

## **China-U.S. Trade Friction under Trade Unilateralism and China's Legal Responses<sup>+</sup>**

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### **Abstract**

Since the ascendance of Donald J. Trump to the U.S. Presidency, the Trump administration relies on the doctrine of unilateralism to implement the “America First” policy and initiate trade frictions with its major trading partners, particularly Mainland China (China). Against this backdrop, the article endeavors to offer an analytical framework for China’s legal responses to U.S. unilateralist trade policy. First, China should fully utilize the current World Trade Organization (WTO) rules to constrain unilateralist measures imposed by the U.S. Second, considering that the world economy is undergoing profound changes and the multilateral trading system is severely undermined by the rising unilateralism and protectionism, a scientific and reasonable proposal regarding WTO reform should be carried out by China and those WTO members supporting multilateralism and free trade. Third, it is clear that there will not be a once-for-all scheme to resolve the China-U.S. trade friction. Confronted with the severe challenge, it is therefore suggested that China should unswervingly promote its national economic strength

through a new round of reform and opening-up with greater determination and efforts.

**Keywords:** *China-U.S. trade friction, dispute settlement mechanism, multilateral trading system, unilateralism, World Trade Organization*

## **1. Introduction**

With the rapid development of China's comprehensive national strength and international influence, the competition between China and the U.S. has become increasingly fierce. For the past two years, to safeguard U.S.'s hegemonic position in the world, President Donald Trump has taken China-U.S. trade issues as a breakthrough point, launching a comprehensive competition against China in the fields of security, politics, aerospace, and international cooperation (Wang, 2020). With regard to security, China has comprehensively promoted the modernization of its national defense and army, so as to adapt to the global development trend of the new military revolution and meet the needs of its national security. The Trump administration, however, sees China's growing military power as a key concern for the national security of the U.S. To that end, to maintain U.S.'s strongest military advantage, the Trump administration has increased defense spending year after year, even as the U.S. budget deficit remains high (*Defense News*, 19th October 2018). For instance, to weaken China's influence in the South China Sea, the U.S. has strengthened its military presence in Asia (*The Diplomat*, 12th June 2020). In the political sphere, the U.S. has voiced concerns over China's repression of its population, especially that of religious and ethnic minorities in Muslim-majority Sinkiang and the Tibet autonomous regions, and called for decisive measures to protect fundamental freedoms in the country (Reuters, 25th September

2019). To achieve the independence of Hong Kong, Sinkiang and Tibet, the U.S. Congress has even enacted the Hong Kong Human Rights and Democracy Act 2019, the Uighur Human Rights Policy Act 2019, and the Tibet Policy and Support Act 2019, creating a big obstacle to China's rise. As for the field of aerospace, on January 3, 2019, the Chinese-developed Chang'e spacecraft successfully completed the first human landing on the far side of the moon (*National Geographic*, 2nd January 2019). Not to be outdone, the Trump administration reversed the Obama-era strategy of focusing on Mars and signed Space Policy Directive 1 in December 2017, announcing its return to the moon (NASA, 12th December 2017). Alongside the competition for 5G technology, the U.S. and China are also competing in the construction of satellite networks (*Bloomberg News*, 24th June 2020). In the area of international cooperation, China's Belt and Road Initiative (BRI) (CLSA, 2017) has created a new model of international cooperation. Since the implementation of BRI, remarkable achievements have been made in China and countries along the BRI. Intending to suppress the rise of China, the U.S. launched the "Indo-Pacific strategy"<sup>1</sup>, adopting containment policies towards BRI. The U.S. also constantly attacked and discredited the BRI based on the remarks of debt growth, environmental destruction, economic plunder and geopolitical expansion (Zhao, 2018).

Since China's accession to the World Trade Organization (WTO) on December 11, 2001, the U.S. has held the firm belief that the current WTO system and the Dispute Settlement Mechanism (DSM) failed to constrain China's market-distorting economic model. China has gained unjust benefits from the multilateral trading system and posed a serious threat to the U.S. economy and the international trading system (Patch, 2019: 898-900). Although China and the U.S. have had different views on the size of the trade deficit for a long period of time, it is undeniable that there is a growing trend of trade imbalance between both sides

(Chow and Sheldon, 2019: 20). Many U.S. critics believed that the rise of China was not due to its market efficiency or excellent marketing and manufacturing technology. Instead, according to their perspectives, the trade deficit with China resulted from the unfair trade practices adopted by China to increase exports, including currency manipulation, dumping, and state subsidies (USTR, 2017; Schoenbaum and Chow, 2019: 180; Chen, 2019: 108). At present, though China has a large volume of manufacturing industry, the actual technological level is not high and China's economic structure is unreasonable. For this reason, China has made every effort to promote industrial upgrading for recent years and the project "Made in China 2025" has been put forward (*China Daily*, 20th April 2017). However, the U.S. considered that "Made in China 2025" is an innovation led by the Chinese government (Shen, 2019: 43). During the implementation of "Made in China 2025", China may restrict the scope and scale of foreign investment in China through joint venture requirements and shareholding restrictions. This may reduce the value of U.S. technology and U.S. investment in China, thereby weakening the global competitiveness of U.S. enterprises (Schoenbaum and Chow, 2019: 181).

Regarding the above-mentioned problems, in March 2018, the U.S., based on the findings under the Section 232 of the Trade Expansion Act of 1962 (1962 TEA), imposed ad valorem tariffs on Chinese imports of steel and aluminum on the ground of national security (U.S. Department of Commerce, 16th February 2018). Parallely, the U.S. launched a Section 301 investigation and further adopted unilateral sanctions against China under the Trade Act of 1974 (1974 TA) (USTR, 2018). The international community widely believed that the multilateralism represented by the WTO system was seriously threatened by the U.S. unilateralism (Patch, 2019: 899; Chow, 2019: 31; Sun, 2019: 181). The European Union (EU) pointed out that the Section 232 measure adopted

by the U.S. is ostensibly a national security measure but essentially a safeguard measure, and constitutes an abuse of national security measures under the WTO framework (*International Trade Law*, 3rd April 2018). In September 2018, the State Council of China published the Facts and China's Position on China-U.S. Trade Friction (IOSC, 2018). The report pointed out that after the inception of WTO, the U.S. government issued a Statement of Administrative Action in 1994, stating that the U.S. intends to use Section 301 under the WTO rules, and that it would only impose sanctions under Section 301 with authorization from the WTO Dispute Settlement Body (DSB) (*ibid.*: 55).

At first glance, the issue of China-U.S. trade relation is due to the huge trade deficit caused by the unfair trade practices of China (Chen, 2019: 108). However, one underlying reason considered by the U.S. is that the WTO rules fail to curb China's unfair trade practices resulted from non-market-oriented policies and practices. (Patch, 2019: 898-900; Shaffer and Gao, 2018: 179). Second, to safeguard the development interests of developing countries, the WTO grants them special and differential treatments. The U.S. believed that China and other emerging market economies acquire a huge advantage in trade with the U.S. because of the special and differential treatments (Ouyang and Qiu, 2019: 33). Finally, the U.S. pointed out that the WTO DSM has serious deficiencies. However, WTO Members have disagreements over the reform of the DSM, and the progress of negotiation is very slow. To compel the WTO reform towards U.S. expectations, the U.S. has repeatedly blocked the selection of members of the Appellate Body (AB) based on the WTO principle of consultation and consensus (Patch, 2019: 883; Lo, 2019: 333). On December 11, 2019, the AB was shut down due to the insufficient number of judges, which was a serious crisis encountered by the WTO in its history (*China Daily*, 10th December 2019).

The U.S. changed the development and the future prospect of economic globalization promoted by the WTO through the disruption of the AB, and regressed the multilateral free trading system into a bilateral negotiation mechanism (Liao, 2019: 44). A most direct manifestation is the United States-Mexico-Canada Agreement (USMCA). The USMCA, as a template for future trade deals of the U.S., reflects the increasingly prominent tendency of “America First” and the unilateralist position held by the U.S. during the negotiation and construction of trade rules. During the agreement amendment process, the phrase “free trade” was deleted from the name of North America Free Trade Agreement (NAFTA). The finally-signed USMCA was called “agreement” without the word “free”, placing greater emphasis on “fairness” and “reciprocity” of trade (Ouyang and Qiu, 2019: 26-7). This change also objectively reflects the Trump administration’s basic attitude towards international trade. The ultimate goal of current U.S. unilateralism is not to return to isolationism or “de-globalization”. Instead, the U.S., relying on its economic strength and huge domestic market, is seducing negotiating opponents one by one into accepting the trade rules it advocates. During this process, the U.S. bilateralizes their unilateral standards, and then multilateralizes the unilateral standards through accumulation of its trade relations, in order to achieve the ultimate goal of reshaping the rules-based global trading system (Liao, 2019: 43). The most obvious manifestation of this is the poison pill under the USMCA, that is, the signing of a free trade agreement between any contracting party and a non-market country will trigger the termination of the USMCA (USMCA, Article 32.10). The poison pill has become the “Sword of Damocles” hanging over Canada and Mexico, severely restricting their autonomy to negotiate and sign free trade agreements with China in the future (Liao, 2019: 55). Putting the non-market country clause under the USMCA into the context of China-U.S. trade

frictions and the WTO reform, the U.S. intention to isolate and block China through renegotiating trade agreements with its major trading partners and updating existing rules is obvious.

On December 13, 2019, through the joint efforts of China and the U.S., the two sides reached an agreement on the text of the Economic and Trade Agreement Between China and U.S. (China-U.S. Phase 1 Trade Agreement) on the basis of equality and mutual respect (*China Daily*, 13th December 2019). The conclusion of China-U.S. Phase 1 Trade Agreement shows that only dialogue on an equal basis that takes into account the balance of interests, rights and obligations between China and the U.S. could resolve differences and problems, and contribute to resolve the crisis of the multilateral trading system (*China Trade News*, 17th December 2019). However, trade friction between China and the U.S. is of a long-term and severe nature, and is only suspended but far from over. This article will first analyze the deep-rooted reasons for the unilateralism and the trade protectionism of the U.S. in the background of stagnant WTO reform. Second, this article will discuss in detail the manifestations of U.S. trade unilateralism at the multilateral, bilateral and U.S. domestic levels. Finally, with the objective recognition of the fact that the U.S. has turned to unilateralism as a means of exerting pressure to its trading partners and conducting bilateral negotiations under the tendency of de-globalization (Schoenbaum and Chow, 2019: 193-194), this article will analyze China's considerations in responding to the rise of U.S. unilateralism.

## **2. The Emergency of U.S. Unilateralism - the Deficiencies of the WTO Rules**

Since the ascendance of Donald J. Trump to the U.S. Presidency, WTO reform has been the most important multilateral trade policy agenda in

the U.S. The U.S. believed that the WTO had issues in the DSM, trade negotiations, the identification of developing countries and its response to China's unfair trade practices, all of which require a radical and breaking reform (Sun, 2019: 183-188).

### ***2.1. The WTO Failed to Provide the Rules Needed to Address Unfair Trade Practices Resulting from the So-Called Non-Market-Oriented Policies and Practices***

The General Agreement on Tariffs and Trade (GATT) and the WTO do not give consistent, clear and widely accepted definitions to non-market economy and market economy. The U.S. argues that the WTO's framework of rules was established without adequately anticipating the disruptive impact of state-led economies on global trade, leaving Member States with insufficient tools to deal with the corrosive dynamics of these problems (USTR, 2019: 26). For example, in the case *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the U.S. believed that one effective standard to identify an enterprise as a public body is that the government holds a majority share, since the government can control the management of the company. However, China pointed out that its commercial banks adopt independent criteria to judge whether to provide loans to applicants and to determine the level of interest rates as well as the duration of loans. In this case, the AB held that government control alone was not sufficient to prove that the enterprise was a public body. The core issue was whether the enterprise was vested with governmental authority. Whether China's state-owned-enterprises (SOEs) are public bodies depends on whether the government grants them government functions, something the U.S. has not proven. Therefore, the AB rejected the U.S. assertion that ownership control could prove that the SOEs are performing the authority of public bodies.



Due to the ambiguity of relevant WTO rules, the U.S. and other WTO Members are unable to find corresponding WTO rules to address the challenges brought by China's unique economic system (Sun, 2019: 186; Wang and Chen, 2019: 28). While taking advantage of its WTO membership to become the biggest beneficiary of economic globalization, China has failed to open its market in accordance with its WTO obligations. In particular, as a non-market economy, China relies heavily on SOEs and government subsidies to practice unfair trade (Chow *et al.*, 2018: 69). On May 23, 2019, in order to create fairer competitive conditions for workers and businesses, the U.S., the EU and Japan jointly issued a tripartite statement, suggesting they are working on the formulation of new rules on industry subsidies and SOEs (Kong and Guo, 2019: 387).

## ***2.2. Special and Differential Treatment Allows Developing Countries to Gain Advantages in Trade with the U.S.***

The original intention of the GATT/WTO to establish a special and differential treatment mechanism was to safeguard the development interests of developing countries, coordinate differences among countries with various levels of economic development, and ensure that international trade rules are relatively fair (Khan, 2018: 48). Based on this principle, the WTO grants special and differential treatments to developing countries in terms of market access, tariff reduction, subsidies, technical assistance and other aspects to support the development of economy and trade of developing countries. However, the WTO agreements only clarify the scope of the least developed countries according to the definition of the United Nations. There is no clear definition or classification of the developing countries. The identity of developing countries is determined on the basis of self-declaration (Ouyang and Qiu, 2019: 33-34). Developed economies such as the EU

and the U.S. believe that the total GDP and the total import and export of goods and services of the developing Member States account for a rapid increase in the global share. As a result, allowing developing countries to continually enjoy the special and differential treatment through self-declaration not only makes the developed Member States encounter with unfair competition, but also hinders the smooth progress of multilateral trade negotiations under the WTO framework (General Council of WTO, 14th February 2019: 10). Therefore, it is necessary to reclassify WTO Members through the reform of special and differential treatment. In particular, the U.S. regards China as a primary target and strongly denies the rationality of China to be continually identified as a developing country. The U.S. has repeatedly stated at the General Council of WTO that the special and differential treatment for a large number of developing countries including China should be withheld.

### ***2.3. Slow Progress of the Negotiation on the WTO DSM Reform***

As the most central and unique function of the WTO multilateral trading system, the DSM safeguards the authority of the WTO and its normal and effective operation. Since the 1990s, the WTO Members have long realized that there are problems and deficiencies in the DSM that need to be reformed and improved. In 1994, the Members decided to complete a full review of the new WTO dispute settlement rules and procedures within four years after the inception of the WTO and to take a decision on whether to continue, modify or terminate such dispute settlement rules and procedures. However, the review was not completed as scheduled due to the difficulty to reach an agreement among Members. The Doha Round also included the reform of the DSM as one of the negotiating topics, but so far, no substantial progress has been made. The U.S. believed that the DSB mainly has the following problems. First, according to the Understanding on Rules and Procedures Governing the

Settlement of Disputes (DSU), the proceedings of the AB to submit its report shall in no case exceed 90 days. The U.S. pointed out that the AB often disregarded this deadline (Payosova *et al.*, 2018: 3). The latest figures indicate that the average time for the AB to process an appeal takes as high as 163 days (Yu, 2019: 14). In that case, the U.S. argued that the DSB should not approve an AB report issued after the 90-days deadline. Second, the U.S. believed that the AB often carries out *ultra vires* review or even overturns the panel's factual findings (Sun, 2019: 184-186), adding to the complexity, repetitiveness and delay of WTO dispute procedures. This is also against Article 17.6 of the DSU, which stipulates that "an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel" (DSU, Article 17.6). Third, the U.S. argued that part of the interpretation of the AB constitutes an extensive interpretation of the WTO treaties, exceeding the original agreement of Member States and creating a great binding force on the contracting parties (Payosova *et al.*, 2018: 8-9). The orientation of policy and value behind the specific legal interpretation of the panel and the AB may have an impact on the subsequent negotiations or even infringe upon the sovereignty that is not alienated by the Members. This practice deprives the Members of the right to provide authoritative interpretation for WTO rules (Patch, 2019: 890).

### **3. The Manifestations of U.S. Trade Unilateralism and Protectionism**

Regarding the above-mentioned problems of the WTO, the U.S. advocated replacing "free trade" with "reciprocity" (Chow and Sheldon, 2019: 9-11). Also, the U.S. adopted extreme measures to protect trade through its domestic laws, and vigorously promoted WTO reforms. In order to retain the hegemonic position of the U.S. in the global

multilateral trading system and actively practice the policy of “America First”, the manifestations of U.S. trade unilateralism at the multilateral, bilateral, and domestic levels (Chow, 2019: 11-29) are as follows:

### ***3.1. Refusal to Appoint AB Members Based on the Unanimous Consensus Mechanism of the WTO***

In the context of economic globalization, multilateral trade negotiations have become increasingly difficult, and it has been hard to reach consensus by seeking for convergence of interests. The reasons behind this phenomenon include the gradual increase in the number of WTO Members, the continuous expansion of the number and content of negotiation topics, as well as the many deficiencies of the WTO that are not conducive to the advancement of international trade (Yu, 2019: 12). At present, the impasse of the AB came from the unanimous consensus mechanism established in Article 9 of the 1994 Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement), which stipulates that the appointment of the AB members must be approved by all Member States. Based on the unanimous consensus mechanism, the Trump administration has long disrupted the selection of members of the AB (World Trade Organization, 28th May 2019). On December 10, 2019, the AB was completely halted and could not continue to process appeal cases because potential nominees were not able to be supplemented in time after former members left their due. In addition, the U.S. believed that the WTO DSM lacks the capability to fully address the problem of China’s economic model (Patch, 2019: 887). Commentator has even suggested that “China, Inc.” has distorted global trade and is destroying the whole system of WTO (Wu, 2016: 261). For this reason, if the WTO rules cannot be reformed in a way that is beneficial to the interests of the U.S., the U.S. will continue to threaten, destroy, and hinder the normal operation of the WTO’s

multilateral DSM (Sun, 2019: 181). Peter Van den Bossche, a former AB Member, pointed out that this situation will lead to the result that any losing party could prevent the pass of a panel report by submitting the report to the paralyzed AB, stepping back to the GATT era. If the AB is unable to handle the dispute, the parties can only resolve trade disputes through diplomatic consultations or rely on national strength (World Trade Organization, 28th May 2019).

### ***3.2. Use of Bilateral Trade Negotiations to Formulate Rules Against Non-Market Countries and the Principle of Special and Differential Treatment***

An inevitable consequence of the stranding of the Doha Round is that major trading economies will shift their focus to regional or bilateral free trade agreements (FTAs). Regional or bilateral FTAs are of an exclusive nature and conflict with the WTO's principle of most-favoured-nation treatment. However, developed economies such as the U.S. and the EU are often in a more favorable position in regional and bilateral negotiations (He, 2019: 11). After Trump became the President, the U.S. even abolished the regional trade agreement, the Trans-Pacific Partnership Agreement (TPP), and began to focus on one-to-one bilateral trade agreement negotiations, starting the bilateralization of trade policies (Chow *et al.*, 2018: 39). As an important diplomatic achievement of the Trump administration, the USMCA is known as a new template of the U.S. trade agreements in the 21st century (Ouyang and Qiu, 2019: 24). The characteristics of the USMCA reflect the new strategy of the U.S. in trade negotiations, that is, to replace multilateralism with bilateralism and to replace the most-favoured-nation treatment with reciprocity (Liao, 2019: 52).

The biggest achievement of the USMCA lies in the promotion of the poison pill clause by the U.S., targeting non-market countries. Article

32.10 of the USMCA provides that if a non-market country, as identified by any of the contracting parties, concludes a FTA with any party among the U.S., Mexico, and Canada, the other two parties have the right to withdraw from the existing agreement and to conclude a bilateral agreement that excludes the concerned party. In other words, if Canada or Mexico wishes to sign a FTA with China in the future, the objectives and the full text of the FTA all need to be reviewed by the U.S. government (Shen, 2019: 44). If the U.S. government believes that the bilateral agreement between Canada or Mexico and China has any adverse impact on it, the U.S. can use the USMCA as a “bargaining chip” to urge Canada and Mexico to abandon terms that will harm the interests of the U.S. Scholars predict that this provision will become an obstacle if China intends to join the TPP in near future (Shen, 2019: 44; He, 2019: 11, Liao, 2019: 53-4). At the same time, the poison pill clauses targeting non-market economies are likely to be replicated into the U.S. FTA with the EU, Japan, and South Korea.

Second, in dealing with trade and investment relations with developing countries, the Trump administration has adopted the principle of reciprocity instead of the principle of special and differential treatment. Under the USMCA framework, differences in the level of development of Member States and economic diversity are no longer considered legitimate reasons to circumvent the obligations under the agreement. National treatment and most-favored-nation treatment apply to all contracting parties without discrimination (Liao, 2019: 52; Ouyang and Qiu 2019: 33-4). Especially, in some areas where the developing countries often enjoy special and differential treatments, the USMCA does not provide distinctive arrangements or apply lower standards because of differences in the level of development of the parties and economic diversity. All contracting parties have the same obligations and enjoy the same rights (Ouyang and Qiu, 2019: 34).

Third, for the dispute settlement mechanism under the USMCA framework, the agreement does not establish a final adjudication body similar to the WTO AB. The claimant actually needs to make its own final judgement with reference to the panel report, including the determination of whether the respondent has failed to or inadequately fulfilled its obligations under the USMCA, and the assessment of the degree of losses that it has suffered due to the respondent's failed or inadequate performance of its obligations (USMCA, Chapter 31). Furthermore, under the WTO mechanism, the claimant must receive authorization from DSB before launching retaliation against the respondent. No Member can decide for itself whether it has suffered from the measures of other Member States or whether to retaliate against other Member States. However, under the USMCA mechanism, if the parties of the dispute cannot reach an agreement on the conclusions of the panel report, the claimant can directly retaliate against the respondent without any authorization (USMCA, Chapter 31).

### ***3.3. Imposition of Unilateral Tariffs based on U.S. Domestic Legislation***

Considering the potential damage to the U.S. caused by the WTO DSM, the U.S. enacted the Uruguay Round Agreements Act (URAA) after its accession to the WTO. The Act insists that U.S. domestic law prevails over WTO rules to ensure that U.S. sovereignty and laws are not violated. The URAA stipulates that the U.S. Trade Representative (USTR) and the President must evaluate the performance of the WTO, particularly that of the DSM, and the USTR must submit a report to the Congress on an annual basis. A comprehensive evaluation of the impact of the WTO is conducted every five years, and the Congress decides whether the U.S. is to remain in the WTO (Wilson, 1997; Yu, 2019: 15). As noted earlier, since the current WTO rules and the DSM were

considered to lack a binding force on the China's market-distorting behaviors, the U.S. began to deploy the domestic legislation, namely Section 232 of the 1962 TEA and the Section 301 of the 1974 TA, instead of multilateral trade agreements, to punish states unilaterally identified by it as engaging in unfair trade.

On March 8, 2018, the U.S. announced that it would impose national security tariffs on steel and aluminum from the EU, Japan, South Korea, Canada and China under Section 232 (Chow, 2019: 19). Section 232 of the 1962 TEA provides that the U.S. Department of Commerce may initiate an investigation to determine the effects of imported goods on U.S. national security, and the President shall decide whether to adopt unilateral import restrictions. To date, it becomes more difficult for the U.S. to prove that exports from China and other countries would constitute a violation of WTO rules, thus the U.S. cannot impose sanctions based on anti-dumping and countervailing measures. While safeguard measures are used for pursuing fair trade, the U.S. has to bear a more stringent burden of proof. More importantly, safeguard measures must be applied simultaneously to all relevant exporting countries. However, under the shield of Section 232, the U.S. can apply sanctions selectively, which is how the Trump administration exempted Canada, Mexico and South Korea, Argentina, Australia, Brazil, and countries of the European Union, representing 63% of U.S. steel imports (Schoenbaum and Chow, 2019: 138). In effect, the use of domestic law by the U.S. to impose sanctions on China and its disruption to the AB are complementary. Only if the AB of the WTO has been disrupted can the U.S. successfully implement its unilateral measures. Otherwise, the U.S. would suffer from retribution under the WTO DSM.

In addition, on May 29, 2018, pursuant to the Finding of the Investigation into China's Acts, Policies, and Practices Related to



Technology, and Innovation under Section 301 of the Trade Act of 1974 (301 Report) released by the USTR, the Trump administration proceeded to impose 25% tariffs on 50 billion dollars of Chinese products importing into the U.S.; in addition, President Trump imposed another 10% tariffs on an additional 200 billion dollars' worth of goods from China (Patch, 2019: 892-893). The legal basis for the imposition of the tariffs is section 301 (b) of the 1974 TA, which allows the president to impose tariffs in retaliation for a foreign country's unreasonable or discriminatory acts, policies or practices that burden or restrict the U.S. commerce (Schoenbaum and Chow, 2019: 140). The 301 Report found that the China's unreasonable or discriminatory practices include "a technology transfer regime that forces U.S. companies to transfer their intellectual property to Chinese entities; a technology licensing scheme that discriminates against U.S. companies; a scheme to invest in U.S. companies for the purpose of acquiring U.S. intellectual property assets; and a scheme of cyber intrusions into U.S. commercial networks for the purpose of acquiring U.S. intellectual property assets" (Chow, 2019: 13; USTR, 2018).

As pointed out by a commentator, being a domestic law of the U.S., Section 301 would not constitute a violation of WTO obligations, as long as it does not conflict with WTO rules, or it is not implemented if there is any conflict (He, 2019: 9). In 2000, in the landmark case *United States — Sections 301-310 of the Trade Act 1974*, the European Communities instituted a claim in the WTO to challenge the unilateral nature of Section 301. After the panel performed a textual analysis of Section 301, it tentatively concluded that since Section 301 enabled the U.S. authorities to take unilateral action before a DSB report was issued, Section 301 violated Article 23 of the DSU (Patch, 2019: 896), which "explicitly prohibits Members from invoking unilateral measures that are not based on the WTO dispute settlement procedures." To fully respect

the WTO rules and its DSM, the U.S. committed to suspend the application of Section 301 in the direct conflict with WTO rules. Subsequently, the U.S. hastily implemented a Statement of Administrative Action (SAA) during the pendency of the case, stating that it would refrain from taking unilateral action under Section 301 before receiving a WTO panel report authorizing such an action. As a result, the DSB panel ruled that “Section 301 was not inconsistent with WTO law, so long as it was applied consistent with the SAA.” (*ibid.*) However, the Trump administration invoked Section 301 again. In the current case involving China, the Trump administration officially imposed unilateral tariffs on China on July 6, 2018, before the “U.S. had even requested the establishment of a panel of the WTO, which it did later on October 29, 2018.” (*ibid.*) Scholars suggested that the unilateral sanction adopted by the U.S. against China is inconsistent with its prior commitment in the SAA, and constitutes a clear violation of Article 23 of the DSU because the U.S. has not received an authorization from the DSB to impose tariffs (Patch, 2018: 896; Chow, 2019: 14). In contrast, the U.S. has always claimed that the application of Section 301 to China is a derogation of interests outside the rules of the WTO system. This not only reflects the political intention of the U.S. to explore the application scope of Section 301 outside the WTO system, but also poses a serious challenge to the existing multilateral trading system centered on the WTO (Liu and Liu, 2019).

#### **4. Legal Responses to the U.S. Trade Unilateralism**

The formation and development of international economic law system is the outcome of economic globalization. Although the system of international economic law is greatly influenced by developed countries, once the body of international economic law, including treaties, rules of

international economic organizations and customary international law, etc., is formed, it becomes stable and irreversible. The system serves as the legal safeguard in the era of economic globalization. Once the system was undermined by trade unilateralism and protectionism, countries would inevitably suffer great loss of interests, making the current international economic model of mutual benefit unsustainable. Regarding the rise of the U.S. trade unilateralism, China could respond from the following three aspects:

#### ***4.1 Utilization of Current WTO Rules to Constrain Trade Unilateralism***

In face of the sanctions imposed by the U.S. pursuant to Section 301 and Section 232, China has always considered the overall interests and has adopted corresponding retaliatory tariffs in accordance with the fundamental principles of international law (Ministry of Commerce of China, 2018). Commentators pointed out that the retaliatory actions taken by China were necessary, appropriate, and in good faith. These actions did not constitute a violation of the multilateral trading system, but were a necessary means to bring the U.S. back to negotiation and an effective safeguard of the multilateral trading system (Wang, 2018: 20-2). In the meantime, China has filed two WTO proceedings, namely the *United States — Tariff Measures on Certain Goods from China* (DS543) and the *United States — Certain Measures on Steel and Aluminum Products* (DS544), on April 4, 2018 and April 5, 2018 respectively, claiming that the unilateral tariffs imposed by the U.S. are in violation of relevant WTO rules. The latter approach adopted by China also shows China's full respect and trust for the DSM and the multilateral trading system represented by the WTO.

In addition, the poison pill clause embedded in the USMCA could bring China and the U.S. into a predicament of direct competition,

forcing all trading partners of the U.S. to pick a side between China and the U.S. Considering the possibility that more WTO Members will incorporate the regulations on non-market country into their bilateral or regional FTAs in the near future, it is suggested that the poison pill clause would seriously undermine the process of legalization and multilateralization of international economic governance established after the World War II (Shen, 2019: 44). The current multilateral trade agreements are enacted to ensure that FTAs could fully perform the function of upgrading the WTO rules, rather than in effect weakening the WTO system. With regard to unfair rules in FTAs, all Members are obliged to amend or modify these rules for them to be more consistent with the WTO regulations. To date, Chinese scholars have raised at least two reasonable grounds to confute the use of poison pill clause that constrains WTO Members from concluding FTAs with other Members unilaterally defined as non-market countries by the U.S.

First, pursuant to Article XXIV (4) of the GATT 1994, the contracting parties “recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories”. Thus, any rules designated to prejudice a particular country or enterprise by WTO Members in their FTAs should be subject to strict scrutiny and restraint under Article XXIV (4) of the GATT 1994, as they are likely to create new non-tariff barriers to the global free trade market (Sun, 2019: 190). Second, the Parties to the Marrakesh Agreement is resolved to develop an integrated, more viable and durable multilateral trading system. Any existing FTAs aimed at preventing certain countries from participating in global trade is obviously contrary to the above goal promoted by the WTO. The poison pill clause would hinder the development of the market economy model of China, restrict the legitimate right to trade of SOEs, and is against the

goal of the WTO to establish an integrated global trading system. It is therefore suggested that this clause not only undermines the authority of multilateral trade rules, but also hinders the further development of global free trade (Sun, 2019: 190). Consequently, China should strongly require the WTO to rigidly strengthen the constraint on any clauses under bilateral or regional FTAs that can be determined as a violation of the WTO rules.

#### ***4.2. Efforts should be Put Forward to Conduct a Necessary Reform of the WTO System***

Confronted with the fact that the world economy is undergoing profound changes and the multilateral trading system is severely undermined by the rising unilateralism and protectionism, China supports a necessary reform of the WTO. The Chinese government has illuminated its three basic principles and five suggestions towards the WTO reform through the China's Position Paper on WTO Reform (Ministry of Commerce of China, 2018) released in November 2018 and China's Proposal on WTO Reform submitted to the WTO (General Council of WTO, 13th May 2019) in May 2019. China believes that the WTO reform should be guided by the following principles, namely to preserve the core values of the multilateral trading system, to safeguard the development interests of developing Members as confirmed by the Marrakesh Agreement, and to adhere to the practice of decision-making by consensus (Ministry of Commerce of China, 2018). China puts forward that the crucial issues, including the blockage of AB member appointment, the unilateralist measures based on national security exception or inconsistent with WTO rules, and the infringement upon inclusiveness of the multilateral trading system, must be resolved in priority for the forthcoming WTO reform (*ibid.*).

To be more specific, as noted earlier, the WTO AB was temporarily shut down due to the contentious blockage of the appointment of AB members by the U.S. Up to date, there is no clear-cut sign showing that the impasse will be immediately resolved. Such a situation would severely threaten the proper functioning of the DSM and therefore poses an imminent and institutional risk to the WTO (General Council of WTO, 13th May 2019: 3). Against this backdrop, China should promptly initiate discussions with other WTO Members to seek for a feasible plan that fully addresses the appointment process of AB members without any further delay. According to the Reform Proposal, China and several WTO Members have already made constant efforts to address the concerns of “the transitional rules for outgoing Appellate Body members, 90-day timeframe for appellate proceedings, the status of municipal law, findings unnecessary for dispute resolution and the issue of precedent” before the General Council of the WTO (*ibid.*). Some commentators further suggest that a new plurilateral AB should be established under the negotiations of the WTO Members if the U.S. continues blocking the appointment of AB Members in the future. The new plurilateral mechanism should be similar to the original one in most respects, but allows the 164 WTO Members to opt in or opt out. This proposal not only largely preserves the role and functions of the WTO as a multilateral trading system, but also effectively resolves the impasse of the appointment process of AB Members (Kong and Guo, 2019: 204-7).

Second, the U.S. argued that the WTO rules on the identification of developing countries are so ambiguous that WTO Members can “self-declare” as developing countries to enjoy special and differential treatment within the framework of the WTO. Given the fact that development is a core objective of the WTO, the reform should primarily resolve the difficulties of developing members in integrating into the economic globalization, and provide them with the necessary

flexibility and policy space to realize their economic development. China pointed out that, as the largest developing country in the world, it is willing to undertake adequate obligations commensurate with its level of development and capacity under the future WTO reform. However, China does not allow other WTO Members to deprive its entitlement to special and differential treatment as a developing country (Ministry of Commerce of China, 2018). On February 15, 2019, the U.S. submitted its reform proposals to the WTO, one of which is to slash the number of developing countries eligible for special and differential treatment (General Council of WTO, 14th February 2019). The U.S. argued that the WTO reform should refuse to grant the special treatment to Members that are classified as “high income” countries by the World Bank, Members of the Organization for Economic Cooperation and Development or the Group of 20, and countries accounting for 0.5% or more of world trade (*ibid.*). The issue of the developing Member status under the WTO system is so highly politicized that it is difficult to be addressed by technical methods, such as the graduation standards raised by the U.S. (Qi and Fan, 2019: 103). Since China’s GDP per capita only accounts for one seventh of that of the U.S., it is unreasonable to determine China as a developed country. However, as the world’s second-largest economy, China is a leader in many technologies such as 5G and is highly industrialized. Accordingly, Chinese government acknowledged that it should bear more responsibility than other developing countries. The Reform Proposal also made a similar statement, encouraging developing Members to actively assume obligations commensurate with their level of development and economic capacity (General Council of WTO, 13th May 2019: 7).

Third, as noted above, in the absence of a clear definition of the national security exception under the WTO rules, the U.S. relied on such exception as a pretext to impose unilateralist tariffs on imports from

China. Hence, China suggests that WTO Members shall only invoke the national security exception provisions in good faith and with restraint, and the contentious provisions need to be further clarified and regulated within the WTO framework, so as to tighten disciplines and curb the abuse of national security exception (*ibid.*: 4). Also, it is clear that the Section 301 sanctions adopted by the U.S. have deeply shaken the foundation of the WTO. Since the current WTO rules fail to provide timely or effective disciplines and remedies, China proposed that the future WTO reform should “effectively curb such unilateralist measures, reinvigorate the efficiency and authority of the WTO, safeguard the rules-based multilateral trading system and protect the legitimate rights of the WTO Members.” (*ibid.*) In addition, the U.S. believed that, due to the control of Chinese government, China’s SOEs have an advantage in bank loans, taxes, government subsidies and capital injections, thereby distorting international trade system. As a result, the U.S. has formulated relevant provisions against non-market countries in the TPP, the Comprehensive Economic and Trade Agreement (CETA), and the USMCA. The purpose of identifying China as a non-market country is to maintain a powerful tool to conduct anti-dumping investigation and to impose high tariffs against China. However, China rebutted that the U.S. accusations were baseless because there was no definition of market economy within the framework of the WTO. The socialist market economy model was the choice of self-development of China, and the forthcoming WTO reform should respect the development model chosen by China (Ministry of Commerce of China, 2018). In the Report of the Working Party on the Accession of China, China is committed to ensuring that all purchase and sell of SOEs must be made based on commercial considerations only. The Chinese government would not directly or indirectly influence the commercial decisions of SOEs. Therefore, to address the concern raised by the U.S. against China that



the socialist market economy model lacks a clear bound between the Chinese government and SOEs, it is proposed that China should comply with the rule of “Competitive Neutrality” in the WTO reform (Shen, 2019: 49). On the one hand, China should open the market up to private and foreign-funded enterprises in protected areas such as telecommunications, electricity, railways and energy, entitling all types of enterprises to a fair access. On the other hand, the Chinese government should eliminate interference in SOEs to achieve the goal of truly separating Chinese government and SOEs, and promote the professionalization and marketization of the management of SOEs (Sun, 2019: 191).

#### ***4.3. Establishment of Binding Mechanisms for Honoring International Agreements and Promotion of China's National Strength***

Recently, in order to achieve the goal of “America First”, the U.S. has been exerting great pressure on its trading partners and has forced them to return to bilateral negotiations. In that case, China will be likely to make necessary concessions and compromises if a reasonable deal can be reached between the two sides (He, 2019: 12-3). The China-U.S. trade negotiation has returned to the right track after more than a year of tense confrontation. On December 13, 2019, on the basis of equality and mutual respect, the final text of the China-U.S. Phase 1 Trade Agreement has been confirmed due to the joint efforts put forward by both sides. The issues covered by the Agreement include intellectual property, technology transfer, food and agricultural products, financial services, exchange rate and transparency, trade expansion, bilateral assessment and dispute settlement. As commentators pointed out, by now, the China-U.S. trade tension is just temporarily relieved. In fact, even though the Phase 1 Trade Agreement was reached, it cannot be said

that the Agreement will be fully implemented by the two sides. It is worth noting that a core issue of the earlier negotiations between China and the U.S. is to search for a mechanism ensuring that both sides could comply with the trade commitments they made. On 26 April 2019, President Xi Jinping addressed at the Opening Ceremony of the Second Belt and Road Forum for International Cooperation that China would work harder to ensure the implementation of trade agreements. As President Xi highlighted:

“We Chinese have a saying that honoring a promise carries the weight of gold. We are committed to implementing multilateral and bilateral economic and trade agreements reached with other countries. We will strengthen the building of a government based on the rule of law and good faith. A binding mechanism for honoring international agreements will be put in place.”

(Xi Jinping, 2019)

The above speech demonstrates that China will actively set up relevant binding enforcement mechanisms to ensure that the commitments made by Chinese government will be fulfilled. Since China has adequate sincerity in accepting the restraint and supervision of the enforcement mechanism, other countries, including the U.S., should also be subject to the binding mechanism.

According to the current text of the China-U.S. Phase 1 Trade Agreement, any trade disputes between China and the U.S. will be mainly resolved through bilateral evaluation. Under Article 7.4.1, where a Party (the Complaining Party) believes that the other Party (the Party Complained Against) fails to act in accordance with the Agreement, the Complaining Party may submit an appeal to the Bilateral Evaluation and Dispute Resolution Office of the Party Complained Against. If the appeal cannot be settled by the Office or relevant officials from both

sides, the dispute shall be forwarded to a meeting between the USTR and the designated Vice-Premier of China for final determination. If the Parties fail to reach a consensus on the underlying dispute, the Complaining Party may resort to taking an action in accordance with the facts provided during the meeting, including “suspending an obligation under this Agreement or by adopting a remedial measure in a proportionate way that it considers appropriate with the purpose of preventing the escalation of the situation and maintaining the normal bilateral trade relationship.” (China-U.S. Phase 1 Trade Agreement, Article 7.4.4) If the above action is not adopted in good faith as considered by the Party Complained Against, the only remedy for the Party Complained Against is to withdraw from the Agreement. The above regulations indicate that China and the U.S., as the two largest economies in the world, may not rely on the current rule-based WTO DSM to resolve their disagreement if a trade dispute occurs during the implementation of the Agreement, and national strengths of both countries will become a key element in deciding how the dispute will be resolved in the future. Such a mechanism is far from perfection, but it indeed reflects the reality of the current international trade structure.

There will not be a once-for-all scheme to resolve the China-U.S. trade friction, thus China has to make corresponding plans and necessary preparations for all kinds of outcomes. Scholars pointed out that the realization of the normal China-U.S. trade relationship ultimately depends on the improvement of China's own comprehensive strength (Shen, 2019: 50; He, 2019: 13). A scientific and reasonable response to trade unilateralism and protectionism to be given by China is to unwaveringly promote a new round of reform and opening-up with greater determination and efforts. The ongoing trade friction reveals the huge gap between China and the U.S. in terms of technology innovation, high-end manufacturing, financial service, opening-up, rule of law

construction and other areas. Only upon being aware of the above shortcomings, can China push forward a new round of reform, opening-up and technology innovation. Meanwhile, based on its own national conditions, China has to raise its claims in a reasonable, beneficial and polite manner to engage in the reconstruction of the international trade governance system. As pointed out by a commentator, the U.S. cannot prevent international trade from moving forward, nor can it curb the rise of China (He, 2019: 13). Accompanying with the constantly improvement of its international economic status, China will become a more active participant in the global governance and strive for a greater voice on behalf of emerging economies and developing countries. To date, the interdependent world requires more international mechanisms. A growing number of China's plans, including a community with a shared future for mankind, the Belt and Road Initiative and the Asian Infrastructure Investment Bank, are designed to effectively supplement the existing multilateral mechanisms and to promote mutual development of all countries around the globe. Confronted with the challenges posed by the U.S. trade unilateralism, China should along with all other countries supporting free trade to firmly defend the multilateral trading system that is centered on the WTO (Sun, 2019: 192).

## **5. Some Concluding Remarks**

The U.S. has the largest trade deficit with China resulting from the rapid development of bilateral trade between China and the U.S. Since Trump's ascendance to the U.S. Presidency, trade protectionism has provoked the China-U.S. trade friction under the pretext of Section 301 and Section 323. At the same time, the Trump administration believed that the existing WTO rules fail to regulate China's unfair trade

practices. The U.S. plans to reach the common understanding on core issues, such as the non-market country, with Japan and the EU through bilateral negotiations in the first place. Subsequently, the understanding will be incorporated into more plurilateral agreements or even multilateral agreements. Therefore, the goal of reconstructing the current WTO system will be achieved. The U.S. firstly establishes a small group of allies and then continuously forces other countries to passively join in. As commentators suggested, the above operation aims to implement the “Make America Great Again” strategy through reshaping the international trade rules. Although developed countries and developing countries have different views on WTO reforms, there is a mainstream consensus on preserving the WTO system. If China and the U.S. can successfully resolve the trade friction between them, it might contribute to the WTO reform and help to achieve a multi-win result.

The China-U.S. trade friction is essentially a conflict between unilateralism and multilateralism, and a collision between protectionism and free trade. The U.S. was once the biggest beneficiary of economic globalization and has long considered itself the most important promoter of free trade. Since Trump took office, the U.S. has turned away from acknowledging that it benefits from free trade, but instead believing that it faces unfair treatment in international trade with China. To now, as the world's largest economy and the former leader of economic globalization, the U.S. turned to trade protectionism, so that free trade and economic globalization encountered a cold winter. Although the U.S. trade protectionism has brought severe challenges to the economic globalization, free trade and economic globalization are still the irreversible trend of the development of human society. Free trade and economic globalization are not only the inevitable result of the advanced development of global productivity, but also the only way to be taken by the countries in the present age for their economic development (Hatch,

2018). In response to the unilateralist and trade protectionist measures initiated by the U.S., China has adopted a series of countermeasures under multilateralism. These countermeasures have effectively safeguarded the core interests of China and established a good international image. Regarding the future, it is difficult to resolve the China-U.S. trade frictions in the short term. China should adhere to the rational, modify the improper, create a new type of multilateral mechanism, and establish a new structure of reform and opening-up. In addition, efforts should be made to encourage the U.S. to return to the multilateral trading system and to promote the sustainable development of economic globalization.

## Notes

+ Acknowledgement: This paper is supported by the “2018 Research Project of National Rule of Law and Legal Theory of the Ministry of Justice” ( “2018 司法部國家法治與法學理論研究項目 ” ) (No. 18SFB3050) and the “2019 Humanities and Social Sciences Research Project of Chongqing Education Commission” ( “2019 重慶市教委人文社會科學研究項目 ” ) (No. 19JD008).

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1. The Indo-Pacific Strategy is the new strategy of the U.S. across the Indian subcontinent to Pacific Ocean with the objective of maintaining freedom, peace and stability in the region, especially focusing on economics, governance and security.

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