

# Of Politics and Law: Analysing the Implications of the US-China Trade War on International Law and International Trade Law

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## Abstract

Since taking office in 2017, the president of the United States of America (US), Donald Trump has been on an offensive on the trade front. His administration has levied tariffs on goods coming from China, which retaliated by levying tariffs against the US. This has led to a trade war between these two economies. The economic warring took a turn for the worse with the arrest of Chinese financial executive for Huawei, Meng Wanzhou in Canada on request from the US Department of Justice. She was accused of making false statements to HSBC Bank in 2013 which significantly understated Huawei's relationship with Skycom. The arrest came after the US levied tariffs on Chinese goods, and also attempted to bar imports of Huawei products.

In light of the above, the question that begs for an answer is: Does the US-China trade war undermine the principles of international law and the WTO rules? The article aims to answer the question of the propriety or otherwise of the ongoing US-China trade war within the ambit of international law and the World Trade Organisation economic framework.

**Keywords:** international law; jurisdiction; extradition; rule of law; Trade War; World Trade Organisation; US-China Trade Deal



## Background

On 1 December 2018, Chinese national and chief financial executive of the technology company Huawei, Meng Wanzhou (Meng), was arrested and detained in Canada as she changed flights at Vancouver airport.<sup>1</sup> The arrest came at the behest of a United States of America (US) warrant, under which she was accused of making a false statement to HSBC, a US headquartered international bank in relation to Skycom Tech Ltd (Skycom), a subsidiary of Huawei in order to help Huawei evade US sanctions in Iran.<sup>2</sup> Huawei and Meng were charged with contravening Schedules 12 and 16 of the US-Canada Extradition Treaty. The charges relate to bank fraud, conspiracy to commit money laundering, and conspiracy to obstruct justice in the US.<sup>3</sup> If convicted, she faces up to ten years in prison. The US made a request to the Canadian authorities to extradite Meng so that she could be tried in the US courts.<sup>4</sup> These events have escalated to a point where China and the US are now engaging in a ‘tit-for-tat’ bilateral trade war.<sup>5</sup> Meng has since made an application to the Supreme Court of British Columbia to oppose her extradition to the US.

The article commences by giving a brief overview of the US-China trade war. It moves on to discuss the relevant provisions of the Economic and Trade Agreement between the governments of the US and China, 2020 (Phase One of the US-China Trade Agreement). Thereafter, the article looks at how the US-China trade war undermines the scope and objectives of the World Trade Organisation (WTO). The article then assesses if the US has jurisdiction to try Meng in its domestic courts. It found that the US has jurisdiction over Meng based on the protective and effects principles. From this basis, the article then deals with the extradition law pertaining to the arrest of Meng, and how the Canadian court interpreted the US-Canada Extradition Treaty<sup>6</sup> in the *Meng* case. The article then deals with the likely impact of the US-China trade war at the national and international level.

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<sup>1</sup> Chuck Chiang, ‘Meng Defence Zeroes in on Details of Vancouver Airport Arrest’ *Vancouver Courier* (1 October 2019) <<https://www.vancourier.com/news/meng-defence-zeroes-in-on-details-of-vancouver-airport-arrest-1.23963183>> 8 September 2020.

<sup>2</sup> *United States v Meng* 2020 BCSC 785 (*Meng*).

<sup>3</sup> *ibid* para 1.

<sup>4</sup> Paul Vieira, ‘Canada Gets Formal U.S. Extradition Request for Huawei CFO’ *The Wall Street Journal* (19 January 2019) <<https://www.wsj.com/articles/canada-gets-formal-u-s-extradition-request-for-huawei-cfo-11548774600>> accessed 5 October 2020.

<sup>5</sup> A trade war is defined as a category of intense international conflict where states interact, bargain, and retaliate over economic objectives directly related to the traded goods or service sectors of their economies. cf John Conybeare, *Trade Wars: The Theory and Practice of International Commercial Rivalry* (Columbia University Press 1987) 3.

<sup>6</sup> The Treaty on Extradition Between the Government of Canada and the Government of the United States of America E101323 – CTS 1976 No 3.

## The Upsurge of the US-China Trade War and Economic Tension

The arrest of Meng came in the wake of a declaration of a trade war<sup>7</sup> from Donald Trump's administration.<sup>8</sup> During the US's presidential campaign, Trump repeatedly mentioned his plan to revive the US economy by bringing back domestic manufacturing jobs that were being done overseas.<sup>9</sup> Part of his plan was to tax imports, specifically those from China, in order to protect domestic businesses.<sup>10</sup> Following through with his words from the presidential campaign, on his first day in office, Trump signed the executive order to withdraw the US from the Trans-Pacific Partnership Negotiations and Agreement,<sup>11</sup> and stated that he will tax Chinese imports by forty-five per cent.<sup>12</sup>

Before the official start of the trade war, the Trump administration unilaterally started what may be considered as a pre-emptive trade war against China by issuing a presidential memorandum to propose substantial tariffs on imported Chinese products in March 2018.<sup>13</sup> Trump further embarked on aggressive, unilateral, economic attacks, which saw the imposition of tariffs across a broad range of products from China.<sup>14</sup> The US opined that the intention behind the imposition of tariffs was to put pressure on China to change its existing policies toward foreign business.<sup>15</sup> However, economists criticised this act as being irrational and based on an outdated mind-set about global trade that primarily focuses on the exchange of final goods.<sup>16</sup> China, for its part, resorted

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<sup>7</sup> A trade war occurs when a nation imposes tariffs or quotas on imports, and foreign countries retaliate with similar forms of trade protectionism. As such, states are primarily concerned with economic objectives directly related to the traded-goods sector of the economy. cf John Conybeare, 'Trade Wars: A Comparative Study of Anglo-Hanse, Franco-Italian, and Hawley-Smoot Conflicts' (1985) 38(1) *World Politics* 147.

<sup>8</sup> The events continue to unfold and for practical reasons, it is difficult to discuss all of them.

<sup>9</sup> Thomas Duesterberg, 'Has Trump Delivered on his Promise to Revive US Manufacturing?' *Forbes* (23 October 2019) <<https://www.forbes.com/sites/thomasduesterberg/2019/10/23/has-trump-delivered-on-his-promise-to-revive-u-s-manufacturing/#6b93415f3231>> accessed 2 October 2020.

<sup>10</sup> Yi Huang and others, 'Trade Linkages and Firm Value: Evidence from the 2018 US-China Trade War' (2018) *Working Paper No HEIDWP11-2018* 6.

<sup>11</sup> White House, 'Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement' Agreement' (23 January 2017) <<https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific-partnership-negotiations-agreement/>> accessed 8 September 2020.

<sup>12</sup> *ibid.* In true Trump fashion, he had to fuel the trade war through Twitter. On 17 September 2018, Trump tweeted that 'Tariffs have put the US in a very strong bargaining position, with billions of dollars, and jobs flowing into our country and yet cost increases have thus far been almost unnoticeable. If countries will not make fair deals with us, they will be "tariffed."'

<sup>13</sup> Huang (n 10).

<sup>14</sup> In the wake of these American inspired trade wars, Trump arrogantly said that 'when a country (US) is losing many billions of dollars on trade with virtually every country it does business with, trade wars are good and easy to win. Example, when we are down \$100 billion with a certain country and they get cute, don't trade anymore – we win big. It's easy.'

<sup>15</sup> Huang (n 10).

<sup>16</sup> *ibid.*

to setting tariffs on USD110 billion worth of US goods.<sup>17</sup> The Customs Tariff Commission of China's State Council announced a further USD75 billion in tariffs on US goods.<sup>18</sup> China's Ministry of Commerce warned that the dispute might even lead to 'the largest trade war in economic history to date.'<sup>19</sup>

In May 2018, Trump's chief trade adviser Robert Lighthizer went to Beijing to propose methods aimed at opening up China's vast domestic market to American goods, and thereby reducing the ballooning trade deficit with China.<sup>20</sup> However, the meeting proved to be unsuccessful,<sup>21</sup> and a series of economic attacks continued from both sides.<sup>22</sup> In August 2018, Trump signed a bill that barred the US government from using Huawei equipment, and considered an executive order that would also ban US companies from doing so.<sup>23</sup> Since 2018 multiple rounds of negotiations have taken place between the US and China's trade representatives in Washington DC and Beijing, with hopes for an imminent settlement.<sup>24</sup> The negotiations were divided into two areas: (i) 'Trade issues', which included trade imbalances in certain sectors; and (ii) 'structural issues' such as forced technology transfers, intellectual property protection, and non-tariff barriers.<sup>25</sup>

On 13 December 2019, the US and China agreed on the terms of phase one of their trade deal.<sup>26</sup> This resulted in the US halting fifteen per cent tariffs on USD160 billion worth of goods. It also reduced tariffs on USD120 billion worth of Chinese goods from fifteen

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<sup>17</sup> Dorcas Wong and Alexander Koty, 'The US-China Trade War: A Timeline' *China Briefing* (13 February 2019) <<https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/>> accessed 24 March 2019.

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> Editorial Staff, 'Trump's Trade War Makes Political Sense to his Base. Rivals Must Beware' *The Guardian* (15 July 2018) <<https://www.theguardian.com/business/2018/jul/15/donald-trump-trade-war-makes-political-sense-other-countries-beware>> accessed 23 February 2019.

<sup>21</sup> *ibid.*

<sup>22</sup> Michael Collins, 'US Slaps Tariffs on Another \$200 Billion in Chinese Goods as Trade Tensions Escalate' *USA Today* (17 September 2018) <<https://www.usatoday.com/story/news/politics/2018/09/17/trade-war-trump-readies-tariffs-another-200-billion-chinese-goods/1336684002/>> accessed 9 September 2020.

<sup>23</sup> Editorial Staff, 'Huawei Sacks Employee Arrested in Poland on Spying Charges' *SABC News* (13 January 2019) <<http://www.sabcnews.com/sabcnews/huawei-sacks-employee-arrested-in-poland-on-spying-charges/>> accessed 15 January 2019.

<sup>24</sup> Melissa Cyrill, 'How Will the US-China Trade War End? We Explore 3 Scenarios' *China Briefing* (25 June 2019) <<https://www.china-briefing.com/news/how-will-us-china-trade-war-end-3-scenarios/>> accessed 24 March 2019.

<sup>25</sup> *ibid.* A 90-day trade war ceasefire was indefinitely postponed by Trump who announced that he expected a visit from President Xi in March 2019 to finalise a trade deal.

<sup>26</sup> Jim Zarroli, 'US-China Trade Deal Phase 1 Is Here: December Tariffs re Scrapped' *NPR News* (13 December 2019) <<https://www.npr.org/2019/12/13/787531540/u-s-china-trade-deal-phase-1-is-here-december-tariffs-are-scrapped>> accessed 3 October 2020.

to seven and a half per cent.<sup>27</sup> China agreed to increase the purchase of US goods and services by at least USD200 billion over the next two years; to suspend retaliatory tariffs; and to implement intellectual property safeguards.<sup>28</sup>

## Analysis of Relevant Provisions of Phase One of the US-China Economic and Trade Agreement

On 15 January 2020, Phase One of the US and China Trade Agreement was concluded.<sup>29</sup> The preamble to Phase One of the US-China Trade Agreement states inter alia that the parties recognise the importance of their bilateral economic and trade relationship; realise the need for trade to grow; and adherence to international norms in promoting market-based outcomes. The parties also acknowledge the existing trade and investment concerns, and the desire to resolve these concerns constructively and expeditiously.<sup>30</sup>

Phase One of the US-China Trade Agreement broadly covers eight chapters dealing with the following issues: Intellectual property; technology transfer; trade in food and agricultural products; financial services; macroeconomic policies and exchange-rate matters and transparency; expanding trade; as well as bilateral evaluation; and dispute resolution. Article 1.8(1) of Phase One of the US-China Trade Agreement requires the parties to provide for the application of criminal procedures and penalties to address wilful trade secret misappropriation. Article 1.8(2) states that China's criminal procedures and penalties shall at least encompass cases of trade secret misappropriation through theft, fraud, physical or electronic intrusion for an unlawful purpose, and the unauthorised or improper use of a computer system in the scope of prohibited acts. Article 1.8(3) states that the US affirms that existing US measures afford treatment equivalent to that provided for in this provision. Article 5.1 requires the parties to respect each other's autonomy in monetary policy in accordance with their domestic laws. Both the US and China undertook to pursue policies that strengthen underlying economic fundamentals, foster growth and transparency, and avoid unsustainable external imbalances.<sup>31</sup>

Phase One of the US-China Trade Agreement is definitely a step forward in an evolving relationship between these two largest economies as it may obviate the trade war between them. When compared with their position prior to the agreement, they are

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<sup>27</sup> *ibid.*

<sup>28</sup> Sergei Klebnikov, 'China Pledges to Buy \$200 Billion of American Goods under Phase One Trade Deal' *Forbes* (14 January 2020) <<https://www.forbes.com/sites/sergeiklebnikov/2020/01/14/china-pledges-to-buy-200-billion-of-american-goods-under-phase-one-trade-deal/#9f809e638bb2>> accessed 3 October 2020.

<sup>29</sup> Offshore Energy, 'US, China Reach 'Phase One' Trade Deal' (16 January 2020) <<https://www.offshore-energy.biz/us-china-reach-phase-one-trade-deal/>> accessed 2 October 2020.

<sup>30</sup> The preamble to Phase One of the US-China Trade Agreement.

<sup>31</sup> Article 5.1(3).

generally in a better position. However, the Agreement has the potential to put everyone in a worse position, except for the US. This is because the focus of Phase One of the US-China Trade Agreement is less centred on providing general obligations and more focussed on China to granting exclusive additional market access to US exporters in order to achieve explicit import targets.

The structure of Phase One of the US-China Trade Agreement is completely different from traditional international trade agreements. There are instances where one party undertakes certain obligations, while the other party undertakes totally different obligations in the same provision. For example, Article 1.3(1) of Phase One of the US-China Trade Agreement titled 'Scope of Actors Liable for Trade Secret Misappropriation' requires the parties to ensure that all natural or legal persons can be subjected to liability for trade secret misappropriation. However, Article 1.3(2) states that 'China shall define "operators" in trade secret misappropriation to include all natural persons, groups of persons, and legal persons', whereas Article 1.3(3) states that the US affirms that existing US measures afford treatment equivalent to that provided for in this provision. This is generally the design throughout the agreement. Many provisions of Phase One of the US-China Trade Agreement seem to suggest that the US trade laws are up to standard as it generally affirms that its existing laws provide treatment equivalent to that contained in the Agreement. This suggests that the Agreement is based on the US economic model, and China is required to align its economic laws with those of the US. At this point, the motivation for this approach is, however, not clear.

The absence of any independent mechanism to resolve disputes associated with Phase One of the US-China Trade Agreement marks a significant departure from current practices in preferential arrangements. Preferential Trade Agreements (PTAs) are generally aimed at lowering tariffs between member states. For example, the WTO rules on PTAs<sup>32</sup> are designed to ensure that member states do not evade the most favoured nation (MFN) principle against discrimination between trading partners by forming trade blocs for selected goods or services.<sup>33</sup> The focus of the agreement is less on providing general obligations that can be applied on an MFN basis, and more on China granting additional market access to US exporters, and dispute resolution mechanism. Tariff liberalisation is not covered in Phase One of the US-China Trade Agreement. However, this may be dealt with in the next phases of the trade deal.

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<sup>32</sup> Article 24 of the General Agreement on Tariffs and Trade, 1947 and Article 5 of the General Agreement on Trade in Services regulate preferential trade agreements in services between members of the World Trade Organisation.

<sup>33</sup> World Bank, 'Chapter II. The Impact of the China-US Trade Agreement' (April 2020) <<https://openknowledge.worldbank.org/bitstream/handle/10986/33477/211565-ch04.pdf?sequence=33&isAllowed=y>> accessed 30 September 2020.

## The Parameters of the WTO in Settling Trade Related Conflicts between Member States

To form a balanced judgement of the US-China trade war, it is necessary to look at the parameters of the WTO. In 1946, states began the first round of negotiating a treaty aimed at regulating trade relations between them. In 1948, the General Agreement on Tariffs and Trade (GATT) was concluded in Havana.<sup>34</sup> The GATT system had major flaws which affected its success. For example, its provisional nature meant that it lacked legal status, and as a result, existing domestic legislation could continue to be applied even if it violated the GATT.<sup>35</sup> Its limited scope of application and lack of a binding dispute settlement mechanisms to hold countries accountable for violating the agreement was also a major flaw of the system.<sup>36</sup> As such, its member states could block the formation of arbitration panels and the adoption of the decisions of such panels, allowing violators to avoid punishment. Even though the GATT had flaws,<sup>37</sup> it succeeded in promoting and securing the liberalisation of world trade.<sup>38</sup>

The GATT was also affected by the economic recession in the 1970s and early 1980s which drove states to devise other forms of protection for sectors facing increased foreign competition.<sup>39</sup> High rates of unemployment and constant factory closures led governments in Western Europe and North America to seek bilateral market-sharing arrangements with competitors.<sup>40</sup> These changes undermined GATT's credibility and effectiveness, and forty-eight years later, states started another round of negotiations, which resulted in the conclusion of the WTO Agreement in Marrakesh in 1995.<sup>41</sup>

The creation of the WTO marked the biggest reform of international trade since the Second World War.<sup>42</sup> The WTO Agreement is the institutional agreement and asserts its own supremacy in the hierarchy of trade agreements.<sup>43</sup> The main purpose of the WTO Agreement is to regulate and supervise the multilateral economic and trade relations

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<sup>34</sup> WTO, 'The GATT Years: From Havana to Marrakesh' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)> accessed 8 September 2019. cf Bernhard Zangl, 'Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO' (2008) 52(4) *International Studies Quarterly* 825–854.

<sup>35</sup> *ibid.*

<sup>36</sup> Philippe Xavier, 'The Dispute Resolution Mechanism of the World Trade Organisation Five Years After its Implementation' (1999) *Law Democracy and Development* 71.

<sup>37</sup> Richard Gardner, 'The Bretton Woods-GATT System after Sixty-Five Years: A Balanced Sheet of Success and Failure' (2008) 47(1) *Columbia Journal of Transnational Law* 40.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> Agreement Establishing the WTO of 1994.

<sup>42</sup> *ibid.*

<sup>43</sup> Article 16 of the WTO Agreement. cf Art (2) of the WTO Dispute Settlement Understanding (WTO DSU).

among states. It does this by: (a) administering trade agreements; (b) acting as a forum for trade negotiations; settling trade disputes; (c) reviewing national trade policies; (d) building the trade capacity of developing economies; and (e) cooperating with other international organisations.<sup>44</sup> Members of the WTO have affirmed that they will adhere to the principles, rules and procedures of the WTO Agreement.<sup>45</sup>

The WTO Agreement has centralised all trade related agreements and put in place a forum for negotiating matters relating to trade relations including tariffs.<sup>46</sup> Trade disputes are channelled into the WTO's dispute settlement process, where the focus is on interpreting agreements and commitments.<sup>47</sup> In this way, the risk of disputes spilling over into political or military conflict is reduced. Annexure 2 of the WTO Agreement contains the WTO Dispute Settlement Understanding (DSU) that deals with the settlement of disputes. Member states are required to refer their disputes to the Dispute Resolution Body (WTO DSB).<sup>48</sup>

Article 23 of the WTO DSU states that 'when members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures' of the WTO DSU. This provision obligates member states by using the term 'shall' to strengthen the WTO's mandatory powers during the dispute resolution process. Article 3(2) of the WTO DSU states that the central element of the WTO dispute settlement system is 'providing security and predictability to the multilateral trading system.'

Both the US and China are members of the WTO.<sup>49</sup> When China decided to initiate the consultation process<sup>50</sup> against the US with the WTO DSB on 2 September 2019, their trade war had already been going on for more than a year.<sup>51</sup> However, Article 3(3) of

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<sup>44</sup> WTO, 'WTO in Brief' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm)> accessed 8 September 2020.

<sup>45</sup> Article 3 of the WTO DSU.

<sup>46</sup> Article 3(2) of the WTO Agreement.

<sup>47</sup> Annexure 2 of the WTO Agreement contains the Dispute Settlement Understanding (WTO DSU) that deals with the settlement of disputes. As such, member states are required to refer their disputes to the Dispute Resolution Body.

<sup>48</sup> Article 2 of the WTO DSU.

<sup>49</sup> The US became a member of the WTO in January 1995; China became a member of the WTO in December 2001.

<sup>50</sup> The request for consultations formally initiates a dispute in the WTO. Consultations give the parties an opportunity to discuss the matter and to find a satisfactory solution without proceeding further with litigation.

<sup>51</sup> WTO, 'DS587: United States-Tariff measures on certain goods from China III' (2 September 2019) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds587\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds587_e.htm)> accessed 17 November 2019. The US accepted the request for consultation but also noted additional tariffs imposed by China in its response.



the WTO DSU provides that before bringing a case to the panel, member states should exercise judgement as to whether the intended action would be fruitful. The WTO DSU does not specify any timeframe to bring matters to the panel. This means that member states have a discretion as to when they can bring matters to the panel. As a result, member states may delay the initiation of proceedings if they believe that the panel will not resolve their dispute. This gap in the WTO system may have adverse effects because it may struggle to avert a potential global crisis, if its member states have a wide discretion to bring trade disputes to the attention of the panel.

What is interesting is that Phase One of the US-China Trade Agreement does not follow the current system of independent dispute settlement mechanisms. It has established a Bilateral Evaluation and Dispute Resolution Arrangement (BEDRA) in charge of dispute settlement between the two parties.<sup>52</sup> The purpose of BEDRA is to resolve issues related to the parties' economic and trade relationship in a fair, expeditious, and respectful manner, and to avoid the escalation of economic and trade disputes.<sup>53</sup> If China and the US defy the WTO system, its security and predictability may be undermined. For this reason, progress of the US-China Trade deal will require both states to comply with their WTO commitments, and to make certain reforms that affect some areas of state control over their economies. US and China need to appreciate that the WTO contains core principles such as non-discrimination, transparency, and the rule of law which forms a baseline of sustainable trade relations. Indeed, the two reasons for the centralisation of the WTO are: First, that the conduct of its members has the potential to directly or indirectly affect the economy of other members. Member states, irrespective of size or economic status, agree to a trade dispute mechanism to avoid unilateral responses to differences and potential trade conflicts.<sup>54</sup> This is intended as a defence against capricious tariffs, quotas, or other unfounded restrictions.<sup>55</sup> However, if the very same members do not trust the WTO to resolve conflicts, then the WTO does not stand a chance of survival. Second, since the WTO has a centralised system, its failure may lead to the creation of more international trading blocs. The uncertainties accompanying the overlapping international obligations emanating from various international agreements is a concern for many economies. Both the US and China affirm their existing rights and obligations with respect to each other under the WTO Agreement.<sup>56</sup> However, the exclusion of the WTO from Phase One of the US-China Trade Agreement may force other governments to reconsider how to enforce their laws to the exclusion of the WTO. The US has continuously undermined the WTO and has

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<sup>52</sup> Article 7.1(1) of Phase One of the US-China Trade Agreement.

<sup>53</sup> *ibid* Art 7.1(2).

<sup>54</sup> Carl Tannenbaum and others, 'Is the WTO Losing Relevance?' (Vaibhav Tandon Northern Trust Report, 17 November 2018) <<https://www.northerntrust.com/africa/insights-research/2018/market-economic-commentary/wec/is-wto-losing-relevance>> accessed 12 September 2019.

<sup>55</sup> *ibid*.

<sup>56</sup> Article 7.6 of Phase One of the US-China Trade Deal.

said in the WTO Doha ministerial round that it will not support the WTO to the extent that it does not regard US interests as paramount.<sup>57</sup>

## Jurisdictional Issues on the Arrest of Meng

### **Establishing US Jurisdiction over Meng in Accordance with International Law**

Meng's arrest was for the purpose of determining whether she should be extradited to the US to stand trial in terms of the US-Canada Extradition Treaty. Before she can be extradited, the US must show that it has jurisdictional grounds. In other words, there should be a legal basis to hear and dispose of the matter. The *SS Lotus (France v Turkey)*<sup>58</sup> case expounded the following principles for jurisdiction: First, 'a state may not exercise its power in any form in the territory of another state unless there is a permissive rule to the contrary.' Second, 'international law does not prohibit a state from exercising jurisdiction in its own territory, in respect of any case that relates to an act which has taken place outside its territory.'<sup>59</sup> Third, the court held that 'states have a wide measure of discretion to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their own territories.'<sup>60</sup> Last, 'territoriality of criminal law is, therefore, not an absolute principle of international law.'<sup>61</sup>

There are various grounds for jurisdiction in international law that are accepted by states as flowing from international customary law.<sup>62</sup> The general principles that form the basis for jurisdiction can be summarised as follows: The territoriality principle, the nationality principle, passive personality, the protective principle, the effects principle, and universal jurisdiction.<sup>63</sup> The US government will have to prove jurisdiction over the matter based on at least one of these accepted jurisdictional grounds.

The first ground of jurisdiction is territoriality and it enjoys primacy in the larger scheme of jurisdiction.<sup>64</sup> The territoriality principle grants states the power to assert jurisdiction over criminal acts that occurred in their territory, and over persons responsible for such

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<sup>57</sup> Suhail Nathani, 'The Decline of the WTO' (*LiveMint*, 20 December 2017) <<https://www.livemint.com/Opinion/EfWh3TopFTyctnCWMUQYJK/The-decline-of-the-WTO.html>> accessed 20 November 2019.

<sup>58</sup> *France v Turkey* 1927 PCJ Reports, Series A no 10 (the *Lotus* case). In this case, a French ship (the *Lotus*) collided with a Turkish ship, the *Boz-Kourt* on the high seas. The latter ship sank, and several crew members and passengers died. The *Lotus* picked up the survivors and put port in Turkey where they were tried and convicted of culpable homicide. France objected to Turkey's exercise of jurisdiction and the dispute was referred to the Permanent Court of International Justice.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> Hennie Strydom (ed), *International Law* (Oxford University Press 2016) 242.

<sup>63</sup> *ibid* 242–252.

<sup>64</sup> *Bankovic v Belgium and 16 other States* 2002 (41) ILM 517, 123 ILR 94.

criminal acts, whatever their nationality.<sup>65</sup> This is based on the practical reason that the territorial state is the most relevant place for a trial since witnesses and items of evidence are present there and may be easily accessible.<sup>66</sup> Meng's company, Skycom was based outside the US (Hong Kong) before it was dissolved in 2017.<sup>67</sup> Therefore, the US will not have jurisdiction based on the territoriality principle since the alleged crime was committed in Hong Kong.

The second ground is nationality. In terms of this principle, a state may punish its nationals for criminal acts committed abroad.<sup>68</sup> The nationality of the perpetrator thus clothes the national court with jurisdiction.<sup>69</sup> The US will not have jurisdiction in terms of the nationality principle over Meng, since she is a Chinese national.

The third ground is the passive personality principle. In terms of this principle, a state may exercise jurisdiction over a person (a foreigner) who commits an offence abroad, which harms one of its own nationals.<sup>70</sup> This principle often finds argument that every state has a right to protect its citizens regardless of where they are.<sup>71</sup> It allows a state whose national was injured to proceed against the perpetrators if they come within its territory.<sup>72</sup> In terms of this principle, the US will not have jurisdiction in terms of the passive personality principle over Meng because she did not commit the offence against nationals of the US.

The fourth ground is the protective principle, which enables a state to exercise jurisdiction over foreigners who commit an offence in a foreign territory by threatening the national security of the prosecuting state.<sup>73</sup> This form of jurisdiction can be extended to conduct which affects the integrity, independence, and economic interests of states.<sup>74</sup> The US claimed that Meng misrepresented herself to HSBC bankers in relation to Skycom in order to help Huawei evade US economic sanctions in Iran. Therefore, the US may claim jurisdiction on account of the protective principle.

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<sup>65</sup> John Dugard, *International Law: A South African Perspective* (Juta 2012) 149.

<sup>66</sup> Mitsue Inazumi, 'Universal Jurisdiction in Morden international Law: Expansion of National Jurisdiction for Prosecuting Crimes under International Law' (LLM, Universiteit Utrecht 2005) 85.

<sup>67</sup> Editorial Staff, 'Justice Department Details Charges Against Chinese Tech Giant Huawei and Its CFO' *Time* (18 December 2018) <<http://time.com/5514960/charges-against-meng-wanzhou-huawei/>> accessed 6 February 2019.

<sup>68</sup> Strydom (n 62).

<sup>69</sup> Angelo Dube, 'The Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 – An Aborted Takeoff' (2018) 51(3) CILSA 33.

<sup>70</sup> Strydom (n 62).

<sup>71</sup> Dube (n 69).

<sup>72</sup> Alfred Boll, *Multiple Nationality and International Law* (Martinus Nijhoff 2006) 130.

<sup>73</sup> Dube (n 69).

<sup>74</sup> Surinder Verma, *An Introduction to Public International law* (Springer Verlag 1998) 151.

The fifth ground is the effects principle. The scope and application of the effects principle is a controversial one among scholars. This principle affords the prosecuting state jurisdiction over acts performed in another state if the substantial effects were felt in that state.<sup>75</sup> The US may exercise jurisdiction over Meng since it can argue that the effects of her actions were felt in its territory, and it incurred financial loss which could have been claimed from Skycom.

The last ground is universal jurisdiction. This principle grants states which have no connection with either the individual, the crime, or the victim, to try the matter in their own territories.<sup>76</sup> The following requirements must be met before a state can claim this form of jurisdiction: (1) the crime must be of a heinous character; (2) the crime must be an affront to entire humankind; and (3) the crime must have taken place on *terra nullius* (nobody's land).<sup>77</sup> This principle is also connected to the principle *jus cogens* which states that certain international law obligations are binding on all states.<sup>78</sup> The US may not claim jurisdiction over Meng in terms of this principle because her conduct does not meet the above-mentioned requirements.

### **International Law Applicable to the Arrest and Extradition of Meng**

The issue of jurisdiction in international law is directly linked to the issue of extradition since only a state that has jurisdiction may extradite a person. Extradition is defined as the delivery of the accused or a convicted individual to the state where he/she is accused of, or has been convicted of a crime, by the state on whose territory he/she happens to be at the time of requesting the extradition.<sup>79</sup> Therefore, extradition is constrained by jurisdiction as it underlies the punitive justice structure of states.<sup>80</sup>

The internationalisation of crimes has made national law enforcement authorities increasingly dependent on the international cooperation of other states.<sup>81</sup> However, international law does not recognise a legal duty to surrender a person accused of or convicted of a crime to another state.<sup>82</sup> This obligation generally emanates from

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<sup>75</sup> Strydom (n 62).

<sup>76</sup> Dube (n 69).

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

<sup>79</sup> Robert Jennings and Arthur Watts (eds), *Oppenheims International Law* (Oxford University Press 1992) 949.

<sup>80</sup> UN *Manual on International Cooperation in Criminal Matters related to Terrorism* (UN 2009) 32.

<sup>81</sup> *ibid.*

<sup>82</sup> Ivan Shear, *Extradition in International Law* (Manchester University Press 1971) 237.

extradition agreements between states.<sup>83</sup> Thus, extradition is a political process<sup>84</sup> which is dependent on the relationship between two countries.<sup>85</sup>

Most extradition agreements contain what is known as a dual criminality clause,<sup>86</sup> which is universally recognised as central to extradition law.<sup>87</sup> It stems from the foundational principle of reciprocity, and requires that the conduct complained of be a criminal offence in both the requesting and the requested state.<sup>88</sup> The dual criminality principle is intended to ensure that a state does not use its processes to secure the surrender of a person for a conduct which the requested state does not characterise as a crime.<sup>89</sup> It stems from the maxim *nulla poena sine lege* (no punishment without law). This view was further affirmed in the South African case of *Patel v S*,<sup>90</sup> which dealt with the requirements for dual criminality. The court in this case held that for an offence to be extraditable, the conduct complained of must be an offence in both the requested and requesting states at the time of the alleged commission, at the time of the enquiry, or, at least, at the time the extradition request was received.<sup>91</sup> Even though this principle has no international customary law status, it has been endorsed in treaties and domestic legislation.<sup>92</sup>

Article 2 of the US-Canada Extradition Treaty contains a double criminality clause and requires the offence for which extradition is sought to be a crime in both countries. Schedule 12 of the US-Canada Extradition Treaty makes ‘obtaining property, money or valuable securities by false pretence or by threat of force or by defrauding the public or any person by deceit or falsehood or any other fraudulent means’ an offence. Schedule 16 deals with fraud by a banker, an agent or a director of a company.

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<sup>83</sup> *ibid.* These treaties vary by the offences covered, some exclude a nation’s own citizens or anyone facing capital punishment.

<sup>84</sup> The extradition process is as follows; the country seeking extradition compiles evidence that contains the nature of the charges and the evidence upon which the charges are based. The records are then sent to the country where the fugitive is. Once a request is received, a country must determine if there is sufficient evidence to support extradition, and it is often the minister of justice who gives a formal order.

<sup>85</sup> Anna MacCormack, ‘The United States, China, and Extradition: Ready for the Next Step?’ (2009) 12 *Legislation and Public Policy* 448.

<sup>86</sup> Dual criminality requires that a person be extradited only for conduct that is criminalised by the laws of both the surrendering and requesting countries.

<sup>87</sup> *Canada (Justice) v Fischbacher* 2009 SCC 46 para 26.

<sup>88</sup> *MM v United States of America* 2015 SCC 62 para 207.

<sup>89</sup> MacCormack (n 85).

<sup>90</sup> *Patel v S* (A101/2014) [2015] ZAGPJHC 188.

<sup>91</sup> *ibid* paras 12 and 42.

<sup>92</sup> Sharon Williams, ‘Double Criminality and the Extradition: A Comparative Analysis’ (1991) 15(2) *Nova Law Review* 582.

China has no extradition treaty with the US. In situations where countries concerned do not have an extradition agreement in place, the extraditing country will issue a red notice indicating that there is an outstanding warrant of arrest of a person in their territory.<sup>93</sup> Red notices are not typically made public, but a person may be arrested on the basis of a red notice as soon as that person arrives at a border crossing or airport in a third country that has an extradition treaty with the contracting state.<sup>94</sup> This is the case between the US, China and Canada. Even though the US does not have an extradition treaty with China, it does have in place an extradition treaty with Canada where Meng was arrested.

In January 2020, Meng made an application to the Supreme Court of British Columbia to oppose her extradition to the US. In her application, she relied on the provisions of the Canada-US Extradition Treaty and requested the court to determine whether the crime with which she is charged is a crime in Canada where she was arrested. She further requested the court to discharge her from the extradition process on basis that the double criminality requirement for her extradition was not met.<sup>95</sup> As a point of departure, she opined that the conduct complained of could not have amounted to fraud in Canada because it relates entirely to the effects of US economic sanctions against Iran, and at the relevant time, Canada had no such sanctions.<sup>96</sup>

The parties agreed that prior to this case, Canada had repealed most of its sanctions including the prohibition against financial services to or from Iran, and has not reintroduced them.<sup>97</sup> In other words, the parties agreed that at the time the authority to proceed was issued, financial institutions operating in Canada would not have been at risk of penalty for engaging in financial transactions or providing credit to companies doing business in Iran.<sup>98</sup> However, the parties disagreed fundamentally about whether the alleged conduct of Meng amounts to fraud in terms of section 380(1)(a) of the Criminal Code of Canada of 1985 (Criminal Code of Canada) and as such meets the double criminality requirements.<sup>99</sup>

On one hand, Meng made the following arguments: First, that the conduct complained of cannot amount to fraud because in essence, the proposed prosecution is to enforce US sanctions and laws against Iran, and this measure is not part of Canadian law because Canada expressly rejected it.<sup>100</sup> As a result, this amounts to ‘an artificiality to cast the

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<sup>93</sup> Lorraine Finlay, ‘Explainer: What is an Interpol Red Notice and How Does it Work?’ *The Conversation* (30 January 2019) <<https://theconversation.com/explainer-what-is-an-interpol-red-notice-and-how-does-it-work-110688>> accessed 5 April 2019.

<sup>94</sup> *ibid.*

<sup>95</sup> *Meng* para 1.

<sup>96</sup> *Meng* para 3.

<sup>97</sup> *Meng* para 28.

<sup>98</sup> *ibid.*

<sup>99</sup> *Meng* para 29.

<sup>100</sup> *Meng* para 30.

case as one of fraud against a bank, because the [US] can have no real interest in policing private dealings between a foreign bank and a private citizen on the other side of the world.<sup>101</sup> Second, that for Canada to extradite for conduct that does not infringe its own laws and standards undermines the rule of law and the principle of fundamental justice, including those that prevent punishment for conduct not clearly prohibited by law.<sup>102</sup> Third, that if the conduct complained of is not a crime in Canada, the *actus reus* (objective element of the crime) of fraud cannot be made out against her. Lastly, that the *mens rea* (the intention or knowledge of the element of the crime) cannot be met with no sanctions under Canadian law. In this respect, she could not be said to have intended or foreseen the conduct complained of as a consequence of her false statements.<sup>103</sup>

On the other hand, the US made counter arguments against Meng by putting forward two legal bases: one that does not require any consideration of US sanctions; and the other relying on US sanctions with a limited purpose of explaining why the alleged misrepresentations mattered.<sup>104</sup> With regard to the first basis, the US argued that double criminality for Meng's conduct may be established in this case without reliance on US sanctions because Meng's false statements about Huawei's relationship to Skycom prevented HSBC from taking into account all of the material facts when it assessed the risk of maintaining the client relationship.<sup>105</sup> As such, this has put HSBC at risk, whether or not there was any real possibility of loss in the circumstances.<sup>106</sup> The basis of this risk, according to the US, was entirely independent of US sanctions and is sufficient on its own to satisfy the double criminality test in relation to fraud.<sup>107</sup> Regarding the second basis, the US argued that the double criminality analysis may properly take US sanctions into account as part of the foreign legal backdrop against which the essential conduct is to be understood.<sup>108</sup> In this regard, the US opined that Meng's approach, which is unduly literal in transposing to Canada the alleged acts and consequences, and without consideration of the context in which they took place, distorts the double criminality test and defeats the objectives of the extradition treaty.<sup>109</sup>

With regard to Meng's arguments, the court held that Meng's approach unduly isolates each of the specific facts which are said to comprise the overall fraud. For the conduct (fraud) to be considered as though it took place in Canada, it must have a more general

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<sup>101</sup> *ibid.*

<sup>102</sup> *Meng* para 32.

<sup>103</sup> *Meng* para 34.

<sup>104</sup> *Meng* para 36.

<sup>105</sup> *Meng* para 37.

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> *Meng* para 38.

<sup>109</sup> *ibid.*

scope than her position allows.<sup>110</sup> The court reasoned that domestic prosecution for fraud could properly take place in Canada on the basis of false statements made in Canada that put a US bank at an economic risk for violating US sanctions.<sup>111</sup> If sufficient events occurred in Canada to establish jurisdiction to prosecute in Canada, the Canadian law of fraud looks beyond international boundaries to encompass all the relevant details that make up the factual matrix, including foreign laws that may give meaning to some of the facts.<sup>112</sup> Since a domestic prosecution could in this way rely indirectly on the effects of US law, it is difficult to understand why the domestic aspect of a double criminality analysis in an extradition proceeding should not do so as well.<sup>113</sup> In this regard, the court concluded that it cannot agree with Meng's arguments, since Canada's laws determine whether the alleged conduct, in essence, amounts to fraud.<sup>114</sup> Meng's approach to double criminality, the court held, would seriously limit Canada's ability to fulfill its international obligations in the extradition context for fraud and other economic crimes.<sup>115</sup>

In its analysis of the US's legal basis for extradition, the court relied on the cases of *R v Knowles*,<sup>116</sup> and *R v Olson*.<sup>117</sup> In this regard, the court held that it is not a fraud to simply lie, where the lie is unrelated to any potential loss or risk of loss to the deceived party.<sup>118</sup> For this reason, the risk cannot be merely theoretical.<sup>119</sup> The false statement or misrepresentation must have been a material or meaningful one in the sense that it could give rise to a loss or risk of loss.<sup>120</sup> The risk of loss must be real and integrally connected with the dishonest act or statement.<sup>121</sup> Concerning the first basis, the court correctly concluded that it cannot accept that double criminality for Meng's conduct may be established without reliance on US sanctions.<sup>122</sup> In the case of *R v Riesberry*,<sup>123</sup> the court held that for the alleged conduct to meet the dual criminality requirement, there must be proof of sufficient causal connection between the fraudulent act and the victim's risk of deprivation, which is not too remote.<sup>124</sup> Using this case as a yardstick, the court held that the US appears to opine that:

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<sup>110</sup> *Meng* para 60.

<sup>111</sup> *Meng* para 61.

<sup>112</sup> *Meng* para 61.

<sup>113</sup> *Meng* para 62.

<sup>114</sup> *Meng* para 81.

<sup>115</sup> *Meng* para 82.

<sup>116</sup> *R v Knowles* (1979) 51 CCC 237.

<sup>117</sup> *R v Olson* (2017) BCSC 1637.

<sup>118</sup> *Meng* para 41.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> *Meng* para 39.

<sup>123</sup> *R v Riesberry* 2015 SCC 65 (*Riesberry*).

<sup>124</sup> *Riesberry* paras 17, 26–28.



[E]conomic or reputational risk to HSBC arose from the simple fact that Ms. Meng misrepresented Huawei's relationship with Skycom in order to maintain the financing relationship, because the misrepresentation deprived HSBC of the ability to make an informed decision about dealing with Huawei. While such may be so, for there to have been a deprivation it nonetheless remains necessary for the evidence to show a causal link between the misrepresentation and the information HSBC needed to make a decision, whether or not HSBC actually relied on that information.<sup>125</sup>

The court held that it is difficult to discern such link in the current case without reference to the US sanctions. The record of the case does not set out a causal basis beyond the theoretical or speculative level for economic or reputational risk to HSBC as a result of Meng's alleged misrepresentation.<sup>126</sup> The US described the potential loss or risk of loss to HSBC as unrelated to US sanctions. However, the court disagreed with this view, and held that the US appears to submit that economic or reputational risk to HSBC arose from the simple fact that Meng misrepresented Huawei's relationship with Skycom to maintain the financing relationship.<sup>127</sup> The court dismissed Meng's application and concluded that as a matter of law, the double criminality requirement for extradition is capable of being met in this case. The court used the effects principle and held that the US sanctions may properly play a role in the double criminality analysis as part of the background or context against which the alleged conduct may be examined.<sup>128</sup>

Like most extradition cases, the *Meng* case tested the parameters of the rule of law in international relations. The US and Meng agreed that Canada repealed most of its sanctions including the prohibition of financial services to or from Iran.<sup>129</sup> However, they disagreed fundamentally about whether Meng's conduct amounts to fraud, and whether the double criminality requirements in terms of section 380 of the Criminal Code of Canada have been met.<sup>130</sup> The court's interpretation of section 380 of the Criminal Code of Canada and principles of extradition law is correct because double criminality as an example of reciprocity accepts differences in foreign approaches to the rule of law.<sup>131</sup> The court in the *Meng* case followed the conduct-based approach. This approach permits the fulfilment of the purpose by accepting differences in the elements of the foreign offence while recognising the similarities between two countries. If one uses this approach, the purpose of section 380 of the Criminal Code of Canada would be the prevailing factor in assessing whether the double criminality requirement has been met. The contrast is the offence-based approach, which compares the elements of the foreign offence and those of an equivalent domestic offence. This approach is very

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<sup>125</sup> *Meng* para 45.

<sup>126</sup> *Meng* para 52.

<sup>127</sup> *Meng* para 45.

<sup>128</sup> *Meng* para 88.

<sup>129</sup> *Meng* para 28.

<sup>130</sup> *Meng* para 29.

<sup>131</sup> *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 para 844 (*Kindler*).

strict, and the court would have had to only look at the literal meaning of section 380 of the Criminal Code of Canada without assessing its purpose.

Using the *Fischbacher* case and the conduct-based approach, the court interpreted fraud broadly, and concluded that Meng's conduct meets the definition of fraud in terms of section 380(1)(a) of the Criminal Code of Canada. The conduct-based approach asks whether the conduct in the foreign jurisdiction could amount to an offence under domestic law. In this regard, the court held that Canada has expressly rejected the offence-based approach, and for this reason, the foreign offence need not have exact elements of the Canadian offence.<sup>132</sup> By using the conduct-based approach, the court correctly applied the purposive approach when interpreting fraud for the purpose of the double criminality requirement.

### Foreseeable Impact on the International Economy

The protectionist approach from Trump seem to be aimed at throwing China off the economic radar and gain economic advantage over it. The years 2018 and 2019 saw a rise in the US-China trade war as they engaged in a 'tit-for-tat' battle for almost two years. The escalation of the trade war is bound to be felt at some point, but the big question is by who. In other words, how will the US-China trade war affect the global economic setting? This question essentially requires a look at the likely effect of these trade wars on developing and developed economies.

First, the conclusion of Phase One of the US-China Trade Agreement seems to afford the US preferential treatment. If China does not afford its other trading partners the same treatment, this may circumvent the rule against discrimination as required by the MFN principle. This may essentially undermine one of the key principles of international trade law.

Second, the trade war may lead to the US dollar experiencing spikes in periodic short-term volatilities.<sup>133</sup> In the long-term, performance of the US dollar may depend on US global economic performance; its actions; and the adopted monetary policies of central banks around the globe.<sup>134</sup> The US and China are embarking on a trade war when China's economy is growing at a faster rate, unlike before where it was dramatically underdeveloped, and needed access to Western technology and manufacturing techniques. China has most of what foreign investors currently need, and what it does not have, it can easily obtain from vendors outside the US.<sup>135</sup> While the US market

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<sup>132</sup> *Kindler* para 21.

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> Winter Nie, 'Why America Would Lose a Trade War with China' (International Institute for Management Development, February 2017) <<https://www.imd.org/research-knowledge/articles/why-america-would-lose-a-trade-war-with-china/>> accessed 29 January 2019.

looked enticing a few decades ago, it is relatively mature, in a global context where foreign investors are developing a keen interest in newer emerging markets.<sup>136</sup>

Third, the global stock market may plummet in fear of a trade war between these world's largest economies. China's gross domestic product (GDP) plummeted to 6.1 per cent in 2019, its lowest rate in thirty years.<sup>137</sup> It is, however, not clear what the cause for the depreciation is as economists are unsure if it was as a result of China's efforts to combat incoming US tariffs or if it was a reflection of China's economy based on the supply and demand levels. The US GDP grew at the rate of 2.3 per cent; 0.7 per cent lower than predicted.<sup>138</sup> The trade wars are inimical to sustainable economic development. Even if they are initially intended to gain economic advantage for each of the warring states, they may end up spending profits towards closing the gaps caused by the economic tension between them.

Fourth, economic depression was one of the reasons for the outbreak of the Second World War in the 1930s.<sup>139</sup> Countries shaped their military strategies during the war to conquer, for example, oil fields or prevent rivals from controlling the commodity which is the essence of industrial economies.<sup>140</sup> The Great Depression<sup>141</sup> led states to adopt 'beggar thy neighbour' policies aimed at addressing economic woes which in turn worsened the economic problems of other countries.<sup>142</sup> Even with Phase One of the US-China Trade Agreement in place, if the two economies fail to perform in terms of the agreement<sup>143</sup> their trade war may escalate to a full blown global trade war.

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<sup>136</sup> *ibid.*

<sup>137</sup> World Bank, 'GDP Growth (Annual per Capita %) China' <<https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2019&locations=CN&start=1990>> accessed 7 October 2020.

<sup>138</sup> World Bank, 'GDP Current US\$-United States' <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US>> accessed 7 October 2020.

<sup>139</sup> Your Article Library, 'Top 11 Causes of 2nd World War' <<http://www.yourarticlelibrary.com/war/top-11-causes-of-2nd-world-war/48494>> accessed 11 September 2019. Besides the two major world wars, states also embarked on wars on a bilateral basis, for example, the Pacific War in 1941, the battle of Stalingrad, the Iran-Iraq War between 1980 and 1988, Saddam Hussein's Invasion of Kuwait in 1991, and the conflict between the US and Iraq stemming from the '9/11' incident.

<sup>140</sup> Michael Peck, '5 Oil Wars That Ended in Disaster' (*The National Interest*, 13 January 2016) <<https://nationalinterest.org/feature/5-oil-wars-ended-disaster-14885>> accessed 12 September 2019.

<sup>141</sup> The Great Depression refers to the greatest and longest economic recession which began with the crash of the US market in 1929.

<sup>142</sup> The term comes from the policy's impact, as it makes a beggar out of neighbouring countries. In the modern day this is known as the protectionist approach as it only benefits an individual domestic state at the expense of other states.

<sup>143</sup> In mid-July 2020 China had not fulfilled most of its undertaking as per Phase One of the US-China Trade Deal.

Lastly, economies around the globe are crumbling under rising debt and collapsing domestic currencies, leading to major negative effects on consumers and investors.<sup>144</sup> For example, the disruptions in the production chains and the loss of foreign investor's confidence may lead to stricter financial conditions. This will in turn affect the import and export services resulting in the collapse of many domestic companies, job losses or decrease in the number of new workers.

Using inter alia the above events and their immediate effect on the economy, the UN Conference on Trade and Development (UNCTAD) conducted a study that looked at the repercussions of US and Chinese tariff hikes. The study underscores that bilateral tariffs that have been imposed by the US and China would do little to help domestic firms in their respective markets.<sup>145</sup> This is because bilateral tariffs are not very effective in protecting domestic firms, instead they are instruments aimed at limiting trade from the targeted country, and thus the effect of US-China tariffs would be mainly distortionary. Over time, the US-China bilateral trade will decline and may be replaced by trade originating in other countries. The study showed that

of the estimates of \$250 billion in Chinese exports subject to US tariffs, about 82 per cent will be captured by firms in other countries, about 12 per cent will be retained by Chinese firms, and only about 6 per cent will be captured by US firms. Similarly, of the approximately \$85 billion in US exports subject to China's tariffs, about 85 per cent will be captured by firms in other countries, US firms will retain less than 10 per cent, while Chinese firms will capture only about 5 per cent.<sup>146</sup>

The results are consistent across different sectors such as machinery, wood products, furniture, communication equipment, chemicals and precision instruments.<sup>147</sup> Moreover, the study did not only focus on the domestic effects of the US-China trade war, it also looked at the economic impact at the international level. In this respect, the head of UNCTAD's international trade division, Pamela Coke-Hamilton said that 'because of the size of their economies, the tariffs imposed by the US and China will inevitably have significant repercussions on international trade.'<sup>148</sup>

## Conclusion

The US-China trade war and the arrest of Meng are unique political events. Since the start of these events in 2018, the US and China have attempted to throw each other off the economic radar. Even though they later agreed on the conclusion of the trade deal, the US-China trade war has brought to the fore aspects of international law and rules of

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<sup>144</sup> *ibid.*

<sup>145</sup> UNCTAD, 'Trade Wars: The Pain and the Gain' (4 February 2019) <<https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1989>> accessed 23 February 2019.

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid.*

<sup>148</sup> *ibid.*

international trade law under the WTO. The principles of international law regarding extradition are clear. However, there are gaps in the WTO which allowed the US and China to disregard some of their obligations under it.

On one hand, the arrest of Meng tested the epitome of international law, international trade and the rule of law. From the outset, it was clear that the US has jurisdiction based on one of the recognised grounds. Extradition law requires that the conduct complained of must be a crime in both the requesting and the surrendering states. Furthermore, the US-Canada Extradition Treaty also makes provision for dual criminality. However, the issue for the parties in the *Meng* case was whether Meng's conduct amounted to fraud in terms of the Criminal Code of Canada, and thus meeting the dual criminality requirement. To resolve this hurdle, the court correctly applied a contextual approach and found that the double criminality requirement was met. The court dismissed Meng's application and ordered that she be extradited to the US to stand trial. Since the court only ruled on Meng's extradition, it is too early to tell if she will be convicted or not.

On the other hand, the US-China trade war tested the WTO rules in settling trade disputes. Article 3(3) of the WTO DSU creates a gap in the effective functioning of the WTO, since it grants member states a discretion to bring disputes to the panel. The structure of Phase One of the US-China Trade Agreement is worrisome as it is geared towards affording the US preferential treatment without taking into account the WTO rules. If the parties fail to grant other member states of the WTO the same treatment as per Phase One of the US-China Trade Agreement, these member states may invoke the MFN treatment. Furthermore, the US and China did not include tariffs in the first phase of their trade deal, even though tariffs have been at the forefront of their trade war. The two economic giants have halted their tariff hikes, and tariffs may be covered in other phases of the trade deal. However, trade wars are unpredictable, and in the meantime, one can only hope that the negotiation of the other phases of the US-China trade deal will run smoothly. Otherwise the two economic giants may embark on a second wave of their trade war.

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