



**“TRADE WARS” A MERCANTILE  
SHOWDOWN: FROM A  
COMMERCIAL AND LEGAL  
VIEWPOINT**

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**ABSTRACT**

Trade War is an economic conflict arising due to protectionist and inward-looking economic policies of States. The US-China trade dispute initially began with imposition of tariffs, and later resulted in full scale trade war. The US has used the Trade Act, 1974 to impose tariffs against China. Chinese tariffs are based on Article 5 of Foreign Trade Law of China, which incorporates principle of equality and mutual benefit in trade. The laws of these two jurisdictions are very different, whereby US laws are based on constitutional principle of “Separation of Powers” whereas the principle is practically non-existent in China. Meanwhile Article 19(1) of the Indian Constitution provides for the Fundamental Right to carry on a trade, occupation and business. Articles 301 to Article 307 of the Constitution specifically deal with freedom of trade and commerce. Specific trade related legislations include Foreign Trade (Development and Regulation) Act, 1992 and Customs Act, 1962 which allow the Government to regulate its trade policy. Further, India being a WTO member, has access to its DSB and is bound by its international obligations, even as International Law recognizes the “Principle of State Sovereignty” in regulating foreign trade. Today, the US-China Trade War has spilled across the globe, opening new

economic avenues to developing ASEAN economies. While, the COVID-19 Pandemic, has overshadowed the Trade War, its resolution holds the key for economic peace in the post COVID-19 world.

**Keywords: Tariffs, Trade War, Foreign Trade Law, Foreign Trade (Development and Regulation) Act, Customs Act, WTO, DSB.**

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**“No nation was ever ruined by trade, even seemingly the most disadvantageous”**

**-Benjamin**

**Franklin<sup>1</sup>  
Introduction**

Trade has played an important role in rapid Human development and expansion. Today, mercantile tendencies and modern trade are attributed to the Age of Discovery and Renaissance. But this has been held to be Euro-Centric view of the world, since the great ancient civilizations of China (via the Silk Route), India (via the Indian Ocean trade), Roman Empire, Mesopotamia and the Islamic Golden age had indulged in trade, long before the present Super-power the United States came into existence. Till 1991, the World was locked in Cold War between the USA and USSR, with the latter representing Socialist tendencies in a Global Capitalist economic order. The collapse of the USSR was predicted to bring the final end of the Communist-Socialist concept of self-sufficiency and collectivism, but to every one’s surprise the next big power emerged

<sup>1</sup> 2014 Public Forum Theme, World Trade Organisation, (Jun. 30, 2020 2:43 PM),

[https://www.wto.org/english/forums\\_e/public\\_forum\\_14\\_e/theme\\_e.pdf](https://www.wto.org/english/forums_e/public_forum_14_e/theme_e.pdf).



from Asia, a country that engineered a vibrant and dynamic mix of Capitalism and Socialism to emerge as a manufacturing powerhouse- China. Never in its 70 years of its existence had the PRC played such an important role on international stage than it is doing now. China's economic development driven by International trade and low-cost manufacturing led the country clocking an impressive 11 per cent average growth rate. The Country has however been labeled as currency manipulator, an IP thief and Reverse engineer for years by the US and its Western allies. Meanwhile, US economy has stagnated predictably, resulting in anger amongst the rural Labour class wanting Protectionist and tariff measures to punish China. This culminated in election of an inward-looking Donald Trump, of the Republican Party as the President of the US, in November 2016. Since coming into power, Trump has signaled his desire to implement campaign promise to punish China for "longtime abuse of the broken international system and unfair practices".<sup>2</sup> The USA has rolled out several policy measures which have been dubbed as a Trade War by American and International Press. In time of such International uncertainty developing, states such as India and Association of Southeast Asian Nations (hereafter referred to as ASEAN) members have to access their options. Thus, in an increasingly volatile environment, which has been further compounded by an outbreak of the 2020 COVID-19 Pandemic, the legality validity of

a trade war with reference to the American, Chinese and International laws along with the legal options available to India, and the ASEAN states is an issue of great significance.

### Concept of a Trade War

Trade War, as a concept is a vague and ambiguous. According to Business Dictionary "a trade war is an economic conflict resulting from extreme protectionism in which states raise or create tariffs or other trade barriers against each other in response to trade barriers created by the other party."<sup>3</sup>

The eventual result might be an *Autarky*, a self-proclaimed sufficient system.<sup>4</sup> Trade wars in the past have resulted in full-scale conflict between states, such as the First Opium War between the Qing dynasty of China and the United Kingdom of Great Britain.<sup>5</sup> Theoretically, under the concept of Sovereignty, a state is entitled to take international decisions with regard to trade and economic matters, but certain economic protections have a chance to trigger a trade war. For example, a measure of Retaliation against a State by another due to the latter's pre-emptive act of High tariffs may result in a Trade War.

### United States of America and a Trade War

The Legality of the US action to impose tariffs against China has seen both opposition and support. Those opposing the decision contend that tariffs are illegal on one hand, while the supporters claim it to be fully legal.

<sup>2</sup> China open to trade talks with US, The Hindu Business Line, (Jun. 30, 2020 2:47 PM), <https://www.thehindubusinessline.com/news/world/china-open-to-trade-talks-with-us/article25461330.ece>.

<sup>3</sup> Trade War, Business Dictionary, (Jul.5, 2020 4:23 PM), [//www.businessdictionary.com/definition/trade-war.html](http://www.businessdictionary.com/definition/trade-war.html).

<sup>4</sup> Trade War, Investopedia, (Jun. 30, 2020 2:06 PM), <https://www.investopedia.com/terms/t/trade-war.asp>.

<sup>5</sup> Trade War, Wikipedia The Free Encyclopedia, (Jul.10, 2020 12:03 PM), [https://en.wikipedia.org/wiki/Trade\\_war](https://en.wikipedia.org/wiki/Trade_war)



According to the experts opposing the move, the constitutional separation of powers in US prevents the Executive or the President from arbitrary exercise of Power. Moreover, the US Constitution assigns the principal responsibility in regulating trade to the Congress.<sup>6</sup> The Trump administration does not have a *de jure* authority to implement the fundamental policy promise of its trade agenda which is a tariff on every single commodity imported from China. In the current U.S.-China trade war, President Trump and U.S. Trade Representative (USTR) Robert Lighthizer have made Section 301 of the Trade Act, 1974 as the basis of authority to impose tariffs on imports from China.<sup>7</sup> Section 301 instructs the “Trade Representative to determine whether any act, policy, or practice of a foreign country is unjustifiable and burdens or restricts U.S. commerce.”<sup>8</sup> . However, at the same time Section 301 is very specific that any action taken by the trade representative (in this case, the tariffs) shall be “equivalent in value to the burden or restriction being imposed” by the foreign country. Thus, the main challenge to the legality of the tariff order comes from the fact, that separate rounds of tariffs imposed by the US administration have effectively imposing a \$60+ billion fine for a \$50 billion crime,<sup>9</sup> which is a violation of Section 301. A future US action that would impose tariff a 25 percent tariff on every single Chinese commodity would be a \$130 billion dollar tax

that would far exceed the damages of any practices China has imposed on the United States. It is therefore submitted that USTR’s original tariffs worth \$50 billion Chinese imports were lawful, but the excessive tariffs under Section 301, purely as an executive action are unlawful. The Executive wing has violated the vague limits set by Section 301, but at the same time even the US Congress has overstepped its constitutional authority in giving the executive branch excessive authority. The Constitution is clear that Congress is supposed to regulate Commerce.<sup>10</sup> In *Gibbons v. Ogden*<sup>11</sup>, Chief Justice Marshall wrote that “Commerce is more than just the buying and selling of objects— includes all branches of commercial intercourse between states.” And that the Commerce Clause (Article 1, Section 8, and Clause 3) granted Congress ample powers. If the Executive wing has no limit to how many tariffs, or restrictions, it can impose on China, then this has been claimed is an unconstitutional delegation of congressional trade power. Thus, the latest rounds of tariffs have potential to spark a legal showdown between U.S. businesses, the Executive administration, and Congress.<sup>12</sup> Meanwhile other experts have stated that the Tariff orders are legal under Section 232 of the Trade Expansion Act, 1962.<sup>13</sup> The section authorizes the secretary of the US Department of Commerce (Secretary) to conduct investigations “to determine the effects on national security” of

<sup>6</sup> Riley Walters, Is the China trade war legal? The Hill, (Jun.18, 2020 6:03 PM), <https://thehill.com/opinion/international/409012-is-the-china-trade-war-legal>.

<sup>7</sup> Ibid.

<sup>8</sup> Section 301 of Trade Act of 1974, Wikipedia The Free Encyclopedia, (Jun.18, 2020 5:33 PM), [https://en.wikipedia.org/wiki/Section\\_301\\_of\\_the\\_Trade\\_Act\\_of\\_1974](https://en.wikipedia.org/wiki/Section_301_of_the_Trade_Act_of_1974).

<sup>9</sup> Walters, *supra* note 8.

<sup>10</sup> US Const. art. 1, § 8, cl.3.

<sup>11</sup> *Gibbons v. Ogden*, 1824 U.S. LEXIS 370.

<sup>12</sup> Walters, *supra* note 6.

<sup>13</sup> Will Kenton, Section 232 of the Trade Expansion Act, Investopedia, (Jun.19, 2020 1:58 PM), <https://www.investopedia.com/terms/s/section-232-trade-expansion-act.asp>.



imports of an article. Further Section 705.11 of Code of Federal Regulations (CFR) provides that “upon the submission of a report to the President by the Secretary that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President is required by Section 232(c) of the Trade Expansion Act of 1962 to take such action as deemed necessary to adjust the imports of the article so that such imports will not threaten to impair the national security.” Thus, the U.S. Secretary of Commerce’s recommendations would allow the President under certain circumstances to impose tariffs.<sup>14</sup>

### Chinese law and Trade War

The Constitution of the People's Republic of China is in theory the *Suprema Lex* of the country<sup>15</sup>. However, the de jure law governing Trade and Commerce is the Foreign Trade Law of the People's Republic of China adopted at the Seventh Meeting of the Standing Committee of the Eighth National People's Congress on May 2, 1994, and became effective as of July 1, 1994.<sup>16</sup> Article 4 reads that The State shall pursue a unified scheme of foreign trade, and uphold according to law a fair and free foreign trade order. Article 5 provides that the State shall

act in conformity with the principle of equality and mutual benefit in matters of trade.<sup>17</sup> Foreign Trade Law was again amended in 2004.<sup>18</sup> Some relevant provisions of this statute include-

Article 16 (1) The State may restrict or prohibit the import or export of relevant goods and technologies to safeguard the state security, public interests or public morals,<sup>19</sup>

Article 16 (9) The State may restrict or prohibit the import or export of relevant goods and technologies in order to maintain the State's international financial status and the balance of international payment,<sup>20</sup>

Article 21 (4) The State may impose restriction and prohibitions on the international trade in services to maintain the balance of international payment of the state.<sup>21</sup>

The Constitutional law of China does not adopt the "separation of power" system as in modern democratic countries, the Supreme People's Court does not enjoy a separate and independent power, but subject to the control of the People's Assembly thus emphasizing the principle of the "leadership of the Communist Party."<sup>22</sup> Because of the Semi-Independent nature of Chinese judiciary and lack of proper adherence to Rule of Law,<sup>24</sup>

<sup>14</sup> CFR 705.11 - Determination by the President and adjustment of imports, Cornell Law School Legal Information Institute, (Jun.19, 2020 2:03 PM), <https://www.law.cornell.edu/cfr/text/15/705.11>.

<sup>15</sup> CHINA Const. art. 5.

<sup>16</sup> Foreign Trade Law of the People's Republic of China, World Trade Organisation, (Jun.19, 2020 10:28 PM), [https://www.wto.org/english/thewto\\_e/acc\\_e/chn\\_e/WTACCCHN43\\_LEG\\_1.pdf](https://www.wto.org/english/thewto_e/acc_e/chn_e/WTACCCHN43_LEG_1.pdf).

<sup>17</sup> Ibid.

<sup>18</sup> Foreign Trade Law of The People's Republic of China (2004), Ministry of Commerce, People's Republic of China, (Jun.19, 2020 11:00 PM),

<http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715845.html>.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Judicial system of China, Wikipedia The Free Encyclopedia, (Jun.19, 2020 10:12 PM), [https://en.wikipedia.org/wiki/Judicial\\_system\\_of\\_China](https://en.wikipedia.org/wiki/Judicial_system_of_China).

<sup>23</sup> CHINA Const. art. 128.

<sup>24</sup> Judicial Independence in the PRC, Congressional-Executive Commission on China, (Jun.19, 2020 10:27 PM), <https://www.cecc.gov/judicial-independence-in-the-prc>.



the Legal experts have not focused on the legal interpretation of the relevant Chinese statutes. The basic fact regarding Chinese law is that it provides wide discretionary powers to governmental authorities in the matter of implementation of laws, which seriously hampers the certainty and predictability of law.<sup>25 26</sup> Thus, the wide powers of the PRC Government to deal with trade related matters is perhaps wholly unparalleled and in stark contrast to the US Executive department which has to operate within the Constitutional limits.

### Indian Trade Laws and legality of a “Trade War” in the Country

The preamble to the Indian Constitution was amended in 1976, by the 42<sup>nd</sup> Amendment to define India as a “Sovereign Socialist Secular Democratic Republic”.<sup>27</sup> India had a Planned Economy based upon the Soviet Union inspired 5-year Plans. Till the Liberalisation Privatisation and Globalisation policies were adopted in the 1990’s the country could be considered not to be very active internationally in matters of Trade and Commerce. Until the 1991 economic reforms, average tariffs in India exceeded 200 percent, with extensive quantitative restrictions on imports and stringent

restrictions on foreign investment<sup>28</sup>. However today, it has emerged as major trading power engaged in active international trade of goods and services and is a leading proponent of free trade. Nevertheless, even in the erstwhile socialist era private sector in the country was allowed to exist, and Freedom to practice any profession or to carry on any occupation, trade or business is provided under Article 19(1).<sup>29</sup> The Provisions regarding Freedom of trade, commerce and intercourse were borrowed from Australian Constitution.<sup>30</sup> Before establishment of the Republic of India the existence of a Princely States and British Indian, had created customs barriers in the Country<sup>31</sup>, thus hindering at several points which constituted the boundaries of those Indian states, the free flow of commerce. Thus, the economic unity was vital for the new Republic. Thus various provisions ensure were made to ensure the same. Articles 301 to 307 of Constitution of India contain the constitutional provisions regarding Trade and Commerce. The main object of Articles is to encourage and regulate the free-flow of trade and commerce within the territory of India.<sup>32</sup> In *M.R.F. Ltd vs Inspector Kerala Govt. and Ors*<sup>33</sup>, the Supreme Court held that the right to freedom of trade, occupation and business under

<sup>25</sup> Chinese law, Wikipedia The Free Encyclopedia, (Jun.19, 2020 10:58 PM), [https://en.wikipedia.org/wiki/Chinese\\_law](https://en.wikipedia.org/wiki/Chinese_law).

<sup>26</sup> CHINA Const. art. 67, cl. 4.

<sup>27</sup> Forty-second Amendment of the Constitution of India, Wikipedia The Free Encyclopedia, (Jun.21, 2020 10:27 PM), [https://en.wikipedia.org/wiki/Forty-second\\_Amendment\\_of\\_the\\_Constitution\\_of\\_India](https://en.wikipedia.org/wiki/Forty-second_Amendment_of_the_Constitution_of_India).

<sup>28</sup> India's Trade, Exports and Imports, Economy Watch, (Jun.21, 2020 8:35 AM), [http://www.economywatch.com/world\\_economy/india/export-import.html](http://www.economywatch.com/world_economy/india/export-import.html).

<sup>29</sup> INDIA Const. art. 19, cl. 1.

<sup>30</sup> Faisal, Freedom of Trade & Commerce, Legal Services India, (Jun.22, 2020 12:47 PM),

<http://www.legalservicesindia.com/article/148/Freedom-of-Trade-&-Commerce.html>.

<sup>31</sup> Smirti Chand, 4 Major Provisions of Indian Constitution Applicable to Business, Your Article Library, (Jun.22, 2020 12:50 PM), <http://www.yourarticlelibrary.com/business/4-major-provisions-of-indian-constitution-applicable-to-business/23482>.

<sup>32</sup> Constitutional Provisions Regarding Trade and Commerce in India, Shodhganga@INFLIBNET, (Jun.22, 2020 1:41 PM), [http://shodhganga.inflibnet.ac.in/bitstream/10603/189518/1/11\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/189518/1/11_chapter%203.pdf).

<sup>33</sup> *M.R.F. Ltd vs Inspector Kerala Govt. and Ors* (1998) 8 SCC 227.



Article 19 (1) (g)<sup>34</sup> is distinct from Article 301<sup>35</sup> which relates to trade, commerce or intercourse both with and within the State. Further, Item Number 41 in the Union List provided by Article 246 in the Seventh Schedule provides the Union Parliament to legislate on the matters of “*Trade and commerce with foreign countries and in import and export across customs frontiers.*”

<sup>36</sup>Several legislations have been passed for the above objective, however in the present scenario it is relevant to consider are the Foreign Trade (Development and Regulation) Act, 1992.<sup>37</sup> The entire scenario of exports and imports in India is regulated and managed by the above mentioned act which empowers the government to make any provisions simultaneously to the formulations of import as well as export policies governing throughout the country.<sup>38</sup> Further the Foreign Trade (Regulation) Rules, 1993 were issued by the Ministry of Commerce in exercise of the powers conferred by Section 19 of the Foreign Trade Act, 1992.<sup>39</sup> <sup>40</sup>Accordingly the Government of India, announced New Foreign Trade Policy on 01st April 2015 for the period 2015-2020.<sup>41</sup> However, the provisions w.r.t these regulatory matters are explicitly dealt

with by the Customs Act 1962.<sup>42</sup> The Act provides for levy and collection of duty on imports and exports, import/export procedures, prohibitions on importation and exportation of goods, penalties, offences, etc.<sup>43</sup>

Section 11 of the Customs Act 1962<sup>44</sup> provides the Union Government the power to prohibit importation or exportation of goods.

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- (1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description
- (2) The purposes referred to in sub - section (1) are the following
  - (a) The maintenance of the security of India;
  - (b) The maintenance of public order and standards of decency or morality;
  - (c) The prevention of smuggling;

<sup>34</sup> Article 19, *supra* note 29.

<sup>35</sup> INDIA Const. art. 301.

<sup>36</sup> Seventh Schedule (Article 246) List I—Union List, Ministry of External Affairs, (Jun.22, 2020 1:47 PM), <https://www.mea.gov.in/Images/pdf1/S7.pdf>.

<sup>37</sup> Foreign Trade (Development and Regulation) Act, 1992, No.22, Acts of Parliament, 1992.

<sup>38</sup> FTDR ACT, 1992 AND Foreign Trade Policy, NBA India, (Jun.22, 2020 2:32 PM) [http://nbaindia.org/uploaded/Biodiversityindia/Legal/29.%20Foreign%20Trade%20\(Development%20and%20Regulation\)%20Act,%201992.pdf](http://nbaindia.org/uploaded/Biodiversityindia/Legal/29.%20Foreign%20Trade%20(Development%20and%20Regulation)%20Act,%201992.pdf).

<sup>39</sup>42<sup>nd</sup> Amendment, *supra* note 27.

<sup>40</sup> FOREIGN TRADE (REGULATION) RULES, 1993, Central Board of Indirect Taxes and Customs, (Jun.22, 2020 3:50 PM)

<http://www.cbic.gov.in/htdocs-cbec/customs/cs-act/formatted-htmls/forgntrade-rules>.

<sup>41</sup> India New Foreign Trade Policy 2015 - 2020, Exim Guru, (Jun.22, 2020 6:56 PM), <http://www.eximguru.com/exim/dgft/exim-policy/2015-2020/default.aspx>.

<sup>42</sup> Customs Act 1962, No. 52, Acts of Parliament, 1962.

<sup>43</sup> Customs Duties (Import Duty and Export Tax, Bussiness.Gov.in, (Jun.22, 2020 7:30 PM), [https://archive.india.gov.in/business/taxation/custom\\_duty.php](https://archive.india.gov.in/business/taxation/custom_duty.php).

<sup>44</sup> Section 11 in the Customs Act 1962, Indian Kanoon, (Jun.22, 2020 3:15 PM), <https://indiankanoon.org/doc/1797702/>.



(d) The prevention of shortage of goods of any description;

(e) The conservation of foreign exchange and the safeguarding of balance of payments;

(f) The prevention of injury to the economy of the country by the uncontrolled import or export of gold or silver;

(g) The prevention of surplus of any agricultural product or the product of fisheries;

(h) The maintenance of standards for the classification, grading or marketing of goods in international trade;

(i) The establishment of any industry;

(j) The prevention of serious injury to domestic production of goods of any description;

(k) The protection of human, animal or plant life or health;

(l) The protection of national treasures of artistic, historic or archaeological value;

(m) The conservation of exhaustible natural resources;

(n) The protection of patents, trademarks and copyrights;

(o) The prevention of deceptive practices;

(p) The carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India;

(q) The fulfillment of obligations under the Charter of the United Nations for the maintenance of international peace and security;

(r) The implementation of any treaty, agreement or convention with any country;

(s) The compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India;

(t) The prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige;

(u) The prevention of the contravention of any law for the time being in force; and

(v) Any other purpose conducive to the interests of the general public

In the case of *Research Foundation for Science v. Union of India*<sup>45</sup>, the Supreme Court ordered Union Government to impose a restriction on the Import of Imported products which were in contravention to the Hazardous Wastes (Management and Handling) Rules, 1989<sup>46</sup> by virtue of Section 11 of the Customs Act, 1962 as they may be harmful to Human, Animal and Plant life. In the case of *N.K. Aggarwal v. State of Punjab*<sup>47</sup> where a Customs Inspector in Customs Division at the International Border was found to be abetting smuggling of certain goods from India to Pakistan, in collusion with a Pakistani citizen, he was held to be violating the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974<sup>48</sup>. The Union Government issued an order of Prohibition under Section 11 of the Customs Act, 1962.<sup>49</sup> However, the order was struck down by the Punjab and Haryana High Court as the court observed that if the Order is served upon the

<sup>45</sup> *Research Foundation for Science v. Union of India* (2005) 13 SCC 661.

<sup>46</sup> Hazardous Wastes (Management and Handling) Rules, 1989, Madhya Pradesh Pollution Control Board, (Jun.22, 2020 3:50 PM), <http://mppcb.nic.in/rules.htm>

<sup>47</sup> *N.K. Aggarwal v. State of Punjab* 1991 SCC OnLine P&H 466.

<sup>48</sup> Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, No.52, Acts of Parliament, 1974.

<sup>49</sup> Customs Act 1962, *supra* note 42.



petitioner, it would be punitive in nature rather than preventive in nature. The Court further observed that power of Union Government to issue order Section 11 of the Customs Act, 1962 is preventive in nature and not punitive. Thus, through various, legislative enactments the Parliament has been bestowed with various powers to make any provisions that are related to foreign trade in order to fulfill objectives such as optimum utilisation of the resources, specialisation and division of labour, price equality and quality of goods and the overall economic development of the country<sup>50</sup>. In pursuance of these objectives the Union Government has utilised actions and measures in the past, most notably the Tariffs or Custom Duties and Trade Barriers. Tariffs are used to restrict imports by increasing the price of goods and services purchased from overseas and making them less attractive to consumers.<sup>51</sup> Thus Union Government has merely notified the World Trade Organisation of such actions in the past. For example in July 2018 India imposed higher tariff rates on 29 import items from the US as reciprocal measures after the latter refused to exempt India from the higher tariffs announced by the US on steel and aluminium imports and notified the WTO of the same.<sup>52</sup> In the past India has used the import quotas

to prescribe physical limit on the quantity of goods which can be imported into a country.<sup>53</sup> However, the Quotas and Tariffs have largely proved to be ineffective in the present scenario.<sup>54</sup> Besides, being a WTO member since 1 January 1995, India has access to WTO Dispute Settlement Body (DSB) to resolve disputes with fellow WTO members.<sup>55</sup> Besides, the Indian Law under the Union list incorporated in 7<sup>th</sup> Schedule provides for the Union Government to take measures such as entering into agreements relating to Trade and Commerce. Such agreements, besides Statutes are significant in regulating Trade and Commerce. India has signed several Bilateral and Multilateral Trade agreements. These include Free Trade Agreements (FTA) signed with Sri Lanka, Thailand, Malaysia and ASEAN etc., Preferential Trade Agreements (PTA) signed with Chile, Afghanistan, Bhutan, and Nepal Comprehensive Economic Partnership Agreements (CEPA), Comprehensive Economic Cooperation Agreements (CECA) etc. Moreover Union Government has bestowed Most Favoured Nation (MFN) status to countries such as Pakistan, Bangladesh and Vietnam.<sup>56</sup> Thus, in situation similar to a Trade War being fought by United States and China, the Republic of India is sufficiently constitutionally

<sup>50</sup>Foreign Trade (Development and Regulation) Act, 1992, iPleaders, (Jun.22, 2020 4:48 PM), <https://blog.ipleaders.in/foreign-trade-policy/>.

<sup>51</sup> Tariff, Investopedia, (Jul. 10,2020 11:54 AM), <https://www.investopedia.com/terms/t/tariff.asp>.

<sup>52</sup> Higher import duties on 29 US products to come into effect from September 18, The Hindu Business Line, (Jul. 10, 2020 9:20 PM), <https://www.thehindubusinessline.com/economy/india-to-impose-delayed-tariffs-on-some-us-goods-in-september/article24600293.ece>.

<sup>53</sup> Import Quota, Wikipedia The Free Encyclopedia, (Jul. 10,2020 10:21 AM), [https://en.wikipedia.org/wiki/Import\\_quota](https://en.wikipedia.org/wiki/Import_quota).

<sup>54</sup> Ritesh Singh, Don't copy Trump on trade: India will hurt itself most by setting up protectionist tariff barriers, The Times of India Blogs, (Jul. 10,2020 1:36 PM), <https://timesofindia.indiatimes.com/blogs/toi-edit-page/dont-copy-trump-on-trade-india-will-hurt-itself-most-by-setting-up-protectionist-tariff-barriers/>.

<sup>55</sup> India and the WTO, World Trade Organisation, (Jul. 10, 2020 5:36 PM), [https://www.wto.org/english/thewto\\_e/countries\\_e/india\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/india_e.htm).

<sup>56</sup>With Which countries India has a Free Trade Agreement? GK Today, (Jul. 10, 2020 7:12 PM), <https://www.gktoday.in/gk/with-which-countries-india-has-a-free-trade-agreement/>.



empowered, with Legal Codes and Statutes up to its sleeves to deal matters of national interest that are affected by the recalcitrant states upon the international trading structure.

### Trade Wars from the Perspective of International Law

The measures to resolve Trade Disputes through measures such as Tariffs and other restrictions maybe well recognised in Municipal Laws of the States, as well the fundamental notions of Westphalian Sovereignty<sup>57</sup> but their legality is doubtful from the perspective of various principle's in the corpus of Public International Law, which is the law which governs relations between States. In spite of the ostensibly weak and ineffective character of International Law<sup>58</sup>, there are explicitly propounded dispute settlement means, even beyond the arbitration, negotiation and other judicial means. Trade War is however neither of the three. Broadly, a "Trade War" will fall in the category of Extra-Judicial and Compulsive/Coercive Means.<sup>59</sup> Trade War as a Policy measure is best said to fit in the category of Retortion (or Retorsion) since the aim is obviously to achieve retaliation. Retortion is the technical term for Retaliation and is based on the principle of Tit for Tat and in lay terms can be defined as "an act

done by a state similar to one done by another state" Thus Retortion signifies "the act by which an individual state returns to its adversary evil for evil."<sup>60</sup> The purpose of Retortion is retaliation and the act is not per se illegal in International Law, and is merely an unfriendly act. The legitimate use of Retortion has been affected to some extent by the provisions of the UN Charter, but such actions are not allowed to be performed that International Peace and Security are endangered.<sup>61</sup> In fact Retortion is common in International trade, within the World Trade Organization as disputes are typically tackled in this manner, if dispute settlement does not reach its goal or Negotiations completely collapse. At the same time, however Retortion is different from Reprisal, which is not in conformity with International Law.<sup>62</sup> Thus, even though Retortion may fall short of being a source of Law as propounded by Article 38(1) of the ICJ Statute,<sup>63</sup> it is a frequently adopted means of extra-judicial dispute settlement. The other possible acts under the label of Retortion including declaration of individuals as *persona non grata* is ubiquitous as well,<sup>64</sup> therefore the practice of Trade Wars seems to be legally accepted at least now in Public International Law.

### Aftermath of the US-China Trade War

<sup>57</sup>Westphalian Sovereignty, Wikipedia the Free Encyclopedia, (Jun. 30, 2020 10:43 PM), [https://en.wikipedia.org/wiki/Westphalian\\_sovereignty](https://en.wikipedia.org/wiki/Westphalian_sovereignty).

<sup>58</sup> Weakness of International Law, SRD Law Notes, (Jun. 30 2020, 12:21 PM), <https://www.srdlawnotes.com/2015/12/weakness-of-international-law.html>.

<sup>59</sup> Settlement of Disputes, Legal Bites, (Jun.29,2020, 9:12 AM), <https://www.legalbites.in/settlement-of-disputes/>

<sup>60</sup> Dr. HO Agarwal, International Law and Human Rights 543 (21<sup>st</sup> ed. 2017).

<sup>61</sup> Dr. HO Agarwal, International Law and Human Rights 544 (21<sup>st</sup> ed. 2017).

<sup>62</sup> Thomas Giegerich, Retorsion, Oxford Public International Law, (Jun. 30, 2020, 12:21 PM), <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e983>.

<sup>63</sup> Public International Law: Sources of International Law, The University of Melbourne, (Jul. 2, 2020 4:31 PM), <http://unimelb.libguides.com/internationallaw/sources>.

<sup>64</sup> Dr. HO Agarwal, *supra note* 60.



The trade war has negatively impacted both the American and Chinese economies. In the US, it has resulted in increase in prices of consumer goods and has led to financial stress for the farmers. In China, the rate of economic growth and industrial output has witnessed a marked slowdown. Meanwhile, US based Corporations have shifted their operations elsewhere in Asia, and there are wide- spread speculations that of economic decoupling of US and China.<sup>65</sup> Earlier, this year on January 15, 2020, both the US and China reached a phase one agreement in Washington DC. which has helped to deescalate tensions.<sup>66</sup> According to the agreement, titled the "Economic and Trade Agreement between the United States of America and the People's Republic of China" (effective from 14 February 2020), disputes pertaining to Intellectual Property Rights, technology transfer , food and agricultural products, financial services, exchange rate matters and transparency , will be subject to bilateral evaluation and dispute resolution procedures in Chapter 7. This, bilateral dispute resolution mechanism is remarkably different from other trade agreements, which generally rely on arbitration through an intergovernmental organization such as the WTO. Under the terms of the agreement, China will undertake increased purchases of U.S. manufactured products, energy and

agricultural goods and services over the next two years, while the US will revoke its previous decision to label China as a currency manipulator. Further, the US has scrapped tariffs initially set to take effect in December 2019, and has agreed to cut duties on products worth \$120 billion to 7.5%. China agreed to submit an “Action Plan to strengthen intellectual property protection” within 30 days of the agreement taking effect, with a promise to crackdown and root out the sale of counterfeit goods. Other experts have pointed out that the US entering into other International Trading Agreements such as the new United States–Mexico–Canada Agreement (USMCA) is aimed at “contain China”.<sup>67</sup> The U.S. Trade Representative Robert Lighthizer has previously claimed that the agreement has “real teeth” to address China’s trade practices, and that the present US tariffs on Chinese goods will help the Trump administration enforce the accord.<sup>68</sup> In fact, Data released on February 5, 2020 by the US Commerce Department showed the country's trade deficit falling for the first time in 6 years.<sup>69</sup> Since, the agreement both US and China, have announced tariff exemptions for several goods. However, amidst the 2020 COVID-19 pandemic, both the countries are not on track to meet the targets from the trade deal as the economic damage and barriers to trade caused by the pandemic made these

<sup>65</sup>James Politi, Fears rise that US-China economic ‘decoupling’ is irreversible, Financial Times, (Jun.29, 2020 8:21 AM), <https://www.ft.com/content/c920bce2-360e-11ea-a6d3-9a26f8c3cba4>.

<sup>66</sup>Jacob Pramuk, Trump signs ‘phase one’ trade deal with China in push to stop economic, CNBC, (Jun.29, 2020 8:21 AM), <https://www.cnbc.com/2020/01/15/trump-and-china-sign-phase-one-trade-agreement.html>.

<sup>67</sup>Emel Akan, Trump’s New Global Trade Order Aims at Ramping Up Pressure on China, The Epoch Times,

(Jun. 30, 2020 8:12 AM), [https://www.theepochtimes.com/trumps-new-global-trade-order-aims-at-ramping-up-pressure-on-china\\_2685211.html](https://www.theepochtimes.com/trumps-new-global-trade-order-aims-at-ramping-up-pressure-on-china_2685211.html).

<sup>68</sup> Pramuk, *supra note* 66.

<sup>69</sup> Ana Swanson, U.S. Trade Deficit Shrinks, but Not Because Factories Are Returning, The New York Times, (Jun. 30, 2020 8:20 AM), <https://www.nytimes.com/2020/02/05/business/economy/trump-trade.html>.



targets even harder to reach.<sup>70</sup> Consequently, in June 2020, China once again rose to become the US top trading partner again.<sup>71</sup> On September 15, 2020 a WTO panel confirmed that US Trade tariffs were violative of multilateral trading rules, as they had been applied only to China and exceeded the maximum rates that the US had agreed to, without any adequate explanation. US Trade Representative Lighthizer remarked that the finding reflected “the WTO is completely inadequate to stop China’s harmful technology practices.”<sup>72</sup> At the same time, there have been calls to reform international trade coordination and dispute settlement bodies such as the WTO. In the past, trade Groupings such as the EU has been vocal against Chinese Trade policies with the EU claiming that WTO rules had to be adapted to new global challenges, such as industrial subsidies, forced technology transfer and other market-distorting policies.<sup>73</sup> The December 2018 G20 Summit saw the Trade War as an important agenda and felt the need for Reform of the WTO. The communiqué issued at the end of the summit read “We

recognise the contribution that the multilateral trading system has made,” the statement read. “The system is currently falling short of its objectives and there is room for improvement. We therefore support the necessary reform of the WTO to improve its functioning. We will review progress at our next summit,” it said.<sup>74</sup> Back in June 2018, the European Union launched legal proceedings in the WTO against Chinese legislations on Technology Import and Export (TIER) and Foreign Equity driven Joint Ventures (JV) which the EU claimed undermined the intellectual property rights of European companies and were in violation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1995.<sup>75</sup> As far as India is concerned it needs to adopt a Legal policy that would encompass trade, investment, tax, regulatory and exchange rates by using the relevant National statutes. Many have called for a bilateral agreement such as an Indo-US trade deal to prevent a potential clash with the US.<sup>76</sup> But according to some experts such a deal will result in imposing stringent

<sup>70</sup> Finbarr Bermingham, US-China trade war reaches second anniversary, with superpower relations at ‘alarming’ lowest ebb, South China Morning Post, (Jun. 30, 2020 8:16 AM), <https://www.scmp.com/economy/china-economy/article/3092534/us-china-trade-war-reaches-second-anniversary-superpower>

<sup>71</sup> Josh Zumbrun, China a Bright Spot for U.S. in Gloomy Global Trade Picture, The Wall Street Journal, (Jun. 30, 2020 8:16 AM), <https://www.wsj.com/articles/china-a-bright-spot-for-u-s-in-gloomy-global-trade-picture-11592127001>.

<sup>72</sup> Emma Farge and Philip Blenkinsop, WTO finds Washington broke trade rules by putting tariffs on China; ruling angers U.S., Reuters, (Sep. 17, 2020 6:30 PM), <https://www.reuters.com/article/us-usa-trade-china-wto-idUSKBN2662FG>.

<sup>73</sup> Jan Strupczewski, EU to push for G20 summit to support WTO reform, Reuters, (Jul. 6, 2020 7:15 PM), <https://in.reuters.com/article/g20-argentina-eu/eu-to->

[push-for-g20-summit-to-support-wto-reform-idINKCN1NX0OV](https://www.reuters.com/article/g20-argentina-eu/eu-to-push-for-g20-summit-to-support-wto-reform-idINKCN1NX0OV).

<sup>74</sup> Julian Borger, G20 agreement backs ‘rules-based’ order but bows to Trump on trade reforms, The Guardian, (Jul. 8, 2020 12:10 PM), <https://www.theguardian.com/world/2018/dec/01/g20-leaders-donald-trump-rules-based-order-wto-reform>.

<sup>75</sup> Annie Wu, European Union Files WTO Complaint Against China on Unfair Intellectual Property Practices, The Epoch Times, (Jul. 09, 2020 12:10 PM), [https://www.theepochtimes.com/european-union-files-wto-complaint-against-china-on-unfair-intellectual-property-practices\\_2548925.html](https://www.theepochtimes.com/european-union-files-wto-complaint-against-china-on-unfair-intellectual-property-practices_2548925.html).

<sup>76</sup> India wants to have trade deal with US: Trump, Economic Times, (Jul. 10, 2020 7:10 PM), <https://economictimes.indiatimes.com/news/economy/foreign-trade/india-wants-to-have-trade-deal-with-us-trump/articleshow/66018235.cms>.



intellectual property protection norms in India. Further, the access to US market is subject to various conditions, including quotas and minimum wages for workers. It has been, therefore argued that such an agreement could tie the hands of successive administrations in New Delhi for years to come with minimum gains and could permanently damage India's regional and multilateral trade priorities.<sup>77</sup> Therefore the need of the hour is to ensure that existing Indian Statues such as the Competition Act 2002 and Foreign Trade (Development and Regulation) Act 1992 continue providing Economic security and Incentives to Foreign Investments including both Greenfield and Foreign Direct Investment (FDI), which provides India a chance to benefit from the US – China Trade War.<sup>78</sup> However in the past India has seen foreign entities such as Companies (2007 Vodafone-Hutchison case) trying to bypass Indian Laws.<sup>79</sup> India should be vigilant enough and take economic advantage of the situation since trade will not be automatically diverted from China to India. Further the Country should reform some of its laws to encourage investment and prevent countries such as Indonesia, Vietnam and the Philippines that are walking away

with the prize of Foreign Investment and US trade.<sup>80</sup>

### The Effect on Philippines, Vietnam, Cambodia and Indonesia

“When the snipe and clam quarrel, it is the fisherman who profits.” The same is a Chinese Proverb. In case of the Trade War, the Fisherman may well be the ASEAN nations like the Philippines, Vietnam and Cambodia since the trade and commercial activities of these Countries is closely tied with both the US and China. A total of 16.9 per cent of Philippines's exports form a part of China's value chain, which is amongst the highest percentage in Southeast Asia.<sup>81</sup> Thus while it is plausible, that the Trade War will cause an Average citizen to suffer in both the US and China, that is not the case for Country. A Quartz report underlines that other countries have opportunities to increase exports to US, in the event of fall in Chinese exports.<sup>82</sup> These “other countries” are South East Asian nations which will step up, as Chinese imports into the US market dip. Massimiliano Cali, a trade economist in the World Bank Group in a recent analysis published by The Center for Economic and Policy Research, found that if all the planned

<sup>77</sup>D.Ravi Kanth, What a free trade pact with the US means for India, Live mint, (Jul. 12,2020 11:20 PM), <https://www.livemint.com/Opinion/gWHt9pITzC3XucLggZNvIO/What-a-free-trade-pact-with-the-US-means-for-India.html>.

<sup>78</sup> Gagan Singla, The US-China trade war and its possible economic impact on India, Your story, (Jul. 12,2020 11:22 PM), <https://yourstory.com/2018/08/us-china-trade-war-impact-india/>.

<sup>79</sup> Meera Siva, All you wanted to know about the Vodafone tax case, The Hindu Business Line, (Jul. 12, 2020 8:28 PM), <https://www.thehindubusinessline.com/opinion/all-you-wanted-to-know-about-the-vodafone-tax-case/article22994858.ece>.

<sup>80</sup> Niranjan Rajadhyaksha, How India should play the trade war, Live mint (Jul. 12, 2020 6:21 PM), <https://www.livemint.com/Opinion/LBE6EpyN7jftfcHHFor85I/Opinion--How-India-should-play-the-trade-war.html>.

<sup>81</sup> Lucio Blanco Pitlo III, For the Philippines, caught between the US and China Trade War is an Opportunity to move up the Value Chain, South China Morning Post, (Jul. 12, 2020 6:55PM), <https://www.scmp.com/comment/insight-opinion/united-states/article/2168594/philippines-caught-between-us-and-china-trade>.

<sup>82</sup> Dan Kopf, The winner of a US-China trade war isn't going to be the US or China, Quartz (Jul. 12, 2020 7:06 PM), <https://qz.com/1432352/vietnam-and-the-philippines-may-gain-from-the-us-china-trade-war/>.



tariffs become effective, US imports from China will fall by nearly \$70 billion. This would amount to 14% of all US imports from China.<sup>83</sup> The analysis explores which other Countries might be able to replace those imports<sup>84</sup> and South East Asian countries undertaking large scale production<sup>85</sup> of these imports have featured. For example, it is estimated that the value of chairs exported by China to the US will decrease by over \$400 million.<sup>86</sup> One such country is Vietnam which already exports upholstered chairs worth millions to the US and the country is well placed to step in and eat into the Chinese share as well.<sup>87</sup> The hike in tariffs will certainly hamper the investor confidence in China, as a manufacturing hub and many firms and institutions will think of relocating themselves in other regions with biggest benefit provided by China i.e. cheap labour. Since Cambodia is one of such locations. Cambodian goods are set to benefit further as orders will move away from China to avoid heavy tariffs by United States.<sup>88</sup> Indonesia is the largest economy among the South East Asian nations. The current US-China Trade has a potential to push a significant number of Companies to Move out of China and shift parts of their supply chains to South East Asian countries like Indonesia. In fact, despite President Trump recently imposing additional tariffs on the import of products like aluminum and steel etc., Indonesia has been exporting steel to the United States. Thus, Indonesian iron and steel exports to the U.S. jumped 87.7 percent through January-

November 2018, as per the data according of the Indonesian trade ministry.<sup>89</sup>

### Conclusion

As world's two largest economies lock horns in the economic arena, the repercussions are here for the entire world to see. The US has imposed certain sweeping tariffs on the Chinese products. Selected commodities are likely to face twenty-five percent tariff when they hit the US borders. The prime objective behind these policy roll-outs by the Trump Administration is to punish China by making its products expensive, prevent people from buying the same and perhaps force Companies to shift their operations elsewhere. China on its part has undertaken retaliatory measures imposing a 25% tariff on various American products. It may be said that China itself is responsible for triggering this economic warfare by the US, owing to its own longstanding record of shady and illegal trade practices. The most well-known of these includes forcing foreign companies to share their technical know-how with domestic Chinese companies before setting up their business in the country and gaining access to the Chinese market. The "Trade War" has not ceased yet, with Trump administration's further steps highly dependent upon on the Chinese reaction. While the US has focused on targeting the technology based -products of the Chinese market which could hit the Chinese vision of 2025 to transform it into a manufacturing hub by then, China, on the contrary, has targeted

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> May Kunmakara, US-China trade war good for Cambodian firms: GMAC, Khmer Times (Aug. 12,2020 11:08 PM),

<https://www.khmertimeskh.com/50521748/us-china-trade-war-good-for-cambodian-firms-gmac/>.

<sup>89</sup> Yen Nee Lee, Indonesia has benefitted from the US-China Trade War, Minister Says, CNBC (Aug. 13,2020 1:01 AM), <https://www.cnbc.com/2019/01/23/trade-war-indonesia-industry-minister-airlangga-hartarto-on-benefits.html>.



American agricultural products which could adversely affect President Trump’s ambitions before the 2020 presidential elections. The future course of actions available to both the parties includes approaching the WTO, bilateral negotiations or continuation of unilateral tariffs on each other. The last way is unlikely to end the dispute in short period. This confrontation has seen effects on many economies, with varying impacts. While some states have the potential to benefit others are likely to suffer disadvantages. The former list includes the ASEAN countries, which have the opportunity to snatch a share of Chinese manufacturing in both the American and global markets. While, the 2020 COVID-19 Pandemic has overshadowed this trade dispute, a permanent solution is still needed for the stability of international socio-economic order. Ideally, such a solution should be something which is amicable and is based upon the need of sustaining global economic justice and growth.

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