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THE ONGOING TRADE WAR BETWEEN CHINA AND THE UNITED STATES: LEGAL JUSTIFICATION FOR THE ADDITIONAL TARIFF MEASURES ADOPTED BY CHINA UNDER THE WTO LEGAL SYSTEM

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Abstract: *The ongoing trade war between the United States and China with the view of offering a legal justification for the additional tariff measures adopted by China under the WTO legal system. The study utilizes a critical literature review study design in establishing the legal options available and related conditions for considerations of using retaliatory tariff measures by a WTO member state against another. The study results showed that the principle of the most favourable nation treatment safeguards the Chinese nation from discriminative trade treatment by the United States. There was no evidence that the United States had complied with dictates of the WTO agreements on exceptions to the most favourable nation treatment principles against China. As such, China is justified to adopt additional tariff measures. There is a need for a more specific study on the specific circumstantial conditions behind the US-China trade wars in light of the WTO legal system. The study informs the mutual participatory nature of the WTO legal system for assured benefits amongst member states.*

Keywords: WTO Agreements, Trade Dumping, Tariff Measures, Dispute Settlement Understanding
Research Area: Law
Paper Type: Research Paper

1. INTRODUCTION

The Ongoing Trade War between China and the United States: A Justification for the Additional Tariff Measures Adopted by China under the WTO Legal System and the International Law in General

The sustainable competitiveness of the modern global economy is increasingly rooted in the principles of free trade and free market economies. This is clear in the influential value that increased interstate flow of commerce continues to have on the growth and development prospects of individual nation states. At the core of this trend, however, is the understanding that there is inherent comparative advantage amongst nation-states in terms of their economic abilities and capabilities. Just to note, while some economies boast a competitive advantage in possession of abundant natural economic resources, others command advantage in possession of excellent capabilities on the means of production such as technology, human resources, cost advantage, and legal and regulatory framework (Howse, Eliason & Trebilcock, 2005). On the contrary, however, though such differences among nation-states are vital enablers of cross-border trade, they are equally a source of power differences.

As a result, without binding provisions for guiding interstate commerce, there is every risk for the potential fostering of anti-competitive and/or exploitative economic engagements amongst nation states. This is the underlying reason behind the founding of the WTO and the various agreements by members' states. In the most basic form, the WTO is in purpose meant

for enhancing the smooth flow of commerce across economies by prohibiting discriminative trade practising and regulatory frameworks between trading partners (Tejeda, 2017). To achieve this goal, it provides an international framework for use by member states as a legally binding guide for use in the negotiating of interstate trade agreements and resolving trade-related disputes. This article gives a critical discussion on the ongoing trade war between the United States and the People's Republic of China as such relates to the provisions of the WTO legal systems. In particular, the author offers a legal justification for the additional tariff measures adopted by China under the WTO legal system.

2. THE TRADE WAR BETWEEN CHINA AND THE UNITED STATES

True to the letter, trade partnership between China and the United States is ranked the largest bilateral relationship in the 21st-century world. This is clear considering the volume of goods and services traded, as well as, the actual economic impact of this trade relationship on the national economies of either nation (Lee, 2018). As an emphasis, in 2017, an estimated about $710.4 billion worth of goods and services were traded between the United States and China. Out of this, about $187.5 billion and $522.9 billion were exports and imports by the United States from China (Lee, 2018). In addition, it is estimated that the exports by the United States to China support over 2.6 million American jobs (Guo, et al., 2018). For the Chinese nation, the United States is the largest source of its international market for its products and services.

Indeed, the United States imports from China are estimated to account for over 21 percent of the overall United States imports. This implies the critical significance of the bilateral trade relationship between the United States and China. In other words, there is evidence of a high-level economic interdependence between the United States and Chinese economies. On the contrary, however, currently, these two nation states are locked in an ongoing trade war as each country has introduced tariffs on goods traded between each other. This is clear in that the United States has so far imposed tariffs on Chinese products worth $250 billion, and that it is threatening to impose additional tariffs on Chinese products worth $267 billion. In taking this action, the United States is alleged to be exploiting the provisions of Section 301-310 of the 1974 US Trade Act.

For the Chinese government, however, this action is a contradiction to the provisions of Paragraph 1 of Article I and Paragraph 1 of Article II sections a and b of the GATT 1994 and Article XXIII of the Dispute Settlement Understanding (DSU) under the WTO agreements. In line with the argument, as of April 4, 2018, China filed a request for consultations with the United States, DS543, in relation to some of these tariff measures. On the contrary, however, in retaliation, China has also imposed tariffs measures worth $110 billion of United States goods. Despite the fact that the United States is the cause for this retaliatory act by the Chinese government, it has criticized the move by China terming it as one that does not have any legal basis. In particular, it has blamed China of violating the dictates of Paragraph 1 of Article I and Paragraph 1 of Article II sections a and b of the

GATT 1994 and Article XXIII of the Dispute Settlement Understanding (DSU) under the WTO agreements.

3. TARIFF MEASURES AND THE WTO LEGAL SYSTEM

The founding objective of the GATT 1994 and the WTO agreement, in general, is to be an international provision for mitigating undue discrimination in the engagement of interstate trade between member states of the WTO agreement (Howse, Eliason & Trebilcock, 2005). This orientation of the WTO agreement is clear in a number of provisions of the various agreements which dictate on the conduct of the WTO member states in the negotiating of trade agreements and resolving of trade-related disputes with each other. First and foremost is the provision of Paragraph 1 of Article I of the GATT 1994 agreement on the principle of most-favoured-nation treatment. Specifically, under this principle, members' states of the WTO agreement are obliged to ensure that the most favourable terms and conditions accorded to the product of any nation-state are accorded to all the other members at the time of import or export of like product (Howse, Eliason & Trebilcock, 2005).

The principle of most-favoured-nation treatment is deemed as the founding principle of the WTO agreement owing to its inherent significance in defining and defending the principle of equal treatment for all WTO member states in the negotiating of trade tariffs. Just to note, the assertion on 'the most favourable tariffs and regulatory treatment offered to one state' does not limit such treatments to trade negotiations between WTO member states, but to any of the sovereign states of the world (Tejeda, 2017). However, the legal obligation to extent such treatment does not cover nation states who are not member states of the WTO. The idea here is to ensure that the negotiations for trade agreements between member states are informed by a commitment to provide each other with the most favourable tariff and regulatory treatment and that such should be non-discriminatory in nature.

Of particular significance here, the principle of most-favoured-nation treatment entails a requirement for equal and most favourable treatment of WTO members not just in terms of tariffs and regulatory treatments on exports and imports alone. Rather, it also applies to the treatment of WTO member states in relation to internal taxes, charges, and regulations related to the practice of interstate trade (Howse, Eliason & Trebilcock, 2005). This is further complemented by the fact that the provisions of equal and most favourable treatment principle prohibit against differential treatment among products from a WTO member which are same, but like. Furthermore, Article XIII of the GATT 1994 provides for the legal right of WTO members to impose quantitative restrictions on any product (Howse, Eliason & Trebilcock, 2005). Nevertheless, this Article dictates that such restrictions must be administered indiscriminately.

The implication here is that the imposition of quantitative restrictions on products by a WTO member state should be engaged in such a way that the tariff quotas allocated to the concerned nation-states are as close as possible to what could be the case if such restrictions were not imposed. As a result, it can be concluded that the provisions of Article XIII of the GATT 1994 prohibit WTO member states from imposing quantitative restrictions contrary to

the proportion of trade that the targeted member state could enjoy relative to others if the restrictions were not presence (Tejeda, 2017). This can be legally construed to negate the ability of a WTO member states trade off the trade share of a given nation in favour of another, especially in the event of an existing business relationship.

Furthermore, Article XXVII of the GATT 1994 prohibits WTO member states against the according to of preferential tariff and regulatory treatment to state trading enterprises by the imposing of discriminative tariffs or regulatory provisions against an importing or exporting WTO member state (Viner, 2016). This implies the fact that the provisions of the GATT on the principle of the most favourable nation treatment are not limited to dictates on the indiscriminate treatment of trade agreements with other WTO member states. Rather, it also applies to tariff and regulatory treatments between domestic and state enterprises and trade agreements with other WTO member states (Viner, 2016).

Nevertheless, despite general consideration as the bedrock on which the WTO agreement is established, the principle of the most favourable nation treatment is not without a number of exceptions. First, Article XXIV provides an exception to the principle of the most favourable nation treatment to the extent that discriminative treatment is meant for enhancing regional integration (Viner, 2016). However, for a WTO member state to qualify for imposing quantitative restrictions and/or discriminative tariffs and regulatory treatments on other WTO member states outside the regional trade block, tariffs and any other barriers within the block should be substantially eliminated for all trade in the block. Furthermore, the move should not be excess for prompting the imposing higher restrictions to outside WTO nation states than was the case prior to the integration (Viner, 2016).

For the current case of the ongoing trade war between China and the United States, the imposition of higher than usual tariff measures by the United States against Chinese products cannot be justified under the regional integration exception. This is because neither such has been prompted an interest by the United States to promote a regional integration effort. And even if that was the case, Article XXIV prohibits against imposing new tariffs above the ones that existing prior to the regional integration (Howse, Eliason & Trebilcock, 2005). The second major exception of the principle of the most favourable nation treatment is the Generalized System of Preferences (GSP). Under the GSP exception, products from developing economies who are members of the WTO can be accorded preferential treatment (Tejeda, 2017). Nevertheless, the GSP exception does not justify for the imposing of punitive tariffs and regulatory treatment on existing trade partners in the name of creating trade space for developing economies.

Other viable exceptions to the principle of the most favourable nation treatment which might be used to automatically qualify the tariff measures by the United States are if the act was in compliance with non-application clause of the multilateral trade agreements between particular member states as stipulated under Article XIII of the GATT (Viner, 2016; Bown, 2017). Ideally, the provision limits the application of the most favourable nation treatment principle to trade agreements which were in force under the GATT 1947 prior to the GATT

1994 (Bown & Reynolds, 2017; Kulovesi, 2011). However, this exception is not applicable to the case trade war between the United States and China given that the United States is one of the core signatories of the WTO who ratified the accession of China into the WTO membership status. As a result, the WTO relationship between the United States and China cannot be overlooked.

The WTO agreement also provides for exception of the most favourable nation treatment principle under Article XX of the GATT 1994 when such measures are deemed to be necessary for protecting public values, health and lives or under Article XXI in which the principle can be negated by priority interests and expectations on national security (Qureshi, 2015; Bown & Reynolds, 2017). However, Paragraph 3 of Article IX of the GATT 1994 excepts member states from the principle of the most favourable nation treatment provided that the obligations attached to such are waived by the other member states involved in a specific trade agreement (Viner, 2016). This exception is however not applicable to the ongoing trade war between the United States and China as there is no such in the bilateral relationship between the two nations.

4. TARIFF MEASURES AND THE WTO AGREEMENTS ON ANTI-DUMPING, SUBSIDIES, AND SAFEGUARDS

However, in addition to the general exceptions to the most favourable nation treatment principles, there are other provisions of the WTO agreements under which WTO members can act in disregard of the dictates of equal and discriminate treatment of all other member states. These expressly qualified exceptions to the most favourable nation treatment principle are limited to three trade situations. First, WTO member states have the legal authority to take action against trade dumping practices by other member states. This exception is not only a provision under Article VI of the GATT 19994 but more so that such has been qualified by the WTO Anti-Dumping Agreement (Viner, 2016).

In particular, the Anti-Dumping Agreement is purposely meant to serve as the legal basis for the implementation of the provision of Article VI of the GATT 1994 in practice. In the most basic form, governments of WTO member states are allowed to take action against -dumping as a way of protecting their domestic industries against unfair competition from the unfair pricing of products and services from foreign nations (Howse, Eliason & Trebilcock, 2005). As a general rule, the question of pricing of products as the basis for imposition of anti-dumping tariff measures is determined by evidence that the price of the exports by a company is lower than that of the products at its own home market. In addition, however, the founding idea behind the anti-dumping provision is to allow governments of WTO member states to rectify dumping behaviour via the imposing of extra tariffs on the specific products from the specific nation-state of interest (Qureshi, 2015).

In other words, the extra tariff measures are sufficiently meant to ensure that the price of the product of concern is brought as close as possible to the normal market value. This is meant to safeguard domestic industries from undue actual or potential harm that might result from the continued influx of such unfairly underpriced products (Viner, 2016). Generally,

however, normal price values are not determined using the market prices of the domestic market of importing nation-state, but those of the exporting nation-state. Nevertheless, the provisions of this agreement also allow for use of other considerations in determining reasonable pricing of the products alleged by be dumped. This includes consideration of the price that the exporter has for same or like products in another country.

The use of this consideration is founded on the general assumption that the principle of the most favourable nation treatment is binding to the exporter for all other markets or in all other trade agreements with other nation states (Basedow & Kauffmann, 2016). However, in the event that this approach is not deemed a viable option, dumping pricing can be determined by conducting a comprehensive calculation of the expected pricing based on a combination of the production costs, typical profit margins and all other viable expenses incurred by the exporter in the process doing the exporting business for the specific product (Viner, 2016). Nevertheless, according to the anti-dumping agreement, a mere qualification that an exporter is pricing their products unduly low is not enough to justify the imposition of anti-dumping tariff measures. Rather, the WTO member concerned should present evidence that the claimed dumping is actually hurting the domestic industries in the importing nation-state (Suttle, 2017).

Secondly, under the WTO agreements, there is an agreement on subsidies and countervailing measures. In the most basic form, this agreement serves as legal provision for enabling WTO member states to act to mitigate undue use of subsidies by other members as a way of securing undue trade advantage in interstate commerce (Verma, 2018; Qureshi, 2015). In line with this objective, the agreement provides that the affected WTO member state can either launch complaint about the perceived use of subsidies with the dispute settlement procedure or conduct its investigation (Basedow & Kauffmann, 2016). The corrective measure upon proof of the use of subsidies is for the affected member state to impose extra tariff charges on the specific products involved. As a general rule, however, this agreement dictates that the claimed use of subsidies should provide evidence on the use of a specific subsidy (Verma, 2018; Suttle, 2017). In other words, general economic subsidies cannot be qualified as an excuse for imposing countervailing duty against the products of a given exporter.

Thirdly, under the WTO agreements, there is also the provision of Article XIX which provide for the consideration of safeguard measures to restrict imports into a nation-state as a way of safeguarding the local industries from the undue effects of an upsurge of imports. This is ideally meant to serve as a temporary measure (Verma, 2018). This is true given that the WTO agreement specifically provides for a sunset clause restricting the use of safeguard measures to temporal time frameworks. In addition, the agreement prohibits against the entering of WTO member states in bilateral trade agreements which are meant to establish or maintain any form of voluntary restraints on exports or imports (WTO, 2017). In place of such arrangements, the agreement has a provision requiring all its member states to commit to the set-out criteria in the determining of the existence of an actual serious injury on the domestic industry resulting from imports.

As a general rule, however, the WTO agreement does not completely negate possible consideration and use of safeguard measures. In particular, the agreement provides for the use of safeguard measures by member states as a temporal measure for safeguarding undue injury to the domestic industries as they adjust to a changing economic environment. According to the agreement, safeguard measures cannot just be taken to safeguard the domestic producers of a member state unless under special arrangements with the affected exporting nation-state (Verma, 2018). In other words, the agreement provides that the exporting nation states are entitled to seek for compensation to the losses caused by the safeguard measures by requesting for consultations under the WTO's Dispute Settlement Understanding (DSU) (WTO, 2017). Failure to reach a binding agreement for compensation through the consultations qualifies the exporting nation states to adopt retaliatory tariff measures.

5. WHY CHINA IS JUSTIFIED UNDER THE WTO LEGAL SYSTEM TO ADOPT RETALIATORY TARIFFS

Based on the WTO legal system, the principle of the most favourable nation treatment safeguards the Chinese nation from discriminative trade treatment by the United States, and that the only exceptions to this principle can only be qualified in three core circumstances. These circumstances are incidents where there is evidence that Chinese exporters are engaged in the dumping of products into the United States domestic market. As a general requirement here, it is the norm for the importing nation state not just to have evidence proving the low pricing of the products of the specific exporter(s) (WTO, 2017). Rather, it should equally provide evidence that the alleged underpricing of the products by the exporter(s) is causing serious injury on the domestic industries.

As can be established from the available literature, the United States has not indicated compliance with these dictates of the WTO agreement of anti-dumping. Furthermore, under the anti-dumping provision for imposition of additional tariff measures, the complaint is only allowed by the WTO agreements to act by imposing extra tariffs charges to increase on the price of the specific product to as close as possible to the normal or expected market value (Verma, 2018). In other words, the imposed tariff measures can only be sufficient to eliminate the effect of the alleged low pricing of the specific product on the domestic industries (Basedow & Kauffmann, 2016). Punitive tariffs are not a legal provision under the WTO agreement.

On the other hand, it is in the records that the Trump administration has consistently alleged the use of subsidies by the Chinese government at the expense of the competitive advantage of American domestic industries. On the contrary, however, the United States has failed to provide evidence in support of such allegations or even launch an official investigation with the WTO under the dispute settlement procedure (Guo, et al., 2018). Furthermore, the WTO agreement only allows for concerned nations to impose extra tariff charges only to the extent that such is sufficient to eliminate the undue advantage caused by the use of the specific subsidy on the specific product (Verma, 2018; Basedow & Kauffmann, 2016). True to the letter, there is no evidence that the current tariff measures that the United

States has imposed on Chinese products are informed by verifiable evidence of the use of subsidies of such products.

Last, but not least, the WTO agreement of the use of safeguard measures is very clear on the terms and conditions for the use of such in protecting domestic producers. The agreement provides for the use of safeguard measures by member states as a temporal measure for safeguarding undue injury to the domestic industries as they adjust to a changing economic environment. According to the agreement, safeguard measures cannot just be taken to safeguard the domestic producers of a member state unless under special arrangements with the affected exporting nation-state (WTO, 2017). In other words, the agreement providers that the exporting nation states are entitled to seek for compensation to the losses caused by the safeguard measures by requesting for consultations under the WTO's Dispute Settlement Understanding (DSU). Failure to reach a binding agreement for compensation through the consultations qualifies the exporting nation states to adopt retaliatory tariff measures (WTO, 2017).

True to the letter, the current trade war between the United States and China seems to be more a question of seeking protection of the domestic producers of the United States from the competition caused by imports from China. Considering the most favourable nation treatment principle, this move is illegal as it discriminatively targets Chinese exporters despite the fact that they are not the only exporters to the United States. Even without such in mind, it is in the record that the Chinese government has legally pursued its legal entitlement of the right for compensation through consultations. This is clear in that on April 4, 2018; China filed a request for consultations with the United States, DS543, in relation to some of these tariff measures (Guo, et al., 2018). Nevertheless, the consultations failed to win any binding agreement, and hence the view that is justified to adopt additional tariff measures against the move by the United States to impose tariff measures on its products.

6. CONCLUSION

Overall, it is clear that the most favourable nation treatment is the founding principle on which the WTO agreements are founded and enforced. For determination on whether a member state has a legal basis for claiming exception of this principle in its action against any other member state, it is imperative to offer evidence that the other member states have acted anti-competitively and that such have caused serious injury on the domestic industries. Use of mere tariff measures to protect domestic industries cannot be assumed binding without paying the affected exporting member states for the trade losses incurred. Since the United States has failed to compensate China for trade losses caused by it recent move to impose safeguard tariff measures against its products as means for protecting its domestic producers, the WTO agreement grants China the legal right to adopt retaliatory tariff measures against the United States.

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