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THE US-LED TRADE WAR: TOWARDS A RULE-BASED SOLUTION

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- The US' trade dispute with China escalated into a full-fledged war on July 6th, as the US imposed retaliatory tariffs against China's IPR-related policies in accordance with Section 301 of the Trade Act of 1974, and China simultaneously retaliated against this move.
- Both sides seems to prefer a shortcut victory in the present trade war to solving the dispute according to the rules of the WTO. They should realize that, in doing so, they imperil the WTO dispute settlement procedure as a whole.

- As the present dispute is pending under two WTO dispute cases, both sides should seriously commit themselves to solving the dispute according to the rules of the WTO, so that they may claim themselves responsible leaders of the global economy and the world trading system.

The US' trade dispute with China escalated into a full-fledged war on July 6th, as the US imposed retaliatory tariffs of 25% on US$34 billion worth of Chinese products in opposition to China's IPR-related policies and in accordance with Section 301 of the Trade Act of 1974, and China simultaneously retaliated against this move with the imposition of additional tariffs on the same amount of US products. The war between the world's largest and second largest economies shows no sign of early settlement. Indeed, it may escalate with the imposition of additional retaliatory tariffs, as the Trump Administration is likely to continue its "America first" trade policy to garner domestic voters' support so as to win the midterm elections this coming November.

This is not the first case in which the US has applied Section 301 to China's IPR-related policies. In April 1991, the USTR designated China a Special 301 Priority Watch Foreign Country, and self-initiated a Section 301 investigation against China's inadequate protection of IPR. When negotiations did not produce an agreement, the US threatened to impose additional 100% tariffs on US$1.5 billion worth of Chinese products. In January 1992, the two sides reached a memorandum of understanding (MOU) where China committed to take steps to strengthen its IPR enforcement regime, and the US did not impose the additional tariffs on Chinese products. The US took similar Section 301 actions against China's IPR-related policies in 1994 and 1996 as well. This is, therefore, the fourth time that the US has applied Section 301 to China's IPR-related policies. However, this is the first case since China joined the WTO in November 2001, and the US measure is problematic in light of the relevant rules of the WTO.

One of the major goals of the US during the Uruguay Round of the GATT, which gave birth to the WTO, was to strengthen the GATT's dispute settlement procedure. Under the GATT, members could delay or block the dispute

settlement panels and its reports. While many US trading partners criticized Section 301 as unilateral, the US claimed that it was often forced to apply Section 301 unilaterally because of the lack of an effective dispute settlement procedure. As a compromise solution, the WTO dispute settlement procedure prevents members from blocking panels and its reports, and it can authorize retaliation only if a member fails to implement a WTO Dispute Settlement Body's ruling. The US has used the WTO dispute settlement procedure for almost all Section 301 cases involving WTO members. The Trump Administration's retaliatory tariffs against China mark a departure from past US practice.

If the US claims that China's IPR-related policies violate the TRIPS Agreement, it should seek redress through the WTO dispute settlement procedure. It did file a request for consultation, or a WTO complaint, against China's discriminatory licensing processes to force technology transfers from US companies on March 23rd. Many WTO members, including Japan and the EU, joined the consultations as third parties, alleging that they also have serious concerns about China's discriminatory IPR-related policies, and that they have substantial trade interest in the consultations. These are what the rules of the WTO require members to do in settling disputes among them with respect to alleged violations of WTO Agreements, including the TRIPS Agreement.

However, on March 23rd, alongside with the WTO complaint, President Trump directed the USTR to take all appropriate action under Section 301, including retaliatory tariffs, to address "the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict US commerce". The US seems to argue that Section 301 action can be pursued against any acts, policies and practices of WTO members that are unreasonable or discriminatory, insofar as they burden or restrict US commerce, even when they do not violate the rules of the WTO. This is, however, not acceptable under the rules of the WTO. Otherwise, a WTO member might be able to "punish" other WTO members on any ground that it deems appropriate by unilaterally imposing retaliatory tariffs. The US unequivocally violated these WTO rules by unilaterally imposing retaliatory tariffs against China. It was therefore proper for China to file a WTO complaint against the US' proposed retaliatory tariffs on April 4th.

As both sides filed WTO complaints, we may claim that the WTO dispute settlement procedure is still a viable alternative to this US-led trade war. However, the US and China practically disregarded the WTO dispute settlement procedure by unilaterally imposing retaliatory tariffs on July 6th. According to the rules of the WTO, retaliatory tariffs may be allowed as "compensation" solely with the authorization of the WTO Dispute Settlement Body (DSB) if the disputing party does not implement the rulings of the DSB. Of course, the US is to be blamed as the first mover. However, China is also to be blamed for imposing tit-for-tat retaliatory tariffs without the authorization of the DSB. In doing so, the US and China imperil the WTO dispute settlement procedure as an indispensable means of solving trade disputes according to the WTO rules.

I do not claim that the WTO dispute settlement procedure is a panacea. It has a number of defects as a means of solving trade disputes. First, not infrequently, it takes several years to reach the final rulings, especially when the case is brought to the Appellate Body. While the case is pending, the alleged wrongdoer may maintain the measures at issue, as a stay of execution is not available under the system. Even the "compensatory" retaliatory tariffs may not force the wrongdoer to abandon the measure, as there is no means of compulsory execution available. Consequently, the WTO dispute settlement procedure is a time-consuming means of solving trade disputes, with a limited capacity to discipline wrongdoers. We must note, however, that such characteristics of the system are the result of compromises among the negotiating members of the Uruguay Round, where both more legalistic approaches and more sovereignty-friendly approaches were dismissed. In other words, the WTO dispute settlement procedure reflects a balance between free trade and sovereignty, and its effectiveness relies largely on the mutual respect and self-restraint of the disputing parties.

These are exactly what are lacking on both sides of the US-China trade war. The Trump Administration seems to prefer a shortcut victory to time-consuming WTO litigation, whereas China does not seem ready to give way in the exchange of tit-for-tat retaliations. Both sides should realize that they imperil the WTO dispute settlement system as a whole, which is too precious for

the global economy and the world trading system to be destroyed. As the present dispute is pending under the aforementioned two WTO dispute cases, both sides should seriously commit themselves to solving the dispute according to the rules of the WTO. By doing so, they may claim themselves responsible leaders of the global economy and the world trading system.

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