

# The Atypical Fashion of the Us-China ‘Phase 1’-Deal: Context, Content and Perspectives

Caroline Glöckle & Aike Würdemann\*

Table of Contents	
A. Introduction	348
B. China’s economic model and the challenges for the Western world	348
I. China’s economic strategy: ‘Made in China 2025’ and the Road & Belt Initiative	349
II. China’s unique economic structure	350
III. The effect of China’s economic policies	351
C. The US’ engagement in ‘national security diplomacy’ for bilateral negotiations with China	352
I. US additional tariffs based on Section 232	352
II. Unilateral US measures based on Section 301	353
D. Atypical fashion of the US-China ‘phase 1’-deal	355
I. Atypical path towards bilateral negotiations	355
II. The ‘phase 1’-deal as manifestation of ‘managed trade’	356
III. The US efforts for concessions on structural changes in China	357
IV. Diplomacy-based dispute settlement	360
V. The US-China ‘phase 1’-deal – not the end of the trade war	361
E. Advantages of a multilateral approach to the ‘China challenge’	362
I. Procedural advantages of taking recourse to the WTO	362
II. China’s record of WTO-compliance	363
III. The controversy surrounding China’s non-market economy status	363
IV. Transparency requirements supporting the detection of China’s trade policies	364
F. Implications of the US-China ‘phase 1’-deal for the EU	364
I. Lack of competences for unilateral EU-wide responses to China	365
II. Negotiating a trade deal with China?	366
G. Conclusions	366

\* *Caroline Glöckle*, LL.M. (Georgetown) is a PhD candidate at the Chair of Constitutional and Administrative, European Law, European and International Economic Law held by Professor Dr. *Christoph Herrmann*, LL.M. at the University of Passau. *Aike Würdemann*, LL.M. (Georgetown) is a PhD candidate and research fellow there, as well as a clerk at the Higher Regional Court of Frankfurt a. M.

## A. Introduction

After more than one-year long negotiations, the United States (US) concluded a bilateral trade agreement with China in January 2020 amidst considerable trade tensions between both countries. US Secretary of the Treasury *Mnuchin* estimated that the US-China ‘phase 1’-deal<sup>1</sup> would be “the most significant change in the trading relationship [between the two countries] in 40 years”.<sup>2</sup> US President *Trump* went even further by claiming that the deal is “[o]ne of the greatest trade deals ever made”.<sup>3</sup>

The following analysis poses that the US-China ‘phase 1’-deal is of atypical fashion in terms of the path leading to its conclusion, but also with respect to its content. The paper holds that the trade deal will neither place US-Chinese trade relations on a new footing, nor does it incentivise China to fundamentally change its economic model. Instead, one may argue that the ‘phase 1’-deal has a harming effect on the multilateral idea of trade law as of today. In supporting this claim, the paper is organised as follows: first, the overall context of the US-China ‘phase 1’-deal is presented; then, the paper turns on to analyse its content and to contrast it with regular free trade agreements. Thereupon, the paper discusses the question of whether the WTO remains the most appropriate forum for addressing the ‘China challenge’. Grounding on the examination of the US-China ‘phase 1’-deal, the paper examines potential shortcomings within the EU law regime to appropriately react to the ‘China challenge’ and elaborates on ways of how to respond to China’s economic and increasingly geopolitical dominance from an EU perspective.

## B. China’s economic model and the challenges for the Western world

China, currently the second largest economy and soon poised to be the largest one in the world, unequivocally constitutes a major systemic<sup>4</sup> challenge to Western economies, in particular to the US which has been accustomed to its role of an economic and military superpower for several decades. The problems that the US along with many other Western countries experiences in relation to China result primarily from China’s economic policy that finds its roots in China’s unique structure of its economic system.<sup>5</sup>

1 A ‘phase 2’-deal is planned and said to address topics that have not been covered by the ‘phase 1’-deal.

2 *Lawder/Schroeder*, *Mnuchin Says Hopes U.S.-China Trade Talks Reaching Final Round*, Reuters, (13/04/2019).

3 *Johnson*, *Foreign Policy*, 16/01/2020.available

4 *Scott/Wilkinson*, *Journal of World Trade*, 2013/47-4, p. 761.

5 *Wu*, *Harvard International Law Journal* 2016/57-2, pp. 261, 269-70.

## I. China's economic strategy: 'Made in China 2025' and the Road & Belt Initiative

China's rise as an economic power started with Xiaoping's reform program in 1978 and the opening of the Chinese economy.<sup>6</sup> It has led to significant economic growth and considerable progress in China ever since.<sup>7</sup> China's continuous goal of pursuing an ambitious economic agenda is mirrored by the 'Made in China 2025' agenda, adopted by China's State Council in 2015.<sup>8</sup>

The 'Made in China 2025' agenda is intended to enhance China's internal transformation into the leading high-tech manufacturing nation as well as the leading figure of the fourth industrial revolution.<sup>9</sup> A high-tech manufacturing economy includes extensive application of robotics and artificial intelligence in production processes and the development of a new era of IT and telecommunication; likewise, it covers research and progress in areas such as agricultural technology and bio-medicine.<sup>10</sup> 'Made in China 2025' supports China's economy in its transition from an economic model based on the extraction of national resources and low wage manufacturing to a high-tech economy that operates self-sufficiently.<sup>11</sup> From a Chinese perspective, the path towards self-sufficiency does not rely on a 'invisible hand' (as introduced by *Adam Smith*), but requires taking recourse to interventionist policies in terms of subsidies, mercantilist industrial strategies or quotas.<sup>12</sup> It further comes along with forced technology transfers, foreign ownership restrictions, commercial espionage and enhanced investments abroad.<sup>13</sup> The implementation of such economic policies is backed by a funding system that is composed of elements such as preferential access to capital for Chinese market participants and the establishment of government funds.<sup>14</sup>

Complementary to 'Made in China 2025', the Belt and Road Initiative (BRI) is to export China's economic model to other countries through an approach to international economic integration that increases China's economic catchment area along certain trade routes across the Eurasian continent and thereby channels Chinese imports and exports with a view to ensuring China's prosperity.<sup>15</sup> More specifically, the objective of the BRI is to establish China as a geopolitical power through opening up new markets, setting up infrastructures to facilitate China's exports, strengthening China's currency and ensuring access to natural resources.<sup>16</sup> The Chinese model of

6 *Li*, China's geoeconomic strategy: China as a trading superpower, LSE IDEAS 2012, p. 25.

7 *Ibid.*, pp. 25-27.

8 *Laskai*, Council on Foreign Relations Net Politics Blog, 2018.

9 US Chamber of Commerce, *Made in China 2025: Global Ambitions Built on Local Protections* (2017), pp. 13-15; *McBride/Chatzky*, Council on Foreign Relations, 07/03/2019.

10 *McBride/Chatzky*, Council on Foreign Relations, 07/03/2019.

11 *Ibid.*; *Laskai*, Council on Foreign Relations Net Politics Blog, 2018.

12 *Laskai*, Council on Foreign Relations Net Politics Blog, 2018.

13 See in general, USTR, *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 1974*, 22/03/2018.

14 US Chamber of Commerce, *Made in China 2025: Global Ambitions Built on Local Protections* (2017), p. 17.

15 *Shaffer/Gao*, Legal Studies Research Paper Series No. 2019-21, pp. 1-2.

16 *Ibid.*, pp. 7-8.

international economic integration includes the creation of free trade areas with BRI participants,<sup>17</sup> the conclusion of a multitude of different types of agreements such as private contracts, bilateral trade and investment treaties and legally non-binding memorandum of understanding (MoUs).<sup>18</sup> In contrast to the concept of the Bretton-Woods system with having a set-up of rules-based international institutions as one of its core elements,<sup>19</sup> the BRI applies a more decentralised, flexible and dynamic model of international economic integration, though it is mostly based on Western models of economic integration.<sup>20</sup>

## II. China's unique economic structure

China's unique economic system facilitates the effective implementation of its economic policies and, at the same time, differs fundamentally from systems of state capitalism as found in other countries such as Russia.<sup>21</sup> The Chinese economy is coined by state-owned enterprises (SOEs),<sup>22</sup> especially in critical economic sectors such as energy, agriculture and telecommunication.<sup>23</sup> Chinese SOEs are controlled and supervised by the state-owned 'Assets Supervision and Administration Commission of the State Council' (SASAC),<sup>24</sup> that can be compared to a private equity company,<sup>25</sup> and is tasked to manage and control SOEs at central, provincial and municipal level.<sup>26</sup> Under the Chinese model, SOEs compete against each other so that market-like conditions are created among different SOEs.<sup>27</sup> In contrast to critical industries, the Chinese government 'only' owns the four biggest Chinese banks and is a majority shareholder of several of the biggest second-tier commercial banks. In the banking and financial sector, governmental control is yet not carried out by the SASAC, but 'Central Huijin', a controlling shareholder whose task goes beyond functioning as an investment fund given that it may also be used as a bail-out instrument.<sup>28</sup> Oversight by SASAC and Central Huijin ensures that economic activities by SOEs especially in critical industries and financial institutions adhere to the government's economic policy goals.<sup>29</sup>

Both oversight bodies follow the policies developed by the 'National Development and Reform Commission' (NDRC) which is empowered to establish and to imple-

17 *Ibid.*, p. 1.

18 *Ibid.*, p. 8.

19 *Ibid.*, pp. 4-5.

20 *Ibid.*, p. 4.

21 *Wu*, *Harvard International Law Journal* 2016/57-2, p. 270.

22 *Chi*, *Journal of World Trade* 2013/47-6, pp. 1349, 1358.

23 *Wu*, *Harvard International Law Journal* 2016/57-2, pp. 261, 271.

24 *Chi*, *Journal of World Trade* 2013/47-6, pp. 1349, 1359.

25 *Wu*, *Harvard International Law Journal* 2016/57-2, pp. 261, 271-72.

26 China Institute, University of Alberta, *State Owned Enterprises in the Chinese Economy Today: Role, Reform and Evolution*, iii.

27 *Wu*, *Harvard International Law Journal* 2016/57-2, pp. 261, 271.

28 *Ibid.*, p. 274.

29 USTR, 2018 Report to Congress on China's WTO Compliance, February 2019, p. 15.

ment agendas of economic and social development and likewise is charged with monitoring China's development and the coordination of economic operations.<sup>30</sup> A well-known task of the NDRC is, for example, to manage the creation and design of China's Five-Year-Plan and to implement it.<sup>31</sup> Further, the dominating Communist Party, which (alongside the Chinese government) represents a two-pronged approach towards political economy,<sup>32</sup> has the power to appoint officials both in government agencies (e.g. NDRC, Central Huijin or SASAC) and in SOEs, and thereby ensures that appointees comply with the Party's objectives.<sup>33</sup> The interlinkages between the Communist Party, the government and its oversight and coordination bodies as well as the Party's influence on the selection and appointment of SOE managers creates an unprecedented streamlined economic structure.

### III. The effect of China's economic policies

In light of 'Made in China 2025' and the BRI, China's trading partners – most prominently the US – challenge China's economic policy and structure even more vividly than in the past, claiming that it puts foreign competitors at a competitive disadvantage and has harming effects on domestic markets of other countries.<sup>34</sup> The line of argument first of all relates to the level of subsidisation of Chinese industries which are directly or indirectly provided with financial resources by the Chinese government and therefore can export at favourable conditions or even below-costs.<sup>35</sup> In conjunction with border tax measures that promote exports as well,<sup>36</sup> subsidised Chinese industries produce goods in overcapacities that pressure world market prices (e.g. in the steel sector) as well as competitors from market economies.<sup>37</sup> Apart from that, China allegedly enhances its technology sector by information illegally acquired from foreign competitors, e.g. through the channels of commercial espionage and cyber theft that also significantly harm industries of other countries. As phrased by US President *Trump*, Chinese laws and actions in the realm of technology and IP rights

*“may inhibit [US] exports, deprive [US] citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services and innovation.”*<sup>38</sup>

30 Wu, Harvard International Law Journal 2016/57-2, pp. 261, 275-76.

31 Ibid., p. 276.

32 *Chi*, Journal of World Trade 2013/47-6, pp. 1349, 1350, 1358.

33 Wu, Harvard International Law Journal 2016/57-2, pp. 261, 280-282.

34 USTR, 2018 Report to Congress on China's WTO Compliance, February 2019, p. 19.

35 Ibid.

36 Ibid., p. 69.

37 Ibid., p. 18.

38 Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 82 Fed. Reg. 39,007 (17/08/2017).

According to the US Commission on Theft of American Intellectual Property, China is responsible for 80% of cyber theft of American IP which equals \$ 240 billion.<sup>39</sup>

### C. The US' engagement in 'national security diplomacy' for bilateral negotiations with China

In contrast to the *Obama* administration which tried to promote a cooperative and constructive relationship with China given the close economic ties between the US and Chinese economy,<sup>40</sup> the *Trump* administration has found such cooperative strategy to be disadvantageous for the US. Therefore, it has pursued a policy of confrontation manifested by unilateral trade-restrictive measures. A major factor for the US' resort to a unilateral strategy is its critical view on multilateral forums such as the WTO. President *Trump* held at several occasions that “[the U.S.] lose[s] the lawsuits, almost all of the lawsuits in the WTO (...) [, and that the DSU] was set up for the benefit of taking advantage of the [US].”<sup>41</sup> So, foremost under the *Trump* Administration, the US has ceased to believe that the WTO could have a disciplining effect on China in a way that would push it towards more market-based economic policies. The US perception that the WTO is incapable of effectively “address[ing] emerging problems caused by unfair trade practices from countries like China”<sup>42</sup> prevails in the current US administration and coins the US' external trade policy. In line with its ‘America First’ policy, the US has taken an increasingly confrontational stance towards international trade in order to respond to China's ‘unfair’ economic practices and its ‘economic aggression’,<sup>43</sup> which has manifested in two categories of trade-restrictive measures, namely ‘Section 232’ and ‘Section 301’ measures.

#### I. US additional tariffs based on Section 232

In the first instance, the US has unilaterally introduced so-called ‘Section 232 tariffs’ on steel and aluminium, purportedly justified by the national security exception under Art. XXI GATT.<sup>44</sup> This approach can be conceptualised as ‘national security diplomacy’ that constitutes a turnover from openness towards international cooperation in

39 Congressional Research Service, U.S. – China Trade Issues, Updated 20/02/2019.

40 *Sutter*, *American Journal of Chinese Studies*, 2017/24-2, pp. 69, 69-70.

41 *Brinkley*, *Trump Is Close To Shutting Down The WTO's Appeals Court*, *Forbes* (27/09/2018).

42 *Mayeda/Mohsin*, *U.S. Rebukes China for Backing Off Market Embrace*, *Bloomberg* (30/11/2017); see *Bacchus/Lester/Zhu*, *Cato Institute Policy Analysis*, 15/11/2018.

43 THE WHITE HOUSE OFFICE OF TRADE AND MANUFACTURING POLICY, *HOW CHINA'S ECONOMIC AGGRESSION THREATENS THE TECHNOLOGIES AND INTELLECTUAL PROPERTY OF THE UNITED STATES AND THE WORLD* (June 2018), at 2-4, available at: <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf> (05/05/2020).

44 WTO, *WT/DS/548/13, United States – Certain Measures on Steel and Aluminum Products*, Communication from the United States, 06/07/2018.

the realm of international trade to a discriminatory and protectionist, sovereignty-focused and power-oriented policy which is sought to create leverage and be legitimised on the basis of national (security) interests – though, as it should be noted, it defines security foremost as economic security and aims at preserving and restoring economic welfare at national level.<sup>45</sup> In this light, the additional tariffs on steel and aluminium have been implemented primarily to respond to overcapacities on the world market originating from respective industries in China.<sup>46</sup> They were also applied to others of the US' trading partners,<sup>47</sup> of which some (such as South Korea)<sup>48</sup> made concessions *vis-à-vis* the US after quite a short period of time in order to evade the economic consequences caused by the US tariffs. In contrast, China has unilaterally retaliated and further filed a claim against the US before the WTO arguing that the Section 232 additional tariffs would constitute disguised safeguard measures.<sup>49</sup> The US' efforts to deal with China's overcapacities of steel on the world market unilaterally invited strong criticism by many of the US' allies and trading partners.

## II. Unilateral US measures based on Section 301

As a second way for creating leverage, the US has introduced a variety of trade-restrictive measures based on Section 301, in order to articulate its concerns relating to China's technology and IP rights policies. Section 301 forms the legal basis under national law to implement counter-measures where trading partners have violated their commitments under a trade agreement with the US or where "an act, policy, or practice of a foreign country (...) is unjustifiable and burdens or restricts [US] commerce".<sup>50</sup> Section 301 constitutes a comparably controversial piece of legislation pre-dating the creation of the multilateral framework of the WTO installed in 1994 which provides for a variety of trade remedies, including violation and non-violation claims. The US consented to abstain from unilaterally invoking Section 301 in the course of the negotiations resulting in the establishment of the WTO.<sup>51</sup> In this light, as well as in light of the WTO's adjudicatory system under the DSU, it appears rather odd that a national government still reserves unilateral authority at national level to determine whether or not a trading partner is in breach of its treaty obligations or disadvantages

45 Argued by *Caroline Glöckle* in her presentation 'The Era of National Security Diplomacy and Its Transformative Effect on International Economic Law' at the International Economic Law and Security Interests Conference at the Amsterdam Center for International Law, University of Amsterdam, 14/15 November 2019; see also *Glöckle*, *Legal Issues of Economic Integration 2020*, forthcoming.

46 See for example, United States Department of Commerce, *The Effect of Imports of Aluminum on the National Security, An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as amended*, 17/01/2018, pp. 2-3.

47 Presidential Proclamation No. 9704, 83 Fed. Reg. 11,619 (8/03/2018); Presidential Proclamation No. 9705, 83 Fed. Reg. 11,625 (08/03/2018).

48 See in detail *Vidigal*, *Journal of World Trade* 2019/53-2, pp. 187-210.

49 China, WT/DS/544/1, United States – Certain Measures on Steel and Aluminum Products, Request for Consultations.

50 § 2411 (a) (1) (B) (i-ii) Trade Act of 1974.

51 *Pockard*, *Lawfareblog*, 06/02/2019.

its interests. With respect to China, the Office of the US Trade Representative (USTR) found in its Section 301 investigations that China (1) has in place a regime of forced technology transfer, (2) has established discriminatory licensing practices, (3) restricts investments, and (4) undertakes cyber intrusion and cyber theft.<sup>52</sup> China, in turn, rejected all of these findings.<sup>53</sup> However, based on the USTR's report, the US President was empowered to implement distinct trade-restrictive measures such as the suspension or withdrawal of benefits or the imposition of duties *vis-à-vis* China.<sup>54</sup> As a further option for action, Section 301 provides to enter into a binding agreement with a trading partner, e.g. in order to eliminate any violation that triggers Section 301.<sup>55</sup> US President *Trump* responded to the USTR's findings in a 'Memorandum of Actions by the United States related to the Section 301 Investigation'<sup>56</sup> and directed the USTR to implement additional tariffs on Chinese goods, to pursue a dispute settlement procedure before the WTO challenging China's licensing process and to exacerbate investment screening in the US.

The USTR followed the presidential instructions in all these respects: first, it put in place three rounds of additional tariffs with a total of \$250 billion worth of Chinese imports between July and September 2018.<sup>57</sup> China, in turn, responded by implementing retaliatory tariffs.<sup>58</sup> Second, the US filed a claim against China for alleged violations of the TRIPS agreement by denying US patent holders to enforce their rights and by discriminating foreign technology.<sup>59</sup> In turn, China filed a claim before the WTO, too.<sup>60</sup> In light of the ongoing negotiations on the 'phase 1'-deal, the US has suspended the dispute settlement procedure three times in accordance with Art. 12.12 DSU; the last suspension just ended on 01/05/2020.<sup>61</sup> Third, the US tightened its investment screening process by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) which explicitly allows the US Committee on Foreign In-

52 See USTR, 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, 22/03/2018.

53 Information Office of the State Council, The People's Republic of China, The Facts and China's Position on China-US Trade Friction, September 2018.

54 § 2411 (c) (1) (A)-(C) Trade Act of 1974.

55 § 2241 (c) (A)-(D) Trade Act of 1974; USTR, 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, 22/03/2018, p. 4.

56 US President Trump, Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation, 22/03/2018, available at: <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-actions-united-states-related-section-301-investigation> (05/05/2020).

57 Congressional Research Service, U.S.–China Trade Issues, updated 20/02/2019.

58 Ibid.

59 United States of America, WT/DS/542/1, China – Certain Measures Concerning the Rejection of Intellectual Property Rights, Request for Consultations by the United States, 26/03/2018.

60 China, WT/DS/565/1, United States – Tariff Measures on Certain Goods From China II, Request for Consultations by the United States, 27/08/2018.

61 WTO, WT/DS542/12, China – Measures Concerning the Protection of Intellectual Property Rights, Communication from the Panel, 05/03/2020.



vestment (CIFIUS) – on behalf of the US President – to reject foreign investments, e.g. in the form of acquisitions, that would lead either to leakage or to transfer of technology or IP rights violations.<sup>62</sup> As a fourth element that was also envisaged in the US President's Section 301 Memorandum, the US commenced negotiations on a trade agreement with China.

#### **D. Atypical fashion of the US-China 'phase 1'-deal**

Much has been written on the US' regime of additional tariffs as well as the question of national security as a legitimate concern for justification. The US-China talks and the 'phase 1' agreement resulting thereof, instead, have not yet been subject to profound analysis. Before digging into the details of the US-China 'phase-1'-deal,<sup>63</sup> it should be noted up front that it is – compared to 'regular' trade agreements – rather of an atypical fashion which manifests in many respects. In this regard, it seems peculiar, for example, that the commitments are phrased, throughout the agreement, in a way that underlines the deal's purpose of resolving the trade tensions between the US and China. It becomes clear that the 'phase 1'-deal is only dedicated to areas of specific US concern against China, which makes the agreement's scope much narrower compared to typical, comprehensive US FTAs addressing all sorts of trade and trade-related areas.<sup>64</sup> In this sense, the deal goes straight to the heart of the matters of US concerns, absent of any definitions or clarifications that are usually inserted in trade agreements to prevent misunderstandings and different interpretations.<sup>65</sup> So, the 'phase 1'-deal is not an agreement that addresses 'trade' in a conceptual manner with a view to fostering trade liberalisation, but is rather mostly intended to lay down commitments that essentially provide no ground for an escape by the other party.<sup>66</sup>

#### **I. Atypical path towards bilateral negotiations**

The first element revealing the atypical fashion of the US-China 'phase 1'-deal is the political environment in which negotiations were kicked off. Regularly, countries would express their willingness to enter into negotiations on an international economic and trade agreement under friendly terms, but not in a situation where the ground for negotiations had been 'prepared' by economic pressure and gradually increased additional tariffs on products originating from the other party's territory. In this sense, one may refer again to the US' recourse to 'national security diplomacy' that involves mechanics triggered by trade-protectionist measures which lead to an environment of economic pressure that in turn generates the indispensable bargaining leverage to suc-

62 Congressional Research Service, CFIUS Reform under FIRRMA, updated, 21/02/2020.

63 From a domestic perspective, the 'phase 1'-deal classifies as executive agreement which is not subject to review and approval by the Senate.

64 *Mandell*, Trade Talks, Ins and Outs of the US-China Phase-One Trade Deal, January 2020.

65 *Ibid.*

66 *Ibid.*

cessfully manage the stage of trade negotiations.<sup>67</sup> In this sense, one can argue that the US applied ‘national security diplomacy’ effectively with respect to China, at least insofar as the US leverage created brought China to the negotiation table.

## II. The ‘phase 1’-deal as manifestation of ‘managed trade’

The atypicality of the US-China ‘phase 1’-deal further traces back to a concept that is not new to the US’ trade policy, but undergoes a revival under the *Trump* administration: ‘managed trade’. It already was an appealing policy tool for the US in the 1980s and 1990s in its efforts to adjust its trade deficit with Japan.<sup>68</sup> Managed trade contrasts diametrically with the conceptual underpinnings of ‘free trade’.<sup>69</sup> Whereas ‘free trade’ aims at the efficient (re-)allocation of resources essentially based on the ratio of comparative cost advantages and thus requires a high degree of trade liberalisation by eliminated or low tariffs and non-tariff barriers, ‘managed trade’ is shaped by a government’s interventionist policy (in the form of quotas and other quantitative restrictions)<sup>70</sup> as it intends to achieve specific outcomes<sup>71</sup> which rather leads to trade diversion and the distortion of existing global labour division instead of an expansion of international trade.<sup>72</sup>

The US-China ‘phase 1’-deal involves strong elements of ‘managed trade’ as manifested by the straight-forward commitment by China to buy US goods worth of \$200 billion.<sup>73</sup> This includes clearly formulated trade outcomes in terms of buying of more food from the US, agricultural products (worth of \$32 billion), manufactured goods (worth of \$78 billion), energy products and services such as financial services (worth of \$38 billion).<sup>74</sup> Thereby, the US reckons to overcome its significant bilateral trade deficit with China. In light of the specific sales numbers, economists doubt, though, that China will be able to meet the buying commitments, given that it would need to double its imports from the US by 2021.<sup>75</sup> For this reason, critical voices have assumed that the buying commitments are merely used as a political strategy of the *Trump*

67 Argued by *Caroline Glöckle* in her presentation ‘The Era of National Security Diplomacy and Its Transformative Effect on International Economic Law’ at the International Economic Law and Security Interests Conference at the Amsterdam Center for International Law, University of Amsterdam, 14/15 November 2019; see also *Glöckle*, Legal Issue of Economic Integration 2020 (forthcoming).

68 *Jones*, World Competition 1992, pp. 71, 74-75.

69 *Herrmann/Weiß/Ohler*, p. 270.

70 Congressional Research Service, Managed Trade and Quantitative Restrictions, 03/12/2018.

71 *Ibid.*

72 *Bown*, Peterson Institute for International Economics, 21/01/2020; see also *Cerutti/Chen/Deb/Gjonbalaj/Hannan/Mohammad*, IMF Working Paper 2019, WP/19/251, p. 3.

73 Art. 6.2 (1) Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China; the increase is based on 2017 trading levels.

74 Art. 6.2 (1) (a)-(d) Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China.

75 *Bown*, Peterson Institute for International Economics, 21/01/2020.

administration for taming the trade war until November 2020, with a view to *Trump's* re-election campaign.<sup>76</sup>

Apart from all that, one may assume that China's buying commitments *vis-à-vis* the US are inconsistent with WTO law and may be challenged by trading partners on their MFN-inconformity. Even further, given that the 'phase 1'-deal concerns only particular goods and services, but not "substantially all trade" between the US and China, it does not seem to fit into the 'block building'-approach envisaged by Art. XXIV GATT.

### III. The US efforts for concessions on structural changes in China

The concessions made – foremost by China – are of an atypical fashion, too. This assumption already stems from the fact that the negotiation agenda primarily reflects US concerns about China's trade practices. In this sense, large parts of the negotiations focused on the establishment of monitoring and sanctioning mechanisms, but indicated no ambition towards the creation of a mutual playing field for the US-China trade relations.

Apart from adjusting the bilateral trade deficit through buying commitments, the US demanded from China comprehensive structural changes to its economic system. For China, these changes would have required to end its comprehensive subsidy programme, to accept the treatment as a non-market economy (NME) and to refrain from its well-functioning SOE system. While China has already agreed to reform its legal regime for foreign investments and now provides equal treatment to foreign enterprises alongside local SOEs, a restructuring of the SOEs system would profoundly alter the dynamics of the Chinese economy. As a matter of course, China rejected to compromise on these points.

Though it is generally not usual that comprehensive trade and economic agreements may require to alter domestic regulation,<sup>77</sup> the US position is particularly atypical insofar as it has an extensive reach and reflects the US' intention of provoking more profound changes to China's economic system. Following this, negotiations concentrated on the six core issues of the US in relation to China, namely forced technology transfer and cyber theft, intellectual property rights, services, currency manipulation, agriculture and non-tariff barriers to trade. At first sight, this agenda may appear comprehensive, the 'phase 1'-deal has however delivered rather modest but no ground-breaking results.

In terms of currency manipulation,<sup>78</sup> for example, the 'phase 1'-deal only reiterates commitments that China has already made *inter alia* before the G20.<sup>79</sup> Other com-

76 Ibid.

77 See Mexico's labour market reforms in the context of the USMCA-negotiations as positive example.

78 Chapter 5 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

79 Art. 5.1 (4) Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

mitments reassure the parties' existing IMF-obligations regarding currency manipulation.<sup>80</sup> So, the 'phase 1'-deal does not present any profoundly novel approach to make commitments against currency manipulation more enforceable. Nonetheless, the US does no longer list China as a 'currency manipulator'.<sup>81</sup>

Similar assessments apply to the issue of forced technology transfers,<sup>82</sup> a main concern of the US as advanced in the USTR's report on China's violations triggering Section 301.<sup>83</sup> The 'phase 1'-deal includes market access obligations,<sup>84</sup> prescribes to abolish licensing requirements,<sup>85</sup> and intends to establish due process and transparency.<sup>86</sup> However, a general commitment by China on technology transfers can already be found elsewhere, as Section 7.3. of China's Protocol of Accession to the WTO explicitly prohibits conditioned transfer of technology.<sup>87</sup>

With respect to IP rights and issues related to technology transfer, the 'phase 1'-deal spends two detailed chapters forefront in the deal,<sup>88</sup> which mirrors the importance for the US to 'manage' IP rights and technology transfer in China. Though, this fact also underlines – from a formal perspective – the atypical character of the deal, as other trade agreements such as the CETA addresses IP in its 20<sup>th</sup> chapter, or the CPTPP that regulates IP rights in its 18<sup>th</sup> chapter. The core message of both IP-related chapters in the 'phase 1'-deal is straightforward: it demands China to undertake structural changes in its domestic law, for instance, by the establishment of legal grounds for referring trade secret violations to criminal courts.<sup>89</sup> Furthermore, the deal establishes the right to a public comment period for legislations which is of high relevance for IP rights and protection.<sup>90</sup> Clearly, the IP chapters constitute a step into the right direction as many IP-related concerns are covered, but nonetheless blind spots remain in areas such as copyright protection and audio-visuals.

80 Art. 5.2 (1) Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

81 Congressional Research Services, U.S.-China Relations, 03/09/2019, p. 1; *Rappeport*, U.S. Says China Is No Longer a Currency Manipulator, The New York Times, 13/01/2020.

82 Chapter 2 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

83 USTR, Findings of the Investigation into China's Acts, Policies and Practices related to Technology Transfer, Intellectual Property and Innovation under Section 201 of the Trade Act of 1974, 22/03/2018.

84 Art. 2.2 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

85 Art. 2.3 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

86 Art. 2.4 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

87 WTO, Accession Protocol of the People's Republic of China to the WTO, WT/L/432, 10/11/2001.

88 Chapter 1 and Chapter 2 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

89 Art. 1.7; Art. 1.8 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

90 Art. 8.5 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

Ibid.

The 'phase 1'-deal further extensively targets agriculture<sup>91</sup> and food safety regulations and encourages China to improve both SPS-measures as well as its regulatory processes for agricultural biotechnology.<sup>92</sup> China has moreover agreed to abolish meat and poultry registration requirements.<sup>93</sup> The reduction of all these various trade barriers (in combination with the buying commitments) may indeed stimulate the export of US agricultural products to China.<sup>94</sup> Though, it remains unclear whether the language of the agricultural provisions is as strong as to embody enforceable commitments.<sup>95</sup> This is also crucially linked to the effectiveness of the dispute settlement mechanism of the trade deal (see below).

Another area of light success for the US relates to market-opening commitments in the financial services sector,<sup>96</sup> which require China to grant market access on a non-discriminatory basis. Market access in that area is of high importance for US businesses such as Visa and MasterCard, and the elimination of requirements in China's licensing regime are crucial for e-payment providers such as Apple Pay.<sup>97</sup> However, the market power of Chinese companies such as WeChat and Alipay and the fact that the Chinese leadership has already made concessions and implemented some legislative reforms concerning the financial services sector in the past, puts the US' negotiating success into perspective.<sup>98</sup> In light of market circumstances in China, it seems unlikely that US providers will gain relevant market shares in China.<sup>99</sup> Even further, it should be noted that Chinese capital controls or restrictions on data flow and data localisation remain in place.<sup>100</sup> Besides, it will be almost impossible for credit card suppliers such as Visa to gain momentum within the Chinese market as Chinese consumers and businesses have abandoned credit cards for the sake of e-payment methods.<sup>101</sup>

91 Chapter 3 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

92 For agricultural biotechnology see, Annex 16 of the Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

93 Chapter 3 Annex 3-Annex 6 of the Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

94 *Vetter*, Trade Talks, January 2020.

95 *Ibid.*

96 Chapter 4 of the Economic And Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China; *Chorzempa*, Peterson Institute for International Economics, 27/01/2020.

97 *Chorzempa*, Peterson Institute for International Economics, 27/01/2020; Art. 4.4 of the Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China.

98 *Chorzempa*, Peterson Institute for International Economics, 27/01/2020.  
*Ibid.*

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*

#### IV. Diplomacy-based dispute settlement

The last typical element of the US-China ‘phase 1’-deal relates to its dispute settlement mechanism.<sup>102</sup> In accordance with the US’ constant criticism on the WTO’s dispute settlement mechanism resulting in the breakdown of the Appellate Body,<sup>103</sup> the ‘phase 1’-deal presents an alternative type of dispute settlement. This alternative model leaves aside any formalised or rules-based framework. During the negotiations of the US-China trade deal, the US initially even pleaded in favour of making the deal only unilaterally enforceable against China.<sup>104</sup> In such a case, China would not have had the possibility to hold the US legally accountable for its commitments under the ‘phase 1’-deal.<sup>105</sup> This US proposal was categorially rejected by China which feared unfair treatment by the US.

The US successfully advocated in favour of a diplomacy-based enforcement mechanism, while China would have preferred a reference to dispute settlement under the WTO. At the core of the mechanism, there is not an adjudicatory procedure or any other approach similar to the one envisaged in the DSU, such as arbitration under Art. 25 DSU. Instead, dispute settlement under the ‘phase 1’-deal is rooted in the so-called ‘Bilateral Evaluation and Dispute Resolution Office’ that each party is to entertain for the purpose of administering appeals raised by the other partner.<sup>106</sup> Upon an appeal, the Bilateral Evaluation and Dispute Resolution Office of the respondent party will undertake an assessment of a challenged measure which results in consultations at political or diplomatic stage.<sup>107</sup> If consultations fail, a designated deputy of the USTR and a designated Chinese Vice Minister will take up the dispute,<sup>108</sup> and only if these consultations remain unsuccessful, the matter will be discussed by USTR’s Trade Representative and a Vice Premier of the Chinese government.<sup>109</sup> If dispute settlement fails even at this stage, “(...) the Parties shall engage in expedited consultations on the response to the damages or losses incurred by the Complaining party.”<sup>110</sup> So, overall, the dispute settlement procedure appears to be rather vague and leaves considerable leeway for political pressure which, in the likely event that the US and China disagree, might again escalate into a ‘tit-for-tat’ tariff war scenario. In this

102 Art. 7.4 Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China.

103 USTR, Report on the Appellate Body of the World Trade Organization, 11/02/2020.

104 US, Draft Framework on US-China phase 1-deal, May 2018, available at: <https://xqdoc.i-medao.com/16329fa0c8b2da913fc9058b.pdf> (05/05/2020).

105 Ibid.

106 Art. 7.4 (1) Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China.

107 Art. 7.4 (3) Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China.

108 Art. 7.4 (4) (a) Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China.

109 Art. 7.4 (4) (a) Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China.

110 Art. 7.4 (4) (b) Economic and Trade Agreement between the Government of the United States of America and the Government of the People’s Republic of China.

light, one may characterise the dispute settlement under the US-China 'phase 1'-deal as a step backwards contrasted with the procedure under the DSU, either in terms of the panel and appellate procedure as well as the arbitration procedure under Art. 25 DSU.

## V. The US-China 'phase 1'-deal – not the end of the trade war

The atypicality of the US-China 'phase 1'-deal has been embraced by the *Trump* administration. As a US official noted, the deal "(...) is not a free trade agreement"; more interestingly, though, the official likewise clarified that the deal's "purpose is to rectify unfair trade practices".<sup>111</sup> However, even from this angle, the deal falls short of meeting US expectations given that the 'phase 1'-deal was supposed to address core US concerns including Chinese industrial subsidies, SOEs, data flows and data localisation. It is unlikely that the 'phase 1'-deal will end China's allegedly unfair trade practices, given that its scope and design does not seem to be capable of initiating a systemic and structural change of China's economy.

The following table contrasts the US-China 'phase 1'-deal with a regular FTAs:

	US-China 'phase 1'-deal	Regular free trade agreements
<b>Aim</b>	Adjustment of bilateral trade deficits by 'managed trade' and transformation of China's state capitalist driven economic model	Enhancement of trade relations to mutual benefits
<b>Scope</b>	Areas of US concerns	Coverage of 'substantially all trade'
<b>Content</b>	Reference to pre-existing commitments/obligations	Efforts of trade liberalisation by 'new' and enforceable rules
<b>Enforcement of the deal</b>	Diplomacy-based dispute settlement system with 'enforcement offices'	Rules-based and formalised dispute settlement system with state-to-state arbitration
<b>Effect</b>	Mechanism for the monitoring and prevention of sanctions	Establishment of a long-term economic partnership

It fits into this picture that, despite the US-China 'phase 1'-deal, the trade war between the two countries is likely to continue. This outlook supports the deal's atypicality, as the US is unwilling to remove its additional tariffs on Chinese goods even though the trade deal was successfully concluded. The US intends to sustain the leverage created by its tariffs regime, which reflects the US' uncleared deep mistrust and profound suspicious *vis-à-vis* China. The US has not taken any stance that would have

111 *Baschuk*, U.S. and China Sign Phase One Trade Deal, Bloomberg, 15/01/2020.

allowed to create a forum for deepening mutual trade relations in a friendly environment.

### E. Advantages of a multilateral approach to the ‘China challenge’

In light of the negotiations of the US-China ‘phase 1’-deal and their outcome, the essential lesson learned seems to be that China’s different economic model and strategy are to be treated as a fact, but not as an undesired error that undermines the Western ideal of international economic integration. This finding appears to be best represented by *Robert Lightizer’s* statement in which he acknowledges that the US and China “have two very different systems [and] trade rules and practices must allow us both to prosper”.<sup>112</sup> However, the atypical fashion of the US-China ‘phase 1’-deal does not only question the effectiveness of the US’ current approach towards China, but is even a step backwards in terms of any multilateral efforts to get a better grip on the ‘China challenge’ as the ‘phase 1’-deal eventually manifests a renouncement of the WTO’s potential role in effectively challenging China under the multilateral legal framework. Yet, as argued by many international scholars, the legal design of the WTO still seems to be the best suited and most efficient forum where a “*big, bold, comprehensive case*”<sup>113</sup> against China’s economic policy and its trade distorting effects on the economies of other WTO members can be advanced. In the following, several arguments are presented which support the idea of filing a multilateral action against China before the WTO instead of engaging in bilateral negotiations with China.

### I. Procedural advantages of taking recourse to the WTO

First, the WTO provides rules for international trade to which China is already bound upon its accession in 2001. So, in most respects, it does not require the negotiation – or reiteration – of any allegedly ‘new’ footing. The ‘management’ of particular ‘stitches’ in bilateral talks consumes valuable time and energy that could better be used for filing a comprehensive claim against China instead. The binding to panel and Appellate Body reports adopted by the DSB<sup>114</sup> does, in principle, effectively end disputes without bearing the risk of diplomatic ill-will. Given the political tensions that accompanied the bilateral trade talks between the US and China, the WTO’s dispute settlement mechanism offers a less politicised arena to deal with trade-related tensions, especially when compared to the mechanism envisaged in the US-China ‘phase 1’-deal that seems to be prone to further tariff battles. Even in terms of compliance monitoring, the DSU offers a feature in the form of the compliance mechanism under

112 *Bown*, Peterson Institute for International Economics, 21/01/2020.

113 *Hillman*, Testimony of Jennifer Hillman Before the U.S.-China Economic and Review Security Commission, Hearing on U.S. Tools to Address Chinese Market Distortions, 08/06/2018.

114 *Lester/Mercurio/Davies*, pp. 156-57.



Art. 21.5 DSU which ensures obedience to the findings of dispute settlement reports in a transparent and predictable manner.<sup>115</sup>

## II. China's record of WTO-compliance

Unlike President Trump's criticism against the effectiveness of the DSU, it should be noted that the US tends to win all claims against Chinese trade practices before the WTO.<sup>116</sup> Even further, and against the predominant doubts concerning China's willingness to abide by international rules, China has a decent record of compliance with reports; in this regard, one may not observe any Chinese peculiarities compared to other WTO members.<sup>117</sup> China's compliance with panel and Appellate Body reports supports the legitimacy of the WTO's dispute settlement system since procedures are perceived to have become a way to obtain "fair solutions" for China.<sup>118</sup> In this light, challenging China before the WTO seems to be more promising than vague diplomacy-based solutions. However, while numbers on China's adherence to dispute settlement reports might seem encouraging, they simultaneously underscore the necessity to uphold WTO obligations, with which China does not seem to comply on a regular basis unless dispute settlement proceedings are initiated before the WTO and panel or Appellate body reports require it to comply with WTO law.<sup>119</sup>

## III. The controversy surrounding China's non-market economy status

A further argument in favour of challenging China before the WTO is provided in the *EU – Price Methodologies* case. An interim report of the panel pointed in the direction that WTO members could continue to treat China as a non-market economy (NME).<sup>120</sup> China reacted by suspending the dispute pursuant to Art. 12.12 DSU.<sup>121</sup> The NME status that traces back to a temporary provision in China's Accession Protocol which recognised the obvious differences between the Chinese and market economies and presumed that China was a non-market economy.<sup>122</sup> This kind of treatment has important implications on the calculation of the dumping margin under the WTO's anti-dumping regime. Despite the fact that the provision had elapsed in 2016, the EU and the US continued to calculate anti-dumping tariffs by taking advantage of the NME calculation methodology arguing that China still has trade dis-

115 *Van den Bossche/Zdouc*, p. 194.

116 *Schott/Jung* Peterson Institute for International Economics, 12/03/2019.

117 *Bacchus/Lester/Zhu*, Cato Institute Policy Analysis, 15/11/2018, pp. 6-7.

118 *Huang/Ji*, Journal of World Trade, 2012/46-6, p. 1290.

119 See *Webster*, Michigan Journal of International Law Issue 2014/35-3, pp. 525, 529-530.

120 WTO, WT/DS516/13, European Union – Measures Related to Price Comparison Methodologies, Communication from the Panel, 17/06/2019 (the interim panel report is not publicly published); see *Kreier*, IELP Blog.

121 See *Kreier*, IELP Blog.

122 Art. 15 (a) (ii) Art. 15 (a) (ii) Accession Protocol of the People's Republic of China to the WTO, WT/L/432, 10/11/2001.

torting practices in place.<sup>123</sup> China initiated dispute settlement proceedings against both the EU and the US. Now, the dispute brought by China underlines that China is not reluctant of resorting to the dispute settlement procedure with regard to controversial topics. This should encourage the US to return to the multilateral sphere of the WTO.

#### IV. Transparency requirements supporting the detection of China's trade policies

Any approach to confront China through the channels of the WTO would further help to transparently detect China's various and fast changing policies, oftentimes unwritten and mostly difficult to access. In China's accession protocol, there are provisions that oblige China *inter alia* to provide for notifications and comments on procedures or to make new laws publicly available.<sup>124</sup> The panel report in the *China–Agricultural Producers* case<sup>125</sup> illustrates that a WTO claim can help to uncover policies and collect reliable facts: the US as complainant was able to effectively detect China's trade harming policies which may have incentivised China to remove some of its trade distorting agricultural subsidies even before the panel report was issued.<sup>126</sup>

#### F. Implications of the US-China 'phase 1'-deal for the EU

The 'phase 1'-deal has implications beyond the bilateral relationship between the US and China. Contrary to the US' particularly critical stance on China ever since President *Trump* took office, the EU fostered a cooperative relationship with China only until recently. Since March 2019, the EU has taken a more determined political position on China, manifested *inter alia* in the European Commission's strategic outlook that has classified China as "an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance."<sup>127</sup> The EU's new position can also be considered – in terms of language as well as perspective – as a reaction to several fundamental challenges emerging in its relation to China. In this respect, one may refer to at least three instances that have essentially contributed to the EU's changed perspective: first, in the context of the BRI, China was able to convince Italy – as a major European economy – to sign an MoU to make itself part

123 Third Party Submission of the United States of America, WT/DS/516, *European Union – Measures Related to Price Comparison Methodologies*, 21/11/2017, paras 23-25.

124 WTO, WT/L/432, Accession Protocol of the People's Republic of China to the WTO, 10/11/2001, p. 3.

125 WTO Panel Report, WT/DS511/R, *China – Domestic Support for Agricultural Producers*, 28/02/2019.

126 See for an analysis of the case *Sohlberg/Yvon*, *China – Domestic Support for Agricultural Producers* (China-Agricultural Producers), DS511, *World Trade Review* 2019/18-3, pp. 531-532.

127 European Commission and HR/VP, Contribution to the Council, EU–China – A strategic outlook, JOIN(2019)5 final, 12/03/2019, p. 1.

of and join the BRI.<sup>128</sup> A fragmented policy approach by individual Member States towards the BRI seems to put at risk effective coordination on economic policies within the EU. Second, a paradigm shift has taken place in the sphere of foreign direct investment (FDI) given that increased amounts of FDI by non-EU-investors (such as China) have been observed in EU Member States. This challenge has led to the establishment of an EU-wide cooperation framework.<sup>129</sup> Third, the fear of China's power and industrial espionage has become a prevalent concern in the ongoing 5G-debate surrounding potential supply of 5G networks and services by Chinese providers like *Huawei*.<sup>130</sup> This debate is held primarily in an area that requires decision-making at Member State level; yet, the EU has involved itself into the opinion-forming process with a view to elaborating on an EU coordinated approach to secure 5G networks.<sup>131</sup> So, it becomes clear that, for the EU, the handling of the 'China challenge' does not only have an external dimension in terms of the EU's common commercial policy, but also requires internal action in order to respond to policy approaches such as the BRI that may have severe implications for the functioning of the internal market.

### I. Lack of competences for unilateral EU-wide responses to China

Despite its new policy approach towards China, the EU seems to face challenges in the development of clear policy responses. The assumption that the EU struggles with the division of competences between itself and the Member State was already evident in the context of the newly established EU investment screening framework. In its current form, the screening mechanism provides a basis for cooperation by establishing notification procedures and postulates information sharing, accompanied by the European Commission's right to issue non-binding opinions on FDI projects.<sup>132</sup> It facilitates coordination and the transparent exchange of information on critical FDIs across the EU. Nonetheless, it should be noted that the European Commission had envisioned, in its initial legislative proposal, to go beyond a coordination mechanism and to insert the possibility of an EU-only FDI screening in certain cases, i.e. where FDIs were "likely to affect projects or programmes of Union interest on the grounds of security or public order"<sup>133</sup> – an idea which was rejected in the very beginning of

128 *Chatzky*, Council on Foreign Relations, 27/03/2019; background information on RBI and Europe, *Fardella/Prodi*, *China & World Economy* 2017/25-5, pp. 125-138.

129 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19/03/2019 establishing a framework for screening of foreign direct investments into the Union, OJ L 79/I of 21/03/2019, p. 1.

130 see in more depth, *Voland/Petite*, *EuZW* 2020, pp. 218-233.

131 See, for example, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Secure 5G deployment in the EU – Implementing the EU toolbox, COM(2020) 50 final, 29/01/2020.

132 *Schill*, *Legal Issues of Economic Integration* 2019/2, pp. 105, 106.

133 European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union COM(2017)487 final, 13/09/2017.

the legislative process, namely in course of the European Parliament's first reading.<sup>134</sup> The current form of the EU screening mechanism does not overcome the fragmentation and differences between a variety of screening procedures in EU Member States. The benefits arising from the coordination envisaged may nonetheless still appear as a crucial aspect for the identification of potential EU-wide strategic FDIs by non-EU investors. However, in light of China's BRI, coordination and transparency may not suffice and substitute a uniform screening mechanism at Union level on the long-term, especially given that not every EU Member State has such a screening mechanism in place. In sum, a lack of appropriate authority at EU level may hamper the finding of uniform responses to China's economic power that actively reaches out to the EU internal market, especially in areas where the limits of the common commercial policy prevent effective actions by the EU. Instead of presenting country-specific industrial policies, the geopolitical pressure arising from the BRI could demand EU Member States to rethink the division of competences between the EU and EU Member States on a more fundamental and general level in order to remain a global player among global powers such as China and the US.

## II. Negotiating a trade deal with China?

The EU could likewise aim at negotiating a trade agreement with China to limit trade distorting effects of China's economic policy on the EU's internal market. As the previous analysis of the US 'phase 1'-deal demonstrates, the US put considerable effort into creating a situation in which China was willing to enter negotiations. Given that the burden of the additional tariffs was not only borne by Chinese producers in terms of decreased exports to the US, but also by US consumers in terms of increased retail prices on products imported from China, some may consider the 'price' for bringing China to the negotiation table as too high when measured against the comparably 'meagre return' of the 'phase 1'-deal. In this light, there seem to be two crucial questions: first, which price the EU would have to pay for reaching such deal with China, and second, whether it would be likely to negotiate a more far-reaching and more comprehensive (free) trade agreement. Bearing in mind these factors, the WTO as 'fall-back'-option seems to be overall by far more appealing for approaching the 'China challenge' in terms of countering China's trade distorting practices.

## G. Conclusions

Contrary to the Trump administration's view that China's WTO accession was a mistake,<sup>135</sup> China's integration into the world trade regime has underscored to legit-

134 General Secretariat of the Council, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union – Outcome of the European Parliament's first reading, 6222/19, 19/02/2019.

135 *Donnan*, US says China WTO Membership was a mistake, *Financial Times*, 19/01/2018.

imise the WTO as *World Trade Organization*.<sup>136</sup> While China as well as its trading partners profited from China's WTO membership and its growing confidence in participating in the dispute settlement system of the WTO, a variety of difficult challenges remain as the Chinese economic model strongly deviates from the Western ideas of market-based capitalism.

The *Trump* administration has decided to take a unilateral approach towards the 'China challenge' and entered into a trade war by imposing additional tariffs on Chinese products based on US domestic law. Taking advantage of the leverage created, the US negotiated the so-called 'phase 1'-deal with China in order to end adverse effects of China's economic policy on particular US interests. However, as the analysis demonstrated, the US-China 'phase 1'-deal reveals an atypical character compared to other FTAs and falls short of keeping up to its promises to fundamentally change the US-Chinese trade relations. Instead, it still seems more promising (though more time-consuming as well) to hold China legally accountable for its distorting trade practices under the multilateral regime of the WTO. From an EU perspective, the US' path of unilateral action does not serve as a good example for 'taming the Chinese dragon'. Given the internal division of competences for economic policy coordination between the EU and its Member States and the rather limited effect that an EU-Chinese free trade agreement could have, the EU (currently) is best advised to take resort to the WTO forum and challenge the legality of China's measures at the multilateral level either through panel proceedings or through the newly established multi-party interim appeal arbitration agreement (MPIA) to which both China and the EU are parties.<sup>137</sup>

136 See *Farah*, Legal Issues of Economic Integration, 2006/33-3, pp. 263, 264-265.

137 See WTO, JOB/DSB/1/Add.2, Multi-party Interim Appeal Arbitration Agreement pursuant to Article 25 of the DSU.

## BIBLIOGRAPHY

- BACCHUS, JAMES; LESTER, SIMON; ZHU, JIAN, *Disciplining China's Trade Practices at the WTO*, Cato Institute Policy Analysis, 15/11/2018.
- BASCHUK, BRYCE, *U.S. and China Sign Phase One Trade Deal*, Bloomberg, 15/01/2020, available at: <https://www.bloomberg.com/news/articles/2020-01-15/u-s-china-sign-phase-one-of-trade-deal-trump-calls-remarkable> (03/03/2020)
- BOWN, CHAD P., *Unappreciated hazards of the US-China phase one deal*, Peterson Institute for International Economics, 21/01/2020, available at: <https://www.piie.com/blogs/trade-and-investment-policy-watch/unappreciated-hazards-us-china-phase-one-deal> (03/03/2020)
- BRINKLEY, JOHN, *Trump Is Close To Shutting Down The WTO's Appeals Court*, Forbes, 27/09/2018
- CERUTTI, EUGENIO; CHEN, SHAN; DEB, PRAGYAN; GJONBALAJ, ALBE; HANNAN, SWARNALI A.; MOHOMMAD, ADIL, *Managed Trade: What Could be Possible Spillover Effects of a Potential Trade Agreement Between the U.S. and China?*, IMF Working Paper, 15/11/2019
- CHATZKY, ANDREW, *China's Belt and Road Gets a Win in Italy*, Council on Foreign Relations, 27/03/2019, available at: <https://www.cfr.org/in-brief/chinas-belt-and-road-gets-win-italy> (10/03/2020)
- CHI, MANJIAO, *Trade-Plus Effects of WTO Dispute Settlement on China: An Ideal or Illusion?*, Journal of World Trade, 2013, Vol. 47, pp. 1349-1384
- CHORZEMPA, MARTIN, *Did the US-China phase one deal deliver a win for US financial services?*, Peterson Institute for International Economics, 27/01/2020, available at: <https://www.piie.com/blogs/trade-and-investment-policy-watch/did-us-china-phase-one-deal-deliver-win-us-financial> (03/03/2020).
- FARAH, PAOLO D., *Five Years of China's WTO Membership*, Legal Issues of Economic Integration, 2006, Vol. 33-3, pp. 263-304
- FARDELLA, ENRICO; PRODI, GEORGIO, *The Belt and Road Initiative Impact on Europe: An Italian Perspective*, China & World Economy, 2017, Vol. 25-5, pp. 125-138
- GLÖCKLE, CAROLINE, *The national security diplomacy – the US' sharpest weapon in fighting its trade war*, Legal Issues of Economic Integration, 2020
- HERRMANN, CHRISTOPH, *Europarechtliche Fragen der deutschen Investitionskontrolle*, Zeitschrift für Europarechtliche Studien, 2019, Vol. 22-3, pp. 429-476
- HERRMANN, CHRISTOPH; WEIß WOLFGANG; OHLER, CHRISTOPH, *Welthandelsrecht*, 2nd edition, Munich, 2007
- HILLMAN, JENNIFER, *Testimony of Jennifer Hillman Before the U.S.-China Economic and Review Security Commission*, Hearing on U.S. Tools to Address Chinese Market Distortions, 08/06/2018

- HUANG, CUI; JI, WENHUA, *Understanding China's Recent Active Moves on WTO Litigation: Rising Legalism and/or Reluctant Response?*, *Journal of World Trade*, 2012, Vol. 46-6, pp. 1281-1308
- JOHNSON, KEITH, *5 Takeaways from Trump's New China Trade Pact*, *Foreign Policy*, 16/01/2020, available at <https://foreignpolicy.com/2020/01/16/trump-new-china-trade-pact-takeaways/> (10/03/2020)
- JOHNSTON, ALASTAIR IAIN, *Is China a Status Quo Power?*, *Intl. Sec.*, 2003, Vol. 27-3
- JONES, KENT, *The Decline of Liberal Trade – Can the 'Dracula Effect Save It?*, *World Competition*, 1992, Vol. 4, pp. 71-87
- KASKA, KADRI; BECKVARD, HENRIK; MINARIK, TOMAS, *Huawei, 5G and China as a Security Threat*, CCDCOE NATO Cooperative Cyber Defence Centre of Excellence, Tallinn, 2019.
- KREIER, JESSE, *China NME Case Suspended*, *IELP Blog*, available at: <https://ielp.worldtradelaw.net/2019/06/china-nme-case-suspended.html> (05/05/2020)
- LASKAI, LORAND, *Why Does Everyone Hate Made in China 2025?*, *Council on Foreign Relations Net Politics Blog*, 2018
- LAWDER, DAVID, *Explainer: Key Issues, Implications of U.S.-China Trade Talks*, *Reuters*, 28/01/2019.
- LAWDER, DAVID; SCHROEDER, PETE, *Mnuchin Says Hopes U.S.-China Trade Talks Reaching Final Round*, *Reuters*, 13/04/2019
- LESTER, SIMON; MERCURIO, BRYAN; DAVIES, ARWEL, *World Trade Law – Text, Materials and Commentary*, 3rd edition, Oxford, 2018
- LI, XIAOJUN, *China's geoeconomic strategy: China as a trading superpower*, *LSE IDEAS*, 2012
- MANDELL, LAUREN, *Ins and Outs of the US-China Phase-One Trade Deal*, *Trade Talks*, 18/01/2020
- MAYEDA, ANDREW; MOHSIN, SALEHA, *U.S. Rebukes China for Backing Off Market Embrace*, *Bloomberg*, 30/11/2017
- McBRIDE, JAMES; CHATZKY, ANDREW, *Is 'Made in China 2025' a Threat to Global Trade?*, *Council on Foreign Relations*, 07/03/2019
- POCKARD, CLACK, *New China Tariffs Will Not Resolve the Trade Dispute*, *Lawfareblog*, 06/02/2019
- RAPPEPORT, ALAN, *U.S. Says China Is No Longer a Currency Manipulator*, *The New York Times*, 13/01/2020, available at: <https://www.nytimes.com/2020/01/13/us/politics/treasury-china-currency-manipulator-trade.html>, (03/03/2020)
- SCHILL, STEPHAN W., *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, *Legal Issues of Economic Integration*, 2019, Vol. 46-2, pp. 105-128

- SCHOTT, JEFFERY J.; JUNG, EUJIN, *In US-China Trade Disputes, the WTO Usually Sides with the United States*, Peterson Institute for International Economics, 12/03/2019.
- SCOTT, JAMES; WILKINSON, RORDEN, *China Threat? Evidence From the WTO*, *Journal of World Trade*, 2013, Vol. 47-4, pp. 761-782
- SHAFFER, GREGORY; GAO HENRY, *A New Chinese Economic Law Order?*, *Legal Studies Research Paper Series*, No. 2019-32, 2019
- SOHLBERG, MARCUS; YVON, ADRIANE, *China – Domestic Support for Agricultural Producers (China-Agricultural Producers)*, DS511, *World Trade Review* 2019, pp. 531-532.
- SUTTER, ROBERT, *Barack Obama, XI Jinping and Donald Trump – Pragmatism Fails as U.S.-China Difference Rise in Prominence*, *American Journal of Chinese Studies*, 2017, Vol. 24, No. 2, pp. 69-85
- VAN DEN BOSSCHE, PETER; ZDOUC, WERNER, *The Law and Policy of the World Trade Organization*, 3rd edition, Cambridge, 2013
- VETTER, DARCI, *Ins and Outs of the US-China Phase-One Trade Deal*, *Trade Talks*, 18/01/2020
- VIDIGAL, GERALDO, *The Return of Voluntary Export Restraints? How WTO Law Regulates (And Doesn't Regulate) Bilateral Trade-Restrictive Agreements*, *Journal of World Trade*, 2019, Vol. 53, No. 2, pp. 187-210
- VOLAND, THOMAS; PETITE, MICHEL, *Cybersecurity measures and WTO law*, *EuZW* 2020, pp. 218-233.
- WEBSTER, TIMOTHY, *Paper Compliance: How China Implements WTO Decisions*, *Michigan Journal of International Law* Issue 35-3/2014, pp. 525, 529-30
- WU, MARK, *The „China Inc.” Challenge to Global Trade Governance*, *Harvard International Law Journal*, 2016, Vol. 57-2, pp. 261-324
- YANG, YONGZHENG, *China's WTO Accession – The Economics and Politics*, *Journal of World Trade*, 2000, Vol. 34-4, pp. 77-94