country claiming the violation to first win a dispute, requesting the trading partner to change its policies.(1)

In this regard, the US could only retaliate if it was ruled that China's measures were inconsistent with WTO rules, followed by its refusal to comply and remove such measures. Even then, the amount of retaliation should be determined based on the nullification and impairment caused rather than an arbitrary decision by the US.(2)

The US's use of certain WTO rules to justify their unilateral imposition of tariffs against other countries could be argued to only add uncertainties to the WTO-based international trading system. In this regard, when the US imposed new tariffs on nearly $50 billion of steel and aluminum imports, it triggered the national security exception under Article XXI of GATT, which could be viewed to involve a degree of vagueness that might lead to negative ramifications on international trade interactions, if misused.

Article XXI of GATT states that GATT/ WTO rules cannot prevent a country "from taking any action which it considers necessary for the protection of its essential security interests".(3) The controversy surrounding such an article comes from the ambiguity as to what is considered as an element of national security, and the scope of the "necessary" action. The US administration has argued that this exception is "self-judging" or "non-justiciable", meaning that it cannot be questioned or debated about its

(1) Chad Bown, *The 2018 Trade War and the End of Dispute Settlement as We Know It*, VOXEU-The Center of economic Policy Research, (June 13, 2019), p. 1.

(2) Ibid.

(3) *General Agreement for Tariffs and Trade 1994*, Legal Instruments – Results of the Uruguay Round Vol. 1, 1994, (April 15, 1994), Article XXI, para. (b).

national security considerations as a matter of sovereignty, which supports concerns over the uncertainty involved in this article.(1) Denying an outside check could lead to copycat actions and encourage a protectionist wave that involves an uncontrolled rise in tariff and trade restrictive policies, which could threaten the functioning of the whole international trading system.(2)

In an attempt to deal with the risks associated with a potential increase in the use of the national security exception of Article XXI of GATT, The WTO has ruled in a later dispute between Ukraine and Russia that while the concept of national security is considered as self-judging for the concerned country, where it defines its essential security interests, the WTO has the right to review whether such claim was made in good faith or not.(3)

While such ruling has given the WTO a degree of control over the use of the national security exception as a ground to justify disputed policies, it could be seen to have made the matter even more complex, as it has the potential to turn the WTO dispute settlement process into a forum of discussions that is involved in the politics of international relations, which is a new dimension that would add pressure on the dispute settlement system of the WTO.(4)

The US has managed to disrupt the international trading system through a two-pronged strategy. It is violating the WTO rules through unilateral decisions to increase tariffs on products from its trading partners; and raising a considerable number of disputes while continuing to block

(1) David Autor, David Dorn, & Gordon Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, Annual Review of Economics 8(1), (2016), pp. 205-240.

(2) Bown, supra note 30, p. 1.

(3) Brandon Murril, *The National Security Exception"and the World Trade Organization*, Congressional Research Report No. 7-5700, Washington D.C., (November 28, 2018), https://digital.library.unt.edu/ark:/67531/metadc1404214/: Last accessed 10/ 1/ 2021.

(4) Parthapratim Pal, *WTO: Struggling to Stay Relevant*, The Hindu Business Line, (July 21, 2019), p. 2. https://www.thehindubusinessline.com/opinion/wto-struggling-to-stay-relevant/article28627776.ece , Last accessed 10/ 1/ 2021.

the appointment of the Appellate Body members in a clear disruption to the dispute settlement system.(1) Such practices of the US, which are reciprocated by other major trading countries, undermine the role of the WTO, which is currently struggling to remain relevant in the changing scenario of international trade.

It could be argued that the US tariff increase related to national security was only a reasonable response to China's model of state-driven economy. China's economy has expanded considerably in the last 20 years. In sectors like steel and aluminum, for example, production increased from 20% of global production in 2002 to more than 50% in 2017 despite the slowing domestic demand. Such an increase in production was a result of China's rise of subsidized export to international markets, which elevated its position to a potential global dominance.(2) In this regard, it is claimed that China has a history of abusing international market power once acquired, which leads to a great deal of concern related to anti-competitiveness grounds for the US side as a competitor.(3)

To deal with such a threat, the US could have resorted to the path of a formal dispute to counter Chinese subsidies. However, the US has long believed that the WTO legal framework was not well-equipped to deal with the Chinese style of subsidization. In this regard, the Chinese subsidization system is based on a complex combination of policies that makes it difficult for the subsidy-related rules of the WTO, which are designed primarily to deal with subsidies that are based on transparent and direct governmental payments to firms, to detect.(4)

China has maintained high tariffs on some sectors, such as automobiles, pushing foreign firms to access the Chinese market through foreign direct investment. However, China's joint venture requirements and other regulatory restrictions have created a great possibility for the forcible

(1) Ibid, pp. 3-4.

(2) Bown, supra note 30, p. 2.

(3) Ibid.

(4) Ibid.

transfer of foreign technology, industrial espionage, and theft of intellectual property.(1) China has created such a framework through a combination of policies, succeeding in making some high tariffs not inconsistent with the WTO system when viewed separately, leading to the inability of the dispute settlement system of the WTO to deal with such a situation.(2)

As a result, the US has claimed that it found itself in a situation where it had no option to protect its interests but to impose unilateral tariffs on $250 billion of imports, considering the inability of the WTO dispute settlement system to deal with the Chinese policies, which were considered to act against the spirit of the WTO system even though their illegality was carefully masked.(3)

One could argue that the US could have still dealt with China's policies effectively through the WTO dispute settlement system despite their non-apparent inconsistency with WTO rules. The US could have utilized the WTO's non-violation nullification and impairment clause under which China could still be found accountable for negatively affecting US trading interests despite the absence of an explicit violation of WTO rules.(4) However, such utilization of the concerned clause could prove not only not as straightforward as asking the dispute settlement system to examine explicit inconsistent measures, but also legally risky and challenging. In this regard, a process where complex policy interactions of a non-market economy are examined to assess their adverse impact on US economic interests does not provide the certainty and reliability the US needs to guard its interests, as the outcome of such a complicated process could go either way, with or against the US's aspiration from the use of such article.(5)

In addition, the US has repeatedly expressed its dissatisfaction against the judicial overreach of the WTO dispute settlement system and considered

(1) Section 301 Report, supra note 9.

(2) Bown, supra note 30, p. 3.

(3) Ibid, p. 2.

(4) Ibid, p. 3.

(5) Ibid.

it as an attempt from the WTO to encroach on national sovereignty. In fact, such dissatisfaction was reflected in the US's effort to disable the Appellate Body of the WTO by blocking the appointment of new members, which was viewed as a negative reaction to highlight its concern and push for its view of a tamed WTO dispute settlement system in terms of how it interprets and applies WTO rules. Therefore, requesting the WTO to convict another country despite the absence of an explicit violation of rules would be inconsistent with its declared philosophy and stand in favor of limitations governing the jurisdiction of the WTO dispute settlement system.(1)

Looking for alternatives the US could have used to counter China's claimed masked illegal practices within the WTO framework, it could be argued that the controversial national treatment tariff against China's steel and aluminum imports could have been replaced by other measures, such as antidumping tariffs or non-discriminatory safeguard tariff. The US had used antidumping tariffs before against China's steel and aluminum imports, which succeeded in restricting such imports directly entering from China, allowing, however, for trade diversion, as China's exports to third countries continued to rise, and ultimately making their way to the US market through such countries.(2) Also, the US has not had a good experience with non-discriminatory safeguard tariffs. The Appellate Body condemned US safeguards imposed over 1995-2003 through a series of legal rulings, including a 2002 US safeguard on steel.(3) Those elements have been provided as a rationale for the US administration's unilateral tariffs against China, as it had a concern that a WTO dispute was too risky and potentially unwinnable.

China has raised a dispute against the US's unilateral tariffs on steel and aluminum, which is still under a WTO panel review. However, China has recently won a dispute it brought against US tariffs enacted in June and September of 2018 on goods with an estimated annual value of more than $200 billion in trade. China's favorable panel ruling was used by the US to support its claim of the WTO inadequacy to deal with China's

(1) Ibid.

(2) Ibid.

(3) Ibid.

claimed unfair practices. This was clear in a statement issued by the US Trade Representative to the WTO, Robert Lighthizer, that states "this panel report confirms what the Trump Administration has been saying for the last four years: The WTO is completely inadequate to stop China's harmful technology practices".(1)

Even though the recent WTO panel ruling would not mean much in practice, as China has already retaliated against the US tariffs through counter-tariffs of their own, it is still considered important for China, as it adds a degree of legitimacy to its retaliatory measures even though they are still considered illegal for their unilateral application without authorization by the Dispute Settlement Body.(2)

The US has appealed the panel's decision to the Appellate Body despite the state of paralysis it is currently suffering from and its inability to function as a result of the US's blockage of the appointment of new members, which has subjected the US to criticisms of hypocrisy in its own positions, criticizing the Appellate Body over the way it functions, yet continuing to resort to it.(3)

Away from the hypocrisy criticisms, it is important to note in this regard that in addition to the series of the unauthorized substantial use of tariffs, the US-China trade war has managed to push the WTO to a breaking point yet again. It could be argued that the US move to appeal the panel decision was not a result of hypocrisy in its position more than it was a calculated move to dump the dispute in limbo, destroying in the process the credibility of the WTO dispute settlement system.

Because appealed panel decisions do not have a legal effect until the Appellate Body decision is issued, a mass appeal of panel decisions in the continuing absence of a functioning Appellate Body, as a copycat practice to what the US has done, would lead the WTO system to crash.(4)

---

(1) Bermingham, supra note 29, p. 3.

(2) Ibid, p. 4.

(3) Ibid, pp. 4-5.

(4) Ibid, p. 5. See also, Becker, Hafeez, Joshi, & Rosenberg, supra note 28, p. 2.

Throughout the US- China trade war, the WTO, as an institution responsible for maintaining the integrity of the international trading system, has been sitting on the sidelines, appearing helpless while watching the largest trade war in history unfold and escalate without making any noticeable move to stop it. The US has been blamed for provoking the trade war and paralyzing the Appellate Body, which has greatly affected the efficiency of the WTO dispute settlement system. However, it is important to note that the trade war would have not escalated if China had simply responded to the US tariffs through the WTO dispute settlement mechanism.(1) It is true that the US violated the WTO rules by applying its unilateral tariffs against China, but the Dispute Settlement Understanding of the WTO has placed the burden of avoiding a trade war on the victim of the violation in Article 23, which requires WTO members to address any violation through the Dispute Settlement Understanding procedures rather than unilateral counter- measures.(2)

Article 23 of the Dispute Settlement Understanding, which was designed to prevent the escalation of trade disputes into trade wars has failed in the case of the US-China conflict, when it was violated by both parties. It was violated by China imposing retaliatory unilateral tariffs against the US decision of unilateral tariffs, and by the US imposing counter retaliatory unilateral tariffs against China's retaliation.(3)

In practice, Article 23 has been involved in several WTO disputes under which violation was established. For example, in the US-Certain

(1) Qin, supra note 1, pp. 3-4.

(2) *Understanding of Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, April 15, 1994, Art. 23.

(3) Qin, supra note 1, p. 4.

EC Products,[1] after the banana regime of the EC was found inconsistent with WTO rules, the EC requested arbitration under Article 22.6 of the Dispute Settlement Understanding on the level of retaliation requested by the US. Out of frustration from the delayed arbitration procedure, the US implemented certain measures against EC imports, claiming that it was preserving its rights to suspend tariff concessions in the presence of the frustrating delaying tactics of the EC in implementing the Dispute Settlement Body's ruling. Despite the rationale provided by the US, the panel was strict in pointing to the illegality of the US measures regardless to the surrounding circumstances. This was clear when the panel stated:

[I]t is clear that a Member cannot find in another Member's violation a justification to set aside the prescription of the DSU. The US argument (which implies that it considers itself justified to do what it did because what the European Communities would have done was WTO illegal) is exactly what is prohibited by Article 23 of the DSU…In short, the regime of counter-measures, reprisals or retaliatory measures has been strictly regulated under the WTO Agreement.[2]

It is clear that the WTO Dispute Settlement Understanding has addressed the issue of unilateral unauthorized retaliation against violations of other WTO members, prohibiting the self-help tit-for-tat trade war. However, the US-China conflict, and the inability of the system to deal with reciprocal violations of both the US and China of Article 23, has demonstrated the absence of a practical remedy to ensure the implementation of the article in case where a trade war has broken out.

The US-China trade war has demonstrated certain gaps in the design of the Dispute Settlement Understanding to deal with such situations. Although Article 23 was rigorous in prohibiting unilateral retaliation outside the legitimacy of the dispute settlement mechanism, it does not

(1) Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WTO Doc. WT/DS165/R (July 17, 2000) [hereinafter Panel Report*, US – Certain EC Products*]; Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities,* WTO Doc. WT/DS165/AB/R (adopted Jan. 10, 2001).

(2) Panel Report, *US-Certain EC Products*, supra note 56.

have measures to deal with situations where retaliation is carried out on a tit-for-tat basis, ignoring the available channels within the system.(1)

Under the systematic design of the WTO dispute settlement system, the remedy for China's violation of Article 23, by imposing unilateral unauthorized retaliatory measures against the US's original violation of WTO rules, was for the US to resort to the dispute settlement mechanism. However, the US in this case decided not to use the system, rather it went on to make its own violation of Article 23, leading to reciprocal Article 23 violations by both parties, breaking down the Article's systematic check that is designed to prevent trade wars, which reveals a major gap in the Dispute Settlement Understanding.(2)

The need for reforms in the WTO

It is reasonable to assume that if the WTO had played a more active role at the beginning of the conflict to deal with the dispute, a different scenario could have taken place. The WTO takes pride in its legally-oriented dispute settlement system, which was a major development over the dominating power politics of the GATT system. However, a space should be given to a reconciliatory third-party intervention in some cases. In this regard, an intervention by the Director General of the WTO, with the assistance of a highly competent staff of the WTO Secretariat, could make a difference in tensions of trade conflicts, especially the ones that involve a degree of accumulated sensitivity that have the potential of exploding into an all-out trade war, such as the case between China and the US. Such intervention would be different from the alternative dispute settlement resolution provided in Article 5 of the Dispute Settlement Understanding,(3) but rather an additional procedure to ensure compliance with Article 23 of the Dispute

(1) Qin, supra note 1, p. 50.

(2) Ibid, p. 49.

(3) Article 5 procedures have never been used in WTO practice. The only case of mediation ever conducted by the Director General was at the request of the Philippines, Thailand, and the EC outside of Article 5. See *WTO Analytical Index*, DSU – Article 5 Jurisprudence, https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art5_jur.pdf

Settlement Understanding, dissuading the member from taking unilateral retaliatory measures in violation of the Article.

However, one could argue that despite some positive outcomes that might be associated with a more active role of the General Director of the WTO and its Secretariat, the WTO still needs major reforms to deal with new issues and challenges in the international trading system, and its Dispute Settlement Understanding needs to address some defects in its function, such as those that allowed for a trade war to escalate and for the Appellate Body to get paralyzed.

Critics say that since the creation of the WTO, the system has failed to evolve, as it has not updated its rules and commitments to accommodate changes in the new patterns of international trade.(1) The WTO system needs new rules to acknowledge the fact that China is not a market-oriented economy, and to be efficient in addressing its state-centered approach to international trade. It is also important for a new reform in the WTO that it effectively deals with the implicit and explicit subsidies that the Chinese economy is heavily involved in.(2)

The WTO dispute settlement system was a major improvement over the one under the GATT system, and it has functioned well despite the lack of reform. However, recent years have exposed some defects in the system that threaten not only its function but also the integrity of the whole WTO trading system. In this regard, the absence of new rules was compensated by overreaching interpretations during the dispute settlement process, especially at the Appellate Body stage. It is argued that some interpretations have been made in a way that goes beyond the scope that was negotiated and agreed on by members, as if such interpretations were establishing new rules.(3)

---

(1) Kazuhito Yamashita, *The WTO and TPP Amid the US-China Trade War*, The Japan Times, (June 29, 2020), https://www.japantimes.co.jp/opinion/2020/06/29/commentary/world-commentary/wto-tpp-amid-u-s-china-trade-war/ , Last accessed 15/ 1/ 2021.

(2) Silvia Amaro, *A Reform-Or-Die Moment: Why World Powers Want to Change the WTO*, CNBC, (Feb. 7, 2020), https://www.cnbc.com/2020/02/07/world-powers-us-eu-china-are-grappling-to-update-the-wto.html , Last accessed 16/ 1/ 2021.

(3) Yamashita, supra note 61.

It is reasonable to expect a degree of variation in the interpretation of WTO legal rules that deviates from the strictly stated intention of members, considering the fact that such legal texts were formulated as part of a political settlement and compromise that accommodates conflicting interests of various countries. Therefore, dispute settlement panels and the Appellate Body have been taking into account the spirit of the rules rather than the strict wording in their interpretation.(1) However, the US's refusal to appoint members of the Appellate Body, which has led to its paralysis, as a protesting move against its overreaching interpretations of WTO rules, presents this issue as an urgent point for consideration. The US's resort to this drastic measure of protest reflects the depth of the issue and the need to address it in any round of possible reforms.

Taking into account that such interpretations were conducted to compensate for shortages or gaps in WTO rules in the absence of new rules, the problematic issue of overreaching interpretation must be dealt with through an overhaul of such rules in a way that acknowledges various trade practices, policies, and developments that have impacted the international trading system. When the expanding and evolving scope of the trading system is regulated through a major review of the WTO rules, the need for such form of undesired interpretations would diminish.

In addition, it could be argued that the current mechanism of the WTO dispute settlement system contributes, unintentionally, in creating an environment of unauthorized retaliation that has the potential to escalate to trade wars. The long periods disputes are consuming for final conclusions to be reached,(2) and the prospective nature of remedies authorized under such conclusions are considered as discouraging factors against the utilization of the dispute settlement system to address trade violations. The outcome of a dispute progresses through a process that might take years to be finalized, especially when the mechanism is manipulated by delay tactics of violating members of which the system is unable to deal with.(3) After such long process, any authorized retaliation is prospective in nature that ignores all

(1) Ibid.

(2) Ibid.

(3) See example, *US-Certain EC Products*, supra note 56.

the damage that has occurred during the waiting period from the date of the violation to that when the authorized retaliation takes place.(1) Those two factors force, in some cases, countries to follow a self-help approach, and take things into their own hands by unilaterally encountering the violation, especially if the damage caused by such violation was too great to ignore or put off.

Any new reform of the dispute settlement system should shorten the timeframes of the process and equip the rules with a better ability to restrict any abuse through delaying tactics. In this regard, there is a need to adopt a retroactive approach in calculating nullification and impairment caused by the violation of measures when authorizing retaliation. The prospective nature of the current remedies provides an incentive for delaying tactics to absorb the benefits resulted from the violating measure until the very last minute, knowing that at the end when an authorization of retaliation is finally made by the Dispute Settlement Body, all past damages would be ignored.(2) This situation pushes WTO members in some cases to act unilaterally to try to stop the damage caused by a violation through counter measures, especially when the violation affects substantial interests, which in turn opens the door for tit-for-tat trade wars.

The introduction of retrospective retaliation at the end of the dispute settlement process would greatly contribute to settling disputes as early as possible to avoid an authorized retaliation that accumulates all damages caused by the violating measure from the starting point. The higher possibility of dispute settlement, and the retrospective approach of calculating damages that takes into consideration the collective value of the damage rather than its value starting after the date of the panel/ Appellate Body ruling, provide an incentive for countries to use the dispute settlement

(1) Hector Smitmans, Unresolved Issues in the WTO Understanding on Roles and Procedures Governing the Settlement of Disputes, in Dencho Georgiev & Kim Van Borght (Eds.), *Reform and Development of the WTO Dispute Settlement System*, (Cameron May, London, 2006), p. 255.

(2) Jacques Bourgeois, Sanctions and Countermeasures: Do the Remedies Make Sense?, in Dencho Georgiev & Kim Van Borght (Eds.), *Reform and Development of the WTO Dispute Settlement System*, (Cameron May, London, 2006), p. 42.

system, knowing that no damages caused by violating measures would be ignored in any decision to authorize retaliation.(1)

In addition, Article 23 should be part of any potential reform conducted on the Dispute Settlement Understanding of the WTO. The Article should have teeth that ensure its efficiency. A failure to abide by the mandate of Article 23 prohibiting unilateral unauthorized retaliation should be subject to a suitable remedy that addresses the violation. In this case, a suspension of WTO agreements could be initiated by the affected member of unauthorized retaliatory measures against the violating member upon the approval of the Dispute Settlement Body. The suspension, which would relieve both members from their WTO obligations owed to each other, would serve as a pressuring tool against the violating member until the unauthorized measures cease to exist. (2)

It is true that the WTO is currently witnessing a stage of stalled progress that resulted from the unprecedented state of divergent views and positions of its members towards an array of issues, which decreases the chances of reaching consensus on substantial reforms in the near future. However, there are some defects in the system that pushed it to a spectacular failure when it was subjected to serious tests. Therefore, there is a desperate need for substantial reforms to be conducted on the WTO system to maintain its role as the main regulator of the international trading system.

Conclusion

The US-China relations have been witnessing conflicts and confrontations in nearly all fronts, with the COVID-19 pandemic recently added as another cause of friction between the two countries. The current undeclared cold war between the two superpowers could be traced originally to the two countries' fight over the throne of global economic dominance. The US-China trade war has reflected the economic race between the two countries, and its magnitude has clearly demonstrated what at stake.

(1) William Davey, *Implementation in the WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions*, Illinois Public Law Research Paper N. 05-16, The University of Illinois College of Law, (2005), p. 14.

(2) Qin, supra note 1, p. 53.

The fact, however, that such a trade war has been waged outside the legal framework of the WTO involves disastrous consequences on the system. The US provoked the trade war with China through its aggressive unilateral violating measures of the WTO law to address certain problematic practices and policies of the Chinese trading regime. China, in turn, retaliated unilaterally in breach of Article 23 of the Dispute Settlement Understanding. Those reciprocal violations have opened the door for reciprocal unilateral retaliatory measures between the two countries, creating as a result a bone-breaking trade war that has pushed the WTO trading system to a spectacular failure that raised questions as to the actual extent under which the WTO can maintain its control over international trade. Other than the magnitude of the US-China trade war as a reason for its significance, such a trade war has managed to expose substantial defects in the WTO trading system.

There is a need for reforms in the WTO trading system to accommodate new areas of international trade and address controversial trade policies that the WTO system is claimed to have failed in dealing with. In relation to its dispute settlement system, it is true that WTO members today have the benefit of a rule-based system that is designed to covert retaliation "from a weapon of economic warfare to an instrument of international order".(1) However, this critical function has failed in the US-China trade war.

The WTO dispute settlement system needs to become more equipped to deal with trade conflicts that ignore its available mechanism for dispute settlement and restrict the chances for such conflicts to escalate to trade wars. Therefore, it has become a top priority in any potential WTO reform to improve multilateral control over unilateral retaliation.

(1) *UN Conference on Trade and Employment, Economic and Social Council*, 2nd Sess., 6th mtg., UN Doc. E/PC/T/A/PV/6 (June 2, 1947) (statement of Clair Wilcox (US)), p. 4.

Bibliography

Karen, A. (2019). Time for a World Trade Organization 2.0. Wall Street Journal. https://www.wsj.com/articles/time-for-a-world-trade-organization-2-0-11568577021. Last accessed 28/12/2020.

Silvia, A. (2020). A Reform-Or-Die Moment: Why World Powers Want to Change the WTO. CNBC. https://www.cnbc.com/2020/02/07/world-powers-us-eu-china-are-grappling-to-update-the-wto.html. Last accessed 16/ 1/ 2021.

David, A., David, D., & Gordon, H. (2016). The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade. Annual Review of Economics, 8(1). https://doi.org/10.1146/annurev-economics-080315-015041

Stephan, B., Sahar, H., Moushami, J., & Rosenberg, S. (2020). World Trade Organization Panel Finds Section 301 Tariffs on Chinese Products Violate WTO Rules, but Decision Unlikely to Have Impact on Tariffs. Pillsbury Global Trade and Sanctions Law.https://www.jdsupra.com/legalnews/world-trade-organization-panel-finds-32031/. Last accessed 2/1/2021.

Finbarr, B. (2020). US Lodges Appeal Against WTO Ruling in China's Favor Over Trade War Tariffs. South China Morning Post. https://www.scmp.com/economy/china-economy/article/3107147/us-lodges-appeal-against-wto-ruling-chinas-favour-over-trade. Last accessed 3/1/2021

Bourgeois, J. (2006). Sanctions and Countermeasures: Do the Remedies Make Sense?, in D. Georgiev & K. V. Borght (Eds.), Reform and Development of the WTO Dispute Settlement System. Cameron May.

Chad, B. (2020). US-China Trade War Tariffs: An Up-to-Date Chart. Perterson Institute for International Economics: Charts. http://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart. Last accessed 20/12/2020.

Chad, B. (2019). The 2018 Trade War and the End of Dispute Settlement as We Know It VOXEU-The Center of Economic Policy Research.

(2018). China-Certain Measures Concerning the Protection of Intellectual Property Rights. World Trade Organization (WTO), WTO/DS542.

(2018). China-Certain Measures on the Transfer of Technology. World Trade Organization, WTO/DS549.

Terence, C., & Xiaoyang, L, (2019). Understanding China-US trade War: Causes, Economic Impact, and the Worst-Case Scenario [Working Paper No. 71]. Lau Chor Tak Institute of Global Economics and Finance, The Chinese University of Hong Kong.

William, D. (2005). Implementation in the WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions. Illinois Public Law Research Paper, No 05-16.

(1994). General Agreement for Tariffs and Trade 1994. Legal Instruments – Results of the Uruguay Round, 1.

Morison, M. (2018). China-US Trade Issues. Congressional Research Report, No. 7-5700. https://fas.org/sgp/crs/row/RL33536.pdf. last accessed 28/12/2020.

Brandon, M. (2018). The "National Security Exception" and the World Trade Organization. Congressional Research Report, No. 7-5700. (https://digital.library.unt.edu/ark:/67531/metadc1404214/: Last accessed 10/ 1/ 2021)

Office of the U.S. Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (March 22, 2018) [hereinafter Section 301 Report].

Parthapratim, P. (2019). WTO: Struggling to Stay Relevant. The Hindu Business Line. https://www.thehindubusinessline.com/opinion/wto-struggling-to-stay-relevant/article28627776.ece. Last accessed 10/ 1/ 2021.

Arvind, P. (2018). The Trade War has Claimed its First Victim. Foreign Policy. https://foreignpolicy.com/2018/10/19/the-trade-war-has-claimed-its-first-victim/. Last accessed, 15/ 1/ 2021.

Panel Report. United States – Import Measures on Certain Products from the European Communities, WTO Doc. WT/DS165/R (July 17, 2000) [hereinafter Panel Report, US – Certain EC Products]; Appellate Body Report, United States – Import Measures on Certain Products from the European Communities, WTO Doc. WT/DS165/AB/R (adopted Jan. 10, 2001).

Julia, Q. (2020). WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons From the US-China Trade War. Wayne State University Law School Legal Studies, Research Paper Series No. 2020-73.

Smitmans, H. (2006). Unresolved Issues in the WTO Understanding on Roles and Procedures Governing the Settlement of Disputes, in D. Georgiev & K. V. Borght (Eds.), Reform and Development of the WTO Dispute Settlement System. Cameron May.

Renata, T. (2018). An Analysis of the US-China Trade War: How the Section 301 China Intellectual Property Case May Impact New Directives to Promote the 'Made in China 2025'. SSRN Electronic Journal. https://www.researchgate.net/publication/328392038_An_Analysis_of_the_US-China_Trade_War_How_the_Section_301_China_Intellectual_Property_Case_May_Impact_New_Directives_to_Promote_the_'Made_in_China_2025. Last accessed 24/12/2020.

UN Conference on Trade and Employment, Economic and Social Council, 2nd Sess., 6th mtg. at 4, UN Doc. E/PC/T/A/PV/6 (statement of Clair Wilcox (US)), (June 2, 1947).

Understanding of Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, April 15, 1994.

United States and China Reach Phase One Trade Agreement, Office of the US Trade Representative (Dec. 13, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach. Last accessed 20/ 12/ 2020

Dorcas, W., & Alexander, K. (2020). The US-China Trade War: A Timeline. China Briefing. https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/ , last accessed 22/12/2020.

WTO Analytical Index, DSU – Article 5 Jurisprudence, https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art5_jur.pdf

Wang, X. (2018). Analysis: Is the Trade War Spelling the End of the WTO. China Daily. https://www.chinadaily.com.cn/a/201808/28/WS5b8491eca310add14f3880fc.html. Last accessed 26/ 12/ 2020.

Kazuhito, Y. (2020). The WTO and TPP Amid the US-China Trade War. The Japan Times. https://www.japantimes.co.jp/opinion/2020/06/29/commentary/world-commentary/wto-tpp-amid-u-s-china-trade-war/. Last accessed 15/ 1/ 2021.

الحرب التجارية بين الولايات المتحدة والصين: الأزمة غير المسبوقة لمنظمة التجارة العالمية

صالح عدنان الشريده[1]

ملخص البحث:

تسببت الحرب التجارية بين الولايات المتحدة الأمريكية والصين في قدر كبير من الاضطراب في النظام التجاري العالمي. الحرب التجارية التي شملت أكبر قوتين اقتصاديتين في العالم تضمنت زيادة كبيرة في الحواجز التجارية والتي أثرت على معظم التبادل التجاري بين البلدين. لكن الأمر الأكثر إثارة للقلق هو أن هذه الاجراءات التقييدية المتبادلة والانتقامية قد تم فرضها خارج اطار منظمة التجارة العالمية وآلياتها لتسوية المنازعات التجارية. لقد أدت الحرب التجارية بين الولايات المتحدة والصين الى تهميش منظمة التجارة العالمية، وكشفت لديها عيوب ونقاط ضعف في قدرتها على التعامل مع مثل هذه الحالات.

تسعى هذه الدراسة الى فهم أسباب الحرب التجارية بين الولايات المتحدة والصين وفشل منظمة التجارة العالمية في منعها. كما تسعى إلى تناول الخيارات التي من شأنها تحسين قدرة منظمة التجارة العالمية على التعامل مع النزاعات المماثلة للحفاظ على كفاءة دورها باعتبارها الهيئة الدولية الرئيسة التي تنظم التجارة الدولية، ومكانتها كضامن لقواعد ومبادئ حرية التجارة الدولية.

الكلمات الدالة: الحرب التجارية، الولايات المتحدة، الصين، منظمة التجارة العالمية، حل المنازعات

(1) كلية القانون – جامعة الشارقة (الشارقة – الإمارات العربية المتحدة)

salshraideh@sharjah.ac.ae