INTERNATIONAL BUSINESS LAW THESIS

The Legality of Unilateral Sanctions Arising from Intellectual Property Practices Under the Scope of the WTO Law Between the United States of America and the People's Republic of China

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List of Contents

List of Abbreviations

AIET	Administration of Imports and Export Technologies
AB	Appellate Body
CCS	Chinese Court System
CPL	Chinese Patent Law
CRP	Chinese Ruling Party
CRS	Congressional Research Service
DSB	Dispute Settlement Body
DSP	Dispute Settlement Process
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
FIL	Foreign Investment Law
GATT	General Agreement on Tariffs and Trade
IP	Intellectual Property
IPL	Intellectual Property Laws

IPP	Intellectual Property Policies
IPR	Intellectual Property Rights
ISDP	Institute for Security & Development Policy
JVR	Joint Venture Regulation
MAS	Mutually Agreed Solution
MFN	Most Favoured Nation
MOFCOM	Ministry of Commerce
NPC	National People's Congress
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
PRC	People's Republic of China
TRIPS	Trade-Related Aspects of Intellectual Property Rights
US	United States
USSR	Union of Soviet Socialist Republics
USTR	United States Trade Representative.
WTO	World Trade Organization

Chapter 1: Introduction

1.1 Background and research problem

The United States of America (hereinafter the "US") and the People's Republic of China (from now on "China") are comprehended as the world's most influential economies, respectively, and both aim to remain and compete for their privileged positions over the next years[1]. The relationship between both nations have been strained for several decades. However, the commercial clash between both states has been sharply aggravated recently, rising to an unprecedented peak in 2018. Although on January the 15th 2020, the US and China have signed a "phase one" new trade agreement[2], tensions are likely to persist throughout 2020 and the years to come due to the known as 'individual interests prevail' approach.
The position of both superpowers in the global economy, as well as the economic friction and influence that these economies generate to other nations, could lead the trade war to produce expanded effects in other countries, contributing to a global commercial crisis in the short term. From a long-term perspective, the lack of confidence in reactions of both governments towards both each other and the international institutions might endanger the survival and influence of the World Trade Organization (WTO), as both nations are implementing strong protectionism obstacles that may obstruct the correct functioning of the organization.

The roots of this conflict originated from a **protectionist ideology[3],** strongly laureated by the current US administration of trade, led by President Donald Trump, who has utterly changed from previous trade ideologies. It could be argued that the traditional way of thinking about trade regarding the benefits of reducing or eliminating trade barriers and therefore enhancing the financial conditions of the country are, to a certain extent, not followed anymore by the US administration. One of the reasons this might have occurred is the prevailing argument related to the loss of American unskilled employment positions due to foreign Asian or South American immigration. Although it may have nothing to do with China, another reason for this protectionist shift might be the potential loss of millions of job positions due to the digital revolution, which will imply the automation of the supply chain processes.

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[1] Prableen Bajpai, "*The 5 Largest Economies in The World and Their Growth In 2020" Nasdaq: world markets news, January 22, 2020*. < https://www.nasdaq.com/articles/the-5-largest-economies-in-the-world-and-their-growth-in-2020-2020-01-22>

[2] *Phase one deal: Economic and Trade Agreement between the government of the United States of America and The Government of the People's republic of China, January 15, 2020*. <https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf>

[3] J.P. Lehmann *"The rising spectre of protectionism: Trump and the global trade agenda" International Institute for Management Development,* November 2016. <https://www.imd.org/research-knowledge/articles/Trump-and-the-rising-spectre-of-proctectionism/>

Furthermore, American companies are furious about the way China is dealing with **intellectual property theft**[4]**.** In these regards, accusations of Chinese companies infringing US Patents is a continuous demand. Americans believe that through such infringements, the reductions of costs of Chinese companies might be substantial, taking into account that they are not bearing Research & Development costs in order to innovate by themselves, and blame the Chinese Government for not dealing properly with this circumstance. In addition to the millions of "*industrial knockoffs*" that China manufactures on a regular basis, the intellectual property issue expands to the sector of Chinese Venture Capital companies. The Chinese Venture capital firms are funding US-based startups creating a relationship that helps the Chinese party to collect cautiously valuable knowledge and data.

In addition to the issues quoted above, there is a severe problem on the table concerning **Chinese subsidies** to local enterprises, all in order to prevail in their position within the global economy[5]. Considered as one of the core fears of Americans, the injections of vast amounts of capital from the Chinese Ruling party towards in house businesses might pose a clear disadvantage to foreign companies to freely compete in the market.

Under this idea of protectionism, promulgated by the President of the United States, Mr. Donald Trump, China is assumed to pose a threat to the US economy and the loss of American jobs. One of the main objectives of Washington is to have an "America first" approach towards trade and therefore reduce the US trade current deficit.[6]
The **core issue** lies in the fact that China exports to the US much more goods and services than the United States exports to China[7]. Under the view of the Republicans, this is identified as the primary cause of unemployment and loss of profits of American companies. In these regards, we need to take into account the attractiveness for US manufacturers to employ a more affordable offshore Chinese workforce to assemble raw materials, which have contributed to a sensitive cost reduction of US companies.

All of these facts contribute to the US administration to adopt an **aggressive approach** towards trading, by means of imposing robust duties and restrictions on importing foreign goods. This bold American approach has, consequently, the effect of

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[4] Walter E. Block*, "The US is targeting China for intellectual property theft, but is the fight really worth it?" South China Morning Post,* January 16, 2020. <https://www.scmp.com/comment/opinion/article/3046129/us-targeting-china-intellectual-property-theft-fight-really-worth>

[5] J. Cai *"Why China's subsidised state-owned enterprises anger US, Europe – and its own private companies" South China Morning Post,* February 21, 2019. <https://www.scmp.com/news/china/diplomacy/article/2184707/why-chinas-subsidised-state-owned-enterprises-anger-us-europe>

[6] Mildner. S, *"America First: U.S. Trade Policy under President Donald Trump". External Economic policy BDI, Nov. 3, 2020* <https://english.bdi.eu/article/news/america-first-u-s-trade-policy-under-president-donald-trump/>

[7] K. Amadeo, *"US Trade Deficit With China and Why It's So High", The Balance,* February 26, 2020. < https://www.thebalance.com/u-s-china-trade-deficit-causes-effects-and-solutions-3306277>

promulgation of international policies that aim to restrict or abolish commercial law transactions with other nations (especially China)[8]. Those trade sanctions range from quotas, tariffs, or non-tariffs barriers to asset freezes or embargoes, which have the express aim of minimizing trade with such nations.[9] The principal economic instrument of policy in the US-China trade war might be the continuous increment or imposition of tariffs on goods imported in the US, and vice versa.

As to US and China's trade relationship, the history of economic sanctions between both countries illustrates that China has not frequently used this sanctioning financial instrument during the last decades. At the beginning of their trade relations, China imposed just a small number of sanctions in response to the US. Nevertheless, recent China's policies prove a sharp focus to become the global first economy and lead the international ranking as a superpower, outpacing the US. Proof of this innovative approach might be the well-known "***Belt and Road Initiative***"[10] (also known as the New era Silk Road), which was suggested by the President of the People's Republic of China Xi Jinping. This macro-engineering project encompasses a colossal chain of infrastructures such as freeways, gas pipelines, and railways that connects Asia with Middle East nations and Western superpowers. In addition to the land corridors, the "Belt" comprehends a maritime route that connects with "ASEAN" countries through the constructions of ports from South East Asia, along with the Indian Ocean, East Africa, and a significant portion of Europe.

These massive projects clearly illustrates the intentions of Beijing to continue growing and boost its trade, all in order to become the most powerful economy in the world. In return, this might mean that China's passive approach as a sanction recipient could change in the years to come. It is likely that China will make use of its leverage power and may start to use sanctions to punch back US's measures. The already mentioned macro-construction projects, along with the increasing influence of Chinese companies worldwide, will boost the Chinese position and power. This circumstance probably allows China to oppose sanctions or policies emanated from Washington and retaliate every single attack to their interest. The enormous amount of debt the US owns to China and the reliance of the US in the Chinese economy, indicate the possibility of China to retaliate against the US actions.

Another example of the Chinese commitment to become the leading global player might be, the so-called, "***Made in China 2025***" Plan[11]. The main objective the program has is

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[8] Such as, *Section 301-310 of the Trade Act of 1974*.

[9] E. Abernathy, C. Scherrer, *"Trump's Trade Policy Agenda" Intereconomics*, Volume 52, Number 6, 2017, pp. 364–369. <https://www.intereconomics.eu/contents/year/2017/number/6/article/trumps-trade-policy-agenda.html>

[10] OECD, *"The Belt and Road Initiative in the global trade, investment and finance landscape", in OECD Business and Finance Outlook, OECD Publishing,* 2018.<https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf>

[11] ISDP, *"Made in China 2025", Institute for Security & Development Policy*, June 2018. <https://isdp.eu/content/uploads/2018/06/Made-in-China-Backgrounder.pdf>

to restructure and impulse the Chinese Technological industry in such a way that it passes from an "era of quantity" to a new "era of quality and efficiency" in the manufacturing of products. The ambition of the Chinese government is to reduce the interdependence on imported foreign goods and promote the production of such goods among in-house manufacturers. A clear example might be the "*CPUs*" *industry*[12]. Even though China is the biggest producer of electronic devices, almost none or a very few of the semiconductor units that are assembled into those devices are produced in Mainland China. The technologies targeted by the plan are those called to dominate the market environment in the near future, such as the production and development of autonomous electric vehicles, the promotion of the Internet of Things (IoT), and the investment in Artificial Intelligence programs (AI). In general, it could be stated that the ultimate goal is to promote and insert new technologies into the different industries, such as agriculture, robotics, the processing of data and machine learning, as well as, cloud services.

In order to achieve global dominance, the strategy enshrined establishes specific targets, such as the granting of subsidies to private companies through tax breaks, as well as reduction of loan's interests, amongst others. Additionally, companies are encouraged to make investments overseas in order to benefit from new technologies and ways of working (especially semiconductors companies previously mentioned). Thirdly, "*mobilizing stake-backed companies*" and the very controversial "*Forced transfer agreements*" which force every company that wants to do their businesses in China to share certain trade secrets with the government.[13]

1.2 Research questions and methodology

This thesis' (the "**Thesis**") research narrows down its scope to the issue of **intellectual property theft** between both nations. In this context, the Chinese IP legislation has sparked plenty of criticism among Americans and westerners' policymakers who argue the unfairness of Chinese IP policies in the global trade stage, due to being in breach of **WTO's rules[14].** The main purpose of this thesis is to analyze the consistency of Chinese IP policies and measures with the so-called agreement on *Trade related aspects of Intellectual Property Rights* ("**TRIPS Agreement**")[15] and the *General Agreement on Tariffs and Trade* ("**GATT Agreement 1994**")[16]. In this context, the US argues that due to

[12] "CPU" stands for "*Central Processing Unit*" and referred to PC semiconductors.
[13] J. McBride, A. Chatzky, *"Is 'Made in China 2025' a Threat to Global Trade?", Council on Foreign Relations,* May 13, 2019. <https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade>
[14] *S. Donnan, J. Leonard "U.S. Accuses China of continuing IP Theft as WTO Launches Probe", Nov 20, 2018* <https://www.bloomberg.com/news/articles/2018-11-20/u-s-accuses-china-of-continuing-ip-theft-as-trump-xi-talks-near>
[15] *Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization* (hereinafter TRIPS Agreement).
[16] *General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization*. (hereinafter GATT 1994).

the illegality of Chinese practices, there is a need to impose economic sanctions in order to regulate the free market and allow American interest to prevail.[17]

In recent years, the use of these foreign policy tools has been increasing considerably, either unilaterally or bilaterally. The preceding year to this Thesis has been characterized to be convulsive, in which the US and China often enacted these economic ***sanctions unilaterally***, arising the necessary intervention of the law to determine its legality, as most of the measures are based on undisclosed evidence and are not subject to judicial review by international courts.

Once exposed the problem that brings conflict between the two nations, the main aim of this Thesis is to examine the **legality of these autonomous actions**, which refers mainly to the economic measures in the form of ***tariffs*** imposed by the US to the Chinese economy to tackle ***Intellectual Property Theft*** and the consequent Chinese reprisals, analyzing if they were imposed without the relevant authorizations or contrary to WTO standards. The economic sanctions imposed could be considered of the same nature (as both are tariff applications), but they vary in relation to the numbers of goods affected, their kind, their amount, and the percentages of tariffs applied.[18]

US unilateral actions are being imposed by the Trump administration, resorting to ***Section 301 of the trade act of 1974***, which concedes the possibility to the president to react when some jurisdictions arrange illegal practices in terms of IP theft. It could be argued that the different states own a right or freedom to revise its relations with other countries; however, it is widely known that "***coercive measures***", which are imposed with the sole intention to change individual domestic IP policies, might be unlawful. The right to impose those sanctions is not unlimited, however. The fact that the US administration has often promulgated economic sanctions to China, arguing IP violations of certain Chinese companies, arise certain doubt as to the legal considerations on which these actions or practices are based on. Are those sufficiently grounded as to imposing economic sanctions on a country? In addition to implementing its economic sanctions against China, the US pursue a *WTO dispute settlement proceeding* arguing that the Chinese IP practices are incompatible with the TRIPS agreement, breaching several provisions of the legal text referred to the "rights" of ***patent owners*** and in breach of the WTO "***National Treatment Principle***".

On the other hand, Chinese officials have claimed that US unilateral restrictive measures imposed against China are inconsistent with WTO law, violating different rules enshrined in GATT 1994 and the "***Most favored Nation principle"***. For its part, China responded with their own counter-measures (also in the form of tariff application), and also initiated their formal *WTO dispute settlement proceeding* against the US.

The primary purpose of this research is to construct a ***legal analysis*** of the tariffs inflicted between both nations. Nevertheless, taking into account the high degree of

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[17] *Bloomberg News "China to Raise Penalties on IP Theft in Trade War Compromise", Nov 24, 2019* < https://www.bloomberg.com/news/articles/2019-11-24/china-to-raise-penalties-on-ip-rights-violations>

[18] *See, section 3.2 of this text*.

complexity that this may entail, the reach of this research is limited only to address the economic sanctions that aim to tackle the Intellectual property rights that are consecrated in WTO law under TRIPS and GATT 1994. Therefore, this assessment is limited to WTO norms, and those sanctions that fall outside the scope of WTO regulation will not be examined in this work. The concept of "economic sanctions" may raise legitimate concerns to the reader concerning their definition. This Thesis' research will take into account the traditional approach of "sanctions" as those punitive measures adopted by a country in the international sphere that aims to force other countries to cease specific acts, actions or policies that are supposed to be contrary to WTO standards. Besides, retaliation adopted by a country that is affected by those measures will also be considered as "economic sanctions".[19]

However, this Thesis' research will focus exclusively on the "***application of tariffs***" between the two WTO members aforementioned. Under the WTO's approach, tariffs must be considered as "*duties*" applied to imports. Their core purpose is to concede an economic advantage to goods or products that are locally grown or manufactured, which grants incomes to the state of origin, in comparison with those imported. All WTO members are bound to the maximum tariffs levels that a country could charge to another, which are consecrated in the *Schedule of concessions and commitments*, which is annexed to the GATT 1994. Therefore, In the process of entering the WTO, the future members must commit to maintain their tariffs under a specific level, as determined in their "*schedules*", that is considered as the "*Bound rate*"[20] that every state member must comply with. Moreover, ordinarily different "tariffs" are going to be implemented by each member taking into account the type of goods imported.[21]
Before diving into the substance of US-China trade dispute, Chapter 2 assesses the historical relationship between both countries in respect to trade in order to better understand how historically the countries have reacted against each other in analogue situations.

This Thesis will examine the **legal provisions** that the US and China need to respect, such as those enshrined in GATT, TRIPS, and DSU. The aim is to analyze tariffs carried out by the two most powerful nations in the world and their compliance with WTO law. In perspective, the global number of tariffs between both nations has been escalating proportionally over the last years. This Thesis' research will analyze the tariffs imposed exclusively in 2018, when the competent Chinese authority imposed tariffs on US goods in retaliation to tariffs previously enforced by Mr. Donald Trump's administration, grounded on IP theft. Whereas, American economic sanctions were inflicted on a large category of goods, mainly on Chinese *technological goods*. The Chinese commerce authorities are relying on sanctions that can profoundly affect the American economy, such as *"pork meat, poultry or Soybeans"*, and other agricultural products that the US

[19] Please note that the term "*measure*" encompasses not only "tariff actions" but "non-tariffs actions" as well, the above refers to any policy action other than "tariffs actions" that might influence trade between members, such as those set out in section 3.2.2 of this text.
[20] "*Bounds rates*" may be considered as "*Ceiling rates*" or "*Binding rates*" that countries must respect in accordance with the *schedule of commitments*.
[21] *World Trade Organization Official website, Trade and Tariffs*.

harvest exclusively to export to China, hitting farmers massively in the US[22]. Those actions that aim directly to attack the economy of the opposite nation and the subsequent retaliation that might affect not only trade transactions between those actors but expand the adverse effects to other countries who rely on those economies create us the particular obligation to determine their ***legality under the scope of the WTO rules***.

Chapter 3 enumerates the different groups of "***tariffs***" imposed between the US and China and divides them by "***tranches***". This section helps us to accurately determine the tariffs at stake that the panel will analyse to verify their legality with WTO standards and to which extent those tariffs are permitted under WTO law.

Chapter 4 is presented as the core part of this Thesis' research aiming to scrutinize individually two WTO disputes between the US and China. The first case ("**DS 542**") in question took place in March 2018, when the US initiated the correspondent WTO proceeding regarding "*certain measures concerning the protection of intellectual property rights*"[23]. Whereas, the second ("**DS 543**") took place in April 2018 and was presented to the WTO by China, regarding "*tariffs measures on certain goods from china*"[24]. The Chinese commercial Authorities have brought a total of 16 cases as a complainant to the WTO competent bodies and have received a total of 23 as a respondent against the US. Overall, the 23 cases prove that over the last 18 years, the US has been slightly more active pursuing commitment to WTO rules to china. Based on the data gathered by the WTO, it could be stated that China and the US (along with the European Union) are the communities more active in terms of disputes.

In this section, the legality is assessed by a substantial review of the "***Dispute understanding provisions***" in conjunction with several fundamental ***WTO jurisprudence*** cases that tackle the questions raised by China and the US, determining the "scope" of the matter and the consistency of tariffs concessions.

In this part, we will examine the US claims and conclude if the Chinese regulation associated with intellectual property fails to comply with the **minimum standards under TRIPS** that might be applied to the case. The legitimacy of Chinese unilateral countermeasures will be examined to the extent of WTO standards as mentioned.

This Thesis' research also analyses the applicability or not of the ***exceptions*** to the unilateral application of tariffs enshrined in the **GATT**, and whether those allegations must be taken into account by the panel. The WTO legal text conceives an enumerated

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[22] M. Durisin, A. Robinson*, "Soybeans Sink as China Hikes Tariffs on American Farm Products", Bloomberg Market news,* August 23, 2019. <https://www.bloomberg.com/news/articles/2019-08-23/soybeans-sink-to-two-week-low-as-china-hikes-u-s-tariffs>

[23] ***DS 542*** "China — *Certain Measures Concerning the Protection of Intellectual Property Rights" (March 2018)*
<https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm>

[24] ***DS 543*** *"United States — Tariff Measures on Certain Goods from China" (April 2018)*
<https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds543_e.htm>

list of exceptions, such as the *general exception* of article XX regarding "*Public morals*" that the US invoked and that we thoroughly examine.

On the other hand, Chapter 5 briefly discusses the "***dispute settlement mechanism***" procedure that every WTO member must follow to assert their claims. Both countries resort to this process to acquire a favorable ruling that allows them to levy their tariffs, proving that the opponents' unilateral measures are inconsistent with the WTO rules. The chapter illustrates that both cases are at an early stage because the panel report was not given to the parties yet and, therefore, are still pending.

Moreover, Chapter 6 focuses on the newly proclaimed Chinese "Foreign investment Law" and centers its attention on the provisions that aim to offer more exhaustive protection of foreign companies to resolve the problems surrounding the Intellectual property rights alleged by the US. In this section, an analysis of the Chinese Intellectual property regulatory framework is executed, identifying every relevant provision that reinforces the protection of those Foreign firms in China. In addition, this section assesses China's strategic movements regarding the repeal of some of its old controversial articles that were subject to conflict between both nations.

Following the foregoing, Chapter 7 provides the thesis author's opinions regarding the possible outcomes of the cases exposed by attending to its interpretation of the WTO agreements.[25] In this section, we exposed the various *interpretation questions* that the panel must evaluate itself for each case and that the pronouncements could suppose a precedent for future cases. Also, we assess the possibilities that both nations have to obtain a favorable result. To sum up, a brief conclusion is conducted in Chapter 8.

[25] Please note that the arguments, conclusions, or opinions raised in this section of the work do not necessarily reflect the same findings that the panel can reach in its forthcoming report. The author's conclusions may be said to be justified in WTO law and jurisprudence, but questions of interpretation may differ.

Chapter 2: Historical approach to economic sanctions between the People's Republic of China and The United States of America

China and US rivalry has had its ups and downs throughout the last decades, with the intention to exert economic and geopolitical control over other countries in the international sphere. Therefore, bilateral trade relations between China and the US have depended remarkably on the ***political position*** of each country towards certain core matters, such as international wars (Korean & Vietnam conflicts), national self-defense, and sovereignty issues.

Bilateral trade relationships date back to the time when the US first obtained their independence and entered the "***Old China trade***" period. Eight years after in 1784, trade relations between the Qing dynasty and the US were starting, which was sustained with the rise of the "*Canton trade system*."[26] Since that moment, both countries have maintained a suspicious attitude towards each other concerning trade, whereas preserving at the same time remarkably economic cooperation in certain circumstances.

Nevertheless, the trade relationship between both nations started to change, notably, with the consummation of the Chinese communist authoritarian regime after the proliferation of the Chinese revolution in 1949. The following year, 1950, is characterized by the support of "*Communist China*" to North Korea in the Korean War that supposed, as a consequence, a "***Total trade embargo***" on China by the US trade administration. In 1951, the UN continued in the same tune as the US and imposed a multilateral embargo on Beijing approved by the "*UN General Assembly resolution 498*"[27] in which China was considered as an aggressor. After the war, the UN economic sanction was lifted. However, the US maintained its "***Trade Embargo***" unilaterally against China, proving the distancing caused by the conflict between the two countries due to Chinese support of North Korea. Undoubtedly, the stiff economic sanction heavily hit China's economy, which prompted a high desire from the communist party to end the problematic trade relationship. Around 22 years later (in 1972), the bilateral relationship between both nations improved with the proliferating negotiations between "*Zhou Enlai*" & the President "*Richard Nixon*" who agreed to lift the embargo in the so-called "*Joint Communiqué*."[28]

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[26] Paul A. Van Dyke, "*Canton Trade: Life and Enterprise on the China Coast, 1700-1845" Hong Kong University Press, 2005.* <https://ebookcentral.proquest.com/lib/uvtilburg-ebooks/detail.action?docID=677561>

[27] General Assembly resolution 498, *"Intervention of the Central People's Government of the People's Republic of China in Korea",* A/RES/498, February 1st, 1951. <https://undocs.org/en/A/RES/498(V)>

[28] Xin-Zhu J. Chen, *"China and the US Trade Embargo, 1950-1972", American Journal of Chinese Studies. Vol. 13, No. 2,* October 2006, pp. 169-186 < https://www-jstor-org.tilburguniversity.idm.oclc.org/stable/44288827?read-now=1&seq=1#page_scan_tab_contents>

The main factors for the US to change their policy behaviour towards China were caused by the growing human and mineral resources that China had, as well as the ongoing industrial and agricultural development of the nation during those years. As a consequence, Richard Nixon (strongly influenced by US secretary of State "Henry Kissinger") realized that China's reassessment as a business partner could bring enormous benefits for the US in returns.[29]

Moreover, it could be stated that during the Korean War, the Chinese principal trade partner was the Soviet Union, since China carried out 70% of its commercial transactions with the "USSR". The massive tragedy of the "*Great Leap Forward*" and the lack of "*Technical Aid*" by the USSR during the early years induced the nation to search for new trading partners[30]. The Chinese government blockade to the USSR trade relationship and the relaxation of trade barriers in favour of America boosted the Sino-American link, subsequently increasing the trading of mainly agricultural goods, such as being grains, soybeans, and cotton.[31]

The establishment of the ***communist revolution*** in China brought the necessity for the Chinese government to concentrate its endeavours on the internal development and restructuring of their economy. The tremendous economic instability that the nation suffered supposed a government more concentrated on national economic and political matters rather than international trade, until the death of the leader of the communist party, Mao Zedong, in September of 1976[32]. From thereafter, the Chinese trade administration eased significant trade barriers and promoted the participation of other international nations to facilitate the commercial progress of China. During this period, The Chinese government liquidated or merged many *"state-owned enterprises*," intending to promote the economy.[33]

It is worth mention the trade relations between both countries during the 2000s when both superpowers had total predisposition to facilitate free trade between each other. The excellent relationship at this moment was reflected in the enactment of the "***US-China Relations Act of 2000***" that concede to China the "*permanent normal trade*

[29] Liang Shing Fan*, *"The economy and foreign Trade of China"* < https://heinonline-org.tilburguniversity.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/lcp38&men_hide=false&men_tab=toc&kind=&page=249>

[30] Mingjiang Li*, "Mao's China and Sino-Soviet Split : Ideological Dilemma", Routledge Contemporary China Series,* 2012, pp. 53-80<https://ebookcentral.proquest.com/lib/uvtilburg-ebooks/detail.action?docID=958313>

[31] Liang Shing Fan*, *"The economy and foreign Trade of China"*< https://heinonline-org.tilburguniversity.idm.oclc.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/lcp38&men_hide=false&men_tab=toc&kind=&page=249>

[32] R. Nephew, *"China and Economic sanctions: Where does Washington have leverage?"* 2019, pp. 1-10 < https://www.brookings.edu/wp-content/uploads/2019/09/FP_20190930_china_economic_sanctions_nephew.pdf>

[33] Garnaut Ross, Ligang Song "*China 2002: WTO entry and world recession*" 2012, pp. 29-44 <https://ebookcentral.proquest.com/lib/uvtilburg-ebooks/reader.action?docID=4602465>

relations" status[34]. The "Act" (Also known as "*China Trade Bill*"), was strongly supported by the president of the US "*Bill Clinton*," who argued that granting this status to China will suppose lower tariffs on US goods being commercialized in China and also included "anti-dumping" measures that preserve the US economy.[35]

The accession to the WTO was possible due to the support of the US Government and the process of trade liberalization carried out by China downsizing state-run companies and conceding more capability to private business activities. With the admittance of China to the WTO in 2001, the nation ends a period of 15 years of negotiations led by premier "*Zhu Rongji*"(among others) and eliminates generated frustrations due the withdrew of China from the GATT membership by "*Nationalist China government*" in Taiwan in the 1950s.[36]

In general, during this decade, trade relations were considered as "exemplary" between both countries due to trade summits where discussions are putting particular emphasis on the benefits of having an open market characterized by free trade and the movement of capital. Both countries had a public predisposition to grant China a more natural path to join the World Trade Organization (WTO) and benefit from the Most Favoured Nation Principle (MFN) that the organization concedes to all its members. At that point, the acceptance of China as a WTO member has boosted the world economy due to the substantial increase in exports worldwide, as well as the decline of tariff on goods imported to China. It could be argued that the MFN principle will avoid discrimination policies towards Chinese exports by other WTO nations. These circumstances led to both superpowers to not impose strict economic sanctions reciprocally and open their markets due to China was considered as a close partner rather than a competitor.

Although China had always declared disquiet with the intrusion in internal political affairs during this early stage, the nation ever had a reticent attitude towards the imposition of economic sanctions to the US. Nevertheless, this posture as a sanction recipient may reverse due to a changing trade behaviour that exposes the capabilities of China to exert this power without exposing its economy to hefty risks. Nowadays, the good economic position of the nation and the vast commercial dependence of the US brings as a consequence a further decision making from Beijing regarding international trade matters, and the subsequent influence to impose economic sanctions worldwide.

This circumstance is due to many factors, among others, the enormous potential of China as an exporter, worldwide, favouring the interdependence of other countries

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[34] "*H.R. 4444 — 106th Congress: China Trade Bill*". 15 May 2000<https://www.govinfo.gov/content/pkg/BILLS-106hr4444enr/pdf/BILLS-106hr4444enr.pdf>

[35] *E. Schmitt, J. Kahn "The China Trade Vote: A Clinton Triumph; House Approves Normal Trade Rights for China" The New York Times May 25,2000.* <https://www.nytimes.com/2000/05/25/world/china-trade-vote-clinton-triumph-house-237-197-vote-approves-normal-trade-rights.html?auth=linked-google1tap>

[36] Hongyi Harry Lai, *"Behind China's World Trade Organization Agreement with the USA" Third World Quarterly, Vol. 22, No. 2* (Apr., 2001), pp. 237-255 < https://www-jstor-org.tilburguniversity.idm.oclc.org/stable/3993409>

towards China as a global supplier of goods. It is worth mention that those exports into other nations have been extremely economical to them due to the affluence of inexpensive and accelerated human labour in China, that attracts foreign companies[37]. The capacity of China to impose economic sanctions has been gradually increasing in accordance with the affluence of Chinese trade, which has been developing at an unprecedented pace. The switch of China as an economic sanctions recipient to a nation that exercises trade power is proportionally and very valuated by the possible economic risks to China, in return. In that context, the transition to the trade power by China begun significantly with the 2008 Financial Crisis. Whereas the US was in "*deep recession*" having problems to exit the commercial crisis situation, the Chinese government released several *Billion with "stimulus packages*" to boost their economy and allowed China to be one of the nations that recovered very quickly from the financial crisis helping Chinese officials to realize the "gigantic" trade power that China possesses[38]. In 2008, China became the world's biggest debtor of US debt when the financial crisis forced the US to borrow money from the Asian nation to avoid the collapse of various American economic institutions. In 2010, the growing trade liberalization and transparency promoted by China, as well as the global recession that hit densely other countries, supposed that China overtook Japan as the second world's largest economy.

The excellent position of China worldwide after the financial crisis foster their opportunity to impose economic sanctions on the US and other Nations. The economic growth of China and the interdependence of third countries towards their economy gives the Asian country more freedom to exert trade control. In current times, the methodology used by the Chinese officials regarding coercive measures to trade shows that China's deployment of these economic sanctions is related to triggering events linked closely to territorial claims or Chinese political issues.[39]

Nowadays, before China embarks itself into a trade dispute, several factors are examined by the Chinese trade authorities related to "certain subjects," "certain countries," or "certain goods." Chinese officials always investigate what the first concerns, possible benefits or negative impacts are and if it is worth initiating the dispute.

For instance, the Chinese trade authorities have not implemented economic sanctions to international disputes regarding self-determination issues that could end up contrary to their political interest with Taiwan. Another pattern might be the size of the country targeted; historically, China often exerted more pressure on smaller nations rather than big and powerful economic countries. Additionally, China is very reticent to impose

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[37] Boden Graham, *"China's Accession to the WTO: Economic Benefits" The park place Economist"* 2012 Vol. 20 <https://digitalcommons.iwu.edu/parkplace/vol20/iss1/8/>

[38] Jing Men, *"Will the financial crisis make China a superpower?"* July 2st 2009, <https://www.nato.int/docu/review/articles/2009/07/02/will-the-financial-crisis-make-china-a-superpower/index.html>

[39] Harrell P, Rosenberg E, and Saravalle, *"China's use of Coercive Economic Measures" CNAS Energy, Economics and Security Programs*, 2018. <https://www.cnas.org/publications/reports/chinas-use-of-coercive-economic-measures>

economic sanctions on US companies that manufacture products or on goods that cannot be acquired from other suppliers, or that cannot be a manufacturer in China.

The year 2012 is characterized as a moment of gradually rising trade tensions between both nations under the presidency of Barack Obama. In that time, it could be argued that China is more prone first to use "*internal coercive economic measures*" that are contrary to the "trade conduct" that the US is expecting in return. Before resorting to WTO Law, the Asian country opts to use all possible internal regulations. China uses this type of inner "*measures*" intending to minimize the risk of having a WTO judgment that may suppose an objection to their actions. An illustration of this policy might be the dispute regarding "rare earth," where China referred to several internal environmental standards to impose restraints on "*rare earth and metal exports*,[40]" which are necessary for other countries to produce certain goods. In this case, the US, Japan, and the EU started a WTO "dispute settlement" case, which has China as a respondent being accused of exerting those inner environmental restricting policies. In the former case, the WTO panel found that the restraints applied by China on rare earth minerals exports, but not on local users of those materials were incompatible with the WTO Rules, judgement that was confirmed by the Appellate Body. However, the problematic trade relation will end up with the promotion to the Chinese presidency of "Xi Jinping" in 2013. During that time, both leaders met in the so-called "*Sunnylands Summit*," where the US-China relationship is enhanced notably by the predisposition of both countries to embrace trade and reduce at the same time environmental concerns.

From ancient times, the relevance on the trade of western countries and the total number of WTO cases throughout history illustrate the critical influence of European nations and the US exploiting more their tools of economic sanctions. However, as stated before, there is a considerable tendency that shows that China probably will appeal to use more frequently sanctions policies. I believe that the strong influence on trade policy matters that the president of China "Xi Jinping" possess and his ambition to boost Chinese economy with the macro-engineering projects mentioned demonstrate that in the future China will be able to adopt economic sanctions not only as a retaliation mechanism but further as a tool to exert their trade policies globally.

At the beginning of Mr. Trump's mandate in 2017, the Sino-American trade relationship appeared to be in an excellent position when a new trade agreement took place, focused on eliminating trade barriers to certain exports regarding "*US beef and poultry producers, payment providers and other financial services*."[41] The deal came after the "*Mar-a-Lago Summit*" between both presidents and proliferated during the next months. During that time, the current US secretary of commerce, "*Wilbur Ross*" made

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[40] Panel Report, *United States—China: Measures Related to the Exportation of Rare Earth, Tungsten and Molybdenum*, WTO Doc. DS431 adopted March 26, 2014. <https://www.wto.org/english/tratop_e/dispu_e/431_432_433r_e.pdf>

[41] D. Palleta, S. Denyer, "*Trump, China reach preliminary trade agreements on beef, poultry" The Washington Post. May 12 ,2017* <https://www.washingtonpost.com/news/wonk/wp/2017/05/11/trump-china-reach-preliminary-trade-agreements-on-beef-poultry/>

some declarations stating that "US-China relationships are now hitting a new high, especially in trade."[42]

The recent history shows that those agreements were precipitated in numerous aspects, and soon the situation worsened. During the summit and the consequent agreement, both leaders did not devote to address the commercial deal regarding specific core industries that are relevant for the two countries, such as the auto industry, steel, or aluminium. Up to this point in time, trade representatives did not approach any intellectual property issue regarding the "industrial copying" of goods that China exports in the world stage.

As stated before, the lack of appreciation of those fundamental trade issues had, as a consequence, the break of trade negotiations, and in 2018 both superpowers embarked in a "*tit for tat*" tariff war. The first package of tariffs aimed to protect the steel and aluminium American producers that had been affected profoundly by Chinese imports on those materials accusing the Chinese authorities of the granting of subsidies to Chinese metals producers.[43] Facing the protection measures established by the US Government, the Chinese authorities were not going to stand idly by, and soon the tension escalates with retaliation measures. The tariff application was promptly expanded by the US Trade Representatives to other goods or industries in which China had a presence in the US as the Clothing, electronic devices, transports, medical services.[44]
In response, China took action against particular goods that were very important in order to sustain the American source of revenue, such as pork meat, seafood, and soybeans.

These last years have been more characterized by the imposition of retaliation measures and robust political interference in domestic social issues. Throughout 2019, the investigation of trade representatives focused on the way the other nation is going to retaliate against their trade actions without taking a thorough interpretation of the global rules and whether those measures are truly beneficial towards their own citizens. Proof of that is the creation of the so-called "US blacklist" of Chinese enterprises that illustrate the intention of the US to restrain the operational activities of foreign companies in their territory as it did with the Chinese Giant "Huawei," curbing the usage of certain services and commodities such as the "5G technology" and restricting domestic companies to do business with Huawei. The restrictions applied by the US are

[42]T. Phillips "*US hails China trade deal as sign relations are 'hitting a new high" The Guardian, May 2017*<https://www.theguardian.com/world/2017/may/12/us-hails-china-trade-deal-as-sign-relations-are-hitting-a-new-high>
[43] *J. McBride, "The Risks of U.S. Steel and Aluminium Tariffs" Council on foreign Relations, March 8, 2018.* <https://www.cfr.org/backgrounder/risks-us-steel-and-aluminum-tariffs>.
[44] *Office of the United States Trade Representative, "USTR Releases Product Exclusion Process for Chinese Products Subject to Section 301 Tariffs" 7 June, 2018.* <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/ustr-releases-product-exclusion>

justified by human rights violations of the "Uighur" Muslim community in the "*Xinjiang region*,"[45] as well as data collection and national security concerns.

Those protectionist actions carried out by the Trump's Trade administration have brought plenty of criticism from economists specialized in trade, who argued that American enterprises, consumers, and farmers are the real victims affected by the Chinese retaliation measures. An economic report regarding the "effects" on American business and consumers illustrates the loss of profits deriving out of import protectionism strategies that brought American producers to increment the prices of their goods or services. According to the report estimation, the "*cumulative deadweight welfare (reduction in real income) cost from US tariffs to be $6.9 Billion during 2018, with an additional cost of $12.3 Billion to domestic consumers and importers in the form of tariff revenue transferred to the government*"[46]. In addition, another economic study shows a broad influence of the tariffs measures on the US economy, according to this report they estimate "*an annual loss for the US of $51 Billion due to higher import prices*".[47]

Regarding the actual trade situation between both nations in 2020, it could be stated that US protectionism practices have been affecting the country economically. The economist analysis represents that US consumers are being affected directly by these policies that are intended to pressure China to accomplish US trade desires, and gradually the prices paid for Americans' daily purchases of the basic needs will increase. The possibilities that both countries have to exert their influence are intrinsically related to the use of economic sanctions. China has done so by imposing restrictive measures on "rare earth" in 2012 or, by contrast, as the US did has done establishing barriers to prevent business activities in the US market of Chinese companies, such as "Huawei." In this context, the future of both countries will be marked with the WTO findings of the still pending cases that are going to assess the legality of their actions. The proliferation of bilateral relations seems to have an important role as well in the future usage of economic sanctions. We are at a critical moment in the trade history of both countries, in the agreements that are being made, both superpowers agreed to diminish the adoption of tariffs and quotas related to certain goods. However, it would not be the only moment in history where both countries committed to do accomplish absolute deals and finally being elusive due the promises made are not any more favourable to their interest. In a nutshell, the best is yet to come.

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[45] A. Swanson, P. Mozur, "*U.S. Blacklists 28 Chinese Entities Over Abuses in Xinjiang", 7 October, 201. The New York Times.* <https://www.nytimes.com/2019/10/07/us/politics/us-to-blacklist-28-chinese-entities-over-abuses-in-xinjiang.html>

[46] *M. Amiti, S.J. Redding and D. Weinstein, "The Impact of the 2018 Trade War on US Prices and Welfare", International Trade and Regional Economics,* CEPR. March 2, 2019. <https://cepr.org/sites/default/files/news/FreeDP_Mar05.pdf>

[47] *P. Fajgelbaum, P. Goldberg, A. Khandelwal, P. Kennedy, "The Return to Protectionism" National Bureau of Economic Research: International Trade and Investment,* Paper No. 25638, March 2019. < https://www.nber.org/papers/w25638>

Chapter 3: US Sanctions against China in terms of Intellectual property and the Chinese reaction.

As referred to in the historical approach, trade relations between the United States and China did not "*come easy*" during the course of history, nor in the last ten years when trade tensions escalate profoundly due to the continuous application of tariffs between both nations. Eventually, the US Trade Representative agreed to endorse a protectionist strategy of exerting pressure on China, which under the "*Americans views*" aimed at forcing the compliance by China with the WTO rules.

One of the main "*niches*" of the conflict are the Chinese policies regarding forced "technology transfer" from American enterprises to Chinese companies, which have culminated with two recent WTO dispute settlement proceedings[48].

In the first one, the US declared that China has breached certain provisions of the WTO agreement on "TRIPS"[49], and that Chinese countermeasures applied are illegal under the same legal text. In the second one, the Asian nation claims to the WTO that Americans' unilateral measures applied on "*Certain goods from China*"[50] are illegal and breached the US commitment under the "GATT"[51], as well as the "DSU" legal text[52].

3.1 Individual restrictive measures under Section 301 of the Trade Act of 1974.

One of the significant changes of Mr. Trump's administration's trade policies, concerning past US trade practices, is the more frequent use of mechanisms established under Section 301 ("investigation") of the Trade Act of 1974. The recurrent usage of Section 301 determines that US trade administration is resorting to two different mechanisms.

On the one hand, when starting a dispute, the United States Trade Representative is required, for those cases associated with trade agreements such as TRIPS or GATT, to

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[48] ***DS 542*** "China — *Certain Measures Concerning the Protection of Intellectual Property Rights" (March 2018)* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm>
DS 543 *"United States — Tariff Measures on Certain Goods from China" (April 2018)* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds543_e.htm>

[49] "*TRIPS*" Stands for "*Trade Related Aspects of Intellectual Property Rights*" and established the minimum standards of protection in terms of intellectual property law in favor of the WTO members.

[50] The measures were applied by the US to China as a reprisal of what they called "Intellectual Property theft."

[51] "*GATT*" stands for "*General Agreement on Tariffs and Trade*", and determine the legal agreement that aims to liberate trade by eliminating "*tariffs*" between WTO members. When the agreement was created, it aimed to eliminate "trade protectionist" ideologies.

[52] "*DSU*" stands for "*Dispute Settlement Understanding*" and referred to the *"Understanding on rules and procedures governing the settlement of disputes",* as its own tittle indicates the legal text determine the "*procedures and rules*" by which the dispute settlement system is governed.

initiate the *formal dispute procedures* enshrined in those legal texts. In the case examined in this document, the US process a formal dispute to the WTO concerning the improper use of intellectual property licenses and practices that US trade authorities believe fall within TRIPS. Therefore, the breach of the law in terms of Intellectual Property would be challenged under the WTO dispute settlement system.

On the other hand, the US seeks through "***Section 301"*** to enforce its law to the rest of the practices that fall outside of the TRIPS agreement on an individual basis.
Section 301 of the trade act of 1974 constitutes one of the **primary mechanisms** by which the US executive aims to enforce US rights in that matter, for instance, by imposing unilateral measures on Chinese goods. Thus, Section 301 grants the president the possibility to approve unilateral measures to enforce US rights when certain jurisdictions abide by discriminatory practices in terms of intellectual property. Therefore, Section 301 is an instrument that aims to give the US government the necessary means to exert strategic "*pressure*" on other countries and boost the US trade. [53]

The way to launch an investigation of a particular case could be directly by the USTR[54] or by the request of a "*petitioner*"[55]. Once the investigation is on course, the USTR should first attempt to reach a peaceful solution of the conflict on a bilateral basis with the other nation. This instrument authorizes the US executive to exercise unilateral sanctions without any previous WTO approval.

In this context, the tariffs imposed on China have been justified by the US trade authorities evoking this piece of legislation alleging deficiency in the WTO dispute settlement system, as well as the lack of WTO rules to resolve specific intellectual property practices carried out by China. The investigation carried out by the USTR on Chinese practices ended up with the "*Special 301 report*"[56], which accused China of committing discriminatory actions against US companies forcing them to transfer technology.

3.2 Economic sanctions.

3.2.1 United States measures on Chinese goods.

[53] *Shirley, A. "Using section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why and How", N.C International Law and Commercial regulation* (2016) <http://scholarship.law.unc.edu/ncilj/vol6/iss3/5>
[54] "USTR", Stands for "*United States Trade Representative*"
[55] The petitioner might be a *company or an industry.*
[56] Findings of The Investigation into China's Acts, Policies, and Practices related to Technology Transfer, Intellectual property, and Innovation under Section 301 of the trade act of 1974. March 22, 2018*. Office of the United States Trade Representative Executive Office of the President.*

As to WTO law covenants, the principal issues are related to the economic measures in the form of ***tariffs*** against certain areas of the Chinese economy and the consequent reprisals in response. In July 2018, the US under the direction of Mr. Donald Trump resorted to its Section 301 tool, and following diverse hearings, commanded a **25 percent tariff** on a total of around $35 billions worth of imported Chinese goods, thus, countering through such mechanism China's alleged unethical trade practices ***concerning intellectual property*** (Tranche I). In the same way, China promptly imposed tariffs on US exports to China worth the corresponding equal value. Furthermore, in August 2018, the USTR inflicted 25 percent tariffs on an extra $16 billion of shipped commodities from China (Tranche II).

In addition to such first round of economic sanctions, in September 2018, Trump US trade Officials exacted tariffs on an additional $200 billion worth of import assets from China. The economic measure initially had a tariff rate of approximately 10 percent, but trade tensions provoke a raise to 25 per cent of the effective hike (Tranche III).

The aggregate sum of the three tranches of economic sanctions results in US implemented tariffs with a total merged cost of nearly $250 billion for China. Moreover, the fourth tranche of potential tariffs, still pending authorization, threatens to levy tariffs on almost every outstanding goods from China.

Table 1. U.S.-China Section 301 Tariff Action

Country Imposing Tariff	Ad Valorem Tariff Rates	Stated Imports Impacted	Tariff Actions and Dates
U.S. Tranche 1	25%	$34 billion	Implemented 7/6/2018
China Tranche 1	25%	$34 billion	Implemented 7/6/2018
U.S. Tranche 2	25%	$16 billion	Implemented 8/23/2018
China Tranche 2	25%	$16 billion	Implemented 8/23/2018
U.S. Tranche 3	10%, then 25%	$200 billion	10% hike effective 9/24/2018; raised to 25% by 6/15/2019
China Tranche 3 (4 lists)	5% and 10%, then 10%, 20%, and 25%	$60 billion	5% and10% hikes on 9/24/2018; increased to 10%, 20%, and 25% on selective products, effective 6/1/2019
U.S. Tranche 4 proposed	25%	$300 billion	Draft USTR notice issued 5/13/2019 (action pending)

Source: Congressional Research Service.[57]

The economic sanctions imposed are catalogued as necessary by the US administration to tackle the Chinese invasion of the American economy, invasion based on unfair IP

[57] *Congressional Research Service: "Enforcing U.S Trade Laws: Section 301 and China"*, 26 June, 2019. <https://fas.org/sgp/crs/row/IF10708.pdf>

practices carried out by China. To such extent, the USTR argues that China carries out the following unlawful actions:

-Demands foreign firms that invest in their country to participate in Joint ventures agreements with Chinese enterprises and to provide relevant technical information to internal Chinese parties as a requirement to operate a business in China. It also alleges that China maintain foreign investment restrictions through regulatory and licensing processes to urge that technology transfer;[58]

-Supports discriminatory licensing regulations that restrict US firms from getting "*marked based returns*" for their Intellectual Property. Therefore, US companies trying to license IP technologies to Chinese companies carry out such licensing on *"non-market-based terms*", favouring Chinese firms.[59]

-Conducts or tolerates unlawful cyber intrusions inside US computer networks in order to obtain US valuable technology for commercial purposes.

-Promote acquisitions and Chinese firms to finance transactions, especially when such transactions imply a massive IP technology transfer, all towards strengthening China's industrial strategy.[60]

The economic sanctions applied in the form of tariffs are the epicentre of the trade conflict under the WTO system, and represent the tools used by the US to protect its own interest in terms of intellectual property rights.

3.2.2 Chinese countermeasures on United States' goods.

The Ministry of Commerce of China has been the governing body in charge of implementing the retaliatory actions against the US. In accordance with its activity, the total number of retaliatory actions amount to a total of around $110 billion. The countermeasures implemented by China are carried out in response to previous US actions, and could be resumed as follows:

- China responded to the imposition of US tariffs by implementing the same tariff rate of 25% on US imports of agriculture and automobile goods, worth about $34 billion. (Tranche I).

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[58] *Congressional Research Service (Legal Sidebar) "Tricks of the Trade: Section 301 Investigation of Chinese Intellectual Property Practices Concludes (Part II)" 29 March, 2018* <*https://fas.org/sgp/crs/misc/LSB10109.pdf*>

[59] Please note that only the first two of the list are going to be subject to examination in this thesis research. The last two, regarding "cyber intrusions and trade secrets," are not being observed in the complaint registered by the US to WTO.

[60] *Congressional Research Service (Legal Sidebar) "Tricks of the Trade: Section 301 Investigation of Chinese Intellectual Property Practices Concludes (Part II)" 29 March, 2018* <*https://fas.org/sgp/crs/misc/LSB10109.pdf*>

- China retaliated on the amount on $16 billion (equal to those implemented by the US) of imported goods coming from the US, imposing the corresponding tariff of 25 percent. (Tranche II).

- Finally, it responded to US actions announcing several tariffs hikes from 5 to 10 percent on a total of $60 billion goods imported from the US. (Tranche III).

In addition to those measures, it seems that China has adopted other "non-tariffs" retaliation actions. Among them, the increment of administrative instruments to examine thoroughly American business operating in China or the creation of the so-called "*Blacklist for American companies*," which include a list of firms that MOFCOM[61] believes suppose a threat to the Chinese government due to compliance with US laws.

[61] "MOFCOM" Stands for "Ministry of Commerce"

Chapter 4: Assessment of sanctions under the WTO Agreements

As stated, certain US trade officials led by Mr. Trump have consistently claimed that the Chinese domestic law of intellectual property and the ensuing economic sanctions applied in response are inconsistent with what WTO legislation dictates. The legality of these actions is currently being assessed in the WTO Dispute Settlement procedure created for that purpose after the US raised a formal complaint against China arguing inconsistency with the WTO agreement on TRIPS. On the opposite side, China denies US allegations to the WTO claiming US tariffs application as a potential violation of the GATT and condemns the usage the already mentioned Section 301 to be contrary to the WTO regulation pertaining to the DSU.

This section of the work aims to scrutinize the two current *WTO disputes* between the US and China, individually, analysing the consistency of the measures under the WTO standards:

4.1 The Chinese measures under TRIPS. (DS542)

In chronological order, The United States administration registered a "***request for consultation***" amidst the trade war with the Asian country at the WTO to discuss specific acts carried out by China regarding the protection of intellectual property rights that the US considers to be unfair "*technology licensing requirements*."

The United States affirmed in their complaint presented to the WTO that China's regulations about "technology transfer" limits US patent owners from enforcing their intellectual property rights within China and prevents them from freely negotiate licensing contracts on "market-based terms."[62]

In that context, the US accused China that it has a biased intellectual property law that provides the Chinese company in a joint-venture deal with the right to proceed using that technology transferred under the agreement after its termination. From the American point of view, this is a violation of Article 3, in conjunction with article 28.1 and 28.2, of the TRIPS Agreement. Due to the failure of both parties to settle the conflict, the US delegation demanded the establishment of the panel, which composition was defined by the WTO[63].

Presumably, two ***principal categories of legal instruments***, through which China inflicts the measures mentioned, seems to fall within the regulation of the TRIPS (due to its

[62] Request for Consultations by the United States, *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (March 26, 2018).
[63] Request for the Establishment of a Panel by the United States, *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS 542/8 (Oct. 19, 2018).

relation to Intellectual property concerns): (i)"*Regulations of the People's Republic of China on the administration of the import and export of technologies*." (ii) *"Regulations for the Implementation of the law of the People's republic of China on Chinese-Foreign Equity Joint Ventures*." (iii)*Foreign Trade Law of the Peoples Republic of China.*[64]

In my view, assessing the legality of these provisions and the exact violations of the TRIPS agreement (if any) is fundamental, as the dispute settlement panel's future pronouncement will suppose ***US tariffs reprisal permissible*** under the WTO laws if the US delegation demands prosper and China is unsuccessful to comply with a potential negative ruling.

The legality of those legal instruments mentioned could be evaluated under at least two of the **TRIPS articles**: The primary provision that may be involved is configured under Article III, which refers to the so-called "***National Treatment Principle***." Whereas the second provision implicated is pertaining to the "Rights conferred" to patent owners under Article XXVIII.

4.1.1 Compatibility of the Chinese law on Foreign Equity Joint-Ventures with the National Treatment Principle under TRIPS.

This section of the work briefly discusses the consistency of the controversial Chinese provisions with the TRIPS to understand whether they have a more "*beneficial treatment*" towards local Chinese firms.

In respect to the last provision expressed (***Art. XXVIII***), its plain wording illustrates that discriminatory practices protected under the Chinese intellectual property law may be incompatible with WTO standards. As article 43.4 of the Chinese regulation on foreign equity Joint Ventures ("JV Legislation"), clearly grants rights to the Chinese Party in a joint venture agreement to "continuously" use that technology transferred after the contract with the foreign entity ends. Article 43.3 of the same legal document, grants a limit of ten years regarding the extent of the "*technology transfer contract*", whereas article 33 on TRIPS clearly states the minimum term to protect a patent holder must be necessarily twenty years.
As the Appellate Body expressed in "*Canada-Patent term*"[65], the country in charge of protecting patent rights must extend a minimum of 20 years of "*effective*" and "*available*" protection to patent holders, therefore, 17 years of patent protection was not sufficient to be consistent with Art 33 of TRIPS. Accordingly, ten years of Chinese protection on patents are deemed to fail WTO standards.

Under those sets of norms, China would be in breach of TRIPS legislation by restricting the rights of non-Chinese patent owners. Also, Article 28.2 of TRIPS clearly states that the "owners of patent rights" should have in their possession the possibility to "*transfer by succession the patent and to terminate licensing contracts*."[66] Furthermore, China

[64] The last legal instrument mentioned operates collectively with the formers' legal regulations.
[65] Appellate Body Report, *"Canada –Term of Patent Protection"*, WTO Doc. WT/DS170. para.85
[66] *Art 28 of* TRIPS.

refuses to guarantee adequate protection of confidential information for IP rights owners, as opposed to article 39 of TRIPS.
However, the panel will have the difficult task of assessing the scope of all the legal instruments in conjunction and determine if there is genuinely an infringement of the TRIPS.

Article III of TRIPS explicitly provides the following:

"1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits."[67]

Because Chinese IP rights holders do not need to comply with the above constraints applied exclusively to US holders, the measures may additionally infringe ***article III*** which outlaws discriminatory treatments amongst nationals. This principle is considered (alongside with the MFN Principle) as one of the most important rules of WTO law. The principle demands that foreigners and locals must be treated with equality. Under this fundamental principle, when a nation awards special advantages or privilege rights to its citizens, they have the obligation also to confer those rights to individuals of other states members. Owing to the fact that case law clarifying Article III is remarkably sparse, it is very challenging to predict how the formed dispute settlement panel will rule in this case.

4.1.2 Compatibility of the Chinese Law on the Administration on the import and export of Technology under TRIPS.

Having already examined the incompatibility of the "JV regulation", we have to investigate the consistency with WTO law of the first Chinese regulation cited in this text referred to the "***Administration of Imports and Export Technologies***",[68] (henceforth, "*AIET Legislation*"). The legislation seems to deprive US patent holders to settle the terms of technology transfer in private, without Chinese government interference. Besides, if they wish to license their technology, they must do in "*non-market based terms*" favoring Chinese companies. Firstly, Article 24 states that the Chinese enterprises will not assume any risks of future compensations derived from any transferred technology issues. Therefore, Chinese law does not permit to adjust the so-called "*allocation of risks*." Particularly, the licensor (normally, a US company) will be held liable when the licensee (more often, a Chinese company) does an infringement to a third party.
On the other hand, Article 27 determines that any developments arranged on the introduced technology belong to the company that makes that improvement. Therefore, whether the licensee makes substantially technology improvements raised

[67] *Art 3 of* TRIPS.

from the confidential information shared by the licensor, any "shared ownership" of the enhancements will be considered under Chinese law. Moreover, the licensor is not able to prohibit the licensee from continuing to make those developments on their technology-shared. Furthermore, several administrative constraints are often use by China, as for instance, the necessity of a "***technology import license***" that mandates an importer to share enormous amount of confidential information.

In the same way as JV regulation, these provisions might be inconsistent with article XXVIII and III of TRIPS. In this case, the panel must evaluate the rights at stake and determine the boundaries. It must decide if those Chinese requirements/clauses quoted above could be considered the same nature as IP theft. What may be problematic is the adoption by China of new domestic legislation in the matter that outlaws the current Chinese law in which the US subtends their defence allegations, the so-called "*Foreign Investment law*" (*discussed later in this text*). With this new regulation, China tries to address the issue. Their purpose was to derogate from the mandatory requirements of transferred technology, targeted by the US complaint.

4.2 US measures against China under GATT 1994. (DS 543)

After the aggressive approach by the US against China by imposing those tranches of surcharges determined above, of 25 percent on a great number of Chinese goods, China entered another "***request of consultations***" to the WTO against US practices. To the fulfillment of China's request and fulfilling its obligations, the correspondent panel of the case was established by January 2019 and recently on May 2019 the General Director determine its composition.

China claimed in its complaint that the measures adopted by the US related to the excessive surcharge in tariff application on specific goods from China, effectively, suppose a violation of the "Most Favoured Nation" principle under GATT 1994 (Article I.I) and the *"United States' Schedule of concessions and commitments"*[69] annexed to the GATT 1994 (Article II.I)
In addition to those violations, China alleges that United States violated the corresponding *procedures and rules* of the article XXIII of the DSU, which determined that WTO members have the prohibition from unilaterally seek the redress of a trade violation, such as, the US did with the utilization of section 301 action.[70]
In that context, The US is willing to defend its practices of tariff application by arguing that these actions are a necessary response to the intellectual property concerns referred in this text on section 4.1 pertaining to the different actions, policies, and retaliations of China that have produced enormous impairment to the US economy.

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[69] *"United States' Schedule of concessions and commitments" Schedule Number XX Annexed to GATT 1994.*
<https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm>
[70] Request for Consultations by China, *United States — Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/1 (April 5, 2018).

The economic sanctions that appear to fall within the scope of GATT 1994 are those categories mentioned in this text in section 3.2, which are the tariff application by the US in pursuant with the commitment to WTO agreement on TRIPS and according to section 301[71]. Therefore, the first three "**Tranches**" of tariffs imposed to a list of particular products of Chinese origin seems to fall within the ambit of this case due to the additional "***ad valorem tariff rates***" reached the 25 percent, coinciding with Chinese claims.
There is a current debate within the proceeding regarding the fact whether the tariffs imposed on the third round (Tranche III), must be included to be assessed by the panel. The US delegation believes it must fall outside of the panel findings since the tariff was imposed on a different later date of the panel creation. Meanwhile, China believes that both measures are in connection because the last one modifies the duty rates of the former from 10 percent to 25 percent.[72]

Assessing the legality of these US sanctions under GATT 1994 is as well a demanding task as it is to assess the commitment of Chinese regulations and actions under TRIPS. In order to address the legality of US tariffs application, it seems necessary an assessment of a possible violation of the Most Favoured Nation principle conjunctively with the provisions arranged in the "*United States' Schedule of concessions and commitments*."
Furthermore, taking into account the severe economic impact of tariffs in the two economies, it is of great importance to analyse thoroughly if those surcharges suppose a strict violation of the MFN clause.
Last but not least, the recurrent usage of Section 301 by the Trump administration raised the question of whether or not WTO members can make use of their unilateral trading instruments in order to prevail in their interests of their country by imposing tariffs.

4.2.1 Compatibility of the US measures under the Dispute settlement understanding provisions.

Regarding the latter, the plain wording of article 23 of DSU illustrates that the US is not able to proceed on a unilateral basis to levy duties on Chinese products without first resorting to the WTO Dispute settlement system. Therefore, all members belonging to WTO need to submit their disputes conforming with WTO law if they want their claims to be fruitful. In its first written submission of the case, the US defends its posture appealing to the application of article 12.7 of DSU. The US argument is simplified by the fact that both parties have reached the establishment of a "Solution" concerning the "case matter." The US understood that the case brought by China to the WTO is a "*misuse of the dispute settlement system*" and that China cannot argue that measures imposed were only "unilateral." Based on this argument, the US believes that the continuation of the case mustn't go further due to the US demands are not covered by

[71] Note that Chinese measures that fall outside the scope of WTO agreements are not subject to be assessed under the WTO dispute settlement system, due to WTO only establish the minimum standards that WTO members need to comply. Therefore, for that purpose, the assessment will pertain to the measures that fall within GATT and DSU.
[72] Note that the US support its position under articles 6.2 and 7.1 of DSU exposing that only the measures referred in the panel request must be considerable in the proceeding.

WTO law. As a consequence, the US adduce the panel to rule with a "*brief description of the case*"[73] determining that a "solution" has already given on a bilateral basis.

In my view, the US assumed a mistaken interpretation of DSU legal text and a broad interpretation regarding the scope of "*matter*" that the case involves. Therefore, the application of article 12.7 does not correspond due to the following observations: first, the claims submitted by both members appear not to be of the same nature, because Chinese policies and retaliatory measures are not subject to the evaluation in this case. Unquestionably, the US is authorized to begin its action against China for those inappropriate polices practices (as it did with DS542 case about the licensing requirements)[74].However, it could not be possible to assert claims of the same nature in two different cases at the same time. In the EU written submission to the case as third party, it alleges that the US is breaching its obligations under article 3.1 of DSU that prohibits expressly that the US ties the so-called "*complaints and counter-complaints*".[75]

As the Appellate Body established in the "*Mexico-Soft drinks*" dispute, under 3.1 of DSU members must not "*link complaints and counter complaints regarding distinct matters"*[76]. In the cause, it was found that there was another separate dispute from the one brought to be addressed by the panel, and both disputes attend to different claims and under separate agreements (NAFTA and WTO agreements). Applied to this case, the panel need to address the US measures exposed in the Chinese request.

Second, the states have not settled the case as the US claimed under 12.7 of DSU. This article permits the so-called "*mutually agreed solution*". [77] Those solutions must necessarily be communicated to the DSB. Until the date, any solution has been announced by China, which clearly states that China doesn't agree with the US terms and conditions proposed. In my opinion, the term "solution" must not include the fact that China has retaliated the US measures, as the US claimed. By contrast, it seems more understandable that it refers to the fact that nations desist in the imposition of tit-for-tat tariffs with the consequent official communication to the DSB.
The US invocation of Article 12.7 raises key questions referred to the interpretation of its application, unfortunately there is no "*case law*" that could support US allegations. It could be stated that plain wording of article 12.7 does not include "retaliation" to

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[73] *United States First Written Submission, "United States – Tariffs Measures on Certain Goods from China"* August 27,2019.
<https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS543%29.fin.%28public%29.pdf>

[74] As a reminder, the case discusses whether China's legislation restricts US patent holders from obtaining appropriate protection of IP rights and the freedom to negotiate their contracts without executive's interference.

[75] *Third party submission by the European Union, DS 543 "United States – Tariffs Measures on Certain Goods from China"* September 15, 2019.
<https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc_158335.pdf>

[76] Report of the panel *"Mexico-Tax measures on soft drinks and other beverages"* October 7, 2005. WT/DS308 Paras. 7,15.

[77] Under this figure, parties can accord a friendly termination of their disputes as long as they comply with WTO law standards.

defend sovereign interest as "agreed solution", however, the panel will need to determine whether those affirmations fall within the scope of the matter, and if such invocation is valid under WTO law.
In accordance with WTO jurisprudence, the "scope" of the "matter" refers to the measures in question set out in the Complaint requested by China, related to article I and II of GATT 1994. As observed by the Appellate body in "*Guatemala- Cement*"[78], the scope of the matter will be referred only to the "measures at issue," and the "claims" concerning them expressed in the panel request, based on this interpretation of the law the article 12.7 would fall outside its scope.[79]For the reasons set out above, I believe that the panel must attend to China's request and make the correspondent findings related to the claims.

4.2.2 Consistency of US measures under the Most-Favored Nation Principle and the applicability of the "General exception" under GATT.

Attending to the compatibility of the tariff application with the articles I and II of GATT 1994, it appears that section 301 recourse may violate provisions.

Article I:1 of the GATT read in the relevant part states:

1. "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation (…) any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"

Assuredly, the most-favoured nation principle is one of the most important pieces of legislation enshrined in WTO law and one of the fundamental pillars which prompted the creation of the WTO. If a member determines ***tariff concessions*** to another country (modifying certain tariffs on specific products), an equal "tariff rate" must necessarily apply to the rest of WTO members. Therefore, no country would have a disfavour treatment in comparison with other WTO membership. In other words, whether a country adopts an approach favouring one nation with respect to a specific matter, it must in compliance with the principle to treat in the same way to all members.

Article I:1 of GATT 1994 works in conjunction with article II:1(a), which determines the following:

[78] Appellate Body Report, *"Guatemala – Antidumping Investigation regarding Portland Cement from Mexico"* WT/DS60, June 1998.
[79] Interestingly, US delegation has not challenged in any of the written submissions that its "measures" are incompatible with GATT.

"Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."

By virtue of the articles mentioned, implementing a group of economic measures over China's goods and, at the same time, imposing more moderate tariffs for the rest of WTO members probably would be perceived by the panel to violate the MFN principle. In addition, the fact that claims appeared not to fall within any primary exceptions of MFN rule, (enshrined in the article XXIV, article XIII), referred to the regional integration agreements and the enabling clause for the GSP[80], supports that appreciation.
The tariff rates obligations that both countries need to comply with are consecrated in the pertaining "*schedules*" that were agreed by both nations. The two WTO members insisted that those percentage of duties are being infringed with elevated charges.[81]

Based on the arguments raised herein, China may have legitimate expectations in the case because the reading of article I illustrates that the US appears to have failed to WTO standards with the adoption of unilateral actions of section 301. However, the reality shows that China retaliated against section 301, and as the US did, no previous Dispute was enabled or arrange by the country at that moment, in the same way that 301 action is incompatible with WTO, the response of china also fails to comply with WTO rules as well. It seems that using section 301 to impose sanctions unilaterally breached the main "objectives" for what WTO was created (liberalization of commerce), and the only possibility of resorting to this mechanism would be the so-called *"suspension of concession or other obligations"* by the panel.

In its written submission, the US tried to justify the unilateral application of tariffs, affirming that by doing so, was preserving the "*Public Morals*" of their own nation. The ***general exception*** stipulated in article XX of GATT would be defended by the US, but it might be a real challenge for the US to obtain a favourable result from the panel. The reading of the article and WTO jurisprudence, exposed two elements necessary to understand whether US actions may fall within the scope of Article XX: Firstly, that the measure at issue should be considered as "***necessary***" to defend "***public morals***" and secondly, that its creation was intended to be enforced with that purpose.[82]
Regarding the first, US delegation argues that the measures are a mechanism *necessary* to "*protect US society from morally wrong stealing IP*"[83] and "*to*

[80] GSP stands for "*Generalized system of preferences*".
[81] Note that lack of transparency by China to release its documents of the ongoing case makes it impossible to address an exhaustive interpretation of the number of specific goods at issue and the evidence that there is an increase of tariffs about each product. This assessment will take for granted that nations effectively have increased their duties, and they can provide the necessary proofs.
[82] *Appellate Body Report, EC- Measures Prohibiting the Importation and Marketing of Seal Products WT DS/400, May 22, 2014*. Para 5.169.
Report of the panel, Measures Relating to the Importation of Textiles, Apparel and Footwear" WT/DS5461 November 27, 2015. para 7.293
[83] *United States First Written Submission, "United States – Tariffs Measures on Certain Goods from China"* August 27,2019. para 79

protect US interest in moral economic behaviour".[84] It also states that discussions were held by both nations on a bilateral basis, but they were not fructiferous.

In my view, the fact that the US might have imposed those tariffs rates massively to all levels of imported goods without taking individual consideration if they were morally impaired to article XX, raises doubts for me. It may be problematic to the panel to find reasons exposed are necessary or not for that purpose. Therefore, the panel must investigate if the US had other options of less damage to china than the application of the tariffs rates and proves at the same time that they would be adequate to obtain favourable results.

Concerning the second element raised herein, the implementation of tariffs appears not to defend the "*public morals*" of the US community. To start with, the section 301 investigation that justifies the application of duties, does not contain any appreciation that refers to the so-called "Public Morals". It relates to practices that the US believes damage the US economy. Therefore, it could be considered as a policy that aims to defend a genuinely economic interest of the US and not to preserve their "public morals".

Lamentably, case law in the matter of "*public moral*" is too scarce, and the core "matter" in those cases deferred consistently with this subject[85]. Moreover, it's important to note that WTO jurisprudence has not established an exhaustive "*general definition*" applied to all members equally of what must be considered as "*Public Moral*." Instead, it could be argued that public moral standards differ significantly between countries, as for what is morally right for someone might not be for the rest WTO membership. From that point of view, if tariffs application form the US are considered as legal under XX of GATT, almost certainly, the MOFCOM will do the same and demand that US tariffs are contrary to the Chinese "Public morals standards" complicating the dispute. It would appear to be relatively simple to invoke this instrument of GATT for another WTO country to impose restrictions on goods imported from other nations just because it is "contrary to their public morals." In conclusion, the panel will be in charge to assess whether the US alleges rational "grounds" to consider the applicability of article XX of GATT.

<https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS543%29.fin.%28public%29.pdf>

[84] *United States First Written Submission*, para 80.

[85] Such as, disputes related to criminal actions *as money laundering (DS285), or the protection of animals (DS400)*

Chapter 5: WTO dispute settlement mechanism procedure

Both China and the United States are resorting to the *dispute settlement procedure* to resolve their disagreements on trade. Both countries desire to acquire the appropriate permissions by the panel to levy their tariffs, accordingly, and to obtain ruling regarding the inconsistency of unilateral actions carried out by the other party in disconformity with WTO standards.

This settlement system is essential for the future of the organization, as through this mechanism, agreements and commitments between members are "enforceable" by the WTO.[86] This procedure is clearly defined by the *DSU* agreement and "*the rules of conduct*" that identifies a clear route and schedules, which all the WTO membership must comply with.

This multilateral trading system gives primacy to the "friendly settlement of disputes" between the WTO membership, instead of directly claiming for a ruling from the WTO. The whole system is designed to offers solutions to the exposed issues and avoid countries to act unilaterally.

In general, a conflict occurs when a member government circulates some policies or measures that other WTO country believe to be infringing either WTO agreements or its obligations under WTO law. As determined in section four of this text, the dispute occurred due to the US belief that Intellectual Property Chinese policies are unsuitable for protecting the right of foreign companies that are operating their business in China. Other WTO members not involved directly in such cause can still express their concerns with the claims raised in the case, presenting themselves as "Third parties".[87]

As one can deduct from section four of this text, the first stage of the DS procedure is to conduct the so-called "*request for consultations*". This phase one of the procedure grants the parties in dispute the right to deliberate the complaint presented and debate if they can arrange a solution without proceeding to the following litigation phases (within a 60 business days' term). In both cases examined[88], countries were unable to reach an agreed friendly solution of the dispute during this early stage, and both complainants demanded the creation of a panel and the adjudication of their complaints to it (45 Business days thereafter).

After the panel is appointed, it releases their report defining whether the "*measures at issue*" can be considered to be "*inconsistent*" with the obligations of the parties with the

[86] Please note that WTO is not able to require WTO members to change their policies directly (*inviable under WTO Rules*). By contrast, they limit their ruling to clarified if those policies or measures are "**Inconsistent**" with WTO agreements and WTO membership commitments. Therefore, whether a country decides not to comply with the finding, retaliation or compensation will be authorized by the competent authority (DSB) ruling the case. "Remedies" are arranged instead of "Punishments".

[87] As the *European Union* and *New Zealand did*, amongst others.

[88] DS542 & DS543

WTO law[89]. The final decision of the panel report can be appealed by either China or the US if they consider it pertinent for the Appellate body to rule on the dispute.

Before the panel presents its judgment of the case, a series of hearings, written submissions and rebuttals might take place between the members in dispute.

The reports made by the competent bodies (Panel or AB) need to be confirmed by the DSB, which represents the highest authority. Eventually, if the triumphant party considers that the defeated party has not complied with the findings, it will be possible to demand compliance through the "*first panel*," and that decision could be appealed to the AB. At any stage of the conflict, the parties are capable to reach a peaceful solution of the dispute through the "*mutually agreed solution*" instrument. The following table offers the approximate "*periods*" in a *Dispute Settlement* procedure, which could be described as follows:

60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	**(without appeal)**
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	**(with appeal)**

Source: WTO Official website[90]

The cases examined are currently being handle in *phase two* because there is no panel report circulating yet. It is likely that both countries appeal the decision held by the panel if it is unfavourable to their interest.

With regards to ***DS543***, several complications in the procedure had taken place due to the *resignation* of one member of the panel in October of this year. However, the fact that the procedure offers a "reasonable" margin of time in various stages, it helped to the appointment of a new panellist. As expressed in the panel's communication[91],

[89] Please note that *final panel report* will be released in a period of 6 months, after the appoint of the panel.
[90] World Trade Organization Official Website: Understanding the WTO: settling disputes "A unique contribution", < https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>
[91] Panel Communication, United States – Tariffs Measures on Certain Goods from China. April 15, 2020. WT/DS543/9.

Article *12.9 of DSU* allows the panel to expand the 6-month period appointing valid motives. It is likely that the panel issues their report in the following month of June 2020.

The composition of the panel is one of the main duties of the DSB, which has "*representatives*" or "*ambassadors*" of all the WTO members. The DSB is the principal authority under the WTO, which structures the panels and provides "green light" to retaliation.

On the other hand, **DS 542** procedure presents another different reality. Based on the last WTO communications, the panel has accepted the solicitation by the US to temporarily suspend its works regarding their initial claims. The US tempted suspension based on article *12.12 of the DSU,* which allows the complainant to ask for such a claim. In accordance with that solicitation, the panel has agreed to halt its work until next May 2020. Under WTO law, the first stage to retire a claim is to solicit the suspension of the panel's work. If, after 12 consecutive months, the complainant has not demanded the panel to resume or reactivate its work, the panel's authority to rule the case is deemed to lapse.

These circumstances provide us with an interesting question that remains unanswered. It would be fascinating to know beforehand how the US will proceed. Will the US reactivates the litigation of this case after the Chinese authorities have promulgated the new Law of foreign investment that is supposed to address the IP issue between the two nations? Would it be preferable for the US to let the case lapse and withdraw their complaints due to the possible inconsistency of their allegations? Or, by contrast, would this be just a provisional suspension of the panel procedure?

In my view, WTO complainants understand clearly what their capacities can achieve regards to a specific issue, and they will proceed with the litigation when they possess a certain level of confidence in obtaining a favourable result. In other words, normally, in a WTO procedure, the complainant only proceeds with litigation when they are sure they will win the case.

Chapter 6: Chinese Foreign Investment Law

This piece of legislation is a clear response by the Chinese government to the US grievances or accusations made in the 301 investigations (later on, alleged in ***DS542***) regarding the protection of intellectual property rights of foreign investors within China. During recent years, there is a trend that shows China as a committed country that seeks to attract talent protecting innovation and boosting the Chinese Economy. The new regulation was drafted in a brief period of time by the Chinese government and released in just three months until it entered into force by January of 2020[92]. This new foreign investment law derogated the previous regulatory framework analysed in section four of this text[93], and encourages international companies to make investments in China with improved protection of their IP rights and better regulatory transparency.

An exhaustive appraisal of the law illustrates that the new provisions undoubtedly enhances investors' protection of IP Rights. Fighting against the administrative hurdles that aim to obtain the forced technology transfer, therefore, granting an equivalent "*modus operandi*" to those enjoyed by Chinese domestic firms in administration procurement of licenses is a mere example of the intentions envisaged under such new legislation. Greater government protection to safeguard IP rights and foreign companies "*trade secrets*" (with more severe penalties if law breach), as well as preserving or implementing the "*National Treatment*" principle in many respects are other examples of the efforts poured hereinto. Nevertheless, the new law arises several doubts regarding how the Chinese authorities will aim to exert the due control over those matters because of the absence of thorough guidance on law enforcement.

Before the implementation of this new law, international companies confronted several obstacles if they desire to invest in the Chinese market. The only option was to joint venture with the domestic enterprise and not having their IP rights safeguarded once the Joint Venture contract expired. Moreover, international companies operating in China needed to comply with the requirement of the existing JV regulation that supposed mistreatment between foreign and domestic enterprises. The recent legislation aims to solve these unfair circumstances and establish the same conditions and obligations to both intern or international enterprises if an infringement of the law occurs.

Some of the most ***prominent highlights*** of the new law regarding the protection of intellectual property rights can be resumed as follows: Firstly, *article 22* is presented as the core provision to tackle the "*forced technology transfer*" issue, establishing an explicit prohibition to Chinese Officials or members of the administration to apply for

[92] *See*, the law was enacted at the second Session of the 13th *National People's Congress* on March 15 of 2019 and took effect by January 1 of 2020. Interestingly, only two review rounds were required to the implementation of the law, (normally are required three rounds), which clarifies the strong determination of China to protect IP rights.

[93] The new regulation unifies and replaced the following legislations: (i) *Regulations of the PRC on Chinese-foreign Equity Joint Ventures; (ii) Regulations of the PRC on Chinese-foreign Cooperative Joint Ventures; (iii) Regulations of the PRC on Wholly Foreign-Owned enterprises.*

any administrative actions aimed to obtain a technology transfer. The article can be read as follows:

Article 22 The State shall protect the intellectual property rights of foreign investors and foreign-funded enterprises, and protect the legitimate rights and interests of holders of intellectual property rights and relevant right holders; in case of any infringement of intellectual property right, legal liability shall be investigated strictly the legal liability in accordance with the law.

During the process of foreign investment, the State shall encourage technology cooperation on the basis of free will and business rules. Conditions for technology cooperation shall be determined by all investment parties upon negotiation under the principle of equity. No administrative department or its staff member shall force any transfer of technology by administrative means.

It could be stated that this article grants several benefits to foreign investors because it encompasses a "*general intention*" to preserve the integrity of holders of IP rights operating in China. It distinguishes that the contract terms or conditions of any IP license are more a "business" belonging to the "free will" of the investment parties. Also, it determines the expression "*by any means*", which encompasses all the possibilities of technology transfer. Obviously, the redaction of this article is very ambitious, but in practical terms it is difficult to determine whether this provision will help solving problems of forced technology transfers.

Additionally, *Article 20* is very clear when stating the straightforward prohibition to *expropriate IP rights*:

Article 20 The State is not to expropriate any investment made by foreign investors.

Under special circumstances, the State may expropriate or requisition an investment made by foreign investors for public interests in accordance with the law. Such expropriation or requisition shall be made pursuant to statutory procedures and fair and reasonable compensation will be given in a timely manner.

It is presented as a totally new stipulation with respect to the former law, clarifying and making very clear the Chinese view, that partners of the government cannot use any administrative means to steal IP rights. Prior to the law, US enterprises were unprotected, but now they are secure backed by the Chinese government which offer restitution for their losses. This last two provisions (*Articles 20 & 22*) may solve the main issues between the US and China and ease tensions between the two super powers because China's compulsory technology transfers it seems to be addressed.

Furthermore, *Article 23* provides the following:

Article 23 Administrative departments and their staff members shall keep confidential any trade secret of foreign investor or foreign-funded enterprise they are aware of during the performance of their duties, and shall not divulge or illegally provide to others the secret.

This stipulation aims to solve the US claims recognized in the 301 investigation regarding the so-called "*trade secrets",* imposing another express prohibition to any staff participant of the Chinese administration to make public any "*secrets*" that they have obtained as consequence of their employment activity. This incorporation is very positive for the protection of foreign investors in the Asian country, as currently companies are facing enormous complications to register IP rights and they were forced to disclose plenty of confidential information with the authorities if they wish to operate

in that market. However, it could be said that the article is very concise, and it should offer some guidelines or parameters that express how it will be applied in practice.

Those two articles mentioned above work conjunctively with *provision 39* of the Foreign Investment Law, which aims to make those claims enforceable by the Chinese authorities if those subjects, bound by law, infringe it. The article expresses the following:

Article 39 Where a staff member of an administrative department abuses his/her functions and powers, neglects his/her duties or engages in malpractice for personal gain during the work relating to promotion, protection and management of foreign investment, or divulge or illegally provide to others any trade secret he/she is aware of during the performance of duties, a penalty will be imposed upon him/her in accordance with the law; if a crime is constituted, he/she will be held criminally liable.

Another substantial reform confirmed with the new Foreign Investment law is consecrated in *article 4.* It accords the extension of the "*National Treatment*" Principle to foreign investment companies (with some exceptions for sectors which are included in the negative list[94]). Without any doubts, this amendment of the law supposes a clear advance for the protection of foreign investors and contributes to have a market with fair and equal opportunities to all the players. Obviously, China is opening up and sending a well-defined message not only to the US, but the world: we are facilitating more market access to foreign companies and we aim to protect them from IP theft. This new implementation of the law grants foreign and domestic enterprises the same level of rights, requirements or obligations. This provision illustrates the intention of China to promote and protect US companies in the mainland China[95], and clearly states their desire of non-confrontation in many respects. However, it's obvious that trade tensions and the WTO dispute settlement proceedings have caused Chinese policy makers to be more reticent and include specific *precautions* within this law taking precedence over the treatment that Chinese companies can receive in other countries. Some of these precautions taking by China englobe the so-called "*National security clause*" consecrated in *article 35* that grants the Chinese government to extensively review an action that could affect the national security of the country. Another safety measure is *provision 40*, that allows China to take the necessary measures when other states discriminate against Chinese investors companies.

At the time the announcement of this new set of rules to defend intellectual property rights was made, China repealed some articles that were subject to the first complaint that the US filed against China to the WTO. Those articles were examined in section four of this text and refers to *provision 34* of the "former" JV-regulation that entitled to "technology importers" (usually, Chinese firms) to use that technology obtained after "*the expiration of the technology transfer agreement*". Indeed, with the derogation of

[94] Note that the negative list includes the sectors or subsectors in which the national treatment principle will not apply. The negative list is distributed by the MOFCOM and subject to approval by the Chinese "*State council*". Therefore, all foreign companies not included in the list that desires to invest or operate in China will be able to do it with "*equal treatment*" with respect to Chinese firms.

[95] *See*, the law is not applied to the territories of Hong Kong, Macau & Taiwan.

the former and the promulgation of the new law, this option is no longer available to Chinese enterprises.

Furthermore, The Chinese government also derogated the articles examined in the same section related to the so called, "*AIET Legislation".* Articles 24,27 and 29 were thoroughly scrutinized in this text, concluding the inconsistency of those provisions with the TRIPS agreement. Those articles referred to the obligation of the "*licensor*" or "*assignor*" (often, the US company) to bear the indemnification caused when an infringement to a third-party IP right by the *licensee* (typically, the Chinese counterpart). Whereas, the last two referred to the legal rights given to the Chinese counterparts to own the technology licensed improvements as a condition to import and the impossibility to the *licensor* to stops the *licensee* from using that technology once the contract is expired.

It should be noted that with this legislative "move", the Chinese implicitly recognizes that those previous articles were not in "tune" with China's interests to attract talent. Thus, this could be understood as a tacit acceptance of the arguments in which the US based its accusations. It is presented as a shrewd move by Chinese counterparts in that regard because the above articles can discourage foreign companies from entering and transferring their privileged technology to China because they cannot bear those compulsory indemnities in favor of Chinese companies. The elimination of these stipulations and the implementation of the new article 22 of the "FIL", indicates that both foreign and national companies can freely organize the terms and allocate the risk assumed in their contracts.

The announcement of this "FIL" could suppose an inflection point in the Sino-US trade relation because this FIL takes a different approach from previous JV laws and advocate for the protection of IP rights of international companies. In fact, the core objectives of the previous law were to defend domestic firms against the "misuse" of technology transfer terms or license agreements. In contrast, the new legislation possesses a distinct connotation that intends to protect those subjects that before were more vulnerable. This new perspective taken by Chinese policymakers is justified by the fact that the Chinese market is now a more "sophisticated" and "mature" market. If their purpose is to attract more innovative foreign technologies to China and comply with the US IP claims, the law necessarily needs to be more protective towards foreign enterprises.

The promulgation of this legislation and the decreasing of industries subject to the negative list might suppose that the Chinese legal system incorporates the more sophisticated intellectual property protection up to date. It could be stated that the new Chinese IP policies aims to be amongst the top IP laws in the world and clearly illustrates that China is eager to protect IP rights and committed with the WTO law. Nonetheless, since there is a lack of an extensive case-law that demonstrates how the new legislation must be applied, there are plenty of uncertainties surrounding the enforcement of the law.

In my view, the implementation of this policy in China could suppose a problem because the Asian country does not possess the same judicial "*infrastructures*" that are well accomplished in western countries. It remains unclear to me how the new legislation is supposed to be enforced and interpreted by the Chinese Court system. What is undoubtedly true is that Chinese commitment seems to be there to stay, even though it might be necessary a more detailed law that tries to fix the loopholes that it may appear in this early stage. In that context, the ambiguity of the terms might be fixed in the future.

I believe that any new legislation won't be able to satisfy straightaway any of the parties, and a thorough investigation of the implications for both sides remained necessary. The FIL is an intend of China to incorporate a domestic regulation in accordance with international standards, granting to foreign investment companies the same level "*playing field*" than those enjoyed by the Chinese counterparts.

The establishment of "the negative list," rather than the former "*specific approvals*" system, clearly simplifies the procedure existing with the previous laws. Therefore, facilitating the task to international firms that wish to invest in China, increasing the efficiency of the procedure, reducing the governmental requirements, or the burden over foreign enterprises to deal with all the pre-requisites demanded by the Chinese administration.

Articles 20, 22, 23 and 39 of this law, examined above, clearly reinforces the protection to foreign investors from the infringements that might suffer in China and strengthens the penalties for IP rights violations. Besides, in an intend to deter corrupt practices, China is introducing amendments to previous domestic regulations, such as their current Chinese patent law increasing the punitive indemnities for infringements of that nature. In addition, provision 25 of the law imposed the obligations to "all levels of the government" that must apply with their "*policy commitments*" in accordance with the law stipulations ensuring protection for foreign companies, regardless of the hierarchy level of the local governments.

To sum up, the new regulatory framework concedes to China a unified law that meets the necessary elements to protect the Intellectual property rights of every foreign company that desires to operate in China in this modern era. The new FIL is deemed to become the most important law for foreign investment and grants a series of pledges to comply with the Chinese desire to finally open up the country to international companies having their IP rights safeguarded.

Chapter 7: Possible outcome of the cases

7.1 DS542

There is no specific case-law that helps us to determine if the US will have a favourable decision by the panel with complete certainty. No previous cases discusses the issue of *IP theft* by China with respect to "*patent protection*" and the problem of *forced technology transfer*[96]. The US has always argued that Chinese policies referred to IP suppose a real threat to the American economy. Since the US delegation filled the complaint to the WTO, they always considered Chinese IP law as a biased instrument that is unsuitable for protecting the rights of American firms in the same way that it protects Chinese firms.

The US allegations regarding the case seem reasonable because, for many years, China has not been a country that grants excellent protection to IP rights. I understand the concerns declared by the US respect to the unfair requirements applied previously to foreign holders of licenses in China. In section four of this work, we had the opportunity to examine the inconsistency of those Chinese policies with articles III and XXVIII of TRIPS. After a thorough examination of the provisions in question, we understood that the Chinese standards that do require technology transfer probably violate the WTO law. If China keeps the provisions claimed by the US in force, the probability of obtaining a favourable decision for the US would be very high.

Nevertheless, China had taken essential steps forwards to satisfy the US grievances by overhauling its foreign investment law, as well as the derogation or amendment of the controversial IP provisions.

In my view, since China has granted in favour of American Claims, the US delegation will likely allow the case to lapse. China has tried to nip the problem in the bud with the promulgation of the new foreign investment law aiming to eliminate the WTO-inconsistencies challenged by the US before the panel could pronounce to such claims.

Nonetheless, as determined in Chapter six, all the uncertainties are surrounding the "*enforceability or implementation*" of the law. I believe that the newly proclaimed law is very enthusiastic in its drafting. However, it is unclear to what extent the new law can solve the problem of the technology transfer and whether it contributes to a complete and viable clarification of the dispute because the essence of the problem consists in the effective application of the law. Therefore, the core concern is whether the exclusion of those articles of the "AIET Legislation" and provision 43 of the previous JV regulation would modify the traditional well-established system of governmental approvals.

[96] Please note that facts of *DS 362* case of 2007 vary substantially with the present one, due to the former was related to the failure of China to grant protection of "Trademarks and copyrights" effectively.

China has always complied with previous adverse WTO rulings proving a high level of compliance with the WTO system[97]. In that respect, China has reacted before the possibility of obtaining an adverse finding and has yielded in favor of the complainant. China adopts this strategic "move" to rigorously resolved any possible unfavorable conclusion of the matter by voluntarily derogating the measures in question and implementing a new regulation. Consequently, implementation of WTO ruling will not be required because "*superficially*" the elimination of the discriminatory treatment between firms have been achieved. Therefore, the measures in question cannot be considered to be incompatible with the WTO law.

This outcome of the case determines that WTO litigation is presented as an effective instrument that the US employs intending to pressure China to improve the IPR protection of foreign enterprises and the implementation of the laws. Therefore, helping the US to achieve its goals or objectives that have been unattainable through other means such as bilateral negotiations between countries or unilateral sanctions.

It could be stated that the early reaction of China expresses great commitment to effectively upgrade their IPR to the minimum standards consecrated in the TRIPS agreement (and substantially enhancing the established minimums).

In my view, better protection of IPR in favor of foreign firms is likely to suppose an economic stimulus that could push international companies to invest in China without fear of IP theft, which will bring benefits not only to the US but to China.

7.2 DS543

From a WTO perspective, the importance of this case is remarkable. The panel must explain the applicability and the correct interpretation of the GATT and DSU provisions at stake: Firstly, it must determine if the US allegations regarding the "*MAS*" enshrined in article 12.7 of DSU are valid under the US-provided interpretation. As explained in section four of this text, the US allegations defend the impossibility of China to resort to the WTO DSS after it had imposed the retaliatory actions against them, arguing that China is unproperly using the WTO system and that the panel must resolve with a "*brief description*."

This situation brings to stage the first question of interpretation: *Does a WTO member have the possibility to initiate a dispute after it has already imposed retaliatory measures to resolve their issue regardless of the prohibition preserved in article XXIII DSU?*

Secondly, it must assert whether the US tariff application strictly violated the MFN principle under article I of GATT, as well as the inconsistency of article II determining if there is an infringement of the US's schedule on tariffs, which includes the applicable tariffs rates. Simultaneously, the panel must pronounce itself regarding the applicability

[97] Zhou, W. "*China's Implementation of the Rulings of the World Trade Organization". China and International Economic Law*, pp. 183-190, Oxford Publications, May 13,2020. <http://dx.doi.org.tilburguniversity.idm.oclc.org/10.5040/9781509913589.ch-008>

of the "*General Exception*" alleged by the US related to "Public morals." This brings us the second question of interpretation*: Is the general exception of "public morals" sufficiently applicable to recourse to section 301 and levy additional duties on Chinese goods?*

As explained in section four, the US will have a difficult task to provide sufficient evidence to obtain a favorable pronouncement by the panel because the US allegations referred to their actions meant to protect the "*US economy*" rather than the protection of their "*public morals."* In my view, this allegation will probably fail because the panel must evaluate the possible US alternatives that could be more effective in tackling the IP theft and less damaging to the Chinese economy than a generalized application of tariffs. And if the panel argue in favor of the US, it will be simpler to other WTO members to resort to this precedent and invoke public morals if they wish to impose new tariffs.

Since the Uruguay round, all WTO members have expressed particular concerns about the legality of the *unilateral actions* carried out by member states. The inclusion of article XXIII of the DSU was intended to avoid any chance of WTO members to unilaterally remedy one issue that could be solved through the reliable DSM. One precedent that could clarify how the panel will rule some aspects of the issue might be the "*US-Section 301 case*"[98]. Although the panel findings gave the reason to the US, it determined essential limitations regarding to the applications of *unilateral measures*: Firstly, it states that members must follow the *Dispute Settlement process* in order to determine the "*inconsistency*" of a "*measure*" with WTO standards, not allowing member to carry out such acts unilaterally. Secondly, it argued that "*section 301*" could represent an encroachment of article XXIII by giving to the USTR the option to decide the inconsistency of those measures without the corresponding WTO process.

One of the main reasons that led the panel to reach such resolution was the USTR assertions, which established that a "*section 301*" action will only be made following WTO standards. Therefore, the panel relied on the fact that in case of disagreements with other WTO member states, the US will follow always the DSS procedure an avoid the imposition of any individual actions based on possible WTO infringements.

However, it is improbable that the panel's findings in the present case reach a similar outcome. In that first case, the European Communities questioned to the WTO the legality of "*section 301"* independently from the imposition of any particular measure. By contrast, the present case contained a unilateral imposition of a measure. Besides, the US accusations regarding China's unethical practices are based on the "*US standards*" and examined unilaterally in section 301 investigation, but not based on WTO rules. Under Mr. Trump's presidency, the US might have violated the promises made to the panel to respect always article XXIII of the DSU legal text. By which the US undertook not to carry out any unilateral measure that could harm the interests of the other member states, without first resorting to the WTO process.

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[98] *Panel Report, "United States—Sections 301–310 of the Trade Act of 1974", WTO Doc. WT/DS152. January 27, 2000)*
<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds152sum_e.pdf>

In my view, the generalized application of tariffs to all sorts of Chinese products will not be authorized by the Panel. The only possibility that the US has to obtain a favorable ruling is that the Panel admits the general exception of *public morals*, which, for the reasons argued in section four of this work, places US claims in a very disfavorable position. On the other hand, the retaliation carried out by China seems as well to fail the WTO standards enshrined in art XXIII of DSU. In that respect, the US will be able to question the legality of the reprisals committed by China under the same articles of the GATT. The idiosyncrasy of Article XXIII itself prevents states from carrying out any response to an action, which might suppose that the panel will condemn the retaliation actions as well. The complainant would undoubtedly have a better position if it had not been involved in the retaliatory actions because the United States' allegations of "*misuse*" of the DSS would not be feasible and would have no legal effect.

Furthermore, it could be argued that the escalation of the trade war would not have occurred if either country had used the corresponding legal channels offered by the WTO since the beginning, before establishing any unilateral measure, as the country that had obtained the unfavourable resolution could not have retaliated against the DSB criteria allowing unilateral action. Therefore, if China had not "*counterattacked*", it would not have had to face any increase in tariffs by the United States, and their position within the dispute would have been better.

Still, China's position in this dispute is virtuous. The Chinese might have legitimate expectations to obtain a favourable pronouncement by the Panel because it appears that the US has failed to comply with the WTO standards. Even though it seems that Chinese retaliation falls outside the WTO rules, China may appeal to the application of the "*Security Exception*" enshrined in article XXI b of the GATT. The complainant may argue that the immediate response to the US was undertaken as a vital action to tackle the negative consequences that could harm the so-called "*essential security interest*" of China to safeguard the economic well-being of the Chinese population and preserve the "*public order*" within China. However, it would be unfair to the US if the Chinese retaliatory actions are permitted by the panel, while their unilateral actions are considered contrary to the WTO law. In my view, the panel has to assert the interests of the WTO itself as a whole and make it clear that no country, no matter how powerful it might be, cannot take justice into its own hands to solve a problem of this category. In my opinion, the panel should resolve the dispute, alleging that no WTO member can ignore the "*Jurisdictional foundation*" of article XXIII DSU. Therefore, the panel must conclude that both China and the United States have breached their WTO commitments jeopardizing the functioning of the multilateral trading system.

The panel final ruling of the case will be especially "*illuminating*" in the WTO's sphere, and other countries will pay special attention to the pronouncement. In that respect, a set of inappropriate findings by the panel could serve as a precedent to other member states to start imposing their tariffs as a tool to follow their political pretensions, which could jeopardize even more the future of the organization. In any event, the cause is likely to reach the appellate body because either China or the US will surely be in disagreement with the panel's findings.

Chapter 8: Conclusions

As determined in section 7 of this text, the outcomes of the cases are truly challenging to predict. The absence of significant *WTO jurisprudence* in terms of Intellectual Property Rights and Forced Technology Transfer makes it tremendously complicate to determine the legality of the tariffs imposed by both countries. However, due to the reasons raised herein, it appears that China might be in a better position to obtain a favorable finding by the WTO panel. The US actions regarding "*self-help*" enshrined in *Section 301 of the Trade Act of 1974* could be considered as inconsistent with what the WTO Agreements mandates and are presented as actions that probably might violate several articles of the GATT Agreement and the DSU legal text.[99]

The inapplicability of the General exemption of "*Public Morals*" alleged by the US could leave the nation without legal grounds to defend its position in the dispute. In order to comply with the WTO commitments, The US must curtail its tariffs on Chinese products to the legal standards, leaving aside its aggressive stance and favoring free trade.

Considering the above, the unilateral imposition of tariffs resorting to the *Section 301* mechanism might not comply with the WTO regulation and its usage in the future could be limited if a ruling determines that this instrument may violate the WTO framework. The WTO Agreements establishes the legal procedures that member states must abide by to obtain a favorable result, not being possible the unilateral imposition or retaliation due to the incompatibility with the principles promulgated by the WTO.

On the other hand, if the General Exception of "*Public Morals*" is permitted by the panel, the case would be a precedent to other WTO members to invoke this exception in future procedures. Either way, it is likely that the party who obtains a non-favorable result in the dispute, appeal to the Appellate Body. The appeal might suppose that the whole process to determine the "*legality*" of the tariffs applied could be prolongated in time, which in return might suppose that the negative effects of the tariffs will be well inflicted for a long period causing grievous harm to both economies before the Appellate Body rule the inconsistency. The harmful effects that this situation could bring to both economies and the little legal grounds of the tariffs levied might suppose that bilateral negotiations as the "*phase one*" deal agreement could proliferate and help to settle part of the "issues" that bring conflict between the countries.

In addition, the implementation of the new Chinese FIL is a leap forward to the protection of Intellectual Property Rights of Foreign companies within China and clearly illustrates China's intention to open up its economy to foreign investors offering a more adequate IP framework to everyone who desires to start or develop a business in the Asian country.

Finally, the economic sanctions analyzed may trigger considerably negatives consequences for international trade and the movement of money between different

[99] *Such as the MFN Principle or Article XXIII of Dispute Settlement Understanding.*

companies or entities around the world that are damaged by the way various nations try to exert their power in the international scope.

In my view, the subject has great importance as they influence not only the economy of both nations, but the worldwide economy. The galloping growth of China might suppose in the future that the Chinese economy surpasses the US counterparts, becoming the first economy on earth. Nevertheless, the way both nations interact in the global scene will be a crucial element to determine if that overtaking will take place. In this context, the WTO will be the "*battlefield*" of both nations to determine the legality of their actions under the WTO regulation.

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