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WTO Reform: Multilateral Control over Unilateral Retaliation - Lessons from the US-China Trade War

Julia Ya Qin

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Julia Ya Qin, *WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons from the US-China Trade War*

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WTO REFORM: MULTILATERAL CONTROL OVER UNILATERAL RETALIATION – LESSONS FROM THE US-CHINA TRADE WAR

JULIA YA QIN*

Preventing trade wars is a key function of the World Trade Organization (WTO) rule-based system. But as the United States (US) and China waged the largest trade war in history, the WTO sat on the side-lines, unable to do anything to stop the fight. Why has the system failed so spectacularly? In a search for answers, this article examines the context of the US-China conflict and makes a number of findings. First, under WTO law, the burden of avoiding this trade war was placed on China, the victim of US aggressive unilateral tariffs; and contrary to China's claim, its retaliatory tariffs cannot be justified by general principles of international law. Second, the WTO rule prohibiting unilateral retaliation was born out of a grand political bargain, but it embodies the wisdom of Adam Smith and achieves the goal of the Havana Charter to turn retaliation into an instrument of international order. Third, the WTO's inability to prevent China's resort to unilateral retaliation reveals a deficiency in its existing legal design, but that deficiency can be fixed procedurally as proposed herein. Given the importance of preventing large-scale trade wars in the future, improving multilateral control over unilateral retaliation should be a top priority in WTO reform.

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I. INTRODUCTION

There is a broad consensus that the WTO is in need of reform. The reform agenda, however, needs to include one item that has been so far overlooked: how to improve the trading system so as to prevent *trade wars*,¹ like the one being waged between the US and China since 2018.

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¹ 'Trade war' is not a legally defined term. In this article, a trade war refers to a situation in which countries raise trade barriers against each other's products, typically in the form of tariff or non-tariff restrictions on imports.

The ongoing US-China conflict encompasses the largest trade war in history. Even after the two countries called a truce with their phase-one deal in January 2020, tariffs mutually imposed remain escalated and extensive, affecting most products in the US-China bilateral trade. More seriously, the tariff war has extended to the fields of technology, science, education, finance, and beyond. The geopolitical tension created by the trade war has been exacerbated by the COVID-19 pandemic, causing bilateral relations to deteriorate to their lowest level in decades and pushing the world to the brink of a new Cold War.

Since the spring of 2018, the Trump administration has launched several trade wars by imposing or threatening extra import tariffs on steel, aluminium, automobiles, and auto parts, from most of its trading partners, and on most of the products from China.² Unlike other *trade wars* the Trump administration provoked, in which the responses of other countries have been largely in line with the WTO rulebook so that the conflicts have not escalated,³ the US-China trade war has been waged entirely outside the WTO legal framework, and hence has metastasized beyond the multilateral control.

Avoiding trade wars is one of the key functions of the WTO system. Throughout the US-China trade conflict, however, the WTO as an institution has been sitting on the side-lines, watching the trade war unfold and escalate, appearing helpless and unable to do anything to stop the fight. On this score, the system has failed spectacularly.

Remarkably, there has been little discussion about the WTO's inability to prevent, or even ameliorate the largest trade war in history. Many would blame the US for provoking the trade war and for paralysing the Appellate Body, which has crippled the WTO dispute settlement mechanism.⁴ It is true that the WTO has been in a

² For status of the tariff wars, see Chad Bown & Malina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. FOR INT'L ECON.: TRADE & INV. POL'Y WATCH (Sept. 28, 2020), <https://www.piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide> [hereinafter Bown & Kolb].

³ See *infra*, Part IV.F. text accompanying notes 184-190.

⁴ See, e.g., Steve Charnovitz, *Grading Trump's China Trade Strategy*, in 10 EUR. Y.B. INT'L ECON. L. 217 (M. Bungenberg et al. eds., 2019). The Trump administration has single-handedly blocked the process of filling any vacancy in the Appellate Body since 2017, citing systemic concerns about the Appellate Body. As a result, the Appellate Body was reduced to one member as of December 10, 2019, which is below the minimum three-member threshold needed to hear new appeals. Although the dispute panel proceedings remain intact, the dysfunction of the Appellate Body deprives a party of the right to appeal decisions of dispute panels. See *Members urge continued engagement on resolving Appellate Body issues*, WTO (Dec. 18, 2019), https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm. Currently, except

crisis provoked by the Trump administration. Yet, what has been overlooked is the fact that the US-China trade conflict would not have escalated if China had simply adhered to the requirements of the WTO Dispute Settlement Understanding (DSU). It is important to clarify that under the DSU, the burden of avoiding a trade war is placed on the “victim” of a WTO violation, rather than on the party guilty of a WTO violation. Specifically, DSU Article 23 requires that in seeking redress for a WTO violation, WTO Members must follow the DSU procedure and must not seek unilateral self-help. It is through this requirement that the WTO attempts to maintain multilateral control over the timing and scale of retaliatory measures, thereby preventing a trade dispute from escalating into a trade war.

Unfortunately, this mechanism failed in the case of the US-China conflict. Clearly, China has breached its obligation under DSU Article 23 by imposing retaliatory tariffs unilaterally; and the US has violated the same by imposing counter-retaliatory tariffs unilaterally. With each round of tariff escalation, both countries have repeated the same WTO-illegal behaviour. But why has the system been unable to stop these breaches? Is it because WTO law has reached its inherent limits, given that the conflict is between the two largest economic powers at an unprecedented scale? If so, there would be little that could be done as a matter of international law to prevent such a trade war. Or is it because the negotiators of the DSU never anticipated the possibility of such an occurrence, thus did not devise the rules necessary for dealing with the contingency? If so, the issue of how to improve the systemic design should be put on the WTO reform agenda.

This article seeks to understand the causes of WTO’s failure to prevent the US-China trade war and explores what can be done to improve the system. The article will proceed as follows. Part II will provide an overview of the US-China trade war. Part III will analyse the illegality of unilateral retaliation under DSU Article 23 and the lack of possible defences under general international law for the violation of DSU Article 23. Part IV explores the wisdom of DSU Article 23 discipline. It does so by explaining the underlying rationale of the DSU rule and by tracing the evolution of international legal disciplines on trade retaliation. Drawing lessons from the US-China trade war, Part V will identify a deficiency in the design of the DSU and propose an additional mechanism for the enforcement of DSU Article 23 discipline. Part VI concludes.

in cases in which the disputing parties agree not to appeal or agree to appeal through alternative dispute settlement mechanism, such as the interim appeal arbitration mechanism set up by the EU and other Members (*See Interim appeal arrangement for WTO disputes becomes effective*, EUR. COMMISSION (Apr. 30, 2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>), the WTO dispute settlement system cannot deliver a final binding decision.

II. THE US-CHINA TRADE WAR: AN OVERVIEW

US-China relations have undergone fundamental changes in the past two decades. Twenty years ago, it was the support of the US that sealed the deal for China's accession to the WTO. The US had expected that the WTO accession would help liberalise China, both economically and politically, thereby transforming the country into a truly market-based economy and an open society.⁵ Contrary to US expectations, China's integration into the global economy has only worked to strengthen its State-led development model and authoritarian rule. Within the past two decades, China's economy has grown tenfold, with its Gross Domestic Product (GDP), measured by purchasing power parity (PPP), surpassing that of the US.⁶ Today, China is not only the world's manufacturing giant but also a technology powerhouse. The wealth accumulated at home has fuelled China's investment overseas and enabled its trillion-dollar Belt and Road Initiative that challenges the geopolitical *status quo*.⁷

It appears that three major concerns drove the US into initiating the trade war: (a) China's chronically large trade surplus that depresses job creation in the US; (b) China's acquisition of US technology through illegal and unfair means; and (c) The perceived China's attempts to weaken US national security and international standing.⁸ Specifically, American businesses have long complained about Beijing's unfair trade practices, including currency manipulation, industrial policies, government subsidies, State-owned enterprises (SOE), monopolies, intellectual property (IP) theft, regulatory discrimination, and other implicit trade and investment barriers. Previous US administrations relied on bilateral consultations and the WTO multilateral forum to address these complaints.⁹ Under the Trump administration, the US has been more willing to abandon multilateralism and

⁵ See Bill Clinton, President, US, Speech on China Trade Bill at the Paul H. Nitze School of Advanced International Studies of the Johns Hopkins University (Mar. 9, 2000).

⁶ China's nominal GDP was \$1.3 trillion in 2001 and grew to \$14.3 trillion in 2019. China's GDP (PPP) reached \$23.46 trillion as compared to \$21.37 trillion of US GDP (PPP) in 2019. See *China*, WORLD BANK GROUP, <https://data.worldbank.org/country/china>; GDP, PPP (current international \$), WORLD BANK GROUP, <https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD>.

⁷ See *United States Strategic Approach to the People's Republic of China*, WHITE HOUSE (May 20, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.20.20.pdf>, for the US government's comprehensive assessment of the China challenges [hereinafter WHITE HOUSE].

⁸ Tao Liu & Wing Thyee Woo, *Understanding the U.S.-China Trade War*, 11(3) CHINA ECON. J. 319 (2018).

⁹ However, the view that China's unique politic-economic system threatens the global trading system had gained traction prior to the Trump era. See Mark Wu, *The "China's Inc." Challenge to Global Trade Governance*, 57(2) HARV. J. INT'L L. 1001 (2016).

pursue aggressive unilateralism instead.¹⁰ The United States Trade Representative (USTR) even declared that it was a mistake to admit China into the WTO,¹¹ and that China's State-led economy constitutes an unprecedented threat to the world trading system.¹² Thus, after an initial *honeymoon* period with Beijing, the Trump administration launched an investigation into China's practices relating to technology transfer and IP under Section 301 of the Trade Act of 1974, which led to the beginning of the trade war.¹³

A. US Section 301 Tariffs

The US-China trade war was officially triggered by the US allegations of China's unfair trade practices in technology transfer and IP under Section 301 of the Trade Act of 1974. Section 301, a highly controversial US statute,¹⁴ authorises the US government to take trade actions against a foreign country if it determines that the foreign country has engaged in "unreasonable or discriminatory" policies or practices that burden or restrict US commerce.¹⁵ In this case, the Office of the USTR initiated the Section 301 investigations in August 2017 and released its report on March 22, 2018 (Section 301 Report).¹⁶ The Section 301 Report made

¹⁰ In addition to creating the Appellate Body crisis, the Trump administration resorted to unilateral tariffs to address trade and non-trade related issues with many WTO members. In addition to the China tariffs, since March 2018, the US has imposed 25% tariffs on steel and 10% on aluminium from most countries and has threatened 25% tariffs on imports of automobiles and auto parts, all in the name of national security. On May 30, 2019, President Trump threatened to levy extra tariffs on all imports from Mexico until illegal immigrants stopped entering into the US through Mexico. For details of the tariff wars, *see* Bown & Kolb, *supra* note 2.

¹¹ OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 REP. TO CONG. ON CHINA'S WTO COMPLIANCE 16 (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

¹² Robert Lighthizer, *US Trade Policy Priorities*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 18, 2017), <https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative>.

¹³ In April 2017, President Xi Jinping visited President Trump at Mar-a-Largo, which led to an accord on a "100-day action plan" on economic cooperation. After the 100-day action plan failed to achieve any result, the USTR initiated the Section 301 investigation in August 2017. The bilateral relations remained stable until after Trump's formal State visit to China in November 2017.

¹⁴ *See infra*, Part IV.E.

¹⁵ The Trade Act of 1974, 19 U.S.C. § 2411(b).

¹⁶ 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 (Mar. 22, 2018) [hereinafter SECTION 301 REPORT].

four findings: (a) China forced US firms to transfer technologies to Chinese entities via administrative processes and equity restrictions; (b) China's technology licensing requirements are discriminatory against foreign firms; (c) China systematically acquired businesses in the US to obtain cutting-edge technologies; and (d) China was involved in cyber theft of American IP. It estimated that the cost of Chinese theft of American IP was between \$225 billion and \$600 billion annually.¹⁷

Based on the findings of the Section 301 Report, the Trump administration pursued three courses of action.¹⁸ First, it levied extra tariffs on Chinese products (Section 301 tariffs), which was supposed to be a response to China's unfair practices not covered by existing WTO law,¹⁹ and as compensation for the loss of American IP assets due to such practices.²⁰ Second, it filed a WTO complaint, claiming that China's technology licensing requirements violated the non-discrimination requirement of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²¹ Third, it amended domestic law to tighten restrictions on China's direct investment in the US on national security grounds.²²

¹⁷ *Id.* Appendix C, at 9 (reporting the estimate by the Commission on the Theft of Intellectual Property (the IP Commission)). It should be noted, however, that the IP Commission Report reported the same estimated numbers as the total cost of IP theft of American IP from the entire world, rather than from China alone, although it also identified China as the worst offender. See NAT'L BUREAU OF ASIAN RESEARCH, UPDATE TO THE IP COMMISSION REPORT, THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENT OF THE CHALLENGE AND U.S. POLICY 12-13 (2017).

¹⁸ *President Trump Announces Strong Actions to Address China's Unfair Trade*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Mar. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/president-trump-announces-strong>.

¹⁹ Statements by the United States at the Meeting of the WTO Dispute Settlement Body (Mar. 27, 2018), https://geneva.usmission.gov/wp-content/uploads/sites/290/Mar27.DSB_Stmt_as-delivered.fin_rev_1.pdf, claiming that three of the four categories of China's practices covered by its Section 301 investigation "did not appear to implicate specific WTO obligations." Dispute Settlement Body, *Minutes of Meeting held in the Centre William Rappard on 27 March, 2018*, WTO Doc. WT/DSB/M/410, ¶ 11.3 (June 26, 2018) [hereinafter *US statement at the DSB meeting*].

²⁰ WHITE HOUSE, *supra* note 7.

²¹ See Request for Consultations by the United States, *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 26, 2018). The proceeding was later suspended at the request of the US, apparently due to changes in the relevant Chinese regulation. For status of the dispute, see *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542 (last update Jan. 16, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm.

²² The Foreign Investment Risk Review Modernization Act of 2018 was enacted in August 2018, which provides the Committee on Foreign Investment in the United States (CFIUS) with greater flexibility in scrutinising foreign direct investment [hereinafter FIRRMA]. For

The Section 301 tariffs were levied in three rounds. The initial round was announced on April 3, 2018, and covered \$50 billion worth of Chinese products at the rate of 25%. The tariffs went into effect in the summer of 2018 (\$34 billion on July 6, 2018, and \$16 billion on August 23, 2018). In response to China's retaliatory tariffs of the same magnitude, the US announced the second round of tariffs in September 2018, which covered an additional \$200 billion of Chinese imports, with a rate of 10% effective on September 24, 2018, to be increased to 25% on January 1, 2019. The increase to 25% did not take effect until May 10, 2019, after the negotiations of a promising bilateral deal broke down. In response to China's second round of retaliatory tariffs, the US announced the third round of the Section 301 tariffs in August 2019, covering an additional \$300 billion of Chinese products. This third round was implemented in part on September 1, 2019, when 15% tariffs went into effect on \$120 billion of Chinese imports. Thanks to the US-China phase-one trade deal, the remainder of the third-round tariffs was called off and the then existing 15% rate was reduced by half.²³ At the time of writing, Section 301 tariffs remained in effect for \$370 billion of Chinese imports (7.5% on \$120 billion and 25% on \$250 billion), covering more than two-thirds of China's total goods exports to the US.²⁴

B. *China's Responses*

The initial reaction of China to the Section 301 Report was complete outrage. China expressed its indignation at the meeting of the WTO Council for Trade in Goods soon after the release of the Section 301 Report. At the meeting, China recalled the chequered history of Section 301, condemned the US "resurrection" of Section 301 investigations as a violation of WTO law, and called on WTO Members to jointly "lock this beast [of Section 301 investigations] back into the

the impact of the new law on Chinese investment, see S. Dickinson, *New CFIUS Rules Shut Down Chinese Investment in U.S. Technology*, CHINA L. BLOG (Jan. 16, 2019), <https://www.chinalawblog.com/2019/01/new-cfius-rules-shut-down-chinese-investment-in-u-s-technology.html>.

²³ For details of tariffs levied during the US-China trade war, see Chad Bown, *US-China Trade War Tariffs: An Up-to-Date Chart*, PETERSON INST. FOR INT'L ECON.: CHARTS (Feb. 14, 2020), <https://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart>.

²⁴ See *United States and China Reach Phase One Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Dec. 13, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach>. The US goods imports from China totalled \$539.5 billion in 2018. See *The People's Republic of China*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>.

cage of the WTO rules.”²⁵ China also declared that it would “firmly take the WTO rules and *other necessary means* to safeguard its legitimate rights and interests” (emphasis added).²⁶ On April 4, 2018, one day after the US announced its decision to levy Section 301 tariffs, China responded by: (a) filing a WTO lawsuit against the US;²⁷ and (b) announcing its decision to levy retaliatory tariffs.²⁸

Beijing has since continued this two-track strategy. On the WTO front, China has filed two more WTO complaints challenging the Section 301 tariffs.²⁹ On the front of retaliatory tariffs, China has adopted a tit-for-tat policy. Whenever the Trump administration has announced or imposed new tariffs on Chinese products, China has responded with the announcement or imposition of new retaliatory tariffs. For the initial round of the Section 301 tariffs, China’s retaliation was of the same magnitude (25% tariffs on \$50 billion of US imports). For the second and third rounds, China’s retaliatory tariffs covered less quantity than the US tariffs, as the total value of US goods exports to China is disproportionately less than that of Chinese exports to the US.³⁰ To make up the quantitative difference, China applied

²⁵ Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods on 23 and 16 March 2018*, G/C/M/131 (Oct. 5, 2018), ¶ 25.4 [hereinafter *Minutes of the Meeting of the Council for Trade in Goods*].

²⁶ *Id.* Notably, except for Japan, the EU and the US, no other WTO Member responded to China’s statement at the meeting. While the US defended its action, Japan and EU both stated that they shared US concerns about China’s IP practice, although the EU also “called on the relevant parties to ensure that their trade actions were WTO-compliant”. *Id.* ¶¶ 25.5-25.8.

²⁷ See Request for Consultations by China, *United States — Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/1 (Apr. 5, 2018) [hereinafter Request for Consultations, Apr 2018].

²⁸ Ministry of Commerce of the People’s Republic of China (MOFCOM) announced 25% additional tariffs on \$50 billion of US products. See MOFCOM *Announcement No. 34 of 2018 on Imposing Additional Tariff on Several Imports of Products Originating in the U.S.*, MOFCOM (Apr. 4, 2018), <http://english.mofcom.gov.cn/article/policyrelease/buwei/201804/20180402734699.shtml> 1 [hereinafter *MOFCOM Announcement No. 34*].

²⁹ Request for Consultations by China, *United States — Tariff Measures on Certain Goods from China II*, WTO Doc. WT/DS565/1 (Aug. 27, 2018) [hereinafter Request for Consultations by China, *United States — Tariff Measures on Certain Goods from China II*]; Request for Consultation by China, *United States — Tariff Measures on Certain Goods from China III*, WTO Doc. WT/DS587/1 (Sept. 4, 2019) [hereinafter Request for Consultation by China, *United States — Tariff Measures on Certain Goods from China III*]. At the time of writing, the two cases remain in the consultation stage.

³⁰ In 2018, US goods exports to China were \$120 billion whereas China goods exports to the US were \$539 billion. See *The People’s Republic of China*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>.

varying rates to its retaliatory tariffs,³¹ and threatened unspecified “qualitative measures” against the US.³² After the phase-one deal, more than a half of the US imports to China remain subject to China’s retaliatory tariffs.³³

In the midst of the trade war, China also took a number of trade liberalisation measures unilaterally. In 2018, China reduced its Most Favoured Nation (MFN) tariffs (i.e., tariffs applied on a non-discriminatory basis) on more than 1500 products, ranging from auto parts to medicine to consumer goods, causing its overall tariff level to drop from 9.8% to 7.5%.³⁴ In 2019 and 2020, China further reduced import tariffs on hundreds of products, including food, medicine, and information technology goods.³⁵ These measures helped China to partially offset the adverse effect of its retaliatory tariffs on the US imports. Furthermore, China eased restrictions on foreign direct investment (FDI). In June 2018, China adopted a new “negative list” approach, under which the number of equity restrictions on FDI has been reduced from sixty-three to forty.³⁶ More significantly, China

³¹ In the second round of retaliation implemented between September 2018 and May 2019, China imposed new tariffs on \$60 billion of US goods, with rates varying from 5% to 25%. In the third round, China announced new tariffs on \$75 billion of US goods, with rates varying from 5% to 10%, which rates were cut in half as a result of the phase-one deal. Note that the new tariffs hit many of the same products already covered by previous rounds. See Chad Bown, *Phase One China Deal: Steep Tariffs Are the New Normal*, PETERSON INST. FOR INT’L ECON.: TRADE & INV. POL’Y WATCH. (Dec. 19, 2019), <https://www.piie.com/blogs/trade-and-investment-policy-watch/phase-one-china-deal-steep-tariffs-are-new-normal> [hereinafter Bown].

³² MOFCOM Spokesman Comments on the White House’s Statement Released on June 18, MOFCOM (June 20, 2018), <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201806/20180602759964.shtml>. See also Tom Mitchell & Shawn Donnan, *China Readies Non-Tariff Weapons in US Trade Spat*, FIN. TIMES (June 19, 2018), <https://www.ft.com/content/4bacf050-7396-11e8-aa31-31da4279a601>; Megan Cassella, *China is finding new ways to hurt US businesses*, POLITICO (Dec. 27, 2018), <https://www.politico.com/story/2018/12/27/china-us-business-1074184>.

³³ See Bown, *supra* note 31.

³⁴ See *Further tariff cuts to boost trade, consumption*, MOFCOM (Oct. 9 2018), <http://english.mofcom.gov.cn/article/services/supplydemandofchina/demand/201810/20181002793354.shtml>; See also *2019 tariff adjustments announced*, DELOITTE (Dec. 24, 2018), <https://www.taxathand.com/article/10960/China/2018/2019-tariff-adjustments-announced> (The MFN rate deductions did not apply to the US).

³⁵ See *China will lower import tariffs on over 850 products from January 1, finance ministry says*, CNBC (Dec. 22, 2019), <https://www.cnbc.com/2019/12/23/china-will-lower-import-tariffs-on-over-850-products-from-january-1.html>; Deloitte, *2020 tariff adjustments announced* (Dec. 30, 2019), <https://www.taxathand.com/article/12750/China/2019/2020-tariff-adjustments-announced>.

³⁶ *Order of the National Development and Reform Commission of the People’s Republic of China and the Ministry of Commerce of the People’s Republic of China No.18 of 2018 on Special Administrative*

adopted a new Foreign Investment Law, which came into effect on January 1, 2020.³⁷ Under the new law, except for sectors specified in the negative list, foreign investment projects no longer require separate government approval, thus reversing China's basic FDI policy of the prior forty years.³⁸ The new law also contains an explicit prohibition of government agencies and their staff from engaging in "forced technology transfer",³⁹ a practice whose existence Beijing has consistently denied.

To date, China has articulated its position on the US-China trade conflict in two white papers. The first paper, released in September 2018, discussed why the US-China economic relations are mutually beneficial, denied every accusation in the Section 301 Report of China's unfair trade practices, and condemned the US for trade protectionism and bullying.⁴⁰ It articulated several principal positions of China, the first of which is that China is firmly committed to safeguarding "its national dignity and core interests".⁴¹ It repeated the standard statement that "China does not want a trade war, but it is not afraid of one and will fight one if necessary", but called for the US-China trade disputes to be addressed "through bilateral consultation or the WTO dispute settlement mechanism."⁴² The shorter second paper was issued in June 2019, which condemned the US for provoking the

Measures (Negative List) for Foreign Investment Access (2018 Edition), MOFCOM (June 29, 2018), <http://english.mofcom.gov.cn/article/policyrelease/aaa/201807/20180702765903.shtml>; *New Negative List to Further Encourage Foreign Investment*, MOFCOM (July 10, 2019), <http://english.mofcom.gov.cn/article/counselorsreport/americandoceanreport/201908/20190802888874.shtml>.

³⁷ *Zhonghua Renmin Gongheguo Waishang Touzi Fa* (中华人民共和国外商投资法), (promulgated by the Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020) (China), translated in *Foreign Investment Law of the People's Republic of China*, US-CHINA BUSINESS COUNCIL, https://www.uschina.org/sites/default/files/foreign_investment_law_of_the_peoples_republic_of_china_-_unofficial_translation.pdf.

³⁸ *Id.* art. 4 (granting foreign investors national treatment with respect to market access in all sectors other than those specified in the negative list).

³⁹ *Id.* art. 22 (no "forced transfer of technologies"), art. 23 (no disclosure of trade secrets), art. 39 (penalties).

⁴⁰ *The Facts and China's Position on the China-US Trade Friction*, STATE COUNCIL OF CHINA (Sept. 26, 2018), http://english.www.gov.cn/archive/white_paper/2018/09/26/content_281476319220196.htm.

⁴¹ *Id.*

⁴² *Id.* Other major positions include China's commitments to the multilateral trading system and to the policy of further opening-up.

trade war and stated explicitly that China had to impose retaliatory tariffs “in defence of its national dignity and its people’s interests.”⁴³

C. *The Phase-One Trade Deal*

After months of on-and-off negotiations, the US and China signed a phase-one trade agreement on January 15, 2020, which took effect on February 14, 2020.⁴⁴ The ninety-six page agreement contains eight chapters, addressing IP, technology transfer, agriculture, financial services, currency, expanding trade, and dispute resolution. Most of the obligations prescribed in the agreement belong to China, whereas the US largely affirms the conformity of its existing measures with prescribed standards.

To implement the agreement, China needs to amend or update various laws and regulations.⁴⁵ The provisions on IP are extraordinarily detailed.⁴⁶ On technology transfer, the agreement elaborates the specific types of practices to be prohibited. Together with the IP section on trade secrets, the agreement appears to cover all types of forced technology transfer alleged in the Section 301 Report.

While its IP provisions are generally positive in enhancing IP protection in China, the agreement also contains troublesome content. The most problematic is China’s purchase commitment under Chapter 6 “Expanding Trade”, which obligates China to increase imports from the US by \$200 billion by the end of 2021.⁴⁷ Chapter 6 specifies the minimum amount of annual increase in each of the categories of manufactured goods, agriculture, energy, and services, covering a total of twenty-

⁴³ *China’s Position on the China-US Economic and Trade Consultations*, STATE COUNCIL OF CHINA (June 2, 2019), http://english.www.gov.cn/archive/white_paper/2019/06/02/content_281476694892692.htm.

⁴⁴ *The Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jan. 15, 2020), https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [hereinafter *Phase-One Trade Agreement*].

⁴⁵ See Qiao Xincheng, *The Impact of the China-US Trade Agreement on the Chinese Legal System*, WEMP FRONTIERS-OF-LAW (Feb. 11, 2020), <https://wemp.app/posts/dae4eaed-82a4-4bd5-a5e8-865f740a3420>.

⁴⁶ The IP chapter (Chapter 1) consists of eighteen pages. For a comprehensive assessment of the IP provisions, see Mark Cohen, *The Phase 1 IP Agreement: Its Fans and Discontents*, CHINA IPR BLOG (Jan. 21, 2020), <https://chinaipr.com/2020/01/21/the-phase-1-ip-agreement-its-fans-and-discontents/>.

⁴⁷ *Phase-One Trade Agreement*, *supra* note 44, art. 6.2.

three subcategories of products.⁴⁸ This purchase commitment is viewed as the centre-piece of the agreement, but few believe that the numbers are realistic.⁴⁹

Legally, this kind of “managed trade” – targeted imports regardless of market conditions – betrays the basic WTO principles of market-based trade liberalisation and non-discrimination.⁵⁰ The arrangement is reminiscent of trade with completely central-planned economies.⁵¹ To fulfil its gigantic purchase commitment, China would have no choice but to resort to State trading, i.e., to direct its State-controlled entities to purchase fixed quantities of American products at the expense of more efficient producers of other countries.⁵² In so doing, however, China may violate Article XVII of the General Agreement on Tariffs and Trade (GATT), which regulates State trading activities, and China’s Accession Protocol, which requires China to ensure that “all State-owned and State-invested enterprises make purchases and sales based solely on commercial considerations” and that “the enterprises of other WTO Members have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory

⁴⁸ *Id.* at Annex 6.1.

⁴⁹ See Chad Bown, *Unappreciated Hazards of the US-China Phase One Deal*, PETERSON INST. FOR INT’L ECON.: TRADE & INV. POL’Y WATCH (Jan. 21, 2020), <https://www.piie.com/blogs/trade-and-investment-policy-watch/unappreciated-hazards-us-china-phase-one-deal>; Scott Kennedy, *China’s Poor Purchasing Performance: How Should the United States Respond?*, CTR. FOR STRATEGIC & INT’L STUD. (May 8, 2020), <https://www.csis.org/analysis/chinas-poor-purchasing-performance-how-should-united-states-respond?from=groupmessage&isappinstalled=0> (stating that the ensuing pandemic “has made the unrealistic the impossible.”).

⁵⁰ See Gary Hufbauer, *Managed Trade: Centerpiece of US-China phase one deal*, PETERSON INST. FOR INT’L ECON.: TRADE & INV. POL’Y WATCH (Jan. 16, 2020), <https://www.piie.com/blogs/trade-and-investment-policy-watch/managed-trade-centerpiece-us-china-phase-one-deal>.

⁵¹ For example, in 1967 when Poland acceded to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] as a central-planned economy, it agreed to increase the total value of imports from GATT countries by not less than seven percent per annum. See Protocol for the Accession of Poland, GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 15S/46 (1967).

⁵² See Chad Bown & M.E. Lovely, *Trump’s Phase One Deal Relies on China’s State-Owned Enterprises*, PETERSON INST. FOR INT’L ECON.: TRADE & INV. POL’Y WATCH (Mar. 3, 2020), <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-phase-one-deal-relies-chinas-state-owned-enterprises>. For potential impact of the phase-one deal on other countries, see Caroline Freund et al., *When Elephants Make Peace: The Impact of the China-US Trade Agreement on Developing Countries*, WORLD BANK GROUP, WPS9173 (Mar. 2020), <http://documents1.worldbank.org/curated/en/925591583252308139/pdf/When-Elephants-Make-Peace-The-Impact-of-the-China-U-S-Trade-Agreement-on-Developing-Countries.pdf>.

terms and conditions.”⁵³ Insofar as Beijing’s instructions to its State-trading firms regarding the targeted purchases are kept confidential, China may also violate the transparency rules of China’s Accession Protocol, which requires it to publish, on a timely basis, all “measures pertaining to or affecting trade.”⁵⁴ In short, to fulfil its purchase obligations under the agreement, China is almost certain to violate its WTO obligations. By expanding the role of State trading, China is moving further away from becoming a truly market-based economy.

The phase-one deal has merely halted the escalation of tariffs. The two countries are supposed to continue negotiation for a phase-two agreement to tackle more difficult structural issues, including SOE subsidies and cyber theft.⁵⁵ The pandemic, however, has practically ruined that prospect.

D. Impact of the Trade War

Predictably, the trade war has hurt both countries. Compared to the US,⁵⁶ however, China appears to have suffered more, both economically and politically. The trade war hit when the Chinese economy was already under downward pressure. In 2018, trade accounted for 38% of China’s GDP, and the US was China’s largest trading partner and exporting market.⁵⁷ The massive scale of Section 301 tariffs has affected countless Chinese exporters, with small and medium-sized private enterprises operating at low margins suffering the most. Meanwhile, hundreds of millions of Chinese consumers have felt the impact of China’s retaliatory tariffs on US imports, especially on American agricultural products, which have caused food prices to rise.⁵⁸ More significantly, the uncertainty and unpredictability associated

⁵³ *Report of the Working Party on the Accession of China*, WTO Doc. WT/MIN(01)/3, ¶ 46 (Nov. 10, 2001).

⁵⁴ *Id.* ¶ 334; *Protocol on the Accession of the People’s Republic of China*, WTO Doc. WT/L/432 (Nov. 10, 2001), Section 2(C) [hereinafter *China’s Accession Protocol*].

⁵⁵ J. Bursztynsky, *Trump trade adviser Peter Navarro lists what the US wants from China in “phase-two” trade deal*, CNBC (Jan. 16, 2020), <https://www.cnbc.com/2020/01/16/peter-navarro-lists-us-demands-from-china-in-phase-two-trade-deal.html>.

⁵⁶ See J. Zumbrun & A. DeBarros, *Trade War With China Took Toll on U.S., but Not Big One*, WALL STREET J. (Jan. 12, 2020), <https://www.wsj.com/articles/trade-war-with-china-took-toll-on-u-s-but-not-big-one-11578832381>.

⁵⁷ *China Trade Indicators 2018*, WORLD BANK: WORLD INTEGRATED TRADE SOLUTIONS (2018), <https://wits.worldbank.org/CountryProfile/en/Country/CHN/Year/2018>.

⁵⁸ Anita Regmi, *Retaliatory Tariffs and U.S. Agriculture*, CONG. RESEARCH SERV. (Sept. 13, 2019), <https://fas.org/sgp/crs/misc/R45903.pdf>. Almost all US agricultural exports to China are subject to retaliatory tariffs, ranging from 5% to 50%. For example, Beijing imposed three rounds of import duties on American pork, raising the total duty from 12% to 72%. By September 2019, the pork prices nearly doubled. See Felix Chang, *Pork Apocalypse: African Swine Fever and the US — China Trade War*, FOREIGN POL’Y RESEARCH

with the trade war have prompted many firms in global supply chains to leave China for more stable locations.⁵⁹ The departure of global supply chains will not only cause massive unemployment but also hinder the technological advancement of Chinese industries.

Most seriously, the trade war has escalated the geopolitical tension between the two countries to the point that threatens to derail bilateral cooperation and exchanges in every field. Politically, China has received little sympathy from the international community in fighting the trade war. Rather, US allegations of China's trade policy and practices have garnered support from the European Union (EU), Japan and others. Under the circumstances, it is increasingly unlikely that China will be able to leverage US pressure to deepen its market-based systemic reform, as many had hoped. Instead, Beijing may retreat further into its State-centric economic model, which in turn will only exacerbate the conflict.

The trade war has set in motion a trend of US-China *decoupling*, and the trend is accelerating. The result will have profound implications for the rest of the world. While the economic impact of the trade war varies—some countries gain from trade diversion, and some lose by the disruption of global supply chains or slowdown of the Chinese economy⁶⁰—the geopolitical impact is rather clear, in that the growing animosity between the two largest economies is forcing smaller nations to choose sides. Unfortunately, the negative impact of the trade war is only being augmented by the ensuing pandemic. The world has been pushed to the brink of a new Cold War.

III. ILLEGALITY OF UNILATERAL TRADE RETALIATION

INST. (Dec. 10, 2019), <https://www.fpri.org/article/2019/12/pork-apocalypse-african-swine-fever-and-the-u-s-china-trade-war/>.

⁵⁹ See, e.g., Finbarr Birmingham, *China's manufacturing exodus set to continue in 2020, despite prospect of trade deal*, S. CHINA MORNING POST (Jan. 9, 2020), <https://www.scmp.com/economy/china-economy/article/3045141/chinas-manufacturing-exodus-set-continue-2020-despite> (The article reported that for every foreign company that left China in 2019, there were two to three more seriously contemplating doing so in 2020).

⁶⁰ Sherman Robinson & Karen Thierfelder, *US — China Trade War: Both Countries Lose, World Markets Adjust, Others Gain*, 19-17 PETERSON INST. FOR INT'L ECON. (Nov. 2019), <https://www.piie.com/publications/policy-briefs/us-china-trade-war-both-countries-lose-world-markets-adjust-others-gain>. See also Patrick van den Bossche et al., *Trade War Spurs Sharp Reversal in 2019 Reshoring Index, Foreshadowing Covid-19 Test of Supply Chain Resilience, Operations and Performance*, KEARNEY, <https://www.kearney.com/operations-performance-transformation/us-reshoring-index/full-report>.

A central claim of this article is that the WTO system should have been able to prevent the US-China trade war if it had had a mechanism to compel China to comply with the WTO rule that prohibits unilateral retaliation. To support this claim, it is necessary to first demonstrate not only that unilateral retaliatory tariffs violate WTO law, but also that there is no valid defence for such a violation under general international law. For, if such unilateral retaliation could be justified under general international law, the trade war would not have been preventable under the WTO system.

A. *GATT Articles I and II*

At the most basic level, both the US Section 301 tariffs and China's retaliatory tariffs have violated GATT Article I "General Most-Favoured-Nation Treatment", and Article II "Schedules of Concessions". Under GATT Article I, a WTO Member is required to treat another Member no less favourably than it treats any other country with respect to customs duties and related matters (MFN treatment).⁶¹ Because Section 301 tariffs apply to China alone, the US has treated China less favourably than other Members, thereby breaching its obligation under Article I. GATT Article II prohibits a Member from raising its customs duties above the levels set forth in its tariff schedule (tariff bindings).⁶² By imposing additional tariffs on China, the US has raised its duties above the scheduled level, thereby breaching its obligation under GATT Article II. In the first of China's WTO lawsuits challenging the Section 301 tariffs, the US did not deny that its measures violated the GATT rules, but defended such violations by invoking the public morals exception under GATT Article XX(a).⁶³ The Panel rejected this defence, finding that the US measures at issue are *prima facie* inconsistent with GATT Articles I and II, and that the US has not met its burden of demonstrating that the measures are justified under GATT Article XX(a).⁶⁴

⁶¹ GATT, *supra* note 51, art. I:1.

⁶² *Id.* art. II:1.

⁶³ Panel Report, *United States — Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/R (Sept. 15, 2020), ¶ 7.100 [hereinafter Panel Report, *US — Section 301 Tariffs*]. For article XX(a) jurisprudence, see WTO Analytical Index, GATT 1994 Article XX Jurisprudence, §1.4, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf.

⁶⁴ Panel Report, *US — Section 301 Tariffs*, *supra* note 63, ¶ 8.1. The US has appealed the Panel decision "into the void", a situation created by the absence of the Appellate Body, thus preventing the Panel Report from being adopted under DSU article 16.4. See *United States — Tariff Measures on Certain Goods from China*, Notification of An Appeal by the United States under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), WTO Doc. WT/DS543/10 (Oct. 27, 2020) [hereinafter *US Appeal "into the void"*].

Likewise, China's retaliatory tariffs also violate GATT Article I, because they apply to the US products alone, and GATT Article II, because they have exceeded the level of China's tariff bindings set out in its tariff schedule. Since the US has not brought a WTO complaint against China regarding such retaliatory tariffs, it remains unclear how China might defend its violation of the GATT rules.⁶⁵ Notably, however, China has cited "basic principles of international law", rather than any WTO provision, to justify its unilateral retaliation.⁶⁶

B. DSU Article 23

In addition to GATT Articles I and II, US Section 301 tariffs and China's retaliatory tariffs have also violated DSU Article 23, the central rule of the WTO for preventing trade wars. Unlike the case of their GATT breaches, however, the two countries differ substantially in the extent of their respective violations of DSU Article 23.

1. Article 23 Jurisprudence

DSU Article 23 provides:

Article 23 Strengthening of the Multilateral System

1. *When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.*

2. *In such cases, Members shall:*

(a) *not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel*

⁶⁵ It should be noted that the Panel in *US — Section 301 Tariffs* was keenly aware of the wider context in which the case was decided and seemed to lament the fact that the US had not initiated a WTO dispute against China's retaliatory measures. See Panel Report, *US — Section 301 Tariffs*, *supra* note 63, ¶¶ 9.2-9.3.

⁶⁶ See MOFCOM *Announcement No. 34*, *supra* note 28.

or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) *follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements* in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.⁶⁷ (emphasis added)

Thus, Article 23 requires that a Member must resort to the WTO dispute settlement procedures and must not take the law into its own hands when seeking to redress a violation of WTO obligations. More specifically, Article 23 requires a Member not to make a self-determination that a violation has occurred or to take any retaliatory action (i.e., suspending concessions or other obligations under the WTO agreements) without the authorisation of the Dispute Settlement Body (DSB). The goal of Article 23 is understood to be the “rejection of unilateral self-help”.⁶⁸

In practice, Article 23 has been involved in a number of WTO disputes,⁶⁹ and violation was established in two of them. The first is *US — Certain EC Products*.⁷⁰ The case arose out of US efforts to retaliate against the banana regime of the European Communities (EC), which had been found to be WTO inconsistent. The EC requested arbitration under DSU Article 22.6 on the level of retaliation requested by the US. When the arbitration proceeding was delayed beyond the 60-day limit imposed by Article 22.6, the US took certain border measures against EC imports to *preserve* its rights to suspend tariff concessions. In response to the US

⁶⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

⁶⁸ WTO ANALYTICAL INDEX, DSU — ARTICLE 23 JURISPRUDENCE §1.2.1, https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art23_jur.pdf.

⁶⁹ *See id.*

⁷⁰ 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).

argument that it was the EC's delaying tactics that frustrated all US efforts to comply with the DSU, the Panel states:⁷¹

[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. It is now only in the institutional framework of the WTO/DSB that the United States could obtain a WTO compatible determination that the European Communities violated the WTO Agreement, and it is only in the institutional framework of the WTO/DSB that the United States could obtain the authorization to exercise remedial action.

Thus, the US was found to have violated DSU Article 23 by taking retaliatory measures against the EC before the Article 22.6 arbitration proceedings were completed. This decision suggests that a Member may not seek self-help in redressing a WTO violation even in the event of a failure in DSU procedures.

The second case is *EC — Vessels*.⁷² At issue here was the EC regulation that authorised temporary State aid to domestic shipbuilders in order to offset the effect of South Korea's (Korea) subsidies to its shipbuilding industry. This temporary State aid was to be granted from the date of the EC's initiation of a WTO dispute challenging Korea's shipbuilding subsidies until the date one month after the resolution of the dispute proceedings. The EC did bring a successful WTO dispute against Korea in which the Korean shipbuilding subsidies were found to be WTO-illegal.⁷³ Meanwhile, Korea brought this case challenging the EC regulation under the GATT, the Agreement on Subsidies and Countervailing Measures (SCM) and DSU Article 23. The Panel rejected Korea's claims under GATT and the SCM but found that the EC regulation violated DSU Article 23. According to the Panel:⁷⁴

⁷¹ *Id.* ¶ 6.133.

⁷² Panel Report, *European Communities — Measures Affecting Trade in Commercial Vessels*, WTO Doc. WT/DS301/R (adopted Jun. 20, 2005) [hereinafter Panel Report, *EC — Commercial Vessels*].

⁷³ See Panel Report, *Korea — Measures Affecting Trade in Commercial Vessels*, WTO Doc. WT/DS/273/R (adopted Apr. 11, 2005).

⁷⁴ Panel Report, *EC — Commercial Vessels*, *supra* note 72, ¶ 7.207.

[DSU Article 23] covers any act of a Member in response to what it considers to be a violation of a WTO obligation by another Member whereby that first Member attempts unilaterally to restore the balance of rights and obligations by seeking the removal of the WTO-inconsistent measure, by seeking compensation from that Member, or by suspending concessions or obligations under the WTO Agreement in relation to that Member.

This decision thus establishes that a Member may not resort to *any* unilateral measure in response to a perceived WTO violation by another Member, even if the unilateral measure is otherwise WTO-consistent.

In addition to these two cases, the Panel decision in *US — Section 301* is also important to note.⁷⁵ In this case, the EC challenged the US Section 301 legislation “as such” violated Article 23, and the US countered that its legislation cannot violate Article 23 “as such” because it merely authorises the USTR to take remedial measures after certain determinations are made. The Panel rejected the US argument and found that certain statutory language of the Section 301 legislation constitutes a *prima facie* violation of Article 23.⁷⁶ Although the Panel ultimately did not hold the US legislation to be inconsistent with Article 23, its final ruling was conditioned upon the US promise in the Statement of Administrative Action (SAA), a document submitted by the US President and approved by the Congress, that the US would always render Section 301 determinations in conformity with its WTO obligations. Should the US in any way repudiate its undertakings, the Panel cautioned, its final ruling “would no longer be warranted.”⁷⁷

The above three cases suggest that the rejection of self-help under DSU Article 23 is absolute.

2. US Section 301 Tariffs under Article 23

To address its grievances against China in trade, the US resorted to its historically controversial legislation of Section 301. In doing so, has the US repudiated its undertakings,⁷⁸ thereby violating DSU Article 23? The answer hinges on whether

⁷⁵ Panel Report, *United States — Sections 301-310 of the Trade Act 1974*, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000) [hereinafter Panel Report, *US — Section 301*].

⁷⁶ *Id.* ¶ 7.97. The Panel also clarified that a “discretionary” law, under which the government has discretion in deciding whether to take unilateral measures, may per se violate article 23 because it can constitute an ongoing threat and create a “chilling effect” on trade. *Id.* ¶¶ 7.88-7.92.

⁷⁷ *Id.* ¶ 7.136.

⁷⁸ *See id.*

the Section 301 tariffs were used to address a matter arising from “the covered agreements” of the WTO.⁷⁹ The US claims that Section 301 measures were imposed to counter China’s unfair practices *not* covered by the WTO agreements, and hence do not violate DSU Article 23.⁸⁰ Notably, the Section 301 Report carefully avoided making any determination that China’s practices had breached WTO rules.⁸¹ Instead of accusing China of violating WTO law by resorting to retaliatory tariffs, the US claimed that China’s retaliation demonstrated its agreement with the US that the matter does not involve the WTO and that the parties have settled the matter bilaterally.⁸²

The US argument, however, is not convincing. It is true that the existing WTO agreements do not regulate all the alleged Chinese practices targeted by the Section 301 tariffs. But “forced technology transfer”,⁸³ the major target of the US tariffs, is at least in principle covered under WTO law. In particular, the Protocol of China’s WTO Accession, which constitutes part of WTO law, obligates China not to condition any government approval of foreign investment upon the transfer of technology or the conduct of research and development in China.⁸⁴ In other words, WTO law explicitly prohibits Beijing from compelling foreign investors to transfer technologies to domestic entities.⁸⁵ The US claims that the Chinese government has used indirect and implicit means to coerce technology transfer, which does not leave a paper trail, thus making it “almost impossible to prosecute”.⁸⁶ It may be true that existing WTO rules do not effectively regulate all forms of forced technology transfer. However, the US claim mostly raises an

⁷⁹ See DSU, *supra* note 67, art. 1, Appendix I.

⁸⁰ See US statement at the DSB meeting, *supra* note 19.

⁸¹ *Id.* (stating that the US “had made no findings in the Section 301 investigation that China had breached its WTO obligation.”)

⁸² First Written Submission of the United States, *United States — Tariff Measures on Certain Goods from China*, WT/DS543, ¶¶ 9-10, (Aug. 27, 2019), <https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS543%29.fin.%28public%29.pdf>. The US also claimed that the parties had agreed to “settle this matter outside the WTO system” and the settlement was final within the meaning of DSU article 12.7. See Panel Report, *US — Section 301 Tariffs*, *supra* note 63, ¶ 7.4. The US claim was rejected by the Panel. Panel Report, *US — Section 301 Tariffs*, *supra* note 63, ¶ 7.22.

⁸³ The term “forced technology transfer” is not defined, but is understood to cover the various technology transfer practices of China detailed in the Section 301 Report. See SECTION 301 REPORT, *supra* note 16, Part II.

⁸⁴ *China’s Accession Protocol*, *supra* note 54, Section 7(3). This commitment was further elaborated in the *Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, ¶¶ 204-07 (Oct. 1, 2001).

⁸⁵ This is one of the many China-specific obligations contained in China’s Accession Protocol. See generally Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483 (2003).

⁸⁶ SECTION 301 REPORT, *supra* note 16, at 21.

evidentiary issue under WTO law, which does not change the fact that certain forms of forced technology transfer as alleged by the US are covered by existing WTO disciplines.⁸⁷ This understanding has also been confirmed by EU's WTO complaint against China, challenging Beijing's technology transfer policy as inconsistent with its WTO accession commitments.⁸⁸

On the other hand, the WTO does not contain a generally applicable discipline on international transfer of technology.⁸⁹ Recognising that the practice of forced technology transfer undermines the proper functioning of international trade, the EU and Japan have joined the US in condemning the practice and in calling for the development of new rules to discipline the practice.⁹⁰

In summation, to the extent that the US tariffs were used as the countermeasure against China's practices specifically covered by WTO rules, they are inconsistent with DSU Article 23.⁹¹ To the extent that they were used to address issues not covered by existing WTO rules, the US tariffs are outside the domain of DSU Article 23. It should also be noted that China did make a comprehensive DSU Article 23 claim in its WTO case against the Section 301 Tariffs.⁹² For unknown

⁸⁷ See Julia Ya Qin, *Forced Technology Transfer and the US-China Trade War: Implications for International Economic Law*, 22 J. INT'L ECON. L. 743-762 (2019), Section I.C. [hereinafter Qin]; Cf. Alan Sykes, *The Law and Economics of "Forced" Technology Transfer (FTT) and Its Implications for Trade and Investment Policy (and the U.S.-China Trade War)*, STAN. L. & ECON. OLIN WORKING PAPER NO. 544 (2020) (treating the difficulty in proving China's violation of its commitment on technology transfer as the equivalent of a lack of specific WTO rules on the subject).

⁸⁸ Request for Consultations by the European Union, *China — Certain Measures on the Transfer of Technology*, WTO Doc. WT/DS549/1/Rev. 1 (Jan. 8, 2019).

⁸⁹ See generally Qin, *supra* note 87.

⁹⁰ See, e.g., *Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jan. 14, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union>. See also European Commission, *WTO — EU's Proposals on WTO Modernization*, COUNCIL OF EUROPEAN UNION (July, 2018), <http://src.bna.com/Aoe>.

⁹¹ Such DSU article 23 – inconsistent tariffs should include the second and third rounds of the Section 301 tariffs, since the US imposed these additional tariffs to counter China's retaliatory tariffs that were clearly in violation of WTO provisions. See Part II.A and Part III.A. It is also worth noting that the domestic legality of the second and third rounds of Section 301 tariffs is being challenged by a large number of companies in the US court. See David Shepardson, *Some 3,500 U.S. companies sue over Trump-imposed Chinese tariffs*, REUTERS (Sept. 25, 2020), <https://www.reuters.com/article/usa-china-tariffs/some-3500-us-companies-sue-over-trump-imposed-chinese-tariffs-idUSL2N2GM166>.

⁹² See Request for the Establishment of a Panel by China, *United States — Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/7 (Dec. 7, 2018).

reasons, however, China must have dropped the claim during the panel proceedings, as the final Panel Report makes no mention of the claim.⁹³

3. China's Retaliatory Tariffs under Article 23

In contrast to the US, China has held from the very beginning that Section 301 tariffs violated WTO law and that its retaliatory tariffs were a response to the US tariffs.⁹⁴ That being the case, China's retaliatory tariffs are, from the outset and in their entirety, inconsistent with DSU Article 23.

Specifically, in seeking to redress a violation of WTO rules unilaterally, China has breached the general obligation under DSU Article 23.1 that WTO Members must use the WTO dispute settlement system "as the exclusive forum" for the resolution of such dispute.⁹⁵ Furthermore, China has breached the specific obligations under Article 23.2(a) by unilaterally determining that a violation of WTO rules by the US has occurred, and Article 23.2(c) by suspending its tariff concessions and MFN obligations vis-à-vis the US without authorisation from the DSB.

Unlike the obligations of GATT Articles I and II, which are subject to various general policy exceptions of the GATT, there is no built-in exception available for the breach of DSU Article 23 under WTO law. The question remains, however, whether such breach can nonetheless be excused by generally applicable international law.

C. Possible Defences of China's Unilateral Retaliation under International Law

According to the Ministry of Commerce of the People's Republic of China (MOFCOM), China's retaliatory tariffs were a "response to the emergency caused by the US violation of international obligations to China", and the retaliation was taken in accordance with relevant domestic Chinese laws and "basic principles of international law".⁹⁶ China's invocation of international law principles appears to be based on two assumptions: (a) WTO rules are part of public international law; and (b) basic principles of international law must prevail over specific WTO obligations. While the first assumption is certainly correct—it has been well established that WTO provisions are "not to be read in clinical isolation from

⁹³ The Panel Report is completely silent about this major change in the scope of China's complaint. See Panel Report, *US — Section 301 Tariffs*, *supra* note 63.

⁹⁴ See MOFCOM Announcement No. 34, *supra* note 28.

⁹⁵ Appellate Body Reports, *United States/Canada — Continued Suspension of Obligations in the EC-Hormones Dispute*, WTO Doc. WT/DS320, 321/AB/R, ¶ 371 (adopted Nov. 14, 2008).

⁹⁶ MOFCOM Announcement No. 34, *supra* note 28.

public international law”⁹⁷—the second assumption is not. Whether basic principles of international law can prevail over a WTO provision will depend upon the specific WTO provision at issue and the particular international law principles invoked.⁹⁸ The specific WTO provision at issue here is DSU Article 23; it remains unclear, however, to which basic principles of international law MOFCOM was referring.

Nonetheless, certain theories have been advanced by Chinese academics to justify China’s retaliatory tariffs.⁹⁹ The international legal principles identified for this purpose include: (a) “self-defence” under the United Nations (U.N.) Charter, Article 51; (b) “material breach” under the Vienna Convention on the Law of Treaties (VCLT), Article 60; and (c) “necessity” under the Draft Articles on Responsibility of States for International Wrongful Acts (Draft Articles), Article 25. Of the three principles suggested, Article 51 of the U.N. Charter is obviously inapplicable as it refers to self-defence against “an armed attack” only.¹⁰⁰ The other two theories merit more careful analysis.

1. “Material Breach” under VCLT Article 60

It was suggested that China’s violation of DSU Article 23 can be excused by the material breach doctrine of customary international law as codified in VCLT Article 60.¹⁰¹ The relevant provisions are:

⁹⁷ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R. (adopted May 20, 1996).

⁹⁸ See Joost Pauwelyn, *Foreword* in GRAHAM COOK, *A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES*, xvii-xviii (2015) (stating that a non-WTO treaty can only prevail over a WTO provision if it amounts to a valid waiver of WTO rights or takes precedence over the WTO provision pursuant to conflict rules of international law).

⁹⁹ See Guohua Yang, *International Legal Basis of Chinese Trade Countermeasures*, 8 J. WTO & CHINA 3 (2018) [hereinafter Yang].

¹⁰⁰ U.N. Charter art. 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. [hereinafter U.N. Charter]

¹⁰¹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

Article 60. Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach

...

2. A material breach of a multilateral treaty by one of the parties entitles:

...

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

Thus, Article 60.2(b) permits a party to a multilateral treaty to invoke “material breach”¹⁰² as the ground for suspending the operation of the treaty between itself and the defaulting party. According to this theory, the Section 301 tariffs were of such nature and scale that they constituted a material breach of the WTO treaty, and that such breach entitles China (a party specially affected by the breach) to invoke it as a ground for suspending the operation of the WTO treaty, in whole or in part, between itself and the US.

Assuming that VCLT Article 60 applies in the WTO context, which is questionable as will be discussed below, the theory nonetheless fails for a simple reason: the remedy provided by Article 60.2 to the victim State of a material breach is the right to suspend the operation of the relevant treaty between itself and the defaulting State. Thus, Article 60 might apply if China had declared that as a result of a material breach by the US, it would suspend the application of the WTO treaty in whole or in part (e.g., to the extent of GATT Articles I and II and DSU Article 23) between itself and the US. Logically, China’s retaliatory tariffs could not be in breach of the WTO provisions that had already been suspended. However, Beijing has never made such a declaration. On the contrary, China has initiated and maintained multiple WTO lawsuits against the US under the GATT and the DSU throughout the period in which its retaliatory tariffs have been in effect, including the three WTO complaints challenging the Section 301 tariffs as violation of GATT Articles I:1 and II:1 and DSU Article 23.¹⁰³ China would not have had the legal basis to engage in these WTO disputes if the operation of these WTO provisions had been suspended between the two countries.

¹⁰² *Id.* art. 60.3. A material breach is defined by article 60.3 as consisting of “(a) a repudiation of the treaty not sanctioned by the present Convention, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”

¹⁰³ Request for Consultations by China, *United States — Tariff Measures on Certain Goods from China II*, *supra* note 29; Request for Consultation by China, *United States — Tariff Measures on Certain Goods from China III*, *supra* note 29.

Moreover, the applicability of VCLT Article 60.2 in the WTO context is questionable. Paragraph 4 of Article 60 provides: “The foregoing paragraphs [of Article 60] are without prejudice to any provision in the treaty applicable in the event of a breach”.¹⁰⁴ Paragraph 4 thus “reserves the rights of the parties under any specific provision of the treaty applicable in the event of a breach.”¹⁰⁵ The provision is an expression of *lex specialis derogat legi generali* (*lex specialis*), a generally accepted technique of interpretation and conflict resolution in international law.¹⁰⁶ It suggests that whenever two or more norms address the same subject matter, the more specific norm should prevail. In the WTO context, the specific “provision of the treaty applicable in the event of a breach” is Article 23 of the DSU. In addition, the application of Article 60 in the WTO context is also subject to the general clause of *lex specialis* in VCLT Article 5 “Treaties constituting international organizations and treaties adopted within an international organization”, which states: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization *without prejudice to any relevant rules of the organization.*” (emphasis added). Accordingly, to the extent that DSU Article 23 and VCLT Article 60.2 deal with the same subject matter, the former should be given priority. Notably, this understanding has also been confirmed by WTO jurisprudence.¹⁰⁷

2. “Necessity” under the Law of State Responsibility

Alternatively, it was suggested that China’s violation of DSU Article 23 can be excused by the international law of “necessity” as codified in Article 25 of the Draft Articles, which was adopted by the U.N. International Law Commission (ILC) in 2001.¹⁰⁸ This theory, however, encounters similar difficulties as that of

¹⁰⁴ VCLT, *supra* note 101, art. 60.4.

¹⁰⁵ Draft Articles on the Law of Treaties with commentaries, *Report of International Law Commission to the General Assembly*, UN Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. INT’L L. COMM’N 187 UN Doc. A/CN.4/SER.A/1966/Add.1, at 255 (Commentary (10) to Article 57) [hereinafter *ILC Report on Draft VCLT*].

¹⁰⁶ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, *Report of the Study Group of the International Law Commission to the General Assembly*, U.N. Doc. A/CN.4/L.702, ¶ 14(5) (2006) [hereinafter *The Fragmentation Report*].

¹⁰⁷ Panel Report, *US — Certain EC Products*, *supra* note 70, ¶ 6.133 (stating that “in the WTO context, the provision of Article 60 of the Vienna Convention on the Laws of Treaties (1969) on this matter does not apply since the adoption of the more specific provisions of Article 23 of the DSU”).

¹⁰⁸ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *Report of International Law Commission to the General Assembly on the work of its fifty-third session*, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] II.2 Y.B. INT’L L. COMM’N 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). [hereinafter *ILC Report on Draft Articles*].

“material breach” under VCLT Article 60. That is, it must overcome the general obstacle of the *lex specialis* provision of the Draft Articles, and the specific obstacle of the conditions set out in Article 25.

a. Lex Specialis

The Draft Articles formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.¹⁰⁹ Like the VCLT, the Draft Articles embody general rules of international law. As such, the Draft Articles explicitly subject all of its provisions to the special rules of international law. Article 55, entitled *Lex Specialis*, states: “These articles *do not apply* where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law” (emphasis added). As an example of such special rules of international law, the ILC Commentary cites the WTO DSU.¹¹⁰ Thus, when in conflict, the DSU shall prevail over the provisions of the Draft Articles.

The application of the special law, however, does not extinguish the relevant general law. Rather, general law will continue to give direction for the interpretation and application of the special law and will become fully applicable in situations not provided for by the special law (gap-filling). Moreover, certain types of general law, such as *jus cogens*, may not be derogated by special laws.¹¹¹

With respect to the law of special systems such as the WTO, the ILC has additionally identified “regime failure” as a situation in which general law becomes applicable. According to the ILC Study Group on the Fragmentation of International Law:¹¹²

Special regimes or the institutions set up by them may fail. Failure might be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime’s institutions to fulfil the purposes allotted to them, persistent non-compliance by one or several of the parties, desuetude, withdrawal by parties instrumental for the regime, among other causes. *Whether a regime has “failed” in this sense, however, would have to be assessed above all by an*

¹⁰⁹ *Id.* at 31 (General Commentary (1)).

¹¹⁰ *Id.* at 140 (Commentary (3) to article 55).

¹¹¹ *The Fragmentation Report, supra* note 106, ¶¶ 14(9)-(10).

¹¹² *Id.* ¶ 14(16).

interpretation of its constitutional instruments. In the event of failure, the relevant general law becomes applicable (emphasis added).

As an example of regime failure, the Chairman of the ILC Study Group noted:¹¹³

A dispute-settlement mechanism under the regime may function so slowly and inefficiently that damage continues to be caused without a reasonable prospect of a just settlement in sight. At some such point the regime will have “failed” – and at that point it must become open for the beneficiaries of the relevant rights to turn to the institutions and mechanisms of general international law.

The above passage was cited by the Chinese commentator to suggest that as a special regime the WTO dispute settlement mechanism had failed because it could not provide “rapid and effective” remedies to China;¹¹⁴ consequently, China’s retaliatory tariffs should not be subject to the special law of DSU Article 23. This suggested assessment of regime failure, however, cannot be reconciled with the fact that, while resorting to unilateral retaliatory tariffs, China has remained actively engaged in the WTO dispute settlement system,¹¹⁵ including maintaining three WTO lawsuits on Section 301 tariffs.¹¹⁶ Some may argue that the collapse of the Appellate Body in December 2019 is a sign of such a regime failure. In this regard, one should note that China announced its first round of retaliatory tariffs in April 2018.¹¹⁷ At the time, the Appellate Body remained functional, and there was no

¹¹³ Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, ¶ 187 (Apr. 13, 2006).

¹¹⁴ Yang, *supra* note 99, at 8 (stating that “[i]f WTO dispute settlement mechanisms fail to provide rapid and effective remedies, it constitutes ‘regime failure’. In such cases [the general law of] ‘material breach’ and ‘necessity’ systems shall apply to analyse the Chinese countermeasures.”).

¹¹⁵ Since announcing its retaliatory tariffs in April 2018, China has brought six WTO complaints, all against the US, and has accepted consultations in four WTO cases brought by the US, the EU, Brazil, and Canada respectively. In addition, China has participated as a third party in 26 other WTO cases. See *China and the WTO*, WTO, https://www.wto.org/english/thewto_e/countries_e/china_e.htm [hereinafter *China and the WTO*].

¹¹⁶ Request for Consultations, April 2018, *supra* note 27; Request for Consultations by China, *United States — Tariff Measures on Certain Goods from China II*, *supra* note 29; Request for Consultation by China, *United States — Tariff Measures on Certain Goods from China III*, *supra* note 29.

¹¹⁷ MOFCOM Announcement No. 34, *supra* note 28.

indication that China sought self-help in anticipation of a possible collapse of the WTO appellate mechanism.¹¹⁸

Leaving aside the factual assessment, the legal question here is whether a WTO Member may unilaterally determine that the WTO dispute settlement mechanism has “failed” so that it can fall back on general international law to deal with a trade dispute. According to the ILC, whether a regime has failed should be assessed “above all by an interpretation of its constitutional instruments.”¹¹⁹ The constitutional instrument of the WTO dispute settlement regime is the DSU. When a WTO Member enters the DSU, it has accepted the explicit choice of all other WTO Members to *contract out* general international law to the extent of the special regime of the DSU. Thus, “[f]or a WTO member unilaterally to ‘contract back in’ on the ground that the special regime is not to its liking or ineffective cannot be accepted.”¹²⁰ In order to “contract back in” general international law, the WTO Member would need to withdraw from the DSU regime altogether. China has never made such a move. On the contrary, China has continued to participate in WTO panel proceedings and has joined the EU and other Members in setting up an interim appeal arbitration mechanism under DSU Article 25.¹²¹

b. “Necessity” under Article 25 of the Draft Articles

Even assuming that China could unilaterally determine that the WTO dispute settlement system had failed so that it could fall back on general international law to justify its retaliatory tariffs, would the suggested theory of “necessity” under the law of State responsibility provide such justification?

“Necessity” is one of the circumstances specified in Chapter V of the Draft Articles that preclude the wrongfulness of a State’s act not in conformity with its international obligation. The provision is set out below in full:¹²²

Article 25 Necessity

¹¹⁸ In this context, it is necessary to distinguish China’s case from that of the EU, which has proposed a policy of seeking self-help in situations where a losing party appeals a WTO panel report “into the void”. See *infra* text at notes 137-143.

¹¹⁹ *The Fragmentation Report*, *supra* note 106, ¶¶ 14(9)-(10).

¹²⁰ JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 231 (2003) [hereinafter PAUWELYN].

¹²¹ See *Interim appeal arrangement for WTO disputes becomes effective*, EUR. COMMISSION (Apr. 30, 2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>.

¹²² *ILC Report on Draft Articles*, *supra* note 108.

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the *only way* for the State to safeguard an essential interest against a *grave and imminent peril*; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.
(emphasis added)

According to the ILC, the notion of necessity is used to denote those “exceptional cases” where “the only way” a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency.¹²³ In comparison with the other specific circumstances under Chapter V,¹²⁴ necessity will “only rarely be available” to excuse non-performance of an obligation, and it is subject to strict limitations to “safeguard against possible abuse.”¹²⁵ To emphasise its exceptional nature and concerns about possible abuse, Article 25 is cast in negative language (“[n]ecessity may not be invoked... unless”).¹²⁶ In State practice, necessity “has been invoked to protect a variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed.”¹²⁷

Would China’s retaliatory tariffs meet the stringent conditions of Article 25? Firstly, it is difficult to see why the imposition of China’s retaliatory tariffs was the *only way* to safeguard its interest. As the ILC noted, the plea of necessity is excluded “if there are other (otherwise lawful) means available even if they may be more costly

¹²³ *ILC Report on Draft Articles, supra* note 108, at 80 (Commentary (1) to Article 25).

¹²⁴ Such other circumstances specified in Chapter V include: consent (art. 20); self-defence in accordance with the U.N. Charter (art. 21); countermeasures taken in accordance with the Draft Articles (art. 22); force majeure (art. 23); distress (art. 24); and compliance with peremptory norms (art. 26).

¹²⁵ *ILC Report on Draft Articles, supra* note 108, at 80 (Commentary (2) to Article 25).

¹²⁶ *Id.* at 83 (Commentary (14) to Article 25).

¹²⁷ *Id.*

and less convenient.”¹²⁸ As will be demonstrated in Part IV below, relying on the WTO dispute settlement exclusively would have been a less costly as well as a lawful way for China to counter the US Section 301 tariffs. Moreover, what constitutes *a grave and imminent peril* must be “objectively established” and not “merely apprehended or contingent.”¹²⁹ Citing the International Court of Justice, the ILC stated that “the invoking State could not be the sole judge of the necessity”.¹³⁰ Given these stringent conditions, it is unlikely that China could successfully invoke necessity to justify its retaliatory tariff under Article 25.

3. “Countermeasures” under the Law of State Responsibility

In addition to the necessity theory, it is instructive to examine whether China’s retaliatory tariffs could otherwise be justified as “countermeasures” under the general law of State responsibility. Legally, countermeasures are to be distinguished from the termination or suspension of treaty relations on account of a material breach of a treaty as provided by VCLT Article 60.¹³¹ There, the legal obligations of the State parties under the treaty will be terminated or suspended as the result of the material breach. In contrast, countermeasures do not affect the continuing operation of the treaty. Instead, they are taken “in derogation from a subsisting treaty obligation” and are “justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken.”¹³² Since China has never terminated or suspended its WTO treaty relations with the US, its retaliatory tariffs can be properly characterised as “countermeasures” under the Draft Articles.

In principle, countermeasures meeting the conditions set out in the Draft Articles do not give rise to State responsibility.¹³³ There are, however, certain types of obligations that may not be impaired by countermeasures. Article 50 “Obligations

¹²⁸ *Id.* at 83 (Commentary (15) to Article 25).

¹²⁹ *Id.* at 83 (Commentary (15) & (16) to Article 25).

¹³⁰ *Id.* at 83 (Commentary (16) to Article 25 citing International Court of Justice, *Gabčíkovo-Nagymaros Project*, ¶51).

¹³¹ *Id.* at 128 (Commentary (4) to Chapter II Countermeasures).

¹³² *Id.* See generally PAUWELYN, *supra* note 120, at 228-236 (explaining the relationship between countermeasures under general international law of State responsibility and countermeasures under WTO law).

¹³³ Art. 22 of the Draft Articles, “*Countermeasures in respect of an internationally wrongful act*”, provides that “[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part III.” Chapter II of Part III of the Draft Articles, comprising articles 49-54, set out the conditions for the taking of countermeasures by an injured State. *ILC Report on Draft Articles*, *supra* note 108.

not affected by countermeasures” identifies two categories of such obligations. The first category, provided in Article 50.1, lists four types of obligations reflecting peremptory norms of international law.¹³⁴ The second category, provided in Article 50.2, comprises two types of obligations, one of which is the obligations “under any dispute settlement procedure applicable” between the State taking countermeasures and the State responsible for the wrongful act against which countermeasures are taken.¹³⁵ As the ILC explains, it is a well-established principle that “dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures [in the first place].”¹³⁶

Accordingly, the WTO Member’s obligations under the DSU procedures may not be suspended by way of countermeasures. This conclusion, however, is predicated on the assumption of proper functioning of the DSU procedures. After the collapse of the Appellate Body, the EU has proposed an amendment to its regulation on the application and enforcement of international trade rules. This amendment would permit the EU to take countermeasures in situations where, after the EU has obtained a favourable ruling from a WTO dispute settlement panel, the process is blocked because the other party appeals the panel decision “into the void” and has not agreed to interim appeal arbitration under Article 25 of the DSU.¹³⁷ The proposed amendment justifies this position by invoking general international law. Specifically, it cites Article 52 of the Draft Articles, which establishes procedural conditions “for the taking of countermeasures in a context where compulsory third-party settlement of disputes may not be available.”¹³⁸ Where a third party procedure exists and has been invoked by either party to the

¹³⁴ The four types are: (a) the obligations to refrain from the use of force as embodied in the U.N. Charter; (b) the obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; and (d) other obligations under peremptory norms of international law). *Id.* art. 50.1.

¹³⁵ Art. 50.2 provides: “A State taking countermeasures is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure applicable between it and the responsible State; (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.” *Id.* art. 50.2.

¹³⁶ *Id.* at 133 (Commentary (13) to Article 50, citing the ICJ in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* Judgement, I.C.J. Rep. 1972 (Aug. 18), and the Court in the *United States Diplomatic and Consular Staff in Tehran (United States of America v. Islamic Republic of Iran)* Judgement, 1979 I.C.J. Rep. 1 (Nov. 4)).

¹³⁷ European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union’s rights for the application and enforcement of international trade rules*, COM (2019) 623 final, 2019/0273 (COD), Dec. 12, 2019, at 3 [hereinafter *the EU proposal*].

¹³⁸ *ILC Report on Draft Articles, supra* note 108, at 136 (Commentary (2) to Article 52).

dispute, the requirements of procedure “should substitute as far as possible for countermeasures.”¹³⁹ Yet, the injured State will be relieved of its obligation not to take countermeasures when the dispute is pending before an international tribunal “if the responsible State fails to implement the dispute settlement procedures in good faith.”¹⁴⁰ According to the ILC, the good faith condition comprehends various possibilities of non-cooperation in the dispute settlement procedures, including “situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established.”¹⁴¹ The EU proposal thus assumes that a Member is not acting in good faith if it blocks the DSU dispute procedures by appealing a panel decision “into the void” while refusing to participate in an alternative appeal procedure. In such situations, the EU believes that it has the right to take unilateral countermeasures, despite the requirement of DSU Article 23.¹⁴²

The rationale of the EU proposal, however, does not apply to the China case. Since China resorted to countermeasures *before* the relevant WTO panel proceedings even began,¹⁴³ and since the US participated fully in the relevant panel proceedings, China will not be able to rely on this theory to justify its countermeasures under the Draft Articles.

To summarise, China’s retaliatory tariffs violated DSU Article 23, and China does not appear to have a valid defence for the violation under either the VCLT or the law of State responsibility.

IV. THE WISDOM OF DSU ARTICLE 23

The legal conclusions reached above may seem counterintuitive and even unfair to China. After all, it was the US that initiated WTO-illegal actions against China, and China merely responded in kind. It seems that the basic notion of fairness would dictate that China should have the right to retaliate against the US in a timely

¹³⁹ *Id.*

¹⁴⁰ *Id.* art. 52.4.

¹⁴¹ *Id.* at 137 (Commentary (9) to Article 52).

¹⁴² The EU proposal does not explicitly mention DSU Article 23. *But see* Trung Nguyen, *The Procedural Inconsistency of the Envisaged EU Enforcement Regulation with the EU Enforcement Regulation with the EU’s WTO Obligations*, OPINIO JURIS (Oct. 30, 2020), <http://opiniojuris.org/2020/10/30/the-procedural-inconsistency-of-the-envisaged-eu-enforcement-regulation-with-the-eus-wto-obligations/> (suggesting that the EU proposal is inconsistent with DSU Article 23).

¹⁴³ China filed its panel request in DS543 on December 6, 2018. *See United States — Tariff Measures on Certain Goods from China*, Request for the Establishment of a Panel by China, WTO Doc. WT/DS543/7 (Dec. 7, 2018).

fashion, not having to trudge through the time-consuming multilateral procedures. This intuitive reaction, while understandable, is mistaken.

A. The Nature of Trade War

In the US-China trade war, it is common to perceive the US Section 301 tariffs as an act of aggression and China's retaliatory tariffs an act of self-defence. A fundamental problem with this perception is that it confuses the nature of a trade war with that of a military conflict. In a military conflict, a State uses armed forces to invade another State's territory or otherwise attack its citizens or property. In doing so, the aggressor State violates the sovereignty of the other State, thus triggering the "inherent right of self-defence" of the latter.¹⁴⁴ In contrast, a State that initiates a *trade war* raises its tariff or non-tariff barriers to prevent foreign products from entering into its own territory. While they hurt the economic interest of the exporting country, the elevated trade barriers are *protectionist* in nature, i.e., they are supposed to protect domestic producers from foreign competition. Legally, a State does not have an inherent sovereign right to export its products to other countries. Rather, its export interests are protected through specific trade agreements applicable to it, subject to all the conditions therein.

Given the fundamental differences between a military attack and a trade barrier, how should a State react when its export interests are hurt by the trade barrier? As commonly understood, trade measures are double-edged swords. While high import tariffs injure the export interests of other countries, they also reduce the overall economic welfare of the country imposing the tariffs. Thus, if the injured country retaliates by raising its import tariffs, it will end up exacerbating the injury to its own economy. Worse yet, the retaliatory measures may provoke counter-retaliatory measures, leading to a downward spiral in international relations. More ominously, the hostility between the two countries may persist and develop to the point that it threatens a military conflict. It is based on this common understanding that the multilateral trading system was established after World War II (WWII) to promote economic prosperity and world peace.¹⁴⁵

A brief review of the history leading up to the adoption of DSU Article 23 will help us better understand the political-economic rationale of the provision.

¹⁴⁴ U.N. Charter, *supra* note 100.

¹⁴⁵ *The WTO can ... contribute to peace and stability*, WTO, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm [hereinafter *WTO- Peace & Stability*].

B. *Adam Smith on Retaliation in a Trade War*

In *The Wealth of Nations*, Adam Smith writes about retaliation in a trade war. He observes that “when some foreign nation restrains by high duties or prohibitions the importation of some of our manufactures into their country”, revenge “naturally dictates retaliation” and that “we should impose the like duties and prohibitions upon the importation of some or all of their manufactures into ours. Nations, accordingly, seldom fail to retaliate in this manner.”¹⁴⁶ He cites a number of examples in history, including the Franco-Dutch war of 1672 which “seems to have been in part occasioned” by a commercial dispute. However, Smith cautions against the policy of trade retaliation:¹⁴⁷

There may be good policy in retaliations of this kind, *when there is a probability that they will procure the repeal of the high duties or prohibitions complained of.* The recovery of a great foreign market will generally more than compensate the transitory inconveniency of paying dearer during a short time for some sorts of goods. . . . When there is no probability that any such repeal can be procured, it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them. (emphasis added)

But who shall be the judge of whether retaliations are likely to induce the foreign nation to repeal its high duties or prohibitions? Unfortunately, the decision to pursue retaliation is often made by “that insidious and crafty animal, vulgarly called a statesman or politician, whose councils are directed by the momentary fluctuations of affairs.”¹⁴⁸

On the effect of trade retaliation, Smith further states that while trade retaliation will certainly benefit some particular class of workmen by excluding some of their foreign rivals, it will not help those workmen who suffered by the foreign country’s prohibition of importation. He says:¹⁴⁹

On the contrary, they and almost all the other classes of our citizens will thereby be obliged to pay dearer than before for certain goods. Every such law, therefore, imposes a real tax upon the whole

¹⁴⁶ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 374 [1776], https://oll.libertyfund.org/titles/237#Smith_0206-01_1241 [hereinafter ADAM SMITH].

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 375.

country, not in favour of that particular class of workmen who were injured by our neighbours prohibition, but of some other class.

To sum up, Adam Smith believes that retaliation in a trade war can sometimes force the offending country to lower its tariffs, but more often than not, the reverse happens.¹⁵⁰ Sadly, his view has been confirmed again nearly two and a half centuries later. To date, China's retaliatory tariffs have not induced the US to repeal its original Section 301 tariffs; instead, they have led to escalations of US tariffs hurting a greater number of Chinese exporters on the one hand, and on the other, forced all Chinese citizens to pay dearer than before for American imports. And more ominously, the hostility generated by the trade war has brought the two countries to the brink of a new Cold War.

C. *The Havana Charter*

In the aftermath of WWII, the U.N. sponsored a Conference on Trade and Employment, which adopted the Havana Charter (Charter) for an International Trade Organization (ITO) in March 1948.¹⁵¹ The Charter set out comprehensive rules for international trade and other economic matters, including employment, economic development, commercial policy, restrictive business practices, inter-governmental commodity agreements, the ITO, and settlement of disputes. Even though the Charter never came into force, primarily due to the lack of US ratification, some provisions of the Charter survived through their adoption into the GATT; and the goal of having an international trade organization was eventually realised by the establishment of the WTO.¹⁵²

One of the most remarkable features of the Charter is its provisions on dispute settlement. For the first time in history, the nations of the world agreed to surrender their power to retaliate in international trade to the control of an international organisation. The basic principle is set out in Article 92 of the Charter:

Article 92: Reliance on the Procedures of the Charter

1. The Members undertake that *they will not have recourse*, in relation to other Members and to the Organization, to any procedure *other than*

¹⁵⁰ *Id.*

¹⁵¹ See Int'l Trade Org., *Final Act of the United Nations Conference on Trade and Employment*, U.N. Doc. E/CONF.2/78 (Mar. 24, 1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf. [hereinafter Havana Charter].

¹⁵² *The GATT Years: from Havana to Marrakesh*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

the procedures envisaged in this Charter for complaints and the settlement of differences arising out of its operation.

2. The Members also undertake, without prejudice to any other international agreement, that *they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter.* (emphasis added)

Thus, the ITO was granted exclusive jurisdiction over disputes among its Members arising out of the Charter, and the Members were obligated not to resort to any unilateral economic measure contrary to the Charter. Note that reflecting the broad range of economic matters covered by the Charter, this obligation extended to unilateral “economic measures of any kind” rather than “trade measures” only.

With respect to the methods for resolving economic disputes, the Charter prescribed consultation, binding arbitration, reference to the Executive Board and ultimately to the Conference consisting of all Members, and review of the International Court of Justice (ICJ).¹⁵³ Procedurally, only the Executive Board and the Conference were to have the authority to release a Member from its obligations under the Charter (i.e., “retaliation”).¹⁵⁴ At the request of an affected Member, the decision of the Conference was to be subject to review by the ICJ in the form of an advisory opinion, which would be binding on the ITO.¹⁵⁵

These dispute settlement provisions “introduced a new principle in international economic relations.”¹⁵⁶ Through these provisions, the drafters of the Charter sought to “tame retaliation, to discipline it, to keep it within bounds” and “to convert it from a weapon of economic warfare to an instrument of international order.”¹⁵⁷ This lofty goal of the Charter, however, was not fully realised until the adoption of DSU Article 23 under the WTO.

¹⁵³ Havana Charter, *supra* note 151, arts. 93-96.

¹⁵⁴ *Id.* arts. 94.3 & 95.3. The Member against which the suspension of performance of a Charter obligation had been authorised would be free to withdraw from the ITO within sixty days. *Id.* art. 95.4.

¹⁵⁵ *Id.* arts. 96.2 & 96.5.

¹⁵⁶ U.N. Conference on Trade and Employment, Economic and Social Council, 2nd Sess., 6th mtg. at 4, U.N. Doc. E/PC/T/A/PV/6 (June 2, 1947) (statement of Clair Wilcox (U.S.)).

¹⁵⁷ *Id.*

D. *GATT 1947*

While the Charter was being negotiated, a group of twenty-three countries concluded a separate agreement on the reduction of tariffs — the General Agreement on Tariffs and Trade (GATT 1947) — which took effect on January 1, 1948, through a Protocol of Provisional Application (PPA).¹⁵⁸ It was anticipated that GATT 1947 would be absorbed by the Charter once the latter entered into force.¹⁵⁹ As a temporary agreement, GATT 1947 did not provide for detailed institutional arrangements. On dispute settlement, it incorporated certain elements from the Charter, including nullification or impairment, violation and non-violation claims, consultation and adjustment, and reference of a dispute to the joint action of all CONTRACTING PARTIES which could authorise one CONTRACTING PARTY to suspend the application of its obligations to another.¹⁶⁰ However, GATT 1947 did not adopt the strict discipline of Article 92 of the Charter on the exclusion of unilateral measures.

Despite its “birth defects,”¹⁶¹ GATT 1947 evolved into a successful world trading regime that preceded the WTO. Out of necessity, the GATT regime developed its own dispute settlement mechanism in practice. Its dispute procedures resembled that of institutional arbitration, except that the decision of a GATT dispute settlement panel was not effective unless it was adopted by the CONTRACTING PARTIES, the collective of all CONTRACTING PARTIES of the GATT. Most critically, the decisions of the CONTRACTING PARTIES were taken by consensus only.¹⁶² As a result, the losing party in a dispute could veto the panel decision, rendering compliance with GATT dispute settlement decisions entirely voluntary.¹⁶³

¹⁵⁸ For an account of this history, see Roy Santana, *GATT 1947 and the gruelling task of signing*, WTO, https://www.wto.org/english/tratop_e/gatt_e/task_of_signing_e.htm.

¹⁵⁹ GATT article XXIX sets out the legal relations between GATT and Havana Charter. For historical background, see DOUGLAS IRWIN, ET AL., *THE GENESIS OF THE GATT* (2008).

¹⁶⁰ GATT arts. XXII & XXIII.

¹⁶¹ John H. Jackson, *The Case of the World Trade Organization*, 84(3) INT’L AFFAIRS 437, 441 (2008).

¹⁶² This was the practice despite the fact that GATT article XXV provides for a majority voting of the CONTRACTING PARTIES.

¹⁶³ Despite the voluntary nature of GATT compliance, a large number of GATT dispute settlement decisions were not blocked. That is mainly because the losing parties had a long-term systemic interest and knew that excessive use of the veto right would result in a response in kind by others. See *Historical development of the WTO dispute settlement system*, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm.

Legally, even though GATT 1947 did not provide for exclusive GATT jurisdiction over disputes arising from its operation, a CONTRACTING PARTY resorting to unilateral retaliatory measures without the approval of the CONTRACTING PARTIES would still violate its GATT obligations, such as tariff bindings and MFN. Yet, as a practical matter, it was difficult to establish the GATT-illegality of unilateral retaliatory measures, since any challenge to such measures could be blocked by the defendant party.¹⁶⁴

In practice, the GATT era witnessed various episodes of retaliatory measures and countermeasures taken unilaterally by the CONTRACTING PARTIES, especially by the US and the European Economic Community.¹⁶⁵ Some of such measures and countermeasures were taken pending the resolution of GATT disputes, and some were adopted entirely outside the GATT framework. A majority of these disputes were eventually settled bilaterally.¹⁶⁶ In fact, the CONTRACTING PARTIES managed to authorise retaliatory measures only once in the entire history of the GATT.¹⁶⁷

In sum, the GATT system lacked an effective multilateral discipline over unilateral retaliation.

E. DSU Article 23: Born of a Grand Bargain

The new discipline of DSU Article 23 over unilateral retaliation was born of a grand bargain between the US and other CONTRACTING PARTIES during the Uruguay Round negotiations (1986-1993), which led to the establishment of

¹⁶⁴ From the US perspective, unilateral retaliatory measures were justified under the GATT system because the approval of retaliation by the CONTRACTING PARTIES could be blocked by the defendant party. *See* Panel Report, *US — Section 301*, *supra* note 75, ¶ 4.75.

¹⁶⁵ For a list of unilateral retaliatory and counter-retaliatory measures involving the US from 1975 to 1989, *see* ROBERT HUDEC, *Thinking about the New Section 301: Beyond Good and Evil*, in *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 198-203, Appendix 1 (1999) [hereinafter HUDEC].

¹⁶⁶ *Id.*

¹⁶⁷ This decision was taken by the CONTRACTING PARTIES on November 8, 1952, adopting the Report of the Working Party and the Determination on the Netherlands measures of suspension of obligations to the US. *See* GATT Analytical Index, art. XXIII Jurisprudence 693, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art23_jur.pdf. For a number of unsuccessful requests for GATT authorisation of retaliations, *see* GATT Analytical Index, art. XXIII Jurisprudence 692-700, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art23_jur.pdf.

the WTO in 1995.¹⁶⁸ The grand bargain, in turn, was occasioned by the US Section 301 legislation.

During the Uruguay Round negotiations, the US pushed an agenda of new trade disciplines and reform of dispute settlement, but its efforts were met with strong resistance from other countries.¹⁶⁹ Frustrated with the lack of progress in the multilateral negotiations, the US resorted to aggressive unilateral action. In 1988, the US adopted a new trade law that amended Section 301 of the Trade Act of 1974.¹⁷⁰ The amendment authorised the US government to take unilateral trade measures to retaliate against a wide range of foreign practices, including not only foreign measures that allegedly violated GATT rules, but also practices that were not covered by the GATT but were deemed by the US as “unreasonable”, such as inadequate IP protection and barriers in service trade.¹⁷¹

The American *aggressive unilateralism* was nearly universally condemned.¹⁷² According to the US, however, its unilateral measures were “necessitated by the failure of bilateral or multilateral efforts to address a problem”, and the way to minimise or avoid unilateralism was “to create a credible multilateral system – by strengthening the existing system.”¹⁷³

Concerned that American unilateralism would have a destructive effect on the GATT, other countries dramatically changed their position.¹⁷⁴ In the end, a grand bargain was struck. In exchange for the agreement of other countries to abandon the veto in the dispute settlement system, the US agreed to give up unilateral enforcement of its rights under the Uruguay Round multilateral agreements, which covered new subjects of IP protection and trade in services. The former part of the bargain is reflected in the “negative consensus” rules of DSU Articles 6 and 16 that make the establishment of panels and the adoption of panel reports effectively

¹⁶⁸ For a brief overview of the Uruguay Round, see *The Uruguay Round*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

¹⁶⁹ Both developed and developing countries opposed to reform proposals of limiting the power of losing parties under the consensus principle, arguing that GATT adjudication should remain consensual and that it would not be productive to force governments into proceedings and rulings that they were not prepared to accept voluntarily. See HUDEC, *supra* note 165, n.23.

¹⁷⁰ The Omnibus Trade and Competitiveness Act, 19 U.S.C. § 2901 et seq. (1988).

¹⁷¹ HUDEC, *supra* note 165.

¹⁷² See generally JAGDISH BHAGWATI & HUGH PATRICK, *AGGRESSIVE UNILATERALISM: AMERICA'S 301 POLICY AND THE WORLD TRADING SYSTEM* (1990).

¹⁷³ Council, *Discussion on Unilateral Measures* (Feb. 8-9, 1989), GATT Doc. C/163, at 4 (Mar. 16, 1989).

¹⁷⁴ HUDEC, *supra* note 165, at 198.

automatic,¹⁷⁵ and the latter part in DSU Article 23, titled “Strengthening of the Multilateral System”.¹⁷⁶

It may seem ironic that the new WTO discipline on unilateral trade retaliation should have been occasioned by the US aggressive unilateralism. The irony, however, can be explained in part by the theory that certain American actions should be characterised as “justified disobedience”.¹⁷⁷

F. The Function of Article 23 and Its Limits

As previously discussed, the rejection of self-help under DSU Article 23 is absolute. In this sense, DSU Article 23 has achieved the goal of Article 92 of the Charter, namely, to “tame retaliation, to discipline it, to keep it within bounds” and “to convert it from a weapon of economic warfare to an instrument of international order.”¹⁷⁸

That said, Article 23 has its limits. The ban on self-help applies only when it is used to counter: (a) a violation of WTO obligations; (b) other nullification or impairment of benefits under the WTO agreements or (c) an impediment to the attainment of any objective of the WTO agreements.¹⁷⁹ Therefore, to the extent that Section 301 tariffs are used to address China’s practice in areas not covered by the WTO agreements, such as outbound foreign investment and cyber theft, DSU Article 23 will have no say. Unfortunately, WTO Members have failed to enact major new multilateral disciplines for more than two decades, leaving the field open for aggressive unilateral measures to address new issues. Some suggested that the resurgence of US unilateral action under Section 301 could be seen in the same light as what was historically described as a form of *civil disobedience*.¹⁸⁰ Yet, the Trump administration’s willingness to weaponise tariffs has extended to areas far

¹⁷⁵ Negative consensus, also known as reverse consensus, means a consensus in the DSB against the establishment of a panel or the adoption of a panel report.

¹⁷⁶ ANDREW GUZMAN ET AL., INTERNATIONAL TRADE LAW 161 (3d ed., 2016).

¹⁷⁷ This theory was suggested by the late Professor Hudec, who upon analysing different components of the Section 301 legislation concluded that those US measures aimed to overcome inertia in the Uruguay Round negotiations should be deemed as “justified disobedience.” See HUDEC, *supra* note 165.

¹⁷⁸ *Id.*

¹⁷⁹ DSU, *supra* note 67, art. 23.1.

¹⁸⁰ CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, CIGI EXPERT CONSULTATION ON WTO REFORM, SPECIAL REPORT: SPRING 2019, at 13, https://www.cigionline.org/sites/default/files/documents/WTO%20Special%20Report_0.pdf. [hereinafter *CIGI Special Report*].

beyond the scope of WTO trade negotiations.¹⁸¹ In this sense, DSU Article 23 has not tamed unilateral retaliation.

Nonetheless, DSU Article 23 can keep aggressive unilateralism in bounds. This is because an aggressive use of unilateral measures, such as the Section 301 tariffs, inevitably results in the breach of GATT rules on tariffs bindings and MFN, thus triggering the application of Article 23. By banning unilateral countermeasures, such as China's retaliatory tariffs, Article 23 can prevent escalation of a trade conflict.

It is critical to understand that DSU Article 23 places the burden of avoiding a trade war on the Member responding to a (perceived) WTO violation. This design makes sense. A trade war—in which two countries engage in tit-for-tat retaliations against each other—cannot happen with an “aggressor” acting alone. More importantly, whether the aggressor's initial action is indeed a WTO violation remains to be determined by a WTO tribunal. Until such a determination is made, the only effective means to prevent escalation of a trade conflict is to ask the “victim” to refrain from unilateral retaliation.

Meanwhile, one must keep in mind that Article 23 does not prohibit trade retaliation *per se*. Once a WTO tribunal renders a guilty verdict on the aggressor's action, the victim may begin to pursue remedies available under the DSU. If the aggressor fails to withdraw the offending measure on a timely basis or otherwise offer satisfactory compensation, the victim is guaranteed—thanks to the negative consensus rule—to receive DSB authorisation for retaliation, provided that the level of retaliation is approved by the DSB.¹⁸² Thus, what Article 23 does is to

¹⁸¹ For example, in 2019 President Trump threatened tariffs on all Mexican goods to get Mexico on board to help curb the tide of immigrants at the US southern border. See Makini Brice, *Trump threatens more tariffs on Mexico over part of immigration deal*, REUTERS (June 10, 2019), <https://www.reuters.com/article/us-usa-trade-mexico/trump-threatens-more-tariffs-on-mexico-over-part-of-immigration-deal-idUSKCN1TB182>. In 2020, President Trump considered new tariffs on China as punishment for China's role in the pandemic. See Jeff Mason et al., *Trump threatens new tariffs on China in retaliation for coronavirus*, REUTERS (Apr. 30, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-china/trump-threatens-new-tariffs-on-china-in-retaliation-for-coronavirus-idUSKBN22C3DS>.

¹⁸² To date, China has obtained the DSB authorisation to retaliate against the US in two cases. See Panel Report, *United States — Certain Methodologies and Their Application to Antidumping Proceedings Involving China*, WTO Doc. WT/DS471/ARB (adopted Nov. 1, 2019) (authorising China to suspend WTO obligations in the amount of \$3.578 billion per year); Panel Report, *United States — Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/30 (adopted Oct. 18, 2019) (Recourse to article 22.2 of the DSU by China) (The final amount of retaliation authorised will be determined by the WTO arbitration).

exert multilateral control over the *timing* and *scale* of trade retaliations. In terms of timing, the length of time needed to go through the DSU procedures may help provide a cooling-off period for the victim.¹⁸³ In terms of scale, a DSB-authorized retaliation has the legitimacy that will deter counter-retaliation, thereby avoiding escalation of a trade conflict.

To illustrate the significance of such multilateral control, it is helpful to compare the US-China trade war with the metal tariff wars waged between the US and a number of WTO Members. In the spring of 2018, the Trump administration imposed additional import tariffs on steel (25%) and aluminium (10%) on the grounds of national security under Section 232 of the Trade Expansion Act of 1962. The US metal tariffs apply to products originated in all countries except for a few that have managed to negotiate a bilateral deal with the US.¹⁸⁴ The EU and eight other Members brought WTO complaints against the US metal tariffs, characterising such tariffs as “safeguard measures” not taken in accordance with the WTO Agreement on Safeguards (Safeguard Agreement).¹⁸⁵ This characterisation provided these Members with a plausible basis for imposing retaliatory tariffs on US products under Article 8.2 of the Safeguard Agreement, which authorises an exporting Member affected by a safeguard measure to suspend equivalent level of concessions and other GATT obligations. The US disagreed with this characterisation, insisting that its metal tariffs are measures necessary to protect its essential security interests, as permitted by GATT Article XXI.¹⁸⁶ Meanwhile, the US also brought WTO complaints against these Members, challenging their retaliatory tariffs as inconsistent with GATT Articles I and II.¹⁸⁷ At the time of writing, the two sets of WTO disputes remain pending.

¹⁸³ Some might argue that “justice delayed is justice denied”. While a prolonged process of dispute settlement weakens WTO rule of law, this argument nonetheless reflects certain misunderstandings about the nature of trade wars. *See supra* Part IV.A.

¹⁸⁴ Countries having struck such bilateral deals are Argentina, Brazil, South Korea, Canada and Mexico. The extent and conditions of the exemption from the US metal tariffs vary depending on the country. For unclear reasons, Australia has been completely exempted from the metal tariffs from the outset. *See generally* Bown & Kolb, *supra* note 2.

¹⁸⁵ *See United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/1 (China), WTO Doc. WT/DS547/1 (India), WTO Doc. WT/DS548/1 (EU), WTO Doc. WT/DS550/1 (Canada), WTO Doc. WT/DS551/1 (Mexico), WTO Doc. WT/DS552/1 (Norway), WTO Doc. WT/DS554/1 (Russia), WTO Doc. WT/DS556/1 (Switzerland), and WTO Doc. WT/DS564/1 (Turkey). Canada and Mexico settled their disputes with the US respectively in July 2019.

¹⁸⁶ *See, e.g., Communications from the United States*, WT/DS548/13 (July 6, 2018).

¹⁸⁷ *See Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS557/1 (Canada), WTO Doc. WT/DS558/1 (China), WTO Doc. WT/DS559/1 (EU), WTO Doc. WT/DS560/1 (Mexico), WTO Doc. WT/DS561/1 (Turkey), WTO Doc. WT/DS566/1

Unlike the US-China trade war, the metal tariff wars have been fought within the WTO legal framework, and hence, have not escalated out of control. The characterisation of the metal tariffs as “safeguard measures” may be merely a fig leaf to cover the desire of the several Members for revenge¹⁸⁸—Article 8.2 of the Safeguard Agreement is one of the few WTO provisions that permit a Member to take retaliatory measures on its own.¹⁸⁹ But that fig leaf has effectively prevented an escalation of the metal tariff wars. Instead of imposing counter-retaliatory tariffs unilaterally, the US went to WTO dispute settlement to challenge the legality of the retaliatory tariffs imposed by several Members. In contrast, in the case of Section 301 tariffs, the lack of a legal cover for China’s retaliatory tariffs has allowed the US to impose counter-retaliatory tariffs time and again. Waged outside the WTO legal framework, the US-China trade war has no predictable endpoint or limit on its scale. By the same token, as long as a trade war is fought within the WTO legal framework, be it antidumping or countervailing duty levies or disguised nontariff barriers, it is unlikely to spiral out of control because the endpoint and scale of the conflict will be largely predictable within the legal framework.¹⁹⁰

Some may argue that China’s decision to retaliate unilaterally, even if legally untenable, is nonetheless understandable in light of the unprecedented scale of the Section 301 tariffs.¹⁹¹ This argument seems to assume that if a WTO violation (e.g., the levy of Section 301 tariffs) reaches a certain scale, DSU Article 23 will lose its effectiveness. From the standpoint of economic rationale, however, the larger the

(Russia), and WTO Doc. WT/DS585/1 (India). The US settled its disputes with Canada and Mexico in July 2019.

¹⁸⁸ The characterisation of the US metal tariffs as safeguard measures is highly problematic. See Yong-Shik Lee, *Are Retaliatory Trade Measures Justified under the WTO Agreement on Safeguards?*, 22(3) J. INT’L ECON. L. 439-458 (2019).

¹⁸⁹ Another situation in which a Member may take “retaliatory” measures on its own is the modification of schedules under GATT art. XXVIII and GATS art. XXI, which provisions allow a Member adversely affected by another Member’s modification of its goods or services schedule to take equivalent measures against the modifying Member. It should be noted that in the contexts of schedule modifications or safeguard measures, the “retaliatory” measures are designed to counter a lawful conduct and their purpose is to rebalance the level of concessions so as to maintain reciprocal and mutually advantageous arrangements. See generally Joost Pauwelyn, *The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO Obligations?*, in *LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 34-72 (Chad P. Bown & Joost Pauwelyn eds., 2010).

¹⁹⁰ For the trajectory of the several trade wars waged by the Trump administration, see Bown & Kolb, *supra* note 2.

¹⁹¹ The initial round of the Section 301 tariffs targeted \$50 billion worth of Chinese products. In comparison, the initial target of the US metal tariffs was \$48 billion, which would be borne by multiple countries. For details, see Bown & Kolb, *supra* note 2.

scale of trade aggression, the higher the stakes the “victim” country will have in following the Article 23 discipline because compliance with Article 23 will save its citizens from the economic woes that would be inflicted by its own retaliatory trade barriers and from even greater damage that would result from an escalation of a trade conflict. Politically, unlike in prior times when it was difficult for nations to resist “misguided councils” of “insidious and crafty” politicians to take trade revenge,¹⁹² the contemporary international discipline of DSU Article 23 lends legitimacy to governments in rejecting such moves. By simply honouring its treaty obligation under Article 23, a WTO Member should be able to resist domestic political pressures to enter into a trade war.

In practice, however, China has followed neither the economic rationale nor the political logic pertaining to the DSU Article 23 discipline. The next section will proceed to address this problem.

V. LESSONS FROM THE TRADE WAR: A REFORM PROPOSAL

The US-China trade war has been fought outside the multilateral legal framework because China, the party to which the multilateral system allocates the burden to avoid the trade war, failed to comply with DSU Article 23. But how did that happen? Is there anything the WTO as an institution could have done to prevent that happening? If not, was it due to certain gaps in the DSU design, or was it because the system had reached its inherent limits? An inquiry into these questions may help us to determine whether the multilateral system can be improved in its function to prevent large-scale trade wars in the future.

A. *China's Policy Mistake*

China made a massive blunder by retaliating against the US tariffs unilaterally. In addition to all the negative economic and political consequences it has suffered from the trade war, China's unilateral retaliation has morally damaged its legal case against the Section 301 tariffs.¹⁹³ Moreover, by engaging in a trade war outside the WTO framework, China has unwittingly collaborated with the US in undermining the multilateral trading system, which is not the result it had hoped for. Being the

¹⁹² ADAM SMITH, *supra* note 146.

¹⁹³ See US statement opposing China's request for establishing a WTO panel in WTO Doc. WT/DS543 at the DSB meeting of Dec. 18, 2018 (accusing China of being “hypocritical” in pursuing its WTO case against the US since it had already retaliated against the US unilaterally and claiming that China sought to “use the WTO dispute settlement system as a shield” for its trade-distorting practices not covered by WTO rules). Dispute Settlement Body, *Minutes of Meeting held in the Centre William Rappard on 18 December 2018*, WTO Doc. WT/DSB/M/423, ¶ 8.3 (Apr. 4, 2019).

biggest beneficiary of the multilateral trading system, China has been a firm supporter of the WTO. Contrary to much of the negative publicity about its WTO compliance, China had been taking care to follow the letter, if not always the spirit, of WTO law, and has kept a near-perfect record of complying with WTO dispute settlement rulings.¹⁹⁴ The blatant violation of DSU Article 23, therefore, is a major exception in China's WTO practice.

What caused Beijing to depart from its historically cautious approach to WTO law? A few factors can be observed. First, the emotional factor. China was outraged by the release of the Section 301 Report and felt its national dignity was at stake. The indignation can be readily observed from the emotional statements of China's representatives at WTO meetings in the early days of the conflict.¹⁹⁵ Second, an inadequate understanding of applicable international law. As already discussed, China invoked "basic principles of international law" as justification for its unilateral retaliation but has yet to explain what such principles are and how they should apply. It appears that China had an inadequate understanding of the underlying rationale of DSU Article 23 and the interaction between DSU Article 23 and general international law. As a result, China pursued a legally incoherent strategy—suing the US at the WTO multilateral forum while retaliating against the US unilaterally without DSB authorisation. Third, a miscalculation of US-China power relations. Beijing had apparently underestimated the Trump administration's resolve to reshape US-China economic relations and the level of US bipartisan

¹⁹⁴ Since its accession, a total of forty-four WTO cases have been brought against China, of which eleven remain in consultation, twelve have been settled without adjudication and twenty-one have resulted in adverse rulings against China. To date, China has never been subject to DSB-authorized retaliation due to non-compliance. For a detailed treatment of China's implementation of adverse WTO rulings, see WEIHUAN ZHOU, *CHINA'S IMPLEMENTATION OF THE RULINGS OF THE WORLD TRADE ORGANIZATION* (2019). For all WTO disputes involving China, see *China and the WTO*, *supra* note 115.

¹⁹⁵ See, e.g., *Minutes of the Meeting of the Council for Trade in Goods*, *supra* note 25 (China's statement at the meeting reads:

WTO Members should jointly prevent the resurrection of Section 301 investigations and lock this beast back into the cage of the WTO rules . . . The character of China was like a bamboo, resilient enough to dance in the wind, but strong enough to withstand tremendous pressure. Unilateralism was fundamentally incompatible with the WTO, like fire and water. In the open sea, if the boat capsized, no one was safe from drowning. Members should not stay put watching someone wrecking the boat. The WTO was under siege and all Members should lock arms to defend it).

See also Dispute Settlement Body, *Minutes of Meeting held in Centre William Rappard on 28 May 2018*, WTO Doc. WT/DSB/M/413, ¶¶ 4.7, 4.8 (Aug. 31, 2018) (China's statement at the DSB meeting on May 28, 2018, condemning the findings of the Section 301 Report as "turning a deer into a horse", a reference to an ancient Chinese fable that exposes the arbitrariness of a Chinese emperor).

support for its China policy. And a long-held notion of economic interdependence between the two countries may have given the Chinese leaders the false impression that China had reached a stage of power parity with the US, whereas in reality, China remained far more reliant on the US than the other way around.¹⁹⁶ It appears that a combination of the above factors was sufficient to prompt Beijing onto the wrong path.

B. A Gap in the DSU

In retrospect, could the WTO, as the global institution for trade, have played a role in preventing China from making its mistake? At the beginning of the trade conflict, China appealed passionately to the WTO Members for their support in its condemnation of US aggressive unilateral measures under Section 301. China's appeal, however, received merely a lukewarm response, with only four members explicitly endorsing China's position.¹⁹⁷ Other than providing the platform for Members to express their views on the US-China dispute, the WTO took no institutional action to mediate the dispute or to stop China from breaching its obligation under DSU Article 23. This state of affairs is unfortunate, but unsurprising. Known as a "member-driven" organisation, the WTO makes all its decisions by consensus;¹⁹⁸ and unlike other major international organisations, power in the WTO is not delegated to a board of directors or the organisation's head.¹⁹⁹

¹⁹⁶ Panos Mourdoukoutas, *A Big Mistake China's Political Elite Makes in Fighting the Trade War*, FORBES (Sept. 7, 2019), <https://www.forbes.com/sites/panosmourdoukoutas/2019/09/07/a-big-mistake-chinas-political-elite-makes-in-fighting-the-trade-war/>. See also, Xiangfeng Yang, *The Lose-Lose Trade War*, 118 (809) CURRENT HIST. 203 (2019).

¹⁹⁷ Of the fourteen Members that spoke out on the issue at the DSB and General Council meetings in the spring of 2018, only Russia, Pakistan, Venezuela and Bolivia explicitly criticised the US. While Brazil, India, Tanzania, Cambodia, Cuba, and Hong Kong expressed their general opposition to unilateralism and called on all parties to adhere to multilateral disciplines, Japan, EU, Chinese Taipei, and Norway stated that they also shared the US concerns over China's IP and technology transfer policies. See Dispute Settlement Body, *Minutes of Meeting held in the Centre William Rappard on 27 March, 2018*, WTO Doc. WT/DSB/M/410, ¶¶ 11.4-11.5 (June 26, 2018); Dispute Settlement Body, *Minutes of Meeting held in the Centre William Rappard on 27 April 2018*, WTO Doc. WT/DSB/M/412, ¶¶ 5.12-5.20 (Aug. 1, 2018); General Council, *Minutes of the Meeting held in the Centre William Rappard on 8 May 2018*, WTO Doc. WT/GC/M/172, ¶¶ 6.20-6.30 (July 6, 2018).

¹⁹⁸ This is despite the various voting provisions in the WTO agreements. For an evolution of the consensus practice, see G. Marceau & C. Marquet, *Practice and Ways of Doing Things in the World Trade Organization (WTO) Law*, in INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 513-550 (H.R. Fabri ed., 2019).

¹⁹⁹ *Understanding the WTO: The Organization, Whose WTO is it anyway?*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

By systemic design, the remedy for violation of DSU Article 23, as in the case of violation of other WTO rules, is for the affected Member(s) to take the violator to the WTO dispute settlement mechanism.²⁰⁰ In this case, however, the Member directly affected by China's violation of Article 23 is the US, which chose not to sue China for the violation.²⁰¹ As a result, the systemic check on China's unilateral retaliation broke down.

This scenario reveals a major gap in the DSU design. If a Member takes unilateral trade measures to tackle an issue not covered by specific WTO rules (i.e., aggressive unilateralism), it may breach GATT or other substantive WTO obligations but will not violate DSU Article 23. But if the victim of aggressive unilateralism retaliates against the breach of substantive WTO rules unilaterally, it will violate DSU Article 23. And there is no built-in mechanism to save the victim from such violation. Without such a mechanism, however, the system cannot prevent the dispute from escalating into a trade war. This problem will persist as long as a Member is willing and able to use aggressive unilateralism to tackle issues beyond the coverage of existing WTO law.²⁰² Since it is practically impossible for WTO disciplines to cover every emerging issue in international relations, the only way to ensure DSU Article 23 compliance by the victim of aggressive unilateralism and thereby to avoid trade wars is to provide an additional enforcement mechanism for Article 23.

C. A Proposal

What might such an additional enforcement mechanism for DSU Article 23 discipline look like? First, the mechanism must be able to exert multilateral control over unilateral retaliation, regardless of whether the underlying causes of the dispute are covered by existing WTO rules. Second, the mechanism needs to be activated as quickly as possible, before unilateral retaliation can take place. Third, the mechanism should have some effective means of ensuring compliance with Article 23. Based on these principles, the mechanism would need two major

²⁰⁰ In theory, nothing in the WTO agreements requires a Member to have a legal interest in a dispute (i.e., legal standing) to bring a WTO lawsuit. See Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS/AB/R27, ¶ 132 (Sept. 9, 1997). In practice, however, only a Member suffering injury to its economic interest would have the incentive to bring a WTO dispute.

²⁰¹ From the US standpoint, the issues addressed by Section 301 tariffs are not covered by WTO rules. Hence, it will tackle the issues, together with China's responses, outside the WTO framework.

²⁰² The Uruguay Round negotiators may not have anticipated the resurrection of US-style aggressive unilateralism. See *supra* Part IV.E.

components. One is intervention by the WTO Director-General (DG); the other a set of consequences in the event the intervention fails.

1. Intervention by the WTO Director-General

As discussed above, when the Section 301 Report was released, China reacted emotionally and did not appear to have an adequate understanding of the applicable international law. From the time China made the first statement at the WTO condemning the Section 301 Report and vowing to “take WTO rules and *other necessary means* to safeguard its legitimate rights and interests”²⁰³ to the time China levied the first round of retaliatory tariffs,²⁰⁴ more than three months had passed. If during that period of time, there had been a mechanism for the DG to intervene, the outcome may well have been different. With the assistance of highly competent staff of the WTO Secretariat, such an intervention could have helped Beijing gain a precise understanding of the applicable law as well as the grave implications of Article 23 violation. The intervention process would also have provided a cooling period for emotions. Moreover, a WTO intervention, with its multilateral legitimacy, would have served as a face-saving device for Beijing politically.

Functionally, the DG intervention might look like a form of alternative dispute resolution (ADR), similar to “good offices, conciliation and mediation” provided in Article 5 of the DSU.²⁰⁵ But it is not ADR in nature, but rather an additional procedure for ensuring compliance with DSU Article 23. The sole purpose of the intervention would be to dissuade a Member from taking unilateral retaliation in contravention of Article 23. The process would be initiated by the DG, and a Member contemplating such unilateral retaliation would be required to participate in the process. The DG initiation of the process and the mandatory participation by the Member in question are the two key features designed to overcome the inability of a “member-driven” institution to respond to the threat of a trade war.

²⁰³ *Minutes of the Meeting of the Council for Trade in Goods*, *supra* note 25, ¶ 25.4.

²⁰⁴ China announced its decision to levy retaliatory tariffs on April 4, 2018 (*see MOFCOM Announcement No. 34*, *supra* note 28) but did not implement the levy until July 6, 2018, the same day the US levied its initial round of Section 301 tariffs. For the timeline of the US-China trade war, *see* Bown & Kolb, *supra* note 2.

²⁰⁵ The article 5 procedures have never been used in WTO practice. The only case of mediation ever conducted by the DG 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.

2. Consequences of Intervention Failure

What if the intervention fails and the Member involved ends up taking unilateral retaliatory measures anyway? Considering the uniquely important function of DSU Article 23 in the world trading system, a special remedy would be warranted for a wilful violation of the DSU rule. A “wilful violation” would occur when the Member required to participate in the intervention failed to follow the advice of the DG and took unilateral retaliatory action instead. It should be emphasised that a special remedy would be necessary only in the case of a wilful violation. Other than in such cases, compliance with DSU Article 23 can be achieved through the normal WTO dispute settlement procedures.

Under existing WTO law, a Member determined to ignore its obligation under Article 23 can be relieved of its legal obligations in one of two ways: withdrawal and waiver. Pursuant to Article XV:1 of the WTO Agreement, any Member may withdraw from the WTO treaties upon six-month written notice. The withdrawal will terminate WTO treaty relations between the withdrawing Member and all other Members; no Member has done so in practice. Alternatively, the Member may request the Ministerial Conference to waive its obligation under DSU Article 23. Pursuant to Article IX:3 of the WTO Agreement, a waiver can only be granted in exceptional circumstances and for a specific period of time, subject to the terms and conditions set out in the waiver decision.²⁰⁶ In practice, most of the waivers granted concern tariff schedules; and none concerns obligations under the DSU.²⁰⁷

Given the lack of viable ways to excuse a wilful violation of Article 23 under existing WTO law, new approaches would be needed to provide special remedies for such violation. Below are two suggestions modelled after existing WTO provisions.

a. Forced withdrawal

Unlike the U.N. and certain other international organisations, the WTO does not entertain the possibility that a Member may be expelled from the organisation for having persistently violated its principles.²⁰⁸ Nonetheless, forced withdrawal is

²⁰⁶ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, arts. IX:3-:4 [hereinafter WTO Agreement].

²⁰⁷ For the list of waivers granted since the inception of the WTO, *see* General Council, *Waivers 1995-2015*, WTO Doc. WT/GC/W718 (Jun. 27, 2016); General Council, *Waivers-2017*, WTO Doc. WT/GC/W/740 (Jan. 12, 2018).

²⁰⁸ A UN member that has persistently violated the UN principles may be expelled from the organisation by the General Assembly upon the recommendation of the Security Council. U.N. Charter, art. 6. For a general introduction on the subject, *see* Louis Sohn,

legally possible in the context of WTO treaty amendment. Pursuant to paragraphs 3 and 5 of Article X of the WTO Agreement, the Ministerial Conference may decide by a three-fourth majority that any amendment made effective under those paragraphs “is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference” (emphasis added). The alternative provided therein suggests that unless the Ministerial Conference consents otherwise, a Member that has failed to accept a certain amendment may be forced to withdraw from the WTO.

A similar approach could be adopted in the case of a wilful violation of DSU Article 23. The Ministerial Conference may decide by a three-fourth majority that the violation of DSU Article 23 by any Member is of such a nature that the Member shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Even though forced withdrawal would be extremely unlikely in practice, prescribing this legal possibility would send a clear message about the systemic importance of the DSU Article 23 discipline. The reputation cost associated with forced withdrawal might deter a Member from committing a wilful violation of Article 23.

b. Suspension of Treaty Relations within the WTO

Alternatively, the special remedy for a wilful violation of Article 23 could be the suspension of WTO treaty relations between the Member taking unilateral retaliation (the retaliating Member) and the Member affected by the retaliation (the affected Member). Unlike the suspension of concessions or other specific obligations that may be authorised by the DSB under DSU Article 22, the suspension of treaty relations proposed here would apply to the operation of all WTO agreements as a whole.

The effect of such suspension would be similar to that of “non-application” under Article XIII of the WTO Agreement. In accordance with Article XIII “Non-Application of Multilateral Trade Agreements between Particular Members”, the WTO Agreement and its Annexes 1 and 2 (GATT, GATS, TRIPS and DSU) shall not apply between any Member and any other Member if either of them does not consent to such application at the time either becomes a Member.²⁰⁹ This mechanism is a continuation of Article XXXV of GATT 1947 “Non-application

Expulsion or Forced Withdrawal from an International Organization, 77 HARVARD L. REV. 1381-1425 (1964).

²⁰⁹ WTO Agreement, *supra* note 206, art. XIII:1. Since non-application can only be invoked at the time a country becomes a Member, the invocation cannot be reinstated once withdrawn.

of the Agreement between Particular Contracting Parties²¹⁰. During the GATT era, a total of seventy-nine invocations of non-application in respect of twenty-two countries had been made; while most of which had been subsequently withdrawn, a few extended into the WTO era.²¹¹ Under the WTO, a total of twelve invocations of non-application had been made, of which ten had been subsequently withdrawn and two remained in force.²¹² Like non-application under Article XIII, the suspension of WTO treaty relations between the retaliating Member and the affected Member would apply to the operation of the WTO Agreement and its Annexes 1 and 2.

Legally, the suspension of WTO treaty relations between the retaliating Member and the affected Member would relieve both Members from their WTO obligations owed to each other. Consequently, the two countries could fight a trade war between themselves without violating WTO rules. Such suspension would be consistent with VCLT Article 60.2, which provides a party the right to invoke a material breach of a multilateral treaty as a ground for suspending the operation of the treaty in whole or in part in its relations with the defaulting State.²¹³

One issue is the effect of the suspension on any ongoing WTO litigation between the two parties. Unlike the case of non-application under Article XIII, where the two Members concerned would not have had the opportunity to engage in any WTO dispute with each other since the DSU has not been applied in their relations, there might be one or more pending WTO disputes between the two Members in the case of suspension. Logically, the suspension of the operation of the DSU between the two Members should result in the suspension of all pending dispute settlement procedures between the two. For the retaliating Member, the loss of recourse to the DSU procedures vis-à-vis the affected Member would be part of the cost for a wilful violation of Article 23.

The objective of the proposed special remedies is to discourage wilful violation of Article 23. Legally, forced withdrawal and suspension of treaty relations would

²¹⁰ Non-application became necessary because of the two-thirds majority voting on accession under GATT article XXXIII. See GATT ANALYTICAL INDEX, ART. XXXV, at 1037,

https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art35_gatt47.pdf.

Accession to the WTO also requires a two-thirds majority voting under article XII of the WTO Agreement, hence the need for the non-application clause in article XIII.

²¹¹ For the list of all invocations during the GATT era, see *Id.*

²¹² For a list of invocations (current as of January 2018), see WTO ANALYTICAL INDEX, GATT 1994 – ARTICLE XIII (JURISPRUDENCE), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art13_jur.pdf.

²¹³ See *supra* Part III.C.1. The provision on the suspension of WTO treaties in the case of a wilful violation would constitute *lex specialis* to the general law of VCLT article 60.

have the same effect of protecting the integrity of the WTO legal system, since in either case the two parties concerned would be completely relieved of their WTO obligations towards each other. In terms of their impact on the WTO system, however, suspension of WTO treaty relations would be less drastic than forced withdrawal. The retaliating Member would maintain its normal WTO relations with all other Members, and could resume its WTO relations with the retaliating Member once the wilful violation ceased to exist. Procedurally, suspension could be effected by written notice from the affected Member to the DSB without the need for action by the Ministerial Conference, hence would be much easier to implement than forced withdrawal. On the whole, therefore, suspension of treaty relations within the WTO would be a preferable form of special remedy.

3. Amendment to DSU Article 23

To implement the above proposal, it would be necessary to add certain provisions to DSU Article 23. Below is a suggested version of DSU amendment.

“The following text shall be inserted at the end of Article 23 ‘Strengthening of the Multilateral System’:

3. If it has become reasonably clear that, in seeking the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements, a Member may take action in contravention of the foregoing paragraphs [i.e., Article 23.1 and 23.2], the Director-General shall initiate an intervention process as soon as practicable by written notice to the Member in question. Any Member receiving such written notification shall participate in the intervention process as directed by the Director-General. The purpose of the intervention is to dissuade the Member in question from breaching its obligations under the foregoing paragraphs. The intervention process is without prejudice to the rights of any Member under the covered agreements. The intervention process shall become unnecessary if a dispute has been brought pursuant to the DSU procedures challenging the action that gives rise to the need for intervention.

4. If a Member fails to participate in the intervention process as required in paragraph 3, or fails to follow the advice of the Director-General in the intervention process, and takes action in violation of its obligations under paragraphs 1 or 2 of this Article, such action shall be deemed to be a wilful violation of the said obligations. In that event, the Member specially affected by the wilful violation shall be free to invoke it as a ground for suspending the operation of the WTO Agreement and the Multilateral Trade Agreements in Annexes 1 and 2

thereof in the relations between itself and the Member in violation. The invocation shall be notified in writing to the DSB. All pending disputes between the two Members shall be suspended during the suspension of the operation of the DSU between them. The operation of the said Agreements shall be resumed between the two Members after the wilful violation ceases to exist.”

In accordance with Article X:8 of the WTO Agreement, the proposed addition to DSU Article 23 would require approval by the Ministerial Conference, which decision must be made by consensus; once approved, however, the DSU amendment would take effect for all WTO Members, without the need for acceptance by individual Members.²¹⁴ Presently, various proposals have been made on the functioning of the appellate review, some of which also contemplate amendments to the DSU.²¹⁵ The proposed amendment to Article 23 could be considered along with those proposals.

It should be emphasised that the proposed mechanism seeks to fill a major gap in the DSU design revealed by the US-China trade war, i.e., the lack of effective multilateral control over unilateral retaliation in the event that the Member targeted by unilateral retaliation is not willing to take the retaliating Member to the WTO dispute settlement. The proposal aims at providing an additional multilateral mechanism for the enforcement of DSU Article 23, an existing WTO rule, so as to prevent escalation of trade disputes into trade wars. The proposal, however, does not solve the problem of aggressive unilateralism. Conceptually, aggressive unilateralism today involves the use of trade measures, such as Section 301 tariffs, to address issues beyond the coverage of existing WTO rules. As such, the

²¹⁴ In contrast, amendments to other covered agreement require acceptance by individual Members. See WTO Agreement, *supra* note 206, arts. X:2-:7.

²¹⁵ See, e.g., General Council, *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council*, WTO Doc. WT/GC/W/752 (Nov. 26, 2018); General Council, *Communication from the European Union, China and India to the General Council*, WTO Doc. WT/GC/W/753 (Nov. 26, 2018); CIGI *Special Report*, *supra* note 180; Bruce Hirsh, *Resolving the WTO Appellate Body Crisis: Proposals on Overreach*, NAT'L FOREIGN TRADE COUNCIL (December 2019), http://www.nftc.org/default/trade/WTO/Resolving%20the%20WTO%20Appellate%20Body%20Crisis_Proposals%20on%20Overreach.pdf; Simon Lester, *WTO Dispute Misunderstanding: How to Bridge the Gap between the United States and the Rest of the World*, INT'L ECON. L. & POL'Y BLOG (Apr. 19, 2020), <https://ielp.worldtradelaw.net/2020/04/wto-dispute-settlement-misunderstandings-how-to-bridge-the-gap-between-the-united-states-and-the-res.html>; See also General Council, *Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator H.E. Dr. David Walker (New Zealand)*, U.N. Doc. JOB/GC/222 (Oct. 15, 2019) (contemplating a General Council decision to address the AB crisis under article IX:1 of the WTO Agreement).

problem can only be dealt with through multilateral negotiations on new disciplines. Thus, revitalising the WTO negotiating function will be the key to reining in aggressive unilateralism.²¹⁶

4. Improving Article 23 Enforcement without DSU Amendment

The above proposal requires DSU amendment because it contemplates additions to the rights and obligations of WTO Members. But if it is impossible for the Ministerial Conference to reach a consensus on the amendment, a soft approach can also be considered. That is, establishing the DG intervention procedure on the basis of voluntary participation and without the special remedy for a wilful violation of Article 23.

Given that the goal is to dissuade a Member from taking unilateral retaliation in violation of Article 23, the proposed mechanism relies heavily on the role of the DG. The DG/the Secretariat must stay vigilant of the threat of unilateral retaliation, exercise sound judgement on the initiation of the intervention, and provide advice and necessary assistance to the Member in question during the intervention process. Short of DSU amendment, these new powers and responsibilities of the DG can nonetheless be authorised by the decision of the Ministerial Conference pursuant to Articles VI:2 and IX:1 of the WTO Agreement.²¹⁷ The specific authorisation by the Ministerial Conference would be necessary as it would demonstrate the systemic importance of ensuring Article 23 compliance and provide the legitimacy to the DG intervention.

Under this soft approach, the participation of a Member in the DG intervention would be voluntary. While voluntary participation would not ensure participation, it is quite likely that a Member engrossed in the heat of a trade conflict would welcome a third-party intervention, especially an intervention authorised by the Ministerial Conference. Judging from the case of China in the early days of its trade war with the US, an intervention by the DG might have made all the difference.

²¹⁶ For a proposal on comprehensive WTO reform, see Ignacio Garcia Bercero, *Why Do We Need a World Trade Organization For? The Crisis of the Rule-Based Trading System and WTO Reform*, BERTELSMANN STIFTUNG (June 6, 2020), https://www.bertelsmann-stiftung.de/fileadmin/files/user_upload/MT_WTO_Reform_2020_ENG.pdf.

²¹⁷ Article VI:2 of the WTO Agreement, *supra* note 206, provides: “The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.” Pursuant to article IX:1 of the WTO Agreement, the decision of the Ministerial Conference shall be taken by consensus; but if no consensus can be reached, the decision shall be taken by a majority of the votes cast.

Finally, a caveat to the above proposal. Recall that DSU Article 23 was born of a grand bargain made in the Uruguay Round: in exchange for eliminating the power of individual CONTRACTING PARTIES to block decisions of dispute settlement panels, the US gave up its power to unilaterally enforce the multilateral trading rules.²¹⁸ Currently, as a result of the collapse of the Appellate Body, it again becomes possible for individual Members to block the decisions of dispute settlement panels.²¹⁹ Consequently, unilateral enforcement of existing WTO rules (as opposed to norms outside the WTO coverage) may also return.²²⁰ In that event, DSU Article 23, and the proposal for its improvement, would be rendered meaningless. In other words, when binding adjudication of WTO disputes is forsaken, WTO law will have reached its inherent limit in preventing trade wars.

VI. CONCLUSION

The US-China trade war has been waged outside the WTO legal framework and its consequences are disastrous. In the midst of a pandemic, the trade war has expanded to conflict and confrontation in nearly all fronts in the US-China relations. The precipitous deterioration of US-China relations has pushed the world to the brink of a new Cold War. While such deterioration may have many causes, it is the trade conflict that has set the process in motion, and the distrust and hostility generated thereby has continued to fuel its ferocity.

The US-China trade war was provoked by the US aggressive unilateralism – the use of trade measures unilaterally in violation of WTO law to address issues not specifically covered by the WTO agreements. Yet, it is China’s tit-for-tat unilateral retaliation in breach of its obligation under DSU Article 23 that has made the trade

²¹⁸ See *supra* Part IV.E.

²¹⁹ See *US Appeal “into the void”*, *supra* note 64; *the EU proposal*, *supra* note 137.

²²⁰ In this regard, the following statement of the USTR is worth noting:

The WTO’s dispute settlement system should be totally rethought. The current two-tier system should be replaced with a single-stage process akin to commercial arbitration. . . . Rather than give the losing party an automatic appeal to a judicial body, there should be a mechanism that allows the WTO membership to set aside erroneous panel opinions in exceptional cases.

See Robert E. Lighthizer, *How to Set World Trade Straight*, WALL STREET J. (Aug. 20, 2020), <https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341>.

In suggesting that the WTO dispute settlement system should resemble commercial arbitration, which is a binding process, the USTR does not seem to be contemplating a return to the GATT era, in which individual Members would have the power to block the adoption of dispute settlement panel decisions and to retaliate unilaterally against violation of WTO rules.

war a reality. The DSU, for sound reasons, allocates the burden of avoiding a trade war to the party that is the “victim” of a WTO violation. As currently formulated, the DSU is incapable of preventing aggressive unilateralism, which can only be dealt with through the negotiation of new disciplines. By prohibiting unilateral retaliation against a WTO violation, however, the DSU may prevent a trade dispute from escalating into a trade war. The larger the scale of trade involved in the original WTO violation, the more important it is for the victim of such violation to comply with DSU Article 23, as avoiding a self-destructing large-scale trade war is at stake.

In failing to comply with DSU Article 23, China made a huge policy mistake. In addition to the grave economic and political consequences it has suffered, China’s resort to retaliatory tariffs unilaterally has morally damaged its WTO case against the US Section 301 tariffs. Moreover, by waging a trade war outside the WTO legal framework, China has unwittingly collaborated with the US in undermining the multilateral trading system. It appears that China’s policy mistake may have been to a considerable extent attributable to an inadequate understanding of the applicable law, that is, the precise scope and the underlying rationale of DSU Article 23 and the relations between the DSU rule and the principles of general international law otherwise permitting unilateral retaliation.

The key question, however, is why the WTO has been impotent in forestalling China from making this policy error. Given the “member-driven” nature of the WTO, the answer may be found in a certain deficiency in the DSU design. Currently, unilateral retaliation is prohibited by DSU Article 23. But the enforcement of Article 23 relies exclusively on the WTO dispute settlement procedures initiated by individual Members. Thus, when the US, the Member directly affected by China’s retaliatory tariffs, was unwilling to bring China to the WTO dispute settlement forum over this matter, the system’s check on unilateral retaliation broke down. In short, the current WTO control over unilateral retaliation is insufficient, as it lacks a built-in mechanism to curb unilateral retaliation multilaterally.

Based on the insights into the causes of China’s policy mistake and of WTO’s inability to prevent such a mistake, this article has proposed an additional enforcement mechanism for DSU Article 23. This mechanism aims at dissuading WTO Members from wilful violation of Article 23. It would instruct the DG of the WTO to intervene on a timely basis and provide a special remedy in the event the intervention fails. The proposal would require an amendment to DSU Article 23. Alternatively, if adopting such an amendment is impracticable, it is proposed that the DG intervention process be established on the basis of voluntary participation and without a special remedy. In that event, the DG intervention should be specifically authorised by the decision of the Ministerial Conference.

The reality of the US-China trade war has confirmed Adam Smith's prediction nearly two and a half centuries ago. Instead of forcing the US to lower its offensive tariffs, China's retaliation has only begotten more US tariffs and the resulting hostility has poisoned the entire bilateral relationship. Unlike in the days of Adam Smith or the GATT era, however, nations today have the benefit of a rule-based WTO regime that is designed to tame retaliation and convert it "from a weapon of economic warfare to an instrument of international order."²²¹ But this critical function of the regime has failed in the US-China trade conflict. While curbing the US-style aggressive unilateralism will require restoring the negotiating function of the WTO, ensuring that other countries will not respond to such aggressiveness unilaterally would go a long way towards prevention of future trade wars. For this reason, improving multilateral control over unilateral retaliation should be a top priority in WTO reform.

²²¹ *WTO- Peace & Stability*, *supra* note 145.