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Legality in Times of Illegality: China and EU's Path in How to React to Trump's Tariff Sword

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Donald Trump uses tariffs as his favorite economic tool (tariffs being the "most beautiful word in the dictionary") and is bringing the aggressiveness of his tariff tools to a level new in history. On April 2, 2025, the White House released the Executive Order of the Reciprocal Tariff, which is dragging more countries into potential trade wars, and further destroys the MFN-based multilateral trade order. According to this Executive Order, a minimum *ad valorem* tariff of 10 percent on imports of most products from all countries other than Canada and Mexico applies, effective on April 5, 2025. In addition, effective April 9, 2025, higher tariffs, ranging from 10 to 50 percent are imposed on imports from certain countries, alltough Trump suspended these additional tariffs on 9 April for 90 days for many countries, except China.

China has been developing a "countermeasure legal tool box" in response to the American tariff policy. Already during Trump's first presidency, China and the US broke into trade war, which started with America's increase to 25% tariffs on Chinese products in 2018, and was temporarily settled by the signing of the U.S. – China Phase One Economic and Trade Agreement in 2020. Five years later Trump is again using the same tactic, while China's legal reaction is becoming more comprehensive and consistent. On March 4th, 2025, one day after the US announced 10% additional tariffs on all Chinese products based on the US *International Emergency Economic Powers Act*, China announced a series of countermeasures, including an increase of tariffs on certain agriculture products, adding US companies to Unreliable Entities List (UEL), as well as listing US companies on the Export Control Entity List (ECEL). China also filed a complaint under the multilateral WTO framework. On April 4, 2025, China adopted similar countermeasures in response to the US Reciprocal Tariff, including an increase of tariffs, as well as listing American companies UEL and ECEL. These countermeasures represent China's newly established pattern under the changing geopolitical environment status quo, which enable greater flexibility to respond to the volatile trade policy of the Trump Administration.

In addition to addressing the Chinese countermeasures, this short note will also clarify the legal basis on which the European Union (EU) is reacting to the US tariff increases on steel, aluminum, and automobiles. It will be shown that, at least so far, China has taken much more differentiated measures. The European Union is initially limiting itself to special regulations for US imports of individual products of particular

sensitivity, even though this approach may likely change in reaction to the reciprocal tariffs Trump announced on April 2, 2025.

China

China's Tool No. 1: Tariff Increase Measure

On April 4th, China's Tariff Commission of the State Council announced an increase of 34% tariff on all products originating from the US. Earlier in March, a similar order was issued in response to America's tariff increase justified by the alleged fentanyl related trade. Unlike during the first Trump administration, China's tariff increase is taken with reference to specific legal basis and through consistent governmental authorities.

In China, upon the approval of the State Council, the Tariff Commission announces the increase of tariffs. Established by *the Regulations of the People's Republic of China on Import and Export Duties (the Regulations)*, Article 4, the Tariff Commission has the special function to coordinate China's tariff system to suit the requirement of the global market. *The Regulations* has been upgraded and repealed upon the entering into force of *the 2024 Tariff Law of the People's Republic of China*. Under Article 7, the Tariff Commission persists, deliberating major tariff policies and implementing tariff measures. In practice, its office sits within the Ministry of Finance and meets with departments including the Ministry of Commerce (MOFCOM), the General Administration of Customs, as well as the Ministry of Finance, to discuss and draft tariff-related laws, regulations, and policies. While MOFCOM has previously co-announced some tariff increases, as of October 2018, the Tariff Commission is the only authority to do so.

The tariff increase measures are based on three domestic laws, namely *the Foreign Trade Law*, *the Tariff Law*, and *the Customs Law of the People's Republic of China*. First, *the Foreign Trade Law* lays out general principles to authorize such measures. According to Article 7, if any country applies "prohibitive, restrictive or other like trade measures on a discriminatory basis" towards China, "as the case may be", China may take countermeasures against such country. As such, US tariff increases are regarded as a restrictive and discriminatory trade measure against China, and China shall adopt countermeasures according to the international rules of state responsibility. The term "as the case may be" allows for discretion and flexibility. Such countermeasures shall be subject to vague procedural requirements under Article 37 that "relevant authorities may carry out an investigation in accordance with the laws and administrative regulations at its disposal or in conjunction with

other relevant administrations".

Second, the *Tariff Law* provides more detailed provisions. According to Article 18, China may impose retaliatory duties on importing goods from a certain country if 1) "the country takes prohibitive or restrictive measures, impose additional tariffs, or takes any other measures that may affect normal trade against China", and 2) "such measures violate the international treaty concluded by the country and China". Further, the scope of goods, applicable countries, tariff rates, periods, and collection methods of the retaliatory duties shall be proposed by the Tariff Commission and be implemented upon approval by the State Council. As such, the US tariff increase is determined as hostile and in violation of binding trade agreements, *i.e.* WTO. In response, China's Tariff Commission will announce retaliatory duties upon the approval of the State Council. Such procedure has been followed consistently, although the specific procedure for investigation is unclear.

The *Customs Law* has no specific rule to authorize countermeasures. However, customs departments implement the tariff increase, and they shall follow "Chapter 5 Tariff" of the *Customs Law* when levying retaliatory duties.

Finally, China's tariff increase measure also refers to "principles of international law". While there is no clear indication as to which international law principle China's tariff increase measure is based on, it may arguably be determined as a countermeasure under the rules of state responsibility. The increased tariff is a retaliatory duty imposed by the Tariff Commission. Hence, it is not a safeguard or trade remedy measure under the WTO framework, as such processes fall within the authority of MOFCOM. It is also not a retaliatory measure under Article 22 DSU of WTO, as these measures can only be carried out after lengthy WTO dispute settlement procedures. Essentially, the retaliatory duty is defined as a "countermeasure" under Article 7 of *the Foreign Trade Law*, and the countermeasure rule of state responsibility may be the referred-to international legal justification. However, China may also purposely use the vague term of 'international law principles' to include WTO principles. While the retaliatory duties do not strictly follow the procedures of the WTO, China still intends to place such measure within the context of the WTO. In almost all the announcements of tariff increase measures, the Tariff Commission emphasized that such measures were taken in reaction to America's violation of the WTO legal order. It is of China's interest to defend the WTO legal order, and adopting a prompt response to emerging tariff threats calls for nuanced balance, even though of course Art. 23 DSU still presents a legal problem.

China's Tool No. 2: Unreliable Entity List (UEL)

On April 4, 2025, 11 American military companies were added to the UEL. On March 4, 2025 similar measures were announced targeting 10 American military companies and Illumina, Inc.. Since MOFCOM issued the *2020 Provisions on the Unreliable Entity List*, such measures have been adopted around 10 times, mostly addressing American military companies. However, China has been cautious in taking such measures, aware that overuse may degrade investor confidence in the Chinese market.

Listed Unreliable Entities	Legal/Fact Basis	Restrictive Measures
Skydio Inc./ BRINC Drones,Inc./ Red Six Solutions/ SYNEXXUS,Inc./ Firestorm Labs,Inc./ Kratos Unmanned Aerial Systems,Inc./ HavocAI/ Neros Technologies/ Domo Tactical Communications/ Rapid Flight LLC/ Insitu,Inc.	Foreign Trade Law, National Security Law, Anti-foreign Sanction Law, Provisions on the Unreliable Entity List For engaging in Taiwan's military activities.	Prohibition from engaging in China-related import and export activities; Prohibition from making new investment in China.
TCOM, Limited Partnership/ Stick Rudder Enterprises LLC/ Teledyne Brown Engineering, Inc./ Huntington Ingalls Industries Inc./ S3 AeroDefense/ Cubic Corporation/ TextOre/ ACT1 Federal/ Exovera/ Planate Management Group	Foreign Trade Law, National Security Law, Anti-foreign Sanction Law, Provisions on the Unreliable Entity List For engaging in Taiwan's military activities.	Prohibition from engaging in China-related import and export activities; Prohibition from making new investment in China.
Illumina, Inc.	Foreign Trade Law, National Security Law, Anti-foreign Sanction Law, Provisions on the Unreliable Entity List For suspending normal transaction with, and discriminate against Chinese enterprises	Prohibition from exporting gene sequencers into China.

In reaction to the US listing Chinese companies on its Entity Lists, the *Provisions* was formulated based on Article 7 of the *Foreign Trade Law*, as well as Article 19 and 59 of the *National Security Law of the People's Republic of China*. Under *Provisions*, Article 2, the UEL may list foreign enterprises, organizations, or individuals if they conduct international economic activities that will: 1) "endanger China's national sovereignty, security or development interests", or 2) "suspend normal transactions with, or apply discriminatory measures against Chinese entities which violates normal market transaction principles and causes serious damage to the legitimate interests of Chinese entities".

The *Provisions* comprehensively

regulate the UEL system. Article 4 establishes a UEL Working Mechanism to enforce the UEL system, which is composed of relevant central departments and located in the Bureau of Industrial Safety and Import and Export Control in MOFCOM. Article 5 and 6 stipulate the investigation procedure, which was followed during the investigation of the US PVH group in 2024. Article 7 provides a non-exhaustive list of factors to be considered, including: 1) "the degree of danger to national sovereignty, security and the development interest of China", 2) "the degree of danger to the legitimate rights and interests of Chinese enterprises, organizations and individuals", and 3) "whether the entity is following internationally accepted economic and trade rules". Article 10 stipulates the measures to be taken on listed entities, including restrictions or prohibitions 1) "from engaging in China-related import or export activities", 2) "from investing in China", 3) "on the entity's relevant personnel or means of transportation from entering into China", 4) "on relevant personnel's work permit, status of stay or residence in China", or 5) imposing a fine of the corresponding amount, and 6) other necessary measures.

Occasionally, the announced UEL measures refer to the *2021 Anti-foreign Sanctions Law* if it is adopted in response to certain foreign sanctions, as Article 4-9 of that law establishes a countermeasure list against individuals or organizations directly or indirectly involved in discriminatory restrictive measures against China. The UEL can be utilized as one type of the countermeasures listed. All of the aforementioned measures refer to *the Anti-foreign Sanctions Law*.

China's Tool No. 3: Export Control Entity List (ECEL)

On April 4, 2025, 16 American companies were added to the ECEL. Chinese exporters are prohibited from exporting dual-use items to such entities and must suspend any ongoing export transactions. Exceptions are available under special circumstances and can be applied for via MOFCOM.

In 2020, China issued the *Export Control Law of the People's Republic of China* and established a unified export control system relating to the exporters, controlled items, and the importers and end-users, by means of controlled lists and export licensure. Dual-use items fall within the scope, and MOFCOM is responsible for such export control. In September 2024, the State Council issued the *Regulation of the People's Republic of China on the Export Control of Dual-use Items*, and in November 2024, MOFCOM announced a comprehensive *Export Control List of Dual-use Items*. Both regulations took effect in December 2024, establishing China's dual-use item export control system.

Chapter 3 of the *Regulation* established three control measures: the Dual-use Items Export License, the Management of End-users and End-uses, and the ECEL. Under Article 28, MOFCOM may list the importers or end-users based on five factors: 1) they "violated the management requirements" under Chapter 3, 2) they endangered "national security interests", 3) they "used the dual-use items for terrorist purposes", 4) they "used the dual-use items for the design, development, production or use of weapon of mass destruction and their means of delivery", or 5) they are "subject to other measures relating to prohibition or restriction on relevant transactions". According to Article 29, depending on the circumstances, the enlisted entities may be subject to necessary measures including "prohibition or restriction on any trade in dual-use items", and "suspension of the export of relevant dual-use items". China's exporters shall not conduct any relevant transactions with such entities, unless MOFCOM approves their application under special circumstances. Article 30 also provides for a procedure for the entities to apply to be removed from the ECEL.

Since the system took effect, China has adopted such measures three times within 5 months (in January the ECEL listed 28 American companies, and in March 15 companies were added to the ECEL), adding the export control tool to its countermeasure toolbox. China pays special attention to such transactions with the US, particularly with respect to items relating to rare earth minerals.

European Union

The European Union is currently affected by US tariff increases on automobiles, aluminum, and steel. In addition to these existing tariffs, the reciprocal tariffs announced by President Trump on April 2, 2025, also now apply. As it is not yet clear how and when the EU will react to the reciprocal tariffs, the following concentrates on the EU reactions to tariffs on automobiles, aluminum, and steel. Options for additional measures by the EU will be indicated at the end of this section.

To understand the EU's reactions announced for mid-April 2025, it is first necessary to go back seven years in history. On March 8, 2018, then US President Trump announced tariff increases on imports of steel and aluminum. The legal basis for this in the domestic sphere was Section 232 of the Trade Expansion Act of 1962, which explicitly and exclusively allows for adopting trade-restrictive measures to protect national security interests. A respective investigation under Section 232 in 2018 concluded that the USA's defense capability would be negatively impaired if the US steel industry lost strength. The

measures initially remained in force. It was only after President Joe Biden took office in 2021 that an agreement was reached with the EU to settle the trade dispute.

As a result, a dispute settlement procedure initiated by the EU before the WTO was also suspended. With the current measures on steel and aluminum that came into effect on March 12, 2025, Trump is relying on the investigation procedure from his first term of office and using it to implement the current measures. There is no independent new investigation into the threats to national security in the steel and aluminum sector. It may also be difficult to justify why only US steel is suitable for maintaining the defense capability of the United States of America. The whole argument is strongly reminiscent of trade-restrictive measures on imports of footwear by Sweden in November 1975, which the Swedish government justified by arguing that economic problems in the domestic footwear industry led to a threat to Sweden's defense capability. This argument was not shared by any other country and Sweden therefore quickly ended the import restrictions on shoes at the time.

When President Trump ordered tariff increases on steel imports from the EU during his first term of office, the EU responded with tariff increases on imports of sensitive American products such as whiskey, agricultural products, peanut butter, and Harley-Davidson motorcycles, some of which were far-reaching. The long list of products from the USA subject to additional tariffs and the corresponding new tariff rates can be found in regulation 2018/886 of June 20, 2018. However, the USA and the EU reached an agreement in their trade dispute in 2021 after President Biden took office. The EU initially suspended its additional tariffs. Following a further agreement with the US government, the EU and US mutually agreed to suspend additional tariffs until at least March 31, 2025 (Regulation 2023/2882 of December 18, 2023).

This also makes it clear how the EU reacts now on the additional tariffs on aluminum and steel. With such a measure, the aforementioned agreement reached with the USA under President Biden becomes invalid for the EU. As a result, the implementing regulation of December 18, 2023 will no longer be in force, meaning that the additional tariffs from the original implementing regulation 2018/886 of June 20, 2018 will be reinstated effective April 1, 2025. The EU, however, announced on March 21, 2025 that it will suspend the additional tariffs for another two weeks into April to give further time for negotiations with the US government.

Internally, the European Commission bases its measures on

the enforcement regulations, the Regulation 654/2014, as amended. This regulation authorizes the EU Commission to react relatively quickly in a specific internal EU procedure to situations that, according to the relevant rules of world trade law or bilateral trade agreements, give the EU the option under international law to adopt countermeasures against trade restrictions imposed by third countries. In a more traditional sense, this concerns the suspension of concessions in the course of WTO dispute settlement proceedings. However, the Regulation also applies under Article 3 (c):

"for the rebalancing of concessions or other obligations, to which the application of a safeguard measure by a third country may give right pursuant to Article 8 of the WTO Agreement on Safeguards, or to the provisions on safeguards included in other international trade agreements, including regional or bilateral agreements".

It is therefore crucial that the EU claims to take the compensatory measures provided for in Art. 8 of the WTO Agreement on Safeguards with regard to the tariff increases by the USA. This in turn presupposes that the scope of application of Art. 8 of the Agreement on Safeguards is open, which is clearly a controversial issue. Reference to Art. 8 of the Agreement on Safeguards by the EU was already made in 2018. Even then, the USA disputed the existence of actual safeguard measures. Instead, the USA argued then, and again now, that these measures safeguard its national security interests within the meaning of Art. XXI GATT. The US's position is thus that Article 11(1)(c) of the Agreement on Safeguards is applicable. According to this provision, the Agreement on Safeguards does not apply to measures:

"taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994".

In the panel proceedings United States — Certain Measures on Steel and Aluminium Products (DS556), it was already established that the tariff increases for steel and aluminum from President Trump's first term in office are measures to protect national security in accordance with Art. XXI GATT, and therefore the Agreement on Safeguards does not apply. The panel explicitly concluded that (para. 7.118)

"in relation to the design and application of the measures at issue indicates that the measures were sought, taken, or maintained pursuant to Article XXI of the GATT 1994. Accordingly, the measures were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX within the meaning of

Article 11.1(c) of the Agreement on Safeguards."

However, the decision is not legally binding as the USA has appealed (into the void). The EU therefore continues to be of the opinion that Article 8 of the Safeguard Agreement applies, as the real reason for the tariff increases by the US is the economic weakness of the US steel industry due to increased imports of steel from abroad; the same argument of course applies to the automobile industry and many more economic sectors of the US. The EU believes that it has complied with all the procedural and other requirements of Article 8 of the Safeguards Agreement and that countermeasures are therefore possible under this provision to restore the balance of tariffs. This argumentation can be based to a certain extent on statements of the Appellate Body in Indonesia — Safeguard on Certain Iron or Steel Products (DS496). The Appellate Body made the following statement:

5.60. In light of the above, we consider that, in order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination, a panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

Whether the EU and other WTO members can actually invoke safeguard measures under Article 8 of the Agreement will not be conclusively determined here. The question has already been discussed in detail elsewhere. At present, it only seems important that the EU explicitly relies on WTO legal considerations to justify its tariff increases in response to the US measures under international law. Whether the conditions for this are

met in terms of WTO law is reserved for a final decision in WTO dispute settlement. At the same time, it remains to be seen whether or on what grounds the EU will take further measures in response to tariff increases by the USA.

As an additional legal basis for any such EU action, next to Art. 8 WTO Safeguard Agreement and the EU enforcement regulation, it seems possible to invoke the Anti-Coercion Instrument (ACI), that is Regulation 2023/2675 of November 22, 2023. With this regulation, a legal framework was created so that the Union can react to economic coercion from third countries in order to deter such coercion or to cease such economic coercion. The Regulation defines economic coercion as a situation in which "a third country applies or threatens to apply a third-country measure affecting trade or investment in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, thereby interfering in the legitimate sovereign choices of the Union or a Member State" (Art. 2 (1) of the ACI Regulation). Without going into further details of the complex regulation, the decisive factor here is that it provides far-reaching decision-making powers for the European Commission, based on a respective qualified majority vote of the Council of the EU (see Art. 5 (5) of the ACI Regulation). As a result, it would be possible for the Commission to react quickly to further tariff increases by the USA, showing its strength. The downside of the instruments, however, is that any action first requires an investigation by the Commission. Even though the Regulation demands that the Commission "shall act expeditiously", "[t]he examination shall normally not exceed 4 months" (Art. 4 (2) of the ACI Regulation). It thus remains to be seen how quickly Commission and Council will be able to act under the Anti-coercion Instrument.

Conclusion

Global production and value chains are deeply integrated. This may change with the current trade war. Trade sanctions and counter-measures – the weaponization of trade relationships – could be carried out in various method. Next to all political and economic impact of all this, it is important to uphold the rule of law. Even though the current US administration does not seem to see any more value in the international rule of law, markets and individual citizens' welfare worldwide depends on stability based in the rule of law. It is a good sign in turbulent times to see that China and the EU are basing their reactions to US protectionism on applicable legal instruments.

This Policy Paper has been written before 8 April 2025. As regards the very dynamic political developments in US trade relations, we did not try to

constantly update the paper.

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