



Trade Talks, with Soumaya Keynes & Chad P. Bown
A podcast about the economics of trade & policy

Episode 109. A Different US-China Fight Hits the Headlines

[Episode webpage](#)

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Transcript

(lightly edited)



Soumaya Keynes 0:00

Hello, you are listening to an episode of Trade Talks, a podcast about the economics of trade policy. I'm Soumaya Keynes, the Trade and Globalization Editor for *The Economist*.

Chad P. Bown 0:09

And I'm Chad P. Bown, a senior fellow at the Peterson Institute for International Economics.

Soumaya Keynes 0:14

This week, we are going to explain a headline that you might have seen. On Friday, November 1, the World Trade Organization gave China permission to block \$3.6 billion dollars' worth of American exports. Now obviously, if you've been paying any attention, you will have worked out by now that economically this is not a massive deal, it is peanuts compared to the bigger trade war that obviously covers hundreds of billions of dollars of trade.

But symbolically, it is very important. It relates to some major frustrations that Americans have with the entire global trading system.



Chad P. Bown 0:54

We're going to hear from Peter Van den Bossche. Peter is a former member of the WTO's Appellate Body. We spoke to Peter back in October when we were in Geneva. And what we weren't discussing this specific case, our conversation with him ended up being pretty relevant for this week's announcement.

Soumaya Keynes 1:11

Now avid listeners to trade talks also remember that we have spoken about the American frustrations with what they see as a kind of European approach to law, and their concerns that that has taken over the Appellate Body. Now, Peter is a European trade lawyer. He was part of the Appellate Body for nine years from 2009 to 2017. And with that background, let's get to it.

Chad P. Bown 1:36

First, for those of you who didn't see the headlines, on Friday, November 1, a very old WTO dispute finally came to a head. The Chinese had been complaining for years that the Americans were breaking the rules, and they weren't getting some of the trade benefits that they were promised as being members of the WTO. And the WTO had ruled in China's favor. And since America still hasn't fixed the problem, China is now being allowed to rebalance the trading relationship with tariffs of their own.

Soumaya Keynes 2:06

Now, the really big thing to keep in your mind is what this dispute is all about. Obviously, it's a dispute, so it's about different things to each side. From the Chinese side, it's about America living up to its trade commitments and granting other countries including China, the trade access that they promised. On the American side, though, it's about whether the trading system gives them enough freedom to defend themselves against unfairly traded imports.

Chad P. Bown 2:38

And so this dispute is all about something called trade remedies. This is what we call it in the United States. The Europeans, they call them trade defense instruments.

So the story here is, under the WTO, America commits to pretty low tariffs for most of the products out there. But they also demand some exceptions to the global trading rules. They want to be able to impose higher tariffs for products that are coming into their market if they're sold too cheaply, so that's dumping; or for products that are coming in that have been unfairly subsidized, that's countervailing duties. These are trade remedies.



The United States is a really heavy user of these trade remedies, these exceptional tariffs. And American trade lawyers, they love fighting on behalf of American industries to try to get them these extra tariffs.

Soumaya Keynes 3:26

Since the beginning of time, other countries have been complaining about the way that America has applied these trade remedies. They say this is the Americans being heavy handed. There was a big negotiation over these trade remedy rules as part of the Uruguay Round. That's this big trade negotiation that happened in the early 1990s that created the World Trade Organization. But even after that round, even after the WTO was created, all these other countries carried on complaining that the Americans were being too blunt in their use of these defensive tools,

Chad P. Bown 4:08

And in the first 10 or 15 years of the WTO, there are a ton of disputes, formal disputes challenging US use of these trade remedies. But at first, none of this involves China. It's Europe, Japan, Canada, Mexico, India, Brazil, name almost any other country, and they're filing trade disputes against the US use of these trade remedies.

And there's a number of different ways in which they're unhappy with the United States and how they're using them. They're annoyed about 'zeroing,' a special way of calculating anti-dumping tariffs. We talked about that in Episode 45. They're annoyed because the United States is supposed to review and actually remove these tariffs after five years, and United States didn't really follow through with that commitment, something called 'sunset reviews.' Then there was a time when the Americans started just giving the collected tariff revenue in these cases to the petitioning industries that had asked for the protection in the first place, under something called the 'Byrd Amendment.' Trading partners weren't happy about that either.

You put it all together, and American trade remedies are just the single most disputed item in WTO dispute settlement history.

Soumaya Keynes 5:11

Just to back up a bit here, the trading system has this process for what happens when rules are broken, that is tougher than pretty much any other international organization around. If you break the rules, there are some independent judges who will say you've broken the rules, and they will authorize tariffs against you.

And there's a question, if you're the US, why do you sign up to this? Why do you sign up to a system that allows other countries to hit you with tariffs? And you do it because you think actually you'll be able to use this tool against other countries. When the US signs up to this WTO system of resolving disputes, it



thinks that it will be able to use it to hold its trading partners to account, like the Europeans without agricultural subsidies, all sorts of things. They think that they will essentially hold other countries feet to the fire.

And then what happens is that other countries turn around and say, we're in this system, and we're going to hold your feet to the fire. We're going to assess your trade remedies rules, against what we think that everyone has agreed as part of these multilateral negotiations.

Chad P. Bown 6:26

I agree. It didn't turn out as one-sided as the Americans might have anticipated that it would have been. They did file a lot of disputes against Europe, Canada, Japan, all these other countries on behalf of their exporters, trying to open up markets.

But yeah, they did get hit by this massive number of cases brought against American use of trade remedies. And not only did they have to face these cases, but the trading partners won most of these cases as well, case after case.

And you can imagine how that made the American legal community feel about this, including the current US Trade Representative, Robert Lighthizer, who was defending the American steel industry in a lot of cases brought against United States at the WTO.

And as they kept on losing these cases, then the Americans got frustrated. They said, we didn't actually give up the right to use these trade remedies; we didn't give up the right to do things like zeroing in these antidumping cases.

But in most of these cases, the litigation happens, the US loses the case, and the US says fine. We will redo the tariff calculation; we will reset the size of the antidumping duty without something like zeroing.

And the trading partner, the complaining country says okay, and we all just move on.

Soumaya Keynes 7:45

So that's the backstory. But now let's talk about China. And to reiterate, this was not a US-China issue at the beginning, but it has definitely become one. Now China is the number one target of American trade remedies.

Chad, this is your thing, right? Give us the numbers.

Chad P. Bown 8:00



You look at the data and yes, I spent far too much time looking at the data, about 10% of China's exports to the United States are hit with anti-dumping duties currently. That's because the US thinks that China's exports are too cheap.

And 7% of China's exports to the US are hit with countervailing duties, these anti-subsidy duties, where the United States is also claiming that China is subsidizing their production and exports.

Soumaya Keynes 8:30

Now the Chinese are upset about some of the same things that all these other countries were upset about. But they also have various complaints about the way that the system works that are quite specific to them.

So they're upset about America's way of applying both anti-dumping duties and countervailing duties at the same time on certain products. The Americans are basically hitting them twice with some duties.

The Chinese are annoyed that the Americans won't use Chinese prices as reference prices when they start making claims that stuff is being sold too cheaply. So that refers to the non-market economy dispute. China says, we're a market economy, you should use our prices, and America says no.

The other complaint is that the Chinese are frustrated that when the Americans look at the Chinese economy, to try to work out whether things are being subsidized, they are far too heavy handed. So the Chinese say just because something is a state owned enterprise, it doesn't mean that it is the state; it doesn't mean that it is capable of handing out subsidies. The Americans say nope.

It is tricky following the news on this and sorting out what all the various different complaints are. And just a warning sign of anyone consuming the news, because there are actually a few different disputes about these various different things, that are going on all at the same time.

But turning to Friday's case, the one that we're talking about in this episode, the most important bit of this dispute was about something that I don't think we've mentioned on trade talks before, a special treat, a new kind of trade law geekery, something called single rate presumption. Doesn't that sound exciting?

Chad, explain.

Chad P. Bown 10:15

The single rate presumption is basically treating all Chinese firms – that make the same product and sell it into the United States – to treat them all exactly the same.

And normally, in these anti-dumping cases, what you're supposed to do is treat each firm differently. You go and ask a firm, tell us about your cost, about how you make something, and we'll figure out a special anti-dumping duty for you.



What the United States is saying in these cases is, Chinese firms, we don't trust your numbers; we're going to calculate one single rate for all the firms out there.

And oh, by the way, that single rate is going to be massively high.

Soumaya Keynes 10:56

I'm sure the Americans might present it a little bit differently perhaps, a bit more nuanced. But sure, this is the Chinese complaint.

This specific case started in 2013 when China came up with dozens of different US antidumping tariffs that had been imposed over the previous decade. So these duties were in place, they were covering things like shrimp, sawblades, furniture, steel products, all sorts of things.

And they took the Americans to the WTO, they sued over these tariffs. And, as generally has tended to happen with these cases, China won. The US appealed, the case went to the Appellate Body, and China still won, they won again.

And then China said, hey, they haven't changed the tariff, we want to retaliate. And the WTO said the US has not changed its tariffs, China, you may retaliate.

Chad P. Bown 11:51

There was a fun, nerdy question about how the amount of retaliation is decided in these types of cases. And so the theory here is that because of America's rule breaking, China lost out on a certain amount of exports that it would have been supposed to sell into the US market.

Their retaliation is supposed to be set equivalent to that. The Chinese can hit back so that Americans lose out by the same dollar value of exports that the Chinese lost out on because of the US tariffs.

Soumaya Keynes 12:26

Now, obviously, the two sides are going to find it hard to agree on exactly how much was lost. In this case, the Chinese claim that all these duties eliminated \$7 billion of its exports each year.

The US said no, no, that is way too high. That's how much the anti-dumping duties stopped. But the bit that was breaking the WTO rules was only responsible for some of that. The rule breaking meant that our duties were too high, not that they shouldn't have been there at all.

If we had followed the rules, and reduced the antidumping tariffs by a bit, according to our fancy modeling, you would only have lost \$0.3 billion dollars' worth of exports each year.



Chad P. Bown 13:10

There's a big gap between \$7 billion and \$0.3 billion, obviously. And so it's the WTO's job to figure out what the right answer is.

And so what they do, the WTO arbitrators, in a case like this is they run their own model. And in this case, they estimated that China's lost exports were at about \$3.6 billion dollars per year. Now that \$3.6 billion dollars, it turns out that this is the third largest WTO-authorized retaliation ever. So that's pretty big in these types of cases. Though, in some sense, it's really 25 smaller cases all rolled up into one.

Soumaya Keynes 13:51

Now, we said at the beginning, this is pretty small change relative to the hundreds and hundreds of billions of dollars affected by the broader trade war. But it matters. It matters to what is about to happen to the WTO system of resolving disputes.

Now, I said that the Americans were unhappy about these cases. They've essentially become so frustrated with the system that they are going to get it. They are currently holding up the appointment of the WTO Appellate Body judges.

And from December 11th, there will be too few judges to rule on a case.

Chad P. Bown 14:29

And this underlying US-China dispute over trade remedies really is a poster case for two of the problems that the United States has with the Appellate Body: judicial overreach, and precedent.

Soumaya Keynes 14:43

In plain English, the Trump administration is blaming the WTO for the fact that it is losing all of these cases. It's claiming that its judges are overreaching and inventing commitments that America never signed up to. You hear the term judicial activism. These lawyers are being too active relative to what they're supposed to be doing.

And the Trump administration is saying that when these lawyers, when these judges, have made mistakes, it has been too hard to fix them to give America back its rights that it thought it had negotiated back in Uruguay Round when the WTO was being set up.

Chad P. Bown 15:19



Obviously, not everyone agrees with what the Americans are complaining about here. We spoke to former WTO Appellate Body member, Peter Van den Bossche, about the American concerns.

Peter Van den Bossche 15:29

If you look at the, not all, but the majority of the cases, in which the United States argues that the Appellate Body has been guilty of judicial activism, of overreach - actually overreach I think is a broader concept than traditional activism.

But if you look at the cases, they are primarily trade remedy cases. The United States has a problem with the zeroing case law. They have a problem with that case law. That is known that they have a problem with that case law. They've always voiced that concern.

Soumaya Keynes 16:06

Peter said that of course the Appellate Body should not be judicially active, that is not within its mandate. Lawyers are meant to interpret the law, not effectively add new laws. But he did not necessarily agree with the American take on the Appellate Body.

Peter Van den Bossche 16:22

The Appellate Body should not be judicially active. That's not within its mandate. It should not add to or diminish rights and obligations of members. I'm not condoning judicial activism. I'm not at all.

But I don't think that the United States has made the case that the Appellate Body has actually been guilty of judicial activism.

Chad P. Bown 16:45

With his nine years at the Appellate Body, Peter has obviously ruled on quite a few of these disputes. So it's probably not surprising that he thinks the Appellate Body has done its job fairly well. And when it's made rulings, it hasn't been creating new laws where it wasn't supposed to.

He also makes the point that for every case the Americans are upset that they lost, and where they think that the WTO lawyers went rogue, the other side is happy that the rules have actually been enforced.

Peter Van den Bossche 17:17



Traditional activism overreach is very much in the eye of the beholder. I did not hear the United States complain about judicial activism in cases where the Appellate Body ruled in favor of the United States on very controversial issues.

Soumaya Keynes 17:32

Now, obviously, lawyers will have strong views on the particular details of each case. I think it's a really difficult argument to make in the abstract, in general. It probably always does relate to details of specific cases, which means that it's very difficult to have a public discussion about what the problem is, but it also means that it's very difficult to come up with specific ways to fix it. Because the problem is with the way that the Americans think that the Appellate Body has implemented the rules and in individual cases. It's a very difficult argument to have basically.

The precedent issue is no easier. At this point, essentially, the US has lost a lot of these WTO disputes about these trade remedies. And it seems to them like the system is now stacked against them. Basically, this weight of past legal decisions is now very hard to reverse.

So you have cases of the Appellate Body going back to the earlier rulings against them, and saying, well, we are consistently going to rule against it now.

Chad P. Bown 18:38

And to the US, this looks a lot like precedent is being formed. These earlier cases are locking in the outcome of future cases. But in international law, they think that this idea of precedent shouldn't be there. We ask Peter about that.

Peter Van den Bossche 18:56

Well, first of all, the Appellate Body has repeatedly stated that there is no such thing as binding precedent in WTO dispute settlement.

At the same time, the Appellate Body has also said that there is a legitimate expectation of WTO remembers that the same legal issue will be treated in the same way in the future. And that's because the dispute settlement system is there to bring security and predictability to the multilateral trading system.

Now, how on earth are you going to bring security and predictability if a dispute settlement system and the bodies of that dispute settlement system feel free to decide one and the same issue differently on Monday than they do on Friday? You have to have consistency. So I think there is precedent in the sense that there has to be consistency in the case law in time. That consistency is essential.



But is it binding precedent? No, in the sense that if, at the panel stage, it is argued that either the particular case before the panel is somewhat different from the cases in the past, and you distinguish from them, and to say therefore, the case law does not apply. But it may also be that the panel argues they have to do that convincingly, that the Appellate Body got it wrong in the first place.

Soumaya Keynes 20:30

So, I feel like this sort of has the same problem as the question of whether there's been judicial overreach, which is that it is sort of in the eye of the beholder. It does come down to the way that individual cases have been ruled on. I've heard Americans talk about big symbolic cases that they wanted to win to show countries what wasn't okay, big systemically important cases. If there really isn't any precedent being set, and you can't really have systemically important cases.

Suppose America won a big case against China's showing that its subsidies broke the rules in some way. In that case, it will presumably welcome consistency in the way that the rules are being applied when it came to future subsidies.

Now, maybe this is just because I'm not a lawyer, but it seems to me that the complaints tend to be about the specific way that cases have gone, the specific way that judges have interpreted a certain set of rules. It's very hard to have the discussion in abstract about what exactly has gone wrong. And that also means that it's very difficult to have a solution in abstract.

Now, obviously, you know, it will be it will be very silly of me to try to adjudicate this issue on Trade Talks. And maybe at this point, I should just hand over to the lawyers, but to broadly explain what is going on, the Americans are just really aggravated. They think that these old decisions are bad, and that they are having too much influence over current ones.

Chad P. Bown 21:51

To me, what is clear is that this big set of WTO disputes, these trade remedy cases that the Americans have continued to lose, have generated a huge amount of frustration in the United States and ill will toward the trading system.

This is not a Trump administration phenomenon. This is broadly felt across administrations in United States, and very much across the Washington DC trade bar community.

But my question for all the American trade lawyers is whether it's been so bad that it's worth killing the entire WTO dispute settlement system over. And that seems to be very much the path that the Trump administration is taking.



Soumaya Keynes 22:35

And you'll hear trade lawyers get very upset about the Appellate Body. And I think in this area, one needs to be super precise about the counterfactual, and what we actually mean by not having an Appellate Body. And I think it would essentially mean that you'd have a risk of US-China to trade war with every single thing that you were upset about.

That is exhausting. It's not that fun for anyone. Is that really what we want?

Chad P. Bown 23:05

And it may extend well beyond the US and China, we have these big disputes between the United States and Europe over aircraft subsidies that we've talked about. Lots of frictions out there in the trading system that the dispute settlement system and the Appellate Body have managed over the decades. All of that could soon disappear.

On the underlying US-China stuff, maybe I'm being ridiculously optimistic, but in my ideal world, it would be really nice if the two countries, the United States and China could actually sit down and talk to each other about these kinds of issues. Maybe they could negotiate some sort of compromise where the United States could utilize some of these trade remedies without China getting overly upset by it, and in exchange for that the United States might give up something else that would be beneficial to China.

And if they could agree between each other, then they could go to the WTO and say, hey, screw this precedent thing, this is how we want these rules to be to be applied, to be interpreted.

Soumaya Keynes 23:58

I mean, who knows, Chad, maybe phase one is going to come out with a wonderful new set of trade remedies rules. We'll watch and wait for that.

Over the next few months, we will obviously return to this question of what's going to happen to the WTO, what could replace it, what countries are doing to try and have a backup system. I think for now, it looks like it's going to be killed in December. And this particular dispute will not have persuaded anyone in the Trump administration that it is worth saving.

And on that note, I think that is all for Trade Talks. A huge thank you to Peter Van den Bossche, former WTO Appellate Body member and now a professor at the World Trade Institute in Bern.

Chad P. Bown 24:47

Thanks also to Collin Warren who handles our audio.



Soumaya Keynes 24:51

Do follow us on Twitter. I'm @SoumayaKeynes.

Chad P. Bown 24:53

And I'm @ChadBown.

Soumaya Keynes 24:55

And we're on @Trade__Talks.

Chad P. Bown 25:00

That's not one but two underscores, @Trade__Talks.

Soumaya Keynes 25:03

Can't think of one. It happened. Is this the end of the end of the two underscores? Just run out of terrible jokes?

Chad P. Bown 25:18

Yeah, I've got nothing.

Soumaya Keynes 25:21

We are going to have to clip out some of that silence. We've just been silent for four minutes. Okay, that's it. That's it.

Chad P. Bown 25:29

Hold on.

Soumaya Keynes 25:29

No if listeners want one, they can tweet one out.