Reciprocity in Trade?

The Recent Initiative of the US President on "Reciprocal Trade and Tariffs"

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28.02.2025 doi: 10.59704/dc4fd99d64da494b

After the new American president announced his plans to impose "reciprocal" tariffs in a Memorandum of 13 February, economists and the media rushed to assess the potential future damage of such measures and to consider how to strike a deal to avert disaster. In the process, one serious damage that has already been done, remains unnoticed – no one is talking about the law. The plans fundamentally contradict the existing rules of the world trade order, in particular the USA's tariff obligations and the principle of providing the same benefits to all imports and exports – known as the most-favoured nation (MFN) treatment. However, breaking existing rules is hardly an argument by itself anymore – a victory on points. Nevertheless, this should not make us forget whose rights are at stake here: the rights of average American consumers, producers around the world as well as their governments, who rely on a rules-based world trade order. The US Constitution also comes to mind, as it assigns the principal competence for tariffs and foreign commerce to Congress rather than the president. The absence of a bolder protest against this flagrant disregard of the law might be due to a shared understanding that the existing rules-based international economic order is in a deplorable state. The crucial question, therefore, is whether we should quietly accept its final abolition by someone with the power to do so, or rather set about repairing it. Now, tariffs may be a very mundane matter. But what is at stake here is the more general and fundamental question of international law today: how do we deal with rules that were created in better times and are now in danger of disintegrating?

Reciprocity through unilateralism: the President's concept

After threatening Canada and Mexico with harsh tariff increases and implementing the same against China, the new US president has set in action what he announced during his first term, namely, to implement his peculiar idea of reciprocity and fairness in international trade by means of imposing additional tariffs on particular trading partners. Reciprocity, in this understanding, means that each US product exported to a foreign country would enjoy the same treatment, which a like product from that country enjoys in the US market. The memorandum further explains that the reciprocity is not only limited to foreign tariffs but would also include all sorts of potential trade barriers including taxes, regulations and measures affecting the terms of trade such as currency policies. The president has instructed various agencies to conduct investigations and propose actions.

Reciprocity, consensus, and mutual benefit: the multilateral trade system

With his initiative, the American president goes beyond disregarding long-standing US commitments and obligations. He aims at manipulating the existing international trade system in such a way that the US would be entitled to unilaterally change the previously agreed balance of market access obligations, without consent of affected parties and without offering them an advantage in turn.

Unlike the novel US view, it is precisely consensus and mutual advantage that constitute the core elements of reciprocity as one of the fundamentals of the established world trade order with the WTO at its center. Such reciprocity allows for a give and take that

can involve market access rights in diverse sectors and to varying degrees. For instance, an industrialised country can negotiate better export opportunities for its machinery and pharmaceuticals in turn for offering better access to its own market for foreign agricultural products. The goal behind this is to attain an international division of labour that not only makes the pie bigger for everyone, but also allows each individual participant to benefit from it. Moreover, if individual parties mutually agree on tariffs, they have to offer such treatment to all other Members under the MFN rule of Art. I:1 of the General Agreement on Tariffs and Trade (GATT). This rule has considerably amplified the effect of reciprocal liberalization while also benefitting smaller or less developed members.

Imposing tariffs for specific goods and comparing them in isolation means that the US gets to unilaterally pick and choose the goods and set the terms for global trade. It will utterly neglect the very core feature of the multilateral trade system – hardly an accident – that the level of tariffs varies between countries and sectors as a matter of past agreements, diverse levels of economic development, and economic structures of a given country.

Security exceptionalism as a justification?

The US president justifies the initiative on the grounds of national and economic security, without offering much in terms of reasoning or evidence to support this claim. According to the memorandum, he probably sees the alleged unfairness in international trade and the US trade deficit in goods or possibly even some sort of a "deindustrialization" as a national security concern. This would hardly fit into the patterns of interpretation of the security exemption clause of Art. XXI GATT. This only allows for WTO-inconsistent measures that are related to supplies for military establishments or situations of an emergency in international relations. However, the US and others maintain that the whole clause is self-judging. They do so even though WTO jurisprudence has established in the 2019 Russia-Transit dispute that the conditions of Art. XXI GATT are subject to some review and the clause altogether does not exempt states from the obligation to observe their treaty obligations in good faith. This "securitization" of international trade and the self-judgement results in a bold exceptionalism, which largely sets aside the established logic, discipline, and rules of the international trade system. The US has gone even one step further in asking partners in trade agreements not to question their approach.

The WTO: not an able remedy against the US, but still effective

Today, it seems hopeless to enforce WTO rules against the US. Already under President Obama the US began to dismantle the WTO's dispute settlement system and succeeded in blocking the Appellate Body. As a result, in addition to lacking an appellate review mechanism (the void), Members can now effectively prevent the first-instance panel decisions from being enforced just by filing an appeal 'into the void'. The US and others have taken advantage of this opportunity. This indefinitely pauses implementation of dispute settlement rulings. Whether this formalistic application of WTO rules was necessary is an open question. However, even without the prospect of later enforcement, decisions of WTO panels in the first instance would send a message of resistance against the US' destructive actions. Bringing complaints to the WTO dispute settlement should therefore be seen as an option to contest the US' actions. It is open to every Member to do so, as the WTO allows for something like an *actio popularis* as Art. 3.8 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) indicates. China has consistently pursued this approach, while the EU has been much more cautious so far.

Uncertainties for many, temptations for some and some coalitions

Even if the US cannot be stopped from undermining the WTO, the system continues to serve other Members, who depend on its rules for securing a minimum of predictability, justice, and participation. Bar the US, the WTO has also been successful in disciplining the exercise of power by other actors. However, while the current US policies themselves do not yet

directly threaten the system, the action of other Members in response to these policies might do. They could be tempted to enter into bilateral arrangements with the US which would further damage the multilateral rules. They could even engage their power and resources to emulate US practices. It cannot be ruled out that some actors will seriously consider one or even both options – leading to a gradual erosion of the system. This would particularly harm the smaller, weaker, and less developed Members, while others may enjoy some opportunistic gains. Depending on whom they are dealing with, they could either rely on the rules or use their powers or surrender to superior powers.

In the likely scenario of a further erosion of the WTO, many actors may turn to free trade agreements to stabilize their trade around the world. While such agreements have so far been concluded bilaterally, larger, multilateral structures are emerging. An example is the 2016 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which had been initiated by President Obama and abandoned by President Trump during his first term. With its eleven members in the pacific region, it now appears as a stronghold against the uncertainties of US trade policies and is likely to see the United Kingdom joining soon.

To the rescue of multilateralism

But, of course, all these agreements can hardly live up to what a multilateral system with the WTO as its core could achieve in terms of governing world trade, including facilitating predictability, justice, and participation. To be sure, the organization is currently far from delivering on its promises. It appears that it has carried its proper concept of reciprocity too far. Focusing on progress in large package deals for all gave too much power to individual veto players. This has blocked any success on the current WTO Doha round of negotiations for more than 20 years. To strengthen the resilience of the WTO, the organization would have to become much more effective. It would probably have to allow and encourage initiatives by individual Members and allow majority voting. Above all, the organization and its members would have to clarify and take into account that, beyond reciprocity and individual interest, the WTO pursues some common interest and requires its Members to act in that spirit.

In the eventful history of world economic governance, the US often played a controversial, sometimes even “disruptive” role. Only time will tell if the US might change course again. The other actors are faced with a difficult choice: they can either try to deal with the existing uncertainties on their own or they must make a significant collective effort to strengthen the existing system so that it continues to ensure a modicum of predictability, fairness and participation. To this end, it is not enough to rely on existing law as it stands. To preserve the system’s benefits, some continuous efforts have to be made in the common interest to secure its effectivity and legitimacy. The same holds true for other areas of international law in times of contestation.

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SUGGESTED CITATION

Stoll, Peter-Tobias: Reciprocity in Trade?: The Recent Initiative of the US President on “Reciprocal Trade and Tariffs”, Verfassungsblog, 28.02.2025, doi: 10.59704/dc4fd99d64da494b.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250301-001128-0.