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June 17, 2019

The Honorable Robert E. Lighthizer
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

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Re: Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation.

My name is Clark Packard and I am trade policy counsel for the R Street Institute. I thank the U.S. Trade Representative (USTR) for the opportunity to comment on the proposed modifications of various actions taken by the Trump administration toward China pursuant to Section 301 of the Trade Act of 1974.

Over the last year, I have shared concerns about the administration's handling of trade and investment relations with China. To be clear, the United States has legitimate complaints about China's commercial practices, as was well-documented by USTR's March 2018 Section 301 Report. I testified before USTR last year about using the World Trade Organization (WTO) to handle the types of complaints the United States and its allies share about China's abusive trade practices.

The administration has ignored recommendations to court like-minded allies who could join a case against China before the WTO's dispute-settlement system under various legal authorities, including Article 41.1 of the Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS) and Article 7.3 of China's Accession Protocol. Instead, the administration pursued unilateral tariffs that led to predictable retaliation by China. I have concerns that another round of tariffs would hamper the United States' ability to export more energy products to China, particularly liquefied natural gas. This trade war has harmed American consumers, both individuals and firms, and yet USTR acknowledges that China's trade policies remain the same.

I have attached two columns I wrote over the last year that further elaborate on a wiser course of action, which would minimize harm to Americans while increasing our ability to influence China's commercial practices.

Sincerely,

Clark Packard
Trade Policy Counsel
R Street Institute

LAWFARE

TRADE AND SECURITY

New China Tariffs Will Not Resolve the Trade Dispute

By Clark Packard Wednesday, February 6, 2019, 8:00 AM

Last week, Chinese Vice Premier Liu He met with U.S. Trade Representative (USTR) Robert Lighthizer in the latest in a series of high-level conversations designed to de-escalate trade tensions between the world's two largest economies. The vice premier, President Xi Jinping's top economic adviser, has a reputation as an economic reformer interested in liberalizing China's economy, which provides some hope that the parties will finally resolve the simmering trade war. Ambassador Lighthizer and an American delegation will reportedly head to Beijing in a few weeks to see if an agreement can be struck before March 1, the date tariffs are slated to ratchet up. With the clock ticking, now is the time to strike a durable agreement.

Last March, the United States issued a damning report on China's trade policy practices under Section 301 of the Trade Act of 1974. The U.S. complaints include that Beijing abuses intellectual property, including by stealing trade secrets, and that it forces American firms to hand over technology to Chinese joint venture partners as the cost of doing business.

Under the temporary detente reached by Washington and Beijing coming out of the G-20 meeting in late November, the United States gave China until March 1 to change its policies or face further ratcheted-up tariffs under Section 301. But while these issues are cause for concern, tariffs are not the appropriate policy prescription with which to address them.

On a practical level, such aggressive, unilateral actions will spook financial markets and hurt the underlying economy, without changing China's trade policy practices. China has historically responded in kind to U.S. tariffs, ensnaring unrelated industries in the back and forth.

Legally speaking, the United States should not be acting unilaterally to confront China's trade policy practices under Section 301. Unlike most other trade statutes, which seek to block imports from abroad to protect domestic industries, Section 301 was written to challenge protectionist practices abroad by empowering the executive branch to impose import restrictions in order to pry open foreign markets for American exports, as the Trump administration is seeking to do in this case. But importantly, the law was written before there was an effective system to resolve trade disputes. Throughout the 1980s, the United States relied heavily on Section 301 to confront allegedly "unfair" foreign trading practices that burdened American industries. This "aggressive unilateralism" angered trading partners and became a point of contention during the Uruguay Round of multilateral trade negotiations in the late 1980s and early 1990s, which led to the creation of the World Trade Organization.

As part of the Uruguay Round's "grand bargain," the United States agreed not to use Section 301 unilaterally to combat alleged violations of WTO agreements in exchange for the creation of a binding dispute settlement system under the WTO. The Uruguay Round Agreements Act and the Statement of Administrative Action, which implemented the United States' commitments into domestic law, require the United States to rely on the WTO's dispute settlement system for violations of WTO agreements. The caveat is that the USTR has the authority to declare whether a matter falls within WTO agreements or not.

But instead of filing a dispute at the WTO, the Trump administration has used Section 301 to levy aggressive tariffs on imports from China and promises to increase those tariffs on March 1 unless Beijing overhauls the trade policy practices at the center of this fight. A better path would be for the United States to form a coalition of willing trade partners—including the European Union, Japan and Canada—to bring an aggressive case against China at the WTO. Many of the United States' trading partners share U.S. concerns, and only together would such a coalition have the leverage necessary to force Beijing to raise its commercial standards.

Such a coalition would have ample legal grounds to confront Beijing. First, as Jim Bacchus, a former member of the WTO's Appellate Body, noted recently, Article 41.1 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement requires all WTO members to protect intellectual property rights. Likewise, Section 7.3 of China's Accession Protocol, the commitments the country made when it joined the WTO in 2001, prohibits Beijing from conditioning importation or investment on, among other things, "the transfer of technology" to Chinese companies—one of the complaints raised by the U.S. in its Section 301 report. This is an explicit prohibition.

Though these provisions are largely untested in this context, disputes over commercial practices between trading partners are the types of issues the WTO's dispute settlement system was designed to handle. Taking action outside the scope of the dispute settlement system, especially for alleged violations of WTO agreements, further erodes the credibility of the rules-based multilateral trading system—already facing its most credible challenge since the inception of the General Agreement on Tariffs and Trade, the precursor to the WTO, in the late 1940s. The Trump administration is waging a multifront battle on the WTO: It continues to threaten to withdraw the United States from the rules-based system while simultaneously blocking new appointments to the Appellate Body, the world's highest court for resolving international trade disputes.

Ambassador Lighthizer believes the WTO would be ineffective at disciplining China.Yet President Trump's own Council of Economic Advisers noted last February that the United States wins more than 85 percent of the cases it brings at the WTO. Research by the Cato Institute's Simon Lester, Huan Zhu and Bacchus finds that China has a pretty good record of complying with WTO decisions.

But given the Trump administration's hostility to the WTO and its professed desire to negotiate deals bilaterally, this course of action seems unlikely. If the administration refuses to use the WTO's dispute settlement system to address its complaints described above, the next best course of action would be for U.S. and Chinese trade negotiators to push forward with a comprehensive, binding and enforceable trade agreement that addresses the complaints both Beijing and Washington have about each other's commercial practices. Such an agreement must include enforceable commitments with a clear process for resolving such disputes. This could go a long way toward de-escalating tensions and soothing financial markets.

Negotiating a durable agreement, however, will take time. Fundamentally changing China's commercial practices cannot be accomplished by March 1, the artificial date set by the Trump administration before it will impose more tariffs. If the two sides can negotiate in good faith and make sufficient progress, the United States should delay new or increased levies on Chinese products while conversations continue.

There is reason to believe that China would be willing to negotiate further trade liberalization. For the past several years, the United States and several other major economic powers have clamored for new negotiations to shape internet-based commerce and trade. China had been reluctant to engage on e-commerce issues. But at the World Economic Forum in Davos, Switzerland, sensing that negotiations were going to move forward with or without China, Beijing relented.

The United States has legitimate and long-standing complaints about China's trade policy practices, but additional tariffs or artificial reductions in the trade deficit will not fundamentally transform China's approach. Unless the United States reverses course and brings a case against China at the WTO, negotiating a binding trade agreement could be the best way to resolve long-standing complaints without damaging the global economy.

Topics: Trade and Security

Tags: China, Trade, Trade War, President Trump, World Trade Organization

Clark Packard is a trade policy counsel at the R Street Institute. Earlier in his career, Clark served as a policy adviser and counsel to former Governor Nikki Haley of South Carolina. He's a graduate of the University of South Carolina School of Law and a member of the South Carolina bar.

OPINION

The right way to discipline China: Trump's mercurial trade and tariff tricks won't get the job done

By CLARK PACKARD
DEC 06, 2018 | 5:00 AM

Needed: Fair trade. (Pablo Martinez Monsivais / AP)

Proclaiming himself to be a "Tariff Man" in a tweet early Tuesday morning, the President sent shivers up the spine of Wall Street. The market's reaction was swift and severe: The Dow fell nearly 800 points.

Investors are clearly getting the sense that there is no impending armistice in the nascent trade war between Washington and Beijing.

The episode underlines the serious and ongoing risk of an administration run by a man who seems governed by his id rather than deliberate strategy. That's a bad fit for a global economy that understandably wants to know the rules of the game before making multi-billion dollar investments.

What's ironic here is that Trump made a hash out of what could have been the start of a healthy correction to the administration's counterproductive trade policies.

Earlier in the week, markets had been up on news that the United States and China had struck a deal at the G-20 summit in Buenos Aires. The terms are ambiguous, but the basic crux is that China will resume purchases of manufactured goods, liquefied natural gas and agriculture products, which is a relief for struggling farmers who are among the casualties in the tit-for-tat.

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In exchange, the United States reportedly agreed to pause for 90 days the ratcheting up of tariffs from 10% to 25% that was scheduled to take effect at the New Year.

At the same time, China agreed take steps during the 90-day reprieve to address a litany of trade policy practices that the United States has complained of. To be clear, these practices represent serious problems, including forced technology transfer, intellectual property abuses and other concerns thoroughly documented in the United States Trade Representative's March report.

Yet savvy trade policy watchers know that changing these practices will take longer than 90 days, and unilateral tariffs, which will inflict pain on American consumers, will fail to discipline China.

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If we really care about fixing this problem, what's truly needed is something far different from what Trump is delivering: a thoughtful, multilateral multipronged effort that can both soothe market anxieties and address longstanding concerns the right way.

First, the United States needs allies who share similar concerns about China's trade policy practices. In order to regain the trust of our closest allies, the Trump administration should abandon its costly and ill-conceived steel and aluminum tariffs, which have alienated numerous countries and triggered widespread retaliation against American exports.

Next, the United States should rejoin the Trans-Pacific Partnership, a promising pact agreement with 11 Pacific Rim nations that the President unwisely abandoned shortly after he was inaugurated.

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Likewise, the President should jump-start trade negotiations with the European Union, known as the Transatlantic Trade and Investment Partnership, which have been stalled since the Obama administration.

Additionally, with like-minded allies in the EU, Japan and Canada, the United States should file an aggressive and broad-ranging case against China at the World Trade Organization — the proper, and legally required, venue for resolving trade disputes. By forming a large trading bloc committed to high-quality commercial rules, the United States can potentially pressure Beijing to raise its standards.

Finally, rather than prioritizing flashy news headlines of minor trade "deals" — short-term tariff suspensions in exchange for purchases of a small amount of American exports — the Trump administration should begin the hard work of negotiating a formal free-trade and investment agreement with China.

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The U.S.-China relationship is the most important geopolitical relationship in the world right now — and increasingly so. Getting it right is crucial to future peace and prosperity around the globe.

If Tariff Man follows this outline, instead of wreaking havoc on the world's financial markets, he could prove himself to be the superhero we actually need.

Packard is trade policy counsel at the R Street Institute.