

New Changes in the Sino-US Trade War and China's Legal Response

Fu Huang'an, Li Xiaofu*

Abstract: The trade deficit seems to have caused the Sino-US trade war, but this is only based on data. The new United States President Joe Biden may be able to appropriately adjust this relationship. There may be a short period of relaxed Sino-US relations, but their long-term struggle and risk are irreversible. In short, the United States' new Cold War and decoupling tried to once again isolate China from the world system. Cooperation between trading partners can not only help them support each other and overcome economic difficulties, but can also serve as a reliable model for promoting the occurrence of international cooperation and mutual trust, forming a virtuous circle. It is time to actively participate in formulating multilateral trade regulations, reducing regulations that have long been unfavorable to China, and reflecting China's interests when formulating rules. Faced with the "poison pill" provision and its possible impact, China should maintain its strategic determination and continue pursuing its goals. Specifically, China can strive to eliminate the possible negative effects of the "poison pill" provision based on three levels.

Keywords: Sino-US relations, Legal warfare, "Poison pill" Provision, International cooperation, Biden administration

I. INTRODUCTION

China is the largest trade partner of many countries, including the United States. According to a recent study in the United Kingdom, China is expected to surpass the United States in economic size by 2028.¹ The new United States President Joe Biden is inheriting a tense and messy relationship with China

* Fu Huang'an, Master Degree Candidate, School of International Law, East China University of Political Science and Law.

Li Xiaofu (Corresponding Author), Associate Professor, Center for Rule of Law Strategy Studies, East China University of Political Science and Law. Email: banhengluli0313@163.com.

This paper is funded by a National Social Science Fund titled "Research on International Law of Free Trade Port with Chinese Characteristics" (No. 20&ZD205). Submission received on February 15, 2016.

1 Nishant Dahiya, What Trump's Declassified Asia Strategy May Mean for US-China Relations under Biden, <https://www.npr.org/2021/01/23/959683134/what-trumps-declassified-asia-strategy-may-mean-for-u-s-china-relations-under-bi> (Last Visited on February 20, 2021).

from his predecessor. From a grueling trade war to numerous sanctions on China's most prominent technology companies, the Donald Trump administration spent most of the last four years pressuring the United States' biggest economic rival. It only became more heated in recent weeks as Washington applied additional restrictions on Chinese business and investment.²

After Biden came to power, he focused on two aspects. One is fighting COVID-19,³ and the other is the United States' economic recovery. The second involves international trade, which means that the Biden administration will deal with Trump's foreign trade strategy. If Biden makes adjustments, the era of Sino-US trade wars may become part of the past.

In this article, the Sino-US trade war refers to trade wars that occurred after the convening of the 19th National Congress of the Communist Party of China, to distinguish it from the anti-dumping and countervailing-based trade conflicts between China and the United States. On March 8, 2018, the President Trump signed an announcement to apply additional tariffs to steel and metal aluminum products exported from China, while China announced the termination of tariff concessions on some agricultural products from the United States, and imposed an additional 15% tariff from April 2, 2018.⁴ Over the months that followed, the two countries have been embroiled in countless back-and-forth negotiations, a tit-for-tat tariff war, introduced foreign technological restrictions, fought several World Trade Organization cases, which led Sino-US trade tensions to the brink of a full-blown trade war. As of August 2020, the Trump administration has imposed tariffs to USD 550 billion worth of Chinese products. China, in turn, has imposed tariffs on USD 185 billion worth of American goods.⁵

It is unusual that the Sino-US trade war has occurred. After many rounds of tariff reduction and exemption negotiations in the World Trade Organization, tariff rates are becoming increasingly lower, and free trade is more common, while the United States has renewed its international trade tariff weapons.⁶

2 Jill Disis, The China Trade War Is One Thing Joe Biden Won't Be Rushing to Fix, <https://www.cnn.com/2021/01/21/economy/china-trade-tech-war-biden-intl-hnk/index.html> (Last Visited on February 20, 2021).

3 World Health Organization (WHO), *Coronavirus Disease (COVID-19) Pandemic*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (Last Visited on February 25, 2021).

4 Dezan Shira and Associates, The US-China Trade War: A Timeline, <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/> (Last Visited on February 25, 2021).

5 *Ibid.*

6 Shen Wei, The Appearance and Formation of American "Small Multilateralism" under the Background of Anti-globalization, *Cross-strait Legal Science*, Vol. 22, No. 3, 2020, pp. 38-52.

II. PERFORMANCE AND CHANGES OF THE SINO-US TRADE WAR

The Sino-US trade war's overt plot is to participate in negotiations between the two governments to reach a trade agreement, while its covert plot is legal warfare between China and the United States regarding sanctions and counter-sanctions, containment and counter-containment. Legal warfare, as a new and unconventional form of containment and counter-containment, concerns battles of law, institutions, and mechanisms between these two countries. China cannot evade and must respond with legal anti-containment when it participates in international economic governance in the context of American legal hegemony. The tools of legal warfare are diverse, which makes legal warfare very complex.⁷

On January 15, 2020, China and the United States signed the Economic and Trade Agreement between the Government of the People's Republic of China and the Government of the United States of America: Phase One (Phase One Agreement).⁸ The Phase One Agreement came into effect on February 14, 2020. It intends to eliminate several practices that bothered the White House and bipartisan members of Congress, including intellectual property theft and forced technology transfers, in exchange for Chinese market access, according to a White House press release. It also describes a USD 200 billion increase in Chinese purchases of American goods over two years — one of Trump's priorities. Trump mentioned that the United States and China are “righting the wrongs of the past and delivering a future of economic justice and security for American workers, farmers and families”, adding that this deal has “total and full enforceability”.⁹ The Phase One Agreement marked a major step in efforts to rein in a trade war between Washington and Beijing that lasted for over 18 months. Trump had pushed to crack down on what he called China's abusive

7 Shen Wei, Lawfare in the US-China Trade Friction: Understanding the Unreliable Entity List System and Blocking Regulations, *Journal of Comparative Law*, Vol. 34, No. 1, 2021, pp. 1-21.

8 The Economic and Trade Agreement between the Government of the People's Republic of China and the Government of the United States of America, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement> (Last Visited on February 11, 2021).

9 Jacob Pramuk, Trump Signs “Phase One” Trade Deal with China in Push to Stop Economic Conflict, <https://www.cnbc.com/2020/01/15/trump-and-china-sign-phase-one-trade-agreement.html> (Last Visited on February 11, 2021).

trade practices and follow through on one of his core campaign promises.¹⁰

In the first year of the Phase One Agreement's implementation, China imported USD 100 billion of the American goods mentioned in the deal — roughly 58% of the targeted USD 173.1 billion during 2020, based on China customs data compiled by the think tank Peterson Institute for International Economics. Over the same period, the United States exported USD 99.9 billion of covered products to China, compared with a target of USD 159.0 billion. Even though they refer to the same thing, statistics on Chinese imports from the United States often do not reflect that of the United States' exports to China, partly due to the two countries' different data collection methods and standards. Peterson Institute for International Economics does not track Chinese purchases of the American services agreed under the deal because the data is not reported monthly.¹¹ Even before the COVID-19 pandemic, several experts had said it was unrealistic for China to increase purchases of the American goods by that amount. The COVID-19 pandemic outbreak made it even more difficult to meet that obligation as Chinese import demand plunged.¹²

President Biden has not made any official announcements on the fate of the Phase One Agreement. He said that he would not immediately roll back tariffs on China and would conduct a full review of the deal in December 2020. Until now, there is no new information from the White House about his intentions for this deal. Some public policy experts pointed out that members of Biden's team agree with the Trump administration on many issues related to China. Experts have said that this means a tough stance on Beijing would continue, but based on a different approach.¹³

The Phase One Agreement involves several major aspects: intellectual property rights, technology transfer, agricultural and food, macroeconomic policies and exchange rate, trade expansion. The deal also sets up a special mechanism for "Bilateral Evaluation and Dispute Resolution" in Chapter 7 to promote its effective implementation. After searching Chinese articles from the Chinese National Knowledge Infrastructure (CNKI) database, it was found that existing

¹⁰ *Ibid.*

¹¹ Chad P. Bown, US-China Phase One Tracker: China's Purchases of US Goods, <https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods> (Last Visited on February 8, 2021).

¹² Yen Nee Lee, China Failed to Buy Agreed Amounts of U.S. Goods under "Phase One" Trade Deal, <https://www.cnbc.com/2021/01/22/china-failed-to-buy-agreed-amounts-of-us-goods-in-phase-one-trade-deal-data.html> (Last Visited on February 11, 2021).

¹³ *Ibid.*

literature mostly focuses on research and analysis of future Sino-US economic and trade relations based on the Phase One Agreement's content on the rights and obligations that the two governments have formulated, but very few papers discuss Chapter 7.¹⁴ The dispute settlement mechanism plays a crucial role in international treaties, especially for clauses with clear and substantive rights and obligations.

From an international relations perspective, dispute settlement mechanisms in economic and trade agreements can be divided into two types: rule-oriented and power-oriented. The former is highly legalized and often resorts to third-party dispute settlement agencies to give legally binding judgments; the latter relies on pragmatism, where the parties resolve their disputes through traditional diplomatic channels, and often threaten to impose retaliatory sanctions.¹⁵ In this sense, the agreed dispute settlement mechanism is a typical example of the power-oriented type. Allee and Elsig analyzed the dispute settlement clauses in nearly 600 FTAs concluded between 1945 and 2009 around the world, and concluded that the dispute settlement mechanism in FTAs signed between developed and developing countries is more complete. The dispute settlement mechanisms in FTAs between developed countries are often relatively loosely defined. Therefore, the strength of the contracting states and their bargaining power in negotiations will played a crucial role in the dispute settlement mechanism's final presentation.¹⁶

Based on a Chinese scholar's viewpoint, unlike the FTAs that China and the United States have previously reached with other countries, the Phase One Agreement's dispute settlement mechanism is special.¹⁷ As part of this deal, the design of its dispute settlement mechanism also resulted from the negotiations between these two big countries. From the application scope, institutional settings, and program design, the Phase One Agreement's dispute settlement mechanism is mainly based on its actual implementation, which makes it self-enforcing. Self-enforcing agreements usually have the following characteristics: the agreement does not introduce third-party agencies to judge its performance

14 China National Knowledge Infrastructure, <http://www.cnki.net> (Last Visited on February 11, 2021).

15 Arne Tostensen and Beate Bull, Are Smart Sanctions Feasible? *World Politics*, Vol. 54, No. 3, 2002, p. 373.

16 Todd Allee and Manfred Elsig, Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? New Evidence from Preferential Trade Agreements, *The Review of International Organizations*, Vol. 11, No. 1, 2016, pp. 89-120.

17 Shang Peixuan, Dispute Settlement Mechanism under US-China Phase One Agreement: Legal Norms and the Political Logic Behind, *Journal of SUIBE*, Vol. 28, No. 1, 2021, pp. 64-75.

or violation, assess losses, and impose sanctions; the contracting parties are free to determine whether they will benefit from continuing to perform the agreement; the contracting parties choose to continue to perform the agreement just because the benefits of continuing to perform are greater than stopping.¹⁸

The Phase One Agreement gives China and the United States great discretion, enabling them to independently determine whether the other party has violated it, and which means to take when addressing violations — a solution reached through consultation, resorting to retaliatory actions, or withdrawing from the treaty. A third-party dispute settlement agency is not involved, so handling of disputes between the two parties is mainly subject to the assessment of the two parties' unilateral interests and strength during negotiations, rather than the rules themselves. This in turn explains why Chapter 7's application scope does not involve the "interpretation and application" of the Phase One Agreement: The country lacks the motivation to judge right or wrong while starting with strength and interests. Therefore, the Phase One Agreement's dispute settlement mechanism signals a change from a focus on rule-oriented to power-oriented.¹⁹

The United States is the world's largest trading nation, with over USD 5.6 trillion in exports and imports of goods and services in 2019. It has trade relations with more than 200 countries, territories, and regional associations around the globe.²⁰ Moreover, it has FTAs in force with 20 countries.²¹ Among the FTAs that the United States has reached, only the US-Israel Free Trade Agreement and US-Jordan Free Trade Agreement clearly stipulate that the panel report is not binding. Article 19.2 of the US-Israel Free Trade Agreement stipulates that once a dispute is submitted to its panel, and after the panel gives its final report, the affected party has the right to take any appropriate measure.²² Similarly, Article 17.2 of the US-Jordan Free Trade Agreement stipulates that after the panel releases its final report, the joint committee shall refer to this report and try its best to resolve the dispute. If the joint committee fails

18 Li Mingqian, Rethinking and Reforming the Investor-State Dispute Settlement Mechanism in the Context of Global Governance, *The Foundation for Law and International Affairs Review*, Vol. 1, No. 2, 2020, p. 21.

19 *Supra* n. 17.

20 Office of the United States Trade Representative, Countries & Regions, <https://ustr.gov/countries-regions> (Last Visited on February 12, 2021).

21 Office of the United States Trade Representative, Free Trade Agreements, <https://ustr.gov/trade-agreements/free-trade-agreements> (Last Visited on February 12, 2021).

22 US-Israel Free Trade Agreement, <https://ustr.gov/countries-regions/europe-middle-east/middle-eastnorth-africa/israel> (Last Visited on February 11, 2021).

to resolve the dispute within 30 days of the panel's release of this report, the parties have the right to take any appropriate and commensurate measure.²³ Article 7.4.2 of the Phase One Agreement is highly similar to the above two FTAs. The US-Israel Free Trade Agreement came into effect in 1985 and was the first and only bilateral FTA that the United States reached before the World Trade Organization was established. The dispute settlement mechanism in the Phase One Agreement is characterized by bilateral routes. Afterwards, only the US-Jordan Free Trade Agreement took the same path. Thirty-six years later, a similar path reappeared in the Phase One Agreement's dispute settlement clause, which confirms the United States' diplomatic strategy of retreating from a multilateral mechanism to a bilateral path or even unilateralism.²⁴

The United States attempts to revise FTAs to promote the return of manufacturing and increase employment. In fact, this is just a way of diverting attention and concealing contradictions. It manifests the unilateralist thinking of the United State. Under President Trump's leadership, the United States renegotiated the North American Free Trade Agreement, replacing it with an updated and rebalanced agreement, the United States-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020.²⁵ USMCA did not differ from the North American Free Trade Agreement's overall framework and structure, and continued rather than subverted it.²⁶ Several new FTAs revised by the United States, such as USMCA and the US-Korea Free Trade Agreement, have two characteristics.²⁷ One is that it has substantially increased the terms benefitting the United States, and the other is that it clearly is marginalizing other countries.

Focusing on the basic idea of America First, USMCA not only further improves the standards for rules of origin, intellectual property rights, digital trade, labor, and the environment, but also introduces the "poison pill" provision located in Article 10 of Chapter 32 of the USMCA and includes a total of 8 specific

23 US-Jordan Free Trade Agreement, <https://ustr.gov/countries-regions/europe-middle-east/middle-eastnorth-africa/jordan> (Last Visited on February 11, 2021).

24 Liu Jingdong, MTA VS PTA: Dilemma and Prospect of Rule of Law of International Trade — In Memory of the 20th Anniversary of WTO, *Chinese Review of International Law*, Vol. 2, No. 5, 2015, pp. 92-103.

25 United States-Mexico-Canada Agreement, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (Last Visited on February 11, 2021).

26 NAFTA Facts, <https://ustr.gov/sites/default/files/NAFTA-Myth-versus-Fact.pdf>s (Last Visited on February 12, 2021).

27 US-Korea Free Trade Agreement, <https://ustr.gov/countries-regions/japan-korea-apec> (Last Visited on February 14, 2021).

items.²⁸ Under the “poison pill” provision, if any of the three countries in the USMCA enters a trade deal with a “non-market economy”, the other two are free to quit in six months and form their own bilateral trade deal. For the first time, the “poison pill” provision adds an either-or exclusive option in bilateral and regional trade agreements. This exclusivity is not aimed at improving regional trade convenience and fairness, but at increasing trade barriers with third countries, which violates the basic principle of international public law not to interfere with these countries’ rights and obligations. The “poison pill” provision essentially gives the United States the right to review and veto the agreements that other countries have signed, and directly links the entry threshold of the “club” with the United States’ domestic legislation, thereby restricting the free trade between contracting parties and third countries. In an interview with Reuters on October 6, 2018, the United States Secretary of Commerce Rose called the “poison pill” provision “another move to try to close loopholes” in trade deals that have served to “legitimize” China’s trade.²⁹ The specific content of the “poison pill” provision is not complicated, and it essentially is not different from old ways of differentiating the so-called “market economy status”. The United States government has always implemented special rules for “non-market economies” (NME). Adopting a one-sided economic policy does not meet the basic interests of other major economies. The design of the “poison pill” provision also reserved room for flexibility and future negotiations. This precedent allows for replication of the “poison pill” provision in other trade agreements. The “poison pill” provision also has a flexible withdrawal mechanism. Even if the contracting parties and the “non-market economies” finally sign a new FTA, it will not necessarily lead to the end of USMCA. The other two parties will rely on current conditions when considering whether to withdraw from the agreement.

Similar wording appeared in the United States’ negotiations for FTAs with the European Union, Japan, and the United Kingdom. A Western scholar examined the anti-NME clause, arguing that its concrete legal consequences

28 For companies, the term poison pill refers to a defense strategy used by a target firm to prevent or discourage a potential hostile takeover by an acquiring company. Potential targets use this tactic in order to make them look less attractive to the potential acquirer. Although they’re not always the first — and best — way to defend a company, poison pills are generally very effective.

29 David Lawder and Karen Freifeld, Exclusive: US Commerce’s Ross Eyes Anti-China Poison Pill for New Trade Deals, <https://www.reuters.com/article/us-usa-trade-ross-exclusive-idUSKCN1MF2HJ> (Last Visited on February 12, 2021).

are less relevant than its symbolic effects. The “poison pill” provision itself is difficult to be replicated in bilateral agreements, since it depends on cooperation between the two non-signing parties. Its operation nonetheless resembles that of two unilateral remedies available under the NME clause, permitting termination of bilateral FTAs in response to the other party entering into an NME FTA. While the “poison pill” provision would offer little in terms of concrete effects if added to agreements that already permit unilateral withdrawal, its greatest value may not be in its legal effects but its legitimating and signaling properties, which push USMCA parties to establish a common front in the “geo-economic” dispute between the United States and China.³⁰

This scholar also found it is likely that the entitlement to respond proportionally is not what the United States seeks in inserting the “poison pill” provision into trade agreements. Rather, it seems that it aims to establish an extreme consequence as the standard response — termination of the treaty — to maximize the clause’s desired dissuasive effect on its trade partners. While this extreme consequence makes the remedy’s concrete use less likely (since termination of trade agreements would be disruptive for all parties), it may be that the real significance of the “poison pill” provision is not in the concrete legal effects it establishes but in its symbolic value: signaling the creation of a “club of market-oriented economies” whose members will not be drawn into piecemeal agreements by a non-club economy (i.e. China), but are required to negotiate with it (i.e. the United States), keeping each other informed of the outsider’s diplomatic movements.³¹

A Chinese scholar was concerned that the United States regards USMCA as a “new model for the 21st century”, so the intention and impact of adding the “poison pill” provision is not limited to the regional level among the three North American countries. Therefore, it is important to pay attention to this new change in USMCA. In particular, from a medium- to long-term perspective, the “poison pill” provision is likely to become one of the United States’ most important tools to implement isolationism and reconstruct global value chains.³²

30 Geraldo Vidigal, A Really Big Button That Doesn’t Do Anything? The Anti-NME Clause in US Trade Agreements between Law and Geoeconomics, *Journal of International Economic Law*, Vol. 23, No. 1, 2020, pp. 45-64.

31 *Ibid.*

32 Tang Xiaosong and Sun Ling, NAFTA Renegotiation and Its Impacts, *Journal of Guangdong University of Foreign Studies*, Vol. 30, No. 2, 2019, pp. 5-11.

The rule of law is the basis of legal warfare and the original value orientation. However, in addition to representing abstract justice, it has both political and economic goals. In addition, it has the same destructive effect as military means, and depends on who uses it, how and why they use it. International rule of law is a vital tool and means for a country to protect its own rights and interests, especially national security. Retaliation or threats based on domestic laws are proactive, offensive, highly targeted, and belong to long-arm jurisdictions.³³ They make up for the insufficiency of the multilateral constraints and soft rules in dealing with economic and trade frictions between countries in international law. The use of legal means as a weapon for sanctions and strikes, and the implementation of policy goals, have legal formal rationality because of its institutional arrangements and procedural rationality. At the same time, the cost of legal warfare is lower than that of traditional military methods.³⁴

The United States government is skilled at using laws or treaties as a means to optimize American policies and strengthen its power.³⁵ The United States included Chinese companies in the list of entities of sanction as a way to crack down on China's high-tech industries. This was essentially to expand the extraterritorial effectiveness of domestic jurisdictions based on American laws, and also to use long-arm jurisdiction and secondary sanctions as the main tools to restrict China. The United States invokes its domestic laws to initiate litigation, adjudication, and direct sanctions against both public and private Chinese entities, or imposes indirect sanctions on Chinese citizens or entities while sanctioning Russia, North Korea, Iran, Myanmar, Sudan, and other countries, which reflects its use of laws. According to another scholar's viewpoint, the United States' application of foreign trade policies has transformed into a competition of rules and systems based on laws and treaties.³⁶

There may be two basic reasons for China to introduce the "unreliable entity list" system. First, this system is an institutional response to the United States including many Chinese companies in the entity list during Sino-US trade friction and restricts or suppresses them. Second, the entity list system is

33 Solomon Major and Anthony J. McGann, Caught in the Crossfire: Innocent Bystanders as Optimal Targets of Economic Sanctions. *The Journal of Conflict Resolution*, Vol. 43, No. 3, 2005, pp. 337-359.

34 *Supra* n. 7.

35 David B. Rivkin, Jr. and Lee A. Casey, The Rocky Shoals of International Law, *National Interest*, Vol. 35, No. 4, 2000, p. 35.

36 *Supra* n. 7.

an integral part for foreign trade control and trade sanctions,³⁷ and by using this legalized and systematic regulatory system, the United States have imposed extreme pressure on China's foreign trade activities in recent years.

The United States' long-arm jurisdiction and secondary sanctions have added containment to companies and entities who have a competitive relationship with the United States, and have also violated other countries' judicial and regulatory sovereignty. Long-arm jurisdiction and secondary sanctions use public power in domestic law to interfere in transnational commercial transactions, and use administrative fines to disturb the contractual arrangements and balance of interests between private parties.³⁸ Forcing companies or individuals in other countries to abide by American laws through unilateral trade sanctions violates other countries' judicial sovereignty as well as the principle of sovereign equality in international law.³⁹ Excessive supervision not only increases the compliance costs for the supervised entities, but also confuses them due to conflicting legal rules. As a regulatory and foreign policy tool, secondary sanctions not only violate the United States Constitution and American laws, but also lack rationality and legitimacy in international law. Long-arm jurisdiction and secondary sanctions clearly violate the principles of sovereign equality and non-interference in internal affairs stipulated in Article 2 of the Charter of the United Nations, and severely threaten the international order based on sovereign equality. The United States uses secondary sanctions to impose its will on other countries to achieve its goals, which is essentially extraterritoriality.⁴⁰

III. BACKGROUND AND REASONS OF SINO-US TRADE WAR

It seems that the trade deficit has caused the Sino-US trade war, but this is only based on the data. The specific reasons are the conflicts between the US economy and China's industrial upgrading as well as the development of high-tech

37 Fred H. Lawson, (1983). Using Positive Sanctions to End International Conflicts, *Journal of Peace Research*, No. 4, 1983, pp. 311-328.

38 Euclid A. Rose, From a Punitive to a Bargaining Model of Sanctions: Lessons from Iraq, *International Studies Quarterly*, Vol. 49, No. 3, 2005, pp. 459-479.

39 Sun Nanxiang, China's High-tech Enterprises' Legal Risks and Its Safeguards — From the Perspective of the Era of "Anti-globalization", *Journal of Chongqing University of Technology (Social Science)*, Vol. 34, No. 11, 2020, pp. 110-117.

40 *Supra* n. 7.

industries, along with the gradual formation of a competitive industrial relationship. The overall situation of China's industry means it is posing a real threat to the United States' weakened system.

Due to capital's profit-seeking nature and as a result of the world economy's division of labor, in the 1990s, American capital owners brought capital into emerging developing countries, especially China, the world's largest developing country. The United States' cost and technological advantages make it profitable. Although American capital owners have acquired a large amount of capital, many problems have followed. On one hand, although American capitalists have acquired a large amount of capital in China, this only benefits them instead of their American workers. These workers have not experienced increased levels of economic development. In addition, the capital has made many of them unemployed, especially due to the transfer of manufacturing technology and facilities, which worsened income inequality. On the other hand, the departure of the United States manufacturing industry has caused inactive infrastructure construction, resulted in lost job opportunities in the manufacturing industry and its service industries, and has increased social instability. However, these problems will not disappear until the American economy can continue to develop and overcome the current problems. In particular, after China's rise, the United States has been increasingly unable to rely on its previous economic production to maintain its long-term status as the world's top-performing economy.⁴¹

In 2017, China's GDP reached USD 12 trillion, equivalent to 63% of the United States, and China's economic growth rate was 6.9%, much higher than the United States' 2.3%. According to this trend, these rates will increase for approximately another decade. Therefore, around 2027, China is expected to replace the United States by becoming the world's largest economy, while the previous economic relationship between China and the United States will also undergo a major transformation.⁴² China is currently experiencing rapid development and economic transformation. China's economic structure is also transforming and upgrading by gradually changing from "Made in China" to "Created in

41 Tian Feilong, The New Cold War between China and America, the Absence of the West and the Reconstruction of World Order from the Perspective of Institutional Change, *Studies on Party and Government*, Vol. 36, No. 1, 2021, pp. 1-10.

42 IMF Data, <https://data.imf.org/?sk=388dfa60-1d26-4ade-b505-a05a558d9a42&slid=1479331931186> (Last Visited on February 13, 2021).

China”, and gradually switching away from relying on traditional manufacturing to focusing on its development of high-tech industries. “Made in China 2025” was proposed based on this background.⁴³

In 2020, China’s GDP expanded by 2.3 percent, its slowest pace in more than four decades. However, China will likely be the only major economy to avoid contraction due to the COVID-19 shocks. The gross product of primary industry went up 3 percent in 2020, with live pig inventory surging by 31 percent.⁴⁴

China’s development in high-tech industries, such as microchips and artificial intelligence, has affected the United States’ core interests. Before that, China relied on labor-intensive industries to export primary and low-end products to the United States, while the United States relied on its high-tech industries to export technology and services to China. China and the United States maintained a complementary relationship involving labor-intensive and high-tech industries. However, along with the development of China, it is involved in industrial upgrading, with the development of high-tech enterprises consequentially. Once China breaks through the bottleneck of high-tech industries, the United States’ advantage compared with China will unavoidably decline, and its trade deficit with China may become larger.⁴⁵

China is the only country with all the industrial categories in the United Nations Industrial Classification Catalog. A rounded industrial system focuses on being large and comprehensive, rather than sophisticated. Historical and institutional factors have caused the United States’ economic development to plunge into severe polarization, hollow manufacturing, and dilapidated infrastructure. Nevertheless, the United States can still rely on its technological advantages to share the greatest amount at the high end of the industrial chain. However, as the world’s most populous country, once China successfully breaks through the high-end industry bottleneck, it will gain more profits from the high-end industrial chain that the United States is dominating. At the same time, China’s lack in the industrial and economic development will be overcome to some extent. It will exist as a larger manufacturing country in the

43 Made in China 2025, <http://www.gov.cn/zhuanli/2016/MadeinChina2025-plan/index.htm> (Last Visited on February 14, 2021).

44 China GDP Annual Growth Rate, <https://tradingeconomics.com/china/gdp-growth-annual> (Last Visited on February 14, 2021).

45 Sun Nanxiang, The United States Economic and Trade Unilateralism: Form, Motivation and Legal Response, *Global Law Review*, Vol. 41, No. 1, 2019, pp. 179-192.

entire industry chain with the capability of achieving self-sufficiency in food staple production and re-achieving energy self-sufficiency, and may have greater influence over the whole globe. The aspects of Sino-US relations that have changed include economic volume, competition between these two countries, and their core interests. This may be also the main reason why Trump launched a trade war with China.⁴⁶

When considering the overall situation of China's manufacturing industry in the past two decades, China's manufacturing value added for 2004 was USD 625.224 billion, surpassing Germany. In 2007, it surpassed Japan, and in 2010, it surpassed the United States. The added value of China's manufacturing industry was USD 3.184 trillion by 2014, surpassing both the United States and Japan. In 2014, China's economic development started to enter a new normal, and its major difficulties in promoting its industrial structure from mid- to high- end are in its manufacturing industry. As a result, China's manufacturing industry has begun to target key areas such as innovation-driven, intelligentization transformation, infrastructure reinforcement, and green development. In 2008, the world's top 10 manufacturing countries totaled USD 10.213 trillion in added value, of which the United States was USD 1.803 trillion, accounting for approximately 17.65% of the global share; China was USD 1.476 trillion, ranking second, accounting for approximately 14.45% of the global share; Japan ranked third with USD 1.08 trillion, accounting for approximately 10.57% of the global share; Germany was USD 747.9 billion, ranking fourth, accounting for approximately 7.32% of the global share; Italy was USD 371.109 billion, ranking fifth, accounting for approximately 3.63% of the global share. The above data shows that the top four countries' proportion has opened a big gap compared with other countries. In 2017, China became the world's top manufacturing country, with an added value of USD 3.558 trillion, accounting for approximately 27.07% of the global share; the United States had USD 2.1733 trillion, ranking second, accounting for approximately 16.54% of the global share; Japan had USD 1.012 trillion, ranking third, accounting for approximately 7.66% of the global share; Germany had USD 753.767 billion, ranking fourth, accounting for approximately 5.72% of the global share. Overall, from 2008 to 2017, the proportion of China's added value rose from 14.45% to 27.07%, an increase of 12.62%. Except for China, the share of other

⁴⁶ *Ibid.*

three countries declined significantly. In 2019, the total value of China's foreign trade imports and exports increased by 2.8% over the same period last year.⁴⁷ At a time when the Sino-US trade war occurred and global trade slowed significantly, the Chinese economy demonstrated its resilience and vitality. This process resulted in new technologies and products such as smart cars as well as "Internet+" and artificial intelligence becoming deeply integrated with the manufacturing industry. In addition, the implementation of environmental protection standards and shutdown of outdated production facilities forced the manufacturing industry to undergo transformation and upgrading. The construction of a national manufacturing innovation center, commercialization of 5G, and digitalized development of the manufacturing industry have enhanced the vitality of China's manufacturing development.⁴⁸

Trump's 2016 victory, mostly due to blue collar voters, provided Democrats with "a harsh lesson about the perils of a trade policy that's not thinking about working people but (about benefiting) finance and agribusiness", said Lori Wallach, director of Public Citizen's Global Trade Watch.⁴⁹

Mindful of that lesson, Biden's team, led by a president who seldom tires of affirming his lifelong ties to the American working class, has promised a trade policy that will create or protect American jobs. As Katherine Tai, Biden's nominee for the United States Trade Representative, mentioned in a December 2020 speech directed to the National Foreign Trade Council, "We will use trade, in coordination with both international and domestic economic tools, to create a more inclusive prosperity for America and Americans". Based on her perspective, Biden's vision "is to implement a worker-centered trade policy." Biden has promised at least one significant change from Trump's "America First" trade stance: He wants to repair relations with key American allies, such as the European Union and Canada, but not China, which was bewildered and infuriated by Trump's mercurial and belligerent rhetoric and actions.⁵⁰

There are plenty of other unresolved problems. For example, Trump never addressed some of Washington's biggest complaints about Beijing, including

⁴⁷ *Supra* n. 45.

⁴⁸ *Supra* n. 41.

⁴⁹ Paul Wiseman, *Biden Treads Carefully around Trump's Combative Trade Policy*, <https://apnews.com/article/biden-global-trade-policies-c8b6af63440cd27a48b600375e512b95> (Last Visited on February 13, 2021).

⁵⁰ *Ibid.*

its favoritism for state-owned enterprises and his accusation that the country steals American technology. Chinese officials have repeatedly denied such allegations and argued that any tech secrets that American companies handed over were part of agreed deals.⁵¹

While removing tariffs on Chinese goods likely will not be a big priority for Biden, several experts — and current United States Secretary of the Treasury Janet Yellen herself — said the new administration will want to more effectively use its major alliances to create a more predictable trade strategy. For instance, Biden is unlikely to attack Washington's longtime European allies in the same way as Trump.⁵²

Biden “continues to say he wants to approach China via a coalition of other democracies, and that will take time to build,” explained William Reinsch, a trade expert at the Center for Strategic and International Studies who served for 15 years as president of the National Foreign Trade Council. Reinsch emphasized that “the [China] relationship is too important to ignore, but I don't see him rushing into anything”.⁵³

Biden was elected as a result of the democratic process and in a legal sense upon his swearing-in of office. The democratic norms and rational spirit of the United States have basically succeeded in continuing the destructive political vigilance and legitimate countermeasures of Trumpism, which has corrected and stabilized the American system of governance. A modest adjustment period can also be obtained for the sake of Sino-US relations and China's long-term development prospects. As for Trump's refusal to acknowledge his election loss and boycotts related to the election's legal battles, especially the judicial support of the United States Supreme Court's conservative majority, it does not align with the American constitutional order's historical experience, boundaries of judicial power, and overall sense of justice.⁵⁴ This article focuses on the fact that it is difficult to reverse the result of defeat. If Trump increases his involvement in litigation, he will enhance his status as an enemy of American society's firmly entrenched democratic norms and mainstream values. According to the basic principles of the democratic United States Constitution, he cannot

⁵¹ *Ibid.*

⁵² *Supra* n. 2.

⁵³ Ana Swanson, Biden Appointments Signal a Trade Approach That Hews to the Left, <https://www.nytimes.com/2021/02/08/business/economy/biden-trade.html> (last Visited on February 13, 2021).

⁵⁴ *Ibid.*

regain the power he lost during his re-election campaign by being involved in judicial proceedings, or it would betray and deny the principle of the American people's sovereignty. Trump hopes to repeat the story of Bush v. Gore in the 2000 Presidential Election, with a minimal amount of manipulation or chance of repetition. As for Trump's adventurous act of inciting populists to directly seize power, all parties have denied involvement in the farce on January 6.⁵⁵

In the 2020 presidential election, Trump and Trumpism have been tested based on their democratic norms and level of accountability according to public opinion. Their defeat is symbolic, but does not indicate that Trump's voters and political spirit have withdrawn from the stage of American history. As the peak of Western hegemony, American hegemony cannot logically accept China's irresistible rise and power sharing, nor can it continue to accept China as a strategic partner and member of the international system. The reconciliation of Sino-US relations and the so-called "honeymoon" period are the products of China's reform and opening up, but also declined as China's economic growth and political system matured. Several Chinese scholars concern that the new Sino-US relationship is centered on competition and conflict. Trade war is the starting points, and a more comprehensive new Cold War is the trend. Trumpism has accelerated the process of qualitative change in this relationship, while the Biden administration may be able to adjust it appropriately. There has been a short period of Sino-US relaxation, but long-term struggle and risk are may be irreversible.⁵⁶

IV. LEGAL SUGGESTIONS FOR THE CHINESE GOVERNMENT

In short, the United States, by way of the new Cold War and decoupling, is trying to once again isolate China from the world system. These factors satisfy the United States' need for unilateral hegemony to maintain its interests. It challenges and destroys the multilateral economic and governance order established after World War II as well as China's efforts. The Trump administration has defended its hegemony against globalization, and China has done its utmost to safeguard the fruit of globalization. Between the positive and negative, the new global order and rational shaping of history in the 21st century are

⁵⁵ *Supra* n. 42.

⁵⁶ *Supra* n. 42.

progressing rapidly. Whether it is “Trumpism without Trump” or Biden’s “liberal internationalism”, China’s path of national rejuvenation and globalization must have its own strategy, determination, system, and direction. Judging from China’s recent policy documents on the 40th Anniversary of the Shenzhen Special Economic Zone and the basic framework of the “14th Five-Year Plan” proposal,⁵⁷ China has responded to the “unchanged” nature of the United States with its own system and development strategy. It is worthwhile for the Chinese people to maintain their strategic determination, theoretical awareness, and practical confidence in the “two centenary” goals.⁵⁸

The initiators of trade wars are often large or powerful countries. Since 2018, the Sino-US trade war has become a central event for China. However, after the COVID-19 pandemic’s outbreak, Vietnam stopped exporting rice to China, trade frictions between China and Europe intensified, and even several small countries launched trade wars against China. Nowadays, the theory of anti-globalization prevails, and China is facing extensive trade protectionism and unilateralism. In this context, the role of friends is particularly important.⁵⁹ Cooperation between trading partners can not only help them support each other and overcome economic difficulties, but also serve as a preferred model for promoting international cooperation and mutual trust between countries, which creates a virtuous circle.⁶⁰

On one hand, it is necessary for China to adjust its foreign policy stance based on other countries’ performance during the pandemic. The COVID-19 pandemic has become a major event related to China’s core interests because of its vital impact on citizens’ lives and social production. The political and social behavior and attitudes of countries around the world during the pandemic may affect the relationship between China and the United States.⁶¹

On the other hand, it is time to seek out possible trading partners in the Western world. The pandemic has directly exposed the differences between the United States and Europe, and these differences have been particularly evident

57 Basic information for 14th Five Year Plan, http://www.gov.cn/xinwen/2020-08/06/content_5532818.htm (Last Visited on January 26, 2021).

58 *Supra* n. 42.

59 Fulvio Attina, Multilateralism and the Emergence of “Minilateralism” in EU Peace Operation, *Romanian Journal of European Affairs*, Vol. 8, No. 2, 2008, pp. 5-6.

60 *Supra* n. 42.

61 Zhang Cheng and Zhao Ziruo, The Sino-US Trade War in the Post-Pandemic World: Motivation, Trend and Chinese Approach, *Area Studies and Global Development*, Vol. 5, No. 1, 2021, pp. 111-123.

among the main countries in Europe: Germany and France. The estrangement in US-European relations has deepened, but Sino-European relations have taken a new turn during the pandemic. Public opinion on China in European countries has gradually changed from a lack of trust to a sense of rational and logical belief. One reason is that, the national capabilities and institutional advantages China showed while fighting against the pandemic have provided people who have tended to view the Chinese system based on a hostile ideological perspective with a new understanding and chances for reflection. The differences in China's and the West's performance in the fight against the pandemic have started a discussion among European public opinion about the "meaning of healthy institutional competition between China and Europe".⁶² German Chancellor Angela Merkel described China's victory in the fight against the pandemic as "unquestionable" and "unrepeatable", showing that Western and especially European leaders have acknowledged China's performance. Respect for China has effectively curbed the Trumpist tendency in European political circle. Another reason is the increasingly close economic and trade relations between China and Europe. When some European countries suppressed and excluded Chinese companies, China did not intend to crowd out Europe. Instead, it adopted incentives to support European companies to invest and operate in China. Under the consensus of jointly fighting the global economic recession and committing to promoting economic globalization, China and Europe have the conditions and necessity to become trading partners.⁶³

It is time to strengthen and perfect supporting legislation in areas such as national security, import and export control, industrial protection, intellectual property protection, and market competition. The legal early warning mechanism is mainly intended to deter unfair trade practices in other countries. The "unreliable entity list" system depends on a set of related foreign trade legal systems to play a role in warning against and deterring the actions of other governments and enterprises. Counter-sanction provisions can provide a legal basis for preventing other countries from expanding their extraterritorial jurisdiction and improper application of domestic laws outside their territory, as well as provide relief for Chinese enterprises and individuals.⁶⁴

Faced with the "poison pill" provision and its possible impact, China

⁶² *Supra* n. 39.

⁶³ *Ibid.*

⁶⁴ *Supra* n. 7.

should maintain its strategic determination and continue pursuing its goals. Specifically, China can try its best to eliminate the possible negative effects of the “poison pill” provision based on three levels: domestic, bilateral, and multilateral. At the domestic level, it must build a new pattern of dual-cycle development, and especially expand the domestic large-scale cycle. China can fully use its comprehensive industrial system, maximize the domestic market’s role as an important engine for economic growth, and reduce its dependence on other economies to build an independently operating domestic economic cycle system. China can build a dual-cycle pattern to further open itself to the outside world, take advantage of its strong domestic demand as the world’s second largest economy and second largest consumer, increase its attractiveness to suppliers of international goods, international services, and producers of international factors, and further integrate into the global value chain and the world economy. At the bilateral level, it can actively engage in dialogue and communication and properly handle bilateral relations. China can maximize its efforts to reduce differences and misunderstandings between itself and the United States by maximizing consultation and dialogue while focusing more on the cooperative and complementary factors of bilateral relations. At the multilateral level, it can promote regional and global cooperation based on the Belt and Road Initiative. Based on this Initiative’s construction, China can more actively promote regional and global multilateral economic cooperation, and can respond to potential risks by expanding their “circle of friends” and expanding their influence. First, China can focus on European countries, further expand the scope of countries participating in Belt and Road Initiative, and further deepen its economic and trade ties with the world’s major economies. Second, China can use its comparative advantages in technology, capital, and other production factors to strengthen its economic and trade cooperation with emerging Belt and Road economies, especially its neighbors, and accelerate the creation of a complete industrial chain.⁶⁵ Third, China can organically integrate the basic framework of the existing Belt and Road Initiative construction with a free trade area strategy. Furthermore, it can gradually build a global free trade cooperation network by consulting with more countries along Belt and Road regarding the construction of free trade areas, further speed up the negotiation process of China-Japan-Korea free trade areas, and improve economic cooperation in

65 Liao Li and Li Xiaofu, Review and Suggestions on Legal Service in Trade under the Belt and Road Initiative, *Journal of WTO and China*, Vol. 9, No. 2, 2019, p. 84.

existing free trade areas such as China-ASEAN and China-Korea.⁶⁶

Last but not least, although globalization has been inhibited, countries and international organizations currently tend to focus on pursuing regional integration. Every country is trying its best to explore measures to maintain its trade relations, but economic integration and globalization are still the main development trend. Each country has a different demand and options for globalization. Globalization is further developing during competition. The world multilateral trading system's development is based on the General Agreement on Tariffs and Trade signed in 1947, which has provided an effective institutional framework for world trade. Most-favored-nation treatment and the principle of non-discrimination are still cornerstones of the world trading system. China is a beneficiary of the multilateral trading system. It should continue to maintain a multilateral platform dominated by the World Trade Organization and reduce the possibility that free trade agreements revised by the United States weaken and split this system.

The conflict between World Trade Organization agreements and current trade practices, the dispute settlement mechanism's ineffectiveness, and the lack of consensus on the "market economy Status" are the reasons why the United States blocks the World Trade Organization. When China is faced with the United States revising free trade agreements against it, it can use World Trade Organization rules when USMCA violates the non-discrimination principle. This principle requires all Member to treat other Members' trade-related subjects and objects fairly, justly, and equally, and requires all Members to treat all other Members equally. The "poison pill" provision stipulates that the contracting parties must choose free trade agreement negotiations based on the distinction between "market economies" and "non-market economies". To meet the challenges that the United States poses, the international community should fully use the consensus and voting system in the World Trade Organization's decision-making procedure. As a responsible great power, when promoting World Trade Organization reform by supporting multilateralism, it is time for China to actively formulate multilateral trade regulations, reduce regulations that have long been unfavorable to China, and reflect China's interests.

66 Yang Liyan, *The Influence of ASEAN Community on the Integration of South China Sea Policy and China's Countermeasures*, *The Foundation for Law and International Affairs Review*, Vol. 1, No. 1, p. 65.